No.

In the Supreme Court of the United States

JAIME GALVEZ,
PETITIONER

v.

WILLIAM MUNIZ, WARDEN,
RESPONDENT

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit, No. 18-56303

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

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INDEX OF APPENDICES

Appendix A:
California Court of Appeal Decision

Filed 11/9/15

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME AYALA GALVEZ,

Defendant and Appellant.

B254807

(Los Angeles County
Super. Ct. No. KA097565)

APPEAL from an order of the Superior Court of the County of Los Angeles, Mike Camacho, Jr., Judge. Affirmed and remanded with instructions.

California Appellate Project, David L. Annicchiarico, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Jaime Galvez (defendant) on multiple counts based on a high speed pursuit by police during which defendant discharged a shotgun at officers. On appeal defendant contends that the trial court erred by: (i) denying his *Faretta*[1] motions; (ii) forcing him to testify in the middle of the prosecution's case; (iii) failing to instruct or failing to instruct adequately on voluntary intoxication; (iv) committing reversible cumulative error; and (v) directing a verdict of sanity during the sanity phase of the trial. Defendant further contends that his trial counsel rendered ineffective assistance by failing to object to inadmissible hearsay from an expert, failing to request jury instructions on voluntary intoxication and mental impairment, and committing reversible cumulative error. In a supplemental brief, defendant contends that the five-year sentence enhancement imposed by the trial court pursuant to Penal Code section 667, subdivision (a)[2] was unauthorized and must be stricken.

We hold that defendant waived or abandoned his challenge to the rulings on his *Faretta* motions; any error in forcing defendant to testify in the prosecution's case was harmless; defendant has failed to show ineffective assistance of counsel as to the hearsay issue; the trial court did not err in instructing the jury on voluntary intoxication as to count 1, and any ineffective assistance of counsel in failing to request adequate instructions on voluntary intoxication and mental impairment was harmless; there was no cumulative error because the errors about which defendant complains either did not occur or were harmless; and the trial court had the discretion to direct a verdict of sanity, and substantial evidence supported the directed verdict. We further hold that the trial court imposed an unauthorized five-year sentence enhancement under section 667, subdivision (a) that must be stricken on remand.

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[1] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

[2] All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL BACKGROUND

A. Prosecution's Case

1. Officer Mullane's Testimony

On April 10, 2012, at about 10:00 p.m., California Highway Patrol Officer David Mullane was back at his office refueling his patrol vehicle. While monitoring his radio, he heard a report of a driver on the westbound 10 freeway brandishing a weapon. He then heard that California Highway Patrol Officer Aaron Rolens had located the suspect vehicle—a silver Dodge Caliber—and that it was exiting the freeway at Puente Avenue. Officer Mullane proceeded to that location and observed the Dodge, two patrol vehicles, and a motorcycle officer exit the freeway at Puente onto North Garvey Avenue where they entered a Home Depot parking lot. The first patrol vehicle had its forward-facing red light activated.

Officer Mullane entered the Home Depot parking lot and positioned his vehicle to prevent the Dodge from exiting the lot from the driveway it had used to enter. He also activated his vehicle's forward-facing red lights. The vehicle went through the parking lot past the Home Depot with Officer Rolens in pursuit. Officer Mullane followed behind Officer Rolens's vehicle. The vehicle made a left turn from the parking lot against a red light and went south on Puente. It then made another left turn against a red arrow onto North Garvey Avenue from where it reentered the westbound 10 freeway. Officer Rolens was in pursuit with his siren activated and Office Mullane followed in secondary pursuit.

As soon as the Dodge entered the westbound 10 freeway, it accelerated to speeds in excess of 100 miles per hour. Officer Mullane was "pacing" the vehicle, "[m]aking [his] patrol vehicle go the same speed as [the Dodge] so [he] neither gain[ed] nor los[t] distance on the [Dodge]."

As it travelled down the 10 freeway, "the Dodge made several lane changes in order to get around slower vehicles. At times it used the center median area in order to

pass vehicles." Traffic was moderate, but "several vehicles had to either swerve to the right or to the left in order to avoid collisions or brake abruptly in order to avoid striking [the Dodge] or having [the Dodge] strike them." During the course of the pursuit on the westbound 10 freeway at San Gabriel Boulevard, Officer Mullane heard "a distinct noise" from the Dodge that sounded like a report from a shotgun.

The Dodge transitioned to the northbound 101 freeway where traffic was heavier. The farther north on the 101 the vehicles travelled, the heavier the traffic became, causing the Dodge and the pursuit vehicles to slow down to speeds of 80 miles per hour or less.

The Dodge was using the center median and the number one lane to pass slower vehicles. As it attempted to pass a Jaguar in the number one lane, it collided with the left rear of a Jaguar "with such force that it broke [the Jaguar's] left rear axle and broke the wheel."

Officer Mullane stopped, exited his vehicle, and approached the Dodge from the right side. Officer Rolens simultaneously made an approach on the left side. When he arrived at the vehicle, Officer Mullane observed defendant in the driver's seat and concluded that he had been stunned by the collision and was nonresponsive. Defendant, who was the only occupant of his vehicle, did not respond to Officer Mullane's several loud and distinct commands to show his hands.

Office Mullane saw a shotgun in the vertical position on the front passenger seat of the Dodge. Because the right front passenger window was open, Officer Mullane was able to reach into defendant's vehicle, retrieve the shotgun, and retreat to a position of cover at a patrol vehicle. As Officer Rolens also retreated to cover, "he made sure that the driver of the Jaguar was taken out of that vehicle . . . to a position of safety."

In both English and Spanish over a patrol vehicle's public address system, defendant was given clear commands to surrender by exiting the Dodge with his hands up. Instead of complying with the commands, defendant began searching around the interior of his vehicle as if looking for the shotgun. Defendant not only stated that he would not exit his vehicle, but also made several hand gestures with his middle fingers.

Defendant eventually exited the Dodge with a can of beer in his hand, refused to comply with any commands, and gestured to the officers to "come and get [him]." Two officers who had taken up a position on the southside of the freeway were armed with a "less lethal shotgun" that fired a bean bag round. One of those officers fired a bean bag round that struck defendant and knocked him to the ground. Defendant immediately stood up, a reaction that suggested to Officer Mullane the defendant was high on alcohol or drugs. Defendant was shot a second time with a bean bag, and stood up again after falling to the ground. After defendant was shot with two more bean bag rounds, he eventually became incapacitated enough for officers to approach and handcuff him.

Officer Mullane found three spent shotgun casings in the Dodge. There was also a box of live shotgun rounds that spilled its contents into the interior of the vehicle. The shotgun itself contained three live rounds.

2. Officer Rolens's Testimony

On April 10, 2012, Officer Rolens was working as a road patrol officer assigned to the Baldwin Park area. At approximately 9:48 p.m., he received a monitored call from dispatch advising that someone in a vehicle was brandishing a firearm at another vehicle. The witness provided a license plate number and a vehicle description, i.e., a silver Dodge Caliber.

While driving westbound on the 10 freeway, east of Puente Avenue, Officer Rolens located the silver Dodge suspect vehicle, which was weaving in a "serpentine manner" in the number two lane. The Dodge then changed lanes to the number one lane and in the process, the left side tires of the vehicle crossed the solid yellow line that delineated the south roadway edge of the freeway so that the vehicle was partially driving in the center medium. Officer Rolens concluded that the vehicle was being operated by a driver who was under the influence of alcohol or drugs.

Near Puente Avenue, the Dodge made an abrupt turning movement from the number two lane across the number three and four lanes. When the vehicle exited the freeway at Puente, Officer Rolens attempted to initiate an enforcement stop by activating

his patrol vehicle's overhead emergency lights. The vehicle made a left turn into the parking lot of a shopping complex and proceeded to drive through the lot without stopping.

After the Dodge exited the parking lot, it made a left turn onto southbound Puente and then another left turn onto eastbound North Garvey Avenue, both times failing to stop for red traffic signals. The vehicle then reentered the westbound 10 freeway. While the vehicle was westbound on the 10 freeway near San Gabriel Boulevard, Officer Rolens heard a gunshot. When the vehicle moved to the right, Officer Rolens observed a shotgun outside the driver's side window. The shotgun was pointing "up and back toward [Officer Rolens]." The vehicle continued westbound until it reached the "carpool bus flyover" near the 710 freeway. Eventually, the vehicle entered the northbound 101 freeway near downtown Los Angeles.

The Dodge continued northbound on the 101 freeway where traffic became heavy. It was continuously travelling in excess of 65 miles per hour and, at times, in excess of 100 miles per hour. The vehicle "was weaving across multiple lanes of traffic. The driver . . . crossed over double yellow lines into the carpool lane on multiple occasions and back out the carpool lane over those double yellow lines, and several times made unsafe lane changes, causing other drivers to take evasive action to avoid a collision."

The pursuit terminated on the northbound 101 freeway when the Dodge collided with a Jaguar.[3] Officer Rolens, who had been joined by Officer Mullane, saw that there was no movement inside the Dodge. They decided to approach the vehicle and remove the shotgun. Officer Mullane was able to remove the shotgun from the vehicle.

Officer Rolens next observed defendant looking around the interior of the Dodge on the passenger side, as if he was searching for the shotgun Officer Mullane had removed. The officer then saw defendant exit the passenger side of his vehicle making a gesture with both his middle fingers. Defendant had a can of beer in his left hand.

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[3] The collision caused the left rear axle of the Jaguar to break and the left rear wheel to separate from the Jaguar.

Defendant was given multiple instructions to "get on the ground," but he refused to comply. At that point, another officer discharged a "less lethal shotgun," hitting defendant in the abdomen with a bean bag round and causing him to fall to the ground. Defendant stood up immediately and picked up his beer. Defendant was shot three more times with beanbag rounds, and the officers were eventually able to take him into custody.

Defendant was brought to the rear of a patrol vehicle and Officer Rolens stood next to him. Defendant smelled of alcohol and "what little he was saying was slurred."

B. Defendant's Case

After not sleeping for four days, defendant went to bed at about 8:00 a.m. on April 10, 2012. He woke up at 1:00 or 2:00 p.m. that day. He woke up with a "big hangover" and began drinking. Because he was "shaky," he took prescription Xanax. He also took his wife's prescription Vicodin.[4]

Defendant and his wife owned two houses and he had gone to bed that day at the smaller of the two houses. Upon awakening, he decided to drive to the larger house to use the restroom. On his way, he stopped to buy beer and rent movies. After using the restroom at the larger house, defendant went downstairs to his wife's room, saw his wife's shotgun and a box of shotgun shells, and decided to take them to his wife at the smaller house. As he walked from the larger house back to his car, he decided to fire the shotgun. He loaded the shotgun and fired it three times.

Defendant returned to the smaller house to pick up his laptop computer. He spoke to his wife and told her he was going to buy some food to eat while he watched the movies he had rented.

Defendant entered his vehicle and drove, but he could not remember to where he drove. The first thing he remembered about the drive was passing a freeway sign for

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[4] During cross-examination, defendant admitted to using alcohol, cocaine, methamphetamine, Xanax, and Vicodin on April 10, 2012.

Rialto. The next thing he remembered was going through Baldwin Park. He did not remember exiting the freeway or driving on surface streets.

When he first entered Baldwin Park, he saw "Satan" behind him. He was afraid and wanted to "get away." The next think he remembered, he saw a "white big wall" and became unconscious. He thought "it was the impact that deployed it." .

When he regained consciousness, he heard helicopters and a voice in his head. He was confused and afraid. He looked up and saw soldiers pointing guns at him and the voices in his head told him to "die with honor and [to] give [his] life for [his] country." The scene prompted memories of when he "used to jump out of the airplane and helicopters [in the military] . . . ."

Because a voice in his head was telling him to die, defendant told the soldiers to kill him. Defendant was hit with something in his abdomen that caused a "very warm feeling all the way [through his] body . . . ." He felt all his strength leave him and "saw [himself] going down in the shadow." He fell to the ground and lost consciousness. The next thing he remembered, he was lying on a stretcher in an ambulance. Defendant went in and out of consciousness. Defendant did not recall holding a firearm while driving his vehicle.

Forensic psychologist Haig Kojian, who testified for the defense, prepared for his testimony by reviewing police reports, a probation officer's report, a preliminary hearing transcript, and medical records relating to defendant. The majority of the medical records indicated that defendant had been diagnosed as suffering from depression and anxiety. The records also reflected that defendant was addicted to various illegal substances and alcohol. According to Kojian, it was possible that a person who was under the influence of drugs and was experiencing emotional problems could be compromised to such an extent that he or she might experience difficulty formulating specific intent. Kojian explained that if depression became severe enough, a patient could become psychotic. He did not, however, see anything in defendants' medical records indicating that defendant was psychotic or delusional.

C. Defendant's Testimony During Sanity Phase

Following the jury's verdict, defendant testified in the sanity phase as follows. Defendant served in the military from 1979 to 1984. During that time, he suffered 10 to 15 head injuries caused by "jumping from airplanes." After he left the military, defendant had surgery to treat one of his head injuries.

Defendant reenlisted in the military, but developed a drinking problem. His last year in the military, he developed depression and his speech impediment worsened. He was demoted several times for alcohol-related reasons and was eventually discharged "with honorable conditions," but with an indication that he had failed to rehabilitate from alcohol addiction.

After he left the military the second time, defendant had suicidal thoughts. He was treated at a Veteran's Administration Hospital for alcohol addiction by a psychiatrist. His alcohol abuse became progressively worse from 1984 to 2002 when he went to prison. Thereafter, he was able to remain sober for the next nine years.

From 2004 to 2012, defendant received disability benefits from the Social Security Administration. Among other medications, defendant was taking prescription Xanax with Celexa, an anti-psychotic medication in April 2012. The Xanax with Celexa caused defendant to have suicidal thoughts.

About a year before April 2012, defendant had a series of anxiety attacks that resulted in several emergency room admissions. After being sober for nine years, defendant's daughter made him mad one day, causing him to begin drinking again.

On April 10, 2012, while defendant was driving on the freeway, he was hallucinating.

PROCEDURAL BACKGROUND

In an amended information,[5] the Los Angeles County District Attorney charged defendant in count 1 with evading a police officer in violation of Vehicle Code section 2800.2, subdivision (a); in count 2 with assault with a firearm on a peace officer in violation of section 245, subdivision (d)(1); in count 3 with shooting at an occupied motor vehicle in violation of section 246; in count 4 with discharging a firearm from a motor vehicle in violation of section 26100, subdivision (d); in count 5 with felon in possession of a firearm in violation of section 29800, subdivision (a)(1); in count 6 with felon carrying a loaded firearm in public in violation of section 25850, subdivisions (a) and (c)(1); in count 7 with discharging firearm in a grossly negligent manner in violation of section 246.3, subdivision (a); in count 9 with resisting, delaying, or obstructing a police officer in violation of section 148, subdivision (a)(1); in count 10 with driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a); and in count 11 with driving with a blood alcohol concentration of 0.08 or greater in violation of Vehicle Code section 23152, subdivision (b).

The District Attorney alleged as to counts 1 through 7 that defendant had suffered a prior conviction for a serious or violent felony within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d). The District Attorney further alleged as to count 2 that defendant personally used and personally discharged a firearm within the meaning of section 12022.53, subdivisions (b) and (c). And the District Attorney alleged as to counts 10 and 11 that defendant had suffered a prior conviction within the meaning of Vehicle Code sections 23540 and 23546.

Following a jury trial, the prosecution dismissed count 11 pursuant to section 1118.1. The jury found defendant guilty on all charges and found the allegations true. Defendant admitted the alleged prior strike conviction.

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[5] The multiple count information did not contain a count 8. By stipulation, the trial court renumbered count 9 as count 8, count 10 as count 9, and count 11 as count 10 for purpose of trial and the verdict form only.

Defendant testified during the sanity phase of the trial. Following his testimony, the trial court directed a verdict of sanity.

At the sentencing hearing, the trial court sentenced defendant to an aggregate sentence of 38 years and four months comprised of the following: a middle term six-year sentence on count 2, doubled to 12 years based on the prior strike conviction, plus an additional 20-year sentence pursuant to section 12022.53, subdivision (c) and a five-year sentence enhancement pursuant to section 667, subdivision (a); and a consecutive one-third the middle term sentence of one-year, four months on count 1. The trial court imposed but stayed concurrent sentences on counts 3 through 7. The trial court imposed a concurrent one-year term on count 9 and a six-month term on count 10.

DISCUSSION

A. Denial of *Faretta* Motion

1. Background

On August 6, 2013, defendant appeared for trial represented by appointed counsel. When the trial court, Judge Hunt presiding, called the matter, counsel for the parties, defendant, and the court engaged in the following discussion: "The Court: Jaime Galvez. [¶] [Prosecutor]: Good morning, your Honor. [. . .] People are ready, but I'm engaged in Department E. [¶] [Defense Counsel]: That's my matter. [¶] The Court: Matter over for Monday, August 12. [¶] [Defense Counsel]: The last we were here, my client wanted to go pro per. [¶] The Court: Let's bring him out after lunch. . . . People v. Galvez, Case No. []. Defendant's present in custody with counsel, [defense counsel]. People represented by [the prosecutor]. This matter is here for jury trial. [¶] [Prosecutor]: Your Honor, I'm currently engaged. I'm asking to continue it to Monday, the 12th. [¶] [Defense Counsel]: Your Honor, as of last week, my client's adamantly been voicing his opinion that . . . is kind of quasi-Marsden and a pro per request that he was not satisfied with my services, and he'd like to represent himself. [¶] [Defendant]:

Yes, your Honor. May I please? [¶] The Court: Can you be ready to go to trial Monday? [¶] [Defendant]: No. [¶] The Court: Denied. Jury trial Monday, August 12. [¶] [Defendant]: Your Honor, can I please—can you please reconsider my request to represent myself because [defense counsel] is not doing that I—I been asking for her. [S]he wanted me to take 24 years on the 22nd of May. I was coerced and threatened by the—by the D.A. in a room. That's why—when I came here on May the 22nd, I was here. I spoke to you then I left the building because I had an anxiety attack because I was threatened and coerced to take 14 years. That's why I would like to represent myself. At this time, I would like to exercise my *Faretta* rights, your Honor. [¶] The Court: Denied. You can't be ready to go to trial. This matter here is for trial. Today I don't have a trial court. So it is over to Monday. That's denied. And [defense counsel] calls the shots, not you, on the way the case is handled. You don't get to call them; she does. [¶] [Defendant]: May I ask you one more time, your Honor? Can I give you this letter that-- [¶] The Court: No. [¶] [Defendant]: -- I -- [¶] The Court: Give it to your lawyer. [¶] [Defendant]: -- wrote to you? [¶] The Court: Don't give it to the Court. Give it to your lawyer. That is an ex-parte communication. I cannot accept it. Give it to your lawyer. Don't give it to the Court."

On August 12, 2013, the parties again appeared for trial before Judge Sortino. When defendant renewed his request that he be allowed to represent himself, the following proceedings took place. "The Court: Jaime Galvez. [The prosecutor] for the People; [Defense Counsel] for the defense. People ready? [Prosecutor]: Yes. [¶] The Court: Defense ready? [Defense Counsel]: I am but my client wants to go pro per and wants to enter an EGI. [¶] The Court: He wants—so he wants to fire the public defender's office and represent himself? [¶] [Defense Counsel]: Yes. [¶] The Court: All right. Let's bring him out, then. People v. Galvez, Case No. []. He's present in Court in custody with [defense counsel]; Prosecutor for the People. You're ready? [¶] [Prosecutor]: Yes. [¶] The Court: And [defense counsel], you're ready but your client wants to address the Court? [¶] [Defense Counsel]: Yes. [¶] The Court: [Defendant], what is it you want to tell me? [¶] The Defendant: Yes. Good morning. I'm sorry

because I stutter sometimes. I apologize for that. [¶] The Court: It's all right. No need to apologize. [¶] The Defendant*: I have asked for the plea of not guilty by reason of insanity back on June 19 and* [*defense counsel*] *failed to enter that plea.* [¶] The Court: That's between you and her regarding what plea you would enter and what defenses may be available to you. Is there anything else that you would like to talk to me about? [¶] The Defendant: I would like to exercise my right—*Faretta* rights against California to represent myself because the public defender that I have has not submitted some of the evidence. We're not getting along very good. [¶] The Court: You want to represent yourself and no longer have the public defender be your lawyer? [¶] The Defendant: Yes, sir. Your Honor, if I may ask the Court to help me to get the proper -- [¶] The Court: Let me ask you this: If I were to grant your right to represent yourself and relieve the public defender and allow you to represent yourself, would you be ready to go to trial today? Today is the day for your trial. Would you be ready to go to trial today? [¶] The Defendant: Today? [¶] The Court: Yes. Today is set for your trial. You are 54 of 60. Your trial has been set. It looks like since June 19 is when the trial was set. Today is the day set for trial. If you relieve [defense counsel] and I allow you to represent yourself, would you be ready to start your trial today? [¶] The Defendant: I've been incarcerated 14 months. I have not got a police report. I have requested a police report from the public defender. I have been denied of that also, your Honor. [¶] The Court: My question for you—listen to me. If I were to relieve the public defender today and allow you to represent yourself, would you be ready to start trial today? [¶] The Defendant: No, your Honor. [¶] The Court: Okay. [¶] The Defendant: I need a little bit of time. [¶] The Court: You would be unable to start trial today? [¶] The Defendant: No. [¶] The Court: Would you be able to start trial today? [¶] The Defendant: I cannot start trial today. [¶] The Court: Thank you. [Defense counsel], you're ready. [¶] [Defense Counsel]: Yes. [¶] The Court: The request to represent himself pursuant to *Faretta* is denied. It's untimely. Today is the day for trial set back in June. He has indicated he's unable to start trial today. The request to represent himself will be denied as it is untimely."

After denying defendant's renewed request to represent himself, the trial court asked defendant's counsel if she thought there was a *Marsden*[6] issue separate and apart from the *Faretta* issue. When defendant's counsel answered in the affirmative, the trial court held an in camera *Marsden* hearing. Following the in camera proceeding, the trial court denied the *Marsden* motion and then the following exchange took place: "The Court: Let me ask you one other question, [defendant], with respect to your request to represent yourself, you're not ready today; is that correct? [¶] The Defendant: That's correct. [¶] The Court: How much time would you need to get ready? [¶] The Defendant: How much time: [¶] The Court: Yes. [¶] The Defendant: 40 days. [¶] The Court: 40 days? So roughly a month and a half? [¶] The Defendant: Yes. [¶] The Court: [Prosecutor], are the People ready? [¶] [Prosecutor]: Yes. [¶] The Court: You have witnesses under subpoena? [¶] [Prosecutor]: I do. [¶] The Court: To continue this trial at this point, would that cause an inconvenience to these witnesses as well as cause delays to the People and deprive them of speedy trial? [¶] [Prosecutor]: Yes. [¶] The Court: The request for *Faretta* is denied based upon the fact it's untimely. He's not ready to go today. He needs another month and a half. The People are ready. *Faretta* is denied. Ready? [¶] [Prosecutor]: Yes. [¶] Are you ready? [¶] [Defense Counsel]: Yes. [¶] The Court: Case is transferred forthwith to Department R. Department R for jury trial. The issue needs to be heard with Judge Falls as soon as you get to his Court. [¶] [Defense Counsel]: Yes."

That same day, the parties appeared in the assigned trial department before Judge Falls. In response to defendant's attorney's request to discuss "some matters involving case strategy," the trial court held an in camera hearing.

The following day, August 13, 2013, the parties again appeared in the department assigned for trial before Judge Falls. The trial court and defendant's attorney engaged in the following discussion about defendant's desire to enter a plea of not guilty by reason of insanity. "The Court: The Court has been vexed over the issue of the defendant's

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[6] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

desire to enter a not-guilty-by-reason-of-insanity plea. In reading over the code and the various cases that are involved, there does not appear to be a bright line. [¶] Initially, the Court thought, believed did not have discretion, that it must allow the plea. However, at this point in time, my tentative is as follows: [¶] Court believes it has discretion whether or not to allow the plea to be entered at this stage of the proceeding, and that it's my obligation to exercise that discretion. Court believes that, had the defendant entered his plea or entered his plea when he was first charged with the crime either at the arraignment on the complaint or at the arraignment on the information, that he would have been allowed to do so. There would not have [been] discretion. [¶] It's not counsel's decision to make. Counsel's job [is] to advise. Counsel's job [is] to tell him, as it is every defendant, whether it's a wise decision or poor one. But at the original arraignment, if that was the defendant's desire, he would have been allowed to enter the plea. [¶] The question is for the Court, should I allow that plea to occur now a year and a half later after he was originally arrested and charged with these offenses? [¶] We've looked up various cases, discussed cases. I've given counsel opportunity to talk to their various appellate departments and do research, so I am going to allow counsel to argue at this point in time. [¶] [Defense Counsel], you—things that we can agree on. You agree if your client wishes to enter a plea—let's not worry about the Court's discretion, even though you believe it to be an unwise decision and tactically a mistake—you agree that he can do so? [¶] [Defense Counsel]: Yes. [¶] The Court: And you are not standing in his way from doing so? [¶] [Defense Counsel]: No. [¶] The Court: Okay. As his advocate on this issue, what is your position with regards to the Court's discretion on this matter? [¶] [Defense Counsel]: After reviewing many of the cases that were discussed yesterday-- [¶] The Court: Correct. [¶] [Defense Counsel]: I agree that at this time period that the Court has discretion in deciding not necessarily whether there's the mental state or mental history to support making such a plea, but the discretion in deciding whether there's good cause within Penal Code section 1015 to show a plausible reason for delay in tendering the plea."

