No.

IN THE SUPREME COURT OF THE UNITED STATES

JUAN T. TYLER,

***Petitioner*,**

v.

LUIS MARTINEZ, Warden,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

FAY ARFA, A LAW CORPORATION
Fay Arfa, Attorney - CA SBN 100143
10100 Santa Monica Blvd., #300
Los Angeles, CA 90067
Tel.: (310) 841-6805
Fax :(310) 841-0817
fayarfa@sbcglobal.net

Attorney for Appellant
JUAN T. TYLER

QUESTIONS PRESENTED

I. Did the Prosecution Proved Beyond a Reasonable Doubt that the Shooter Premeditated and Deliberated an Attempted Murder?

II. Did the Trial Court Deprive Tyler of Due Process and a Fair Trial by Failing to Instruct with the Lesser Included Offense of Attempted Voluntary Manslaughter?

III. Did the Prosecutor Commit Prejudicial Misconduct During Closing Argument; Did Trial and Appellate Counsel Render Ineffective Assistance?

IV. Did Trial and Appellate Counsel Render Ineffective Assistance (Claims I-III)?

V. Did the Cumulative Effect of the Errors in Claims I-III Deprive Tyler of Due Process and a Fair Trial?

VI. Did the Trial Court Err by Failing to Sua Sponte Instruct the Jury on the Affirmative Defense of Others?

TOPICAL INDEX

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL CONSTITUTION

FEDERAL STATUTES

STATE STATUTES

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v.

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

Petitioner, JUAN T. TYLER, petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's denial of Tyler's Request for a Certificate of Appealability. (Appendix A)

OPINION BELOW

On February 11, 2025, the Ninth Circuit Court of Appeals denied Tyler's request for a certificate of appealability. (Appendix A)

JURISDICTION

On February 11, 2025, the Ninth Circuit Court of Appeals

denied Tyler's request for a certificate of appealability. (Appendix A)

The Court has jurisdiction. 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

U.S. Const. Amends. V, VI, XIV; 28 U.S.C.§ 2254.

STATEMENT OF THE CASE

A. State Court Trial Proceedings

The prosecution charged Tyler with the second degree robbery of Emmanuel "Manny" Jones and Rayvon Apolonio. (Cal. Penal Code1 § 211; Cts. 1 & 2)[1] and the attempted willful, deliberate, and premeditated murder of Jones. (§§ 664, 187 (a); Ct. 3)

As to all counts, the prosecution alleged that a principal was armed with a firearm and Tyler used and discharged a firearm, which caused Jones great bodily injury. §§ 12022(a), 12022.5 (a), 12022.53 (b)-(d)12022.7, (a)). The jury convicted Tyler of all charges and found the special allegations true. The trial court sentenced Tyler to 44 years to life in state prison.

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[1] Unless otherwise stated, all references are to the California Penal Code.

B. Direct Appeal

Tyler appealed to the California Court of Appeal (CCA), and on January 8, 2019 the CCA affirmed the judgment.

Tyler then filed a Petition for Review. On March 13, 2019, the California Supreme Court (CSC) summarily denied his petition.

C. Federal Habeas Proceedings

On, November 11, 2022, Tyler filed a petition for writ of habeas corpus in the district court. On March 25, 2024, the district court denied Tyler's habeas petition.

On May 9, 2024, Tyler filed a Request for Certificate of Appealability to the Ninth Circuit. On February 11, 2025, the Ninth Circuit Court of Appeals denied Tyler's request for a certificate of appealability. (Appendix A)

STATEMENT OF THE FACTS ELICITED FROM THE CALIFORNIA COURT OF APPEAL OPINION

We summarize evidence in favor of the party prevailing at trial. Jones drove Apolonio in a Hyundai to a rendezvous. They saw a silver sedan pull up with three or four people inside. Daynian Tyler and Juan Tyler left the silver sedan for the Hyundai. Daynian Tyler sat down in the Hyundai's back seat on the driver's side, behind Jones. Juan Tyler got in behind Apolonio. The Tylers drew guns and demanded marijuana. Jones and Apolonio handed over all eight pounds they had. Juan Tyler persisted, saying "give me everything," which Jones took to mean "my life, my car, my money, whatever I have on me."

Jones testified he responded "by fighting back." "With quickness," he got out of the car's driver door and went to the driver's side passenger door, which Daynian Tyler was opening. Jones pushed against the rear door to keep Daynian Tyler inside the car, but Tyler forced his way out anyway, gun in hand. There was a "scuffle," meaning Jones hit Daynian Tyler once in the face. The blow did not fell or stun Daynian Tyler but did inspire him to run to the silver sedan, throwing down his gun in flight. Jones did not chase Daynian Tyler but turned back toward the Hyundai.

Meanwhile, Juan Tyler also got out of the Hyundai. As Jones turned away from the fleeing Daynian Tyler and after Daynian Tyler had separated from Jones and was some distance from him, Juan Tyler fired shots at Jones, hitting him once in the shoulder and once in the abdomen.

Jones suffered collapsed lungs, spinal damage, and other injuries.

REASONS TO GRANT CERTIORARI

I. THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE SHOOTER PREMEDITATED AND DELIBERATED AN ATTEMPTED MURDER

A. Introduction

The Due Process Clause requires sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 318 (1979). U.S. Const., amends. V, VI, XIV. The evidence failed to prove beyond a reasonable doubt that Tyler premeditated the alleged attempted murder. The shooting occurred spontaneously after Jones punched Tyler's brother, Daynian, in the face. The attempted murder premeditation enhancement should be dismissed. *Burks v. United States,* 437 U.S. 1, 18 (1978); *Greene v. Massey,* 437 U.S. 19, 25 (1978); *People v. Pierce*, 24 Cal.3d 199, 209-210 (1979).

B. California Law

Under California law, an attempted murder conviction premised upon premeditation and deliberation requires more than a showing of an intent to kill; it requires evidence from

which reasonable jurors can infer that the attempted killing resulted from the defendant's preexisting thought and reflection. *People v. Solomon*, 49 Cal.4th 792, 812–813 (2010); *People v. Koontz*, 27 Cal.4th 1041, 1080 (2002).

"The very definition of 'premeditation' encompasses the idea that a defendant thought about or considered the act beforehand." *People v. Pearson,* 56 Cal.4th 393, 443 (2013). "Deliberate" means "'"formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citation.]" [Citation.]' " *People v. Houston,* 54 Cal.4th 1186, 1216 (2012). "'An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.'" *Pearson*, at 443

C. The Evidence Failed to Support the Premeditation and Deliberation Enhancement

The evidence failed to support the finding that Tyler attempted to kill with premeditation and deliberation. See *People v. Boatman,* 221 Cal.App.4th 1253, 1274 (2013) (Insufficient evidence of premeditation and deliberation where defendant shot

his girlfriend in the face even though he knew the gun was loaded, he intentionally cocked the hammer, and the hammer slipped)

No evidence proves that Tyler planned or attempted any murder. Daynian, in his pretrial police statement, said that either Jones handed Manny a gun or Manny pulled it cause he was reaching for the gun. And Daynian told the police "And that's what had me scared." (1CT 132) Daynian also told the police he thought the "dude with the dreads" had a gun. (1CT 133)

The shooting occurred when Jones fought with Tyler's brother, Daynian. Tyler had no motive to kill Jones or Apolonio based on any prior relationship or conduct between Tyler or Jones or Apolonio or any preconceived design to kill Jones in a certain way. *People v. Edwards,* 54 Cal.3d 787, 813-814 (1991).

Even the firing of multiple shots at close range did not support premeditation and deliberation because neither "the brutality of a killing" nor " 'the infliction of multiple acts of violence' " prove the killing was the result of careful thought and weighing of considerations. *People v. Anderson*, 70 Cal.2d 15, 24-25 (1968)

The overwhelming evidence proved that Tyler shot at Jones to protect his brother. But for the violent interaction between Jones and Daynian, Tyler would not have shot anyone. Only when Tyler turned and saw Jones attacking Daynian, did Tyler fire his gun. Tyler fired the gun because he feared for Daynian's life. The shooting happened within seconds of Jones punching Daynian in the head. Although Daynian ran away, Tyler acted instinctively to save his brother's life.

'"[R]easonable jurists could debate whether (or, . . . agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473 (quoting *v. Estelle,* 463 U.S. at 893, n. 4.)

II. THE TRIAL COURT DEPRIVED TYLER OF DUE PROCESS AND A FAIR TRIAL BY FAILING TO INSTRUCT WITH THE LESSER INCLUDED OFFENSE OF ATTEMPTED VOLUNTARY MANSLAUGHTER

A. Introduction

On February 24, 2016, the prosecution charged Tyler with two counts of robbery and attempted willful, deliberate and premeditated murder. Because the evidence supported a lesser

included offense as to the attempted murder charge, the trial court erred by failing to sua sponte instruct the jury with the lesser included offense attempted voluntary manslaughter. In California, voluntary manslaughter is defined as "the unlawful killing of a human being without malice . . . [¶] upon a sudden quarrel or heat of passion." Cal. Penal Code § 192 (a).

B. The Evidence Supported Tyler's Right to Lesser Included Instruction on a Defense Theory

The trial evidence triggered the court's *sua sponte* duty to instruct the jury on attempted voluntary manslaughter based on provocation and heat of passion. Evidence of the drug deal gone bad and Jones' attack on Daynian constituted substantial evidence that Tyler harbored an actual, albeit unreasonable, belief he needed to defend Daynian from imminent danger of death or great bodily injury. *People v. Booker*, 51 Cal.4th 141, 182 (2011).

The CCA overlooked that, to warrant an instruction, the trial court does not weigh the evidence or determine the credibility of witnesses, for those are tasks for the trier of fact. *People v. Breverman,* 19 Cal.4th 142, 162, 177 (1998) (a court

determines only the "bare legal sufficiency" and "not its weight"); *People v. Mayberry,* 15 Cal.3d 143, 151 (1975); *People v. Randle,* 8 Cal.App.4th 1023, 1028 (1992).

And, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. *People v. Breverman*, 19 Cal. 4th at 154. This obligation includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present. The trial court must so instruct even when, as a matter of trial tactics, a defendant not only fails to request the instruction, but expressly objects to its being given. *People v. Koontz*, 27 Cal.4th at 1085; see also, *People v. Barton*. 12 Cal.4th 186, 196, 199-203 (1995) (Court must instruct on heat-of-passion and unreasonable self-defense manslaughter theories if supported by evidence, even if defendant objects.)

C. The Trial Court's Failure to Issue a Lesser Included Instructions Had a Substantial and Injurious Effect

Jones' and Apolonio's testimony justified the lesser included attempted voluntary manslaughter instruction. Jones testified he tried to detain Daynian inside the car, got out of the

car, and punched Daynian in the face. When Tyler saw the altercation between Jones and Daynian, Tyler shot Jones. (3RT 970-982)

Apolonio testified that, after the robbery, he heard no shots and stood up in the car. When he stood up, he saw Jones and Daynian in a "scuffle." (4RT 1280) As Jones and Daynian fought, Apolonio saw Tyler turn around and, seeing Daynian getting beaten by Jones, Tyler fired his gun. (4RT 1280) Apolonio testified:

> BY APOLONIO: I'm crouched down [in the car]. And I thought to myself, all right. He's either going to shoot this door or he's not. And 2 seconds went by. There was no shots to the door, so I stood up. As soon as I stood up I'm seeing Manny and Daynian scuffle. *And then I see Juan turn around. He sees Daynian getting scuffled up. He aims the weapon, shoots about two to three times.* (4RT 1280) (Italics added.)

And, during his interview with Detective Pitcher-Noone, Tyler, Sr. told Pitcher-Noone that Tyler shot Jones because, "He was just protecting his brother. I would've done the same thing." (5RT 1633) Based on Jones', Apolonio's, and Tyler Sr.'s testimonies, substantial evidence justified an attempted voluntary manslaughter instruction.

By failing to issue instructions on the lesser included offense of attempted voluntary manslaughter, the trial court severely limited the jury's options. *People v. Barton*, 12 Cal.4th at 186 (jury denied opportunity to decide if defendant was guilty of lesser included offense)

The trial court's failure to issue a viable instruction on the lesser included offense of attempted voluntary manslaughter violated Tyler's constitutional rights because the jury was left with an "'unwarranted all-or-nothing choice'" *(People v. Ramkeesoon,* 39 Cal.3d 346, 352 (1985)), making it likely that it resolved any doubts in favor of conviction. *Beck v. Alabama,* 447 U.S. 625, 634 (1980).

'"[R]easonable jurists could debate whether (or, . . . agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473 (quoting *Barefoot v. Estelle,* 463 U.S. at 893, n. 4.)

III. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT; TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO RAISE THE ISSUE

A. Introduction

The prosecutor committed misconduct throughout his closing argument. The prosecutor impermissibly vouched for their witnesses, argued that trial counsel conceded guilt, violated the "Golden Rule," and misstated the reasonable doubt burden of proof. The prosecutorial misconduct undermined Tyler's state and federal due process right to a fundamentally fair trial. U.S. Const., amends. V, VI, XIV; *Estelle v. McGuire*, 502 U.S. 62, 73 (1991); *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974); U.S. Const., amends. V, VI, XIV.

