No. _____

IN THE

Supreme Court of the United States

JOHN ATLAS, JR.,

Petitioner,

v.

PATRICK COVELLO, WARDEN,

Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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NOT FOR PUBLICATION

FILED

AUG 5 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ATLAS, Jr., Petitioner-Appellant, v. ERIC ARNOLD, Warden, Respondent-Appellee.	No. 20-55452 D.C. No. 5:15-cv-01504-RSWL-RAO MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted July 7, 2021
Pasadena, California

Before: D.M. FISHER,** WATFORD, and BUMATAY, Circuit Judges.
Dissent by Judge WATFORD

Petitioner John Atlas, Jr., was convicted in California state court of dissuading witnesses by force or fear. The conviction stemmed from an incident in which Atlas made threatening remarks to a couple while Atlas's acquaintance was arrested for

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

** The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

stealing their car. At trial, Atlas testified that he had been diagnosed with schizophrenia and prescribed medication, which he had failed to take the night before the incident.

On direct appeal from his conviction, Atlas argued that trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), because he failed to call Atlas's psychiatrist as a witness to testify about his mental illness. The California Court of Appeal rejected his claim, holding that Atlas failed to show any deficient representation prejudiced him. The California Supreme Court summarily denied his petition for review.

Thereafter, Atlas sought habeas relief under 28 U.S.C. § 2254 in federal district court, which stayed proceedings while Atlas exhausted state habeas remedies. He then filed a habeas petition in the California Superior Court, which denied his petition for two reasons: (1) the petition was not verified, and (2) relief was barred under *In re Waltreus*, 62 Cal. 2d 218 (1965). Under the *Waltreus* rule, "claims that have been raised and rejected on direct appeal" cannot support state habeas relief. *In re Scoggins*, 9 Cal. 5th 667, 673 (2020). Finally, Atlas filed a separate, verified petition in the California Supreme Court, which summarily denied relief. The district court then denied relief, and Atlas appealed. We review de novo, *Lambert v. Blodgett*, 393 F.3d 943, 964–65 (9th Cir. 2004), and affirm.

In considering a habeas petition under § 2254, the first issue is whether we

owe AEDPA deference under § 2254(d) and, if so, to which decision deference applies. We start with the California Supreme Court's denial of state habeas relief, as the last relevant state court decision. *Fox v. Johnson*, 832 F.3d 978, 985–86 (9th Cir. 2016). Because it is an unreasoned decision, there is a presumption that the court adopted the last relevant reasoned state-court decision. *Id.* This "look-through" presumption, however, may be rebutted by "strong evidence." *Sandgathe v. Maass*, 314 F.3d 371, 377 (9th Cir. 2002).

Here, the last reasoned decision is the California Superior Court's denial of state habeas relief. But strong evidence rebuts the presumption that the California Supreme Court adopted the Superior Court's decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 802 (1991) (holding that "the nature of the disposition" and "surrounding circumstances" may inform the reasoning behind a state court's silent denial of relief). The Superior Court's first ground for denial—that the petition there was not verified—is clearly inapplicable to the decision in the California Supreme Court, where the petition was undisputedly verified.

The California Supreme Court also did not adopt the Superior Court's *Waltreus* ground for denial of relief. First, *Waltreus* does not apply to claims of ineffective assistance of trial counsel. *In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998). And we apply a "presumption that the state court knew and followed the law." *Lopez v. Schriro*, 491 F.3d 1029, 1037 (9th Cir. 2007). It is implausible that

the court unreasonably applied California law. Second, the state's briefing in the California Supreme Court did not even advance the *Waltreus* argument, unlike its briefing in the Superior Court. Third, the California Supreme Court granted California's motion to judicially notice the conviction of Atlas's mental-health expert, suggesting that the Supreme Court considered Atlas's ineffective assistance claim on the merits since the conviction only pertained to merits consideration. Finally, the California Supreme Court "denied" the petition, rather than "dismissed" it. *See Ylst*, 501 U.S. at 802 (noting that dismissal indicates a procedural decision, whereas a denial indicates a decision on the merits). This evidence rebuts the look-through presumption. We therefore presume that the California Supreme Court's denial was a decision on the merits. *See Harrington v. Richter*, 562 U.S. 86, 99 (2011).

Given the rebuttal of the look-through presumption, we now look to "the last related state-court decision that . . . provide[s] a relevant rationale" and apply AEDPA deference to it. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Because the Superior Court's decision here did not decide the ineffective assistance claim on the merits, *see Forrest v. Vasquez*, 75 F.3d 562, 564 (9th Cir. 1996) ("[A] *Waltreus* citation is neither a ruling on the merits nor a denial on procedural grounds."), we look further back to the Court of Appeal's decision on direct appeal.

Atlas contends, however, that the Court of Appeal decided a different

ineffective assistance claim than the one raised in his habeas petitions. In Atlas's view, his current claim was therefore never adjudicated on the merits and should be subject to de novo review. We disagree. Both on direct appeal and on collateral review, his claim is that trial counsel failed to sufficiently advance his mental illness defense to the mens rea element of his charges. This claim was decided in the Court of Appeal. Even supposing the minor differences between his ineffective assistance arguments are relevant, Atlas's habeas petition before the California Supreme Court raised the precise same issues as he does here and, as explained above, that court's decision was on the merits and is thus due deference.

Applying AEDPA deference to the Court of Appeal's determination that any deficient performance by Atlas's counsel did not prejudice him, we conclude that the decision is not unreasonable under § 2254(d). The court determined that Atlas's testimony made the jury "fully aware of his claims of schizophrenia and medications." Furthermore, the evidence against him was overwhelming—including Atlas's confession that he remembered telling the victims not to go to court and a credible officer's testimony as to his other threats—so that stronger evidence regarding his mental illness would have had no effect. A gang expert also testified that Atlas was an associate of a gang or its members and that his threatening statements would serve to raise his standing with the gang. Atlas has not shown that the Court of Appeal's conclusion is an unreasonable application of *Strickland*. *See*

White v. Woodall, 572 U.S. 415, 419 (2014) (Unreasonable applications are "objectively unreasonable," not "merely wrong" or even "clear[ly] erro[neous]." (simplified)).

The dissent would have remanded to the district court for an evidentiary hearing to develop the facts underlying Atlas's ineffective assistance claim. A petitioner is only entitled to an evidentiary hearing in federal district court if he alleges facts that, if proven, "would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). In undertaking this inquiry, federal courts must "take into account [AEDPA] standards in deciding whether an evidentiary hearing is appropriate." *Id.* "[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.* "[A]n evidentiary hearing is not required on issues that can be resolved by reference to the state court record.'" *Id.* (quoting *Totten v. Merkle,* 137 F.3d 1172, 1176 (9th Cir. 1998)).

Here, the California Court of Appeal determined that, due to the overwhelming evidence of Atlas's guilt, the addition of the expert witness testimony would only bolster the facts before the jury. We cannot say that this was an unreasonable determination of the facts under § 2254(d)(2). As the district court concluded, there was "no reasonable probability that presentation of the proffered evidence . . . would have raised a reasonable doubt in any juror's mind as to whether

Petitioner had the specific intent to commit the charged offenses," primarily because of the sharp contrast between Atlas's behavior at the time of the incident and his behavior when he is having an episode of mental illness. When suffering a psychotic episode, according to the record, Atlas acted in recognizably aberrant and incoherent ways, such as hitting the walls or his head and stating his fear of demons emerging out of the toilet. By contrast, at the time of the incident, Atlas waited to obtain his jacket from the victims' car, then clearly and specifically threatened the victims, warning them not to go to court and that he knew where the victims live. There is no evidence that Atlas was disconnected from reality. The threat was considered so genuine that an officer accompanied the victims home for their safety and the victims immediately moved from their home because they were frightened for their family. It was not unreasonable for the California Court of Appeal to hold there was no *Strickland* prejudice and that the result would have been the same even had Atlas's attorney presented additional evidence about Atlas's mental illness.

AFFIRMED.

FILED

AUG 5 2021

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

John Atlas, Jr. v. Eric Arnold, No. 20-55452

WATFORD, Circuit Judge, dissenting:

I agree with my colleagues that the look-through presumption has been rebutted and that the California Supreme Court's summary denial of Atlas's ineffective-assistance-of-counsel claim should be treated as a decision on the merits. "Under California law, the California Supreme Court's summary denial of a habeas petition on the merits reflects that court's determination that the claims made in the petition do not state a prima facie case entitling the petitioner to relief." *Cullen v. Pinholster*, 563 U.S. 170, 188 n.12 (2011). Thus, the only question before us is whether Atlas in fact stated a prima facie claim for relief. If he did, the California Supreme Court's denial of the claim without holding an evidentiary hearing would be based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). *See Nunes v. Mueller*, 350 F.3d 1045, 1053–56 (9th Cir. 2003).

Atlas's conviction for two counts of dissuading a witness by force or threat and for the benefit of a criminal street gang stems from a bizarre encounter on April 2, 2013. That morning, a stolen vehicle was found in the parking lot of a grocery store. Police arrested Dunell Crawford, who was later identified as a gang member. Atlas had received a ride from Crawford, an acquaintance of his, and waited with the police until the car owners arrived so that he could retrieve his

jacket from the car. When the car owners confirmed that the jacket was not theirs, police gave the jacket to Atlas and told him to leave. At that point, Atlas began walking back and forth, yelling, "Don't go to court," and "We know you live in Five Time" gang territory. He also made gunshot noises. All of this occurred in front of the police, who arrested Atlas as he continued yelling. A search of Atlas's person revealed two cigarette lighters, which prompted Atlas to yell that they would be used to burn the victims' house down. Atlas's jacket pocket contained medication that had been prescribed for his psychiatric condition.