After further discussion with counsel, the court conducted another in camera proceeding on the issue. Following that in camera proceeding and after further discussions on the record, the trial court again conducted an in camera proceeding on the issue. Following the conclusion of that proceeding, the trial court stated: "The Court: Back on the record on the matter of People v. Galvez, Case No. []. Record should reflect the Court was prepared to deny the motion. [¶] Based on information the Court received during the in-camera hearing, [the Court] believes its obligated to allow the defendant to enter his plea. I don't believe it's well taken or timely, but I want to avoid problems on appeal. [¶] . . . [¶] The Court: All right. [Defendant], you have insisted on entering a plea of not guilty by reason of insanity against your attorney's advice. Is that correct, sir? [¶] The Defendant: Yes, your Honor. [¶] The Court: How do you plead to the charges? [¶] The Defendant: Not guilty by reason of insanity. [¶] The Court: All right. Court will show the defendant has entered not-guilty-by-reason-of-insanity defense. You understand this case is going to have to be continued at least 90 days at this point in time? [¶] The Defendant: Yes, your Honor. [¶] The Court: Court orders two doctors from the Panel to be appointed. They are to interview the defendant."

Following further discussion with defendant and counsel, defendant informed the trial court that he "want[ed] to withdraw that,-- I'm very satisfied with [appointed counsel] as my defense counsel." The minute order of the August 13, 2013, proceedings stated, "Defendant withdraws his previous request to proceed pro per and states that he was satisfied with his current counsel."

2. Faretta and Waiver

The principles governing a criminal defendant's right to self representation, the so-called *Faretta* right, are well settled. "*Faretta* holds that the Sixth Amendment grants an accused personally the right to present a defense and thus to represent himself upon a timely and unequivocal request. (*People v. Marshall* [(1997)] 15 Cal.4th [1,] 20-21.) The right to self-representation obtains in capital cases as in other criminal cases (*People v. Clark* (1990) 50 Cal.3d 583, 617 [268 Cal.Rptr. 399, 789 P.2d 127]), and may be asserted

by any defendant competent to stand trial—one's technical legal knowledge, as such, being irrelevant to the question whether he knowingly and voluntarily exercises the right (*Godinez v. Moran* (1993) 509 U.S. 389, 399-400 [125 L.Ed.2d 321, 113 S.Ct. 2680]; *People v. Joseph* (1983) 34 Cal.3d 936, 943-944 [196 Cal. Rptr. 339, 671 P.2d 843]). The right to representation by counsel persists until a defendant affirmatively waives it, and courts indulge every reasonable inference against such waiver. (*People v. Marshall*, *supra*, 15 Cal.4th at p. 20.)" (*People v. Dunkle* (2005) 36 Cal.4th 861, 908-909.)

"[T]he *Faretta* right, once asserted, may be waived or abandoned. In *McKaskle v. Wiggins* (1984) 465 U.S. 168 [79 L.Ed.2d 122, 104 S.Ct. 944], in which the trial court appointed standby counsel for a self-represented defendant, the United States Supreme Court concluded that the defendant, who had acquiesced in standby counsel's participation at various points during the trial, could not complain on appeal that he was denied his right to represent himself at those points. (*Id.* at pp. 182-183.) In *Brown v. Wainwright* (5th Cir. 1982) 665 F.2d 607, the federal court of appeals concluded that a defendant who, expressing dissatisfaction with his attorney, first asserted his right of self-representation and later made no objection when his counsel told the court that he and the defendant had resolved their difficulties and that the defendant wanted him to continue his representation, had waived his *Faretta* request. (*Id.* at p. 611; see also *People v. Rudd* (1998) 63 Cal.App.4th 620, 628-631 [73 Cal.Rptr.2d 807]; *id*. at p. 631 [a defendant who failed to object to revocation of his self-represented status for '"serious and obstructionist misconduct"' in failing to be ready for trial on the date he had agreed could not complain on appeal]; *People v. Skaggs* (1996) 44 Cal.App.4th 1, 7-9 [51 Cal.Rptr.2d 376] [even if the defendant's equivocal comment were construed as a *Faretta* request, he abandoned it by failing to seek a definitive ruling on it]; *People v. Kenner* (1990) 223 Cal.App.3d 56, 62 [272 Cal.Rptr. 551] [a defendant may, by his or her conduct, indicate abandonment or withdrawal of a request for self-representation].)" (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 909.)

"A defendant's waiver or abandonment of this constitutional right [to self representation] should be voluntary, knowing, and intelligent (*People v. D'Arcy* (2010)

48 Cal.4th 257, 284 [106 Cal.Rptr.3d 459, 226 P.3d 949]); such waiver or abandonment may be inferred from a defendant's conduct. (*Id.* at pp. 284-285; *People v. Stanley* (2006) 39 Cal.4th 913, 929 [47 Cal.Rptr.3d 420, 140 P.3d 736]; *People v. Dunkle*, *supra*, 36 Cal.4th at p. 909.)" (*People v. Trujeque* (2015) 61 Cal.4th 227, 262-263.)

3. Analysis

The Attorney General contends that defendant forfeited his *Faretta* contention on appeal by his statements that he was withdrawing his request to represent himself and was "very satisfied" with appointed counsel, which statements, according to the Attorney General, constituted a waiver or abandonment of the *Faretta* issue in the trial court. Defendant asserts that his statement that he "want[ed] to withdraw that" was vague and did not explicitly refer to his denied requests to represent himself.

Defendant's statement that he "want[ed] to withdraw that," when read in the context of the proceedings relevant to his *Faretta* requests, was a reference to his repeated requests to represent himself, as accurately reflected in the minute order for the proceeding at which his statements were made. As the record reflects, on August 6 and again on August 12, 2013, defendant made repeated requests to represent himself that were denied as untimely by two different judges. Defendant's requests were based primarily on his defense counsel's refusal to enter a plea of not guilty by reason of insanity.[7] On August 13, 2013, defendant appeared before a third judge and the issue of his insanity plea was discussed at length between the trial court and defense counsel during in camera proceedings, as well as proceedings conducted in open court. At the end of those discussions, the trial court, with defense counsel's acquiescence, allowed defendant to enter a plea of not guilty by reason of insanity and continued trial 90 days. It was at that point that plaintiff made his statements. Because defendant's prior *Faretta* requests were centered mainly around his counsel's refusal to enter an insanity plea, once the trial court allowed that plea and continued the trial, defendant's statement that he

[7] Defendant also complained that his trial counsel tried to coerce him to accept a plea bargain and had refused his request for a copy of the police report.

"want[ed] to withdraw that" could only have referred to his prior requests to represent himself.

Defendant did not renew his *Faretta* request after his statements and instead acquiesced in appointed counsel's representation throughout trial. Therefore, his statements about withdrawing his *Faretta* requests and his satisfaction with appointed counsel constituted a waiver or abandonment in the trial court of his right to represent himself. Given that waiver or abandonment in the trial court, defendant cannot demonstrate on appeal that he was prejudiced by the denials of his prior *Faretta* requests.

B. Requiring Defendant to Testify Out of Order

1. Background

After Officer Mullane finished testifying in the prosecution's case and before the time scheduled for Officer Rolens's testimony to begin, the following exchange took place between and among the trial court, defense counsel, and defendant concerning whether defendant intended to testify and, if so, whether he was willing to testify during the time remaining before Officer Rolens's scheduled arrival at court.

"The Court: People's next witness [Officer Rolens] [is the prosecution's]—final witness; is that correct? [¶] [Prosecutor]: Yes, your Honor. [¶] The Court: -- [He i]s available at 1:30 this afternoon and that's fine. The Court was certainly put on notice in advance of that scheduling conflict if you will. [¶] But we have roughly a good solid hour and fifteen minutes of Court time this morning, which we can make good use of it in the event there is a defense witness that is available to testify between now and noon. [¶] So we can certainly accommodate the defense and call a witness out of order if you have one available [defense counsel]. [¶] [Defense Counsel]: Other than [defendant], I do not this morning. [¶] The Court: All right. Does your client definitely—has he definitely decided to offer testimony? [¶] [Defense Counsel]: Yes, he has. [¶] The Court: Okay. Then we can certainly accommodate his testimony right away. If you desire to do that, [defense counsel], I'll certainly allow that to happen. [¶] [Defense Counsel]: *Certainly*.

[¶] The Court: Okay. [Defendant], before we proceed, and, obviously, allow you to testify on your own behalf, I want to make abundantly clear for the record that you have an absolute right not to testify. You cannot be compelled to testify as a witness in this case. Do you understand that right? [¶] The Defendant: Yes, your Honor. [¶] The Court: Okay. Now, if you elect to testify as to what—which is what I'm hearing from your lawyer—that means not only do you understand your right to remain silent, but you're also waiving and giving up that right so on your own you can offer testimony. [¶] So do you understand, waive and give up your right to remain silent so you can offer testimony before this jury? [¶] The Defendant, Well, not -- [¶] The Court: I just need to hear a yes or a no. I don't need to hear an explanation. That's not what I'm asking. Are you indeed going to testify? [¶] The Defendant: *Yes, your Honor, but not now*. [¶] The Court: Okay. That's all I need to hear is that you plan on testifying. And, forgive me, it's not that I'm not interested in what you have to say. I just don't want you to mention anything beyond the Court's inquiry which could affect your right or your privilege against self-incrimination. [¶] I'm going to give you a few minutes to discuss this with your lawyer because I get the impression from you that you're somewhat equivocal in your giving up of your right to remain silent, that you feel should be conditional in some respect, and that is not the case. [¶] . . . [¶] The court has given [defendant] some additional time to consult with counsel in order for me to inquire as to whether or not he understands his right to remain silent, and he's unequivocally waiving and giving up that right so he can offer testimony in this case. [¶] So, [defense counsel], I'll allow you to speak on his behalf. Now that he's had some additional time to consider his options, how does the defense wish to proceed? [¶] [Defense Counsel]: *The defense wishes to proceed by having [defendant] testify, which is his right*. And I've explained to him the repercussions as far as bringing into evidence prior convictions or moral turpitude, and the limitation of what he would be testifying to in the guilty phase versus the sanity phase. I've explained that to him. I don't believe there's—I'm not sure if it's a level of comprehension or stubbornness, but I've tried to explain. [¶] *Additionally, he's concerned about testifying now*. *He prefers to testify at the close of the case*, and so

that's where we are at this time. [¶] The Court: Okay. And again, [defendant], you can't put conditions on your testimony. Either you want to testify or you don't. And we have available time this morning, so if you wish to testify, now is your time. If not, then you certainly can exercise your right to remain silent and not testify, but I will not allow you to put conditions on your availability to testify. [¶] So, [defendant], is it your desire to testify, yes or no? [¶] The Defendant: Yes, your Honor. [¶] The Court: Okay. You got it. Then let's bring in our jury and let's proceed." (Italics added.)

2. Analysis

Defendant contends that by compelling him to testify in the middle of the prosecution's case, the trial court violated his Fifth Amendment right against self-incrimination, as well as his Sixth Amendment right to assistance of counsel. According to defendant, the trial court's order requiring him to testify out of order deprived him of the right to hear the entirety of the prosecution's case before deciding whether to waive his right against self-incrimination and testify, and further deprived him of the right to his trial counsel's assistance and advice before making that decision. (*Brooks v. Tennessee* (1972) 406 U.S. 605, 607-609; *Geders v. United States* (1976) 425 U.S. 80, 88-89.) Moreover, defendant contends that the error was structural because it affected the framework within which the trial proceeded and was therefore reversible per se, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 and *Yarborough v. Keane* (2d Cir. 1996) 101 F.3d 894, 897. In addition, defendant urges that even if the error is subject to a harmless error analysis under the federal Constitutional standard set forth in *Chapman*,[8] the prosecution cannot show that the error was harmless beyond a reasonable doubt.

Assuming, without deciding, that the trial court's conduct in forcing defendant to testify before the prosecution had finished its case constituted the error claimed, we conclude that any such error was harmless. In doing so, we reject defendant's assertion that the error in issue was structural and therefore reversible per se. As defendant

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[8] *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

concedes in his opening brief, the United States Supreme Court has not held that the asserted error in issue is structural. Moreover, because defendant fails to cite any state appellate decision holding that such error is structural, he implicitly concedes that there is no appellate authority directly on point to support his assertion of structural error. Absent such authority, we conclude that the claimed error is subject to a harmless error analysis and that, under either the federal *Chapman* standard or the state law standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, no prejudice can be shown.

Using the harmless error standard articulated in *Chapman*, *supra*, 46 Cal.4th 818, defendant claims he was prejudiced by the trial court's order requiring him to testify before Officer Rolens testified because, if he had heard Officer Rolens's testimony, he either would have testified differently[9] or would not have testified at all. According to defendant, if he testified differently or did not testify, a reasonable juror could have concluded that he was not guilty of one or more of the charged crimes.

Contrary to defendant's assertion, it is not reasonably likely that he would have testified differently or would have chosen not to testify. Following Officer Mullane's testimony, defendant was unequivocal about his intent to testify on his own behalf, a fact that suggests he would have testified regardless of whether the prosecution had completed its case. Moreover, his testimony did not rebut directly Officer Mullane's version of the events of April 10, 2012. To the contrary, defendant conceded that he did not remember much about the police pursuit that night because he was heavily intoxicated—due to his consumption of prescription drugs, illegal drugs, and alcohol—and he was suffering from delusions. That testimony did not relate to defendant's conduct on the night of the pursuit, but rather related to the issue of his capacity to form the specific intent and acquire the knowledge necessary for the commission of certain of the charged crimes. Without some or all of that testimony, defendant would have had no defense or a much weaker defense to the charged crimes. In addition, Officer Rolens's testimony was largely duplicative of the testimony provided by Office Mullane, and

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[9] Defendant does not explain how he would have changed or adjusted his testimony, in a truthful manner, in response to the testimony of Officer Rolens.

served primarily to corroborate Officer Mullane's version of the events of April 10, 2012. Thus, even if defendant had heard Officer Rolens's testimony, there was nothing about it that likely would have changed the way defendant testified. Given the nature of defendant's testimony and his expressed desire to testify on his own behalf, it is highly unlikely that his testimony would have changed at the close of the prosecution's case or that he would have changed his mind and declined to testify.

Even if defendant had changed his testimony or refused to testify, the prosecution's case against him was overwhelming. Officers Mullane and Rolens, who were both in uniform driving marked patrol cars with their red lights and sirens activated, observed first hand defendant's erratic and reckless driving during the pursuit. They also heard there was a witness report of someone in a car matching the description of defendant's car brandishing a shotgun; they both heard a shotgun report from defendant's car during the pursuit at the same location; Officer Rolens saw the shotgun pointing back toward him; and, after defendant crashed into the Jaguar, Officer Mullane recovered a loaded shotgun from defendant's car, along with expended shotgun shell casings and live shotgun rounds. In addition, both officers observed defendant's noncompliant behavior and defiant gestures after he emerged from his wrecked vehicle with a beer in his hand. Therefore, given the state of the prosecution's evidence—which, under defendant's theory, the jury would have considered without any or at least all of defendant's testimony—no reasonable juror could have concluded that defendant was not guilty of one or more of the charged crimes. Accordingly, the claimed error was harmless beyond a reasonable doubt.

C. Ineffective Assistance of Counsel for Failure to Exclude Hearsay in Psychiatric Records

1. Background

During his testimony, defendant's expert, Haig Kojian, was asked about a statement defendant made to someone while incarcerated at the Twin Towers

Correctional Facility two days after his arrest. The cross-examination and redirect questioning on this issue was as follows: "Q. The Mental Records reflect the defendant's statement as to what he was trying to do on the night of April 10th, 2012, correct? A. Statement to mental health individuals at [Twin Tower Correctional Facility]? Q. Correct. A. Yes, that's true. Q. And the defendant's statement was that he was trying to make the police mad so they would shoot him, correct? A. That was in the record, yes. [Prosecutor]: Thank you. I have no further questions. The Court: Any redirect on those issues? [Defense Counsel]: Q. As far as the forensic—Twin Towers, the statement: make the police shoot him so that what? So he would die or – A. Well, I think what counsel is referring to was a statement in the Twin Towers mental health records, which wasn't made to me, just to be clear. It was part of the discovery that I reviewed. There was an alleged statement made at the time that was memorialized in the records from [Twin Towers Correctional Facility] that I reviewed which says something to the effect that he was trying to make the police mad enough to shoot him. Something to that effect. That's not a direct quote. Q. Okay. So there's more to it than just that one little sentence. A. I can check my notes and I'll give you the exact quote if you want. [Defense Counsel]: May he check, your Honor? The Court: Absolutely. The Witness: Thank you sir. Okay. So according to the record on April 12th, 2012, which is correct, it's two days after the date of the alleged offense, at 0438 hours, in terms of the—with respect to the alleged matter, the subject had allegedly indicated, 'I tried to make police mad so that they would shoot me to kill me.' [Defense Counsel]: And that is two days after the event? A. That -- Q. After the arrest? A. That note was dated April 12, 2012. Again, it wasn't made to me. He made it to somebody else. I can go through this to see who he made it to allegedly. But it was memorialized, documented in the records. And that was a date stamp. Now, when he actually made that statement to whoever it was that generated that report, I don't know. A. That I don't know. It could have been. . . . And it's difficult to tell when the statement was made versus when that particular sheet was generated. And so all I know is that in my notes I listed that date and time that I just

indicated, but I don't know when he made that statement. I don't know at what time chronologically that statement can be attributed to."

2. Legal Principles

"In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 2068, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217 [233 Cal.Rptr. 404, 729 P.2d 839].) A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. (*Strickland v. Washington*, *supra*, at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253 [124 Cal.Rptr.2d 473, 52 P.3d 656].) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 [62 Cal.Rptr.2d 437, 933 P.2d 1134].) Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus. (*Id.* at pp. 266-267.)" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

3. Analysis

Defendant contends that his trial counsel provided ineffective assistance of counsel by failing to object to the hearsay statement from the records of the Twin Towers Correctional Facility regarding his desire to have police officers kill him. According to defendant, although his expert was entitled to rely on the hearsay statement in forming his opinion (Evid. Code, § 801, subd. (b)), the statement was inadmissible to prove the

truth of the matter asserted therein or that defendant made the statement. Therefore, defendant argues his trial counsel should have requested a limiting instruction[10] advising the jury not to consider the statement for the truth of the matter asserted or to prove the defendant made the statement. Defendant maintains his trial counsel's failure to request such an instruction fell below the objective standard of reasonableness under prevailing professional norms and that there is no satisfactory explanation for counsel's failure in that regard.

Assuming, without deciding, that the statement in issue was inadmissible hearsay that could have been subject to a limiting instruction, we cannot conclude from the record that there was no rational tactical purpose for defense counsel's failure to request such an instruction. Defendant's trial counsel could have reasonably concluded that such an instruction may have caused the jury to focus more attention on the statement than the jury might otherwise have given the statement without the instruction. Accordingly, defendant has not carried his burden of showing that defense counsel's alleged failure to act had no rational tactical purpose and his claim of ineffective assistance of counsel would therefore be more appropriately raised in a petition for habeas corpus.

D. Inadequate Instruction on Voluntary Intoxication, Omission of Instruction on Mental Impairment, and Ineffective Assistance of Counsel

Defendant contends that the trial court erred in instructing the jury on voluntary intoxication. According to defendant, the trial court's instruction on voluntary intoxication as to count 1—evading a police officer with willful disregard—was inadequate because, although it specified that voluntary intoxication could negate the

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[10] CALCRIM No. 360 is a limiting instruction that advices the jury that hearsay statements repeated in an expert's testimony can be considered "only to evaluate the expert's opinion" and cannot be considered as "proof that the information contained in the statement is true." (CALCRIM No. 360.)

requisite specific intent, i.e., intent to evade, it failed to specify that voluntary intoxication could also negate the requisite knowledge element of count 1, i.e., knowledge that defendant's pursuers were police officers. In addition, defendant contends that the trial court erred by failing to instruct on voluntary intoxication as to counts 2 and 9—assault with a firearm on a police officer and resisting, delaying, or obstructing a police officer because each of those counts also had a knowledge component relating to police officers. In the alternative, defendant contends that he received ineffective assistance of counsel based on his trial counsel's failure to request that the trial court modify the voluntary intoxication instruction as to count 1 to specify that such intoxication could also negate the knowledge requirement of that count 1; failure to request an adequate voluntary intoxication instruction as to counts 2 and 9; and failure to request a mental impairment instruction as to counts 1, 2, and 9.

1. Background

During the jury instruction conference with counsel, the trial court stated: "Then we have [CALCRIM No.] 3426,[11] voluntary intoxication applicable only to specific intent crimes, which is Count 1." The trial court then asked counsel if there were any objections to that instruction as to count 1. Defendant's trial counsel did not object or

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11 The version of CALCRIM No. 3426 given by the trial court reads: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence in deciding whether the defendant acted with the intent to evade a peace officer as charged in Count 1. [¶] A person is *voluntarily intoxicated* if he becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] In connection with the charge of evading a peace officer with wanton disregard for safety, or misdemeanor evading a peace officer, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to evade a peace officer. If the People have not met this burden, you must find the defendant not guilty of evading a peace officer with wanton disregard and the lesser offense of misdemeanor evading a police officer. [¶] You may not consider evidence of voluntary intoxication for any other purpose. Voluntary intoxication is not a defense to the remaining crimes charged in this case or remaining lesser offenses."

request any modification to the instruction. In addition, defendant's trial counsel did not request a voluntary intoxication instruction as to either count 2 or count 9. And defendant's trial counsel did not request a mental impairment instruction as to counts 1, 2, or 9.

2. Analysis

a. Trial Court Error

Defendant's contention that the trial court's voluntary intoxication instruction as to count 1 was inadequate has been forfeited. The trial court's instruction was a correct statement of the law, even though it did not address specifically the knowledge element of count 1. Therefore, if defendant determined that a modification to the instruction was necessary to address specifically the knowledge element of count 1, it was incumbent upon his trial counsel to request such a modification. (*People v. Richardson* (2008) 43 Cal.4th 959, 1022-1023, ["while the court may review unobjected-to instruction that allegedly implicates defendant's substantial rights, claim that instruction, correct in law, should have been modified 'is not cognizable, however, because defendant was obligated to request clarification and failed to do so'"], quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1134.) The failure of his trial counsel to do so forfeited any claimed error on appeal.

Defendant's contention that the trial court erred by failing to instruct on voluntary intoxication as to counts 2 and 9 has also been forfeited. As defendant concedes, the trial court did not have a sua sponte duty to instruct on voluntary intoxication.[12] (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Rather, the burden was on defendant to request that those instructions be given as to those counts. (*Ibid.*) Therefore, the failure of

[12] Similarly, the trial court had no sua sponte duty to instruct on mental impairment. (*People v. Ervin* (2000) 22 Cal.4th 48, 91.)

defendant's trial counsel to request such instructions resulted in a forfeiture of the issue on appeal. (*People v. Mayfield* (1997) 14 Cal.4th 668, 778-779.)

b. Ineffective Assistance of Counsel

Defendant's assertions of ineffective assistance of counsel as to the voluntary intoxication and mental impairment instructional issues fail for reasons similar to those that caused us to reject his earlier assertion of ineffective assistance. Based on the legal principles that control our analysis of a claim of ineffective assistance of counsel discussed above, it is defendant's burden to demonstrate that there was no tactical reason for his trial counsel's failure to request the instructions in issue. Here, the instructions on voluntary intoxication and mental impairment are pinpoint instructions and the decision to request them as to any given count is presumed to fall within the broad range of professional competence. Because the record sheds no light on why counsel did not request the instructions and we cannot conclude that there can be no satisfactory explanation for counsel's failure to act, the matter is more appropriately addressed in a petition for a writ of habeas corpus.

Moreover, even assuming defense counsel's failure to request instructions on voluntary intoxication and mental impairment constituted ineffective assistance, any such error was harmless. The court in *People v. Larsen* (2012) 205 Cal.App.4th 810 explained that [t]he omission of CALCRIM No. 3428[13] [which is a pinpoint instruction similar to the involuntary intoxication instruction in CALCRIM No. 3426] could not have misled

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13 CALCRIM No. 3428 provides: "You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required intent or mental state, specifically: _____ <*insert specific intent or mental state required, e.g., 'malice aforethought,' 'the intent to permanently deprive the owner of his or her property,' or 'knowledge that ...'*> . If the People have not met this burden, you must find the defendant not guilty of _____ <*insert name of alleged offense*>"

the jury as to the intent element of any of the charged crimes or lesser included offenses. The jury instructions as a whole correctly stated applicable law and instructed on necessary elements. "CALCRIM No. 3428 [like CALCRIM No. 3426] does not delineate or describe an element of an offense. It is a pinpoint instruction relating particular facts to a legal issue in the case." (*People v. Larsen, supra,* 205 Cal.App.4th at p. 830.)

The jury in this case was properly instructed as to all elements of counts 1, 2, and 9. Nothing in the instructions prevented the jury from considering defendant's evidence of his intoxication and mental issues in determining intent and knowledge during deliberations. The juror's were well aware from defendant's testimony that he was extremely intoxicated and that he claimed to have seen Satan and was hallucinating about his prior military experience, believing the police officers were soldiers. Thus, the omission of CALCRIM Nos. 3426 and 3428 could not have mislead the jury on the issues of intent and knowledge.

In addition, as discussed above, there was strong, credible, and corroborating evidence of defendant's guilt on count 1, 2, and 9 with respect to both knowledge and intent, much of which was uncontradicted by defendant's testimony. Two of the officers involved in the primary and secondary pursuit of defendant's vehicle—who were both in uniform in marked patrol vehicles with lights and sirens activated—described his reckless driving while under the influence, heard at least one gun shot from defendant's vehicle, described his belligerent, noncooperative behavior following the collision with the Jaguar, and recovered a loaded shotgun, expended shotgun shells, and live, unexpended shotgun rounds from defendant's vehicle. Given the strength of the evidence showing defendant's guilt on counts one, two, and nine, defendant did not "suffer prejudice to a reasonable probability, that is, a probability sufficient to undermine the outcome" of his trial on counts 1, 2, and 9. (*People v. Carter, supra,* 30 Cal.4th at p. 1211.)

