APPENDIX

EXHIBIT “A”

FILED

JAN 31 2025

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALD BRENT HARRIS, Petitioner - Appellant, v. SCOTT FRAUENHEIM, Warden, Respondent - Appellee.	No. 24-642 D.C. No. 1:19-cv-01203-JLT-SAB MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Jennifer L. Thurston, District Judge, Presiding

Argued and Submitted January 16, 2025
San Francisco, California

Before: H.A. THOMAS and MENDOZA, Circuit Judges, and BOLTON, District Judge.**
Dissent by Judge BOLTON.

Gerald Brent Harris appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. Our review of Harris' petition is governed by the Antiterrorism and Effective

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

** The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

Death Penalty Act ("AEDPA"). *See* 28 U.S.C. § 2254(d). Under AEDPA, we may grant habeas relief only if the state court's adjudication of Harris' claim was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* We review de novo a district court's denial of a habeas petition. *Lee v. Thornell*, 118 F.4th 969, 980 (9th Cir. 2024). We affirm.

The state supreme court's determination that Harris did not expressly instruct his trial counsel to file a notice of appeal was not objectively unreasonable. The Supreme Court has "long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (citing *Rodriquez v. United States*, 395 U.S. 327 (1969)). When "a defendant's wishes are less clear," *Garza v. Idaho*, 586 U.S. 232, 242 n.9 (2019), we focus on counsel's consultation with the defendant, *Flores-Ortega*, 528 U.S. at 478. Harris' question to his attorney—whether she "would" appeal—is susceptible of more than one understanding, including that the question fell short of a specific instruction to appeal. And any argument that Harris' trial counsel acted in an unprofessional manner by failing to follow up with appellate counsel and with him, was not

exhausted in state court proceedings. 28 U.S.C. § 2254(b)(1)(A). Because "fairminded jurists could disagree" as to whether Harris instructed his attorney to appeal, under AEDPA, the state court's determination must stand.[1] *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

AFFIRMED.

[1] We decline to consider Harris' uncertified issues because he fails to make a "substantial showing of the denial of a constitutional right." *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999) (quoting 28 U.S.C. § 2253(c)(2)).

Harris v. Frauenheim, 24-642
BOLTON, District Judge, dissenting:

I am troubled by this case because of the words that Harris used. Harris' statement in his sworn declaration wherein "[he] asked Ms. Singh if she would appeal," taken as true, constitutes "express instructions" to file an appeal. *Flores-Ortega*, 528 U.S. at 478. Prejudice is presumed when an attorney fails to file an appeal against a petitioner's express wishes. *Id.* at 477. If Harris' allegations that his counsel failed to carry out his instruction to file a notice of appeal are true, he would be entitled to relief. *Id.* I would therefore reverse and remand for an evidentiary hearing.

EXHIBIT “B”

ACMS Case Summary
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 24-642 **Docketed:** 02/06/2024
Nature of Suit: 3530 Habeas Corpus
Harris v. Frauenheim
Appeal From: Fresno, Eastern California
Fee Status: IFP

Case Type Information:
1) Prisoner
2) Private
3) 2254 Habeas Corpus

Originating Court Information:
District: Eastern District of California : 1:19-cv-01203-JLT-SAB
Trial Judge: Jennifer L. Thurston, District Judge
Date Filed: 09/03/2019

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
01/29/2024	01/29/2024	02/06/2024	02/06/2024

11/03/2024	24	**NOTICE OF ORAL ARGUMENT** ***on Thursday, January 16, 2025 - 09:00 A.M. - Courtroom 1 - Scheduled Location: San Francisco CA*** View the Oral Argument Calendar for your case here. NOTE: Although your case is currently scheduled for oral argument, the panel may decide to submit the case on the briefs instead. See Fed. R. App. P. 34. Absent further order of the court, if the court does determine that oral argument is required in this case, you are expected to appear in person at the Courthouse. If an in person appearance would pose a hardship, you must file a motion for permission to appear remotely by video, using ACMS filing type Motion to Appear Remotely for Oral Argument. Such a motion must be filed within 7 days of this notice, absent exigent circumstances. Everyone appearing in person must review and comply with our Protocols for In Person Hearings, available **here**. If the panel determines that it will hold oral argument in your case, the Clerk's Office will contact you directly at least two weeks before the set argument date to review any requirements for in person appearance or to make any necessary arrangements for a remote appearance that has been approved or directed by the panel. Please note that if you do file a motion to appear remotely, the court **strongly prefers** video over telephone appearance. Therefore, if you wish to appear remotely by telephone you will need to justify that request in your motion and receive explicit permission to do so. Be sure to review the GUIDELINES for important information about your hearing. If you are the specific attorney or self-represented party who will be arguing, use the ACKNOWLEDGMENT OF HEARING NOTICE filing type in ACMS no later than 28 days before the hearing date. No form or other attachment is required. If you will not be arguing, do not file an acknowledgment of hearing notice. [24-642] [Entered: 11/03/2024 06:31 AM]
12/09/2024	25	**AUTHORIZATION** for CJA attorney to travel to San Francisco to attend oral argument. See attached letter for details. [Entered: 12/09/2024 08:21 AM]
12/19/2024	26	**ACKNOWLEDGMENT** of hearing notice filed by Max Feinstat for Appellee Scott Frauenheim. Hearing in San Francisco - Courtroom 1 in San Francisco, on 1/16/2025 9:00:00 AM. Filer argument time: By myself. (Argument minutes: [-]). Special accommodations: **No**. Filer admission status: I certify that I am admitted to practice before this Court. [Entered: 12/19/2024 10:08 AM]
12/19/2024	27	**ACKNOWLEDGMENT** of hearing notice filed by Gary Paul Burcham for Appellant Gerald Brent Harris. Hearing in San Francisco - Courtroom 1 in San Francisco, on 1/16/2025 9:00:00 AM. Filer argument time: By myself. (Argument minutes: [-]). Special accommodations: **No**. Filer admission status: I certify that I am admitted to practice before this Court. [Entered: 12/19/2024 02:14 PM]
01/16/2025	28	**ARGUED AND SUBMITTED** to Holly A. THOMAS, Salvador MENDOZA, Jr., Susan R. Bolton. Audio and video recordings of the argument are available on the court's website at **https://www.ca9.uscourts.gov/media/.** [Entered: 01/16/2025 10:27 AM]
01/24/2025	29	**MOTION** for Limited Remand filed by Appellant Gerald Brent Harris. [Entered: 01/24/2025 03:20 PM]
01/28/2025	30	**RESPONSE** to Motion for Limited Remand (DE 29) filed by Appellee Scott Frauenheim. [Entered: 01/28/2025 04:26 PM]
01/31/2025	31	**TEXT CLERK ORDER.** The motion for limited remand (DE 29) is denied. [Entered: 01/31/2025 09:48 AM]

01/31/2025	32	**MEMORANDUM DISPOSITION WITH DISSENT** (Holly A. THOMAS, Salvador MENDOZA, Jr., Susan R. Bolton) AFFIRMED. FILED AND ENTERED JUDGMENT. [Entered: 01/31/2025 11:19 AM]
02/24/2025	33	**MANDATE ISSUED** Holly A. THOMAS, Salvador MENDOZA, Jr., Susan R. Bolton [Entered: 02/24/2025 09:55 AM]

EXHIBIT “C”

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GERALD BRENT HARRIS,

Petitioner,

v.

SCOTT FRAUENHEIM,

Respondent.

Case No. 1:19-cv-01203-NONE-SAB-HC

FINDINGS AND RECOMMENDATION RECOMMENDING EVIDENTIARY HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR FAILURE TO FILE NOTICE OF APPEAL AND DENIAL OF REMAINING CLAIMS OF PETITION FOR WRIT OF HABEAS CORPUS

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

I.

BACKGROUND

On September 4, 2014, Petitioner was convicted after a jury trial in the Kern County Superior Court of second-degree murder. The jury also found true the special allegations that Petitioner personally discharged a firearm causing death. (2 CT[1] 394–95, 406). The trial court sentenced Petitioner to an indeterminate term of fifteen years to life for second-degree murder plus twenty-five years to life for the personal gun use enhancement. (2 CT 406; 7 RT[2] 1550). On March 28, 2018, the California Court of Appeal, Fifth Appellate District ordered that the

[1] "CT" refers to the Clerk's Transcript on Appeal lodged by Respondent on April 15, 2021. (ECF No. 26).
[2] "RT" refers to the Reporter's Transcript on Appeal lodged by Respondent on April 15, 2021. (ECF No. 26).

sentence be "vacated and the case remanded for the trial court to exercise its discretion whether to impose or to strike the gun use enhancement pursuant to section 12022.53 as amended [by Senate Bill No. 620]." People v. Harris, No. F070236, 2018 WL 1516967, at *10 (Cal. Ct. App. Mar. 28, 2018). The judgment was otherwise affirmed. Id. The California Supreme Court denied Petitioner's petition for review on June 13, 2018. (LD[3] 19). On November 1, 2018, the trial court re-imposed the same sentence of fifteen years to life for second-degree murder plus twenty-five years to life for the personal gun use enhancement. (LD 20).

On September 3, 2019, Petitioner filed the instant federal petition for writ of habeas corpus. (ECF No. 1). As various claims were pending in a collateral challenge in the California Court of Appeal, this Court stayed the petition on January 6, 2020 so that Petitioner could exhaust his state remedies. (ECF No. 10). On November 7, 2019, the California Court of Appeal, Fifth Appellate District denied Petitioner's state habeas petition without prejudice for failing to first file a petition in the Kern County Superior Court and for failing to include copies of reasonably available documentary evidence supporting Petitioner's claims. (LD 21). On February 17, 2021, the California Supreme Court summarily denied Petitioner's state habeas petition that was filed on July 23, 2020. (LD 22). That same day, the California Supreme Court also denied Petitioner's subsequent state habeas petition that was filed on September 21, 2020, with citation to In re Miller, 17 Cal.2d 734, 735 (1941), noting that "courts will not entertain habeas corpus claims that are repetitive." (LD 23). On March 1, 2021, this Court lifted the stay in this matter. (ECF No. 24).

In the petition, Petitioner raises the following claims for relief: (1) instructional errors; (2) ineffective assistance of trial and appellate counsel; (3) erroneous admission of prejudicial evidence; and (4) abuse of discretion regarding Petitioner's sentence. (ECF No. 1 at 4–7, 12).[4] On April 26, 2021, Respondent filed an answer. (ECF No. 27). On July 2, 2021, Petitioner filed a traverse. (ECF No. 33).

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[3] "LD" refers to the documents lodged by Respondent on April 15, 2021. (ECF No. 26).

[4] Page numbers refer to the ECF page numbers stamped at the top of the page.

II.

STATEMENT OF FACTS[5]

Isaac Foreman grew up knowing Dante Breeding and was close enough to him to refer to Breeding as his cousin. Foreman's girlfriend, Jasmine Wilemon, lived next door to defendant, introduced Foreman to defendant's wife (Kim), and subsequently introduced Foreman to defendant. Foreman was living with Jasmine Wilemon and would see defendant once or twice a day.

About two or three months before the shooting, Foreman was in the front yard of defendant's home when Breeding showed up. Foreman had not known Breeding knew Kim, but Breeding told Foreman that Kim was a friend. Foreman frequently saw Breeding at defendant's residence. Foreman explained Breeding would "hang out" with both Kim and defendant. According to Foreman, Breeding was at defendant's house on a regular basis, three times a day—morning, afternoon, and at night. Other neighbors, including Jasmine Wilemon, also observed Breeding's regular visits to defendant's house. Breeding was frequently at defendant's house late in the afternoon or late at night.

Defendant worked the graveyard shift as a United States Postal Service employee. During the two-month period leading up to the shooting, Foreman believed Breeding was at defendant's house every night while defendant was at work. Breeding was not living at defendant's house; he lived with his wife. Foreman believed his cousin and Kim were having a sexual relationship. A month after Breeding first started frequenting defendant's house, Foreman observed Breeding and Kim smoking cigarettes in the garage. He saw Kim approach Breeding, who was sitting on the washing machine, and kiss him on the lips.