At the time of the offense, Atlas was 43 years old and had no history of gang activity or membership. Atlas admits that he yelled "Don't go to court," but he does not remember the other threats and cannot otherwise explain his conduct. Although the victims felt frightened and intimidated, they also testified at trial that it seemed as though Atlas "was just drunk or something." According to a treatment note from the detention center, the day after the offense, while in custody, Atlas was "angry and hitting walls," reported having "auditory hallucinations," and "appeared to be responding to internal stimuli."

At trial, the State had to prove beyond a reasonable doubt that Atlas had the specific intent to dissuade the witnesses by force or threat and for the benefit of a gang. The trial court defined the specific intent requirement as acting "maliciously," meaning a person "unlawfully intends to annoy, harm, or injure

someone else in any way or intends to interfere in any way with the orderly administration of justice." Although Atlas's attorney presented a mental health defense, only Atlas testified in support of the defense, and the prosecution understandably characterized his testimony as "self-serving" without the support of even a mental health expert.

Atlas argued before the California Supreme Court on collateral review that his attorney rendered ineffective assistance of counsel by failing to retain a mental health expert and to investigate the basis for a potential mental health defense. Atlas asserted that a properly presented mental health defense would have rebutted the required specific intent for his conviction. Atlas supported his claim by submitting mental health records, declarations from his trial counsel and family members, and an expert evaluation prepared by Dr. Jason H. Yang. He also requested an evidentiary hearing to further develop the factual basis for his claim. The California Supreme Court nonetheless summarily denied his claim without first holding an evidentiary hearing.

In his federal petition for a writ of habeas corpus, Atlas requested an evidentiary hearing. When a state court has denied relief without holding an evidentiary hearing, a federal habeas court must grant a petitioner's request for an evidentiary hearing when three conditions are met. First, the petitioner must assert "a colorable claim," meaning the petitioner must "allege specific facts which, if

true, would entitle him to relief." *Earp v. Ornoski*, 431 F.3d 1158, 1167 & n.4 (9th Cir. 2005). Second, the petitioner must not have "failed to develop the factual basis of his claim in state court." *Hurles v. Ryan*, 752 F.3d 768, 791 (9th Cir. 2014); *see* 28 U.S.C. § 2254(e)(2). And third, the petitioner must show that the state court's decision was based on an unreasonable determination of the facts under § 2254(d)(2), a showing that is met if the petitioner can establish one of the circumstances described in *Townsend v. Sain*, 372 U.S. 293, 313 (1963). *Earp*, 431 F.3d at 1167. Atlas has met all three conditions.

First, Atlas has asserted a colorable claim of ineffective assistance of counsel. Under *Strickland v. Washington*, 466 U.S. 668 (1984), Atlas must establish both that his attorney's performance was deficient and that there is a reasonable probability that, but for those errors, the result of the proceeding would have been different. *Id.* at 687–88, 694. As explained below, Atlas has alleged specific facts that, if true, would entitle him to relief.

Dr. Yang's report and the mental health records demonstrate that Atlas has a history of serious mental health issues. Atlas first heard voices and saw ghosts as a child but was able to ignore them. After high school, he moved to England to play soccer and, by staying active, he was able to ignore the infrequent auditory or visual hallucinations. He raised a family and worked various jobs while in England until the age of 37, when he moved back to the United States. In 2009,

however, he began exhibiting severe psychiatric symptoms. Over the years, clinicians have diagnosed Atlas with variations of bipolar disorder, psychotic disorder, and schizoaffective disorder. Atlas was most recently diagnosed with schizoaffective disorder, bipolar type.

Atlas's mental health issues have contributed to previous run-ins with law enforcement and being placed on psychiatric holds. In December 2009, police brought Atlas in on his first documented psychiatric hold, when Atlas was hitting the walls and "afraid of demons coming out of the toilet." In February 2012, police brought Atlas to a hospital on another psychiatric hold after he walked into a McDonald's restaurant and "threatened to blow the place up."

Declarations from Atlas's family members corroborate his history of mental health issues. In late 2011 or early 2012, Atlas lived with his younger sister for a year and a half. She attested that Atlas acted strangely at times, "as though he had a split personality," and sometimes said "things that made no sense," including "things that would sound threaten[ing] to anyone who did not know him well." In late March and early April 2013, shortly before the offense conduct at issue here, Atlas lived with his grandmother. She attested that during that time, he was "acting very strangely" by blurting out "things that were weird or did not make sense," and would "talk about hearing voices."

Atlas's symptoms increased in severity shortly before his arrest on April 2,

2013. At the end of March 2013, Atlas went to a clinic to obtain a new medication regimen. A psychiatrist determined that he was in a manic state and presenting "building mania." Atlas was prescribed antipsychotic medication and mood stabilizers, but when police arrested him less than a week later, he had taken the antipsychotic medication for only three days after it had been prescribed. He did not take his medication the day before, the day of, or the day after the offense. He also had trouble sleeping and had not taken any of his mood-stabilizing medication.

Crediting these facts as true, as we must at this stage of the proceedings, the record before the California Supreme Court establishes that Atlas's trial counsel performed deficiently. "Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired." *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003). Here, according to a declaration from Atlas's attorney, he failed to hire a mental health expert or investigate the basis for a mental health defense despite knowing about Atlas's history of mental health issues. His attorney could not make a strategic decision to forego hiring a mental health expert without first conducting a reasonable investigation that would allow him to make an informed decision. *See Weeden v. Johnson*, 854 F.3d 1063, 1069–70 (9th Cir. 2017). Even Atlas's lack of receptiveness to a mental health defense did not absolve his attorney of the duty to

at least investigate the basis for such a defense. *See Douglas*, 316 F.3d at 1086.

The facts described above, if true, would also establish that Atlas was prejudiced by his attorney's deficient performance. Had this evidence been presented to a jury, "the probability of a different result is sufficient to undermine confidence in the outcome." *Weeden*, 854 F.3d at 1072; *see also Bloom v. Calderon*, 132 F.3d 1267, 1278 (9th Cir. 1997). Counsel's presentation of a mental health defense should have rested on at least one medical opinion, as even the prosecution remarked during trial. Dr. Yang's report placed Atlas's mental health history and his offense conduct in context. Dr. Yang opined that when Atlas made the threatening statements to the victims on the street and in front of a police officer, he was suffering from "bouts of mania, paranoia, and disorganized outbursts." As noted above, less than a week before his arrest, Atlas had started a new medication regimen, with which he was noncompliant at the time of the offense. And at that point, the treatment provider indicated that Atlas was already presenting with "building mania." Significantly, Dr. Yang emphasized in his report that it would have taken at least four weeks for the new medication to be fully effective. Furthermore, comparing the offense conduct with the past McDonald's incident when Atlas was brought in on a psychiatric hold reveals further similarities: Both times, Atlas was noncompliant with his medication and yelled what could be perceived as threats in public.

Had the evidence detailed above been presented to and credited by the jury, there is a reasonable probability that at least one juror would have concluded that Atlas did not harbor the specific intent required for the crime of dissuading a witness by force or threat and for the benefit of a gang. At the time of the offense, Atlas had no documented history of gang activity, and there is ample history of his mental health issues. Testimony from a qualified expert would have "added an entirely new dimension to the jury's assessment of the critical issue of . . . mens rea." *Weeden*, 854 F.3d at 1072.

The State argues that the California Supreme Court's summary denial was proper given credibility issues surrounding Dr. Yang. The California Supreme Court took judicial notice of state records showing that a few months after completing his psychiatric evaluation of Atlas, Dr. Yang pleaded guilty to making false material misrepresentations as part of an insurance fraud scheme. But when determining prima facie sufficiency, the California Supreme Court must draw all inferences in Atlas's favor and cannot make credibility determinations. *See Nunes*, 350 F.3d at 1055 n.7, 1056. Accordingly, any determination that Dr. Yang's report lacked credibility could not be made without granting Atlas an evidentiary hearing.

Second in the trio of conditions that Atlas must satisfy to obtain an evidentiary hearing in federal court, Atlas adequately developed the factual basis for his claim before the California Supreme Court. He submitted his mental health

records, declarations from his trial counsel and family members, and Dr. Yang's evaluation, thus providing the factual underpinning for his claim. He also requested an evidentiary hearing to further develop the facts supporting his claim. "A petitioner who has previously sought and been denied an evidentiary hearing has not failed to develop the factual basis of his claim." *Hurles*, 752 F.3d at 791.

