No.

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN LIU,

Petitioner

v.

MARCUS POLLARD, Warden,

Respondent

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

APPENDIX

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NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN LIU, Petitioner-Appellant, v. MARCUS POLLARD, Warden, Respondent-Appellee.	No. 20-56338 D.C. No. 2:17-cv-07465-SB-JPR MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stanley Blumenfeld, Jr., District Judge, Presiding

Submitted July 19, 2023**
Pasadena, California

Before: NGUYEN and FORREST, Circuit Judges, and BENNETT,*** District Judge.
Partial Concurrence by Judge NGUYEN.

Petitioner-Appellant Kevin Liu appeals the district court's denial of his 28

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* FED. R. APP. P. 34(a)(2).

*** The Honorable Richard D. Bennett, United States Senior District Judge for the District of Maryland, sitting by designation.

U.S.C. § 2254 petition challenging his California state convictions for attempted murder and related crimes. In support of his petition, Liu argued that he was denied his right to counsel of choice when the state trial court denied his request for a continuance at his preliminary hearing. The district court concluded that this claim was procedurally defaulted under California's *Dixon* bar. On appeal, Liu contends that the district court's finding was improper because there was no procedural default, and, in any event, any default is excused. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a), and we affirm.

I.

This Court reviews *de novo* the denial of a 28 U.S.C. § 2254 petition, *Williams v. Warden*, 422 F.3d 1006, 1008 (9th Cir. 2005), as well as findings of procedural default and exhaustion. *Insyxiengmay v. Morgan*, 403 F.3d 657, 665 (9th Cir. 2005). "Federal habeas courts generally refuse to hear claims 'defaulted . . . in state court pursuant to an independent and adequate state procedural rule.'" *Johnson v. Lee*, 578 U.S. 605, 606 (2016) (per curiam) (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Like all states, California requires criminal defendants to raise available claims on direct appeal. *Id*. Under California law, courts will not entertain habeas corpus claims "where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." *In re Dixon*, 264 P.2d 513, 514 (Cal. 1953). This is known as the *Dixon* bar, which the Supreme Court has held was both

firmly established and regularly followed such that it can serve as an adequate ground for denying a federal habeas petition. *See Johnson*, 578 U.S. at 608–12.

Liu's main argument[1] is that the *Dixon* bar is inapposite, as his continuance claim was based on facts outside the appellate record that could not have been raised on direct review. But federal habeas relief generally "does not lie for errors of state law," *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011), and "it is unusual to reject a state court's use of a procedural bar on the ground that it was erroneously applied." *Sivak v. Hardison*, 658 F.3d 898, 907 (9th Cir. 2011). In any event, the record supports the state court's application of the *Dixon* bar.

Liu contends that, in any event, he is excused from his procedural default. To overcome a state procedural bar such as *Dixon*, a prisoner must demonstrate cause for his state court default of any federal claim, as well as prejudice resulting

[1] In his Reply Brief, Liu argues that "the *Dixon* bar [was] not adequate to bar federal review because the state court's application of *Dixon* in this case was novel, unforeseeable, and inconsistent with long-standing California precedent," citing *Cruz v. Arizona*, 143 S. Ct. 650 (2023). However, *Cruz* concerned whether a state prisoner could be barred from challenging an Arizona state court's decision denying his right to inform the jury about relevant sentencing information, where the state court applied a novel rule to bar his ability to present the issue on post-conviction review. *Id.* at 655–57. The Supreme Court held that the state court's basis for precluding the claim was such a novel and unforeseeable interpretation of state law that it was not an "adequate state procedural ground" to bar federal review. *Id*. at 660–62. Comparatively, nothing suggests that the California Supreme Court's application of the *Dixon* bar in this case relied on a novel or unforeseeable interpretation of state law. *See Ford v. Georgia*, 498 U.S. 411, 423–24 (1991) (holding that a state procedural bar is adequate if it is "firmly established and regularly followed" at the time it is applied).

therefrom, before the federal habeas court will consider the merits of that claim. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). The one exception to this rule—which is not at issue here—is where the habeas petitioner can demonstrate a sufficient probability that failure to review his federal claim will result in a fundamental miscarriage of justice. *Id*.

Liu argues that he received ineffective assistance of appellate counsel, which constitutes cause to excuse the procedural default. However, Liu did not exhaust this ineffective assistance of counsel claim. *Id.* at 452 ("A claim of ineffective assistance . . . generally must 'be presented to the state court as an independent claim before it may be used to establish cause for a procedural default.'" (citation and alteration omitted)). Rather, he abandoned his ineffective assistance of appellate counsel claim when he voluntarily dismissed it in his September 19, 2018, federal filing, explicitly conceding the claim was unexhausted.

Petitioner next argues that he was not required to prove prejudice to overcome his default because the denial of a continuance to allow him to be represented by a different attorney constituted "structural error." As the district court noted, Liu had no constitutional right to a preliminary hearing; he likewise had no constitutional right to have the preliminary hearing continued. *See e.g., Peterson v. California*, 604 F.3d 1166, 1169 (9th Cir. 2010); *Ramirez v. Arizona*, 437 F.2d 119, 119–20 (9th Cir. 1971). He specifically alleges that he was denied his Sixth Amendment right to

counsel of his choice. The California Supreme Court summarily denied both of his state petitions. Trial judges have broad discretion to balance a defendant's right to counsel of choice with the demands of their calendars, *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983), and nothing indicates that the trial court's denial of Liu's request for a continuance was arbitrary or unreasonable. *See, e.g., Armant v. Marquez*, 772 F.2d 552, 556–58 (9th Cir. 1985); *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985). While a continuance would have afforded Liu's newly hired attorney time to prepare for the hearing, Liu's public defender indicated that she was prepared to represent him, and a continuance would have inconvenienced the prosecution, which had three witnesses present for the hearing. Accordingly, we conclude Liu's claim was procedurally defaulted.

II.

Alternatively, assuming Liu's Sixth Amendment claim is not procedurally defaulted, it fails on the merits. If a state inmate's habeas claim is "clearly not meritorious," then "appeals courts are empowered to, and in some cases should, reach the merits" of the claim "despite an asserted procedural bar." *Ayala v. Chappell*, 829 F.3d 1081, 1096 (9th Cir. 2016) (quoting *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002)).

"[T]he right to counsel of choice is 'circumscribed in several important respects.'" *Miller v. Blacketter*, 525 F.3d 890, 895 (9th Cir. 2008) (quoting *Wheat v.*

United States, 486 U.S. 153, 159 (1988)). "[A] trial court requires 'wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.'" *Id.* (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006)). "As such, trial courts retain the discretion to 'make scheduling and other decisions that effectively exclude a defendant's first choice of counsel.'" *Id.* (quoting *Gonzalez-Lopez*, 548 U.S. at 152).

Liu asserts that the trial court "did not ask [him] if the prosecutor's representations" about his refusal to waive time "were accurate," but Liu was represented by competent counsel who confirmed that "Mr. Liu didn't want to waive time." Liu, who was present, did not contest his counsel's representations. Regardless, the trial court denied the continuance *before* being told that Liu had refused to waive time, so that information did not sway the court's decision.

The trial court had sound reasons for proceeding with the preliminary hearing—in particular, the prosecution had ensured that the victims were present and ready to testify. And the trial court allowed Liu's retained counsel, who attended the hearing, to substitute into the case immediately afterward. For these reasons, Liu's Sixth Amendment claim fails, and we affirm the district court's order denying habeas relief.

AFFIRMED.

NGUYEN, Circuit Judge, concurring in part and in the judgment:

I concur in the majority's resolution of the merits, but I would not decide the procedural question. The California Supreme Court's reasoning for twice denying Kevin Liu's habeas claim is opaque, and it's not clear to me that Liu's claim is procedurally defaulted.

I.

Liu presented the California Supreme Court with two identical habeas petitions containing several claims, including the one at issue here—that the trial court denied Liu his Sixth Amendment right to counsel of choice. The California Supreme Court summarily denied both petitions. In denying the first petition, the court stated that "a petition for writ of habeas corpus must include copies of reasonably available documentary evidence," citing *People v. Duvall*, 886 P.2d 1252, 1258 (Cal. 1995).[2] Liu provided some transcript excerpts with his second petition. In denying that petition, the court stated that "a petition for writ of habeas corpus must allege sufficient facts with particularity," citing *Ex parte Swain*, 209 P.2d 793, 796 (Cal. 1949).

[2] In denying both habeas petitions, the California Supreme Court also stated that "courts will not entertain habeas corpus claims that were rejected on appeal," citing *In re Waltreus*, 397 P.2d 1001, 1005 (Cal. 1965). These *Waltreus* citations evidently refer to the claims of misconduct based on the prosecution's introduction of evidence that Liu's ex-wife, one of the victims, had cancer.

"[T]he California Supreme Court's denial of [a] habeas petition with reference to *Swain* and *Duvall*" means that the court "rejected [the] petition as insufficiently pleaded." *Curiel v. Miller*, 830 F.3d 864, 869 (9th Cir. 2016) (en banc). That makes sense given Liu's allegations. Just prior to the preliminary hearing, the trial court denied Liu's request for a continuance to substitute in newly retained counsel. In his habeas petitions, Liu claimed that the prosecutor "misled the court . . . to believe that" in an earlier, apparently unreported proceeding,[3] Liu "refused to waive his right to a speedy trial . . . as a tactical man[e]uver." But Liu provided no further details.

Generally, a "denial [of habeas relief] accompanied by citations to *Swain* and *Duvall* is the equivalent of a demurrer for pleading inadequacies." *Curiel*, 830 F.3d at 870. And "[a] dismissal without prejudice for failure to plead with specificity invites a refiling of the habeas petition," *id.* at 870–71, leading to the possibility that Liu's claim is still unexhausted. But not necessarily. If Liu's claim is "incapable of being alleged with any greater particularity," "then the California Supreme Court's denial for lack of particularity amounts to a holding that the [claim itself is] defective," and we may consider it. *Kim v. Villalobos*, 799 F.2d 1317, 1319–20 (9th Cir. 1986). And even if the claim is unexhausted, we may deny it on the merits if

[3] The state provided numerous transcripts below, as required, *see* Rules Governing § 2254 Proceedings, R. 5(c), 28 U.S.C. foll. § 2254, but failed to include the proceeding where Liu waived his speedy trial rights.

having the state courts consider Liu's additional attempts at exhaustion would serve no purpose. *See* 28 U.S.C. § 2254(b)(2).

II.

In denying Liu's second state habeas petition, the California Supreme Court also stated that "courts will not entertain habeas corpus claims that could have been, but were not, raised on appeal," citing *Ex parte Dixon*, 264 P.2d 513, 514 (Cal. 1953). The majority, assuming that the citation to *Dixon* referenced Liu's Sixth Amendment claim, concludes that the state court denied Liu's claim pursuant to an independent and adequate state procedural rule. For several reasons, that is doubtful.

First, as discussed above, Liu's failure to allege any details regarding his claim suggests that the state court's denial was for pleading deficiencies rather than Liu's failure to raise the claim earlier. Second, if the state court thought that Liu should have raised the claim on direct appeal, why did it wait until the second denial order to say so? Instead, the court likely was responding to Liu's allegations of error during the trial, including that the prosecutor prejudicially manipulated facts and evidence. Liu did not provide evidence for his trial-related claims because he purportedly did not have access to the trial transcripts.

Third, Liu's Sixth Amendment claim revolves around an event that is not part of the record—Liu's apparent refusal to waive his speedy trial rights—and California courts do not consider such claims on direct appeal. *See In re Bower*, 700

P.2d 1269, 1272 (Cal. 1985) ("[W]hen reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right[,] resort to habeas corpus is not only appropriate, but required."). To the extent the state court concluded that Liu was required to raise his claim on appeal, "an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude [federal habeas] review of a federal question." *Cruz v. Arizona*, 143 S. Ct. 650, 658 (2023) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

Because the procedural default issue is close, I would not reach it. I therefore concur in the majority disposition affirming the district court's denial of habeas relief only insofar as it concludes that Liu's Sixth Amendment claim lacks merit.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN LIU, Petitioner-Appellant, v. MARCUS POLLARD, Warden, Respondent-Appellee.	No. 20-56338 D.C. No. 2:17-cv-07465-SB-JPR Central District of California, Los Angeles ORDER

Before: CANBY, Circuit Judge.

The request for a certificate of appealability is granted with respect to the following issue: whether appellant's claim that he was denied his right to counsel of choice when the trial court denied his request for a continuance at the preliminary hearing is procedurally defaulted. *See* 28 U.S.C. § 2253(c)(3); *Valerio v. Crawford*, 306 F.3d 742, 774-75 (9th Cir. 2002) (en banc); *see also Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Slack v. McDaniel*, 529 U.S. 473, 483-85 (2000); *see also* 9th Cir. R. 22-1(e).

Appellant's motion for in forma pauperis status (Docket Entry No. 3) is granted. The Clerk will change the docket to reflect appellant's in forma pauperis status.

Appellant's motion for appointment of counsel (Docket Entry No. 4) is granted. *See* 18 U.S.C. § 3006A(a)(2)(B); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). Counsel will be appointed by separate order.

The Clerk will electronically serve this order on the appointing authority for the Central District of California, who will locate appointed counsel. The appointing authority must send notification of the name, address, and telephone number of appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel.

The opening brief is due May 31, 2022; the answering brief is due June 30, 2022; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk will serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

If Marcus Pollard is no longer the appropriate appellee in this case, counsel for appellee must notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KEVIN LIU,

Petitioner,

v.

MARCUS POLLARD, Warden,

Respondent.

Case No. CV 17-7465-SB (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 ADJUDGED that the Petition is denied, and this action is dismissed with prejudice.

DATED: November 23, 2020

STANLEY BLUMENFELD, JR.
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KEVIN LIU, Petitioner, v. MARCUS POLLARD, Warden, Respondent.	Case No. CV 17-7465-SB (JPR) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE

The Court has reviewed the Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge. On July 8, 2020, Petitioner filed Objections to the R. & R., in which he mostly repeats arguments from his Petition and Traverse. In light of his complaint that because of the COVID-19 pandemic he had limited law-library access while preparing the Objections (see Objs. at 1-2), the Magistrate Judge sua sponte granted him additional time to file supplemental objections and then granted his two requests for a further extension. On October 14, 2020, Petitioner filed Supplemental Objections, in which he primarily

reiterates the arguments raised in his Objections.[1] Respondent has not responded to the Objections or Supplemental Objections.

Although he mostly spends his time discussing their merits (see id. at 3-5), Petitioner also seems to contend that the Magistrate Judge erred in finding grounds one through three and six procedurally defaulted (id. at 2-5). Specifically, he argues that the Petition's claims were "presented in a timely manner" to the state courts. (Id. at 2.) But as the Magistrate Judge recognized as to claims one through three, and as the Court previously found (see Aug. 31, 2018 R. & R. at 6-8; Oct. 10, 2018 Order Accepting R. & R.), the claims were barred because they should have been raised on direct appeal, not because they were untimely, and the Magistrate Judge rightly rejected Petitioner's argument that his appellate attorney's ineffectiveness excused his procedural default because that claim, which was previously dismissed from the Petition, was unexhausted (see R. & R. at 23-24).

Petitioner also asserts that his procedural default should be excused because there was "no remedy [to be] found within the

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[1] **Error! Main Document Only.**Petitioner still maintains that he has been denied law-library access (Suppl. Objs. at 6), and he emphasizes that he has "limited knowledge and understanding" of English and no "knowledge and understanding of the legal procedures and processes" (id. at 7). But he did not request additional time to file his Supplemental Objections, and his burden to establish entitlement to federal habeas relief is not lessened by his pro se status. To the extent he claims he received ineffective assistance from a fellow inmate in preparing his Objections and Supplemental Objections (see id. at 6-8), there is no constitutional right to counsel in federal habeas proceedings. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).

state's courts," suggesting that they would be reluctant to ever find prosecutorial misconduct. (See Objs. at 4; Suppl. Objs. at 4.) But "[i]f a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." Engle v. Isaac, 456 U.S. 107, 130 (1982) (rejecting argument that "cause" excusing procedural default was shown when raising claim in state court would have been futile). Because Petitioner has failed to show that his default was excused by cause or actual prejudice, the Magistrate Judge didn't err by not addressing grounds one through three and six on the merits. (See Objs. at 6.)

