Andrew Rachal v. Robert W. Fox

2024 | Cited 0 times | N.D. California | February 12, 2024

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

ANDREW RACHAL,

Plaintiff, v. ROBERT W. FOX,

Defendant.

Case No. 17-cv-01254-PJH

ORDER DENYING AMENDED PETITION FOR WRIT OF HABEAS CORPUS Re: Dkt. No. 22

Before the court is the first amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by represented state prisoner Andrew Mark Rachal and the memorandum of points and authorities in support thereof. See Dkt. 2 . The briefs are fully submitted and the court determines that the matter is suitable for decision carefully considered the relevant legal authorities, the court DENIES the petition.

BACKGROUND A. Factual Summary

1. California Court of Appeal Summary of Facts Introduced at Trial The following summary of facts is taken from the decision by the California Court of Appeal on direct appeal, based on evidence presented at trial, which resulted in a conviction on August 13, 2013. See Pet., Ex. B on Appeal from the Judgment of the Superior Court at 3604 (date of verdict). 1

1 This order refers to page numbers in the original document when available as in, e.g., state court opinions and orders. Otherwise, and where original pagination is unclear, this

On May 10, 2011, Ricky Patterson suffered multiple stab from house and drive away. The next day, defendant fell or jumped off of a highway overpass in Santa Barbara County, resulting in serious injuries.

Patterson was an unlicensed contractor. In late 2010 and early 2011, Patterson was working with Kevin Johnson, another unlicensed contractor. Patterson and Johnson worked on various projects for Ronald Willoughby, who owned property in Berkeley. One of the projects required a licensed general

contractor, so Patterson proposed that Willoughby hire wife, defendant, Patterson, and Johnson subsequently agreed that Johnson would do the painting and drywall, Patterson would do carpentry and some other work, and defendant would

Johnson were working together on a different project. They commuted to the job site together in Patt the commutes, Johnson often heard phone conversations between defendant and Patterson. Patterson would put his cell phone on speaker, so Johnson heard both sides of the conversations. son overheard defendant tell Patterson that he was not going to use Patterson or Johnson for the Willoughby job. Johnson later overheard defendant say that he had started the job. He also heard Patterson tell defendant that the Willoughbys wanted their money back, referring to a $10,000 deposit or down payment. At some point after learning that defendant was not going to use him for the Willoughby job, Johnson spoke to defendant on the phone. They argued, and defendant hung up on Johnson. Defendant then called Johnson back. Defendant said he did not have a problem with Johnson; his issues were with Patterson.

he did advise Patterson to stay away from defendant. Johnson also advised Patterson to stop being upset about defendant not using them for the Willoughby job. As recently as two days before the stabbing incident, Johnson had told Patterson to

court refers to the page numbers stamped in the lower righthand corner of documents, as in the Rep . For example, RT page 3604 is found -19 at ECF page 205.

go. According to Johnson, the arguments between defendant and Patterson were not just about the Willoughby job. Defendant - Patterson getting defendant fired from being a supervisor at another construction job. The conversations he overheard

Between May 2, 2011 and May 10, 2011 (the day of the homicide), there were numerous phone calls between seven calls on May 2, five calls on May 3, seven calls on May 4, three calls on May 5, no calls on May 6, 28 calls on May 7, four calls on May 8, six calls on May 9, and three calls on May 10.

Just before 3:00 p.m. that day, he heard cries for help and followed the sound. He encountered Phuong Phan, who lived next door to defendant. Phan had just returned home with two of her children and was in her driveway. After confirming that Phan had also heard the cries for help, use. Brillantes looked through a broken window and saw two men inside near the -1-

Brillantes backed away from the house. He saw the garage door open, then saw a man in the driveway. Phan, who was in her driveway, saw that the person was defendant. Phan asked de injured.

Meanwhile, Brillantes called 9-1-1. While on the phone with the up, then

driveway, just outside of the garage, near the back of and taken to the hospital, where he died.

C. Defen On the afternoon of May 11, 2011, Brian Kent and his wife were driving northbound on Highway 101 in Santa Barbara County. He saw a white truck come up behind him. The truck was times. Kent wanted to call 9-1-1, and his wife wanted to call the number on the side of the truck. Kent followed the truck as it took an exit and went onto an overpass. The white truck stopped on the overpass. Defendant was inside the truck. He appeared to be doing something possibly writing. After about two or three minutes, he drove forward, stopped again, got out, and walked to the overpass railing.

Ronald Jasso was also driving with his wife northbound on Highway 101 on May 11, 2011. Jasso saw defendant standing on the overpass. Defendant put his arms at his sides and of the freeway, feet first, and then and went to see if defendant was okay. Defendant appeared to

be unconscious at first, but he later tried to stand up and crawl toward the center of the fast lane. Jasso did not hear defendant say anything. Defendant was wearing clear plastic gloves on both hands. sted a number of

truck also contained an empty Sominex box, Sominex pill wrappers, two empty Red Bull cans, and eight unopened cans of tuna fish.

After his death, Patter wounds of the head and extremities in other words, extreme

blood loss. Patterson had 31 penetrating stab wounds, one of which had transected a large vein and an artery. Seven of the stab wounds were one-half inch deep; all of the others were deeper. Patterson had a stab wound near his shoulder that was over three inches long and one inch deep. He had a stab wound in the back of his head that was one and a half inches long and one inch deep. could have broken a knife blade.

Patterson had several stab wounds in his face. One was on the right side of his face, one was in his forehead, and one was on the left side of his face. He also had a stab wound near his left ear. Patterson had a number of stab wounds in or around his left arm. A stab wound in his left shoulder was three inches deep; it had both entry and exit wounds. Another stab wound was below that one. He had three stab wounds in his left arm. One most signif transected a major vein and an artery.

with an incised wound on that hand. At least two of the stab stab wounds in that hand was four inches long. Patterson had two stab wounds in his right arm. Stab wounds in the back of his right upper arm and in his right forearm were both three inches deep. There was one stab wound and one incised wound on his right hand. Several of the stab wounds in his left leg were three or more inches deep. was four inches deep, and another one had gone through his leg. Patterson also had blunt force injuries to his forehead, the bridge of his nose, and to his chest. He had abrasions on his abdomen, back, and arm. Patterson was five feet, 11 inches tall and weighed 262 pounds at the time of his death. Defendant was five feet, 10 inches tall and weighed 228 pounds.

he was in the hospital. There were horizontal defects on four

force injuries, and they would have made it impossible for defendant to grip a knife handle. - Defendant had similar damage to the pinkie finger of with his hands sliding onto the blade of the knife after stabbing Patterson and hitting bone. The injuries could also have been defensive wounds.

A knife handle with a broken blade, which contained blood, was found in a garbage can in the garage. A broken knife blade was found on the kitchen floor. A broken coffee pot was also found on the kitchen floor. When police first arrived, the faucet in the kitchen sink was running. The bay window in the living room was broken, with a small kitchen drawer lodged in it. A chair in the dining room was overturned. A set of blinds in the bedroom was pulled down. bedroom, where a lot of blood was lost. There was blood on the

bed, pillows, and carpet. There was also blood in the hallway leading out to the living room and kitchen, including handprints on the hallway walls. Some of the handprints were near the ground, indicating a person may have been crawling. Other hand prints were higher up, suggesting that a second person had walked through the hall. The higher handprints appeared to have been from someone who had blood on his or her hands but whose own hands were not cut. The lower handprints

In the living room, there were bloody footprints leading from the kitchen to the front door and back. There was a blood smear on

A large amount of blood was in the kitchen. Blood was smeared on cabinets, appliances, and the floor. Blood droplets were on on top. There was a large pool of blood under a kitchen counter,

indicating that someone lost a lot of blood in that location. A blood smear on a kitchen cabinet suggested that something such as a head or knee had been hit repeatedly against it. The blood on the kitchen floor was consistent with Patterson being stabbed there, and higher spatter indicated that was where he was stabbed in the back of the head. Blood spatter near a light switch in the entry to the garage from the kitchen was consistent with the hand injury defendant had suffered. Blood stains on the floor going into and through the garage were consistent with someone crawling. Patterson was the major source of the DNA in samples taken from blood on the bedroom floor and from blood on items in the bedroom such as a quilt and two pillowcases. Patterson was also the source of the DNA in blood samples taken from the hallway. Samples of blood found in the kitchen contained DNA was on the knife blade along with other DNA, which could handle, with Patterson as a possible contributor.

According to criminalist Cordelia Willis, the above evidence showed that defendant was not bleeding in the master bedroom, where there had been a struggle; he was injured in the kitchen, where there was a further struggle. The bloody footprints indicated that defendant had walked to the front door

and back after the struggle in the bedroom and before being injured in the kitchen. There was no si except where the police had broken down the front door.

G. Defense Testimony Timothy Sutherland was driving his motorcycle north on Highway 101 in Santa Barbara County on May 11, 2011 when he saw defendant lying in the roadway. Sutherland pulled over

Forensic pathologist and consultant Dr. Judy Melinek testified injuries. She thought it was unlikely, but possible, that the knife blade. She testified that if defendant had consumed the entire box of Sominex pills, he would have been disoriented and sleepy, and he possibly would have hallucinated and been delirious. Private investigator Gregg Dietz took photos and video at where Brillantes claimed to have been standing when he looked inside, a person could not see into the kitchen. Santa Barbara Deputy Sheriff David Valadez was one of the from the overpass on May 11, 2011. Deputy Valadez had defendant had tried to prevent him from doing so by clenching his fists. Deputy Valadez did not know what had happened to the gloves. Defendant did not testify at trial. H. Prior Misconduct Evidence Chanda McClendon Chanda McClendon had a two-year dating relationship with defendant that ended in May of 2011. At some point in April or

On May 2, 2011, McClendon was parking in a garage at her school when defendant showed up. Defendant blocked atened to kill himself. car, but he eventually allowed her to move her car. McClendon called 9-1-1 and drove towards a police station. Defendant followed her and pulled up alongside her when she parked. McClendon subsequently obtained a restraining order. showed that defendant had performed a number of Google searches following the McClendon incident. On May 2, 2011, , 2011, defendant had searched for defendant had performed a number of searches containing rched stalking.