Third, and finally, Atlas has established one of the circumstances described in *Townsend v. Sain*—namely, "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing." 372 U.S. at 313; *see Hurles*, 752 F.3d at 791; *Earp*, 431 F.3d at 1169. When a state court's decision turns on the resolution of a disputed issue of fact—particularly when, as here, credibility determinations are at issue—an evidentiary hearing will usually be required in order for the state court's fact-finding procedure to be "adequate to afford a full and fair hearing." *Earp*, 431 F.3d at 1167, 1169; *see also Perez v. Rosario*, 459 F.3d 943, 950 (9th Cir. 2006). An exception exists when the record before the state court "conclusively establishes" the fact at issue, but that is not the case here. *Perez*, 459 F.3d at 951. In addition to Dr. Yang's report, Atlas submitted ample other evidence supporting Dr. Yang's ultimate opinion that Atlas was suffering from a manic episode during the offense conduct. Certainly, nothing in the record conclusively refutes that view. Atlas was not required to prove his claim "with absolute certainty" before being granted an evidentiary hearing.

Nunes, 350 F.3d at 1054.

Because the California Supreme Court's decision was "based on an unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2), Atlas is entitled to an evidentiary hearing on his ineffective-assistance-of-counsel claim. *See Hurles*, 752 F.3d at 790–92; *Earp*, 431 F.3d at 1167. I would thus vacate the district court's judgment and remand for an evidentiary hearing.

United States Court of Appeals for the Ninth Circuit

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

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

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

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

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

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

(1) A. Purpose (Panel Rehearing):

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

B. Purpose (Rehearing En Banc)

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

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

(2) Deadlines for Filing:

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

(3) Statement of Counsel

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

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

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

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

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

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

Attorneys Fees

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

Petition for a Writ of Certiorari

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

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

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9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN ATLAS, JR.,

Petitioner,

v.

ERIC ARNOLD, Warden,

Respondent.

Case No. ED CV 15-01504 RSWL (RAO)

JUDGMENT

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

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

DATED: March 27, 2020

s/ RONALD S.W. LEW
RONALD S.W. LEW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN ATLAS, JR., Petitioner, v. ERIC ARNOLD, Warden, Respondent.	Case No. ED CV 15-01504 RSWL (RAO) ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, all of the records and files herein, and the Magistrate Judge's Report and Recommendation ("Report"). Further, the Court has made a *de novo* determination of those portions of the Report to which objections have been made.[1] While the Court accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge as modified, the arguments raised in Petitioner's Objections warrant discussion.

Petitioner attached eight exhibits to his Objections, some of which were not part of the state record previously lodged in this case and were not previously

[1] Federal Rule of Civil Procedure 72(b)(2) gave Respondent a right to respond to the objections, but the time to do so has elapsed and Respondent has filed neither a response nor a request for an extension of time.

presented in this action, including the Declaration of Amanda Gregory, Ph.D. (Ex. 1 to Objections, hereinafter "Gregory Decl.") and Dr. Gregory's Psychological Assessment Report (Ex. 2 to Objections, hereinafter "Gregory Assessment"). "[A] district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation." *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000). The Court has exercised its discretion and considered the new evidence, but concludes that the new evidence does not warrant departure from the conclusions articulated in the Report.[2]

According to the new evidence, Dr. Gregory, a neuropsychologist, evaluated Petitioner on October 10 and 11, 2019, interviewed family members and reviewed family declarations, reviewed Petitioner's medical and legal records, and considered Petitioner's school district records. (Gregory Decl. at ¶ 3; Gregory Assessment at 19.) She diagnosed Petitioner with Schizoaffective Disorder, Bipolar Type, Multiple Episodes, Currently in Full Remission, and Alcohol Use Disorder, In Sustained Remission, In a Controlled Environment. (Gregory Decl. at ¶ 5b.) She opined that at the time of the incident on April 2, 2013, Petitioner was experiencing symptoms of Schizoaffective Disorder, Bipolar Type, and such symptoms "appear to have had a significant impact on his mental state and behavior" at the time of the incident. (*Id.* at ¶¶ 5c-d.) She further opined that at the time of the incident, Petitioner exhibited symptoms similar to those exhibited during prior incidents of acute mania and psychosis, including mood swings, irritability, agitation, verbal aggression, impulsivity, poor judgment, grandiose thoughts, and psychotic symptoms. (*Id.* at ¶¶ 7f, 7k, 7m.)

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[2] Petitioner asserts that Dr. Gregory's assessment was not presented earlier because it was obtained in light of the allegations against Petitioner's other examining expert, Dr. Jason Yang. (Obj. at 8.) The Court notes a ten-month delay between Dr. Gregory's first communication with Petitioner's counsel in April 2019 and Dr. Gregory's report dated February 14, 2020. (Gregory Assessment at 18.)

Petitioner contends that his evidence in support of a mental state defense, "further corroborated by Dr. Gregory's report and the totality of the documents she and Dr. [Y]ang relied on," shows that trial counsel's deficient performance prejudiced Petitioner. (Obj. at 9-24.)

The Court concludes that there remains no reasonable probability that presentation of the proffered evidence, including Dr. Gregory's declaration, would have raised a reasonable doubt in any juror's mind as to whether Petitioner had the specific intent to commit the charged offenses. The jury heard strong evidence that Petitioner intended to dissuade the victims from testifying and to aid and assist the Five Time gang at the time of the incident. (1 RT at 9-33, 42-51.) Petitioner argues that his manic episode continued through the time of the incident as demonstrated by his rapidly shifting mood, his loud and aggressive threats, and his lack of impulse control and poor judgment. (Obj. at 17-18.) Even if the jury had heard that Petitioner exhibited some symptoms of schizoaffective disorder, bipolar type at the time of the incident, no reasonable juror would have concluded that Petitioner was having a manic episode, given the stark contrast between Petitioner's behavior when he is having a manic episode and when he is not. Thus, there is no reasonable probability that the outcome of the proceeding would have been different had the proffered evidence been introduced.

Accordingly, the Court accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge, with the following modifications, which are not material to the Court's decision:

- At page 1, line 27, strike the "a" between "stayed" and "term," so the phrase reads, "a stayed term of five years."
- At page 19, lines 9-12, strike "The Court concludes that there is no reasonable probability that presentation of the proffered mental defense evidence would have convinced the jury that Petitioner actually lacked the specific intent to dissuade the victims and to aid and assist a gang" and replace with "The Court

concludes that there is no reasonable probability that presentation of the proffered mental defense evidence would have raised a reasonable doubt in a juror's mind as to whether Petitioner had the specific intent to commit the charged offenses."

IT IS ORDERED that the Report and Recommendation is adopted as modified, the First Amended Petition is denied, and Judgment shall be entered dismissing this action.

DATED: March 27, 2020

s/ RONALD S.W. LEW
RONALD S.W. LEW
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN ATLAS, JR., Petitioner, v. ERIC ARNOLD, Warden, Respondent.	Case No. ED CV 15-01504 RSWL (RAO) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

I. INTRODUCTION

In December 2013, a jury in the San Bernardino County Superior Court found John Atlas, Jr. ("Petitioner") guilty of two counts of dissuading a witness by force or threat and for the benefit of a criminal street gang, which stemmed from an incident involving a vehicle that was stolen by another person. (2 CT 263-68.) Petitioner admitted he suffered a prior conviction for which he had served a prison term, and the trial court sentenced him to seven years to life for the first count, a concurrent term of seven years to life for the second count, a stayed a term of five years for the gang allegation, and a term of one year for the prior felony conviction. (*Id.* at 280.)

Petitioner appealed his conviction and sentence to the California Court of Appeal, which affirmed the judgment in a reasoned decision.[1] (Lodg. Nos. 3, 4.) Thereafter, Petitioner filed a petition for review in the California Supreme Court, which was summarily denied. (Lodg. No. 6.)

On July 27, 2015, Petitioner, proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 in this Court. (Dkt. No. 1.) On November 13, 2015, after briefing had been completed, the Court appointed counsel to represent Petitioner. (Dkt. No. 13.) On July 14, 2016, Petitioner sought and was granted leave to file a First Amended Petition, which was filed simultaneously. (Dkt. No. 20-22.) The action was stayed to allow Petitioner to exhaust all of his unexhausted claims for habeas corpus relief in state court. (Dkt. No. 32.) Petitioner filed a petition for writ of habeas corpus in San Bernardino County Superior Court alleging ineffective assistance of counsel. (Lodg. No. 7.) The court denied the petition on procedural grounds. (Lodg. No. 8.) Petitioner then filed a petition for writ of habeas corpus in the California Supreme Court. (Lodg. No. 9.) After receiving an informal response and reply, the state supreme court denied relief. (Lodg. Nos. 10, 11.) On February 4, 2019, the Court lifted the stay and ordered Respondent to file an Answer to the FAP. (Dkt. No. 46.) On March 12, 2019,

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[1] Petitioner's appellate counsel, who had been appointed by the court, submitted a brief pursuant to *People v. Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071 (1979), and *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). (Lodg. No. 3.) The California Court of Appeal offered Petitioner the opportunity to file a brief of his own, which he did. In that filing, Petitioner argued ineffective assistance of counsel on the part of both his trial and appellate counsel. (Lodg. No. 4 at 8; Lodg. No. 5 at Ex. B.)

The Court takes judicial notice of the state court records. *See* Fed. R. Evid. 201(b)(2) (providing that a court may take judicial notice of adjudicative facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *Harris v. Cty. of Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (noting that a court may take judicial notice of federal and state court records).

Respondent filed an Answer to the FAP ("Answer"). (Dkt. No. 47.) On June 13, 2019, Petitioner filed a Traverse ("Traverse"). (Dkt. No. 53.)