Having reviewed de novo those portions of the R. & R. to which Petitioner objects, the Court agrees with and accepts the findings and recommendations of the Magistrate Judge. IT THEREFORE IS ORDERED that judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: November 23, 2020

STANLEY BLUMENFELD, JR.
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KEVIN LIU, Petitioner, v. MARCUS POLLARD, Warden,[1] Respondent.	Case No. CV 17-7465-VAP (JPR) REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, 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 12, 2017, Petitioner, proceeding pro se, filed a Petition for Writ of Habeas Corpus by a Person in State Custody,

[1] Petitioner is incarcerated at Richard J. Donovan Correctional Facility, see Cal. Dep't Corr. & Rehab. Inmate Locator, https://inmatelocator.cdcr.ca.gov (search for "Kevin" with "Liu") (last visited June 9, 2020), whose warden is Marcus Pollard. Pollard is therefore substituted in as the proper Respondent. See Fed. R. Civ. P. 25(d); see also R. 2(a), Rs. Governing § 2254 Cases in U.S. Dist. Cts.

challenging his June 2015 convictions for attempted murder and related crimes.

On January 22, 2018, Respondent moved to dismiss the Petition, arguing that four of its claims, which the state supreme court had denied on procedural grounds, were unexhausted. On February 2, 2018, Petitioner moved for a stay so that he could return to state court to exhaust the claims. On April 27, 2018, before the Court could rule on either motion, he filed a second habeas petition in the supreme court, raising the four unexhausted claims; it was denied on August 8.

On August 31, 2018, the Court found that one of those claims — that preliminary-hearing and appellate counsel were ineffective — was still unexhausted and that Petitioner was not entitled to a stay under Rhines v. Weber, 544 U.S. 269, 277 (2005), to try again to exhaust it. On September 19, 2018, Petitioner moved to voluntarily dismiss the ineffective-assistance-of-counsel claim. On October 10, 2018, the District Judge dismissed the claim and denied as moot Petitioner's motion for a stay and Respondent's motion to dismiss.

On December 18, 2018, Respondent filed his Answer to the Petition's remaining claims. On February 15, 2019, Petitioner filed a Traverse. For the reasons discussed below, the Court recommends that the Petition be denied and this action be dismissed with prejudice.

PETITIONER'S REMAINING CLAIMS[2]

I. Petitioner's constitutional right to counsel was violated when the trial court denied his motion to continue the preliminary hearing so that he could be represented at it by retained instead of appointed counsel. (Pet. at 18-20; Traverse at 3, 8-9, 12-13.)[3]

II. The trial court abused its discretion when it unconstitutionally denied his motion to continue the preliminary hearing. (Pet. at 18-20; Traverse at 3, 8-9, 12-13.)

III. The prosecutor committed misconduct by making factual misstatements that caused the trial court to deny Petitioner's motion to continue the preliminary hearing. (Pet. at 15-18; Traverse at 3, 9, 12-13.)

IV. The trial court unconstitutionally refused to instruct the jury on attempted voluntary manslaughter, a lesser included offense of attempted murder. (Pet. at 21-22; Traverse at 3-4, 13-14.)

V. The trial court unconstitutionally precluded him from eliciting a psychiatrist's expert testimony about his mental state during the crimes (Pet. at 22-23; Traverse at 14) and from introducing evidence that one of the victims had allegedly been accused of molesting Petitioner's daughter (Pet. at 23-24; Traverse at 15).

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[2] For clarity and concision, the Court has renumbered Petitioner's remaining claims and combined two of them.

[3] For nonconsecutively paginated documents, the Court uses the pagination generated by its Case Management/Electronic Case Filing system.

VI. The prosecutor committed misconduct by eliciting testimony that one of the victims had cancer. (Pet. at 24-25; Traverse at 15.)

VII. The cumulative effect of the errors denied him a fair trial. (Pet. at 25-27; Traverse at 15-16.)

BACKGROUND

On June 19, 2015, Petitioner was convicted by a Los Angeles County Superior Court jury of attempting to murder and making criminal threats against Martin Sandoval, possessing a silencer, and assaulting Sandoval and Nancy Liu, his then-estranged wife, with a firearm (Lodged Doc. I, 2 Clerk's Tr. at 236-39, 242, 256); he was acquitted of attempting to murder and making criminal threats against Nancy and of burglary (id. at 235, 240-41, 256). The jury found true that he used a firearm during the crimes (id. at 236-38, 242) and not true that he attempted murder "willfully, deliberately and with premeditation" and "personally and intentionally discharged a firearm" (id. at 236, 257). He was sentenced to prison for 20 years. (Id. at 373, 378.)

He appealed, raising grounds four through seven of the Petition. (See Lodged Doc. A.) On August 16, 2016, the court of appeal rejected the claims in a reasoned decision on the merits, affirming the judgment. (See Lodged Doc. D); People v. Liu, No. B266352, 2016 WL 4366792 (Cal. Ct. App. Aug. 16, 2016). He filed a petition for review raising the same claims in the supreme court (see Lodged Doc. E), which summarily denied it on November 16, 2016 (see Lodged Doc. F).

On July 3, 2017, Petitioner filed a state supreme court habeas petition raising the Petition's first three claims. (See

Lodged Doc. G.) The court denied it on procedural grounds with citations to People v. Duvall, 9 Cal. 4th 464, 474 (1995) (petition for writ of habeas corpus must include copies of reasonably available documentary evidence), and In re Waltreus, 62 Cal. 2d 218, 225 (1965) (habeas courts will not entertain claims that were rejected on appeal). (See Lodged Doc. H.)

On April 27, 2018, Petitioner filed another habeas petition in the supreme court, raising the same claims as in the first one. (See Lodged Doc. L.) On August 8, 2018, the second petition was denied with citations to Waltreus, 62 Cal. 2d at 225, In re Dixon, 41 Cal. 2d 756, 759 (1953) (holding that courts will not consider habeas claims that could have been but were not raised on direct appeal), and In re Swain, 34 Cal. 2d 300, 304 (1949) (holding that habeas claims must be alleged with sufficient particularity). (Lodged Doc. M.)

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)). Although Petitioner does not challenge the sufficiency of the evidence, the Court has nonetheless independently reviewed the state-court record. See Nasby v. McDaniel, 853 F.3d 1049, 1054-55 (9th Cir. 2017). Based on this review, the Court finds that the following statement of facts from the court-of-appeal decision fairly and accurately summarizes the evidence.

I. Prosecution Evidence

[Petitioner] and Nancy married in 1988 and had three children. In 2005, Nancy told [Petitioner] that she wanted to separate. She agreed to stay with [him] in their house in Perris for financial reasons and for the children, but she made preparations for divorce. Nancy and [Petitioner] both worked at Morongo Casino; they had different shifts and different times. At work, they shared a locker, in which they had to put all of their personal belongings while working.

In 2009, Nancy began dating Sandoval, who also worked at the casino. When they started dating, Sandoval was aware that she was living with her husband, but he understood that Nancy and [Petitioner] were separated. Nancy continued having sexual relations with [Petitioner] up until 2013 because she believed it was the only way to keep peace in her house. In January 2013, Nancy told [Petitioner] that she was dating Sandoval.

Two months later, Nancy filed for divorce [FN 3] and moved in with a friend. During that time, she received several "terrifying" telephone calls from [Petitioner]. He often called 20 or 30 times a day. She did not report his threats to the police because they both would have lost their jobs. She explained that, in the gaming industry, any instance of harassment or domestic violence could cause a casino to terminate employment. Nancy spoke to her family and asked a friend who was a police officer to talk to [Petitioner] about his threats. Once,

[Petitioner] called while he was outside her residence, even though she had never told him where she was living.

[FN 3] The divorce became final in September 2013.

Nancy began to record [Petitioner's] telephone calls in late March or early April 2013. Two were played for the jury. One day, at around 4:00 a.m., [Petitioner] told Nancy that she was "never going to leave" him. When she replied that she was divorcing him, [Petitioner] said: "Let's see over my dead body honey. [¶] . . . [¶] I'm going to fucking hurt everybody." He later said, "I will follow you and I will get him, honey . . . . Good luck to him and good luck to his fucking family. . . . This is the fucking last warning for him. . . . I could have fucking hurt him today." That night, in another telephone call, [Petitioner] told Nancy that Sandoval had ruined his life and that he would ruin Sandoval's life. [Petitioner] stated: "I am going to firkin' kill him yester—last night" and that Sandoval was "lucky last night." [Petitioner] also told Nancy: "He will be dead. [¶] . . . [¶] He is fucking my wife and I am going to kill him. I have all the fucking right to do that." He then told Nancy that he had parked in front of her house that day but did not do anything to her. She asked him about lock ties [FN 4] that she had discovered under his pillow and he just replied "Okay."

[FN 4]: Nancy acknowledged that she and [Petitioner] had used scarves as tie devices

> during sex, but she never saw plastic lock ties before finding them under [Petitioner's] pillow.

A few months later, Nancy moved into an apartment in La Puente. She did not tell [Petitioner] where she was living because she feared for her life. When she got off work at 4:00 a.m., she drove around her neighborhood for a while to make sure that she was not being followed. No one other than Nancy had keys to her apartment; neither Sandoval nor [Petitioner] had ever stayed the night at her place.

Sometime before September, [Petitioner] called Sandoval and accused him of "screwing [his] wife." Sandoval told [Petitioner] that he and Nancy were dating and that Nancy had said that there was nothing going on between her and [Petitioner]. [Petitioner] became upset and angrily told Sandoval to stay away from Nancy. He threatened Sandoval if he did not stop contacting Nancy, saying: "If I ever see you, I'll kill you." Sandoval was scared and told Nancy about the telephone call.

Sometime in late August, [Petitioner] called Nancy and told her that he was overwhelmed with a family issue. He said that he was "going to kill everybody" if she did not go back to his house in Perris and take care of it. Nancy went to the house and stayed for about four days. She and [Petitioner] did not have any reconciliation talks. At the time, Sandoval was in Mexico.

On September 6, 2013, Nancy and Sandoval returned to her apartment after going shopping. Sandoval put the items they had purchased on the bed and gave Nancy a hug. [Petitioner] emerged from the bathroom and pointed a gun with a homemade silencer at them. He said, "I going to kill you," several times. Sandoval believed that [Petitioner] was going to kill him, and he was scared for himself and Nancy.

[Petitioner] told Sandoval to sit, and he sat on the bed. Nancy was facing [Petitioner] and told Sandoval not to sit. Sandoval stood up. [Petitioner] pointed the gun at Nancy and said, "I told you both that if you made me crazy, this was going to happen. I going to kill you both." Nancy told [Petitioner] that she and [Petitioner] were not together and that Sandoval had nothing to do with their relationship. She begged him to stop and not hurt anyone. When [Petitioner] pointed the gun at Sandoval, Nancy moved in front of him. [Petitioner] pushed her out of the way and Sandoval lunged at him. Sandoval grabbed [Petitioner's] right wrist with his left hand. The gun discharged and made a "pop" sound. Sandoval and [Petitioner] fell to the floor and the gun fell out of reach. When [Petitioner] reached for the gun, Sandoval pulled him away and held him down. They both fell back onto the bed. Nancy went outside and called 9-1-1.

Jacob Rico (Rico), Nancy's neighbor, saw Nancy yelling into a cell phone that "he has a gun." She

pointed toward her apartment. Through the open door, Rico saw [Petitioner] and Sandoval struggling on a bed. Sandoval was holding [Petitioner's] arms and neck from behind. Rico ran into the room and helped restrain [Petitioner] until deputies arrived. Sandoval sustained minor injuries to his forehead from the struggle.

Deputies took [Petitioner] into custody. As he was being searched, [Petitioner] said, "I was going to shoot that motherfucker because he was sleeping with my wife." Deputies found a loaded gun magazine and 69 rounds of nine-millimeter ammunition in his pockets. They also found on his person a key that matched Nancy's front door.

A loaded Smith and Wesson nine-millimeter handgun with a blue cylinder attached to the muzzle was on the bathroom floor, along with an expended shell casing. The handgun had an aftermarket threaded barrel that allowed for the blue silencer to be attached. The silencer had been made from an oil filter. Forensic analyst Amanda Davis examined the gun and found that it had functioning safety mechanisms and a trigger pull of five and three-quarters pounds. There was a bullet hole by the mirror in the bathroom. The nine-millimeter bullet was found in Rico's next-door apartment.

Deputies also found a black bag inside the apartment next to the bed. It contained plastic zip ties and a wire cutter. The zip ties were tied together to form two handcuffs with another tie linking them together. The

bag and its contents did not belong to Nancy. There were no signs of forced entry into the apartment.

A vehicle belonging to [Petitioner] was parked a few blocks away. A pink gym bag was in the trunk and contained two oil filter canisters, an empty box of ammunition, pliers, a wood stick, rope, packaging tape, and a red bag with washers and gloves. Nancy had previously left this gym bag at the Perris house, but none of the items in the bag belonged to her.

[Petitioner] had purchased the gun on August 5, 2013, and picked it up nearly two weeks later. The gun store manager had showed him how to use it properly. [Petitioner] took his son to a firing range in August. [Petitioner] had previously been issued a handgun safety certificate card on June 20, 2013.

After [Petitioner] was arrested, Nancy removed a safe containing her jewelry from the Perris house.

II. Defense Evidence

[Petitioner] testified that in January 2013, Nancy told him that she was having an affair. He was hurt, angry, and depressed. In March, she moved out of their Perris home and filed for divorce. In March or April, [Petitioner] made threats to hurt people, but he never acted on them. He admitted to making the threatening phone calls to Nancy and he wanted her to feel scared. He lied on the phone when he told her that he was outside her residence.

[Petitioner] and Nancy had been having sexual relations until 2013. They sometimes used items such as scarves for tying, but they never used zip ties. Once, [Petitioner] tried to use a zip tie with Nancy, but she would not let him.

[Petitioner] bought a handgun in August and sometimes went to a shooting range. He bought the silencer canisters online as aftermarket attachments. He used them on the gun because he sometimes went shooting in the desert. He learned online how to put the silencer together with various parts. He transported his gun and accessories in a Puma bag that he kept in his car trunk.

[Petitioner] had been to Nancy's apartment in La Puente several times and spent one night there in August. Nancy gave him the key to the apartment; he denied taking it from their shared locker at the casino. On August 21, 2013, he brought a black bag and left it at her apartment. The bag contained zip ties and ropes that they had used during sex.

The last time [Petitioner] went shooting in the desert, he removed his gun from the trunk and brought it into the house. He did not know how the bag was placed back in the trunk on September 6, 2013. During the week that Nancy was at his house in August, she drove his car.

On September 5, 2013, [Petitioner] learned that Nancy had taken a safe from the house. His gun and ammunition, which were in a locked case, were also

missing. He called Nancy and she admitted that she had taken the items.

On September 6, 2013, at around 2:30 p.m., [Petitioner] parked his car behind Nancy's apartment. He went inside and searched for his items. He found the black bag, containing his gun, ammunition, and attachments, in the bathroom. He put the magazine in the gun and attached the silencer in order to make sure that everything worked. He put the ammunition in his pocket and walked out of the bathroom. [Petitioner] was surprised when Nancy and Sandoval entered the apartment. He held the gun pointed at the floor. This was the first time that he had ever seen Sandoval and he was angry. But he did not threaten to shoot or point the gun at anyone. When he entered the apartment, he did not know that anyone would be there and he had no intent to hurt or kill anyone.

Nancy stood in front of Sandoval. Sandoval asked [Petitioner] what he was doing there, and [Petitioner] asked Sandoval what he was doing with his wife. [Petitioner] asked Nancy why Sandoval was still with her and said that they needed to sit and talk. Sandoval approached, and [Petitioner] said: "I got a gun. I'm going to shoot you, you motherfucker." Nancy told [Petitioner] that they were not going to talk that day and that he was not going to shoot anyone. She reached for his gun, and [Petitioner] pushed her hand away. Sandoval charged him, slapped his hand, and grabbed for

the gun. They fell and struggled on the floor. Sandoval picked him up and threw him on the bed. [Petitioner] did not shoot the gun.

[Petitioner] denied making any statement to the police while he was arrested.

