United States Court of Appeals
For the First Circuit

No. 19-1909

JOSE A. TORRES,

Petitioner - Appellant,

v.

LISA A. MITCHELL, Superintendent; MAURA T. HEALEY, Attorney General of the State of Massachusetts,

Respondents - Appellees,

CAROL HIGGINS O'BRIEN, Commissioner,

Respondent.

Before

Howard, Chief Judge,
Thompson and Gelpí, Circuit Judges.

JUDGMENT

Entered: December 23, 2021

Petitioner Jose A. Torres appeals from the order of the district court denying his petition for habeas corpus, filed pursuant to 28 U.S.C. § 2254. We review the district court's denial of habeas relief de novo. Moore v. Dickhaut, 842 F.3d 97, 99 (1st Cir. 2016). We have carefully reviewed the petitioner-appellant's submissions, and the record. Essentially for the reasons set forth in the magistrate judge's Report and Recommendation dated November 6, 2018, and the district court judge's Order dated September 3, 2019, we affirm the order denying the petition.

The judgment of the district court is affirmed. See 1st Cir. Loc. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc: Jose A. Torres, Todd Michael Blume

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOSE A. TORRES,	*	
	*	
Petitioner,	*	
	*	
v.	*	Civil Action No. 15-cv-11901-IT
	*	
LISA MITCHELL, Superintendent of Old Colony Correction Center; and MAURA HEALEY, Attorney General,	*	
	*	
Respondents.	*	

ORDER

September 3, 2019

TALWANI, D.J.

In August 2009, a Massachusetts jury found Petitioner Jose A. Torres guilty of first-degree murder based on theories of deliberate premeditation and extreme atrocity or cruelty. The court entered the verdict and imposed a life sentence. Torres appealed his conviction in state court and subsequently filed this timely habeas petition pursuant to 28 U.S.C. § 2254. Petition [#1]. The Magistrate Judge to whom this matter was referred issued a Report and Recommendation [#52] recommending that the Petition [#1] be denied, and Torres filed Objections [#53]. On *de novo* review, the court accepts the Report and Recommendation [#52] and denies the Petition [#1].

The court briefly addresses Petitioner's Objections [#53]. Petitioner contends that: he was entitled to a "reasonable provocation" instruction; the instruction that was given without objection by his trial counsel differed from the model jury instruction for manslaughter; the Massachusetts Supreme Judicial Court ("SJC") mistakenly concluded that the model instruction for manslaughter had been given; and the SJC's ruling therefore did not address the federal claim

on the merits, such that he is entitled to *de novo* review. Petitioner argues further that on *de novo* review, the court should find the instructions constitutionally inadequate.

After stating that the judge's instruction on manslaughter was the model instruction, the SJC continued: "Taken as a whole, we think the jury understood that a verdict of guilty of murder in the first degree required proof beyond a reasonable doubt of the absence of reasonable provocation and the heat of passion, and that there was no error . . . ." Commonwealth v. Torres, 469 Mass. 398, 263-64 (2014). In light of the SJC's review of the instructions "as a whole" as to murder in the first degree, the court concludes that the SJC did consider the merits of the federal claim. Moreover, on *de novo* review, the court also finds no error, as the trial judge explicitly instructed the jury in accordance with Massachusetts law that for either first or second degree murder, "the Commonwealth must prove beyond a reasonable doubt the absence of the mitigating circumstances of heat of passion upon a reasonable provocation . . . ." S.A. 2346.

For the reasons stated in the Report and Recommendation [#52] and herein, the Petition [#1] is DENIED.

IT IS SO ORDERED.

Date: September 3, 2019

/s/ Indira Talwani
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOSE A. TORRES,
Petitioner,

v.

CIVIL ACTION NO.
15-11901-IT

CAROL HIGGINS O'BRIEN,
Commissioner;[1] LISA MITCHELL,
Superintendent of Old
Colony Correction Center; and
MAURA HEALY, Attorney General
of the State of Massachusetts,
Respondents.

REPORT AND RECOMMENDATION RE:
PETITION FOR WRIT OF HABEAS CORPUS (DOCKET ENTRY # 1);
RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO
THE PETITION FOR A WRIT OF HABEAS CORPUS
(DOCKET ENTRY # 41)

November 6, 2018

BOWLER, U.S.M.J.

In this habeas petition filed under 28 U.S.C. § 2254 ("section 2254"), petitioner Jose A. Torres ("petitioner"), an inmate at the Old Colony Correctional Center in Bridgewater, Massachusetts ("OCCC"), attacks an August 2009 first degree murder conviction on theories of deliberate premeditation and extreme atrocity or cruelty rendered in Massachusetts Superior Court (Suffolk County) ("the trial court" or "the trial judge"). After initially raising six grounds for relief (Docket Entry # 1,

[1] As previously explained, Carol Higgins O'Brien is not a proper respondent. (Docket Entry # 44, n.1).

pp. 6-7), petitioner presently wishes to proceed only on ground four.[2] (Docket Entry # 46, p. 1). Ground four raises due process and ineffective assistance of counsel claims primarily based on faulty manslaughter instructions to the jury.[3] (Docket Entry # 1, pp. 6, 25-27, 40-42) (Docket Entry # 46, p. 1).

Respondents Lisa Mitchell, superintendent of OCCC, and Maura Healey, attorney general of the state of Massachusetts, ("respondents") maintain that the deferential standard of review under the AEDPA, 28 U.S.C. § 2254(d)(1) ("section 2254(d)(1)"), bars "all grounds" raised in the petition including ground four. (Docket Entry # 41, p. 4). In addition, because the Massachusetts Supreme Judicial Court ("SJC") addressed the merits of the ineffective assistance of counsel claim in ground four, respondents disagree with petitioner that de novo review applies

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[2] Represented by counsel throughout these proceedings, petitioner initially took the position that none of the other grounds for relief "are intentionally waived." (Docket Entry # 32, n.1). Upon further briefing, petitioner wisely recognized that the other grounds "may be considered waived" in light of his counsel's forthright and apt acknowledgment of an inability to construct a viable argument which meets the constraints of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). (Docket Entry # 46, n.1). Grounds one, two, three, five, and six are therefore waived. See Merrimon v. Unum Life Ins. Co. of America, 758 F.3d 46, 57 (1st Cir. 2014).

[3] The petition refers to the manslaughter instruction in the plural whereas other filings (Docket Entry ## 32, 42, 46) refer to the manslaughter instructions in the singular. For consistency, this court adheres to the plural form. As discussed elsewhere in greater detail, ground four also alleges an ineffective assistance of counsel claim based on trial counsel's closing argument. (Docket Entry # 1, pp. 6, 25-26).

to the ineffective assistance of counsel claim based on the failure to object to the manslaughter instructions. (Docket Entry # 41, pp. 15-17). Respondents also argue that the murder and manslaughter instructions as a whole were neither constitutionally infirm nor burden-shifting. According to respondents, the instructions were correct and did not weaken the Commonwealth's "burden in violation of due process."[4] (Docket Entry # 41, pp. 19-20).

PROCEDURAL BACKGROUND

On June 26, 2008, a grand jury sitting in Suffolk County returned a one count Indictment charging petitioner with murder in the first degree of his girlfriend, the victim, on March 8 or 9, 2008 in violation of Massachusetts General Laws chapter 265, section one. (S.A. 309, 866, 1119).[5] Trial commenced on August 20, 2009. (S.A. 7). Petitioner's counsel ("trial counsel") did not call petitioner to the stand. Rather, the jury listened to a tape recording and had a transcript of petitioner's interview with David Munroe, a Boston police detective assigned to the homicide unit at the time of the interview. (S.A. 353, 643, 562-609, 1632, 2212). The interview took place on March 9, 2008 in

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[4] Petitioner's arguments are set out in the discussion section.

[5] "S.A." refers to a two-volume supplemental appendix of the state court record. (Docket Entry # 28). The SJC opinion (S.A. 866-869) sets out certain facts which are presumed correct. 28 U.S.C. § 2254(e)(1).

the late afternoon. (S.A. 562).

At the conclusion of the evidence, the trial judge charged the jury on the elements of first degree murder (including the theories of deliberate premeditation and extreme atrocity or cruelty), second degree murder, and manslaughter.[6] Previously, trial counsel submitted proposed instructions for voluntary manslaughter under the heat of passion as well as sudden combat. (S.A. 346-347). In a preliminary charge conference, the trial judge was "not inclined to give a manslaughter instruction" due to insufficient evidence. (S.A. 2185-2193). After further thought, the trial judge decided to charge the jury on the heat of passion based on reasonable provocation in light of evidence in the interview of infidelity (S.A. 582-583, 588, 606-609) and case law allowing a voluntary manslaughter instruction based on marital infidelity. (S.A. 2203-2209). The trial judge continued to reject a sudden combat instruction. (S.A. 2204-2209).

Throughout closing argument, trial counsel presented his primary theory that petitioner did not kill the victim, who he loved, and did not have an opportunity to commit the offense between the time a downstairs neighbor left the victim's apartment and two hours later when petitioner's "Charlie Card" showed activity on a fare box on a bus. (S.A. 2248-2270). Trial

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[6] The trial judge's instructions are set out in detail in the discussion section.

counsel also emphasized the absence of petitioner's fingerprints on various items used to inflict the harm on the victim. (S.A. 2255-2256). At the very end of the lengthy closing argument (S.A. 2248-2270), trial counsel urged the jury to "return a verdict of not guilty. And at the most, at most, the government has proven manslaughter." (S.A. 2270).