Three weeks before the shooting, defendant came home from his job at 3:00 a.m. to get some medication. Defendant found Breeding and Kim in the computer room with the lights off. Defendant told Breeding he no longer wanted him to come to the house. The following day, as Foreman was mowing defendant's lawn, defendant told Foreman, "[I]f I see your cousin over here, I'm going to shoot him." Foreman explained that about two-months before the shooting, defendant stated "if he caught anyone [effing] with his girl, he will shoot him."

Foreman said Kim had shown him a shotgun. But in a statement made to a law enforcement officer, Foreman had said it was defendant who showed him the shotgun while telling Foreman he would kill anyone having sex with his wife. Adrian Wilemon, Jasmine Wilemon's brother, also lived next door to defendant's home. Adrian explained defendant had shown him his shotgun. A couple of weeks before the shooting, Adrian heard defendant say if he found someone with his wife he would kill the person, and he shoots to kill. About a month before the shooting, defendant told Adrian he had come home from work one evening and found Breeding and Kim together in the computer room. Defendant did not make further negative comments to Adrian about Breeding. Adrian did not recall defendant saying of Breeding that he "never liked that nigger." But Adrian told an investigator defendant had made a remark of that nature.

[5] The Court relies on the California Court of Appeal's March 28, 2018 opinion for this summary of the facts of the crime. See Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).

Either the night before the shooting, or possibly two nights before, Jasmine Wilemon and Foreman played a prank on defendant by taking condoms out of their wrappers and placing them on the doorknob of his house and inside defendant's car. Foreman denied personally participating in this prank, but said he watched Jasmine place condoms on the steering wheel and antenna of defendant's car. Although a deputy investigating the scene did not find condoms or condom wrappers in the car or at the front door, a condom wrapper was found on the concrete walkway north of the driveway. Foreman identified the wrapper as one from the prank.

A day after the prank, Jasmine Wilemon worried defendant would believe Breeding had placed the condoms at the house, because she knew Breeding and Kim were "messing around" and thought defendant would think Breeding did this as a joke on defendant. After the shooting, Jasmine was concerned the prank could have fueled defendant's worry over his wife's relationship with Breeding.

Jasmine Wilemon spoke to defendant on the phone about a condom wrapper a deputy had found in the garage. Defendant told her not to worry because she had nothing to do with anything. In a recorded call from the jail, defendant told Kim he thought Breeding had opened up the garage door to shed light on the condoms that were on his car. During this call, Kim told defendant, "I thought you were upset about the fucking rubbers everywhere." Defendant replied: "I was cause I thought whoever did it was [Breeding] and I said I wanted to be alone with you that night. That same time I tell you—tell him that I wanted to be alone with you, he goes and does all this stuff."

The evening before the shooting, a neighbor heard a male and female arguing at defendant's house. Then, the morning of June 5, Foreman overheard an argument between defendant and Breeding. Kim had allowed Breeding to shower at the Harris house. Defendant told Breeding he did not want him in the house. According to Foreman, defendant "was upset that my cousin kept coming around after he told him not to." Foreman had initially told a law enforcement officer he thought the argument was about Kim's sexual relationship with Breeding.

Foreman testified Kim was driving him and Jasmine Wilemon to the store in defendant's vehicle in late afternoon of June 5 when they saw Breeding. Kim pulled over to talk with him, and she told him to come to her house. They drove back to the Harris house. Breeding and Kim walked inside the house, and Foreman and Jasmine went to Jasmine's house. Foreman and Jasmine heard a gunshot about 10 minutes later. Foreman testified that "during or around" the time of the shotgun blast, he heard defendant yelling and "going crazy."

Jasmine Wilemon's testimony differed from Foreman's testimony concerning the events immediately before the shooting. She did not remember going to the store with Kim and Foreman. Jasmine explained she had arrived home from an appointment when she, Foreman, and her brother saw Breeding drive up to the Harris house. Jasmine added, "We seen that [Breeding] was kind of upset about something. We didn't know what, though, and then me and [Foreman] seen him walking up [defendant]'s driveway to the garage, and shortly after that, that's when they said they heard the gunshot."

Deputy Benjamin Pallares questioned Kim shortly after the shooting. Kim stated her husband shot defendant over a cell phone. She told Pallares her husband was upset with Breeding "because the cell phone wasn't on the night stand, and the day before [Breeding] had left and [defendant] was calling [Breeding] a thief."

> Kim said Breeding had just returned the cell phone earlier that day. Kim said Breeding left but later returned and she was speaking to him in the garage. While she was speaking with Breeding, Kim heard a gunshot come from behind her and saw Breeding fall to the ground, bleeding from his head. She turned around and saw her husband with a gun. According to Kim's account, her husband fell to his knees, stating, "I didn't know, I didn't know."
>
> After firing the gun, defendant went into the house. Investigators found a shotgun in the living room with one spent round in the chamber. When defendant came out of the house, he was unarmed, his hands were shaking, and he appeared scared.
>
> In a recorded conversation between defendant and a friend visiting him at the jail, defendant told the friend in a stutter that he was scared, and when the friend stated defendant was "[s]cared for your life," defendant replied, "I never been so scared. It was—it was, I can't even explain it." The friend commented that Breeding should not have been there. Defendant said he had told Breeding "to stay away I don't [know] how many times." Defendant elaborated, saying, "So, either it was to see—to feed her ... addiction or there was going to be something inevitably going on between them but, I—I—that's not what I think. I think he was doing it to finally say you owe me, you're going to give me this or I'm taking it from you." Later defendant told his friend that after the shot, he vomited multiple times, drank some liquor, and smoked cigarettes.

Harris, 2018 WL 1516967, at *1–3.

III.

STANDARD OF REVIEW

Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the U.S. Constitution. The challenged conviction arises out of the Kern County Superior Court, which is located within the Eastern District of California. 28 U.S.C. § 2241(d).

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc). The instant petition was filed after the enactment of AEDPA and is therefore governed by its provisions.

Under AEDPA, relitigation of any claim adjudicated on the merits in state court is barred unless a petitioner can show that the state court's adjudication of his claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 97–98 (2011); Lockyer v. Andrade, 538 U.S. 63, 70–71 (2003); Williams, 529 U.S. at 413.

As a threshold matter, this Court must "first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court of the United States.'" Lockyer, 538 U.S. at 71 (quoting 28 U.S.C. § 2254(d)(1)). In ascertaining what is "clearly established Federal law," this Court must look to the "holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." Williams, 529 U.S. at 412. "In other words, 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Id. In addition, the Supreme Court decision must "'squarely address [] the issue in th[e] case' or establish a legal principle that 'clearly extend[s]' to a new context to the extent required by the Supreme Court in . . . recent decisions"; otherwise, there is no clearly established Federal law for purposes of review under AEDPA. Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009) (quoting Wright v. Van Patten, 552 U.S. 120, 125 (2008)); Panetti v. Quarterman, 551 U.S. 930 (2007); Carey v. Musladin, 549 U.S. 70 (2006). If no clearly established Federal law exists, the inquiry is at an end and the Court must defer to the state court's decision. Musladin, 549 U.S. 70; Wright, 552 U.S. at 126; Moses, 555 F.3d at 760.

If the Court determines there is governing clearly established Federal law, the Court must then consider whether the state court's decision was "contrary to, or involved an unreasonable application of, [the] clearly established Federal law." Lockyer, 538 U.S. at 72 (quoting 28 U.S.C. § 2254(d)(1)). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412–13; see also Lockyer, 538 U.S. at 72. "The

word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" Williams, 529 U.S. at 405 (quoting Webster's Third New International Dictionary 495 (1976)). "A state-court decision will certainly be contrary to [Supreme Court] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." Id. If the state court decision is "contrary to" clearly established Supreme Court precedent, the state decision is reviewed under the pre-AEDPA de novo standard. Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc).

"Under the 'reasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 413. "[A] federal court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411; see also Lockyer, 538 U.S. at 75–76. The writ may issue only "where there is no possibility fair minded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." Richter, 562 U.S. at 102. In other words, so long as fair minded jurists could disagree on the correctness of the state court's decision, the decision cannot be considered unreasonable. Id. If the Court determines that the state court decision is objectively unreasonable, and the error is not structural, habeas relief is nonetheless unavailable unless the error had a substantial and injurious effect on the verdict. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

The Court looks to the last reasoned state court decision as the basis for the state court judgment. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018); Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011). If the last reasoned state court decision adopts or substantially incorporates the reasoning from a previous state court decision, this Court may consider both decisions to ascertain the reasoning of the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Richter, 562 U.S. at

99. This presumption may be overcome by a showing "there is reason to think some other explanation for the state court's decision is more likely." Id. at 99–100 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)).

Where the state courts reach a decision on the merits but there is no reasoned decision, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under § 2254(d). Stanley, 633 F.3d at 860; Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Himes, 336 F.3d at 853. While the federal court cannot analyze just what the state court did when it issued a summary denial, the federal court must review the state court record to determine whether there was any "reasonable basis for the state court to deny relief." Richter, 562 U.S. at 98. This Court "must determine what arguments or theories . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." Id. at 102.

IV.

REVIEW OF CLAIMS

A. Instructional Error

1. Legal Standard

"[T]he fact that an instruction was allegedly incorrect under state law is not a basis for [federal] habeas relief." Estelle v. McGuire, 502 U.S. 62, 71–72 (1991). A federal court's inquiry on habeas review is not whether a challenged jury instruction "is undesirable, erroneous, or even 'universally condemned,' but [whether] it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." Cupp v. Naughten, 414 U.S. 141, 146 (1973). "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." Middleton v. McNeil, 541 U.S. 433, 437 (2004). The "only question for [a federal habeas court] is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Estelle, 502 U.S. at 72 (quoting Cupp, 414 U.S. at

147). "It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle, 502 U.S. at 72 (quoting Cupp, 414 U.S. at 147).

In reviewing an ambiguous instruction, the Court "inquire[s] 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." Estelle, 502 U.S. at 72 (quoting Boyde v. California, 494 U.S. 370, 380 (1990)). With respect to omitted instructions, a petitioner's "burden is especially heavy because no erroneous instruction was given . . . . An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S. 145, 155 (1977).

2. Heat of Passion

In Ground One, Petitioner asserts that the trial court erred by giving an inadequate heat of passion instruction that allowed the jury to reject voluntary manslaughter if it found that a third party provoked Petitioner. (ECF No. 1 at 4). Respondent argues that the state court's rejection of this claim was reasonable. (ECF No. 27 at 13). This claim was raised on direct appeal to the California Court of Appeal, Fifth Appellate District, which denied the claim in a reasoned opinion. The California Supreme Court summarily denied Petitioner's petition for review. As federal courts review the last reasoned state court opinion, the Court will "look through" the California Supreme Court's summary denial and examine the decision of the California Court of Appeal. See Wilson, 138 S. Ct at 1192.

In denying the heat of passion instructional error claim, the California Court of Appeal stated:

> Defendant contends the heat of passion instruction was inadequate because it allowed the jury to reject that defense if it found a third party other than defendant himself was the source of provocation. Defendant more specifically argues that although the standard instruction uses the terms "provoked" and "provocation," the instruction fails to meaningfully define these terms. According to defendant, the instructions further failed to indicate the victim need not have provoked defendant because the provocation could have come from third parties—neighbors Isaac Foreman and Jasmine Wilemon, who conducted the condom prank.
>
> The People reply this issue is waived because defendant seeks a pinpoint instruction and trial counsel did not seek any elaboration on CALCRIM No. 570. The People further argue on the merits the terms provoke and provocation do not

require further elaboration, and nothing in the instruction prevented the jury from applying provocation to the third party neighbors.