Tiffany Liu (Tiffany), [Petitioner] and Nancy's daughter, testified that [Petitioner] told her sometime in 2013 that Nancy was dating Sandoval. When Nancy moved out of their house in March, [Petitioner] was upset and angry. He said that he wanted to hurt Sandoval. In late August, Nancy stayed at their house for a few days. Nancy told Tiffany that she was confused and wanted to keep her family together. Around that time, Nancy told Tiffany that [Petitioner] was with her at the apartment. Nancy told Tiffany that she was afraid of [Petitioner] but believed that he would never hurt her.

Nancy further told Tiffany that on September 6, 2013, she and Sandoval entered her apartment. [Petitioner] was coming out of the bathroom and they argued. He said that she destroyed his life. [Petitioner] was waving a gun but not pointing it at anyone. Nancy stood between [Petitioner] and Sandoval. When [Petitioner] moved her to the side, Sandoval rushed toward him and they fell to the floor. Sandoval grabbed [Petitioner's] hand and the gun went off during the struggle.

Sam Liu (Sam), [Petitioner] and Nancy's son, testified that Nancy had told him that when she and

Sandoval arrived at her apartment, [Petitioner] was inside with a gun. She stepped in front of Sandoval and told [Petitioner] that if he was going to shoot anyone, he should shoot her. Sandoval and [Petitioner] struggled for the gun and a shot accidentally fired. Earlier, [Petitioner] had taken Sam to a shooting range for practice shooting.

Phillip Liu (Phillip), [Petitioner's] brother, testified that Nancy had called him after the incident. She said that [Petitioner] was in her apartment with a gun when she and Sandoval arrived. She distracted him and Sandoval grabbed the gun. The gun fell to the floor and accidentally fired. Phillip testified that Nancy had told him that [Petitioner] regularly visited her at the apartment and stayed the night. Sometimes, he brought a gun because he was concerned that she was living alone.

Stephen Seger (Seger), a family friend, testified that Nancy had discussed the incident with him by telephone. She said that she stood in front of Sandoval and told [Petitioner] that if he was going to hurt anyone, he should hurt her. Sandoval then pushed Nancy away and attacked [Petitioner]. [Petitioner] and Sandoval fell to the floor and the gun accidentally discharged.

John H. Pride (Pride), a firearms expert, examined [Petitioner's] handgun. He found that the trigger pressure was within the acceptable range for this firearm. The blue cylinder was a silencer that was

illegal to own in California. Pride explained that there were situations where the gun could be fired accidentally, such as during a struggle. Where someone grabs the wrist of a person holding a gun, it might cause the person to accidentally pull the trigger. The firearm evidence was consistent with both an intentional and unintentional firing. The silencer attachment might explain why there was not a round in the chamber when the gun was fired.

III. Prosecution Rebuttal Evidence

Thuy Lien Nguyen Gomez (Gomez), who had been dating Sam, lived at [Petitioner's] house for a time. [Petitioner] found out about Nancy's relationship with Sandoval in January after going through Nancy's cell phone. He said that if Nancy was still seeing Sandoval, he was "dead to him." In June 2013, [Petitioner] showed Gomez a photograph of Sandoval and asked her if it was him; she said yes. Once, Nancy asked her to stay outside the bedroom while she and [Petitioner] argued because she was concerned that he might do something. Nancy told Gomez that she still had sex with [Petitioner] to "keep peace."

Nancy told Gomez that on September 6, 2013, [Petitioner] exited the bathroom with a gun and waved it around, and said that Sandoval had ruined his life. [Petitioner] pushed Nancy away and Sandoval rushed [Petitioner] to get the gun. As they struggled, the gun fired.

(Lodged Doc. D at 2-9.)

STANDARD OF REVIEW

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 does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" Glebe v. Frost, 574 U.S. 21, 23 (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 four through seven on direct appeal (see Lodged Doc. A), and the court of appeal rejected them in a reasoned decision on the merits (see Lodged Doc. D). The supreme court then summarily denied his petition for review raising those claims. (See Lodged Docs. E, F.) Under Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018), a rebuttable presumption exists that a higher state court's unexplained decision "adopted the same reasoning" as the last reasoned state-court decision. Id.; see also Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (applying presumption that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground"). The parties have not attempted to rebut that presumption here, and the Court therefore looks through the supreme court's silent denial to the court of appeal's decision as the basis for the state court's judgment on grounds four through seven. See Wilson, 138 S. Ct. at 1196-97. Deferential review under AEDPA applies because the state court denied those claims on the merits. See Richter, 562 U.S. at 100.

Petitioner first raised grounds one through three in a January 2018 habeas petition to the supreme court, and they were rejected as procedurally deficient. (See Lodged Docs. G, H.) He raised them several months later in another petition to the

supreme court. (See Lodged Doc. L.) The second petition was also denied for procedural reasons. (See Lodged Doc. M.) As discussed below, grounds one through three are procedurally defaulted and the Court therefore does not reach their merits.

PROCEDURAL DEFAULT

A habeas petitioner must provide the state an opportunity to address his claims before presenting them in a federal habeas petition. See Davila v. Davis, 137 S. Ct. 2058, 2064 (2017). A federal court will generally not review a constitutional claim if the state court denied it on a state-law ground that was independent of the federal issue and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729-30 (1991); see also id. at 732 (noting that "independent" means "independent of federal law"); Johnson v. Lee, 136 S. Ct. 1802, 1804 (2016) (per curiam) ("State rules count as 'adequate' if they are 'firmly established and regularly followed.'" (citation omitted)). If a claim is so barred, the federal court can review its merits only if the petitioner shows "cause" to excuse his failure to comply with the rule and "actual prejudice resulting from the alleged constitutional violation," Davila, 137 S. Ct. at 2064-65 (citation omitted), or a "fundamental miscarriage of justice," Schlup v. Delo, 513 U.S. 298, 314-15 (1995) (citation omitted). "[T]he miscarriage of justice exception is limited to those extraordinary cases where the petitioner asserts his innocence and establishes that the court cannot have confidence in the contrary finding of guilt." Johnson v. Knowles, 541 F.3d 933, 937 (9th Cir. 2008) (emphasis omitted).

"Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner." Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir. 2003) (as amended). The petitioner can satisfy this burden "by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." Id.

I. Grounds One Through Three Are Procedurally Barred

The supreme court denied Petitioner's second habeas petition, which raised grounds one through three as well as the dismissed ineffective-assistance-of-counsel claim, with citations to Waltreus, Dixon, and Swain. (See Lodged Doc. M.) The court did not specify which citation applied to which ground (see id.), but as the Court previously found (see Aug. 31, 2018 R. & R. at 6-8; Oct. 10, 2018 Order Accepting R. & R.), grounds one through three must have been denied under Dixon, 41 Cal. 2d at 759, as Petitioner improperly sought habeas review of issues that should have been raised on direct appeal, and possibly also Swain, 34 Cal. 2d at 304 (holding that habeas petitions must "allege with particularity the facts upon which" relief is sought). See Cook v. Kernan, 801 F. App'x 474, 475 & n.2 (9th Cir. 2020) (holding that "Dixon bar preclude[d] federal habeas review" of certain claims despite supreme-court denial citing both Dixon and Waltreus when "comparison of the . . . claims that [petitioner] raised on appeal with the claims he raised in his state habeas petition clarifie[d] which allegations were previously raised and

rejected by the California Supreme Court on direct review (and barred by the state habeas court under Waltreus), and which were not (and barred under Dixon)"); Flores v. Barnes, No. CV 13-03934 JLS (AFM), 2017 WL 8186292, at *4 (C.D. Cal. Sept. 18, 2017) (finding, when supreme court denied petition citing both Waltreus and Dixon, that "Dixon citation applied to [claim that] could have been, but was not, raised on direct appeal"), accepted by 2018 WL 1229810 (C.D. Cal. Mar. 6, 2018), aff'd sub nom. Flores v. Pfeiffer, 798 F. App'x 153 (9th Cir. 2020); Jackio v. Pfeiffer, No. 2:16-cv-2812 WBS GGH, 2019 WL 130332, at *12 (E.D. Cal. Jan. 8, 2019) (finding claim procedurally defaulted under Dixon despite state-court denial citing both Waltreus and Dixon because Dixon "[c]learly . . . applied" to claim not raised on direct appeal), aff'd, 785 F. App'x 442 (9th Cir. 2019).

And even if grounds one through three were not stated with sufficient particularity and thus the Swain citation applied to them too, they would still be defaulted under Dixon. See Davidson v. Madden, No. 1:14-cv-00745 AWI MJS (HC), 2017 WL 784861, at *33 (E.D. Cal. Feb. 28, 2017) (finding claim procedurally defaulted under Dixon despite state-court denial also citing Swain), cert. of appealability denied by No. 17-16559, 2018 WL 673130 (9th Cir. Jan. 31, 2018); Corrales v. Warden, No. SACV16-02061-MWF (JDE), 2018 WL 5993856, at *8 (C.D. Cal. Apr. 12, 2018) (same), accepted by 2018 WL 6003552 (C.D. Cal. June 28, 2018).

As Respondent argues (see Answer, Mem. P. & A. at 6), the Dixon bar has been found to be an independent and adequate state procedural rule. See Lee, 136 S. Ct. at 1804. The burden

therefore shifts to Petitioner to place the defense at issue. See Bennett, 322 F.3d at 585-86. He appears to acknowledge that grounds one through three are procedurally defaulted. (Traverse at 11-12.) He suggests that the default should be excused because his appellate counsel was ineffective. (See id. at 2 (arguing that "several of his . . . claims were based upon [his ineffective-assistance] claim as a foundational basis").)

Before an ineffective-assistance-of-appellate-counsel claim can constitute "cause" to excuse the procedural default of another claim, the petitioner must have fairly presented the former to the state courts as an independent claim. See Murray v. Carrier, 477 U.S. 478, 488-89 (1986) ("[T]he exhaustion doctrine . . . generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default."); Tacho v. Martinez, 862 F.2d 1376, 1381 (9th Cir. 1988) (same).

Here, Petitioner raised an ineffective-assistance-of-appellate-counsel claim in his federal Petition (see Pet. at 20-21) as well as in his state-court petitions (see Lodged Docs. G at 21-22, L at 21-22). But as this Court previously found, the claim was unexhausted because it had not been fairly presented to the state courts. (See Aug. 31, 2018 R. & R. at 8-9.) Specifically, Petitioner asserted that his preliminary-hearing and appellate counsel's "performances fell below an objective standard of reasonableness" and were prejudicial. (See Lodged Doc. L at 22.) But he didn't support that conclusory claim with specific facts or evidence or indicate what choices his attorneys

allegedly made that fell below prevailing norms, and none of the exhibits he attached to the Petition demonstrated the attorneys' purportedly unreasonable actions (or inactions). (See Aug. 31, 2018 R. & R. at 8-9.) Petitioner apparently agreed with the Court's finding, as he moved to voluntarily dismiss his ineffective-assistance-of-counsel claim, acknowledging that it was "unexhausted," and he did not seek a Kelly stay to exhaust it despite being told that he could do so and confirming that he then had a "more detailed understanding" of what a Kelly stay entailed. (Notice of Mot. Voluntary Dismissal at 1-2.) Thus, his now-dismissed ineffective-assistance-of-appellate-counsel claim was never exhausted, and he cannot rely on it to show cause relating to the default of grounds one through three. See Murray, 477 U.S. at 488-89.

Nor does Petitioner's being "totally untrained, uneducated, and inexperienced in legal matters" (Traverse at 3, 12) constitute sufficient cause to excuse procedural default. See Hughes v. Idaho State Bd. of Corr., 800 F.2d 905, 908 (9th Cir. 1986) (holding that petitioner's illiteracy did not constitute "cause" to excuse procedural default when he was able to apply for state postconviction relief).

Absent cause, there is no need to consider prejudice. See Thomas v. Lewis, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991). In any event, Petitioner is unable to demonstrate that the purported errors he challenges "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions," United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis omitted), or that a "reasonable probability"

exists that the outcome of the trial would have been different without them, Frost v. Gilbert, 835 F.3d 883, 890 (9th Cir. 2016) (citation omitted). Because there is no right to a preliminary hearing at all, see Howard v. Cupp, 747 F.2d 510, 510 (9th Cir. 1984) (per curiam), deficiencies in them cannot serve as the basis for federal habeas relief, see Ortiz v. Figueroa, No. EDCV 14-1754-GW (KK)., 2014 WL 8579622, at *4 (C.D. Cal. Dec. 5, 2014), accepted by 2015 WL 1730370 (C.D. Cal. Apr. 8, 2015). Moreover, that the victims were present and ready to testify at the preliminary hearing was a proper basis for the court to deny the continuance request (see Lodged Doc. I, 1 Clerk's Tr. at 2-5), particularly given its last-minute nature and the confirmation by counsel — with whom Petitioner did not claim to have any conflict — that she was "prepared" to represent him (id. at 3). See Thomas v. Kramer, No. 07cv2257-IEG (BLM)., 2008 WL 4370021, at *11-12 (S.D. Cal. Sept. 25, 2008) (holding that court did not abuse discretion denying continuance for petitioner to retain new counsel for preliminary hearing when "existing, appointed lawyer was ready and able to represent the defendant," "Petitioner . . . did not have an objection to the individual lawyer appointed to represent him or any specific aspect of his representation," and "Petitioner requested the continuances two days before").[4]

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[4] The Court recognizes that when "the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry" because "[d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants." United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006). But a showing of actual prejudice is still required to excuse

Finally, Petitioner does not suggest that the procedural default is excused because his "falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" Schlup, 513 U.S. at 314-15 (citation omitted). He has not presented any new evidence of his actual innocence, "as is required to show that the procedural default would constitute a fundamental miscarriage of justice." Colbert v. Sinclair, 561 F. App'x 638, 639 (9th Cir. 2014). To the contrary, he "is not claiming total innocence," just that "his level of involvement [was] extraordinarily exaggerated." (Traverse at 16.)

Accordingly, Petitioner has failed to show that his procedural default should be excused, and the Court does not review the merits of grounds one through three.

II. Ground Six Is Procedurally Barred

To preserve a claim of prosecutorial misconduct on appeal, California requires a defendant to raise a timely and specific objection at trial and request an admonition. People v. Thornton, 41 Cal. 4th 391, 454 (2007). The contemporaneous-objection rule has been found by the Ninth Circuit to be an independent and adequate state bar. See Tong Xiong v. Felker, 681 F.3d 1067, 1075 (9th Cir. 2012); Rogers v. Soss, 775 F. App'x 879, 879 (9th Cir. 2019) (holding that prosecutorial-misconduct claim denied by state court as forfeited was procedurally defaulted because "California's contemporaneous objection rule is an adequate and independent state ground that precludes federal habeas review").

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procedural default.

Here, Petitioner claimed on appeal that the prosecutor committed misconduct when he asked Nancy about her cancer diagnosis on direct examination. (See Lodged Doc. A at 30-35.) The court of appeal found that Petitioner "forfeited his prosecutorial misconduct claim" because "defense counsel preserved defendant's claim of evidentiary error as to the admission of Nancy's medical condition, but he failed to object to the prosecutor's question as misconduct." (Lodged Doc. D. at 16.) The record supports the court of appeal's finding. Although Petitioner's counsel did object, he did so on relevance grounds and never challenged the prosecutor's question as misconduct. (See Lodged Doc. N, 3 Rep.'s Tr. at 1053-54, 1061-63); Rogers, 775 F. App'x at 879; see also People v. Reyes, 246 Cal. App. 4th 62, 77 (2016) ("Counsel forfeited any claim of prosecutorial misconduct in connection with these remarks by failing to assign misconduct to the prosecutor's statements.").

Respondent has therefore asserted an independent and adequate state procedural ground barring review of the prosecutorial-misconduct claim. (See Answer, Mem. P. & A. at 31-32.) Petitioner does not contend that the default was excused by cause or actual prejudice. As a result, the claim is procedurally barred. Accordingly, the Court does not address its merits.

MERITS DISCUSSION

I. Petitioner's Instructional-Error Claim Does Not Warrant Habeas Relief

Petitioner contends that the trial court unconstitutionally failed to instruct the jury on attempted voluntary manslaughter,

a lesser included offense of attempted murder. (Pet. at 21-22.)[5]

A. Relevant Background

The court of appeal laid out the facts underlying the claim:

> During trial, the defense indicated that it would request that the trial court instruct the jury on the lesser included offense of attempted voluntary manslaughter. The trial court stated that it would so instruct if substantial evidence of heat of passion or sudden quarrel was presented at trial.[6]
>
> After [Petitioner] testified, the trial court indicated that there was no evidence of any lesser included offense to the attempted murder charges in counts 1 and 2. The trial court noted that [Petitioner] presented an absolute defense, namely that he never pointed the gun at anyone and that it discharged

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[5] Respondent argues that Teague v. Lane, 489 U.S. 288 (1989), bars Petitioner's claim. (See Answer, Mem. P. & A. at 15, 17-20.) 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").