B. The Prosecutor Impermissibly Vouched for Witness Credibility

The prosecutor repeatedly and personally asserted the veracity of the prosecution witnesses:

> BY PROSECUTOR BROWN: . . . *Mr. Stirling and I believe . . . We also think that you're not going to have to spend too much time deciding . . .* (Italics added.)

* * *

> THE PROSECUTOR: *[Jones] told you the truth about what his life was like at the time*; . . . (7RT 2105) (Italics added.)
>
> * * *
>
> THE PROSECUTOR: *We know some of the things that Daynian said are true. . . . Some things that we know are lies and some things that we know are true because of the other evidence.* (7RT 2121) (Italics added.)
>
> * * *
>
> THE PROSECUTOR: . . . *We know, based on the ballistics that that's not the gun that fired the 3 rounds . . .* (7RT 2113) (Italics added.)

The prosecutor vouched for the credibility of witnesses and encouraged the jury to act based on considerations other than the facts of the case such as saying, "We know. . . ." The vouching deprived Tyler of due process, a fair trial, and his right to have the jury consider the totality of the evidence. See, *United States v. Weatherspoon*, 410 F.3d 1142, 1152 (9th Cir. 2005); See, *United States v. Kerr,* 981 F.2d 1050, 1053 (9th Cir. 1992) (prosecutor engaged in vouching by arguing, "I think he (Jim Ludden) was very candid," "I think he (Al Butler) was candid," and "I think he was honest."); U.S. Const., amends. V, VI, XIV.

C. The Prosecutor Impermissibly Argued the "Golden Rule"

The prosecutor asked the jury to view the evidence through the victim's eyes:

> THE PROSECUTOR: *I knew a little bit about them [Jones and Apolonio], what he [Jones] went through in his life now and dealing with that kind of a moment,* which *I don't think anybody else here really has exactly, not as actual victims but maybe through loved ones or friends of loved ones or reading the paper every freaking day. Going through this is a hard core. . . . So I'm passionate about it. And I do care. But not about anything other than you just please seek the truth.* (7RT 2152) (Italics added.)

The Golden Rule expressly prohibits the prosecutor from "inviting the jury to put itself in the victim's position" and imagine what they experienced "is a blatant appeal to the jury's natural sympathy for the victim." *People v. Vance*, 188 Cal.App.4th 1182, 188, 1192 (2010).

Here, the prosecutor specifically invited the jury to consider what they knew about what "[Jones] went through in his life now and dealing with that kind of a moment," and that jurors may also know what victims have gone through via "*loved ones or friends of loved ones or reading the paper every freaking day. . .*" (7RT 2152) (Italics added.)

D. The Prosecutor Committed Misconduct by Arguing that Defense Counsel Conceded Guilt

The prosecutor argued that because defense counsel did not, during argument, mention the "concept of premeditation, willfulness, and deliberation. . . . *in this regard at all. A reasonable interpretation of his failure to do so could be of the understanding that the charges are all good . . .* [H]e's arguing to you, "My guy is not the guy." Okay. He's not saying robbery *and such wasn't committed here* . . ." (7RT 2209) (Italics added.)

Reasonable jurists . . . . . would debate if the jury had to decide if the perpetrator, namely Tyler, committed not just the crime of attempted murder, but attempted murder with premeditation, willfulness, and deliberation. Trial counsel never admitted "charges are all good" or that a robbery "*and such wasn't committed here* . . ." (7RT 2209) (Ex. G at 369) (Italics added.)

The law prohibited the prosecutor from arguing that defense counsel conceded Tyler's guilt of robbery and willful premeditated attempted murder. See, *People v. Bell,* 49 Cal.3d 502, 537 (1989). (Improper for a prosecutor to argue to the jury

"as an analysis of the defense argument or strategy that defense counsel believes his client is guilty.")

E. The Prosecutor Reduced the Reasonable Doubt Standard

The prosecutor urged the jury to ignore the reasonable doubt standard, to weigh innocence versus guilt and ". . . put all that [evidence] together [so] there is no interpretation that points to innocence. *The only interpretation points to guilt . . .*" (7RT 2217) (Italics added.)

The prosecutor diluted the reasonable doubt standard and used the circumstantial evidence instruction wording to lower the burden of proof and confuse the jury. "[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation]." *People v. Marshall,* 13 Cal.4th 799,831(1996). "[I]t is error for the prosecutor to suggest that a 'reasonable' account of the evidence satisfies the prosecutor's burden of proof." *People v. Centeno*, 60 Cal.4th 659, 672 (2014).

F. The Jury Instructions Could Not Cure the Prejudicial Misconduct

Closing argument is a critical stage of the trial. Cf. *Herring v. New York,* 422 U.S. 853, 858, 862, 45 L.Ed.2d 593, 95 S.Ct. 2550 (1975) ("[C]losing argument is a critical part of a criminal trial because it provides the parties with 'the opportunity finally to marshal the evidence . . . before submission of the case to judgment.'") " Since it [closing argument] comes from an official representative of the People, it carries great weight and must therefore be reasonably objective. [Citation]'" *People v. Talle,* 111 Cal.App.2d 650, 677 (1952).

Normally, jurors are presumed to follow instructions. *People v. Homick,* 55 Cal.4th 816, 866-867 (2012); but see *People v. Robinson,* 37 Cal.4th 592, 626 (2005). However, "Times [exist] when the evidence is so potent or inflammatory that this presumption is overcome." *People v. Dallas,* 165 Cal.App.4th 940, 958 (2008). The presumption here cannot be overcome.

And, the ". . . damage is hard to undo: 'Otherwise stated, one "cannot unring a bell"; "after the thrust of the saber it is difficult to say forget the wound"; and finally, "If you throw a

skunk into the jury box, you can't instruct the jury not to smell it."'" *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979), quoting *Dunn v. United States,* 307 F.2d 883, 886 (5th Cir. 1962).

The prosecutorial misconduct, by lowering and confusing the reasonable doubt standard, so powerfully affected Tyler's right to a fair trial that it would be "the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect." *People v. Gibson,* 56 Cal.App.3d 119, 130 (1976); see also, *People v. Hendrix*, 214 Cal.App.4th 216, 247-248 (2013); cf. *People v. Rogers*, 57 Cal.4th 2013, 327-328, 332 (2013); *People v. Homick*, 55 Cal.4th at 866-867.

IV. TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE (CLAIMS I - III)

A. Appellate Counsel Rendered Ineffective Assistance by Failing to Challenge the Sufficiency of the Evidence

Under California law, appellate counsel must "argue all issues that are arguable." *People v. Feggans,* 67 Cal.2d 444, 447 (1967); see also *People v. Wende,* 25 Cal.3d 436 (1979), *People v.*

Barton, 21 Cal.3d at 519. A habeas petitioner need not prove his case would have been reversed to show prejudice in the denial of effective appellate counsel. *People v. Rhoden,* 6 Cal.3d 519, 524 (1972).

Appellate counsel raised only a single substantive issue on appeal and two sentencing issues. Appellate counsel rendered ineffective assistance by failing to raise the meritorious insufficient evidence issue that would have resulted in a reversal of Tyler's conviction. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

B. Trial Counsel Rendered Ineffective Assistance by Failing to Request Attempted Voluntary Manslaughter Instructions

The evidence supported an attempted voluntary manslaughter and the required the trial court to issue an attempted voluntary manslaughter as a lesser included offense. Trial counsel failed to request an attempted voluntary manslaughter instruction. *Strickland.* And, the California courts failed to hold an evidentiary hearing to determine if trial counsel made an informed strategic decision to forgo an attempted voluntary manslaughter instruction. But for trial counsel's

failings, Tyler would have had a more favorable result. *Strickland*, 466 U.S. at 691.

C. Appellate Counsel Rendered Ineffective Assistance by Failing to Challenge the Voluntary Manslaughter Instructional Issue on Direct Appeal

Appellate counsel must "argue all issues that are arguable." *People v. Feggans,* 67 Cal.2d at 447; see also *People v. Wende,* 25 Cal.3d 436, *People v. Barton,* 21 Cal.3d at 519. A habeas petitioner need not prove his case would have been reversed to show prejudice in the denial of effective appellate counsel. *People v. Rhoden,* 6 Cal.3d at 524.

Appellate counsel rendered ineffective assistance by failing to raise the attempted voluntary manslaughter instructional issue on appeal. If appellate counsel raised the issue, the attempted murder conviction would have resulted in a reversal of his conviction. *Strickland*, 466 U.S. at 691.

D. Trial Counsel Rendered Ineffective Assistance by Failing to Object to the Prosecutorial Misconduct

Trial counsel rendered effective assistance. If trial counsel objected to the prosecutorial misconduct, the trial court would

have sustained the objection and the prosecutor could not have made arguments that deprived Tyler of due process and a fair trial. U.S. Const., amends. V, VI, XIV.

E. Appellate Counsel Rendered Ineffective Assistance by Failing to Raise Trial Counsel's Ineffective Assistance

Appellate counsel rendered ineffective assistance by failing to raise on appeal the prosecutor's misconduct during closing and trial counsel's failure to object to the prosecutor's misconduct. *Strickland,* 466 U.S. at 691. And, a reasonable probability exists that, absent counsel's deficiency, the result would have been different. *Id. at* 694.(See Argument IV, A)

'"[R]easonable jurists could debate whether (or, . . . agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473 (quoting *Barefoot v. Estelle,* 463 U.S. at 893, n. 4.)

V. THE CUMULATIVE EFFECT OF THE ERRORS IN CLAIMS I - III DEPRIVED TYLER OF DUE PROCESS AND A FAIR TRIAL

The multiple errors occurred that deprived Tyler of due process by rendering Tyler's trial fundamentally unfair. *Parle v.*

Runnels, 505 F.3d 922, 928 (9th Cir. 2007) (citing *Donnelly v. DeChristoforo*, 416 U.S. at 643), U.S. Const., amends. V, VI, XIV.

VI. THE TRIAL COURT ERRED BY FAILING TO SUA SPONTE INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSE OF OTHERS

A. Introduction

The trial court failed to sua sponte instruct the jury on the affirmative defense of others. If the trial court had issued the instruction, the prosecution would have had to prove beyond a reasonable doubt that Tyler did not use force in defense of another. CALCRIM No. 505 provides in part, "The People have the burden of proving beyond a reasonable doubt that the [attempted] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [. . . attempted murder/ [or] attempted voluntary manslaughter]."

Apolonio testified that after he and Jones exited the car, Jones "scuffled" with Daynian. Apolonio testified he saw Tyler turn around and, seeing "Daynian getting scuffled up" by Jones, Tyler fired his gun 2 to 3 times. (4RT 1280) Similarly, Tyler, Sr., told the detective that he [Tyler] shot Jones as, "he was just protecting his brother. . . ." (5RT 1633)

The CCA unreasonably held the "trial court had no sua sponte duty to instruct on defense of another, because no substantial evidence supported this defense." (Ex. At 4)

B. The Evidence Supported a Defense of Others Instruction

In his pretrial statement, Daynian told police ". . . I've had a bad experience, of everybody that I've known gets killed with guns. *I get shot with guns. So I really don't know. And that's why I had the gun. . . .*" (Ex. 45B; 1CT 132) (Italics added.) Tyler reasonably believed that Jones and/or Apolonio armed themselves with guns. *People v. Bland,* 10 Cal. 4th 991, 1005(1995) Firearms are """"tools of the trade""" in the """narcotics business."""" *People v. Glaser*, 11 Cal.4th 354, 367 (1995); *People v. Bradford,* 38 Cal. App. 4th 1733, 1739 (1995) ("[I]t is common knowledge that perpetrators of narcotics offenses keep weapons available to guard their contraband.")

C. The Trial Court's Failure to Issue a Defense of Others Instruction Deprived Tyler of His Constitutional Right to Present a Defense

Tyler presented sufficient evidence supporting the defense of others instruction and the trial court's failure to instruct the

jury on the affirmative defense violated Tyler's federal constitutional right to present a complete defense and violated "clearly established federal law."*Bradley v. Duncan,* 315 F.3d 1091, 1098-99 (9th Cir. 2002).

A clearly established federal constitutional right to a jury instruction exists on "any recognized defense for which there exists evidence sufficient for a reasonable jury to find in [the defendant's] favor." *Bradley v. Duncan*, 315 F.3d at 1098 (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)). *Mathews v. United States*, 485 U.S. at 63, held, as a principle of federal criminal procedure, "'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.'"

A criminal defendant has the right to a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). In *Bradley v. Duncan,* 315 F.3d at 1099, the Ninth Circuit explained that right "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." (Internal quotation marks omitted.)

"[A] state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense." See *Barker v. Yukins,* 199 F.3d 867, 875-76 (6th Cir.1999) (AEDPA habeas relief granted because the erroneous self-defense instruction deprived defendant of a "meaningful opportunity to present a complete defense") (relying on *Trombetta,* 467 U.S. at 485, cert. denied, 530 U.S. 1229 (2000).) The right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." *Tyson v. Trigg,* 50 F.3d 436, 448 (7th Cir.1995); *Bradley v. Duncan*, 315 F.3d at 1098-99.