CALCRIM No. 570

CALCRIM No. 570 was read to the jury as follows:

> "A killing that would otherwise would [*sic*] be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. The defendant killed someone, because of a sudden quarrel or in the heat of passion if ... One, the defendant was provoked. Two, as a result of the provocation, the defendant acted rationally [*sic*] under the influence of intense emotion and that obscured his reasoning or judgement. And, three, the provocation would have caused a person of average disposition to act rationally [*sic*] and without due deliberation, and that is from passion, rather than from judgment.
>
> "Heat of passion does not require anger, range [*sic*], or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection in order for heat of passion [*sic*]. To reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. When no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. It is not enough that the defendant simply was provoked.
>
> "The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition in the same situation and knowing the same facts, whatever [*sic*] he acted from passion rather than from judgment. If enough time passed between the provocation and the killing for a person of average disposition to cool off and regain his or her clear reasoning or judgment, then, the killing is not reduced to voluntary manslaughter on this basis. The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." (See CALCRIM No. 570.)

Forfeiture

A trial court has no sua sponte duty to revise or improve an accurate statement of law without a request from counsel. Failure to request clarification of an otherwise correct instruction forfeits the claim of error on an appeal. (*People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Jones* (2014) 223 Cal.App.4th 995, 1001.) Some legal terms have technical meanings requiring further explanation. The terms provocation and heat of passion as used in standard jury instructions, however, bear their common meaning and require no further explanation in the absence of a specific request. (*People v. Cole* (2004) 33 Cal.4th 1158, 1217–1218; *People v. Cox* (2003) 30 Cal.4th 916, 967, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1334.) Because defendant is not arguing the instruction as

given was incorrect, it was incumbent on his trial counsel to seek any appropriate elaboration on the instruction, and counsel's failure to do so means this issued is forfeited on appeal.

Merits of Defendant's Contention

Although we find this issue forfeited, we alternatively conclude defendant's argument lacks merit. As noted above, the terms provoke and provocation bear common meanings requiring no further explanation by the trial court. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1217–1218.) The standard language of CALCRIM No. 570 has been found to be legally correct and to properly convey the test necessary for the jury to determine whether a defendant has been sufficiently provoked. (*People v. Jones*, *supra*, 223 Cal.App.4th at p. 1001; *People v. Hernandez*, *supra*, 183 Cal.App.4th at p. 1334.) The trial court has no sua sponte duty to give a pinpoint instruction relating particular facts to an element of the charged crime, thereby explaining or highlighting a defense theory. (*People v. Mayfield* (1997) 14 Cal.4th 668, 778, overruled on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 390.)

Further, provocation was not used in the instruction in a technical sense peculiar to the law. We presume the jurors were aware of the common meaning of the term. Provocation means something that provokes, arouses, or stimulates. (*People v. Hernandez*, *supra*, 183 Cal.App.4th p. 1334.) Provoke means to arouse to a feeling or action, or to incite anger. (*Ibid.*, citing Webster's Collegiate Dict. (10th ed. 2002) p. 938 and *People v. Ward* (2005) 36 Cal.4th 186, 215.) There is, therefore, no special technical legal definition of the terms provocation and provoke requiring further explanation or elaboration by the trial court.

Defendant also argues CALCRIM No. 570 failed to direct the jury to the neighbors' condom prank as a source of provocation. As the People explain, the instruction did not preclude the jury from considering third party conduct defendant could reasonably have believed to have been done by Breeding. During a recording of defendant's jail conversation with his wife, defendant told her he thought the condom prank had been done by Breeding. During defendant's conversation with Jasmine Wilemon after the shooting regarding the condoms, defendant told her not to worry because she had nothing to do with anything. From the record presented at trial, it does not appear defendant blamed anyone except Breeding for the condom prank. CALCRIM No. 570 correctly instructed the jury on how to weigh evidence of provocation, including the condom incident defendant thought was carried out by Breeding. Defendant has failed to demonstrate the absence of further clarification of the meaning of provocation or reference of participation by third parties in any way diminished defendant's defense.

The People point out that before the shooting, defendant had warned Breeding not to come back to his house but Breeding did so anyway. The People argue this would have been far more provocative to defendant than the condom incident, which occurred a day or two prior to the shooting. We agree with this analysis of the facts adduced at trial. There was no instructional error and the instructions given adequately advised the jury how to evaluate evidence of provocation, including the condom incident.

Harris, 2018 WL 1516967, at *3–5.

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The heat of passion instruction as given was a correct statement of state law. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) ("[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."). It was objectively reasonable for the state court to conclude that the heat of passion instruction as given did not preclude the jury from considering third-party conduct, such as the neighbors' condom prank, as a source of provocation, and Petitioner has not demonstrated that the heat of passion "instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Estelle, 502 U.S. at 72.

Accordingly, the Court finds that the state court's rejection of the heat of passion instructional error claim was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of fact. The decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103. Therefore, Petitioner is not entitled to habeas relief for his instructional error claim regarding provocation and heat of passion, and it should be denied.

3. Self-Defense

In Ground Two, Petitioner asserts that the trial court erred by refusing to instruct the jury on self-defense and imperfect self-defense. (ECF No. 1 at 4). Respondent argues that the state court's rejection of this claim was reasonable. (ECF No. 27 at 16). This claim was raised on direct appeal to the California Court of Appeal, Fifth Appellate District, which denied the claim in a reasoned opinion. The California Supreme Court summarily denied Petitioner's petition for review. As federal courts review the last reasoned state court opinion, the Court will "look through" the California Supreme Court's summary denial and examine the decision of the California Court of Appeal. See Wilson, 138 S. Ct at 1192.

In denying Petitioner's self-defense jury instruction claim, the California Court of Appeal stated:

> The trial court denied defendant's request for instructions for self-defense (CALCRIM No. 505), defense of one's home or property (CALCRIM No. 506), and imperfect self-defense (CALCRIM No. 571). Defendant argues the trial court

erred in refusing these instructions on self-defense and imperfect self-defense because during a conversation with his friend in jail, defendant said he was afraid during the incident. We reject this argument.

Even in the absence of a request from the defendant, the trial court in criminal cases must instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Najera* (2008) 43 Cal.4th 1132, 1136.) California law places a sua sponte duty on the trial court to instruct fully on all lesser necessarily included offenses supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148–149.) Here, defendant requested the instructions not given by the trial court.

The doctrine of self-defense embraces both perfect and imperfect self-defense. Perfect self-defense requires the defendant have an honest and reasonable belief in the need to defend himself or herself. Imperfect self-defense is the killing of another under the actual but unreasonable belief the killer was in imminent danger of death or great bodily injury. The doctrine requires without exception that the defendant had an actual belief in the need for self-defense; fear of future harm, no matter how great the fear and no matter how great the likelihood of harm, does not suffice. The defendant's fear must be of imminent danger to life or great bodily injury. In imperfect self-defense, the killing is without malice and therefore does not constitute murder but manslaughter. It is a form of voluntary manslaughter. (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168.)

There was no evidence defendant or his wife were in any danger of harm or that defendant believed he and his wife were in such danger. Defendant concedes in his argument that he had warned Breeding on several occasions to stay away from his home and his wife. Defendant argues he expressed fear of the situation to his friend during a conversation in jail. In a stutter, defendant told his friend he had been afraid. Defendant's friend suggested defendant was afraid of Breeding. Defendant said he had never been so scared but could not explain it. The friend stated Breeding should not have been there. To this comment, defendant replied he had told Breeding to stay away many times. Elaborating on this statement, defendant added, "So, either it was to see—to feed her ... addiction or there was going to be something inevitably going on between them but, I—I—that's not what I think. I think he was doing it to finally say you owe me, you're going to give me this or I'm taking it from you."

Read in context, defendant was not expressing fear of imminent harm to himself or his wife. Defendant never directly expressed fear for his life or for his wife's life. It is defendant's friend, not defendant himself, who suggested defendant was in fear of his life. In response to this statement from his friend, defendant vaguely referred to never being so scared. As defendant elaborated, however, he was afraid about the relationship his wife had with Breeding as well as what he apparently believed to be his wife's drug addiction.

Defendant may also have been expressing fear about the consequences of his actions. Later during the same conversation defendant told his friend that after the shot, he vomited multiple times, drank some liquor, and smoked several cigarettes.

Assuming arguendo defendant's jailhouse statement to his friend constituted substantial evidence he feared Breeding, we would find the trial court's failure to give self-defense instructions to be harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18. There was no evidence presented at

> trial showing Breeding was armed, he had ever verbally or physically threatened defendant or his wife, or he had a past history of making threats to defendant or to his wife. The opposite is true; there was evidence presented from multiple witnesses that defendant had threatened Breeding in the past in addition to telling him to stay away from the Harris home. Defendant showed his shotgun to others and boasted he would kill anyone sleeping with his wife. Some of these threats occurred weeks before the shooting. Isaac Foreman testified he heard defendant yelling and "going crazy" at the time of the shotgun blast. No witness described Breeding as yelling, uttering provocative statements, or threatening defendant or Kim.
>
> Defendant argues Breeding "continued to invade" the Harris home. The jury was instructed on trespass and involuntary manslaughter.[6] Defense of habitation alone, however, can never justify homicide without self-defense or defense of others. The defendant must show he or she reasonably believed the intruder intended to kill or inflict serious injury on someone in the home. (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1360.)
>
> There was no evidence showing Breeding was a threat to defendant or to his wife. Indeed, Breeding was invited onto the property by Kim, so he could not be an invader. Where a trespass is forcible, an owner may resist it, but is not justified in killing the trespasser unless it is necessary to defend himself or herself against the loss of life or great bodily harm. (See *People v. Hecker* (1895) 109 Cal. 451, 461–462.) "Self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for killing." (*Id.* at p. 462.) In sum, the trial court did not err in denying defendant's request for self-defense instructions, and if there was error, it was harmless beyond a reasonable doubt.

Harris, 2018 WL 1516967, at *6–7 (footnotes in original).

"[T]he test for determining whether a constitutional error is harmless . . . is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Neder v. United States, 527 U.S. 1, 15 (1999) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). The Supreme Court has held that when a state court's "Chapman decision is reviewed under AEDPA, 'a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable.'" Davis v. Ayala, 576 U.S. 257, 269 (2015) (quoting Fry v. Pliler, 551 U.S. 112, 119 (2007)). That is, Petitioner must show that the state court's harmless error determination "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." Ayala, 576 U.S. at 269–70 (quoting Richter, 562 U.S. at 103).

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[6] The court instructed the jury with the general involuntary manslaughter instruction (CALCRIM No. 580) and the right to eject a trespasser from real property (CALCRIM No. 3475).

The appellate court's reasonable assessment of the evidence presented at trial supports its conclusion that the trial court's refusal to instruct the jury on self-defense and imperfect self-defense resulted in no prejudice. It was not objectively unreasonable for the state court to conclude that the evidence did not show imminent danger to life or great bodily injury of someone in the home. There was no evidence presented at trial showing that Breeding was armed or otherwise physically or verbally threatening Petitioner or Petitioner's wife, or that Breeding had previously threatened Petitioner or Petitioner's wife.

"An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law," Kibbe, 431 U.S. at 155, and the Court finds that the state court's rejection of the self-defense and imperfect self-defense instructional error claim was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of fact. The decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103. Accordingly, Petitioner is not entitled to habeas relief for his instructional error claim regarding self-defense and imperfect self-defense, and it should be denied.

B. Admission of Prejudicial Evidence

In Ground Four, Petitioner asserts that the trial court abused its discretion in admitting evidence that Petitioner used an offensive racial epithet on one occasion when referring to the victim. (ECF No. 1 at 5). Respondent argues that the state court's rejection of the prejudicial evidence claim was reasonable. (ECF No. 27 at 17).

