No.

**IN THE SUPREME COURT OF THE UNITED STATES**

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**CHARLES CHAD GIESE,**

***Petitioner*,**

v.

**CRAIG KOENIG, Warden**,

***Respondent*.**

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

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

**I. Did Trial Counsel Render Ineffective Assistance by Failing to present Evidence About the Psychological and Physical Effects of Methamphetamine and Alcohol, Giese's Good Character, and Giese's Efforts to Relocate?**

**II. Did the Trial Court Deny Giese Due Process and a Fair Trial by Admitting his Un-*Mirandized* and Involuntary Statements?**

**III. Did the Prosecutor Fail to Prove First Degree Premeditated Murder Beyond a Reasonable Doubt?**

**IV. Did the Trial Court Violate Giese's Constitutional Rights to a Fair Trial and Due Process by Excluding Evidence of Vallivero's Drug Use?**

**V. Did the Mutual Combat Instruction Violate Giese's Constitutional Rights to a Reliable Jury Determination of his Guilt?**

**VI. Did the Prosecutor's Prejudicial Misconduct During Closing Argument Deprive Giese of Due Process and a Fair Trial?**

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**No.**

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

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Petitioner, CHARLES CHAD GIESE, petitions for a Writ of Certiorari to review the United States Court of Appeals for the Ninth Circuit's denial of Giese's Request for a Certificate of Appealability. (Appendix A)

## OPINION BELOW

On July 29, 2025, the Ninth Circuit Court of Appeals denied Giese's request for a certificate of appealability. (Appendix A)

## JURISDICTION

On July 29, 2025, the Ninth Circuit Court of Appeals

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

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

## CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

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

## STATEMENT OF THE CASE

### A. State Court Trial Proceedings

The prosecution charged Giese with murder of Walter Vallivero and alleged that he personally used a deadly weapon. (Cal. Penal Code §§ 187(a), 12022(b)(1))[1]

The jury convicted Giese of first degree murder and found the deadly weapon enhancement true. The trial court sentenced Giese to 25 years to life plus a consecutive one year for the personal use of a deadly weapon.

### B. Direct Appeal

Giese appealed to the California Court of Appeal (CCA), and on February 26, 2020 the CCA affirmed the judgment. On March 25, 2020 the CCA filed a modified opinion with no change

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

in judgment. (Appendix G, H)

Giese then filed a Petition for Review. On May 27, 2020, the California Supreme Court (CSC) summarily denied his petition. (Appendix F)

On September 21, 2020, Giese filed a Petition for Writ of Certiorari in this Court. On November 2, 2020, this Court denied Giese's Certiorari petition. (Appendix E)

### C. Federal Habeas Proceedings

On, November 28, 2021, Giese filed a petition for writ of habeas corpus in the district court. On March 1, 2024, the U.S. magistrate judge issued a Report and Recommendation (RR) and recommended that Giese's petition be denied and that the action be dismissed with prejudice. (Appendix D)

On February 5, 2025, the district court adopted the RR and denied Giese's habeas petition. (Appendix C)

On April 16, 2025, Giese filed a Request for Certificate of Appealability to the Ninth Circuit. On July 29, 2025, the Ninth Circuit Court of Appeals denied Giese's request for a certificate of appealability. (Appendix A)

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

See, CCA's February 26, 2020 Opinion. (Appendix H)

## REASONS TO GRANT CERTIORARI

### I. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO PRESENT EVIDENCE ABOUT THE NEGATIVE EFFECTS OF METHAMPHETAMINE AND ALCOHOL; GIESE'S GOOD CHARACTER; AND GIESE'S EFFORTS TO RELOCATE

#### A. Introduction

Trial counsel rendered ineffective assistance by failing to present witnesses to testify how methamphetamine and alcohol use negatively affected Vallivero's behavior, about Giese's state of mind, about Giese's efforts to seek relocation, about Giese's good character, and witnesses to testify about Vallivero's aggressive and violent character. *Strickland v. Washington,* 466 U.S. 668, 694 (1984).

#### B. The Courts Have Not Required a Declaration

The District Court finds that Giese's claims fail for lack of evidence because Giese did not submit or try to submit a declaration from trial counsel. (Appendix C) But, the District Court overlooks that trial counsel's testimony at the motion for

new trial explains why he did not raise the issues Giese identified. And trial counsel never adequately explained his deficient representation.

The District Court relies on *Dunn v. Reeves,* 594 U.S. 731, 743 (2021) (per curiam), for the notion that "a silent record cannot discharge a prisoner's burden" to prove ineffective assistance of counsel. (Appendix C) *Dunn* did not require that a petitioner submit a declaration from trial counsel in every case raising an ineffective assistance of counsel issue.

*Dunn* held, "To be sure, the record in this particular case happened to be deficient 'because Reeves failed to call his counsel to testify.' [Citation] But, *this unremarkable observation of cause and effect in light of the facts before the court was hardly an absolute bar in every case where other record evidence might fill in the details*." *Dunn v. Reeves,* 141 S. Ct. 2405, 2413. (Italics added)

*Gentry v. Sinclair,* 705 F.3d 884, 900 (9th Cir. 2013) did not require a declaration from trial counsel or a detail of the efforts made to secure a declaration from trial counsel. In *Gentry*, trial counsel submitted affidavits; the affidavits did not state the specific ineffective assistance claim. *Id.*

### C. Trial Counsel Rendered IAC By Failing to Move to Introduce Giese's Statements (Cal. Evidence Code § 356)

The District Court finds trial counsel did not render ineffective assistance by failing to urge the trial court to admit Giese's statements about Vallivero's methamphetamine use under Evidence Code section 356. (Appendix C) The District Court finds the CCA properly found that Vallivero's methamphetamine use had no relevancy because of Vallivero's negative toxicology report and that past use was irrelevant and overly prejudicial and 'doomed to fail.'" (Appendix C)

Giese disagrees. Defense counsel theorized that evidence of Vallivero's methamphetamine use affected Giese's perceptions. Immediately after the incident, Giese told his interrogators Vallivero "gets real high" and would "get real, real abusive and threatening," "then he'd get on the drugs," and "When he comes down on drugs, he keeps fighting."

The District Court found that the trial court properly excluded evidence about Vallivero's drug use as irrelevant, prejudicial and needlessly time consuming. (Appendix C) But the District Court overlooked that California's rule of completeness

(Cal. Evid. Code, § 356), required the trial court to admit Giese's entire statement into evidence.

Trial counsel objected to excising Giese's statements about Vallivero's drug use because the effects of Vallivero's drug use went to Giese's state of mind. But trial counsel failed to object based on California's rule of completeness (Cal. Evid. Code §356). The methamphetamine use explained why Giese feared for his life. *Strickland v. Washington,* 466 U.S. 668.

### D. Trial Counsel Rendered Ineffective Assistance by Failing to Present Expert Testimony about the Negative Effects of Methamphetamine and Alcohol Use

Vallivero's medical records proved that Vallivero suffered from the effects of chronic methamphetamine use. The trial court excluded all references to Vallivero's prior use of methamphetamine or cannabis. Cal. Evid. Code § 352. The District Court finds a "'silent record'" cannot support Giese's claim that trial counsel erred by failing to present expert testimony about the psychological and physical effects of methamphetamine and alcohol use. (Appendix C)

The District Court overlooks that lawyers traditionally call

experts to testify about the effects of methamphetamine and alcohol. For example, in *People v. Penunuri,* 5 Cal. 5th 126, 138 (2018), a psychiatrist testified about the effects of methamphetamine and the resulting violent behavior its use may cause. "He described the short-term symptoms, which include elevated mood and energy level, feelings of grandiosity and euphoria, decreased appetite, and decreased need for sleep. Dr. Rosenberg testified that methamphetamine use can also cause permanent brain damage and frontal lobe brain syndrome. Brain damage can lead to changes in personality and the development of psychotic symptoms. Damage to the frontal lobe in particular can cause problems with judgment, impulse control, and the ability to control aggressive feelings." *Id.* See also *People v. Silveria & Travis*, 10 Cal. 5th 195, 229-31 (2020) (expert testified that methamphetamine was "commonly associated with violent behavior.")

The District Court overlooks that the exclusion of methamphetamine evidence deprived Giese of his constitutional right to present a complete defense. *Crane v. Kentucky,* 476 U.S. 683, 690-691 (1986). The District Court did not recognize that the

chronic methamphetamine abuse made Vallivero violent. Giese acted in self defense because Vallivero became violent when he used methamphetamine.

The District Court overlooks that Giese's *belief* that Vallivero used methamphetamine and alcohol affected Giese's state of mind before, during, and after the killing. Giese's belief would have proved Giese committed a lesser offense like voluntary manslaughter, instead of premeditated, deliberate first degree murder. Cal. Penal Code, § 192 defines voluntary manslaughter as an intentional, unlawful homicide "upon a sudden quarrel or heat of passion" (§ 192(a).) *People v. Breverman*, 19 Cal. 4th 142, 163 (1998).

The methamphetamine evidence proved Giese believed Vallivero would kill him. The methamphetamine evidence would have supported Giese's self-defense theory; would have proved why Giese reasonably believed Vallivero suffered from methamphetamine effects, including violence, during the encounter; and would have corroborated Giese's belief that Vallivero was under the influence of methamphetamine.

The methamphetamine evidence supported Giese's defense

because it would have helped the jury understand Giese's state of mind and how methamphetamine use causes violent and aggressive behavior. *United States v. Shay*, 57 F.3d 126, 133 (1st Cir. 1995) (Case reversed because trial court excluded expert testimony that defendant suffered from a mental disorder which caused him to tell grandiose, self-incriminating lies).

### E. Trial Counsel Rendered Ineffective Assistance by Failing to Present Evidence of Giese's Non-Violent Character and Efforts to Relocate

*1. Character Witnesses re Giese's Nonviolent Character*

Giese had several character witnesses who would have testified that they knew Giese to be a gentle, considerate, and caring man. Trial counsel failed to investigate or present any character witnesses. He waited until sentencing to submit character letters.

The District Court finds trial counsel adequately explained why he did not call Giese's good character witnesses. (Appendix C) But the District Court assumes that, if Giese presented character witnesses, the prosecution could have undermined Giese's defense by showing he had options other than to stay with Vallivero. (Appendix C)

The District Court overlooks that evidence of Giese's good character, his attempts to move, and Vallivero's methamphetamine use would have proved that Giese did not premeditate and deliberate Vallivero's murder. The jury would have learned that Giese's actions resulted in a strong passion aroused by a "provocation" sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'" *People v. Berry,* 18 Cal. 3d 509, 515 (1976), quoting *People v. Valentine,* 28 Cal. 2d 121, 139 (1946); *People v. Botchers*, 50 Cal. 2d 321, 328-329 (1958).

Defense counsel rendered ineffective assistance by failing to present character witnesses to testify in Giese's defense. *Strickland v. Washington,* 466 U.S. 668. The character witnesses would have testified that Giese had no violent propensities and was peaceful and kind. Defense counsel had nothing to lose and everything to gain by presenting evidence of Giese's non-violent character.

*2. Giese's Efforts to Relocate*

Trial counsel failed to present witnesses to corroborate

that Giese planned to move and sought legal help from California Rural Legal Assistance Organization (CRLA). The District Court finds that such evidence would have undercut Giese's theory of defense by showing Giese had other options. (Appendix C) Giese disagrees because his attempts to relocate would have corroborated Giese's fear of Vallivero and proved that he wanted to get away from him. The CRLA records prove Giese tried to determine his rights against what he perceived as an illegal eviction.

Certified records from the CRLA show that Giese, who had lived at the dwelling for three years, had been served with a 30-day notice on October 2, 2015 and consulted with CRLA on October 5, 2015. And, without any corroborative evidence of Giese's attempts to relocate, the prosecution referred to Giese as an illegal squatter "from hell." The prosecutor also argued Giese "was a nightmare squatter, over two months, given every opportunity to leave."

Giese's attempts to seek help with his eviction would have proved that Giese wanted to comply with the law and find a place to live. The evidence from CRLA would have proved Giese was

not a squatter and planned only to assert his rights and sought assistance to find another place to live. Trial counsel rendered ineffective assistance by failing to investigate and introduce the CRLA records. *Strickland v. Washington,* 466 U.S. 668.

### F. Trial Counsel Rendered Ineffective Assistance by Failing to Present Witnesses to Testify About Vallivero's Violent Behavior

Not only did trial counsel fail to present any witnesses about Giese's good character, trial counsel failed to present witnesses to testify about Vallivero's aggressive and hostile character. For example, Tim Himmerich and Sandra Gillham would have testified about Vallivero's aggressive character.

The District Court finds that Himmerich's testimony would have been cumulative because the jury heard Giese's statements about Vallivero's abuse and threats to shoot Giese. (Appendix C) Giese disagrees because Vallivero placed Giese in fear for his life. Giese could not stop; he was "in overdrive" because he believed Vallivero would kill him. Giese feared for his life and defended himself against Vallivero.

Giese disagrees because the District Court overlooks that California Evidence Code section 1103 authorizes the defense in a

criminal case to offer evidence of the victim's character to prove his conduct at the time of the charged crime. In a prosecution for a homicide or an assaultive crime where self-defense is raised, evidence of the violent character of the victim is admissible to show that the victim was the aggressor. *People v. Rowland,* 262 Cal.App.2d 790, 797 (1968); *People v. Smith*, 249 Cal.App.2d 395, 404-405 (1967)

The District Court overlooks that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The right[] . . . to call witnesses in one's own behalf has long been recognized as essential to due process." *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973); see also *Crane*, 476 U.S. at 690.

Trial counsel rendered ineffective assistance by failing to investigate and introduce the CRLA records. *Strickland v. Washington,* 466 U.S. 668.

## II. THE TRIAL COURT DENIED GIESE DUE PROCESS AND A FAIR TRIAL BY ADMITTING HIS UN-*MIRANDIZED* AND INVOLUNTARY STATEMENTS

### A. Giese's Claim is Not Procedurally Barred

The District Court finds that trial counsel's failure to make a contemporaneous objection procedurally barred Giese's claim. (Appendix C) Giese disagrees. The CCA unreasonably held, "To the extent appellant claims that his statements were involuntary because the detectives exploited his mental illness and unduly prolonged his interview at the sheriff's station, those were not raised below and are thus forfeited." (Appendix H)

But Giese filed a written motion to "suppress involuntary statements," and trial counsel argued Giese's statements were "involuntary as a matter of law" because of the detectives' failure to *Mirandize* him. The District Court finds that Giese's written motion did not "argue . . . that his statements were coerced or involuntary because of the circumstances of the interview. [Citations]." And the motion made only "bare references" and did not develop "any argument" regarding involuntary statements. (Appendix C)

The District Court also overlooks that trial counsel presented and the trial court considered Giese's mental health and voluntariness issues. And the District Court overlooks that Giese did raise the *Miranda* and voluntariness claims in the trial court and the CCA considered the issue. (Appendix H)

The District Court also "declines to consider" Giese's ineffective assistance of counsel argument. (Appendix C) Giese disagrees because, trial counsel's inaction violated Giese's constitutional right to the effective assistance of counsel. *People v. Centeno*, 60 Cal.4th 659, 674 (2014); *Strickland v. Washington,* 466 U.S. 668.

**B. Giese Asserted His Miranda Rights**

Giese also asserted his *Miranda* rights. He told the detectives that "Well, I don't know my rights . . . I defended myself . . . " The detective responded, "Need to talk to you to get that . . . That's all we're trying to do." And the detectives continued to talk to Giese. After two hours into the interview, Giese told the detective, "I didn't know I didn't have to talk to you . . . "

The CCA unreasonably applied clearly established Supreme

Court precedent by rejecting Giese's claim that he made involuntary statements and that the deputies obtained Giese's statements in violation of *Miranda*. The extensive police station interviews and Giese's mental health impairments prove that he made involuntary statements and the CCA unreasonably found no deprivation of Giese's Fifth Amendment constitutional right to remain silent. *Chapman v. California,* 386 U.S. 18, 24 (1967). And, if trial counsel forfeited the issue, then trial counsel rendered ineffective assistance. *Strickland,* 466 U.S. 668.

The District Court finds the CCA reasonably decided that, under the circumstances, the police did not need to Mirandize Giese because Giese was not in custody, the police did not physically restrain him, the police told him he was not under arrest, the police did not display any weapons and the officers did not speak to him in an aggressive manner. (Appendix C)

The District Court overlooks that several objective factors prove that, because the deputies restrained Giese's freedom, the deputies were required to *Mirandize* Giese before or during the time they interviewed Giese at the hospital. The deputies were dispatched to his mother's home to collect, control and interrogate

Giese. The deputies ordered Giese to come outside and walk backwards toward the deputies, who patted him down on the street.

The watch commander, fire department medics, and an ambulance responded to the scene. A deputy accompanied Giese at all times at Caves' home. A deputy then accompanied Giese in the ambulance to the hospital while another deputy followed in a patrol car.

The deputies took Giese to the emergency room and monitored him until Detective Marquez arrived. They stationed themselves in the hallway. As a detective questioned Giese at his curtained bedside, another detective and two deputies stationed themselves outside.

The District Court overlooks that the relevant inquiry is "whether a reasonable person in defendant's position would have felt he or she was in custody." *People v. Stansbury*, 9 Cal.4th 824, 830 (1995). A hospital interrogation does not categorically rule out custody. *People v. Mosley*, 73 Cal.App.4th 1081, 1090-1091 (1999); *United States v. Martin,* 781 F.2d 671, 673 (9th Cir. 1985) ("If the police . . . monitored the patient's stay, stationed

themselves outside the door, arranged an extended treatment schedule with the doctors, or some combination of these, law enforcement restraint amounting to custody could result.")

## III. THE PROSECUTION FAILED TO PROVE FIRST DEGREE PREMEDITATED MURDER BEYOND A REASONABLE DOUBT

The prosecution failed to prove, beyond a reasonable doubt, that Giese committed premeditated and deliberate murder. *People v. Nguyen,* 61 Cal.4th 1015, 1054-1055 (2015) citing *Jackson v. Virginia,* 443 U.S. 307, 318-319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979). The District Court finds Giese armed himself with a rock before walking into the home, had a motive to kill Vallivero, beat Vallivero viciously and stabbed him in the neck. (Appendix C)

Giese disagrees. The evidence showed a spontaneous, fast-occurring explosion of violence evincing intent to kill or disable, but not a carefully weighed or deliberated gang attack or a plan to kill. And, an unjustified killing is presumed to be murder of the second, not the first degree. *People v. Anderson,* 70 Cal.2d 15, 25 (1968). Giese did not deliberate or choose to kill Vallivero. Grabbing a rock, bottle, and bat fail to constitute

"planning activity." And, if Giese wanted to remain as Vallivero's roommate, Giese would frustrate that goal by killing Vallivero. With Vallivero dead, Giese would have been evicted from the mobile park home. *Anderson,* 70 Cal.2d at 27.

Premeditated murder requires more than express malice or intent to kill. *People v. Van Ronk,* 171 Cal.App.3d 818, 822–823 (1985); *People v. Martinez,* 193 Cal.App.3d 364, 369 (1987) (careful thought and weighing of considerations); *People v. Boatman*, 221 Cal.App.4th 1253, 1264 (2013) ("[S]ubstantially more reflection than may be involved in the mere formation of a specific intent to kill"); *People v. Bender*, 27 Cal.2d 164 (1945). Acts demonstrating an intent to kill are not enough to prove first degree murder because an unjustified killing is presumed to be murder of the second, not the first degree. *People v. Anderson,* 70 Cal.2d 15, 25 (1968). The factors stated in *Anderson,* 70 Cal.2d 15, namely, planning, motive, and method of killing – are absent.

## IV. THE TRIAL COURT VIOLATED GIESE'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS BY EXCLUDING EVIDENCE OF VALLIVERO'S DRUG USE

The trial court excluded all references to Vallivero's illicit

drug use. The trial court denied Giese's right to present a defense because Vallivero's drug use and Giese's knowledge of Vallivero's unreasonable and violent behavior while on drugs proved Giese did not premeditate Vallivero's murder and prove Giese acted in self-defense or imperfect self-defense.

The District Court finds that the CCA reasonably found evidence of Vallivero's drug use "irrelevant and unduly prejudicial" and would not have changed the outcome because the jury knew about Vallivero's alcohol use. (Appendix C)

The District Court overlooks that the trial court excluded all mention of Vallivero's extensive drug use. Although Giese could explain what happened, Giese could not explain why he believed Vallivero could kill him. Although Giese could present part of his defense, he could not present the critical part of Giese's defense, that Vallivero's illegal drug use, not his alcohol use, affected his perceptions of the need to defense himself.

And even though the jury heard about Vallivero's alcohol abuse and Vallivero's blood alcohol level when he was killed, trial counsel never presented evidence to show how alcohol impacted Vallivero's state of mind and caused him to act aggressively

toward Giese.

Exclusion of the evidence violated Giese's rights to due process and a fair trial. U.S. Const. amends. VI, XIV; *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Chambers v. Mississippi*, 410 U.S. 284. Prejudice resulted because, to understand Giese's defenses, the jury needed to understand Giese's state of mind. By excluding the evidence, the jury could not understand why Giese perceived Vallivero's action as threatening. Giese's perceptions corroborated his fear that Vallivero would kill him and showed that Giese acted out of fear that Vallivero would kill him. *People v. Minifie*, 13 Cal.4th 1055, 1065 (1996); *People v. Sotelo-Urena*, 4 Cal.App.5th 732, 745 (2016).

## V. THE MUTUAL COMBAT INSTRUCTION VIOLATED GIESE'S CONSTITUTION RIGHTS TO A RELIABLE JURY DETERMINATION OF HIS GUILT

Over Giese's objection, the trial court instructed the jury with CALCRIM No. 3471, the instruction on mutual combat. CALCRIM No. 3471 instructed the jury that Giese had no right to self defense if the parties engaged in mutual combat, i.e., if he "did not try to withdraw from a fight" after Vallivero punched

him.

The District Court finds the CCA reasonably rejected Giese's claim because the evidence supported the mutual combat instruction, the jury could have found Giese engaged in mutual combat with Vallivero, and that Giese acted as the initial aggressor. (Appendix C) The District Court also finds that no clearly established federal law prohibits a trial court from instructing a jury with a correct but inapplicable law. (Appendix C)

Giese disagrees because the mutual combat instruction removed a material factual issue from the jury's determination, lowered the prosecution's burden of proof, and impinged on the defenses of perfect and imperfect self-defense by telling the jurors that Giese had no right to self-defense if he "engage[d] in mutual combat and did not try to withdraw from a fight" when Vallivero punched him. CALCRIM No. 3471.

The District Court finds that AEDPA does not permit Giese to generally frame his claim in terms of due process and a fair trial. (Appendix C) The District Court overlooks *Fauber v. Davis*, 43 F.4th 987, 1007 (9th Cir. 2022), upon which the District Court

relies, involved an unaccepted plea offer. Unlike an unaccepted plea agreement, CALCRIM No. 3471 violated Giese's constitutional guarantees to due process, fair trial, and reliable jury determination of all factual questions material to the charges. U.S. Const. amends. V, VI, XIV; *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *In re Winship,* 397 U.S. 358, 364 (1970).

## VI. THE PROSECUTOR'S PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED GIESE OF DUE PROCESS AND A FAIR TRIAL

### A. Introduction

The prosecutor committed misconduct by misstating the law during his closing arguments to the jury. "Improper remarks by a prosecutor can 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" See, *People v. Earp,* 20 Cal.4th 826, 858 (1999) citing *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974).

### B. Giese's Prosecutorial Misconduct Claims Are Not Procedurally Barred

Trial counsel rendered ineffective assistance by failing to

object to the prosecutorial misconduct. *Strickland,* 466 U.S. at 694. The District Court finds the CCA properly held that Giese forfeited the misconduct issues by failing to raise them in the trial court and that trial counsel did not render ineffective assistance. (Appendix C)

Giese disagrees. Competent counsel would have objected to the prosecutor's multiple misstatements of law, a reasonable possibility exists that the jury did not properly consider the lesser included offenses given the prosecutor's misstatements of law, and absent the improper argument, at least one juror would have determined the offense was a lesser offense to murder. *People v. Wilkins,* 56 Cal.4th 333, 351 (2013); *People v. Soojian,* 190 Cal.App.4th 521 (2010); *People v. Anzalone,* 141 Cal.App.4th 380 (2006) disapproved on another ground (Trial counsel rendered prejudicial ineffective assistance by failing to object). *Id.* at 393, 395. *People v. Stone*, 46 Cal.4th 131, 140 (2009) (Case reversed because prosecutor misstated the law on attempted murder by arguing that indiscriminate shooting into an undefined "zone of danger" constituted attempted murder). *Id.* at 392-393.

The District Court overlooks that the prosecutor's

misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo,* 416 U.S. at 643).

The prosecutor's multiple misstatements of law during closing arguments constituted misconduct by suggesting to the jury that the only proper verdict was premeditated first degree murder. *People v. Hill*, 17 Cal.4th 800, 832 (1998). Giese disagrees. The prosecutor engaged in a "pervasive campaign to mislead the jury on key legal points." *Id.* Even if the trial court properly instructed the jury, the sheer onslaught of the prosecutor's misstatements deprived Giese of due process and a fair trial and require reversal. *Id.* at 845-846.

## VII. THE CUMULATIVE ERRORS REQUIRE RELIEF

The District Court finds each individual error meritless and no cumulative error occurred. (Appendix C) Giese disagrees because his claims prove that the multiple errors cumulatively deprived Giese due process, a fair trial, and the right to present a defense. *Chambers v. Mississippi,* 410 U.S. at 289-295 & fn.3;

*Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007).

## CONCLUSION

Giese respectfully requests that this Court grant Certiorari because ". . . reasonable jurists could debate whether (or, . . . agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. at 893 and n. 4.(1983))

DATED: October 21, 2025

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s Fay Arfa

_____

Fay Arfa, Attorney for Petitioner

# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 29 2025

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

CHARLES CHAD GIESE,

Petitioner - Appellant,

v.

CRAIG KOENIG, Warden,

Respondent - Appellee.

No. 25-787

D.C. No. 2:21-cv-08535-MEMF-JPR
Central District of California,
Los Angeles

ORDER

Before: CALLAHAN and FORREST, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

**DENIED.**

# APPENDIX A

JS-6

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| CHARLES CHAD GIESE,<br><br>Petitioner,<br><br>v.<br><br>CRAIG KOENIG, Warden,<br><br>Respondent. | Case No. CV 21-8535-MEMF (JPR)<br><br>**J U D G M E N T** |

Pursuant to the Order Accepting Magistrate Judge's Report and Recommendation,

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

DATED: February 5, 2025

MAAME EWUSI-MENSAH FRIMPONG
U.S. DISTRICT JUDGE

**APPENDIX B**

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

CHARLES CHAD GIESE,

Petitioner,

v.

CRAIG KOENIG, Warden,

Respondent.

Case No. 2:21-cv-08535-MEMF (JPR)

**ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

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

The Report and Recommendation ("Report") recommends denial of the Petition and dismissal of this action with prejudice. (ECF No. 43.) As explained below, Petitioner's objections to the Report (ECF No. 48) do not warrant a change to the Magistrate Judge's findings or recommendation.