On August 27, 2008, the jury returned a verdict of guilty on the first degree murder charge based on the theories of deliberate premeditation and extreme atrocity or cruelty. (S.A. 2377-2378). Petitioner filed a timely notice of appeal (S.A. 357) and the SJC docketed the appeal in November 2010. (S.A. 11). Petitioner also filed a motion for a new trial and requested an evidentiary hearing, which the SJC remanded to the trial court. (S.A. 12, 113-117). In May 2012, the trial judge denied the motion without conducting an evidentiary hearing. (S.A. 191). Petitioner appealed the denial, which the SJC consolidated with the direct appeal. (S.A. 12, 869); see Mass. Gen. Laws ch. 278, § 33E ("section 33E").

On August 18, 2014, the SJC affirmed the conviction and the denial of the motion for a new trial. The SJC further concluded there was "no reason . . . to reduce the degree of guilt or order a new trial." Commonwealth v. Torres, 14 N.E.3d 253, 264 (Mass. 2014). As explained below, the SJC addressed and rejected the claims that comprise ground four on the merits. Id. at 265-264.

Petitioner filed this action less than one year later.

FACTUAL BACKGROUND

The SJC's summary of the facts is presumed correct. 28 U.S.C. § 2254(e)(1). The presumption applies to "'basic, primary, or historical facts'" with respect to external events, including the credibility of witnesses.[7] Moore v. Dickhaut, 842 F.3d 97, 100 (1st Cir. 2016); accord Sleeper v. Spencer, 510 F.3d 32, 38 (1st Cir. 2007) ("the term 'facts'" in section 2254(e)(1) "refers to 'basic, primary, or historical facts,' such as witness credibility and recitals of external events"). The facts, as determined by the SJC, are as follows:

> The defendant moved into his girl friend's third-floor apartment in the Dorchester section of Boston in the middle of February, 2008. His girl friend, the victim, had four children, the oldest of whom was six years old. On March 8, 2008, Kristina Ortiz visited the victim at her apartment. The defendant and the victim's four children were there. As Ortiz was leaving, the defendant made a disparaging remark about the victim's children.
>
> That evening the victim sent her six year old son down to the first-floor apartment of a neighbor three times to ask the neighbor to come up to his mother's apartment. Each time the neighbor said she would be right up, but became distracted by her own children and failed to appear. At 9 P.M. the defendant went down to the first-floor apartment and told the neighbor that his "wife was waiting" for her. The neighbor went up to the victim's apartment at around

[7] The presumption does not apply to legal determinations made by the SJC. See Teti v. Bender, 507 F.3d 50, 60 (1st Cir. 2007) ("determination by the state trial judge would be a legal--not factual--conclusion and thus not relevant to the § 2254(e)(1) inquiry"); accord Brown v. Smith, 551 F.3d 424, 431 (6th Cir. 2008) (AEDPA's deference under section 2254(e)(1) "does not apply to the state court's legal adjudication").

9:30 P.M. The victim asked the neighbor if the neighbor knew where she could get some cocaine. The neighbor was surprised because she knew the victim was trying to stop using cocaine. The neighbor said she did not know, and left after a brief conversation.

Sometime between 2 and 3 A.M. on March 9 the first-floor neighbor heard "an unusual thud" from an apartment above hers. The victim's apartment was two floors directly above her apartment, but the neighbor could not tell if the noise had come from the victim's apartment. Shortly thereafter she heard footsteps coming down the stairs. She went back to bed.

At about 11:15 A.M. on March 9 the victim's two eldest children appeared at the first-floor neighbor's apartment. The oldest child said, "My mommy and daddy had a fight and he killed her. She's dead." He added that the defendant had left. The next oldest, who was five years old at the time of the incident, testified at trial to the physical beating he saw the defendant inflict on his mother. He saw the defendant push her under a leg of the kitchen table, then sit on the table. The defendant then locked the children in their bedroom. The neighbor went upstairs and found the victim lying lifeless on the kitchen floor in a pool of blood. An electrical cord was pulled tight around her neck. The kitchen was in a state of disarray: furniture was overturned, the kitchen table was broken, and laundry was strewn about the room. The neighbor gathered the children, brought them to her apartment, and telephoned the police.

In the meantime, at about 10 A.M. on March 9, the defendant had gone to the home of Doris Serrano, where the defendant's father lived in the basement. He told his father that the victim had "kicked [him] out." His father asked about scratches on the defendant's face. The defendant explained that the victim had scratched him. The defendant left his duffle bag and knapsack in his father's room and went out to have a beer. Later that afternoon the defendant visited his cousin Iliana Pagan (Serrano's daughter), who was a close friend of the victim. Pagan's fiancé was present. The defendant explained that the victim had scratched his face during an argument over drugs. During the defendant's visit Pagan received a telephone call in which she learned that the victim had been found dead in her home. Pagan burst into tears. When her fiancé asked what was wrong, she broke the news in a voice loud enough for the defendant to hear.

The defendant said nothing. He bowed his head and put his face in his hands.

Police tried to locate the defendant. They went to Serrano's apartment and asked if Serrano would get in touch with him. Serrano reached the defendant by cellular telephone and told him that his father was looking for him. The defendant returned to Serrano's apartment within minutes. The police asked him to accompany them to Boston police headquarters for questioning. He agreed.

The defendant made a statement that was audiorecorded by police. He told police that he loved the victim and was supposed to marry her. He described what had happened the night of March 8, saying that the victim went "bi-polar" on him. He tried to hug her, but she scratched his face. She threatened to kill herself and call the police if he did not leave. He gathered all his belongings into a duffle bag (which was "heavy") and a backpack, and then left. He took a bus to his father's home, arriving at about 1 A.M. He denied striking the victim or killing her. He also said he loved her children. The defendant said he could not have hit the victim with the kitchen table because he has arthritis and scoliosis, and could not lift heavy objects.

The pathologist who performed the autopsy determined that death was caused by a combination of ligature strangulation (probably by the electrical extension cord found around the victim's neck) and a sharp incision to the front of the victim's neck that severed her right carotid artery and jugular vein, and completely divided her trachea (windpipe). The strangulation occurred before the incision wound. The victim had suffered blunt trauma to her head. She also had been exposed to a caustic chemical, such as bleach, after death. The pathologist could not determine if the incision wound was caused by drawing a sharp blade from right to left or from left to right.

Police recovered the duffle bag and backpack the defendant had left in his father's room. Inside the duffle bag was a "CharlieCard," a fare card used for Massachusetts Bay Transportation Authority (MBTA) services, that had been used at 11:33 P.M. on March 8 on an MBTA bus that passed within a few blocks of the victim's apartment. Also inside the duffle bag was a receipt from a 7-Eleven store that evidenced a cash purchase at 12:02 A.M. on March 9, 2008. The backpack contained personal items, including a notebook, a pair of sandals, and some clothing.

The notebook had served as a journal. The defendant had made an entry on January 11, 2008, in which he wrote:

> "Today was a real good day. But out of nowhere I got filled with rage and a lot of anger for no apparent reason. I'm sick and tired of my mental illness. I can't control my actions. I'm afraid that one day I'm going to blow-up on someone. I'm on my meds like I'm supposed to be . . . . It's like all the people who done me wrong are targets. The way I see it it is like one thing in my mind, Liquidation time. Vaporize all the wrong doer's to me and my life."

The tread on the defendant's left sandal was similar in size and pattern to a footwear impression made in blood within a few feet of the victim's body. The impression left at the crime scene lacked sufficient detail to support a definitive comparison.

The victim was found to be a potential source of deoxyribonucleic acid (DNA) evidence recovered from reddish-brown stains on the heel of the defendant's right sandal, three areas on the defendant's duffle bag, and the handle and blade of a knife found in the victim's kitchen sink, as well as a brown stain on the defendant's shirt, where 1 in 39 quintillion Caucasians, 1 in 1.7 sextillion African Americans, and 1 in 260 quadrillion Southeastern Hispanics would have the same genetic profile. The victim was also determined to be a possible source of DNA recovered from reddish-brown stains on the defendant's denim pants containing a mixture of DNA from two individuals on the defendant's denim pants, where 1 in 44 trillion Caucasians, 1 in 2.5 quadrillion African Americans, and 1 in 1.8 trillion Southeastern Hispanics would have the same genetic profile. Both the victim and the defendant were determined to be potential contributors to a mixture of DNA from three or more individuals found on the upper half of the sole of the defendant's right sandal.

Commonwealth v. Torres, 14 N.E.3d at 256-258.

DISCUSSION

A. Merits versus De Novo Review

Petitioner argues that the SJC did not address the merits of the ineffective assistance of counsel claim involving trial

counsel's failure to object to the manslaughter instructions. He points out that the SJC misunderstood the trial court's instructions as the model instruction[8] even though the actual instructions omitted essential language from the model instruction. Because the SJC misunderstood the given instructions as the model instruction, the SJC never addressed trial counsel's failure to object to the *actual* instructions given by the trial judge, according to petitioner. (Docket Entry ## 32, 42, 46). As a result, he submits that de novo review applies to the ineffective assistance of counsel claim based on the failure to object to the manslaughter instructions. (Docket Entry # 32, p. 8) (Docket Entry # 42, p. 3) (Docket Entry # 46, p. 2). Respondents disagree. (Docket Entry # 41, pp. 15-17).