This claim was raised on direct appeal to the California Court of Appeal, Fifth Appellate District, which denied the claim in a reasoned opinion. The California Supreme Court summarily denied Petitioner's petition for review. As federal courts review the last reasoned state court opinion, the Court will "look through" the California Supreme Court's summary denial and examine the decision of the California Court of Appeal. See Wilson, 138 S. Ct at 1192.

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In denying Petitioner's prejudicial evidence claim, the California Court of Appeal stated:

> Defendant argues the trial court abused its discretion in admitting evidence of defendant's remark: "I never liked that nigger." Defendant contends use of the racial epithet was inflammatory and violated Evidence Code section 352. Defendant further argues his federal due process rights were also violated. We disagree.
>
> ***Evidentiary Ruling***
>
> Defense counsel objected to the introduction of evidence of Adrian Wilemon hearing defendant refer to Breeding by using a racial epithet. The trial court conducted an Evidence Code section 402 hearing outside the presence of the jury on the admissibility of this evidence. Adrian Wilemon explained he heard defendant threaten to kill Breeding if defendant caught him "messing with his wife." Adrian denied, however, he ever heard defendant say he "never liked that nigger." Adrian could not remember talking to an investigator from the district attorney's office and telling him defendant had made this statement.
>
> The prosecutor explained to the court she sought to impeach Adrian Wilemon with the testimony of the investigator who heard and recorded Adrian's statement to the contrary. Defense counsel vigorously objected to the statement as being too inflammatory to be admissible. The trial court agreed the statement was highly inflammatory, but found it was probative as to defendant's state of mind, and the statement also went to defendant's motive. The court acknowledged the statement was prejudicial but ruled the prejudicial effect of the statement did not outweigh its probative value. The court noted there were no African–Americans on the jury. The court ruled the prosecutor could present this evidence.
>
> In his testimony before the jury, Adrian Wilemon said he did not remember defendant using the racial epithet to describe Breeding. The prosecutor called Investigator Daniel Stevenson, who testified he spoke with Adrian, who told him defendant did not like Breeding. Adrian further told Stevenson defendant had made general threats to kill anyone he thought was having sex with his wife, and Adrian heard defendant call Breeding "the N word or nigger."
>
> ***Analysis***
>
> Only relevant evidence is admissible. All relevant evidence is admissible unless it is excluded under the United States or California Constitution or by statute. (*People v. Scheid* (1997) 16 Cal.4th 1, 13–14.) Evidence Code section 210 defines relevant evidence as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the proffered evidence tends to logically, naturally, or by reasonable inference establish material facts such as identity, intent, or motive. (*People v. Scheid*, *supra*, at p. 13.)
>
> Under Evidence Code section 352, the trial court may exclude evidence if its probative value is substantially outweighed by the probability its admission will create substantial danger of undue prejudice. The admission of photographs of a victim lies within the broad discretion of the trial court when a defendant asserts the pictures are unduly gruesome or inflammatory. The trial court's exercise of discretion will not be disturbed on appeal unless the probative value of the racial epithet is clearly outweighed by its prejudicial effect. (*People v. Montes* (2014) 58 Cal.4th 809, 862; *People v. Ramirez* (2006) 39 Cal.4th 398, 453–454.) Prejudicial

> evidence is evidence uniquely tending to evoke an emotional bias against a party as an individual with only slight probative value. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1248; *People v. Carey* (2007) 41 Cal.4th 109, 128.) A trial court's exercise of discretion under Evidence Code section 352 is upheld on appeal unless the court abused its discretion by exercising it in an arbitrary, capricious, or patently absurd manner. (*People v. Suff* (2014) 58 Cal.4th 1013, 1066.)
>
> Expressions of racial animus by a defendant towards a victim and the victim's race, like other expressions of enmity by an accused murderer towards the victim, is relevant evidence under Evidence Code section 210. It constitutes evidence of the defendant's prior attitude toward the victim, a relevant factor in deciding whether the murder was deliberate and premeditated because it goes to the defendant's motive. Generally, racial epithets are not so inflammatory that their probative value is substantially outweighed by their potential for undue prejudice under Evidence Code section 352. (*People v. Quartermain* (1997) 16 Cal.4th 600, 628.)
>
> As explained by our Supreme Court in *Quartermain*:
>
> > "The unfortunate reality is that odious, racist language continues to be used by some persons at all levels of our society. While offensive, the use of such language by a defendant is regrettably not so unusual as to inevitably bias the jury against the defendant. Here, the racial epithets were only a small portion of the evidence concerning defendant's interviews with the police, and the prosecutor did not ask any follow-up questions or otherwise focus attention on them." (*People v. Quartermain*, *supra*, 16 Cal.4th at p. 628.)
>
> The trial court considered the potential for undue prejudice to defendant if expression of his racial epithet directed at Breeding came into evidence. The court found the evidence relevant and its probative value outweighed its prejudicial effect on the jury. Here, the evidence demonstrated defendant harbored a long simmering anger toward Breeding that included not only the alleged affair with defendant's wife, but Breeding's race. As noted by the trial court, this evidence was probative of defendant's state of mind as well as his motive to kill Breeding. The trial court did not abuse its discretion in allowing defendant's prior statement into evidence pursuant to Evidence Code sections 210 and 352.
>
> Defendant further argues his constitutional right to due process was implicated by the trial court's ruling. The admission of relevant evidence found not to be unduly prejudicial also did not violate defendant's right to due process because it did not render defendant's trial fundamentally unfair. (*People v. Hamilton* (2009) 45 Cal.4th 863, 930; *People v. Partida* (2005) 37 Cal.4th 428, 439.) We reject defendant's constitutional challenge to the admissibility of this evidence.

Harris, 2018 WL 1516967, at *7–9.

Admission of evidence is an issue of state law, and errors of state law do not warrant federal habeas corpus relief. Estelle v. McGuire, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). The pertinent question on habeas review is whether the state proceedings satisfied

due process and "[t]he admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (quoting Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir. 1995)). The petitioner in Holley was charged with multiple felony counts of lewd and lascivious acts on a child under fourteen and challenged the trial court's admission of a lewd matchbook and several sexually explicit magazines seized from the petitioner's bedroom. Holley, 568 F.3d at 1096. The Ninth Circuit denied habeas relief because the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ [of habeas corpus]." Id. at 1101. "Absent such 'clearly established Federal law,'" the Holley court could not "conclude that the state court's ruling was an 'unreasonable application.'" Id. (quoting Carey v. Musladin, 549 U.S. 70, 77 (2006)).

Holley's conclusion "that there was, at that time, no clearly established federal law providing that the 'admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ' . . . remains true," and this Court is bound by the Ninth Circuit's decision in Holley. Walden v. Shinn, 990 F.3d 1183, 1204 (9th Cir. 2021) (quoting Holley, 568 F.3d at 1101)). Although circuit caselaw is not governing law under AEDPA, the Court must follow Ninth Circuit precedent that has determined what federal law is clearly established. Byrd v. Lewis, 566 F.3d 855, 860 n.5 (9th Cir. 2009). See Campbell v. Rice, 408 F.3d 1166, 1170 (9th Cir. 2005) (en banc) (Ninth Circuit "precedents may be pertinent to the extent that they illuminate the meaning and application of Supreme Court precedents.").

Because there is no Supreme Court holding that establishes the fundamental unfairness of admitting prejudicial evidence, the California Court of Appeal's denial was not contrary to, or an unreasonable application of, clearly established federal law. The decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103. The Court must defer to the state court's decision. Accordingly, Petitioner is not entitled to habeas relief on his prejudicial evidence claim, and it should be denied.

C. Sentencing Error

In Ground Five, Petitioner asserts that the sentencing court abused its discretion in not striking the gun use enhancement on remand pursuant to Senate Bill No. 620 ("SB 620"). (ECF No. 1 at 7). Respondent argues that this claim is not cognizable because the state law error presents no federal question. (ECF No. 27 at 21). Whether Petitioner's gun use enhancement should have been stricken pursuant to SB 620 is an issue of state law that is not cognizable in federal habeas corpus. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010) (per curiam) ("[I]t is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in the federal courts."); Estelle v. McGuire, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994) ("Absent a showing of fundamental unfairness, a state court's misapplication of its own sentencing laws does not justify federal habeas relief."). Accordingly, Petitioner is not entitled to habeas relief on his sentencing error claim, and it should be denied.

D. Ineffective Assistance of Counsel

In Grounds Three and Five, Petitioner asserts ineffective assistance of trial counsel for: (1) failing to argue that Petitioner was legally provoked by the condom prank; (2) failing to litigate issues regarding Petitioner's mental health; and (3) failing to file a notice of appeal regarding the SB 620 hearing. (ECF No. 1 at 5–7, 12). In Ground Five, Petitioner also asserts ineffective assistance of appellate counsel for: (1) failing to litigate issues regarding Petitioner's mental health; and (2) failing to develop and raise claims on appeal and/or in habeas corpus that Petitioner now raises in the instant petition. (ECF No. 1 at 7, 12).

1. *Strickland* Legal Standard

The clearly established federal law governing ineffective assistance of counsel claims is Strickland v. Washington, 466 U.S. 668 (1984). In a petition for writ of habeas corpus alleging ineffective assistance of counsel, the court must consider two factors. Strickland, 466 U.S. at 687. First, the petitioner must show that counsel's performance was deficient, requiring a showing that counsel made errors so serious that he or she was not functioning as the "counsel"

guaranteed by the Sixth Amendment. Id. at 687. The petitioner must show that counsel's representation fell below an objective standard of reasonableness and must identify counsel's alleged acts or omissions that were not the result of reasonable professional judgment considering the circumstances. Richter, 562 U.S. at 105 ("The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom.") (citing Strickland, 466 U.S. at 690). Judicial scrutiny of counsel's performance is highly deferential. A court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 687. A reviewing court should make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at that time." Id. at 689.

Second, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. A court "asks whether it is 'reasonable likely' the result would have been different. . . . The likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 111–12 (citing Strickland, 466 U.S. at 696, 693). A reviewing court may review the prejudice prong first. See Pizzuto v. Arave, 280 F.3d 949, 955 (9th Cir. 2002).

When § 2254(d) applies, "[t]he pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard." Richter, 562 U.S. at 101. Moreover, because Strickland articulates "a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) (citing Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). "The standards created by Strickland and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." Richter, 562 U.S. at 105 (citations omitted). Thus, "for claims of ineffective assistance of counsel . . . AEDPA review must be 'doubly deferential' in

order to afford 'both the state court and the defense attorney the benefit of the doubt.'" Woods v. Donald, 575 U.S. 312, 316–17 (2015) (quoting Burt v. Titlow, 571 U.S. 12, 15 (2013)). When this "doubly deferential" judicial review applies, the inquiry is "whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Richter, 562 U.S. at 105.

2. Failure to Argue Third-Party Provocation

Petitioner asserts that trial counsel was ineffective for failing to argue that Petitioner was legally provoked by the condom prank. (ECF No. 1 at 5). Respondent argues that it was reasonable to reject Petitioner's trial-related ineffectiveness claims. (ECF No. 27 at 18). This claim was raised on direct appeal to the California Court of Appeal, Fifth Appellate District, which denied the claim in a reasoned opinion. The California Supreme Court summarily denied Petitioner's petition for review. As federal courts review the last reasoned state court opinion, the Court will "look through" the California Supreme Court's summary denial and examine the decision of the California Court of Appeal. See Wilson, 138 S. Ct at 1192.

In denying Petitioner's ineffective assistance of trial counsel claim regarding the third-party provocation theory, the California Court of Appeal stated:

> During closing argument to the jury, defense counsel referred to the condom prank carried out by Foreman and Jasmine Wilemon, but argued Foreman's account of not directly participating was inconsistent with Jasmine's account and showed Foreman's testimony lacked general credibility. Defense counsel did not otherwise make other argument concerning the incident and did not argue it, too, could have provoked defendant.
>
> Defendant contends his trial counsel was ineffective for failing to argue a third party provocation theory to the jury based on the neighbors' condom prank. Defendant argues his counsel was ineffective for failing to argue the prank was sufficient provocation to constitute heat of passion. We disagree.
>
> A defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Williams v. Taylor* (2000) 529 U.S. 362, 391, 394; *In re Hardy* (2007) 41 Cal.4th 977, 1018.) A reasonable probability is one sufficient to undermine confidence in the outcome. The second question is not one of outcome determination but whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. (*In re Hardy*, *supra*, at p. 1019.)