For his claims of ineffective assistance of counsel, Petitioner objects to the Report's finding that the "claims fail because [Petitioner] did not submit a declaration" to support the claims. (ECF No. 48 at 11.) This objection does not

overcome the Report's finding that the claims "fail for lack of evidence." (ECF No. 43 at 79.) The Report's finding is entirely consistent with Supreme Court precedent. *See Dunn v. Reeves*, 594 U.S. 731, 743 (2021) (*per curiam*) (it is clearly established that "a silent record cannot discharge a prisoner's burden" to prove ineffective assistance of counsel) (citing *Burt v. Titlow*, 571 U.S. 12, 15 (2013)).

For his claim of ineffective assistance of counsel based on the failure to seek admission of evidence of the victim's past methamphetamine use, Petitioner objects that the evidence was "required" to be admitted under California's rule of completeness. (ECF No. 48 at 12-13.) To the contrary, as the Report found, the rule does not "prevent courts from excluding parts of a conversation that are irrelevant, unduly prejudicial, or needlessly time-consuming." (ECF No. 43 at 94.) This finding was consistent with the California Court of Appeal's finding that evidence of the victim's past methamphetamine use "had no relevancy based on the negative toxicology report [of the victim], and past use was overly prejudicial." (*Id*. at 77.) Thus, an argument for the admission of this evidence was "doomed to fail." (*Id*. at 94.)

For his claim of ineffective assistance of counsel based on the failure to present expert testimony about drug and alcohol use, Petitioner objects that the claim was rejected because he "did not enclose an expert's declaration." (ECF No. 48 at 14.) But the Report's finding was consistent with the Supreme Court's holdings that "a silent record cannot discharge a prisoner's burden" to prove ineffective assistance of counsel. *Dunn*, 594 U.S. at 743. In the absence of evidence of what an expert would have said, the claim is speculative. *See Gallegos v. Ryan*, 820 F.3d 1013, 1035 (9th Cir. 2016) (speculation about what an expert would have said is insufficient to establish prejudice under *Strickland*) (citing *Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001)).

For his claim of ineffective assistance of counsel based on the failure to present evidence of Petitioner's non-violent character and efforts to relocate,



**APPENDIX C**

Petitioner objects that counsel "had nothing to lose" in presenting such testimony. (ECF No. 48 at 19.) But the Supreme Court "has never established anything akin to . . . [a] 'nothing to lose' standard for evaluating *Strickland* claims." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). Instead, the record here shows that "trial counsel strategically decided not to call the witnesses whom Petitioner has identified." (ECF No. 43 at 98.) Specifically, trial counsel "explained that he decided not to call those witnesses because he believed they would have undercut Petitioner's self-defense theory by showing that he had multiple options available to him other than staying at [the victim's] home." (*Id*. at 99.) As the Report found, counsel's informed and strategic decision about these witnesses is "virtually unchallengeable" on federal habeas review. (*Id*.)

For his claim of ineffective assistance of counsel based on the failure to present testimony about the victim's propensity for violence, Petitioner objects to the Report's finding that such testimony would have been cumulative. (ECF No. 48 at 21.) Petitioner does not explain, however, why the testimony was not cumulative. The Report reasonably found that the jury heard evidence, from multiple sources, about the victim's abusive behavior, including his threats to shoot Petitioner in the face. (ECF No. 43 at 103.) Thus, Petitioner failed to show prejudice from counsel's failure to present cumulative evidence about the victim's propensity for violence. (*Id*.)

For his claim challenging the voluntariness of his pretrial statements to detectives, Petitioner objects to the Report's finding that the claim is procedurally barred. (ECF No. 48 at 22.) As the Report found, with extensive analysis, the claim is procedurally barred because the California Court of Appeal determined Petitioner had failed to raise the issue at trial. (ECF No. 43 at 15-23; *see also* ECF No. 9-1 at 9.) Although Petitioner argues that he did raise the issue at trial, with a written motion (ECF No. 48 at 22-23), the Report explained that the motion did not argue, as Petitioner argues here, that his statements were coerced or involuntary



**APPENDIX C**

because of the circumstances of the interview (ECF No. 43 at 16 and n.9). Instead, the motion raised only an argument under *Miranda v. Arizona*, 384 U.S. 436 (1966). (ECF No. 38-1 at 107-111 [Clerk's Transcript, Volume 1, pages 97-101].) Although the motion also made some bare references to "involuntary statements" (*id.*), it did not develop any argument in that regard. This was insufficient to preserve a coercion or involuntariness issue at trial. *See People v. Alvarez*, 14 Cal. 4th 155, 186 (1996) (defendant's bare reference to the "confrontation rule" in his moving papers was insufficient to preserve a claim under the Sixth Amendment's confrontation clause). And although Petitioner now argues that the Report "overlooks" that his counsel was ineffective for not raising the coercion issue at trial (ECF No. 48 at 23), Petitioner did not raise this argument before the Magistrate Judge, and the Court declines to consider it now in the first instance. *See Brook as Trustee of David North II Trust v. McCormley,* 837 F. App'x 433, 436 (9th Cir. 2020) (district court need not address novel arguments raised in objections). Thus, the coercion claim is procedurally barred.

For his *Miranda* claim, Petitioner objects that the California Court of Appeal unreasonably rejected it. (ECF No. 48 at 25.) The California Court of Appeal found that, under the totality of the circumstances, *Miranda* warnings were not required because Petitioner was not "in custody" when he spoke to detectives at the hospital and the sheriff's station. (ECF No. 9-1 at 5-9.) Petitioner disagrees, pointing out that deputies were dispatched to the home of Petitioner's mother, ordered Petitioner to come outside and walk backwards toward them, patted him down, accompanied him to the hospital, and stationed themselves outside the hospital room. (ECF No. 48 at 25-26.) This objection does not overcome the California Court of Appeal's determination that the totality of the circumstances failed to establish custody: Petitioner was free of physical restraints, he was advised he was not under arrest and was free to leave, no weapons were displayed, and no officer spoke to him in an aggressive or accusatory manner or employed



**APPENDIX C**

special techniques to pressure him. (ECF No. 9-1 at 8-9.) Moreover, every effort was made to ensure Petitioner was comfortable and that his needs were accommodated. (*Id*. at 9.) Given these circumstances, the state court's rejection of this claim was not objectively unreasonable.

For his claim challenging the sufficiency of the evidence, Petitioner objects that the evidence failed to prove he killed with premeditation and deliberation. (ECF No. 48 at 27.) The California Court of Appeal found that sufficient evidence supported the jury's finding: Petitioner had armed himself with a rock before encountering the victim, had a motive to kill the victim, beat him to death in a particularly vicious manner, and stabbed him in the neck after he was dead. (ECF No. 9-1 at 11-12.) Petitioner's objection does not overcome the state court's finding.

For his claim challenging the exclusion of evidence, Petitioner objects that it was prejudicial error for the trial court to exclude all evidence of the victim's drug use. (ECF No. 48 at 29.) The California Court of Appeal rejected this claim after agreeing with the trial court that evidence of past drug use by the victim, who had no drugs in his system at the time of his death, was irrelevant and unduly prejudicial. (ECF No. 9-1 at 13.) The California Court of Appeal also concluded that it was not reasonably probable that evidence of the victim's drug use would have changed the outcome, given that the jury knew of the victim's alcohol use. (*Id*.) Petitioner objects that "the jury could not understand why [Petitioner] perceived [the victim's] act as threatening." (ECF No. 48 at 24.) To the contrary, the jury "was aware that [the victim] was drunk and had a history of threatening to kill Petitioner when he was drunk." (ECF No. 43 at 54.)

For his claim of instructional error, Petitioner objects that his rights were violated when the jury was instructed with CALCRIM No. 3471, a "mutual combat" instruction. (ECF No. 48 at 32.) The California Court of Appeal determined that the instruction was supported by evidence from which the jury



**APPENDIX C**

could find that Petitioner not only engaged in mutual combat with the victim, but also acted as the initial aggressor. (ECF No. 9-1 at 14.) And as the Report found, the California Court of Appeal's determination could not be objectively unreasonable because there is no clearly established federal law, *i.e.*, "the Supreme Court has never held that a correct but inapplicable jury instruction violates due process." (ECF No. 43 at 60.) Although Petitioner objects that clearly established federal law does afford him the right to due process and a fair trial (ECF No. 48 at 33), this objection does not rebut the Report's finding. "The Supreme Court has repeatedly reminded lower courts applying AEDPA not to 'frame[e] [Supreme Court] precedents at a high level of generality." *Fauber v. Davis*, 43 F.4th 987, 1007 (9th Cir. 2022) (alterations in original, citing *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (*per curiam*)). Petitioner's overly general framing, in terms of due process and a fair trial, "would defeat the substantial deference that AEDPA requires." *Fauber*, 43 F.4th at 1008 (quoting *Jackson*, 569 U.S. at 512).

For his claims of prosecutorial misconduct, Petitioner objects that the claims are not procedurally barred. (ECF No. 48 at 34.) To the contrary, the California Court of Appeal found that the claims were forfeited because they were not raised before the trial court, and that Petitioner had not shown cause for the default based on his counsel's alleged ineffectiveness in failing to object to the alleged misconduct. (ECF No. 9-1 at 16-19.) The Report also analyzed, in detail, why counsel's failure to object to the prosecutor's alleged misstatements of the law during closing arguments did not amount to ineffective assistance. (ECF No. 43 at 80-93.) Petitioner does not challenge these findings in any meaningful manner. (ECF No. 48 at 34-36.) Because Petitioner has failed to overcome the procedural bar of his prosecutorial misconduct claims, habeas relief is unavailable for them.

For his claim of cumulative error, Petitioner objects that multiple errors cumulatively violated his rights. (ECF No. 48 at 38.) To the contrary, Petitioner



**APPENDIX C**

has not overcome the Report's finding that "each of Petitioner's claims is meritless, so there can be no cumulative error." (ECF No. 43 at 108.)

In sum, Petitioner's objections are overruled.

**ORDER**

It is ordered that (1) the Report and Recommendation of the Magistrate Judge is accepted and adopted; and (2) Judgment shall be entered denying the Petition and dismissing this action with prejudice.

DATED: February 5, 2025

MAAME EWUSI-MENSAH FRIMPONG
UNITED STATES DISTRICT JUDGE



APPENDIX C

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| CHARLES CHAD GIESE,<br><br>Petitioner,<br><br>v.<br><br>CRAIG KOENIG, Warden,<br><br>Respondent. | Case No. CV 21-8535-MEMF (JPR)<br><br>REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE |

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

**PROCEEDINGS**

On October 28, 2021, Petitioner filed a counseled Petition for Writ of Habeas Corpus by a Person in State Custody, raising eight claims challenging his 2018 conviction for first-degree murder. On May 5, 2023, after his motion to dismiss was denied, Respondent answered, and on August 2, Petitioner replied.

For the reasons below, the Court recommends that the Petition be denied and this action be dismissed with prejudice.



# APPENDIX D

**PETITIONER'S CLAIMS**

I. Trial counsel was ineffective because he failed to present expert testimony about the psychological and physical effects of methamphetamine and alcohol use or argue that evidence of the victim's methamphetamine use was admissible under California's "rule of completeness." (Pet. at 5, ECF No. 1 (throughout, the Court uses the pagination generated by its Case Management/Electronic Case Filing system except for citations to the Clerk's and Reporter's transcripts).)

II. Trial counsel was ineffective because he failed to investigate and present evidence concerning the victim's "propensity for aggression," Petitioner's nonviolent character, and his efforts to move out of the victim's home. (Id. at 5-6.)

III. The trial court violated due process by allowing the prosecutor to introduce Petitioner's pretrial statements because they were coerced and he made them during a custodial interrogation without first being advised of his Miranda[1] rights. (Id. at 6.)

IV. The evidence was insufficient to show that Petitioner committed the charged murder with premeditation and deliberation. (See id.)

V. The trial court violated due process and Petitioner's right to a fair trial by excluding evidence concerning the victim's drug use. (See id.)

VI. The trial court violated Petitioner's right to a jury trial by instructing the jury with CALCRIM 3471 because it was

[1] Miranda v. Arizona, 384 U.S. 436 (1966).



# APPENDIX D

not supported by the evidence and effectively precluded the jury from finding that he acted in self-defense or imperfect self-defense. (See id. at 7; Traverse at 24, ECF No. 41.)

VII. The prosecutor committed misconduct by repeatedly misstating the law during his closing arguments, and trial counsel was ineffective in failing to object. (See Pet. at 7-8, ECF No. 1.)

VIII. The cumulative effect of the errors alleged in claims three through seven requires reversal of Petitioner's conviction.[2] (See id. at 8.)

**BACKGROUND**

In November 2015, a San Luis Obispo County Superior Court jury convicted Petitioner of first-degree murder. (See Lodged Doc. 10, 2 Clerk's Tr. at 639-40, ECF No. 38-2.) He was sentenced to 26 years to life in state prison. (See id., 3 Clerk's Tr. at 841-42, ECF No. 38-3; Lodged Doc. 12, 24 Rep.'s Tr. at 6964, ECF No. 38-32.)

Petitioner appealed (Lodged Doc. 14, ECF No. 38-36), asserting grounds three through eight of the Petition, and on February 26, 2020, the court of appeal affirmed the judgment (see Lodged Doc. 1, ECF No. 9-1). Thereafter, he filed a petition for review in the state supreme court, which denied it on May 27, 2020. (See Pet. at 37-75, ECF No. 1.)

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[2] Petitioner's cumulative-error claim does not include the Petition's ineffective-assistance claims in grounds one and two, as the Court has already found (see R. & R. at 4-5, ECF No. 33) and Petitioner has conceded (see Reply at 2, ECF No. 31 ("Ground Eight does not include Grounds One and Two, but refers to and includes Grounds Three through Seven.")).



# APPENDIX D

On September 21, 2020, Petitioner filed a petition for writ of certiorari in the U.S. Supreme Court, which denied it on November 2. (See Lodged Doc. 5, ECF No. 9-5.) On October 26, 2021, he filed a habeas petition in the court of appeal, asserting the Petition's ineffective-assistance claims in grounds one and two. (See Lodged Doc. 6, ECF No. 9-6.) On October 29, 2021, that court denied the petition without prejudice, citing Petitioner's failure to first seek relief in the superior court. (See Lodged Doc. 7, ECF No. 9-7.) On November 3, 2021, he asserted the same claims in a habeas petition in the superior court (see Lodged Doc. 18, ECF No. 38-40), which denied it in a reasoned decision on May 19, 2022 (see Lodged Doc. 19, ECF No. 38-41). On May 24, 2022, he raised the same claims in a habeas petition in the court of appeal (see Lodged Doc. 20, ECF No. 38-42), which denied it without comment (see Lodged Doc. 21, ECF No. 38-43).[3] On June 15, 2022, he filed a habeas petition in the supreme court, asserting the same claims.[4] See Cal. App. Cts. Case Info., http://appellatecases.courtinfo.ca.gov/ (search for "Charles" with "Giese" in supreme court) (last visited Feb. 28, 2024). On July 27, 2022, the supreme court denied it. See id.

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[3] Although the court of appeal summarily denied Petitioner's ineffective-assistance claims, it granted his application to file documents under seal and took judicial notice of the pleadings stemming from his superior-court habeas petition and of the superior court's reasoned decision denying it. (See Lodged Doc. 21, ECF No. 38-43.)

[4] Neither party has lodged a copy of that habeas petition, but the Court accepts Petitioner's counsel's uncontested word that it presented grounds one and two of the Petition. (See Mot. Withdraw, ECF No. 25.)



# APPENDIX D

**SUMMARY OF THE EVIDENCE**

The factual summary in a state appellate-court decision is entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). See Crittenden v. Chappell, 804 F.3d 998, 1010-11 (9th Cir. 2015); but see Murray v. Schriro, 745 F.3d 984, 1001 (9th Cir. 2014) (discussing "state of confusion" in circuit's law concerning interplay of § 2254(d)(2) and (e)(1)). Nonetheless, because one of Petitioner's claims challenges the sufficiency of the evidence, the Court has independently reviewed the state-court record. See Nasby v. McDaniel, 853 F.3d 1049, 1054-55 (9th Cir. 2017). Based on that review, the Court finds that the following statement of facts from the California Court of Appeal decision on direct review fairly and accurately summarizes the evidence.

> In early 2015, [Petitioner] began renting a room in Walter Vallivero's mobile home. Shortly after [Petitioner] moved in, the manager of the mobile home park began receiving complaints from other residents about frequent loud arguments at Vallivero's home.[5]

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[5] Kristy Tolbert, one of Petitioner's and Vallivero's neighbors, testified that she overheard the two arguing so regularly that she became "numb" to it. (Lodged Doc. 12, 9 Rep.'s Tr. at 2450-52, ECF No. 38-17.) According to her, Vallivero did "most of the arguing and talking," whereas Petitioner "was pretty quiet." (Id. at 2451.) Several other neighbors — including Sarah Demolar, her husband Joshua, and Barbara Clark — testified about arguments they overheard and Vallivero's threats to shoot Petitioner, which he made in the weeks and months before he was killed. (See Lodged Doc. 12, 10 Rep.'s Tr. at 2712, 2713, 2715, 2726, 2730, 2753-54, 2760-63, 2767, 2771, ECF No. 38-18.) The manager and owner of the Rancho Oaks Community Park, where Petitioner and Vallivero lived, also testified. (See Lodged Doc.



# APPENDIX D

There were also complaints that [Petitioner] had urinated in public and was acting strangely. Several residents requested that [Petitioner] be ordered to leave the mobile home park. Shawn Reed, the owner of the park, sent Vallivero a letter outlining the complaints regarding [Petitioner] and stating that he would be asked to leave the park if his inappropriate behavior continued.

On September 5, the police were called to Vallivero's home regarding a physical altercation between [Petitioner] and Vallivero. [Petitioner] told the police that he and Vallivero were arguing about trash in the kitchen when Vallivero reached into the cushion on the couch and pulled out a BB gun. [Petitioner] grabbed the hand that was holding the gun and repeatedly punched Vallivero in the face. Vallivero told the responding officers that [Petitioner] repeatedly punched him in the face after he confronted [Petitioner] about the messy kitchen. According to Vallivero, whose face was bloody and swollen, it was [Petitioner] who grabbed the BB gun from the couch cushions before running outside.

A few days later, Reed sent Vallivero a letter referring to the recent incident and revoking Vallivero's right to have [Petitioner] as a renter. On September 17, Reed sent Vallivero another letter informing him that [Petitioner] had 30 days to vacate the premises. Ten

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12, 8 Rep.'s Tr. at 2130-31, 2202-03, ECF No. 38-16.)



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days later, Reed sent Vallivero a letter informing him that [Petitioner] had been observed recklessly driving in the mobile home park while intoxicated. Vallivero subsequently told Reed "he was having a hard time getting an agreement with [[Petitioner]] to vacate the park." On October 7, [Petitioner] was formally served with notice of the eviction proceedings against him.

On the morning of November 16, [Petitioner's] mother Brenda Caves called 911 and reported that [Petitioner] had hit his roommate with a baseball bat, that the roommate did not appear to be breathing, and that [Petitioner] had put him in the bathtub. San Luis Obispo County Sheriff's Deputies Dustin Phillips and Jason Hall responded to Caves's house. [Petitioner] was outside the house with Caves and his hand was bandaged. [Petitioner] requested medical assistance and Deputy Hall rode with him in an ambulance to the hospital. While they were in the ambulance, [Petitioner] said he cut his finger on a glass bottle and that his jaw hurt because he had been hit with a fist.

Vallivero's body was found in the bathtub. He had a laceration to his left arm, a deep incision wound on the back of his neck, lacerations and fractures along the left side of his head, stab wounds to his back, and numerous wounds to his head and body that were consistent with blunt force trauma. Vallivero also had defensive wounds on his forearms, hands, and wrists, and bruises on the right side of his torso. The cause of death was



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blunt force injuries to the head. Toxicology results showed that Vallivero had a 0.19 blood alcohol level; tests for controlled substances were negative.

[Petitioner] was interviewed at the hospital and later at the sheriff's station. He said he had just finished cleaning the kitchen when Vallivero arrived home after buying beer and told him to "get the fuck out of [his] house." [Petitioner] became "heated" and armed himself with a rock because he was going to walk past Vallivero and was "sick of [Vallivero's] shit." Vallivero told [Petitioner], "I'm going to kill you. You're going to fucking die." Vallivero punched [Petitioner]. [Petitioner] hit Vallivero with the rock and struck him approximately three times on the head with a beer bottle. The bottle broke and Vallivero fell backwards onto the couch. [Petitioner] picked up a baseball bat and hit Vallivero with it, causing Vallivero to fall to the floor.

[Petitioner] continued to hit Vallivero with the bat as Vallivero lay motionless on the floor. [Petitioner] then retrieved a knife and tried to stab Vallivero in the chest "to make sure that he was gone." The knife would not penetrate Vallivero's chest, so [Petitioner] stabbed him in the neck.

After placing Vallivero's body in the bathtub, [Petitioner] drank Vallivero's beer and attempted to clean the house. He also considered fleeing, but ultimately called Caves and told her what had happened.



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> [Petitioner] believed that he had to defend himself because Vallivero "kept punching" him, but acknowledged that Vallivero had struck him only once or twice. [Petitioner] felt that his conduct was due to feelings of frustration that "went way overboard" and added that if he could "take it back [he] would."

(Lodged Doc. 1 at 2-5, ECF No. 9-1 (footnote omitted).)

**STANDARD OF REVIEW**

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

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

Under AEDPA, the "clearly established Federal law" that controls federal habeas review consists of holdings of Supreme Court cases "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). As the Supreme Court has "repeatedly emphasized, . . . circuit precedent does not constitute 'clearly established Federal law, as



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

Although a particular state-court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 412-13. A state-court decision is "contrary to" clearly established federal law if it either applies a rule that contradicts governing Supreme Court law or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (citation omitted). A state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Id.

State-court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts' (emphasis added)." Id. at 11 (quoting § 2254(d)). A state-court decision that correctly identifies the governing legal rule may be rejected if it unreasonably applies the rule to the facts of a particular case. Williams, 529 U.S. at 407-08. To obtain federal habeas relief



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for such an "unreasonable application," however, a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Id. at 409. In other words, relief is warranted only if the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). And even then, the error must have had a "substantial and injurious effect" on the verdict. Brown v. Davenport, 142 S. Ct. 1510, 1517, 1523 (2022). "[E]ven clear error will not suffice." Woods v. Donald, 575 U.S. 312, 316 (2015) (per curiam) (citation omitted).

Here, Petitioner asserted claims three through eight on direct appeal (see Lodged Doc. 14, ECF No. 38-36) and claims one and two in the habeas petition he filed in the superior court (see Lodged Doc. 18, ECF No. 38-40), and the court of appeal and superior court, respectively, rejected them on their merits in reasoned decisions (see Lodged Doc. 1, ECF No. 9-1; Lodged Doc. 19, ECF No. 38-41). The supreme court summarily denied his petition for review and habeas petition raising the same claims.[6] (See Pet. at 37-75, ECF No. 1.)

A rebuttable presumption exists that a higher state court's unexplained decision adopted the same reasoning as the last reasoned state-court decision. See Wilson v. Sellers, 138 S. Ct.

[6] After the superior court rejected the Petition's claims one and two in its reasoned decision, the court of appeal rejected them without comment. (See Lodged Doc. 20, ECF No. 38-42; Lodged Doc. 21, ECF No. 38-43.)



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1188, 1192 (2018) ("[F]ederal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "presume that the unexplained decision adopted the same reasoning."). The parties have not rebutted that presumption here, and the Court therefore looks through the supreme court's silent denials to the court of appeal's and the superior court's reasoned decisions as the basis for the state court's judgment on claims three through eight and claims one and two, respectively. Because the state court adjudicated the claims on their merits, the Court's review is limited by AEDPA deference.[7] See Richter, 562 U.S. at 100.

**DISCUSSION**

**I. Part of Petitioner's Involuntary-Statement Claim and His Whole Prosecutorial-Misconduct Claim Are Procedurally Barred**

In his third ground for relief, Petitioner contends that his pretrial statements to police were involuntary because they were the product of police coercion. (See Pet. at 6, ECF No. 1.) In part, he claims that "[t]he extensive police station interviews and [his] mental health impairments prove that he made

[7] As related below, the court of appeal rejected Petitioner's claim that counsel was ineffective for failing to object to the prosecutor's purported misstatements of law because he was not prejudiced by them, without addressing whether counsel's performance was deficient. (See Lodged Doc. 1 at 18-19, ECF No. 9-1.) The Court's review of that court's prejudice finding is of course limited by AEDPA deference, See Richter, 562 U.S. at 100, but its review of whether counsel's performance was deficient is de novo, see Jones v. Ryan, 52 F.4th 1104, 1116 (9th Cir. 2022) ("[B]ecause the state court reached only the deficient performance prong of Jones's IAC claims, we review only that prong under § 2254(d), and we review the prejudice prong of his claims de novo" (citations omitted)).



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involuntary statements."[8] (Traverse at 18-19, ECF No. 41.) In his seventh claim, he contends that the prosecutor committed misconduct by making several misstatements of law during his closing arguments. (See Pet. at 7, ECF No. 1.)

Respondent maintains that these claims are procedurally barred because the court of appeal on direct review held that Petitioner had forfeited them by failing to raise them in the trial court. (See Answer at 21-22, 46, ECF No. 37.) As related below, Respondent is correct.

**A. Applicable Law**

Federal habeas courts generally refuse to hear claims that were defaulted in state court "pursuant to an independent and adequate state procedural rule." Johnson v. Lee, 578 U.S. 605, 606 (2016) (per curiam) (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)). The state court must "explicitly invoke[ ]" a state procedural bar as a separate basis for its decision. Fairbank v. Ayers, 650 F.3d 1243, 1256 (9th Cir. 2011) (as amended) (citation omitted). To be independent, the state-law rule must not be "interwoven" with federal law. La Crosse v. Kernan, 244 F.3d 702, 704 (9th Cir. 2001). A procedural bar is adequate if it is "firmly established and regularly followed."

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[8] The interview occurred at a sheriff's station, not a police station. (See Lodged Doc. 10, Interview, Clerk's Tr. at 207 (unredacted), ECF No. 38-4.) The Clerk's transcript includes a redacted and an unredacted version of Petitioner's interview with detectives investigating Vallivero's murder. (See Lodged Doc. 10, Interview, Clerk's Tr. (unredacted), ECF No. 38-4; id., Interview, Clerk's Tr. (redacted), ECF No. 38-5.) The trial court designated both "confidential" and "detached" them "from the exhibits contained in the Clerk's Normal Transcript." (See id., 1 Clerk's Tr., ECF No. 38-1 at 186; id., 2 Clerk's Tr., ECF No. 38-2 at 17.)



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Walker v. Martin, 562 U.S. 307, 316 (2011) (citation omitted).