[6] CALCRIM 603, the instruction on attempted voluntary manslaughter under a heat of passion, states that "[a]n attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill someone because of a sudden quarrel or in the heat of passion." A defendant "kill[s] someone because of a sudden quarrel or in the heat of passion" when he "took at least one direct but ineffective step toward killing a person," "intended to kill that person," "attempted the killing because [he] was provoked," the "provocation would have caused a person of average disposition to act rashly and without due deliberation," and the "attempted killing was a rash act done under the influence of intense emotion that obscured the defendant's reasoning or judgment." Id.

> accidentally. Because there was no intent to kill inferable from the defense evidence, there could be no attempted voluntary manslaughter offense, since that offense requires an intent to kill. Accordingly, the trial court denied [Petitioner's] request for an instruction on attempted voluntary manslaughter.

(Lodged Doc. D at 10.)

The court then rejected the claim:

> Courts have a sua sponte duty to instruct on lesser included offenses when the offense is supported by substantial evidence, which, if accepted, would permit the jury to find the defendant not guilty of the greater offense and guilty of the lesser offense. (People v. Breverman (1998) 19 Cal.4th 142, 148-149.) A trial court need not instruct the jury on a lesser included offense where no evidence supports a finding that the offense was anything less than the crime charged. (People v. Gutierrez (2009) 45 Cal.4th 789, 826.)
>
> Voluntary manslaughter is a lesser included offense of murder when the requisite mental element of malice is negated by a sudden quarrel or heat of passion or by an unreasonable but good faith belief in the necessity of self-defense. (People v. Elmore (2014) 59 Cal.4th 121, 133; see also § 192.) Attempted voluntary manslaughter is a lesser included offense of attempted murder. (People v. Thompkins (1987) 195 Cal.App.3d 244, 255-256.)
>
> Here, the prosecution presented evidence of attempted murder — [Petitioner] was angry and upset when

he learned of Nancy's affair with Sandoval; [he] threatened to kill Sandoval and others; [he] had purchased a handgun one month before the instant shooting; [he] modified that handgun illegally with a homemade silencer; [he] entered Nancy's apartment without permission, pointed the gun at Nancy and Sandoval, and discharged the gun during a struggle. There was no evidence of sufficient provocation resulting from a sudden quarrel or heat of passion.

[Petitioner] claims that he "acted under the influence of a stirring passion, the humiliation and distress of seeing his wife's lover for the first time, not only face to face, but embracing her in the small studio apartment near her bed." But there is no evidence that the confrontation and the embrace led to a heat of passion that negated his intent to kill. He had known for at least eight months that Nancy was seeing someone else. She had filed for divorce in March and it was set to become final on September 14, 2013. And, he had seen a photograph of Sandoval three months before the shooting. Taken together, this evidence confirms that [Petitioner's] anger and emotions that drove his actions emerged long before the shooting; they did not arise out of a sudden quarrel or heat of passion.

[Petitioner's] testimony also did not support an instruction on attempted voluntary manslaughter. Rather, as the trial court noted, his testimony supported a complete defense to the attempted murder charges.

> . . . .
>
> It follows that the trial court did not err in refusing to give an attempted voluntary manslaughter instruction and that [Petitioner] was not deprived of his due process rights.

(Id. at 10-11.)

B. Applicable 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." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (citation omitted).

In Beck v. Alabama, 447 U.S. 625, 627 (1980), the Supreme Court held that failure to instruct the jury regarding 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 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 or provide grounds for habeas relief. See id. at 929; Windham v. Merkle, 163 F.3d 1092, 1105-06 (9th Cir. 1998).

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").[7]

To the extent clearly established federal law provides that a petitioner has a constitutional right to adequate jury instructions on his theory of the 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

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[7] 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.

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. Brecht, 507 U.S. at 738 (citation omitted). A claim that a jury instruction on a point of state law was erroneously omitted is "less likely to be prejudicial than a misstatement of the law," and so the burden on a petitioner raising such a claim is "especially heavy." Henderson v. Kibbe, 431 U.S. 145, 155 (1977).

C. Analysis

To start, to the extent Petitioner claims that the court of appeal erroneously applied state law in finding that no attempted-voluntary-manslaughter instruction was warranted (see Pet. at 21-22), that is not cognizable on federal habeas review. 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 claim. 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 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 constitutional right to present a defense was not violated by the omission of the voluntary-manslaughter instruction because it was not his theory of the defense. Bradley, 315 F.3d at 1098; Conde, 198 F.3d at 739. In California, "[m]anslaughter, a lesser included offense of murder, is an unlawful killing without malice." People v. Cruz, 44 Cal. 4th 636, 664 (2008) (citation omitted). "Malice is presumptively absent when a defendant kills 'upon a sudden quarrel or heat of passion,' provided that the provocation is sufficient to cause an ordinarily reasonable person to act rashly and without deliberation, and from passion rather than judgment." Id. (citation omitted); see CALCRIM 603 (requiring intent to kill).

As the court of appeal recognized, "[Petitioner's] testimony . . . did not support an instruction on attempted voluntary manslaughter" because he denied harboring any intent to kill Nancy or Sandoval. (Lodged Doc. D at 11.) Specifically, he testified that although he was "stunned," "shocked," and "angry" when he saw them together in Nancy's apartment (Lodged Doc. N, 6

Rep.'s Tr. at 2164-66), he kept his gun pointed down and never pointed it at either of them (id. at 2165-66, 2207). He had no intention of "kill[ing]" or "hurt[ing] anybody." (Id. at 2168.) And although he threatened to shoot Sandoval — who was "really mad" and "aggressive[ly]" "took a step toward [him]" — if he did not sit down (id. at 2167), even then he did not point the gun at him (id. at 2207). He never "fired" the gun (id. at 2169) and did not recall it even discharging (id. at 2169, 2211). He also denied that immediately after his arrest he told a police officer that he "was gonna shoot that motherfucker because he was sleeping with my wife." (Id., 4 Rep.'s Tr. at 1389, 6 Rep.'s Tr. at 2170-71.)

The witnesses called by the defense echoed its theory that Petitioner never intended to kill Nancy or Sandoval. (See, e.g., id., 5 Rep.'s Tr. at 1830-32 (family friend testifying that Nancy told him that "gun went off accidently"), 1956-57 (Petitioner's son testifying that Nancy told him that gun "accidently fired"), 6 Rep.'s Tr. at 2109-11 (Petitioner's brother testifying that Nancy told him that "gun fell on the floor and . . . accident[ly] fired").) And in his closing argument Petitioner's counsel stressed that "[n]ot one piece of evidence said that" Petitioner "pulled the trigger" or that it was "an intentional fire" (id., 6 Rep.'s Tr. at 2460-61) and that although Petitioner was "reasonabl[y]" "mad" upon seeing Sandoval, "[a]nger has nothing to do with intent" (id. at 2485, 2456).

His was therefore not a "classic heat of passion scenario." (Pet. at 21.) Rather, as both the trial court and court of appeal recognized, Petitioner's testimony that he never acted on

his emotions by attempting to kill Nancy or Sandoval was a "complete" or "absolute" defense to the attempted-murder charges. (Lodged Doc. D at 11; Lodged Doc. N, 6 Rep.'s Tr. at 2214-15, 2217-18, 2403-04.)[8] Thus, even if "walk[ing] in on his wife embracing her lover in the bedroom" was theoretically sufficient provocation to warrant an attempted-voluntary-manslaughter instruction (Pet. at 21), he was not entitled to one because according to his own testimony he did not have the intent to commit that crime. See Kitlas v. Haws, No. LACV 08-6651-GHK (LAL), 2016 WL 8722641, at *25 & n.17 (C.D. Cal. May 13, 2016) (voluntary-manslaughter instruction not warranted when petitioner "did not argue that he acted in the heat of passion," instead asserting that someone else committed murder), accepted by 2016 WL 8732524 (C.D. Cal. Sept. 23, 2016), aff'd, 736 F. App'x 158 (9th Cir. 2018); Brooks v. Soto, No. 1:13-cv-01683-LJO-SAB-HC., 2014 WL 6901836, at *41 (E.D. Cal. Dec. 5, 2014) (voluntary-manslaughter instruction not warranted when petitioner testified that "he did not lose 'his cool'" or act "rashly . . . without

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[8] As discussed in the next section, before trial Petitioner sought the court's permission to introduce expert testimony on his mental state during the crime to support a heat-of-passion defense. The court's decision to preclude that testimony might have influenced how Petitioner testified. But as discussed below, the court correctly recognized that the expert testimony was inadmissible under state law. Moreover, it appears that Petitioner never planned to testify that he intended to kill Nancy or Sandoval. When the court explained that an attempted-voluntary-manslaughter instruction was inappropriate because Petitioner denied intending to kill anyone, counsel responded,

> Did you think he was going to say that [he had the intent to kill], your honor? Come on.

(Lodged Doc. N, 6 Rep.'s Tr. at 2216-17.)

due deliberation and reflection" or from "strong passion rather than judgment"), cert. of appealability denied by No. 15-15458 (9th Cir. Dec. 17, 2015).

Thus, habeas relief is not warranted.

II. Petitioner Is Not Entitled to Habeas Relief on His Evidentiary-Error Claims

Petitioner contends the trial court unconstitutionally precluded him from eliciting a psychiatrist's expert testimony about his mental state during the crimes (Pet. at 22-23; Traverse at 14) and from introducing evidence that Sandoval had allegedly been accused of molesting Petitioner's daughter (Pet. at 23-24; Traverse at 15).

A. Relevant Background

1. Expert testimony

Before trial, the prosecutor moved to preclude the defense from introducing psychiatrist Ronald Markman's expert testimony on Petitioner's mental state at the time of the crimes and how people react to certain emotional triggers. (Lodged Doc. N, 2 Rep.'s Tr. at 11-13; see Lodged Doc. I, 1 Clerk's Tr. at 117-21 (prosecution's motion in limine), 2 Clerk's Tr. at 357-58 (Dr. Markman's report).) Petitioner's counsel explained that Dr. Markman would testify that seeing Nancy and Sandoval together "struck [an] emotional cord [sic]" with Petitioner and that "emotions and issues of infidelity and this and that can affect the human mind and have someone . . . suddenly pointing a gun and wanting to kill everyone"; he argued that the testimony was relevant to a heat-of-passion defense. (Lodged Doc. N, 4 Rep.'s Tr. at 1379-80; see Lodged Doc. I, 2 Clerk's Tr. at 270-72

(Petitioner's new-trial motion).) The court found Dr. Markman's proposed testimony inadmissible under People v. Czahara, 203 Cal. App. 3d 1468 (1988) (see Lodged Doc. N, 4 Rep.'s Tr. at 1381-82), which held that an expert witness could not testify that a defendant committed a crime while "acting in the heat of passion" or "that the ordinarily reasonable person in the same circumstances would also have acted in passion," Czahara, 203 Cal. App. 3d at 1476-77, in part because such knowledge is "an understandable product of common human weakness" and expert testimony would not assist the jury in deciding whether the defendant's conduct was reasonable, id. at 1478.

2. Molestation accusation

During his cross-examination of Sandoval, Petitioner's counsel asked whether he was "aware that there was an allegation against [him]" concerning Nancy and Petitioner's youngest daughter. (Lodged Doc. N, 3 Rep.'s Tr. at 1028-29.) The prosecutor objected, and counsel explained during a sidebar that "allegations of, potentially, molestation" had been made against Sandoval and that Petitioner had confronted him about those accusations in the apartment. (Id. at 1029.) Counsel later clarified that the accusation in question — apparently based on a therapist's letter (id., 7 Rep.'s Tr. at 3612 (new-trial-motion decision)) — was that Nancy and Petitioner's daughter didn't "feel comfortable with [Sandoval] alone," potentially because "Nancy apparently was molested when she was younger and somehow that might affect [the daughter] being alone with men." (Id., 3

Rep.'s Tr. at 1032-33.)[9] Counsel argued that Petitioner had confronted Sandoval about the accusation in the apartment and that that confrontation was relevant to Sandoval's "state of mind" and "motiv[ated]" him to lie about what occurred. (Id. at 1029-30, 1033.)

The court ruled that counsel could not ask Sandoval any leading questions about the purported allegations, as that would be "more prejudicial than probative" under Evidence Code section 352, particularly because the subject matter was "irrelevant" and "would mislead the jury." (Id. at 1033; see id., 6 Rep.'s Tr. at 2143.) But it permitted counsel to ask Sandoval whether he and Petitioner had "argu[ed]" in the apartment or whether Petitioner had leveled any accusation against him and to ask follow-up questions if Sandoval answered affirmatively. (Id., 3 Rep.'s Tr. at 1034.) It also observed that if Petitioner testified, he would be permitted to "tell his story" and discuss any such accusation to the extent it was relevant to his "state of mind" or "why he was upset." (Id. at 1031, 1035, 6 Rep.'s Tr. at 2143.)

Counsel asked Sandoval whether he had any "arguments with [Petitioner]" in the apartment and whether Petitioner made any accusation against him; Sandoval answered that they had not argued and that the only "allegat[ion]" Petitioner made was that he was "going to kill [him]." (Id., 3 Rep.'s Tr. at 1036.)

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[9] As the court later noted, the therapist's letter didn't expressly have "anything to do with molestation" and counsel had simply "infer[red] that there was somehow an allegation of molestation lurking in the background." (Lodged Doc. N, 7 Rep.'s Tr. at 3611.)

Petitioner testified that when he saw Sandoval inside the apartment he asked, "what the hell you doing here with my wife" and "why he's still with her and why he's around my daughter." (Id., 6 Rep.'s Tr. at 2166; see id. at 2207.) He did not mention any accusation that Sandoval had molested his daughter.

B. Court-of-Appeal Decision

The court of appeal rejected Petitioner's claim that the trial court erroneously excluded Dr. Markman's testimony:

> An expert witness may offer opinion testimony if the subject is sufficiently beyond common experience that it would assist the trier of fact. (Evid. Code, § 801.) A trial court has broad discretion to determine the admissibility of expert testimony, and its ruling is reviewed for an abuse of that discretion. (People v. McDowell (2012) 54 Cal.4th 395, 426.)
>
> . . . As set forth above, there is no evidence that [Petitioner] committed the instant offenses under a heat of passion or sudden quarrel. In fact, [Petitioner] testified that the shooting was accidental. Thus, Dr. Markman's testimony would have been irrelevant to the jury's determination of whether [Petitioner] had the intent to kill when he shot at Sandoval.
>
> [Petitioner] claims that the expert testimony would have been relevant to show that he was under a tremendous amount of stress from the affair and divorce. But this type of evidence does not require expert testimony; the emotional effects of divorce are within the common

> experience of jurors. (Czahara, supra, 203 Cal.App.3d at p. 1478.)
>
> Moreover, [Petitioner] was not denied the opportunity to present a defense. He was fully allowed to, and did, present a defense of accident and lack of intent to kill. Thus, [Petitioner's] constitutional contention is meritless.

(Lodged Doc. D at 12-13.)

The court of appeal also rejected Petitioner's claim that the trial court erroneously excluded evidence that Sandoval had allegedly molested his daughter:

> Only relevant evidence is admissible. (Evid. Code, § 350.) . . .
>
> The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. . . .
>
> Here, the evidence concerning the accusation was irrelevant to the issues at trial. Whether there was an accusation against Sandoval concerning [Petitioner's] daughter had no relevance to [Petitioner's] actions during the incident. Sandoval testified that there was no argument between the parties other than that concerning [Petitioner] pointing a gun at them and saying that he was going to shoot Sandoval for dating Nancy. Moreover, [Petitioner] did not testify that he was motivated by any molestation accusation against Sandoval; rather, he testified that his presence in the apartment with Nancy and Sandoval and the discharge of the gun were

> accidental and not driven by emotion. While [Petitioner] testified that he was hurt and angry, those emotions were directed at Nancy and Sandoval for their affair, not the result of any unsubstantiated allegation of molestation.
>
> Moreover, there was no credible evidence of any molestation accusation. Defense counsel's theory was based upon a therapist's letter, which the trial court noted had nothing to do with molestation; "[t]hat was counsel's surmising. . . . [¶] . . . [¶] It was counsel's fertile imagination that it was somehow related to molestation, but there was nothing explicit."
>
> Under these circumstances, allowing defense counsel's question about a molestation accusation would have been far more prejudicial than probative. (Evid. Code, § 352.) It follows that the trial court did not abuse its discretion in excluding it.