II. PETITIONER'S CLAIM

Petitioner's sole ground for relief is that trial counsel rendered ineffective assistance by failing to investigate Petitioner's mental health to support a mental health defense. (FAP at 26-45.)

III. FACTUAL SUMMARY

The following factual summary is taken from the California Court of Appeal's opinion on direct appeal. Because Petitioner has not rebutted these facts with clear and convincing evidence, they are presumed to be correct. 28 U.S.C. § 2254(e)(1).

Prosecution Evidence

> The stolen vehicle was found in a parking lot. When the responding police officer arrived, the officer saw Dunell Crawford exit the vehicle. The officer arrested him, and the vehicle's owners were called to retrieve their vehicle. Petitioner had left his jacket in the vehicle and had asked the police officer if he could retrieve it, but Petitioner was not allowed to do so until after the vehicle's owners arrived and confirmed that the jacket was not theirs. Once confirmed, the officer gave Petitioner the jacket and told him to leave.
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> At that point, [Petitioner] began walking back and forth and yelling, "Don't go to court," or "You better not go to court," "We know you live in Five Time," and that they were going to come after the [vehicle's owners]. [Petitioner] also made "gunshot noises." "Five Time" is a gang on the west side of San Bernardino. Mr. [victim] became upset and "wanted to hurt [Petitioner]." The officers, however, stepped between them and kept them apart. The officers then handcuffed [Petitioner], who continued yelling at the [victims]. The officers searched [Petitioner] and found two cigarette lighters. When

the lighters were placed on the roof of one of the police vehicles, [Petitioner] yelled, "That's to burn your f---in' house down."

[The victims] felt frightened and intimidated. Officer Kokesh, at their request, accompanied them home. Neither wanted to come to court, but felt they had been compelled to do so. The [victims] moved from the residence immediately after the incident because they were frightened for their family. Whoever took the car knew where they lived, so [Petitioner's] threats appeared genuine.

Nelson Carrington, a San Bernardino police officer, testified as a gang expert. The Five Time Hometown Crips were a "notorious" criminal street gang consisting of about 80 members operating in San Bernardino. . . . . Members of the gang call the area "Five Times," or "the Five." The [victims'] . . . residence was in the Five Time territory. . . . The gang's primary activities included narcotic sales, possession of firearms, vehicle thefts, witness intimidation, and making criminal threats. Members of the gang had committed the "predicate" offenses necessary to show a pattern of criminal gang activity.

While Officer Carrington did not know if [Petitioner] was a member of the Five Time gang, he opined that [Petitioner] was an associate of the gang or its members. His opinion was based on the fact that Dunell Crawford was a documented member of the gang, and [Petitioner] made threatening statements while Crawford was still present, which would serve to raise [Petitioner's] standing with the gang. Also, [Petitioner's] use of the term "we" when speaking about knowing where the victims lived indicated that he was "with" the gang and acting for them. Answering a hypothetical question mirroring the facts of this case, the officer testified that a person who did what [Petitioner] did would have acted in association with, and for the benefit

of, a criminal street gang. Using the gang's name and the gang's territory to threaten the [victims] was a way of sending a specific message to them.

Defense Evidence

[Petitioner] testified in his own defense. He was raised on Manteca Street in Rialto. He left the country for a time after high school, but came back in 2005. Before he left the country, he had never heard of the Five Time gang, but did hear about the gang after his return "by associating with people, talking to certain people."

When [Petitioner] was arrested in this case, he had the prescription medications Risperdal, Depakote and Benadryl in his possession. Risperdal was a psychiatric medication; he had been diagnosed with schizophrenia in 2009. [Petitioner] took Risperdal at night to help him sleep. However, he did not take the medication the night before he was arrested because he was meeting a girl and did not want to go to sleep.

[Petitioner] took a bus from Rialto to San Bernardino to meet the girl and did not sleep the night before his arrest. He first saw the [victims'] vehicle where it was parked when he was arrested. Dunell was outside the car. [Petitioner] knew Dunell and approached him to see if [Petitioner] could get a ride. [Petitioner] thought Dunell was selling drugs because the girl he was with "wanted some drugs," specifically methamphetamine.

[Petitioner] knew that Dunell was a member of the Five Time gang because he had mentioned it. [Petitioner] did not think that the [victims'] car belonged to Dunell, but he did not know whether it was stolen. Dunell had the key, and "some drug dealers, they can give people drugs for them to loan them their car."

> When the police arrived, [Petitioner] was in a doughnut shop getting a doughnut and soda. He saw the police get Dunell out of the car at gunpoint and thought they were arresting him for drug sales. [Petitioner] tried to get his coat out of the car.
>
> [Petitioner] did not know who the [victims] were when they got to the parking lot, but remembered yelling at them. He acknowledged that he yelled, "Don't go to court" more than once. He, however, did not remember saying, "We know you live in the Five," or that the lighter was to burn their house down. Likewise, he did not remember making a noise like a gunshot. He did know that the Five Time gang had a territory and it was called "the Five."
>
> [Petitioner] could not explain why he did what he did, "because what was said shouldn't have been said." Also, he did not want to put anyone in fear of going to court. Also, he did not want to help the gang.

(Lodg. No. 4 at 4-7.)

IV. STANDARD OF REVIEW

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

A state court's decision is "contrary to" clearly established federal law if: (1)

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

A state court's decision is based upon an "unreasonable application" of clearly established federal law if it applies the correct governing Supreme Court law but unreasonably applies it to the facts of the prisoner's case. *Williams*, 529 U.S. at 412-13. A federal court may not grant habeas relief "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be *unreasonable*." *Id.* at 411 (emphasis added).

In determining whether a state court decision was based on an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), such a decision is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010). The "unreasonable determination of the facts" standard may be met where: (1) the state court's findings of fact "were not supported by substantial evidence in the state court record"; or (2) the fact-finding process was deficient in some material way. *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (citing *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004), *abrogated on other grounds by Murray v. Schriro*, 745 F.3d 984, 999-1000 (9th Cir. 2014)).

When a relevant state court decision on the merits does not come accompanied with reasons, a federal habeas court should "look through" to the last related state-

court decision that provides a "relevant rationale" and "presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 584 U.S. —, 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018). There is a presumption that a claim that has been silently denied by a state court was "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d), and that AEDPA's deferential standard of review therefore applies, in the absence of any indication or state-law procedural principle to the contrary. *See Johnson v. Williams*, 568 U.S. 289, 298, 133 S. Ct. 1088, 1094, 185 L. Ed. 2d 105 (2013) (citing *Richter*, 562 U.S. at 99, 131 S. Ct. 770).

Here, Petitioner raised his current ineffective assistance of counsel claim for the first time in his state habeas petitions. Petitioner's ineffective assistance of counsel claims on direct appeal to the California Court of Appeal and on petition for review to the California Supreme Court did not include new sub-claims and evidence that Petitioner presented to the state courts on habeas review.[2] On habeas review, the Superior Court denied Petitioner's claim in a reasoned opinion based on lack of verification and *In re Waltreus*, 62 Cal. 2d 218, 42 Cal. Rptr. 9, 397 P.2d 1001 (1965), and the California Supreme Court denied the claim without comment or citation.[3] (Lodg. Nos. 10, 11.) Petitioner argues that the California Supreme Court did not adjudicate his claim on the merits and the "look through" doctrine does not apply because the Superior Court relied on an inapplicable procedural rule. Respondent

[2] On direct appeal, Petitioner argued ineffective assistance of counsel on the part of both his trial and appellate counsel. (Lodg. No. 4 at 8.; Lodg. No. 5, Exh. B.) Petitioner argued that his trial counsel was ineffective due to counsel's failure to call Petitioner's psychiatrist as a witness to corroborate Petitioner's own testimony, and also to investigate whether Petitioner had been out of the country prior to the incident. (Lodg. No. 4 at 9-11.) Petitioner argued that his appellate counsel was ineffective because counsel had filed a *Wende* brief rather than arguing that trial counsel had been ineffective. (*Id.* at 11-12.)

[3] Counsel for Petitioner verified the petition filed in the California Supreme Court. (Lodg. No. 9 at 41.)

argues that the Supreme Court did reach the merits.[4] The Court need not resolve the appropriate standard of review because it finds that even under *de novo* review, Petitioner's claim fails. *See Burghuis v. Thompkins*, 560 U.S. 370, 390, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010) ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review.").

V. DISCUSSION

Petitioner contends that trial counsel's performance was deficient for not investigating and then presenting evidence in support of Petitioner's diminished actuality defense.[5] (FAP at 37.) Specifically, Petitioner argues that (1) counsel should have obtained and introduced Petitioner's mental health records; (2) counsel should have retained a mental health expert to evaluate Petitioner and then testify as to Petitioner's diagnoses and how they could affect his ability to formulate intent; and (3) counsel should have interviewed and called to testify members of Petitioner's family, who could corroborate Petitioner's testimony about his schizophrenia and speak to Petitioner's mental state around the time of the incidents leading to Petitioner's arrest. (*Id.* at 37, 40-41.) Respondent argues that the state court reasonably rejected Petitioner's claim. (Answer at 11-15.)