I. Prior Misconduct Evidence Diane Williams and Gail Seahorn On March 28, 1998, San Jose Police officers were dispatched to a residence in response to a domestic dispute call. The officers contacted defendant and Diane Williams, and they asked Williams not to press charges. While one officer filled out paperwork and the other spoke with Williams in another room, defendant tried to dive head-first through a second story window. In 1999, defendant was convicted of felony false imprisonment by violence against Williams as well as infliction of corporal injury on a spouse or cohabitant. In 2004, defendant was convicted of false imprisonment by violence against Gail Seaton. No facts of that offense were introduced at trial. Pet., Ex. C (found at Dkt. 22-20, hereafter the at 2 10.

This factual summary by the state court of appeal of the evidence presented at trial is presumed correct. See 28 U.S.C. § 2254(e)(1); Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009).

2. This court can consider new facts so long as they meet the standard outlined in 28 U.S. Code § 2254. The applicant can rebut a determination of a factual issue made by a s § 2254(e)(1).

Andrew Rachal v. Robert W. Fox

2024 | Cited 0 times | N.D. California | February 12, 2024

Petitioner presents the following facts that were not introduced at trial, but which petitioner argues should have been introduced, as well as evidence produced during the evidentiary hearing in the Superior Court on the habeas proceeding brought at that level. declarations of Andrew Mark Rachal submitted in support of the superior court Petition for

, as well as recorded witness interviews taken by Santa Clara County District Attorney Investigator Kevin Coyne . Pet. at 9 n.2 (citing Exs. D G & J K).

a. The Willoughby Job Petitioner was asked by Ricky Patterson and Kevin Johnson to give an estimate for a friend to repair various parts of a building that sustained water damage. Ultimately, Audrey Owens, the executor for Lorraine Owens, at the Owens Apartments in Berkeley, signed a contract for petitioner's company, R-Square Design and Construction Company, to do the work. The plans were drawn, stamped, and approved and permits were given to start work. The contract petitioner bid for was in the amount of $23,000 but it required Farmers Insurance approval before the work was to start.

Subsequently, the Farmers adjuster in the Claims Department approved the contract. However, without petitioner's knowledge, it was approved for $33,000. Petitioner learned later, after the Farmers investigation concluded, that Arcola Moore, Audrey's daughter, used the same contract letter head and repair list that he drafted, made a counterfeit copy, and forged petitioner's signature on it. Ms. Moore also signed her grandmother's signature.

Prior to starting the job, petitioner met with Audrey Owens Willoughby at Wells Fargo Bank in Oakland, California to receive the first check. This check was for $7,300. At this point, petitioner had already started doing some preliminary work and was clocking company hours. The next Monday, petitioner approached the Owens Apartment Complex when he was informed that there would be a delay in starting the work. Petitioner asked the reason but was hung up on by Mr. Willoughby.

Within the next hour, Arcola Moore called petitioner and told him he was fired. Petitioner asked to speak with Audrey Owens but Arcola replied that Audrey did not want to speak with him. Petitioner then offered to send an invoice after he received a breach of contract notice. Arcola stated she wanted a full refund but petitioner stated he would give her $5,000. Arcola subsequently stated that if they did not get a full refund, they would call the contractor's board.

Next, petitioner signed over the copyrights to the architectural drawing to Lorraine Owens on behalf of the property owners. He contacted the building department to inform them that he would not be doing the Owens project and that R-square Design would not be liable for the work. Petitioner told the Farmers adjuster he wanted something in writing, so he stated that he would fax the contract to him. Once the adjuster received the contract, he contacted petitioner and stated that it was for $10,000 less than the contract that was e-mailed by Arcola. Petitioner later met with investigator Larry Shaffer from Farmers, and it was confirmed that the contract they received from Arcola was a

counterfeit copy. In March of 2011, the Farmers adjuster informed petitioner he was cleared of any wrongdoing in this fraudulent insurance claim being pursued by the Willoughbys.

b. May 9, 2011 On May 9, 2011, the night before the homicide, Patterson visited his long-time friend, Steven Friendly, at his home. Friendly stated that Patterson advised him that he had come there after leaving petitioner s home. While at Friendly's home, petitioner called Patterson who put his phone on speaker allowing Friendly to hear the conversation. Friendly noted that he could tell petitioner was doing cocaine because he sounded strange on the phone and he suspected Patterson was doing it with him before coming over. During the conversation, petitioner told Patterson that he wanted to go out that night and "pick up on some women." He wanted the two to "go out to the bars and we gotta pick up women ... You're a pretty good lookin' guy ... you'll probably get anyone you want ... you'd be surprised at what you could get." Petitioner and Patterson spoke for at least thirty minutes to discuss whether they should go to the bars together that night.

Friendly felt that petitioner was coming onto Patterson. After the conversation ended, Friendly told Patterson that it sounded like Rachal was making a move on him. Patterson seemed to know what Friendly was talking about and stated that he had "been there before with [Rachal] with this kind of conversation" and that he was not worried about it. Patterson stated he knew how to deal with it and "just kinda blew it off."

c. May 10, 2011 On the day of the homicide, Patterson woke up between 4:00 and 5:00 a.m. at the home of his girlfriend, Cora Coloma. He told Coloma that he was going to San Francisco to pick up his check and then to petitioner's home to discuss a job. Patterson left around 5:00 a.m. At around 6:00 a.m. Patterson briefly returned to Friendly's to let him know that petitioner was going to help him on a job that Friendly had spoken to him about the previous night when they were together.

Patterson subsequently drove to the home of his ex-girlfriend, Sandy Tellez, to pick up his tools. He arrived between 6:30 and 7:00 a.m. Around 7:45 a.m., Coloma left to work when Patterson called her. Patterson stated he was coming back from San Francisco and Coloma stated he left his car alarm key. The two met near Blossom Hill Road. Five minutes after leaving, Patterson called Coloma and stated he was going to petitioner's house.

After thirty minutes passed, Patterson called Coloma and stated "You know, Andrew is a gay, Cora." Cora asked him, "What makes you say that?" Patterson responded, "I just left his house ... he tr[ied] to pull my pants and do me ... he's gay." Patterson continued, "I was so mad ... we had a fight because I [didn't] want to do it. That's why I left."

Patterson subsequently called Sandy Tellez and told her to open the garage door because he was on his way. According to Tellez, Patterson sounded disturbed. When he arrived to Tellez's home, Patterson exclaimed, "Sandy, you're not going to believe this!" Tellez asked Patterson what was wrong. Patterson responded, " I just came from Andrew's ... and he hit me up, you know ... and tried

to pull my pants down." Patterson showed Tellez scrapes on his forearms. Patterson continued, "That effin' tried to eff me ... he pulled down my pants ... that effin pervert." Tellez told Patterson to calm down and not to go back over to petitioner's.

Patterson described petitioner as "a mad man, on something ... not himself." According to Tellez, the sexual advances made by petitioner visibly disturbed Patterson. He had a look of hurt and devastation. Patterson told Tellez he was not going to go back to petitioner's home but that he was going to tell everyone what had occurred.

After Patterson left Tellez's home, he went next door to Henry and Laura Alcantar's home. According to Mrs. Alcantar, he arrived between 9 and 11 a.m. His plan was to pick up Henry to go get a check for a job they finished. Mrs. Alcantar described Patterson as anxious when he arrived. Patterson told Mrs. Alcantar that "something just happened right now." Mrs. Alcantar asked him, "What's going on?" Patterson stated that one of his friends tried to make a pass at him. He said "What the hell, I'm not freaking gay." Patterson told Mrs. Alcantar that petitioner told him he has had a crush on him throughout the years. Patterson subsequently stated again, "I'm not gay ... I've always had a woman ... Oh man ... I can't believe that." According to Mrs. Alcantar, Patterson was in shock. The Alcantars called Patterson 30-40 minutes later. Patterson called back and said he was on his way back to their house but never showed up.

At 11:45 a.m., Patterson called Coloma and asked her to go to lunch. Coloma was unable to go because she was meeting a friend at a restaurant. At 12:11 p.m., Patterson called Friendly and left a message. At 12:49 p.m., Friendly called Patterson back. The two men never got in touch with each other. B. Procedural History

The Petition for Writ of Habeas Corpus stems from two state court actions brought on behalf of Rachal that were unsuccessful. 1. State Court Trial and Direct Appeal

Petitioner was charged with murder arising out of the May 10, 2011, death of Ricky Patterson. See Court of Appeal Sixth Appellate District Clerk's Transcript, Pet., Ex. A at 426 28. The information specifically charged petitioner Andrew Mark Rachal with murder in violation of California Penal Code section 187, with a weapon use allegation under section 12022(b). Id. Rachal pled not guilty. Id. at 430. On August 13, 2013, the jury found him guilty of murder, with a finding that it was in the first degree, and found true the weapon enhancement. RT 3604; CT 799 89. On October 18, 2013, the court sentenced Rachal to serve an indeterminate prison term of twenty-five years to life, to be served consecutive to a one-year determinant term for a violation of section 12022(b)(1). RT 3649; CT 1020 22.

On October 18, 2013, petitioner filed a notice of appeal. CT 1023. On November 30, 2015, the California Court of Appeal upheld the judgment of conviction. See Appellate Opinion at 1. The California Supreme Court denied review on March 9, 2016. Pet., Ex. U.

2. State Court Habeas Proceedings On December 2, 2016, petitioner, through counsel, filed a habeas petition in Santa Clara County Superior Court.

The Superior Court issued an order to show cause, and the district attorney filed a return with exhibits. On December 7 and 10, 2018, the Superior Court held an evidentiary hearing at which petitioner and his trial counsel Mr. Lempert testified. On July 2, 2019, the Superior Court denied the petition in a reasoned decision. See Decision on Writ of Habeas Corpus, Pet., Ex. N Decision . On July 12, 2019, the Superior Court filed an addendum to the decision. See Addendum to Order Re: Habeas Corpus, Pet., Ex. O.