The applicable standard of review of the claim depends upon whether the SJC rendered a decision on the merits of the federal ineffective assistance of counsel claim. 28 U.S.C. § 2254(d); see Lyons v. Brady, 666 F.3d 51, 53-54 (1st Cir. 2012) ("standard of review of the SJC's decision depends on whether that court 'adjudicated on the merits' [Lyons' due process] claim"); Pike v. Guarino, 492 F.3d 61, 67 (1st Cir. 2007). By its terms, section 2254(d) only applies to adjudications by a state court "on the merits." 28 U.S.C. § 2254(d). Consequently, when a state court

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[8] 1 Frances A. McIntyre, *Massachusetts Superior Court Criminal Practice Jury Instructions* (1999 ed., Supp. 2003) (henceforth "model instructions" or "model instruction").

decision "does not address the federal claim on the merits," a federal "habeas court reviews such a claim de novo." Junta v. Thompson, 615 F.3d 67, 71 (1st Cir. 2010); Yeboah-Sefah v. Ficco, 556 F.3d 53, 66 (1st Cir. 2009) (when "petitioner raises a federal claim during state proceedings that is not decided by the state court," court "reviews that claim *de novo*").

Section 2254(d), however, "'does not require a state court to give reasons before its decision can be deemed to have been "adjudicated on the merits."'" Johnson v. Williams, 568 U.S. 289, 298 (2013). As explained in Harrington, "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."[9]

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[9] Petitioner correctly does not contend that the SJC did not decide the alleged federal constitutional error in the manslaughter instructions on the merits. Petitioner's brief to the SJC included citations to three United States Supreme Court cases setting out the federal constitutional issues as well as a state court case, Commonwealth v. Acevedo, 695 N.E.2d 1065, 1067-1068 (Mass. 1998), which also cites an applicable United States Supreme Court case and a state court case that each set out the federal constitutional issue. Id. (citing Francis v. Franklin, 471 U.S. 307, 322 (1985), and Commonwealth v. Repoza, 400 Mass. 516, 519 (1987)). (S.A. 247-248). The SJC's citation to Commonwealth v. Acevedo, 695 N.E.2d at 1067-1068, and the SJC's statement that "the jury understood that a verdict of guilty of murder in the first degree required proof beyond a reasonable doubt of the absence of provocation and the heat of passion" establish that the SJC addressed the merits of the federal constitutional claim regarding the instructions and the Harrington presumption is not rebutted. See Johnson v. Williams, 568 U.S. at 304. Separately, although trial counsel did not object to the manslaughter instructions at trial, except for

Harrington v. Richter, 562 U.S. 86, 99 (2011). Indeed, although the presumption is rebuttable "in some limited circumstances," when the "state court rejects a federal claim without expressly addressing that claim, a federal habeas court *must* presume that the federal claim was adjudicated on the merits." Johnson v. Williams, 568 U.S. at 301 (emphasis added); see also Johnston v. Mitchell, 871 F.3d 52, 59 (1st Cir. 2017) (review is de novo only when petitioner exhausts claims "'in state court but the state court fails to consider them on the merits or resolve them on adequate and independent state law grounds'"), cert. denied, 138 S. Ct. 1310 (2018). For example, "if the state-law rule subsumes the federal standard—that is, if it is at least as protective as the federal standard—then the federal claim may be regarded as having been adjudicated on the merits." Johnson v. Williams, 568 U.S. at 301 (citing Early v. Packer, 537 U.S. 3, 8 (2008)). Hence, "there are circumstances in which a line of state precedent is viewed as fully incorporating a related federal constitutional right" and, in such circumstances, the state "court may regard its discussion of the state precedent as

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certain aspects not argued here (S.A. 346, 2351-2355), there is no indication that the SJC rested its decision on the instructions on a procedural bar. See Coleman v. Thompson, 501 U.S. 722, 735 (1991) (presumption of waiver where state decision "fairly appears to rest primarily on federal law or to be interwoven with such law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion"); Harris v. Reed, 489 U.S. 255, 263 (1989). In addition, neither party raises the procedural default issue thereby waiving it. See Logan v. Gelb, 790 F.3d 65, 70 (1st Cir. 2015).

sufficient to cover a claim based on the related federal right." Id. at 298-299.

Likewise here, the Harrington presumption is not rebutted. In the brief to the SJC, petitioner presented all of the ineffective assistance of counsel claims, which necessarily include the failure to object ineffective assistance of counsel claim, as brought under the state *and* the federal standards. (S.A. 217-219). With respect to all such claims, the brief to the SJC cites the Sixth and Fourteenth Amendments as well as Strickland v. Washington, 466 U.S. 668 (1984) ("Strickland") (S.A. 217-218), and explains that:

> Both the federal and Massachusetts state courts created a two-pronged test for determining whether a constitutional violation of this right has occurred. The first prong is nearly identical-whether counsel's performance was seriously deficient, measured against an objective standard of reasonableness.

(S.A. 218).

At the time of the SJC's decision, the First Circuit considered the state standard functionally equivalent under both prongs, see Ouber v. Guarino, 293 F.3d 19, 32 (1st Cir. 2002) (discussing functional equivalence of Massachusetts and federal standards for habeas purposes and rejecting district court's position that Commonwealth v. Saferian, 315 N.E.2d 878, 883 (Mass. 1974), articulates a standard contrary to *Strickland*"), and continues to adhere to this position. Powell v. Tompkins, 783 F.3d 332, 349 n.12 (1st Cir. 2015). Massachusetts courts likewise treat the federal constitutional standard as "no more

favorable to a defendant" than the state constitutional standard. Commonwealth v. Wright, 584 N.E.2d 621, 624 (Mass. 1992). Furthermore, in the portion of the brief to the SJC that explicitly addresses the failure to object to the manslaughter instructions, the brief cites to Commonwealth v. Satterfield, 364 N.E.2d 1260, 1264 (Mass. 1977), a case "which the First Circuit in *Scarpa* characterizes as 'reminiscent of the federal constitutional standard.'" Omosefunmi v. Attorney General of Commonwealth of Massachusetts, 152 F. Supp. 2d 42, 49 (D. Mass. 2001); Scarpa v. DuBois, 38 F.3d 1, 6-7 (1st Cir. 1994); (Docket Entry # 32, p. 13); (S.A. 249).

The brief also quotes the substantial likelihood of a miscarriage of justice standard of review that applies under section 33E in a direct appeal of a first degree murder conviction consolidated with an appeal of a denial of a new trial motion raising ineffective assistance of counsel claims. (S.A. 48, 78). Well-established Massachusetts law considers the substantial likelihood, section 33E ineffective assistance of counsel standard as "more favorable to a defendant" than the state constitutional standard in Saferian and it considers the federal constitutional standard in Strickland v. Washington, 466 U.S. at 687, as "no more favorable to a defendant than" the state constitutional standard. Commonwealth v. Wright, 584 N.E.2d at 624.

Although the foregoing exhaustion of the claim potentially leads to de novo review, see Johnston v. Miller, 871 F.3d at 59

(merits review can occur "when a petitioner's claims are exhausted in state court but the state court fails to consider them on the merits"), the SJC's citation to Wright in the following passage evidences that the SJC fully understood the interplay between these standards and adjudicated the imbedded federal claim:

> The defendant asserted multiple claims of ineffective assistance of counsel in his motion for a new trial. Because he has been convicted of murder in the first degree and his appeal from the denial of his motion for a new trial has been consolidated with his direct appeal, we consider his claims of ineffective assistance of counsel to determine if any error has created a substantial likelihood of a miscarriage of justice, as required by G.L. c. 278, § 33E. This standard of review is more favorable to the defendant than the constitutional standard for determining ineffective assistance of counsel. See Commonwealth v. Wright, 411 Mass. 678, 682, 584 N.E.2d 621 (1992).

Commonwealth v. Torres, 14 N.E.3d at 258-259 (setting out standard for all of the ineffective assistance of counsel claims); see generally Scott v. Gelb, 810 F.3d 94, 99 (1st Cir. 2016) ("SJC cited and relied upon both Maldonado, based in part on the standard set in Soares, and Fryar, which together ensure essentially the same protections as the standard set by Batson and its progeny" thus engendering AEDPA deferential review); Paulding v. Allen, 393 F.3d 280, 283 (1st Cir. 2005) (AEDPA standard applies because "SJC understood that Paulding's claim was premised, in part, on federal law"). Because "the *Wright* standard is at least as protective of defendants as the federal ineffective assistance of counsel standard," a federal habeas court "will presume the federal law adjudication to be subsumed

within the state law adjudication." Yeboah-Sefah v. Ficco, 556 F.3d at 70 n.7 (ellipses, citation, quotations marks, and brackets omitted); see Lucien v. Spencer, 871 F.3d 117, 129 (1st Cir. 2017) (SJC's citation to Wright and Commonwealth v. Adams, 375 N.E.2d 681 (Mass. 1978), a standard "'"at least as protective of the defendant's rights as its federal counterpart"'" engenders section 2254(d)(1)'s deferential review); Knight v. Spencer, 447 F.3d 6, 15 (1st Cir. 2006). Finally, as noted above, the SJC explicitly states that, "Counsel's failure to object to the instruction was not ineffective assistance of counsel." Commonwealth v. Torres, 14 N.E.3d at 263-264.

The foregoing leads to the conclusion that the SJC adjudicated the merits of the federal ineffective assistance of counsel claim based on the failure to object to the manslaughter instructions particularly in light of the presumption under Harrington, 562 U.S. at 99, and its progeny. Petitioner nevertheless maintains that the SJC's misinterpretation of the trial judge's manslaughter instructions as the model instruction means that the SJC did not adjudicate the federal claim on the merits. Petitioner grounds the argument on the following portion of the SJC's opinion:

> Finally, *the judge's instruction on manslaughter was the model instruction.* Counsel's failure to object to the instruction was not ineffective assistance of counsel. See Commonwealth v. Tassinari, 466 Mass. 340, 356-357, 995 N.E.2d 42 (2013) (manslaughter charge nearly verbatim to model instruction—no error).

Commonwealth v. Torres, 14 N.E.3d at 263 (emphasis added).[10] As indicated above, however, this language shows that the SJC fully understood the ineffective assistance of counsel claims as based on the failure to object to the manslaughter instructions and it adjudicated the merits of the imbedded federal claim by finding that the decision not to object "was not ineffective assistance of counsel." Id. The SJC's misinterpretation of the record, if any, is a comment about the nature of the trial court's manslaughter instruction as opposed to a summary of the legal *claim* or *argument* the SJC adjudicated.[11] Cf. Johnston v. Mitchell, 871 F.3d at 58-60 (declining to decide if SJC's decision, which characterized a "nested claim" as a Sixth rather than a Fifth Amendment claim, meant that SJC did not adjudicate the Fifth Amendment claim on the merits). It is not a direct comment eschewing adjudication of the federal claim or a summary of the claim(s) as limited to the state law claim. Although lack

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[10] The SJC then states that:

> Taken as a whole, we think the jury understood that a verdict of guilty of murder in the first degree required proof beyond a reasonable doubt of the absence of reasonable provocation and the heat of passion, and that there was no error as in Commonwealth v. Acevedo, 427 Mass. 714, 717, 695 N.E.2d 1065 (1998).

Commonwealth v. Torres, 14 N.E.3d at 263-264.

[11] As an aside, this court does not view the comment as entitled to a presumption under 28 U.S.C. § 2254(e)(1) because it does not depict an historical fact. The comment addresses the record of the instructions before the court as opposed to the record of a witnesses' testimony or an historical fact that would invoke a presumption of correctness under 28 U.S.C. § 2254(e).

of exhaustion or a procedural default may rebut the Harrington presumption, the federal ineffective assistance of counsel claim is fully exhausted, as shown by the presentation in petitioner's brief to the SJC (S.A. 247) (citing Supreme Court cases); (S.A. 217-219), and not procedurally defaulted. See Jackson v. Marshall, 864 F.3d 1, 9 (1st Cir. 2017) ("only when a petitioner's claims are exhausted in state court but the state court fails to consider them on the merits or resolve them on adequate and independent state law grounds do we review them de novo"). Finally, the manslaughter instructions only omitted a portion of the model instruction[12] while otherwise including a majority of the substance of the model instruction. As such, the premise for petitioner's argument that the SJC incorrectly recognized the actual manslaughter instructions as the model instruction is not entirely convincing.

Overall, petitioner fails to rebut the presumption that the SJC adjudicated the merits of the ineffective assistance prong of the federal claim grounded on the failure to object to the manslaughter instructions. In the interest of engendering a comprehensive review of the conviction, however, this court will additionally review the ineffective assistance prong of trial counsel's failure to object to the instructions de novo.

As to the prejudice prong, the SJC decided the claim on the

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[12] Footnote 13 sets out the omitted language.

ineffective assistance prong. Because the SJC's rejection of the claim rested only on the performance prong, de novo review applies to the prejudice prong. See Wiggins v. Smith, 539 U.S. 510, 534 (2003) (reviewing issue of whether petitioner suffered prejudice de novo because state court's rejection under Strickland rested solely on attorney's performance as constitutionally deficient); accord Rivera v. Thompson, 879 F.3d 7, 13-14 (1st Cir. 2018) (when state court "reached only one prong of the test for ineffective assistance of counsel, the other prong is reviewed de novo").

B. Section 2254(d)(1) Review

Respondents argue that section 2254(d)(1)'s "highly deferential" standard of review precludes relief. (Docket Entry # 41). Under this deferential standard, a "state court decision is 'contrary to' clearly established federal law 'if the state court "'applies a rule that contradicts the governing law set forth' by the Supreme Court or 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent.'"'" Linton v. Saba, 812 F.3d 112, 122 (1st Cir. 2016) (quoting Hensley v. Roden, 755 F.3d 724, 730-731 (1st Cir. 2014)); accord Ramdass v. Angelone, 530 U.S. 156, 165-166 (2000) (decision is contrary to "clearly established federal law if it applies a legal rule that contradicts" the "prior holdings" of Supreme Court or "reaches a different result from" Supreme Court

case "despite confronting indistinguishable facts").

An unreasonable application of clearly established federal law occurs if a state court decision "correctly identifies the governing legal rule but applies that rule unreasonably to the facts of a particular prisoner's case." White v. Woodall, 572 U.S. 415, 426 (2014); Cullen v. Pinholster, 563 U.S. 170, 182 (2011). A state court does not unreasonably apply clearly established Supreme Court law by simply refusing to extend it "'"to a context in which the principle should have controlled."'" White v. Woodall, 572 U.S. at 425; accord Bebo v. Medeiros, Civil Action No. 17-2218, __F.3d__, 2018 WL 4770913, at *3 (1st Cir. Oct. 3, 2018) ("[f]ederal habeas relief only 'provides a remedy for instances in which a state court unreasonably applies the Supreme Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error'") (internal brackets omitted). In order to obtain federal habeas relief, "'a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" White v. Woodall, 572 U.S. at 419-420 (quoting Harrington v. Richter, 562 U.S. at 103). Habeas relief under section 2254(d)(1) is available "if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." Id. at 427; accord

Dunn v. Madison, 138 S. Ct. 9, 11 (2017) (habeas relief warranted only when petitioner shows "state court's decision was 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement'") (quoting Harrington v. Richter, 562 U.S. at 103), reh'g denied, 138 S. Ct. 726 (2018). Indeed, federal habeas relief exists "only in cases in which all fairminded jurists would agree that a final state court decision is at odds with the Supreme Court's existing precedents." Bebo v. Medeiros, 2018 WL 4770913, at *3.

An objectively unreasonable application of the relevant jurisprudence differs from an incorrect or erroneous application of such jurisprudence. Williams v. Taylor, 529 U.S. 362, 411 (2000); accord Wiggins v. Smith, 539 U.S. at 520-521 ("state court's decision must have been more than incorrect or erroneous"). Under the unreasonable application prong, the question "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable-a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007); Williams v. Taylor, 529 U.S. at 411 ("application must also be unreasonable").

"'[C]learly established Federal law'" includes only the holdings, "as opposed to the dicta, of" Supreme Court decisions at the time of the state court decision. White v. Woodall, 572 U.S. at 412; Yeboah-Sefah v. Ficco, 556 F.3d at 65 ("'clearly

established Federal law'" refers to "'holdings, as opposed to the dicta, of the *Supreme Court's* decisions at the time of the relevant state court decision'") (internal brackets and citations omitted). "[C]ircuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court,'" Parker v. Matthews, 567 U.S. 37, 48 (2012), and "diverging approaches" to an issue in courts of appeals may "illustrate the possibility of fairminded disagreement." White v. Woodall, 572 U.S. at 422 n.3.

C. Jury Instructions

In ground four, petitoner seeks habeas relief because the voluntary manslaughter instructions defined manslaughter as if it was a separate, charged crime thereby depriving petitioner of a fair opportunity for a manslaughter verdict in violation of due process. More specifically and because the evidence suggested reasonable provocation based on the heat of passion, petitioner contends that the trial judge omitted an essential portion of the model instruction that explains voluntary manslaughter to the jury as a lesser included offense of murder and that murder becomes voluntary manslaughter when the Commonwealth fails to prove the absence of the mitigating circumstance of reasonable provocation based on the heat of passion. (Docket Entry # 1, pp. 26-27, 40-42) (Docket Entry # 32, pp. 5-12) (Docket Entry # 42,

pp. 2-3) (Docket Entry # 46, p. 2).[13] Petitioner insists that due process requires the trial judge to inform the jury that murder is reduced to manslaughter "absent proof that [petitioner] did not act" in the "heat of passion based on reasonable provocation." (Docket Entry # 32, p. 9). Furthermore, the instruction purportedly "diluted" or "inverted the Commonwealth's burden to prove the absence of mitigating factors negating malice." (Docket Entry # 1, p. 27) (Docket Entry # 32, p. 7). Citing Cupp v. Naughten, 414 U.S. 141 (1973), and other cases, petitioner grounds the challenge as a violation of due process and further submits that the constitutional error satisfied the "'substantial and injurious effect" standard in Brecht v. Abrahamson, 507 U.S. 619 (1993). (Docket Entry ## 1, 32, 42,

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[13] As succinctly framed by petitioner in the most recent filing, "The missing portion of the model instruction would have informed the jury that if the defendant had committed an unlawful killing with malice, *manslaughter* and not murder was the correct verdict *unless the Commonwealth proved the absence of heat of passion.*" (Docket Entry # 46, p. 2) (emphasis in original). A proper instruction "would have given [petitioner] an even-handed chance of a manslaughter verdict," according to petitioner. (Docket Entry # 42). The omitted language reads as follows:

> "If after your consideration of all the evidence you find that the Commonwealth has proved beyond a reasonable doubt the elements of murder, except that the Commonwealth has not proved beyond a reasonable doubt the absence of (heat of passion upon reasonable provocation/heat of passion induced by sudden combat), then you must not find the defendant guilty of murder and you would be justified in finding the defendant guilty of voluntary manslaughter."