The trial court's failure to instruct the jury on an affirmative defense, supported by substantial evidence, deprived Tyler of his federal constitutional right to present a defense. *Chambers v. Mississippi,* 410 U.S. 284 (1973); accord *Davis v. Alaska,* 415 U.S. 308, 317 (1974), *Washington v. Texas,* 388 U.S. 14, 19 (1967); U.S. Const., amends. V, VI, XIV.

The instruction required the prosecution to prove beyond a reasonable doubt that Tyler did not use force in defense of another. CALCRIM No. 505. If the trial court had issued an

instruction on the defense of others, it is reasonably probable that Tyler would have received a better result; the instruction would have undermined the claim that Tyler planned or premeditated Jones' attempted murder.

The jury would have found, that if Tyler fired the gun, he did so to protect his brother. Because substantial evidence supported the defense-of-others instruction, the trial court's failure to issue the instruction prejudiced Tyler and deprived him of due process. U.S. Const., amends. V, VI, XIV.

'"[R]easonable jurists could debate whether (or, . . . agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473 (quoting *Barefoot v. Estelle,* 463 U.S. at 893, n. 4.)

CONCLUSION

Mr. Tyler respectfully requests that this Court grant Certiorari.

DATED: May 5, 2025

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s Fay Arfa

Fay Arfa, Attorney for Appellant

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 11 2025

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

JUAN T. TYLER,

Petitioner - Appellant,

v.

LUIS MARTINEZ, Warden,

Respondent - Appellee.

No. 24-1887

D.C. No. 2:22-cv-08250-FMO-DFM
Central District of California,
Los Angeles

ORDER

Before: BERZON and BADE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX A

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JUAN T. TYLER, Petitioner, v. LUIS MARTINEZ, Warden, Respondent.	No. CV 22-08250-FMO (DFM) JUDGMENT

Pursuant to the Court's Order Accepting Report and Recommendation of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

Date: March 25, 2024

_____/s/_____
FERNANDO M. OLGUIN
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JUAN T. TYLER, Petitioner, v. LUIS MARTINEZ, Warden, Respondent.	No. CV 22-08250-FMO (DFM) Order Accepting Report and Recommendation of United States Magistrate Judge

Under 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made.

The Report and Recommendation ("Report") recommends denial of the Petition and dismissal of this action with prejudice. (ECF No. 24.) On February 26, 2024, Petitioner's retained counsel filed Objections to the Report. (ECF No. 27.) As discussed below, the Objections do not warrant a change to the Report's findings or recommendation.

For Grounds One to Four, Petitioner objects that federal review should be *de novo* because the Los Angeles County Superior Court rejected the claims on procedural grounds rather than on the merits. (ECF No. 27 at 13-16.) The

Superior Court rejected Grounds One to Four because Petitioner had failed to show a prima facie case for relief, citing *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). (Lodged Document 11.) Contrary to Petitioner's argument, this was an adjudication on the merits. *See Seeboth v. Allenby*, 789 F.3d 1099, 1103 (9th Cir. 2015) (pin citation to *Duvall* discussing the "substantive requirements for habeas petitioners," "including the requirement to plead facts sufficient to state a claim" was an adjudication on the merits); *see also Montiel v. Chappell*, 43 F.4th 942, 956-57 (9th Cir. 2022) (state court's denial because "no prima facie case for relief is stated" was an adjudication on the merits) (citing *Cullen v. Pinholster*, 563 U.S. 170, 187-88 (2011)). Thus, Grounds One to Four are reviewed under the Antiterrorism and Effective Death Penalty Act.

For Ground One, Petitioner objects that the evidence was insufficient to prove premeditation and deliberation for his attempted murder conviction. (ECF No. 27 at 17-23.) However, as the Report found in extensive detail, the evidence at trial demonstrated planning, motive, manner of attempted killing, and ample time to premeditate and deliberate. (ECF No. 24 at 8-10.) Despite these findings, Petitioner argues that he brought the gun to the incident only for protection; that the victim had hit Petitioner's brother in the face; that he lacked motive to shoot the victim; and that he shot the victim only because the victim was attacking Petitioner's brother. (ECF No. 27 at 19-23.) These arguments were comprehensively addressed by the Report, which correctly concluded that Petitioner's arguments amount "to nothing more than an invitation to reweigh the evidence at trial and intrude on the jury's exclusive province to resolve conflicts in the evidence." (ECF No. 24 at 10.)

For Ground Two, Petitioner objects that the trial court erred by failing to instruct the jury with the lesser-included offense of attempted voluntary manslaughter, based on a theory of imperfect defense of others. (ECF No. 27 at 23-28.) However, as the Report correctly found, even assuming such a

APPENDIX C

claim is cognizable, Petitioner was not entitled to the instruction because his defense at trial was misidentification, not defense of others. (ECF No. 24 at 16-17 (citing *Morris v. Madden*, 2023 WL 4688154, at *25-*26 (C.D. Cal. June 2, 2023).) The objection does not address this critical finding.

For Ground Three, Petitioner objects that the prosecutor committed misconduct during closing arguments, in several instances. (ECF No. 27 at 28-35.) This objection does not meaningfully challenge the several findings made in the Report. Petitioner's objection that the prosecutor vouched for witnesses does not address the Report's finding that the prosecutor made permissible arguments about the evidence, rather than vouch for any witness. (ECF No. 24 at 26-27.) Petitioner's objection that the prosecutor violated the "Golden Rule," by asking the jurors to imagine the victim's point of view, does not address the Report's finding that the comment, even assuming it was improper, was only an isolated moment during a lengthy closing argument. (*Id*. at 29.) Petitioner's objection that the prosecutor argued the defense had conceded guilt does not address the Report's finding that the prosecutor had made no such concession but, rather, had acknowledged Petitioner's defense of mistaken identity. (*Id*. at 30.) Petitioner's objection that the prosecutor lowered the burden of proof does not address the Report's finding that the prosecutor accurately stated the reasonable doubt standard, by quoting it and emphasizing its significance. (*Id*. at 32-33.)

For Grounds One to Three, Petitioner objects that his trial and appellate counsel were ineffective for failing to raise these grounds as issues during trial or appeal. (ECF No. 27 at 35-39.) Because Grounds One to Three are meritless, counsel could not have been ineffective for failing to raise them as issues. (ECF No. 24 at 35-38 (citing *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985).)

APPENDIX C

For Ground Four, Petitioner objects that the cumulative effect of the errors from Grounds One to Three deprived him of due process and a fair trial. (ECF No. 27 at 40.) This objection does not address the Report's finding that there was no error to accumulate. (ECF No. 24 at 38 (citing *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002), *overruled on other ground as recognized by United States v. Chandler*, 658 F. App'x 841, 845 (2016).)

For Ground Five, Petitioner objects that the trial court erred by failing to *sua sponte* instruct the jury on the perfect defense of others as an affirmative defense. (ECF No. 27 at 40-46.) However, the California Court of Appeal, in a reasoned decision, determined that the instruction was not warranted because there was no evidence that Petitioner actually believed his brother was in imminent danger of death or great bodily injury. (Lodged Document 8 at 4-5.) Petitioner's objection does not address the Report's finding that the Court is bound by the California Court of Appeal's determination. (ECF No. 24 at 15 (citing *Bradshaw v. Richey*, 546 U.S. 74, 76 (2006) (*per curiam*).)

The Court accepts the report, findings, and recommendations of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

Date: March 25, 2024

_____/s/_____
FERNANDO M. OLGUIN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JUAN T. TYLER, Petitioner, v. LUIS MARTINEZ, Warden Respondent.	No. CV 22-08250-FMO (DFM) Report and Recommendation of United States Magistrate Judge

This Report and Recommendation is submitted to the Honorable Fernando M. Olguin, United States District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. BACKGROUND

Juan T. Tyler ("Petitioner") was convicted by a Los Angeles County Superior Court jury of second-degree robbery and attempted murder. See CT 175-80.[1] The jury also found that he committed the attempted murder willfully, deliberately, and with premeditation and found true several gun allegations. See id. He was sentenced to 44 years to life in state prison. See 7 RT 2405-06. He has filed a Petition for Writ of Habeas Corpus by a Person in State

[1] Except for citations to the Clerk's and Reporter's Transcripts, all citations to page numbers refer to the CM/ECF pagination.

APPENDIX D

Custody. See Dkt. 1 ("Petition").

Having considered the submissions of the parties, the relevant law, and the underlying record, the Court recommends that the Petition be DENIED.

A. Factual Background

The facts underlying the offenses are taken from the unpublished decision of the California Court of Appeal.[2] See Lodged Document ("LD") 8; People v. Tyler, No. B278095, 2019 WL 155991 (Cal. Ct. App. Jan. 8, 2019). These facts are presumed true for federal habeas corpus review in the absence of clear and convincing evidence to the contrary. See 28 U.S.C. § 2254(e)(1); Crittenden v. Chappell, 804 F.3d 998, 1011 (9th Cir. 2015).

> [Emanuel] Jones drove [Rayvon] Apolonio in a Hyundai to a rendezvous. They saw a silver sedan pull up with three or four people inside. Daynian Tyler and [his brother, Petitioner,] left the silver sedan for the Hyundai. Daynian Tyler sat down in the Hyundai's back seat on the driver's side, behind Jones. Petitioner got in behind Apolonio. [Daynian Tyler and Petitioner] drew guns and demanded marijuana. Jones and Apolonio handed over all eight pounds they had. Petitioner persisted, saying "give me everything," which Jones took to mean "my life, my car, my money, whatever I have on me."
>
> Jones testified he responded "by fighting back." "With quickness," he got out of the car's driver door and went to the driver's side passenger door, which Daynian Tyler was opening. Jones pushed against the rear door to keep Daynian Tyler inside the car, but Tyler forced his way out anyway, gun in hand. There was a "scuffle," meaning Jones hit Daynian Tyler once in the face. The blow did not fell or stun Daynian Tyler but did inspire him to run to the silver sedan, throwing down his gun in flight. Jones did not chase Daynian Tyler but turned back toward the Hyundai.

[2] In all quoted sections of the state appellate court's decision, "Juan Tyler" has been replaced with "Petitioner."

APPENDIX D

> Meanwhile, Petitioner also got out of the Hyundai. As Jones turned away from the fleeing Daynian Tyler and after Daynian Tyler had separated from Jones and was some distance from him, Petitioner fired shots at Jones, hitting him once in the shoulder and once in the abdomen. Jones suffered collapsed lungs, spinal damage, and other injuries.

LD 8 at 2-3.

B. State Appeal and Habeas Petitions

Petitioner appealed, arguing, among other things, that the trial court erred in failing to sua sponte instruct the jury on a defense-of-another defense. See LD 3. On January 8, 2019, the Court of Appeal remanded for the trial court to decide whether to strike or dismiss a firearm enhancement and correct the abstract of judgment but otherwise affirmed the judgment. See LD 8 at 10. Petitioner sought review in the California Supreme Court, which denied review on March 13, 2019. See LD 9, 10. On remand, the trial court struck the firearm enhancement and resentenced Petitioner to 19 years to life. See Dkt. 1-3 at 138-39.

Petitioner then filed a habeas corpus petition in Superior Court, see Petition at 43-90, which denied the petition for failure to establish a prima facie case for relief, see LD 11. Next, Petitioner filed a habeas corpus petition in the Court of Appeal, see LD 12, which summarily denied it on December 21, 2022, see LD 13. He then filed a petition for review, see LD 14, and a habeas corpus petition in the California Supreme Court, which summarily denied them on February 1, 2023, see LD 15. See Cal. Cts., App. Cts. Case Info., http://appellatecases.courtinfo.ca.gov/ (search Case No. S277830) (last visited November 7, 2023).

C. Federal Proceedings

Petitioner filed the instant Petition on November 11, 2022. He asserts the following five claims for relief:

APPENDIX D

(1) the prosecutor failed to present sufficient evidence to support the jury's finding that Petitioner committed attempted murder with premeditation and deliberation;

(2) the trial court violated due process and deprived Petitioner of a fair trial by failing to instruct the jury on attempted voluntary manslaughter under an imperfect-defense-of-others theory as a lesser-included offense to the charged crime of attempted murder, trial counsel was ineffective by failing to request the instruction, and appellate counsel was ineffective in failing to raise the issue on appeal;

(3) the prosecutor committed misconduct by vouching for the prosecution witnesses' credibility, arguing "the golden rule," claiming that defense counsel had conceded Petitioner's guilt, and lowering the burden of proof, and trial and appellate counsel were ineffective in failing to challenge the prosecutor's misconduct;

(4) the cumulative impact of the errors alleged in claims one through three violated due process and deprived Petitioner of his right to a fair trial; and

(5) the trial court violated Petitioner's right to present a complete defense by failing to sua sponte instruct the jury on perfect defense of others as an affirmative defense.

See Petition at 5-6; Dkt. 1-1, Memorandum of Points and Authorities ("MPA") at 22-52.