E. Cumulative Error

Defendant contends that the cumulative effect of the erroneous admission of inadmissible hearsay during his expert's testimony and the instructional errors or omissions warrants reversal of the convictions on counts 1, 2, and 9. As explained above, however, the claimed errors either did not occur or they were harmless. Therefore, we reject defendant's assertion of cumulative error.

F. Directed Verdict on Insanity Defense

1. Background

Following the jury's guilty verdict, the trial court held a bifurcated trial on defendant's plea of not guilty by reason of insanity. Defendant was the only witness to testify on his behalf. Following his testimony, the trial court directed a verdict against defendant on the grounds that there was insufficient evidence that defendant suffered from a mental disorder. The trial court explained its ruling as follows: "The Court: The issue that I have is whether or not there's sufficient evidence in the record upon which the jury can find a preponderance of the evidence that [defendant] suffers from a mental illness or a mental defect or disorder that coupled with his substance abuse could meet the criteria for legal insanity for purposes of a jury to determine. [¶] That's the problem that I have here because the evidence is in and that's what it is. What I gather from [defendant] is certainly there's substance abuse in his history and perhaps even on the date in question, including alcohol consumption to excess. [¶] But the law requires more than just simply that, it requires a medical disorder or defect. And [I] understand [that defendant] in his own words . . . suffers from anxiety and depression. But that alone is not mental illness or defect as a matter of law. [¶] And even coupled with the substance abuse and alcohol abuse that he has mentioned, still doesn't reach the level of legal insanity for purposes of even a jury to decide. [¶] So my concern is whether or not I can legally allow the jury even to receive this case based upon the insufficiency of the

evidence that I have before me. [¶] It would have been different, [defendant], if you could have produced an expert to say, yes, indeed, you suffer from a—some type of mental disorder or defect or illness. There's just no evidence in the record of that. [¶] So, [defense counsel], what are your thoughts about this issue? [¶] [Defense Counsel]: Well, according to my research, the court, pursuant to a particular case I think in 2003, although it's a novel area, the court does have the power and authority to grant its own 1118.1. And the standard of proof would be the preponderance of the evidence. And if that's not been presented for your Honor's satisfaction, I believe the case law supports, I think, what you're ultimately getting to. [¶] The Court: Well, the case that I think you and I are both referring to—and you're right it is a 2003 matter—its People versus Ceja, CEJA, cited as 106 Cal.App.4th page 1071, specifically at page 1089 where the court concluded, based upon analysis of case law—and this case is still current law. It's still valid. And I'll read the finding of the holding into the record. [¶] And again, it was a case very similar to what we have here. But even in the Ceja case there was expert testimony introduced during the sanity phase and here we don't even have that. But in the Ceja matter the court concluded that: 'There was no Constitutional infirmity, either under the California Constitution or the United States Constitution, for a judge to remove the issue of sanity from the jury when the defendant has failed to present evidence sufficient to support the special plea. As recognized by Justice Brown—citing another case called *Hernandez*—and the prior cases involving double jeopardy, courts retain an inherent power to remove an affirmative defense from the jury where there is no evidence to support it.' So the court does have the authority, but it's not an 1118 analysis. That only pertain to directing a verdict for the defendant, so that's not the analysis. [¶] . . [¶] And that's the way I'm going to find. I'm going to remove this from the jury and find as a matter of law there is insufficient evidence for the jury to resolve the [sanity] issue . . . because there is just simply insufficient evidence presented in the record at this point."

2. Authority to Direct Verdict

Defendant contends that the trial court denied his due process and jury trial rights by directing a verdict of insanity because only the jury was empowered to rule on the factual issue of his sanity. The Attorney General argues that defendant has forfeited the issues of whether the trial court denied him due process and violated his rights to a jury trial by failing to raise those issues in the trial court, citing *People v. Stowell* (2003) 31 Cal.4th1107, 1114 and *People v. Garceau* (1993) 6 Cal.4th 140, 173. Defendant contends that because the trial court was bound by the holding in *People v. Ceja* (2003) 106 Cal.App.4th 1071, 1084-1085 (*Ceja*) confirming a trial court's authority to direct a verdict of sanity, it would have been futile to object in the trial court, citing *People v. Severence* (2006) 138 Cal.App.4th 305, 314-315.

We do not need to resolve whether defendant forfeited his challenges to the trial court's authority to direct verdict on the sanity issue because even if the issue has been preserved for appeal, there is no merit to those challenges. Defendant concedes that there is, not one, but three appellate court decisions that recognize a trial court's discretionary authority to direct a verdict against a defendant in a trial of a sanity defense. (See *Ceja, supra*, 106 Cal.App.4th 1071; *People v. Severence* (2006) 138 Cal.App.4th 305; and *People v. Blakely* (2014) 230 Cal.App.4th 771.) Defendant also concedes that the Supreme Court has not addressed the issue.

Nevertheless, defendant urges us to ignore established case law on this issue because the three cases in issue were wrongly decided. According to defendant, the premise of these cases—a trial court may direct a sanity verdict because the defendant has the burden of proof on that affirmative defense—is flawed. Defendant asserts that the assignment of the burden of proof has nothing to do with the core issue of who determines the factual issue of sanity. Because section 25, subdivision (b) and section 1026, subdivision (a) assign that factual question to the jury and no statute authorizes a trial court to direct sanity verdicts, defendant concludes that the issue of sanity must always be determined by the jury.

We are not persuaded that the three appellate decisions in issue, which recognize a trial court's discretion to direct a verdict of sanity, were wrongly decided. We therefore choose to follow established precedent on this issue and conclude that the trial court did not violate defendant's due process and jury trial rights by directing a verdict on the sanity issue.

3. Substantial Evidence

Defendant maintains that even if the trial court had the power to direct a verdict, it nevertheless erred by finding that there was no substantial evidence to support an inference that defendant was insane at the time he committed the crimes. According to defendant, his testimony about his physical injuries and his mental issues, including anxiety, depression, and drug and alcohol addiction, when considered together with his expert's testimony during the guilt phase that his mental and addiction problems could have made it difficult for him to form specific intent, constituted substantial evidence that supported an inference of insanity.

The principles governing the trial of an affirmative defense of insanity are well-established. "Under California law, if a defendant pleads not guilty and joins it with a plea of not guilty by reason of insanity, the issues of guilt and sanity are tried separately. Penal Code section 1026, subdivision (a), provides that in such circumstances, 'the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In that trial, the jury shall return a verdict either that the defendant was sane at the time the offense was committed or was insane at the time the offense was committed.' [¶] Although guilt and sanity are separate issues, the evidence as to each may be overlapping. Thus, at the guilt phase, a defendant may present evidence to show that he or she lacked

the mental state required to commit the charged crime. (*People v. Saille*[, *supra*,] 54 Cal.3d [at pp.] 1111-1112; Pen. Code, § 21, 28, 29.) A finding of such mental state does not foreclose a finding of insanity. Insanity, under California law, means that at the time the offense was committed, the defendant was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong. (Pen. Code, § 25, subd. (b); *People v. Skinner* (1985) 39 Cal.3d 765, 776-777 [217 Cal.Rptr. 685, 704 P.2d 752 [construing Pen. Code, § 25, subd. (a), as providing that defendant may be found insane if he did not know the nature and quality of his act *or* if he did not know the act to be morally wrong].)" (*People v. Hernandez* (2000) 22 Cal.4th 512, 520-521.)

Insanity is a plea raising an affirmative defense to a crime charged. (*People v. Hernandez, supra,* 22 Cal.4th at p. 522.) The burden is on the defendant to prove by a preponderance of the evidence that he was insane at the time of the offense. (*Id*. at p. 521.) A defendant must show that he suffered from a "mental condition which render[ed him] incapable of knowing or understanding the nature and quality of his act, or incapable of distinguishing right from wrong in relation to that act." (*People v. Kelly* (1973) 10 Cal.3d 565, 574.)

As discussed, defendant was the only witness to testify on his behalf during the sanity phase. As a result, there was no expert testimony on the issue of whether he was able to appreciate the nature and quality of his acts or was not able to distinguish right from wrong in relation to those acts. Moreover, the only mental conditions that defendant claimed he was suffering from were anxiety and depression. He also claimed to be addicted to alcohol and drugs. But anxiety, depression, and addiction cannot be the basis for a finding of insanity. "In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or an abuse of, intoxicating substances." (§ 29.8) Likewise, the fact that defendant had suffered injuries to his head in the past which caused him to become unconscious and had surgery to treat one of those injuries did not support a reasonable inference that defendant did not appreciate the nature and quality of his acts or was incapable of distinguishing

right from wrong in relation to those acts on the night he committed the charged crimes. And although defendant claimed he saw Satan and was hallucinating on the night of his crimes, those facts were not related to his ability to appreciate the nature and quality of his acts or to distinguish right from wrong.

Given the conclusory nature and limited extent of defendant's testimony during the sanity phase, the trial court correctly concluded that defendant had not presented substantial evidence that he was legally insane. The trial court therefore did not err in directing a sanity verdict.

G. Supplemental Briefing on Sentencing Error

After this matter was fully briefed, we granted defendant leave to file a supplemental brief on a sentencing issue. In his supplemental brief, defendant contends, inter alia, that the five-year sentence enhancement imposed by the trial court pursuant to section 667, subdivision (a) was unauthorized and must be stricken. According to defendant, because the accusatory pleading did not contain a section 667, subdivision (a) allegation and it was not tried and found true or admitted, the trial court could not lawfully impose the five-year sentence enhancement, citing, inter alia, *People v. Mancebo* (2002) 27 Cal.4th 735, 743-744. The Attorney General filed a supplemental letter brief in response agreeing that the five-year sentence enhancement was unauthorized and must be stricken.

In a letter brief filed September 30, 2015, defendant advised this court of the recent decision in *People v. Vizcarra* (2015) 236 Cal.App.4th 422 (*Vizcarra*). Defendant contends that to the extent *Vizcarra* suggests that a sentence enhancement under section 667, subdivision (a) is mandatory and must be imposed by a trial court, it was wrongly decided.

We have reviewed the parties' briefs on this issue and conclude that the five-year sentence enhancement imposed by the trial court was unauthorized and must be stricken

because it was not alleged in the accusatory pleading and it was not tried and found true or admitted.

Nothing in the recent decision of *Vizcarra*, *supra*, 236 Cal.App.4th 422 alters our conclusion. That decision involved the legal issues of collateral estoppel and law of the case and whether the trial court abused its discretion in resentencing the defendant. The issue concerning the five-year sentence enhancement under section 667, subdivision (a) to which the court in *Vizcarra* refers was actually decided in a prior unpublished decision in that case. Thus, the published decision in *Vizcarra* cannot be cited for issues that were not necessarily determined in that decision.

DISPOSITION

The judgment of conviction is affirmed and the matter is remanded to the trial court with instructions to strike the unauthorized five-year sentence enhancement imposed under section 667, subdivision (a) and to resentence defendant in light of the stricken enhancement.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

BAKER, J.

Appendix B:
California Supreme Court Order Denying Review

Court of Appeal, Second Appellate District, Division Five - No. B254807

S231393

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JAIME AYALA GALVEZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Appendix C:
Central District of California Decision

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAIME AYALA GALVEZ,
Petitioner

v.

WILLIAM MUNIZ, Warden,
Respondent.

Case No. CV 16-7626-AG (GJS)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Under 28 U.S.C. § 636, the Court has reviewed the habeas petition ("Petition") and all pleadings, motions, and other documents filed in this action, the Report and Recommendation of United States Magistrate Judge ("Report"), and Petitioner's two sets of Objections to the Report, namely, the Objections prepared by Petitioner and filed on July 23, 2018 [Dkt. 37, "First Objections"], and the Objections prepared by an attorney assisting Petitioner and filed on August 1, 2018 [Dkt. 38, "Second Objections"]. Under 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a de novo review of those portions of the Report receiving objections stated in writing.

The Court has reviewed the Second Objections carefully and has concluded that they need not be specifically addressed. Its arguments, even when directed to

particular portions of the Report, merely restate arguments made previously in Petitioner's briefing in this case, which already have been considered.

Concerning the First Objections, Petitioner states that he objects only to the Report's analyses of Grounds One through Three of the Petition. As to Grounds One and Two, Petitioner seeks to introduce new evidence that was not a part of the record in this case at the time the Report issued. One exception is a copy of the notice of appeal filed by counsel. Although this document is part of the state record and may be considered, it does not cause the Court to question the correctness of the Report's analyses and conclusions. The new evidence includes: photocopies of military records and letters of recommendation; photographs of an asserted missionary trip to Tijuana, Mexico; a copy of a *Marsden* hearing transcript that was not included in the lodged state record; and numerous allegations by Petitioner regarding conversations held off the record, his description of the underlying events, his personal feelings and beliefs, and other extrinsic matters.

A district court has discretion, but is not required, to consider evidence or arguments presented for the first time in objections to a report and recommendation. *See Brown v. Roe*, 279 F.3d 742, 744-45 (9th Cir. 2002); *United States v. Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000). The Court exercises its discretion *not* to consider the newly-proffered evidence appended to and factual allegations made in the First Objections. The state courts denied all of Petitioner's habeas claims on their merits and, thus, they are governed by the standard of review set forth in 28 U.S.C. § 2254(d). Unless the Court were to find that threshold standard satisfied, the Court's review of these claims is limited to the record that actually was before the state courts when they considered and resolved these claims. *See Cullen v. Pinholster*, 563 U.S. 170, 181-85 (2011); *Runningeagle v. Ryan*, 686 F.3d 758, 773-74 (9th Cir. 2012). For the reasons set forth in the Report, Petitioner has not surmounted the initial hurdle presented by Section 2254(d)(1) and (2). As a result, *Pinholster* precludes consideration of the new matters that Petitioner now proffers.

Regardless, nothing in the First Objections calls into question the Report's analyses and conclusions regarding Grounds One and Two, whether factually or legally.

In the First Objections' discussion of both Ground Two and Ground Three, Petitioner attempts to object to the Report by asserting a variety of new claims, including claims based on prosecutorial misconduct, the presentation of false evidence, and additional instances of alleged ineffective assistance of counsel that were not alleged in the Petition. There is no evidence before the Court that Petitioner has exhausted these belatedly-raised claims and, further, they are not properly raised in response to a Report and Recommendation. Accordingly, the Court declines to consider them. Moreover, whether or not trial counsel performed deficiently in these newly-asserted respects, Petitioner has not shown that the Report erred in concluding that Section 2254(d) is not satisfied based on the state court's decision on the particular ineffective assistance claim actually raised through Ground Three.

Having completed its review, the Court concludes that nothing set forth in the First or Second Objections affects or calls into question the analyses and conclusions set forth in the Report. The Court accepts the findings and recommendations set forth in the Report. Accordingly, **IT IS ORDERED** that: (1) the Petition is DENIED; and (2) Judgment shall be entered dismissing this action with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATE: 9/16/18

ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

Appendix D:
Magistrate Report and Recommendation

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAIME AYALA GALVEZ, Petitioner v. WILLIAM MUNIZ, Warden, Respondent.	Case No. CV 16-7627-AG (GJS) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to United States District Judge Andrew J. Guilford, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On October 13, 2016, Petitioner, a state prisoner, filed a habeas petition pursuant to 28 U.S.C. § 2254 ("Petition") with a supporting Memorandum of Points and Authorities ("Pet. Mem.") and Exhibits. On November 21, 2016, Petitioner voluntarily dismissed Ground Five of the Petition on the basis that the claim is unexhausted. Respondent thereafter filed an Answer to the Petition and lodged the relevant portions of the state record ("Lodg."), and Petitioner filed a Reply.

The matter, thus, is submitted and ready for decision. For the reasons set forth below, the Court recommends that the District Judge deny the Petition.

PRIOR STATE PROCEEDINGS

On November 26, 2013, a Los Angeles County Superior Court jury found Petitioner guilty of: evading a police officer with wanton disregard for safety; assault with a firearm upon a police officer; shooting at an occupied motor vehicle; shooting from a motor vehicle; possession of a firearm by a felon; felon carrying a loaded firearm in public; resisting, obstructing or delaying a police officer; and driving under the influence of alcohol and/or drugs. The jury also found true enhancement allegations that Petitioner personally used and discharged a firearm. (Lodg. No. 1, Clerk's Transcript ("CT") 177-84, 204.) In a bifurcated proceeding, Petitioner admitted that he had suffered a prior "strike" conviction. (CT 205.)

A separate sanity phase proceeding then occurred based on Petitioner's plea of not guilty by reason of insanity ("NGI"). (CT 208-09.) Petitioner was the sole witness. The trial court concluded that there was insufficient evidence for the jury to find insanity and directed a verdict of sanity. (Lodg. No. 3, Reporter's Transcript ("RT") 639-67.) At a subsequent sentencing hearing, Petitioner received a total sentence of 38 years and four months. (CT 258; Lodg. No. 2 at 2; RT 901-22.)

Petitioner appealed. (CT 260; Lodg. Nos. 7-9.) On November 9, 2015, the California Court of Appeal issued a reasoned decision affirming the judgment, but remanded with instructions to strike an unauthorized five-year sentence enhancement. (Lodg. No. 12.) Petitioner then filed a petition for review, which the California Supreme Court denied on February 24, 2016, without comment or citation to authority. (Lodg. Nos. 13-14.)

On April 22, 2016, the trial court resentenced Petitioner in accordance with the California Court of Appeal's directive. Petitioner's new sentence was 33 years and four months. (Lodg. No. 15.)

SUMMARY OF THE EVIDENCE AT TRIAL

On federal habeas review, "a determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Schriro v. Landrigan*, 127 S. Ct. 1933, 1939-40 (2007) ("AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'") (citing Section 2254(e)(1)); *Pollard v. Galaza*, 290 F.3d 1030, 1033, 1035 (9th Cir. 2002) (statutory presumption of correctness applies to findings by both trial courts and appellate courts).

The Section 2254(e)(1) presumption has not been shown to be inapplicable to the California Court of Appeal's summary/description of the evidence presented at Petitioner's trial. Accordingly, while the Court has independently reviewed the trial record and will discuss the relevant portions subsequently in its analysis of Petitioner's claims, the Court now sets forth the state appellate court's summary to provide an initial factual overview.

A. Prosecution's Case

1. Officer Mullane's Testimony

> On April 10, 2012, at about 10:00 p.m., California Highway Patrol Officer David Mullane was back at his office refueling his patrol vehicle. While monitoring his radio, he heard a report of a driver on the westbound 10 freeway brandishing a weapon. He then heard that California Highway Patrol Officer Aaron Rolens had located the suspect vehicle—a silver Dodge Caliber—and that it was exiting the freeway at Puente Avenue. Officer Mullane proceeded to that location and observed the Dodge, two patrol vehicles, and a motorcycle officer exit the freeway at Puente onto North Garvey Avenue where they entered a Home Depot parking lot. The first patrol vehicle had its forward-facing red light activated.
>
> Officer Mullane entered the Home Depot parking lot and positioned his vehicle to prevent the Dodge from exiting the lot from the driveway it had used to enter. He also activated his vehicle's forward-facing red lights. The vehicle went through the parking lot past the Home Depot with Officer Rolens in pursuit. Officer Mullane

followed behind Officer Rolens's vehicle. The vehicle made a left turn from the parking lot against a red light and went south on Puente. It then made another left turn against a red arrow onto North Garvey Avenue from where it reentered the westbound 10 freeway. Officer Rolens was in pursuit with his siren activated and Officer Mullane followed in secondary pursuit.

As soon as the Dodge entered the westbound 10 freeway, it accelerated to speeds in excess of 100 miles per hour. Officer Mullane was "pacing" the vehicle, "[m]aking [his] patrol vehicle go the same speed as [the Dodge] so [he] neither gain[ed] nor los[t] distance on the [Dodge]."

As it travelled down the 10 freeway, "the Dodge made several lane changes in order to get around slower vehicles. At times it used the center median area in order to pass vehicles." Traffic was moderate, but "several vehicles had to either swerve to the right or to the left in order to avoid collisions or brake abruptly in order to avoid striking [the Dodge] or having [the Dodge] strike them." During the course of the pursuit on the westbound 10 freeway at San Gabriel Boulevard, Officer Mullane heard "a distinct noise" from the Dodge that sounded like a report from a shotgun.

The Dodge transitioned to the northbound 101 freeway where traffic was heavier. The farther north on the 101 the vehicles travelled, the heavier the traffic became, causing the Dodge and the pursuit vehicles to slow down to speeds of 80 miles per hour or less.

The Dodge was using the center median and the number one lane to pass slower vehicles. As it attempted to pass a Jaguar in the number one lane, it collided with the left rear of a Jaguar "with such force that it broke [the Jaguar's] left rear axle and broke the wheel."

Officer Mullane stopped, exited his vehicle, and approached the Dodge from the right side. Officer Rolens simultaneously made an approach on the left side. When he arrived at the vehicle, Officer Mullane observed [Petitioner] in the driver's seat and concluded that he had been stunned by the collision and was nonresponsive. [Petitioner], who was the only occupant of his vehicle, did not respond to Officer Mullane's several loud and distinct commands to show his hands.

> Officer Mullane saw a shotgun in the vertical position on the front passenger seat of the Dodge. Because the right front passenger window was open, Officer Mullane was able to reach into [Petitioner's] vehicle, retrieve the shotgun, and retreat to a position of cover at a patrol vehicle. As Officer Rolens also retreated to cover, "he made sure that the driver of the Jaguar was taken out of that vehicle ... to a position of safety."
>
> In both English and Spanish over a patrol vehicle's public address system, [Petitioner] was given clear commands to surrender by exiting the Dodge with his hands up. Instead of complying with the commands, [Petitioner] began searching around the interior of his vehicle as if looking for the shotgun. [Petitioner] not only stated that he would not exit his vehicle, but also made several hand gestures with his middle fingers.
>
> [Petitioner] eventually exited the Dodge with a can of beer in his hand, refused to comply with any commands, and gestured to the officers to "come and get [him]." Two officers who had taken up a position on the southside of the freeway were armed with a "less lethal shotgun" that fired a bean bag round. One of those officers fired a bean bag round that struck [Petitioner] and knocked him to the ground. [Petitioner] immediately stood up, a reaction that suggested to Officer Mullane the [Petitioner] was high on alcohol or drugs. [Petitioner] was shot a second time with a bean bag, and stood up again after falling to the ground. After [Petitioner] was shot with two more bean bag rounds, he eventually became incapacitated enough for officers to approach and handcuff him.
>
> Officer Mullane found three spent shotgun casings in the Dodge. There was also a box of live shotgun rounds that spilled its contents into the interior of the vehicle. The shotgun itself contained three live rounds.
>
> *2. Officer Rolens's Testimony*
>
> On April 10, 2012, Officer Rolens was working as a road patrol officer assigned to the Baldwin Park area. At approximately 9:48 p.m., he received a monitored call from dispatch advising that someone in a vehicle was brandishing a firearm at another vehicle. The witness provided a license plate number and a vehicle

description, i.e., a silver Dodge Caliber.

While driving westbound on the 10 freeway, east of Puente Avenue, Officer Rolens located the silver Dodge suspect vehicle, which was weaving in a "serpentine manner" in the number two lane. The Dodge then changed lanes to the number one lane and in the process, the left side tires of the vehicle crossed the solid yellow line that delineated the south roadway edge of the freeway so that the vehicle was partially driving in the center medium. Officer Rolens concluded that the vehicle was being operated by a driver who was under the influence of alcohol or drugs.

Near Puente Avenue, the Dodge made an abrupt turning movement from the number two lane across the number three and four lanes. When the vehicle exited the freeway at Puente, Officer Rolens attempted to initiate an enforcement stop by activating his patrol vehicle's overhead emergency lights. The vehicle made a left turn into the parking lot of a shopping complex and proceeded to drive through the lot without stopping.

After the Dodge exited the parking lot, it made a left turn onto southbound Puente and then another left turn onto eastbound North Garvey Avenue, both times failing to stop for red traffic signals. The vehicle then reentered the westbound 10 freeway. While the vehicle was westbound on the 10 freeway near San Gabriel Boulevard, Officer Rolens heard a gunshot. When the vehicle moved to the right, Officer Rolens observed a shotgun outside the driver's side window. The shotgun was pointing "up and back toward [Officer Rolens]." The vehicle continued westbound until it reached the "carpool bus flyover" near the 710 freeway. Eventually, the vehicle entered the northbound 101 freeway near downtown Los Angeles.

The Dodge continued northbound on the 101 freeway where traffic became heavy. It was continuously travelling in excess of 65 miles per hour and, at times, in excess of 100 miles per hour. The vehicle "was weaving across multiple lanes of traffic. The driver ... crossed over double yellow lines into the carpool lane on multiple occasions and back out the carpool lane over those double yellow lines, and several times made unsafe lane changes, causing other drivers to take evasive action to avoid a collision."