> A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel's decisionmaking is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one or unless there simply could be no satisfactory explanation. Prejudice must be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Attorneys are not expected to engage in tactics or to file motions that are futile. (*Id.* at p. 419; also see *People v. Mendoza* (2000) 24 Cal.4th 130, 166.)
>
> As the People have argued and we have explained above, this argument is not persuasive given the context of defendant's actions. Defendant's wife was apparently having an affair with Breeding for some time prior to the shooting. Defendant had seen the two alone in a room together late at night when defendant unexpectedly returned home from the graveyard shift to get medication. During her closing argument, defense counsel focused the jury's attention on Breeding's conduct, including the fact Breeding came back to defendant's home after being told to stay away. Defense counsel argued this conduct was provocative enough to justify a conviction for manslaughter rather than first or second degree murder.
>
> Defense counsel was more effective in trying to turn the jury's scrutiny to Breeding's most recent conduct because this conduct left defendant with less time to cool down than the condom incident occurring earlier. Defendant's ire at Breeding was more likely fueled by what appeared to be an affair with his wife than the condom prank—whether or not the jury found defendant thought Breeding carried out the prank or it was done by his neighbors. Defense counsel's argument centered on heat of passion caused by his wife's alleged affair with Breeding, which would supersede the condom prank in its emotional intensity.
>
> Defendant has failed to show defense counsel's representation fell below professional norms in how she argued provocation in her closing argument. Defendant has further failed to demonstrate defense counsel's failure to add the condom prank to her closing argument was prejudicial to defendant's defense.

Harris, 2018 WL 1516967, at *5–6.

"[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." Yarborough v. Gentry, 540 U.S. 1, 5–6 (2003). Because "which issues to sharpen and how best to clarify them [during closing argument] are questions with many reasonable answers," "[j]udicial review of a defense attorney's summation is therefore highly deferential—and doubly deferential when it is conducted through the lens of federal habeas." Id. at 6. Therefore, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical

reasons rather than through sheer neglect." Gentry, 540 U.S. at 8 (citing Strickland, 466 U.S. at 690).

Strickland instructs that courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," 466 U.S. at 689, and the California Court of Appeal's determination that Petitioner "failed to show defense counsel's representation fell below professional norms in how she argued provocation in her closing argument," Harris, 2018 WL 1516967, at *6, was not objectively unreasonable. The third-party provocation "issue[] counsel omitted w[as] not so clearly more persuasive than those [s]he discussed that the[] omission can only be attributed to a professional error of constitutional magnitude." Gentry, 540 U.S. at 9. In fact, as set forth by the California Court of Appeal, it was reasonable to conclude that counsel's focus on Breeding's affair with Petitioner's wife, which would surpass the condom prank in emotional intensity, and Breeding's most recent conduct, which left Petitioner with less time to cool down than the earlier condom prank, was a more effective argument to the jury.

Based on the foregoing, under AEDPA's "doubly deferential" review, Donald, 575 U.S. at 316, the Court finds that the state court's rejection of Petitioner's ineffective assistance claim regarding the third-party provocation theory was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of fact. The decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103. Accordingly, Petitioner is not entitled to habeas relief for ineffective assistance of counsel on this ground, and the claim should be denied.

3. Mental Health Issues

Petitioner asserts that trial counsel was ineffective for failing to challenge Petitioner's competency to stand trial and for failing to introduce evidence of Petitioner's psychiatric care at trial. (ECF No. 1 at 13–14). Respondent argues that it was reasonable to reject Petitioner's trial-related ineffectiveness claims. (ECF No. 27 at 18). This claim was raised in a state habeas petition filed in the California Supreme Court, which summarily denied the petition. (LD 22).

There is no reasoned state court decision on this claim, and the Court presumes that the state court adjudicated the claim on the merits. See Johnson, 568 U.S. at 301. Accordingly, AEDPA's deferential standard of review applies, and the Court "must determine what arguments or theories . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." Richter, 562 U.S. at 102.

a. Competency to Stand Trial

"[T]o succeed on a claim that counsel was ineffective for failing to move for a competency hearing, there must be 'sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt defendant's competency' and 'a reasonable probability that the defendant would have been found incompetent.'" Dixon v. Ryan, 932 F.3d 789, 802 (9th Cir. 2019) (quoting Hibbler v. Benedetti, 693 F.3d 1140, 1149–50 (9th Cir. 2012)). "A defendant is deemed competent to stand trial if he 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and . . . has a rational as well as factual understanding of the proceedings against him.'" Clark v. Arnold, 769 F.3d 711, 729 (9th Cir. 2014) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam)).

Petitioner alleges that trial counsel Singh knew of Petitioner's mental health treatment history and did not believe that Petitioner was mentally stable enough to testify on his own behalf. (ECF No. 1 at 14, 22). Although Petitioner appears to argue that these allegations should have given counsel reason to doubt Petitioner's competence to stand trial, a history of mental health treatment and lack of confidence in Petitioner's ability to withstand one to two days of questioning from the prosecution at trial would not necessarily have raised questions regarding Petitioner's ability to consult with counsel with a reasonable degree of rational understanding or Petitioner's rational and factual understanding of the proceedings against him.

Based on the foregoing, under AEDPA's "doubly deferential" review, Donald, 575 U.S. at 316, the Court finds that the state court's rejection of Petitioner's ineffective assistance claim regarding trial counsel's failure to challenge Petitioner's competency to stand trial was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based

on an unreasonable determination of fact. The decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103. Accordingly, Petitioner is not entitled to habeas relief for ineffective assistance of counsel on this ground, and the claim should be denied.

b. Evidence of Psychiatric Care

The petition does not explain Petitioner's mental health issues or his treatment history in detail, but rather contains vague language concerning Petitioner's psychiatric care since approximately 2004, "years of 'mental health care,'" and "psychiatrically prescribed meds." (ECF No. 1 at 14, 22). However, Petitioner did present the California Supreme Court with limited mental health records, which consist of records of his January 18, 2005 initial evaluation and a May 9, 2013 visit. (ECF No. 26-22 at 17–20).

"AEDPA . . . restricts the scope of the evidence that we can rely on in the normal course of discharging our responsibilities under § 2254(d)(1)." Murray v. Schriro, 745 F.3d 984, 998 (9th Cir. 2014). "AEDPA's 'backward-looking language requires an examination of the state-court decision at the time it was made. It [then logically] follows that the record under review is limited to the record in existence at that same time, *i.e.*, the record before the state court.'" Id. (alteration in original) (quoting Cullen v. Pinholster, 563 U.S. 170, 182 (2011)). Therefore, this Court will look to the state habeas petition presented to the California Supreme Court and any attachments thereto rather than the petition filed in this Court.

The record of the January 18, 2005 visit indicates that Petitioner came in for an initial evaluation and to start medication management. The record states that Petitioner had a history of whining and getting angry easily and was diagnosed with ADHD when he was young. There was no history of mood swings, depression, feeling hopeless, suicidal ideation, delusions, voices, visions, or paranoia. (ECF No. 26-22 at 19). The mental status examination describes Petitioner as alert, oriented, very hyper, and not sitting still, his thought content as fair, memory as decreased, judgment and insight as fair, attention and concentration as poor, intellectual functions as fair, and with no current suicidal or homicidal ideation. (Id. at 20).

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The record of the May 9, 2013 visit[7] references Petitioner's ADHD diagnosis and indicates that Petitioner was taking medication and came in for a routine follow-up appointment for progress evaluation and medication management. (ECF No. 26-22 at 17–18). The record states that Petitioner had no complaints and no behavioral problems and that he denied delusions, voices, visions, paranoia, and suicidal and homicidal ideation. Petitioner's medications were taken regularly with no noted side effects. The record also describes Petitioner as sitting calmly with no abnormal movements, having fair hygiene and appearance, fair eye contact, good speech volume and rhythm, good mood and appropriate affect, fair thought content and process, and fair insight and judgment. The record further indicates that Petitioner was "at baseline" and "remain[ed] safe to treat at outpatient," although "continuous efforts w[ould] be made to improve the impaired level of functioning." (ECF No. 26-22 at 17).

Petitioner asserts that trial counsel Singh was ineffective because she "[k]new of [Petitioner]'s mental health issues and made a professional/strategic determination not to raise them." (ECF No. 1 at 13). Petitioner alleges that he asked trial counsel why she did not use his years of mental health care at trial and that counsel responded, "then, the D.A. would have been able to introduce the illegal drugs in your system beyond that of the psychiatrically prescribed meds." (ECF No. 1 at 22). Petitioner further alleges that when he asked trial counsel why she did not call Petitioner's psychiatrist and introduce the years of psychiatric care Petitioner received, counsel claimed that Petitioner exhibited no signs of mental instability. (Id.).

"The law . . . does not permit us to second-guess the trial attorney's strategy. Instead, 'every effort [must] be made to eliminate the distorting effect of hindsight. We must therefore resist the temptation 'to conclude that a particular act or omission was unreasonable' simply because it 'proved unsuccessful' at trial." Daire v. Lattimore, 818 F.3d 454, 465 (9th Cir. 2016) (quoting Strickland, 466 U.S. at 689). "[T]he relevant inquiry under Strickland is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable." Atwood v. Ryan, 870 F.3d 1033, 1064 (9th Cir. 2017) (alteration in original)

[7] This visit occurred approximately one month before Breeding's death.

(internal quotation marks omitted) (quoting Siripongs v. Calderon, 133 F.3d 732, 736 (9th Cir. 1998)).

Here, Petitioner acknowledges that trial counsel "made a professional/strategic determination not to raise" Petitioner's mental health issues and his treatment history. (ECF No. 1 at 13). The documents submitted to the California Supreme Court regarding Petitioner's mental health treatment history indicate that although Petitioner had been diagnosed with ADHD and was prescribed medication, Petitioner had no behavioral problems, was taking medication with no noted side effects, had fair thought content and process, and had fair insight and judgment. The records do not demonstrate that Petitioner's mental health issues had an impact on Petitioner's ability to form the required mental state for the offense. Given that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," Strickland, 466 U.S. at 690, the California Supreme Court reasonably could have concluded that counsel did not perform deficiently by not introducing mental health evidence and instead pursuing a heat of passion defense focused on Breeding's affair with Petitioner's wife.

Further, even if trial counsel performed deficiently, the California Supreme Court reasonably could have concluded that Petitioner failed to establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. See Sully v. Ayers, 725 F.3d 1057, 1070 (9th Cir. 2013) (finding state court was not unreasonable in concluding no prejudice stemmed from counsel's failure to investigate mental state because while petitioner "proffered evidence showing that he was generally consuming large quantities of cocaine and suffering various psychotic symptoms around the time of the murders, none of the evidence relates to the impact of his cocaine usage or psychotic symptoms on specific instances of murder").

Based on the foregoing, under AEDPA's "doubly deferential" review, Donald, 575 U.S. at 316, the Court finds that the state court's rejection of Petitioner's ineffective assistance claim regarding trial counsel's failure to introduce evidence of Petitioner's mental health and treatment history was not contrary to, or an unreasonable application of, clearly established federal law,

nor was it based on an unreasonable determination of fact. The decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103. Accordingly, Petitioner is not entitled to habeas relief for ineffective assistance of counsel on this ground, and the claim should be denied.