A. Background

At a pre-trial hearing, Petitioner was represented by counsel different from his

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[4] Both parties agree that the *Waltreus* bar against raising claims that were previously rejected on appeal does not apply to ineffective assistance of counsel claims on habeas (*People v. Tello*, 15 Cal. 4th 264, 267, 62 Cal. Rptr. 2d 437, 933 P.2d 1134 (1997)), and thus, the Superior Court relied on an inapplicable procedural rule. (Answer at 10; Traverse at 13.)

[5] "To support a defense of 'diminished actuality,' a defendant presents evidence of . . . mental condition to show he 'actually' lacked the mental states required for the crime." *People v. Clark*, 52 Cal. 4th 856, 880 n.3, 131 Cal. Rptr. 3d 225, 261 P.3d 243 (2011) (citation omitted).

trial counsel who is the subject of his claim. Petitioner's counsel stated, "[T]here are mental health issues as to [Petitioner]. The next step is for me to declare a doubt as to [Petitioner's] competence." (1 RT at 1.) The trial court suspended criminal proceedings against Petitioner and referred him to two doctors for a report on whether Petitioner was competent to stand trial. (*Id.* at 2-3.)

At a subsequent pre-trial hearing, Petitioner was again represented by counsel different from his trial counsel. The trial court ruled that based on the reports of both doctors, Petitioner was competent to stand trial, and the trial court reinstated criminal proceedings. (1 RT at 5.)

During trial, outside the presence of the jury, trial counsel told the court that Petitioner might testify regarding his medical history or condition, specifically his diagnosis of schizophrenia and treatment with Risperdal, Depakote, and Benadryl. (1 RT at 93-94.) Trial counsel represented that "the defense on the case is that [Petitioner] did not take his medication the night before this event because it puts him to sleep rather quickly, and when he doesn't take it, stress causes him to have schizophrenic events, but more often or easier than would have occurred if he had been on his medication." (*Id.* at 94.) The prosecution objected to a lay witness testifying that "this type of thing is common for people that have schizophrenia when [Petitioner] has no medical credential to testify in that manner." (*Id.* at 95.) The trial court ruled that Petitioner could testify as to his medical history, his condition, and the medications he takes, "and if that goes to a specific intent here and the jury agrees, that would be one thing." (*Id.* at 96.) The trial court further stated:

> Certainly, the weight of the evidence would be something that the prosecution could address inasmuch as there is no expert opinion as to what schizophrenia is, what it may cause in the absence of medication. And certainly the defendant can't testify as to that as an expert. He is testifying as to his own medical history and the fact that he takes these medications and that it is his belief that because he wasn't taking these

> medications that he did not have the intent to commit the offenses charged here, it being an intent issue and not a diminished capacity issue. I'll allow the defense to do that.

(*Id.*)

Petitioner testified at trial as to his diagnosis of paranoid schizophrenia. (1 RT at 138, 163.) He further testified that he had Risperdal, Depakote, and Benadryl with him when he was arrested, but he had not taken his "psych" medications the night before he was arrested because they made him go to sleep and he was meeting someone. (*Id.* at 138-39.) He testified that "what was said shouldn't have been said" and he "didn't want to put nobody in no fear of not going to court or anything." (*Id.* at 149.) On redirect, he testified that he was arrested for auto theft on a previous occasion when he had not taken his antipsychotic medication, and he was convicted. (*Id.* at 163.)

Both parties agreed that a jury instruction for a mental impairment defense to specific intent or mental state was appropriate. (1 RT at 167.)

In the defense closing argument, trial counsel argued that Petitioner was "a schizophrenic, and he had a schizophrenic event that day. And it's unfortunate for the people that he had contact with that day that he had a schizophrenic event, but he certainly did not have the specific intent to help a gang get away with committing crimes." (1 RT at 213.)

In the prosecution's rebuttal, the prosecutor emphasized that a psychiatrist had not testified about schizophrenia and that the jury had heard only "self-serving statements" from Petitioner that he had a diagnosis and he had some medication. (1 RT at 214-15.)

On direct appeal, the California Court of Appeal affirmed, finding that Petitioner had failed to demonstrate that trial counsel's alleged deficient representation prejudiced him, given that the evidence against Petitioner was

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overwhelming and the jury was aware of Petitioner's claims of schizophrenia, the medications he took, and his absence from San Bernardino. (Lodg. No. 4 at 9-11.)

With his state court habeas petitions, Petitioner submitted new exhibits in support of his petitions, including mental health evaluations and records and declarations from his trial counsel, an expert, and family members. (FAP Exhibits; Dkt. No. 29; Lodg. Nos. 7, 9.) Trial counsel declared that he did not obtain Petitioner's mental health records, arrange for a mental health expert to evaluate him, or present testimony of his family members because he "did not think it would help the case and because [Petitioner] was not receptive to a mental health defense." (FAP, Exh. B.) Trial counsel further stated that when he first began representing Petitioner, trial counsel did not know he had a history of mental health problems, but became aware of Petitioner's history of mental health problems by the time trial started. (*Id.*) Trial counsel presented a mental health defense by having Petitioner testify that he had been previously diagnosed as paranoid schizophrenic and had been prescribed Risperdal, Depakote, and Benadryl to take each night and that Petitioner had not taken those medications the night before the incident. (*Id.*)

Dr. Yang, an expert forensic and industrial psychiatrist, declared that he reviewed Petitioner's mental health records and the police reports from the incident, and interviewed Petitioner and his family.[6] (FAP, Exh. L.) He stated that had he been called to testify at Petitioner's trial, he would have opined that Petitioner suffers from schizoaffective disorder and, at the time of the incident, Petitioner was suffering from disorganized delusional thoughts and "lack of control impulse and speech."

[6] Respondent argues that Dr. Yang lacks credibility, as he recently pleaded guilty, in a Riverside Superior Court case, to multiple counts of making false material representations in order to obtain workers' compensation. (Answer at 14.) Petitioner acknowledges the plea agreement and argues that Respondent has not challenged the conclusions presented in Dr. Yang's report and any debate regarding Dr. Yang's report may be resolved in an evidentiary hearing. (Traverse at 7 n.1.) For the purposes of the Court's analysis here, the Court finds that even taking Dr. Yang's report at face value, Petitioner's claim fails.

(*Id.*; Dkt. No. 29 at Exh. K.) Dr. Yang also concluded that "[i]t is a great possibility that [Petitioner] suffers from psychotic illness that was untreated, and he was not in touch with reality and made nonsensical random statements." (Dkt. No. 29 at Exh. K at 96.)

B. Federal Law and Analysis

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

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

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

The Court may reject an ineffective assistance claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. *See, e.g.*, *Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.");

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Gentry v. Sinclair, 705 F.3d 884, 889 (9th Cir. 2013) (noting that failure to meet either prong is fatal to an ineffective assistance claim).

1. Deficient Performance

"Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired." *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003) (citation omitted). Even where a defendant is adamant against introducing psychological issues at trial, counsel is not "absolve[d] . . . of all responsibility for further investigation into a mental health defense." *Id.* at 1086; *see also Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1994) ("An attorney cannot blindly follow a client's demand that his [mental state] not be challenged . . . and end[ ] further inquiry regarding [the defendant's] mental fitness when [the defendant] refused to submit to psychiatric examination.").

Here, trial counsel was on notice of Petitioner's possible mental condition and should have investigated it further prior to trial. Petitioner was found with psychiatric medications in his jacket at the time of his arrest; and his file from his competency hearing would have shown that although Petitioner was determined competent to stand trial, he was diagnosed with Bipolar I Disorder and prescribed medication that restored his competence to stand trial, he received psychiatric treatment for hallucinations and paranoia since he arrived at the Central Detention Center, and he experienced auditory hallucinations and paranoia just before and after the incident. (Lodg. No. 4 at 6-7, 9-10; Dkt. No. 9 at 4-10; FAP, Exh. A at 6.) Trial counsel acknowledged that between the time he first began representing Petitioner and the time trial started, he was aware Petitioner had a history of mental health problems. (FAP, Exh. A at 6.) Trial counsel also acknowledged that he was aware that Petitioner's father had been found not guilty by reason of insanity in a past criminal case. (*Id.*) During trial, trial counsel advised the trial court that Petitioner was going to testify regarding his paranoid schizophrenia and the medications he took for it, and Petitioner so testified. (1 RT at 94-95, 138-39.)

Respondent argues that Petitioner has failed to establish deficient performance. Respondent contends that trial counsel could have reasonably determined that the circumstances of the offense did not support a mental health defense. (Answer at 12.) Trial counsel's decision to have Petitioner testify regarding his diagnosis of paranoid schizophrenia and his prescribed "psych" medications contradict that theory. A mental health expert could have bolstered Petitioner's testimony by explaining what paranoid schizophrenia is and what it may cause in the absence of medication. Respondent further argues that even if trial counsel were obligated to investigate Petitioner's mental health, deficient performance is not shown because "[i]t is not clear that [trial] counsel could obtain medical records absent his client's affirmative consent . . . [a]nd evaluation by an expert would be of little use if [Petitioner] were uncooperative." (Answer at 13.) This argument, too, is faulty. Even assuming trial counsel could not have obtained Petitioner's medical record without his consent and Petitioner would not have cooperated at a mental health evaluation, trial counsel would have been aware from the mental competency evaluations that Petitioner suffered from severe and persistent mental illness that manifested just before and after the incident. (FAP, Exh. A at 4-11.) By failing to investigate and present evidence of Petitioner's mental condition, trial counsel's performance was deficient. *See Wiggins v. Smith*, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) ("[W]e focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [defendant's] background was *itself reasonable*.") (citation omitted); *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc) ("Judicial deference to counsel is predicated on counsel's performance of sufficient investigation and preparation to make reasonably informed, reasonably sound judgments.") (citing *Strickland*, 466 U.S. at 691).