> The pursuit terminated on the northbound 101 freeway when the Dodge collided with a Jaguar.[1] Officer Rolens, who had been joined by Officer Mullane, saw that there was no movement inside the Dodge. They decided to approach the vehicle and remove the shotgun. Officer Mullane was able to remove the shotgun from the vehicle.
>
> Officer Rolens next observed [Petitioner] looking around the interior of the Dodge on the passenger side, as if he was searching for the shotgun Officer Mullane had removed. The officer then saw [Petitioner] exit the passenger side of his vehicle making a gesture with both his middle fingers. [Petitioner] had a can of beer in his left hand.
>
> [Petitioner] was given multiple instructions to "get on the ground," but he refused to comply. At that point, another officer discharged a "less lethal shotgun," hitting [Petitioner] in the abdomen with a bean bag round and causing him to fall to the ground. [Petitioner] stood up immediately and picked up his beer. [Petitioner] was shot three more times with beanbag rounds, and the officers were eventually able to take him into custody.
>
> [Petitioner] was brought to the rear of a patrol vehicle and Officer Rolens stood next to him. [Petitioner] smelled of alcohol and "what little he was saying was slurred."
>
> **B. [Petitioner's] Case**
>
> After not sleeping for four days, [Petitioner] went to bed at about 8:00 a.m. on April 10, 2012. He woke up at 1:00 or 2:00 p.m. that day. He woke up with a "big hangover" and began drinking. Because he was "shaky," he took prescription Xanax. He also took his wife's prescription Vicodin.[2]
>
> [Petitioner] and his wife owned two houses and he had gone to bed that day at the smaller of the two houses. Upon awakening, he decided to drive to the larger house

---

[1] [Footnote 3 in original: "The collision caused the left rear axle of the Jaguar to break and the left rear wheel to separate from the Jaguar."]

[2] [Footnote 4 in original: "During cross-examination, [Petitioner] admitted to using alcohol, cocaine, methamphetamine, Xanax, and Vicodin on April 10, 2012."]

to use the restroom. On his way, he stopped to buy beer and rent movies. After using the restroom at the larger house, [Petitioner'] went downstairs to his wife's room, saw his wife's shotgun and a box of shotgun shells, and decided to take them to his wife at the smaller house. As he walked from the larger house back to his car, he decided to fire the shotgun. He loaded the shotgun and fired it three times.

[Petitioner] returned to the smaller house to pick up his laptop computer. He spoke to his wife and told her he was going to buy some food to eat while he watched the movies he had rented.

[Petitioner] entered his vehicle and drove, but he could not remember to where he drove. The first thing he remembered about the drive was passing a freeway sign for Rialto. The next thing he remembered was going through Baldwin Park. He did not remember exiting the freeway or driving on surface streets.

When he first entered Baldwin Park, he saw "Satan" behind him. He was afraid and wanted to "get away." The next thin[g] he remembered, he saw a "white big wall" and became unconscious. He thought "it was the impact that deployed it.".

When he regained consciousness, he heard helicopters and a voice in his head. He was confused and afraid. He looked up and saw soldiers pointing guns at him and the voices in his head told him to "die with honor and [to] give [his] life for [his] country." The scene prompted memories of when he "used to jump out of the airplane and helicopters [in the military]...."

Because a voice in his head was telling him to die, [Petitioner] told the soldiers to kill him. [Petitioner] was hit with something in his abdomen that caused a "very warm feeling all the way [through his] body...." He felt all his strength leave him and "saw [himself] going down in the shadow." He fell to the ground and lost consciousness. The next thing he remembered, he was lying on a stretcher in an ambulance. [Petitioner] went in and out of consciousness. [Petitioner] did not recall holding a firearm while driving his vehicle.

Forensic psychologist Haig Kojian, who testified for the defense, prepared for his testimony by reviewing

police reports, a probation officer's report, a preliminary hearing transcript, and medical records relating to [Petitioner]. The majority of the medical records indicated that [Petitioner] had been diagnosed as suffering from depression and anxiety. The records also reflected that [Petitioner] was addicted to various illegal substances and alcohol. According to Kojian, it was possible that a person who was under the influence of drugs and was experiencing emotional problems could be compromised to such an extent that he or she might experience difficulty formulating specific intent. Kojian explained that if depression became severe enough, a patient could become psychotic. He did not, however, see anything in [Petitioner's] medical records indicating that [Petitioner] was psychotic or delusional.

C.[Petitioner's] Testimony During Sanity Phase

Following the jury's verdict, [Petitioner] testified in the sanity phase as follows. [Petitioner] served in the military from 1979 to 1984. During that time, he suffered 10 to 15 head injuries caused by "jumping from airplanes." After he left the military, [Petitioner] had surgery to treat one of his head injuries.

[Petitioner] reenlisted in the military, but developed a drinking problem. His last year in the military, he developed depression and his speech impediment worsened. He was demoted several times for alcohol-related reasons and was eventually discharged "with honorable conditions," but with an indication that he had failed to rehabilitate from alcohol addiction.

After he left the military the second time, [Petitioner] had suicidal thoughts. He was treated at a Veteran's Administration Hospital for alcohol addiction by a psychiatrist. His alcohol abuse became progressively worse from 1984 to 2002 when he went to prison. Thereafter, he was able to remain sober for the next nine years.

From 2004 to 2012, [Petitioner] received disability benefits from the Social Security Administration. Among other medications, [Petitioner] was taking prescription Xanax with Celexa, an anti-psychotic medication in April 2012. The Xanax with Celexa caused [Petitioner] to have suicidal thoughts.

> About a year before April 2012, [Petitioner] had a series of anxiety attacks that resulted in several emergency room admissions. After being sober for nine years, [Petitioner's] daughter made him mad one day, causing him to begin drinking again.
>
> On April 10, 2012, while [Petitioner] was driving on the freeway, he was hallucinating.

(Lodg. No. 12 at 3-9.)

PETITIONER'S HABEAS CLAIMS

Ground One: Petitioner was deprived of his Sixth Amendment right to represent himself, because the trial court twice denied his motions for self-representation on the ground that they were untimely. (Petition at 5; Pet. Mem. ay 16-37.)

Ground Two: The trial court violated Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendment by forcing him to testify in the middle of the prosecution's case. (Petition at 5; Pet. Mem. ay 37-50.)

Ground Three: Petitioner's trial counsel provided ineffective assistance by failing to object when, on cross-examination, defense witness Kojian was asked about statements Petitioner had made that were reflected in his jail mental health records. (Petition at 6; Pet. Mem. at 50-58.)

Ground Four: The trial court erred in its instruction to the jury regarding voluntary intoxication as to Count 1, and by failing to give a voluntary intoxication instruction as to Counts 2 and 9. Petitioner's trial counsel provided ineffective assistance by failing to request that the voluntary intoxication instruction be given as to Counts 2 and 9 and that a mental impairment jury instruction also be given as to all three Counts. (Petition at 6; Pet. Mem. at 59-73.)

Ground Six: The trial court erroneously directed a verdict of sanity in violation of Petitioner's rights to due process and trial by jury. (Petition at 9; Pet. Mem. at 74-88.)

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STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996, as amended ("AEDPA"), Petitioner is entitled to habeas relief only if the state court decided his claims on their merits and this "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011); *see also Harrington v. Richter*, 131 S. Ct. 770, 784 (2011) ("By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2).").

For purposes of Section 2254(d)(1), the relevant clearly established federal law consists of Supreme Court holdings (not dicta), applied in the same context to which the petitioner seeks to apply it and existing at the time of the state court's decision. *See Lopez v. Smith*, 135 S. Ct. 1, 2, 4 (2014) (*per curiam*); *Premo v. Moore*, 131 S. Ct. 733, 743 (2011); *see also Greene v. Fisher*, 132 S. Ct. 38, 43, 45 (2011) (clearly established federal law is the law that exists at the time of the state court adjudication on the merits). A state court acts "contrary to" clearly established federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts. *Price v. Vincent*, 123 S. Ct. 1848, 1853 (2003). A state court "unreasonably appli[es]" clearly established federal law if it engages in an "objectively unreasonable" application of the governing legal rule to the facts; however, Section 2254(d)(1) "does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 134 S. Ct. 1697, 1705-07 (2014). "And an 'unreasonable application of' [the Supreme Court's] holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Id.* at 1702 (citation omitted). "The question . . . is not whether a federal court believes the state

court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold." *Landrigan*, 127 S. Ct. at 1939.

For purposes of Section 2254(d)(2), a state court has made an "unreasonable determination of the facts" within the meaning of Section 2254(d)(2) when either its findings were not supported by substantial evidence in the state court record or its fact-finding process was unreasonably deficient. *See Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). However, the federal courts "must be particularly deferential to our state-court colleagues" in conducting section 2254(d)(2) review. *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004). A state court's "factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 130 S. Ct. 841, 849 (2010). The petitioner must show that the state court's factual findings were not merely incorrect but "'objectively unreasonable.'" *Hibbler*, 693 F.3d at 1146 (citations omitted).

When a claim is governed by the Section 2254(d) standard of review, federal habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Richter*, 131 S. Ct. at 786; *see also id.* at 786-87 (as "a condition for obtaining habeas relief," a petitioner "must show that" the state decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"). "[T]his standard is 'difficult to meet,'" *Metrish v. Lancaster*, 133 S. Ct. 1781, 1786 (2013) (citation omitted), as even a "strong case for relief does not mean the state court's contrary conclusion was unreasonable," *Richter*, 131 S. Ct. at 786. "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief is precluded by Section 2254(d). *Id.* (citation omitted). "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' . . . and 'demands

that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010) (citations omitted).

Petitioner's present habeas claims were raised on state direct appeal and were resolved by the California Court of Appeal in a reasoned decision. (Lodg. No. 12, the "Decision.") The California Supreme Court thereafter denied review without comment. Therefore, the Court looks to the last reasoned decision of the state courts – here, the California Court of Appeal's Decision. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1193-96 (2018) (when a state high court summarily denies relief following a reasoned lower court decision, a federal habeas court looks through the summary denial to the lower court's reasoned decision for purposes of AEDPA review, because it is presumed the state high court's decision rests on the grounds articulated by the lower state court); *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259 (2010) (when the state court of appeal denied claims on their merits in a reasoned decision and the state supreme court denied discretionary review, the "relevant state-court decision" under Section 2254(d) was the state court of appeal decision); *Cannedy v. Adams*, 706 F.3d 1148, 1158-59 (9th Cir.) (the "look through" practice continues to apply on AEDPA review when the California Supreme Court has summarily denied either direct or collateral review of a claim previously adjudicated by a lower California court), *amended by* 733 F.3d 794 (9th Cir. 2013).

While the parties agree that the Decision is the relevant departure point for analysis, Respondent asserts that Section 2254(d) deferential review is inapplicable to several of the Petition's claims, because the California Court of Appeal allegedly failed to address them on the merits. Specifically, Respondent contends that de novo review is required for the following claims: Ground Two, because the California Court of Appeal assumed constitutional error; Ground Three, because the California Court of Appeal failed to address the prejudice prong; and the trial court error subclaim of Ground Four, which the California Court of Appeal resolved solely on a procedural bar basis, (Answer at 13.)

Ground Four consists of two subclaims alleging that: (1) the trial court committed instructional error; and (2) trial counsel performed ineffectively by failing to request a jury instruction. The California Court of Appeal resolved the second on its merits but imposed a state procedural bar to relief as to the first, namely, California's contemporaneous objection rule. (Decision at 28-30.) Accordingly, there was no merits decision on the first subclaim of Ground Four and Respondent is correct that, if the claim were to be resolved on its merits, de novo review would apply. *See Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

In resolving Ground Two, the California Court of Appeal assumed, *arguendo,* that there had been constitutional error and then resolved the claim under the harmless error doctrine. (Decision at 21-23.) The fact that the state appellate court assumed constitutional error does not mean its decision was not one on the merits for purposes of Section 2254(d). Under current Supreme Court precedent, the threshold question for determining whether Section 2254(d) review applies at the outset is whether a petitioner received a *merits* decision on a claim, not whether he received a detailed reasoned decision. *Richter*, of course, made this clear, finding that Section 2254(d) "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Richter*, 131 S. Ct. at 785. By assuming constitutional error and assessing whether such error was harmless, the California Court of Appeal resolved Ground Two on its merits. *See Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) ("There is no dispute that the California Supreme Court held that any federal error was harmless beyond a reasonable doubt under *Chapman*, and this decision undoubtedly constitutes an adjudication of Ayala's constitutional claim 'on the merits.'"). Accordingly, Section 2254(d)'s deferential standard of review applies to Ground Two.

Ground Three is an ineffective assistance of counsel claim and, as discussed *infra*, requires proof of two elements – deficient performance and prejudice. *Strickland v. Washington*, 104 S. Ct 2051, 2064 (1984). As also noted *infra*, under

clearly established federal law, because both prongs of the *Strickland* test must be satisfied to establish a constitutional violation, a petitioner's failure to satisfy either prong mandates the denial of his ineffective assistance claim and, therefore, a reviewing court may stop its analysis if it finds one prong unsatisfied, without reaching the other prong. *Id.* at 2069. The California Court of Appeal followed this procedure for Ground Three, finding that Petitioner had not satisfied his burden of establishing deficient performance and, because the first *Strickland* prong was not met, denying relief without addressing the second prong (prejudice). (Decision at 25-26.) Under the clearly established federal law, the state appellate court was entitled to stop its analysis at that juncture.

Petitioner received a merits decision on Ground Three when the California Court of Appeal rejected the claim for failure to satisfy the first *Strickland* prong, as that failure doomed the claim on its merits. The state appellate court's declination to proceed to an unnecessary resolution of the second *Strickland* prong does not alter the merits nature of its decision. The Court, therefore, must apply the Section 2254(d) standard of review to Ground Three. A de novo review of the claim will be permissible only if the Court concludes that the state appellate court's finding on the first *Strickland* prong was an objectively unreasonable application of clearly established federal law and/or rests on an unreasonable determination of the facts. *See Rompilla v. Beard*, 125 S. Ct. 2456, 2467 (2005) (when state court rejected claim on first *Strickland* prong alone without also assessing prejudice and the Supreme Court found, under Section 2254(d), that the state court unreasonably applied *Strickland* in concluding that counsel's performance had not been deficient, it applied de novo review in assessing prejudice, the second *Strickland* prong); *see also Wiggins v. Smith*, 125 S. Ct. 2527, 2542 (2003) (same).

In sum, with the exception of the first subclaim of Ground Four, each of Petitioner's claims is subject to the Section 2254(d) standard of review at the outset. The Court now proceeds with that analysis.

DISCUSSION

I. Ground One

In his first habeas claim, Petitioner contends that the trial court erred in denying as untimely two motions Petitioner made to represent himself.

A. Background

Following initial proceedings, private counsel substituted in to represent Petitioner in early May 2012. Counsel advised the trial court Petitioner had "mental health issues" that needed to be evaluated before the preliminary hearing, and the preliminary hearing was postponed. (Lodg. No. 6 at A1-A5, B1-B3.) On September 25, 2012, counsel declared a doubt as to Petitioner's competency to stand trial and, after questioning Petitioner, the trial court ordered that a competency evaluation occur. (Lodg. No. 6 at C1-C8.) As of November 28, 2012, Petitioner had been found mentally competent and the preliminary hearing therefore was scheduled. (Lodg. No. 6 at D1.) Following the preliminary hearing, on April 2, 2013, private counsel was relieved and the public defender's office was appointed. (CT 75.) Deputy Public Defender Anna M. Armenta-Rigor ("Trial Counsel") first appeared in court with Petitioner on May 3, 2013, at which time the arraignment was continued. (CT 78.) On June 19, 2013, Petitioner appeared with Trial Counsel and was arraigned. (CT 85-86.)

The next court appearance took place on August 1, 2013. The record before the Court shows that Petitioner was in lock up and Trial Counsel was in court, but does not indicate why Petitioner was not present. The trial court trailed the matter to August 6, 2013, for trial. (CT 87; Lodg. No. 4 at 1-2.)

On August 6, 2013, Petitioner and Trial Counsel appeared for the scheduled trial, but the trial court put the matter over to August 12, 2013, due to a scheduling issue. Trial Counsel stated that "[t]he last time we were here, my client wanted to go pro per." (Lodg. No. 5 at 1.) She noted that Petitioner had been "adamantly voicing his

opinion that he is quasi-*Marsden* and a pro per request that he was not satisfied with my services, and he'd like to represent himself"; Petitioner then said, "May I please?" (Lodg. No. 5 at 2.) The trial court asked Petitioner if he could be ready to go to trial on Monday and when Petitioner responded, "No," the trial court said, "Denied," and set trial for Monday, August 12, 2013. (*Id.*) Petitioner asked the trial court to reconsider, stating that on May 22, 2013, he had been "threatened and coerced" by the prosecutor to take a 24-year plea deal and that Trial Counsel wanted him to take the deal, which was why he wished to exercise his self-representation right. (*Id.*) The trial court again denied the request, noting that, but for the lack of an available courtroom, the matter was set for trial that day and Petitioner had said he was not ready to go to trial. (*Id.*)

On August 12, 2013, the trial court asked if the attorneys were ready to proceed with the trial. Trial Counsel stated that she was ready but Petitioner "wants to go pro per and wanted to enter an NGI." (RT A1.) Petitioner stated that, on June 19, 2013, he asked Trial Counsel to enter the NGI plea but she failed to do so. (RT A2.) Petitioner stated that he wanted to represent himself, because Trial Counsel had not "submitted some of the evidence" and they "were not getting along very good." (*Id.*) The trial court asked Petitioner whether, if his request were granted, he would be ready to start trial that day, and Petitioner responded that he lacked the police report even though he had asked Trial Counsel for it. (RT A3.) The trial court asked the question again and Petitioner responded that he could not start trial that day and needed more time. (*Id.*) The trial court denied Petitioner's request on the ground that it was untimely. (RT A4.)

The trial court then asked Trial Counsel if a *Marsden* hearing[3] was needed and she said, "Yes." (RT A4.) The transcript of that hearing (RT A5-A22) is sealed and has not been lodged in this action. When the matter came back on the record, the

[3] In California, a defendant may move to substitute appointed counsel pursuant to *People v. Marsden*, 2 Cal. 3d 118 (1970).

trial court indicated that the *Marsden* motion was denied and asked Petitioner again how much time he would need to be ready for trial, and Petitioner said he would need 40 days. (CT 90; RT A22.) The prosecutor indicated that he was ready, had witnesses subpoenaed, and that it would inconvenience them if trial were to be delayed. (*Id.*) The trial court again denied Petitioner's request to represent himself, finding it to be untimely. (RT A22-A23.)

When the parties appeared shortly thereafter in their assigned trial courtroom, Trial Counsel advised the trial judge that she wished to discuss some defense strategy matters. The trial judge excluded the prosecutor and held an in camera hearing. (RT A24-A25.) The transcript of that hearing (RT A26-A35) has been lodged under seal. Suffice it to say that the trial judge addressed with Petitioner his desire to enter an NGI plea. The case was trailed to the next day. (RT A36.)

On August 13, 2013, the trial judge held a hearing on whether Petitioner should be allowed to enter an NGI plea belatedly. (RT B1-B10.) Trial Counsel confirmed that, although she believed it to be a tactical mistake, she agreed that Petitioner could do so and was not standing in his way. (RT B3.) The trial judge held an in camera hearing without the prosecutor (RT B9-B10; RT B11-B14, lodged under seal; *see* CT 94) and went back on the record to discuss with counsel the logistics if an NGI plea were allowed (RT B15-B20). The trial judge then held another in camera hearing (RT B21-B26, lodged under seal; *see* CT 94), and on the record stated that, based on the information he had received in the in camera hearing, believed he was obligated to allow Petitioner to enter an NGI plea (RT B27). The trial court explained that, due to the NGI plea, Petitioner would have to be evaluated by two doctors and, thus, the trial would be delayed by at least 90 days. Petitioner stated that he understood and entered his NGI plea. (RT B28.) The trial judge then explained to Petitioner the charges he faced and further anticipated events and Petitioner agreed to waive time. (RT B28-B34.) The prosecutor asked to approach "off the record" and an unreported discussion occurred. ((RT B34.) The transcript

next shows the following: the trial judge said, "Yes"; Petitioner then said, "I want to withdraw that and -- I'm very satisfied with [Trial Counsel] as my defense counsel"; and the trial judge said, "Note that for the record." (RT B34.) The minute order for August 13, 2013, in addressing this particular portion of the hearing, states: "Defendant withdraws his previous request to proceed in pro per and states that he is satisfied with his current counsel." (CT 95.)

B. The Clearly Established Federal Law That Governs Here

A criminal defendant has a right to self-representation at trial, provided the defendant: is mentally competent and fully informed about the consequences of representing himself or herself; knowingly and intelligently waives the benefits of legal counsel; timely and unequivocally invokes his right; and does not assert the right for the purpose of delay. *Faretta v. California*, 95 S. Ct. 2525, 2541 (1975); *Stenson v. Lambert*, 504 F.3d 873, 882 (9th Cir. 2007); *Sandoval v. Calderon*, 241 F.3d 765, 773-74 (9th Cir. 2001). However, the right to self-representation does not attach until asserted and "occupies no hallowed status similar to the right to counsel enshrined in the Sixth Amendment." *Id.* (characterizing the right to self-representation as "disfavored" compared to the right to counsel). "Because a defendant normally gives up more than he gains when he elects self-representation," a court "must be reasonably certain that he in fact wishes to represent himself." *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989) (citing *Brewer v. Williams*, 97 S. Ct. 1232, 1242 (1977) for the proposition that "courts must indulge in every reasonable presumption against waiver of the right to counsel").

"*Faretta* does not articulate a specific time frame pursuant to which a claim for self-representation qualifies as timely." *Stenson*, 504 F.3d at 884. The Ninth Circuit has held that, for purposes of Section 2254(d)(1) clearly established federal law, *Faretta* may be read to require a grant of a request for self-representation "when the request occurs 'weeks before trial.'" *Marshall v. Taylor*, 395 F.3d 1058,

1061 (9th Cir. 2005); *see also Stenson*, 504 F.3d at 884. However, because *Faretta* does not define when a request for self-representation becomes untimely, "other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely." *Marshall*, 395 F.3d at 1061. In California, a *Faretta* request must be made a reasonable amount of time before trial. *Id.* (relying on *People v. Windham*, 19 Cal. 3d 121, 127-28 (1997)).

As the Supreme Court has explained, the "range of reasonable judgment" by a state court to be assessed under the "unreasonable application" prong of Section 2254(d)(1) is dependent on the nature of the clearly-established law in question, *to wit*, whether the rule the high court has stated is general or specific. As to specific legal principles, the "range of reasonable judgment" "may be narrow." As to general standards, "[t]he more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 124 S. Ct. 2140, 2149 (2004). Thus, for Section 2254(d)(1) review, *Faretta* leaves the states free to define "timeliness" with respect to motions for self-representation, as long as such definitions do not conflict with *Faretta*'s "weeks before trial" proviso. *See Marshall*, 395 F.3d at 1061 (so finding and noting that the "precise contours of" the timing element remain uncertain).

For example, in *Marshall*, the state court applied the *Windham* rule to find untimely a request made on the morning of his trial and prior to jury selection. When the petitioner claimed he had been denied his right of self-representation, the Ninth Circuit found that federal habeas relief was precluded, reasoning that:

> Because the timing of Marshall's request fell well inside the "weeks before trial" standard for timeliness established by *Faretta*, the court of appeal's finding of untimeliness clearly comports with Supreme Court precedent. Therefore, the California Court of Appeal could, and did, properly conclude that Marshall's request was untimely.

395 F.3d at 1061. Similarly, in *Stenson*, the Ninth Circuit found Section 2254(d)(1)

unsatisfied based on the denial of a *Faretta* request made during voir dire, following the denial of the petitioner's repeated *Marsden* motions. The Ninth Circuit reasoned that, because the Supreme Court has never held that *Faretta* requires granting requests for self-representation made "on the eve of trial," the state court's decision was not objectively unreasonable. *Stenson*, 504 F.3d at 882, 884-85.

In short, while it is clearly established that *Faretta* gives rise to a timeliness requirement for requests for self-representation, there is no clearly-established federal law, within the meaning of Section 2254(d)(1), directly governing the timeliness of requests that are made less than "weeks before trial."

With respect to the question of when a previously-made *Faretta* motion can be found to have been waived or abandoned, the governing federal law is even less "clearly established" within the meaning of Section 2254(d)(1). The Supreme Court has not directly opined on this issue, and Circuit Court decisions are scant. That said, the Ninth Circuit has concluded that, "in light of the disfavored status the right to self-representation enjoys vis-a-vis the right to counsel," *Sandoval*, 241 F.3d at 774, "a defendant may withdraw his request for self-representation and that the trial court need not 'engage in a personal colloquy with the defendant' to find the motion withdrawn," *Patterson v. Asuncion*, __ Fed. App'x __, 2018 WL 1323624, at *1 (9th Cir. Mar. 15, 2018) (relying on and quoting *Sandoval*).

C. The State Court Decision

On direct appeal, Petitioner contended that the trial court erred on August 6 and 12, 2013 in denying his *Faretta* motions on the ground they were untimely. (Lodg. No. 7 at 34-49.) Petitioner further argued that his statement at the conclusion of the August 13, 2013 hearing – "I want to withdraw that and – I'm very satisfied with [Trial Counsel] as my defense counsel" – was both "inconclusive," because it did not specifically reference his second *Faretta* motion, and meaningless, because Petitioner's motion already had been denied. Petitioner asserted that, therefore, the

statement did not constitute a waiver of his *Faretta* request. (*Id.* at 49-41.)

The California Court of Appeal resolved Ground One based on Petitioner's second argument, finding that Petitioner had abandoned his *Faretta* request.