4. Appellate Counsel

Petitioner asserts that appellate counsel was ineffective for failing to litigate issues regarding Petitioner's mental health and failing to develop and raise claims on appeal and/or in habeas corpus that Petitioner now raises in the instant petition. (ECF No. 1 at 7, 12). Respondent argues that it was reasonable to reject this claim because appellate counsel need only raise claims most likely to prevail on appeal as limited to the four corners of the record on appeal and there is no federal constitution right to counsel when seeking state postconviction relief. (ECF No. 27 at 21). This claim was raised in a state habeas petition filed in the California Supreme Court, which summarily denied the petition. (LD 22). There is no reasoned state court decision on this claim, and the Court presumes that the state court adjudicated the claim on the merits. See Johnson, 568 U.S. at 301. Accordingly, AEDPA's deferential standard of review applies, and the Court "must determine what arguments or theories . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." Richter, 562 U.S. at 102.

As noted by Respondent, "[a]ppellate jurisdiction is limited to the four corners of the record on appeal." In re Carpenter, 9 Cal. 4th 634, 646 (1995). Further, "[u]sually ineffective assistance of counsel claims are properly decided in a habeas corpus proceeding rather than on appeal." People v. Carrasco, 59 Cal. 4th 924, 980 (2014) (citing People v. Tello, 15 Cal. 4th 264, 266–267 (1997)). In a response letter to Petitioner, appellate counsel stated:

> The issue about trial counsel's failure to bring up mental health treatment is a potential IAC claim. I did not question trial counsel about this issue. It goes beyond the record on appeal, so you will need to file a state habeas raising IAC in order to exhaust this claim prior to your 2254 petition.

> The jury's statement that the "racial slur" influenced their decision is outside the appellate record, and is something you will need to address in your 2254 petition/state habeas.

(ECF No. 1 at 39). As set forth in the letter, appellate counsel was constrained by the trial record. Accordingly, appellate counsel was not deficient for failing to raise an ineffective assistance of trial counsel claim or failing to litigate issues regarding Petitioner's mental health that relied on evidence outside the record on appeal. Additionally, there is no constitutional right to counsel in state postconviction proceedings. Garza v. Idaho, 139 S. Ct. 738, 749 (2019) (citing Pennsylvania v. Finley, 481 U.S. 551, 555 (1987)). Therefore, the California Supreme Court could have reasonably determined that Petitioner's appellate counsel did not perform deficiently by failing to develop and raise claims in a state postconviction proceeding that Petitioner now raises in the instant petition.

Under AEDPA's "doubly deferential" review of ineffective assistance of counsel claims, Donald, 135 S. Ct. at 1376, the Court finds that the California Supreme Court's decision denying Petitioner's ineffective assistance of appellate counsel claim was not contrary to, or an unreasonable application of, clearly established federal law. The decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103. Accordingly, Petitioner is not entitled to habeas relief for ineffective assistance of appellate counsel, and the claim should be denied.

5. Failure to File Notice of Appeal

Petitioner asserts that trial counsel was ineffective for failing to file a notice of appeal regarding the SB 620 hearing. (ECF No. 1 at 12). Respondent argues that "there was at least a reasonable argument that the state petition did not support an inference that during the time to appeal Petitioner expressly told [trial counsel] to pursue an appeal" and that it was reasonable to find Petitioner failed to show prejudice. (ECF No. 27 at 22). This claim was raised in a state habeas petition filed in the California Supreme Court, which summarily denied the petition. (LD 22). There is no reasoned state court decision on this claim, and the Court presumes that the state court adjudicated the claim on the merits. See Johnson, 568 U.S. at 301. Accordingly, AEDPA's

deferential standard of review applies, and the Court "must determine what arguments or theories . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." Richter, 562 U.S. at 102.

Strickland "applies to claims . . . that counsel was constitutionally ineffective for failing to file a notice of appeal," and the Supreme Court has "long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000).

> In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. We employ the term "consult" to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance.

Flores-Ortega, 528 U.S. at 478 (citation omitted).

> [C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.

Flores-Ortega, 528 U.S. at 480.

"[T]o show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Flores-Ortega, 528 U.S. at 484. "[P]rejudice is presumed 'when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken.'" Garza v. Idaho, 139 S. Ct. 738, 744 (2019) (quoting Flores-Ortega, 528 U. S. at 484).

As "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits," Pinholster, 563 U.S. at 181, this Court will look to the state habeas petition presented to the California Supreme Court and any attachments thereto rather than the petition filed in this Court. In the state habeas petition filed in the California Supreme Court, Petitioner alleged:

> At the SB620 – hearing Mr. Harris asked Ms. Singh about filling [*sic*] an appeal of the judge's denial to strike the gun enhancement, Ms. Singh said she would contact Mr. Warriner (appellate counsel) about it (Harris Declaration) yet she never did (see Exhibit – D, postit note attached to some correspondence from Mr. Warriner to Mr. Harris).

(ECF No. 26-22 at 8–9). In a sworn declaration attached to the state habeas petition, Petitioner stated: "I asked Ms. Singh if she would appeal the denial, by the judge, of the SB620 striking of the 25-year to life gun enhancement. Ms. Singh stated that she would contact my appeal counsel about that issue." (Id. at 25). Petitioner also presented a Post-It note bearing prior appellate counsel Warriner's apparent signature that stated "Pam [Singh] didn't contact me about appealing the gun enhancement." (ECF No. 26-21 at 29; ECF No. 26-22 at 47; ECF No. 27 at 25).

Respondent argues that "[a]t least one fairminded jurist's view of the state court presentation allowed for at least a reasonable argument that Petitioner chose not to include [a] straightforward statement" that Petitioner "expressly told [trial counsel] Singh to file a notice of appeal—and that he did so in time for Singh to file the notice by December 31, 2018[.]" (ECF No. 27 at 23). Respondent contends that "a fairminded jurist could observe that the careful-partitioning of the declaration ensured that it surgically omitted a sworn representation as to just when, after the denial [of the SB 620 striking of the gun enhancement], Petitioner made that communication to Singh [regarding an appeal], or just when she responded." (ECF No. 27 at 23–24). Respondent asserts that it was within Petitioner's ability to specifically state "(1) that he in fact told Singh to start an appeal and (2) when," and that there is a reasonable argument that "by choosing vague language and omitting dates . . . Petitioner chose not to provide stronger evidence" and "that such poor effort in the state petition warranted an affirmative inference that he knew the true facts were adverse." (ECF No. 27 at 25).

Here, Respondent focuses almost exclusively on Petitioner's sworn declaration, which does not include details regarding *when* Petitioner communicated to counsel regarding an appeal. However, in the state habeas petition filed in the California Supreme Court, Petitioner alleged that "*[a]t the SB620 – hearing* Mr. Harris asked Ms. Singh about filling [*sic*] an appeal of the judge's denial to strike the gun enhancement[.]" (ECF No. 26-22 at 8–9 (emphasis added)). "[W]hen the California Supreme Court issues a summary denial of a habeas claim, it '*generally assumes the allegations in the petition to be true*, but does not accept wholly conclusory allegations, and will also review the record of the trial to assess the merits of the petitioner's claims.'" Livaditis v. Davis, 933 F.3d 1036, 1045 (9th Cir. 2019) (emphasis added) (quoting Pinholster, 563 U.S. at 188 n.12). Therefore, based on both the allegations in the state habeas petition and Petitioner's sworn declaration, the record before the California Supreme Court was that: Petitioner asked trial counsel about filing an appeal of the judge's denial to strike the gun enhancement at the SB 620 hearing, trial counsel said she would contact appellate counsel about the issue, there was a notation from appellate counsel stating that trial counsel did not contact him about appealing the gun enhancement, and no notice of appeal was filed.

As there are no allegations whatsoever regarding a failure to consult with Petitioner about an appeal, in summarily denying Petitioner's ineffective assistance of counsel claim for failure to file a notice of appeal, the California Supreme Court could have concluded there was no ineffectiveness only if it found that: (1) Petitioner did not instruct counsel to file an appeal; or (2) Petitioner did not establish prejudice resulting from counsel's deficient performance.

"A state court's decision is based on unreasonable determination of the facts under § 2254(d)(2)[8] if the state court's findings are 'unsupported by sufficient evidence,' if the 'process employed by the state court is defective,' or 'if no finding was made by the state court at all.'"

[8] A different provision of AEDPA provides that "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). The Ninth Circuit's "panel decisions appear to be in a state of confusion as to whether § 2254(d)(2) or (e)(1), or both, applies to AEDPA review of state-court factual findings," Murray, 745 F.3d at 1001, and the Supreme Court has not addressed the relationship between § 2254(d)(2) and (e)(1), Wood v. Allen, 558 U.S. 290, 300 (2010). However, the Court "need not address the interaction between § 2254(d)(2) and (e)(1) when the petitioner's claims fail to satisfy either provision." Atwood v. Ryan, 870 F.3d 1033, 1047 (9th Cir. 2017) (citing Murray, 745 F.3d at 1001). "Indeed, it is difficult to imagine a case in which a court would find that a state court decision was 'an unreasonable determination of the facts,' but that the petitioner had not rebutted the 'presumption of correctness by clear and convincing evidence.'" Apelt v. Ryan, 878 F.3d 800, 837 n.23 (9th Cir. 2017).

Hernandez v. Holland, 750 F.3d 843, 857 (9th Cir. 2014) (quoting Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004)). "[U]nder § 2254(d)(2), a federal court 'may not second-guess' a state court's factual findings unless 'the state court was not merely wrong, but actually unreasonable' in light of the record before it." Atwood v. Ryan, 870 F.3d 1033, 1047 (9th Cir. 2017) (quoting Taylor, 366 F.3d at 999).

The Court finds that a determination that Petitioner did not instruct counsel to file a notice of appeal would be unreasonable under 28 U.S.C. § 2254(d)(2). Petitioner's allegations in the state habeas petition and declaration—"Mr. Harris asked Ms. Singh about filling [*sic*] an appeal of the judge's denial to strike the gun enhancement" and "I asked Ms. Singh if she would appeal the denial, by the judge, of the SB620 striking of the 25-year to life gun enhancement"—initially may appear as reasonably demonstrating to counsel that Petitioner was interested in appealing but falling short of establishing that Petitioner specifically or expressly instructed counsel to file a notice of appeal. However, given that counsel's response to Petitioner's statement was to say that she would contact Petitioner's appellate counsel about an appeal, it appears that trial counsel herself construed Petitioner's statement as instructions to file an appeal and her stated response was consistent with such instructions. Therefore, considering the whole record (including counsel's response) rather than a technical parsing of Petitioner's pro se allegations regarding Petitioner's statement to trial counsel, the Court is "'convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record' before the state court" and that the California Supreme Court made a decision based on an unreasonable determination of the facts. Hurles v. Ryan, 752 F.3d 768, 778 (9th Cir. 2014) (quoting Taylor, 366 F.3d at 1000).

Having found that a determination that Petitioner did not instruct counsel to file a notice of appeal would be unreasonable under 28 U.S.C. § 2254(d)(2), it follows that a determination that Petitioner did not establish prejudice also would be objectively unreasonable. See Manning v. Foster, 224 F.3d 1129, 1136 (9th Cir. 2000) ("[P]rejudice is presumed when an attorney fails to file an appeal against the petitioner's express wishes. Such failure always constitutes ineffective assistance of counsel." (citations omitted)).