(Id. at 13-14.)

C. Applicable Law

A defendant generally has a due process right to meaningfully present a complete defense. Chambers v. Mississippi, 410 U.S. 284, 294 (1973); see Moses v. Payne, 555 F.3d 742, 757 (9th Cir. 2009) (as amended) (defendant's right to present defense stems from both 14th Amendment right to due process and Sixth Amendment right to compel witnesses). A defendant does not have license to present any evidence he pleases, however; for instance, due process is not violated by the exclusion of evidence that is only marginally relevant, repetitive, or more prejudicial than probative. Crane, 476 U.S.

at 689-90; see Chambers, 410 U.S. at 302 ("[T]he accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."); Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.").

Rather, the right is implicated only when exclusionary rules infringe upon a "weighty interest of the accused" and are "arbitrary or disproportionate to the purposes they are designed to serve." Holmes v. South Carolina, 547 U.S. 319, 324-25 (2006); see also Nevada v. Jackson, 569 U.S. 505, 510 (2013) (per curiam) (finding that challenged evidentiary rule was supported by "good reasons" and therefore that its constitutional propriety "cannot be seriously disputed" (alteration omitted)). "In general, it has taken 'unusually compelling circumstances . . . to outweigh the strong state interest in administration of its trials.'" Moses, 555 F.3d at 757 (citation omitted).

The Supreme Court has not yet "squarely addressed" whether a state court's discretionary exclusion of evidence can ever violate a defendant's right to present a defense. See id. at 758-59 (considering challenge to state evidentiary rule allowing discretionary exclusion of expert testimony favorable to defendant); see also Brown v. Horell, 644 F.3d 969, 983 (9th Cir. 2011) (noting that no Supreme Court case has squarely addressed issue since Moses). In fact, existing precedent suggests the opposite. In Holmes, the Court noted that

> [w]hile the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

547 U.S. at 326; see also Jackson, 569 U.S. at 509 (observing that "[o]nly rarely" has Supreme Court found violation of right to present defense based on exclusion of defense evidence under state evidentiary rules).

D. Analysis

The court of appeal was not objectively unreasonable in rejecting Petitioner's claims. As discussed above, the Supreme Court has not yet squarely addressed whether a state court's discretionary exclusion of potentially exculpatory evidence can ever violate a defendant's right to present a defense. See Moses, 555 F.3d at 758-59. Thus, the court of appeal's decision could not have contravened clearly established federal law under AEDPA. Id.; Knowles, 556 U.S. at 122.

Further, as Respondent points out (see Answer, Mem. P. & A. at 25-26), Petitioner's claim that the state court incorrectly applied state evidence law is not cognizable on federal habeas review, and this Court is bound by the court of appeal's analysis and findings on that issue. See Waddington, 555 U.S. at 192 n.5 (quoting McGuire, 502 U.S. at 67-68); Richey, 546 U.S. at 76. To the extent he raises a federal claim, Petitioner cannot show that

the state court's decision was contrary to or an unreasonable application of federal law.

1. Dr. Markman's testimony

Petitioner claims that the trial court improperly excluded Dr. Markman's "expert psychiatric testimony" on "how the stress and humiliation of the affair and the divorce affected [his] mental state." (Pet. at 22-23.) He argues that the testimony was "key to [his] heat of passion defense," was "extremely probative" on that point (id. at 23), and would have "led to a conviction of attempted voluntary manslaughter" (id. at 23).

But as the court of appeal found (see Lodged Doc. D at 12-13), under state law Dr. Markman would not have been permitted to testify that "he was under a tremendous amount of stress from the affair and divorce" and therefore acted reasonably under the circumstances. That decision, which the Court is bound by, see Waddington, 555 U.S. at 192 n.5 (quoting McGuire, 502 U.S. at 67-68), appears correct. See Penal Code § 29 ("[A]ny expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged"); Czahara, 203 Cal. App. 3d at 1477-78 (expert testimony that defendant's "emotional reaction was objectively reasonable under the circumstances" was inadmissible because "the adequacy of provocation is not a subject sufficiently beyond common experience that the opinion of an expert would assist the trier of fact").

Further, as discussed, Petitioner's own theory of the defense established that a heat-of-passion instruction was inappropriate because he denied any intent to kill Nancy or Sandoval. Although his testimony to that effect may have been impacted by the preclusion of Dr. Markman's testimony, it appears that he was never going to admit intending to kill (see Lodged Doc. N, 6 Rep.'s Tr. at 2216-17), which he would have had to do to warrant a heat-of-passion instruction. See Kitlas, 2016 WL 8722641, at *25 & n.17; Brooks, 2014 WL 6901836, at *41.[10]

2. Molestation accusation

Petitioner claims that the trial court improperly prevented him from introducing evidence that Sandoval had allegedly been accused of molesting Petitioner and Nancy's youngest daughter. (Pet. at 23.) To start, as the court of appeal recognized, "there was no credible evidence" that Sandoval had ever been accused of molesting the child. (Lodged Doc. D at 14.) Petitioner's counsel conceded that the "accusation" in question was a suggestion that Petitioner's daughter felt uncomfortable around Sandoval. (Lodged Doc. N, 3 Rep.'s Tr. at 1032-33.) And the trial court noted that counsel's theory was based on a

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[10] Petitioner cites Ake v. Oklahoma, 470 U.S. 68 (1985), in support of his claim. (See Traverse at 14.) In Ake, the U.S. Supreme Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." Id. at 74; see Harris v. Vasquez, 949 F.2d 1497, 1516 (9th Cir. 1990) (as amended Aug. 21, 1991) (discussing Ake). But Ake is inapplicable here because Petitioner's sanity was not at issue, and Ake does not stand for the proposition that a defendant has an absolute right to expert psychiatric testimony to advance any defense.

therapist's letter that "had nothing to do with molestation." (Id., 7 Rep.'s Tr. at 3612.) Thus, even assuming that evidence Sandoval had molested Petitioner's daughter or that Petitioner had accused him of doing so would have advanced his defense, no such evidence existed.

Beyond that, the trial court did not prevent Petitioner from presenting his chosen defense. Specifically, although the court found that it would be overly prejudicial for counsel to ask Sandoval a leading question about whether he had ever been accused of molesting Petitioner's daughter, the court did permit counsel to ask whether Sandoval and Petitioner had argued in the apartment or whether Petitioner accused him of anything and to ask follow-up questions if appropriate. (Lodged Doc. N, 3 Rep.'s Tr. at 1034.) Sandoval testified, however, that the only thing Petitioner accused him of was being with his wife. (Id., 3 Rep.'s Tr. at 1036.)

Significantly, the court also made plain that Petitioner would be permitted to testify about any such accusation. (Id. at 1031, 1035, 6 Rep.'s Tr. at 2143.) But during his testimony, although he mentioned confronting Sandoval about why he was "around [his] daughter" (id., 6 Rep.'s Tr. at 2166; see id. at 2007), Petitioner didn't mention any accusation lodged against Sandoval, let alone of molesting his daughter. Thus, while he asserts that the thought that Sandoval "had sexually molested his daughter . . . infuriated [him]" and was relevant to his "mental state" (Traverse at 15), he did not testify to that effect at trial despite being given the opportunity to do so. And as discussed above, he denied having any intention of shooting

Sandoval. Thus, Petitioner was not deprived of evidence to advance a heat-of-passion defense; it simply didn't exist.

For these reasons, the state court was not objectively unreasonable in finding no error from exclusion of Dr. Markman's testimony and of a direct question to Sandoval about a molestation accusation.

III. Cumulative Error Did Not Render the Trial Fundamentally Unfair

In ground seven Petitioner contends that the "cumulative" effect of the alleged errors deprived him of a fair trial. (Pet. at 25-27; Traverse at 15-16.)

According to the Ninth Circuit, the Supreme Court has "clearly established" that although individual errors may not each rise to the level of a constitutional violation or independently warrant reversal, a collection of such errors might. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers, 410 U.S. at 298, 290 n.3, 302-03). A court must determine whether the errors "rendered the . . . defense 'far less persuasive,'" taking into consideration the overall strength of the prosecution's case. Id. at 928 (quoting Chambers, 410 U.S. at 294).

But if none of the claims demonstrate error, no cumulative prejudice can stem from them. See Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) (finding that when "no error of constitutional magnitude occurred, no cumulative prejudice is possible"). Here, for the reasons discussed above, Petitioner has failed to identify any error, let alone one of

"constitutional magnitude." Id. Accordingly, he is not entitled to habeas relief on the basis of cumulative error.[11]

RECOMMENDATION

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

DATED: June 18, 2020

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

[11] Petitioner claims that "[a]n evidentiary hearing is necessary." (Traverse at 4, 8, 16.) Under AEDPA, this Court "is limited to the record that was before the state court that adjudicated the claim on the merits." Cullen v. Pinholster, 563 U.S. 170, 180 (2011). In any event, an evidentiary hearing on Petitioner's claims is unnecessary because "the record refutes [Petitioner's] factual allegations or otherwise precludes habeas relief[.]" Schriro v. Landrigan, 550 U.S. 465, 474 (2007). Accordingly, Petitioner is not entitled to an evidentiary hearing.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KEVIN LIU, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. CV 17-7465-VAP (JPR) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE; DENYING AS MOOT RESPONDENT'S MOTION TO DISMISS AND PETITIONER'S MOTION FOR STAY; DISMISSING GROUND FOUR OF PETITION; ORDERING RESPONDENT TO FILE RESPONSE TO PETITION'S REMAINING CLAIMS

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge. The Magistrate Judge recommended that the Petition be dismissed under Rose v. Lundy, 455 U.S. 509, 518 (1982), unless within the time for filing objections to the R. & R. Petitioner notified the Court that he wished to dismiss his one unexhausted claim, ground four. On September 19, 2018, Petitioner moved for voluntary dismissal of that claim, stating that he was doing so "solely by my own accord, willingly and without hesitation." (Mot. at 2.) He also confirmed that he had "no plans to attempt to raise this claim at any later date for any reason." (Id.)

Having reviewed the R. & R. de novo, the Court accepts the findings and recommendations of the Magistrate Judge. Accordingly, ground four of the Petition, asserting ineffective assistance of counsel, is DISMISSED; Respondent's motion to dismiss the Petition and Petitioner's motion for a stay are DENIED AS MOOT. Respondent is ORDERED to file a response to the Petition's remaining claims no later than 30 days from the date of this Order.

DATED: October 10, 2018

Virginia A. Phillips

VIRGINIA A. PHILLIPS
CHIEF U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KEVIN LIU, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. CV 17-7465-VAP (JPR) REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, 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 12, 2017, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody, raising nine claims: (1) violation of his right to counsel during the preliminary hearing, (2) prosecutorial misconduct at the preliminary hearing and during trial, (3) abuse of judicial discretion at the preliminary hearing and during trial, (4) ineffective assistance of preliminary-hearing and appellate counsel, (5) jury-

instruction errors, (6) erroneous exclusion of expert-witness testimony, (7) erroneous exclusion of other witness testimony, (8) prosecutorial misconduct in eliciting certain testimony, and (9) cumulative error. (Pet., Mem. P. & A. at 5-19.)

On January 22, 2018, Respondent moved to dismiss the Petition, arguing that the first four claims were unexhausted. Apparently conceding as much, Petitioner on February 2 moved for a stay so that he could exhaust the unexhausted claims in state court. On February 27, the Court ordered Respondent to file a response and informed Petitioner that "he may immediately return to state court" to litigate his claims and did not need the Court's permission to do so. On April 3, Respondent filed a response opposing the stay.

On April 27, 2018, Petitioner filed a second habeas petition with the state supreme court, which denied it on August 8. (See Lodged Doc. M (ECF No. 24-2))[1]; see also Cal. App. Cts. Case Info., http:// appellatecases.courtinfo.ca.gov/ (search case no. S248546) (last visited Aug. 31, 2018).

For the reasons discussed below, the Court recommends that Respondent's motion to dismiss be granted and Petitioner's motion for a stay be denied unless within the time for filing objections to this Report and Recommendation Petitioner notifies the Court that he has elected to take one of the actions explained below in Section IV.

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[1] Respondent assigned its 13 lodged documents the letters A through M in its notices of lodging but did not label the documents themselves with their assigned letters. Respondent is warned that in future filings it must clearly label each of its lodged documents with the number or letter assigned to it.

DISCUSSION

I. Applicable Law

Under 28 U.S.C. § 2254(b), habeas relief may not be granted unless a petitioner has exhausted the remedies available in state court. Exhaustion requires that the petitioner's contentions were fairly presented to the state courts, Ybarra v. McDaniel, 656 F.3d 984, 991 (9th Cir. 2011), and disposed of on the merits by the highest court of the state, Greene v. Lambert, 288 F.3d 1081, 1086 (9th Cir. 2002). As a matter of comity, a federal court will not entertain a habeas petition unless the petitioner has exhausted the available state judicial remedies on every ground presented in it. See Rose v. Lundy, 455 U.S. 509, 518 (1982).

Two procedures are available to a habeas petitioner who wishes to have a pending federal petition stayed while he exhausts additional claims in state court: one under Rhines v. Weber, 544 U.S. 269, 277 (2005), and the other under Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), overruled on other grounds by Robbins v. Carey, 481 F.3d 1143, 1149 (9th Cir. 2007). See King v. Ryan, 564 F.3d 1133, 1139-40 (9th Cir. 2003) (explaining differences between Kelly and Rhines stays). Under Rhines, a Court may stay a "mixed" federal petition — one that includes both exhausted and unexhausted claims — while the Petitioner returns to state court to exhaust his unexhausted claims; all claims remain pending in federal court and are protected from any statute-of-limitations issues. 544 U.S. at 277-78. Under Kelly, the petitioner voluntarily dismisses any unexhausted claims from the pending federal petition and only the exhausted claims are

stayed; the petitioner may then seek to amend the dismissed claims into the petition after he has exhausted them in state court. King, 564 F.3d at 1135; see Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005) (noting that "Rhines applies to stays of mixed petitions" and Kelly to "stays of fully exhausted petitions" (emphasis omitted)). Under Kelly, the newly exhausted claims are not necessarily protected from any time bar. See King, 564 F.3d at 1140-41. "In this regard, the Kelly procedure . . . is a riskier one for a habeas petitioner because it does not protect a petitioner's unexhausted claims from expiring during a stay." Morris v. California, No. 2:11-cv-1051 MCE DAD P, 2012 WL 2358720, at *2 (E.D. Cal. June 20, 2012).

Rhines applies in "limited circumstances." See 544 U.S. at 277. For a Rhines stay, the petitioner must show that (1) he has good cause for failing to earlier exhaust the claims in state court, (2) the unexhausted claims are not "plainly meritless," and (3) he has not engaged in "abusive litigation tactics or intentional delay." Id. at 277-78. The Supreme Court has not precisely defined what constitutes "good cause" for a Rhines stay. See Blake v. Baker, 745 F.3d 977, 980-81 (9th Cir. 2014). The Ninth Circuit has found that good cause does not require "extraordinary circumstances." Jackson, 425 F.3d at 661-62. Rather, "good cause turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify" the failure to exhaust. Blake, 745 F.3d at 982. That a petitioner was without counsel in state habeas proceedings generally establishes "good cause" because such a petitioner could not "be expected to understand the technical requirements

of exhaustion and should not be denied the opportunity to exhaust a potentially meritorious claim simply because he lacked counsel." Dixon v. Baker, 847 F.3d 714, 721 (9th Cir. 2017).

Under Kelly, the petitioner need not show good cause for a stay of totally exhausted claims. See King, 564 F.3d at 1135. But a stay under Kelly "will be denied when the court finds such a stay would be futile." Knowles v. Muniz, 228 F. Supp. 3d 1009, 1016 (C.D. Cal. 2017). "Futility would exist if the petitioner seeks a stay to exhaust a meritless claim." Id. Further, a petitioner may amend a newly exhausted claim into a pending federal habeas petition after the expiration of the limitation period only if it shares a "common core of operative facts" with one or more of the claims in the pending petition. Mayle v. Felix, 545 U.S. 644, 664 (2005). A new claim "does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." Id. at 650.