> [Petitioner's] statement that he "want[ed] to withdraw that," when read in the context of the proceedings relevant to his *Faretta* requests, was a reference to his repeated requests to represent himself, as accurately reflected in the minute order for the proceeding at which his statements were made. As the record reflects, on August 6 and again on August 12, 2013, [Petitioner] made repeated requests to represent himself that were denied as untimely by two different judges. [Petitioner's] requests were based primarily on his defense counsel's refusal to enter a plea of not guilty by reason of insanity.[4] On August 13, 2013, [Petitioner] appeared before a third judge and the issue of his insanity plea was discussed at length between the trial court and defense counsel during in camera proceedings, as well as proceedings conducted in open court. At the end of those discussions, the trial court, with defense counsel's acquiescence, allowed [Petitioner] to enter a plea of not guilty by reason of insanity and continued trial 90 days. It was at that point that [Petitioner] made his statements. Because [Petitioner's] prior *Faretta* requests were centered mainly around his counsel's refusal to enter an insanity plea, once the trial court allowed that plea and continued the trial, [Petitioner's] statement that he "want[ed] to withdraw that" could only have referred to his prior requests to represent himself.
>
> [Petitioner] did not renew his *Faretta* request after his statements and instead acquiesced in appointed counsel's representation throughout trial. Therefore, his statements about withdrawing his *Faretta* requests and his satisfaction with appointed counsel constituted a waiver or abandonment in the trial court of his right to represent himself. Given that waiver or abandonment in the trial court, [Petitioner] cannot demonstrate on appeal that he was prejudiced by the denials of his prior *Faretta* requests.

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[4] [Footnote 7 in original: "[Petitioner] also complained that his trial counsel tried to coerce him to accept a plea bargain and had refused his request for a copy of the police report."]

(Lodg. No. 12 at 18-19.)

In his petition for review, Petitioner first argued that his two *Faretta* motions had been wrongly denied as untimely. (Lodg. No. 13 at 10-14.) He then argued that he had not waived his *Faretta* request. (*Id*. at 14-21.) As noted earlier, the California Supreme Court denied relief without comment.

D. The State Court Decision Is Entitled To Deference.

As he did in the state courts, Petitioner argues principally that his two *Faretta* motions were timely and, thus, the trial court erred in finding them untimely (Pet. Mem. at 22-32), and secondarily that it was error – factually and legally – to find that he had abandoned his *Faretta* request (*id.* at 32-36.) Viewed within the prism of Section 2254(d) review, as is required, the Court concludes that neither argument warrants federal habeas relief.

First, with respect to timeliness, Petitioner's arguments overlook the effect of Section 2254(d)(1) on his claim. Although Petitioner concedes that the Supreme Court "has not delineated when a motion for self-representation may be denied as untimely" (Pet. Mem. at 22), he argues, based on two pre-AEDPA Circuit Court decisions (one Ninth and one Fifth), that a *Faretta* motion necessarily is timely as long as it is made before the jury is empaneled and no finding is made that the motion is a pretext to secure delay. This is incorrect. The only clearly established federal law on the timeliness question is, at most, that a self-representation request made "weeks before trial" should be considered timely. Again, however, the state courts are free to impose their own standards as long as they do not conflict with the "weeks before trial" time frame envisioned by *Faretta*, and California's rule – within a reasonable amount of time before trial – plainly does not.

Neither of Petitioner's *Faretta* requests were made "weeks before trial." Petitioner was arraigned on June 19, 2013, and at the close of the hearing, he was ordered to appear for a readiness hearing on Thursday, August 1, 2013, with trial set

for Monday, August 5, 2013. (CT 85-86.) Thus, by the time of the August 1, 2013 readiness conference, at which time Petitioner apparently raised with Trial Counsel his desire to go pro per, his trial was set to commence two court days later – a fact he had known since June 19, 2013. The transcript for the August 1, 2013 readiness conference shows that there was an issue with the prosecutor's appearance, and therefore, the trial court trailed Petitioner's trial to the next day, August 6, 2013. (Lodg. No. 4 at 1-2.) Accordingly, when Petitioner made his first formal *Faretta* motion on August 6, 2013, he did so on the first scheduled day of trial – a trial that did not commence only because no courtroom was available and the prosecutor was engaged in another case. (Lodg. No. 5 at 1-2.) Trial was put over until August 12, 2013, and Petitioner then made his second *Faretta* motion – again, on the date on which he knew he was scheduled to commence trial.

Petitioner did not make either of his *Faretta* motions within the pre-"weeks before trial" period that, under the clearly established federal law (as well as California law), would have rendered them timely. In both instances, he made his motions on the date on which trial actually was scheduled to commence. It is irrelevant that the trial then was delayed due to his choice to enter an NGI plea, given that, at the times both motions were made, his trial was just a moment away. Moreover, in both instances, Petitioner conceded he was not remotely ready to go to trial, even though, as far as he had known since June 19, 2013, trial was set to commence on August 5, 2013.

The conclusion that these motions were untimely plainly is not contrary to any Supreme Court precedent, nor is it an unreasonable application of *Faretta* and the Circuit Court decisions that have opined about its meaning. Indeed, the denial of these motions as untimely was wholly consistent with the Ninth Circuit's decisions in *Marshall* and *Stenson*, As in *Marshall*, "because the timing of [Petitioner's] request fell well inside the 'weeks before trial' standard for timeliness established by *Faretta*," the trial court's finding of untimeliness "clearly comports with Supreme

Court precedent." 395 F.3d at 1061. As a result, there was nothing objectively unreasonable in denying Ground One on this basis.

Second, neither Section 2254(d)(1) nor Section 2254(d)(2) is satisfied with respect to the California Court of Appeal's finding of abandonment. Contrary to Petitioner's view of the evidence of record, his statement that "I want to withdraw that and – I'm very satisfied with [Trial Counsel] as my defense counsel" is not ambiguous (RT B34.) After two days of hearings – in which multiple in camera proceedings took place in which Petitioner expressed his concerns with Trial Counsel's performance and Trial Counsel explained her decisions, including her thinking with respect to the NGI plea that Petitioner wished to enter – the trial judge allowed Petitioner to enter an NGI plea, thus resolving in his favor one of the primary reasons for Petitioner's *Faretta* requests. At the very end of the August 13 hearing, counsel asked to raise something with the trial judge off the record and, after this occurred, Petitioner made the statement quoted above. The minute order for this portion of the hearing, as directed by the trial court to "note that," reflects that Petitioner "withdraws his previous request to proceed in pro per and states that he is satisfied with his current counsel." (CT 95.) Unlike this Court and Petitioner's appellate counsel, the clerk who prepared that minute order was present in court and a percipient witness to what was said, including Petitioner's statement, and "note[d] that" as directed by the trial judge. If Petitioner's "I want to withdraw that" statement had been a reference to some other motion, why wouldn't the clerk have so indicated? Petitioner's assertion that perhaps he was referring to his *Marsden* motion instead is self-serving and unpersuasive in light of the minute order and the record. In the Court's view, the California Court of Appeal's finding that this statement was Petitioner's withdrawal of his *Faretta* request was the only reasonable interpretation of the evidence of record. In any event, the Section 2254(d)(2) standard for objective unreasonableness is not met for the state appellate court's factual finding as to the meaning of Petitioner's statement.

The California Court of Appeal's finding of abandonment also was not contrary to, or an unreasonable application of, any clearly established Supreme Court precedent. Petitioner cites no Supreme Court decision that governs here other than decisions espousing the maxim that waivers/abandonments of constitutional rights generally are disfavored and should be intentional rather than inferred – a proposition far too general and abstract to satisfy the Section 2254(d)(1) clearly established federal law requirement. *See*, *e.g.*, *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (under Section 2254(d)(1), it is error to frame "the issue at too high a level of generality" in an attempt to apply a Supreme Court holding to the circumstances at hand, when the Supreme Court itself has not done so); *Lopez*, 135 S. Ct. at 4 (when petitioner's claim was that, although he received initial adequate notice that he could be convicted on an aiding and abetting theory, the prosecutor instead focused at trial on the theory that petitioner himself delivered the fatal blow, the Circuit Court erred in granting relief under Section 2254(d)(1) by relying on three Supreme Court decisions "that stand for nothing more than the general proposition that a defendant must have adequate notice of the charges against him," as this "proposition is far too abstract to establish clearly the specific rule" needed to satisfy Section 2254(d)(1)'s clearly established federal law requirement); *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (*per curiam*) (warning lower federal courts against "framing our precedents at such a high level of generality" that they thereby "transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court'"). And in any event, even if that broad maxim could be said to constitute the clearly established federal law that governs Ground One, the California Court of Appeal's finding does not contravene it. Petitioner's affirmative statement that he wanted to withdraw his *Faretta* request because he was very happy with his counsel's performance indicated an intentional and knowing relinquishment of his right to represent himself. At a minimum, a fairminded jurist could so find.

Applying the deference required by the AEDPA, the Court concludes that the state court's denial of Petitioner's *Faretta* claim was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of any fact. Section 2254(d), therefore, forecloses habeas relief based on Ground One.

II. Ground Two

The second claim in the Petition stems from the timing of Petitioner's trial testimony. Petitioner contends that, because the trial court forced him to testify in the middle of the prosecution's case, he was deprived of a panoply of Fifth and Sixth Amendment rights, including due process, the privilege against self-incrimination, the right to testify in his defense, the right to counsel's assistance, and his rights under the Compulsory Process Clause. He argues that this constitutional error was structural and is not subject to harmless error analysis.

A. Background

The California Court of Appeal made the following relevant factual findings:

> After Officer Mullane finished testifying in the prosecution's case and before the time scheduled for Officer Rolens's testimony to begin, the following exchange took place between and among the trial court, defense counsel, and defendant concerning whether defendant intended to testify and, if so, whether he was willing to testify during the time remaining before Officer Rolens's scheduled arrival at court.
>
> "The Court: People's next witness [Officer Rolens] [is the prosecution's]—final witness; is that correct? [¶] [Prosecutor]: Yes, your Honor. [¶] The Court:—[He i]s available at 1:30 this afternoon and that's fine. The Court was certainly put on notice in advance of that scheduling conflict if you will. [¶] But we have roughly a good solid hour and fifteen minutes of Court time this morning, which we can make good use of it in the event there is a defense witness that is available to testify

between now and noon. [¶] So we can certainly accommodate the defense and call a witness out of order if you have one available [defense counsel]. [¶] [Defense Counsel]: Other than [defendant], I do not this morning. [¶] The Court: All right. Does your client definitely—has he definitely decided to offer testimony? [¶] [Defense Counsel]: Yes, he has. [¶] The Court: Okay. Then we can certainly accommodate his testimony right away. If you desire to do that, [defense counsel], I'll certainly allow that to happen. [¶] [Defense Counsel]: Certainly. [¶] The Court: Okay. [Defendant], before we proceed, and, obviously, allow you to testify on your own behalf, I want to make abundantly clear for the record that you have an absolute right not to testify. You cannot be compelled to testify as a witness in this case. Do you understand that right? [¶] The Defendant: Yes, your Honor. [¶] The Court: Okay. Now, if you elect to testify as to what—which is what I'm hearing from your lawyer—that means not only do you understand your right to remain silent, but you're also waiving and giving up that right so on your own you can offer testimony. [¶] So do you understand, waive and give up your right to remain silent so you can offer testimony before this jury? [¶] The Defendant, Well, not— [¶] The Court: I just need to hear a yes or a no. I don't need to hear an explanation. That's not what I'm asking. Are you indeed going to testify? [¶] The Defendant: Yes, your Honor, but not now. [¶] The Court: Okay. That's all I need to hear is that you plan on testifying. And, forgive me, it's not that I'm not interested in what you have to say. I just don't want you to mention anything beyond the Court's inquiry which could affect your right or your privilege against self-incrimination. [¶] I'm going to give you a few minutes to discuss this with your lawyer because I get the impression from you that you're somewhat equivocal in your giving up of your right to remain silent, that you feel should be conditional in some respect, and that is not the case. [¶] ... [¶] The court has given [defendant] some additional time to consult with counsel in order for me to inquire as to whether or not he understands his right to remain silent, and he's unequivocally waiving and giving up that right so he can offer testimony in this case. [¶] So, [defense counsel], I'll allow you to speak on his behalf. Now that he's had some additional time to consider his options, how does the defense wish to proceed? [¶] [Defense Counsel]: The defense wishes to proceed by having [defendant] testify, which is his right. And I've explained to him the

> repercussions as far as bringing into evidence prior convictions or moral turpitude, and the limitation of what he would be testifying to in the guilty phase versus the sanity phase. I've explained that to him. I don't believe there's—I'm not sure if it's a level of comprehension or stubbornness, but I've tried to explain. [¶] Additionally, he's concerned about testifying now. He prefers to testify at the close of the case, and so that's where we are at this time. [¶] The Court: Okay. And again, [defendant], you can't put conditions on your testimony. Either you want to testify or you don't. And we have available time this morning, so if you wish to testify, now is your time. If not, then you certainly can exercise your right to remain silent and not testify, but I will not allow you to put conditions on your availability to testify. [¶] So, [defendant], is it your desire to testify, yes or no? [¶] The Defendant: Yes, your Honor. [¶] The Court: Okay. You got it. Then let's bring in our jury and let's proceed." (Italics added.)

(Lodg. No. 12 at 19-21.)

B. The State Court Decision

As he does here, in his direct appeal, Petitioner argued that the trial court violated various of his Fifth and Sixth Amendment rights by requiring him to testify during the prosecution's case and that the error was structural and not subject to harmless error analysis. The California Court of Appeal assumed, without deciding, "that the trial court's conduct in forcing [Petitioner] to testify before the prosecution had finished its case constituted" federal constitutional error. (Lodg. No. 12 at 21.) The state appellate court, however, disagreed that the error was structural, because as Petitioner conceded in his briefing, the Supreme Court has not held that such an error is structural, nor has any California court so found. The California Court of Appeal concluded that, absent any such authority, harmless error analysis governed under the federal standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967). (*Id.* at 21-22.)

As here, Petitioner argued that, if harmless error analysis was applied, the error was prejudicial, because had he been allowed to wait until after Officer Rolens

testified and the video of the incident was played for the jury, he might have testified differently or not testified at all. Petitioner reasoned that, had this occurred, a reasonable juror could have found him not guilty. (Lodg. No. 7 at 65.) The California Court of Appeal noted Petitioner's failure to "explain how he would have changed or adjusted his testimony, in a truthful manner, in response to the testimony of Officer Rolens." (Lodg. No. 12 at 22 n.9.) It then rejected Petitioner's prejudice argument, finding as follows:

> Contrary to [Petitioner's] assertion, it is not reasonably likely that he would have testified differently or would have chosen not to testify. Following Officer Mullane's testimony, [Petitioner] was unequivocal about his intent to testify on his own behalf, a fact that suggests he would have testified regardless of whether the prosecution had completed its case. Moreover, his testimony did not rebut directly Officer Mullane's version of the events of April 10, 2012. To the contrary, [Petitioner] conceded that he did not remember much about the police pursuit that night because he was heavily intoxicated—due to his consumption of prescription drugs, illegal drugs, and alcohol—and he was suffering from delusions. That testimony did not relate to [Petitioner's] conduct on the night of the pursuit, but rather related to the issue of his capacity to form the specific intent and acquire the knowledge necessary for the commission of certain of the charged crimes. Without some or all of that testimony, [Petitioner] would have had no defense or a much weaker defense to the charged crimes. In addition, Officer Rolens's testimony was largely duplicative of the testimony provided by Officer Mullane, and served primarily to corroborate Officer Mullane's version of the events of April 10, 2012. Thus, even if [Petitioner] had heard Officer Rolens's testimony, there was nothing about it that likely would have changed the way [Petitioner] testified. Given the nature of [Petitioner's] testimony and his expressed desire to testify on his own behalf, it is highly unlikely that his testimony would have changed at the close of the prosecution's case or that he would have changed his mind and declined to testify.
>
> Even if [Petitioner] had changed his testimony or refused to testify, the prosecution's case against him was

> overwhelming. Officers Mullane and Rolens, who were both in uniform driving marked patrol cars with their red lights and sirens activated, observed first hand [Petitioner's] erratic and reckless driving during the pursuit. They also heard there was a witness report of someone in a car matching the description of [Petitioner's] car brandishing a shotgun; they both heard a shotgun report from [Petitioner's] car during the pursuit at the same location; Officer Rolens saw the shotgun pointing back toward him; and, after [Petitioner] crashed into the Jaguar, Officer Mullane recovered a loaded shotgun from [Petitioner'] car, along with expended shotgun shell casings and live shotgun rounds. In addition, both officers observed [Petitioner's] noncompliant behavior and defiant gestures after he emerged from his wrecked vehicle with a beer in his hand. Therefore, given the state of the prosecution's evidence—which, under [Petitioner's] theory, the jury would have considered without any or at least all of [Petitioner's] testimony—no reasonable juror could have concluded that [Petitioner] was not guilty of one or more of the charged crimes. Accordingly, the claimed error was harmless beyond a reasonable doubt.

(Lodg. No. 12 at 22-23.)

C. The Clearly Established Federal Law That Governs Here

As noted above, the California Court of Appeal assumed federal constitutional error and proceeded to assess its effect under the harmless error rule. Petitioner argues that, in doing so, the state appellate court erred in two respects: first, by not treating the error as structural, which required reversal per se; and second, in finding the error to be harmless.

Petitioner's contention that the structural error rule applies fails readily and the state court correctly so found. As Petitioner conceded on appeal (and so concedes here, Pet. Mem. at 45), and as the California Court of Appeal observed, the Supreme Court has not declared the errors alleged in Ground Two to be structural. For that reason alone, the state court's finding that harmless error, rather than structural error, analysis governed was objectively reasonable under Section 2254(d)(1). A

state court's rejection of a claim cannot be contrary to, or an unreasonable application, of clearly established federal law when no Supreme Court precedent exists that supports it. *See Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009); *Wright v. Van Patten*, 128 S. Ct. 743, 746-47 (2008) (*per curiam*); *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006).

As the Supreme Court has explained, "[m]ost constitutional mistakes call for reversal only if the government cannot demonstrate harmlessness" and "[o]nly the rare type of error—in general, one that 'infect[s] the entire trial process' and 'necessarily render[s] [it] fundamentally unfair'—requires automatic reversal." *Glebe v. Frost*, 135 S. Ct. 429, 430-31 (2014) (*per curiam*) (quoting *Neder v. United States*, 119 S. Ct. 1827, 1833 (1999); internal quotation marks omitted). No Supreme Court decisions clearly place any of the errors claimed in Ground Two as the "rare" type of error that falls within this scope. Petitioner attempts to salvage his structural error contention by arguing that the error in forcing him to testify before Officer Rolens was structural under two Supreme Court decisions addressing deprivation of the right to counsel, namely, *Gideon v. Wainwright*, 83 S. Ct. 792 (1963), and *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006). (Pet. Mem. at 45; Reply at 13.) Neither decision, however, is applicable here and neither supports finding this to be an instance of structural error. As the portions of the state record quoted above make clear, Petitioner was not deprived of the assistance of counsel or of his counsel of choice by the circumstances challenged in Ground Two. Trial Counsel was present and participated in the colloquy at issue and she explained that, whenever Petitioner testified, he wished to testify about matters relevant to specific intent. Moreover, the trial court took a break in the proceedings to allow Trial Counsel to consult with Petitioner before the decision was made for Petitioner to testify. (RT 342-47.) Whether or not Trial Counsel's ability to assist Petitioner was affected by the timing of his testimony, it is plain that she conferred with and assisted Petitioner in making his decision; this simply was not an instance in which

Petitioner actually was deprived of counsel.

As the clearly established federal law governing structural error situations does not apply to Ground Two, the applicable clearly established federal law is that which governs when a state court resolves a claim solely on the basis of harmless error.[5] On direct appeal, "the harmlessness standard is the one prescribed in *Chapman*," namely that a federal constitutional error is harmless if the court can declare "that it was harmless beyond a reasonable doubt." *See Ayala*, 135 S. Ct. at 2197 (quoting *Chapman*, 87 S. Ct. at 828); *see also Deck v. Jenkins*, 814 F.3d 954, 984 (9th Cir. 2016) ("even on direct review a constitutional trial error will not warrant reversal if it was harmless beyond a reasonable doubt."). By contrast, in a collateral proceeding, habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice'" under *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). *Ayala*, 135 S. Ct. at 2197. *Brecht* requires that federal courts evaluate whether an error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 113 S. Ct. 1722 (internal quotation omitted).

In *Ayala*, the Supreme Court clarified that *Brecht* "subsumes" the requirements of AEDPA. 135 S. Ct. at 2199. Thus, if a state court has determined that a trial error was harmless, then "'a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable.'" *Id.* (quoting *Fry v. Pliler*, 127 S. Ct. 2321, 2326 (2007)). However, because federal courts need not "formally" apply both *Brecht* and AEDPA, the Court simply applies *Brecht* to any assumed error. *Ayala*, 135 S. Ct. at 2198; *see also Fry*, 127 S. Ct. at 2327. And the

[5] Because the state court declined to conduct a full analysis of the question of whether the circumstances of Ground Two constituted federal constitutional error and, instead, assumed that federal constitutional error occurred and proceeded to assess whether it was harmless, this Court will do the same. Put otherwise, the state court "decision" at issue for purposes of Ground Two and Section 2254(d) is the California Court of Appeal's harmless error analysis.

Supreme Court made clear in *Ayala* that the stringent rules governing Section 2254(d) review govern when the state decision under review is one based on harmless error, namely, that "a state-court decision is not unreasonable if fairminded jurists could disagree on [its] correctness" and a petitioner therefore must show that the state court's decision to reject his claim based on harmless error "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Ayala*, 135 S. Ct. at 2199 (citation and internal quotation marks omitted). Thus, in assessing Ground Two, the Court must determine whether, under *Brecht* and the deferential standard that governs here, the state court's finding that the error alleged is harmless was objectively unreasonable within the meaning of Section 2254(d).

D. The State Court Decision Is Entitled To Deference

Under *Brecht*, "relief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Ayala*, 135 S. Ct. at 2197-98 (internal quotation marks and citation omitted). "There must be more than a 'reasonable possibility' that the error was harmful," because "a 'State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error.'" *Id.* at 2198 (citation omitted).

Petitioner first argues that, had he not been required to testify before Officer Rolens, he might have testified in an unspecified different manner or not at all, which, in turn, could have caused the jury to view the prosecution's case differently. Plaintiff contends the state court erred in noting his failure to explain how he might have testified differently and for concluding that it is unlikely that he would have testified in a different manner or not at all. Petitioner dismisses such reasoning as speculative, because according to Petitioner, there is no way of knowing how he

would have acted or what his testimony would have been had he waited until the end of the prosecution's case to testify. This argument is unconvincing.

Officer Mullane testified first for the prosecution and as summarized earlier, described a scenario in which: he received a report of a driver brandishing a weapon on the 10 freeway; he observed the vehicle (which Petitioner was driving) after it exited the freeway, when it went through parking lots and ran red lights before re-entering the freeway with police in pursuit; he observed Petitioner driving in a dangerous manner at excess speeds; while Petitioner was driving on the freeway near San Gabriel, Mullane "absolutely" heard a shot being fired from Petitioner's car; after Petitioner crashed into another car and stopped, Mullane approached the car, saw Petitioner in an apparent nonresponsive status and a shotgun in a vertical position on the front passenger seat, and was able to pull the shotgun from the car; after Petitioner at first refused but eventually exited the car, Mullane observed him refuse to comply with commands; and when he searched Petitioner's car afterward, he found three spent shotgun shells along with a box of unspent shotgun rounds. In addition, on cross-examination, Mullane testified that, during the pursuit, Officer Rolens stated over the radio that he had observed a shotgun pointed out of the window of Petitioner's car. (RT 314-25, 331.) After Mullane concluded, when asked about Petitioner's planned testimony, Trial Counsel advised that his intent in testifying was to negate specific intent by describing his history of mental health issues and drinking and substance abuse. The trial court responded that Petitioner could not testify about "his own mental illness" until after his expert testified in the afternoon but could testify about the events in question. (RT 344-45.)

As described earlier, Petitioner then testified about his actions before the events in question, including his drinking/drug use and related impairment, obtaining and loading a shotgun to take with him, and shooting the shotgun before leaving the house and placing the spent shells in the floor of the car. Petitioner claimed to have little to no memory of the events at issue once he started driving. He testified that

he did not remember where he went other than to recall seeing a freeway sign for Rialto and next seeing that he was in Baldwin Park, did not recall exiting the freeway and driving on streets, did not remember seeing any police although did see "Satan" behind him at one point, did not remember folding his shotgun while driving, and after that, remembered only trying to get away, seeing a large white wall, getting knocked out, and seeing soldiers pointing guns at him and hearing voices telling him to die with honor for his country. (RT 351-69.)

After the lunch break, Officer Rolens testified. For the most part, his testimony was essentially repetitive of Officer Mullane's testimony, although Rolens additionally noted that he had observed a shotgun sticking out of the driver's window, pointed towards the officers, and answered questions about events depicted in the video of the incident that was played in front of the jury. (RT 392-404.) After the defense psychiatric expert testified, Trial Counsel advised the court that she would not call any additional witnesses. (RT 426.) The evidence portion of the trial then concluded.

The record shows that Petitioner was insistent on testifying, apparently against Trial Counsel's advice. (*See* RT 343 ln. 8, 347 lns. 13-20 – in which Petitioner advised that he intended to testify but "not now" and Trial Counsel advised that she had cautioned Petitioner about the repercussions of testifying and was not "sure if it's a level of comprehension of stubbornness," but nonetheless, he intended to testify.) While Petitioner disputes the state court's conclusion that Petitioner was "unequivocal about his intent to testify" (Lodg. No. 12 at 22), the evidence of record certainly supported drawing such a conclusion and doing so was not an objectively unreasonable determination of fact. At a minimum, fairminded jurists could reach that conclusion and, thus, the Court must defer to it.