On March 30, 2023, Respondent filed an Answer. See Dkt. 12 ("Answer"). On October 26, 2023, Petitioner filed a Traverse. See Dkt. 22 ("Traverse"). The matter is now ready for decision.

II. STANDARD OF REVIEW

The Petition is governed by the Antiterrorism and Effective Death

Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. AEDPA bars the relitigation of any claim adjudicated on the merits by a state court unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," at the time the state court adjudicated the claim, id. § 2254(d)(1), or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," id. § 2254(d)(2).

"The 'contrary to' and 'unreasonable application' clauses of § 2254(d)(1) have independent meaning." Cook v. Kernan, 948 F.3d 952, 965 (9th Cir. 2020) (citation omitted). A state court's decision is "contrary to" clearly established federal law if it fails to apply controlling authority, "applies a rule that contradicts the governing law," or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court" and reaches a different result. Williams v. Taylor, 529 U.S. 362, 405-06 (2000). A decision is an "unreasonable application" of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts" of the case. Id. at 407-08.

The Los Angeles County Superior Court rejected claims one through four on habeas corpus review, on the ground that Petitioner had failed to show a prima facie case for relief, citing People v. Duvall, 9 Cal. 4th 464, 474 (1995). See LD 11. This is a merits ruling, which is entitled to AEDPA deference. See Curiel v. Miller, 830 F.3d 864, 870 (9th Cir. 2016) ("We have no cause to treat a state court's summary order with citations as anything but a 'reasoned' decision, provided that the state court's references reveal the basis for its decision."). The Court of Appeal and California Supreme Court both summarily denied review without discussion or citation to authority. See LD 13, 15. The Court "looks through" the unexplained decisions to the decision that provided a relevant rationale and presumes that the unexplained decision

adopted the same reasoning. See Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018). Thus, the Superior Court's denial is the relevant state court decision for purposes of AEDPA review. See Berghuis v. Thompkins, 560 U.S. 370, 378-80 (2010)

The Court of Appeal rejected claim five on the merits in a reasoned decision on direct review; the California Supreme Court then summarily denied review. See LD 8, 10. The Court of Appeal's decision is the relevant state court decision for purposes of AEDPA review.

III. DISCUSSION

A. Sufficiency of the Evidence

Petitioner contends that there was insufficient evidence to support the jury's finding that he acted with premeditation and deliberation in the attempted murder of Jones. See MPA at 18-23; Traverse at 10-12. He argues that he did not have time to premediate or deliberate because testimony showed that he shot Jones "within seconds" of seeing Jones punch Daynian. MPA at 22; Traverse at 11. He further argues that he could not have planned to murder Jones, as opposed to rob him, because he did not kill Jones when he had the chance to do so when he was holding a gun to Jones's head. See MPA at 22; Traverse at 11.

1. Legal Standard

Under Jackson v. Virginia, 443 U.S. 307 (1979), evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. "Jackson claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." Coleman v. Johnson, 566 U.S. 650, 651 (2012) (per curiam). "First, on direct appeal, it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence

admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." Id. (internal quotation marks and citation omitted). "[S]econd, on habeas review, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was objectively unreasonable." Id. (internal quotation marks and citation omitted). The Jackson standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." Jackson, 443 U.S. at 324 n.16; Boyer v. Belleque, 659 F.3d 957, 964 (9th Cir. 2011).

Here, Petitioner challenges the jury's finding that the attempted murder was deliberate and premeditated. To prove deliberate and premeditated murder under California law, the prosecutor must show that the defendant weighed the consequences and considerations of his actions before taking the action leading to his conviction. See People v. Koontz, 27 Cal. 4th 1041, 1080 (2002). The test "is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ." Id.

In considering whether the defendant acted with premeditation and deliberation, California courts consider three categories of evidence: (1) prior planning activity; (2) motive; and (3) the manner of killing. See Davis v. Woodford, 384 F.3d 628, 640 (9th Cir. 2004). A guilty verdict is "typically sustained 'when there is evidence of all three types'; otherwise, there must be 'at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3).'" Id. at 640 (citation omitted).

2. Analysis

The Superior Court was not objectively unreasonable in rejecting

APPENDIX D

Petitioner's sufficiency-of-the-evidence claim. First, the evidence at trial supported a reasonable inference that Petitioner planned to kill Jones. Witnesses testified that both Petitioner and Daynian armed themselves with loaded guns before going to meet Jones. See 3 RT 962, 967-68; 4 RT 1215, 1276-78; Jones v. Wood, 207 F.3d 557, 563 (9th Cir. 2000) (finding evidence sufficient to prove premeditation when crime involved planned procurement of weapon even though evidence "was almost entirely circumstantial and relatively weak"); People v. Romero, 44 Cal. 4th 386, 401 (2008) (finding defendant's decision to bring gun constituted evidence that he planned to shoot victim). And after they had drawn their weapons on Jones and Apolonio, Daynian or Petitioner pressed a gun to the back of Jones's head. See 3 RT 969; 4 RT 1276.

That Petitioner did not kill Jones at that point does not, as Petitioner suggests, conclusively show that he intended only to rob Jones. See MPA at 22. Before Petitioner and Daynian were sure that Jones had given up everything he had of value, Jones disrupted Petitioner's plan by slipping out of car and momentarily trapping Daynian inside. See 4 RT 1275-79. Apolonio simultaneously slipped out of the car because he believed his "head[] [was] going to get blown off on [the car's] dashboard." 4 RT 1278. Given these facts, the jury reasonably could have concluded that Petitioner and Daynian planned to kill Jones all along but were prevented from doing so by Jones and Apolonio's unexpected escape.

Second, Petitioner had ample motive to kill Jones. To begin, Jones was a witness to the crime Petitioner and Daynian had just committed – namely, robbery by using a firearm. See People v. Hughes, 27 Cal. 4th 287, 371 (2002) (finding need to eliminate witness to crime provided motive for purposes of showing premeditation and deliberation). Additionally, Petitioner might have believed that Jones, if permitted to live, would seek retribution against him and

Daynian. After all, they had just stolen several pounds of marijuana valued at $5,000.00 per pound. See 3 RT 920. But even putting those obvious motives aside, Jones had hit Petitioner's brother. See 3 RT 974. That fact alone provided sufficient motive for Petitioner to kill Jones. See People v. Otero, No. B225496, 2012 WL 2861016, at *5 (Cal. Ct. App. July 12, 2012) (finding sufficient evidence to show appellant acted with deliberation and premeditation in killing victim when appellant's motive for killing was to avenge brother's beating in street fight).

Third, the manner of the attempted murder was consistent with premeditation and deliberation. Petitioner fired three shots from close range at Jones, one of which hit his abdomen and caused his lung to collapse. See 3 RT 975-976, 981-983, 1031-1032, 1043; see also Jackson, 443 U.S. at 325 (reasoning that evidence of shooting multiple times at close range indicates manner of attempted killing consistent with premeditation and deliberation); Koontz, 27 Cal. 4th at 1082 (finding manner of killing supported deliberate intent to kill where defendant fired close range shot "at a vital area of the [victim's] body"); see also Drayden v. White, 232 F.3d 704, 709 (9th Cir. 2000) ("[I]n California, when manner-of-killing evidence strongly suggests premeditation and deliberation, that evidence is enough, by itself, to sustain a conviction for first-degree murder." (citation omitted)).

Fourth, ample evidence at trial supported a reasonable inference that Petitioner had time to premeditate and deliberate before shooting Jones. According to Jones's testimony, his 10-second "scuffle" with Daynian had ended, and Daynian had run away towards his car before Jones even turned to face Petitioner. See 3 RT 975, 1031-32. And, according to Jones, Petitioner did not fire at him until he had turned to face Petitioner. See id. Jones's testimony was corroborated in large part by video-surveillance footage of the shooting. See 3 RT 1022-25. That footage showed that Daynian had indeed run off

before the shooting occurred and that Petitioner ran to his car and back to Jones's car before opening fire on Jones. See 3 RT 1023-25. Between when the 10-second scuffle ended and when he shot Jones after Daynian had run to safety, Petitioner had time to weigh the consequences and considerations of his actions and make a calculated decision to murder Jones.

Finally, there is no merit to Petitioner's claim that Apolonio's testimony precluded a finding that the attempted murder was premeditated and deliberate. See MPA at 20, 22. Apolonio testified that Petitioner saw "Daynian getting scuffled up" and then "aim[ed] [his] weapon" and shot "about 2 to 3 times." 4 RT 1280. As explained below in connection with Petitioner's instructional-error claims, it is far from clear that Apolonio's testimony conflicted with Jones's testimony about the sequence of events before Petitioner opened fire. But to the extent it did, the jury is presumed to have resolved that conflict in favor of the jury's verdict. See Cavazos v. Smith, 565 U.S. 1, 2 (2011) (per curiam) ("[A] reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" (quoting Jackson, 443 U.S. at 326)). Thus, at bottom, Petitioner's argument concerning Apolonio's testimony amounts to nothing more than an invitation to reweigh the evidence at trial and intrude on the jury's exclusive province to resolve conflicts in the evidence. Reviewing courts are prohibited from doing either. See id.

Petitioner is not entitled to relief on his sufficiency-of-the-evidence claim.

B. Instructional Error

Petitioner's second and fifth claims assert instructional error. See MPA at 23-32, 47-52; see also Traverse at 12-20, 27-31. Petitioner's second claim is that the trial court violated due process and deprived him of a fair trial by

APPENDIX D

failing to instruct the jury on attempted voluntary manslaughter under an imperfect-defense-of-others theory as a lesser-included offense of attempted murder. See id. at 23-32. According to Petitioner, substantial evidence supported the instruction, and as such, the jury likely would have found him guilty of voluntary manslaughter rather than attempted murder if given the choice between the two. By failing to instruct the jury on voluntary manslaughter, the trial court left the jury with an "all-or-nothing choice" between convicting him of attempted murder and acquitting him of any wrongdoing concerning the shooting of Jones. Id. at 31.[3]

Petitioner's fifth claim is that the trial court violated his right to present a complete defense by failing to sua sponte instruct the jury on perfect defense of others as an affirmative defense to attempted murder. See id. at 47-52. According to Petitioner, "the instruction would have undermined" any suggestion that he acted with premeditation and "proved Jones was the aggressor and [Petitioner] fired the gun to protect his brother." See id. at 51.

By and large, Petitioner cites the same evidence and makes the same fact-based argument in support of both claims. First, he cites Apolonio's testimony that Petitioner saw "Daynian getting scuffled up" and then "aim[ed] [his] weapon" and shot "about 2 to 3 times." 4 RT 1280. That testimony, according to Petitioner, established that he shot Jones believing—be it

[3] Respondent contends that Teague v. Lane, 488 U.S. 289 (1989), bars this instructional-error claim. See Answer at 29-33. The Ninth Circuit has held that Teague does not bar a constitutional claim based on the failure to instruct on imperfect self-defense. See Menendez v. Terhune, 422 F.3d 1012, 1029 n.6 (9th Cir. 2005). Regardless, because the Court recommends that the claim be denied on its merits, no prejudice adheres to either party from not conducting a Teague analysis. See Moore v. Pollard, No. 19-7771, 2022 WL 2079722, at *6 n.7 (C.D. Cal. Mar. 23, 2023) (declining to address Teague when petitioner's claims were "plainly meritless"), report and recommendation adopted, 2022 WL 1591692 (C.D. Cal. May 19, 2022).

APPENDIX D

reasonably or unreasonably—that Jones was going to kill or cause great bodily injury to Daynian. See MPA at 19-20, 51. Second, Petitioner cites a pretrial statement his father made to the investigating detective concerning the shooting. See id. at 31, 51. Specifically, his father told the detective that "[Petitioner] was just protecting his brother. I would have done the same thing." 5 RT 1633. That statement, according to Petitioner, corroborated Apolonio's testimony and showed that Petitioner shot Jones because he believed that Daynian's life was in danger. See MPA at 31, 51.

1. Applicable Law

The United States Supreme Court has never held that a trial court's failure to instruct on a lesser-included offense in a non-capital case violates due process. See Morris v. Madden, No. 20-7402, 2023 WL 4688154, at *24 (C.D. Cal. June 2, 2023) (noting lack of controlling Supreme Court authority concerning non-capital defendant's right to lesser-included-offense instruction), report and recommendation adopted, 2023 WL 4684899 (C.D. Cal. July 19, 2023). Rather, the Supreme Court has held only that a defendant has a constitutional right to have the jury instructed on lesser-included offenses in capital cases. See Beck v. Alabama, 447 U.S. 625, 638 (1980). In so holding, the Supreme Court expressly declined to state whether that right extended to non-capital cases. See id. at 638 n.14.

In the years following Beck, the circuits have split on the question of 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 generally does not present a federal constitutional question and does not provide grounds for habeas relief. See id. at 929.

Notwithstanding this rule, a defendant generally has a constitutional

right to meaningfully present a complete defense. See Crane v. Kentucky, 476 U.S. 683, 689-90 (1986); see also Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984) (stating general rule that failure to instruct on lesser included offense in non-capital cases does not present federal constitutional question but noting that rule "may not apply to every habeas corpus review, because the criminal defendant is also entitled to adequate instructions on his or her theory of defense"). 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. 333, 343 (1993). 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. (citation omitted).