II. Dismissal Is Warranted

In January 2018, when Respondent moved for dismissal, the Petition's first four claims were likely unexhausted: at the time, they had been presented to the state court just once,[2] and that habeas petition had been denied on procedural grounds, with citations to People v. Duvall, 9 Cal. 4th 464, 474 (1995), and In

[2] Petitioner initially suggested he filed another, earlier state petition, with the superior court (see Mot. Stay at 1), but later clarified that he was mistaken (see Mot. Judicial Not. at 2; see also Lodged Doc. K (ECF No. 21-2).)

re Waltreus, 62 Cal. 2d 218, 225 (1965). (See Lodged Docs. G, H (ECF Nos. 13-7, 13-8); Harris v. Super. Ct. of Cal., 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc) (claims in state habeas petitions that have been denied as procedurally deficient are not exhausted).

The state supreme court clarified that the Duvall citation was for a procedural deficiency: failure to "include copies of reasonably available documentary evidence." (See Lodged Doc. H (ECF No. 13-8).) That defect was curable, see Raygoza v. Holland, No. 16-cv-02978-EMC, 2017 WL 2311300, at *7 (N.D. Cal. May 26, 2017) (failure to include "reasonably available documentary evidence supporting [state-habeas] claim" is "curable defect[] that can be cured in a renewed state petition"), and thus the claims remained unexhausted.[3]

Petitioner has since reattempted exhaustion. On April 27, 2018, he filed a habeas petition with the state supreme court, raising the same four claims as in his earlier state petition. (See Lodged Docs. G, L (ECF Nos. 13-7, 21-2).) On August 8, 2018, the new petition was denied with citations to Waltreus, 62

[3] The citation to Waltreus, which holds that claims raised on direct appeal generally cannot be reconsidered on habeas review, see 62 Cal. 2d at 225, suggested that at least one claim was exhausted. See Carter v. Giurbino, 385 F.3d 1194, 1198 (9th Cir. 2004). In fact, as Respondent concedes (Mot. Dismiss at 7 n.3), none of the four claims was raised on direct appeal. Although Petitioner did raise a prosecutorial-misconduct claim on appeal, it concerned different allegations from ground two of the Petition and is in fact brought separately, in ground eight. (Compare Lodged Doc. G (ECF No. 13-7), Mem. P. & A. at 9-12 (first state habeas petition), with Lodged Docs. A (ECF No. 13-1) at 30-35 (opening brief on appeal), D (ECF No. 13-4) at 14-17 (court of appeal decision), E (ECF No. 18-5) at 18-20 (petition for review).)

Cal. 2d at 225, In re Dixon, 41 Cal. 2d 756, 759 (1953) (holding that courts will not consider habeas claims that could have been but were not raised on direct appeal), and In re Swain, 34 Cal. 2d 300, 304 (1949) (holding that habeas claims must be alleged with sufficient particularity). (Lodged Doc. M (ECF No. 24-2).) The state supreme court did not specify which citations applied to which claims. (See id.) But because denial was based in part on Swain, at least one of the claims remains presumptively unexhausted. See Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir. 1986).

Indeed, only Swain likely applied to the fourth claim, for ineffective assistance of preliminary-hearing and appellate counsel. The petition's first through third claims were likely dismissed under Waltreus or Dixon and are thus exhausted or procedurally defaulted. See Johnson v. Lee, 136 S. Ct. 1802, 1806 (2016) (per curiam) (holding that dismissal under Dixon "qualifies as adequate to bar federal habeas review"); Carter v. Giurbino, 385 F.3d 1194, 1198 (9th Cir. 2004) ("If the claim barred from relitigation by Waltreus has already been decided by the California Supreme Court, that claim is properly exhausted for federal habeas corpus review."). Dixon likely applies to Petitioner's first, second, and third claims, for violation of his right to counsel, prosecutorial misconduct at the preliminary hearing, and abuse of judicial discretion, because none were raised on direct appeal. (Compare Lodged Doc. L (ECF No. 24-1), Mem. P. & A. at 6-9, 12-15, with Lodged Docs. A, E (ECF Nos. 13-1, 13-5).) Even if those claims were not stated with sufficient particularity and thus the Swain cite applied to them too, they

would still be exhausted. Petitioner can hardly be expected to attempt to raise claims in state court with more particularity when the state supreme court has indicated that it wouldn't consider them anyway because they should have been raised on direct appeal. See Dixon, 41 Cal. 2d at 760 (citing Swain for proposition that petitioner bears burden of sufficiently stating reason for not raising claim on direct appeal). Thus, to the extent both Swain and Dixon applied to a particular claim, the supreme court's denial is best read as indicating that that claim is exhausted.

But under California law, a claim of ineffective assistance of counsel, like Petitioner's fourth claim, must generally be raised on habeas, not direct appeal, and hence would not implicate Waltreus or Dixon. See People v. Salcido, 44 Cal. 4th 93, 172 (2008) (as amended) (citing cases); People v. Mendoza Tello, 15 Cal. 4th 264, 266-67 (1997) (as amended) (citing cases). Thus, only the Swain citation could have applied to it.

In such circumstances, a federal habeas court must independently examine the unexhausted claim to determine whether it in fact sufficiently stated a claim. See Kim, 799 F.2d at 1319-20. Petitioner's ineffective-assistance claim does not because it rests on a bed of conclusory allegations. In the state petition, Petitioner argued that his counsel's "performances fell below an objective standard of reasonableness, under prevailing professional norms." (Lodged Doc. L (ECF No. 24-1), Mem. P. &. A. at 16.) But he didn't support that claim with specific factual details or evidence or indicate what choices his attorneys allegedly made that fell below "prevailing"

norms, and none of the exhibits he attached to the petition demonstrated the attorneys' purportedly unreasonable actions (or inactions).

In other parts of the petition Petitioner stated that his preliminary-hearing counsel "failed to inform him of any rights," "failed to discuss the waiver of his right to a speedy trial," and discussed only "guilt or innocence" with him. (Lodged Doc. L (ECF No. 24-1), Mem. P. & A. at 8.) But he didn't explain what exactly should have been told to him or when, nor did he demonstrate how such alleged failures were unreasonable or, importantly, how they prejudiced him at trial. See Rose v. Mitchell, 443 U.S. 545, 576 (1979) (Stewart & Rehnquist, JJ., concurring) ("It is well settled that deprivations of constitutional rights that occur before trial are no bar to conviction unless there has been an impact upon the trial itself."); see also Ratliff v. Martel, No. 10-cv-1705-H (DHB), 2012 WL 3263939, at *11 (S.D. Cal. Apr. 17, 2012) (finding that petitioner made "no such demonstration" of prejudice at trial from preliminary-hearing counsel's alleged errors or that his performance was unreasonable (in part citing James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."))).

Elsewhere in the petition he similarly alleged that his appellate counsel "failed to raise pertinent claims" on appeal and "informed [him] that he could not raise any more claims." (Lodged Doc. L (ECF No. 24-1), Mem. P. & A. at 2.) But Petitioner didn't allege when his appellate counsel allegedly

said this to him, what claims he wanted her to raise, how her decisions or statements were unreasonable under the circumstances, or how he was prejudiced by them. See James, 24 F.3d at 26. Thus, because his ineffective-assistance claim was not pleaded with sufficient particularity and could be cured in a renewed petition, it was not fairly presented to the state supreme court and remains unexhausted. See Grayton v. Davidson, No. 97-CV-1654 TW (LAB), 1999 WL 253520, at *5 (S.D. Cal. Jan. 19, 1999) (independently examining state habeas claim of ineffective assistance of counsel denied under Swain and finding that it was "conclusory" and thus "not 'fairly presented' to the California Supreme Court"). Thus, Petitioner's ineffective-assistance claim remains unexhausted.

Excessive state-court delay may excuse exhaustion in certain situations, as Petitioner states. (See Mot. Stay at 2); see Coe v. Thurman, 922 F.2d 528, 530-31 (9th Cir. 1990) (so holding when delay in state direct appeal was approximately four years and habeas claim directly challenged that delay). But no state court here appears to have excessively delayed Petitioner's habeas pursuits — indeed, the state supreme court dismissed his first petition in less than two months and the second in less than four. (See Lodged Docs. H, M (ECF Nos. 13-8, 24-2).) Nor does Petitioner challenge any such alleged delay in one of the Petition's nine claims. In fact, as discussed below, Petitioner's own aversion to fully exhausting his claims seems to have been the source of the delay at issue here. See Ashmus v. Davis, No. 93-cv-0594-TEH, 2017 WL 2876842, at *2 (N.D. Cal. July 6, 2017) ("Only delays attributable to the state are considered

when determining whether there has been delay sufficient to excuse exhaustion."). Thus, because the Petition is mixed and inexcusably so, it is subject to dismissal under Rose. 455 U.S. at 518.

III. Petitioner Has Failed to Show Good Cause for a Rhines Stay

Petitioner requests a stay but does not identify which procedure he wishes to invoke, Rhines or Kelly. (See generally Mot. Stay.) He initially attempted to exhaust grounds one through four of the Petition in June 2017, when he filed his first state habeas petition. It was denied about two months later, in August, and he filed his federal Petition in October. Not until April 2018, nearly eight months after the first state petition was denied, did he file his second state habeas petition.

Under Dixon, Petitioner has likely shown good cause for the initial delay, up to the time the state supreme court denied his first state petition, because he was not represented by counsel. See 847 F.3d at 721. But he has not adequately explained the subsequent eight-month delay in filing his second state petition. As explained below, even if Dixon dictates that because he was unrepresented when he filed that petition too he automatically has shown good cause as to it — and that is far from clear[4] — he

[4] Petitioner was clearly aware even when he filed his first state habeas petition that he needed to exhaust his claims in state court before bringing them in a federal habeas petition. (See Lodged Doc. G (ECF No. 13-7) at 6 & Mem. P. & A. at 1-2.) (Petitioner stating in first petition that he filed for "exhaustion of state[] remedies" so that he could "timely proceed into the United States District Court[] well within the AEDPA [timeline]").) Because he was not "denied the opportunity to exhaust a potentially

cannot satisfy Rhines's requirement that he not have engaged in abusive litigation tactics. See Dixon, 847 F.3d at 722 ("[A] dilatory litigant's failure to exhaust his claims in state court will not be condoned.").

In part, Petitioner attributes the second period of delay to his "lack of legal training[] and education." (Mot. Stay at 2.) But ignorance of the law does not constitute good cause for delay. See Blake, 745 F.3d at 981; see also Hamilton v. Clark, No. CIV S-08-1008 EFB P, 2010 WL 530111, at *2 (E.D. Cal. Feb. 9, 2010) ("Ignorance of the law and limited access to a law library are common among pro se prisoners and do not constitute good cause for failure to exhaust.").

Petitioner, moreover, hasn't demonstrated how any lack of legal expertise prevented him from timely exhausting his claims. See Blake, 745 F.3d at 982 ("An assertion of good cause without evidentiary support will not typically amount to a reasonable excuse justifying a petitioner's failure to exhaust."). To the contrary, he apparently drafted each of his habeas filings, both federal and state, himself despite his reliance on "legal assistants." (See generally Pet.; Mot. Stay; Mot. Jud. Not.; Lodged Doc. G (ECF No. 13-7); Lodged Doc. L (ECF No. 24-1).) And he appears to have adequately understood AEDPA's requirements that he not only exhaust his claims in state court but also timely file his federal petition. (See Pet., Mem. P. & A. at 2 (stating that he "elect[ed] to simply exhaust [his] claims in the

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meritorious claim simply because he lacked counsel," the Ninth Circuit's reasoning in Dixon does not apply. See 847 F.3d at 721.

state's supreme court and timely proceed into the United States[] District Court, well within the [AEDPA] timeline").)

Indeed, Petitioner alleges having had "concerns" about "meeting the timeliness" requirements of AEDPA. (Mot. Stay at 4.) At some point, he states, he was transferred to a new prison, and that prison's "library" was not "equip[p]ed as of the time [he] arrived." (Id.; see also Mot. Jud. Not. at 2 (alleging that "new facility . . . didn't even have the legal library opened" or "properly stocked" until "some time" after Petitioner's arrival).) But Petitioner doesn't explain when he was transferred, when the library opened, or what materials the library lacked and for how long, much less how that impacted his exhaustion efforts. Cf. Hamilton, 2010 WL 530111, at *2. In fact, despite the alleged issues, he nonetheless was able to and did file his first state habeas petition in June 2017 and the federal Petition in October 2017, which Respondent concedes was timely. (See Resp. at 8; see also Mot. Stay at 4 (Petitioner stating that he "did exhibit due diligence in keeping his timeline and in getting his claims to [the] Court within that timeline")); Barno v. Hernandez, No. 08cv2439 WQH (AJB), 2009 WL 2448435, at *2 (S.D. Cal. Aug. 10, 2009) (finding no good cause under Rhines when petitioner did not show "with any specificity how he had limited access to the library, or what legal materials or exhibits he needed that were lacking").[5]

[5] Petitioner also alleges that he has "limited understanding and ability to speak in the English language" (Mot. Jud. Not. at 2), which when coupled with other facts may constitute good cause. See Isayev v. Knipp, No. 2:12-cv-2551 KJN P, 2013 WL 4009192, at *2-3 (E.D. Cal. Aug. 2, 2013), accepted by 2013 WL 5773349 (E.D.

Petitioner concedes that he in fact intentionally delayed filing his second state petition because he felt that it would "most likely [result in] a denial" and that the denial of his first state habeas petition was a "stall tactic," apparently by the state courts. (Mot. Stay at 3-4.) The "apparent futility of presenting claims to state courts," however, does not excuse a petitioner's failure to exhaust. See Roberts v. Arave, 847 F.2d 528, 530 (9th Cir. 1988); see also Noltie v. Peterson, 9 F.3d 802, 805 (9th Cir. 1993). Even if it did, Petitioner doesn't provide evidence to support his assertion, let alone that the procedural defects of his first state petition cited by the state court were baseless or incurable. Nor does he explain why he believed that another state habeas petition would be denied, other than by conclusorily alleging that his claims were being "shuffle[d] . . . under the carpet" because they would bring "highly possible embarr[ass]ment to the state." (See Mot. Stay at 2-3.)

To the extent Petitioner argues that his appellate counsel was to blame for his failure to exhaust (see Pet., Mem. P. & A. at 1-2), that reason has not uniformly been recognized as "good

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Cal. Oct. 23, 2013); Valdivia v. Frauenheim, No. 2:14-cv-2097 TLN KJN P, 2015 WL 5546955, at *3 (E.D. Cal. Sept. 18, 2015), accepted by 2015 WL 6123753 (E.D. Cal. Oct. 16, 2015). But again, Petitioner doesn't support his allegation with any evidence other than his own conclusory allegations. See Blake, 745 F.3d at 981. And as discussed, he apparently drafted each of his federal and state filings himself despite his reliance on "legal assistants." Cf. Mendoza v. Carey, 449 F.3d 1065, 1070 (9th Cir. 2006) (in equitable-tolling context, petitioner's alleged English-language limitations do not constitute extraordinary circumstance warranting tolling when he "demonstrates proficiency in English" (citing Cobas v. Burgess, 306 F.3d 441, 444 (6th Cir. 2002))).

cause" under Rhines. Compare Blake, 745 F.3d at 983 (recognizing good cause for ineffective assistance of "post-conviction counsel"), with Noqueda v. California, No. 2:14-cv-1045-GGH P, 2014 WL 5473548, at *2 & n.4 (E.D. Cal. Oct. 23, 2014) (discussing Blake and distinguishing between ineffective assistance of "post-conviction counsel" on state habeas petition and ineffective assistance of "appellate counsel on direct review"). Although some courts appear to have so held, see, e.g., Jauregui v. Jones, No. CV 16-1711-DSF (RAO), 2016 WL 4257147, at *2 (C.D. Cal. July 7, 2016) (making no distinction between appellate and postconviction counsel), accepted by 2016 WL 4251572 (C.D. Cal. Aug. 9, 2016); Abel v. Chavez, No. CIV S-11-0721-GEB (GGH) P, 2011 WL 4928689, at *3-4 (E.D. Cal. Oct. 17, 2011) (collecting cases), accepted by 2011 WL 6000394 (E.D. Cal. Nov. 22, 2011), that approach deemphasizes the reasoning of Blake that a petitioner who relies on incompetent postconviction habeas counsel is prejudiced because he would have had no reason to separately raise claims himself during the AEDPA limitation period. See 745 F.3d at 983-84. A petitioner does not rely on his appellate counsel to raise claims for him during that same period, however.