On September 5, 2019, petitioner filed a habeas petition in the California Court of Appeal. (Pet., Ex. P), the state filed a response (Pet., Ex. Q), and petitioner filed a reply (Pet., Ex. R). On June 10, 2020, the appellate court summarily denied the petition. Pet., Ex. S.

On August 7, 2020, petitioner filed a habeas petition in the California Supreme Court. On February 10, 2021, the California Supreme Court summarily denied the petition. Pet., Ex. T. 3. Federal Habeas Proceedings

On March 9, 2017, petitioner filed a habeas petition in this court. Dkt. 1. He sought a stay until the state courts had resolved his pending claims. Dkt. 4. On March 3, 2017, this court granted a stay pursuant to Rhines v. Weber, 544 U.S. 269 (2005). Dkt. 9.

This court lifted the stay on March 10, 2021. Dkt. 12. On June 8, 2021, petitioner filed the First Amended Petition. Dkt. 22. On September 29, 2021, this court ordered respondent to show cause with respect to following claims:

Claim 1: There was a lack of sufficient evidence to convict Rachal of first degree murder. Claim 2: The trial court violated right to a jury trial by improperly dismissing a juror. Claim 3: The trial court erred by failing to instruct the jury on a lesser included offense. Claim 4: The trial court erred by failing to properly instruct the jury on the issue of self-defense. Claim 5: The prosecution committed misconduct. Claim 6: constitutional right to counsel. Claim 7: T - girlfriend. Claim 8: trial counsel provided ineffective assistance by failing to present all of the facts relevant to self-defense an theory of motive.

Claim 9: False testimony was allowed to be presented at trial. Claim 10: Trial counsel s decision to forgo manslaughter instructions was not based on a rational and strategic decision. Claim 11: Cumulative constitutional errors caused petitioner undue prejudice. Dkt. 25 at 2.

Respondent filed an answer to the first amended petition on January 26, 2022. Dkt. 28-1 Rachal filed the traverse on July 14, 2022. Dkt. 41 habeas petition is now fully briefed, and the court determines that the matter is suitable for decision without oral argument.

STANDARD OF REVIEW which is applicable to any federal habeas petition filed after April 1, 1996, a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that 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 § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact (Williams v. Taylor, 529 U.S. 362, 407 09 (2000)), while the second prong applies to decisions based on factual determinations (Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)). A state court decision is under § 2254(d)(1)

on a question of law or if the state court decides a case differently than [the Supreme] Court has on a se Williams, 529 U.S. at 412 13. A

Id. at 413. A

concludes in its independent judgment that the relevant state-court decision applied cl Id. at 411. Rather, the Id. at 409. s

Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations Id. (quoting Yarborough, 541 U.S. at 664). claim being presented in federal court was so lacking in justification that there was an

error well understood and comprehended in existing law beyond any possibility for Id. at 103. Under 28 U.S.C. § determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state- Miller-El, 537 U.S. at 340. Review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

DISCUSSION A. Claim 1: Whether There Was a Lack of Sufficient Evidence to Convict

Rachal of First Degree Murder Rachal argues that the prosecution failed to present sufficient evidence for a jury to convict him of first degree murder.

First, Rachal argues that because the issue of self-defense was properly presented to the jury under CALCRIM No. 505 (Justifiable Homicide: Self-Defense or Defense of Another) and CALCRIM No. 506 (Justifiable Homicide: Defending Against Harm to Person Within Home or on Property) (RT 3390 95), the prosecution was required to prove the absence of the self-defense justification beyond a reasonable doubt. He argues that the state court's denial of his claim was an objectively unreasonable application of Jackson v. Virginia, 443 U.S. 307 (1979), because no rational trier of fact could have

found beyond a reasonable doubt that Rachal did not act in self-defense and that he was not entitled to defend himself in his own home.

Second, petitioner argues that there was insufficient evidence presented for the jury to find beyond a reasonable doubt that another essential element of first degree murder was met: that he committed the murder with premeditation and deliberation.

1. Legal Standard The Due Process Clause of the United States Constitution protects the accused against 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). A state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt therefore states a constitutional claim which, if proven, entitles him to federal habeas relief. Jackson, 443 U.S. at 321 & 324.

Jackson claims face a high bar in . Coleman v. Johnson, 566 U.S. 650, 651 & 655 (2012) (per curiam) (overruling court that ailed to apply the deferential standard of Jackson -grained factual federal court collaterally reviewing a state-court conviction does not assess for itself

whether the evidence established guilt beyond a reasonable doubt. Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992), cert. denied, 510 U.S. 843 (1993). The federal court determines only 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. Id. (quoting Jackson, 443 U.S. at 319); see also Coleman, question under Jackson Due Process is

violated only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt. Jackson, 443 U.S. at 324; Payne, 982 F.2d at 338; Miller v. Stagner, 757 F.2d 988, 992 93 (9th Cir.), amended, 768 F.2d 1090 (9th Cir. 1985), cert. denied, 475 U.S. 1048, and cert. denied, 475 U.S. 1049 (1986); Bashor v. Risley, 730 F.2d 1228, 1239 (9th Cir.), cert. denied, 469 U.S. 838 (1984).

federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume even if it does not affirmatively appear in the record that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. Jackson, 443 U.S. at 326. The court may not substitute its judgment for that of the jury. See Coleman, 566 U.S. at 655 56 (lower court

had a specific intent to kill victim and force was used simply because there was no onsibility of the jury not the court to decide what conclusions should be drawn from evidence admitted Parker v. Matthews, 567 U.S. 37, 43 (2012) (per curiam) (quoting Cavazos v. Smith, 565 U.S. 1, 2 (2011) (per curiam) (lower court erred by substituting its judgment for that of California jury on the question whether the prosecution s or defense s expert witnesses more persuasively explained the cause of

death)). The court must also consider all of the evidence admitted at trial in light most favorable to the prosecution. See McDaniel v. Brown, 558 U.S. 120, 133 (2010) (lower court erred by failing to consider all of the evidence in light most favorable to the prosecution when it resolved inconsistencies in testimony in favor of petitioner); see also LaMere v. Slaughter, 458 F.3d 878, 882 (9th Cir. 2006) (in a case where both sides have presented evidence, a habeas court need not confine its analysis to evidence presented by the state in its case- in-chief).

Under Jackson's standard of review, a to near-total deference. Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004). Except in

the most exceptional of circumstances, Jackson does not permit a federal habeas court to revisit credibility determinations. See id.; see also Guam v. McGravey, 14 F.3d 1344, 1346 47 (9th Cir. 1994) (upholding conviction for sexual molestation based entirely on uncorroborated testimony of victim).

may reject uncontradicted testimony when cross examination, other evidence, or their own common sense and ordinary experience convince them the testimony is probably false. Even perfectly plausible allegations can be disbelieved if they occur during the course of a generally implausible account. United States v. Sandoval-Mendoza, 472 F.3d 645, 649 (9th Cir. 2006) (footnote omitted) (quoting Grotemeyer v. Hickman, 393 F.3d 871, 879 (9th Cir. 2004)).

Under the Jackson standard, a conviction may be supported by logical inferences from circumstantial evidence, but the inferences cannot be merely speculative. Sarausad v. Porter, 479 F.3d 671, 677 (9th Cir. 2007), rev d on other grounds sub nom Waddington v. Sarausad, 555 U.S. 179 (2009); Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995); compare United States v. Begay, 673 F.3d 1038 1043-45 (9th Cir. 2011) (en banc)

premeditation and with Juan H. v.

Allen, 408 F.3d 1262, 1278-79 (9th Cir. 2005) (granting writ where, after resolving all conflicting factual inferences in favor of prosecution, only speculation supported Jackson leaves juries broad discretion in deciding what inferences to draw from the

evid Coleman, 566 U.S. at 655 (quoting Jackson, 443 U.S. at

319).

Where behavior is consistent with both guilt and innocence, the burden is on the state to produce evidence that would allow a rational trier of fact to conclude beyond a Sarausad, 479 F.3d at 678 (quoting Wright v. West, 505 U.S. 277, 296 (1992)). The existence of some small doubt based on an unsupported yet unrebutted hypothesis of innocence therefore is not sufficient to invalidate an otherwise legitimate conviction. See Taylor v. Stainer, 31 F.3d 907, 910 (9th Cir. 1994).

Under AEDPA, federal habeas courts must apply the standards of Jackson with an additional layer of deference. Juan H., 408 F.3d at 1274. Generally, a federal habeas court must ask whether the operative state court decision reflected an unreasonable application of Jackson to the facts of the case. Coleman, 566 U.S. at 651; Juan H., 408 F.3d at 1275. Thus, if the state court affirms a conviction under Jackson, the federal court must apply § Jackson was objectively unreasonable. See McDaniel, 558 U.S. at 132 33. To grant relief, therefore, a federal habeas court must conclude that "the state court's determination that a rational jury could have found that there was sufficient evidence of guilt, i.e., that each required element was proven beyond a reasonable doubt, was objectively unreasonable." Boyer v. Belleque, 659 F.3d 957, 965 (9th Cir. 2011).

By contrast, § 2254(d)(2) is not readily applicable to Jackson cases, because a court under Jackson resolving factual disputes. Sarausad, 479 F.3d at 678. Rather, the court views the evidence in the light most favorable to the prosecution without resolving any disputed factual questions. Id. unreasonably determined disputed facts; it is, rather, to decide whether the state court unreasonably applied the Jackson test. Id. characterization of certain testimony was objectively unreasonable, its conclusion that the

Jackson standard was satisfied was not objectively unreasonable). Federal courts -of-the-evidence Id. at 678. 2

2 test under § 2254(d)(1) to a state court decision applying Jackson: The Jackson standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law. Jackson, 443 U.S. at 324 n.16; see also Boyer Due Coleman, 566 U.S. at 655. When a jury instruction incorrectly adds an additional element

nts of the charged crime, not against the erroneously heightened command in the jury Musacchio v. United States, 577 U.S. 237, 243 (2016).