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 (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." Id. at 63 (citation omitted).

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.[4] See id. at 59, 63-65. And indeed, more recently, the Ninth Circuit has repeatedly held that the right to jury instructions on a defense is not clearly established and thus cannot provide a basis for habeas relief. See Marquez v. Gentry, 708 F. App'x 924, 925 & n.2 (9th Cir. 2018) (holding that "right to present a 'complete defense' under federal law" extends only to "the 'exclusion of evidence' and the 'testimony of defense witnesses'" and explaining that its opinion in Bradley failed to recognize that Mathews involved direct appeal of federal district court case, not habeas review); Larsen v. Paramo, 700 F. App'x 594, 596 (9th Cir. 2017) (explaining that Mathews "did not recognize a constitutional right to a jury instruction" but rather decided only "'general proposition' of federal criminal procedure" (quoting Mathews, 485 U.S. at 63)).

To the extent clearly established federal law provides that a petitioner has a constitutional right to adequate jury instructions on a theory of defense, the petitioner 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. Further, federal habeas relief remains unwarranted unless the instructional error caused a "substantial and injurious effect or influence in determining the jury's verdict." Bradley, 315 F.3d at 1099 (citation omitted);

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[4] The Supreme Court has "repeatedly emphasized [that] . . . circuit precedent does not constitute clearly established Federal law," Glebe v. Frost, 574 U.S. 21, 24 (2014) (per curiam) (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 v. Smith, 574 U.S. 1, 7 (2014) (per curiam) (citation omitted). Nonetheless, this Court is of course bound by it.

APPENDIX D

see Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993). Thus, relief is appropriate only if the court has grave doubt about whether a federal-law trial error was actually prejudicial. See Davis v. Ayala, 576 U.S. 257, 267-68 (2015).

2. Analysis

Petitioner is not entitled to habeas relief on either of his instructional-error claims. Petitioner's suggestion that the Court of Appeal erroneously applied state law in rejecting his instructional-error claims does not afford a basis for federal habeas relief. See Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009) ("[W]e have repeatedly held that 'it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.'" (citation omitted)). Additionally, the Court is bound by the state court's finding that Petitioner was not entitled to any instruction on defense of others. See LD 8 at 4-5; Bradshaw v. Richey, 546 U.S. 74, 76 (2006) (per curiam) ("[A] state court's interpretation of state law . . . binds a federal court sitting in habeas corpus." (citations omitted)).

Applying the general rule discussed above, Petitioner's challenge to the trial court's failure to instruct the jury on any lesser-included offense to attempted murder is not cognizable on federal habeas review. See Solis, 219 F.3d at 929; Bashor, 730 F.2d at 1240 ("Failure of a state court to instruct on a lesser offense fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding." (citation omitted)). Indeed, because no Supreme Court authority holds that a defendant has a constitutional right to a jury instruction on a lesser-included offense or on an affirmative defense in a noncapital case, the state court could not have unreasonably applied clearly established federal law when they rejected Petitioner's claims. 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.").

Petitioner argues that the trial court's failure to instruct on a lesser included offense "deprived him of a constitutional right to receive adequate instructions regarding his theory of defense." Traverse at 15; see also id. at 28-31 (asserting similar argument with respect to fifth claim for relief). Although such a claim may exist on habeas review, see, e.g., Bashor, 730 F.2d at 1240; Bradley, 315 F.3d at 1099, Petitioner's constitutional right to present a defense was not violated in this case.

First, he did not pursue a defense-of-others theory of defense at trial. Rather, his defense was that he was not involved in the shooting and that Jones and Apolonio had incorrectly identified him as the shooter. In his opening statement, trial counsel told the jury that Petitioner "did not rob, did not shoot anyone on October 18" and that "nothing will place him inside the victim's car at any time." 2 RT 618. He also stated that Apolonio had identified someone else as the shooter and that Jones's pretrial identification of Petitioner was unreliable because Jones was "in bad shape" and on a "litany of medications" when he made the identification. 2 RT 619-20. Similarly, in his closing argument, trial counsel maintained that Petitioner had no role in the shooting. See 7 RT 2132-33 ("Truth is there's no physical evidence linking [Petitioner] to this incident. No fingerprints, no DNA, no gun, nothing in the victim's car, hair samples, anything links [Petitioner] to this incident."), 2135-41 (arguing that Jones's and Apolonio's identifications of Petitioner as shooter were untrustworthy and unreliable). Because Petitioner's theory of defense was incompatible with a defense-of-others theory, the trial court's refusal to instruct the jury on defense of others did not deprive him of his right to present a complete defense. See Morris, 2023 WL 4688154, at *25-26 (holding that

APPENDIX D

petitioner was not deprived of right to present complete defense based on trial court's refusal to instruct jury on lesser-included offenses when petitioner's defense was that he committed no wrongdoing of any kind).

Second, neither defense-of-others instruction was supported by substantial evidence. See Mathews, 485 U.S. at 63. In California, perfect defense of others is a complete defense to a murder charge, rendering a killing a justifiable homicide. People v. Randle, 35 Cal. 4th 987, 996 (2005), overruled on other grounds by, People v. Chun, 45 Cal. 4th 1172 (2009). For perfect defense of others to apply, the perpetrator must actually and reasonably believe in the necessity of defending another from "imminent danger of death or great bodily injury." Id. at 994. By contrast, the doctrine of imperfect defense of others provides that "[a]n honest but unreasonable belief that it is necessary to defend [another] from imminent peril to life or great bodily injury negates malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter." People v. Rogers, 39 Cal. 4th 826, 883 (2006) (citation omitted). The doctrine is "narrow" and applies "only when the defendant has an actual belief in the need for [defending another] and only when the defendant fears immediate harm that must be instantly dealt with." Id. (citations and internal quotation marks omitted).

Here, Petitioner has failed to show that substantial evidence supported either defense-of-others instruction. He did not testify and thus offered no insight into what he believed when he shot Jones. See Gonzalez v. Allison, No. 11-0960, 2012 WL 5944768, at *17 (S.D. Cal. June 18, 2012) (holding that state court's conclusion that trial court did not err in refusing to instruct on imperfect self-defense was reasonable when petitioner did not testify and thus could not establish that he subjectively believed that he was in imminent peril at moment he fired gun), report and recommendation adopted, 2012 WL 5932673 (S.D. Cal. Nov. 27, 2012). The testimony at trial, moreover, showed

APPENDIX D

that Jones did not pose any risk to Daynian. Indeed, Jones testified without contradiction that neither he nor Apolonio was armed. See 3 RT 1053. And Jones testified that when he punched Daynian, Daynian merely stumbled and then ran away. See 3 RT 1031-32. According to Jones, Petitioner did not open fire until the 10-second scuffle between Jones and Daynian had ended and Daynian had reached a place of relative safety. See 3 RT 975, 1031-32. As such, no reasonable juror would conclude that Petitioner actually believed he needed to fire three shots from close range at Jones to protect Daynian from imminent harm or death.

Petitioner's claim that Apolonio's testimony was sufficient to warrant either defense-of-others instruction is unavailing. As related above, Apolonio testified that Petitioner saw "Daynian getting scuffled up" and then "aim[ed] [his] weapon" and shot "about 2 to 3 times," 4 RT 1280. But Apolonio did not testify how much time passed between the time Petitioner saw the "scuffle" and the time he opened fire. And Apolonio was not asked if the scuffle had ended before Petitioner opened fire. To the contrary, he testified that he did not watch as either Daynian or Petitioner ran back to their respective vehicles. See 4 RT 1289. He also testified that he was behind the car door of Jones's car for most of the events that preceded the shooting and that he was not paying any attention "at all" to what Jones, Petitioner, or Daynian were doing. See 4 RT 1279, 1299. In any event, Apolonio's testimony shed no light on what Petitioner actually believed when he opened fire on Jones.

Petitioner's claim that his father's pretrial statement to police constituted substantial evidence supporting either a perfect- or imperfect-defense-of-others instruction is equally unpersuasive. Although his father told police that Petitioner was "just protecting his brother," 5 RT 1633, that statement does not constitute substantial evidence supporting the proposed instructions because Petitioner's father was not present at the shooting and thus had no

APPENDIX D

way of knowing what actually happened—let alone what Petitioner actually believed in the moment. And in any event, he testified at trial that his pretrial statement was unrelated to the shooting of Jones and that neither Petitioner nor Daynian told him anything about the shooting before he spoke with the detective. See 2 RT 699-701, 704-05. And later, he testified that Petitioner and Daynian both told him that they were not involved in Jones's shooting and that Petitioner was not even present in the parking lot where Jones was shot. See 2 RT 704-05, 713.

Furthermore, that drug dealers, like Jones, are known to keep guns to protect themselves and their drugs does not, without more, constitute substantial evidence that Petitioner actually believed Jones posed an imminent risk to Daynian's life. See MPA at 37; see also Traverse at 17. Petitioner cites several California cases acknowledging that drug dealers often keep guns for protection and argues that Petitioner would have reasonably believed that Jones or Apolonio was armed on that basis. See MPA at 37. However, Jones testified without contradiction that neither he nor Apolonio was armed. See 3 RT 1053. Again, Petitioner did not testify and thus offered no insight into whether he believed Jones or Apolonio was armed. Given this, Petitioner's cited cases are of no consequence; they do not suffice to contradict the evidence actually presented at trial.

Daynian's pretrial statement to the investigating detective concerning a gunshot he suffered likewise does not suggest that Jones was armed. During his pre-trial interview with police, Daynian stated that Jones had brought a gun to the drug deal and had shot him several times in the leg. See CT 132-37. Daynian showed the detective scars on his left leg that he claimed were the result of a shooting. See CT 134-37. Although a recording of Daynian's pretrial statement was played for the jury, see 6 RT 1802-14, it was insufficient, for a number of reasons, to support a reasonable inference that Jones was armed or

APPENDIX D

that he shot Daynian. To begin, Daynian never testified to those facts at trial, and no testimony at trial suggested that Jones was armed or that he ever got ahold of a gun during his 10-second scuffle with Daynian. Moreover, Daynian testified that he had been shot in his leg sometime around 2008. See 2 RT 673-76, 681. And the investigating detective to whom Daynian made the pretrial statement observed Daynian's scars in December of 2012 and concluded that whatever caused them occurred long before October 2012, when the Jones shooting occurred. See 6 RT 1813-14. The detective also testified that when Daynian was describing the 2008 shooting at trial, Daynian had pointed to the same scars he had previously claimed were the result of having been shot by Jones. See 6 RT 1811. And as trial counsel noted in his closing argument, Daynian initially told the investigating detective that he had been shot in the leg years before Jones was shot. See 7 RT 2142. Accordingly, no credible evidence suggested that Jones was armed at any point during his encounter with Petitioner and Daynian. Put simply, there was no substantial evidence supporting the proposed defense-of-others instructions, and thus the trial court did not deprive Petitioner of his right to a complete defense by failing to instruct the jury with them.

Regardless, even assuming error, Petitioner cannot show that the trial court's failure to instruct the jury on perfect or imperfect defense of others had a substantial and injurious impact on the jury's verdict. See Brecht, 507 U.S. at 638. The jury explicitly found that Petitioner acted with premeditation and deliberation. See CT 179. Consequently, it could not have believed that he merely acted in defense of Daynian. See Hernandez v. McDowell, No. 16-03039, 2018 WL 6131221, at *9 (C.D. Cal. Sept. 27, 2018) (finding that petitioner could not establish prejudice concerning irregularities in instructions on perfect and imperfect self-defense when jury found that charged murder was premeditated and deliberate and thus "necessarily rejected" claim that

APPENDIX D

petitioner "had a reasonable or unreasonable belief in the need to defend against imminent peril"), report and recommendation adopted, 2019 WL 858642 (C.D. Cal., Feb. 21, 2019).

Moreover, the evidence on which Petitioner relies to show that he actually believed Daynian's life was at risk was far from compelling. His father's pretrial statement was unlikely to have convinced a jury that Petitioner actually believed he needed to protect Daynian when he shot Jones for a variety of reasons. As Petitioner's father, he had motive to falsify his account of what he purportedly learned about the shooting to protect his son. See House v. Bell, 547 U.S. 518, 552 (2006) (explaining that eyewitness testimony given by disinterested witness with no motive to lie "has more probative value" than "testimony from inmates, suspects, or friends or relations of the accused"). And as related above, he had no firsthand knowledge about the shooting or why it occurred, and he recanted his pretrial statement at trial. In any event, his pretrial statement concerning the shooting was riddled with inaccuracies. For example, he told police that Jones had tried to lock Daynian in the car and drive away. See 5 RT 1635. But the surveillance-video footage that was played to the jury showed that this never happened, and no first-hand account of the shooting suggested otherwise. Additionally, he told police that Daynian had been shot during the episode. But again, the video does not reflect this, and no witness—including Daynian himself—testified that Daynian had been shot during the incident. Put simply, Petitioner's father was not a credible witness for the defense, and there is no reason to believe the jury would have relied on any statement he made, whether at trial or before, to find that Petitioner actually believed he needed to shot Jones to protect Daynian from imminent harm or death.