Officer Rolens' testimony and the related video added very little to the evidence that already was before the jury by the time Petitioner testified. At most, the officer added testimony that he had personally seen a shotgun pointing out of the window

of Petitioner's car, but critically, the jury *already knew this before Petitioner testified*, because Officer Mullane testified that Rolens had provided this information over the radio during the pursuit. In short, the prosecution's case already was before the jury when Petitioner testified; the later Rolens testimony and video were simply corroboration of the Mullane testimony.

Given Petitioner's intent to testify and the actual testimony he gave under penalty of perjury, it beggars belief that Petitioner would have testified in a different manner, or not testified at all, had his testimony been scheduled for after the Rolens testimony. In his testimony, Petitioner explained why he had the shotgun in the car with him, along with the spent shotgun casings and box of live shotgun rounds. Plainly, he did so in response to the existing prosecution evidence (*i.e.*, that he shot the gun from inside the car), hoping to persuade the jury that there was an innocent explanation for the gun and fired rounds. In addition, Petitioner consistently testified that he remembered almost nothing about what happened after he got into his car and started driving and, significantly, did not deny committing the charged acts but, rather, endeavored to portray his conduct in a manner that could persuade the jurors that he lacked the required intent or knowledge. Given that, before Petitioner testified, Mullane essentially already had presented all of the material information to which Rolens later testified, unless the Court is to assume Petitioner would have been willing to perjure himself, it stands to reason that he would have presented the same testimony he gave even if he had taken the stand after Rolens testified. Given Petitioner's failure to provide even a hint of how he might have testified differently, it was not objectively unreasonable for the state court to conclude that there was no meaningful likelihood that the jury would have heard a different version of events from Petitioner, or would not have heard from him at all, had his testimony been scheduled for after the close of the prosecution's case. At a minimum, fairminded jurists could disagree on this point, which mandates that the Court defer to the state court's conclusion in this respect.

Finally, the California Court of Appeal found that, even if Petitioner had been permitted to testify at the close of the prosecution's case and would either have provided different testimony or declined to testify at all, the prosecution's case against him was overwhelming and, thus, any error was harmless. That conclusion was an objectively accurate assessment of the evidence of record.

The testimony of the two police officers was consistent and subject to little to no dispute; there is no tenable reason for believing that the jurors would not have found it credible. Petitioner disputes this, arguing that reasonable doubt existed about whether he pointed a gun at the police and shot it, because the only percipient witness who testified to this was Officer Rolens and the jury was not required to accept his testimony, especially because the video did not depict such an act. While Officer Rolens conceded that it was difficult to see the gun pointing on the video (RT 399), his testimony about observing Petitioner shoot was corroborated by Officer Mullane's testimony that Rolens had reported the act over the radio contemporaneously and there was no defense evidence in rebuttal – two critical facts that Petitioner ignores. If Petitioner's argument here is that he could have affected the jury's verdict by testifying after Rolens and affirmatively denying that he pointed the gun and fired it, his claim devolves to a contention that he was deprived of a chance to perjure himself by testifying in a manner contrary to the sworn testimony he actually gave at trial, which was that he lacked any memory of what happened. The Court declines to find *Brecht* satisfied based on a contention that a defendant might have wanted to perjure himself in some unspecified manner but was deprived of the opportunity to do so by reason of an error that a state court determined was harmless. In any event, nothing about the state court's conclusion that the error was harmless due to the strength of the prosecution's case is rendered objectively unreasonable by Petitioner's assertions as to purported reasonable doubt about whether he pointed a gun at the officers.

The Court concludes that *Brecht* is not satisfied here, for the reasons set forth in

the California Court of Appeal's decision and above. There is no basis for finding that the fact that Petitioner testified during the prosecution's case rather than after it (or not at all) resulted in a substantial and injurious effect on the jury's verdict. The state court's finding of harmlessness was not, in itself, objectively unreasonable legally or factually. Accordingly, Section 2254(d) is unsatisfied, and habeas relief based on Ground Two therefore is foreclosed.

III. Ground Three

The third claim alleged in the Petition is predicated on asserted ineffective assistance of counsel in connection with the failure to request a jury instruction. Petitioner faults Trial Counsel for failing to request that a limiting instruction be given to the jury after the defense expert testified about a statement Petitioner had made that was contained in his jail mental health records.

A. Background

As noted earlier, Haig Kojian, a forensic psychologist, testified briefly for the defense. He noted that he had reviewed a host of materials, including mental health records from the jail, and discerned that Petitioner has a "dual diagnosis" of depression with anxiety and polysubstance dependence. (RT 420-21.) Trial Counsel asked Kojian if he had an opinion whether Petitioner, at the time he committed the acts charged, "had the capability of formulating a specific intent," and Kojian responded that it is "possible that an individual who is under the influence of drugs, who is experiencing emotional problems, could be compromised to the extent that they might experience difficulty with an issue of formulating specific intent, but just generally speaking." (RT 421-22.)

On cross-examination, the prosecutor elicited testimony from Kojian that there was nothing in Petitioner's records since 1984 that indicated psychosis or delusions. (RT 423.) The prosecutor also elicited testimony that, one or two days after the

incident, Petitioner told mental health individuals at the jail that he was trying to make the police mad so that they would shoot him. (RT 424.) On redirect examination, Kojian clarified that this statement was not made to him but was memorialized in the records and read: "I tried to make the police mad so that they would shoot me to kill me." (RT 424-25; hereafter, the "Statement.")

B. The Clearly Established Federal Law That Governs Ground Three

As a threshold matter, the specific nature of Ground Three must be clarified, as its nature dictates just what clearly established federal law governs this Court's review. As raised in the California Supreme Court, Ground Three was brought as a Sixth Amendment ineffective assistance of counsel claim based upon Trial Counsel's failure to seek a limiting instruction regarding Kojian's testimony about the Statement. (*See* Lodg. No. 13 at 2-3, 29-32.) Here, Petitioner alleges that the failure to request a limiting instruction was ineffective assistance because, without such an instruction, evidence of the Statement violated both evidentiary/hearsay rules and various of his Fifth and Sixth Amendment rights. Petitioner asserts that Trial Counsel's ineffective assistance violated **both** the Fifth and Sixth Amendments. (Petition at 6; Pet. Mem. at 50; Reply at 17.) He appears to be raising as *independent* bases for federal habeas relief claims that the admission of evidence of the Statement violated: his Fifth Amendment right to be free from self-incrimination; his Sixth Amendment right to counsel (based upon the absence of counsel at the time he made the Statement); and his rights under the Confrontation Clause. (Reply at 19-22.)

A claim for ineffective assistance of counsel is grounded in, and properly raised only under, the Sixth Amendment's guarantee of the right to the effective assistance of counsel, not under the Fifth Amendment. *See Strickland v. Washington*, 104 S. Ct. 2052, 2063 (1984) (the Sixth Amendment guarantees the effective assistance of counsel at trial); *see also Hymon v. Williams*, No. 209-CV-1124-RLH-LRL, 2010

WL 2265175, at *2 (D. Nev. June 2, 2010) (opining that there is no "independent right to the effective assistance of counsel guaranteed by the Fifth Amendment," and noting the distinctions between the "right to counsel protected by the Fifth Amendment (the right to the advice of counsel during questioning in a criminal investigation—the right not to incriminate oneself) and the Sixth Amendment right to the effective assistance of counsel at all critical stages of a criminal prosecution"). Petitioner properly should raise his ineffective assistance of counsel claim under the Sixth Amendment; he cannot predicate it on the Fifth Amendment.

Moreover, and critically, Petitioner did not raise in the California Supreme Court, and thereby exhaust, any extant claims predicated upon the theory that the evidence of the Statement itself violated his Fifth and Sixth Amendment rights to confrontation, to counsel, and to be free from self-incrimination and/or constituted evidentiary error rising to the level of constitutional violation. As a result, he is precluded from raising such additional claims here under the umbrella of his Ground Three ineffective assistance of counsel claim. *See Rose v. Palmateer*, 395 F.3d 1108, 1111-12 (9th Cir. 2005) (claim raised in the state court – that petitioner was denied the effective assistance of counsel under the Sixth Amendment when trial counsel failed to argue properly that his confession was inadmissible and appellate counsel failed to raise a claim based on the trial court's adverse ruling on his motion to suppress – pleaded and exhausted only a Sixth Amendment ineffective assistance of counsel claim and did not raise and exhaust a claim based on the underlying Fifth Amendment violation; petitioner "did not fairly present the Fifth Amendment claim to the state courts when he merely discussed it as one of several issues which were handled ineffectively by his trial and appellate counsel," because "[w]hile admittedly related, they are distinct claims with separate elements of proof, and each claim should have been separately and specifically presented to the state courts"); *Kelly v. Small*, 315 F.3d 1063, 1068 n. 2 (9th Cir. 2003) (with respect to a claim of prosecutorial misconduct and a claim of ineffective assistance of trial counsel for

failing to seek the prosecutor's recusal based on such misconduct, observing that "[a]lthough the grounds underlying the claim of ineffective assistance for failure to file a motion to recuse are nearly identical [to the prosecutorial misconduct claim], they remain separate constitutional claims" and petitioner was required to state them as "independent constitutional claim[s]" to exhaust them both); *see also White v. Mitchell*, 431 F.3d 517, 526 (6th Cir. 2005) (finding a *Batson* claim to be unexhausted even though, in the state courts, petitioner had discussed its substance within his habeas claim that appellate counsel should have raised the *Batson* issue on appeal, because "[w]hile these two claims are related due to the fact that the ineffective assistance claim is based on the failure to raise a *Batson* challenge, the two claims are analytically distinct"); *U.S. ex rel Jones v. Carter*, No. 98 C 3343, 1999 WL 1426211, at *9 (N.D. Ill. Sept. 20, 1999) ("A claim of a violation of the Fifth Amendment implicates an entirely different jurisprudence from one for ineffective assistance of counsel in violation of the Sixth Amendment.").

Even though Ground Three properly presents only an ineffective assistance claim resting on the Sixth Amendment, the parties argue at some length about whether the Statement was admissible under any exception to the hearsay rule and whether its admission effected a violation of Petitioner's privilege against self-incrimination and/or rights of confrontation and cross-examination. Their efforts, however, are immaterial to the Section 2254(d) task at hand, given that no such extant claims of constitutional and/or evidentiary error actually are before the Court and require resolution. Rather, the sole question at issue in Ground Three is whether the California Court of Appeal's rejection of the third claim was objectively unreasonable under the governing test for ineffective assistance claims established by *Strickland* (discussed below) and as explicated in subsequent cases. That is the clearly established federal law that governs Ground Three, not the jurisprudence directed to the Confrontation Clause, the privilege against self-incrimination, hearsay, etc. *See Rose*, 395 F.3d at 1112 (under the governing *Strickland* test,

petitioner's "Sixth Amendment claim could have been rejected regardless of whether his Fifth Amendment rights were violated," and noting approvingly that the state court simply resolved the Sixth Amendment claim on the first *Strickland* prong without reaching the question of whether petitioner's underlying Fifth Amendment rights had been violated). Accordingly, the Court declines to engage in an unnecessary analysis and resolution of the Confrontation Clause, self-incrimination, right to counsel, and hearsay issues discussed by the parties and instead, will assess only the ineffective assistance of counsel claim at issue here, which is to be analyzed under the rubric of the following governing federal law.

For purposes of Section 2254(d)(1), the federal law that governs Ground Three are the standards set forth in *Strickland v. Washington*, 104 S. Ct. 2052 (1984). *See Andrews v. Davis*, 798 F.3d 759, 774 (9th Cir. 2015); *see also Brown v. Ornoski*, 503 F.3d 1006, 1011 (9th Cir. 2007) ("In addition to the deference granted to the state court's decision under AEDPA, [federal habeas courts] review ineffective assistance of counsel claims in the deferential light of" *Strickland*.). To establish that Trial Counsel provided ineffective assistance under the Sixth Amendment, Petitioner must demonstrate both that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland*, 104 S. Ct at 2064-68. As both prongs of the *Strickland* test must be satisfied to establish a constitutional violation, failure to satisfy either prong requires that an ineffective assistance claim be denied, and if it is easier to resolve an ineffective assistance claim on one prong without reaching the other, a court should do so. *Id.* at 2069; *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("[f]ailure to satisfy either prong of the Strickland test obviates the need to consider the other"); *Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998) (no need to address prejudice when petitioner cannot establish deficient performance).

The first prong of the *Strickland* test – deficient performance – requires a petitioner to show that, in light of all the circumstances, counsel's performance was

"outside the wide range of professionally competent assistance." *Strickland*, 104 S. Ct. at 2066; *see also Richter*, 131 S. Ct. at 788 (the "question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom"). Judicial scrutiny of counsel's performance "must be highly deferential," and this Court must guard against the distorting effects of hindsight and evaluate the challenged conduct from counsel's perspective at the time in issue. *Strickland*, 104 S. Ct. at 2065. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*; *see also Pinholster*, 131 S. Ct. at 1403. "[F]ederal courts are to afford 'both the state court and the defense attorney the benefit of the doubt.'" *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (*per curiam*) (citation omitted). The burden to show deficient performance "rests squarely on the" petitioner, and "the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013).

The second prong of the *Strickland* test – prejudice – requires a petitioner to establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." *Strickland*, 104 S. Ct. at 2068. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 131 S. Ct. at 792. The court must consider the totality of the evidence before the jury in determining whether a petitioner satisfied this standard. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010).

"The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 131 S. Ct. at 788 (citations omitted); *see also Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009) (review of a *Strickland* claim pursuant to Section 2254(d)(1) is "doubly deferential"). To succeed on an ineffective assistance of counsel claim governed by

Section 2254(d), the petitioner must show that the state court "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 122 S. Ct. 1843, 1852 (2002); *see also Richter*, 131 S. Ct. at 788 (the "question is not whether counsel's actions were reasonable," but rather, "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard"). "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Mirzayance*, 129 S. Ct. at 1420; *see also Richter*, 131 S. Ct. at 788 (given the general nature of the *Strickland* standard, "the range of reasonable applications [of the *Strickland* standard] is substantial").

C. The State Court Decision

As noted earlier, the California Court of Appeal resolved Ground Three solely on *Strickland*'s deficient performance prong, reasoning:

> Assuming, without deciding, that the statement in issue was inadmissible hearsay that could have been subject to a limiting instruction, we cannot conclude from the record that there was no rational tactical purpose for defense counsel's failure to request such an instruction. [Petitioner's] trial counsel could have reasonably concluded that such an instruction may have caused the jury to focus more attention on the statement than the jury might otherwise have given the statement without the instruction. Accordingly, [Petitioner] has not carried his burden of showing that defense counsel's alleged failure to act had no rational tactical purpose.

(Lodg. No. 12 at 26.)

D. Federal Habeas Relief Is Foreclosed.

Petitioner concedes that, under California law, Dr. Kojian was entitled to rely on the Statement in formulating his opinion regarding the specific intent issue. He contends, however, that Kojian's testimony about the Statement was inadmissible

hearsay and that a limiting instruction should have been given to the jury advising it that Statement could be considered only for the purpose of evaluating Kojian's opinion and not for its truth. Petitioner argues that Trial Counsel provided ineffective assistance by failing to request that such a limiting instruction be given.

The California Court of Appeal found the *Strickland* deficient performance prong unsatisfied, because Trial Counsel may have had a rational tactical reason for failing to request a limiting instruction regarding the Statement. The state appellate court reasoned that Trial Counsel could have believed so instructing the jury would have caused the jury to focus undue attention on the Statement and generated more scrutiny than jurors otherwise would have given to the brief testimony at issue.

Petitioner argues that any concern by Trial Counsel that an instruction would highlight the Statement, and thus do more harm than good, could not have been a reasonable tactical decision, because even if it was a legitimate strategy initially, "any such tactical value evaporated when the prosecutor highlighted this evidence in closing argument." This is a bit hyperbolic; the prosecutor made a single brief reference to the Statement in his closing argument. But in any event, under the governing standard of review, this Court's task is not to decide if it believes the *Strickland* standard to be satisfied with respect to Petitioner's claim. Rather, this Court must determine whether the state court applied *Strickland* and its progeny to Petitioner's claim in an objectively unreasonable manner. And it must do so in a "doubly deferential" manner, considering not whether, in the Court's own view, Trial Counsel's declination to request a limiting instruction was in itself reasonable but, rather, "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 131 S. Ct. at 788.

Here, the state court identified what is perceived as a rational tactical basis for the failure to ask that jurors be instructed regarding the Statement and, as a result, found *Strickland*'s deficient performance prong to be unsatisfied. Whether or not that was the most effective tactical choice is not the issue; the question here is

whether fairminded jurists could disagree on the correctness of the state court's conclusion that it was a rational tactical choice. The Court concludes that fairminded jurists could disagree on this issue. Given the possibility of fairminded disagreement, Section 2254(d) mandates deference to the state court's decision on the first *Strickland* prong. *Richter*, 131 S. Ct. at 786-87. As a result, the Court need not assess the prejudice prong, and Ground Three cannot serve as a basis for federal habeas relief.

IV. Ground Four

Ground Four stems from asserted instructional error on the issues of voluntary intoxication and mental impairment as these issues related to Counts 1, 2, and 9. Ground Four consists of two subclaims. In the First Subclaim, Petitioner contends that the trial court erred in two respects: in inadequately instructing the jury on voluntary intoxication as it related to Count 1; and in failing to instruct the jury regarding voluntary intoxication with respect to Counts 2 and 9. In the Second Subclaim, Petitioner argues that Trial Counsel provided ineffective assistance by failing to rectify these trial court instructional errors and by failing to request that the jury be instructed on mental impairment as to Counts 1, 2, and 9.

A. Background

Count 1 against Petitioner was a felony charge of evading an officer. (CT 98.) Count 2 was a felony charge of assault with a firearm upon a police officer. (CT 99.) Count 9 was a misdemeanor charge of resisting, obstructing, or delaying a police officer. (CT 102; *see also* CT 116 – deeming Count 9 to be Count 8 for purposes of the trial and verdict form, due to a numbering issue.)

During the jury instruction conference, the trial court stated: "Then we have [CALCRIM No.] 3426. voluntary intoxication applicable only to specific intent crimes, which is Count 1." (RT 383.) The trial court asked if there were any

objections to that instruction "as a defense to specific intent crimes." Neither the prosecutor nor Trial Counsel objected or requested any modification to the instruction. (*Id.*) Trial Counsel also did not request that a voluntary intoxication instruction be given as to either Count 2 or Count 9, nor did she request that a mental impairment instruction be given as to Counts 1, 2, or 9. (*See* RT, *passim*.)

The trial court instructed the jury that Counts 2 and 9 were general intent crimes that required wrongful intent, that is, intentionally committing a prohibited act, although the crimes did not require intent to break the law. (CT 133; RT 438-39.) The trial court instructed the jurors that Count 1 and its related misdemeanor counterpart were specific intent crimes, that is, that a person not only intentionally commit a prohibited act but do so with a specific intent and mental state. (CT 134; RT 439-40.) With respect to voluntary intoxication, the trial court instructed the jury with the following version of CALCRIM 3426:

> You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence in deciding whether the defendant acted with the intent to evade a peace officer as charged in Count 1.
>
> A person is voluntarily intoxicated if he becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.
>
> In connection with the charge of evading a peace officer with wanton disregard for safety, or misdemeanor evading a peace officer, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to evade a peace officer. If the People have not met this burden, you must find the defendant not guilty of evading a peace officer with wanton disregard and the lesser offense of misdemeanor evading a police officer.
>
> You may not consider evidence of voluntary intoxication for any other purpose. Voluntary intoxication is not a defense to the remaining crimes charged in this case or

remaining lesser offenses.

(CT 168; RT 463-64.)

The trial court did not instruct the jury with CALCRIM 3428 regarding mental impairment – the instruction Petitioner contends should have been given. CALCRIM 3428 provides as follows:

> You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect [,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required intent or mental state, specifically: _____ <*insert specific intent or mental state required, e.g., 'malice aforethought,' 'the intent to permanently deprive the owner of his or her property,' or 'knowledge that ...'*>. If the People have not met this burden, you must find the defendant not guilty of _____ <*insert name of alleged offense* >

B. First Subclaim

1. **The State Court Decision**

As noted earlier, the California Court of Appeal did not resolve the First Subclaim on its merits, instead finding the claim to be procedurally barred:

> [Petitioner's] contention that the trial court's voluntary intoxication instruction as to count 1 was inadequate has been forfeited. The trial court's instruction was a correct statement of the law, even though it did not address specifically the knowledge element of count 1. Therefore, if [Petitioner] determined that a modification to the instruction was necessary to address specifically the knowledge element of count 1, it was incumbent upon his trial counsel to request such a modification. (*People v. Richardson* (2008) 43 Cal. 4th 959, 1022-1023, ["while the court may review unobjected-to instruction that allegedly implicates defendant's substantial rights, claim that instruction, correct in law, should have been modified 'is not cognizable, however, because defendant was obligated to request clarification and failed to do so' "], quoting

> *People v. Guerra* (2006) 37 Cal. 4th 1067, 1134.) The failure of his trial counsel to do so forfeited any claimed error on appeal.
>
> [Petitioner's] contention that the trial court erred by failing to instruct on voluntary intoxication as to counts 2 and 9 has also been forfeited. As [Petitioner] concedes, the trial court did not have a sua sponte duty to instruct on voluntary intoxication.[6] (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Rather, the burden was on [Petitioner] to request that those instructions be given as to those counts. (*Ibid.*) Therefore, the failure of [Petitioner's] trial counsel to request such instructions resulted in a forfeiture of the issue on appeal. (*People v. Mayfield* (1997) 14 Cal. 4th 668, 778-779.)

(Lodg. No. 12 at 28-29.)

2. **The First Subclaim Is Procedurally Defaulted.**

Under the procedural default doctrine, a federal habeas court will not review a question of federal law decided by a state court if the state court's decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 111 S. Ct. 2546, 2553 (1991). This doctrine bars the federal courts from reconsidering an issue in the context of habeas corpus review if the state court expressly invoked a state procedural bar rule as a separate basis for its decision. *Fairbank v. Ayers*, 650 F.3d 1243, 1256 (9th Cir. 2011). To be "independent," the state rule must not be interwoven with federal law. *Michigan v. Long*, 103 S. Ct. 3469, 3476 (1983); *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000). To be "adequate," the state rule must be "firmly established and regularly followed." *Walker v. Martin*, 131 S. Ct. 1120, 1127 (2011) (internal quotation marks and citation omitted).

If the state rule is independent and adequate, the procedural default may be excused if the petitioner can show: (1) cause for the default and actual prejudice as

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[6] [Footnote 12 in original: "Similarly, the trial court had no sua sponte duty to instruct on mental impairment. (*People v. Ervin* (2000) 22 Cal. 4th 48, 91.)"]

a result of the alleged violation of federal law; or (2) that failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 111 S. Ct. at 2565. "[C]ause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 106 S. Ct. 2639, 2645 (1986). To show prejudice, a habeas petitioner "must show 'not merely that the errors at ... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Id.* at 2648 (citation omitted).

Respondent asserts that the First Subclaim is procedurally defaulted based upon the California Court of Appeal's finding that Petitioner had forfeited the subclaim due to Trial Counsel's failure to object to, and request modification of, the instructions given. Respondent has met his burden of pleading an independent and adequate state procedural ground as an affirmative defense – what is commonly known as the contemporaneous objection rule. *See Wainwright v. Sykes*, 97 S. Ct. 2497, 2506 (1977) (the failure to comply with a state's contemporaneous objection rule results in a procedural default that bars federal habeas corpus review). The Ninth Circuit has long held that California's contemporaneous objection rule, which requires objection at the time of trial to preserve an issue for appeal, is consistently applied and constitutes an adequate and independent bar to federal review. *See, e.g., Kelly v. Swarthout*, 599 Fed. App'x 267, 268 (9th Cir. 2015) ("We have previously found that the contemporaneous objection bar is an independent and adequate state law ground that bars federal review of the underlying claim."); *Fairbank*, 650 F.3d at 1256; *Vansickel v. White*, 166 F.3d 953, 957-58 (9th Cir. 1999). Generally, a state court's invocation of its contemporaneous objection rule, as occurred here, will suffice to bar consideration of a claim on federal habeas review. *See, e.g., Paulino v. Castro*, 371 F.3d 1083, 1092-93 (9th Cir. 2004) (instructional error claim found barred by California's contemporaneous objection rule); *Rich v. Calderon*, 187 F.3d

1064, 1070 (9th Cir. 1999) (habeas review of prosecutorial misconduct claims held barred by failure to object); *Vansickel*, 166 F.3d at 957-58 (procedural default found based upon lack of contemporaneous objection to denial of peremptory challenges).

The California Court of Appeal clearly invoked California's contemporaneous objection rule in denying the First Subclaim, which renders the claim procedurally defaulted absent Petitioner meeting his burden of establishing cause and prejudice for his procedural default or a fundamental miscarriage of justice. *Coleman*, 501 111 S. Ct. at 2565. Petitioner has offered no such showing in any of his filings in this action or in the state proceedings – indeed, he makes no such argument at all – and none is apparent from the record. Instead, Petitioner asserts simply that the procedural default doctrine does not apply to the First Subclaim, because the error he claims is one of due process and is a "federal constitutional issue." (Reply at 27.) This contention plainly fails to avoid a procedural default, as a claim of federal constitutional violation is a circumstance that is present in every cognizable federal habeas claim, and if it were enough to avoid a procedural default, the doctrine would not exist. Accordingly, because the state court invoked an adequate and independent state procedural bar to the First Subclaim, the claim is procedurally barred and cannot serve as a basis for federal habeas relief.

C. Second Subclaim

1. The State Court Decision

In a brief analysis, the California Court of Appeal found the first *Strickland* prong unsatisfied, concluding that Petitioner had failed to meet his burden of demonstrating that there was no tactical reason for trial counsel's failure to request a modification of the voluntary intoxication instruction to be given as to Count 1 and, further, to request that a modified version of that instruction, along with a mental impairment instruction, be given as to Counts 1, 2, and 9. (Lodg. No. 12 at 29.)