2. Prejudice

Petitioner fails, however, to satisfy the prejudice prong of the *Strickland* analysis. The proffered medical records, family-member testimony, and expert

testimony do not demonstrate a reasonable probability that the result of the proceeding would have been different had the evidence been introduced. The proffered medical records support a paranoid schizophrenia diagnosis, but describe behavior not consistent with Petitioner's behavior at the scene of the incident. For example, when he was arrested for driving a stolen vehicle in December 2009, he was recommended for a California Welfare and Institutions Code Section 5150 psychiatric hold because he "began to bang [and] hit the walls [and was] afraid of demons coming out of the toilet." (Dkt. No. 29, Exhs. C, D.) In October 2011, he was not taking medication and he was placed on suicide watch for hitting his head on a wall. (*Id.* at Exh. F at 23.) He was described as "standing at door; threatening [and] swear[ing] at staff; threatening to kick door" and making suicidal statements. (*Id.* at Exh. F at 24-26.) In December 2011, he was admitted on a Section 5150 hold for lunging at another patient and calling for grandma, Terrell and others, saying that they were around him, and for exhibiting violent behavior. (*Id.* at Exh. F at 31, 33, 39.) Petitioner was admitted on a Section 5150 hold in February 2012 for running into a McDonalds, after he had run into a busy street and nearly got struck by a car, and threatening to blow the building up. (*Id.* at Exh. H at 53-56, 59.) He had not been taking his medication and was described as "very agitated" and actively hallucinating. (*Id.*) On April 3, 2013, the day after the incident, Petitioner was angry and hitting walls and reported auditory hallucinations. (*Id.* at Exh. J at 77.)

The proffered family-member testimony similarly supports a paranoid schizophrenia diagnosis, but does not describe behavior consistent with how Petitioner acted at the scene of the incident. Petitioner's grandmother, with whom Petitioner lived at the time of the incident, stated that Petitioner would "blurt out things that were weird or did not make sense," say he heard voices, and once went on top of the roof and "shouted weird things." (FAP, Exh. M.) Petitioner's sister, with whom Petitioner lived in late 2011 or early 2012 for one and a half years, stated that Petitioner acted "weird" and would "often pace back and forth and would

periodically laugh to himself or talk to himself" or "say things that made no sense." (*Id.* at Exh. N.)

Nor does Dr. Yang's proffered testimony demonstrate a reasonable probability that the result of the proceeding would have been different had the evidence been introduced. To the extent that Dr. Yang opines that Petitioner lacked the requisite intent, such testimony is prohibited at trial. CAL. PENAL CODE § 29;[7] *People v. Nunn*, 50 Cal. App. 4th 1357, 1364, 58 Cal. Rptr. 2d 294 (1996) ("[S]ection 29 . . . prohibits an expert from offering an opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time he acted."). As with the proffered medical records and family-member testimony, Dr. Yang's proffered testimony supports a paranoid schizophrenia diagnosis, but does not describe behavior consistent with how Petitioner acted at the scene of the incident, despite his conclusions that either Petitioner was suffering from delusional thoughts and lack of control at the time of the incident or that there was a "great possibility" that Petitioner was not in touch with reality and made nonsensical random statements at the time of the incident. (Dkt. No. 29 at Exh. K.)

As Respondent argues, the proffered evidence illustrates the stark contrast between when Petitioner is suffering a psychotic event and when he is not. No witnesses to the incident described Petitioner as hitting his head against a wall, running into busy streets, climbing a roof, calling for people who were not there, acting afraid of demons, complaining of hearing voices, or making non-sensical

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[7] California Penal Code § 29 provides:

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

CAL. PENAL CODE § 29.

statements, as he did during his prior schizophrenic events. Instead, the victims testified that Petitioner was loud and threatening when he looked at them and said, "Don't go to court;" mentioned "The Five" gang and said "we" or "they" were going to come after them; and made gunshot noises. (1 RT at 9-33.) The victims took Petitioner's threats seriously and immediately moved with their nine children out of their house and changed schools because they were in fear. (*Id.* at 20.) Sergeant Kokesh testified that when he arrived at the scene, Petitioner asked to get his jacket out of the vehicle and waited until the victims arrived because Sergeant Kokesh told him to wait. (*Id.* at 42-43.) After Petitioner got his jacket, Sergeant Kokesh told him to leave. (*Id.* at 44.) Instead, Petitioner came toward the victims and yelled, "Don't go to court. We know you live in Five Time." (*Id.* at 45-46.) After he yelled the threat three times, he was arrested for intimidating a witness, but continued to be angry and direct his outbursts at the victims. (*Id.* at 47-48.) When a lighter was found on Petitioner, Petitioner yelled clearly in the direction of the victims, "That's to burn your f---in' house down." (*Id.* at 50.) Sergeant Kokesh followed the victims home because they were afraid and he felt Petitioner's threats were "very credible." (*Id.* at 51.) None of this evidence supports a theory that during the incident, Petitioner was suffering from paranoid delusions and hallucinations, resulting in random, non-sensical and uncontrolled speech, behavior, and thoughts.

Nor does the proffered evidence that Petitioner may have had schizophrenic episodes before or after the incident establish that Petitioner had a schizophrenic episode during the incident. *See Cadavid v. Sullivan*, Case No. LACV 04-00289-VBF-PJW, 2018 WL 6265102, at *2 (C.D. Cal. Sept. 26, 2018) (finding no prejudice where evidence that petitioner suffered a syncopal episode after the incident did not establish that he was mentally impaired during the incident). Petitioner's threats, the gang reference, and the gunshot noises make sense as the actions of someone trying to intimidate witnesses and dissuade them from going to court to testify against Dunell, a Five Time gang member known to Petitioner, and are not the random,

paranoid, non-sensical acts Petitioner committed at McDonalds and other times. Further, Petitioner's own testimony that he remembered saying, "Don't go to court," remembered he wanted to get his jacket from the car so he could catch the bus, remembered the officer telling him to wait when he asked for his jacket, remembered how much the bus cost, and remembered that he got a doughnut and coffee from the coffee shop undermines Dr. Yang's opinion that there is "a great possibility" that Petitioner was not in touch with reality during the incident or that Petitioner was suffering from delusional thoughts and lack of control.

The Court concludes that there is no reasonable probability that presentation of the proffered mental defense evidence would have convinced the jury that Petitioner actually lacked the specific intent to dissuade the victims and to aid and assist a gang. Any expert testimony would have had to overcome the witnesses' testimony, supported in part by Petitioner's own testimony, that does not provide any support for the notion that, at the time of the incident, Petitioner was suffering from a mental defect such that he could not actually form the specific intent to commit the crimes for which he was charged. *See Wright v. Ayers,* 271 F. App'x 597, 598 (9th Cir. 2008) (affirming district court's decision denying habeas relief on ineffective assistance of counsel claim for failure to present evidence of mental retardation and schizophrenia where petitioner failed to establish prejudice because there was "overwhelming evidence" presented of intent); *Johnson v. Terhune*, 80 F. App'x 557, 560 (9th Cir. 2003) (reversing district court's grant of habeas relief based on counsel's failure to investigate petitioner's mental health history, finding state court's decision that petitioner failed to show prejudice under *Strickland* not unreasonable in light of strong evidence at trial concerning petitioner's behavior); *Isayev v. Lizarraga*, No. 2:12-cv-02551-JKS, 2018 WL 4510722, at *6 (E.D. Cal. Sept. 19, 2018) (finding no prejudice where counsel did not investigate and present a diminished actuality defense, given the testimony presented at trial and the limits on expert testimony and the diminished actuality defense in California), *certificate of*

appealability denied by Isayev v. Knipp, No. 18-16921, 2019 WL 4928610 (9th Cir. Sept. 27, 2019). As outlined above, there was strong evidence in the form of Petitioner's statements and actions that Petitioner intended to dissuade the victims from testifying and to aid and assist the Five Time gang. The Court concludes that there is no reasonable probability that, but for trial counsel's ineffectiveness, the result would have been different. Thus, no prejudice is shown and on *de novo* review, this claim fails on the merits. Habeas relief is not warranted.[8]

VI. RECOMMENDATION

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

DATED: December 6, 2019

Rozella A. Oliver

ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in Local Civil Rule 72 and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

[8] Petitioner requests an evidentiary hearing to resolve any factual disputes and to corroborate Dr. Yang's conclusions. (FAP at 16; Traverse at 7 n.1.) That request is denied as unnecessary to resolve Petitioner's claim.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 27 2021

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

JOHN ATLAS, Jr.,

Petitioner-Appellant,

v.

ERIC ARNOLD, Warden,

Respondent-Appellee.

No. 20-55452

D.C. No.
5:15-cv-01504-RSWL-RAO
Central District of California,
Riverside

ORDER

Before: D.M. FISHER,* WATFORD, and BUMATAY, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Bumatay and Fisher have voted to deny the petition for panel rehearing, and Judge Watford has voted to grant the petition for panel rehearing. Judges Watford and Bumatay have voted to deny the petition for rehearing en banc, and Judge Fisher has so recommended. Fed. R. App. P. 40. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, (Dkt. No. 42), is **DENIED**.