Similarly, Apolonia's testimony that Petitioner saw Jones fighting with his brother and then shot Jones would not have persuaded the jury that

Petitioner actually believed he had to shoot Jones to protect Daynian from imminent harm. As explained above, Apolonio did not elaborate on (and was not questioned about) the sequence of events underlying the shooting, and he admitted that he was not paying attention to what anyone was doing before Jones was shot. And any suggestion that Petitioner shot Jones during his 10-second scuffle with Daynian conflicted with Jones's account of the shooting. Indeed, Jones testified that after being punched, Daynian ran back to his car, and only afterwards did Petitioner open fire. See 3 RT 975. More importantly, the surveillance video of the shooting showed that during the 10-second scuffle between Jones and Daynian, Petitioner ran back to his car and then back to the front of Jones's car before aiming and firing at Jones. See 3 RT 1022-25. It also showed that Daynian had run away from Jones before Petitioner opened fire. In other words, Petitioner did not see the fight between Jones and Daynian and then immediately fire at Jones.

In sum, the trial court's failure to instruct the jury on perfect or imperfect defense of others did not deprive Petitioner of his right to present a complete defense, and even assuming error, he suffered no prejudice. Accordingly, he is not entitled to habeas relief on either of his instructional-error claims.

C. The Prosecutor's Closing Arguments

Petitioner contends that the prosecutor committed four acts of misconduct that alone or in combination deprived him of his right to a fair trial. See MPA at 33-44; Traverse at 20-27.

1. Legal Standard

Prosecutorial misconduct warrants habeas relief only if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citation omitted). Under Darden, the first question is whether the prosecutor committed misconduct; if so, the decisive question is whether the misconduct infected the

APPENDIX D

trial with unfairness. See Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir. 2005). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219 (1982).

To determine whether a prosecutor's comments amount to a due process violation, the reviewing court must examine the entire proceedings so that the comments may be placed in their proper context. See Boyde v. California, 494 U.S. 370, 384-85 (1990). Assuming, however, that a petitioner can establish that the prosecutor engaged in misconduct, habeas relief nevertheless is unwarranted unless the petitioner can show that the misconduct had a substantial and injurious impact on the jury's verdict. Karis v. Calderon, 283 F.3d 1117, 1128 (9th Cir. 2002) (citing Brecht, 507 U.S. at 638).

2. Analysis

None of Petitioner's prosecutorial-misconduct allegations warrant habeas relief. Each allegation is addressed in turn below.

a. Vouching for the prosecution's witnesses

Petitioner contends that the prosecutor committed misconduct by vouching for the prosecution witnesses' credibility, citing four separate excerpts from the prosecutor's closing arguments. See MPA at 35-37; see also Traverse at 21-23. First, he cites the prosecutor's statements that he doubted the jury would need to spend too much time deciding "whether or not somebody pulling a gun out of their waistband and holding it to the back of somebody's head and saying, 'Give me everything,' [was] actually a robbery" or whether a person commits attempted murder when "[he] point[s] a weapon at someone and [he] fire[s] not once, not twice, pause and then for a third time." MPA at 35-36 (quoting 7 RT 2103-04).

Second, Petitioner faults the prosecutor for making the following statement concerning whether Jones was telling the truth when he testified:

> [Jones] told you the truth about what his life was like at the time; that he was selling drugs for a couple of years, specifically marijuana, and he worked explicitly with [Petitioner] that day to set up the drug deal for the 5 pounds. They had their plan to go to Ralphs, sell the 5 pounds, and then be on about his way. [¶] [Jones] called himself a, quote, "honest drug dealer[,]" and I asked him what that meant? And that's he didn't use guns. He was straight up about what he did. Got his supply, marked it up, and then sold it to the buyer without any intervening violence.

Id. at 36 (quoting 7 RT 2105).

Third, he cites the following statement concerning Daynian's testimony:

> We know some of the things that Daynian said are true because they're consistent with what the victim told us about the crime. And they're things that only someone who was there could know. We know that Daynian knows who Detective Noone is because you heard what? An hour and-a-half-long interview of them talking to each other. It wasn't on the phone. It was face to face about this far apart as Daynian laid in the hospital bed. I took extensive notes during Daynian's testimony. And I'd like to go over some of the other things that he told us. Some things that we know are lies and some things that we know are true because of the other evidence.

Id. (quoting 7 RT 2121).

Finally, he cites a statement by the prosecutor arguing that only Petitioner and Daynian were armed:

> The lack of guns in this case is also incredibly telling. Remember the victims tell you that they didn't have guns when they came. Only the defendants did. And just one gun was recovered. We know, based on the ballistics that that's not the gun that fired the 3 rounds where the casings ended up at the back of the car. That came from a separate gun, like Detective Noone told us, that left with the shooter. . . .

Id. at 37 (quoting 7 RT 2113).

APPENDIX D

Petitioner offers little by way of analysis in the MPA to show these statements amounted to vouching; at most, he argues that the prosecutor's statement that the victims were not armed "overlooked that drug dealers are known to keep guns to protect not only themselves, but also their drugs and drug proceeds." Id. (citations omitted). He clarifies in his Traverse that by making the above statements, the prosecution "repeatedly and personally asserted the veracity of the prosecution witnesses," and therefore "encouraged the jury to act based on considerations other than the facts of the case." Traverse at 22.

Although prosecutors are permitted to argue reasonable inferences from the evidence at trial, see Duckett v. Godinez, 67 F.3d 734, 742 (9th Cir. 1995), they may not vouch for the credibility of a prosecution witness, see United States v. Young, 470 U.S. 1, 18-19 (1985); United States v. Jackson, 84 F.3d 1154, 1158 (9th Cir. 1996). "Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980) (citations omitted).

An example of impermissible vouching occurs when the prosecutor personally assures the jury that a prosecution witness is honest. See Hein v. Sullivan, 601 F.3d 897, 912-13 (9th Cir. 2010) (concluding that prosecutor impermissibly vouched for witness's credibility when he described the witness as a "very powerful and credible witness" and "the model of a perfect witness," who was "painfully honest," "so honest about it," and possessed "the kind of integrity that our system would like to see"). By contrast, no vouching occurs when the prosecutor argues about the truthfulness of a witness's statements based upon evidence in the record, provided that the argument does not imply that the prosecution is personally assuring the witness's veracity or reflect the prosecutor's personal beliefs. See United States

APPENDIX D

v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993), as amended on denial of reh'g (Apr. 15, 1993) (holding that prosecutor did not vouch for witness when he argued that "if [the witness is] lying, isn't she doing a better job of it? I submit to you, ladies and gentlemen, that she's not lying. I submit to you that she's telling the truth" because argument was "simply an inference from evidence in the record"); United States v. Preston, 845 F. App'x 526, 529 (9th Cir. 2021) (prosecutor's statements "Why do we think he's credible" and "I would submit to you he's a very credible witness" were permissible because prosecutor was arguing that jury should find witness credible based on evidence in record and inferences to be drawn therefrom).

Here, the prosecutor did not impermissibly vouch for any witness. First, the prosecutor's argument concerning the ease with which the jury would decide whether a robbery and attempted murder had occurred did not reference any witness. Indeed, they did not even reference Petitioner. And in any event, the prosecutor's statement was a fair comment on the evidence because Jones and Apolonio testified without contradiction to facts supporting both crimes, and the only disputed issue at trial was whether Petitioner was the person who committed them.

Second, the prosecutor did not impermissibly vouch for Jones by arguing that he had "told you the truth about what his life was like at the time" or by stating that he "was straight up about what he did." 7 RT 2105. At bottom, the prosecutor was simply arguing that Jones's willingness to be forthcoming about his past added credibility to his testimony. The prosecutor's argument was proper because it was based on Jones's testimony at trial and did not imply that the prosecutor had personal knowledge concerning Jones's credibility. As such, there was no reason for the jury to believe that the prosecutor had any personal knowledge concerning Jones's credibility.

Third, the prosecutor's arguments concerning Daynian's testimony were

likewise proper. In arguing that aspects of Daynian's testimony were true and other aspects were false, the prosecutor cited evidence adduced at trial. For example, in arguing that aspects of Daynian's testimony were true, the prosecutor noted that they were corroborated by Jones's testimony. See 7 RT 2121 (arguing that "some of the things that Daynian said are true because they're consistent with what the victim told us about the crime"). And in arguing that some aspects of Daynian's testimony were false, the prosecutor again alluded to "other evidence." Id. Specifically, the prosecutor cited Daynian's pretrial statements to police that contradicted his trial testimony. See id. at 2121-24. As such, these arguments did not constitute misconduct.

Fourth, the prosecutor did not vouch for any witness or commit any misconduct in arguing that only Petitioner and Daynian were armed. That argument was supported by Jones's testimony, who testified without contradiction that neither he nor Apolonio was armed, whereas Petitioner and Daynian were. See 3 RT 962, 967, 1053; see also 4 RT 1215, 1276-78 (Apolonio testifying that Petitioner and Daynian drew handguns). There is also no merit to Petitioner's suggestion that the prosecutor committed misconduct by "overlook[ing]" that drug dealers often carry weapons for protection. MPA at 37. The prosecutor was not obligated to argue that point, and Petitioner was free to do so on his own. Of course, Petitioner did not do so because he pursued a mistaken-identity defense, and whether Jones was armed or not was irrelevant to that defense.

In short, the prosecutor did not impermissibly vouch for any witness or commit misconduct in making any of the statements that Petitioner cites. Accordingly, Petitioner is not entitled to relief on this claim.

b. "Golden Rule" violation

Petitioner argues that the prosecutor violated the "golden rule" by asking the jurors to "view the evidence through the victim's eyes and their own eyes."

MPA at 37; see also Traverse at 23-24. Specifically, he faults the prosecutor for making the following statement:

> I knew a little bit about [Jones and Apolonio], what [Jones] went through in his life now and dealing with that kind of a moment, which I don't think anybody else here really has exactly, not as actual victims but maybe through loved ones or friends of loved ones or reading the paper every freaking day. [¶] Going through this is a hard core. So at least we need to be the voice of justice at least the truth also known in my mind is justice is achieved. So I'm passionate about it. And I do care. But not about anything other than you just please seek the truth.

MPA at 38 (quoting 7 RT 2152).

The state court was not objectively unreasonable in rejecting this claim. A "golden rule" argument is one "in which a lawyer asks the jurors to reach a verdict by imagining themselves or someone they care about in the place of the injured plaintiff or crime victim." Dyleski v. Grounds, No. 12-05336, 2016 WL 3194997, at *37 (N.D. Cal. June 9, 2016) (citation omitted). Such an argument constitutes misconduct because it "inappropriately obscure[s] the fact that [the prosecutor's] role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim." Fields v. Woodford, 309 F.3d 1095, 1109 (9th Cir. 2002) (quoting Drayden, 232 F.3d at 712-13).

Here, however, the prosecutor did not make a "golden rule" argument. To be sure, he argued Jones (and to a lesser extent, Apolonio) had experienced something "hardcore" that none of the jurors had experienced and that the experience had lasting impacts on Jones's life. But the prosecutor never asked the jury to imagine the robbery or shooting from Jones's or Apolonio's point of view. To the contrary, in the supposedly offending statement, the prosecutor said nothing directly about either crime. As such, the prosecutor did not violate the "golden rule."

APPENDIX D

In any event, even if the prosecutor's argument violated the "golden rule" or amounted to any other type of misconduct, it did not result in a fundamentally unfair trial. The offending comment was isolated, comprising less than 11 full lines of the transcript, see 7 RT 2152, in a closing argument that spanned 90 pages, see id. at 2102-30, 2146-73, 2182-2217. The jurors, moreover, were instructed that "nothing the attorneys say"—including in "their opening statements and closing arguments"— "[was] evidence," CT 157-58 (CALCRIM 222)), and to not let "bias, sympathy, [or] prejudice" for any witness or victim influence their decision, CT 156 (CALCRIM 200)). The jury is presumed to have followed these unambiguous instructions, see Weeks v. Angelone, 528 U.S. 225, 234 (2000), and Petitioner cites no evidence to rebut that presumption. What's more, the evidence against Petitioner—including the uncontradicted testimony of Jones and Apolonio, the detective's testimony about Daynian's pretrial statements, and the video-surveillance footage—was compelling and substantial. Consequently, there is no reasonable probability that the prosecutor's isolated comment deprived Petitioner of a fair trial.

Petitioner is therefore not entitled to relief on this claim.

c. Arguing defense counsel had conceded Petitioner's guilt

Petitioner contends that the prosecutor committed misconduct in his rebuttal argument by arguing that trial counsel had "conceded [Petitioner's] guilt" when in fact trial counsel had done no such thing. MPA at 39; see also Traverse at 24. Specifically, Petitioner faults the prosecutor for making the following statement:

> The next point I was talking about, I was going to get into 2 more slides. The concept of premeditation, willfulness, and deliberation. Counsel did not touch upon the law in this regard at all. A reasonable interpretation of his failure to do so could be of the understanding that the charges are all good.