Respondent relies on Canales v. Roe, 151 F.3d 1226 (9th Cir. 1998), for the proposition that counsel's deficiency did not cause Petitioner to lose his appellate rights because "'California provides an avenue of relief for a defendant whose counsel has filed a late notice of appeal' and has, 'time and time again, declared that the loss of appeal rights can easily be remedied where counsel has erred. . . . The defendant need only act in a timely fashion. . . .'" (ECF No. 27 at 26 (quoting Canales, 151 F.3d at 1230)). Initially, the Court notes that Canales was decided before Flores-Ortega, and it is unclear to what extent Canales was abrogated by Flores-Ortega. Further, Canales can be differentiated from the instant matter because counsel filed an untimely notice of appeal and "the state trial court notified Canales of the untimeliness of his appeal and directed him toward a potential avenue of relief." Canales, 151 F.3d at 1230. Because Canales "failed to follow that direction," the Ninth Circuit found that "[u]ltimately, it cannot be said that inadequate performance by counsel denied him the right to an appeal." Id. See also Garcia v. Foulk, No. 1:14-cv-00461-AWI-SKO, 2015 WL 6689651, at *4 (E.D. Cal. Oct. 28, 2015) ("Like Canales, Petitioner initially lost his right to appeal by his trial attorney's ineffective assistance, but ultimately lost it again through his own failure to act after the California Court of Appeals reopened a time period in which he could file a notice of appeal. When a defendant fails to follow the path to relief mapped out for him by the state court, 'it cannot be said that inadequate performance by counsel denied him the right to an appeal.'" (quoting Canales, 151 F.3d at 1230)). In contrast, here, counsel failed to file a notice of appeal, and Petitioner was not directed toward a potential path of relief.

Based on the foregoing, the Court finds that the state court's decision denying Petitioner's ineffective assistance claim for failure to file a notice of appeal was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

E. Expansion of Record and Evidentiary Hearing

> If we determine, considering only the evidence before the state court, that the adjudication of a claim on the merits resulted in a decision contrary to or involving an unreasonable application of clearly established federal law, or that the state court's decision was based on an unreasonable determination of the facts,

> we evaluate the claim de novo, and we may consider evidence properly presented for the first time in federal court.

Hurles, 752 F.3d at 778.

"AEDPA [28 U.S.C. § 2254(e)(2)] constrains when the district court may hold an evidentiary hearing or expand the record pursuant to Rule 7 of the Rules Governing § 2254 cases if a state prisoner seeking federal habeas relief has failed to develop the factual record that supports a claim in state court." Rhoades v. Henry, 598 F.3d 511, 517 (9th Cir. 2010) (citing Holland v. Jackson, 542 U.S. 649, 652–53 (2004) (per curiam); Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005)). "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams v. Taylor, 529 U.S. 420, 432 (2000). "Diligence for purposes of the opening clause [of § 2254(e)(2)] depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court[.]" Id. at 435.

Here, the record before the Court demonstrates that Petitioner exercised diligence to develop the factual basis of his ineffective assistance of counsel claim for failure to file a notice of appeal. Prior to filing his state habeas petitions, Petitioner wrote a letter to trial counsel asking, *inter alia*, why she did not file a notice of appeal with respect to the SB 620 hearing. (ECF No. 1 at 33–35). Petitioner also obtained and presented to the state courts a copy of a Post-It note bearing prior appellate counsel Warriner's apparent signature that stated that trial counsel "Pam [Singh] didn't contact me about appealing the gun enhancement." (ECF No. 26-21 at 29; ECF No. 26-22 at 47). Additionally, the state courts denied Petitioner's state habeas petitions without ordering formal pleadings. "Because [Petitioner] never reached the stage of the [state habeas] proceedings at which an evidentiary hearing should be requested, he has not shown 'a lack of diligence at the relevant stages of the state court proceedings' and therefore is not subject to AEDPA's restrictions on evidentiary hearings." Horton v. Mayle, 408 F.3d 570, 582 n.6 (9th Cir. 2005).

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As the record before the Court demonstrates that Petitioner did not fail to develop the factual basis for his ineffective assistance of counsel claim for failure to file a notice of appeal, the Court may expand the record pursuant to Rule 7 of the Rules Governing § 2254 cases.[9]

In addition, where, as here, the "petitioner has not failed to develop the factual basis of his claim as required by 28 U.S.C. § 2254(e)(2), an evidentiary hearing is required if (1) the petitioner has shown his entitlement to an evidentiary hearing pursuant to Townsend v. Sain . . . and (2) the allegations, if true, would entitle him to relief." Hurles, 752 F.3d at 791 (citing Stanley v. Schriro, 598 F.3d 612, 624 (9th Cir. 2010)). Townsend held that a federal court must grant an evidentiary hearing if:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend v. Sain, 372 U.S. 293, 313 (1963), overruled on other grounds by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

Petitioner was not afforded an evidentiary hearing in state court. As set forth in section IV(D)(5), *supra*, a determination that Petitioner did not instruct counsel to file a notice of appeal is not fairly supported by the record as a whole and Petitioner's allegations, if true, would entitle him to relief. Accordingly, an evidentiary hearing on Petitioner's ineffective assistance of counsel claim for failure to file a notice of appeal is warranted.

V.

RECOMMENDATION

Based on the foregoing, the undersigned HEREBY RECOMMENDS that:

1. The record be expanded and an evidentiary hearing be held on Petitioner's ineffective assistance of counsel claim for failure to file a notice of appeal; and

[9] The Court "may direct the parties to expand the record by submitting additional materials relating to the petition," such as "letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge," and affidavits. Rule 7(a)–(b), Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"), 28 U.S.C foll. § 2254. "[T]he party against whom the additional materials are offered" must have an opportunity to admit or deny their correctness. Habeas Rule 7(c).

2. The remaining claims for relief in the petition for writ of habeas corpus be DENIED.

This Findings and Recommendation is submitted to the assigned United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within **THIRTY (30) days** after service of the Findings and Recommendation, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within fourteen (14) days after service of the objections. The assigned District Judge will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **December 21, 2021**

UNITED STATES MAGISTRATE JUDGE

EXHIBIT “D”

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

GERALD BRENT HARRIS,

CASE NO: **1:19-CV-01203-JLT-SAB**

V.

SCOTT FRAUENHEIM,

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 1/29/2024

Keith Holland
Clerk of Court

ENTERED: **January 29, 2024**

by: /s/ O. Rivera
Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GERALD BRENT HARRIS,

Petitioner,

v.

SCOTT FRAUENHEIM,

Respondent.

Case No. 1:19-cv-01203-JLT-SAB-HC

ORDER ADOPTING FINDINGS AND RECOMMENDATION, DENYING IN PART PETITION FOR WRIT OF HABEAS CORPUS, AND REFERRING MATTER BACK TO MAGISTRATE JUDGE FOR EVIDENTIARY HEARING

(Doc. 35)

On December 21, 2021, the assigned magistrate judge issued findings and that an evidentiary hearing be held on Petitioner's ineffective assistance of counsel claim related to defense counsel's alleged failure to file a notice of appeal (hereinafter referenced as the "notice of appeal IAC claim") from a resentencing proceeding held pursuant to California Senate Bill 620 ("SB 620") and that the remaining claims in the petition be denied. (Doc. 35.) Respondent filed timely objections, challenging only the recommendation to hold an evidentiary hearing on the notice of appeal IAC claim. (Doc. 37.) Although Petitioner was granted an extension of time to file a reply to Respondent's objections, he did not do so, and the time for doing so has passed.

According to 28 U.S.C. § 636(b)(1)(C), the Court conducted a *de novo* review of the case. Having carefully reviewed the entire file as to all claims, including Respondent's objections, the Court adopts the findings and recommendations in full. Nonetheless, the Court finds it appropriate to address Respondent's objections in some detail. *See Mays v. Hines*, 141 S. Ct. 1145, 1149, *reh'g denied*, 141 S. Ct. 2693 (2021) (noting that "there is no way to hold that a

decision was 'lacking in justification' without identifying—let alone rebutting—all of the justifications").

The standard of decision applicable to motions filed under § 2254 is set forth in § 2254(d), which states:

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

See also Harrington v. Richter, 562 U.S. 86, 97–98 (2011).

As the findings and recommendations correctly explain, Petitioner raised his notice of appeal IAC claim in his state habeas petition filed in the California Supreme Court. (Doc. 35 at 29 (citing record).) The California Supreme Court summarily denied the petition. (*Id.*) Although there is no reasoned state court decision addressing this claim, the findings and recommendations correctly presumed that the state court adjudicated the claim on the merits. (*Id.* (citing *Johnson v. Williams*, 568 U.S. 289, 301 (2013)).) The Court's role under such circumstances is to "determine what arguments or theories. . . could have supported, the state court's decision; and then . . . ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the U.S. Supreme] Court." (*Id.* at 30 (citing *Harrington*, 562 U.S. at 102).)

Strickland v. Washington, 466 U.S. 668 (1984), is the starting point for understanding the clearly established federal standard governing ineffective assistance of counsel claims. Under *Strickland*, a petitioner must first demonstrate that counsel's performance was deficient, which requires a showing that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 687. Second, the petitioner must show that the deficient performance prejudiced the defense. *Id.*

A line of Supreme Court cases has applied *Strickland* in the context of the failure to file a notice of appeal. The key case for purposes of the present analysis is *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000), in which the defendant pled guilty to second-degree murder charges in California state court. *Id.* at 473. After pronouncing sentence, the trial judge informed Flores-Ortega of his right to file an appeal within sixty days. *Id.* at 474. Although defense counsel wrote "bring appeal papers" in her file, no notice of appeal was filed within the allotted 60 days. *Id.* Approximately four months after entry of judgment, Flores-Ortega tried to file a notice of appeal, which was rejected as untimely by the Fresno County Superior Court Clerk. *Id.*

Flores-Ortega eventually filed a habeas petition before the Eastern District of California pursuant to § 2254, bringing, among other things, notice of appeal IAC claim. *Id.* The district court denied the motion, finding that "there was no consent to a failure to file [a notice of appeal]," but that the relevant Ninth Circuit caselaw that would have provided Flores-Ortega relief under those circumstances post-dated his conviction and could not be applied retroactively on collateral review. *Id.* at 474–75. The Ninth Circuit reversed, relying on even older Ninth Circuit case that predated Flores-Ortega's conviction and holding that a habeas petitioner need only show that his counsel's failure to file a notice of appeal was without the petitioner's consent. *Id.* at 476. The Supreme Court granted certiorari, to "resolve a conflict in the lower courts regarding counsel's obligations to file a notice of appeal." *Id.*

The Court began by addressing the first *Strickland* prong—deficient performance—explaining that it has "long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). The Court then articulated a bifurcated standard for deficient performance, with one standard applying to situations in which counsel consults with the defendant, and another applying to situations in which counsel has not engaged in such consultation—as follows:

> In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the

> defendant about an appeal. We employ the term "consult" to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance.
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> ***
>
> [C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known.

Flores-Ortega, 528 U.S. at 478, 480 (citations omitted).

As to the prejudice prong, the Court also articulated a bifurcated standard. In some circumstances, such as where the petitioner argues that counsel failed to make a particular argument on appeal, the defendant is required to show actual prejudice (i.e., a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, the result of the proceeding would have been different). *Id.* at 482. In other circumstances, prejudice is *presumed*, such as "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken." *Id.* at 484.

The Supreme Court applied the presumption-of-prejudice standard to Flores-Ortega's situation, finding that "counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." *Id.* at 483. In other words, counsel's deficient performance deprived Flores-Ortega "of the appellate proceeding altogether." *Id.* To show prejudice in these circumstances, a defendant need only demonstrate "that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484.