To preserve a constitutional claim on appeal, California requires a defendant to raise a timely, specific objection at trial. See People v. Alvarez, 14 Cal. 4th 155, 186 (1996). The contemporaneous-objection rule is an independent and adequate state bar. See Tong Xiong v. Felker, 681 F.3d 1067, 1075 (9th Cir. 2012); Fairbank v. Ayers, 650 F.3d 1243, 1256-57 (9th Cir. 2011); see also Rich v. Calderon, 187 F.3d 1064, 1069-70 (9th Cir. 1999) (as amended) (petitioner's prosecutorial-misconduct claims were procedurally barred because he failed to object to alleged misconduct at trial); Michel v. Galaza, No. CIV S-02-2230 MCE CMK P., 2006 WL 2620481, at *7 (E.D. Cal. Sept. 13, 2006) (petitioner's claim that statements to police were involuntary was procedurally barred when he failed to object to statements' admission on coercion grounds), accepted by 2007 WL 677616 (E.D. Cal. Mar. 1, 2007).

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

Assuming that the respondent has pleaded the existence of an independent and adequate state procedural ground and the petitioner has not satisfied his burden of placing the



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procedural-default defense at issue, federal habeas review is barred unless the petitioner can demonstrate (1) cause for his procedural default and actual prejudice as a result of the alleged violation of federal law or (2) a fundamental miscarriage of justice because, for example, the petitioner is actually innocent. See Coleman, 501 U.S. at 750; see also Schlup v. Delo, 513 U.S. 298, 314-15 (1995); Bennett, 322 F.3d at 580.

**B. Analysis**

The court of appeal found that Petitioner had "forfeited" his claim that "his statements were involuntary because the detectives exploited his mental illness and unduly prolonged his interview at the sheriff's station," as alleged in ground three of the Petition, by failing to "raise[] [the issue] below" and his prosecutorial-misconduct claim, as alleged in ground seven, because "defense counsel did not object to the prosecutor's alleged misstatements and made no requests that the jury be admonished." (Lodged Doc. 1 at 9, 16, ECF No. 9-1; see Pet. at 6-8, ECF No. 1.) Petitioner has not even attempted to show that the procedural ground relied on by the court of appeal was inadequate, nor could he because it was adequate, as related above. See Tong Xiong, 681 F.3d at 1075; Fairbank, 650 F.3d at 1256-57; see also Rich, 187 F.3d at 1069-70; Michel, 2006 WL 2620481, at *7.

Further, Petitioner has not shown cause relating to the defaults. Although he notes that he argued in the trial court that his statements were "'involuntary as a matter of law' because of the detectives' failure to Mirandize him" (Traverse at 17, ECF No. 41 (quoting Lodged Doc. 10, 1 Clerk's Tr. at 97-101,



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ECF No. 38-1)),[9] he did not argue there as he did on direct review that "[t]he extreme length of the interviews," their location, and his "particular mental state at the time . . . rendered his statements involuntary." (Lodged Doc. 14 at 52, ECF No. 38-36; see also Traverse at 18-19, ECF No. 41.) Put simply, he did not raise his coercion claim in the trial court and has advanced no reason for his failure to do so.

As to his prosecutorial-misconduct claim, Petitioner cites Martinez v. Ryan, 566 U.S. 1, 17 (2012), for the proposition that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." (Traverse at 25, ECF No. 41.) As an initial matter, his prosecutorial-misconduct claim does not raise a "substantial claim of ineffective assistance at trial." Moreover, even if it did, he had counsel in his initial-review collateral proceeding. (See Lodged Doc. 6, ECF No. 9-6.) And in any event, he raised the Petition's prosecutorial-misconduct claim and its

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[9] Although Petitioner captioned his motion to suppress his pretrial statements as a "Motion to Suppress Involuntary Statements" (Lodged Doc. 10, 1 Clerk's Tr. at 97, ECF No. 38-1), the only law he cited and the only arguments he offered concerned whether he was in custody — and thus entitled to Miranda warnings — when he made the statements (see id. at 99-101). Since Vega v. Tekoh, 597 U.S. 134 (2022), some courts on federal habeas review have questioned whether such a freestanding Miranda claim still exists. See Gumbs v. Stanford, No. 22-CV-4659 (VEC), 2023 WL 5928454, at *3 n.5 (S.D.N.Y. Sept. 12, 2023), appeal filed, No. 23-7244 (2d Cir. Oct. 3, 2023); Samuel v. Carlin, No. 2:20-cv-00545-REP, 2023 WL 3627647, at *8 n.2 (D. Idaho May 24, 2023), appeal filed, No. 23-35408 (9th Cir. June 13, 2023).



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corresponding ineffective-assistance claim on direct review, when he was also represented by counsel. (See Lodged Doc. 14 at 88-101, ECF No. 38-36); Martinez, 566 U.S. at 11 (exception for ineffective-assistance claims applies when "the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial"). He does not contend that appellate counsel was ineffective in prosecuting either claim or that habeas counsel was ineffective in prosecuting his initial state petition. Thus, Martinez is inapplicable.

Absent cause, there is no need to consider prejudice. See Thomas v. Lewis, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991). In any event, as related below in Section VI(D)(1), Petitioner is unable to demonstrate that the prosecutor's purported misstatements of law "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions," United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis omitted), or that a "reasonable probability" exists that the outcome of the trial would have been different without them,[10] Frost v. Gilbert, 835 F.3d 883, 890 (9th Cir.

[10] In the facts supporting his prosecutorial-misconduct claim, Petitioner identifies each of the prosecutor's supposed misstatements of law and thereafter conclusorily states, "defense counsel rendered Ineffective Assistance by Failing to Object." (Pet. at 8, ECF No. 1.) It is questionable whether this was sufficient to raise an independent ineffective-assistance claim, particularly given that Petitioner is represented by counsel. See R. 2(c), Rs. Governing § 2254 Cases in U.S. Dist. Cts. (habeas petition must "specify all the grounds for relief" and "state the facts supporting each ground"); see also Fed. R. Civ. P. 8(a)(2) (requiring that pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); Brazil



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2016) (en banc) (as amended) (citation omitted).

Petitioner likewise cannot show actual prejudice concerning his claim that his pretrial statements were coerced. Fatally, he has shown no coercive police activity. See Withrow v. Williams, 507 U.S. 680, 693 (1993) (describing police coercion as "crucial element" in determination that confession was involuntary); Colorado v. Connelly, 479 U.S. 157, 167 (1986) (stating that "coercive police activity is a necessary predicate to finding that a confession is '[in]voluntary' within the meaning of the Due Process Clause"). Although he contends his statements were involuntary because he was not administered a Miranda warning before making them (see Traverse at 7), no such warning was required because he was not in custody when he made the statements, as explained in Section II. And the trial court found that neither of the detectives who questioned him "was aggressive, confrontational, or accusatory or used interrogation techniques to pressure [him]." (Lodged Doc. 12, 6 Rep.'s Tr. at 1524, ECF No. 38-14). Petitioner has cited no facts suggesting let alone showing that that finding was unreasonable or argued that the court's fact-finding process was deficient. Nor could he given that the trial court made its findings only after viewing the video of the police interview, considering the parties' briefing on the matter, and conducting an evidentiary

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v. U.S. Dep't of Navy, 66 F.3d 193, 199 (9th Cir. 1995) (Rule 8 requires that pleading provide "minimum threshold" giving party "notice of what it is that it allegedly did wrong"). Nevertheless, as the court of appeal did (see Lodged Doc. 1 at 17-19, ECF No. 9-1), the Court addresses Petitioner's "claim" that counsel erred in failing to object to the prosecutor's alleged misstatements of law.



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hearing. (See id., 5 Rep.'s Tr. at 1204-75, ECF No. 38-13, 6 Rep.'s Tr. at 1503-12, ECF No. 38-14.) Accordingly, the court's finding is entitled to AEDPA deference. See Burton v. Davis, 816 F.3d 1132, 1140 (9th Cir. 2016) (explaining that "a state court's findings of fact are ordinarily subject to deference" unless shown to be deficient under exceptions enumerated "in former § 2254[(d)]"); Loher v. Thomas, 825 F.3d 1103, 1112 (9th Cir. 2016) (federal court may not "second-guess" state court's finding of fact unless it was "actually unreasonable"); compare Hurles v. Ryan, 752 F.3d 768, 790-91 (9th Cir. 2014) (state court's factual finding not entitled to deference when presiding judge did not hold evidentiary hearing "or provide another mechanism" for petitioner to develop factual record supporting claim and based her findings only on her memory).

There is, moreover, no evidence to support his claim that police exploited "his mental illness." (Traverse at 17, ECF No. 41.) Indeed, he does not identify the nature of his purported mental-heath impairments and cites no evidence showing he suffered from any when he was interviewed or the extent to which they might have affected his ability to exercise free will under questioning. James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."); Jones v. Gomez, 66 F.3d 199, 205 (9th Cir. 1995) (habeas relief not warranted when claims for relief are unsupported by facts). The transcript of the interviews shows that he spoke freely, responded appropriately to questions, and recalled without difficulty his version of the events underlying Vallivero's



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murder. (See, e.g., Lodged Doc. 10, Interview, Clerk's Tr. at 214 (unredacted), ECF No. 38-4 (relaying prior confrontation with Vallivero and providing appropriate answers to detective's questions concerning details), 217-20 (describing circumstances of Vallivero's murder and appropriately responding to questions concerning details)); United States v. Lewis, 833 F.2d 1380, 1384-86 (9th Cir. 1987) (defendant's statements at hospital several hours after he was administered general anesthesia were voluntary when he claimed to feel fine, was responsive, and demonstrated unimpaired recollection); United States v. Martin, 781 F.2d 671, 672-74 (9th Cir. 1993) (defendant's statements were voluntary despite his being in pain and under influence of medication when he was conscious, relatively coherent during questioning, and spoke freely). And by his own account, any purported mental impairment Petitioner had was not "'disabl[ing]'" despite his having "a hard time processing information quickly."[11] (Lodged Doc. 10, 3 Clerk's Tr. at 743, ECF No. 38-3.)

Equally meritless is Petitioner's claim that the length of the sheriff-station interview shows that his statements were involuntary. (See Traverse at 18-19, ECF No. 41.) In total, the interview lasted less than four hours (see Lodged Doc. 12, 6 Rep.'s Tr. at 1505, ECF No. 38-14), which does not suggest that

[11] During the interview, Petitioner stated that he had been prescribed Lorazepam for stress and anxiety. (Lodged Doc. 10, Interview, Clerk's Tr. at 289-90 (unredacted), ECF No. 38-4.) He did not indicate what dosage he took or how often he took it. In any event, neither his Petition nor his Traverse cites his prescription-medication use in support of his coercion claim.



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the resulting statements may have been involuntary. See, e.g., Clark v. Murphy, 331 F.3d 1062, 1072-73 (9th Cir. 2003) (duration of interrogation did not support finding that suspect's statements were involuntary when interrogation lasted less than six hours; collecting cases); Ashcraft v. Tennessee, 322 U.S. 143, 149-54 (1944) (invalidating confession because police questioned suspect for 36 hours straight). And during that time, the detectives provided him with food and water and allowed him to take as many cigarette and bathroom breaks as he desired. (See Lodged Doc. 12, 5 Rep.'s Tr. at 1254-57, 1270, ECF No. 38-13, 6 Rep.'s Tr. at 1521-22, ECF No. 38-14); Berghuis v. Thompkins, 560 U.S. 370, 386-87 (2010) (explaining that hours-long interrogation is not coercive unless accompanied by "other facts indicating coercion, such as an incapacitated and sedated suspect, sleep and food deprivation, and threats").

In any event, even assuming error, Petitioner can show no prejudice. His coercion claim is premised on the "extensive [sheriff] station interviews." (Traverse at 18-19, ECF No. 41.) But before he had even arrived there, he had already given police a detailed account of his role in Vallivero's murder.[12]

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[12] To the extent Petitioner intended to challenge the voluntariness of the statements he made before agreeing to accompany detectives to the sheriff's station, that challenge fails because he cites no facts supporting it. See Borg, 24 F.3d at 26; Jones, 66 F.3d at 205. And the transcript of that interview reveals nothing suggesting that his statements were involuntary. (See, e.g., Lodged Doc. 10, Interview, Clerk's Tr. at 205-07 (unredacted), ECF No. 38-4 (reflecting that before initiating any questioning, detectives offered Petitioner assistance, ensured he received any needed medical treatment for cut to his hand, and asked if he wanted them to call anyone), 210-30 (reflecting that detectives made no threats, did not use aggressive tone, and



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(See Lodged Doc. 10, Interview, Clerk's Tr. at 207-31 (unredacted), ECF No. 38-4.) Indeed, when he was interviewed at the hospital, he admitted that he had armed himself with a rock before confronting Vallivero, repeatedly struck Vallivero — who was not armed — in the head with a bottle, then repeatedly struck him in the head with a baseball bat after he was no longer moving, and finally repeatedly stabbed him with a knife to "make sure he was gone" and "done." (Id. at 215-24.) He also admitted that he had tried to "wash" the weapons he had used and "clean up" after he had killed Vallivero to eliminate any incriminating evidence. (Id. at 224.) Although he stated at times that Vallivero had repeatedly punched him, he conceded at the outset that Vallivero had struck him only once and was not moving when Petitioner repeatedly struck him with a baseball bat. (Compare id. at 212 (stating that Vallivero hit him "one [1] time"), 223 (conceding that Vallivero was not moving when he repeatedly struck him with bat), with id. at 226 ("When I hit [him] with the bottle he went backwards and then he hit me and was still hitting me . . . and then I got . . . the bat . . . and fought him away from me.").)

And Petitioner conceded on direct appeal that his account of the murder at the sheriff's station mirrored the account he gave at the hospital. (See Lodged Doc. 14 at 23, ECF No. 38-36 (stating that at sheriff's station, Petitioner "again described the incident in detail, consistent with the account given at the hospital").) Accordingly, he cannot show that any purported

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allowed Petitioner to control pace of interview).)



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error in admitting his statements from the sheriff's station had a substantial and injurious impact on the jury's verdict. See Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (constitutional trial error does not warrant habeas relief unless it had "substantial and injurious effect or influence in determining the jury's verdict"); see also Mejorado v. Hedgpeth, 629 F. App'x 785, 787 (9th Cir. 2015) ("Neither the exclusion nor the admission of cumulative evidence is likely to cause substantial prejudice." (citing Wong v. Belmontes, 558 U.S. 15, 22-23 (2009) (per curiam))); Delgado v. McEwen, No. CV 11-10496-GHK (RZ)., 2012 WL 7170432, at *17 (C.D. Cal. Oct. 10, 2012) (counsel's failure to challenge petitioner's custodial statement for lack of Miranda warnings was harmless when he had already confessed to crimes before he was in custody), accepted by 2013 WL 638893 (C.D. Cal. Feb. 18, 2013).

Finally, Petitioner doesn't argue that the procedural default is excused because his case "falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" Schlup, 513 U.S. at 314-15 (citation omitted). Any attempt to do so would be futile because he admitted killing Vallivero, repeatedly stabbing him with a knife, and beating him with a baseball bat when he was defenseless, as related above.

Accordingly, Petitioner has failed to show that his procedural default should be excused, and the Court does not review the merits of his claims that his pretrial statements were involuntary based on coercive tactics or that the prosecutor committed misconduct by misstating the law.



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**II. Petitioner Is Not Entitled to Relief on His Miranda Claim**[13]

Petitioner contends that his pretrial statements to the investigating detectives should have been excluded because he made them while being subjected to a custodial interrogation without having first been advised of his Miranda rights. (See Pet. at 6, ECF No. 1.)

**A. Applicable Law**

In Miranda, the U.S. Supreme Court declared that a person questioned by law-enforcement officers after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has the right to remain silent, that any statements he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444. Statements elicited in noncompliance with this rule may not be admitted for certain purposes in a criminal trial. See Stansbury v. California, 511 U.S. 318, 322 (1994) (per curiam).

An officer's duty to administer Miranda warnings arises "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Stansbury, 511 U.S. at 322 (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per

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[13] The Court addresses the merits of the Petition's claims three, four, six, and seven (see Lodged Doc. 14, ECF No. 38-36) – all of which Petitioner raised on direct review — before addressing its ineffective-assistance claims, two of which he asserted in his postappeal habeas petitions and one on direct review (see id.; Lodged Doc. 18, ECF No. 38-40). The Court addresses the Petition's cumulative-error claim, which includes only the ineffective assistance he asserted on direct appeal (see Pet. at 8, ECF No. 1; Lodged Doc. 14 at 96-101, ECF No. 38-36), last.



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curiam)). The reviewing court must examine the totality of the circumstances surrounding the interrogation to determine whether the person is in custody. See id. The "ultimate inquiry" is "whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (citation omitted).

To determine if a person is in custody for purposes of Miranda, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarthy, 468 U.S. 420, 442 (1984); see also Stansbury, 511 U.S. at 323 ("Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."). Accordingly, courts must examine "all of the circumstances surrounding the interrogation" and then determine "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." Stansbury, 511 U.S. at 322, 325 (alteration and citation omitted).

In making this determination, courts consider among other things the site of the interview, whether the investigation has focused on the subject, whether any objective indicia of arrest are present, and the length and form of the questioning. See Yarborough v. Alvarado, 541 U.S. 652, 664-65 (2004). If on balance the factors point to no definitive conclusion of whether the suspect was in custody, the state court's finding must be



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upheld. Id. In Yarborough, for example, several factors — including that the interview lasted two hours and was conducted in a police station, the petitioner was not told he could leave, and the officer's denial of his counsel's request to have a parent present — weighed in favor of custody. Id. at 665. Nevertheless, the Supreme Court held that the state court's decision that the petitioner was not in custody was reasonable because other factors — including that the investigating officers did not require him to come to the station, offered him breaks during the interview, and used no threats but rather "appealed to his interest in telling the truth and being helpful to a police officer" — weighed against a finding of custody. Id. at 664-65.

**B. Court of Appeal's Decision**

The court of appeal summarized the facts underlying Petitioner's Miranda claim as follows:

> At the hearing on [Petitioner's] suppression motion, Deputy Hall testified that [Petitioner] was subjected to a patdown search for the deputies' safety when they first encountered him at Caves's house. [Petitioner] was never handcuffed and Deputy Hall never asked him any questions about Vallivero's killing. Deputy Hall rode with [Petitioner] in the ambulance to the hospital to ensure the paramedics' safety while Deputy Phillips followed in the patrol car.
>
> Detective David Marquez arrived at the hospital and introduced himself to [Petitioner] as he lay in a bed in the emergency room. Detective Marquez asked [Petitioner] if he needed anything and told him he would speak to him



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after he was treated.

Detective Nathan Paul subsequently arrived and introduced himself to [Petitioner]. Detective Paul told [Petitioner] he was there to find out what had happened and asked if [Petitioner] was willing to accompany him to the sheriff's station to talk. [Petitioner] said "okay" then added, "I don't know my rights. . . . I defended myself." Detective Paul responded "you're not under arrest. If you defended yourself, that's what I want to hear about." [Petitioner] replied: "My mom's working on an attorney . . . and [she] told me not to talk to anyone cause I could incriminate myself. . . . I don't know my rights, so um, I was in a fight and I defended myself and — and it got really bad and then I didn't know what to do after that point. I tried to clean up the mess." [Petitioner] proceeded to provide a detailed account of what had happened. At one point during the interview, [Petitioner] was allowed to use the bathroom.

After [Petitioner] had been treated, Detective Paul asked if he was still willing to accompany him to the sheriff's station for further questioning. [Petitioner] asked if he could smoke a cigarette after they arrived at the sheriff's station and the detective replied, "When we get there we'll let you . . . stand outside and . . . smoke as many as you need." [Petitioner] then asked, "I know you've probably gotta book me, right?" The detective replied in the negative and told [Petitioner] he was not being handcuffed and was a "free walking man."



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> After they arrived at the sheriff's station, [Petitioner] was allowed to smoke a cigarette outside and use a restroom without any supervision.[14] Before conducting the interview, Detective Paul confirmed with [Petitioner] that he was there voluntarily and reiterated he was not under arrest. During the interview, [Petitioner] took at least three cigarette breaks and a bathroom break. Near the end of the interview, [Petitioner] was told he was being detained for killing Vallivero.
>
> In denying [Petitioner's] suppression motion, the court found that [Petitioner] had voluntarily agreed to be interviewed; that there was no custodial interrogation because a reasonable person in [Petitioner's] position would have felt free to terminate the interview until the point he was told he was being detained; and that [Petitioner] had never unequivocally indicated that he wanted an attorney. The court further found that law enforcement had not dominated or controlled the course of the interrogation and that [Petitioner] had "set the pace" of the interview.

(Lodged Doc. 1 at 7-8, ECF No. 9-1.)

The court of appeal rejected Petitioner's Miranda claim,

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[14] Petitioner disputes this, alleging that he was always accompanied. (See Pet, Mem. P. & A. at 17 n.5, 18 n.6, ECF No. 1-1.) Although he was when he took cigarette breaks (see, e.g., Lodged Doc. 10, Interview, Clerk's Tr. at 285-88 (unredacted), ECF No. 38-4), he was unaccompanied when he used the restroom (see Lodged Doc. 12, 5 Rep.'s Tr. at 1265-66, ECF No. 38-13).



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finding that he was not in custody until detectives informed him at the conclusion of the interview that he was being detained:

> The court did not err in denying [Petitioner's] motion [to suppress his pretrial statements]. At both the hospital and the sheriff's station, [he] was free of physical restraints and was advised he was not under arrest and was free to leave. Moreover, no weapons were displayed and there is nothing to indicate that the deputies and detectives who spoke to him were aggressive or accusatory or employed special techniques to pressure him. On the contrary, every effort was made to ensure that [Petitioner] was comfortable and that his needs were accommodated. The court thus correctly found, under the totality of the circumstances, that [his] statements at the hospital and the sheriff's station were not the result of a custodial interrogation.

(Id. at 8-9.) Separately, the court found that any error in admitting the statements Petitioner made during the sheriff-station interview was harmless because he "had already provided a detailed account of the incident while he was at the hospital." (Id. at 9.)

**C. Analysis**

As an initial matter, there is no merit to Petitioner's contention that the sheriff's deputies who initially contacted him were instructed to "take [him] . . . into custody and control



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him."[15] (Pet., Mem. P. & A. at 46, ECF No. 1-1.) To the contrary, the deputies testified that they were dispatched only "to contact" him and "give detectives an opportunity to talk to him." (Lodged Doc. 12, 5 Rep.'s Tr. at 1210, ECF No. 38-13; see id. at 1237 (deputy testifying that they were not ordered to "keep [Petitioner] under control" but rather only to "contact" him, "get his information," ask him no questions, and wait to be contacted by detectives). And nothing during their interaction with him suggested that he was in custody. Although they patted him down for weapons (see id. at 1210, 1229), they did so only to ensure their own safety and never placed him in handcuffs or drew their weapons (see id. at 1211-13, 1216-18, 1220, 1224, 1229-30). See Brooks v. Yates, No. 1:11-cv-01315-LJO-JLT (HC), 2017 WL 3641731, at *33, *35 (E.D. Cal. Aug. 24, 2017) (petitioner was not in custody even though officers patted him down before questioning to ensure their safety in part because he was not handcuffed); Velasquez v. Gipson, No. SA CV 12-1078-(JSL)., 2013 WL 3381371, at *7, *10 (C.D. Cal. July 18, 2013) (same when officers did not restrain petitioner or draw their weapons). Their interactions with him were cordial and respectful (see Lodged Doc. 12, 5 Rep.'s Tr. at 1213, 1217, 1218, 1220, 1230, ECF No. 38-13), and they never questioned him about the murder but

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[15] Petitioner suggests that the deputies who initially contacted him were the same people who later interviewed him. (See Pet., Mem. P. & A. at 46.) In truth, the deputies never questioned him about the murder (see Lodged Doc. 12, 5 Rep.'s Tr. at 1213, 1218, 1222, ECF No. 38-13); instead, two detectives questioned him (see Lodged Doc. 10, Interview, Clerk's Tr. at 205-31, 237 (unredacted), ECF No. 38-4).



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rather repeatedly offered him medical assistance and otherwise engaged in "small talk" (see id. at 1213, 1215, 1218, 1222, 1231-32). Accordingly, he was not in custody during his interactions with the sheriff's deputies.

The court of appeal, moreover, reasonably concluded that Petitioner was not in custody during either of the subsequent interviews because neither involved any objective indicia of arrest. To the contrary, the first interview occurred at a hospital (see Lodged Doc. 10, Interview, Clerk's Tr. at 205-31 (unredacted), ECF No. 38-4); see Echols v. Neuschmid, No. CV 19-4877-CJC (PLA), 2020 WL 1452542, at *9 (C.D. Cal. Feb, 24, 2020) (fact that petitioner was questioned at hospital while receiving treatment rather than in police station supported conclusion that he was not in custody), accepted by 2020 WL 1445634 (C.D. Cal. Mar. 25, 2020), and he was never handcuffed during either interview (see Lodged Doc. 10, Interview, Clerk's Tr. at 234 (unredacted), 336 (reflecting that Petitioner was handcuffed only after sheriff-station interview had ended and he had been informed that he was being detained), ECF No. 38-4); see Plumb v. Hedgpeth, No. SACV 08-340 DOC (FFM)., 2011 WL 1212086, at *8 (C.D. Cal. Mar. 3, 2011) (fact that petitioner was not handcuffed during drive to police station or when he was questioned there supported finding that he was not in custody), accepted by 2011 WL 1211474 (C.D. Cal. Mar. 29, 2011). Nor were any weapons displayed during either interview. (See Lodged Doc. 12, 5 Rep.'s Tr. at 1246-47, 1251, 1257, ECF No. 38-13); United States v. Acosta-Licerio, 756 F. App'x 743, 744 (9th Cir. 2019) (defendant was not in custody during interview with two officers



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in part because neither officer's weapon was visible); Vance v. Adams, No. EDCV 04-1515 JST (FFM)., 2011 WL 978161, at *11 (C.D. Cal. Jan. 13, 2011) (petitioner was not in custody during polygraph examination conducted at police station in part because no firearms were displayed), accepted by 2011 WL 977957 (C.D. Cal. Mar. 18, 2011).

That the second interview occurred at a sheriff's station is not enough to show that Petitioner was in custody. The investigating detectives there repeatedly told him he was not under arrest (see Lodged Doc. 10, Interview, Clerk's Tr. at 237 (unredacted) (detective telling Petitioner that "it's important to me you understand you're not under arrest"), 293 ("I told you when you got here, you know, you're not under arrest right now. You're still not under arrest[.] [W]e're still just talking. Okay . . . You don't have to talk to me like I said before."),[16] 294 (detective reiterating that Petitioner voluntarily came to sheriff's station and stating, "[Y]ou[] know . . . that you don't have to talk to us"), ECF No. 38-4)), just as the initial investigating detective had done when he questioned Petitioner at the hospital (see id. at 209 (twice telling Petitioner he was "not under arrest"); see also id. at 235 (detective stating, "No, we're going to talk," in response to Petitioner asking if he was going to be booked at sheriff's station and telling him he was "a

[16] In response to this statement, Petitioner stated, " I didn't know I didn't have to talk to you." (Lodged Doc. 10, Interview, Clerk's Tr. at 293 (unredacted), ECF No. 38-4.) But "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury, 511 U.S. at 323.