APPENDIX D

> He's just saying his guy is not the guy. To be clear, he's saying that he's arguing to you, "My guy is not the guy." Okay. He's not saying robbery and such wasn't committed here . . .

MPA at 39 (quoting 7 RT 2208) (emphasis removed).

This claim is meritless. The prosecutor never suggested that trial counsel had conceded Petitioner's guilt. While the prosecutor stated that the trial counsel did not contest that the charged robbery and attempted murder had occurred, that statement was accurate because trial counsel pursued a mistaken-identity defense. See, e.g., 2 RT 618-20; 7 RT 2132-41. Moreover, the prosecutor repeatedly noted trial counsel's position that Petitioner was not the perpetrator. See 7 RT 2208. Petitioner's characterization of those statements as an "afterthought" is unconvincing, see Traverse at 24; the prosecutor acknowledged trial counsel's mistaken-identity defense while reasonably arguing that such defense did not address premeditation, willfulness, and deliberation. Accordingly, the prosecutor committed no misconduct in making this statement to the jury.

d. Lowering the burden of proof

Petitioner contends that the prosecutor effectively lowered his burden to prove Petitioner's guilt beyond a reasonable doubt by arguing that an instruction concerning circumstantial evidence superseded the beyond-a-reasonable-doubt instruction. See MPA at 40-41; see also Traverse at 24-25.

(1) Relevant facts

Petitioner's claim is premised on a series of quotes from the prosecutor's closing argument concerning the jury instructions on the prosecution's burden of proof and the extent to which the jury could rely on circumstantial evidence to conclude that the prosecutor had met that burden as to any or all elements of the charged crimes. See MPA at 41-42. By and large, those quoted portions of the prosecutor's argument show that he identified and accurately quoted or

APPENDIX D

paraphrased the beyond-a-reasonable-doubt and circumstantial-evidence instructions. See 7 RT 2213-16. Concerning the latter, the prosecutor stated:

> So if we presented the case here, after the totality of the case you take the reasonable doubt instruction, which requires the entire comparison and consideration of all the evidence. And if you're left with 2 reasonable interpretations, 1 that directs you towards guilt and 1 toward innocence, the presumption of innocence drives it home and you walk him out the door. Okay?

7 RT 2215-16. The prosecutor also noted that the circumstantial-evidence instruction stated that "when considering circumstantial evidence you must accept only reasonable conclusions and reject unreasonable conclusions." 7 RT 2216 (quoting CT 159 (CALCRIM 224)).

The prosecutor then argued that the evidence at trial supported only one reasonable inference—namely, that Petitioner was guilty. See 7 RT 2217. Specifically, the prosecutor stated:

> Is there any reasonable interpretations of all of this evidence that leads you anywhere other than to guilt? Counsel parsed apart little things. But he never put it together because it doesn't work well for the defense when you do that. So what is the entire interpretation of all the evidence? The totality of all the evidence? You take [Jones] and you take [Apolonio] and take the crime scene, where the gun was found, where the cartridges were found. You take the video, the length of the time they're face to face, where the parties are when certain things happen. You then take [Petitioner's father]. You then take Daynian. And you take the phone records, which I've hardly touched upon, which put [Petitioner] speaking with [Jones] texting with [Jones] at the scene of our crime driving away from our scene and then changing the phone number to another number with the same handset. And he was then calling the same people . . . You put all that together there is no interpretation that points to innocence. The only interpretation points to guilt.

7 RT 2216-17.

APPENDIX D

(2) Analysis

The state court was not objectively unreasonable in rejecting this claim. The Supreme Court has long recognized, "arguments of counsel generally carry less weight with a jury than do instructions from the court." Boyde v. California, 494 U.S. 370, 384 (1990). Nevertheless, "a prosecutor's 'misleading . . . arguments' to the jury may rise to the level of a federal constitutional violation." Deck v. Jenkins, 814 F.3d 954, 977-78 (9th Cir. 2016) (citation omitted).

In determining whether a misleading argument amounts to a constitutional violation, courts consider the following factors: (1) whether the prosecutor's misstatement was intentional or isolated; (2) whether the record contains any evidence suggesting that the jury relied on, or had difficulty applying the correct law due to, the prosecutor's misstatement; (3) whether the trial court took any curative steps to address the prosecutor's offending statement; and (4) whether the evidence implicating the defendant in the charged crime was strong or weak. See id. at 980-86. Thus, in Deck, a prosecutor's intentional misstatement of law about the requisite intent to commit a lewd act upon a child was prejudicial when the trial court declined to answer a question from the jury about the prosecutor's misstatement and the evidence implicating the defendant in the charged crime was weak. See id.

Here, by contrast, the prosecutor made no misleading argument concerning his burden to prove Petitioner's guilt beyond a reasonable doubt. To the contrary, the prosecutor quoted the beyond-a reasonable-doubt standard of proof. See 7 RT 2213. And rather than stopping there, he argued that it was the "centerpiece of our system, hands down," and "thank[ed] the lord" that such a high standard of proof would be in place in the event he was "ever in a bad place." Id. Moreover, he argued that instruction's reference to "proof that leaves you with an abiding conviction that the charge is true,"

essentially meant that the jurors would still need to be "good with" their decision on their death bed. 7 RT 2213-14. Put simply, the prosecutor did not misstate his burden of proof.

The prosecutor likewise made no misleading argument in discussing the circumstantial-evidence instruction. For the most part, he either accurately paraphrased it or simply quoted it verbatim. At no point did he state or even imply that the circumstantial-evidence instruction superseded the beyond-a-reasonable-doubt instruction. Rather, he argued that the only reasonable conclusion the circumstantial evidence at trial supported was that Petitioner was guilty. See 7 RT 2216-17. In doing so, he did not suggest or imply that he was not required to prove Petitioner's guilt beyond a reasonable doubt. Accordingly, the prosecutor committed no misconduct. See Bolduc v. Ndoh, No. 16-2601, 2019 WL 7206457, *12 (C.D. Cal. 2019) ("Arguing to the jury that a particular theory is the only reasonable conclusion to draw from the evidence does not implicate any burden of proof."), report and recommendation adopted, 2019 WL 5959562 (C.D. Cal. 2019).

In any event, even assuming error, Petitioner has not shown prejudice. The jurors were instructed on the beyond-a-reasonable-doubt standard and on the extent to which circumstantial evidence constituted sufficient evidence to support a guilty verdict. See CT 157 (CALCRIM 220), 158-59 (CALCRIM 224). Moreover, the trial court instructed the jury to "follow the law as I explain it to you" and to disregard the attorneys' comments on the law that conflicted with the trial court's instructions. Id. at 156 (CALCRIM 200). The jury is presumed to have followed these unambiguous instructions. See Weeks, 528 U.S. at 234 (2000). Petitioner appears to argue that the prosecutor's statements were so inherently potent or inflammatory that they overcame this presumption, see Traverse at 26 (citations omitted), but a review of the prosecutor's statements does not support this argument. Any purported

APPENDIX D

misstatement of law that the prosecutor made neither deprived Petitioner of a fair trial nor had a substantial and injurious impact on the jury's verdict. See Mihajson v. McDowell, 752 F. App'x 538, 539-40 (9th Cir. 2019) (holding that state court reasonably concluded prosecutor's misstatement of law was harmless when "trial court not only properly instructed the jury on the reasonable doubt standard, [but] also instructed the jury to follow the court's instructions if they conflicted with counsel's statements").

In sum, each of Petitioner's prosecutorial-misconduct claims is meritless. As such, none of them—whether viewed alone or in combination—warrants habeas relief.

D. Trial Counsel's and Appellate Counsel's Performance

With respect to Petitioner's first three claims, he argues that trial and/or appellate counsel rendered ineffective assistance. See MPA at 23, 32, 44-45.[5] Specifically, Petitioner argues (i) that appellate counsel should have raised the sufficiency of evidence challenge discussed above; (ii) that trial counsel was ineffective by failing to request a voluntary-manslaughter instruction based on imperfect defense of others and that appellate counsel should have challenged the trial court's failure to so instruct the jury; and (iii) that trial counsel failed to object to the prosecutor's alleged misconduct or request a curative admonition, causing Petitioner to forfeit his claims of prosecutorial misconduct, and appellate counsel failed to raise the prosecutor's alleged misconduct on appeal. See id.; see also Traverse at 11-12, 19-21.

[5] In the Traverse, Petitioner also asserts an ineffective assistance of trial counsel argument in connection with his fifth claim. See Traverse at 27. Because Petitioner did not include this argument in the Petition, the Court declines to consider it. See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) ("A Traverse is not the proper pleading to raise additional grounds for relief.").

APPENDIX D

1. Legal Standard

The standards for assessing the performance of trial and appellate counsel are the same. See Cockett v. Ray, 333 F.3d 938, 944 (9th Cir. 2003). As to each allegation of error, the petitioner bears the burden of establishing both components of the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the first prong of that test, the petitioner must prove that his attorney's representation fell below an objective standard of reasonableness. Id. at 687-88. In reviewing counsel's performance, however, courts "strongly presume[] [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. In assessing whether appellate counsel performed reasonably, reviewing courts must be mindful that appellate counsel has no constitutional duty to raise every issue, when, in the attorney's judgment, the issue has little or no likelihood of success. See McCoy v. Wisconsin, 486 U.S. 429, 436 (1988).

Under the second part of Strickland's two-prong test, the petitioner must show that he was prejudiced by demonstrating a reasonable probability that, but for his counsel's errors, the result would have been different. 466 U.S. at 694. The errors must not merely undermine confidence in the outcome of the trial or the appeal but must result in a proceeding that was fundamentally unfair. See Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). The petitioner must prove both deficient performance and prejudice. A court need not, however, determine whether counsel's performance was deficient before determining whether the petitioner suffered prejudice as the result of the alleged deficiencies. Strickland, 466 U.S. at 697.

2. Analysis

Petitioner is not entitled to relief on any of his ineffective-assistance claims. First, as discussed above, the Superior Court reasonably rejected

APPENDIX D

Petitioner's sufficiency-of-the-evidence claim. Ample evidence at trial supported the jury's finding that the attempted murder was premeditated and deliberate. Petitioner fails to show that but for appellate counsel's failure to raise this issue on appeal, the result of Petitioner's criminal proceedings would have been different. See id. at 694. Further, Petitioner's appellate counsel had no constitutional duty to raise an issue that had little or no likelihood of success. See McCoy, 486 U.S. at 436.

Second, trial counsel could not have performed unreasonably in failing to request an imperfect-defense-of-others instruction because, as related above, there was no substantial evidence to support it. Trial counsel made a strategic decision to pursue a mistaken-identity theory of defense rather than a defense-of-others theory. Such strategic decisions are "virtually unchallengeable" on federal habeas review. Strickland, 466 U.S. at 690; see also Silva v. Woodford, 279 F.3d 825, 844 (9th Cir. 2002) (holding counsel commits no error when making informed strategic decision (citing Burger v. Kemp, 483 U.S. 776, 790-91, 794 (1987))).

Regardless, Petitioner cannot show a reasonable probability that but for trial counsel's failure to request an imperfect-defense-of-others instruction, the jury would have reached a more favorable verdict. There is no reason to believe that the trial court would have given the instruction if asked to do so because, as the Court of Appeal found, there was no substantial evidence showing that Petitioner actually believed Daynian was in imminent danger of death or great bodily injury. See LD 8 at 4 ("This requirement of actual belief dooms Petitioner's argument."). And even in the unlikely event that the trial court would have instructed the jury on imperfect defense of others, there is no reason to believe that the jury would have found that Petitioner actually believed Daynian was in imminent danger of death or great bodily injury for the reasons explained above.

APPENDIX D

Third, Petitioner cannot show that appellate counsel was ineffective in declining to raise a claim on appeal based on the trial court's failure to instruct the jury on imperfect defense of others or that he suffered any prejudice from appellate counsel's failure to do so. Again, there was no substantial evidence to support the instruction; thus, appellate counsel could not have performed unreasonably in failing to challenge the trial court's failure to instruct the jury with it. See Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985) (holding counsel's failure to raise meritless argument does not constitute ineffective assistance). And even if appellate counsel had raised the proposed claim, it would have failed because the Court of Appeal found that there was no substantial evidence to show that Petitioner actually believed Daynian was in imminent danger of death or great bodily injury. See LD 8 at 4.

Finally, Petitioner asserts that trial counsel erred in failing to object to the prosecutor's misconduct and that appellate counsel erred in declining to assert a prosecutorial-misconduct claim on appeal, those claims, however, assume that Petitioner forfeited his prosecutorial-misconduct allegations by failing to object to them at trial. See MPA at 44-45. But the California Supreme Court did not find that Petitioner had forfeited his prosecutorial-misconduct allegations, and Respondent does not argue that any portion of Petitioner's prosecutorial-misconduct claim is procedurally barred in this Court. In any event, as explained above, each of Petitioner's prosecutorial-misconduct allegations is meritless. As such, trial counsel did not perform unreasonably failing to object to the prosecutor's statements, and Petitioner suffered no prejudice from counsel's failure to do so. The same is true with respect to Petitioner's corresponding appellate-counsel claim.