(Docket Entry # 32, p. 10) (Docket Entry # 42, p. 2) (quoting model instruction).

46).

Clearly established federal law as determined by the Supreme Court requires the prosecution to prove every element of a charged offense beyond a reasonable doubt. See Carella v. California, 491 U.S. 263, 265 (1989); In Re Winship, 397 U.S. 358, 364 (1970); see also Francis v. Franklin, 471 U.S. 307, 314 (1985) (mandatory presumptions "violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense"). "'[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Cupp v. Naughten, 414 U.S. at 148 (quoting In re Winship, 397 U.S. at 364); Henderson v. Kibbe, 431 U.S. 145, 153 (1977) (same). Examining a Maine statute that required a defendant to prove heat of passion on reasonable provocation to reduce murder to manslaughter, the Supreme Court in Mullaney held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."[14] Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) (finding Maine law unconstitutional because it placed burden on defendant to prove "heat of passion" to obtain manslaughter

[14] As explained below, Massachusetts law similarly requires the prosecution to prove beyond a reasonable doubt the absence of provocation to obtain a murder conviction when the evidence shows that the defendant "may have acted with provocation." Commonwealth v. Acevedo, 695 N.E.2d 1065, 1067 (Mass. 1998).

rather than murder conviction).[15] More broadly, a jury instruction is "unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt." Tyler v. Cain, 533 U.S. 656, 659 (2001); accord Carella v. California, 491 U.S. at 265; see also Victor v. Nebraska, 511 U.S. 1, 5 (1994) ("so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof") (citing Jackson v. Virginia, 443 U.S. 307, 320, n.14 (1979)).

In order to obtain habeas relief based on an erroneous

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[15] The First Circuit in Lynch v. Ficco, 438 F.3d 35 (1st Cir. 2006), addressed an ineffective assistance of counsel claim based on counsel's failure to object to instructions that inverted the Commonwealth's burden to prove beyond a reasonable doubt the absence of reasonable provocation as an element of manslaughter in the context of a first degree murder charge. Although finding the due process claim based on the faulty manslaughter charge under Winship, 397 U.S. at 364, and Mullaney, 421 U.S. at 704, procedurally defaulted, the First Circuit addressed the ineffective of assistance of counsel claim de novo and concluded that defendant did not show that trial counsel's failure to object fell below the constitutional standard of reasonableness, i.e., that "that no competent lawyer would have reasonably permitted these instructions to be given without objection." Id. at 49. The manslaughter instructions in Lynch were more confusing than those in the case at bar, included the elements of voluntary manslaughter, and undeniably inverted the burden of proof by stating the Commonwealth must prove that defendant injured the victim as a result of the heat of passion. See Lynch v. Ficco, 438 F.3d at 40-42 & n.3, 5. That said, this court does not consider the Lynch decision clearly established federal law as determined by the Supreme Court under section 2254(d)(1) review under the AEDPA.

instruction, the applicable clearly established law requires petitioner to show that the instruction "so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. at 147; accord Waddington v. Sarausad, 555 U.S. 179, 191 (2009); Estelle v. McGuire, 502 U.S. 62, 72 (1991) ("only question for us is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process'") (quoting Cupp v. Naughten, 414 U.S. at 147); Lucien v. Spencer, 871 F.3d 126 (1st Cir. 2017) (quoting Estelle v. McGuire, 502 U.S. at 71-72); see Henderson v. Kibbe, 431 U.S. at 154 (question in habeas "proceeding is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process', not merely whether the instruction is undesirable, erroneous, or even universally condemned") (quoting Cupp v. Naughten, 414 U.S. at 146, 147). In making this determination, the challenged instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. at 147; accord Estelle v. McGuire, 502 U.S. at 72 (quoting Cupp v. Naughten, 414 U.S. at 147). Finally, habeas relief does not extend to errors of state law, and the fact that an instruction is allegedly incorrect under state law, such as a deviation from a model instruction used in state court, "is not a basis for habeas relief." Estelle v. McGuire, 502 U.S. at 67, 71-72 (dicta stating habeas courts "do not grant relief, as might a state appellate court, simply because the instruction may have

been deficient in comparison to the [standard California] model" jury instruction).[16]

In denying relief, the SJC stated that "[t]aken as a whole, . . . the jury understood that a verdict of guilty of murder in the first degree required proof beyond a reasonable doubt of the absence of reasonable provocation and the heat of passion, and that there was no error as in Commonwealth v. Acevedo, 427 Mass. 714, 717, 695 N.E.2d 1065 (1998)." Commonwealth v. Torres, 14 N.E.3d at 263-264. This principle mirrors the holding in Mullaney v. Wilbur, 421 U.S. at 704, and thereby evidences the SJC's application of clearly established federal law as determined by the Supreme Court. In addition, the relevant portion of Acevedo cited in Torres cites to both Francis v. Franklin, 471 U.S. at 322 ("Francis"), and Commonwealth v. Repoza, 400 Mass. 516, 519 (1985) ("Repoza"). Commonwealth v. Acevedo, 427 Mass. at 717. The cited portion of Francis in Acevedo sets out the principle that, "Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." Francis v. Franklin, 471 U.S. at 322. The cited portion of Repoza in Acevedo sets out a similar

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[16] To state the obvious, the above dicta does not constitute clearly established law under section 2254(d) and is not treated as such.

principle and further interprets Francis as abiding by "the general principle that constitutionally erroneous jury instructions are not to be viewed in isolation but rather in the context of the charge as a whole, so that a reviewing court can assess the possible impact of the error on the deliberations of a reasonable juror." Commonwealth v. Repoza, 400 Mass. at 519. In light of the foregoing, including the citation to Acevedo, the SJC did not apply a rule that contradicts the above-noted Supreme Court holdings with respect to shifting the burden of proof or viewing the instructions as a whole. The SJC also did not reach a different result than a Supreme Court decision despite confronting materially indistinguishable facts. See generally Linton v. Saba, 812 F.3d at 122. The issue therefore reduces to whether the SJC applied the governing rule unreasonably which, in turn, entails an understanding of the underlying Massachusetts law.

Under Massachusetts law in the context of a first degree murder charge, "[t]he presence of malice is what makes an unlawful killing murder." Commonwealth v. Sires, 596 N.E.2d 1018, 1021-22 (Mass. 1992); Commonwealth v. Judge, 650 N.E.2d 1242, 1246 (Mass. 1995) (jury must find "defendant formed the mens rea of malice aforethought" to find "murder in the first or second degree"). "The correct rule" in Massachusetts is that where "the evidence raises the possibility that the defendant may have acted on reasonable provocation, the Commonwealth must prove, and the jury must find, beyond a reasonable doubt that the

defendant did not act on reasonable provocation."[17] Commonwealth v. Acevedo, 695 N.E.2d at 1067; accord Commonwealth v. Whitman, 722 N.E.2d 1284, 1289-90 (Mass. 2000) (in "murder case where evidence has raised the possibility of provocation and voluntary manslaughter may be at issue, proof of malice requires proof of the absence of provocation"); Commonwealth v. Boucher, 532 N.E.2d 37, 39 (Mass. 1989) (when Commonwealth fails to prove "absence of provocation beyond a reasonable doubt," there is "no finding of malice and hence no conviction of murder"). "Malice and adequate provocation are mutually exclusive." Commonwealth v. Acevedo, 695 N.E.2d at 1067. Hence, when evidence arises that "the defendant may have acted with provocation," Massachusetts law requires the trial judge to instruct "the jury in *some* form 'that, if the Commonwealth had not proved the absence of

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[17] Massachusetts cases which invert the above burden typically include language that places the burden on the Commonwealth to prove beyond a reasonable doubt that the defendant acted with reasonable provocation. See Commonwealth v. Acevedo, 695 N.E.2d at 1067 (stating that "difference between proof beyond a reasonable doubt that a defendant acted with reasonable provocation and proof beyond a reasonable doubt that a defendant did not act with reasonable provocation is substantial"); accord Commonwealth v. Fickling, 746 N.E. 475, 483-484 & n.15 (Mass. 2001) (collecting cases); see also Commonwealth v. Van Winkle, 820 N.E.2d 220, 229 n.8 (Mass. 2005) (noting erroneous instruction that Commonwealth had to prove beyond reasonable doubt that "'defendant injured a victim as a result of . . . heat of passion'" but judge then correctly instructed "Commonwealth's burden of proving that the defendant did not act in heat of passion"); Commonwealth v. Niemic, 696 N.E.2d 117, 119-121 (Mass. 1998) (examining charge as a whole, error in manslaughter instruction placing burden on Commonwealth to prove defendant injured victim as a result of heat of passion did not create substantial likelihood of miscarriage of justice in light of evidence establishing "victim's threatening, belligerent behavior").