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. . . free walking man")). See Earl v. Turnbull, 393 F. App'x 475, 475 (9th Cir. 2010) (state court reasonably concluded that petitioner was not in custody when among other things he was repeatedly advised that he was not under arrest and free to leave); Fusin v. Tilton, 305 F. App'x 425, 426 (9th Cir. 2008) (state court reasonably found that petitioner was not in custody despite some indications to contrary because he was repeatedly assured he was not under arrest and told he could leave). What's more, the investigating detective did not order Petitioner to go to the sheriff's station but instead asked him if he would agree to go, and he replied that he would. (See Lodged Doc. 10, Interview, Clerk's Tr. at 233 (unredacted), ECF No. 38-4; see also id. at 237 (detective stating at beginning of sheriff-station interview that he "appreciate[d] [Petitioner] . . . agreeing to come down and talk to [him] voluntarily" and that it "meant a lot" to him).)

Moreover, Petitioner had no reason to believe that moving from the hospital to the sheriff's station signaled that he was under arrest. To the contrary, the investigating detective explained that he wanted to question Petitioner at the station because there were "people running around" the hospital and there would be less "interruptions" and noise at the station. (Id. at 208.) Additionally, the detective who led the interview was not in uniform but instead wearing "dirty jeans." (Id. at 207); Garcia v. Cash, No. EDCV 11-1869 GAF (FFM)., 2013 WL 1010368, at *13 (C.D. Cal. Jan. 29, 2013) (fact that officer who questioned petitioner "was dressed in casual street clothes, not in a uniform," supported finding that petitioner was not in custody),



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accepted by 2013 WL 1087350 (C.D. Cal. Mar. 13, 2013).

Furthermore, nothing about the detective's questioning during either of the interviews suggested that Petitioner was in custody. As related above, the trial court found that the questioning was not "aggressive, confrontational, or accusatory" and that the detectives used no "interrogation techniques to pressure [him]." (Lodged Doc. 12, 6 Rep.'s Tr. at 1524, ECF No. 38-14). And during the interview at the hospital, the investigating detective expressed a willingness to believe Petitioner acted in self-defense (see, e.g., Lodged Doc. 10, Interview, Clerk's Tr. at 209 (unredacted) ("If you defended yourself, that's what I want to hear about."), 218 (stating, "I can see . . . the redness on your face," when Petitioner said that Vallivero had hit him), ECF No. 38-4) and by and large offered one-word responses as Petitioner relayed his account of the murder (see, e.g., id. at 209-26 (asking Petitioner how fight started and then prompting Petitioner to elaborate by stating, "Okay," "Yeah," and "Um hm" and then asking follow-up questions concerning details about his account).

The detectives' questioning at the sheriff's station was similarly nonconfrontational. At no point did they threaten him with prosecution, and nothing in the transcript suggests that they raised their voices at him. Rather, it shows that for the most part they simply allowed him to tell his story without interruption. (See, e.g., id. at 239-54 (allowing Petitioner to relay his account of his history with Vallivero and murder with little interruption and prompting him to elaborate by stating, "Okay," "Oh okay," "Mmm Hmm," and "Yea").) And when they



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interrupted him, they either apologized (see id. at 248 ("And I don't mean to stop you, but I —"), 305 (apologizing for interrupting before asking question about why Petitioner continued to beat Vallivero after he was down); see also id. at 303 ("It is of the utmost importance to me that I don't put words in your mouth.")), asked him open-ended questions (see, e.g., id. at 250 ("Tell me about Saturday night.")), or simply questioned him about some detail he had already provided (see, e.g., id. at 259 (asking Petitioner what he "clean[ed] up" after he said that he had tried to "clean up" after murdering Vallivero), 269-70 (asking what kind of bat Petitioner used to beat Vallivero), 276 (asking him details about knife he used to stab Vallivero)).

What's more, the detectives at times appeared sympathetic to Petitioner's claims about Vallivero's allegedly aggressive and threatening behavior. (See id. at 247 (asking, "[H]e fucked with your mom in the past?" and "He went behind your back, right?" in response to Petitioner's account of Vallivero's past actions), 279 (stating, "There's no doubt in my mind he was screaming at you and he was, it was, a bad situation," and praising Petitioner's efforts to be "good . . . roommate"), 313 (stating that "it seem[ed] like you were backed against a wall here[.] [Y]ou didn't have much choice . . . ."); see also id. at 268 (describing Vallivero's actions as "uncool," stating, "I keep coming back to the fact that you paid rent").) And they indicated that they were open to believing he acted in self-defense. (See, e.g., id. at 237 (detective stating, "I want to know more about what [Vallivero has] done to you . . . . What I'm looking at is a guy who got threatened, and, had some bad



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shit kick off."); Plumb, 2011 WL 1212086, at *10 (finding that tone of officer's questions indicated that petitioner was not in custody when they "intended to make [him] believe that they had compassion for him" rather than intimidate him). They also expressed gratitude to him for his cooperation and willingness to talk. (See, e.g., Lodged Doc. 10, Interview, Clerk's Tr. at 258 (unredacted) ("Like I said before I can't tell you how much I appreciate you talking to me and helping me understand the details.").) Further, during some parts of the interview, Petitioner and the detectives discussed matters having nothing to do with the murder, such as the composition of Petitioner's family, the circumstances under which he received treatment for his stress and anxiety, and the type of work he enjoyed. (See id. at 289-92.)

To be sure, the detectives at times prompted Petitioner to provide incriminating details about the murder (see, e.g., id. at 281 ("And he still won't let you pass by. So, did part of you think enough is enough?")) and confronted him with facts that cast doubt on his self-defense claim (see id. at 298 ("[H]ow come there's neighbors out there that are telling my guys from the scene . . . that they've heard you yelling at [Vallivero] that you're going to kill him?")). But for the most part, they allowed him to simply tell his side of the story and appealed to his sense of honesty. (See, e.g., id. at 270 (detective assuring Petitioner that they were "here to get to the truth" when he asked if he was going to be prosecuted), 285 (detective stating that he was only interested in truth), 303 ("All I want is the truth, like I said[,] I'm here to investigate.").) Such



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questioning further weighs against a finding that Petitioner was in custody. See Yarborough, 541 U.S. at 664 (appealing to defendant's interest in telling truth and being helpful to police rather than relying on threats of arrest and prosecution weighed against finding of custody).

The lengths of the two interviews are likewise insufficient to establish that Petitioner was in custody during either. The interview at the hospital lasted less than one hour and thus does not support a finding that he was in custody then. Compare Mathiason, 429 U.S. at 495 (interrogation lasting 30 minutes was not custodial in part because its duration was not substantial), with Yarborough, 541 U.S. at 665 (observing that two-hour interrogation without Miranda warnings weighed in favor of custody finding). Although the interview at the station lasted nearly four hours (see Lodged Doc. 12, 6 Rep.'s Tr. at 1505, ECF No. 38-14), Petitioner recounted with limited prompting the events of the murder and his antagonistic relationship with Vallivero and never asked to stop. (See Lodged Doc. 10, Interview, Clerk's Tr. at 237-57 (unredacted), ECF No. 38-4.) And more importantly, nothing that occurred during the interview would have led Petitioner to believe he was not free to leave. To the contrary, as related above, the detectives repeatedly told him at the station that he was not in custody and had done so earlier. He was also allowed as many cigarette and bathroom breaks as he wanted and took several during the interview. (See id. at 237, 257, 285, 288, 312, 327; Lodged Doc. 12, 6 Rep.'s Tr. at 1520-22, ECF No. 38-14.) What's more, the detectives promptly responded to his requests for water and food. (See, e.g., Lodged



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Doc. 10, Interview, Clerk's Tr. at 209 (unredacted), ECF No. 38-4 (stating, "You bet. I'll get you one. A big one? A big glass? I'm in," in response to Petitioner's request for water), 262 (offering to "scare up some food" for Petitioner after he indicated that he had eaten only rice for last two days), 267 (providing Petitioner with "apple and packaged snacks" and offering him more water), 288 (encouraging Petitioner to eat and stating, "And if you're hungry you need something in your stomach"), 289 (same); Lodged Doc. 12, 6 Rep.'s Tr. at 1521-22, ECF No. 38-14)); Yarborough, 541 U.S. at 664-65; Figueroa v. Ducart, No. ED CV 15-1119-SVW (SP), 2018 WL 7150497, at *10 (C.D. Cal. Sept. 27, 2018) (state court reasonably found that petitioner was not in custody even though he was questioned for nearly eight hours at police station in part because he was not restrained, was provided food and water, and was permitted to "freely" take restroom breaks during questioning), accepted by 2019 WL 404421 (C.D. Cal. Jan. 28, 2019), aff'd by, 857 F. App'x 336 (9th Cir. 2021).

For all these reasons, the court of appeal reasonably concluded that Petitioner was not in custody until the moment the detectives told him he was being detained. Accordingly, he is not entitled to relief on this claim.

**III. Petitioner Is Not Entitled to Relief on His Sufficiency-of-the-Evidence Claim**

Petitioner contends that the evidence was insufficient to show he committed murder with premeditation and deliberation because he in fact acted in "a panic." (Pet. at 6, ECF No. 1.)



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**A. Applicable Law**

The Due Process Clause of the 14th Amendment protects a criminal defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). In considering a sufficiency-of-the-evidence claim, a court must determine whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). California's standard for determining the sufficiency of evidence is identical to the federal standard announced in Jackson. People v. Johnson, 26 Cal. 3d 557, 576 (1980).

A federal habeas court reviews a sufficiency claim with an additional layer of deference, in that relief is not warranted unless the state court's application of Jackson was not just wrong but "objectively unreasonable." Coleman v. Johnson, 566 U.S. 650, 651 (2012) (per curiam) (citation omitted). Thus, a petitioner faces a "high bar" when challenging the sufficiency of the evidence used to obtain a state conviction. Id. And Jackson "makes clear that it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial." Cavazos v. Smith, 565 U.S. 1, 2 (2011) (per curiam). Thus, the reviewing court "cannot second-guess the jury's credibility assessments"; such determinations are "generally beyond the scope of review." Kyzar v. Ryan, 780 F.3d 940, 943 (9th Cir. 2015) (citation omitted).



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The reviewing court "must look to state law for 'the substantive elements of the criminal offense,'" although the "minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." Coleman, 566 U.S. at 655 (quoting Jackson, 443 U.S. at 324 n.16).

To prove deliberate and premeditated murder under California law, the prosecutor must show that the defendant weighed the consequences and considerations of his actions before taking the action leading to his conviction. See People v. Koontz, 27 Cal. 4th 1041, 1080 (2002). This showing does not, however, require proof that the defendant had a great deal of time in which to weigh those consequences and considerations:

> The process of premeditation and deliberation does not require any extended period of time. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .

Id.

**B. Court of Appeal's Decision**

The court of appeal rejected Petitioner's sufficiency-of-the-evidence claim on its merits:

> Sufficient evidence supports [Petitioner's] conviction of attempted [sic] premeditated and deliberate murder. [His] arguments to the contrary fail to acknowledge the standard of review, which compels us to view the evidence in the light most favorable to the judgment.



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> Prior to the killing, [Petitioner] armed himself with a rock. After Vallivero allegedly punched [him], [Petitioner] hit him on the head with the rock and proceeded to break a beer bottle over his head, causing him to fall on the couch. [Petitioner] then armed himself with a baseball bat and repeatedly hit Vallivero in the head as he lay motionless on the ground. To make sure Vallivero was dead, [Petitioner] retrieved a knife and stabbed him in the neck. The circumstances and manner of the killing amply support the jury's findings of premeditation and deliberation. [Petitioner] also expressed a motive for the killing by acknowledging he was angry about being evicted, was "sick of [Vallivero's] shit," and wanted him "gone." [Petitioner's] claim of insufficient evidence thus fails.

(Lodged Doc. 1 at 11-12, ECF No. 9-1 (citations omitted).)

**C. Analysis**

The court of appeal reasonably rejected Petitioner's sufficiency-of-the-evidence claim. First, viewed through the deferential lens of AEDPA, the evidence at trial supported a reasonable inference that he planned to kill Vallivero. Indeed, he admitted that he armed himself with a rock before even walking into the home and intended to strike Vallivero if he "start[ed] shit." (Lodged Doc. 10, Interview, Clerk's Tr. at 475-76, 525-27 (redacted), ECF No. 38-5); see Jones v. Wood, 207 F.3d 557, 563 (9th Cir. 2000) (evidence was sufficient to prove premeditation when crime involved planned procurement of weapon even though evidence "was almost entirely circumstantial and relatively



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weak"); Tyler v. Martinez, No. CV 22-08250-FMO (DFM), 2023 WL 9348064, at *4 (C.D. Cal. Dec. 4, 2023) (jury could infer that defendant planned murder when he brought gun to drug deal at which he attempted to kill victim).

Second, Petitioner had ample motive to kill Vallivero. He told detectives that Vallivero had repeatedly tried to evict him for no good reason and that he was "sick of [Vallivero's] shit." (Lodged Doc. 10, Interview, Clerk's Tr. at 499, 527-28 (redacted), ECF No. 38-5; see id. at 558 ("[T]his guy's lying behind my back to get me out, you know, and I paid my rent, and he just, he wants, he wants to make my life miserable because he thinks he can just kick me out."); Lodged Doc. 12, 13 Rep.'s Tr. at 3628, ECF No. 38-21.) He also relayed how Vallivero had "r[ode] [him] and just ripp[ed] [him] a new one every day" and verbally abused him "many, many times." (Lodged Doc. 10, Interview, Clerk's Tr. at 497-98, 505, 507, 523, 542, 545 (redacted), ECF No. 38-5; see id. at 566 ("[T]he guy's like a hawk on me and he's like . . . trying to fuck with me the whole time.").) Accordingly, the jury reasonably could infer that he had motive to murder Vallivero.

Third, the manner of the murder was consistent with premeditation and deliberation. Petitioner repeatedly beat Vallivero — first with a rock, then with a bottle until it shattered, and then with a baseball bat. (Id. at 475-76, 478-80, 529, ECF No. 38-5.) More importantly, he continued to bash Vallivero's head with the baseball bat again and again even as he lay motionless on the floor. (See id. at 483, 532.) The "devastation" to Vallivero's head was "immense," and his left ear



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was "broken apart." (Lodged Doc. 12, 15 Rep.'s Tr. at 4239-46, ECF No. 38-23; see also id. at 4245 (forensic pathologist describing "fractures" to back of Vallivero's head as resembling what would occur if "you drop[ped] a hardboiled egg").) His head injuries were so severe that they resembled those that would have been expected of someone who had "slam[med] into a tree" driving 60 miles an hour or jumped head first from 200 feet onto "rocks." (Id. at 4245-46.) And even as Vallivero remained motionless on the ground — presumably unconscious from having had his head beaten with a baseball bat (see id. at 4248 (forensic pathologist testifying that "reasonable interpretation" of evidence was "that once [Vallivero] recieve[d] the severe head injury," he was rendered unconscious)) — Petitioner discarded the bat, retrieved a knife, and repeatedly stabbed him in the back and neck to "make sure he was gone, and he was done" (Lodged Doc. 10, Interview, Clerk's Tr. at 480, 562-63 (redacted), ECF No. 38-5; see Lodged Doc. 12, 15 Rep.'s Tr, 4238, 4246-47, ECF No. 38-23 (reflecting that Vallivero had stab wounds to his back and large, two-inch-deep stab wound to back of neck)). The prolonged, violent nature of the attack alone is sufficient to show that Petitioner acted with premeditation and deliberation. See Drayden v. White, 232 F.3d 704, 709 (9th Cir. 2000) ("[W]hen manner-of-killing evidence strongly suggests premeditation and deliberation, that evidence is enough, by itself, to sustain a conviction for first-degree murder."); see also Campbell v. Hill, CV 18-7591-JAK (PLA), 2021 WL 7815377, at *14 (C.D. Cal. Dec. 16, 2021) (petitioner's act of "plung[ing]" knife into unarmed victim's chest with enough force to leave three-inch-deep wound "easily" supported finding that



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murder was premeditated and deliberate), accepted by 2022 WL 952173 (C.D. Cal. Mar. 30, 2022).

The jury was, moreover, under no obligation to accept Petitioner's claim that he merely lost control while defending himself from Vallivero. (See Pet. at 6, ECF No. 6.) Vallivero — a 54-year-old man who stood only five feet nine inches and weighed only 160 pounds (see Lodged Doc. 12, 8 Rep.'s Tr. at 2236-37, ECF No. 38-16) — had defensive wounds indicating that he was fighting off an attack (see id., 15 Rep.'s Tr. at 4228-436, ECF No. 38-23), whereas Petitioner — who was only 40 years old when the murder occurred, stood six feet tall, and weighed 200 pounds (see id., 8 Rep.'s Tr. at 2238-39, ECF No. 38-16) — had minimal wounds, consisting primarily of a cut to his hand that he himself inflicted when he broke a bottle on Vallivero's head (Lodged Doc. 10, Interview, Clerk's Tr. at 476-77 (redacted), ECF No. 38-5; see Lodged Doc. 12, 11 Rep.'s Tr at 3051-52, ECF No. 38-19) (photographs taken shortly after murder showing no visible injuries to Petitioner other than "an area of redness" on left side of his face)); see Humphries v. Sherman, No. CV 18-5748-JFW (JEM), 2019 WL 13437224, at *10 (C.D. Cal. Apr. 11, 2019) (noting that "the number, extent, and severity of" victim's stab wounds compared to minor cut marks on petitioner's hand and lacerations on his arm "indicate[d] that he was the aggressor, and [were] inconsistent with [his] testimony that he merely swung the knife at [victim] to keep her away"), accepted by 2019 WL 13437225 (C.D. Cal. May 22, 2019).

In any event, even if the jurors believed that Vallivero initiated the fight, they nevertheless could have reasonably



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inferred that the murder was premeditated and deliberate. After all, Petitioner told police that he repeatedly beat Vallivero's head in with a baseball bat as he lay motionless on the floor. (Lodged Doc. 10, Interview, Clerk's Tr. at 532 (redacted), ECF No. 38-4.) Petitioner had time to deliberate the nature of his actions each time he raised the bat as well as each time he decided to again strike Vallivero's head. See Johnson v. Miller, No. CV 13-7708-PA (PLA), 2015 WL 4748960, at *7 (C.D. Cal. Apr. 13, 2015) (petitioner had time to weigh consequences of his actions and decide to kill victim before doing so even though shooting occurred "in a 'matter of seconds'" (citing People v. Sanchez, 26 Cal. 4th 834, 849 (2001)), accepted by 2015 WL 4757635 (C.D. Cal. Aug. 10, 2015); see also Doherty v. Valenzuela, No. CV 11-5690 PSG (SS)., 2013 WL 1912534, *8 (C.D. Cal. Apr. 4, 2013) (evidence was sufficient to show that petitioner, who was approximately 54 years old, committed first-degree murder when he "continued to hit, stab, and stomp on" victim, who was 79 years old, after victim was disarmed and "appeared unconscious"), accepted by 2013 WL 1912504 (C.D. Cal. May 7, 2013).[17]

Fourth, Petitioner's actions immediately after killing

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[17] Likewise, between the time he dropped the baseball bat and obtained the knife, he had time to deliberate and make the cold, calculated decision to repeatedly stab Vallivero's motionless body to "make sure he was gone, and he was done." (Lodged Doc. 10, Interview, Clerk's Tr. at 480, 562-63 (redacted), ECF No. 38-5.) To be sure, Vallivero was likely already dead by that point. (See Lodged Doc. 12, 15 Rep.'s Tr. at 4248, 4277, ECF No. 38-23.) But even so, Petitioner's desire to ensure that Vallivero was dead evidenced his intent moments earlier when he beat Vallivero's head in with the baseball bat.



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Vallivero evidenced his consciousness of guilt. Indeed, he moved Vallivero's dead body from the living room to a bathtub and attempted to "clean[] up all the evidence." (Lodged Doc. 10, Interview, Clerk's Tr. at 469-70, 484-85, 519, 541 (redacted), ECF No. 38-5; Lodged Doc. 12, 11 Rep.'s Tr. at 3063, ECF No. 38-19.) He also "washed" the bat and knife he used, "wiped the blood off the walls," "tried to clean the carpet," put his bloodied shirt in a trash can, showered, and changed clothes before leaving the crime scene to go to his mother's house.[18] (Lodged Doc. 10, Interview, Clerk's Tr. at 470, 484-85, 518-19 (redacted), ECF No. 38-5); United States v. Castillo, 615 F.2d 878, 885 (9th Cir. 1980) ("An attempt by a criminal defendant to suppress evidence is probative of consciousness of guilt." (citation omitted)); Cooper v. Brown, 565 F.3d 581, 641 (9th Cir. 2009) (Rymer, J., concurring) (reviewing court was obligated to presume that jury inferred petitioner's consciousness of guilt when he disposed of incriminating clothes).

In short, overwhelming evidence showed that the murder was premeditated and deliberate. Accordingly, Petitioner is not entitled to relief on his sufficiency-of-the-evidence claim.

**IV. Petitioner's Exclusion-of Evidence Claim Does Not Warrant Habeas Relief**

Petitioner contends that the trial court violated due process and deprived him of a fair trial by excluding evidence

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[18] He also told police that he considered fleeing and dumping the evidence elsewhere but ultimately did not do so. (Lodged Doc. 10, Interview, Clerk's Tr. at 485 (redacted), ECF No. 38-4; Lodged Doc. 12, 13 Rep.'s Tr. at 3627, ECF No. 38-21.)



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concerning Vallivero's drug use. (See Pet. at 5, 14-15, ECF No. 1.) He maintains that had the evidence been admitted, it would have shown that he acted either in self-defense or imperfect self-defense because he knew Vallivero became "violent" when he was under the influence of drugs and alcohol. (Traverse at 20-21, ECF No. 41.)

**A. Applicable Law**

A defendant generally has a due process right to meaningfully present a complete defense. Chambers v. Mississippi, 410 U.S. 284, 294 (1973); see Moses v. Payne, 555 F.3d 742, 757 (9th Cir. 2009) (as amended). A defendant does not have license to present any evidence he pleases, however; for instance, due process is not violated by the exclusion of evidence that is only marginally relevant, repetitive, or more prejudicial than probative. See Crane v. Kentucky, 476 U.S. 683, 689-90 (1986); Chambers, 410 U.S. at 302 ("[T]he accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."); Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.").

Rather, the right is implicated only when exclusionary rules infringe upon a "weighty interest of the accused" and are "arbitrary or disproportionate to the purposes they are designed to serve." Holmes v. South Carolina, 547 U.S. 319, 324-25 (2006) (citation omitted); see also Nevada v. Jackson, 569 U.S. 505, 510



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(2013) (per curiam) (finding that challenged evidentiary rule was supported by "good reasons" and therefore that its constitutional propriety "cannot be seriously disputed" (alteration omitted)). "In general, it has taken 'unusually compelling circumstances . . . to outweigh the strong state interest in administration of its trials.'" Moses, 555 F.3d at 757 (citation omitted).

The Supreme Court has not yet "squarely addressed" whether a state court's discretionary exclusion of evidence can ever violate a defendant's right to present a defense. See id. at 758–59 (considering challenge to state evidentiary rule allowing discretionary exclusion of expert testimony favorable to defendant); see also Sherman v. Gittere, 92 F.4th 868, 880 (9th Cir. 2024) (noting that no Supreme Court case has addressed issue since Moses). In fact, existing precedent suggests the opposite. In Holmes, the Court noted that

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

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



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**B. Court of Appeal's Decision**

The court of appeal summarized the facts underlying the claim:

> When [Petitioner] was interviewed [by police], he stated that Vallivero used methamphetamine and was "drinking and on meth" when the crime occurred. Prior to trial, the prosecution moved in limine to exclude any reference to Vallivero's methamphetamine and cocaine use as irrelevant and substantially more prejudicial than probative under Evidence Code section 352. The court granted the motion after finding that the evidence was both irrelevant and unduly prejudicial because no methamphetamine, cocaine, or other illicit drugs were found in Vallivero's system after his death. Later in the proceedings, defense counsel moved to admit Vallivero's medical records showing that Vallivero had admitted using methamphetamine and had been diagnosed as a chronic user of the drug. The court denied the motion and reiterated its prior ruling that evidence of Vallivero's methamphetamine use was unduly prejudicial under Evidence Code section 352.

(Lodged Doc. 1 at 12-13, ECF No. 9-1.)

The court of appeal then rejected Petitioner's exclusion-of-evidence claim:

> The court did not err. [Petitioner] contends that "his statements about how he personally experienced Vallivero to act unreasonably and violently when Vallivero was using or high on meth were relevant to show



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> the reasonableness of [Petitioner's] fear and resulting actions." It is undisputed, however, that Vallivero was not under the influence of methamphetamine or any other illicit drug when he was killed. Moreover, it is not reasonably probable that [Petitioner] would have achieved a more favorable result had the challenged evidence been admitted. As the People aptly put it, "[Petitioner's] alleged belief that Vallivero was under the influence of methamphetamine, as opposed to just alcohol, had minimal or no probative value to any claim of self-defense." Accordingly, any error in excluding evidence of Vallivero's drug use was harmless.

(Id. at 13 (citations omitted).)

**C. Analysis**

The court of appeal reasonably rejected Petitioner's exclusion-of-evidence claim. As discussed above, the Supreme Court has not yet squarely addressed whether a state court's discretionary exclusion of potentially exculpatory evidence can ever violate a defendant's right to present a defense. See Moses, 555 F.3d at 758–59. Thus, the court of appeal's decision could not have contravened clearly established federal law under AEDPA. Id.; Knowles v. Mirzayance, 556 U.S. 111, 122 (2009).

Further, any claim that the state court incorrectly applied state law is not cognizable on federal habeas review, and this Court is bound by the court of appeal's analysis and findings on that issue. See Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009) ("[W]e have repeatedly held that 'it is not the province of a federal habeas court to reexamine state-court determinations



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on state-law questions.'" (quoting Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)); Bradshaw v. Richey, 546 U.S. 74, 76 (2006) (per curiam) ("[A] state court's interpretation of state law . . . binds a federal court sitting in habeas corpus.").

Moreover, Petitioner was provided a full opportunity to present his defense that he acted in self-defense or imperfect self-defense. This contrasts sharply with the defendant in Holmes, who was precluded entirely from presenting his theory that a third party was the perpetrator. See 547 U.S. at 323-24. Here, the jury heard Petitioner's interview with police, in which he claimed that Vallivero had threatened to kill him and attacked him without provocation and explained that he responded by attacking Vallivero because he thought he was going to kill him. (Lodged Doc. 10, Interview, Clerk's Tr. at 483-84, 500 (redacted), ECF No. 38-5; see also id. at 513 (Petitioner explaining that he continued to strike Vallivero because he was "so fuckin[g] scared").) Indeed, Petitioner repeatedly stated that he was "defending" himself. (Id. at 510, 516.) What's more, the jury heard his claim that Vallivero became angry and violent when he was drunk (see, e.g., id. at 471 (redacted) (stating that Vallivero was "nice" in morning but later "flipped out on me" once he began "drinking"), 499 ("Then [Vallivero] gets his, get [sic] really really drunk and then, and then he, he'd want to fight."), 510-11 (describing how Vallivero would "act crazy" and become verbally abusive when he was drunk), ECF No. 38-5)), and testimony established that Vallivero had a .19 blood-alcohol level when he was killed (see Lodged Doc. 12, 15 Rep.'s Tr. at 4218-19, ECF No. 38-23). Further, one of Petitioner's



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neighbors testified that she told investigators that Vallivero was "wasted most of the time" and had "alcohol issues." (Lodged Doc. 12, 10 Rep.'s Tr. at 2752, ECF No. 38-18.)

Petitioner also presented evidence that Vallivero was violent and abusive. Indeed, he described Vallivero as "very abusive" and "like Jeckyl [sic] and Hyde" and recounted that in the past, Vallivero had repeatedly threatened to kill him, pulled a gun on him, and beat him. (Lodged Doc. 10, Interview, Clerk's Tr. at 484, 497-501, 503-04, 507-08 (redacted), ECF No. 38-5.) What's more, witness testimony corroborated some of his claims. Specifically, his neighbors Sarah and Joshua Demolar testified that a few months before the murder, they heard Vallivero threaten to shoot Petitioner. (See Lodged Doc. 12, 10 Rep.'s Tr. at 2730, 2753-54, ECF No. 38-18 (Sarah testifying that she heard Vallivero tell Petitioner, "I'll blow your fucking face off"), 2771 (Joshua testifying that he overheard Vallivero threaten to "shoot" Petitioner "in the face"), ECF No. 38-18.) Another neighbor, Barbara Clark, testified that 10 weeks before the murder, Petitioner told her Vallivero had attacked him and threatened him with a gun. (See id. at 2713.) And the jury was instructed that it could consider any prior threats Vallivero made in determining whether Petitioner acted in self-defense. (See Lodged Doc. 10, 2 Clerk's Tr. at 671, ECF No. 38-2.)

Moreover, trial counsel's closing argument highlighted Petitioner's defense theory. For example, he argued that alcohol was the "potion" that transformed Vallivero from Dr. Jekyll to Mr. Hyde and highlighted his repeated acts of threatening Petitioner with a gun. (See Lodged Doc. 12, 18 Rep.'s Tr. at



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5129-35, ECF No. 38-26; see also id. at 5135 ("[How often do we come across [someone like Vallivero] . . . who . . . not only threatens you with a gun, he also says I'm going to shoot your face off and I'm going to blow your face off . . . . How often in life do we come across an individual who is a genuine threat to our life? Well, you know what, my client did.").) He also cited Vallivero's history of violence and making threats to argue that Petitioner actually and reasonably believed his life was in danger when he killed Vallivero. (See, e.g., id. at 5176 (citing Vallivero's past actions and arguing, "Clearly, my client had reasonably believed that he was in imminent danger given the documented verbal and physical abuse that he suffered"), 5182 (arguing that "overkill" was warranted because "[Petitioner] felt he had no choice once he literally became scared for his life"), 5177-78 (arguing that Petitioner's use of multiple weapons was reasonable because of Vallivero's past threats and actions).) And in doing so, counsel argued that Vallivero's use of alcohol exacerbated the threat he posed to Petitioner. (See id. at 5176 ("He was drunk, and my client said he turned instantaneously. He had his potion."), 5177 ("Alcoholics don't get better. They get more and more violent . . . . And the hating and the I'm going to shoot you and threatening and pointing the gun a week before, it's all building up, and it's getting worse and worse and worse and the evidence is uncontroverted.").)

In short, Petitioner presented a defense that he acted in self-defense against a violent substance abuser who had threatened to kill him and physically attacked him. As such, he was not deprived of his right to present a complete defense.



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In any event, even assuming error, Petitioner cannot show that the exclusion of evidence concerning Vallivero's methamphetamine use had a "substantial and injurious" impact on the jury's verdict. Brecht, 507 U.S. at 623. As an initial matter, Petitioner's belief that Vallivero was under the influence of methamphetamine during the confrontation leading to his death would not have been persuasive because he wasn't, as Petitioner's counsel conceded. (See Lodged Doc. 12, 8 Rep.'s Tr. at 2186, ECF No. 38-16.) What's more, the jury rejected Petitioner's self-defense claim even though it was aware that Vallivero was drunk and had a history of threatening to kill Petitioner when he was drunk. (See, e.g., Lodged Doc. 10, Interview, Clerk's Tr. at 471, 499, 510-11 (redacted), ECF No. 38-5; Lodged Doc. 12, 10 Rep.'s Tr. at 2752, ECF No. 38-18, 15 Rep.'s Tr. at 4218-19, ECF No. 38-23.) Given those facts, nothing suggests that evidence of Petitioner's mistaken belief that Vallivero was on methamphetamine would have had any effect on the jury's verdict.

That Vallivero had admitted to being a methamphetamine user was also unlikely to move the needle in Petitioner's direction because Petitioner's actions precluded a finding that he acted in self-defense. He did not have a right to use force when he repeatedly struck Vallivero in the head with a baseball bat or when he repeatedly stabbed Vallivero because Vallivero was no longer moving (see Lodged Doc. 10, Interview, Clerk's Tr. at 480, 483, 532, 562-63 (redacted), ECF No. 38-5) and therefore incapable of inflicting any injury (see id., 2 Clerk's Tr. at 678, ECF No. 38-2 (self-defense instruction stating, "When the



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attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends.")). Petitioner's actions likewise precluded a successful imperfect-self-defense claim. See Garcia v. Muniz, No. LACV 16-7606-MWF (LAL), 2018 WL 1626460, at *10 (C.D. Cal. Feb. 16, 2018) (jury could not have found that petitioner acted in imperfect self-defense when he "savagely beat" victim after rendering him unconscious), accepted by 2018 WL 1626253 (C.D. Cal. Mar. 30, 2018); see also Berry v. Davis, No. 2:10-cv-00305-JKS, 2014 WL 12672683, at *19 (E.D. Cal. Oct. 20, 2014) (neither self-defense nor imperfect self-defense was available to petitioner who continued to beat victim to death after she ceased to be threat to him), aff'd on other grounds by Berry v. Jacquez, 644 F. App'x 740 (9th Cir. 2016). Moreover, forensic evidence showed that Petitioner was the aggressor, as related above (see Lodged Doc. 12, 8 Rep.'s Tr. at 2236-39, ECF No. 38-16, 11 Rep.'s Tr at 3051-52, ECF No. 38-19, 15 Rep.'s Tr. at 4228-436, ECF No. 38-23; Lodged Doc. 10, Interview, Clerk's Tr. at 476-77 (redacted), ECF No. 38-5), and thus Vallivero's prior methamphetamine use would not have swayed the jury. See Humphries v. Sherman, No. CV 18-5748-JFW (JEM), 2019 WL 13437224, at *10 (C.D. Cal. Apr. 11, 2019) (any error in failing to instruct jury on imperfect self-defense was harmless when petitioner, who had only minor wounds to his arm and hands, inflicted "23 sharp force injuries, 12 of them stab wounds to [victim's] face, neck, arms, hands, shoulder, elbow, thigh, and hip"), accepted by 2019 WL 13437225 (C.D. Cal. May 22, 2019).

Finally, the jury's verdict shows that exclusion of Vallivero's prior drug use was inconsequential. The jury found



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the murder deliberate and premeditated. (See Lodged Doc. 10, 2 Clerk's Tr. at 639, ECF No. 38-2.) Accordingly, there is no likelihood — let alone a reasonable one — that it would have found Petitioner acted in imperfect self-defense had evidence of Vallivero's past drug use been admitted. See Swierski v. Koenig, No. 16-cv-03199-HSG (PR), 2020 WL 6562350, at *29 (N.D. Cal. Nov. 9, 2020) ("[T]he jury's affirmative finding that Petitioner acted with malice aforethought and committed the premeditated and deliberated killing . . . effectively foreclosed the possibility of a successful imperfect self-defense claim."); Garcia, 2018 WL 1626460, at *10 n.33 (petitioner suffered no prejudice from trial court's failure to instruct on imperfect self-defense in part because jury "rejected all other lesser-included offense theories and convicted him of first degree murder").

Petitioner is not entitled to relief on this claim.

**V. Petitioner Is Not Entitled to Relief on His Instructional-Error Claim**

Petitioner contends the trial court violated his right to a jury trial by instructing the jury, over his objection, with CALCRIM 3471, which provides that a person who acts as the initial aggressor or engages in mutual combat does not have the right to self-defense except in limited circumstances.[19] (See

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[19] As given to Petitioner's jury, CALCRIM 3471 stated:

> A person who engages in mutual combat or who starts a fight has a right to self-defense only if: [¶] 1. He actually and in good faith tried to stop fighting; [¶] 2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped



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Pet. at 7, ECF No. 1; see also Lodged Doc. 10, 2 Clerk's Tr. at 677, ECF No. 38-2.) According to Petitioner, CALCRIM 3471 effectively told the jurors that he had no right to defend himself against Vallivero's unprovoked attack unless he "refused to fight, communicated his peaceable intentions to Vallivero, and gave him an opportunity to desist." (Traverse at 23, ECF No. 41.) As such, he claims, it "removed a material factual issue from the jury's determination, lowered the prosecution's burden of proof, and impinged on the defenses of perfect and imperfect self-defense." (Pet. at 7, ECF No. 1.) He also claims that insufficient evidence supported the instruction. (See Traverse at 24, ECF No. 41.)

**A. Applicable Law**

Claims of error in state jury instructions are generally matters of state law only. See Gilmore v. Taylor, 508 U.S. 333, 343 (1993); see also Menendez v. Terhune, 422 F.3d 1012, 1029

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> fighting; [¶] AND [¶] 3. He gave his opponent a chance to stop fighting. [¶] If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight. [¶] However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting, or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim of self-defense arose.

(Lodged Doc. 10, 2 Clerk's Tr. at 677, ECF No. 38-2 (emphasis omitted).)



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(9th Cir. 2005). A state-law instructional error "does not alone raise a ground cognizable in a federal habeas corpus proceeding." Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988). Habeas relief is available only when a petitioner demonstrates that "[an] ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." McGuire, 502 U.S. at 72. A challenged instruction must be evaluated in the context of other instructions and the trial record as a whole, not in artificial isolation. Id.; United States v. Frady, 456 U.S. 152, 169 (1982); Chambers v. McDaniel, 549 F.3d 1191, 1199 (9th Cir. 2008). In habeas cases involving instructional error, a petitioner is generally not entitled to relief unless the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623.

**B. Court of Appeal's Decision**

The court of appeal rejected Petitioner's instructional-error claim on its merits:

> The court did not err in giving the challenged instruction. There was evidence from which the jury could have found that [Petitioner] not only engaged in mutual combat with Vallivero, but also acted as the initial aggressor. Although [Petitioner] offers his self-serving assertion that Vallivero initiated the incident by punching him, the jury was entitled to reject that assertion. According to Vallivero, [Petitioner] had been the initial aggressor of a prior fight between the two regarding the cleanliness of the kitchen. Moreover, [Petitioner] admitted that he approached Vallivero with



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a rock in his hand because he "knew" the two of them were going to fight. The jury could thus reasonably find that [Petitioner] intended to fight with Vallivero before Vallivero allegedly punched him.

Even if the instruction should not have been given, the error would be harmless. The jury was separately instructed pursuant to CALCRIM No. 3474 that "[t]he right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends." [Petitioner] continued to use deadly force against Vallivero well after he had rendered Vallivero incapable of inflicting any injury upon him. No reasonable juror thus would have found that [Petitioner] killed Vallivero in self-defense or imperfect self-defense.

The jury was also instructed pursuant to CALCRIM No. 200 that "[s]ome of the[ ] instructions may not apply, depending on your findings about the facts of the case." Because of this instruction, "the jury is presumed to disregard an instruction if the jury finds the evidence does not support its application." (People v. Frandsen (2011) 196 Cal. App. 4th 266, 278; People v. Olguin (1994) 31 Cal. App. 4th 1355, 1381.) Because [Petitioner] does not rebut this presumption or otherwise demonstrate a reasonable probability that he would have achieved a more favorable result had the challenged instruction not been given, his claim fails.



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(Lodged Doc. 1 at 14-16, ECF No. 9-1 (citation omitted).)

**C. Analysis**

The court of appeal was not objectively unreasonable in denying this claim. To the extent Petitioner challenges the evidence supporting giving CALCRIM 3471, his claim fails because the Supreme Court has never held that a correct but inapplicable jury instruction violates due process. See Griffin v. United States, 502 U.S. 46, 59-60 (1991) (no due process violation when jury was instructed on legal theory lacking evidentiary support "since jurors are well equipped to analyze the evidence"). For that reason, courts routinely reject analogous claims. See, e.g., Larrabee v. Pollard, No. EDCV 18-0049 JGB (PVC), 2020 WL 5665812, at *21 (C.D. Cal. Aug. 13, 2020) (rejecting claim that insufficient evidence supported CALCRIM 3471 because instruction accurately reflected California law and no clearly established federal law prohibited court "from instructing a jury with a factually inapplicable but accurate statement of state law" (citations omitted)), accepted by 2020 WL 5658716 (C.D. Cal. Sept. 22, 2020); McKinney v. Allison, No. CV 22-01243 SPG (RAO), 2022 WL 16952266, at *9 (C.D. Cal. Sept. 23, 2022) (same), accepted by 2022 WL 16951836 (C.D. Cal. Nov. 15, 2022). Because no clearly established precedent exists, AEDPA precludes relief. See Wright v. Van Patten, 552 U.S. 120, 126 (2008) (per curiam); Crater v. Galaza, 491 F.3d 1119, 1123 (9th Cir. 2007) (noting that Supreme Court has "explained that if habeas relief depends upon the resolution of 'an open question in [Supreme Court] jurisprudence, § 2254(d)(1) precludes relief'" (quoting Carey v. Musladin, 549 U.S. 70, 76 (2006) (alteration in original)).



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In any event, there was ample evidence to support the mutual-combat instruction. Petitioner conceded that he armed himself with a rock before approaching Vallivero because he "knew" they were going to fight. (Lodged Doc. 10, Interview, Clerk's Tr. at 475-76, 525-27 (redacted), ECF No. 38-5.) He further explained that he wanted to fight Vallivero because he was "sick of [Vallivero's] "shit." (Id. at 527.) And even accepting Petitioner's claim that Vallivero was the initial aggressor — which was not supported by the forensic evidence (see Lodged Doc. 12, 8 Rep.'s Tr. at 2236-39, ECF No. 38-16, 11 Rep.'s Tr. at 3051-52, ECF No. 38-19, 15 Rep.'s Tr. at 4228-436, ECF No. 38-23; Lodged Doc. 10, Interview, Clerk's Tr. at 476-77 (redacted), ECF No. 38-5) — the instruction was nevertheless warranted. Giving Petitioner every benefit of the doubt, any strike that Vallivero landed was not substantial. To the contrary, if it occurred, it resulted in only some "redness" to one side of Petitioner's face. (See Lodged Doc. 12, 11 Rep.'s Tr at 3051-52, ECF No. 38-19.) Thus, it could not have prevented Petitioner from simply walking away. Rather than do that, he attacked Vallivero with multiple weapons and continued to beat his head with a baseball bat and then repeatedly stab him after he had fallen to the ground and was no longer moving. (See Lodged Doc. 10, Interview, Clerk's Tr. at 475-76, 478-80, 483, 529, 532, 562-63 (redacted), ECF No. 38-5); Larrabee, 2020 WL 5665812, at *21 (substantial evidence supported mutual-combat instruction even though some testimony suggested that victim attacked petitioner, who was sitting in car, because petitioner chose to exit vehicle and fight rather than drive away).



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Moreover, Petitioner's claim that the challenged instruction prevented the jury from finding that he acted in self-defense or imperfect self-defense is meritless. (See Pet. at 6, ECF No. 1.) His theory at trial was that he believed — reasonably or unreasonably — that Vallivero was going to kill him. (See e.g., Lodged Doc. 12, 18 Rep.'s Tr. at 5129-36, 5149, 5176-78, ECF No. 38-26.) Nothing in the mutual-combat instruction prevented the jury from crediting that theory. Rather, the instruction stated only that under a specific scenario, Petitioner could not legitimately claim self-defense. See Abiel v. Rackley, No. 16cv2685-MMA (JMA), 2017 WL 5070074, at *11 (S.D. Cal. Nov. 3, 2017). The jury was instructed on self-defense and imperfect self-defense (Lodged Doc. 10, 2 Clerk's Tr. at 670-71, 674-75, ECF No. 38-2), and had it believed that Petitioner acted in either, it would have disregarded the mutual-combat instruction, as it was instructed to do (see id. at 662 (instructing jury that "[s]ome of [the] instructions may not apply" and to apply only those that "d[id] apply to the facts as [the jury] f[ound] them")). The jury is presumed to have followed that unambiguous instruction, and Petitioner cites no evidence to rebut that presumption. See Weeks v. Angelone, 528 U.S. 225, 234 (2000). As such, the mutual-combat instruction did not violate any constitutional right to which he was entitled. See Murray v. Lozano, No. 20-cv-00471-HSG, 2021 WL 3773615, at *7 (N.D. Cal. Aug. 25, 2021) (rejecting federal habeas challenge to CALCRIM 3471 because jury was free to disregard instruction if it believed no mutual combat occurred); Thomas v. Lewis, No. 1:11-CV-01037 LJO GSA HC., 2012 WL 169770, at *30 (E.D. Cal. Jan.



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19, 2012) (same).

Finally, even assuming error, Petitioner cannot show that the purported error had a substantial and injurious impact on the jury's verdict. See Brecht, 507 U.S. at 623. To begin, the mutual-combat instruction could not have affected his right to claim imperfect self-defense because it said nothing concerning that theory of liability. Instead, it discussed only the circumstances in which a defendant has the right to self-defense, which under California law is a complete defense. See People v. Humphrey, 13 Cal. 4th 1073, 1082 (1996) (explaining that successful self-defense claim "exonerate[s] the person completely"). By contrast, imperfect self-defense is not a defense at all; instead, when it applies, it merely reduces murder to voluntary manslaughter by "remov[ing] the element of malice aforethought." People v. Thomas, 219 Cal. App. 3d 134, 144-45 (1990). In other words, a person has the right to engage in self-defense, but it is a crime to engage in imperfect self-defense. Because the mutual-combat instruction spoke only to the right to self-defense, it could not have undermined Petitioner's imperfect-self-defense theory.

Moreover, the jury showed no confusion about how to apply the mutual-combat instruction. It asked no questions about it even though it did about other instructions. (See Lodged Doc. 10, 2 Clerk's Tr. at 632, 637, ECF No. 38-2); compare Shafer v. South Carolina, 532 U.S. 36, 52-53 (2001) (jury's questions concerning instruction or requests for additional instructions may provide evidence of jury confusion), with Vasquez v. Montgomery, No. CV 15-9749-SJO (PLA), 2017 WL 3986518, at *9



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(C.D. Cal. June 26, 2017) (finding that jury was not confused by seeming inconsistency between instructions and prosecutor's remarks in part because jury never sought clarification of either), accepted by 2017 WL 3995111 (C.D. Cal. Sept. 1, 2017). Consequently, there is no reason to believe the jury misunderstood or misapplied the mutual-combat instruction.

Petitioner is not entitled to relief on this claim.

**VI. Petitioner Is Not Entitled to Relief on His Ineffective-Assistance Claims**

Petitioner contends trial counsel committed five errors that deprived him of his right to effective assistance. (See Pet. at 5-8, ECF No. 1.) First, he faults trial counsel for failing to object to the prosecutor's alleged misstatements of law during closing argument. (See id. at 7-8.) Second, he asserts that counsel neglected to argue that his pretrial statements about Vallivero's methamphetamine use were admissible under California Evidence Code section 356.[20] (See id. at 5.) Third, he contends that counsel erred in failing to present expert testimony about the psychological and physical effects of methamphetamine and of alcohol use. (See id.) Fourth, he faults counsel for failing to

[20] Section 356 provides:

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.



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present witness testimony about his nonviolent character and efforts to move out of Vallivero's home. (Id. at 5-6.) And finally, he maintains that counsel was ineffective because he failed to investigate and present evidence concerning Vallivero's "propensity for aggression." (See id. at 6.)

**A. Relevant Facts**[21]

**1. The prosecutor's closing argument**

In arguing that the murder was premeditated and deliberate, the prosecutor discussed the implications of the evidence showing that Petitioner had motive to kill Vallivero. He stated:

> One thing that I do not have to prove is motive, but if there is a motive, it does help you show and help you understand that this is murder and not something lesser. There is a clear motive in this case, the eviction. And in fact, even [Petitioner's] own mouth, he gave it to you. Quote, he was sick of [Vallivero's] shit. Claims [Vallivero] was trying to ruin his life. [Vallivero] was verbally abusive. Claims that he basically had to live out of his car because of this. He claims he got into debt over this. He was in anxiety because of this guy. And when you heard and saw him on that tape, you could feel the anger coming back to him. That anger that you saw is proof of motive, and if there is motive, there's

[21] The relevant facts concerning Petitioner's claim that his pretrial statements about Vallivero's methamphetamine use were admissible under California Penal Code section 356 were set forth in connection with his exclusion-of-evidence claim. Those facts are also relevant to his claim that counsel erred in failing to present expert testimony about the psychological and physical effects of methamphetamine use.



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first degree murder because it came to him before.

(Lodged Doc. 12, 18 Rep.'s Tr. at 5113, ECF No. 38-26 (emphasis added to show specific language to which Petitioner objects).)

The prosecutor then discussed Petitioner's efforts to alter the crime scene and argued consciousness of guilt:

> There's a jury instruction, "If you find the defendant hid evidence, that can show he was aware of his consciousness of guilt." We have reams of this in this case. We have motive established. We have hiding evidence. He washed the blood off of the walls. He washed blood off the carpet. He dragged [Vallivero] all the way to the back of the house. If you remember on the diagram, that location of the bath tub is the far corner of that house, as far away from doors and windows as you can get. [¶] He washed off the bat. He washed off the knife. He showered, cleaned up broken glass, put the TV back up, washed that off, changed his clothes, vacuumed the carpet, did everything he could to hide what he did. And as the law tells you, that means he in his own mind knows he is guilty of murder.

(Id. at 5114 (emphasis added).)

Thereafter, the prosecutor argued that Petitioner did not act in self-defense, stating:

> So you were given an instruction on justifiable homicide. It has several elements. If you find justifiable homicide as a complete defense to murder, you must find [Petitioner] reasonably . . . believed he was in imminent danger of being killed, right then and there,



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which obviously he wasn't.

(Id. at 5115 (emphasis added).) He then summarized the evidence showing that Petitioner could not have reasonably believed he needed to use deadly force against Vallivero, including his statements indicating that he provoked the confrontation leading to Vallivero's death. (See id. at 5115-16.) The prosecutor argued that Petitioner "was looking for any excuse to do this to [Vallivero]" and as such he could not claim self-defense under the law or show that he committed the murder in the heat of passion or because of sudden quarrel. (See id. at 5116-18.)

The prosecutor then turned to imperfect self-defense. In pertinent part, he stated:

> Imperfect self-defense is the second way to get to voluntary manslaughter. This requires three things, the defendant acted in imperfect self-defense if he actually — he actually believed he was in imminent danger of being killed from an unarmed man; he actually believed immediate use of force was necessary to defend against an unarmed man. At least one of those is unreasonable. And if you find there is no imperfect self-defense, then it's murder.

(Id. at 5120 (emphasis added).)

As related above, the prosecutor also argued that Petitioner did not murder Vallivero in the heat of passion or because of sudden quarrel, noting that there was no evidence of provocation that would have caused "a person of average disposition to act rashly and without due deliberation." (Id. at 5117.) The prosecutor noted that the responses of two witnesses to



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overhearing Vallivero's purported threats to kill Petitioner months before the murder provided some "indication[] . . . of what the average person would do." (Id. at 5117-18.) Specifically, he stated:

> Kristy Tolbert, average person, was so unconcerned by what she heard, she said she was numb to it. She heard it every day. She didn't even think enough to call 911 about it. [¶] Now, Josh Demolar — decide the Demolars' credibility for themselves. Let's assume he did, in fact, hear [Vallivero] threaten to shoot [Petitioner] towards the end of the summer. That was nine, ten weeks before the murder. Nine to ten weeks before the murder. And if you believe Josh Demolar heard that, you would have to believe he was an average person of average disposition. And was he so concerned by this? No. He did not even call 911. So even if you believe that [Vallivero] made those statements nine to ten weeks before he was killed, the average person would not have acted rashly and without due deliberation.

(Id. (emphasis added).)

Next, the prosecutor discussed the concept of premeditation and deliberation. Specifically, he stated:

> First degree murder is if the murder was willful, deliberate, and premeditated. Willful means he intended to kill. We already talked about how that's satisfied. Deliberate, you carefully weighed the considerations for and against your choice. Premeditation, you decided to kill before completing the act that caused death. And in



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> the jury instruction, it describes how the choice can be made fairly quickly and it's not the time of the reflection, it's the extent of the reflection. And in jury selection we talked about the idea of coming to a yellow light, which we do every day. And in that instant, you are looking in your rear-view mirror, you are looking to see if someone is coming the other way, you are looking to your side, you are looking to the other side, you are checking your speed, you are checking to see how long that light was yellow. And in that instant, you've carefully weighed and considered all of your options and come to a decision. [¶] So what does that mean? It means you make a choice after thinking about it. The defendant had time to reflect even during the attack.

(Id. at 5124-25 (emphasis added).)

During his rebuttal argument, the prosecutor again argued that the murder was not legally justified. (See id. at 5192.) In doing so, he noted that no evidence corroborated Petitioner's statement that Vallivero struck him in the jaw and implied that the killing could only have been justified if Vallivero landed a severe strike. (See id.) In particular, he argued:

> Now, the injuries and lack thereof to the jaw is critically important because of what [Petitioner] wants you to believe is that he was socked in the jaw so severely, so violent [sic], that it justified a killing. This better have shattered his jaw, better have annihilated his jaw. Instead there's no evidence of any



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> injury, because it didn't happen, because no one heard the yelling, and all six of them were home, and Kristy was there 15 feet away right there and didn't hear a thing. It didn't happen. That's why there is no redness on his jaw.

(Id.)

Finally, the prosecutor discussed reasonable doubt, arguing that it could not be based on something that was possible but unreasonable. (See id. at 5194.) Specifically, he stated:

> Reasonable doubt, it's not beyond all doubt. Remember, we talked about this in jury selection. It's the same standard used even in traffic court. What it means is if defense scenario is possible, sure possible, but still unreasonable, the law says reject that which is possible but unreasonable. As a matter of fact, the law says you must reject it. If what the People are saying is reasonable and defense says it's possible but unreasonable, that's a guilty verdict. Okay? You look at all of the evidence, put together all of it, and what are the logical inferences you can draw from that.

(Id. (emphasis added).)

**2. Evidence of Petitioner's nonviolent character and efforts to relocate**

At his sentencing hearing, Petitioner submitted a series of unsworn letters from friends. (See Pet., Ex. G at 224-29, ECF No. 1-3.) Two of the letters described him as "passive" and "extremely kind" and never "mean," "aggressive or violent," and one stated that he "would never, ever hurt anyone out of rage or



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misdirected anger." (Pet., Ex. G at 224-25, ECF No. 1-3.) A third letter stated that he had "never once uttered an aggressive or agitated word" and "never made an aggressive or negative gesture." (Id. at 228.) A fourth letter described him as "open, giving, and caring" but did not indicate anything about his nonviolent character. (Id. at 226-27).

Two of the letters also relayed Petitioner's alleged pretrial statements about his efforts to move out of Vallivero's home. (See id. at 227-28.) In one, the author stated that Petitioner told her a few weeks before the murder that he intended to move out of Vallivero's home after "winter break," when "housing would open up." (Id. at 227.) In another, the author stated that she was "aware [Petitioner] was desperately looking for a new place to live and felt his chances of finding a new rental were better when students left for winter break." (Id. at 228.) None of the people who authored the letters testified at trial.

In connection with his state habeas petition, Petitioner submitted records showing that he repeatedly contacted California Rural Legal Assistance Program, a nonprofit law firm, to assist him in fighting Vallivero's efforts to evict him. (See Lodged Doc. 6 at 36, ECF No. 9-6; Pet., Ex. G at 219-21, ECF No. 1-3); Cal. Rural Legal Assistance, https://crla.org/about-crla (last visited Feb. 13, 2024). CRLA refused to represent him. (See Pet., Ex. G at 219-21, ECF No. 1-3.) Nothing in the records suggests that Petitioner sought CRLA's assistance in moving out of Vallivero's home or that anyone at CRLA was aware that he had attempted or planned to do so. (See id.)



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**3. Testimony concerning Vallivero's propensity for violence**

In connection with his state habeas petition, Petitioner submitted declarations from two witnesses who were willing to testify about Vallivero's propensity for violence. (See Lodged Doc. 6 at 43-44, ECF No. 9-6; Pet., Ex. G at 230-35, ECF No. 1-3.) The first was from Tim Himmerich, who claimed to have witnessed Vallivero "verbally abuse," berate, and threaten to kill Petitioner. (Pet., Ex. G at 233-35, ECF No. 1-3.) Although Himmerich witnessed Vallivero "quite often" threaten to "shoot [Petitioner's] fucking face off" (id. at 233), he does not claim to have seen Vallivero actually threaten Petitioner with a gun. According to Himmerich, whenever Vallivero and Petitioner argued, Vallivero was "the aggressor in the tone of voice and words that he used." (Id. at 235.) The second declaration was from Sandra Robinson Gilham, who claimed to have visited Petitioner two or three times when he was living with Vallivero. (See id. at 230.) She declared that she was "aware" Vallivero "threaten[ed] people and intimidat[ed] [Petitioner] with guns." (Pet., Ex. G at 230, ECF No. 1-3.) She also related Petitioner's pretrial statement that Vallivero and his friends would "always pick on [Petitioner] when they were partying."[22] (Id.)

Neither declarant testified at trial.

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[22] Both Gilham and Himmerich claimed to have known that Vallivero regularly used drugs and alcohol. (Pet., Ex. G at 230, 233, ECF No. 1-3.) Petitioner does not, however, fault counsel for failing to present testimony from either on that point. In any event, the court's rulings prohibited any testimony concerning Vallivero's drug use. (See Lodged Doc. 12, 9 Rep.'s Tr. at 2405-09, ECF No. 38-17, 13 Rep.'s Tr. at 3607-12, ECF No. 38-21.)



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**B. Applicable Law**

A petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 687-89. The petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 689-90. Further, the petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690.

Counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. Counsel's "duty to investigate" is not "limitless," however, and does not "necessarily require that every conceivable witness be interviewed" or "every path" pursued. Hamilton v. Ayers, 583 F.3d 1100, 1129 (9th Cir. 2009). Further, "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Strickland, 466 U.S. at 691.

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, the petitioner must affirmatively show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the



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proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.; see also Richter, 562 U.S. at 111 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."). To find prejudice from counsel's failure to investigate, the reviewing court must consider "whether the noninvestigated evidence was powerful enough to establish a probability that a reasonable attorney would decide to present it and a probability that such presentation might undermine the jury verdict." Mickey v. Ayers, 606 F.3d 1223, 1236-37 (9th Cir. 2010).

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

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

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

In Premo v. Moore, 562 U.S. 115, 127-28 (2011), the Supreme Court reversed the Ninth Circuit's grant of habeas relief on an



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ineffective-assistance claim based on Supreme Court precedent "that did not involve ineffective assistance of counsel" and "says nothing about the Strickland standard." "The lesson of Premo is that Strickland bears its own distinct substantive standard for a constitutional violation; it does not merely borrow or incorporate other tests for constitutional error and prejudice." Walker v. Martel, 709 F.3d 925, 940 (9th Cir. 2013).

Attorneys may strategically decide not to object to improper closing arguments "to avoid highlighting them." Cunningham v. Wong, 704 F.3d 1143, 1159 (9th Cir. 2013); see United States v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993) (as amended) (observing that "many lawyers refrain from objecting during opening statement and closing argument"). And the Ninth Circuit has "repeatedly held that, 'absent egregious misstatements,' failing to object to error during closing argument falls within the 'wide range' of reasonable assistance." Demirdjian v. Gipson, 832 F.3d 1060, 1073 (9th Cir. 2016) (quoting Cunningham, 704 F.3d at 1159).

**C. Relevant State-Court Decisions**

**1. Court-of-appeal decision**

The court of appeal rejected Petitioner's claim that counsel erred in failing to object to the prosecutor's closing-argument statements because he was not prejudiced by them:

> Even assuming that defense counsel provided deficient performance by failing to object to these arguments, [Petitioner] was not prejudiced because the jury was instructed that counsel's arguments were not evidence (CALCRIM No. 222) and that the jury was to



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follow the instructions given by the court even if counsel's comments conflicted with those instructions (CALCRIM No. 200). The jury was also properly instructed on reasonable doubt (CALCRIM Nos. 103, 220), motive (CALCRIM No. 370), hiding evidence as consciousness of guilt (CALCRIM No. 371), justifiable homicide based on self-defense (CALCRIM No. 505), provocation (CALCRIM No. 522), and voluntary manslaughter based on sudden quarrel or heat of passion (CALCRIM No. 570) and imperfect self-defense (CALCRIM No. 571). Absent evidence to the contrary, we presume the jury followed these instructions. [Petitioner] offers no such evidence here, so his claim of ineffective assistance of counsel fails.

(Lodged Doc. 1 at 18-19, ECF No. 9-1 (citations omitted).)

**2. Superior-court decision**

The superior court rejected Petitioner's other ineffective-assistance claims on their merits:

> In this case, there was no evidence of methamphetamines in Mr. Vallivero's system at the time of the forensic toxicology study on his body. Thus, methamphetamine could not have been a contributing factor. The court properly excluded the topic as irrelevant evidence and, in exercising its inherent discretion, excluded mention of prior use by the victim, finding the probative value was substantially outweighed by the probability such evidence would lead to undue consumption of court time, undue prejudice, and confusion of the issues, and could be highly misleading to the



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jury. During the trial, Petitioner's counsel renewed his request to present evidence that Vallivero used drugs and alcohol, but this subsequent request was denied on the same grounds.

Petitioner now claims his counsel should have objected to this ruling by asserting the necessity of "completeness" of the evidence under section 356 of the Evidence Code. However, the "rule of completeness," codified in section 356, "is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items . . . introduced." (Witt v. Jackson (1961) 57 Cal. 2d 57, 67[)]. . . . The trial court's finding was that this evidence had no relevancy based on the negative toxicology report, and past use was overly prejudicial. An argument under section 356 would have necessarily failed under these facts.

As to counsel's trial strategy regarding the witnesses and the testimony he chose to elicit at trial on behalf of his client, these efforts were reasonable and well within professional norms. Counsel outlined a sound strategy for trial, as stated on the record at [Petitioner']s motion for a new trial following the jury verdict. Counsel articulated well reasoned tactical decisions and they withstand the test of scrutiny.

It should not be overlooked that the evidence of Petitioner's guilt was overwhelming. The victim was not armed in the attack on November 16, 2015. In contrast,



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Petitioner used five separate weapons to kill Mr. Vallivero: a rock, a bottle which broke during the attack, a baseball bat, and two different knives. In fact, [Petitioner] armed himself with the rock prior to the confrontation and admitted beating Mr. Vallivero unconscious with the bat. Petitioner then continued to hit Vallivero when he was no longer moving. The wounds to Mr. Vallivero were substantial and overwhelmingly defensive in nature, creating ample evidence Petitioner was the primary aggressor and that the attack was sustained over a significant period of time, especially in contrast to the minimal injuries Petitioner suffered during the attack. Petitioner's statements of his belief regarding Mr. Vallivero's drug use and possible aggression are not in "close connection" with his remaining statements when viewed in light of a section 356 analysis. Petitioner's state of mind was very different than what is presented here; Petitioner made his motive very clear when he confessed to killing Mr. Vallivero, saying he was "sick of [Mr. Vallivero's] shit" and wanted him "gone."

As to evidence of good character or Petitioner's attempts to move from the premises, even if such evidence was available at trial and ruled to be admissible, such evidence would not have resulted in a different outcome for Petitioner. He, after all, confessed to killing Mr. Vallivero. In addition, introduction of evidence regarding methamphetamine and cocaine use by the victim



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> — if indeed such evidence was relevant or admissible at trial — could not counteract the evidence of a sustained and lethal attack on Mr. Vallivero, who was unarmed and whose wounds clearly indicated a defensive posture during the attack. When coupled with Petitioner's own admission of the various weapons used, his own lack of injuries and the sustained nature of the assault, no amount of evidence regarding Mr. Vallivero's drinking and drug habits were [sic] likely to change the outcome of the verdict. Petitioner admitted killing Mr. Vallivero because he was "sick of his shit," and vividly described how he went about the task with little to no resistance or aggression from Mr. Vallivero.

(Lodged Doc. 19 at 5-7, ECF No. 38-41 (some citations omitted).) Although the court acknowledged Petitioner's expert-testimony claim (see id. at 4-5), it did not expressly address it.

**D. Analysis**

None of Petitioner's ineffective-assistance-of-counsel claims warrant habeas relief. As an initial matter, his claims fail for lack of evidence because they are not supported by a declaration from trial counsel concerning his actions (or any evidence that Petitioner unsuccessfully sought one), and as related below, reasons apparent from the record (including trial counsel's testimony at the hearing on Petitioner's new-trial motion) could explain counsel's decision not to raise the challenges Petitioner has identified. See Dunn v. Reeves, 594 U.S. 731, 743 (2021) (per curiam) (failure to submit declaration or elicit testimony from trial counsel about his actions defeated



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ineffective-assistance claim when record suggested strategic reasons for challenged actions because "silent record cannot discharge a [petitioner's] burden"); Gentry v. Sinclair, 705 F.3d 884, 900 (9th Cir. 2013) (as amended) (state court was not unreasonable in concluding that trial counsel's performance was not deficient as to particular ineffective-assistance claim when petitioner presented counsel's affidavit only to "support . . . other ineffective assistance claims" and "had no evidence" to support first claim).[23]

Putting that aside, Petitioner's allegations of attorney error are meritless. Each is discussed in turn below.

**1. The prosecutor's closing argument**

The court of appeal reasonably rejected Petitioner's claim that counsel was ineffective in failing to object to the prosecutor's alleged misstatements of law.[24] First, counsel's decision to not object to the prosecutor's statement that "if there is motive, there's first degree murder" was not deficient. (Lodged Doc. 12, 18 Rep.'s Tr. at 5113, ECF No. 38-26; see Pet. at 8, ECF No. 1.) According to Petitioner, the jury likely understood this statement to mean that it could convict him of

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[23] That Petitioner was represented by counsel in state court on direct review and during all relevant habeas proceedings (see Lodged Doc. 14, ECF No. 38-36; Lodged Doc. 18, ECF No. 38-40; Lodged Doc. 20, ECF No. 38-42) and is represented here only amplifies his failure to support his ineffective-assistance claims with a declaration from trial counsel. That failure if anything suggests that a declaration from trial counsel would have been detrimental to Petitioner's claims.

[24] As noted earlier, the Court reviews the deficient-performance portion of this subclaim de novo because the state court did not reach the issue.



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first-degree murder as long as the prosecutor proved he had motive to kill Vallivero. (See Traverse at 26, ECF No. 41.) But just seconds earlier, the prosecutor had explained that proof of motive would only "help show you and help you understand that this is murder and not something lesser." (Lodged Doc. 12, 18 Rep.'s Tr. at 5113, ECF No. 38-26.) And shortly after making the challenged statement, the prosecutor listed the elements of first-degree murder, discussed the evidence proving each one, and referred to the instruction requiring him to establish that the murder was premeditated and deliberate to prove first-degree murder. (See id. at 5124-27.) At the conclusion of that argument, the prosecutor stated, "The defendant premeditated and deliberated and that . . . is first-degree murder." (Id. at 5127.) Thus, the jury had no reason to interpret the challenged remark in the manner suggested by Petitioner.

In any event, even if the jury had so interpreted the prosecutor's remark, counsel's failure to object to it resulted in no prejudice. The remark was isolated, comprising just eight words in a closing argument that spanned nearly 30 pages of the reporter's transcript. (See id. at 5107-28, 5191-99); Cunningham, 704 F.3d at 1159 (counsel's failure to object to prosecutor's comments "denigrating the defense team" could not have been prejudicial when they constituted only "a single paragraph of a twenty-page argument"); see also Harrell v. Allison, No. 3:21-cv-0255-RBM-AHG, 2022 WL 1292142, at *24 (S.D. Cal. Apr. 29, 2022) (prosecutor's misstatement of fact during closing argument did not deprive petitioner of fair trial when misstatement "was an isolated comment during a lengthy . . .



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closing argument" spanning 45 pages of transcript), cert. of appealability denied, No. 22-55510, 2023 WL 8320029 (9th Cir. Aug. 30, 2023); Williams v. Lewis, No. CV 11-3303 PA (FFM)., 2012 WL 5499552, at *8 (C.D. Cal. Sept. 19, 2012) (prosecutor's improper comments did not prejudice petitioner when they consisted of four lines in argument that spanned 14 pages of trial transcript), accepted by 2012 WL 5499427 (C.D. Cal. Nov. 9, 2012). The jurors, moreover, were instructed on the elements of premeditated-and-deliberate murder and the prosecutor's burden to prove each element beyond a reasonable doubt (see Lodged Doc. 10, 2 Clerk's Tr. at 672-73, ECF No. 38-2) and that evidence of Petitioner's motive was only "a factor tending to show" his guilt (see id. at 669). The jurors were also instructed to disregard any comment that the attorneys made that conflicted with the court's instructions. (See id. at 682); Mihajson v. McDowell, 752 F. App'x 538, 539-40 (9th Cir. 2019) (state court reasonably concluded prosecutor's misstatement of law was harmless when "trial court not only properly instructed the jury on the reasonable doubt standard, [but] also instructed the jury to follow the court's instructions if they conflicted with counsel's statements"). The jurors are presumed to have followed those unambiguous instructions, see Weeks, 528 U.S. at 234, and Petitioner cites no evidence to rebut that presumption. Thus, in the unlikely event that the challenged remark was interpreted in the manner advanced by Petitioner, it would have conflicted with the court's instructions and thus been disregarded by the jurors.

Second, trial counsel did not err in failing to object to the prosecutor's argument that Petitioner's efforts to destroy



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incriminating evidence and alter the crime scene evidenced his consciousness of guilt. (See Pet. at 8, ECF No. 1.) According to Petitioner (see Traverse at 26-27, ECF No. 41), the prosecutor misstated the law in arguing, "And as the law tells you, that means he in his own mind knows he is guilty of murder" (Lodged Doc. 12, 18 Rep.'s Tr. at 5114, ECF No. 38-26).[25] This argument is meritless. Seconds before making the challenged remark, the prosecutor quoted the relevant instruction concerning how suppression or fabrication of evidence shows consciousness of guilt. (Compare id. ("There's a jury instruction, 'If you find the defendant hid evidence, that can show he was aware of his consciousness of guilt.'"), with Lodged Doc. 10, 2 Clerk's Tr. at 672-73, ECF No. 38-2 (instruction stating, "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt.").) The prosecutor then summarized the evidence showing that Petitioner attempted to destroy incriminating evidence after murdering Vallivero. Accordingly, the jury would have understood the prosecutor's challenged remark as simply argument that Petitioner's destruction of incriminating evidence evidenced his consciousness of guilt. Because that argument was permissible under the court's instructions (see Lodged Doc. 10, 2 Clerk's Tr. at 672-73, ECF No. 38-2) and longstanding California law, see

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[25] Despite being represented by counsel, Petitioner offers no explanation of how the prosecutor's challenged statement amounted to a misstatement of law. Instead, he conclusorily alleges that it was because he claimed to have acted in "self-defense or committed the lesser crime of voluntary manslaughter" and asserts his "conduct after Vallivero's death did not prove [he] knew he was guilty of murder." (Pet., Mem. P. & A. at 56-57, ECF No. 1-1.)



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People v. Yeoman, 31 Cal. 4th 93, 131 (2003) ("[R]eason and common sense amply justified the suggested conclusion that defendant's suppression of evidence showed consciousness of guilt."), any objection to it would have been doomed to fail. As such, counsel could not have performed deficiently in failing to object. See Kimmelman v. Morrison, 477 U.S. 365, 375 (1986); Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985) (counsel's failure to raise meritless argument does not constitute ineffective assistance).

In any event, as the court of appeal observed (see Lodged Doc. 1 at 19, ECF No. 9-1), any error was harmless. The challenged remark was isolated, see, e.g., Williams, 2012 WL 5499552, at *8, and the jury was instructed on the limited purpose for which it could consider Petitioner's suppression and destruction of evidence (see Lodged Doc. 10, 2 Clerk's Tr. at 672-73, ECF No. 38-2), that it could not find him guilty of first-degree murder unless the prosecutor proved beyond a reasonable doubt that the murder was premeditated and deliberate (see id. at 672-73), and to disregard any arguments of counsel that conflicted with the court's instructions (see id. at 682). See Mihajson, 752 F. App'x at 539-40. Petitioner has offered no evidence to rebut the presumption that the jury followed those unambiguous instructions. See Weeks, 528 U.S. at 234.

Third, Petitioner suffered no prejudice from trial counsel's failure to object to the prosecutor's misstatement of California law concerning self-defense and imperfect self-defense. (See Pet. at 8, ECF No. 1; Traverse at 27, ECF No. 41.) Under that law, the defenses require a reasonable or actual belief in the



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need to defend against an "imminent danger to life or great bodily injury." Humphrey, 13 Cal. 4th at 1082 (emphasis added) (discussing both self-defense and imperfect self-defense). Thus, as Petitioner notes (see Traverse at 27, ECF No. 41), the prosecutor's statement that they required Petitioner to reasonably or actually believe that "he was in imminent danger of being killed" (Lodged Doc. 12, 18 Rep.'s Tr. at 5113, 5115, 5120, ECF No. 38-26) was an incomplete statement of California law. But Petitioner suffered no prejudice because the jury was instructed on self-defense and imperfect self-defense and that they required him to reasonably or actually believe "he was in imminent danger of being killed or suffering great bodily injury." (Lodged Doc. 10, 2 Clerk's Tr. at 670 (self-defense), 694 (imperfect self-defense), ECF No. 38-2.) The jury is presumed to have disregarded the prosecutor's incomplete statement of California law, see Weeks, 528 U.S. at 234, as it was instructed to do (see Lodged Doc. 10, 2 Clerk's Tr. at 682, ECF No. 38-2),[26] and Petitioner has cited no evidence to rebut that presumption.

In any event, Petitioner's actions after rendering Vallivero defenseless — including repeatedly beating his head with a baseball bat and thereafter repeatedly stabbing him as he lay motionless on the ground (see Lodged Doc. 10, Interview, Clerk's Tr. at 480, 483, 532, 562-63 (redacted), ECF No. 38-5) —

[26] For his part, defense counsel correctly argued that self-defense and imperfect self-defense required a belief of imminent danger of being killed or suffering great bodily injury. (See Lodged Doc. 12, 18 Rep.'s Tr. at 5173, 5175, ECF No. 38-26.)



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precluded any realistic possibility that the jury would have believed he acted in self-defense or imperfect self-defense, as related above (see id., 2 Clerk's Tr. at 678, ECF No. 38-2 ("When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends.")). And as further discussed, its finding that the murder was premeditated and deliberate (see Lodged Doc. 10, 2 Clerk's Tr. at 639, ECF No. 38-2) conclusively showed that it did not believe he acted in self-defense or imperfect self-defense. Accordingly, he cannot show that but for counsel's failure to object, the jury would have reached a more favorable verdict.

Fourth, the prosecutor committed no misconduct in arguing that the reaction of Petitioner's neighbors to the ongoing hostilities between him and Vallivero showed that insufficient provocation existed that he killed Vallivero in the heat of passion or because of a sudden quarrel. (See Pet. at 8, ECF No. 1; Traverse at 28-29, ECF No. 41.) Under California law, a person commits voluntary manslaughter as opposed to murder when among other things he kills in response to provocation "sufficient to cause an ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." People v. Moye, 47 Cal. 4th 537, 541 (2009) (citation omitted) (alteration in original). The prosecutor's argument did not contravene that law. At bottom, he noted that the neighbors who claimed to have witnessed or overheard those hostilities thought little of them; as such, they could not have caused an average person to have acted rashly and without due deliberation. (See Lodged Doc. 12,



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18 Rep.'s Tr. at 5117-18, ECF No. 38-26.) And in making that argument, he cited and accurately paraphrased the relevant jury instruction on voluntary manslaughter as well as the relevant evidence. (Compare Lodged Doc. 12, 18 Rep.'s Tr. at 5117, ECF No. 38-26) ("Provocation. As you heard, it's not just any provocation. As a result, the defendant acted rashly and under the influence of intense emotion rather than reasoning and judgment, . . . provocation [that] would have caused a person of average disposition to act rashly and without due deliberation."), with Lodged Doc. 10, 2 Clerk's Tr. at 673, ECF No. 38-2 (jury instruction explaining that "the defendant killed someone because of a sudden quarrel or in the heat of passion if" he was provoked and, "as a result," "acted rashly and under the influence of intense emotion that obscured his reasoning or judgment").) In short, the prosecutor's argument comported with the law and was based on the evidence adduced at trial.

In any event, assuming counsel should've objected, failure to do so resulted in no prejudice to Petitioner. The jury was instructed on voluntary manslaughter and the requisite provocation needed to establish that the killing was committed in the heat of passion or because of sudden quarrel (see Lodged Doc. 10, 2 Clerk's Tr. at 673, ECF No. 38-2), and Petitioner cites no evidence suggesting that the jury did not follow that instruction. There is, moreover, no reason to believe as much because, as related above, the prosecutor accurately paraphrased the instruction immediately before making the challenged comment. (See Lodged Doc. 12, 18 Rep.'s Tr. at 5117, ECF No. 38-26.) Putting that aside, the jury's finding that the murder was



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premeditated and deliberate (see Lodged Doc. 10, 2 Clerk's Tr. at 639, ECF No. 38-2) conclusively shows that it did not believe Petitioner acted in the heat of passion or because of sudden quarrel. Indeed, that finding meant that the jury believed he "carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill" (Lodged Doc. 10, 2 Clerk's Tr. at 672-73, ECF No. 38-2), which precluded a finding that he acted in the heat of passion. See Sanchez v. Foulk, No. CV 13-4363-JFW (AJW)., 2014 WL 1716082, at *5 (C.D. Cal. Feb. 18, 2014) ("In finding that petitioner stabbed Clark with premeditation and deliberation, the jury necessarily found that he carefully considered his conduct, and also that he did not act under the heat of passion."), accepted by 2014 WL 1779356 (C.D. Cal. May 1, 2014). Accordingly, Petitioner cannot show that but for counsel's failure to object, the jury would have reached a more favorable verdict for him.

Fifth, trial counsel performed reasonably in not objecting to the prosecutor's statement that "if you find there is no imperfect self-defense, then it's murder." (Lodged Doc. 12, 18 Rep.'s Tr. at 5120, ECF No. 38-26; see Pet. at 8, ECF No. 1; Traverse at 28-29, ECF No. 41.) Although Petitioner maintains that that statement was incorrect because the jury could alternatively have found that he acted in self-defense or killed Vallivero in the heat of passion (see Traverse at 28-29, ECF No. 41), he ignores the context in which the prosecutor's statement was made. Indeed, before making the challenged statement, the prosecutor had already argued that Petitioner did not act in self-defense or in the heat of passion. (See Lodged Doc. 12, 18



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Rep.'s Tr. at 5115-20, ECF No. 38-26.) Only then did he argue that a finding of no imperfect self-defense dictated a finding that Petitioner committed murder. (See id. at 1520-23.) And before turning to the evidence showing that Petitioner murdered Vallivero, the prosecutor reminded the jurors that he had "already talked about how this [was] not justifiable homicide, how this [was] not heat of passion sudden quarrel, [and] how this is not imperfect self-defense." (Id. at 5123.) Given this context, no reasonable juror would have interpreted the prosecutor's remark to mean that the jury's only options were to convict Petitioner of first-degree murder or find that he acted in imperfect self-defense.

In any event, even if counsel erred in failing to object, Petitioner suffered no prejudice. The jury was instructed on self-defense and heat-of-passion, sudden-quarrel voluntary manslaughter. (See Lodged Doc. 10, 2 Clerk's Tr. at 693-94, ECF No. 38-2.) Petitioner provides no reason to believe that the prosecutor's brief remark caused the jury to ignore those instructions — particularly since the prosecutor spent time going over them with the jury (see Lodged Doc. 12, 18 Rep.'s Tr. at 5115-20, ECF No. 38-26) — and the jury is presumed to have correctly applied the relevant instructions. See Weeks, 528 U.S. at 234. And as related above, the jury's finding that the murder was premeditated and deliberate (see Lodged Doc. 10, 2 Clerk's Tr. at 639, ECF No. 38-2) conclusively showed that the jurors did not believe Petitioner acted in self-defense or killed Vallivero because of a sudden quarrel or in the heat of passion. Thus, Petitioner cannot show that but for counsel's failure to object,



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the jury would have reached a more favorable verdict to him.

Sixth, counsel was not ineffective in declining to object to the prosecutor's argument that premeditation and deliberation required the type of reflection that goes into deciding to drive through a yellow traffic light. (See Pet. at 8, ECF No. 1; Traverse at 29-30, ECF No. 41.) In accordance with California law, see Koontz, 27 Cal. 4th at 1080, the court instructed the jury that "a cold, calculated decision to kill can be reached quickly" and that "[t]he test is the extent of the reflection, not the length of time." (Lodged Doc. 10, 2 Clerk's Tr. at 693, ECF No. 38-2 (instruction concerning premeditation and deliberation).) The prosecutor's challenged argument comported with that law because it conveyed the point that Petitioner did not require long to make the cold, calculated decision to murder Vallivero. See People v. Avila, 46 Cal. 4th 680, 715 (2009) (as modified on denial of reh'g) (prosecutor committed no misconduct in arguing that decision to go through yellow light after assessing various considerations was example of "a 'quick judgment'" that was "nonetheless 'cold' and 'calculated'"); People v. Azcona, 58 Cal. App. 5th 504, 516 (2020) (as modified Jan. 11, 2021) (same when prosecutor argued that weighing consequences of going through yellow light and deciding to do so meant that "[y]ou deliberated and premeditated it"); Cervera v. Montgomery, No. ED CV 16-111-JAK (RAO), 2016 WL 2940511, at *8 (C.D. Cal. Apr. 13, 2016) ("By analogizing [the decision to murder] to the time and consideration it takes to decide to enter an intersection against a yellow light, the prosecution merely drove home the point that the process of deliberation does not



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require any extended period of time."), accepted by 2016 WL 2940014 (C.D. Cal. May 18, 2016). And indeed, the prosecutor explained that the point of his analogy was to illustrate that premeditation and deliberation mean that "you make a choice after thinking about it." (See Lodged Doc. 12, 18 Rep.'s Tr. at 5125, ECF No. 38-26.) Because the prosecutor's challenged argument reflected an accurate statement of California law, trial counsel was not ineffective in failing to object to it.

In any event, even assuming error, Petitioner suffered no prejudice. The jury was instructed on premeditation and deliberation and that "[a] decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated." (Lodged Doc. 10, 2 Clerk's Tr. at 692-93, ECF No. 38-2.) And as related above, it was also instructed to disregard any argument of counsel that conflicted with the trial court's instructions. (See id. at 662.) Thus, assuming the jurors believed the prosecutor's comments conflicted with those instructions, they are presumed to have resolved the conflict in favor of the trial court's instructions, see Weeks, 528 U.S. at 226, and Petitioner offers no evidence to rebut that presumption.

Seventh, Petitioner suffered no prejudice from counsel's failure to object to the prosecutor's argument that he could not claim self-defense because Vallivero did not "annihilate his jaw." (Pet. at 8, ECF No. 1; see Lodged Doc. 12, 18 Rep.'s Tr. at 5192, ECF No. 38-26.) Even assuming this argument was improper, it could not have affected the jury's verdict because Petitioner's actions after rendering Vallivero defenseless



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precluded a finding that he acted in self-defense. As related above, after Vallivero lay motionless on the floor, Petitioner repeatedly beat his head in with a baseball bat and then repeatedly stabbed him with a knife to "make sure he was gone" and "done." (Lodged Doc. 10, Interview, Clerk's Tr. at 480, 483, 532, 562-63 (redacted), ECF No. 38-5.) Because Vallivero was incapable of inflicting injury when he was motionless, Petitioner had no right to use deadly force against him. (See id., 2 Clerk's Tr. at 678, ECF No. 38-2 (jury instruction stating, "When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends").) And the jury's finding that the murder was premeditated and deliberate (see id. at 639) shows that it flatly rejected Petitioner's claim that he acted in self-defense. Accordingly, he cannot show that but for counsel's failure to object, the jury would have reached a more favorable verdict to him.

Finally, Petitioner suffered no prejudice from the prosecutor's attempt to explain reasonable doubt. (See Pet. at 8, ECF No. 1; Traverse at 31-32, ECF No. 41.) According to Petitioner, the prosecutor urged the jury to find him guilty "based on a 'reasonable' account of the evidence" (Traverse at 31, ECF No. 41) by stating that "if what the people are saying is reasonable and defense says it's possible but unreasonable, that's a guilty verdict" (Lodged Doc. 12, 18 Rep.'s Tr. at 5194, ECF No. 38-26). In context, the prosecutor's challenged statement was simply an inartful attempt to convey to the jury that the beyond-a-reasonable-doubt standard did not require him to disprove that which was possible but unreasonable. Indeed,



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immediately before making the challenged remark, the prosecutor stated, "What [reasonable doubt] means is if [the] defense scenario is possible, sure possible, but still unreasonable, the law says reject that which is possible but unreasonable" (id.), which aligned with the jury instruction on reasonable doubt (see Lodged Doc. 10, 2 Clerk's Tr. at 658, ECF No. 38-2 ("The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.")). And assuming the challenged statement was improper, it was unlikely to have affected the jury's verdict because — like the prosecutor's brief remark that motive established first-degree murder (see Lodged Doc. 12, 18 Rep.'s Tr. at 5113, ECF No. 38-26) — it was isolated, comprising only one sentence of an argument that spanned nearly 30 pages of transcript (see id. at 5107-28, 5191-99).

What's more, the trial court instructed the jury that the prosecutor could meet his burden to prove Petitioner's guilt beyond a reasonable doubt only by presenting "proof that leaves you with an abiding conviction that the charge is true." (Lodged Doc. 10, 2 Clerk's Tr. at 658, ECF No. 38-2.) If the jurors believed that the prosecutor's brief remark conflicted with that unambiguous instruction, they would have disregarded it, as they were instructed to do. (See id. at 662); Weeks, 528 U.S. at 226. Moreover, the jurors evidenced no confusion in applying the beyond-a-reasonable-doubt standard, and the evidence against Petitioner was overwhelming, as related above. Accordingly, Petitioner cannot show that but for counsel's failure to object, the jury would have reached a more favorable verdict.



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**2. Petitioner's pretrial statements concerning Vallivero's drug use**

Counsel did not err in failing to argue that Petitioner's pretrial statements about Vallivero's methamphetamine use were admissible under California Penal Code section 356. (Pet. at 5, ECF. No. 1.) Any such argument would have failed because the superior court found that Petitioner's statements were not so admissible. (See Lodged Doc. 17 at 6, ECF No. 38-41.) This Court is bound by the superior court's application of California law, as related above. See Waddington, 555 U.S. at 192 n.5; Bradshaw, 546 U.S. at 76.

Putting that aside, counsel had no reason to argue that Petitioner's pretrial statements were admissible under section 356. It provides that "where one party has introduced part of a conversation, the opposing party may admit any other part necessary to place the original excerpts in context." People v. Pride, 3 Cal. 4th 195, 235 (1992) (citations omitted). It does not, however, prevent courts from excluding parts of a conversation that are irrelevant, unduly prejudicial, or needlessly time-consuming. See id. (trial court did not violate section 356 by excluding recording of defendant's pretrial interview about which testimony was adduced when recording was "irrelevant, cumulative, or unduly prejudicial or time-consuming"); People v. Von Villas, 10 Cal. App. 4th 201, 272 (1992) (trial court did not violate section 356 by excluding recording of conversation that witness mentioned on direct examination when its probative value was outweighed by its prejudicial effect); see also Witt v. Jackson, 57 Cal. 2d 57, 67



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(1961) (discussing prior iteration of section 356 and stating that it "is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced").

Here, the trial court not once but twice ruled that any evidence concerning Vallivero's methamphetamine use was irrelevant and unduly prejudicial. (See Lodged Doc. 12, 9 Rep.'s Tr. at 2405-09, ECF No. 38-17, 13 Rep.'s Tr. at 3607-12, ECF No. 38-21.) Accordingly, any argument that Petitioner's pretrial statements about Vallivero's methamphetamine use were nevertheless admissible under section 356 was doomed to fail, and counsel did not perform deficiently in opting not to advance one. See Kimmelman, 477 U.S. at 375; Boag, 769 F.2d at 1344.

**3. Expert testimony about the psychological and physical effects of methamphetamine and alcohol**

Petitioner has not shown that counsel erred in failing to present expert testimony about the psychological and physical effects of methamphetamine and alcohol use. (See Pet. at 5, ECF No. 1.) To start, he has not provided a declaration from any such expert demonstrating a willingness to testify and setting forth the facts to which any such expert would have testified. See Dows v. Wood, 211 F.3d 480, 486 (9th Cir. 2000) (rejecting ineffective-assistance claim based on failure to call witness when petitioner presented no affidavit from witness showing witness was willing to provide testimony helpful to defense). Putting that aside, any evidence concerning the effects of methamphetamine use generally would have been rejected because the trial court prohibited any evidence concerning Vallivero's



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methamphetamine use. (See Lodged Doc. 12, 9 Rep.'s Tr. at 2405-09, ECF No. 38-17, 13 Rep.'s Tr. at 3607-12, ECF No. 38-21.)

Moreover, assuming that counsel erred in failing to present expert testimony concerning the psychological and physical effects of alcohol, Petitioner suffered no prejudice. He does not even attempt to articulate what testimony his unidentified expert would have provided, let alone how that testimony would have been beneficial to his defense. See Borg, 24 F.3d at 26; Jones, 66 F.3d at 205. To the contrary, aside from passing references to Vallivero's alcohol use, Petitioner's entire argument concerning the proposed expert testimony focuses exclusively on Vallivero's methamphetamine use — about which the trial court prohibited any testimony. (See Pet. at 5, ECF No. 1 (reflecting that Petitioner did not mention alcohol in facts supporting claim); Traverse at 10-14 (arguing only what expert testimony about Vallivero's methamphetamine use would have shown).) Although Petitioner's Traverse references Vallivero's alcohol use once in his argument concerning counsel's failure to present expert testimony, that reference is limited to what Petitioner believed, not the proposed testimony of the unidentified expert. (See Traverse at 11, ECF No. 41 (arguing that superior court "overlook[ed] that [Petitioner's] belief that Vallivero used methamphetamine and alcohol affected [his] state of mind before, during, and after the killing and would have proved [he] committed voluntary manslaughter, not premeditated, deliberate first degree murder" (emphasis omitted)).)

In any event, there is no reason to believe that expert testimony concerning Vallivero's alcohol use was necessary or



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would have affected the jury's verdict. Indeed, as the Ninth Circuit has observed, it is common knowledge that alcohol and drug use can lead to violent acts. See Lopez v. Allen, 47 F.4th 1040, 1050 (9th Cir. 2022) ("The common knowledge that drug and alcohol use can impair decision making or lead to violent acts would have been known to the jurors, regardless of whether such facts were reinforced by an expert's opinion or specific scientific data."). And as related above, the jury heard Petitioner's claim that Vallivero became angry and violent when he was drunk and would "flip[] out," "want to fight," and threaten to kill him (Lodged Doc. 10, Interview, Clerk's Tr. at 471, 498-99, 507, 510-11 (redacted), ECF No. 38-5), as well as expert testimony establishing that Vallivero had a .19 blood-alcohol level when he was killed (see Lodged Doc. 12, 15 Rep.'s Tr. at 4218-19, ECF No. 38-23) and witness testimony that he was "wasted most of the time" and had "alcohol issues" (id., 10 Rep.'s Tr. at 2752, ECF No. 38-18). Further, trial counsel highlighted how Vallivero's alcohol use caused him to become violent and abusive. (See id., 18 Rep.'s Tr. at 5129-35, 5176-77 ECF No. 38-26.)

Given these facts, no reason exists to believe that but for counsel's failure to present expert testimony about the commonly understood effects of alcohol and methamphetamine use, the jury would have reached a verdict more favorable to Petitioner.

**4. Evidence of Petitioner's nonviolent character and efforts to relocate**

Petitioner's claim that counsel erred in failing to present evidence concerning his nonviolent character and efforts to



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relocate is meritless. (See Pet. at 5-6, ECF No. 1.) As an initial matter, it fails for lack of evidence. Although Petitioner claims that several witnesses were willing to testify about these issues, he has not presented a sworn declaration from any such witness. See Dows, 211 F.3d at 486. Instead, he relies on a series of unsworn letters from friends that were submitted at his sentencing hearing. (See Pet., Ex. G at 224-29, ECF No. 1-3.) Because those letters are not signed under penalty of perjury, they do not constitute competent evidence. See Henning v. Adams, No. CV 09-3337-AHM (MAN)., 2012 WL 4791038, *1 (C.D. Cal. Jan. 24, 2012) ("The purported 'affidavit' is not signed under penalty of perjury, and thus, it is not competent evidence."), accepted by 2012 WL 4791037 (C.D. Cal. Oct. 5, 2012).

Putting that aside, the record if anything shows that trial counsel strategically decided not to call the witnesses whom Petitioner has identified. To be sure, he was aware of the proposed witnesses. (See Pet., Ex. F at 17-18 (Petitioner testifying that he and his initial counsel provided trial counsel names of potential witnesses), 18 (Petitioner testifying that his mother gave trial counsel "some witnesses to look into"), ECF No. 5-2; see also Lodged Doc. 10, 3 Clerk's Tr. at 743, ECF No. 38-3 (Petitioner declaring that he told counsel "the names of several people that [he] believed would support" his claims about Vallivero's abusive conduct).) Petitioner has failed to show that counsel did not interview them and in fact conceded in state court that he might have. (See 3 Clerk's Tr. at 743, ECF No. 38-3 (stating that if counsel interviewed witnesses, "he did not



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discuss it with me").) What's more, counsel testified at Petitioner's new-trial-motion hearing that Petitioner had given him a "complete list of witnesses" and that he and his investigator had "thoroughly vet[ted] and evaluate[d] each witness" whom they were able to "locate and identify."[27] (Pet., Ex. F at 34-35, ECF No. 5-2.) He explained that he decided not to call those witnesses because he believed they would have undercut Petitioner's self-defense theory by showing that he had multiple options available to him other than staying at Vallivero's home. (Id. at 37-38; see id. at 38 ("I thought it would be a more effective presentation to the jury to show that he was closed in and to minimize the contacts to the outside . . . . That's why I called the witnesses I called and limited those outside witnesses.").) Such strategic decisions are "virtually unchallengeable" on federal habeas review. See Strickland, 466 U.S. at 690; Silva v. Woodford, 279 F.3d 825, 844 (9th Cir. 2002) (as amended) (counsel commits no error when making informed strategic decision).

And any such decision was sound under the circumstances. Each of the proposed "witnesses" was a longtime friend of Petitioner's (see Pet., Ex. G at 223-29, ECF No. 1-3) and, as such, would have been open to obvious credibility attacks. See House v. Bell, 547 U.S. 518, 552 (2006) (eyewitness testimony given by disinterested witness with no motive to lie "has more probative value" than "testimony from inmates, suspects, or

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[27] Petitioner evidently was unable to provide last names for some of the witnesses he wanted to testify. (See Pet., Ex. F at 35, ECF No. 5-2.)



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friends or relations of the accused"). And had they testified, they could have been questioned about anything Petitioner had done or said that would have undermined their proposed testimony about his nonviolent character. That questioning, moreover, might have revealed his drug use and behavior while on drugs, both of which counsel successfully kept out of evidence. (See Pet., Ex. F at 19, ECF. No. 5-2.) Indeed, counsel cited this fact at the hearing on Petitioner's new-trial motion as a reason for not calling some of the witnesses Petitioner had identified. (See id. at 35-36 (counsel testifying that he "absolutely" strategically decided to prevent evidence of Petitioner's "methamphetamine use from coming into evidence").) In short, there was little to gain from the proposed witness testimony, and presenting it carried significant risk.

In any event, Petitioner can show no prejudice from counsel's failure to present the proposed testimony concerning his character for nonviolence. Such testimony would have been unlikely to have swayed the jury in Petitioner's favor because the nature of the murder, as well as his pretrial statements to police, showed that he was extremely violent. Indeed, he admitted that he broke a bottle over Vallivero's head (after first hitting him with a rock) and beat his head with a baseball bat so hard that it resulted in the type of injury that would have occurred had someone "slam[med] into a tree" driving at 60 miles an hour or jumped head first from 200 feet onto "rocks." (Lodged Doc. 12, 15 Rep.'s Tr. 4245-46, ECF No. 38-23; Lodged Doc. 10, Interview, Clerk's Tr. at 475-76, 478-80, 483, 529, 532 (redacted), ECF No. 38-5.) And even after Vallivero lay



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motionless on the floor, Petitioner continued to beat his head with the baseball bat and thereafter repeatedly stabbed him. (See Lodged Doc. 10, Interview, Clerk's Tr. at 480, 483, 532, 562-63 (redacted), ECF No. 38-5.) In short, his actions demonstrably established that he was a violent person, and there is no reasonable likelihood that testimony from his friends suggesting he wasn't would have led to a more favorable verdict. See House, 547 U.S. at 552.

Petitioner likewise suffered no prejudice from counsel's failure to present testimony concerning his efforts to move out of Vallivero's home. As an initial matter, the letters on which Petitioner relies do little more than relay his own inadmissible hearsay statements (see, e.g., Pet., Ex. G at 225, ECF No. 1-3 (letter stating that "as I understand it," Petitioner had consulted with "a legal assistance group" concerning his living arrangements), 228 (relaying Petitioner's out-of-court statements about "looking for a new place to live") and thus do not constitute competent evidence. He identifies no witness from CRLA who was willing to testify on his behalf, see Dows, 211 F.3d at 486, and the records from there if anything show that he did not want to move out of Vallivero's home (see Pet., Ex. E at 219-21, ECF No. 1-3 (reflecting that Petitioner unsuccessfully sought assistance from CRLA in fighting Vallivero's efforts to evict him)). Putting that aside, the jury heard Petitioner's pretrial statements about his efforts to move out of Vallivero's home. (See, e.g., Lodged Doc. 10, Interview, Clerk's Tr. at 472 (redacted), ECF No. 38-5 ("You know — I mean — I'm like — I mean I've done everything to try to move out of there."), 497 ("I was



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trying to get out of there. And um, I had like six Craigslist ads trying to find a rental . . . . [S]o I was trying to get another place."), 503 (Petitioner stating that he informed someone at "legal aid" that he did not "have another place to stay"), 505 ("I mean I'm trying to get out of there . . . I mean I'm doing Craigslist ad[s]").) As such, any witness testimony relaying his pretrial statements on that point would have been cumulative, and counsel's failure to elicit it resulted in no prejudice to Petitioner's defense. See Mejorado, 629 F. App'x at 787 (citing Wong, 558 U.S. at 22-23).

In any event, Petitioner fails to explain how testimony corroborating his pretrial statements about his unsuccessful efforts to relocate would have affected the jury's verdict. It would not have undercut the evidence showing that he committed premeditated-and-deliberate murder; if anything, it shored up the evidence of motive. Nor would it have shown that he acted in self-defense or imperfect self-defense. Consequently, there is no reasonable likelihood that but for counsel's failure to present witness testimony corroborating Petitioner's pretrial statements about his efforts to relocate, the jury would have reached a verdict more favorable to him.

**5. Testimony concerning Vallivero's propensity for violence**

Petitioner suffered no prejudice from counsel's failure to present Himmerich's and Gilham's proposed testimony concerning Vallivero's purported "propensity for aggression." (Pet. at 5, ECF No. 1.) Himmerich's proposed testimony about Vallivero's verbally abusive behavior and threats to kill Petitioner could



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not have meaningfully benefited his defense because it would have been cumulative of other evidence at trial. See Mejorado, 629 F. App'x at 787 (citing Wong, 558 U.S. at 22-23). Indeed, the jury heard Petitioner's pretrial interview, in which he told the investigating detectives that Vallivero was verbally abusive and had repeatedly threatened to kill him. (See, e.g., Lodged Doc. 10, Interview, Clerk's Tr. at 497-98, 505, 507 523, 542, 545 (redacted), ECF No. 38-5.) What's more, two different witnesses testified that they overheard Vallivero threaten to shoot Petitioner in the face (see Lodged Doc. 12, 10 Rep.'s Tr. at 2730, 2753-54, 2771, ECF No. 38-18), and a third testified that Petitioner told her that Vallivero had threatened him with a gun (see id. at 2713), as related above. Himmerich could have added little to that testimony, and more importantly, he never actually saw Vallivero threaten Petitioner with a gun or witnessed any physical altercations between the two.[28]

Gilham's proposed testimony about Vallivero's threatening Petitioner and others with a gun likewise would not have benefited Petitioner. As an initial matter, it was necessarily based on inadmissible hearsay. Indeed, she stated that she was "aware or had witnessed" the events set forth in her declaration

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[28] The record shows that counsel was aware of Himmerich. (See Lodged Doc. 10, 3 Clerk's Tr. at 743, ECF No. 38-3 (Petitioner stating that he alerted counsel to "Tim, our landscaper who saw Mr. Vallivero being aggressive"); Pet., Ex. G at 233, ECF No. 1-3 (reflecting that Himmerich's first name was "Tim").) To the extent counsel strategically decided not to call Himmerich as a witness, that decision cannot be second-guessed on habeas review, see Strickland, 466 U.S. at 690; Silva, 279 F.3d at 844, particularly because Himmerich's testimony would have added nothing of value, as related above.



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and distinguished between the events she had witnessed and those of which she was merely "aware." (Compare Pet., Ex. G at 230, ECF No. 1-3 (Gilham claiming that she was "aware" that Vallivero had threatened Petitioner and others with "his guns"), 231 (stating that she "knew" Vallivero "used drugs" but had never been "personally exposed to it"), with id. at 231 (stating that she "observed" Vallivero's "extreme mood swings" and could "attest" that he was drunk on day he was killed because she saw him when he came to her house).) She did not claim to have witnessed Vallivero threatening anyone with a gun. Instead, she merely claims to have been "aware" that he had.[29] (Id. at 230.)

And even if the trial court would have allowed Gilham to relay her "aware[ness]" that Vallivero had purportedly threatened Petitioner with a gun in the past (Pet., Ex. G at 230, ECF No. 1-3), there is no reasonable likelihood that her testimony would have affected the jury's verdict. It would not have supported a self-defense claim because Petitioner conceded that Vallivero was unarmed when he beat him to death. (See Lodged Doc. 10, Interview, Clerk's Tr. at 477 (redacted), ECF No. 38-5.) Although it might have been relevant to show that Petitioner acted in imperfect self-defense, his actions after rendering Vallivero defenseless precluded any realistic possibility that the jury would have found that he believed his life was in danger when he actually killed Vallivero, as related above. (See Lodged

[29] Petitioner asserts Gilham would have testified that "she saw Vallivero 'intimidating [Petitioner] with his guns.'" (Pet., Mem. P. & A. at 43, ECF No. 1-1.) Gilham's declaration contains no such statement. (See Pet., Ex. G at 230-31, ECF No. 1-3.)



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Doc. 10, Interview, Clerk's Tr. at 475-76, 478-80, 483, 529, 532, 562-63 (redacted), ECF No. 38-5.) And in any event, her proposed testimony would have been cumulative because Petitioner's neighbors testified that they had personally heard Vallivero threaten to shoot Petitioner's face off. (See Lodged Doc. 12, 10 Rep.'s Tr. at 2730, 2753-54, ECF No. 38-18; see also id. at 2713, 2771); Mejorado, 629 F. App'x at 787 (citation omitted).

Gilham's testimony would have been equally unhelpful to show that Petitioner killed Vallivero because of a sudden quarrel or in the heat of passion. See People v. Wright, 242 Cal. App. 4th 1461, 1481 (2015) (as modified on denial of reh'g Jan. 6, 2016) (heat-of-passion and sudden-quarrel manslaughter require proof that victim provoked defendant and provocation was sufficient to cause ordinary person of average disposition to "act rashly or without due deliberation and reflection" (citations omitted)). After all, it was cumulative of the testimony of other witnesses, whose firsthand accounts would have been more likely to sway the jury than Gilham's secondhand account.

In any event, Gilham's proposed testimony would have shed little light concerning whether Vallivero's supposed past threats provided the requisite provocation to establish a heat-of-passion or sudden-quarrel killing because she never indicated when Vallivero supposedly threatened Petitioner. Putting that aside, her proposed testimony — like the testimony of Petitioner's neighbors — would have been unlikely to have persuaded the jury that the murder was provoked because Petitioner necessarily had ample time to "cool off" between when he was threatened and when he killed Vallivero. (Lodged Doc. 10, 2 Clerk's Tr. at 674, ECF



# APPENDIX D

No. 38-2 ("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 and judgment, then the killing is not reduced to voluntary manslaughter on this basis.").) Indeed, Sarah Demolar testified that Vallivero had threatened to "blow [Petitioner's] fucking face off" toward the end of summer of 2015, which was necessarily months before he was murdered, in November.[30] (See Lodged Doc. 12, 10 Rep.'s Tr. at 2730, 2753-54, ECF No. 38-18.) Likewise, Clark testified that Petitioner reported to her that Vallivero had threatened him with a gun 10 weeks before the murder. (See id. at 2709.) And Petitioner himself told police that Vallivero had "pulled a gun" on him "maybe a month, two months ago."[31] (Lodged Doc. 10, Interview, Clerk's Tr. at 503 (redacted), ECF No. 38-5.) Put simply, no reasonable juror would have found that those stale provocative acts, assuming they occurred, caused Petitioner to act in the heat of passion or in response to sudden quarrel. And considering that Gilham did not declare when the alleged threat about which she became "aware" occurred (Pet., Ex. G at 230, ECF No. 1-3), her proposed testimony would have made no difference.

---

[30] Joshua Demolar could not remember when he overheard Vallivero threaten to shoot Petitioner "in the face." (Lodged Doc. 12, 10 Rep.'s Tr. at 2771, ECF No. 38-18.) But considering the similarity of the threats he and his wife overheard, the jury in all likelihood inferred that they were the same.

[31] Petitioner also told police that he saw Vallivero holding a gun "the other night," but on that occasion, Vallivero did not threaten to shoot him or point the gun at him. (Lodged Doc. 10, Interview, Clerk's Tr. at 504 (redacted), ECF No. 38-5.) He later explained that that incident occurred during the "middle" of the week before the murder. (Id.)



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Finally, the jury's finding that the murder was premeditated and deliberate (see Lodged Doc. 10, 2 Clerk's Tr. at 639, ECF No. 38-2) demonstrably shows that any error was harmless. Indeed, the jury instruction on premeditation and deliberation stated that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." (Id. at 673.) Thus, the jury necessarily believed that the murder was not committed in response to a sudden quarrel or in the heat of passion. (See id. ("[The] defendant killed someone because of a sudden quarrel or in the heat of passion if" as result of being provoked he "acted rashly and under the influence of intense emotion that obscured his reasoning or judgment.")); Aquillon v. Evans, No. CV 08-1748-SJO (OP)., 2010 WL 2384861, at *10 (C.D. Cal. March 15, 2010) (jury's finding that murder was premeditated and deliberate showed that it "flatly rejected the idea that heat of passion obscured Petitioner's reasoning"), accepted by 2010 WL 2384863 (C.D. Cal. June 7, 2010); Perez v. Johnson, No. CV 22-1302 RSWL (PVC), 2023 WL 3293368, at *17 (C.D. Cal. Mar. 1, 2023) ("In finding that Petitioner shot Calvillo with premeditation and deliberation, the jury necessarily found that he carefully considered his conduct and that he did not act under the heat of passion."), accepted by 2023 WL 3292866 (C.D. Cal. May 4, 2023).

Accordingly, Petitioner is not entitled to relief on any of his ineffective-assistance claims.

**VII. Petitioner Is Not Entitled to Relief on His Cumulative-Error Claim**

Petitioner contends that the cumulative effect of the



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alleged trial errors in claims three through seven requires reversal of his convictions. (See Pet. at 8, ECF No. 1.)

According to the Ninth Circuit, the Supreme Court has "clearly established" that although individual errors may not each rise to the level of a constitutional violation or independently warrant reversal, a collection of such errors might. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers, 410 U.S. at 290 n.3, 298, 302-03). Courts therefore must determine whether the errors "rendered the . . . defense 'far less persuasive,'" taking into consideration the overall strength of the prosecution's case. Id. at 928 (quoting Chambers, 410 U.S. at 294). But if none of the claims actually demonstrate error, no cumulative prejudice can stem from them. See Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) (finding that when "no error of constitutional magnitude occurred, no cumulative prejudice is possible"); Taylor v. Beard, 616 F. App'x 344, 345 (9th Cir. 2015) ("[Petitioner] has failed to demonstrate any error here; thus, there can be no cumulative error.").