Accordingly, Petitioner is not entitled to habeas relief on these ineffective-assistance claims.

APPENDIX D

E. Cumulative Error

Finally, Petitioner contends that the cumulative effect the trial errors alleged in claims one through three deprived him of a fair trial and due process of law. See MPA at 45-46; see also Traverse at 27-31.

The Ninth Circuit recognizes that "[t]he cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Ybarra v. McDaniel, 656 F.3d 984, 1001 (9th Cir. 2011) (citation omitted). Relief is warranted only "when there is a 'unique symmetry' of otherwise harmless errors, such that they amplify each other in relation to a key contested issue in the case." Id. (citation omitted). Accordingly, only where cumulative errors render a trial "fundamentally unfair" is habeas relief merited. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (quoting Chambers v. Mississippi, 410 U.S. 284, 298, 302-03 (1973)).

Here, Petitioner has not identified a single error. Where there is no single existing constitutional error, nothing can accumulate to the level of a constitutional violation. See Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002). Thus, Petitioner is not entitled to habeas relief on this claim of error.

IV. CONCLUSION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) accepting this Report and Recommendation; and (2) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

Date: December 4, 2023

DOUGLAS F. McCORMICK
United States Magistrate Judge

APPENDIX D

Supreme Court

Change court

Case Summary	Docket	Briefs
Disposition	Parties and Attorneys	Lower Court

Disposition

PEOPLE v. TYLER
Division SF
Case Number S253582

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation: **none**

Date	Description
03/13/2019	Petition for review denied

Click here to request automatic e-mail notifications about this case.

APPENDIX E

Filed 1/8/19 P. v. Tyler CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JUAN T. TYLER, Defendant and Appellant.	B278095 (Los Angeles County Super. Ct. No. LA072403)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael V. Jesic, Judge. Affirmed and remanded with directions.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

APPENDIX F

A jury convicted Juan Tyler of robbing and attempting to murder Emanuel Jones. Jones and his partner Rayvon Apolonio thought Tyler was going to pay them $25,000 for marijuana. Instead, Tyler and his brother Daynian Tyler pulled guns and robbed Jones and Apolonio. After robbing Jones, Juan Tyler shot him. Juan Tyler raises three points on appeal. The first two are invalid and we affirm the judgment. On point three, we remand with directions. Statutory citations are to the Penal Code.

I

We summarize evidence in favor of the party prevailing at trial. Jones drove Apolonio in a Hyundai to a rendezvous. They saw a silver sedan pull up with three or four people inside. Daynian Tyler and Juan Tyler left the silver sedan for the Hyundai. Daynian Tyler sat down in the Hyundai's back seat on the driver's side, behind Jones. Juan Tyler got in behind Apolonio. The Tylers drew guns and demanded marijuana. Jones and Apolonio handed over all eight pounds they had. Juan Tyler persisted, saying "give me everything," which Jones took to mean "my life, my car, my money, whatever I have on me."

Jones testified he responded "by fighting back." "With quickness," he got out of the car's driver door and went to the driver's side passenger door, which Daynian Tyler was opening. Jones pushed against the rear door to keep Daynian Tyler inside the car, but Tyler forced his way out anyway, gun in hand. There was a "scuffle," meaning Jones hit Daynian Tyler once in the face. The blow did not fell or stun Daynian Tyler but did inspire him to run to the silver sedan, throwing down his gun in flight. Jones did not chase Daynian Tyler but turned back toward the Hyundai.

APPENDIX F

Meanwhile, Juan Tyler also got out of the Hyundai. As Jones turned away from the fleeing Daynian Tyler and after Danian Tyler had separated from Jones and was some distance from him, Juan Tyler fired shots at Jones, hitting him once in the shoulder and once in the abdomen. Jones suffered collapsed lungs, spinal damage, and other injuries.

II

Juan Tyler first argues the trial court should have instructed the jury on a defense-of-another defense (CALCRIM No. 505), even though he did not rely on that theory at trial and his trial counsel did not request this instruction. At trial, Tyler's defense was he was not at the scene and witnesses claiming otherwise were wrong and not to be believed. On appeal, Tyler's theory is the jury, if instructed on the defense of defense of another, perhaps might have found he shot Jones to defend Daynian Tyler, whom Jones had punched.

We independently review jury instruction issues for legal error. (See *People v. Simon* (2016) 1 Cal.5th 98, 133.) A defendant in a criminal matter has a constitutional right to have the jury decide every material factual matter presented by the evidence. We resolve doubts about whether there is enough evidence to warrant a particular jury instruction in favor of the accused. A necessary instruction must be given when substantial evidence warrants it, but need not be given if only slight evidence is presented. The evidence must be strong enough to permit a reasonable jury to conclude facts underlying the instruction existed. This simply frees the court from an obligation to present theories the jury could not reasonably endorse. (*People v. Strozier* (1993) 20 Cal.App.4th 55, 62-63.) Substantial evidence is

APPENDIX F

evidence a reasonable jury could find persuasive. (*People v. Barton* (1995) 12 Cal.4th 186, 201 fn. 8.)

The requirement that Juan Tyler must actually have believed Jones had placed Daynian Tyler in imminent danger of death or great bodily injury is common to both two versions of the defense of defense of another. These two versions are as follows. Imperfect defense of another is when a defendant acts in the actual but unreasonable belief that another person is in imminent danger of great bodily injury or death. (See *People v. Simon*, *supra*, Cal.5th at p. 132 [self-defense].) Perfect defense of another applies when the defendant's belief is both actual and reasonable. (See *ibid* [self-defense].) Essential to both versions, then, is the requirement that Juan Tyler actually believed his brother was in imminent danger of death or great bodily injury. Imminent means immediate and present and not prospective or in the near future. An imminent peril is one that must be dealt with instantly. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1187, overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.)

This requirement of actual belief dooms Tyler's argument. The trial court had no sua sponte duty to instruct on defense of another, because no substantial evidence supported this defense.

There was no evidence that, when he shot Jones, Juan Tyler actually believed Daynian Tyler was in imminent danger of death or great bodily injury. According to Jones's testimony, both the Tyler brothers had guns. Jones lacked weapons but hit Daynian Tyler once anyway. The blow was not enough to floor or daze Daynian Tyler, who immediately ran and gained distance from Jones. Jones turned away from Daynian Tyler rather than

APPENDIX F

pursue him. At the moment Juan Tyler fired, Daynian Tyler was in no danger.

Apolonio's testimony was consistent with but less detailed than Jones's.

Daynian Tyler offered no evidence to support the instruction. He testified under a grant of immunity and denied being in danger. He was the victim of Jones's attack, according to Juan Tyler's theory on appeal, but Daynian Tyler denied any confrontation with Jones. Daynian Tyler did not recall any episode involving marijuana or Juan Tyler shooting someone, testifying that the shooting suggestion "sounds very ridiculous."

No other eyewitness described the event. Tyler argues that his father told police that his son Juan shot Jones because "he was just protecting his brother. I would have done the same thing." No one claimed, however, that the father was at the shooting scene or had any personal knowledge of those events. This evidence was insubstantial.

Juan Tyler's appellate theory about defense of another thus founders on lack of evidence. Absent substantial evidence that Jones posed a serious threat to someone, no sua sponte duty existed. The trial court did not err by omitting an unsupported sua sponte defense-of-another instruction. (See *People v. Lam Thanh Nguyen* (2015) 61 Cal.4th 1015, 1052.)

Tyler cites the factually inapposite case of *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178-1180. Defendant Vasquez was confined to a wheelchair and shot a man who was choking him. Unlike the assailant in *Vasquez*, Jones neither was strangling Daynian Tyler nor was gripping him and preventing his exit. Daynian Tyler successfully escaped all risk by running

APPENDIX F

away, unconstrained by a wheelchair or disability. Daynian Tyler faced no danger like the one that imperiled Vasquez.

Tyler also cites *People v. Barton, supra*, 12 Cal.4th 186, but *Barton* does not assist him. The *Barton* decision stated trial courts must instruct sua sponte on unreasonable self-defense only when substantial evidence shows the defendant killed in unreasonable self-defense, not when supporting evidence is only "minimal and insubstantial." (*Id.* at p. 201.) We apply *Barton*'s rule here: the trial court had no duty to instruct sua sponte on a theory unsupported by substantial evidence.

III

Juan Tyler's second ground for appeal is that his sentence for second degree robbery should have been stayed according to section 654 in that the robbery conviction arose from the same facts as the attempted murder conviction.

The jury found Juan Tyler guilty of second degree robbery (§ 211) of Jones (count 1) and Apolonio (count 2) and attempted willful, deliberate and premeditated murder (§§ 187, subd. (a), 664, subd. (a)) of Jones (count 3). As to all counts, the jury found true the allegations Tyler personally used and discharged a handgun, causing great bodily injury to Jones (§§ 12022.5, subd. (a)(1), 12022.53, subds. (b), (c) & (d)). It also found, as to counts 1 and 2, that Tyler personally inflicted great bodily injury on Jones (id., § 12022.7, subd. (a)).

The trial court sentenced Tyler to life in prison for the attempted murder plus 25 years to life for the discharge of a handgun causing great bodily injury; it stayed the other enhancements pursuant to section 654. For one robbery, the trial court imposed the lower term of 2 years plus 10 years for the discharge of a handgun, to run consecutively to the sentence on

APPENDIX F

count 1; it stayed the remaining enhancements pursuant to section 654. For the other robbery, the trial court imposed the lower term of two years plus a 10-year enhancement, to run concurrently with the sentences on counts 1 and 3, and stayed the remaining enhancements under section 654.

Section 654, subdivision (a), provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

The test for section 654 is whether a course of criminal conduct is divisible or indivisible, which in turn depends on the intent and objective of the actor. If all offenses are indivisible and incidental to one objective, then a defendant may be punished for only one of the offenses. (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.)

A divisible course of conduct, however, gives rise to more than one act within the meaning of section 654. If the defendant harbored multiple independent criminal objectives, that defendant may be punished for each statutory violation committed in pursuit of each objective, even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The question whether section 654 applies is a factual determination for the trial court. Appellate courts accord broad latitude to this trial court determination. We uphold trial court factual determinations if substantial evidence supports it. (*People v. DeVaughn* (2014) 227 Cal.App.4th 1092, 1113.)

APPENDIX F

Tyler contends the trial court should have stayed the sentence for robbery under section 654, because his convictions for the robbery and attempted murder of Jones arose from the same set of facts and were an indivisible transaction: a confrontation over the marijuana and efforts to get away. Tyler maintains his attempted murder was not gratuitous but was part of the single criminal objective of robbery and escape.

Substantial evidence, however, supports the trial court's decision not to stay either count 1 or count 3 under section 654. (*People v. DeVaughn*, *supra*, 227 Cal.App.4th at p. 1113.)

As reviewed above, Daynian Tyler escaped from Jones and was running to a getaway car when Juan Tyler shot Jones. Jones was not threatening or hurting anyone when Tyler fired. The shooting did not further the robbery or enable the escape. It was gratuitous. (See *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190-191.)

This case differs from *People v. Mitchell* (2016) 4 Cal.App.5th 349, 351, where robbery with use of a deadly weapon and assault with a deadly weapon arose from the same indivisible transaction.

IV

This case must be remanded because the law has changed since the court sentenced Tyler in 2016. The then-mandatory firearm enhancement now is optional. We remand for the trial court to exercise its new discretion.

Senate Bill No. 620 became effective since Tyler was sentenced. The Attorney General concedes this new law applies to Tyler but maintains remand would be futile because the trial court would never have exercised its discretion to reduce the sentence. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894,

APPENDIX F

1896.) The trial court did display a degree of leniency, however, and said nothing to foreclose the possibility of further mercy. (See also *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1109-1111.)

V

The abstract of judgment contains errors. The sentencing memorandum confused count 1 with count 3 and the trial court did not catch this error. Thus the abstract of judgment reflects a sentence of life with the possibility of parole on count 1, robbery, rather than count 3, attempted murder. Additionally, it erroneously states the sentences for the robberies are to run concurrently to that for the murder, rather than one to run concurrently and one to run consecutively. We order that the abstract be corrected. (*People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [oral judgment controls any discrepancy with the minutes or the abstract of judgment]; *People v. Menius* (1994) 25 Cal.App.4th 1290, 1294-1295 [a sentence that is the result of clerical error in the sense of inadvertence, though committed by the judge, may be corrected at any time].)

APPENDIX F

DISPOSITION

The judgment of convictions is affirmed. The case is remanded with directions to the superior court to decide whether to strike or dismiss the enhancement under the provisions of section 12022.53, subdivision (h). If the court has modified the sentence by striking the enhancement under the provisions of section 12022.53, subdivision (h), the abstract of judgment must be suitably amended. The court also must correct the abstract of judgment to reflect the sentence actually imposed and must send a copy to the Department of Corrections and Rehabilitation.

WILEY, J.*

WE CONCUR:

ZELON, Acting P. J.

SEGAL, J.

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* Associate Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned to Division Seven, by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX F