APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 12 2023

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

PHILIP JONES, Petitioner-Appellant, v. PATRICK COVELLO, Acting Warden, Respondent-Appellee.	No. 21-56361 D.C. No. 2:13-cv-07792-JWH-JPR Central District of California, Los Angeles ORDER

Before: CANBY and SUNG, Circuit Judges.

Appellant's unopposed motion to file under seal the unredacted motion for reconsideration (Docket Entry No. 6) is granted. The Clerk will file publicly the motion to seal (Docket Entry No. 6-1). The Clerk will file under seal the unredacted motion for reconsideration (Docket Entry Nos. 6-2). The redacted motion has been filed at Docket Entry No. 5.

Appellant's motion for reconsideration (Docket Entry Nos. 5 & 6) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

PHILIP JONES, Petitioner-Appellant, v. PATRICK COVELLO, Acting Warden, Respondent-Appellee.	No. 21-56361 D.C. No. 2:13-cv-07792-JWH-JPR Central District of California, Los Angeles ORDER

Before: BUMATAY and VANDYKE, Circuit Judges.

Appellant's unopposed motion to file under seal the unredacted request for a certificate of appealability (Docket Entry No. 3) is granted. The Clerk will file publicly the motion to seal (Docket Entry No. 3-1). The Clerk will file under seal the unredacted request for a certificate of appealability (Docket Entry No. 3-2). The redacted request has been filed at Docket Entry No. 2.

The request for a certificate of appealability (Docket Entry Nos. 2 & 3) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILIP JONES, Petitioner, v. KELLY SANTORO, Warden, Respondent.	Case No. CV 13-7792-JWH (JPR) ORDER DENYING A CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing § 2254 Cases in the U.S. District Courts provides as follows:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a

certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were '"adequate to deserve encouragement to proceed further."'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted).

Here, Petitioner hasn't made the necessary showing as to the merits of any of his claims.

Accordingly, a certificate of appealability is **DENIED.**

IT IS SO ORDERED.

DATED: November 17, 2021

JOHN W. HOLCOMB
U.S. DISTRICT JUDGE

Presented by:

Jean Rosenbluth
U.S. Magistrate Judge

APPENDIX D

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILIP JONES, Petitioner, v. KELLY SANTORO, Warden, Respondent.	Case No. CV 13-7792-JWH (JPR) **J U D G M E N T**

Pursuant to the Order Accepting Findings and Recommendations of U.S. Magistrate Judge,

It is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the Second Amended Petition is **DENIED** and that this action is **DISMISSED with prejudice.**

IT IS SO ORDERED.

DATED: November 17, 2021

JOHN W. HOLCOMB
U.S. DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILIP JONES, Petitioner, v. KELLY SANTORO,[1] Warden, Respondent.	Case No. CV 13-7792-JWH (JPR) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE

The Court has reviewed the Second Amended Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge, which recommends that judgment be entered denying the SAP and dismissing the action with prejudice. See 28 U.S.C. § 636(b)(1). Petitioner filed objections to the R. & R. on June 16, 2021; Respondent did not reply.

Most of Petitioner's objections simply reargue points made in his SAP and Traverse. A few warrant discussion, however. To show deficient performance by his trial counsel, he again points to counsel's testimony during the evidentiary hearing that he did not "investigate a mental state defense." (Objs. at 2.) As he argues, in many cases that might be "significant." (Id.) But as the Magistrate Judge pointed out, defense counsel's testimony

[1] Kelly Santoro is the warden of North Kern State Prison, where Petitioner is housed, and is substituted in under Federal Rule of Civil Procedure 25(d) as the proper Respondent. See also R.2(a), Rules Governing § 2254 Cases in U.S. Dist. Cts.

as a whole made clear that he at least somewhat investigated a mental-state defense before reasonably deciding not to pursue the issue further. (See R. & R. at 26-31 (summarizing defense counsel's evidentiary-hearing testimony); see also id. at 39.) He reviewed all five expert reports then available concerning Petitioner's mental state and discussed with Petitioner's mother and girlfriend his mental state immediately before the crimes. (See id. at 27-29.) When Petitioner's mother mentioned a family history of mental illness, he followed up by asking that she provide him with more information, but she never did. (Id. at 28.) And counsel knew from talking to the mother that Petitioner had never been in mental-health treatment and had no medical records concerning it. (Id.)

Defense counsel also knew from reading the expert reports that many of Petitioner's doctors suspected that he was malingering. (See id. at 27-28; see also id. at 36-39.) As the Magistrate Judge explained, he therefore reasonably decided to pursue another defense at trial rather than risk having Petitioner rely entirely on a flawed mental-state one. (See id. at 36-41.)

On habeas review, "a federal court may grant relief only if every 'fairminded juris[t]' would agree that every reasonable lawyer would have made a different decision." Dunn v. Reeves, 141 S. Ct. 2405, 2411 (2021) (emphasis and alteration in original) (quoting Harrington v. Richter, 562 U.S. 86, 101 (2011)). Given the evidence of malingering, Petitioner's insistence to counsel that he did not commit the crimes (see R. & R. at 26-27, 29), and the reasonableness of an identification

defense given many witnesses' failure to identify Petitioner and the flaws in the identifications of those who did (see id. at 41-42), that is clearly not the case here.[2]

Having reviewed de novo those portions of the R. & R. to which Petitioner objects, see 28 U.S.C. § 636(b)(1)©, the Court accepts the findings and recommendations of the Magistrate Judge in the R. & R. as well as in the January 19, 2017 order granting a stay, which the Court has read. Therefore, Judgment shall be entered denying the SAP and dismissing this action with prejudice.

IT IS SO ORDERED.

DATED: November 17, 2021

JOHN W. HOLCOMB
U.S. DISTRICT JUDGE

[2] Petitioner argues that the Magistrate Judge erroneously found that he raised his argument that "the superior court 'unreasonably determined the facts by inserting its own opinions and recollections into the record'" for the first time in his Traverse and therefore had forfeited it. (Objs. at 3 (citing R. & R. at 44).) He points to a short statement in his SAP complaining about the superior court's "leading questions" as preserving the argument. (Id. at 3-4.) But a trial court asking leading questions is not the same thing as it relying on its own factual observations. In any event, as the Magistrate Judge observed, "before the court questioned him, [defense counsel] had testified that he considered the mental-state defense, and he confirmed on redirect that he had weighed both defenses." (R. & R. at 44 (citation omitted).) Thus, any leading questions and personal observations did not play a significant role in the state court's findings. (See also id. at 43-46.)

APPENDIX F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILIP JONES, Petitioner, v. PATRICK COVELLO, Acting Warden, Respondent.	Case No. CV 13-7792-JWH (JPR) REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable John W. Holcomb, U.S. District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the U.S. District Court for the Central District of California.

PROCEEDINGS

On October 22, 2013, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody, challenging his 2011 convictions for attempted murder, carjacking, and attempted carjacking as well as the related firearm enhancements. On May 5, 2014, the Court granted his motion for appointment of counsel. On June 15, 2015, he moved, through counsel, to amend the Petition, lodging a proposed First Amended Petition. On March

15, 2016, the Court granted the motion and ordered the FAP filed, and on January 19, 2017, it granted his motion to stay the proceedings while he exhausted the FAP's claim that his trial counsel was ineffective for failing to investigate a mental-state defense.[1]

After the claim was exhausted and the stay lifted, Petitioner moved to amend the FAP, lodging a proposed Second Amended Petition and a memorandum of points and authorities. Respondent did not oppose, and on May 26, 2020, the Court granted the motion and ordered the SAP filed. On June 9, 2020, Respondent filed an Answer and a memorandum of points and authorities. Petitioner filed a Traverse and a memorandum of points and authorities on July 9, 2020. For the reasons discussed below, the Court recommends that judgment be entered denying the SAP and dismissing this action with prejudice.

PETITIONER'S CLAIMS

I. Petitioner received ineffective assistance of counsel when his trial counsel failed to investigate or present a mental-state defense. (SAP at 5; id., Mem. P. & A. at 6-40; Traverse, Mem. P. & A. at 1-17.)

II. The evidence was insufficient to establish Petitioner's

[1] Respondent opposed Petitioner's leave-to-amend and stay motions, arguing that the ineffective-assistance claim he sought to exhaust and add was untimely. See Resp't's Oct. 27, 2015 Leave Amend Opp'n, ECF No. 62 & Resp't's Nov. 30, 2016 Stay Opp'n, ECF No. 98. Respondent incorporates his arguments on that score in his Answer. (See Answer at 1.) For the reasons stated in the Court's Order granting Petitioner's stay motion, see Jan. 19, 2017 Order, ECF No. 103, the claim is timely, and it is recommended that the District Judge read and accept that Order as well as this R. & R.

guilt of attempted carjacking. (SAP at 5; id., Mem. P. & A. at 40-45; Traverse, Mem. P. & A. at 17-19.)

III. The trial court deprived Petitioner of due process when it failed to sua sponte instruct the jury on attempted voluntary manslaughter, a lesser included offense of attempted murder. (SAP at 6; id., Mem. P. & A. at 45-50; Traverse, Mem. P. & A. at 19-22.)

IV. Petitioner received ineffective assistance of counsel when his trial counsel failed to request jury instructions on attempted voluntary manslaughter and self-defense. (SAP at 6; id., Mem. P. & A. at 50-53; Traverse, Mem. P. & A. at 22-25.)

BACKGROUND

On February 15, 2011, Petitioner was convicted by a Los Angeles County Superior Court jury of attempted murder, carjacking, and attempted carjacking, with related firearm enhancements. (Lodged Doc. 1, Clerk's Tr. at 100-02, 164-66.) He was sentenced to prison for 55 years to life. (Id. at 184-88.) He appealed, raising the SAP's second to fourth claims. (See Lodged Doc. 4.) On July 31, 2012, the court of appeal affirmed the convictions but reduced his sentence to 41 years to life. (See Lodged Doc. 7); see also People v. Jones, No. B233106, 2012 WL 3094076 (Cal. Ct. App. July 31, 2012). On October 10, 2012, the supreme court denied review. (See Lodged Docs. 8 & 9.) He did not file a petition for a writ of certiorari in the U.S. Supreme Court. (See SAP at 5.)

On February 22, 2017, Petitioner filed a superior-court habeas petition raising the SAP's first claim (see SAP, Ex. 11); it was denied on procedural grounds on March 24 (see id., Ex.

12). On April 26, 2017, Petitioner raised the claim in a habeas petition to the state court of appeal (see id., Ex. 37), which ordered the superior court to hold an evidentiary hearing on it (see Notice of Lodging, ECF No. 115, Attach. 1). It did so on December 21, 2018, after which it found that Petitioner's trial counsel had not been ineffective for failing to investigate or present a mental-state defense. (See SAP, Ex. 31 at 3144-67.)[2] On February 25, 2019, Petitioner reraised the claim in a habeas petition to the state court of appeal (see Notice of Lodging, ECF No. 124, Attach. 1), which summarily denied it on July 24, 2019 (see Notice of Lodging, ECF No. 125, Attach. 1). On August 26, 2019, Petitioner raised the claim in a habeas petition to the state supreme court (see Notice of Lodging, ECF No. 128, Attach. 1), which summarily denied it on March 11, 2020 (see Notice of Lodging, ECF No. 134, Attach. 1).

SUMMARY OF THE EVIDENCE

The factual summary in a state appellate-court opinion is entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). See Crittenden v. Chappell, 804 F.3d 998, 1010-11 (9th Cir. 2015). But see Murray v. Schriro, 745 F.3d 984, 1001 (9th Cir. 2014) (discussing "state of confusion" in circuit's law concerning interplay of § 2254(d)(2) and (e)(1)). Because Petitioner challenges the sufficiency of the evidence supporting his attempted-carjacking conviction, the Court has independently reviewed the state-court record and finds that the following

[2] Some of the SAP's exhibits bear multiple different page numbers; the Court uses the numbering on the bottom right of each page, which is preceded by "CSC Exs. Page."

statement of facts from the court-of-appeal decision on direct appeal fairly and accurately summarizes the evidence. See Nasby v. McDaniel, 853 F.3d 1049, 1054-55 (9th Cir. 2017).

> At approximately 8:00 a.m. on January 10, 2009, Loretta Maddox drove her family to the Lancaster Metrolink train station on Sierra Highway in Los Angeles County. Sitting next to her was ex-husband Julius Hall and sitting in the back seat were granddaughter, Anzuira H.[3] and Hall's step-brother, Jimmy Shelton. Maddox parked in the first stall by the ticket booth and waited in the car with Anzuira, while Hall and Shelton left to smoke a cigarette. Maddox saw [Petitioner] standing next to the ticket booth. The two of them made eye contact.
>
> When Hall and Shelton returned, the family walked over to the ticket booth and bought tickets. Anzuira noticed that [Petitioner] was about three feet behind them. He was walking around and staring at the family. After buying tickets, the family returned to the car. Maddox got into the driver's seat, and Anzuria sat behind her in the back seat. Hall and Shelton wanted to know when the train was leaving. Hall left to ask some people in the station, and Shelton decided to look for a conductor. Minutes later, Hall was coming back to the car and passed by [Petitioner], who asked where Hall was traveling. Hall replied he was headed for the San

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[3] The court of appeal occasionally misspelled this witness's first name, which is Anzuria. (See Lodged Doc. 3, 2 Rep.'s Tr. at 631.)

Fernando Valley. [Petitioner] said, "I don't think you are gonna make it."

At that point, Maddox called out to Hall. He walked up to [the] driver's side window and spoke to Maddox about [Petitioner's] comments. While they were talking, [Petitioner] approached the front of the car, stopping five to seven feet away from Maddox. [Petitioner] told Hall, "Tell your wife to give me a ride." Hall responded, "No, we don't know you." Maddox also told [Petitioner] she would not give him a ride because she did not know him. [Petitioner] then yelled angrily twice, "Get the kid out [of] the car," referring to Anzuria in the back seat. Anzuria was frightened.

Maddox thought there was going to be a confrontation between Hall and [Petitioner]. Hall was frightened for his granddaughter. He rushed towards [Petitioner], bent down and attempted to grab [Petitioner's] legs in an effort to flip him onto the ground. Maddox was about to get out of the car to help Hall, when she saw [Petitioner] take a step back, pull out a gun and shoot Hall. After being shot, Hall leaned against the hood of the car. [Petitioner] fled across Sierra Highway.

Shortly after the shooting, [Petitioner] carjacked Walter Herrera's pickup truck at gunpoint, in front of a nearby car wash.[4]

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[4] Later that day, Petitioner crashed Herrera's truck in the San Fernando Valley. (Lodged Doc. 3, 2 Rep.'s Tr. at 675-76, 922.) He left the scene and hid inside a nearby house. (Id. at 1203-04.)

(Lodged Doc. 7 at 2-3.)

LEGAL STANDARDS

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim — (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under AEDPA, the "clearly established Federal law" that controls federal habeas review consists of holdings of Supreme Court cases "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). As the Supreme Court has "repeatedly emphasized, . . . circuit precedent

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After the owners made him leave, he was arrested while hiding inside a nearby trash can. (Id. at 914-15.) He told police that he couldn't remember anything about the events leading up to his arrest because he had been "drinking and doing drugs," but he explained that he had ended up in the San Fernando Valley because he had paid a "Mexican guy" $100 to drive him there. (Id. at 1223-24.) When confronted with the evidence against him, Petitioner "indignant[ly]" stated, "Well, if you got it, then you got it" and "you don't need to be talking to me." (Id. at 1225.)

does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" Glebe v. Frost, 574 U.S. 21, 24 (2014) (per curiam) (quoting § 2254(d)(1)). Further, circuit precedent "cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the] Court has not announced.'" Lopez v. Smith, 574 U.S. 1, 4 (2014) (per curiam) (quoting Marshall v. Rodgers, 569 U.S. 58, 64 (2013) (per curiam)).

Although a particular state-court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 412-13. A state-court decision is "contrary to" clearly established federal law if it either applies a rule that contradicts governing Supreme Court law or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (citation omitted). 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." Id.

State-court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts' (emphasis added)." Id. at 11 (quoting § 2254(d)). A state-court decision that correctly identifies the governing legal rule may be rejected if it unreasonably applies the rule to the facts of a particular case.

Williams, 529 U.S. at 407-08. To obtain federal habeas relief for such an "unreasonable application," however, a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Id. at 409. In other words, habeas relief is warranted only if the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). "[E]ven clear error will not suffice." Woods v. Donald, 575 U.S. 312, 316 (2015) (per curiam) (citation omitted).

Here, Petitioner raised grounds two through four on direct appeal. (See Lodged Doc. 4.) The court of appeal rejected grounds two and three in a reasoned decision on the merits. (See Lodged Doc. 7 at 3-7.) And although it "did not reach" Petitioner's fourth claim, that his trial counsel "rendered ineffective assistance by failing to request" certain jury instructions (see id. at 7 n.2), its finding that "there was no evidentiary support for [those] instructions" (id.; see id. at 5-7) reflects that the ineffective-assistance claim was implicitly denied on the merits as well. See Kipp v. Davis, 971 F.3d 939, 951 (9th Cir. 2020) (holding that given "overlapping nature" of petitioner's claims, it was "improbable" that state court "neglected" to decide one claim while adjudicating other); Rahman v. Laxalt, No. 2:13-cv-01334-GMN-GWF, 2017 WL 3429345, at *29 (D. Nev. Aug. 8, 2017) (holding that ineffective-assistance claims were "subject to deferential review under AEDPA even though the state supreme court did not expressly address th[o]se particular

claims in . . . decision that expressly rejected other claims on the merits"); see also Johnson v. Williams, 568 U.S. 289, 298-99 (2013) (noting that state court may choose not to "discuss separately" claim that it "regard[s] . . . as too insubstantial to merit discussion").[5] Given the context, the court of appeal's statement that it wasn't "reaching" the claim simply meant that it needn't discuss it because it necessarily failed in light of its ruling on ground three.

The state supreme court summarily denied review of all three claims. (See Lodged Doc. 9.) Thus, the Court "looks through" the supreme court's silent denial to the court of appeal's decision, the last reasoned state-court decision, as the basis for the state court's judgment on grounds two through four. See Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018).

As for ground one, that claim was denied in a reasoned oral decision by the superior court. (See SAP, Ex. 31 at 3144-67.) The state court of appeal and supreme court summarily denied Petitioner's habeas petitions raising the same claim. (See Notice of Lodging, ECF No. 124, Attach. 1, ECF No. 125, Attach. 1, ECF No. 128, Attach. 1, & ECF No. 134, Attach. 1.) Thus, the Court "looks through" the court of appeal's and supreme court's silent denials to the superior court's decision, the last reasoned state-court decision, as the basis for the state court's

[5] Respondent concedes Petitioner's argument that review of ground four should be de novo because "the state court did not adjudicate [the] claim on the merits." (SAP, Mem. P. & A. at 51; see Answer, Mem. P. & A. at 6.) But the "issue of the proper standard by which to review [Petitioner's] habeas claim is 'non-waivable.'" Kipp, 971 F.3d at 950 (citation omitted).

judgment on ground one. See Wilson, 138 S. Ct. at 1192. AEDPA's deferential review applies to all four claims. See Richter, 562 U.S. at 100.

DISCUSSION[6]

I. Petitioner's Ineffective-Assistance-of-Counsel Claim Concerning His Mental State Does Not Warrant Habeas Relief

In ground one Petitioner argues that he was deprived of the effective assistance of counsel when his trial counsel failed to "investigate, prepare[,] and present" a mental-state defense. (SAP, Mem. P. & A. at 6.)

A. Applicable Law

Under Strickland v. Washington, 466 U.S. 668, 687 (1984), a petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 687-89. To show deficient performance, the petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 689-90. Further, the petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."

[6] In an Addendum to the SAP, Petitioner conclusorily asserts that the constitutional violations he alleges are "structural" and therefore reversal is automatic, without any prejudice inquiry necessary. (See SAP, Add. at 11.) He has not developed that argument in any of his briefing, and it is therefore "abandoned." Acosta-Huerta v. Estelle, 7 F.3d 139, 144 (9th Cir. 1992).

Id. at 690. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. The duty to investigate is flexible and not "limitless." Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995) (as amended) (citation omitted). And a tactical decision "may constitute constitutionally adequate representation even if, in hindsight, a different defense might have fared better." Bemore v. Chappell, 788 F.3d 1151, 1163 (9th Cir. 2015).

The Supreme Court has recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Accordingly, to overturn the strong presumption of adequate assistance, the petitioner must demonstrate that the challenged action or omission could not reasonably be considered sound trial or appellate strategy under the circumstances of the case. Id.

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, the petitioner must affirmatively

> show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome.

Id. at 694; see also Richter, 562 U.S. at 111 ("[i]n assessing prejudice under Strickland, the question is . . . whether it is 'reasonably likely' the result would have been different" if counsel had acted as petitioner claims he should have (citation omitted)). "The likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112 (citation omitted).

When counsel's error was a failure to adequately investigate, "demonstrating Strickland prejudice requires showing both a reasonable probability that counsel would have made a different decision had he investigated, and a reasonable probability that the different decision would have altered the outcome." Bemore, 788 F.3d at 1169 (citing Wiggins v. Smith, 539 U.S. 510, 535-36 (2003)).

In Richter, the Supreme Court stressed that AEDPA review requires an additional level of deference to a state-court decision rejecting an ineffective-assistance-of-counsel claim:

> The standards created by Strickland and § 2254(d) are both "highly deferential," . . . and when the two apply in tandem, review is "doubly" so. . . . Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

562 U.S. at 105 (citations omitted).

In Premo v. Moore, 562 U.S. 115, 127-28 (2011), the Supreme Court reversed the Ninth Circuit's grant of habeas relief on an ineffective-assistance claim based on Supreme Court precedent "that did not involve ineffective assistance of counsel" and "says nothing about the Strickland standard." "The lesson of Premo is that Strickland bears its own distinct substantive standard for a constitutional violation; it does not merely borrow or incorporate other tests for constitutional error and prejudice." Walker v. Martel, 709 F.3d 925, 940 (9th Cir. 2013).

B. Relevant Background

1. Pretrial record

Petitioner committed the crimes and was arrested on January 10, 2009. (See Lodged Doc. 3, 2 Rep.'s Tr. at 321, 604, 662, 902, 908.) Los Angeles County Sheriff's Department records show that on January 13, he was a "little anxious" but "alert" and "calm and cooperative," with "no hostile behavior." (SAP, Ex. 26 at 2423-24.) On January 14, however, he displayed "bizarre behavior"; was "uncooperative," "unpredictable," and "disorganized"; stated that "all the inmates want[ed] to kill him"; and was looking around "as if he was seeing people." (Id. at 2421; see id. at 2420, 2422.)[7] He was apparently prescribed

[7] The records show a "mental illness diagnosis" of "bipolar" on January 13, 2009 (see SAP, Ex. 26 at 2424; see id. at 2423), but although Petitioner apparently reported being bipolar on January 13 (see id. at 2423), neither the January 14 notes nor his January 20 initial mental-health assessment mentions that diagnosis (id. at 2421, 2493).

Risperidone[8] at that time, although his compliance was "poor." (Id. at 2492; see id. at 2495.)

On January 20, 2009, during his initial mental-health assessment, he was "very guarded and resistant" and presented as "immature and oppositional"; his thoughts were "organized" and "linear," however, and he did not appear to be "delusional" or "influenced by internal stimuli." (Id. at 2491-93.) He reported not knowing why he had been arrested but "denied anxiety, depression or paranoia or a history of mental illness or treatment" and stated that he was "doing well." (Id.) He was diagnosed with "Adult Antisocial [Behavior]," "Cannabis Abuse," and "[Rule Out] Malingering," and the psychologist opined that his symptoms were "indicative of oppositional [behavior] with staff and lack of maturity." (Id. at 2493.) On February 1, he threatened to cut his wrists. (Id. at 2418.) He reported hearing voices and continued to present with suicidal ideation through April 2009. (Id. at 2411-18.) On April 10, he was diagnosed with schizophrenia. (Id. at 2411-12.)

On January 26, 2009, Petitioner's counsel at the time questioned his competence to stand trial, and the court ordered a competency evaluation. (See SAP, Ex. 23 at 1950-51.) On March 25, Dr. Kory Knapke interviewed Petitioner. (SAP, Ex. 1 at 8.) During the interview, Petitioner appeared "disheveled," "paranoid," and "unpredictable" and was "completely mute" (id. at

[8] Risperidone is an antipsychotic medication used to treat schizophrenia and other mental and mood disorders. See Risperidone, WebMD, available at https://www.webmd.com/drugs/2/drug-6283-2034/risperidone-oral (last visited Apr. 19, 2021).

12; see id. at 8-9); "[a]t times . . . he appeared as if he might jump out of his chair" (id. at 12). He was not "responding to any internal stimuli." (Id.) He was wearing a "green suicide vest" (id. at 8) and was housed on the jail's seventh floor, which meant that he "requir[ed] a high level of psychiatric monitoring and/or treatment" (id. at 11).

Knapke reviewed police reports of the crimes but was not provided with Petitioner's criminal history or psychiatric records. (Id. at 8.) Marsha Knox, Petitioner's mother, gave "background and history." (Id. at 9; see id. at 8.) She reported that Petitioner had "no history of psychiatric hospitalizations or outpatient mental health treatment." (Id. at 10.) She stated that he did not use drugs, was not involved in a criminal street gang, and worked doing construction (id. at 10-11), but it was "clear" to Knapke that she was "attempting to minimize [Petitioner's] previous criminal history and/or previous antisocial behavior patterns" (id. at 10). Knox noted that his behavior "dramtica[ally] change[d]" after he was released from prison in 2007. (Id.) He became "paranoid," "isolated" himself, and was observed "responding to internal stimuli" and "demonstrating bizarre behaviors." (Id.; see id. at 11.) About two days before the crimes, Petitioner walked up to a couple and "accus[ed] them" of being with the police and "watching him" (id. at 11); around that time he also entered a neighbor's house at 4 a.m. with "no shirt or shoes . . . and asked to use [a] telephone" (id.). He accused Knox of having the police harass him, and he claimed Ta-wae Black, his partner and the mother of one of his children, was having extramarital affairs. (Id. at

10-11.) He had a "substantial" history of mental illness on his father's side of the family: his father had been psychiatrically hospitalized, and Petitioner's half-brother and cousin also suffered from mental illness. (Id. at 11.)

Knapke opined that there was "a very high likelihood that [Petitioner was] suffering from a valid psychotic illness" and wasn't competent to stand trial. (Id. at 8; see id. at 12.) He recommended that he be transferred to a hospital for further evaluation and treatment and be prescribed antipsychotic medication. (Id. at 12.) But he could not "rule out the possibility" that Petitioner was malingering because of the "extremely limited information" available to him, which impeded his ability to assess Petitioner's "level of criminal sophistication and antisocial tendencies." (Id.; see id. at 8.)

Petitioner was deemed not competent to stand trial and was committed on April 2, 2009. (See SAP, Ex. 2 at 15.) He was transferred to Patton State Hospital for treatment on July 20. (Id.) During an evaluation on July 28, he was "severely paranoid" and "quite preoccup[ied] with internal psychotic stimuli," and he claimed not to know why he was there. (SAP, Ex. 25 at 2031; see id. at 2028.) He was diagnosed with "Schizophrenia, Paranoid Type," "Polysubstance Dependence," and "Anti-Social Personality Disorder" and was prescribed several psychotropic medications. (Id. at 2026-27.)

On January 12, 2010, Dr. George Christison, Patton's medical director, reported the clinical staff's "consensus" that Petitioner had been returned to competency. (SAP, Ex. 2 at 15.) In an accompanying report, Christison noted Petitioner's earlier

diagnoses (id. at 16) and his prescription for Seroquel, a psychotropic medication (id. at 17). On admission to Patton, he had a "tense affect and hostile mood" and was "mute for approximately two weeks" (id. at 18); when he began speaking he "refused to meet with the wellness and recovery team" (id.). At the time of the report, however, his affect and mood were normal, he was "not observed responding to internal stimuli," his thought process was clear, he was able to problem-solve, and he did not present with any "unusual behaviors." (Id. at 19.)

Christison observed that Petitioner was "quite good" at games requiring "advanced . . . problem solving skills" (id. at 18) and was a member of his unit's "ward government," a "leadership position[] . . . reserved for the individuals who are role models" (id. at 19). He cooperated with staff "when it benefit[ed] him." (Id. at 18.) For instance, he would attend group-therapy sessions when he knew a social worker would be there to assist with phone calls. (Id. at 19.) He claimed when "formally evaluated" that he didn't know about court processes but had been "overheard discussing [them] with his peers" (id. at 18; see id. at 19) and was able to "discuss . . . court material appropriately and accurately" (id. at 18). He "wishe[d] to stay at Patton" and had "refused to meet with the treatment team . . . in order to demonstrate that he [was] not cooperat[ive]." (Id.) But he was "able to cooperate," and "[i]f he chooses not to cooperate, it [was] volitional and not because he [was] unable to." (Id.; see id. at 19.)

Dr. David Stone interviewed Petitioner on February 2, 2010, and also concluded that he had been restored to competency.

(SAP, Ex. 3 at 23.) Stone noted "inconsistencies" similar to those flagged in Christison's report. (Id.) Petitioner initially claimed he "knew nothing of the charges [against him] or of [the] court process" but later, while distracted, "recounted in a sophisticated manner his prior . . . plea . . . and parole violations." (Id.) Stone opined that his "current alleged lack of knowledge about any element of his present case did not appear credible." (Id.) He also answered "forced-choice questions about psychiatric symptoms in the non-credible direction." (Id.)

On February 3, 2010, the court found that Petitioner was competent to stand trial. (SAP, Ex. 23 at 1955.) On July 30, 2010, Jesse Duran substituted in as Petitioner's counsel. (Lodged Doc. 1, Clerk's Tr. at 49.) On October 22, 2010, after meeting with Petitioner to discuss the "strengths and weaknesses of the case," Duran questioned his competence to stand trial, noting that the witnesses Petitioner had sent him to speak with were a result of his "delusions." (Lodged Doc. 3, 2 Rep.'s Tr. at C4; see id. at C2-3.) After Petitioner told the court he didn't know what crimes he was being charged with, the court ordered that he be reevaluated. (Id. at C4; see Lodged Doc. 1, Clerk's Tr. at 56-57.)

Knapke again evaluated Petitioner, on November 21, 2010. (SAP, Ex. 4 at 27.) Petitioner refused to participate, however, so Knapke was "unable to render any psychiatric diagnoses" or "opinions about [his] competency" so as to defeat the legal presumption of competence. (Id. at 30.) Knapke noted that Petitioner, who had used different aliases, Social Security

numbers, and birth dates in the past and whose criminal record reflected that he was "highly criminally oriented" and had been an active gang member, had "substantial Antisocial Personality Features"; he therefore "maintain[ed] a high suspicion" that Petitioner was malingering. (Id.; see id. at 27-29.)

Dr. Kaushal K. Sharma interviewed Petitioner on November 17, 2010, and deemed him competent. (SAP, Ex. 5 at 32.) Sharma opined that Petitioner's "presentation . . . [was] consistent with a person who is malingering incompetency to stand trial" (id.; see id. at 34) and that he was "an antisocially motivated individual . . . trying to play games by claiming lack of knowledge" (id. at 34). Sharma observed that he was "functioning at a reasonably intact level" but behaving as if "he d[id] not know what's going on." (Id.) He made "spontaneous statements" consistent with those "usually" made by "individuals who are trying to falsely impress on others that they are mentally ill while in reality they are not." (Id. at 33.) Petitioner claimed that "he believed that the devil was actually sitting on the left side of his shoulder and [that] God was sitting on the right side of his shoulder," but despite allegedly experiencing that feeling for two years he had never shared it with anyone. (Id.) He denied knowing what crimes he was charged with but declined Sharma's offer to give him that information, leading Sharma to conclude that he was lying. (Id.; see id. at 34.)

On December 1, 2010, the court again found Petitioner competent to stand trial (see Lodged Doc. 1, Clerk's Tr. at 58-59; Lodged Doc. 3, 2 Rep.'s Tr. at D1-2), and a jury trial began on February 1, 2011, before the Honorable Charles A. Chung (see

Lodged Doc. 3, 2 Rep.'s Tr. at 1). Petitioner was convicted 14 days later. (Lodged Doc. 1, Clerk's Tr. at 100-02, 164-66.)

2. Evidentiary hearing

On December 21, 2018, an evidentiary hearing on Petitioner's ineffective-assistance mental-state claim was held before Judge Chung, at which Knox, Black, defense expert Dr. Nathan Lavid, Duran, and Duran's cocounsel, Jonathan Nielsen, testified. (See SAP, Ex. 31 at 2966, 2968.)

a. *Knox*

Marsha Knox was Petitioner's mother. (SAP, Ex. 31 at 3108.) She testified that his behavior changed after he was released from prison in 2007. (Id. at 3108-09.) He "isolate[d] himself," stopped talking to her about things they used to talk about, and "lost interest in the things that he like[d] to do." (Id. at 3109.) She "heard him talking to god" but didn't think "too much of it" because he had a "relationship with god." (Id. at 3109-10; see id. at 3126; SAP, Ex. 28 (Knox Decl.) at 2929-30 (stating that she observed Petitioner "hearing and responding to voices" about seven or eight times).) Petitioner also became "paranoid" toward Black, suspecting her of having extramarital affairs. (SAP, Ex. 31 at 3110-11.) Petitioner's father and other members of his family on his father's side suffered from mental illness. (Id. at 3117-19; see Knox Decl. at 2929.)

In 2009, Petitioner split time between Knox's house and the home he shared with Black. (SAP, Ex. 31 at 3123.) He worked with a family friend remodeling houses and had worked the last week of December, shortly before the crimes. (Id. at 3126-27.) Knox suspected "something [was] wrong" and urged him to "stay in

until [she] figure[d] out what's going on to get [him] some help." (Id. at 3114.) The week of the crimes, Petitioner was "isolating himself," "not going home," "talking to hi[m]self," and "not eating normally." (Id. at 3112.) During a drive two days before the crimes, he told her they were being followed by the police when it didn't appear they were (id. at 3112-13; see Knox Decl. at 2930); around that time he went inside a neighbor's house at 4 a.m. without a shirt or shoes and asked to use the phone even though they had a phone at home (SAP, Ex. 31 at 3112-13; see Knox Decl. at 2930).

Before trial, Knox told Duran that Petitioner was "having problems" and "doing things that he normally wouldn't do" and that she was trying to get him help. (SAP, Ex. 31 at 3115.) She also spoke to Knapke about Petitioner's mental health. (Id. at 3116-21.) She would have been willing to testify at trial consistent with her hearing testimony but, despite asking Duran to testify, she wasn't called as a witness. (Id. at 3121.)

b. *Black*

Petitioner and Black lived together between 2005 and 2009, and they had a son together. (SAP, Ex. 31 at 3028-29, 3037; see id., Ex. 29 (Black Decl.) at 2933.) Around 2006, Petitioner became "paranoid." (SAP, Ex. 31 at 3030.) He once thought a man taking photographs of a house for sale was taking pictures of him and chased after him. (Id. at 3030-31; see Black Decl. at 2933.) On another occasion, they were driving when he thought somebody was following them when it didn't appear anyone was. (SAP, Ex. 31 at 3032; see Black Decl. at 2933.) He often accused her of being unfaithful to him and sometimes denied that he was his

son's father. (SAP, Ex. 31 at 3031, 3037-38.) She observed him talking to himself on several occasions. (Id. at 3031, 3033.)

After he was released from prison in 2007, his behavior got even stranger: he accused her of "trying to give him life in prison" when she served him Life cereal (id. at 3035); he wrongly accused her of tampering with his car by putting sugar in the engine and said her mother, a corrections officer, was "trying to send him to jail" (id. at 3037); he called her over to his mother's house in the middle of the night, claiming that someone was trying to break in, but when she arrived nobody was (id. at 3038); and he was spotted by police "driving erratically" (id. at 3039). At the time of the crimes, he had access to a car and had money because he had finished a renovation job a few days earlier. (Id. at 3040, 3046-47.) He didn't do drugs and drank only occasionally. (Id. at 3046.)

Before trial, Duran hadn't asked her about Petitioner's mental health. (Id. at 3041, 3052.) If he had, she would have told him what she had testified to at the hearing and would have testified to that effect at trial. (Id. at 3042, 3052.) She didn't tell Duran about the mental-health issues because she was "young" and "didn't think nothing serious of it" at the time. (Id. at 3050; see id. at 3042.)

c. *Lavid*

Dr. Nathan Lavid was a clinical and forensic psychiatrist, and he "frequently" testified as an expert on forensic mental-health issues in cases in state and federal court. (SAP, Ex. 30 (Lavid Decl.) at 2938; see SAP, Ex. 31 at 3075.) Lavid opined that at the time of the crimes, Petitioner was "most likely . . .

suffering from mental illness" and that that mental illness "most likely had a bearing on his behaviors, actions and thoughts," causing him to be "unable to accurately perceive and respond appropriately to the world around him." (SAP, Ex. 31 at 3054-55, 3094; see id. at 3068.)

Lavid based his assessment on Petitioner's "voluminous" medical records from after his arrest (see id. at 3057, 3079), when he had been "evaluated by literally 50 different doctors," all of whom concurred that "throughout [the] time" since the crimes he had a severe mental illness, namely, schizophrenia (id. at 3067; see id. at 3058, 3072, 3077). Although he interviewed Petitioner for around 45 minutes in August 2018, that interview served only to "confirm" his opinion about Petitioner's mental illness, which he had formed in 2015, before he had reviewed his criminal history or his medical records from Patton or the sheriff's department — the medical records that would have been available to Duran before trial had he sought them out. (Id. at 3072, 3076, 3079, 3081.)

Lavid opined that Petitioner had schizophrenia at the time of the crimes given his "bizarre[]" and "paranoid" behavior right before them, as well as his age, family history of mental illness, and history of head trauma.[9] (Id. at 3063-66.) He also noted that Petitioner was prescribed antipsychotic medications days after his arrest (id. at 3059-61, 3072, 3096-97) and had been medicated since, against his will since 2011 (see id. at 3060, 3068). He explained that schizophrenia is a psychotic

[9] Petitioner had apparently suffered "head trauma with a loss of consciousness" in 2007. (SAP, Ex. 31 at 3064; see id. at 3065.)

disorder that "impairs a person's ability to present [sic] the world around him because it affects the senses." (Id. at 3058.) Paranoia is "very common" in those who suffer from schizophrenia. (Id.) As with all mental illnesses, schizophrenia presents with "different severities" and may "come and go" (id. at 3074, 3104; see id. at 3073), and whether someone with schizophrenia is "impaired in . . . [their] ability to grasp reality" depends on the severity of the disease at the time (id. at 3074; see id. at 3088-89).

When pressed by the prosecutor to identify what "misperceptions" Petitioner suffered during the crimes, Lavid acknowledged that that was "hard to pinpoint . . . with any accuracy" because "nobody did a mental status evaluation right at that time." (Id. at 3094; see id. at 3093.) He observed that even if no particular aspect of Petitioner's crimes was "bizarre," "the telltale thing . . . [was] that he clearly ha[d a] mental illness" at the time. (Id. at 3094; see id. at 3095, 3103.) He also noted that the crimes were "odd" because Petitioner committed them despite "having money and . . . a car" (id. at 3067) and that his "bizarre behavior" of going to a neighbor's house without shoes or shirt in the middle of the night shortly before the crimes was consistent with impairment as a result of mental illness (id. at 3063).

Lavid reviewed the reports of malingering in the record, but there was "no question in his mind" that Petitioner was not malingering given the consensus by doctors that he suffered from a mental illness and required "significant medicines." (Id. at 3070; see id. at 3084, 3087.) He agreed that Petitioner also

exhibited "anti-social manipulative behavior" (id. at 3081); he explained that antisocial personality disorder is "characterized by a pervasive pattern for disregard for and violation of the rights of others," "doesn't cause psychosis," and is associated with "deceit and manipulation," including malingering (id. at 3082).

d. *Nielsen*

Nielsen was Duran's cocounsel during Petitioner's trial, but Duran made all the strategic decisions. (SAP, Ex. 31 at 2973-74.) He had done five to 10 civil trials, but Petitioner's was his first criminal felony trial. (Id. at 2978, 2981.) Duran never discussed a potential mental-state defense with him. (Id. at 2975-76.) He was unaware that Petitioner was receiving mental-health treatment. (Id. at 2978-81.) Nothing about him appeared "strange or off or bizarre," and he was "completely coherent and lucid" (id. at 2979); Petitioner was "actively aware and taking part in the trial strategy" (id. at 2980).

e. *Duran*

Duran was retained by Petitioner's mother and a family friend. (SAP, Ex. 31 at 2985, 3006.) Nielsen served as cocounsel but Duran made all the strategic decisions. (Id. at 2986.) He had handled over 100 criminal cases, but Petitioner's was his first trial. (Id. at 2984-85, 3004.)

Petitioner told him he didn't commit the crimes and initially wanted Duran to present an alibi defense. (Id. at 2993, 3014.) But he couldn't find the "Mexican guy" who Petitioner told police had given him a ride to the San Fernando Valley, and when Duran contacted the alibi witness he identified,

that person told Duran he would say whatever Duran told him to; as a result, Duran didn't call him as a witness. (Id. at 2993-94, 3014-15.) When Duran told Petitioner what happened with the potential alibi witness, Petitioner maintained his innocence. (Id. at 2995.) Duran ultimately settled on a theory that Petitioner wasn't the person who committed the crimes and was misidentified by the several witnesses who identified him.[10] (Id. at 2990.) Petitioner was "completely on board" with that defense. (Id. at 3023.) Duran did not present any affirmative evidence in support of it. (Id. at 2990.)

Duran was aware that Petitioner had been committed to Patton and received psychiatric treatment there after his arrest. (Id. at 3003.) He had reviewed all the expert reports but did not subpoena mental-health records from either Patton or the Los Angeles County Sheriff's Department or consult with or retain his own expert witness. (Id. at 2987, 2990, 2995, 2999, 3002-04, 3016-18.) He was also aware that Petitioner's prior attorney had questioned his competence to stand trial and that he himself had declared a doubt about Petitioner's competency, although he could not remember what prompted him to do so. (Id. at 2996-97.) After Duran questioned Petitioner's competency, the experts who evaluated him "suspected malingering." (Id. at 2997-98.) As

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[10] During his closing argument, Duran also remarked that the prosecution bore the burden of demonstrating that the perpetrator of the attempted murder had the requisite intent to kill and had acted with deliberation and premeditation, stating that the perpetrator here acted on a "mere unconsidered and rash impulse"; he also observed that Petitioner had been "drunk" and "high" when he was arrested in the San Fernando Valley. (See SAP, Ex. 31 at 2990-91, 3021-22; Lodged Doc. 3, 3 Rep.'s Tr. at 1504-05, 1510-11.)

soon as those reports were filed, Petitioner went "back to conversing [with Duran] like normal." (Id. at 2998; see id. at 3016.) This led Duran to suspect that Petitioner was malingering. (Id. at 3016.)

Petitioner's mother told him that Petitioner "didn't do" the crimes and that the witnesses who identified him were "lying." (Id. at 3006.) She also said that "if he did" the crimes it was because of "mental health issues." (Id.) She told Duran that Petitioner was "not behaving like himself" (id. at 2992) and "had been acting strangely in the days leading up to the offense" (id. at 300), and Duran read Knapke's initial report, which conveyed additional information that Knox had provided (id. at 3007-08). She told Duran that Petitioner had never been "treated" for or "diagnosed" with a mental illness, and it was Duran's understanding that there were no mental-health records that predated the crimes. (Id. at 3009-10, 3025-26.) She also mentioned his family history of mental illness (id. at 2993), but when Duran "asked for further information" he was not provided any (id. at 3009). Duran also spoke to Black, who told him about "odd behavior" Petitioner was exhibiting before the crimes.[11]

[11] Duran observed that a second woman also attended Petitioner's trial; she was a "family friend" who was "romantically" "interested" in Petitioner. (SAP, Ex. 31 at 3010.) Duran spoke with Black and the other woman; Petitioner told him that one of the women "was more aware of the court appearances than the other by design." (Id.; see id. at 3011-12.) Petitioner told "one" not to "tell the other" about the proceedings, and that caused "a whole thing." (Id. at 3011.) When the court asked whether it was "correct in understanding that [Petitioner] was juggling two romantic interests simultaneously," Duran agreed with that assessment. (Id.)

(Id. at 3011-12.)

Duran was aware that he could have raised a mental-state defense to the specific-intent crimes Petitioner was charged with; that the competency reports didn't assess Petitioner's mental state at the time of the offenses; and that the finding that he was competent to stand trial did not mean that a mental-state defense was unavailable. (Id. at 2999-3001.)[12] But after he discussed the expert reports and Knox's concerns about his behavior with Petitioner, who was "adamant" that he didn't commit the crimes, Duran settled on the misidentification defense.[13] (Id. at 2995-98; see id. at 2993, 3027-28.) Duran noted that a mental-state defense would have been "inconsistent" with a misidentification defense, as the two were "mutually exclusive." (Id. at 3021.) Therefore, he didn't investigate a mental-state defense or ask Knox to testify at trial about Petitioner's mental health (id. at 2993, 3027), and before trial he agreed with the prosecution that evidence of Petitioner's mental health wasn't relevant and shouldn't be admitted (id. at 2997; see Lodged Doc. 3, 2 Rep.'s Tr. at 1).

Toward the end of Duran's testimony, the following exchange

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[12] Duran denied telling Petitioner's prior habeas counsel that he didn't investigate a mental-state defense because Petitioner had been deemed competent to stand trial. (SAP, Ex. 31 at 3001; see SAP, Ex. 7 at 94 (habeas counsel's declaration stating that Duran told him he didn't investigate mental-state defense because Petitioner "was found competent to stand trial by court-appointed mental health professionals").)

[13] Petitioner declined to accept a plea bargain that Duran had negotiated even after Duran told him that it was going to be a "tough case" to win. (SAP, Ex. 31 at 3014, 3026.)

occurred between him and the court:

> Court: So, Mr. Duran, correct me if I'm wrong. And I do want you to correct me if I'm wrong. To me it sounds like, although you didn't actively pursue a mental health defense, that defense was in your mind, at least to the point where you thought about it and dismissed it, because of the malingering — because it would have undercut the I.D. defenses. Is that a correct assumption on my part?
>
> Duran: It was — Yes. The direction that everything went and was based on what my understanding of everyone's testimony at the time had been, and I would say that I gave the most weight to what [Petitioner] was telling me and then having to work my way backwards based on what he was telling me and how I could make that work with the evidence I had at the time.
>
> Court: It is not that the mental health defense never occurred to you — I want you to correct me if I'm assuming it wrong. It is not it never occurred to you. You did process in your mind, however brief it may have been, and you decided it's not good based on the malingering and based upon the inconsistent statements. Is that a correct assumption?
>
> Duran: Primarily based on the malingering. The inconsistent defenses as well.
>
> Court: Correct me if I'm wrong, but it sounds like you weighed the two defenses and decided that the lack of I.D. was the better defense based on everything your

client was telling you and based on the malingering assessment by the various doctors. Is that a correct assessment on my part?

Duran: Yes.

(SAP, Ex. 31 at 3022-23; see id. at 3027 (Duran confirming on redirect examination that he "weighed two alternative defenses, misidentification and a possible mental state defense," and considered Petitioner's potential malingering as part of his analysis).)

f. *Superior-court decision*

The superior court found that counsel wasn't deficient for not further investigating or pursuing a mental-state defense and that Petitioner wasn't prejudiced by counsel's decision not to do so. (Id. at 3144-45, 3167.)

Recognizing that counsel had a "duty to make reasonable investigations into various defenses or to make a reasonable decision that makes particular investigations unnecessary" (Id. at 3144), the court found that Duran "consider[ed] the mental health defense" but "discounted it." (Id. at 3147; see id. at 3165.) Duran's decision not to pursue that defense was "strategic" because it would have "undercut" or "watered down" a "powerful" misidentification defense that was consistent with Petitioner's "adamant" insistence that he didn't commit the crimes as well as with "jury instructions that . . . warn[ed] about [identification] cases" (Id. at 3147-49, 3164-65; see id. at 3146 (observing that although "shotgun" defenses may be "worthwhile" in some cases, "sometimes the best defense is to focus on one issue and drive that issue deep into the minds of

the jurors"), 3152 (noting that "there were very legitimate issues with the I.D.").) The court observed that after Duran had finished his closing argument it believed he "may have actually won" despite the strength of the prosecution's case. (Id. at 3145; see id. at 3152-53 (pointing out that Duran made "phenomenal argument" to "explain the nuances of the evidence").) It remarked that it hadn't realized that Petitioner's case was Duran's first trial and that Duran had done a "great job" and "handled himself [as] . . . a seasoned attorney."[14] (Id. at 3145, 3167.)

Further, observing that "one of the great skills of a good trial attorney is [not] wast[ing] . . . time spinning . . . wheels on things that probably will not pan out," it found that Duran reasonably didn't pursue the mental-state defense given his and the experts' concern that Petitioner was malingering. (Id. at 3165; see id. at 181, 188.) After summarizing the expert reports by the "very well-known doctors" who had expressed "concerns about whether . . . [Petitioner] was malingering" (id. at 3148-49; see id. at 3165), the court noted that they "put [Petitioner] in a horrible light" that would have "been devastating" to the mental-state defense, would have "mitigated" the misidentification defense, and would have "just blown out all [of Duran's] credibility" (id. at 3160). It also noted that

[14] "In considering a claim of ineffective assistance of counsel, it is not the experience of the attorney that is evaluated, but rather, his performance," LaGrand v. Stewart, 133 F.3d 1253, 1275 (9th Cir. 1998), and the Court may not "infer deficient performance from the presence of inexperience alone," McLain v. Calderon, No. CV 89-3061 JGD., 1995 WL 769176, at *102 (C.D. Cal. Aug. 22, 1995).

"throughout the whole course of the trial," Petitioner was "conversing well with [Duran]" and was "very presentable and . . . very engaged," and that that "obviously . . . [was] not lost on the jury." (Id. at 3147; see id. at 3155, 3164.)

The court found that "any evidence that could have been presented would not have changed the outcome." (Id. at 3167.) Specifically, it found that nothing in the records that Duran didn't subpoena would have led to a "different result." (Id. at 3148.) As for Lavid, the court noted that he "did not have extensive observations of [Petitioner]" (id. at 3155) and "formed his opinion" before interviewing him and based on his assessment of postconviction records that would not have been available to Duran before trial (id. at 3155, 3160).

It also noted that Lavid testified that schizophrenia presented on a "sliding scale from minor to severe" and that the crimes and Petitioner's circumstances reflected that he was functioning at a "high level." (Id. at 3167.) Specifically, it remarked that the facts of the crimes showed that Petitioner had engaged in "sophisticated" and goal-oriented behavior by assessing the victims' vulnerability and engaging them in a "very intelligent conversation" that reflected that he was "perceiving the situation very correctly"; had exhibited consciousness of guilt; and had engaged the police in a "cat and mouse game" during questioning. (Id. at 3150-54.) It also noted that other facts showed that Petitioner was "highly functional," including that he "balanc[ed] two girlfriends . . . hiding one from the other"; maintained a steady remodeling job; was a member of a gang, which required "constant vigilance"; was on active parole;

and used different dates of birth, Social Security numbers, and aliases. (Id. at 3151-53; see id. at 3155-56, 3162.)

As for Knox and Black, the court observed that they would have been "potentially unreliable" and "inherent[ly] bias[ed]" witnesses (id. at 3156; see id. at 3166), and that although Knox's testimony suggested Petitioner was "dealing with . . . personal stress," it didn't show that he was "mentally deficient or going through mental difficulties" (id. at 3157). Knox's testimony would also have been undermined by Knapke's opinion that she "was attempting to minimize" Petitioner's drug use, criminal history, and antisocial behavior. (Id. at 3156-57.)

C. Analysis

For the reasons discussed below, the state court's finding that Petitioner was not deprived of the effective assistance of counsel was not contrary to or an unreasonable application of clearly established law.

1. Deficient performance

Although another lawyer might have chosen a mental-state defense, the state court wasn't objectively unreasonable in concluding that Duran's performance wasn't deficient for not doing so.

In California, "[e]vidence of mental disease, mental defect, or mental disorder is admissible . . . on the issue of whether or not the accused actually formed a required specific intent." People v. Mills, 55 Cal. 4th 663, 671-72 (2012). Trial counsel has a duty to investigate a defendant's mental state if evidence suggests that the defendant was impaired. See, e.g., Douglas v. Woodford, 316 F.3d 1079, 1085 (9th Cir. 2003); Bean v. Calderon,

163 F.3d 1073, 1078 (9th Cir. 1998). In such circumstances, counsel must undertake at least "a minimal investigation in order to make an informed decision regarding the possibility of a defense based on . . . mental health." Seidel v. Merkle, 146 F.3d 750, 756 (9th Cir. 1998); see Strickland, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

Respondent contends that Duran didn't have adequate "notice" that Petitioner's mental state might have been impaired at the time of the crimes. (See Answer, Mem. P. & A. at 26-27.) As Petitioner points out (see Traverse, Mem. P. & A. at 1-2, 30-31), that is plainly wrong. Specifically, Duran had read all the expert reports (SAP, Ex. 31 at 2987, 2995, 2999, 3002-04, 3016-18), including Knapke's March 2009 report, in which he opined that Petitioner was "suffering from a valid psychotic illness" (SAP, Ex. 1 at 8; see id. at 12), and Christison's January 2010 report, in which he noted that Petitioner had been diagnosed with schizophrenia and prescribed antipsychotic medication while receiving psychiatric treatment at Patton (SAP, Ex. 2 at 16). From the reports, Duran knew that just two months after the crimes, Petitioner was receiving a "high level" of psychiatric care and was "completely unresponsive," "guarded," and "paranoid" (SAP, Ex. 1 at 11-12); he was also aware that Petitioner's prior counsel had declared a doubt about his competence to stand trial on January 26, 2009, just two weeks after the crimes (SAP, Ex. 31 at 2996-97). Beyond that, Duran testified during the evidentiary hearing that he had considered a mental-state defense and had

even discussed it with Petitioner before settling on an identification defense instead. (See SAP, Ex. 31 at 2995-98, 3022-23, 3027.)

Indeed, as the state court recognized, Duran's hearing testimony establishes that after some investigation, he made the strategic decision to forgo a mental-state defense because he was concerned that it would be undermined by evidence of Petitioner's malingering and because it conflicted with the identification defense, which, unlike a mental-state defense, was consistent with Petitioner's "adamant" insistence that he hadn't committed the crimes. (See id. at 2995-98, 3022-23, 3027); Lawrence v. Marshall, No. CV 05-2408-RSWL (MAN)., 2012 WL 6923666, at *37 (C.D. Cal. Sept. 27, 2012) (finding that "Petitioner's counsel reasonably formulated a strategy consistent with Petitioner's claim that he was innocent of all of the crimes of which he was charged") (emphasis omitted), accepted by 2013 WL 247449 (C.D. Cal. Jan. 22, 2013).

As the state court found, Duran reasonably decided not to pursue the mental-state defense because it would have been severely weakened by the malingering evidence. (See SAP, Ex. 31 at 3148-49, 3165.) Specifically, as Duran noted at the hearing (see id. at 2995-98), all of the experts who had evaluated Petitioner's competency raised the prospect that he was malingering. For instance, in his March 2009 report, Knapke couldn't "rule out the possibility" that Petitioner was malingering, particularly because he didn't have access to information that would enable him to assess Petitioner's "level of criminal sophistication and antisocial tendencies." (SAP, Ex.

1 at 10, 12.) When he again evaluated Petitioner, in November 2010, several months before trial, he did have that information and observed that his criminal record, gang membership, and use of different aliases, Social Security numbers, and birth dates reflected that he was "highly criminally oriented" and had "substantial Antisocial Personality Features," and he "maintain[ed] a high suspicion" that Petitioner was malingering. (SAP, Ex. 4 at 30; see id. at 26-29.)

As Duran knew, the other experts who evaluated Petitioner were even less equivocal in their suspicion of malingering. Christison noted that Petitioner cooperated with Patton staff "when it benefit[ed] him" (SAP, Ex. 2 at 18), was "overheard discussing" court processes despite claiming ignorance of them (id.), and purposely refused to meet or cooperate with the treatment team, not because he was "unable to" but because he "wishe[d] to stay at Patton" and thus chose not to, to demonstrate that he was uncooperative (id. at 18-19). Similarly, in February 2010, Stone noted that Petitioner's alleged lack of knowledge about his case "did not appear credible," and he answered questions about his psychiatric symptoms in a "non-credible direction." (SAP, Ex. 3 at 23.) And in November 2010, Sharma observed that Petitioner was "an antisocially motivated individual . . . trying to play games by claiming lack of knowledge," his "presentation . . . [was] consistent with a person who is malingering incompetency to stand trial," and he made "spontaneous statements" consistent with those "usually seen in . . . individuals who are trying to falsely impress on others that they are mentally ill." (SAP, Ex. 5 at 34.)

As the state court found, evidence that Petitioner was malingering during the competency evaluations and attempting to manipulate his treatment team at Patton would have cast him "in a horrible light" and been "devastating" to a mental-state defense. (SAP, Ex. 31 at 3160.) After all, although the inquiry into Petitioner's competency to stand trial wasn't the same as one into his mental state at the time of the crimes (see SAP, Mem. P. & A. at 33-34), evidence that he was exaggerating or fabricating mental-health symptoms would have been damaging had a mental-state defense been presented. See Owens v. Lamarque, 283 F. App'x 566, 567-68 (9th Cir. 2008) (affirming district court's finding that trial counsel "reasonably decided to avoid a mental state defense in order to prevent the introduction of . . . evidence that [petitioner] was malingering"). Petitioner claims that Duran's concerns about his malingering were irrelevant because he was "not a trained mental health professional." (SAP, Mem. P. & A. at 34.) But although Duran expressed his own suspicion that Petitioner was malingering based on interactions with him (see SAP, Ex. 31 at 3016), his concerns were primarily based on the assessments of multiple experts (see id. at 2987, 2995, 2999, 3002-04, 3016-18 (referring to SAP, Exs. 1-5)). Petitioner also argues that he may have been mentally ill despite malingering certain symptoms. (SAP, Mem. P. & A. at 37.) Although that is true, Duran reasonably decided not to take the risk that a jury might not make that nuanced inference after hearing the evidence of Petitioner's malingering and manipulative behavior.

Under these circumstances, the state court was not

objectively unreasonable in finding that Duran wasn't deficient for not expending additional resources to pursue a flawed mental-state defense. (See SAP, Ex. 31 at 3165); Owens, 283 F. App'x at 567-68; Flores v. Sullivan, No. CV 17-434 VBF (MRW), 2020 WL 4031795, at *5 (C.D. Cal. Apr. 24, 2020) (holding that trial counsel reasonably chose not to investigate or present mental-state defense when "adverse psychological reports" suggested that petitioner was "malingering during testing" and pursuing that defense would have "open[ed] the door to negative evidence about Petitioner's malingering").

Indeed, although Duran agreed with habeas counsel's observation during the evidentiary hearing that he hadn't "investigated" the mental-state defense (SAP, Ex. 31 at 3001), his evidentiary-hearing testimony makes clear that he had taken the time — by reading all five expert reports on Petitioner's mental state, which were generated before trial — to familiarize himself with the plusses and pitfalls of that defense. Cf. Seidel, 146 F.3d at 756 (finding ineffective assistance when defense counsel "failed to conduct even the minimal investigation that would have enabled him to come to an informed decision" about petitioner's mental-health defense). Even if he might have investigated the mental-state defense further before deciding to pursue an identification defense — by requesting Petitioner's medical records from the jail or Patton, for example — the state court was not objectively unreasonable in concluding that his performance wasn't deficient. See Richter, 562 U.S. at 105 (review of state-court decision rejecting ineffective-assistance claim is "doubly" deferential, with question being "whether there

is any reasonable argument that counsel satisfied Strickland's deferential standard"); see also Wood v. Allen, 558 U.S. 290, 302 (2010) (holding that "even if it [was] debatable, it [was] not unreasonable" for state court to conclude, after reviewing expert report, that "counsel made a strategic decision not to inquire further into the information contained in the report"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Significantly, Christison's report was based on Petitioner's Patton records (see SAP, Ex. 2 at 16-20), and thus Duran was aware of what those records would say. Further, Duran spoke with Knox about Petitioner's mental health and reviewed Knapke's report, which contained additional information from Knox. (See SAP, Ex. 31 at 2992, 3007-08.) Thus, by the time he decided not to further investigate or present the mental-state defense, he had ample information on which to base that decision.

Thus, unlike in Weeden v. Johnson, 854 F.3d 1063, 1070-71 (9th Cir. 2017), cited by Petitioner (see SAP, Mem. P. & A. at 31, 33), in which counsel chose not to investigate a mental-state defense out of concern for what such an investigation might unearth and therefore didn't know what an expert might say, here, Duran was aware that Petitioner had been receiving psychiatric care while in custody starting almost immediately after his arrest but that multiple experts were concerned that he was malingering. The state court therefore reasonably found that he rested his decision not to pursue a mental-state defense on legitimate problems with that defense, rendering any further

investigation of such evidence "unnecessary." Id.; see Turk v. White, 116 F.3d 1264, 1266-67 (9th Cir. 1997) (holding that defense counsel's reasonable selection of self-defense theory obviated need to investigate conflicting incompetency defense when pursuing both "would be unsound"); Bean, 163 F.3d at 1082 ("[I]t was within the broad range of professionally competent assistance for [counsel] to choose not to present psychiatric evidence which would have contradicted the primary defense theory.").

Further, not only were the malingering concerns sufficient to forgo the mental-state defense, but, as both Duran and the state court recognized, to present that defense would have undermined the identification defense because the two were "mutually exclusive." (SAP, Ex. 31 at 3021, 3147-49, 3164-65.) As the state court observed, the identification defense was a "powerful" one, executed proficiently by Duran. (See id. at 3148-49, 3164-65.) Indeed, "there were very legitimate issues with the I.D." (Id. at 3152.) After all, Hall, the shooting victim and the person who interacted with Petitioner the most, couldn't identify him (see Lodged Doc. 1, Clerk's Tr. at 10, 16; Lodged Doc. 3, 2 Rep.'s Tr. at 608, 615, 621, 627), and he testified that the shoes his assailant was wearing were not the same as those Petitioner was arrested in a short time later (Lodged Doc. 3, 2 Rep.'s Tr. at 614). Moreover, Herrera, the carjacking victim, also couldn't identify Petitioner. (See id. at 670, 1221.) And the two witnesses who did identify Petitioner during show-up identifications after his arrest didn't or couldn't identify him at trial. (See id. at 686, 905-08, 1206-

07.) Further, as Duran stressed in his closing argument, Petitioner's gun was never recovered, and neither was the sweatshirt that Maddox, who did identify him, claimed he had been wearing. (See id., 3 Rep.'s Tr. at 1506, 1509.) Thus, only two of six eyewitnesses were able to identify him in court, and Duran was able to point to the absence of certain physical evidence to undermine the identifications that were made.[15]

Although the defense was ultimately unsuccessful, the trial court found that Duran pursued a reasonable strategy, noting that it believed he "may have actually won" after hearing his closing argument. (SAP, Ex. 31 at 3145.) And that the jury deliberated for parts of five days corroborated the trial court's assessment that the case was close. See Thomas v. Chappell, 678 F.3d 1086, 1103 (9th Cir. 2012) (jury deliberations lasting five days "suggest[ed] that the case was close").

The relative strength of the identification defense here is one factor that distinguishes this case from those cited by Petitioner. For instance, in Bemore, 788 F.3d at 1165, the Ninth Circuit held that the alibi defense counsel had settled on in

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[15] Petitioner argues that if, as Respondent avers, the evidence of his guilt was overwhelming (see Answer, Mem. P. & A. at 31, 44, 47; Traverse, Mem. P. & A. at 11), then that was all the more reason for Duran to pursue a mental-state defense instead. But although the evidence that Maddox and Herrera were carjacked and Hall was shot was strong, whether Petitioner was the one who did those things was more attenuated and ripe for attack. Indeed, although Petitioner claims he admitted his guilt to the police (see SAP, Mem. P. & A. at 38), that wasn't the case. Rather, when confronted by them with the evidence against him, he said, "if you got it, then you got it . . . [and] don't need to be talking to me." (Lodged Doc. 3, 2 Rep.'s Tr. at 1225.) Far from an admission of guilt, Petitioner's answer shows an understanding of the predicament he was in and the need to avoid incriminating himself.

lieu of a potentially winning mental-state defense was weak and so his decision wasn't reasonable. Likewise, in Miller v. Terhune, 510 F. Supp. 2d 486, 499 (E.D. Cal. 2007), the court stressed that counsel was deficient for not investigating an intoxication defense when the defense he selected was equally "problematic" and wasn't "inconsistent" with the intoxication one. See also Seidel, 146 F.3d at 753, 758 (finding that counsel was deficient for not investigating mental-state defense when selected defense was not inconsistent).

Petitioner asserts that Duran didn't actually know he could raise a mental-state defense, citing Duran's alleged statement to prior habeas counsel. (See SAP, Mem. P. & A. at 27 n.7.) But Duran expressly testified that he was aware that he could raise a mental-state defense and chose not to. (SAP, Ex. 31 at 3000-01.) The state court credited his testimony on that score, and that factual finding is entitled to a presumption of correctness that Petitioner hasn't rebutted by "clear and convincing evidence." Lambert v. Blodgett, 393 F.3d 943, 971, 977 (9th Cir. 2004) (holding that under AEDPA, "presumption of correctness" applies to state-court factual determinations, including those "made in the course of resolving claims of ineffective assistance of counsel," and that petitioner bears burden of rebutting presumption of correctness by clear and convincing evidence). Petitioner could have called the former counsel to testify at the evidentiary hearing, but he did not.

Similarly, Petitioner claims that the state court put words in Duran's mouth when it suggested in a series of questions to him that he had considered the mental-state defense and

strategically chose not to pursue it. (See SAP, Mem. P. & A. at 37; Traverse, Mem. P. & A. at 6.) But although the court asked Duran such questions, it repeatedly stressed that he should "correct [it]" if its assessment was wrong. (See SAP, Ex. 31 at 3022-23.) Instead, Duran agreed with the court. (Id.) Moreover, before the court questioned him, Duran had testified that he considered the mental-state defense (see id. at 2995-98), and he confirmed on redirect that he had weighed both defenses (id. at 3027).

Finally, In his Traverse, Petitioner argues for the first time that the superior court "unreasonably determined the facts by inserting its own opinions and recollections into the record, and relying on facts or supposition that were irrelevant." (Traverse, Mem. P. & A. at 5; see id. at 6-9.) Arguments raised for the first time in a reply brief are forfeited. See United States v. Johnson, 833 F. App'x 665, 668 (9th Cir. 2020) (declining to consider argument raised for first time in reply brief); Eberle v. City of Anaheim, 901 F.2d 814, 818 (9th Cir. 1990) (refusing to consider potentially meritorious argument first raised in reply, observing that "it is well established in this circuit that the general rule is that appellants cannot raise a new issue for the first time in their reply briefs" (cleaned up)). Moreover, unlike in the cases cited by Petitioner (see Traverse, Mem. P. & A. at 5-6), the state court didn't err by engaging in factfinding without holding an evidentiary hearing, see Hurles v. Ryan, 752 F.3d 768, 791 (9th Cir. 2014), or relying on its "personal knowledge" to resolve a disputed issue of fact, see Buffalo v. Sunn, 854 F.2d 1158, 1165 (9th Cir.

1988). For instance, Petitioner faults the trial court for remarking that Petitioner appeared "presentable" and "engaged" during trial. (See Traverse, Mem. P. & A. at 8-9.) But that was based not just on the judge's observations but on Nielsen's and Duran's testimony to that effect during the evidentiary hearing (see SAP, Ex. 31 at 2979-80 (Nielsen testifying that during trial Petitioner was "completely coherent and lucid" and was "actively aware and taking part in the trial strategy"); id. at 3014, 3026 (Duran testifying that he discussed guilty plea with Petitioner), and Petitioner could have introduced evidence to dispute that assertion if he believed it inaccurate.

Similarly, that Petitioner was once a gang member and simultaneously involved in a relationship with two different women at the time of trial (see Traverse, Mem. P. & A. at 15-16), as the trial court observed (see SAP, Ex. 31 at 3151-53), was also based on evidence in the record[16] (see SAP, Ex. 4 at 30 & Ex. 31 at 3010-12), and any error the state court made in

[16] Petitioner suggests that "racial prejudice may have influenced the court's reasoning," citing its observation that Petitioner was "juggling" two romantic interests simultaneously. (See Traverse, Mem. P. & A. at 16.) But the trial court's observation, which was in the form of a question to Duran to confirm whether the court understood him correctly, followed Duran's evidentiary-hearing testimony that two women, both of whom were romantically involved with Petitioner, attended the trial, and that Petitioner told him that one "was more aware of the court appearances than the other by design." (SAP, Ex. 31 at 3010-12.) Thus, the court's observation was appropriately based on the evidence. The court's point was also relevant, as Petitioner's ability to balance two relationships and hide one from the other while incarcerated reflected that he was "highly functional" and might have undermined a mental-state defense, as the trial court noted. (See id. at 3151-53, 3155-56, 3162.)

invoking personal experience to infer that gang members were "paranoid" and "vigilant" was inconsequential, particularly given other evidence that Petitioner had an extensive criminal history and used various aliases and personal identifiers, suggesting some degree of criminal sophistication. Indeed, even Petitioner's expert, Lavid, testified that Petitioner exhibited "anti-social manipulative behavior" and "tended towards manipulation" and "deceitfulness." (Id. at 3081-82.) And of course here, unlike in Hurles, an evidentiary hearing was held.

The trial court's assessment of Duran's identification strategy and his execution of it (see SAP, Ex. 31 at 3145, 3152, 3167) was also record based and relevant to resolving Petitioner's claims that Duran was inexperienced as a trial attorney and that he was prejudiced by his pursuing an identification defense instead of a mental-state one. Indeed, it is not uncommon for state courts to resolve whether an approach taken by trial counsel was reasonable in light of an alternative, competing approach. See Wildman v. Johnson, 261 F.3d 832, 838-40 (9th Cir. 2001) (affirming denial of habeas petition when state court found that "trial counsel's strategy was reasonable"); Furman v. Wood, 190 F.3d 1002, 1006 (9th Cir. 1999) (affirming denial of habeas petition when state court found that "evidence . . . was strong").

For all these reasons, the state court's finding that Duran did not perform deficiently was not objectively unreasonable.

2. Prejudice

The state court wasn't objectively unreasonable in concluding that Petitioner wasn't prejudiced even if Duran

performed deficiently. Nothing in the evidence that would have been available to Duran had he investigated further makes it reasonably likely that he would have opted to present the mental-state defense or that it would have been successful.

To start, although Petitioner claims that if Duran had further investigated he would have discovered the information Knox and Black testified to at the hearing (see SAP, Mem. P. & A. at 2; see Traverse at 10), all of the information Knox provided was in fact already in Knapke's report (see SAP, Ex. 1), which Duran had read and considered, and he testified that before trial Knox had told him about Petitioner's odd behavior before the crimes. Indeed, Duran discussed Knox's concerns about his behavior with Petitioner before settling on the identification defense. (SAP, Ex. 31 at 2995-98.) Black's account of Petitioner's behavior didn't add much to Knox's. Moreover, the anecdotes shared by Knox and Black concerned Petitioner's paranoia and his irrational responses to it. But nothing about the facts of this case suggests that Petitioner was driven by paranoia. Although Petitioner describes the crimes as "odd" (Traverse, Mem. P. & A. at 11-12), they were in fact quite straightforward. Petitioner apparently wanted to get to the San Fernando Valley and, despite apparently having money and access to a car, was determined do so without paying, which meant trying to hitch a ride and, when that failed, carjacking a ride. Nothing that he said during the crimes was bizarre or delusional. Indeed, his instruction to Hall — after discovering that he was heading for the San Fernando Valley — to tell Maddox to "give [him] a ride" and take Anzuria out of the car (see Lodged Doc. 3,

2 Rep.'s Tr. at 331, 611, 638) showed that he had a clear goal and objective. Even if Knox's and Black's testimony might have supported an inference that he was suffering from and impaired by a mental illness at the time of the crimes, Duran would likely have recognized that their value as witnesses was limited given their close relationship to Petitioner.

As for the mental-health records that Duran could have subpoenaed, there was very little information in them that he wasn't already aware of. To be sure, as Petitioner points out (see SAP, Mem. P. & A. at 2), the jail records show that he was acting bizarrely almost immediately upon being incarcerated and was promptly prescribed antipsychotic medication. (See SAP, Ex. 26 at 2421-22, 2492, 2495.) That information strengthened a potential mental-state defense, as it suggested that Petitioner's mental state was impaired at the time of the crimes. But Duran was aware that Petitioner's prior counsel had declared a doubt about his competence to stand trial on January 26, just two weeks after the crimes, and so he was already on notice that there was evidence that Petitioner might have been suffering from a mental illness around that time. And Petitioner points to nothing probative in the Patton records that isn't mentioned in Christison's report, which Duran reviewed. At bottom, there is nothing in the records that would have assuaged Duran's concerns about Petitioner's malingering or would have bolstered the defense to the point that Duran would have eschewed the identification defense in favor of it.