Here, each of Petitioner's claims is meritless, so there can be no cumulative error. Consequently, habeas relief is unwarranted on this claim.

**RECOMMENDATION**

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

DATED: March 1, 2024

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE



# APPENDIX D

Search documents in this case: Search

## No. 20-5884

| | |
|---|---|
| Title: | **Charles Chad Giese, Petitioner**<br>**v.**<br>**California** |
| Docketed: | October 1, 2020 |
| Lower Ct: | Court of Appeal of California, Second Appellate District |
| Case Numbers: | (B292208) |
| Decision Date: | February 26, 2020 |
| Discretionary Court Decision Date: | May 27, 2020 |

| DATE | PROCEEDINGS AND ORDERS |
|---|---|
| Sep 21 2020 | Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 2, 2020)<br><br>**Motion for Leave to Proceed in Forma Pauperis Petition Appendix Proof of Service** |
| Oct 12 2020 | Waiver of right of respondent California to respond filed.<br><br>**Main Document** |
| Oct 15 2020 | DISTRIBUTED for Conference of 10/30/2020. |
| Nov 02 2020 | Petition DENIED. Justice Barrett took no part in the consideration or decision of this petition. |

| NAME | ADDRESS | PHONE |
|---|---|---|
| Attorneys for Petitioner | | |



APPENDIX E

| | | |
|---|---|---|
| Rose Fay Arfa<br>Counsel of Record | Fay Arfa, A Law Corporation<br>10100 Santa Monica Blvd., Suite 300<br>Los Angeles, CA 90067<br><br>fayarfa@sbcglobal.net | 3108416805 |
| Party name: Charles Chad Giese | | |

| | | |
|---|---|---|
| Attorneys for Respondent | | |
| Scott Alan Taryle<br>Counsel of Record | California Attorney General's Office<br>Scott Taryle<br>300 South Spring Street, 5th Floor<br>Los Angeles, CA 90013<br><br>scott.taryle@doj.ca.gov | 213-269-6073 |
| Party name: California | | |



APPENDIX E

Supreme Court

Change court

| Case Summary | Docket | Briefs |
|---|---|---|
| Disposition | Parties and Attorneys | Lower Court |

## Disposition

**PEOPLE v. GIESE**
**Division SF**
**Case Number S261456**

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

**Case Citation:** **none**

| Date | Description |
|---|---|
| 05/27/2020 | Petition for review denied |

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





# APPENDIX F

Filed 3/25/20 P. v. Giese CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CHARLES CHAD GIESE,<br><br>Defendant and Appellant. | 2d Crim. No. B292208<br>(Super. Ct. No. 15F-10827)<br>(San Luis Obispo County)<br><br>ORDER MODIFYING OPINION AND DENYING REHEARING<br>[NO CHANGE IN JUDGMENT] |

THE COURT:

It is ordered that the opinion filed on February 26, 2020, be modified as follows:

1. On page 11, the first sentence of the first full paragraph beginning "Sufficient evidence" is deleted and replaced with the following:

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Sufficient evidence supports appellant's conviction of willful, premeditated and deliberate murder.

2. On page 19, the last sentence of the first partial paragraph beginning "Appellant offers no such evidence" is deleted and replaced with the following:

Moreover, the prosecutor's allegedly improper arguments were brief and the evidence of appellant's guilt was overwhelming. (See, e.g., *People v. Centeno* (2014) 60 Cal.4th 659, 676-677 [applying harmless error analysis to claim that trial counsel provided ineffective assistance by failing to preserve clam that prosecutor repeatedly misstated the law on reasonable doubt during rebuttal].) Appellant's claims of ineffective assistance of counsel thus fail.

This modification does not change the judgment.

Appellant's petition for rehearing is denied.



# APPENDIX G

Filed 2/26/20 P. v. Giese CA2/6 (unmodified opinion)

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CHARLES CHAD GIESE,<br><br>Defendant and Appellant. | 2d Crim. No. B292208<br>(Super. Ct. No. 15F-10827)<br>(San Luis Obispo County) |

Charles Chad Giese appeals the judgment entered after a jury convicted him of willful, deliberate, and premeditated murder (Pen. Code,[1] §§ 187, 189) and found true allegations that in committing the murder he used two deadly weapons, i.e., a baseball bat and a knife (§ 12022, subd. (b)(1)). The trial court sentenced him to 26 years to life in state prison and ordered him to pay fines and fees including a $7,800 restitution fine (§ 1202.4, subd. (b)), a $30 criminal conviction assessment (Gov. Code,

[1] All statutory references are to the Penal Code unless otherwise stated.

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§ 70373), and a $40 court operations assessment (§ 1465.8, subd. (a)(1)). Appellant contends (1) his extrajudicial statements to law enforcement were admitted against him in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*); (2) the evidence is insufficient to support his conviction of first degree murder; (3) the court erred in excluding evidence of the victim's drug use; (4) the jury was erroneously instructed on the right of self-defense available to a person who starts a fight or engages in mutual combat; (5) the prosecutor committed misconduct during closing argument, and defense counsel provided ineffective assistance by failing to object; and (6) the cumulative effect of the alleged errors compels the reversal of his conviction. Appellant also contends the court erred in imposing the criminal conviction and court operations assessments without first determining his ability to pay those assessments, as contemplated in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We affirm.

**STATEMENT OF FACTS**

In early 2015,[2] appellant began renting a room in Walter Vallivero's mobile home. Shortly after appellant moved in, the manager of the mobile home park began receiving complaints from other residents about frequent loud arguments at Vallivero's home. There were also complaints that appellant had urinated in public and was acting strangely. Several residents requested that appellant be ordered to leave the mobile home park. Shawn Reed, the owner of the park, sent Vallivero a letter outlining the complaints regarding appellant and stating that he would be asked to leave the park if his inappropriate behavior continued.

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[2] All date references are to the year 2015.



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On September 5, the police were called to Vallivero's home regarding a physical altercation between appellant and Vallivero. Appellant told the police that he and Vallivero were arguing about trash in the kitchen when Vallivero reached into the cushion on the couch and pulled out a BB gun. Appellant grabbed the hand that was holding the gun and repeatedly punched Vallivero in the face. Vallivero told the responding officers that appellant repeatedly punched him in the face after he confronted appellant about the messy kitchen. According to Vallivero, whose face was bloody and swollen, it was appellant who grabbed the BB gun from the couch cushions before running outside.

A few days later, Reed sent Vallivero a letter referring to the recent incident and revoking Vallivero's right to have appellant as a renter. On September 17, Reed sent Vallivero another letter informing him that appellant had 30 days to vacate the premises. Ten days later, Reed sent Vallivero a letter informing him that appellant had been observed recklessly driving in the mobile home park while intoxicated. Vallivero subsequently told Reed "he was having a hard time getting an agreement with [appellant] to vacate the park." On October 7, appellant was formally served with notice of the eviction proceedings against him.

On the morning of November 16, appellant's mother Brenda Caves called 911 and reported that appellant had hit his roommate with a baseball bat, that the roommate did not appear to be breathing, and that appellant had put him in the bathtub. San Luis Obispo County Sheriff's Deputies Dustin Phillips and Jason Hall responded to Caves's house. Appellant was outside the house with Caves and his hand was bandaged. Appellant



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requested medical assistance and Deputy Hall rode with him in an ambulance to the hospital. While they were in the ambulance, appellant said he cut his finger on a glass bottle and that his jaw hurt because he had been hit with a fist.

Vallivero's body was found in the bathtub. He had a laceration to his left arm, a deep incision wound on the back of his neck, lacerations and fractures along the left side of his head, stab wounds to his back, and numerous wounds to his head and body that were consistent with blunt force trauma. Vallivero also had defensive wounds on his forearms, hands, and wrists, and bruises on the right side of his torso. The cause of death was blunt force injuries to the head. Toxicology results showed that Vallivero had a 0.19 blood alcohol level; tests for controlled substances were negative.

Appellant was interviewed at the hospital and later at the sheriff's station. He said he had just finished cleaning the kitchen when Vallivero arrived home after buying beer and told him to "get the fuck out of [his] house." Appellant became "heated" and armed himself with a rock because he was going to walk past Vallivero and was "sick of [Vallivero's] shit." Vallivero told appellant, "I'm going to kill you. You're going to fucking die." Vallivero punched appellant. Appellant hit Vallivero with the rock and struck him approximately three times on the head with a beer bottle. The bottle broke and Vallivero fell backwards onto the couch. Appellant picked up a baseball bat and hit Vallivero with it, causing Vallivero to fall to the floor.

Appellant continued to hit Vallivero with the bat as Vallivero lay motionless on the floor. Appellant then retrieved a knife and tried to stab Vallivero in the chest "to make sure that



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he was gone." The knife would not penetrate Vallivero's chest, so appellant stabbed him in the neck.

After placing Vallivero's body in the bathtub, appellant drank Vallivero's beer and attempted to clean the house. He also considered fleeing, but ultimately called Caves and told her what had happened.

Appellant believed that he had to defend himself because Vallivero "kept punching" him, but acknowledged that Vallivero had struck him only once or twice. Appellant felt that his conduct was due to feelings of frustration that "went way overboard" and added that if he could "take it back [he] would."

## DISCUSSION

### Miranda *Motion*

Appellant contends the trial court erred in denying his motion to exclude the statements he made at the hospital and sheriff's station on the ground they were obtained in violation of *Miranda*. We are not persuaded.

*Miranda* provides that a person questioned by law enforcement after being "taken into custody" must first be warned that he or she has the right to remain silent, that any statements that he or she makes may be used against the person, and that he or she has a right to the presence of retained or appointed counsel. (*Miranda*, *supra*, 384 U.S. at p. 444.) For the *Miranda* rule to apply, there must be an interrogation by the police while the suspect is in police custody. (*Id.* at p. 478.)

Whether a person is in custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." (*Stansbury v. California* (1994) 511 U.S. 318, 323 [128 L.Ed.2d 293].) "The question whether [the] defendant was



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in custody for *Miranda* purposes is a mixed question of law and fact." (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) "[A]n appellate court must 'apply a deferential substantial evidence standard' [citation] to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave' [citation]." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400.)

"To determine whether an interrogation is custodial we consider a number of circumstances, including: 'whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation.'" (*People v. Torres* (2018) 25 Cal.App.5th 162, 172-173.)



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At the hearing on appellant's suppression motion, Deputy Hall testified that appellant was subjected to a patdown search for the deputies' safety when they first encountered him at Caves's house. Appellant was never handcuffed and Deputy Hall never asked him any questions about Vallivero's killing. Deputy Hall rode with appellant in the ambulance to the hospital to ensure the paramedics' safety while Deputy Phillips followed in the patrol car.

Detective David Marquez arrived at the hospital and introduced himself to appellant as he lay in a bed in the emergency room. Detective Marquez asked appellant if he needed anything and told him he would speak to him after he was treated.

Detective Nathan Paul subsequently arrived and introduced himself to appellant. Detective Paul told appellant he was there to find out what had happened and asked if appellant was willing to accompany him to the sheriff's station to talk. Appellant said "okay" then added, "I don't know my rights. . . . I defended myself." Detective Paul responded "you're not under arrest. If you defended yourself, that's what I want to hear about." Appellant replied: "My mom's working on an attorney . . . and [she] told me not to talk to anyone cause I could incriminate myself . . . . I don't know my rights, so um, I was in a fight and I defended myself and – and it got really bad and then I didn't know what to do after that point. I tried to clean up the mess." Appellant proceeded to provide a detailed account of what had happened. At one point during the interview, appellant was allowed to use the bathroom.

After appellant had been treated, Detective Paul asked if he was still willing to accompany him to the sheriff's station for



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further questioning. Appellant asked if he could smoke a cigarette after they arrived at the sheriff's station and the detective replied, "When we get there we'll let you . . . stand outside and . . . smoke as many as you need." Appellant then asked, "I know you've probably gotta book me, right?" The detective replied in the negative and told appellant he was not being handcuffed and was a "free walking man."

After they arrived at the sheriff's station, appellant was allowed to smoke a cigarette outside and use a restroom without any supervision. Before conducting the interview, Detective Paul confirmed with appellant that he was there voluntarily and reiterated he was not under arrest. During the interview, appellant took at least three cigarette breaks and a bathroom break. Near the end of the interview, appellant was told he was being detained for killing Vallivero.

In denying appellant's suppression motion, the court found that appellant had voluntarily agreed to be interviewed; that there was no custodial interrogation because a reasonable person in appellant's position would have felt free to terminate the interview until the point he was told he was being detained; and that appellant had never unequivocally indicated that he wanted an attorney. The court further found that law enforcement had not dominated or controlled the course of the interrogation and that appellant had "set the pace" of the interview.

The court did not err in denying appellant's motion. At both the hospital and the sheriff's station, appellant was free of physical restraints and was advised he was not under arrest and was free to leave. Moreover, no weapons were displayed and there is nothing to indicate that the deputies and detectives who spoke to him were aggressive or accusatory or employed special



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techniques to pressure him. On the contrary, every effort was made to ensure that appellant was comfortable and that his needs were accommodated. The court thus correctly found, under the totality of the circumstances, that appellant's statements at the hospital and the sheriff's station were not the result of a custodial interrogation. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1400.) The cases appellant cites in support of his claim are plainly inapposite.[3]

To the extent appellant claims that his statements were involuntary because the detectives exploited his mental illness and unduly prolonged his interview at the sheriff's station, those were not raised below and are thus forfeited. In any event, appellant fails to establish that the detectives who interviewed him engaged in coercive conduct. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1041 [recognizing that "[c]oercive police activity is a necessary predicate" to a finding that a confession was involuntary].) Moreover, the identified circumstances that allegedly rendered appellant's statements involuntary took place at the sheriff's station. Because appellant had already provided a detailed account of the incident while he was at the hospital, any error in admitting the statements he subsequently made at the sheriff's station was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]; *People v. Case* (2018) 5 Cal.5th 1, 22 [*Miranda* violations subject to harmless error standard of review set forth in *Chapman*].)

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[3] Appellant also fails to inform us that one of the cases upon which he relies, *People v. Boyer* (1989) 48 Cal.3d 247, has been disapproved to the extent it "may be read to suggest that an officer's subjective focus of suspicion is an independently relevant factor in establishing custody for the purposes of *Miranda* . . . ." (*People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)



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***Sufficiency of the Evidence***

Appellant claims that his murder conviction must be reversed because the evidence is insufficient to prove he killed Vallivero with premeditation and deliberation. In reviewing this claim, we "must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054-1055, internal quotation marks omitted.) We "presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*Ibid.*)

The "mental state [for first-degree murder] is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*People v. Chiu* (2014) 59 Cal.4th 155, 166.) The process of premeditation and deliberation does not require any extended period of time. (*People v. Watkins* (2012) 55 Cal.4th 999, 1026.) The test is one of the extent of reflection rather than the duration of time. (*Ibid.*)

Our Supreme Court has identified three categories of evidence relevant to establishing premeditation and deliberation. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; *People v. Brooks* (2017) 3 Cal.5th 1, 58-59; *People v. Houston* (2012) 54 Cal.4th 1186, 1216.) The categories include events occurring before the



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killing that indicate planning, motive to kill, and manner of killing that reflects a preconceived design to kill. (*Anderson*, at pp. 26-27.) The factors are neither exclusive nor invariably determinative. (*Brooks*, at p. 59; *Houston*, at p. 1216.) Evidence of each category is not required to affirm a judgment of first degree murder. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 605.) The factors are merely a guide in determining whether the evidence supports an inference that the killing occurred as a result of preexisting reflection rather than a rash impulse. (*Brooks*, at p. 59.)

Sufficient evidence supports appellant's conviction of attempted premeditated and deliberate murder. Appellant's arguments to the contrary fail to acknowledge the standard of review, which compels us to view the evidence in the light most favorable to the judgment. (*People v. Nguyen*, *supra*, 61 Cal.4th at pp. 1054-1055.)

Prior to the killing, appellant armed himself with a rock. After Vallivero allegedly punched appellant, appellant hit him on the head with the rock and proceeded to break a beer bottle over his head, causing him to fall on the couch. Appellant then armed himself with a baseball bat and repeatedly hit Vallivero in the head as he lay motionless on the ground. To make sure Vallivero was dead, appellant retrieved a knife and stabbed him in the neck. The circumstances and manner of the killing amply support the jury's findings of premeditation and deliberation. (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27; see also *People v. Perez* (1992) 2 Cal.4th 1117, 1128 [recognizing that defendant's use of a second knife to inflict post mortem wounds, when considered in conjunction with the manner of killing, "could easily have led the jury to infer premeditation and



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deliberation"].) Appellant also expressed a motive for the killing by acknowledging he was angry about being evicted, was "sick of [Vallivero's] shit," and wanted him "gone." Appellant's claim of insufficient evidence thus fails.

***Evidence of Vallivero's Drug Use***

Appellant also contends the court abused its discretion and violated his due process rights by excluding evidence of Vallivero's drug use. We disagree.

Only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court has discretion to exclude relevant evidence when its prejudicial effect substantially outweighs its probative value. (Evid. Code, § 352.) Evidentiary rulings are reviewed for abuse of discretion, and a court's decision will be upheld unless it exceeds the bounds of reason. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197; see also *People v. Stitely* (2005) 35 Cal.4th 514, 550.)

When appellant was interviewed, he stated that Vallivero used methamphetamine and was "drinking and on meth" when the crime occurred. Prior to trial, the prosecution moved in limine to exclude any reference to Vallivero's methamphetamine and cocaine use as irrelevant and substantially more prejudicial than probative under Evidence Code section 352. The court granted the motion after finding that the evidence was both irrelevant and unduly prejudicial because no methamphetamine, cocaine, or other illicit drugs were found in Vallivero's system after his death. Later in the proceedings, defense counsel moved to admit Vallivero's medical records showing that Vallivero had admitted using methamphetamine and had been diagnosed as a



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chronic user of the drug. The court denied the motion and reiterated its prior ruling that evidence of Vallivero's methamphetamine use was unduly prejudicial under Evidence Code section 352.

The court did not err. Appellant contends that "his statements about how he personally experienced Vallivero to act unreasonably and violently *when Vallivero was using or high on meth* were relevant to show the reasonableness of appellant's fear and resulting actions." It is undisputed, however, that Vallivero was not under the influence of methamphetamine or any other illicit drug when he was killed. Moreover, it is not reasonably probable that appellant would have achieved a more favorable result had the challenged evidence been admitted. As the People aptly put it, "appellant's alleged belief that Vallivero was under the influence of methamphetamine, as opposed to just alcohol, had minimal or no probative value to any claim of self-defense." Accordingly, any error in excluding evidence of Vallivero's drug use was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Mullens* (2004) 119 Cal.App.4th 648, 659 [error in excluding evidence under Evidence Code section 352 reviewed under the harmless error standard set forth in *Watson*].)

***Mutual Combat/Initial Aggressor (CALCRIM No. 3471)***

The trial court instructed the jury on the doctrines of self-defense (CALCRIM No. 505) and imperfect self-defense (CALCRIM No. 571). Over appellant's objection, the jury was also instructed on the limitations of the right of self-defense to one who engaged in mutual combat or acted as the initial aggressor, as provided in CALCRIM No. 3471.[4] Appellant

[4] The jury was instructed as follows: "A person who engages in mutual combat or who starts a fight has a right to



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contends the court committed prejudicial error and violated his federal constitutional rights by giving the mutual combat instruction. This contention lacks merit.

"It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) Error in giving an inapplicable instruction is one of state law subject to the *Watson* test for prejudice, under which reversal is required if it is reasonably probable the defendant would have obtained a more favorable result in the absence of the error. (*Id.* at p. 1130; *Watson*, *supra*, 46 Cal.2d at p. 836.)

The court did not err in giving the challenged instruction. There was evidence from which the jury could have found that appellant not only engaged in mutual combat with Vallivero, but also acted as the initial aggressor. Although appellant offers his

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self-defense only if: [¶] 1. He actually and in good faith tried to stop fighting; [¶] 2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting; [¶] AND [¶] 3. He gave his opponent a chance to stop fighting. [¶] If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight. [¶] However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting, or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim of self-defense arose." (Italics omitted.)



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self-serving assertion that Vallivero initiated the incident by punching him, the jury was entitled to reject that assertion. According to Vallivero, appellant had been the initial aggressor of a prior fight between the two regarding the cleanliness of the kitchen. Moreover, appellant admitted that he approached Vallivero with a rock in his hand because he "knew" the two of them were going to fight. The jury could thus reasonably find that appellant intended to fight with Vallivero before Vallivero allegedly punched him.

Even if the instruction should not have been given, the error would be harmless. The jury was separately instructed pursuant to CALCRIM No. 3474 that "[t]he right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends." Appellant continued to use deadly force against Vallivero well after he had rendered Vallivero incapable of inflicting any injury upon him. No reasonable juror thus would have found that appellant killed Vallivero in self-defense or imperfect self-defense. (*People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201-202.)

The jury was also instructed pursuant to CALCRIM No. 200 that "[s]ome of the[] instructions may not apply, depending on your findings about the facts of the case." Because of this instruction, "the jury is presumed to disregard an instruction if the jury finds the evidence does not support its application." (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 278; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381.) Because appellant does not rebut this presumption or otherwise demonstrate a reasonable probability that he would have achieved a more



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favorable result had the challenged instruction not been given, his claim fails. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.)

***Prosecutorial Misconduct; Ineffective Assistance of Counsel***

For the first time on appeal, appellant contends the prosecutor committed misconduct by misstating the law eight times in his closing argument. Anticipating our conclusion that these claims are forfeited because defense counsel did not object to any of the alleged misstatements, appellant alternatively contends that counsel's failure to object amounts to ineffective assistance.

Prosecutorial misconduct exists "'under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' (*People v. Earp* (1999) 20 Cal.4th 826, 858.) In more extreme cases, a defendant's federal due process rights are violated when a prosecutor's improper remarks ""'infect[] the trial with unfairness,'"' making it fundamentally unfair. (*Ibid.*) ""'To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument.'" [Citation.] A court will excuse a defendant's failure to object only if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 349.)

Here, defense counsel did not object to the prosecutor's alleged misstatements and made no requests that the jury be admonished. Moreover, appellant has not established that objections or admonition would have been futile. Because the alleged misconduct consisted of purported misstatements of law,



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they could have easily been corrected by the trial court with an admonition. (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*).) Appellant's claims of prosecutorial misconduct are thus forfeited. (*Ibid*; *People v. Jackson*, *supra*, 1 Cal.5th at p. 349.)

We also reject appellant's claims that trial counsel provided ineffective assistance by failing to object. "A party claiming ineffective assistance must first demonstrate that his counsel's performance was deficient. [Citations.] In reviewing counsel's performance, we 'exercise deferential scrutiny.' [Citations.] To that end, it is up to [appellant] to show his counsel's performance was deficient because his '"representation fell below an objective standard of reasonableness . . . under prevailing professional norms."' [Citation.] Second, even after a party demonstrates ineffective assistance, he must also show he has been prejudiced, i.e., 'that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.] If [appellant's] showing as to either component is insufficient, the claim fails. [Citation.] Accordingly, if he cannot show prejudice, we may reject his claim of ineffective assistance, and need not address the adequacy of trial counsel's performance. [Citations.]" (*People v. King* (2010) 183 Cal.App.4th 1281, 1298; *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [80 L.Ed.2d 674].)

Moreover, "[t]he appellate record . . . rarely shows that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored." (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) "'[T]he



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decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one' [citations], and 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence' [citation]." (*Centeno*, *supra*, 60 Cal.4th at p. 675.)

Appellant contends that during closing argument the prosecutor misstated the law by asserting (1) that "if there is motive, there's first degree murder"; (2) that appellant's efforts to clean up the crime scene after he killed Vallivero "means [that] he in his own mind knows he is guilty of murder"; (3) that appellant could not be found to have acted in self-defense unless he "reasonably believed he was in imminent danger of being killed"; (4) that the provocation element of voluntary manslaughter based on sudden quarrel or heat of passion was not established by evidence that Vallivero had previously threatened appellant, because two neighbors who allegedly heard Vallivero make such threats were not concerned enough to call the police; (5) that "if you find there is no imperfect self-defense, then it's murder"; (6) that the extent of reflection required for a finding of premeditation is similar to the extent of reflection a driver engages in when approaching a yellow traffic signal; (7) that for appellant's claim of self-defense to be valid, Vallivero "better have" hit appellant so hard that he "annihilated his jaw"; and (8) that reasonable doubt means "[i]f what the People are saying is reasonable and [the] defense says it's possible but unreasonable, that's a guilty verdict."

Even assuming that defense counsel provided deficient performance by failing to object to these arguments, appellant was not prejudiced because the jury was instructed that counsel's arguments were not evidence (CALCRIM No. 222) and that the



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jury was to follow the instructions given by the court even if counsel's comments conflicted with those instructions (CALCRIM No. 200). The jury was also properly instructed on reasonable doubt (CALCRIM Nos. 103, 220), motive (CALCRIM No. 370), hiding evidence as consciousness of guilt (CALCRIM No. 371), justifiable homicide based on self-defense (CALCRIM No. 505), provocation (CALCRIM No. 522), and voluntary manslaughter based on sudden quarrel or heat of passion (CALCRIM No. 570) and imperfect self-defense (CALCRIM No. 571). Absent evidence to the contrary, we presume the jury followed these instructions. (*People v. Johnson* (2015) 61 Cal.4th 734, 770; see also *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8 ["We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate"].) Appellant offers no such evidence here, so his claim of ineffective assistance of counsel fails.

**Dueñas**

For the first time on appeal, appellant contends, in reliance on *Dueñas*, *supra*, 30 Cal.App.5th 1157, that the trial court erred by ordering him to pay a $30 criminal conviction assessment (Gov. Code, § 70373) and a $40 court operations assessment (§ 1465.8, subd. (a)(1)) without first determining his ability to pay those assessments. In *Dueñas*, the court held that imposing these assessments without a hearing on the defendant's ability to pay violates due process of law under both the federal and state constitutions. (*Dueñas*, at p. 1168.) Neither statute expressly prohibits the court from considering the defendant's ability to pay. By contrast, section 1202.4, subdivisions (b)(1) and (c) expressly prohibit the trial court from considering a defendant's ability to pay a restitution fine unless the fine exceeds $300.



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If the court imposes a restitution fine above the $300 statutory minimum, it may consider the defendant's ability to pay. (§ 1202.4, subd. (c).) Appellant was ordered to pay a $7,800 restitution fine, so he had the opportunity to bring to the court's attention any factors relevant to his ability to pay. (*People v. Avila* (2009) 46 Cal.4th 680, 729.) He did not do so, so he forfeited any challenges to the restitution fine. (*Ibid.*) Appellant likewise did not object to the two assessments he now challenges. We need not decide whether he forfeited his claims because under the circumstances present here, where appellant did not object to the $7,800 restitution fine, "he surely would not complain on similar grounds regarding an additional" $70 in assessments. (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033.)

***Cumulative Error***

Appellant contends that the cumulative effect of the alleged errors deprived him of his due process rights and resulted in the denial of a fair trial. We reject this contention because there is no prejudicial error to cumulate. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1094.)

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J. TANGEMAN, J.



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Jacquelyn H. Duffy, Judge
Superior Court County of San Luis Obispo

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Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

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