* The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

S246827

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JOHN ATLAS, JR., on Habeas Corpus.

The Attorney General's motion for judicial notice is granted. The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE
Chief Justice

Superior Court of California
County of San Bernardino
247 West Third Street, Department S20
San Bernardino, California 92415-0240

FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT
DEC 14 2016
BY [signature] DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

In the Petition of JOHN ATLAS Petitioner For Writ of Habeas Corpus	Case No. WHCJS1600118 **MODIFIED** ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

A summary of the facts is set out in the unpublished court of appeal decision in case number E060974.[1] In December 2013 a jury convicted petitioner of two counts of dissuading a witness by force or threat in violation of Penal Code section 136.1. The jury also found true the gang allegation as to both counts. On February 27, 2014 the petitioner admitted that he suffered a prior conviction for which he served a prison term. That same day, the trial court sentenced petitioner to serve 1 year plus 7 years to life in state prison.

On July 14, 2016, petitioner filed a petition for writ of habeas corpus asserting that he received ineffective assistance of counsel because his trial attorney failed to

[1] The Court takes judicial notice of the unpublished California Court of Appeal decision in case number E060974. (Evid. Code, §452, subd. (d).)

conduct a reasonable investigation regarding his mental health diagnosis and the effect his medication had on him, failed to have him evaluated by a mental health professional, failed to introduce mental health records from the previous four years that showed he was suffering from his mental illness during that time including only the week before he committed the offenses and for failing to call family members who observed his strange behavior while he was living in Georgia and South Carolina. On October 28, 2016, this court requested that respondent file and serve an informal response. The informal response was filed and served on November 10, 2016. On December 14, 2016, the petitioner filed a reply. The court has considered the relevant law as well as all of the documents and exhibits filed in this matter, including the documents filed under seal. The court hereby rules on the petition for writ of habeas corpus.

PROCEDURAL BARS

Timeliness

Unjustified delay in presenting habeas claims bars consideration of the merits of a petition. (*In re Clark* (1993) 5 Cal. 4th 750, 759; *In re Swain* (1949) 34 Cal.2d 300, 302.) Respondent argues that petitioner has failed to adequately explain in his petition, the approximate two-year delay in raising his claims, or to show that any of the timeliness exceptions apply to his petition. (*In re Reno,* (2012) 55 Cal. 4th 428, fn. 15; *In re Robbins* (1998) 18 Cal. 4th 780-781.) Petitioner filed the writ about 18 months after the Court of Appeal affirmed his conviction. The court notes that the psychological report signed by Dr. Jason H. Yang is dated June 21, 2016 and that the petition was filed less a month later. Under the circumstances this court cannot conclude that there was an unjustified substantial delay in filing the writ. The petition is not time barred.

Successive

Petitioner acknowledged that he previously filed a number of petitions for writ of habeas corpus in the Court of Appeal. However this is his first petition in superior

court. The respondent has not argued that the writ is barred as successive and the court does not find that it is barred as successive. (*In re Clark, supra* 5 Cal.4th 750.)

Unverified Petition

As respondent notes, the petition is not verified as required in Penal Code section 1474, subdivision (3). Therefore the petition is defective and this court should not consider the merits of petitioner's claim.

Claim Previously Rejected on Appeal

On appeal petitioner raised an ineffective assistance of counsel claim against his trial attorney on the basis that trial counsel failed to call an expert witness to testify regarding his mental health diagnosis of schizophrenia and the medication he takes and the side effects of the medication. The Court of Appeal noted that petitioner testified at trial about his mental health diagnosis and the medication he takes for it. In rejecting petitioner's argument, the Court of Appeal reasoned as follows: "even if [petitioner's] own testimony could have been bolstered by the testimony of his psychiatrist, the result would have been the same. . . . the evidence against defendant was overwhelming."[2]

Petitioner's writ raises the same issue that was unsuccessfully raised on appeal. The addition of the declaration of family members and the report prepared by Dr. Yang are insufficient to overcome the procedural bar precluding this court from

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[2] Unpublished Decision at p. 10.

addressing claims previously rejected on appeal (*In re Waltreus* (1965) 62 Cal.2d 218.) "[H]abeas corpus will not lie ordinarily as a . . . second appeal." (*In re Reno* (2012) 55 Cal. 4th 428, 478, emphasis and citation omitted.)[3]

For the reasons stated herein, the petition for writ of habeas corpus is DENIED.

Dated this 14th day of December 2016

HON. KATRINA WEST
Judge of the Superior Court

[3] This is particularly true in light of the criminal and ethical concerns pertaining to Dr. Yang as well as Penal Code section 29.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO

San Bernardino District-Justice Center
247 West Third Street

San Bernardino CA 924150240

CASE NO: WHCJS1600118

FEDERAL PUBLIC DEFENDAR
321 East 2nd. Street
Los Angeles CA 90012-4202

I M P O R T A N T C O R R E S P O N D E N C E

From the above entitled court, enclosed you will find:

copy of modified order

CERTIFICATE OF SERVICE

I am a Deputy Clerk of the Superior Court for the County of San Bernardino at the above listed address. I am not a party to this action and on the date and place shown below, I served a copy of the above listed notice:
( ) Enclosed in a sealed envelope mailed to the interested party addressed above, for collection and mailing this date, following standard Court practices.
( ) Enclosed in a sealed envelope, first class postage prepaid in the U.S. mail at the location shown above, mailed to the interested party and addressed as shown above, or as shown on the attached listing.
( ) A copy of this notice was given to the filing party at the counter
( ) A copy of this notice was placed in the bin located at this office and identified as the location for the above law firm's collection of file stamped documents.

Date of Mailing: 12/14/16
I declare under penalty of perjury that the foregoing is true and correct. Executed on 12/14/16 at San Bernardino, CA

BY: DIANA DEVINCE

M A I L I N G C O V E R S H E E T

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ATLAS, JR.,

Defendant and Appellant.

E060974

(Super.Ct.No. FSB1301322)

OPINION

APPEAL from the Superior Court of San Bernardino County. Lorenzo R. Balderrama, Judge. Affirmed.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

1 LODGMENT #4

On December 3, 2013, a fourth amended information charged defendant and appellant John Atlas, Jr. with two counts of dissuading a witness by force or threat in violation of Penal Code[1] section 136.1, subdivision (c)(1) (counts 1 and 2). The information also alleged as to both counts that defendant committed the crimes in association with or for the benefit of, a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(B). Furthermore, the information alleged that defendant had suffered a prior conviction for which he served a prison term within the meaning of section 667.5, subdivision (b). Following a jury trial, on December 10, 2013, the jury found defendant guilty, as charged, as to both counts 1 and 2, and found true the gang allegation. On February 27, 2014, defendant admitted that he suffered a prior conviction for which he served a prison term.

The trial court sentenced defendant to a determinate term of one year for his prior felony conviction and a consecutive life term with a minimum term of seven years pursuant to section 186.22, subdivision (b)(4)(C) as to count 1. The court imposed a concurrent life term with a minimum term of seven years as to count 2.

Defendant filed a timely notice of appeal.

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

FACTUAL AND PROCEDURAL HISTORY

A. PROSECUTION EVIDENCE

On April 2, 2013, Aviata Malufau, Jr. lived on West Spruce Street in Rialto with his wife, mother-in-law, and nine children. He owned a Chevrolet Tahoe. On that date, at about 5:40 a.m., he was letting his car warm up outside while he gathered his children to drop them off for bible study. When he went back outside, he saw the car being driven off. He could not see who was driving, but he did not give anyone permission to take or drive the car. His wife, Annie Malufau, called the police.

Later that morning, Mrs. Malufau received a call from her sister; her sister thought she saw Mrs. Malufau's car in a Stater Bros. Market parking lot. After confirming that the car was hers through the license plate number, Mrs. Malufau told her sister to call the police.

San Bernardino Police Officer Emil Kokesh monitored a radio call that a stolen car had been spotted at a Stater Bros. parking lot on 4th Street and responded to the call. When he got there, he saw the parked Tahoe. After confirming that the car had been stolen, the officer parked behind the Tahoe so it could not leave.

A person named Dunell Crawford got out of the driver's seat of the Tahoe, and began to walk away. Officer Kokesh told Crawford to stop and "took him down to the ground" when Crawford failed to do as asked. After arresting Crawford, Officer Kokesh found and took into custody a film container with two bindles of what appeared to be methamphetamine.

Defendant was standing at the front of the Tahoe when Officer Kokesh first approached, and stayed there while the officer restrained and arrested Crawford. After Crawford was detained, defendant approached and asked if he could get his jacket out of the car. Officer Kokesh saw a jacket in the back seat and found a prescription bottle with defendant's name on it in the pocket of the jacket. The officer told defendant to wait until the owner of the vehicle arrived; if the owner said the jacket did not belong to him, Officer Kokesh would release the jacket to defendant. Defendant stood off to the side and waited.

Mr. and Mrs. Malufau and one of their children went to the Stater Bros. parking lot to try to retrieve their Tahoe. The car and a number of police officers were there when they arrived. Mr. Malufau told Officer Kokesh that the jacket in the car did not belong to him. The officer gave the jacket to defendant and told him to leave.