provocation beyond a reasonable doubt, there could be no finding of malice and hence no conviction of murder.'" Commonwealth v. Acevedo, 695 N.E.2d at 1067 (quoting Commonwealth v. Boucher, 532 N.E.2d at 39) (emphasis added). Furthermore, although "voluntary manslaughter differs from murder because of the absence of malice," Commonwealth v. Dyer, 955 N.E.2d 271, 289 (Mass. 2011) (citing Commonwealth v. Anderson, 563 N.E.2d 1353 (Mass. 1990), and Commonwealth v. Acevedo, 695 N.E.2d at 1067), it remains "'an intentional killing which is mitigated by extenuating circumstances." Commonwealth v. Whitman, 722 N.E.2d 1284, 1290 (Mass. 2000); see Commonwealth v. Jones, 911 N.E.2d 793, 796 (Mass. App. Ct. 2009) (stating, in context of indictment charging first degree murder, that "judge correctly told the jury that to prove voluntary manslaughter, the Commonwealth must prove 'an intentional infliction of injury likely to cause death, which causes death' and 'the defendant acted unlawfully'").[18]

Turning to the instructions in the case at bar, the trial judge began by explaining that the burden of proof is on the Commonwealth to prove petitioner guilty of the charge beyond a reasonable doubt. (S.A. 2329-2331). The trial judge then correctly defined murder as "the unlawful killing of a human being *with malice*" (S.A. 2331) (emphasis added) and set out the

[18] The voluntary manslaughter charge in the case at bar likewise required the jury to find that petitioner "intentionally inflicted an injury likely to cause death upon the deceased, that caused her death," and that petitioner "acted unlawfully." (S.A. 2348). Petitioner objects, inter alia, to this portion of the manslaughter instructions.

distinction between murder in the first degree and murder in the second degree:

> Murder is the unlawful killing of a human being with malice. Malice committed with deliberate premeditation and malice is murder in the first degree. Murder committed with extreme atrocity or cruelty and with malice is murder in the first degree. Murder that does not appear to be murder in the first degree, is murder in the second degree.

(S.A. 2331).

In addition to explaining the element of an unlawful killing, the instructions correctly explained the element of malice in the context of both deliberate premeditation and extreme atrocity or cruelty for first degree murder and in the context of second degree murder. (S.A. 2333-2335, 2338-2339). In the course of explaining malice, the trial judge repeatedly and consistently noted it was the Commonwealth's burden to prove malice beyond a reasonable doubt. (S.A. 2333) ("second element the Commonwealth must prove beyond a reasonable doubt is . . . malice"); (S.A. 2334, 2342) ("[i]n evaluating whether the Commonwealth has proven beyond a reasonable doubt malice . . ."); (S.A. 2336, 2341) (if you conclude or find "that the Commonwealth has proven beyond a reasonable doubt each of these three elements[,]" which include "that the killing was completed with malice"); (S.A. 2343) (to prove second degree murder, Commonwealth must prove, beyond a reasonable doubt, "an unlawful killing" and a killing "committed with malice"); (S.A. 2343) ("Commonwealth must prove beyond a reasonable doubt, malice"); (S.A. 2344) (to prove second degree murder, "Commonwealth is

required to prove beyond a reasonable doubt that [petitioner] unlawfully killed the deceased with malice").

After comprehensively discussing the concept of malice for first and second degree murder, the trial judge introduced the "crime of voluntary manslaughter."[19] (S.A. 2345). In particular, the trial judge stated that a killing may be voluntary manslaughter if it took place "under mitigating circumstances so that the Commonwealth cannot prove" malice beyond a reasonable doubt. Having listened to the instructions that first and second degree murder require malice as an element, this statement adequately introduces the "'malice'-'no malice' fork in the road," Commonwealth v. Boucher, 532 N.E.2d at 39, between murder and manslaughter. See Commonwealth v. Sires, 596 N.E.2d at 1021-22 ("presence of malice is what makes an unlawful killing murder"); Commonwealth v. Boucher, 532 N.E.2d at 39 ("[m]alice and adequate provocation are mutually exclusive"). The trial judge additionally instructed the jury that to prove malice the Commonwealth must prove "the absence of certain mitigating circumstances[,]" and that for either first or second degree murder "the Commonwealth must prove beyond a reasonable doubt the absence of the mitigating circumstances of heat of passion upon a reasonable provocation."[20] (S.A. 2345-2346).

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[19] During oral argument, petitioner criticized this language.

[20] The exact language of the instructions at this juncture reads as follows:

In order to prove that [petitioner] acted with malice, the

This language correctly explains the Commonwealth's burden to prove beyond a reasonable doubt the absence of the mitigating circumstance of a killing based on the heat of passion on reasonable provocation in order to prove murder. See Commonwealth v. Acevedo, 695 N.E.2d at 1067 (trial judge should instruct "jury in some form 'that, if the Commonwealth had not proved the absence of provocation beyond a reasonable doubt, there could be no finding of malice and hence no conviction of murder'") (quoting Commonwealth v. Boucher, 532 N.E.2d at 39). Placed in the context of the preceding instructions regarding malice and reasonable doubt, the foregoing language in the instructions exemplifies the SJC's reasonable application of the foregoing, clearly established Supreme Court precedent including the holding in Mullaney that "the Due Process Clause requires the

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> Commonwealth must prove beyond a reasonable doubt, the absence of certain mitigating circumstances. Mitigating circumstances are circumstances that lessen a defendant's culpability for an act.
>
> Both the crimes of murder and voluntary manslaughter, which I will instruct you about in a minute -- both require proof of an unlawful killing.
>
> But the killing may be the crime of voluntary manslaughter if it occurred under mitigating circumstances so that the Commonwealth cannot prove beyond a reasonable doubt that Mr. Torres acted with malice.
>
> *In order to obtain a conviction of murder, either first or second, the Commonwealth must prove beyond a reasonable doubt the absence of the mitigating circumstances of heat of passion upon a reasonable provocation.*

(S.A. 2345-2346) (emphasis added).

prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." Mullaney v. Wilbur, 421 U.S. at 704.

Petitioner nevertheless contends that the omission of an explanation that murder *becomes manslaughter* when the Commonwealth does not prove the absence of heat of passion deprived petitioner of a fair or even-handed chance for a manslaughter verdict. According to petitioner, the trial "*judge never identified any circumstance where the jury 'should find' [petitioner] guilty of manslaughter.*" (Docket Entry # 32) (emphasis in original). Petitioner maintains that the instructions a few pages later set out the elements of manslaughter as a separate crime[21] as opposed to setting out that the jury should find manslaughter if it finds the elements of murder (an unlawful killing with malice) without also finding that the Commonwealth proved the absence of heat passion.[22] (Docket Entry # 1, pp. 26-25) (Docket Entry # 32, pp. 5-12) (Docket Entry # 42, pp. 2-3) (Docket Entry # 46, pp. 2-3). In

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[21] See footnote 18.

[22] Petitioner also argues that the instruction to choose the highest offense after the manslaughter instruction improperly focused the jury's attention on murder rather than manslaughter. (Docket Entry # 32). The highest offense instruction is correct under Massachusetts law and, in any event, did not unduly focus the jury's attention on murder. See Commonwealth v. Rivera, 833 N.E.2d 1113, 1123 (Mass. 2005) ("judge was entitled to inform the jury of its duty to return a verdict of guilty of the highest crime that was proved beyond a reasonable doubt").

presenting these arguments, including the purported inversion of the burden of proof (Docket Entry # 1, pp. 26-27) (Docket Entry # 32, p. 7), petitioner takes issue with the following instructions:

> And now my instructions, ladies and gentlemen, as to voluntary manslaughter. Voluntary manslaughter includes the intentional, unlawful killing of the deceased by [petitioner].
>
> To prove this crime, the Commonwealth must prove beyond a reasonable doubt, each of the following two elements beyond a reasonable doubt.
>
> One, that [petitioner] intentionally inflicted an injury or injuries likely to cause death upon the deceased, that caused her death, and two, that [petitioner] acted unlawfully. I've previously given you the instructions concerning, or the definition of an unlawful killing.
>
> If the Commonwealth proves each of these two elements beyond a reasonable doubt then you should return a verdict of voluntary manslaughter. If the Commonwealth fails to prove each of these elements beyond a reasonable doubt, you must not convict [petitioner] of voluntary manslaughter.

(S.A. 2348-2349).

It is true that the trial judge did not inform the jury that manslaughter is a lesser included offense of murder. It is also true that the trial judge did not instruct the jury that:

> "if you find that the Commonwealth has proved beyond a reasonable doubt the elements of murder, except that the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion . . ., then you must not find the defendant guilty of murder and you would be justified in finding the defendant guilty of voluntary manslaughter."

(Docket Entry ## 32, 42) (quoting model instruction).