Even if ineffective assistance of appellate counsel generally constitutes good cause, Petitioner provides no evidence to support its application here, as already discussed; thus, that argument is unavailing. See Wizar v. Sherman, No. CV 15-03717-PSG (KES), 2016 WL 3523837, at *4 (C.D. Cal. May 19, 2016) (denying Rhines stay in part because petitioner did not submit "any evidence in support of his contention that he received

ineffective assistance of counsel on direct appeal"; collecting cases), accepted by 2016 WL 3511781 (C.D. Cal. June 27, 2016); Jaurequi, 2016 WL 4257147, at *3 (denying Rhines stay when petitioner "fail[ed] to proffer any evidence justifying his failure to exhaust," "supplie[d] no evidence that his appellate counsel was constitutionally ineffective for failing to raise his unexhausted grounds," and "fail[ed] to provide any evidence that he raised and discussed his unexhausted grounds with his appellate counsel and was disregarded"); Nogueda, 2014 WL 5473548, at *2 (finding no good cause under Rhines when petitioner provided "no documentation — as opposed to oral assertions — showing he discussed [his unexhausted] claims with trial and/or appellate counsel and was ignored").[6]

Accordingly, Petitioner is not entitled to a Rhines stay because he cannot show good cause for not having earlier exhausted his claims and in any event has engaged in dilatory and abusive litigation tactics.

IV. Petitioner May Request a Kelly Stay

Under Kelly, Petitioner has two options to avoid dismissal. First, he may request voluntary dismissal of his unexhausted ineffective-assistance claim (ground four of the Petition) and elect to proceed only on his exhausted claims (grounds one through three and five through nine). He is advised, however,

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[6] In any event, Petitioner's appellate counsel likely was not ineffective for failing to raise his ineffective-assistance-of-counsel claim on direct appeal because under California law such claims should generally be raised on habeas. See People v. Salcido, 44 Cal. 4th 93, 172 (2008) (as amended) (citing cases); People v. Mendoza Tello, 15 Cal. 4th 264, 266-67 (1997) (as amended) (citing cases).

that if he elects to proceed with the exhausted claims, any future habeas petition containing the unexhausted claim (presumably filed after it has been exhausted) may be rejected as successive and potentially untimely.

Second, if Petitioner so requests, the Court may permit him to voluntarily dismiss the unexhausted ineffective-assistance claim and hold the exhausted claims in abeyance under Kelly while he attempts to exhaust it. Once the claim has been exhausted, Petitioner may request to amend it back into the Petition, but he will be allowed to do so only if it is timely or "relates back" to the exhausted claims. See Mayle, 545 U.S. at 650.[7]

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Judge accept this Report and Recommendation, grant Respondent's motion to dismiss the Petition, and deny Petitioner's motion for a stay unless within the time for filing objections to this Report and Recommendation he notifies the Court that he has elected to take one of the actions explained above.

DATED: August 31, 2018

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

[7] Petitioner alludes to claims concerning his "excessive sentence," which he apparently recently discovered, and says he hopes he will be allowed to "proceed" with them. (Mot. Jud. Notice at 1-2.) No such claims appear in the federal Petition or either of his state petitions and thus are at this point unexhausted and in any event likely untimely.

Appellate Courts Case Information

Supreme Court

Change court

Court data last updated: 08/21/2018 03:50 PM

Docket (Register of Actions)

LIU (KEVIN) ON H.C.
Division SF
Case Number S248546

Date	Description	Notes
04/27/2018	Petition for writ of habeas corpus filed	Petitioner: Kevin Liu Pro Per (Exhibits A through D attached)
08/08/2018	Petition for writ of habeas corpus denied	The petition for writ of habeas corpus is denied. (See In re Waltreus (1965) 62 Cal.2d 218, 225 [courts will not entertain habeas corpus claims that were rejected on appeal]; In re Dixon (1953) 41 Cal.2d 756, 759 [courts will not entertain habeas corpus claims that could have been, but were not, raised on appeal]; In re Swain (1949) 34 Cal.2d 300, 304 [a petition for writ of habeas corpus must allege sufficient facts with particularity].)

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Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 11/01/2017 07:03 AM

Docket (Register of Actions)

LIU (KEVIN) ON H.C.
Case Number S242913

Date	Description	Notes
07/03/2017	Petition for writ of habeas corpus filed	Petitioner: Kevin Liu Pro Per
08/30/2017	Petition for writ of habeas corpus denied	The petition for writ of habeas corpus is denied. Individual claims are denied, as applicable (See People v. Duvall (1995) 9 Cal.4th 464, 474 [a petition for writ of habeas corpus must include copies of reasonably available documentary evidence]; In re Waltreus (1965) 62 Cal.2d 218, 225 [courts will not entertain habeas corpus claims that were rejected on appeal].)

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Court of Appeal, Second Appellate District, Division Two - No. B266352

S237257

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

KEVIN LIU, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED

NOV 16 2016

Jorge Navarrete Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

Filed 8/16/16 P. v. Liu CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEVIN LIU, Defendant and Appellant.	B266352 (Los Angeles County Super. Ct. No. KA103107)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

In an information filed by the Los Angeles County District Attorney, defendant and appellant Kevin Liu was charged with attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664/187, subd. (a); counts 1 & 2);[1] assault with a firearm (§ 245, subd. (a)(2); counts 3 & 4); possession of a silencer (§ 33410; count 5); first degree residential burglary (§ 459; count 6); and criminal threats (§ 422, subd. (a); counts 7 & 8). It was further alleged that defendant personally used a firearm as to counts 1 and 2 (§ 12022.53, subds. (b) & (c)) and as to counts 3, 4, 6, 7, and 8 (§ 12022.5, subd. (a)).

Following trial, the jury found defendant guilty of the attempted murder of Martin Sandoval (Sandoval) on count 2 and the willful and deliberate allegation was found not true. The jury also found as to count 2 that defendant personally used a firearm (§ 12022.53, subd. (b)), but found the section 12022.53, subdivision (c), allegation not true. Finally, the jury found defendant guilty on counts 3, 4, 5, and 8, and found the firearm allegations true. It found defendant not guilty on counts 1, 6, and 7.

The trial court sentenced defendant to a total term of 20 years in state prison.

Defendant timely appeals. He assigns the following errors: (1) The trial court erred in refusing a heat of passion instruction; (2) The trial court should have allowed the defense psychiatric expert to testify about defendant's mental condition; (3) The trial court improperly excluded testimony that Sandoval had been accused of molesting defendant's daughter; and (4) The prosecutor committed misconduct by eliciting testimony that defendant's wife, Nancy Liu (Nancy),[2] had cancer.

We affirm.

FACTUAL BACKGROUND

I. *Prosecution Evidence*

Defendant and Nancy married in 1988 and had three children. In 2005, Nancy told defendant that she wanted to separate. She agreed to stay with defendant in their

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 We refer to various related persons by their first names, not from disrespect, but to avoid confusion.

house in Perris for financial reasons and for the children, but she made preparations for divorce. Nancy and defendant both worked at Morongo Casino; they had different shifts and different times. At work, they shared a locker, in which they had to put all of their personal belongings while working.

In 2009, Nancy began dating Sandoval, who also worked at the casino. When they started dating, Sandoval was aware that she was living with her husband, but he understood that Nancy and defendant were separated. Nancy continued having sexual relations with defendant up until 2013 because she believed it was the only way to keep peace in her house. In January 2013, Nancy told defendant that she was dating Sandoval.

Two months later, Nancy filed for divorce[3] and moved in with a friend. During that time, she received several "terrifying" telephone calls from defendant. He often called 20 or 30 times a day. She did not report his threats to the police because they both would have lost their jobs. She explained that, in the gaming industry, any instance of harassment or domestic violence could cause a casino to terminate employment. Nancy spoke to her family and asked a friend who was a police officer to talk to defendant about his threats. Once, defendant called while he was outside her residence, even though she had never told him where she was living.

Nancy began to record defendant's telephone calls in late March or early April 2013. Two were played for the jury. One day, at around 4:00 a.m., defendant told Nancy that she was "never going to leave" him. When she replied that she was divorcing him, defendant said: "Let's see over my dead body honey. [¶] . . . [¶] I'm going to fucking hurt everybody." He later said, "I will follow you and I will get him, honey. . . . Good luck to him and good luck to his fucking family. . . . This is the fucking last warning for him. . . . I could have fucking hurt him today." That night, in another telephone call, defendant told Nancy that Sandoval had ruined his life and that he would ruin Sandoval's life. Defendant stated: "I am going to firkin' kill him yester—last night" and that Sandoval was "lucky last night." Defendant also told Nancy: "He will be dead. [¶] . . .

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3 The divorce became final in September 2013.

[¶] He is fucking my wife and I am going to kill him. I have all the fucking right to do that." He then told Nancy that he had parked in front of her house that day but did not do anything to her. She asked him about lock ties[4] that she had discovered under his pillow and he just replied "Okay."

A few months later, Nancy moved into an apartment in La Puente. She did not tell defendant where she was living because she feared for her life. When she got off work at 4:00 a.m., she drove around her neighborhood for a while to make sure that she was not being followed. No one other than Nancy had keys to her apartment; neither Sandoval nor defendant had ever stayed the night at her place.

Sometime before September, defendant called Sandoval and accused him of "'screwing [his] wife.'" Sandoval told defendant that he and Nancy were dating and that Nancy had said that there was nothing going on between her and defendant. Defendant became upset and angrily told Sandoval to stay away from Nancy. He threatened Sandoval if he did not stop contacting Nancy, saying: "'If I ever see you, I'll kill you.'" Sandoval was scared and told Nancy about the telephone call.

Sometime in late August, defendant called Nancy and told her that he was overwhelmed with a family issue. He said that he was "going to kill everybody" if she did not go back to his house in Perris and take care of it. Nancy went to the house and stayed for about four days. She and defendant did not have any reconciliation talks. At the time, Sandoval was in Mexico.

On September 6, 2013, Nancy and Sandoval returned to her apartment after going shopping. Sandoval put the items they had purchased on the bed and gave Nancy a hug. Defendant emerged from the bathroom and pointed a gun with a homemade silencer at them. He said, "'I going to kill you,'" several times. Sandoval believed that defendant was going to kill him, and he was scared for himself and Nancy.

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4 Nancy acknowledged that she and defendant had used scarves as tie devices during sex, but she never saw plastic lock ties before finding them under defendant's pillow.

Defendant told Sandoval to sit, and he sat on the bed. Nancy was facing defendant and told Sandoval not to sit. Sandoval stood up. Defendant pointed the gun at Nancy and said, "'I told you both that if you made me crazy, this was going to happen. I'm going to kill you both.'" Nancy told defendant that she and defendant were not together and that Sandoval had nothing to do with their relationship. She begged him to stop and not hurt anyone. When defendant pointed the gun at Sandoval, Nancy moved in front of him. Defendant pushed her out of the way and Sandoval lunged at him. Sandoval grabbed defendant's right wrist with his left hand. The gun discharged and made a "pop" sound. Sandoval and defendant fell to the floor and the gun fell out of reach. When defendant reached for the gun, Sandoval pulled him away and held him down. They both fell back onto the bed. Nancy went outside and called 9-1-1.

Jacob Rico (Rico), Nancy's neighbor, saw Nancy yelling into a cell phone that "he has a gun." She pointed toward her apartment. Through the open door, Rico saw defendant and Sandoval struggling on a bed. Sandoval was holding defendant's arms and neck from behind. Rico ran into the room and helped restrain defendant until deputies arrived. Sandoval sustained minor injuries to his forehead from the struggle.

Deputies took defendant into custody. As he was being searched, defendant said, "'I was going to shoot that motherfucker because he was sleeping with my wife.'" Deputies found a loaded gun magazine and 69 rounds of nine-millimeter ammunition in his pockets. They also found on his person a key that matched Nancy's front door.

A loaded Smith and Wesson nine-millimeter handgun with a blue cylinder attached to the muzzle was on the bathroom floor, along with an expended shell casing. The handgun had an aftermarket threaded barrel that allowed for the blue silencer to be attached. The silencer had been made from an oil filter. Forensic analyst Amanda Davis examined the gun and found that it had functioning safety mechanisms and a trigger pull of five and three-quarters pounds. There was a bullet hole by the mirror in the bathroom. The nine-millimeter bullet was found in Rico's next-door apartment.

Deputies also found a black bag inside the apartment next to the bed. It contained plastic zip ties and a wire cutter. The zip ties were tied together to form two handcuffs

with another tie linking them together. The bag and its contents did not belong to Nancy. There were no signs of forced entry into the apartment.

A vehicle belonging to defendant was parked a few blocks away. A pink gym bag was in the trunk and contained two oil filter canisters, an empty box of ammunition, pliers, a wood stick, rope, packaging tape, and a red bag with washers and gloves. Nancy had previously left this gym bag at the Perris house, but none of the items in the bag belonged to her.

Defendant had purchased the gun on August 5, 2013, and picked it up nearly two weeks later. The gun store manager had showed him how to use it properly. Defendant took his son to a firing range in August. Defendant had previously been issued a handgun safety certificate card on June 20, 2013.

After defendant was arrested, Nancy removed a safe containing her jewelry from the Perris house.

II. *Defense Evidence*

Defendant testified that in January 2013, Nancy told him that she was having an affair. He was hurt, angry, and depressed. In March, she moved out of their Perris home and filed for divorce. In March or April, defendant made threats to hurt people, but he never acted on them. He admitted to making the threatening phone calls to Nancy and he wanted her to feel scared. He lied on the phone when he told her that he was outside her residence.

Defendant and Nancy had been having sexual relations until 2013. They sometimes used items such as scarves for tying, but they never used zip ties. Once, defendant tried to use a zip tie with Nancy, but she would not let him.

Defendant bought a handgun in August and sometimes went to a shooting range. He bought the silencer canisters online as aftermarket attachments. He used them on the gun because he sometimes went shooting in the desert. He learned online how to put the silencer together with various parts. He transported his gun and accessories in a Puma bag that he kept in his car trunk.

Defendant had been to Nancy's apartment in La Puente several times and spent one night there in August. Nancy gave him the key to the apartment; he denied taking it from their shared locker at the casino. On August 21, 2013, he brought a black bag and left it at her apartment. The bag contained zip ties and ropes that they had used during sex.

The last time defendant went shooting in the desert, he removed his gun from the trunk and brought it into the house. He did not know how the bag was placed back in the trunk on September 6, 2013. During the week that Nancy was at his house in August, she drove his car. On September 5, 2013, defendant learned that Nancy had taken a safe from the house. His gun and ammunition, which were in a locked case, were also missing. He called Nancy and she admitted that she had taken the items.

On September 6, 2013, at around 2:30 p.m., defendant parked his car behind Nancy's apartment. He went inside and searched for his items. He found the black bag, containing his gun, ammunition, and attachments, in the bathroom. He put the magazine in the gun and attached the silencer in order to make sure that everything worked. He put the ammunition in his pocket and walked out of the bathroom. Defendant was surprised when Nancy and Sandoval entered the apartment. He held the gun pointed at the floor. This was the first time that he had ever seen Sandoval and he was angry. But he did not threaten to shoot or point the gun at anyone. When he entered the apartment, he did not know that anyone would be there and he had no intent to hurt or kill anyone.

Nancy stood in front of Sandoval. Sandoval asked defendant what he was doing there, and defendant asked Sandoval what he was doing with his wife. Defendant asked Nancy why Sandoval was still with her and said that they needed to sit and talk. Sandoval approached, and defendant said: "'I got a gun. I'm going to shoot you, you motherfucker.'" Nancy told defendant that they were not going to talk that day and that he was not going to shoot anyone. She reached for his gun, and defendant pushed her hand away. Sandoval charged him, slapped his hand, and grabbed for the gun. They fell and struggled on the floor. Sandoval picked him up and threw him on the bed. Defendant did not shoot the gun.

Defendant denied making any statement to the police while he was arrested.