Much more recently, the Supreme Court re-affirmed and elaborated upon *Flores-Ortega*

in *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019). There, the Court considered a notice of appeal IAC claim brought by a defendant who had waived the right to collaterally attack his conviction and sentence in a plea agreement. *Id.* at 742. Although the Court acknowledged such a waiver can preclude challenges that fall within its scope, in reality "no appeal waiver serves as an absolute bar to all appellate claims," for a variety of reasons. *Id.* at 747. For example, the language of the waiver can leave some claims outside its reach; the prosecution can forfeit or waive the right to enforce the waiver; and certain kinds of claims, such as those that argue the waiver itself was unknowing or involuntary, cannot be waived. *Id.* at 744–75. Because *Garza* "retained a right to appeal at least some issues despite the waivers he signed . . . *Garza* had a right to a proceeding, and he was denied that proceeding altogether as a result of counsel's deficient performance." *Id.* at 747. The Court specifically rejected the proposition that a defendant in Garza's position should have to "show on a case-specific basis, either (1) that he in fact requested, or at least expressed interest in, an appeal on a non-waived issue, or, alternative, (2) that there were nonfrivolous grounds for appeal despite the waiver." *Id.* at 748 (internal quotations and citations omitted). The Court found such a proposal "unworkable" because "it would be difficult and time consuming for a postconviction court to determine—perhaps years later—what appellate claims a defendant was contemplating at the time of conviction," particularly given that most postconviction petitioners proceed pro se, making it more difficult for a court to engage in the proposed case-by-case analysis. *Id.* at 749. The Court explained that:

> The more administrable and workable rule, rather, is the one compelled by our precedent: When counsel's deficient performance forfeits an appeal that a defendant otherwise would have taken, the defendant gets a new opportunity to appeal. That is the rule already in use in 8 of the 10 Federal Circuits to have considered the question, and neither Idaho nor its *amici* have pointed us to any evidence that it has proved unmanageable there. That rule does no more than restore the status quo that existed before counsel's deficient performance forfeited the appeal, and it allows an appellate court to consider the appeal as that court otherwise would have done—on direct review, and assisted by counsel's briefing.

Id. (internal citations omitted)

Citing *Flores-Ortega* and *Garza*, the findings and recommendations concluded it would be unreasonable determination of the facts under § 2254(d)(2) to find that Petitioner did not

instruct counsel to file a notice of appeal. (Doc. 35 at 30–33.) In other words, the magistrate judge concluded the *only reasonable way* to interpret the facts was to find that Petitioner instructed counsel to file a notice of appeal. Relatedly, and based upon that factual finding, the magistrate judge concluded that it would be objectively unreasonable to find that Petitioner did not establish prejudice as a matter of law because, "prejudice is presumed when an attorney fails to file an appeal against the petitioner's express wishes." (Doc. 35 at 33; *see also id.* at 30 (citing *Garza*, 139 S. Ct. at 744).)

Respondent's objections assume for the sake of argument that the magistrate judge concluded correctly that Petitioner instructed his lawyer to file a notice of appeal; the objections focus instead on the magistrate judge's prejudice conclusion. (*See* Doc. 37 at 7.) Respondent argues, in essence, the presumption of prejudice articulated in *Flores-Ortega* does not dictate the outcome here because California provides defendants a procedural mechanism for re-opening the time to file a notice of appeal, so long as that mechanism is invoked with diligence. (*See id.* at 3–4.)

Respondent's objections rely heavily on *Canales v. Roe*, 151 F.3d 1226, 1230 (9th Cir. 1998), a case that pre-dates *Flores-Ortega*. The petitioner in *Canales* was convicted of murder in California state court. *Id.* at 1227. His trial counsel attempted to appeal the conviction but filed the notice of appeal two days late. *Id.* Shortly thereafter, the state court sent Canales a letter indicating that his appeal was not timely filed and directing him to seek relief from the California Court of Appeal pursuant to established state law process that provides an avenue for appellate rights to be restored if a defendant acts in a timely fashion. *Id.* at 1228, 1230. A few months later, the state court provided him with another notice of his right to seek relief from the late-filed appeal. *Id.* at 1228. Canales attempted to file for that form of relief, but not until eighteen months after the time to file a notice of appeal had lapsed. *Id.* Canales eventually brought a § 2254 petition in federal court. *Id.*

In examining how *Strickland* would apply to Canales' situation, the Ninth Circuit anticipated that a presumption of prejudice might become clearly established Supreme Court law and assumed without deciding that such a rule was in place. *See id.* at 1229–30. Even assuming as

much, the Ninth Circuit explained such a rule would not be dispositive of Canales' case because "in a state that affords the defendant an avenue of relief, it would be too simplistic to state baldly that a 'case-by-case inquiry into prejudice is not worth the cost.'" *Id.* at 1230 (citing *Strickland*, 466 U.S. at 692). Ninth Circuit indicated that it could not conclude that "the loss of Canales' appeal rights was entirely without his consent." *Id.* The Ninth Circuit reasoned:

> California provides an avenue of relief for a defendant whose counsel has filed a late notice of appeal. It has, time and time again, declared that the loss of appeal rights can easily be remedied where counsel has erred. *See, e.g., In re Benoit*, 10 Cal. 3d 72, 85–89 (1973); *People v. Sanchez*, 1 Cal. 3d 496, 500–01 (1969); *People v. Tucker*, 61 Cal. 2d 828, 831–32 (1964). The defendant need only act in a timely fashion. *See, e.g., In re Clark*, 5 Cal. 4th 750, 764–65 (1993). Here the state trial court notified Canales of the untimeliness of his appeal and directed him toward a potential avenue of relief, but he, as the state courts determined, failed to follow that direction. Ultimately, it cannot be said that inadequate performance by counsel denied him the right to an appeal.
>
> To put it yet another way, even if a claim of ineffective assistance of counsel does not require any showing of probable success on issues that could be raised on appeal, that is not the end of the analysis. The question is really whether counsel's failure to timely file is what deprived Canales of his appeal in the courts of California. We made a similar point in *Katz*, 920 F.2d at 612–13. There counsel had failed to perfect the appeal, but Katz had fled the jurisdiction. *Id.* at 611. When he was recaptured, he sought to revive the appeal and asserted that counsel was ineffective. We said:
>
> > We conclude that Katz did not make the showings Strickland requires. Even if we assume the failure to perfect an appeal is an act outside the range of reasonably competent counsel, Katz has failed to show prejudice. If Katz's attorney had perfected his 1971 appeal, as pointed out earlier, the appeal would have been dismissed on the ground of the *Molinaro* disentitlement doctrine. Thus, Katz can show no prejudice.
>
> *Id.* at 613 (footnote omitted). So it is with Canales.
>
> Again, California provides a method for filing a belated notice of appeal. A defendant must, however, satisfactorily explain his delay in filing the request. Here Canales was told within a few days of counsel's presumed timing error that his notice of appeal had been filed too late, but that he could seek relief from the California Court of Appeal. Five months later he was told again and was even given the address of the Court of Appeal. Yet he did nothing until eighteen months after the first notice. Thus, his appeal rights were lost. In other words, his lack of a California appeal process was based on his failure to satisfactorily explain his delay in asking for

> it, and not on the nature of the issues he would have raised on appeal.
>
> No Supreme Court or other federal case has held that, despite an available delayed appeal procedure like that in California, the Constitution requires that a defendant be given a right to proceed with an appeal as long after counsel's error as he wishes. Certainly, clearly established Supreme Court law does not do so. Thus, Canales is not entitled to relief under the revised habeas corpus statute. *See* 28 U.S.C. § 2254(d).

Canales, 151 F.3d at 1230–3.

Drawing upon the logic expressed in *Canales*, Respondent contends that a fairminded jurist could have concluded in the present case that Petitioner's delay in seeking relief from counsel's error—not counsel's error itself—ultimately caused the loss of the right to appeal. (*See* Doc. 37 at 7.) Respondent correctly points out, (Doc. 2 at 22), that Petitioner's appeal from his November 1, 2018 re-sentencing under SB 620 was due within 60 days of that date (i.e., on or about December 31, 2018). (*See* Doc. 26-20 (resentencing minutes).) The record appears to reflect that Petitioner did not attempt to remedy the late filing in any way for approximately 8 months, until August 28, 2019, when he filed his first state habeas petition. (*See* Doc. 26-21 at 92 (first state habeas petition served Aug. 28, 2019); *see also id.* at 27 (letter from Petitioner to trial counsel sent Aug. 28, 2019).)

The findings and recommendations indicate it is unclear whether *Canales* was abrogated by *Flores-Ortega*, instead reasoning that *Canales* can be distinguished from the present case on the facts. (Doc. 35 at 34.) The Court also finds it unnecessary at this stage of the proceedings to definitively determine whether *Canales* is still good law. Assuming it is, the present case appears to be distinguishable. In *Canales*, the defendant was notified that the notice of appeal filed by counsel was deficient almost immediately after the deadline to file the appeal lapsed, yet he took no further action for approximately 18 months. *Canales*, 151 F.3d at 1230–3. Here, though there was a lapse of approximately eight months between the appeal notice deadline and the first action by Petitioner to pursue his appellate rights independently, nothing suggests that any court gave Petitioner any warning that his appeal from the SB 620 re-sentencing had not been properly perfected.

This is a distinction that is underscored by one of the only post-*Flores-Ortega* cases to rely on *Canales*: *Garcia v. Foulk*, No. 1:14-cv-00461-AWI-SKO-HC, 2015 WL 6689651, at *4 (E.D. Cal. Oct. 28, 2015). In *Garcia* a California Court of Appeal granted the petitioner habeas relief based upon his trial attorney's failure to file a notice of appeal and permitted him leave to file a notice of appeal on or before a date certain, yet the petitioner "inexplicably . . . failed to file a notice of appeal within the time period that the Court of Appeals provided to him." The California Court of Appeal later rejected the petitioner's request for relief under the constructive filing doctrine because he failed to file a notice of appeal on or before the new deadline and failed to make an adequate showing that he relied on counsel to timely file it on his behalf. *See id.* (reviewing state court record). Citing *Canales*, this Court found the state court's conclusion to be a reasonable application of federal law because "[w]hen a defendant fails to follow the path to relief mapped out for him by the state court, 'it cannot be said that inadequate performance by counsel denied him the right to an appeal.'" *Id.* Again, the facts presented here are different, as no "path to relief" was mapped out for Petitioner in state court.

Respondent's objections suggest this is a distinction without a difference by arguing it would be reasonable for a jurist to deny habeas relief to a petitioner who failed to act with diligence to discover whether his attorney had indeed filed a notice of appeal as instructed. But such a rule would seems contrary to the reasoning in *Garza* (which pre-dated the state court's summary habeas ruling in this case), which directly rejected an approach that would require a "case-by-case" analysis of the record, albeit under somewhat different circumstances. The undersigned stops short of definitively determining how *Flores-Ortega, Garza*, and *Canales* would apply to the facts of this case, because doing so may not be necessary depending on the outcome of the deficient performance analysis.[1] The Court agrees with the magistrate judge that an evidentiary hearing is required to properly evaluate the deficient performance issue.[2]

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[1] Depending on the outcome of the evidentiary hearing ordered herein, the Court may find it appropriate to entertain additional, focused briefing on this issue.

[2] After finding that prejudice must be presumed under *Flores-Ortega* and *Garza*, the findings and recommendations suggest that an that an evidentiary hearing is mandatory here. (Doc. 35 at 36 (indicating that an evidentiary hearing is mandatory if the petitioner has met the requirements of Townsend v. Sain, 372 U.S. 293, 212 (1963), and the allegations, if true, "**would** entitle him to relief") (emphasis added).) Although the undersigned stops short of finding

Accordingly, the Court **ORDERS**:

1. The findings and recommendations issued on December 21, 2021 (Doc. 35) are **ADOPTED IN FULL**.
2. The petition for writ of habeas corpus is **DENIED EXCEPT** for petitioner's claim of ineffective assistance of counsel related to the failure to file a notice of appeal.
3. This matter is **REFERRED** to the magistrate judge to conduct an evidentiary hearing on this claim.

IT IS SO ORDERED.

Dated: **July 8, 2022**

Jennifer L. Thurston
UNITED STATES DISTRICT JUDGE

that the allegations would definitely entitle Petitioner to relief, his legal argument is more than colorable, and this Court retains the discretion to order an evidentiary hearing under such circumstances. *See Seidel v. Merkle*, 146 F.3d 750, 754 (9th Cir. 1998); *Flannery v. Walker*, No. 2:10-CV-0950 MCE AC, 2013 WL 3242101, at *3 (E.D. Cal. June 25, 2013); *see also Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("Prior to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, the decision to grant an evidentiary hearing was generally left to the sound discretion of district courts. That basic rule has not changed.") (citations omitted).