Overall, however, the trial judge correctly distinguished murder from manslaughter on the basis that to prove murder the

Commonwealth must prove beyond a reasonable doubt the absence of the mitigating circumstance of heat of passion based on reasonable provocation. The trial judge prefaced the above instructions with an instruction that "[i]f the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion upon reasonable provocation, the Commonwealth has not proved malice," which a reasonable juror would understand meant that the Commonwealth has not proved murder. (S.A. 2348); see Commonwealth v. Acevedo, 695 N.E.2d at 1067 (judge should tell jury "in some form 'that, if the Commonwealth had not proved the absence of provocation beyond a reasonable doubt, there could be no finding of malice and hence no conviction of murder"). Previously, the trial judge instructed the jury that first as well as second degree murder require the Commonwealth to prove the absence of the mitigating circumstance of heat of passion upon a reasonable provocation. (S.A. 345-346). Recognizing that murder requires malice and requires the Commonwealth to prove the absence of heat of passion upon a reasonable provocation, a reasonable juror would understand that an unlawful killing may be manslaughter when the Commonwealth fails to prove the absence of the mitigating circumstance of heat of passion based on reasonable provocation. See generally Francis v. Franklin, 471 U.S. at 315 ("'whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable

juror could have interpreted the instruction'"). The instructions did not invert the burden of proof because they did not include unexplained language contradicting the correct instruction that "the Commonwealth must prove beyond a reasonable doubt the absence of . . . heat of passion upon a reasonable provocation" to find first or second degree murder. (S.A. 2345-2346); Commonwealth v. Acevedo, 695 N.E.2d at 1067; see Francis v. Franklin, 471 U.S. at 322 & n.8 (setting out holding). The instructions "taken as a whole" adequately conveyed the Commonwealth's burden such that the "ambiguity," if any, "in the particular language challenged could not have been understood by a reasonable juror as shifting the burden of persuasion." Francis v. Franklin, 471 U.S. at 318-319. The SJC applied this clearly established Supreme Court law correctly as opposed to unreasonably. See Commonwealth v. Torres, 14 N.E.3d at 263-264. The instructions sufficiently conveyed that the Commonwealth had the burden to prove every element of first degree murder beyond a reasonable doubt, including the burden to show the absence of heat of passion based on reasonable provocation to show murder as opposed to manslaughter. See Carella v. California, 491 U.S. at 265; see also Francis v. Franklin, 471 U.S. at 314; Mullaney v. Wilbur, 421 U.S. at 704. As a result, the SJC's rejection of the federal due process claim based on the allegedly faulty manslaughter instructions as diluting the burden of proof on

murder by failing to inform the jury that manslaughter was not murder absent proof of heat of passion (Docket Entry # 32, p. 7) was not an unreasonable application of the above-noted clearly established law as determined by the Supreme Court in Estelle v. McGuire, 502 U.S. at 72, Francis v. Franklin, 471 U.S. at 314, 322, Mullaney v. Wilbur, 421 U.S. at 704, Cupp v. Naughten, 414 U.S. at 147. Indeed, the instructions as a whole were constitutionally correct and neither the challenged instructions nor the omission of the model instruction on voluntary manslaughter,[23] "so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. at 147; accord Estelle v. McGuire, 502 U.S. at 72.

Finally, as an aside, it is worth noting that "[t]here is no clearly established right to an instruction on a lesser included offense in a noncapital case."[24] Exilhomme v. Spencer, Civil Action No. 08-10552-DPW, 2011 WL 3759219, at *11 & n.9 (D. Mass. Aug. 24, 2011) (applying section 2254(d)(1) review to failure to give lesser included offense instruction). "The United States

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[23] Footnote 13 sets out the omitted language of the model instruction.

[24] A noncapital case includes a sentence of life imprisonment. See McMullan v. Booker, 2012 WL 603990, *3 (E.D.Mich. Feb. 24, 2012) (Sixth Circuit and "several other circuits have concluded that cases in which a defendant receives a sentence of life imprisonment without parole instead of the death penalty should be treated as a noncapital case" when "determining whether due process requires" lesser included offense instruction).

Supreme Court has held that a capital defendant maintains a due process right to receive a lesser included offense instruction if the evidence so warrants, but it has explicitly reserved whether this right extends to noncapital defendants." Paulding v. Allen, 393 F.3d 280, 283 (1st Cir. 2005); Exilhomme v. Spencer, 2011 WL 3759219, at *11 & n.9; see Smith v. Spisak, 130 S.Ct. 676, 689-690 (2010); Beck v. Alabama, 447 U.S. 625, 627 (1980).

D. Ineffective Assistance of Counsel

Ground four also raises an ineffective assistance of counsel claim based on trial counsel's failure to object to the manslaughter instructions which, as explained previously, engenders deferential review under section 2254(d)(1) because the SJC adjudicated the merits of the federal claim. To complete the record, this court separately addresses the performance prong of this claim applying de novo review. Ground four also asserts that trial counsel's closing argument raising the issue of manslaughter was inconsistent with petitioner's defense that he did not commit the crime. (Docket Entry # 1, pp. 6, 25-27, 41). Respondents submit that the SJC's adjudication of the claims was not contrary to or an unreasonable application of clearly established Supreme Court precedent. (Docket Entry # 41).

As earlier indicated, the SJC reviewed petitioner's ineffective assistance of counsel claims by asking "whether there was error by trial counsel . . . and, if there was, whether the

error was likely to have influenced the jury's verdict." Commonwealth v. Torres, 14 N.E.3d at 258-259 (citing Commonwealth v. Wright, 584 N.E.2d at 624). Because this standard under Wright "'is at least as protective of defendants as the federal ineffective assistance of counsel standard,'" the First Circuit "'"presume[s] the federal law adjudication to be subsumed within the state law adjudication."'" Yeboah-Sefah v. Ficco, 556 F.3d at 71; see Lucien v. Spencer, 871 F.3d at 129. The SJC therefore addressed these imbedded federal claims on the merits and the AEDPA's deferential review applies to both ineffective assistance of counsel claim claims.

Strickland sets out the applicable standard under federal law applying de novo review and it is also "clearly established law" within the meaning of the AEDPA. See Smith v. Dickhaut, 836 F.3d 97, 103 (1st Cir. 2016) (contrasting section 2254(d)(1) inquiry as to whether Strickland's application was unreasonable to the different "de novo determination of whether trial counsel's performance fell below the standards established in Strickland"), cert. denied, 137 S. Ct. 1226 (2017); Jewett v. Brady, 634 F.3d 67, 75 (1st Cir. 2011) ("[t]he clearly established federal law governing ineffective assistance of counsel claims is the framework established in Strickland"). The two prong standard in Strickland requires showing "both deficient performance and prejudice." Sexton v. Beaudreaux, 138 S. Ct.

2555, 2558 (2018); Strickland v. Washington, 466 U.S. at 687.

In order to show "'that counsel's performance was deficient, a defendant must show that it fell below an objective standard of reasonableness under the circumstances.'" Yeboah-Sefah v. Ficco, 556 F.3d at 70; Strickland v. Washington, 466 U.S. at 688. Evaluating counsel's conduct "'from counsel's perspective at the time'" under "'prevailing professional norms,'" the performance prong asks "'whether counsel's assistance was reasonable considering all of the circumstances.'" Rivera v. Thompson, 879 F.3d at 12; Strickland v. Washington, 466 U.S. at 688. Because of "'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" Rivera v. Thompson, 879 F.3d at 12 (quoting Strickland, 466 U.S. at 689), trial counsel's performance "is deficient 'only where, given the facts known at the time, counsel's choice was so patently unreasonable that no competent attorney would have made it.'" Id. (quoting Knight v. Spencer, 447 F.3d at 15). Indeed, "[e]ven under de novo review, the standard for judging counsel's representation is a most deferential one." Harrington v. Richter, 562 U.S. at 105.

The prejudice prong requires demonstrating "that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Rivera v. Thompson, 879 F.3d at 12 (quoting Strickland v.

Washington, 466 U.S. at 688). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Harrington v. Richter, 562 U.S. at 104 (quoting Strickland v. Washington, 466 U.S. at 694).

The added layer of determining that the SJC's application of Strickland was unreasonable under section 2254(d)(1) review "is all the more difficult." Id. at 105. "[T]he 'pivotal question' in a federal collateral attack under Strickland is not 'whether defense counsel's performance fell below Strickland's standard,' but 'whether the state court's application of the Strickland standard was unreasonable,'. . ., that is, whether 'fairminded jurists' would all agree that the decision was unreasonable." Jewett v. Brady, 634 F.3d at 75 (quoting Harrington v. Richter, 562 U.S. at 101-102); see Harrington v. Richter, 562 U.S. at 105 (when section 2254(d)(1) "applies, the question is not whether counsel's actions were reasonable" but "whether there is any reasonable argument that counsel satisfied Strickland's deferential standard"). Thus, "[w]hen combined with Strickland's already 'highly deferential' standard for a trial attorney's conduct" on de novo review, "the AEDPA standard 'is "doubly" so,' requiring the court to ask 'whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.'" Harrington v. Richter, 562 U.S. at 105 (quoting Knowles v. Mirzayance, 556 U.S. 111, 123 (2009)); Rivera v.

Thompson, 879 F.3d at 12.

Turning to the ineffective assistance claim based on the failure to object to the manslaughter instructions under the AEDPA, section 2254(d)(1) applies. See Smith v. Dickhaut, 836 F.3d at 103 (in "federal habeas proceeding, claims of ineffective assistance of counsel present mixed questions of law and fact which are reviewed under § 2254(d)(1)'s 'unreasonable application' clause"). As previously noted, the SJC applied the substantial miscarriage of justice standard of review to the ineffective assistance of counsel claims. Commonwealth v. Torres, 14 N.E.3d at 258-259. The SJC rejected the claim because "[c]ounsel's failure to object to the instruction was not ineffective assistance of counsel." Id. at 263. Where, as here, "the SJC applies its more favorable 'substantial likelihood of a miscarriage of justice' standard, its decision will not be deemed to be 'contrary to' the Strickland criterion." Knight v. Spencer, 447 F.3d at 15. Accordingly, the issue devolves to the unreasonable application of Strickland under section 2254(d)(1).

Viewing the instructions as a whole, they were constitutional. Even though the instructions did not inform the jury that manslaughter was a lesser included offense, the trial judge "told the jury in *some* form 'that, if the Commonwealth had not proved the absence of provocation beyond a reasonable doubt, there could be no finding of malice and hence no conviction of

murder.'" Commonwealth v. Acevedo, 695 N.E.2d at 1067 (quoting Commonwealth v. Boucher, 532 N.E.2d at 39) (emphasis added). In fact, the trial judge correctly charged the jury that "[i]n order to obtain a conviction of murder, either first or second, the Commonwealth must prove beyond a reasonable doubt the absence of the mitigating circumstances of heat of passion upon a reasonable provocation." (S.A. 2345-2346). In addition, the primary defense theory was that petitioner did not have adequate time to commit the crime as opposed to the existence of reasonable provocation. The instructions did not misstate the burden of proof as to provocation in a manner consistent with other Massachusetts cases that criticize manslaughter instructions.[25] Under the circumstances, fairminded jurists would *not* all agree that trial counsel's decision not to object was unreasonable. Even more to the point, "[t]he *Strickland* standard is a general one, so the range of reasonable applications is substantial." Harrington v. Richter, 562 U.S. at 105; accord Jewett v. Brady, 634 F.3d at 75 ("Strickland standard is a very general one, so that state courts have considerable leeway in applying it to individual cases"). Placed against this general standard, a reasonable argument exists that trial counsel satisfied the performance prong. See Rivera v. Thompson, 879 F.3d at 12 (AEDPA standard asks "'whether there is any reasonable argument that

[25] See footnote 17.

counsel satisfied Strickland's deferential standard'"); see generally Sexton v. Beaudreaux, 138 S. Ct. at 2558-2559 ("fairminded jurist could conclude that counsel's performance was not deficient because counsel reasonably could have determined that the motion to suppress would have failed"). Accordingly, the SJC's adjudication of the claim was not an unreasonable application of Strickland's performance prong.

Applying de novo review to the claim, the result is the same. The instructions as a whole adequately conveyed the concept of malice as the distinguishing feature between murder and manslaughter. A reasonable jury listening to the instructions would understand that murder required the Commonwealth to prove beyond a reasonable doubt the absence of the mitigating circumstance that petitioner acted in the heat of passion based on reasonable provocation. (S.A. 2345-2346). Immediately before the instructions regarding the elements of manslaughter, the trial judge reiterated that if the Commonwealth has not proved the absence of reasonable provocation, it has not proved malice thereby necessarily conveying to a reasonable juror that it has not proved murder. (S.A. 2348). The jury also heard that the killing may be manslaughter if it occurred under mitigating circumstances and that the Commonwealth had the burden to prove the absence of mitigating circumstances. (S.A. 2345). Overall and in light of the instructions as a whole, trial

counsel's failure to object was not "'so patently unreasonable that no competent attorney would have made it.'" Rivera v. Thompson, 879 F.3d at 12; see, e.g., Lynch v. Ficco, 438 F.3d at 40-42, 49.[26]

As to prejudice, there is not a reasonable probability that the result of the trial would have been different. Scientific physical evidence, albeit not definitive, placed petitioner at the scene. Commonwealth v. Torres, 14 N.E.3d at 258; 28 U.S.C. § 2254(e)(1); see Yeboah-Sefah v. Ficco, 556 F.3d at 80 (noting that "the trial court made several factual findings relevant to the instant claim to which, even when reviewing the legal issues de novo, we are nevertheless required to defer," citing 28 U.S.C. § 2254(e)(1)). The cause of death was strangulation and the incision occurred after the strangulation, Commonwealth v. Torres, 14 N.E.3d at 257 (summarizing pathologist's findings); 28 U.S.C. § 2254(e)(1), thus evidencing extreme atrocity or cruelty. Petitioner's description of the victim's statements that purportedly provided the basis for provocation did not indicate they took place during any physical struggle beyond perhaps the victim scratching petitioner's face thus allowing the jury to infer that a sufficient time period took place such that petitioner would have "cooled off by the time of the killing." (S.A. 588, 606-609, 2346). Accordingly, there is an inadequate

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[26] See footnote 15.

showing that but for the purported error of not objecting to the instructions as confusing or as omitting certain language,[27] there is a reasonable probability that the result of the proceeding would have been different. In sum, the ineffective assistance claim based on the failure to object to the manslaughter instructions does not warrant habeas relief.

Ground four additionally alleges that trial counsel was ineffective for arguing manslaughter during closing argument on the basis that it was inconsistent with the primary defense that petitioner did not commit the killing. (Docket Entry # 1, pp. 6, pp. 25-26). The SJC rejected the claim because trial counsel's argument consisted of only a few words in a lengthy closing argument and the brevis argument gave the jury an additional option in lieu of murder. The relevant passage in the decision states that trial counsel's:

> argument to the jury was more in passing than it was inconsistent with the primary trial strategy. He argued at the very end of a closing argument that spanned approximately twenty-three pages of the transcript, "You must return—must return a verdict of not guilty. And at the most, at most, the government has proven manslaughter." The argument was hardly the "abrupt switch" in strategy about which the defendant complains. Rather, in the context of the entire closing argument and the entire trial, it was the gentle planting of a small seed. It served primarily as a quiet introduction to the judge's instructions, and not a shift in strategy. The requested instruction also gave the jury, and the defendant, an additional option between guilty of murder and not guilty of murder.

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[27] See footnote 13.

Commonwealth v. Torres, 14 N.E.3d at 263.

Here, the SJC's application of the substantial miscarriage of justice standard was not "'contrary to' the Strickland criterion." Knight v. Spencer, 447 F.3d at 15. The SJC's application of the Strickland standard was also not unreasonable. Manslaughter remained a possibility, albeit not a strong possibility in light of the evidence, based on petitioner's statements during the interview. (S.A. 588, 606-609). Because manslaughter was not consistent with petitioner's main theory that he did not commit the killing, however, trial counsel mentioned manslaughter briefly and only in passing. As cogently reasoned by the SJC, "in the context of the entire closing argument and the entire trial," the reference to manslaughter "was the gentle planting of a small seed" which gave the jury another option in lieu of finding petitioner guilty or not guilty of murder. Commonwealth v. Torres, 14 N.E.3d at 263. In giving the jury this option but otherwise focusing on the primary defense that petitioner did not commit the killing, trial counsel acted reasonably and well within prevailing professional norms. Coupled with section 2254(d)(1)'s deferential standard and the substantial range of reasonable applications of Strickland, Harrington v. Richter, 562 U.S. at 105, the SJC's rejection of the claim under the performance prong was not an unreasonable application of Strickland and its Supreme Court progeny.

As a final matter, petitioner requests an evidentiary hearing if "a live question" arises "as to whether trial counsel's failure" to object to the manslaughter instructions was a legitimate strategic decision. (Docket Entry # 46, p. 3). Petitioner maintains that an evidentiary hearing would give trial counsel an opportunity to explain the lack of an objection. (Docket Entry # 46, p. 3). Trial counsel's May 2011 affidavit filed in the trial court, however, makes it highly unlikely that trial counsel has a specific memory other than his general memory of "leaving 'no stone unturned' in [the] case." (S.A. 416-417). Furthermore, trial counsel's subjective belief that he made a strategic decision and the content of that subjective or internal decision is not the proper framework to gage a Strickland claim. "Counsel's performance" under Strickland "is measured objectively, considering only what is 'reasonable[ ] under prevailing professional norms.'" Phim v. Demoura, Civil Action No. 16-11100-LTS, 2018 WL 1320703, at *5 (D. Mass. Mar. 14, 2018) (quoting Strickland, 466 U.S. at 687-88). Consequently, an evidentiary hearing to ascertain whether trial counsel made a strategic decision is unlikely to reveal relevant information. See Companonio v. O'Brien, 672 F.3d 101, 112 (1st Cir. 2012) (to warrant evidentiary hearing, "Companioni must . . . demonstrate that his allegations would entitle him to relief and that the hearing is likely to elicit the factual support for those

allegations").

In any event, where, as here, the SJC undertook a merits review, federal habeas review is limited to the record before the state court. Atkins v. Clarke, 642 F.3d 47, 49 (1st Cir. 2011) (Cullen v. Pinholster, 563 U.S. 170, 181 (2011), "held that habeas 'review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits'") (quoting Cullen, 563 U.S. at 181).

CONCLUSION

In accordance with the foregoing discussion, this court **RECOMMENDS**[28] that respondents' request to deny the petition (Docket Entry # 41, p. 34) be **ALLOWED** and that the petition (Docket Entry # 1) be **DISMISSED.**

/s/ Marianne B. Bowler
MARIANNE B. BOWLER
United States Magistrate Judge

[28] Any objections to this Report and Recommendation must be filed with the Clerk of Court within 14 days of receipt of the Report and Recommendation to which objection is made and the basis for such objection should be included. See Fed. R. Civ. P. 72(b); Rule 3, Rules for U.S. Magistrate Judges in U.S. District Court for the District of Massachusetts. The written objections must specifically identify the portion of the Report and Recommendation to which objection is made. Any party may respond to another party's objections within 14 days after being served with a copy of the objections. Failure to file objections within the specified time waives the right to appeal the order.