Tiffany Liu (Tiffany), defendant and Nancy's daughter, testified that defendant told her sometime in 2013 that Nancy was dating Sandoval. When Nancy moved out of their house in March, defendant was upset and angry. He said that he wanted to hurt Sandoval. In late August, Nancy stayed at their house for a few days. Nancy told Tiffany that she was confused and wanted to keep her family together. Around that time, Nancy told Tiffany that defendant was with her at the apartment. Nancy told Tiffany that she was afraid of defendant but believed that he would never hurt her.

Nancy further told Tiffany that on September 6, 2013, she and Sandoval entered her apartment. Defendant was coming out of the bathroom and they argued. He said that she destroyed his life. Defendant was waving a gun but not pointing it at anyone. Nancy stood between defendant and Sandoval. When defendant moved her to the side, Sandoval rushed toward him and they fell to the floor. Sandoval grabbed defendant's hand and the gun went off during the struggle.

Sam Liu (Sam), defendant and Nancy's son, testified that Nancy had told him that when she and Sandoval arrived at her apartment, defendant was inside with a gun. She stepped in front of Sandoval and told defendant that if he was going to shoot anyone, he should shoot her. Sandoval and defendant struggled for the gun and a shot accidentally fired. Earlier, defendant had taken Sam to a shooting range for practice shooting.

Phillip Liu (Phillip), defendant's brother, testified that Nancy had called him after the incident. She said that defendant was in her apartment with a gun when she and Sandoval arrived. She distracted him and Sandoval grabbed the gun. The gun fell to the floor and accidentally fired. Phillip testified that Nancy had told him that defendant regularly visited her at the apartment and stayed the night. Sometimes, he brought a gun because he was concerned that she was living alone.

Stephen Seger (Seger), a family friend, testified that Nancy had discussed the incident with him by telephone. She said that she stood in front of Sandoval and told defendant that if he was going to hurt anyone, he should hurt her. Sandoval then pushed

Nancy away and attacked defendant. Defendant and Sandoval fell to the floor and the gun accidentally discharged.

John H. Pride (Pride), a firearms expert, examined defendant's handgun. He found that the trigger pressure was within the acceptable range for this firearm. The blue cylinder was a silencer that was illegal to own in California. Pride explained that there were situations where the gun could be fired accidentally, such as during a struggle. Where someone grabs the wrist of a person holding a gun, it might cause the person to accidentally pull the trigger. The firearm evidence was consistent with both an intentional and unintentional firing. The silencer attachment might explain why there was not a round in the chamber when the gun was fired.

III. *Prosecution Rebuttal Evidence*

Thuy Lien Nguyen Gomez (Gomez), who had been dating Sam, lived at defendant's house for a time. Defendant found out about Nancy's relationship with Sandoval in January after going through Nancy's cell phone. He said that if Nancy was still seeing Sandoval, he was "dead to him." In June 2013, defendant showed Gomez a photograph of Sandoval and asked her if it was him; she said yes. Once, Nancy asked her to stay outside the bedroom while she and defendant argued because she was concerned that he might do something. Nancy told Gomez that she still had sex with defendant to "keep peace."

Nancy told Gomez that on September 6, 2013, defendant exited the bathroom with a gun and waved it around, and said that Sandoval had ruined his life. Defendant pushed Nancy away and Sandoval rushed defendant to get the gun. As they struggled, the gun fired.

DISCUSSION

I. *The trial court properly did not instruct the jury on voluntary manslaughter*

Defendant argues that the trial court erred when it refused a heat of passion instruction.

A. Relevant Proceedings

During trial, the defense indicated that it would request that the trial court instruct the jury on the lesser included offense of attempted voluntary manslaughter. The trial court stated that it would so instruct if substantial evidence of heat of passion or sudden quarrel was presented at trial.

After defendant testified, the trial court indicated that there was no evidence of any lesser included offense to the attempted murder charges in counts 1 and 2. The trial court noted that defendant presented an absolute defense, namely that he never pointed the gun at anyone and that it discharged accidentally. Because there was no intent to kill inferable from the defense evidence, there could be no attempted voluntary manslaughter offense, since that offense requires an intent to kill. Accordingly, the trial court denied defendant's request for an instruction on attempted voluntary manslaughter.

B. Analysis

Courts have a sua sponte duty to instruct on lesser included offenses when the offense is supported by substantial evidence, which, if accepted, would permit the jury to find the defendant not guilty of the greater offense and guilty of the lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 148–149.) A trial court need not instruct the jury on a lesser included offense where no evidence supports a finding that the offense was anything less than the crime charged. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826.)

Voluntary manslaughter is a lesser included offense of murder when the requisite mental element of malice is negated by a sudden quarrel or heat of passion or by an unreasonable but good faith belief in the necessity of self-defense. (*People v. Elmore* (2014) 59 Cal.4th 121, 133; see also § 192.) Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 255–256.)

Here, the prosecution presented evidence of attempted murder—defendant was angry and upset when he learned of Nancy's affair with Sandoval; defendant threatened to kill Sandoval and others; defendant had purchased a handgun one month before the

instant shooting; defendant modified that handgun illegally with a homemade silencer; defendant entered Nancy's apartment without permission, pointed the gun at Nancy and Sandoval, and discharged the gun during a struggle. There was no evidence of sufficient provocation resulting from a sudden quarrel or heat of passion.

Defendant claims that he "acted under the influence of a stirring passion, the humiliation and distress of seeing his wife's lover for the first time, not only face to face, but embracing her in the small studio apartment near her bed." But there is no evidence that the confrontation and the embrace led to a heat of passion that negated his intent to kill. He had known for at least eight months that Nancy was seeing someone else. She had filed for divorce in March and it was set to become final on September 14, 2013. And, he had seen a photograph of Sandoval three months before the shooting. Taken together, this evidence confirms that defendant's anger and emotions that drove his actions emerged long before the shooting; they did not arise out of a sudden quarrel or heat of passion.

Defendant's testimony also did not support an instruction on attempted voluntary manslaughter. Rather, as the trial court noted, his testimony supported a complete defense to the attempted murder charges.

Defendant's reliance upon *People v. Millbrook* (2014) 222 Cal.App.4th 1122 (*Millbrook*) and *People v. Thomas* (2013) 218 Cal.App.4th 630 (*Thomas*) is misplaced. In *Millbrook*, there was evidence that the defendant was acting under the actual influence of extreme emotion. (*Millbrook*, *supra*, at pp. 1139–1140.) Likewise, in *Thomas*, the defendant shot the victim; at trial, he testified that he pulled the trigger out of fear and nervousness. (*Thomas*, *supra*, at p. 645.) In contrast, here there is no evidence that defendant acted under a heat of passion or other emotion. Rather, defendant's contention at trial was that the gun discharged accidentally.

It follows that the trial court did not err in refusing to give an attempted voluntary manslaughter instruction and that defendant was not deprived of his due process rights.

II. *The trial court properly excluded psychiatric expert testimony as to defendant's mental state*

Defendant argues that the trial court erred when it excluded the defense psychiatric expert to testify about his mental condition.

A. Relevant Proceedings

Before trial, the prosecutor moved to exclude the proffered testimony of Dr. Ronald Markman regarding defendant's mental state and how people typically react to certain provocation. Later, defense counsel made an offer of proof. According to Dr. Markman: "The behavior that led to [defendant's] arrest was clearly the result of an overwhelming sense of being rejected by his wife, which likely initiated feelings of inadequacy and worthlessness. This emotional instability also unleashed an uncontrollable anger potential that resulted in a lack of judgment, thoughtlessness and impulsive behavior controlled by emotions, consistent with an event occurring in the heat of passion." Relying upon *People v. Czahara* (1988) 203 Cal.App.3d 1468 (*Czahara*), the trial court precluded Dr. Markman from testifying.

B. Analysis

An expert witness may offer opinion testimony if the subject is sufficiently beyond common experience that it would assist the trier of fact. (Evid. Code, § 801.) A trial court has broad discretion to determine the admissibility of expert testimony, and its ruling is reviewed for an abuse of that discretion. (*People v. McDowell* (2012) 54 Cal.4th 395, 426.)

Here, the trial court did not err in excluding Dr. Markman's testimony. As set forth above, there is no evidence that defendant committed the instant offenses under a heat of passion or sudden quarrel. In fact, defendant testified that the shooting was accidental. Thus, Dr. Markman's testimony would have been irrelevant to the jury's determination of whether defendant had the intent to kill when he shot at Sandoval.

Defendant claims that the expert testimony would have been relevant to show that he was under a tremendous amount of stress from the affair and divorce. But this type of

evidence does not require expert testimony; the emotional effects of divorce are within the common experience of jurors. (*Czahara, supra,* 203 Cal.App.3d at p. 1478.)

Moreover, defendant was not denied the opportunity to present a defense. He was fully allowed to, and did, present a defense of accident and lack of intent to kill. Thus, defendant's constitutional contention is meritless.

III. *The trial court properly excluded evidence of defendant's allegation that Sandoval molested his daughter*

Defendant argues that the trial court improperly excluded testimony that Sandoval was accused of molesting defendant's daughter Jasmine.

A. Relevant Proceedings

During cross-examination, defense counsel asked Sandoval if he was aware that there was an allegation against him concerning Jasmine, defendant's daughter. Following the prosecutor's objection, defense counsel contended that there were allegations against Sandoval for "potential[]" molestation during defendant and Nancy's divorce proceedings. Therefore, this questioning was relevant to Sandoval's mental state, motive, and credibility. After all, Sandoval might have been angry because of the accusation and reacted upon seeing defendant in the apartment. The trial court allowed defense counsel to ask Sandoval if there were any arguments between him and defendant in any capacity. But the trial court precluded the defense attorney from specifically asking about any molestation allegation, pursuant to Evidence Code section 352.

B. Analysis

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "'The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference" to establish disputed material facts such as identity, intent, or motive. [Citation.]'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1166.)

The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. (*People v. Carter, supra,* 36 Cal.4th at

pp. 1166–1167.) A trial court's exercise of discretion in excluding evidence is reviewed for abuse of discretion, and "the [trial] court's exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233.)

Here, the evidence concerning the accusation was irrelevant to the issues at trial. Whether there was an accusation against Sandoval concerning defendant's daughter had no relevance to defendant's actions during the incident. Sandoval testified that there was no argument between the parties other than that concerning defendant pointing a gun at them and saying that he was going to shoot Sandoval for dating Nancy. Moreover, defendant did not testify that he was motivated by any molestation accusation against Sandoval; rather, he testified that his presence in the apartment with Nancy and Sandoval and the discharge of the gun were accidental and not driven by emotion. While defendant testified that he was hurt and angry, those emotions were directed at Nancy and Sandoval for their affair, not the result of any unsubstantiated allegation of molestation.

Moreover, there was no credible evidence of any molestation accusation. Defense counsel's theory was based upon a therapist's letter, which the trial court noted had nothing to do with molestation; "[t]hat was counsel's surmising. . . . [¶] . . . ¶] It was counsel's fertile imagination that it was somehow related to molestation, but there was nothing explicit."

Under these circumstances, allowing defense counsel's question about a molestation accusation would have been far more prejudicial than probative. (Evid. Code, § 352.) It follows that the trial court did not abuse its discretion in excluding it.

IV. *The prosecutor did not err by eliciting testimony that Nancy had cancer*

Defendant contends that the prosecutor committed misconduct when he elicited testimony that Nancy had cancer.

A. Relevant Proceedings

On direct examination, the prosecutor began by asking Nancy if she was currently undergoing treatment for cancer. Following a defense objection on the grounds of

relevance, the prosecutor explained that her treatment was relevant to her mental state "in regards to testifying." The trial court overruled the objection and asked Nancy if she was taking any medication as a result of her treatment. She answered affirmatively and stated that she would do her best to think and answer questions.

During a recess, the trial court noted to the prosecutor that "the proper way to introduce a witness who may be under medication is to simply ask, are you currently taking medication? Yes. If so, does that have an effect on what she is saying here today. If she says yes, what type of effects does it have on you. You don't have to get into why she was taking medication or anything else to appeal to the sympathy of the jury, in terms of this particular witness. [¶] The court has already admonished this jury during the jury selection that—repeatedly, that whatever empathy or sympathy they have with the witness, it's going to be an evidence-based decision and evidence-based decision only. You know better than that. There's a way to approach that subject without getting into the issue of why she's taking medication or even identifying the medication . . . ." The trial court further advised that if medication causes a witness to get tired and need breaks or need an opportunity to refresh himself or herself, then the trial court would accommodate.

Defense counsel then moved for a mistrial: "To be honest, I don't think anything can be more prejudicial and have passion or sympathy for a jury. I understand the court painstakingly tried, at least for the defense, to say it's an emotionless based decision, and then we have this. You can't unring that bell. [¶] And my dad died of cancer, so I can't believe it was asked, but I wanted to throw that in, too."

Noting that the jury was an intelligent jury, the trial court denied the motion.

When Nancy resumed her testimony, she stated that she moved to that particular apartment because it was closer to the medical office for her chemotherapy and radiation treatments.

After Nancy finished her testimony, the trial court instructed the jurors: "At the outset of witness's testimony, it was mentioned of her medical condition, and the fact that she's taking medication. That is only relevant in terms of whether she is competent to

testify and whether the medication affects her stamina or ability to testify. But as I told you at the outset of this trial during jury selection, this decision will be made based upon the evidence. It's not going to be an emotional-based [decision]. It's not going to be a[n] empathy-based decision or sympathy-based decision."

Nancy returned to testify the following day. She stated that on the morning of the shooting, she had a biopsy done at a laboratory. She also said that she told her children in 2014 that her cancer was in remission, but she was actually still undergoing treatment; she only told her children that the cancer was in remission so they would not be concerned.

B. Forfeiture

Generally, a defendant forfeits a claim of prosecutorial misconduct unless the defendant makes a specific objection to the argument in the trial court and requests that the jury be admonished to disregard it. (*People v. Jackson* (2014) 58 Cal.4th 724, 762; see also *People v. Reyes* (2016) 246 Cal.App.4th 62, 76–77.) "Counsel has an obligation to state the '*specific ground* for an objection in order to preserve the issue for appeal.' [Citations.]" (*Id.* at p. 77.)

Here, defense counsel preserved defendant's claim of evidentiary error as to the admission of Nancy's medical condition, but he failed to object to the prosecutor's question as misconduct. Accordingly, he has forfeited his prosecutorial misconduct claim. (*People v. Reyes*, *supra*, 246 Cal.App.4th at p. 77 ["Counsel forfeited any claim of prosecutorial misconduct in connection with these remarks by failing to assign misconduct to the prosecutor's statements"].)

C. Analysis

Even reaching the merits of defendant's contention, it fails. A prosecutor's conduct violates the Fourteenth Amendment to the United States Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Reyes*, *supra*, 246 Cal.App.4th at p. 71.) That did not occur here. Nancy's condition and medication were relevant to her competence and ability to testify. It follows that the prosecutor's questions did not amount to misconduct.

Even if the prosecutor did err in asking Nancy about her medical condition, and even if that issue were preserved for appeal, defendant has not shown that there was a reasonable probability that the jury's verdict would have been different. (*People v. Frye* (1998) 18 Cal.4th 894, 976, overruled in part on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The trial court repeatedly told the jurors that they were to decide the case based on the evidence, not on emotions. We presume that the jurors understood and followed the trial court's instructions. (*People v. McKinnon* (2011) 52 Cal.4th 610, 670.) Moreover, the fact of Nancy's cancer was admitted through her subsequent testimony. Thus, the jury would have learned about it anyway. Last, as set forth above, the evidence that defendant committed attempted murder was strong.

IV. *Cumulative effect of alleged errors*

Finally, defendant argues that the cumulative effect of the trial court's errors violated defendant's right to due process. As set forth above, we find no error. It follows that there was no cumulative prejudicial effect of any error on defendant's right to due process.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT

SUPREME COURT OF THE UNITED STATES

KEVIN LIU	)	
	)	NO._____
Petitioner,	)	
	)	CERTIFICATE OF SERVICE
v.	)	
	)	
MARCUS POLLARD,	)	
Warden	)	
	)	
Respondent.	)	
_____	)	

I hereby certify that I was appointed to represent the petitioner under the Criminal Justice Act, 18 U.S.C. 3006A and that I have on this date served copies of the petitioner's Petition for Writ of Certiorari by depositing them in the U.S. Mail, first class postage prepaid, at Berkeley, California and addressed to:

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PETITIONER

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RESPONDENT

Dated: _____, 2023.

_____
Stephanie M. Adraktas
Attorney for Petitioner