Nor would Lavid's opinion (or one similar to it) likely have changed Duran's mind. His testimony that Petitioner was probably

suffering from a mental illness at the time of the crimes (see SAP, Ex. 31 at 3054-55) did little more than confirm that the mental illness Petitioner was diagnosed with while incarcerated was active when he committed the crimes. But Lavid shed limited light on whether that mental illness impaired Petitioner's ability to form the specific intent to commit the charged crimes. Indeed, his only explanation for his assessment that Petitioner's mental-state at the time of the crimes was impaired (see id. at 3068) was that Petitioner had a mental illness. But as the state court recognized, Lavid also testified that the effect of schizophrenia on a person's mental state is based on the severity of the disease (id. at 3167), and his explanation for why he believed Petitioner's schizophrenia was sufficiently severe at the time of the crimes so as to influence his intent was limited to the same factors he relied on to conclude more generally that Petitioner had schizophrenia. Under these circumstances, it isn't likely that counsel would have done anything differently even if he had more thoroughly investigated the mental-state defense.

Nor is it likely that the defense would have been successful if Duran had presented it. As discussed, although Lavid testified that Petitioner was suffering from schizophrenia at the time of the crimes (see SAP, Ex. 31 at 3054-55, 3068, 3094), according to him the primary evidence of that was that Petitioner was diagnosed with that disease by many doctors after the crimes (id. at 3057, 3079). Indeed, Lavid hadn't even interviewed Petitioner or reviewed his criminal history or medical records from shortly after the crimes before reaching that assessment

(id. at 3072, 3076, 3079, 3081), which would have undermined the strength of his potential testimony. And even if his testimony could have persuaded a jury that Petitioner was suffering from schizophrenia, he couldn't identify any way that disease affected Petitioner's perception of reality during the crimes or impeded his ability to form the requisite intent for attempted murder and carjacking. (See id. at 3093-94.)

Further, as the state court noted, Petitioner's behavior during the crimes cut against a finding that he was then mentally impaired. (See id. at 3150-54.) For instance, the evidence shows that Petitioner didn't randomly approach Hall's family but did so after watching them for some time from nearby. (See Lodged Doc. 3, 2 Rep.'s Tr. at 326-28, 348, 645-46.) That he instructed Hall to tell Maddox to "give [him] a ride" (id. at 331, 611) showed, as the court noted, that he had clear goals and objectives (id. at 331, 611). And that he commanded them to "get the kid out of the car" (id. at 638; see id. at 332, 611, 637) showed that he was able to perceive that Anzuria was a child and, more importantly, that he was clear headed enough to recognize that he shouldn't elevate a carjacking to a kidnapping by taking the car with Anzuria in it. Further, that he was arrested while hiding in a trash can (id. at 914-15) showed that he was conscious of his guilt, a fact confirmed by his coy answers to police when arrested (see id. at 1225).

Petitioner maintains, citing Lavid's testimony, that his conduct must be viewed through the lens of mental illness. (See Traverse, Mem. P. & A. at 12.) Lavid explained that schizophrenia manifested in paranoia and misperceptions of

reality. (See SAP, Ex. 31 at 3058.) To be sure, Petitioner appears to have acted out of paranoia during some of the incidents detailed by Knox and Black. For instance, according to them he repeatedly believed he was being followed and that people, including family members, were out to get him. (See id. at 3038-39, 3112-13.) That he attempted to use a neighbor's phone in the middle of the night despite having a phone in his own home (see id. at 3112-13) suggested that his perception of reality was also altered at the time. But nothing like that occurred during the crimes. Petitioner never suggested to his victims that he was being followed or that he was attempting to get away from someone. Nor did he say or do anything odd or unusual for someone who was intent on committing a carjacking. Thus, the evidence undermined any inference that his mental state was so impaired by his schizophrenia at the time of the crimes that he couldn't form the requisite intent.

Further, as discussed above, there was ample evidence in the record that Petitioner was malingering mere months after the crimes, which would have caused the jury to doubt whether his mental-state was indeed impaired during them. That he presented well at trial and was engaged with his attorneys would have fueled the jury's doubts about whether his mental illness was genuine, even if that might have been the result of his having been involuntarily medicated. (See id. at 3060, 3068.) Although his attorney could have attempted to explain that to the jury, it remains that his presentation at trial might have been viewed as consistent with malingering, undermining his mental-state defense.

In addition to the substantial evidence of malingering, there was also ample other evidence that the prosecution may have introduced to show that Petitioner wasn't impaired at the time of the crimes. For instance, Knox testified that he worked doing construction and had completed a job shortly before the crimes. (See id. at 3126-27.) That he was a member of a gang and had used different dates of birth, Social Security numbers, and aliases tended to show that he was a savvy criminal. (See id. at 3162; see SAP, Ex. 26 at 2491 (medical record noting that law enforcement knew that Petitioner had multiple aliases).) And the prosecution may have been allowed to introduce evidence of his prior crimes, some of which were committed only several years before the ones at issue here, to show that he committed the charged crimes knowingly and with the requisite intent.

Petitioner correctly points out that the jury deliberated for parts of five days and acquitted him of attempted willful, deliberate, and premeditated murder. (See SAP, Mem. P. & A. at 39.) But that simply shows that Duran's strategy of contesting identity and arguing in the alternative that the perpetrator of the crimes lacked the requisite intent proved partially fruitful. See Thomas, 678 F.3d at 1103 ("[L]engthy deliberations suggest a difficult case." (citation omitted)). That the jury apparently didn't accept that the attempted murder was premeditated because the evidence suggested it was "unconsidered and rash" and followed Hall's "lunge" attempt doesn't show that the jury would have been receptive to a mental-state defense, which would have focused on a completely different aspect of Petitioner's state of mind.

Under these circumstances, had Duran presented a mental-state defense, it is not reasonably probable that a juror would have concluded that Petitioner lacked the requisite intent to commit the crimes.[17] See Bemore, 788 F.3d at 1169.

Accordingly, habeas relief is not warranted.

II. Petitioner's Insufficient-Evidence Claim Does Not Warrant Habeas Relief

In ground two Petitioner contends that insufficient evidence supported his conviction for attempting to carjack Maddox. (See SAP, Mem. P. & A. at 40-45; Traverse, Mem. P. & A. at 17-19.)

A. Applicable Law

The Due Process Clause of the 14th Amendment protects a criminal defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Thus, a state prisoner who alleges that the evidence was insufficient to support the jury's findings states a cognizable federal habeas claim. Herrera v. Collins, 506 U.S. 390, 401-02 (1993).

In considering a sufficiency-of-the-evidence claim, a court must determine whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

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[17] Petitioner's reliance on Bloom v. Calderon, 132 F.3d 1267, 1277 (9th Cir. 1997), to show that he was prejudiced is unpersuasive. In Bloom, the Ninth Circuit found that counsel's deficient performance was prejudicial because counsel pursued a mental-state defense that was fatally undermined by his failure to adequately prepare the expert for trial. Id. Here, counsel didn't raise a mental-state defense, which as discussed above the state court reasonably found didn't amount to deficient performance.

could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (citation omitted) (emphasis in original). California's standard for determining the sufficiency of evidence is identical to the federal standard from Jackson. People v. Johnson, 26 Cal. 3d 557, 576 (1980). On federal habeas review, a state court's resolution of a sufficiency claim is evaluated under § 2254(d)(1) rather than (d)(2). Juan H. v. Allen, 408 F.3d 1262, 1274-75 (9th Cir. 2005) (as amended). Under AEDPA, federal courts must "apply the standards of Jackson with an additional layer of deference." Id. at 1274.

Moreover, Jackson "makes clear that it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial." Cavazos v. Smith, 565 U.S. 1, 2 (2011) (per curiam). Thus, the reviewing court "cannot second-guess the jury's credibility assessments"; such determinations are "generally beyond the scope of review." Kyzar v. Ryan, 780 F.3d 940, 943 (9th Cir. 2015) (citation omitted).

The reviewing court "must look to state law for 'the substantive elements of the criminal offense,'" although the "minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." Coleman v. Johnson, 566 U.S. 650, 655 (2012) (per curiam) (citation omitted). In determining whether the evidence was sufficient, a federal court must follow the state courts' interpretation of state law, including in the underlying case. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam); Emery v. Clark, 643

F.3d 1210, 1214 (9th Cir. 2011) (per curiam).

"'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." People v. Montoya, 33 Cal. 4th 1031, 1034 (2004) (citing Penal Code § 215(a)). "[T]he owner or possessor of a vehicle may be deprived of possession . . . when the victim remains in the car and the defendant exercises dominion and control over the car by force or fear." People v. Gray, 66 Cal. App. 4th 973, 985 (1998).

To establish attempted carjacking, the prosecution was required to show that Petitioner intended to commit carjacking and performed a "direct unequivocal overt act toward its commission." People v. Vizcarra, 110 Cal. App. 3d 858, 861 (1980); see Penal Code § 21a. Under section 21a, a defendant attempts to commit a crime when, acting with the specific intent to commit the crime, he "performs an act that goes beyond mere preparation and indicates that he . . . is putting a plan into action." People v. Toledo, 26 Cal. 4th 221, 230 (2001).

B. Court-of-Appeal Decision

The court of appeal rejected Petitioner's claim that the evidence was insufficient to establish that he had the specific intent to deprive Maddox of her car against her will by means of force or fear. (Lodged Doc. 7 at 3; see id. at 3-5.)

> The record shows [Petitioner] began watching Maddox and her family upon their arrival, followed them as they were purchasing tickets, told Hall he was not going to make his train and angrily demanded that Maddox give him a ride and that Anzuria be removed from the car. [Petitioner's] coercive and frightening behavior constitutes sufficient evidence of his unambiguous intent and attempt to deprive Maddox of possession of her car through force and fear.

(Id. at 5.)

C. Analysis

The court of appeal's finding that sufficient evidence established Petitioner's specific intent to deprive Maddox of her car was not contrary to or an unreasonable application of clearly established law.

As the court of appeal found, Petitioner's "coercive and frightening behavior" was sufficient evidence of his "unambiguous intent and attempt" to exercise control over Maddox's car. (Lodged Doc. 7 at 5.) Specifically, evidence that he watched and followed Maddox and her family after they arrived at the train station (see Lodged Doc. 3, 2 Rep.'s Tr. at 326-28, 348, 645-46) suggests that when he subsequently told Hall to tell Maddox to "give [him] a ride" (id. at 331, 611) he had formed the intent to carjack after identifying Maddox as his mark. That he told Hall, "I don't think you are gonna make it," after asking him where he was going (id. at 608, 623) further supported an inference that he intended to gain control of Maddox's car.

And although there might have been innocent explanations for Petitioner's conduct up to that point, the encounter fundamentally changed when, after Maddox refused to give him a ride, he twice "angr[ily]" "yell[ed]," "Get the kid out [of] the car," referring to Anzuria, who was 10 years old at the time and sitting in the backseat. (Id. at 638; see id. at 332, 611, 637.) The jury could and apparently did infer that Petitioner's angry command, which scared Anzuria (id. at 638) and made both Hall and Maddox feel that a confrontation was about to ensue (id. at 332-33, 612), was an implied threat and an attempt to take control of the car. See People v. Magallanes, 173 Cal. App. 4th 529, 534 (2009) (noting in carjacking case that express threat is not necessary to establish that defendant intended to deprive victim by means of fear). That less than 20 minutes later Petitioner successfully carjacked Herrera (see Lodged Doc. 3, 2 Rep.'s Tr. at 664-68, 922) further supported the inference that he intended to do the same to Maddox.

Petitioner claims the evidence was insufficient because it didn't show that based on his behavior "no one would doubt" that he intended to carjack Maddox. (SAP, Mem. P. & A. at 43 (citing People v. Kipp, 18 Cal. 4th 349, 377 (1998)).) But Kipp did not hold, as Petitioner suggests, that an attempted carjacking is committed only "'at that point' at which, 'if the transaction is interrupted . . . no one would doubt'" that the defendant was attempting carjacking. (Id.) Rather, in Kipp, in discussing the facts of that case, the state supreme court simply noted that were a transaction interrupted when a defendant "displays a

firearm[] and demands money . . . no one would doubt that [he] is guilty of an attempted robbery." Kipp, 18 Cal. 4th at 377. It didn't change the law that, as the court of appeal laid out here, to establish an attempted crime the prosecution was required to show that Petitioner intended to commit that crime and performed a "direct unequivocal overt act toward its commission." (Lodged Doc. 7 at 4 (citation omitted).) Here, Petitioner committed several, including ordering Maddox and Hall to remove Anzuria from the car. And to the extent Petitioner claims that the court of appeal misstated California law, this Court can't review state-law-based claims. Cf. Estelle v. McGuire, 502 U.S. 62, 67 (1991).

Accordingly, habeas relief is not warranted on this claim.

III. Petitioner's Instructional-Error-Based Claims Do Not Warrant Habeas Relief

In ground three Petitioner claims the trial court violated his constitutional rights by failing to sua sponte instruct the jury on attempted voluntary manslaughter, a lesser included offense of attempted murder. (SAP, Mem. P. & A. at 45-50; Traverse, P. & A. at 19-22.)[18] In ground four he argues that Duran was ineffective for failing to request that instruction as well as one for reasonable self-defense. (SAP, Mem. P. & A. at

[18] Respondent contends that Teague v. Lane, 489 U.S. 288 (1989), bars Petitioner's claim. (See Answer at 1; id., Mem. P. & A. at 36-40.) But because the Court recommends that the claim be denied on its merits, no prejudice adheres to either party from not conducting the Teague analysis. See Ayala v. Ayers, No. 01cv0741 BTM., 2008 WL 1787317, at *54 (S.D. Cal. Apr. 16, 2008) (declining to address Teague because relevant claim "simply fails on the merits").

50-53; Traverse, P. & A. at 22-25.)

A. Court-of-Appeal Decision

The court of appeal rejected Petitioner's claim that the trial court was obligated to sua sponte instruct the jury on attempted voluntary manslaughter as a lesser included offense of attempted murder under theories of self-defense or heat of passion:

> [Petitioner] argues the doctrines of imperfect self-defense and heat of passion should have been applied because Hall's sudden attack amounted to provocation that caused [Petitioner] either reasonably or unreasonably to fear he was about to suffer serious harm or death and to act rashly by shooting Hall in the heat of passion. This contention is without merit.
>
> . . . .
>
> . . . [I]mperfect self-defense, like perfect self-defense, cannot be invoked by a defendant who, through his or her own wrongful conduct has created the circumstances under which his or her adversary's attack or pursuit is legally justified.
>
> [Petitioner] initiated the events leading to his confrontation with Hall. [Petitioner] stalked the family, and told Hall he would not make his train, before he menacingly approached Hall and attempted to commandeer Maddox's car. Only then did Hall lurch towards [Petitioner] and reach for his legs in an effort to flip [Petitioner] on his back. Consequently, because

> [Petitioner] was the original aggressor, as a general matter, he was precluded from asserting imperfect (or perfect) self-defense until he withdrew from the confrontation, and gave clear notice to Hall that he was doing so.
>
> There is an exception to the rule an aggressor must first withdraw. "[W]hen the victim of simple assault responds in a sudden and deadly counterassault, the original aggressor need not attempt to withdraw and may use reasonably necessary force in self-defense." Nonetheless, [Petitioner] cannot avail himself of this exception because there was no "sudden and deadly" counterassault. The undisputed evidence is that Hall did not use deadly force. He did not employ any weapon, nor throw any kicks or punches, but merely tried to grab [Petitioner's] legs.
>
> Nor was [Petitioner] entitled to instructions on attempted voluntary manslaughter on the heat of passion theory. . . .
>
> [A] defendant may not provoke a confrontation as an aggressor, and, without first seeking to withdraw, kill an adversary and expect to reduce the crime to manslaughter by merely asserting it was provoked by a sudden quarrel or acted in the heat of passion. "The claim of provocation cannot be based on events for which the defendant is culpably responsible."

(Lodged Doc. 7 at 5-7 (citations omitted).)

B. Applicable Law

1. Federal law

Claims of error in state jury instructions are generally matters of state law only and thus not cognizable on federal habeas review. See Gilmore v. Taylor, 508 U.S. 333, 344 (1993). Failure to give a jury instruction warranted under state law does not by itself merit federal habeas relief. Menendez v. Terhune, 422 F.3d 1012, 1029 (9th Cir. 2005). Habeas relief is available only when a petitioner demonstrates that the instructional error "by itself so infected the entire trial that the resulting conviction violates due process." McGuire, 502 U.S. at 72 (citation omitted).

In Beck v. Alabama, 447 U.S. 625, 627 (1980), the Supreme Court held that failure to instruct the jury on a lesser included offense in a capital case violates the Due Process Clause if evidence supported the instruction. It expressly declined to decide whether due process requires such an instruction in a noncapital case. Id. at 638 n.14. In the years following Beck, the circuits have split on whether its holding applies to noncapital cases. See Solis v. Garcia, 219 F.3d 922, 928-29 (9th Cir. 2000) (collecting cases).

The Ninth Circuit has declined to find a constitutional right to a lesser-included-offense instruction in noncapital cases, holding that its omission does not present a federal constitutional question and does not provide grounds for habeas relief. Solis, 219 F.3d at 929; see Bortis v. Swarthout, 672 F. App'x 754, 754 (9th Cir. 2017). Notwithstanding this rule, a defendant generally has a constitutional right to meaningfully

present a complete defense. Crane v. Kentucky, 476 U.S. 683, 689-90 (1986). Supreme Court cases discussing that right, however, have generally "dealt with the exclusion of evidence . . . or the testimony of defense witnesses," not jury instructions. Gilmore, 508 U.S. at 343. In Gilmore, the Supreme Court rejected arguments that "the right to present a defense includes the right to have the jury consider it" and that due process was violated when the instructions at issue "prevent[ed] [the] jury from considering an affirmative defense." Id. at 344. The Court observed that "such an expansive reading of [its] cases would make a nullity" of the rule that "instructional errors of state law generally may not form the basis for federal habeas relief." Id. (citing McGuire, 502 U.S. at 62).

Nevertheless, the Ninth Circuit has held that a trial court's failure "to correctly instruct the jury on [a] defense may deprive the defendant of his due process right to present a defense." Bradley v. Duncan, 315 F.3d 1091, 1099 (9th Cir. 2002); see also Conde v. Henry, 198 F.3d 734, 739 (9th Cir. 2000) (as amended) ("It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case."). In so holding, the Ninth Circuit has relied on Mathews v. United States, 485 U.S. 58, 63 (1988), a pre-Gilmore case, in which the Supreme Court stated that "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." See, e.g., Bradley, 315 F.3d at 1098-99, 1100; Drew v. Scribner, 252 F. App'x 815, 817 (9th Cir. 2007). Whether this principle is "clearly established

Federal law" under AEDPA is open to question, however, given that Mathews was a direct appeal of a federal criminal conviction discussing the scope of the entrapment defense under "[f]ederal appellate cases" and federal rules of civil and criminal procedure, not the Constitution. 485 U.S. at 59, 63-65; see also id. at 69 (White, J., dissenting) ("The Court properly recognizes that its result is not compelled by the Constitution"); Bueno v. Hallahan, 988 F.2d 86, 88 (9th Cir. 1993) (per curiam) (acknowledging that Mathews is "not compelled by the Constitution").[19]

To the extent clearly established federal law provides that a petitioner has a constitutional right to adequate jury instructions on his theory of defense, he must first show that sufficient evidence supported that defense. See Mathews, 485 U.S. at 63; Bradley, 315 F.3d at 1098; Conde, 198 F.3d at 739. And federal habeas relief remains unwarranted unless the instructional error caused a "substantial and injurious effect or influence in determining the jury's verdict." Bradley, 315 F.3d at 1099 (citation omitted); see Brecht v. Abrahamson, 507 U.S. 619, 638 (1993). Thus, relief is appropriate only if the court has grave doubt about whether a federal-law trial error was actually prejudicial. Davis v. Ayala, 576 U.S. 257, 267-68 (2015) (citation omitted).

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[19] As noted, the Supreme Court has "repeatedly emphasized [that] . . . circuit precedent does not constitute clearly established Federal law," Frost, 574 U.S. at 24 (citation omitted), and cannot "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the] Court has not announced," Lopez, 574 U.S. at 7 (citation omitted). Nonetheless, this Court is of course bound by it.

2. State law

A defendant who intentionally "commits an unlawful killing without malice is guilty only of voluntary manslaughter." People v. Blacksher, 52 Cal. 4th 769, 832 (2011). An unlawful killing lacks malice "when the defendant acted under a 'sudden quarrel or heat of passion' or under an 'unreasonable but good faith belief in having to act in self-defense.'" Id. at 832 (citations omitted). The circumstances giving rise to sudden quarrel or heat of passion are viewed objectively. People v. Cole, 33 Cal. 4th 1158, 1215 (2004); see also People v. Manriquez, 37 Cal. 4th 547, 583-84 (2005) ("The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.").

A defendant may not, however, "provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion." People v. Oropeza, 151 Cal. App. 4th 73, 83 (2007) (citation omitted); see People v. Enraca, 53 Cal. 4th 735, 761 (2012) (holding that doctrines of perfect and imperfect self-defense can't "be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified").

"A trial court must instruct on a lesser-included offense if

substantial evidence exists indicating that the defendant is guilty only of the lesser offense." Manriquez, 37 Cal. 4th at 584 (citation omitted). "The duty exists even when the lesser included offense is inconsistent with the defendant's own theory of the case." People v. Brothers, 236 Cal. App. 4th 24, 29 (2015).

C. Analysis

1. Instructional error

To start, to the extent Petitioner claims the court of appeal erroneously applied state law in finding that an attempted-voluntary-manslaughter instruction was not warranted, that is not a cognizable basis for federal habeas relief. See Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009) ("[W]e have repeatedly held that 'it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.'" (quoting McGuire, 502 U.S. at 67–68)); Bradshaw v. Richey, 546 U.S. 74, 76 (2005) ("[A] state court's interpretation of state law . . . binds a federal court sitting in habeas corpus.").

Petitioner's claim is equally unavailing as a matter of federal law. Because no Supreme Court authority holds that a defendant has a constitutional right to a jury instruction on a lesser included offense in a noncapital case, the court of appeal could not have unreasonably applied clearly established federal law when it rejected Petitioner's claims, as Respondent notes. (Answer, Mem. P. & A. at 40); see Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) ("[T]his Court has held on numerous occasions that it is not 'an unreasonable application of clearly

established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." (citations omitted)); Solis, 219 F.3d at 929 (holding that trial court's failure to give jury instructions on lesser included offense in noncapital case does not present cognizable federal constitutional claim). And even though such a claim may exist on habeas review if the instructions implicate a defense theory, see Bradley, 315 F.3d at 1099; Conde, 198 F.3d at 739, Petitioner's defense theory, as discussed above, was misidentification. Therefore, the trial court's failure to instruct on the lesser included offense of attempted voluntary manslaughter does not present a cognizable federal constitutional claim. Solis, 219 F.3d at 929.[20]

But even if such a claim exists on habeas review, Petitioner's constitutional rights were not violated by the omission of the voluntary-manslaughter instruction because sufficient evidence did not support it. Bradley, 315 F.3d at

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[20] Petitioner recognizes that Duran's "primary argument" was misidentification but points out that he also argued during closing that Petitioner "was drunk and high on the day of the offenses and that the prosecutor had failed to prove the required specific intent to kill and to carjack." (Traverse, Mem. P. & A. at 20.) But Duran never suggested that Petitioner lacked the requisite specific intent specifically because he had been provoked. (See Lodged Doc. 3, 3 Rep.'s Tr. at 1504-05.) For instance, he referred to Petitioner as being "drunk and high" to explain his conduct after he had crashed a car in the San Fernando valley (see Lodged Doc. 3, 3 Rep.'s Tr. at 1510-11), and although he suggested that the perpetrator acted on a "mere unconsidered and rash impulse" that followed Hall's "lunge" (id. at 1505), he never expressly suggested that that impulse was in response to Hall's provocation, as he does here. (See SAP, Mem. P. & A. at 48; see id. at 47-49; Traverse, Mem. P. & A. at 20-21; Lodge Doc. 3, 3 Rep.'s Tr. at 1505.) Thus, self-defense was never his theory of the case.

1098; Conde, 198 F.3d at 739. Petitioner's arguments about why he was entitled to a voluntary-manslaughter instruction under a heat-of-passion or self-defense theory all focus on his assertion that the evidence showed that he was provoked by "Hall's sudden attack." (SAP, Mem. P. & A. at 48; see id. at 47-49; Traverse, Mem. P. & A. at 20-21.) In doing so, he ignores the court of appeal's finding that he wasn't entitled to a voluntary-manslaughter instruction because as the "original aggressor . . . he was precluded" from relying on a heat-of-passion or self-defense theory under state law despite any subsequent provocation. (Lodged Doc. 7 at 5-7.) The Court is bound by that determination of state law. Richey, 546 U.S. at 76.[21]

In any event, as the court of appeal found, Petitioner "initiated the events leading to his confrontation with Hall." (Id. at 6.) After all, as discussed above, Hall tackled Petitioner only after he had attempted to carjack Maddox by instructing Hall to tell her to "give [him] a ride" and, when rejected, angrily yelling at them to "[g]et the kid out [of] the car." (Lodged Doc. 3, 2 Rep.'s Tr. at 638; see id. at 332, 611, 637.) Because the evidence showed that by "the commission of a felony" Petitioner created the circumstances under which Hall attacked him, Enraca, 53 Cal. 4th at 761, he was not entitled to an attempted-voluntary-manslaughter instruction under a heat-of-passion or self-defense theory. Hernandez v. Pennywell, No. ED

[21] As the court of appeal observed, although an aggressor doesn't need to first withdraw "when the victim of simple assault responds in a sudden and deadly counterassault," that exception didn't apply here because "Hall did not use deadly force." (Lodged Doc. 7 at 6.)

CV 13-475-GHK (PJW), 2015 WL 5138666, at *5-6 (C.D. Cal. Aug. 4, 2015) (holding that "[t]here was no error" when state court didn't instruct jury on imperfect self-defense because, as initial aggressor, petitioner "could not rely" on that defense), accepted by 2015 WL 5145517 (C.D. Cal. Sept. 1, 2015).

2. Ineffective assistance of counsel

Whether considered with AEDPA deference or de novo, Petitioner's claim that Duran was ineffective for not requesting instructions on attempted voluntary manslaughter under a heat-of-passion or self-defense theory is unavailing.

As an initial matter, Petitioner has failed to submit a declaration from Duran explaining why he didn't request the instructions; nor did he attempt to ask him about that issue at the evidentiary hearing. As a result, the Court cannot conclude that Duran's failure to ask for the instructions wasn't strategic. (See Traverse, Mem. P. & A. at 22-23.) That alone is reason to deny Petitioner's claim. See Gentry v. Sinclair, 705 F.3d 884, 899-900 (9th Cir. 2012) (as amended Jan. 15, 2013); Wallace v. Montgomery, No. CV 15-05400-AB (DFM), 2017 WL 5001422, at *34 (C.D. Cal. Sept. 13, 2017) (denying ineffective-assistance claim on de novo review when petitioner never presented declaration from trial counsel to support his claims (citing Gentry, 705 F.3d at 899-900)), accepted by 2017 WL 4990492 (C.D. Cal. Oct. 30, 2017). Indeed, counsel could reasonably have believed that Petitioner had a better chance at a straight-out acquittal if the jury's only choice was to convict him of attempted murder and not some lesser, compromise crime. See Robinson v. Hill, 2:13-cv-01311-TJH (KES), 2018 WL 7501271, at

*49 (C.D. Cal. Sept. 7, 2018) (finding that petitioner failed to overcome presumption that counsel had "strategic reason for not requesting the instruction" when counsel might have sought full acquittal and wanted to avoid risk of "compromise verdict"). And unlike in Crace v Herzog, 798 F.3d 840, 852 (9th Cir. 2015), cited by Petitioner (see Traverse, Mem. P. & A. at 23-24), in which counsel's failure to request a lesser included instruction "was neither strategic nor deliberate" because he acknowledged that he hadn't "consider[ed] it," Duran made no such admission here.

Moreover, there was another obvious strategic reason for not requesting the instructions. As already discussed, Duran's defense theory was based on identification. Instructions on attempted voluntary manslaughter and self-defense would have conflicted with his defense theory and potentially blunted its persuasiveness, which the trial judge noted was "powerful" as "phenomenal[ly]" executed by Duran. See Green v. Davis, No. CV 12-07332-JVS (DFM), 2017 WL 2129564, at *10 (C.D. Cal. Mar. 28, 2017) (counsel not ineffective for failing to request voluntary-manslaughter instruction when it would have conflicted with defense theory that petitioner was not shooter), accepted by 2017 WL 2129563 (C.D. Cal. May 16, 2017).

Beyond that, as the court of appeal implicitly recognized (see Lodged Doc. 7 at 7 n.2), Duran was not ineffective for not requesting those instructions because as discussed, there was no evidentiary support for them. See Juan H., 408 F.3d at 1273 (trial counsel cannot have been ineffective for failing to raise meritless argument); Smith v. Duncan, No. C 04-4743 WHA (PR).,

2008 WL 906813, at *5 (N.D. Cal. Mar. 31, 2008) ("Because requests by counsel for the instructions would not have succeeded, counsel was not ineffective in failing to take the futile action of asking for them.").

For all these reasons, habeas relief isn't warranted.[22]

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Judge accept this Report and Recommendation and direct that Judgment be entered denying the Second Amended Petition and dismissing this action with prejudice.

DATED: May 6, 2021

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

[22] Petitioner asks that if the Court doesn't grant habeas relief on the "current record," it allow him to further develop the evidence through discovery and an evidentiary hearing. (See SAP, Mem. P. & A. at 40; SAP, Add. at 10; Traverse at 3.) But Petitioner had ample opportunity to develop the record during the state-court proceedings, and further factfinding is unnecessary because, for the reasons discussed above, his claims can be resolved by reference to the existing state-court record. See Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998). Further, he has failed to establish good cause necessitating further discovery, see Bracy v. Gramley, 520 U.S. 899, 904 (1997); Campbell v. Blodgett, 982 F.2d 1356, 1358 (9th Cir. 1993) (as amended), or that any failure to adequately develop the facts wasn't the result of his own lack of diligence, see Rhoades v. Henry, 598 F.3d 511, 517 (9th Cir. 2010) (citation omitted).

APPENDIX G

CV-13-7792-DMG (JPR) Lodged document #9

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 12/04/2012 03:05 PM

Docket (Register of Actions)

PEOPLE v. JONES
Case Number S205167

Date	Description	Notes
09/05/2012	Petition for review filed	Defendant and Appellant: Jones, Philip Attorney: Maureen L. Fox
10/10/2012	Petition for review denied	
10/16/2012	Returned record	petition for review

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APPENDIX H

Filed 7/31/12 P. v. Jones CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. PHILIP JONES, Defendant and Appellant.	B233106 (Los Angeles County Super. Ct. No. MA044546)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles A. Chung, Judge. Affirmed as modified.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Eric E. Reynolds and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Philip Jones appeals from the judgment entered following his convictions by jury of attempted murder (Pen. Code, §§ 187, subd. (a), 664; count 1),[1] attempted carjacking (§§ 215, subd. (a), 664; count 2), and carjacking (count 3). As to all counts, the jury found true the attendant firearm-enhancement allegations (§ 12022.53, subds. (b), (c) & (d)). In a bifurcated proceeding, the trial court found Jones had served two separate prison terms for felonies (§ 667.5, subd. (b)). Jones was sentenced to an aggregate state prison term of 55 years to life. Jones contends the evidence was insufficient to support his conviction for attempted carjacking, the trial court erred in failing to instruct the jury sua sponte on attempted voluntary manslaughter and trial counsel rendered ineffective assistance. Jones also asserts sentencing error; he is correct. We affirm as modified.

FACTUAL BACKGROUND

At approximately 8:00 a.m. on January 10, 2009, Loretta Maddox drove her family to the Lancaster Metrolink train station on Sierra Highway in Los Angeles County. Sitting next to her was ex-husband Julius Hall and sitting in the back seat were granddaughter, Anzuira H. and Hall's step-brother, Jimmy Shelton. Maddox parked in the first stall by the ticket booth and waited in the car with Anzuira, while Hall and Shelton left to smoke a cigarette. Maddox saw Jones standing next to the ticket booth. The two of them made eye contact.

When Hall and Shelton returned, the family walked over to the ticket booth and bought tickets. Anzuira noticed that Jones was about three feet behind them. He was walking around and staring at the family. After buying tickets, the family returned to the car. Maddox got into the driver's seat, and Anzuria sat behind her in the back seat. Hall and Shelton wanted to know when the train was leaving. Hall left to ask some people in the station, and Shelton decided to look for a conductor. Minutes later, Hall was coming back to the car and passed by Jones, who asked where Hall was traveling. Hall replied he

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

was headed for the San Fernando Valley. Jones said, "I don't think you are gonna make it."

At that point, Maddox called out to Hall. He walked up to driver's side window and spoke to Maddox about Jones's comments. While they were talking, Jones approached the front of the car, stopping five to seven feet away from Maddox. Jones told Hall, "Tell your wife to give me a ride." Hall responded, "No, we don't know you." Maddox also told Jones she would not give him a ride because she did not know him. Jones then yelled angrily twice, "Get the kid out [of] the car," referring to Anzuria in the back seat. Anzuria was frightened.

Maddox thought there was going to be a confrontation between Hall and Jones. Hall was frightened for his granddaughter. He rushed towards Jones, bent down and attempted to grab Jones's legs in an effort to flip him onto the ground. Maddox was about to get out of the car to help Hall, when she saw Jones take a step back, pull out a gun and shoot Hall. After being shot, Hall leaned against the hood of the car. Jones fled across Sierra Highway.

Shortly after the shooting, Jones carjacked Walter Herrera's pickup truck at gunpoint, in front of a nearby car wash.

DISCUSSION

1. *Sufficient Evidence Supports the Attempted Carjacking Conviction*

Jones contends his conviction for attempted carjacking must be reversed because the evidence is insufficient to support the verdict. Specifically, Jones challenges the evidence to support the specific intent element of the offense, arguing the prosecution failed to show he engaged in acts that indicated a certain, unambiguous intent to deprive Maddox of her car within the meaning of section 215, subdivision (a).

Our constrained assessment of the evidence to support the conviction is guided by well-defined rules. To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt.

[Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

"'"Carjacking" is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.' [Citation.]" (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035; § 215, subd. (a); see also *People v. Coryell* (2003) 110 Cal.App.4th 1299, 1302.) "The owner or possessor of a vehicle may be deprived of possession not only when the perpetrator physically forces the victim out of the vehicle, but also when the victim remains in the car and the defendant exercises dominion and control over the car by force or fear." (*People v. Gray* (1998) 66 Cal.App.4th 973, 985.)

To establish the offense of attempted carjacking, the prosecution was required to show Jones intended to commit elements of the offense and took a "direct unequivocal overt act toward its commission." (*People v. Vizcarra* (1980) 110 Cal.App.3d 858, 861; § 21a; see also *People v. Herman* (2002) 97 Cal.App.4th 1369, 1385.) Under section

21a, an attempt to commit a crime may be shown, where a defendant, acting with the specific intent to commit the crime, "performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action." (*People v. Toledo* (2001) 26 Cal.4th 221, 230; see also *People v. Post* (2001) 94 Cal.App.4th 467, 480-481.) "'Although mere preparation such as planning or mere intention to commit a crime is insufficient to constitute an attempt, acts which indicate a certain, unambiguous intent to commit that specific crime, and in themselves, are an immediate step in the present execution of the criminal design will be sufficient.' [Citations.]" (*People v. Jones* (1999) 75 Cal.App.4th 616, 627.)

There is sufficient evidence in this case of Jones's specific intent to deprive Maddox of her car within the meaning of section 215, subdivision (a). The record shows Jones began watching Maddox and her family upon their arrival, followed them as they were purchasing tickets, told Hall he was not going to make his train and angrily demanded that Maddox give him a ride and that Anzuria be removed from the car. Jones's coercive and frightening behavior constitutes sufficient evidence of his unambiguous intent and attempt to deprive Maddox of possession of her car through force and fear. Jones is not entitled to reversal of the attempted carjacking conviction.

2. *Trial Court Did Not Err in Failing to Instruct on Attempted Voluntary Manslaughter*

Jones did not request an instruction on attempted voluntary manslaughter as a lesser included offense of attempted murder. However, he now contends the trial court was required sua sponte to instruct the jury on this theory. Jones argues the doctrines of imperfect self-defense and heat of passion should have been applied because Hall's sudden attack amounted to provocation that caused Jones either reasonably or unreasonably to fear he was about to suffer serious harm or death and to act rashly by shooting Hall in the heat of passion. This contention is without merit.

A trial court must instruct the jury sua sponte on general principles of law applicable to the case. (*People v. Najera* (2008) 43 Cal.4th 1132, 1136.) This requirement includes instruction on lesser included offenses supported by the evidence.

(*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) Because attempted voluntary manslaughter is a lesser included offense of attempted murder (*People v. Lewis* (1993) 21 Cal.App.4th 243, 257; *People v. Heffington* (1973) 32 Cal.App.3d 1, 11), whether or not requested, the trial court was required to give the attempted voluntary manslaughter instruction if there was substantial evidence to support it – that is a reasonable jury could conclude that the lesser included offense rather than the greater offense was committed. (*People v. Breverman, supra,* at p. 162.) The evidence was insufficient here.

Manslaughter is "the unlawful killing of a human being without malice." (§ 192.) A defendant lacks malice and is guilty of voluntary manslaughter in "limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense.' [Citation.]." (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

Unreasonable or imperfect self-defense requires the defendant to have an actual, if unreasonable, belief that he was in imminent danger of loss of life or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) In such circumstances, the defendant is deemed to have acted without malice and cannot be convicted of murder but only of manslaughter. (*Ibid*.) However, imperfect self-defense, like perfect self-defense, cannot be invoked by a defendant who, through his or her own wrongful conduct has created the circumstances under which his or her adversary's attack or pursuit is legally justified. (*In re Christian S.* (1994) 7 Cal.4 th 768, 773, fn. 1; *People v. Seaton* (2001) 26 Cal.4th 598, 664.)

Jones initiated the events leading to his confrontation with Hall. As previously discussed, Jones stalked the family, and told Hall he would not make his train, before he menacingly approached Hall and attempted to commandeer Maddox's car. Only then did Hall lurch towards Jones and reach for his legs in an effort to flip Jones on his back. Consequently, because Jones was the original aggressor, as a general matter, he was precluded from asserting imperfect (or perfect) self-defense until he withdrew from the confrontation, and gave clear notice to Hall that he was doing so.

There is an exception to the rule an aggressor must first withdraw. "[W]hen the victim of simple assault responds in a sudden and deadly counterassault, the original aggressor need not attempt to withdraw and may use reasonably necessary force in self-defense." (*People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201; *People v. Crandell* (1988) 46 Cal.3d 833, 871-872, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 365.) Nonetheless, Jones cannot avail himself of this exception because there was no "sudden and deadly" counterassault. The undisputed evidence is that Hall did not use deadly force. He did not employ any weapon, nor throw any kicks or punches, but merely tried to grab Jones's legs.

Nor was Jones entitled to instructions on attempted voluntary manslaughter on the heat of passion theory. "Although section 192, subdivision (a), refers to 'sudden quarrel or heat of passion,' the factor which distinguishes the 'heat of passion' form of voluntary manslaughter from murder is provocation." (*People v. Lee* (1999) 20 Cal.4th 47, 59.) A person who is provoked by a sudden quarrel or acts in the heat of passion to kill lacks malice. A conviction of manslaughter based on heat of passion requires proof of (1) an objective element that there was sufficient provocation "to cause an 'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment" (*People v. Breverman, supra*, 19 Cal.4th at p. 163); and (2) a subjective element that the defendant's reason was, in fact, overcome by an overwhelming passion. (*Ibid*.)

But a defendant may not provoke a confrontation as an aggressor, and, without first seeking to withdraw, kill an adversary and expect to reduce the crime to manslaughter by merely asserting it was provoked by a sudden quarrel or acted in the heat of passion. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.) "The claim of provocation cannot be based on events for which the defendant is culpably responsible." (*Ibid.*)[2]

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[2] Because we conclude there was no evidentiary support for instructions on voluntary manslaughter, we do not reach Jones's claim his trial counsel rendered ineffective assistance by failing to request the instructions.

3. *Trial Court Committed Sentencing Error*

The trial court sentenced Jones to an aggregate state prison term of 55 years to life, consisting of the upper term of nine years for attempted murder of Maddox (count 1), plus 25 years to life for the section 12022.53, subdivision (d) firearm enhancement, plus two years for the two prior prison term enhancements; plus the upper term of nine years for carjacking (count 3) plus 10 years for the section 12022.53, subdivision (b) firearm enhancement. Sentence on count 2 and the remaining firearm enhancements attendant to counts 1 and 2 were stayed pursuant to section 654.

Jones contends and the People concede the trial court imposed an unauthorized sentence for carjacking on count 3. As the subordinate consecutive term, the sentence on count 3 should have been 1 year 8 months (one-third of the middle term of five years) for carjacking, plus three years four months (one-third of the 10-year term) for the firearm enhancement. (§ 1170.1, subd. (a).) Thus, Jones's aggregate state prison sentence should be modified from 55 years to life to 41 years to life.

DISPOSITION

The 19-year sentence imposed on count 3 is modified to five years for an aggregate sentence of 41 years to life rather than 55 years to life. As modified the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.

UNDER SEAL
APPENDIX I

APPENDIX J

S257647

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re PHILIP JONES on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

UNDER SEAL
APPENDIX K

APPENDIX L

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, VS. PHILIP JONES Defendant.	Case Number MA044546	Department A-20
	VERDICT Count 1 (GUILTY)	

We, the Jury in the above-entitled action, find the Defendant, PHILIP JONES, GUILTY of the crime of ATTEMPTED MURDER, unlawfully and with malice aforethought, upon JULIUS CEASAR HALL, on or about January 10, 2009, in violation of Penal Code Section 664/187(a), a felony, as charged in Count 1 of the Information

We further find the allegation that the aforesaid attempted murder was committed willfully, deliberately and with premeditation within the meaning of Penal Code Section 664(a) to be: NOT TRUE
(Insert "TRUE OR NOT TRUE")

We further find the allegation that in the commission of the above offense, the said defendant PHILIP JONES personally and intentionally discharged a firearm, a handgun, which caused great bodily injury to JULIUS HALL within the meaning of Penal Code Section 12022.53(d) to be TRUE
(Insert "TRUE" or "NOT TRUE")

We further find the allegation that in the commission and attempted commission of the above offense, the said defendant, PHILIP JONES, personally and intentionally discharged a firearm, a handgun, within the meaning of Penal Code Section 12022.53(c) to be TRUE.
(Insert "TRUE" or "NOT TRUE")

We further find the allegation that in the commission and attempted commission of the above offense, the said defendant, PHILIP JONES, personally used a firearm, a handgun, within the meaning of Penal Code Section 12022.53(b) to be TRUE.
(Insert "TRUE" or "NOT TRUE")

Dated this 15th day of Febevary, 2011

FOREPERSON

Juror Seat Number 8

VERDICT (GUILTY)

FILED
LOS ANGELES SUPERIOR COURT
FEB 15 2011
JOHN A. CLARKE, CLERK
E. Heiner
BY E. HEINER, DEPUTY