The California Court of Appeal then concluded that the second *Strickland* prong

also was unsatisfied, because the instructions given, as a whole, correctly stated the law and instructed on the necessary elements. (Lodg. No. 12 at 29-30.)

> The jury in this case was properly instructed as to all elements of counts 1, 2, and 9. Nothing in the instructions prevented the jury from considering [Petitioner's] evidence of his intoxication and mental issues in determining intent and knowledge during deliberations. The juror[]s were well aware from [Petitioner's] testimony that he was extremely intoxicated and that he claimed to have seen Satan and was hallucinating about his prior military experience, believing the police officers were soldiers. Thus, the omission of CALCRIM Nos. 3426 and 3428 could not have mislead the jury on the issues of intent and knowledge.
>
> In addition, as discussed above, there was strong, credible, and corroborating evidence of [Petitioner's] guilt on count 1, 2, and 9 with respect to both knowledge and intent, much of which was uncontradicted by [Petitioner's] testimony. Two of the officers involved in the primary and secondary pursuit of [Petitioner's] vehicle—who were both in uniform in marked patrol vehicles with lights and sirens activated—described his reckless driving while under the influence, heard at least one gun shot from [Petitioner] vehicle, described his belligerent, noncooperative behavior following the collision with the Jaguar, and recovered a loaded shotgun, expended shotgun shells, and live, unexpended shotgun rounds from [Petitioner's] vehicle. Given the strength of the evidence showing [Petitioner's] guilt on counts one, two, and nine, [Petitioner] did not "suffer prejudice to a reasonable probability, that is, a probability sufficient to undermine the outcome" of his trial on counts 1, 2, and 9.

(Lodg. No. 12 at 30; citation omitted.)

2. **Habeas Relief Is Not Warranted.**

The Second Subclaim fails under Section 2254(d), because the state court's finding that neither *Strickland* prong was satisfied was not objectively unreasonable.

With respect to Count 1 – the California Vehicle Code § 2800.2(a) crime of

evading an officer with wanton disregard for safety – the trial court instructed the jury that Petitioner's intoxication could be considered on the question of whether he "acted with the intent to evade a peace officer." (RT 463.) The Court believes that any rational and reasonable juror who received this instruction would have understood it to mean not that Petitioner acted with the intent to evade some random person but, rather, with the intent to evade someone he understood to be a peace officer, and that it would have been irrational to construe it otherwise. Nonetheless, Petitioner contends that the trial court was required to specifically parse out for the jurors that the "intent to evade" was one extant element of the Count 1 offense, and the jury must find as a separate element that Petitioner possessed "the knowledge that the pursuer is a peace officer."

Significantly, the instruction given to jurors for the charged Count 1 crime itself – which Petitioner has never challenged – utilized similar "intending to evade the officer language" without parsing out and expressly instructing on the purported separate "knowledge" element that Petitioner now claims required a distinct instruction. (*See* CT 144-45.) The Count 1 crime instruction, however, did tell the jurors that to find Petitioner guilty of charged Section 2800.2(a) violation, in addition to finding that he intended to elude the peace officer who was pursuing him and did so with willful and wanton disregard for the safety of others or property, they must find that there was at least one lighted red lamp visible on the car in pursuit, Petitioner "saw or reasonably should have seen" that lamp, the peace officer's vehicle was sounding a siren and was distinctively marked, and the peace officer was wearing a uniform. (*Id.*) Thus, before the jurors could determine whether Petitioner was guilty of Count 1, they necessarily had to specifically find that a marked police car with a siren and lit red lamp was following Petitioner and decide whether he actually or should have seen that lit red lamp, which would have caused him to understand – or in Petitioner's parlance, have "knowledge" – that a

police car was pursuing him. The voluntary intoxication instruction given told the jurors to consider the effect of his intoxication on that understanding.

The Court has researched California law on Section 2800.2 and has yet to find a decision holding that jurors must be instructed that the crime contains a separate and distinct "knowledge" element in addition to the intent to evade a police officer requirement. Petitioner has not cited one. For the reasons set forth above, the state court reasonably concluded that the voluntary intoxication instruction given properly instructed the jurors as to Count 1's elements. Petitioner's arguments that the instruction somehow foreclosed the jurors from assessing the effect his intoxicated state had on his "knowledge" that he was being pursued by the police are wholly unpersuasive. Trial Counsel did not perform deficiently in failing to request that the trial court modify the instruction, and the lack of such a modification did not render it reasonably probable that, but for Trial Counsel's failure to request a modification, the result of the trial would have been different as to Count 1.

With respect to the next issue – whether the trial court should have told the jurors that the voluntary intoxication instruction also applied to Counts 2 and 9, alleged violations of California Penal Code §§ 245(d)(1) and 148(a)(1), respectively – Petitioner again proffers no persuasive argument that the state court erred, much less in an unreasonably objective manner.

To convict Petitioner based on Count 2, the jury was required to find that he committed an assault with a firearm upon a peace officer and either knew or "reasonably should have known that" the victim was a peace officer. *See* California Penal Code § 254(d)(1); *see also* CT 148 (so instructing the juror"). The alternative "reasonably should have known" element of this crime is objective. Thus, to convict Petitioner under Section 245(d)(1), the jury did not have to find that Petitioner actually knew that Officers Mullane and/or Rolens were police officers but, rather, only that he "reasonably should have known" that they were.

In California, a voluntary intoxication instruction may not be given when the

crime at issue is a general intent crime. *See, e.g., People v. Parks*, 4 Cal. 3d 955, 960 (1971). California courts have concluded that the California Penal Code § 245 crime of assault with a deadly weapon is a general intent crime. *See People v. Rocha*, 3 Cal. 3d 893, 899 (1971). "Voluntary intoxication is not a defense to assault with a deadly weapon." *Id.; see also People v. Windham*, 19 Cal. 3d. 121, 130-31 (1977) (because Section 245(a) assault by means of force likely to cause great bodily harm is a general intent crime to which voluntary intoxication is not a defense, the trial court so correctly instructed the jury).

In *People v. Finney*, 110 Cal. App. 3d 705 (1980), the California Court of Appeal found that the trial court properly instructed the jury that voluntary intoxication was not a defense to the crime of assault with a deadly weapon upon a police officer (and rejected a related ineffective assistance claim) when, under the evidence, the "reasonably should have known" was implicated. The state appellate court reasoned that voluntary intoxication will not negate that element, and thus no instruction was required, because "defendant's unawareness of the officers' identities due to self-induced intoxication is immaterial when a sober person would have been aware of their identities" and a "defendant's voluntarily becoming intoxicated to the extent of his being unable to perceive the identities of uniformed peace officers driving marked patrol cars with lights and sirens operating is sufficiently culpable conduct to warrant criminal liability for the crime of assault with a deadly weapon on a police officer." *Id.* at 712-14. The *Finney* court relied in substantial part on the California Supreme Court's decision in *People v. Hood*, 1 Cal. 3d 444 (1969), in which the state high court concluded that, regardless of whether the Count 2 crime at issue here is a specific or general intent crime, a trial court should not instruct the jury "to consider evidence of defendant's intoxication in determining whether he committed assault with a deadly weapon on a peace officer or any of the lesser assaults included therein." *Id.* at 459. *Finney*, in short, precludes Petitioner's claim.

Petitioner argues that the *Finney* decision is "wrongly decided." Whether the Count 2 charge is a general intent, or a specific intent, crime and whether or not voluntary intoxication may negate an element of this crime are California, not federal, law questions, and this federal habeas court must defer to the California courts' interpretation and application of California law in this respect. *See Bradshaw v. Richey*, 126 S. Ct. 602, 604 (2005) (*per curiam*) ("a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"); *Hicks v. Feiock*, 108 S. Ct. 1423, 1428 & n.3 (1988) (when the California Supreme Court has denied review, a federal habeas court is "not free in this situation to overturn the state [appellate] court's conclusions of state law" regardless of a contention that the state appellate court misapplied the law, because the federal court is "not at liberty to depart from the state appellate court's resolution of these issues of state law"). The California Courts – in *Hood* and *Finney* have ruled contrary to the Count 2 argument that Petitioner makes here.

In light of this state law precedent, it is hard to divine how Trial Counsel could be deemed to have performed deficiently in failing to request that the voluntary intoxication instruction be given as to Count 2. California law foreclosed doing so, and the Sixth Amendment does not require defense counsel to make legally unsupported or futile requests. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) ("the failure to take a futile action can never be deficient performance"). Moreover, it is not reasonably probable that the trial outcome would have differed had Trial Counsel made such a request. Apart from the fact that it would have been denied, there was ample evidence for the jurors to find that Petitioner "reasonably should have known" that the men in the cars pursuing him were peace officers, regardless of his testimony that he was intoxicated and saw "Satan" following him. Multiple officers in marked patrol cars with sirens and red lights activated followed Petitioner off the freeway and as he entered a Home Depot parking lot, as he

maneuvered through the lot and through adjacent city streets, and as he entered and sped down one freeway and transitioned onto another.

The Second Subclaim fails as to Count 9 for the very same reasons. The Count 9 crime – California Penal Code § 148(a), resisting, obstructing or delaying a peace officer in the performance of his duties – contains the same objective "reasonably should have known" language as the crime at issue in Count 2. *See People v. Simons*, 42 Cal. App. 4th 1100, 1109 (1996). The jury was so instructed. (CT 164.) This offense is a general intent crime. *In re Muhammed C.*, 95 Cal. App. 4th 1325, 1329 (2002). Under California law, Petitioner's voluntary intoxication was not a defense to the crime[7] and a voluntary intoxication instruction would have been improper. Trial Counsel, therefore, did not perform deficiently in failing to request one and it is not reasonably probable that the trial outcome would have differed had she done so.

The final Second Subclaim issue relates to Petitioner's contention that Trial Counsel should have requested that CALCRIM No. 3428, a mental impairment instruction, be given as to Counts 1, 2, and 9. As the California Court of Appeal noted, this instruction does not set forth or describe the elements of any crime but, rather, is a pinpoint instruction "relating particular facts to legal issues in the case." *People v. Larson*, 205 Cal. App. 4th 810, 824 (2012). The California Court of Appeal concluded that Petitioner was not prejudiced by Trial Counsel's failure to request this instruction, because nothing in the instructions given prevented the jurors from considering the evidence of Petitioner's mental issues in determining intent and knowledge for any of these three crimes.

The state court's conclusion was objectively reasonable. Petitioner testified about his inability to remember what happened and his audio and visual

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[7] Indeed, the jury was so instructed explicitly when it was instructed on the elements of the Count 9 crime (CT 164) and, yet, Petitioner never has complained about the Count 9 instruction given.

hallucinations (seeing Satan, his belief once he had crashed that the police officers were soldiers, and hearing voices in his head), and the defense psychologist (Kojian) testified about Petitioner's diagnosis of depression and anxiety and that someone who was under the influence and experiencing emotional issues might have difficulty formulating special intent. The jury, therefore, was fully aware of the mental impairment issue being raised by the defense. The jurors were specifically instructed that voluntary intoxication was not a defense to most of the charged crimes (*see* CT 151, 155, 157, 158, 159, 161, 162, 163, 164, 168), but significantly, were never told that any mental impairment on Petitioner's part could not serve as a defense to the crimes with which he was charged and/or to the intent required for them. There simply is no substantial likelihood of a different result within the meaning of the *Strickland* prejudice requirement had Trial Counsel requested, and the trial court given, CALCRIM No. 3428.

The state court's rejection of the Second Subclaim, with its various arguments, was not an objectively unreasonable application of *Strickland* and its progeny, nor does it rest on any unreasonable determination of fact. Accordingly, federal habeas relief based upon the Second Subclaim of Ground Four is precluded.

V. Ground Six

Petitioner's final claim is that the trial court deprived him of his rights to due process and a jury trial when, at the conclusion of the separate jury trial on Petitioner's NGI plea, the trial court directed a verdict of sanity.

A. Background

After the jury rendered its guilty verdicts, a trial took place on Petitioner's NGI plea. As the trial court correctly noted at the outset, "it's the defense burden to prove the defendant was legally insane at the time any and all offenses were committed." (RT 637.) *See Leland v. Oregon*, 72 S. Ct. 1002, 1006-08 (1952)

(state constitutionally may require defendants asserting NGI pleas to bear the burden of proving their insanity beyond a reasonable doubt). The trial court instructed the jury that Petitioner had the burden of proving that it was more likely than not he was insane when he committed the crimes and then instructed on the standards for finding insanity. (RT 642-44.)

Petitioner testified as the sole witness. (RT 644-63.) He testified that, while in the military: he hit his head 10-15 times and had been unconscious at times; he developed a drinking problem but did not receive treatment; he became depressed and his speech impediment (stuttering) increased; and he was kicked out of the army due to his alcohol problems; (RT 646-48.) After his release, he had suicidal tendencies and saw a psychiatrist at the VA. (RT 648-49.) His alcohol intake worsened until he was sent to prison in 2002, when he stopped drinking because he had found religion. He retained his sobriety for eight or nine years. (RT 649-50.) When Petitioner was back in the community as of 2004, he received treatment at the VA and a disability determination from the Social Security Administration. He had been prescribed medications, including Prozac, Xanax, and Celexa, an anti-psychotic medication. The Xanax made him feel better but also gave him suicidal thoughts and hallucinations when he mixed it with alcohol. (RT 650-53.)

On the date of the crimes, he had stopped taking Celexa a week before but was taking Xanax. He had been experiencing stress, because the Department of Child Service had allowed his 15-year old daughter to live with him in Yucca Valley, which she did not like, and she had stopped going to school, was very rebellious, and ran away. Petitioner had to move to the Los Angeles area to be allowed to keep his daughter. At the same time, Petitioner's wife developed congestive heart failure, and he had to travel back and forth every week to try to keep the family afloat. He started having anxiety and panic attacks and ended up in the ER six to seven times a month as a result of the panic attacks. (RT 653-54.)

Although Petitioner testified that he had stopped taking Celexa a week before the

crimes, when asked about whether he knew his conduct on the day in question was morally wrong, he testified that when he was sober, he had good judgment but on that day, he was not sober and the Celexa had affected his judgment so that he did not care about anything. (RT 654-55.) Trial Counsel asked him if he was aware and conscious while he was driving on the freeway, and Petitioner stated that he was hallucinating and "running." (RT 656.) Petitioner could not remember whether or not he told someone at the Jail that he was trying to have the officers kill him. (*Id.*)

Petitioner testified that he smoked crack and used methamphetamine prior to the crimes because he was addicted. (RT 658.) He denied having shot at the police and when the prosecutor asked Petitioner if he knew it would be wrong to shoot at the police, Petitioner responded that he did not know and had memory gaps. Petitioner repeated that he did not shoot at the police and said, "I don't think I have the heart." (RT 659.) The prosecutor asked, "You said you don't have the heart because you know that would be a wrong thing to do, right?," and Petitioner responded, "Yes." (*Id.*) Petitioner conceded that he knew he was driving a car and how to operate it, but denied that he knew that the weapon in the car was a shotgun, although admitted that he knew it was a shotgun when he fired it earlier. (RT 660-61.) Petitioner blamed his conduct on an overdose of Xanax, which was his "mistake." (RT 662.) Trial Counsel asked Petitioner if, on the night in question, he knew the difference between right and wrong. Petitioner responded, "I didn't know." (RT 663.)

After excusing the jury to take a break, the trial court stated the following:

> The issue that I have is whether or not there's sufficient evidence in the record upon which the jury can find a preponderance of the evidence that [defendant] suffers from a mental illness or a mental defect or disorder that coupled with his substance abuse could meet the criteria for legal insanity for purposes of a jury to determine.
>
> That's the problem that I have here because the evidence is in and that's what it is. What I gather from [defendant] is certainly there's substance abuse in his history and perhaps even on the date in question,

> including alcohol consumption to excess.
>
> But the law requires more than just simply that, it requires a medical disorder or defect. And [I] understand [that defendant] in his own words ... suffers from anxiety and depression. But that alone is not mental illness or defect as a matter of law.
>
> And even coupled with the substance abuse and alcohol abuse that he has mentioned, still doesn't reach the level of legal insanity for purposes of even a jury to decide.
>
> So my concern is whether or not I can legally allow the jury even to receive this case based upon the insufficiency of the evidence that I have before me.
>
> It would have been different, [defendant], if you could have produced an expert to say, yes, indeed, you suffer from a—some type of mental disorder or defect or illness. There's just no evidence in the record of that.

(RT 664-65.) The trial court asked Trial Counsel for her thoughts, and she responded: "Well, according to my research, the court, pursuant to a particular case I think in 2003, although it's a novel area, the court does have the power and authority to grant its own 1118.1. And the standard of proof would be the preponderance of the evidence. And if that's not been presented for your Honor's satisfaction, I believe the case law supports, I think, what you're ultimately getting to." (RT 665.) The trial court noted that Trial Counsel was referring to *People v. Ceja*, 106 Cal. App. 4th 1071 (2003), and that the *Ceja* decision was "still current law" and "valid" and "was a case very similar to what we have here," except that "even in the *Ceja* case there was expert testimony introduced during the sanity phase and here we don't even have that." (RT 665-66.) The trial court then quoted the following portion of the *Ceja* decision (p. 1089):

> "There was no Constitutional infirmity, either under the California Constitution or the United States Constitution, for a judge to remove the issue of sanity from the jury when the defendant has failed to present evidence sufficient to support the special plea. As recognized by Justice Brown—citing another case called Hernandez — and the prior cases involving double jeopardy, courts retain an inherent power to remove an affirmative defense from the jury where there is no evidence to support it."

(RT 666.) The trial court noted that it had the authority to remove the sanity issue from the jury but it did not stem from California Penal Code § 1118.1, which only pertained to directing a verdict for the defense. (*Id.*) The trial court concluded: "And that's the way I'm going to find. I'm going to remove this from the jury and find as a matter of law there is insufficient evidence for the jury to resolve the … sanity issue ... because there is just simply insufficient evidence presented in the record at this point." (RT 667.) The trial court then set aside and vacated Petitioner's NGI plea. (*Id.*)

B. The State Court Decision

The California Court of Appeal recounted the above comments by the trial court and then rejected Petitioner's contention that the trial court's action deprived him of rights to due process and a jury trial on the ground that "only the jury was empowered to rule on the factual issue of his insanity." (*Id.* at 32-33.) It noted Petitioner's concessions that: in addition to the *Ceja* decision on which the trial court relied, there were two additional California Court of Appeal decisions that recognized "a trial court's discretionary authority to direct a verdict against a defendant in a trial of a sanity defense" (*People v. Severence*, 138 Cal. App. 4th 305 (2006), and *People v. Blakely*, 230 Cal. App. 4th 771 (2014)); and the California Supreme Court had not addressed the issue. (*Id.*) As he does here, Petitioner argued that these decisions were wrongly decided and should be disregarded, but the state appellate court disagreed, choosing to follow established state law precedent. (*Id.* at 33-34.) It concluded that, therefore, Petitioner's due process and jury trial rights had not been violated by the trial court's action. (*Id.*)

The California Court of Appeal then turned to Petitioner's contention – also made here – that even if the trial court had the authority to direct a verdict on the sanity issue, it erred in finding there was no substantial evidence to support a jury finding that Petitioner was insane at the time of the crimes. It noted the California

standards for an insanity defense: "[i]nsanity, under California law, means that at the time the offense was committed, the defendant was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong"; because insanity is an affirmative defense, "[t]he burden is on the defendant to prove by a preponderance of the evidence that he was insane at the time of the offense'; and "[a] defendant must show that he suffered from a 'mental condition which render[ed him] incapable of knowing or understanding the nature and quality of his act, or incapable of distinguishing right from wrong in relation to that act.'" (Lodg. No. 12 at 35; citations omitted.)

The California Court of Appeal noted the reasons why the trial court had not erred in declining to send the insanity issue to the jury. First, there was no "expert testimony on the issue of whether he was able to appreciate the nature and quality of his acts or was not able to distinguish right from wrong in relation to those acts." (Lodg. No. 12 at 35.) Second, the only evidence of mental disease or impairment before the trial court was Petitioner's testimony, as well as that of the defense psychologist during the guilt trial, that Petitioner suffers from anxiety and depression, as well as Petitioner's claim that he is addicted to alcohol and drugs. (*Id.*) The state appellate court noted that "anxiety, depression, and addiction cannot be the basis for a finding of insanity," because under California Penal Code § 29.8, "[i]n any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or an abuse of, intoxicating substances." (*Id.*) Third, the California Court of Appeal reasoned that "the fact that [Petitioner] had suffered injuries to his head in the past which caused him to become unconscious and had surgery to treat one of those injuries did not support a reasonable inference that [Petitioner] did not appreciate the nature and quality of his acts or was incapable of distinguishing right from wrong in relation to those acts on the night he committed the charged crimes." (*Id.*) Fourth and finally,

the state appellate court determined that, "although [Petitioner] claimed he saw Satan and was hallucinating on the night of his crimes, those facts were not related to his ability to appreciate the nature and quality of his acts or to distinguish right from wrong." (*Id.* at 35-36.) The California Court of Appeal found that "[g]iven the conclusory nature and limited extent of [Petitioner's] testimony during the sanity phase, the trial court correctly concluded that [Petitioner] had not presented substantial evidence that he was legally insane," and thus, the "trial court therefore did not err in directing a sanity verdict." (*Id.* at 36.)

C. Habeas Relief Is Not Warranted.

Ground Six fails for several reasons, each of which suffices to foreclose federal habeas relief.

First, and critically, the sixth claim fails on its face, because it does not meet the threshold requisite of Section 2254(d)(1), *to wit*, a state court decision that is contrary to or an unreasonable application of clearly established federal law. Petitioner contends that *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), and *Duncan v. Louisiana*, 88 S. Ct. 1444 (1968), are clearly established federal law holding that a trial court may not direct a verdict of sanity, but Petitioner is mistaken. *Sullivan* dealt with an instructional error claim based on a defective reasonable doubt instruction. As Justice Scalia put it at the outset of the opinion: "The question presented is whether a constitutionally deficient reasonable-doubt instruction may be harmless error." *Sullivan*, 113 S. Ct. at 2080. The Supreme Court opined that the defect in the instruction in question would lead to a verdict that would not satisfy the Sixth Amendment, and thus, the instructional error was not subject to harmless error analysis. *Id.* at 2080-83. While it is true that the decision, at its outset, contains the following language – "although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence" (*id.* at 2080) – this

comment regarding the inappropriateness of directed verdicts of guilt in the guilt phase of a trial was made in passing before the Supreme Court set forth its analysis and conclusion with respect to the instructional error at issue, and has nothing to do with the propriety of directed verdicts at the sanity phase of a trial. The earlier decision in *Duncan* is even less apt here. The case concerned whether a defendant charged with a petty crime was entitled to a jury trial; the Supreme Court held that he was and reversed his simple battery conviction. 88 S. Ct. at 1447-48.

For purposes of Section 2254(d)(1), clearly established federal law means actual holdings by the Supreme Court, not passing comments or dicta. Neither *Sullivan* nor *Duncan* addresses the question of whether a trial court may direct a verdict of sanity when the evidence is insufficient to support an NGI plea, nor can either decision be stretched to yield the conclusion that Petitioner claims they mandate. As the Supreme Court has made clear, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision'" and Section 2254(d)(1) is not satisfied. *Woodall*, 134 S. Ct. at 1706 (quoting *Alvarado*, 124 S. Ct. at 2150). "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* [the Supreme] Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error." *Id.*; *see also id.* at 1706-07 ("The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no "fairminded disagreement" on the question"). As the Ninth Circuit has explained, through *Woodall*, the Supreme Court has "limit[ed] federal courts' ability to extend Supreme Court rulings to new sets of facts on habeas review," "courts may so extend Supreme Court rulings only if it is "beyond doubt" that the rulings apply to the new situation or set of facts," and "it is beyond doubt that a ruling applies to a new set of facts only if there can be "no 'fairminded disagreement' on the question."

Moore v. Helling, 763 F.3d 1011, 1016 (9th Cir. 2014).

No such "beyond doubt" conclusion can be drawn here. Consistently with the rules of AEDPA review, District Courts in California have determined that there is no clearly established federal law, within the meaning of Section 2254(d)(1), holding that the United States Constitution bars a trial court from directing a verdict of sanity when a defendant has not offered substantial evidence to meet his burden of proof. *See Singleton v. Ayers*, No. CV 06-3877-SJO (JC), 2011 WL 6329552, *21 (C.D. Cal. Oct. 20, 2011) (no clearly established Supreme Court authority holds that a trial court may not direct a verdict when a defendant offers no substantial evidence of insanity to meet his burden of proof), adopted by 2011 WL 1329415 (Dec. 16, 2011); *Severance v. Evans*, No. CIV S-06-1964 FCD KJN, 2009 WL 1705698, *14 (E.D. Cal. June 17, 2009) (rejecting the same due process/Sixth Amendment arguments made in Ground Six and opining that: "The United States Supreme Court has not addressed whether a trial court deprives a criminal defendant of his rights to due process and a jury trial if it directs a verdict of sanity. Because there is no United States Supreme Court case addressing this issue, the state court's decision on petitioner's claims does not violate AEDPA and may not be set aside."), adopted by 2009 WL 2382354 (Aug. 3, 2009). In this circumstance, federal habeas relief is foreclosed by Section 2254(d)(1). *See Knowles*, 129 S. Ct. at 1419 ("this Court has held on numerous occasions that it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court").

Second, apart from the AEDPA bar to relief, Petitioner's contention – that the California Court of Appeal's decision satisfies the Section 2254(d)(1) threshold because the three state appellate decisions on which it relied were "wrongly decided" and "unsound" – is not persuasive. Petitioner has not proffered a good reason to find that three separate California courts erred in rejecting the Ground Six arguments he makes here and, moreover, federal courts have rejected his assertions.

In *Leach v. Kolb*, 911 F.2d 1249, 1255-56 (7th Cir. 1990), the Seventh Circuit rejected the claim made in Ground Six and held that, although a defendant has a Sixth Amendment right to have the jury determine all elements of the charged offense, once he has been found guilty, the Sixth Amendment does not preclude a trial court from directing a verdict of sanity when the defendant fails to produce sufficient evidence upon which a jury could conclude that his mental status rendered him incapable of appreciating the nature and wrongfulness of his conduct or conforming his actions to the requirements of the law at the time he committed the charged offense. The Seventh Circuit reasoned that, because Wisconsin state law provided that the insanity defense was dispositive only on whether the convicted defendant was to be held criminally responsible for committing the charged offense and was not dispositive on the question of the elements of the offense and whether criminal conduct had been established, the Sixth Amendment did not preclude a trial court from withdrawing the insanity issue from the jury when the evidence of insanity was insufficient to create a jury question. *Id.* Similarly, in *Singleton*, 2011 WL 6329552, at *21, this District found that "there is no constitutional bar to the trial court's directing a verdict of sanity," reasoning that unlike in the guilt phase, in which the Constitution requires a presumption of innocence and directing a verdict of guilt therefore is impermissible, there is no constitutional entitlement to a presumption of insanity and, thus, a directed verdict is permissible if a defendant fails to offer substantial evidence to meet his burden of proof.

In a concurring opinion, California Supreme Court Justice Brown has explained that California law is the same as that considered in *Leach* on the question of whether or not an insanity defense bears on the elements of the charged crime:

> Under the United States and California Constitutions, a criminal defendant has the right to a jury determination of all elements of the charged offenses…. Because a finding of insanity under California law "is dispositive only on the question of whether the accused is to be held criminally responsible for committing the charged

> offense[,] it is not determinative of whether the elements of the offense, and thus the criminal conduct itself, have been established." ... Thus, taking the issue of insanity away from the jury does not violate the United States or California Constitution….

People v. Hernandez, 22 Cal. 4th 512, 529 (2000); *see also Pop v. Yarborough*, 354 F. Supp. 2d 1132, 1137 (C.D. Cal. 2005) (under California law, sanity is not an element of the crime even when the defendant enters an NGI plea). The Court finds the *Leach* rationale dispositive here, given that California, like Wisconsin, treats sanity as a matter bearing on criminal responsibility after a defendant has been found guilty and not as determinative of guilt itself. As a result, regardless of Petitioner's failure to meet Section 2254(d)(1)'s requisites, neither his federal due process nor jury trial rights were violated by the trial court directing a verdict at the sanity phase trial.

Third and finally, the California Court of Appeal reasonably rejected Petitioner's arguments that the evidence he proffered was substantial enough to go to the jury.[8] At the outset, Petitioner's contention (Pet. Mem. at 82; Reply at 34-35) – that as long as a defendant proffers "any evidence" whatsoever in support of his NGI plea, a factual issue exists that must be resolved by the jury and a directed verdict is impermissible – lacks any support and is plainly meritless. Under Petitioner's theory, all a defendant would have to do is get up on the stand and say, "I am crazy. End of story," and this alone would create enough "evidence" of legal insanity to require jury consideration. That, quite simply, is untenable. *Cf. United States v. Whitehead*, 896 F.2d 432, 434-36 (9th Cir. 1990) (in federal criminal action, rejecting argument that an insanity instruction is required as long as the defendant adduces "some evidence" of insanity, holding that the jury need not be instructed unless the defendant has shown insanity "with convincing clarity," and affirming

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[8] Petitioner's contention that he is entitled to de novo review of this issue (Pet. Mem. at 82) is frivolous. The California Court of Appeal indisputably resolved the issue on its merits. (Lodg. No. 12 at 34-36.)

district court's refusal to instruct the jury on insanity when defense expert's testimony was insufficient to rise above speculation as to whether the defendant, on the day in question, appreciated the nature and wrongfulness of his conduct).

In California, to establish legal insanity, a defendant must proffer evidence that he was incapable of knowing or understanding the nature and quality of his act or of distinguishing right from wrong at the time of the commission of the offense. *See People v. Skinner*, 39 Cal. 3d 765, 773-77 (1985) (although the statute states these two prongs with an "and" between them, they are disjunctive). As to the latter prong, this includes knowing what is morally wrong or what is legally wrong. *Id.* at 783. There is a rebuttable presumption that a defendant was sane when he committed the crimes and he bears the burden of proving otherwise by a preponderance of the evidence. *Pop*, 354 F. Supp. 2d at 1137; *see also Blakely*, 230 Cal. App. 4th at 779 (the defendant bears the burden to proffer sufficient evidence to prove these two requirements). Thus, the question is whether the state courts unreasonably found that Petitioner did not present sufficient evidence to establish either prong.

The California Court of Appeal did not act unreasonably in concluding that the evidence was insufficient to satisfy the second prong. As described above, when asked if he knew his conduct was morally wrong on the day in question, Petitioner testified that his use of Celexa had affected his judgment so that he did not care about anything. On cross-examination, Petitioner said "yes" when asked if he knew that shooting at the police would be wrong. Although Trial Counsel got Petitioner to state, on redirect, that he didn't know the difference between right and wrong on the day in question, he made no attempt to reconcile that inconsistent testimony with his prior admissions. The defense expert in the guilt phase did not render an opinion on this issue. Under this state of the evidence, a rational factfinder would have to find that Petitioner had not met his burden of proof of establishing the second prong required to prove legal insanity by a preponderance of the evidence. Under these

circumstances, it was not objectively unreasonable to find no error in removing this issue from the jury. *See Blakely*, 230 Cal. App. 4th at 781 (when there was no evidence from which the jury could reasonably conclude that defendant believed his crimes were morally justified, a directed verdict was proper).

With respect to the first prong under California law, the California Court of Appeal correctly noted that defense expert Kojian had not opined on this issue. At most, Kojian informed the jurors that Petitioner had "mental health issues consistent with depression with anxiety" and polysubstance dependence and that it was possible someone who was under the influence of drugs and who had "emotional issues" might have difficulty formulating specific intent. (RT 421.)[9] This testimony was not probative at all on the issue of the first prong of the legal insanity test in California. Thus, the sole evidence on the first legal insanity prong was Petitioner's testimony. Petitioner testified, variously, in both trials, that: he remembered little of what happened during the commission of the crime but did recall seeing Satan following him and drove away in fear; after he crashed his car, he heard a voice in his head telling him to die with honor for his country and saw soldiers pointing guns at him; and had suffered head injuries and unconsciousness in the past, as well as continuing panic and anxiety attacks. The federal habeas issue is whether the California Court of Appeal was objectively unreasonable in concluding that the trial court did not err in directing a sanity verdict under the first prong, because Petitioner had not met his burden of showing that he was incapable of knowing or understanding the nature of his actions.

Petitioner argues that the evidence presented at both trials was sufficient to show

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[9] Petitioner argues that Kojian testified that his mental issues stemming from his depression and substance abuse could have caused him to be psychotic. (Reply at 36.) This is inaccurate. Kojian never said that someone with Petitioner's mental state could become psychotic; rather, he testified it is possible severe depression can lead to psychosis, which is a "different state" from depression, and he saw nothing in Petitioner's records "to indicate evidence for psychosis." (RT 423.)

that he had a mental disorder or defect, and that his testimony that he believed he was being pursued by Satan showed he suffered from "classic insanity." Even if, *arguendo*, the evidence was sufficient to cause a reasonable factfinder to conclude that Petitioner suffered from some form of mental illness, this in itself is insufficient to prove the first prong of California's insanity rule. "Mere affliction with a mental illness is insufficient to establish insanity in California." *Pop*, 354 F. Supp. 2d at 1143; *see also People v. Kelly*, 1 Cal. 4th 495, 540 (1992) ("Although mental illness (or defect) may cause insanity, the concepts are different. Mental illness is a medical diagnosis; it alone does not necessarily establish legal insanity. A defendant must also show that the illness made him insane under the prevailing *M'Naghten* test."). Evidence merely showing the existence of mental illness – as opposed to evidence tending to show the effect that the mental illness had on the defendant's appreciation of the nature and quality of his acts and/or their wrongfulness – is insufficient to established legal insanity and warrants a directed verdict. *Keen*, 96 F.3d at 431.

While Petitioner claimed he believed Satan was pursuing him, he also testified that he recalled almost nothing about the events at issue once he started driving and prior to crashing his car, other than realizing he passed through Rialto and was in Baldwin Park at one point. He claimed not to remember exiting and reentering the freeway, although he claimed he decided to keep driving on the freeway to get away from Satan. (RT 359-61.) And while Petitioner claimed that, once he had crashed his car, had in essence a flashback to his military days and believed he was being told to die for his country "with honor," witnesses testified to belligerent behavior by him that was wholly inconsistent with his testimony, including that he ignored officer commands to exit his car, searched inside it for some time, stated that he would not exit the vehicle and "flipped off" the officers, and eventually got out of his car holding a can of beer and gestured for the officers to come and get him.

Reasonable minds could differ on whether this evidence – predicated on

Petitioner's selective recall of the events in question – was sufficient or not to support sending the insanity issue to the jury, but the Court does not believe that all fairminded jurists would conclude that the evidence was sufficient to require a jury determination. A fairminded jurist certainly could find this evidence insufficient to satisfy the first prong of the insanity test in California. Considering the record as a whole, the Court cannot conclude that the California Court of Appeal's determination that the trial court did not err in finding the evidence of insanity insufficient to meet Petitioner's burden of proof was objectively unreasonable under Section 2254(d)(1) or (d)(2).

Federal habeas relief is unavailable based on the Ground Six for the various reasons set forth above. The sixth claim, therefore, should be denied.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting this Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: May 29, 2018

GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the United States Court of Appeals for the Ninth Circuit, but may be subject to the right of any party to file objections as provided in the Local Civil Rules for the United States District Court for the Central District of California and review by the United States 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 the District Court enters judgment.

Appendix E:
Ninth Circuit Decision

FILED

MAR 1 2021

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAIME AYALA GALVEZ, Petitioner-Appellant, v. WILLIAM MUNIZ, Warden, Respondent-Appellee.	No. 18-56303 D.C. No. 2:16-cv-07626-AG-GJS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Andrew J. Guilford, District Judge, Presiding

Argued and Submitted November 16, 2020
Pasadena, California

Before: RAWLINSON and HUNSAKER, Circuit Judges, and ENGLAND,** District Judge.
Concurrence by Judge HUNSAKER

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

** The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.

Petitioner–Appellant Jaime Ayala Galvez (Galvez) challenges the district court's denial of his petition for habeas relief pursuant to 28 U.S.C. § 2254.[1]

Under the Antiterrorism and Effective Death Penalty Relief Act of 1996, habeas relief is available only if the state court decision being reviewed was contrary to or an unreasonable application of Supreme Court precedent. *See Murray v. Schriro*, 882 F.3d 778, 801 (9th Cir. 2018). Reviewing *de novo*, we affirm. *See id.*

The California Court of Appeal assumed without deciding, that requiring Galvez to testify before the prosecution completed the presentation of its case violated various constitutional rights. The state court nevertheless concluded that any error was harmless, as Galvez was unable to establish prejudice.

Galvez contends that the error here is structural error, and was not subject to harmless error review. However, the United States Supreme Court has not ruled that this type of trial error is structural in nature. *See Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) ("[T]his Court has held on numerous occasions that it is not an unreasonable application of clearly established Federal law for a state court to

[1] We decline to expand the certificate of appealability to include the uncertified ineffective assistance of counsel claim because Galvez failed to "make a substantial showing of the denial of a constitutional right." *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999) (citation and internal quotation marks omitted).

decline to apply a specific legal rule that has not been squarely established by this Court. . . .") (citations and internal quotation marks omitted).

Galvez argues in the alternative that the California Court of Appeal's harmlessness determination was erroneous because Galvez was prejudiced by being forced to testify before completion of the government's case. We disagree. The state court's rejection of Galvez's prejudice argument was not objectively unreasonable in light of the overwhelming evidence of guilt. *See Allen v. Woodford*, 395 F.3d 979, 992 (9th Cir. 2005), *as amended* ("[T]o the extent that any claim of error . . . might be meritorious, we would reject that error as harmless because the evidence of [the petitioner's] guilt is overwhelming.").

Finally, there is no clearly established federal law holding that the United States Constitution bars a trial court from directing a verdict of sanity when a defendant has not offered substantial evidence of insanity. *See Kahler v. Kansas*, 140 S. Ct. 1021, 1029 (2020) (reiterating that "[t]he takeaway [is] clear: [a] State's insanity rule is substantially open to state choice") (citation, alteration, and internal quotation marks omitted). In addition, California Penal Code § 29.8 barred

application of the insanity defense based on the use of drugs.[2] Therefore, the state court did not unreasonably apply Federal law in affirming the directed verdict of sanity against Galvez. *See White v. Woodall*, 572 U.S. 415, 426 (2014) (discussing unreasonable application of Supreme Court precedent).[3]

AFFIRMED.

[2] "In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances." California Penal Code § 29.8.

[3] Contrary to Galvez's contention, the expert witness did not testify that he was insane.

FILED

MAR 1 2021

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

Galvez v. Muniz, 18-56303
HUNSAKER, J., concurring:

I concur in the court's decision because the Supreme Court has not held it is structural error to require a criminal defendant to either testify or lose his right to testify before the prosecution has completed its case. *See Williams v. Taylor*, 529 U.S. 362, 381 (2000) ("If t[he Supreme] Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar."). I write separately, however, to address the seriousness of the state court's seemingly cavalier error.

Petitioner Jaime Galvez was indicted on multiple California firearms charges. At trial, one of the prosecution's witnesses finished testifying well before its next witness was available. To fill the one hour and fifteen minutes remaining before the noon break, the trial court asked if a *defense* witness was available to fill the time. Defense counsel replied that the only defense witness present was Galvez. The trial court inquired whether Galvez had "definitely decided to offer testimony." When defense counsel answered in the affirmative, the trial court indicated that Galvez should take the stand. Defense counsel did not object, and the trial court questioned Galvez to ensure he understood and wanted to waive his right to remain silent.

During this colloquy, Galvez explained that he wanted to testify "but not now." The trial court stated that all it needed to hear was that Galvez planned to

testify. It then explained, "I'm going to give you a few minutes to discuss this with your lawyer because I get the impression from you that you're somewhat equivocal in [waiving] your right to remain silent, that you feel should be conditional in some respect, and that is not the case." After Galvez conferred with his counsel, the trial court again asked whether he wanted to testify. Defense counsel responded that "[t]he defense wishes to proceed by having [Galvez] testify" but that Galvez was still "concerned about testifying now. He prefers to testify at the close of the case . . . ."

The trial court rebuffed Galvez's objection, stating:

> [A]gain . . . you can't put conditions on your testimony. Either you want to testify or you don't. And we have available time this morning, so if you wish to testify, now is your time. If not, then you certainly can exercise your right to remain silent and not testify, but I will not allow you to put conditions on your availability to testify.

The trial court asked a final time: "So, [Galvez], is it your desire to testify, yes or no?" Galvez responded that he wanted to testify, and he took the stand before the prosecution rested its case. Ultimately, Galvez was found guilty.[1]

As the majority notes, it is uncontroversial that the state court erred—the state appellate courts assumed error. At issue here is a criminal defendant's right to "remain inactive and secure, until the prosecution has taken up its burden and

[1] The relevant factual summary is largely drawn from the California Court of Appeal's factual summary, which is presumed to be correct. *See, e.g.*, *Slovik v. Yates*, 556 F.3d 747, 749 n.1 (9th Cir. 2009).

produced evidence and effected persuasion." *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12 (1978) (quoting 9 John Henry Wigmore, Evidence § 2511 (3d ed. 1940)). Embedded in the Due Process Clause, this right—often referred to inaccurately as the presumption of innocence[2]—"is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Id.* at 483 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

[2] The Supreme Court previously "held that the presumption of innocence and the equally fundamental principle that the prosecution carries the burden of proof beyond a reasonable doubt were logically separate and distinct." *Taylor*, 436 U.S. at 483 (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895)). It has since changed that view. *Id.* at 483 n.12 ("It is now generally recognized that the 'presumption of innocence' is an inaccurate, shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e., to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it.'") (citation omitted). The right to remain inactive and secure often is implicated when a trial court fails to instruct the jury on the presumption of innocence, *see, e.g.*, *id.* at 485–86, which—depending on the particular facts of the case—can violate the Due Process Clause. *See id.* at 490; *see also Kentucky v. Whorton*, 441 U.S. 786, 789 (1979) ("In short, the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution."). But there is a difference between instructing the jury on the presumption of innocence and preserving this "axiomatic" right throughout the trial proceedings (i.e., ensuring that the defendant is allowed to remain inactive and secure until the prosecution completes its case and presents sufficient evidence to meet its burden). *See Herrera v. Collins*, 506 U.S. 390, 399 (1993) ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."); *Delo v. Lashley*, 507 U.S. 272, 278 (1993) (per curiam) ("Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears."); *Betterman v. Montana*, 136 S. Ct. 1609, 1618 (explaining a conviction "terminates the presumption of innocence").

The origin of this right extends well beyond our constitutional founding. *See Coffin*, 156 U.S. at 454–56 (discussing ancient sources). One early American legal scholar explained:

> The operation and exact scope of [the presumption of innocence], both in civil and criminal cases, was very neatly expressed by the General Court (the Legislature) of Massachusetts so long ago as 1657, as follows: "Whereas, in all civil cases depending in suit, the plaintiff affirmeth that the defendant hath done him wrong and accordingly presents his case for judgment and satisfaction—it behoveth the court and jury to see that the affirmation be proved by sufficient evidence, else the case must be found for the defendant; and so it is also in a criminal case, for, in the eye of the law every man is honest and innocent, unless it be proved legally to the contrary."

James Bradley Thayer, The Presumption of Innocence in Criminal Cases, 6 Yale L.J. 185, 189 (1897). By ensuring that the defendant remains inactive and secure until *after* the prosecution rests its case, we "not only strengthen[] th[e] safeguard against wrongful conviction, but [we also] ensure[] . . . that the government carry the central burden of the litigation." LaFave et al., Accusatorial burdens, 1 Criminal Procedure § 1.5(d) (4th ed. 2020).

In fact, if the prosecution fails to present the necessary evidence to meet the elements of the crime charged, then the defendant is entitled to a judgment of acquittal at the close of the prosecution's case. *See* Fed. R. Crim. P. 29. Thus, only if the prosecution carries its initial burden of proof must the defendant consider

whether to present any evidence—let alone whether to testify.[3] And the decision whether to testify is a weighty one. As the Supreme Court has recognized, "[w]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972).

> [A] defendant's choice to take the stand carries with it serious risks of impeachment and cross-examination; it may open the door to otherwise inadmissible evidence which is damaging to his case, including, now, the use of some confessions for impeachment purposes that would be excluded from the State's case in chief because of constitutional defects. Although it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify, none would deny that the choice itself may pose serious dangers to the success of an accused's defense.

Id. at 609 (internal quotation marks and citations omitted). Considering the nature of this decision, a defendant must be given the *opportunity* to "meticulously balance the advantages and disadvantages of . . . becoming a witness in his own behalf." *Id.*

[3] By requiring a defendant to testify during the prosecution's case in chief (or not at all), a trial court also undermines other constitutional rights. Specifically, the privilege against self-incrimination. However, the history does not address the temporal aspect of whether a defendant can be required to testify *before* the prosecution rests its case because "at the time of framing of the Fifth Amendment and for many years thereafter the accused in criminal cases was not allowed to testify in his own behalf" at all. *McGautha v. California*, 402 U.S. 183, 214 (1972). Nonetheless, the purpose underlying the privilege is undoubtedly implicated. *See Couch v. United States*, 409 U.S. 322, 327 (1973) ("Historically, the privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's own mouth."); *see also Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (explaining the rationales underlying the privilege).

at 608 (quoting *United States v. Shipp*, 359 F.2d 185, 190 (6th Cir. 1966) (McAllister, J., dissenting)). A defendant is deprived of this opportunity when he is forced to decide whether to testify before the prosecution has completed its case.

The state argues that the trial court properly exercised its discretion in managing trial proceedings. That trial judges have broad power to control the proceedings before them, including the order of proof, cannot reasonably be questioned. *See id.* at 613 ("[N]othing we say here otherwise curtails in any way the ordinary power of a trial judge to set the order of proof."). But that power is not limitless; it must be exercised within the bounds of the law. *See generally United States v. Goode*, 814 F.2d 1353, 1355 (9th Cir. 1987) (explaining that trial courts have "broad discretion in determining the conduct and order of the [criminal] trial" but that such discretion is limited "when a party's rights are somehow prejudiced") (citing *Brookhart v. Janis*, 384 U.S. 1 (1966)).

Specifically, "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes [such restrictions] are designed to serve." *Rock v. Arkansas*, 483 U.S. 44, 55–56 (1987). Thus, even though a trial court may require a defendant to testify or rest his case when the defendant has been inefficient in its presentation of *the defense's case*, *see, e.g.*, *Loher v. Thomas*, 825 F.3d 1103, 1117 (9th Cir. 2016), that does not mean a trial court can require a defendant to testify during the prosecution's case in chief (or not at all) to fill a gap of time *in the*

prosecution's case. Not only is the defendant not responsible for the prosecutor's inefficiency and lack of planning, but—more important—a myopic focus on efficiency in this circumstance undermines the "axiomatic and elementary" legal doctrine of our criminal justice system: a defendant's right to remain inactive and secure until the prosecution completes its case and meets its burden. *See Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established . . . beyond a reasonable doubt."). On balance, the foundational requirement that the government independently carry its burden of proof cannot be subverted for such a trivial reason as presented here. The trial court's insistence that Galvez take the stand or lose his right to do so to fill a gap of time in the prosecution's case smacks of judicial whim, not legitimate trial management, as the state contends. *See Brooks*, 406 U.S. at 608.

However, because Galvez's case comes to us under habeas review of a state conviction, to prevail he must show not only that the trial court erred, but that the error has been clearly established as structural error by the Supreme Court. 28 U.S.C. § 2254(d); *Glebe v. Frost*, 574 U.S. 21, 23 (2014) (per curiam). I agree with the majority that Galvez cannot meet this burden.

Structural errors are those that "affect[] the framework within which the trial

proceeds, rather than being simply an error in the trial process itself." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (internal quotation marks and citation omitted). Such errors are found in a "very limited class of cases," *Johnson v. United States*, 520 U.S. 461, 468–69 (1997) (listing cases), and reversing decisions based on these errors serves to "ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial," *Weaver*, 137 S. Ct. at 1907. The Supreme Court has identified "three broad rationales" for deeming an error structural. *Id.* at 1908. First, structural error has been found where the right at issue is not designed to protect the accused from erroneous conviction but instead protects some other interest. *Id.* Denying a defendant the right to conduct his own defense is structural error because, although the defendant is more likely to receive an unfavorable outcome, he "must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* Second, structural error has been found where the effects of the error cannot be measured. *Id.* Because it will be "almost impossible" for the government to prove beyond a reasonable doubt the harmlessness of this error, "the efficiency costs of letting the government try to make the showing are unjustified." *Id.* A defendant's right to choose his own attorney falls under this rationale. *Id.* (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149–50 & n.4 (2006)). Finally, structural error has been found where the error is of a kind that always results in fundamental unfairness. *Id.* "For example, if an indigent

defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one." *Id.* (citing *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). These are not rigid categories, and "more than one of these rationales may be part of the explanation for why an error is deemed to be structural." *Id.* But "one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.*

Here, there are compelling arguments for treating the state court's error as structural. The right to "remain inactive and secure" has important purposes beyond protecting against erroneous convictions. It upholds the fundamental structure of our accusatorial system by ensuring that the government *independently* carries its burden of proof. *See In re Winship*, 397 U.S. 358, 364 (1970) ("Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt.") (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *see also* Fed. R. Crim. P. 29. Indeed, as discussed above, the requirement that the "proponent of the . . . charge must evidence it," *Taylor*, 436 U.S. at 483 n.12 (citation omitted), is the "foundation of the administration of our criminal law," *id.* at 483 (citation omitted). And the Supreme Court has long recognized that this requirement arises from the common law's "devotion to human liberty and individual rights," which is embodied in our constitutional order. *Coffin*,

156 U.S. at 460; *see also Estelle*, 425 U.S. at 503 ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice" that is protected by the Fourteenth Amendment."). There is also fundamental unfairness in allowing an error that undermines the most basic structure of our criminal prosecution system to stand. Defendants make strategic decisions about whether to go to trial and what to present at trial with the assumption that their right not to have to present a defense unless and until the prosecution makes a prima facie case is intact. It may be that in some cases forcing the defendant to testify before the prosecution's case is completed will make no difference to the outcome. But that is not always true. *See generally Estelle*, 425 U.S. at 504 ("The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny."). It is not hard to imagine how disrupting the proper order of proof could infect the reliability of an entire trial. But more to the point, the precise structure of criminal trials was established intentionally—choices were made to protect the liberty of the individual against the power of the state. Such important considerations should not be tossed aside for minor efficiency objectives.

Nonetheless, based on the current state of Supreme Court precedent, I cannot conclude that the state court's decision to require Galvez to testify (or lose his right

to do so) before completion of the prosecution's case "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Perhaps this means that the foundational principles undergirding a defendant's right to remain "inactive and secure" are so well-established and ubiquitous that what happened here is an outlier. One can hope.

I respectfully concur.