At that point, defendant began walking back and forth and yelling, "Don't go to court," or "You better not go to court," "We know you live in Five Time," and that they were going to come after the Malufau family. Defendant also made "gunshot noises." "Five Time" is a gang on the west side of San Bernardino. Mr. Malufau became upset and "wanted to hurt [defendant]." The officers, however, stepped between them and kept them apart. The officers then handcuffed defendant, who continued yelling at the Malufaus. The officers searched defendant and found two cigarette lighters. When the lighters were placed on the roof of one of the police vehicles, defendant yelled, "That's to burn your f---in' house down."

Mr. and Mrs. Malufau felt frightened and intimidated. Officer Kokesh, at their request, accompanied them home. Neither wanted to come to court, but felt they had been compelled to do so. The Malufaus moved from the residence immediately after the incident because they were frightened for their family. Whoever took the car knew where they lived, so defendant's threats appeared genuine.

Nelson Carrington, a San Bernardino police officer, testified as a gang expert. The Five Time Hometown Crips were a "notorious" criminal street gang consisting of about 80 members operating in San Bernardino. They were known as the Junior Playboy Supremes when they started, but evolved as members from Los Angeles began moving into the area. The gang's territory was bounded by Etiwanda on the north, Rialto Street on the south, Pepper Street on the west, and Terrace Street on the east. Members of the gang call the area "Five Times," or "the Five." The Malufaus' Spruce Street residence was in the Five Time territory. The gang had a number of signs and symbols, including a five-point star, the number 5, 5X, Meridian Boys, 2700 Block and Dino Boys. The gang's primary activities included narcotics sales, possession of firearms, vehicle thefts, witness intimidation, and making criminal threats. Members of the gang had committed the "predicate" offenses necessary to show a pattern of criminal gang activity.

While Officer Carrington did not know if defendant was a member of the Five Time gang, he opined that defendant was an associate of the gang or its members. His opinion was based on the fact that Dunell Crawford was a documented member of the gang, and defendant made threatening statements while Crawford was still present, which

would serve to raise defendant's standing with the gang. Also, defendant's use of the term "we" when speaking about knowing where the victims lived indicated that he was "with" the gang and acting for them. Answering a hypothetical question mirroring the facts of this case, the officer testified that a person who did what defendant did would have acted in association with, and for the benefit of, a criminal street gang. Using the gang's name and the gang's territory to threaten the Malufaus was a way of sending a specific message to them.

B. DEFENSE EVIDENCE

Defendant testified in his own defense. He was raised on Manteca Street in Rialto. He left the country for a time after high school, but came back in 2005. Before he left the country, he had never heard of the Five Time gang, but did hear about the gang after his return "by associating with people, talking to certain people."

When defendant was arrested in this case, he had the prescription medications Risperdal, Depakote and Benadryl in his possession. Risperdal was a psychiatric medication; he had been diagnosed with schizophrenia in 2009. Defendant took Risperdal at night to help him sleep. However, he did not take the medication the night before he was arrested because he was meeting a girl and did not want to go to sleep.

Defendant took a bus from Rialto to San Bernardino to meet the girl and did not sleep the night before his arrest. He first saw the Malufaus' vehicle where it was parked when he was arrested. Dunell was outside the car. Defendant knew Dunell and approached him to see if defendant could get a ride. Defendant thought Dunell was

selling drugs because the girl he was with "wanted some drugs," specifically methamphetamine.

Defendant knew that Dunell was a member of the Five Time gang because he had mentioned it. Defendant did not think that the Malufaus' car belonged to Dunell, but he did not know whether it was stolen. Dunell had the key, and "some drug dealers, they can give people drugs for them to loan them their car."

When the police arrived, defendant was in a doughnut shop getting a doughnut and soda. He saw the police get Dunell out of the car at gunpoint and thought they were arresting him for drug sales. Defendant tried to get his coat out of the car.

Defendant did not know who the Malufaus were when they got to the parking lot, but remembered yelling at them. He acknowledged that he yelled, "Don't go to court" more than once. He, however, did not remember saying, "We know you live in the Five," or that the lighter was to burn their house down. Likewise, he did not remember making a noise like a gunshot. He did know that the Five Time gang had a territory and it was called "the Five."

Defendant could not explain why he did what he did, "because what was said shouldn't have been said." Also, he did not want to put anyone in fear of going to court. Also, he did not want to help the gang.

DISCUSSION

After defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of the case, a summary of the facts, and potential arguable issues, and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, and he has done so. On December 23, 2014, defendant filed a "petition for writ of habeas corpus in conjunction with brief." We hereby treat his petition and brief as a personal supplemental brief. In his brief, defendant essentially argues ineffective assistance (IAC) of both his trial and appellate counsel.

In order to establish a claim of IAC, defendant must demonstrate, "(1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541, citing, among other cases, *Strickland v. Washington* (1984) 466 U.S. 668; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 430.) Hence, an IAC claim has two components: deficient performance and prejudice. (*Strickland v. Washington*, *supra*, at pp. 687-688, 693-694; *People v. Williams* (1997) 16 Cal.4th 153, 214-215; *People v. Davis* (1995) 10 Cal.4th 463, 503; *People v. Ledesma*

(1987) 43 Cal.3d 171, 217.) If defendant fails to establish either component, his claim fails.

We first address defendant's IAC claim regarding his trial counsel. To support his claim that his trial counsel rendered IAC, defendant argues that his trial counsel should have called his psychiatrist as a witness. Defendant argues that his psychiatrist could have testified about his mental illness, why he was prescribed Risperdal, and what side effects the drug could have.

In this case, we have reviewed the record and find that defense counsel actively and consciously represented defendant throughout the trial court proceedings. Counsel examined and cross-examined the witnesses, and made succinct and persuasive arguments to the trial court. When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

Notwithstanding, we need not determine if defense counsel's actions fell below an objective standard of reasonableness because defendant cannot demonstrate that counsel's alleged deficient representation prejudiced him, i.e., there is a reasonable probability that, but for counsel's purported failings, defendant would have received a more favorable result. (*People v. Dennis, supra*, 17 Cal.4th at pp. 540-541; *Strickland v. Washington*, *supra*, 466 U.S. at p. 687.) Defendant, in support of his argument that he was prejudiced, simply states that he was prejudiced because the jury could not weigh evidence of defendant's psychiatric diagnosis and medications he was taking since his

trial counsel failed to call his psychiatrist to testify. First, we note that defendant did testify as to his mental status and the jury was fully aware of his claims of schizophrenia and medications he took. However, even if defendant's own testimony could have been bolstered by the testimony of his psychiatrist, the result would have been the same. As discussed in detail above, the evidence against defendant was overwhelming. Here, defendant admitted that he yelled at the victims, "Don't go to court[,]" a few times. Moreover, although defendant did not remember, Officer Kokesh testified that, in addition to yelling for the victims not to go to court, defendant stated that he knew where the victims "live in Five Time," made gunshot noises, and stated he would burn the victims' house down with the lighters the officers found. It should be noted that these remarks and gestures were made *after* defendant got his jacket and was free to leave. The jury obviously believed the testimony of the officer in finding defendant guilty.

In addition, defendant argues that his trial counsel rendered IAC because he failed to investigate that defendant was out of the country playing football. Again, even if counsel should have investigated this fact, no prejudice resulted from counsel's failure to do so. Here, defendant argues that because he was out of the country, he could not have been an associate of the Five Time gang. This information was relayed to the jury. Defendant testified that he was out of the country after high school until 2005. Defendant also stated that he had been in South Carolina and had only been back in California for two weeks prior to the incident. In fact, during closing argument, trial counsel reminded the jury, as follows: "One thing you know that's not disputed is that [defendant], though he grew up in San Bernardino County, he moved away, and he came back to California

just two weeks before this event occurred." Hence, the jury was fully aware of defendant's absence from San Bernardino. Therefore, any additional evidence regarding defendant's absence would not have made a difference in the outcome of his case. Again, as noted above the evidence against defendant was strong. Although defendant was free to leave the scene after he retrieved his jacket, he stayed around and made threats to the victims and indicated that "the Five" will come after your family – all in front of a known Five Time gang member, Dunell Crawford. Although defendant denied being associated with the gang, the jury believed the overwhelming evidence to the contrary.

In sum, the jury, as the trier of fact, believed the evidence presented by the prosecutor and did not believe defendant's testimony and assertions. We find that any alleged IAC by his counsel would not have changed the outcome of his case. Defendant has failed to demonstrate that his counsel's alleged deficient representation prejudiced him, i.e., there is a reasonable probability that, but for counsel's purported failings, defendant would have received a more favorable result. (*People v. Dennis, supra*, 17 Cal.4th at pp. 540-541; *Strickland v. Washington, supra*, 466 U.S. at p. 687.)

As for appellate counsel, defendant essentially argues that counsel provided IAC for filing a *Wende* brief instead of arguing IAC of trial counsel. Defendant's argument is without merit because under the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we must independently review the record for potential error. Simply filing a *Wende* brief does not deem a counsel's performance as ineffective.

We have examined the entire record and are satisfied that no arguable issues exist, and that defendant has, by virtue of counsel's compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the judgment entered against him in this case. (*People v. Kelly, supra,* 40 Cal.4th 106.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.