- Parker, 567 U.S. at 43. A state court decision denying a sufficiency challenge may not be overturned on federal habeas unless the decision was Id. (quoting Cavazos, 565 U.S. at 2). T inquiry asks whether, viewing the evidence in the light most favorable to the prosecution,

any rational trier of fact could have found the essential Id. (quoting Jackson, 443 U.S. at 319).

2. Self-Defense The parties agree that the prosecution was required to prove beyond a reasonable doubt that s of self-defense and defending oneself within the home. This court assesses whether the California Co any rational trier of fact could have found the

inquiry is on the state court decision; (2) Even with the deference due by statute to the state court's determinations, the federal habeas court must look to the totality of the evidence in evaluating the state court's decision; (3) The failure of the state court to consider at all a key argument of the

defendant may indicate that its conclusion is objectively unreasonable; however, the paucity of reasoning employed by the state court does not itself establish that its result is objectively unreasonable; (4) The failure of a state court to give appropriate weight to all of the evidence may mean that its conclusion is objectively unreasonable; and (5) The absence of cases of conviction precisely parallel Sarausad, 479 F.3d at 678 (quoting Hurtado v. Tucker, 245 F.3d 7, 18 (1st Cir. 2001)) (quotation marks omitted). Parker, 567 U.S. at 43.

The California Court of Appeal found that there was sufficient evidence for the jury

- person would be People v. Clark

(1982) 130 Cal.App.3d 371, 377 (Clark), overruled on other grounds by People v. Blakeley (2000) 23 Cal.4th 82, 92.) When reasonable fear of imminent danger when he [or she] used

People v. Brown (1992) 6 Cal.App.4th 1489, 1496.) in view of the nature of the attack; any use of excessive force is not justified and a homicide which results therefrom is Clark, supra, 130 Cal.App.3d at p. 377.) person may be found guilty of unlawful homicide even where the evidence establishes the right of self-defense if the jury finds that the nature of the attack did not justify the resort to deadly force or that the force used exceeded that which was reasona Id. at p. 380.) -defense is properly presented in a homicide case, the prosecution must prove the absence of the People v. Pineiro (1982) 1 self-defense, including whether the circumstances would cause a reasonable person to perceive the necessity of defense, whether the defendant actually acted out of defense of himself [or herself], and whether the force used was excessive, are normally questions of fact for the trier of fact to resolve. Clark, supra, 130 Cal.App.3d at p. 378.) However, a reviewing court may conclude that the prosecution failed to carry its burden to prove that a homicide was not justified if the evidence of adequate provocation or self- Ibid.) The evidence tends to show a situation in which a killing may not be reasonable persons could differ on whether the resort to force (Id. at p. 379.)

Here, defendant contends the prosecution did not present sufficient evidence from which the jury could have concluded that defendant did not act in self-defense when he killed Patterson. In other words, defendant contends that the evidence established he acted in self-defense as a matter of law. Defendant points out that there was evidence Patterson - evidence defendant had invited Patterson to his home, that the that defendant subsequently claimed that Patterson had come at him with a knife. The question of whether defendant was entitled to use deadly force was a question for the jury because at least some of the evidence tended to show that the homicide was not justified Clark, supra, 130 Cal.App.3d at p. 379.) The evidence showed that the violent altercation began in the bedroom, but the evidence did not necessarily support the defense theory that defendant had been sleeping or was taken by surprise by Patterson. Patterson not defendant was the major source of the blood in the bedroom, where a lot of blood was lost. The evidence indicated that defendant suffered the injuries to his hands later, in the kitchen, whe could reasonably conclude that defendant had the knife from

the very beginning of the altercation and that he initiated the use of force. The evidence of the two sets of bloody handprints coming from the bedroom strongly indicated in light of the DNA evidence that Patterson crawled out of the bedroom, while defendant walked out, and that Patterson suffered additional injuries in the kitchen, including the injury to his head, which likely caused the high blood spatter in the kitchen and possibly caused the knife blade to break. The evidence established that Patterson was stabbed more than 30 times, all Patterson may have tried to call 9-1-1 when he was still in the

bedroom, prior to the additional stab wounds he suffered in the kitchen. Based on this evidence, the jury could reasonably conclude that defendant continued to stab Patterson at a time when Patterson was not a reasonable threat to defendant i.e., that even if Patterson initiated the altercation, defendant used force i Id. at p. 380.)

not act in self- help, and the jury could reasonably find that those cries came

from Patterson, in light of the severity of his injuries in comparison to those suffered by defendant, who was able to walk out of the house and drive away. Additionally, when defendant saw his neighbors, he did not say that he had been

On this record, a reasonable jury could have found beyond a justifie the homicide was not justified. Appellate Opinion at 11 14. altercation ensued was Rachal That

statement establishes a factual basis for a claim of self defense . Pet. at 24 (citation omitted). He argues that the prosecution did not produce any evidence to contradict Traverse at 3. overcome the presumption favoring self-defense, and the jury's failure to reach such a

finding could only have come about from their failure to observe all the facts and Pet. at 28. Petitioner argues that there was no justification for Patterson to be in his home (much less his bedroom), and that California law creates a rebuttable presumption that a residential occupant has a reasonable fear of death or great bodily injury when he or she uses deadly force against an unlawful and forcible intruder into the residence. Petitioner argues that Patterson initiated the attack in Traverse at 3. In short,

overcome the only evidence that he started the altercation with an unprovoked attack Id. use only that force which is necessary in view of the nature of the attack; any use of

excessive force is not justified and a homicide which results therefrom is unlawful. A person may be found guilty of unlawful homicide even where the evidence establishes the right of self-defense if the jury finds that the nature of the attack did not justify the resort to deadly force or that the force used exceeded that which was reasonably necessary to repel the attack. Appellate Opinion at 12 (internal citations and quotation he question of whether defendant was entitled to use deadly force was a

question for the jury because at least some of the evidence tended to show that the homicide was not justified and that the force resorted to was excessive. Id. at 13. The California Court of Appeal reasoned that although evidence suggested the altercation began in the bedroom, evidence showing Patterson (rather than Rachal) was

initiated the use of force. Further evidence indicated that Rachal suffered injuries to his

DNA was on the knife handle. Such evidence could also have supported finding.

Concerning [t] hom Id. at 15 in a manner suggesting he believed he was welcome at the residence. The blood spatter

and DNA evidence supported a finding that defendant was the initial assailant, first stabbing Patterson with a knife in the bedroom, then following him through the hallway,

asonable or that defendant formed the plan to kill Patterson after allowing Patterson to enter the

Id.

The California Court of Appeal found that additional evidence regarding the location of each party during the altercation (e.g., bloody handprints evidencing that Patterson crawled out of the bedroom while Rachal walked), ing over 30 stab wounds),

k that Patterson was supported a finding that a jury could reasonably conclude that Rachal continued to stab Patterson at a time when Patterson was not a reasonable threat to Rachal i.e., that even if Patterson initiated the altercation, defendant used force in Id. at 14.

the jury was presented with ample evidence of what occurred before and during the See, e.g., Walters, 45 F.3d at 1358 (circumstantial evidence and inferences drawn from such evidence may be sufficient to sustain a conviction); Coleman Jackson leaves juries broad discretion in deciding what inferences to draw from the evidence presen Jackson, 443 U.S. at 319); Begay, 673 F.3d at 1043 45

. Although not

primarily in the form of witness testimony concerning the events of the attack, the California Court of Appeal assessed that the jury was presented with sufficient physical and other evidence to draw reasonable inferences concerning the events of the attack, including who initiated it and critically whether Concerning the contrary evidence that Rachel stated ,

the California Court of Appeal reasonably applying Jackson would properly grant near- total deference to Bruce, 376 F.3d at 957. -defense claims was not objectively unreasonable.

3. Premeditation and Deliberation The parties agree that the prosecution was required to prove premeditation and deliberation in order for the jury to convict Rachal of first degree murder. This court any rational trier of fact Parker, 567 U.S. at 43.

The California Court of Appeal found that there was sufficient evidence to support a jury finding of premeditated and deliberate murder, stating as follows:

Defendant contends the evidence was insufficient to support a finding of premeditated and deliberate murder. His argument is based on People v. Anderson (1968) 70 Cal.2d 15 (Anderson), in which the court set forth three categories of evidence commonly present in cases of premeditated and deliberate murder: (1) planning activity, (2) preexisting motive and (3) manner of killing. 3

(Id. at pp. 26-27.) Defendant first contends there was no evidence showing that he planned to attack or kill Patterson. According to defendant, defendant brought the knife to his bedroom before the violent

altercation began. Defendant also argues that any inference of premeditation was negated by the fact that Patterson was still alive when defendant left. On this record, the jury could have reasonably concluded that defendant planned a knife attack on Patterson. There was no evidence that Patterson forced his way in a manner suggesting he believed he was welcome at the

residence. The blood spatter and DNA evidence supported a finding that defendant was the initial assailant, first stabbing Patterson with a knife in the bedroom, then following him through the hallway, and continuing to stab him in the kitchen reasonabl Patterson over as part of a plan to kill him or that defendant

formed the plan to kill Patterson after allowing Patterson to enter the residence. (See People v. Perez (1992) 2 Cal.4th 1117, 1127.) Further, after the stabbing, defendant tried to convince his neighbors that Patterson was fine, and he fled; he People v. Boatman (2013) 221 Cal.App.4th 1253, 1267

(Boatman).) Defendant next contends there was no evidence of motive. He relies to a large extent on Boatman, supra, 221 Cal.App.4th 1253, in which the defendant shot his girlfriend in the face. The

3 The Anderson Anderson analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the People v. Thomas (1992) 2 Cal.4th 489, 517.)

Boatman court found n text messages to a friend, which suggested the defendant was angry, nor from a loud argument that began about three minutes before the shooting. (Id. at pp. 1258-1259, 1267-1268.) Defendant points out that according to the Boatman court, motive satisfies the Anderson -ere

(Id. at p. 1268.)

Here, the evidence of motive was much stronger than in Boatman. In contrast to Boatman, the evidence here showed - that they had been arguing for weeks prior to the homicide, not merely for a few minutes beforehand. Over a month before the result - Boatman, supra,

221 Cal.App.4th at p. 1268.) not support a finding that the murder was premeditated. -style People v. Hawkins (1995) 10 Cal.4th 920, 956 (overruled on other grounds by People v. Lasko (2000) 23 Cal.4th 101), where the victim was shot at close range in the back of the head and neck, and with cases where the defendant located. Defendant points out that the stab wounds suffered by Patterson were not to critical organs and that they were spread all over his body. The evidence here strongly suggested that defendant surprised Patterson with the knife attack, indicating he premeditated the where the assault began, and the upper hand prints in the hallway were not made by someone whose hands were bleeding. By contrast, Patterson lost a significant amount of blood in the bedroom, and his hands were apparently bleeding as he crawled through the hallway. This evidence indicates that defendant suffered no defensive wounds initially, and thus indicates that he brought the knife into the bedroom and took advantage of an opportunity to attack an unsuspecting victim. In addition, most of the stab wounds were very deep many were three inches or more, which showed that defendant acted in a manner consistent with the premeditated decision to kill organs does not detract from the strength of this evidence. The among the first body parts injured, suggesting he put his hands up to keep defendant from stabbing more serious body parts. cating People v. Sanchez

(1995) 12 Cal.4th 1, 34 [manner of killing tended to demonstrate the defendant acted with premeditation and deliberation], disapproved on another ground by People v. Doolin (2009) 45 Cal.4th 390, 421, fn. 22 (Doolin).) And finally, defendant eventually did stab Patterson in a major artery as well as in the back of the head. These facts supported a finding Anderson, supra, 70 Cal.2d at p. 27.)

Because the evidence was sufficient to support a conviction of first degree premeditated murder, we need not consider whether it also supported a conviction under a torture-murder theory or a lying-in-wait theory. Any deficiency in the evidence bsent an affirmative indication in the record that the verdict actually People v. Guiton (1993) 4 Cal.4th 1116, 1129 [where case is given to jury on different factual theories, one of which is not supported by the evidence, court presumes the jurors rejected that theory and based the verdict on the factually supported theory].) The record here does not affirmatively indicate the jury relied on torture or lying in wait rather than premeditation as a basis for first degree murder. Appellate Opinion at 14 17 (footnote in original).

Pet. at 30. He argues that there was insufficient evidence of planning, motive, and

manner of killing from which the trier of facts could infer premeditation and deliberation pursuant to the framework outlined in People v. Anderson, 70 Cal. 2d 15 (1968). Id. at 30 37. Petitioner also argues that, as an alternative to basing the first degree murder conviction on the element of

premeditation and deliberation, there was insufficient evidence to show the murder was conducted by torture or lying in wait, which as an alternative element could support a first degree murder conviction in the absence of premeditation and deliberation. Id. at 38 45.

Applying Anderson set forth three categories of evidence commonly present in cases of premeditated and deliberate murder: (1) planning activity, (2) preexisting motive, and (3) manner of killing, although the Anderson factors are not exclusive or exhaustive but ts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and Appellate Opinion at 14 n.3 (quoting People v. Thomas, 2 Cal. 4th 489, 517 (1992)).

a. Planning Petitioner argues that there was insufficient evidence of planning because there much less the bedroom; that the knife used in the killing of Patterson was a common

household item; that no evidence was presented that Rachal brought the knife to his bedroom (instead, the only evidence presented at trial had a knife, he came at me and that given Patterson was one inch taller and 34 pounds heavier than Rachal larger man with a kitchen knife. Pet. at 31 34. Petitioner also argues that the fact that

Patterson was alive when Rachal left his home and that the killing occurred in Rac home show that Rachel did not engage in any planning.

The California Court of Appeal reasoned that on the record, the jury could have reasonably concluded that defendant planned a knife attack on Patterson. It explained that t , but rather parked and locked his car in driveway in a manner suggesting he believed he was welcome at the residence. Further, the blood spatter and DNA evidence supported a finding that Rachal was the initial assailant, first stabbing Patterson with a knife in the bedroom, then following him through the hallway, and continuing to stab him Based on these facts, the jury could have reasonably inferred that defendant either invited Patterson over as part of a plan to kill him or that defendant formed the plan to kill Patterson after allowing Patterson to enter the residence.

Rachal had lured presented that Mr. Rachal had brought the kitchen knife to his bedroom at any time Pet. at 33. He argues thathe only evidence presented at trial regarding the events immediately before the physical altercation occurred was defendant's own statement, he had a knife, he came at me. Id. s to draw from the

conviction, Coleman, 566 U.S. at 655 (quoting Jackson, 443 U.S. at 319).

reasonable jury could have found that

acted with premeditation and deliberation was not objectively unreasonable.

b. Motive Petitioner argues there was no evidence that he reflected on the murder, nor that he had a motive to kill Patterson from which reflection could be inferred. Pet. at 34. Petitioner argues that evidence of an ongoing dispute between the two showed that he and Patterson both harbored animus toward each other, and that animus was not held exclusively by petitioner against Patterson, therefore not establishing a clear motive. Id. The only evidence of motive was Rachal's statement that "He had a knife, he came at me", which showed only a motive for self-defense. Petitioner also argues that although there was evidence that Rachal had a motive to kill Patterson and even had said he but there was no animosity at the time of the killing. Traverse at 6.

The California Court of Appeal explained that there was in fact strong evidence of motive. The evidence at trial showed that Rachal - and that they had been arguing for weeks prior to the homicide over work and financial

matters. Evidence was introduced suggesting that Rachal believed that Patterson had gotten him fired from a job, and Rachal wrote that Patterson had stolen $5,000 from him. E.g., Appellate Opinion at 5; RT 1851 ; RT 2384 (discussing Trial Ex. 100). Further, over a month before the homicide Rachal even Patterson. This evidence could support a inference that the homicide

was the result of a pre-existing reflection and careful thought and weighing of considerations rather than mere unconsidered or rash impulse hastily executed. Appellate Opinion at 16 (internal quotation marks omitted) (quoting People v. Boatman,

221 Cal. App. 4th 1253, 1268 (2013)).

the killing to evidence motive, Rachal asks this court to parse the evidence and the interpretation of it too finely. Likewise with he and Patterson

shared mutual animus rather than .

reasonable jury could have found supported a finding

that Rachal acted with premeditation and deliberation was not objectively unreasonable.

c. Manner of Killing Petitioner argues that 34 of 35 stab wounds were not fatal nor focused on a specific vital body part. Accordingly, the evidence supports only a verdict of murder in the second degree.

The California Court of Appeal reasoned that the evidence strongly suggested that Rachal surprised Patterson with the knife attack, indicating he premeditated the assault.

handprints in the hallway were not made by someone whose hands were bleeding. By contrast,

Patterson lost a significant amount of blood in the bedroom, and his hands were apparently bleeding as he crawled through the hallway. This evidence indicates that Rachal suffered no defensive wounds initially, and thus indicates that he brought the knife into the bedroom and took advantage of an opportunity to attack an unsuspecting victim. In addition, most of the stab wounds were very deep many were three inches or more, which showed that defendant acted in a manner consistent with the premeditated not detract from the strength of this evidence. The blood in the hallway indicated that

re among the first body parts injured, suggesting he put his hands up to keep defendant from stabbing more serious body parts. Further, the attack continued into additional rooms, and Rachal eventually did stab Patterson in a major artery as well as in the back of the head. none of the stabbing wounds were centered or focused on a specific, vital body part

reasonable jury could have found the manner of killing supported a finding that Rachal

acted with premeditation and deliberation was not objectively unreasonable.

d. Torture and Lying in Wait Petitioner argues that insufficient evidence was presented to support a finding that the killing was committed with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain, or murder-by-torture.

support a conviction of first degree premeditated murder, we need not consider whether it

also supported a conviction under a torture-murder theory or a lying-in-wait theory because there is no indication in the record that the verdict actually did rest on torture or lying in wait rather than premeditation as a basis for first degree murder. Appellate Opinion at 17.

Because this court finds that the California Court of Ap planning, motive, and manner of killing sufficiently supported finding of

premeditation, it need not reach the question whether there was also sufficient evidence of first degree murder under the theories of torture or lying in wait. The California Court of Appeal reasonably found that where the alleged error involves an unsupported factual theory of guilt, the jurors are presumed to have relied on the supported theory. See also Griffin v. United States, 502 U.S. 46, 59 (1991); Taylor v. Beard, 811 F.3d 326, 334 (9th Cir. 2016) (en banc).

e. Conclusion manner of killing, its conclusion that a reasonable jury could have found Rachal acted

with premeditation and deliberation was not objectively unreasonable.

Claim 1 is therefore DENIED. B. Claim 2: Improperly Dismissing a Juror

Rachal argues that the trial court violated his right to a jury trial and to due process of law when it discharged juror number 11 in the absence of evidence showing misconduct to a demonstrable reality.

1. Factual Background At 10:44 a.m. on August 8, 2013, the jury retired to deliberate. The jury broke for lunch at 11:52 a.m. CT 753. After lunch, the prosecutor told the trial court that he had received a call from another Deputy District Attorney, Kevin Smith, who had overheard Juror No. 11 speaking on his cellphone outside the courthouse just after noon. RT 3559 60. The prosecutor presented Smith to explain what he had heard. The trial court asked

defense counsel if he wanted Smith to be sworn in; defense counsel responded in the truth. RT 3560.

Smith informed the court that around noon he was in the parking lot outside the cellphone. Id. h

Id. The juror then walked back inside the courthouse. Id. Neither trial counsel nor the prosecutor had any questions for Smith.

The court called in Juror No. 11 to explain his conduct. Id. at 3562 63. The juror told the court that he was speaking to his sister during the lunch break about being in Id. at 3563. When confronted with the information provided by Smith that the juror was heard stating his position regarding guilt, the juror denied doing so. Juror No. had. Id. at 3564. The court ask that you did not discuss your position with respect to whether or not you felt the

Id. Juror No. 11 responded Id. The juror also told that court that he did not discuss the position of the other jurors. Juror No. Id.

The court discussed the matter with the attorneys at the bench and then told Juror No. Id. at 3565.

At that point, Juror No. 11 admitted that in fact he used those words. Id. at 3565 66. When pressed by the court, Juror No. now. . . . and everybody has got a chance to say what they believe, and it will be . . . a period of

Id. at 3566. The court again asked if the juror said anything about being

at we've got to decide if he's guilty or not guilty, and Id. The court excused the juror from the courtroom and again asked Deputy District Attorney Smith whether he had any doubt about what he overheard the juror say on the cell phone. Id. at 3567. Smith no explanation after it.

Id. at 3568.

Thereafter, the prosecutor argued that the juror should be discharged for violating ions not to talk about the case with anyone outside the courtroom and to discuss the case only in the jury room when

all other jurors are present. Id. at 3569 71. The prosecutor argued that Smith was credible and Juror No. 11 was not. Id. at 3571 72. Defense counsel argued that Juror No. 11 had not discussed the details of the case and therefore had not violated the admonition. Id. at 3572 74.

The trial court determined that the juror should be discharged, stating as follows:

We are all concerned with the integrity of the jury process, and I know that. There are two issues here. There is the issue regarding misconduct and credibility. With respect to misconduct, I, once again, looked at the language of CAL-CRIM 3550. Mr. Boyd [the prosecutor] read it. It does

It is clear that in this case Mr. rather Juror Number 11 did discuss the case with his sister. When we come to the issue of credibility, I have a veteran district attorney. And what makes it really simple for me is that Kevin Smith has tried I can name three major cases offhand; one that lasted for weeks. That I suspect that there were more than that. There could have been as many as four or five over the years, spanning many years. And I have such respect for him, not only his skills as an he says, you can take it to the bank. He has integrity. He has Even in a sentencing last week, he did the right thing by giving a defendant a break after he had been convicted in a jury trial. He is the quintessential prosecutor who does believe that he has the ethical obligation to accomplish justice. . . . So if Mr. Smith said he heard it, I know he heard it. very accurate. He was clearly uncomfortable. Now, well, you can certainly say that that is because here he is called into a try to put him at ease, but he was evasive. I questioned him two t the first set of answers were different from the second set of answers. So, he was evasive, he was nervous, he was clearly not candid. The court finds that he was not credible. The court is satisfied that Mr. Smith is very credible, and the court finds that there is a demonstrable reality that Juror Number 11 cannot has not [sic] instructions and cannot continue to abide or will not continue to good cause to discharge Juror Number 11. Id. at 3575 76.

On review, the California Court of Appeal found no constitutional error. Under The appellate court held:

was credible. (See Linton, supra, 56 Cal.4th at p. 1194.) As court who was expected to tell the truth. Smith was definitive and consistent when reporting on the conversation he had overheard, and he told the trial court there was no question in demeanor first-hand.

Juror No. 11 was not credible. Juror No. 11 was vague and inconsistent when reporting on his statements to his sister. Juror No. 11 first told the trial court only that he had told his the trial court, Juror No. 11 then added that he had also told his sister that he had not decided yet. Upon still further questioning, position. The trial court was able to observe Juror No. demeanor in making these statements. With respect to

taken a vote at the beginning of deliberations, we observe that it is common for a jury to take a preliminary vote soon after they have retired to deliberate. (See, e.g., People v. Mendoza (2000) 24

Cal.4th 130, 194; Vomaska v. City of San Diego (1997) 55 Cal.App.4th 905, 909.) On this record, the trial court could reasonably conclude that Juror No. 11 was less credible than Smith, and that Juror No. 11 had in fact violated his duty not to discuss the case or the deliberations with anyone. As the basis for Juror No. that juror. (Lomax, supra, 49 Cal.4th at p. 589.)

Appellate Opinion 22 23.

2. Legal Standard The Sixth Amendment affords criminal defendants the right to trial by an impartial jury. The right to a jury trial applies to state criminal trials through the Due Process Clause of the Fourteenth Amendment. See Duncan v. Louisiana, 391 U.S. 145, 149 (1968). The Sixth Amendment and the Due Process Clause to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (internal quotation marks omitted). A particular juror substitution may be challenged on grounds there was not good cause for it. See Perez v. Marshall, 119 F.3d 1422, 1426 (9th Cir. 1997), cert. denied, 522 U.S. 1096 (1998).

The parties dispute the appropriate standard of review for a dismissal for good cause. Petitioner argues that a federal court reviewing a habeas petition assesses whether a juror's inability to perform as a juror [was] shown as a demonstrable reality, Pet. at 46 (internal quotation marks and citations omitted). standard requires a showing that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that bias was established. He argues that the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied. Id.

Respondent argues that the determination of whether a juror was removed for good cause due to bias is a question of fact, and presumed correct under 28 U.S.C. § 2254(e)(1) unless the petitioner rebuts the finding by clear and convincing evidence. Answer at 20 (citing Hedlund v. Ryan, 815 F.3d 1233, 1248 (9th Cir. 2016)).

Petitioner relies primarily on People v. Wilson, 44 Cal. 4th 758 (2008), which did not concern a habeas claim but rather was a direct appeal of the Although the appellant presented arguments concerning his right to a fair and impartial

jury, as well as a unanimous jury, under the Sixth and Fourteenth Amendments to the United States Constitution . . . . [h]e also contend[ed] the court's action violated his rights under [Cal. Penal Code] section 1089. Wilson, 44 Cal. 4th at 814. Prior to analyzing the petitioner a juror, that court specifically clarified that conclusion, based on state law, obviates the need to decide whether removal of Juror No. 5 also violated defendant's constitutional rights. Id. Petitioner reliance on California law in support of his argument that this court must, on reviewing his habeas reasoning to ensure its conclusions were manifestly supported by evidence on which it actually relied is not persuasive. Accordingly, this removed for good cause by clear and convincing evidence.

3. Alleged State Law Violations California's statute for discharge and substitution of jurors has been upheld as facially constitutional. See Miller, 757 F.2d at 995. The statute reads, in relevant part:

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors. Cal. Penal Code § 1089 (emphasis added).

claim, to the extent that it is rooted in an argument that the trial court violated state law in removing Juror No. 11, fails. See Estelle v. McGuire, 502 U.S. 62, 67 68 (1991) (a federal writ is not available for alleged error in the interpretation or application of state law); Swarthout v. Cooke, 562 U.S. 216, 221 (2011) (per curiam) (no federal habeas challenge cognizable to challenge whether state law was correctly applied). a d Swarthout, 562 U.S. at 863 (internal quotation marks omitted)),

and a petitioner may not transform a state-law issue into a federal one by simply asserting a violation of due process (Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996)).

Moreover, a state court's interpretation of state law, including one announced on Bradshaw v. Richey, 546 U.S. 74, 76 (2005); see West v. AT & T, 311 U.S. 223, 236

the highest court of the state is the final arbiter of what is state law. When it has ; Hicks v. Feiock, 485 U.S. 624, 629 30 & n.3 (1988) (a determination of state law by a state intermediate appellate court is also binding in a federal habeas action). This is especially true where the highest court in the state has denied review of the lower court's decision. Hicks, 485 U.S. at 629 30 & n.3; see West so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the Shannon v. Newland, 410 F.3d 1083, 1087 (9th Cir. 2005) (same).

Here, petitioner appealed his conviction within California found that the trial court's action violated his rights under Cal. Penal Code section 1089.

That conclusion remains binding on this court.

4. Alleged Constitutional Violations The court next considers whether the decision is contrary to or an unreasonable application of clearly established federal law. See 28 U.S.C. § 2254(d).

is a prompt hearing in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not the misconduct was prejudic Bell v. Uribe, 748 F.3d 857, 867 (9th Cir. 2014), cert. denied sub nom. DeMola v. Johnson, 135 S. Ct. 1545 (2015) (decision of state

appellate court that trial judge properly removed a juror after she consulted a dictionary during deliberations in violation of the court's express instructions was not contrary to or an unreasonable application of clearly established federal law). fitness are entitled to special deference. Accordingly, we review for manifest error the trial court's determination that a juror cannot render an impartial verdict. Perez, 119 F.3d at 1426 (citation omitted) (citing Patton v. Yount, 467 U.S. 1025, 1036 38 & n.12 (1984) (whether a juror can render an impartial verdict is a question of historical fact entitled to special deference)).

Excusal of a juror may be permissible even where the trial court knows the excused juror was the sole holdout for acquittal. See id. at 1427 (dismissal of holdout juror permissible because juror's emotional instability that made her unable to continue deliberating provided good cause for her dismissal). The court may not, however, remove a juror during deliberations if the request for discharge stems from doubts about the sufficiency of the government's evidence. See id. at 1428; accord United States v. Litwin, 972 F.3d 1155, 1169, 1171, 1174 75 (9th Cir. 2020) (dismissal inappropriate where obstructive behavior may have stemmed from her views on the merits of the case).

Petitioner argues that No. 11 s continued position that he did not violate the admonition given to him by the court, and that he could or. Pet. at 48. Later recognizing contradictory evidence in the form of the deputy petitioner argues that the trial court should have discounted that evidence, weighed Juror

No. hat the jury will follow the instructions Id. Petitioner argues that the trial court would only have been permitted to dismiss Juror No. 11 if that juror had himself indicated that he could not No. 11 that [he] could not abide by the instructions, the court was required to keep him on the jury Id.; Traverse at 9. Petitioner also argues that evidence of past rule-breaking would not justify dismissal because such evidence was not relevant to whether the juror could follow rules in the future, and that the trial judge made an incorrect and impermissible credibility determination when weighing Juror No. Pet. at 48 49. Not only does petitioner disagree with the

but he credibility determination at all by considering misconduct. Traverse

the judge, i.e. the weight of the credibility put on Kevin Smith versus Juror No. bec etitioner also

argues that it was factually unlikely that Juror No. 11 would have known he was the only not-guilty vote because deliberations had only just begun at the time of the call, and if he did know that removal was prejudicial because the court removed the only not-guilty vote.

Respondent argues that the determination whether a juror is impartial is a question of fact, and particular deference is owed when the determination relies on credibility determinations. Answer at 20. The determinations were amply supported by the record.

or about any of the people or any subject involved in it with anyone, including, but not

limited to, your spouse or other family, or friends, spiritual leaders or advisors, or therapists. You must discuss the case only in the jury room and only when all jurors are present. Do not discuss your deliberat RT at 3550; see also CALCRIM No. 3550; Cal. Penal Code § 1122(a)(1) & (b) (jurors must be instructed after themselves, or with anyone else, ... The trial

court was presented with evidence that Juror No. 11 violated this instruction. See, e.g., RT 3560.

When asked, Juror No. 11 initially denied discussing the case with his sister on the guilt or innocence. Id. at 3564. Only when told by the court that he was heard saying the

concerning his conversation with his sister, including that the jury was in deliberation now

. Id. at 3562 66. The court heard

testimony from a witness who overheard portions of the conversation, which included Juror No. Id. at 3568.

Following the prompt hearing concerning what transpired, the trial court found that [i]t is clear that . . . Juror Number 11 did discuss the case with his sister. Id. at 3575 76. Concerning the content of that conversation, the judge made a reasoned credibility determination among the witnesses who presented information at that hearing. The court explained the credibility of each witness, including Juror No. discomfort, evasiveness, and in particular that after two episodes of questioning first set of answers were different from the second set of answers. So, he was evasive,

he was nervous, he was clearly not candid. The court finds t Id. at 3575 76. Number 11 cannot has not [sic] Id. at 3576.

The California Court of Appeal found that the basis for Juror No. disqualification appears on the record as a demonstrable reality, and the California

Supreme Court did not disagree. Appellate Opinion at 22 23 No. 11 s disqualification appears on the record as a demonstrable reality, the trial court (internal quotation marks omitted); Pet., Ex. U (denying petition for review).

Although this court inquires only whether the decision is contrary to or an unreasonable application of clearly established federal law, it is clear also satisfy the higher

admitted to violating his admonitions by discussing deliberations with his sister contrary . Moreover, the decision to dismiss the juror was fundamentally based on a credibility determination concerning

Juror No. nstructions. hear testimony exclusively from Juror No. 11, nor was it precluded from making credibility determinations when hearing testimony at the hearing. And although petitioner argues that the trial court made incorrect credibility assessments, such determinations are afforded particular deference on habeas review. Nor does the fact that Juror No. 11 claimed to be the only not-guilty vote render the excusal impermissible. See Perez, 119 F.3d at 1427.

Following a reasoned explanation, the court found that Juror Number 11 did not and could not abide . That factual determination was a e California Court of decision denying this claim is not contrary to or an unreasonable application of United States Supreme Court authority and may not be set aside. See 28 U.S.C. § 2254(d)(1).

Claim 2 is therefore DENIED. C. Claim 3: Whether the Trial Court Erred by Failing to Instruct the Jury on a

Lesser Included Offense offense of voluntary manslaughter violated his right to due process. He argues that the

court should have instructed on both heat of passion and unreasonable self-defense, which can result in a voluntary manslaughter verdict if accepted by the jury. Respondent argues that the claim is (1) not cognizable; (2) procedurally defaulted un ; and (3) meritless.

included offenses in a non-capital case does not present a federal constitutional Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998); Solis v. Garcia, 219 Bashor and its - capital case] fails to present a federal constitutional question and will not be considered in see also Keeble v. United States, 412 U.S. 205, Amendment guarantees the right of a defendant to have the jury instructed on a lesser

United States v. Rivera-Alonzo, 584 F.3d 829, 834 n.3 (9th Cir. 2009) there is no clearly established federal constitutional right to lesser included instructions in non- ; cf. Vickers v. Ricketts, 798 F.2d 369, 371 (9th Cir. 1986) (due process requires that court give instruction sua sponte in capital cases), cert. denied, 479 U.S. 1054 (1987); Beck v. Alabama, 447 U.S. 625, 638 (1980) (same).

cannot be unreasonable. Harrington, 562 U.S. at 101 application of clearly established Federal law for a state court to decline to apply a

Knowles v. Mirzayance, 556 U.S. 111, 122 (2009)). Accordingly, habeas relief is

unavailable for this claim. Claim 3 is DENIED. D. Claim 4: Whether the Trial Court Erred by Failing to Properly Instruct the

Jury on the Issue of Self-Defense In Claim 4, petitioner contends the trial court committed prejudicial error by incorrectly instructing the jury on self-defense in the home. Respondent argues

that the error was not prejudicial.

1. Factual Background The trial court instructed the jury:

The defendant is not guilty of murder if he killed to defend Such a killing is justified, and therefore not unlawful, if: One, the defendant reasonably believed that he was defending his home against Ricky Patterson who intended to or tried to commit the crime of assault with a deadly weapon and tried to enter or did enter that home intending to commit an act of violence against someone inside. RT 3392 93 (emphasis added); CT 760. The court should have instructed the jury with See CALCRIM No. 506; Cal. Penal Code § 197.

The California Court of Appeal reviewed this argument, found that the trial court erred, and determined that the error was not prejudicial:

an offense, which is subject to harmless error review under the beyond-a-reasonable-doubt standard of Chapman v. California (1967) 386 U.S. 18, 24 (Chapman). (See People v. Flood (1998) 18 Cal.4th 470, 502-503.) Under this standard, the error that the error complained of did not contribute to the verdict Chapman, supra, at p. not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered Yates v. Evatt (1991) 500 U.S. 391, 403 (Yates) disapproved on another ground by Estelle v. McGuire (1991) 502 U.S. 62, 73, fn. 4.) As given, the instruction required the jury to find that Patterson The instruction should have required the jury to find only one of

these two facts. On this record, however, the error was harmless beyond a reasonable doubt. The defense theory was commit an act of violence against him, and then proceeded to assault defendant with the knife while defendant was in his bed. Defendant s trial counsel never argued that Patterson formed the intent to commit an act of violence against defendant after entering the residence. If the jury believed the defense theory that Patterson assaulted defendant with a knife while defendant was in bed, it would have found tha and defense theory relied on the existence of both facts, the

else the jury considered on the issue in question, as revealed Yates, supra, 500 U.S. at p. 403.) Moreover, the defense of section 197, subdivision (2) as defined in CALCRIM No. 506 required the jury to find that established that defendant used more force than necessary, even if Patterson did initiate the assault by coming towards defendant with a knife. The incident began in the bedroom, established that defendant either initiated the assault with the knife or quickly disarmed Patterson of the knife. Further, Patterson was stabbed more than 30 times, including a likely final blow to the back of the head that was hard enough to break kitchen, after he was so wounded he could only crawl out of the bedroom. On this record, no reasonable juror would find that an (Chapman, supra, 386 U.S. at p. 24.) Appellate Opinion at 28 29.

2. Legal Standard The parties agree that the California Court of Appeal already found error. They

dispute whether that error was prejudicial. Petitioner argues that reversal is required under the Chapman "harmless beyond a reasonable doubt" standard, because the burden is on the state to show "beyond a reasonable doubt" that the error had no effect on the verdict. Chapman v. California, 386 U.S. 18 (1967). Respondent argues that if the federal habeas court finds either that the state co Chapman holding was reasonable or that the error was harmless under Brecht.

court cannot grant relief without first applying both the test this Court outlined in Brecht Brown v. Davenport, 596 U.S. 118, 122 (2022) [S]atisfying Brecht is only a necessary, not a sufficient, condition to relief. Id. at 127. -error determination Id. Accordingly, this court must deny relief if unreasonable application of Chapman nor an unreasonable determination of the facts. Id. at 125 & 134 deny relief to a state habeas petitioner who fails to

satisfy either this Court's equitable precedents or AEDPA. But to grant relief, a court must find that the pet

decision [applying Chapman Id. at 135. petitioner must persuade a federal court that no fairminded jurist could reach the state

court's conclusion under [the Supreme] Court's precedents. Id. (internal quotation marks omitted). Chapman held that a claim of constitutional error identified on direct appeal does not require reversal of a conviction if the prosecution can establish that the error was harmless beyond a reasonable doubt. Id. at 124.

Under the Brecht test, a habeas petitioner is not entitled to relief unless the instructional error had substantial and injurious effect or influence in determining the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). In other words, state prisoners seeking federal habeas relief may obtain plenary review of constitutional claims of trial error, but are not entitled to habeas relief unless the error resulted in actual prejudice. Id. at 637; see, e.g., Coleman v. Calderon, 210 F.3d 1047, 1051 (9th Cir. 2000) (finding Brecht error where at the very least, we cannot say with fair assurance . . . that the judgment was not substantially swayed by the [instructional] error.). The proper question in assessing harm under Brecht O'Neal v. McAninch, 513 U.S. 432, 436 (1995). If the court is convinced

that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. Id. at 437. If, on the other hand, the court is not fairly assured that there was no effect on the verdict, it must reverse. Id. injurious effect or influence in determining the jury's verdict, it must assume that the error

is not harmless and the petitioner must win. Id. at 436 44 (relief granted because record so evenly balanced that conscientious judge in grave doubt as to harmlessness of error); Chambers v. McDaniel, 549 F.3d 1191, 1200 01 (9th Cir. 2008) (granting habeas relief based upon "grave doubt" as

to harmlessness of erroneous first degree murder instruction on premeditation, where error went to "very heart of the case" and evidence against petitioner was not so great that it precluded a verdict of second degree murder); Murtishaw v. Woodford, 255 F.3d 926, 974 (9th Cir. 2001) (granting habeas relief as to death sentence where Ninth Circuit in "grave doubt" about whether the jury would have returned a death sentence even if they had been properly instructed that they did not have to do so after weighing mitigating and aggravating circumstances).

every fairminded jurist would agree that an error was prejudicial, Brecht asks only whether a federal habeas court itself harbors Davenport, 596 U.S. at 136.

3. Analysis This court first inquires whether the state court's decision applying Chapman was unreasonable.

to prove both that he reasonably believed that he was defending his home against Patterson who intended to or tried to assault him with a deadly weapon; and that Patterson tried to enter or did enter home intending to commit an act of violence. The instruction should have required Rachal to prove only one of those elements. Petitioner argues that the evidence supported a finding that Patterson entered the premises and committed an act of violence (the first element), but that it was impossible to show his intent at the moment of entry (the second element). Pet. at 68; Traverse at 17.

The California Court of Appeal properly identified the controlling standard in Chapman. See Appellate Opinion at 28 29. It also identified the nature of the error in the instruction. Id. The appellate court concluded that the prosecution had established the erroneous jury instruction was harmless beyond a reasonable doubt in light of the to commit an act of violence against him, and then proceeded to assault defendant with the knife while consistent with a theory that Patterson formed the intent to commit an act of violence

against defendant only after entering the residence. Therefore:

If the jury believed the defense theory that Patterson assaulted defendant with a knife while defendant was in bed, it would have found that Patterson both intended to or tried to commit the crime of assault with a deadly weapon and tried to enter or did enter that home intending to commit an act of violence against someone inside. Because the defense theory relied on the existence of both facts, the instructional error was (Yates, supra, 500 U.S. at p. 403.) Appellate Opinion at 29. Even had the instructional error harmed Rachal contrary to the California Court of in order to find defendant not no more force than was reasonably necessar pursuant to

the defense of section 197, subdivision (2) as defined in CALCRIM No. 506. Id. The more force than necessary, even if Patterson did initiate the assault by coming towards

Id. The court recounted trial evidence discussed above, including that Patterson was stabbed more

than 30 times, that Patterson was stabbed in the back of the head hard enough to break the knife, and that many of wounds were inflicted in the kitchen after he was so wounded he could only crawl out of

the bedroom. n this record, no reasonable juror would find that defendant used no more force than was reasonably necessary to defend against the danger. Thus, beyond a reasonable doubt, the instructional error with respect to did not contribute to the verdict obtained. Id. (quoting Chapman, 386 U.S. 18). This court finds that the conclusion that the error was harmless beyond a reasonable doubt was not so lacking in justification that it was beyond any possibility for fairminded disagreement. Here, [e]ven if some fairminded jurist applying Chapman could reach a different conclusion, we cannot say that every fairminded jurist must. Davenport, 596 U.S. at 144. Accordingly, Claim 4 is DENIED, and the court need not additionally assess the claim under the standard set out in Brecht. See id. at 134 deny relief to a state habeas petitioner who fails to satisfy either this Court's equitable precedents or AEDPA. But to grant relief, a court must find that the petitioner has

E. Claim 5: Prosecutorial Misconduct

In Claim 5, petitioner argues that the prosecutor's actions so infected the trial with unfairness as to make the resulting conviction a denial of due process. Pet. at 69. Petitioner contends the prosecutor committed misconduct by (1) misstating the law, (2) appealing to the sympathies of the jurors, (3) injecting his personal opinion of the evidence into the trial, and (4) attacking defense counsel. 4

Traverse at 18. As a threshold the alleged misconduct in Claim 5 are procedurally defaulted because trial counsel failed

to object to any of the alleged instances of prosecutorial misconduct at trial. Answer at 32. Respondent argues that this court cannot reach the merits of a claim where the state court has resolved the issue based on a state procedural ground that is independent and adequate to support the judgment, and that the Ninth Circuit has held that failure to

constitutes a procedural default, respondent argues that this court must dismiss the

prosecutorial misconduct claims with prejudice, unless petitioner meets his burden to show ineffective assistance of counsel or failure to object or request an admonition does not forfeit the normally would the issue is not forfeit amounted to ineffective assistance of counsel in viol Traverse at 20; see also Pet. at 68 72.

This court cannot reach the merits of a claim where the state court has resolved the issue based on a state procedural ground that is independent and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729, holding modified by Martinez v. Ryan, 566 U.S. 1 (2012) contemporaneous objection requirement constitutes a valid procedural default. Zapata v.

4 Petitioner also contends as part of Claim 6 that trial counsel was ineffective for failing to object to these alleged instances of prosecutorial misconduct. Traverse at 20. Those Vasquez, 788 F.3d 1106, 1112 (9th Cir. 2015) (failure to object to prosecutorial misconduct); Rich v. Calderon, 187 F.3d 1064, 1070 (9th Cir. 1999) (same); Featherstone v. Estelle, 948 F.2d 1497, 1506 (9th Cir. 1991) (same).

Under California law, claims of prosecutorial misconduct must be objected to at trial in order to be preserved on appeal. See People v. Fosselman, 33 Cal. 3d 572, 580 81 (1983). A petitioner who fails to observe a state's "contemporaneous objection" rules

may not challenge the constitutionality of the conviction in federal court absent a showing of cause and prejudice. See Engle v. Isaac, 456 U.S. 107, 129 (1982); United States v. Frady, 456 U.S. 152, 162-169 (1982) (while plain error applies in determining whether a defendant may raise a claim for the first time on direct appeal, cause and prejudice standard applies in determining whether that same claim may be raised on habeas); Fauber v. Davis, 43 F.4th 987, 1001-1002 (9th Cir. 2002) (petitioner failed to show cause and prejudice for his defaulted prosecutorial misconduct claim based on improper see also Sawyer v. Whitley, 505 U.S. 333, 339-40 (1992); Kuhlmann v. Wilson, 477 U.S. 436, 454 55 (1986) (If a state prisoner cannot meet the cause and prejudice standard, however, a federal court may hear the merits of successive, abusive or procedurally defaulted claims if the failure to hear the claims would constitute a "miscarriage of justice."). Petitioner relies exclusively on United States v. Sanchez, 176 F.3d 1214, 1218 (9th Cir. 1999) for his absent his contemporaneous objection, but that case is inapposite as it concerned a

direct appeal of a criminal conviction in federal district court, not a habeas claim.

Accordingly, petitioner may not challenge the constitutionality of his conviction in this court on this basis absent a showing of cause and prejudice. Thus, this court must dismiss Claim 5 unless petitioner meets his burden to show cause and prejudice. See Thompson, 501 U.S. at 750. requires the petitioner to show that some objective factor external to the defense impeded counsel's efforts to construct or raise the claim. McClesky v. Zant, 499 U.S. 467, 493 (1991) (citing Murray v. Carrier, 477 U.S. at 488). A petitioner may show cause by establishing constitutionally ineffective assistance of counsel, but attorney error short of constitutionally ineffective assistance of counsel does not constitute cause and will not excuse a procedural default. See McCleskey, 499 U.S. at 494; Carrier, 477 U.S. at 486- 88; see, e.g., Fauber, 43 F.4th at se to the level of a Sixth Amendment violation because he cannot show prejudice).

cause and prejudice arguments rely on claims that his trial counsel was constitutionally ineffective, those arguments are addressed together with petit below. For the reasons discussed below, petitioner fails to show cause and prejudice, and Claim 5 is therefore DENIED. F. Claim 7: Whether the Trial Court Improperly Admitted Evidence Regarding

Petition -girlfriend Petitioner argues that the trial court committed prejudicial error in violation of

his right to due process by admitting evidence regarding his relationship with his ex-girlfriend, Chanda McClendon. Pet. at 81 82. Respondent argues that (1) the claim was not exhausted in state court and therefore cannot be granted by this court; and (2) on the merits, no due process violation occurred.

1. Factual Background At trial, the prosecution called as a witness Chanda McClendon. RT 2387. She testified that, inter alia, she had been in a relationship with the defendant for two years, Rachal was right-handed, she lived with Rachal for a year, Rachal was friends and had worked with Patterson, and about various other facts concerning Rachal. Id. at 2387 2400.

McClendon also testified as to details of her relationship with Rachal that form the id. at 2400), he was

id. at 2401 02), she reported his behavior to the police and obtained a restraining order (id. at 2403 08), and id. at 2411).

The prosecution also introduced evidence of Google searches performed by petitioner including, e.g., How to get out of a restaining [sic] order (id. at 3006); How to make yourself look different (id. at 3010.); Chanda E. Mc Clendon, prostitution charges in Oakland (id. at 3011); prostitution in Chowchilla (id. at 3013); The difference in a restraining order domestic violence charge from a regular domestic violence charge (id. at 3014); What is considered stocking [sic] (id.); Can a person other than the victum [sic] say you violated a restraining (id. at 3015); stalking but not caught (id.); If your girlfriend is a liar what to do (id.); hire a private investigator in San Jose to see if your wife cheating (id.).

The California Court of Appeal described the trial proceedings as follows:

the admission of testimony about the incident involving McClendon. The prosecutor argued that the evidence was relevant to d offense. The trial court found that the proposed testimony

pursuant to a discussion with prosecutor had purposely avoided asking McClendon

questions that would have elicited that defendant had made

During argument to the jury, the prosecutor told the jury that in breakup with McClendon and reminded the jury that

and argued that the evidence showed th happened t take it anymore, and he took someone with [him], his friend, Ricky Patterson[.] Appellate Opinion at 39 40; see also RT 3415 21 & 3432.

The California Court of Appeal found that the evidence regarding McClendon was l. Evidence Code

section 210 and was admissible as possible motive evidence under Cal. Evidence Code section 1101(b). The appellate court further found that the evidence was not more prejudicial than probative under Cal. Evidence Code section 352. See Appellate Opinion at 40 42.

2. Exhaustion Respondent argues that the claim was not exhausted in state court and therefore cannot be granted by this court.

a. Legal Standard Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are first required to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b) & (c); Rose v. Lundy, 455 U.S. 509, 515 16 (1982). The state's highest court must be given an opportunity to rule on the claims even if review is discretionary. See O'Sullivan v. Boerckel requirement, a claim must be raised at every level of appellate review; raising a claim for

Casey v. Moore, 386 F.3d 896, 918 (9th Cir. 2004) (holding that where petitioner only raised federal constitutional claim on appeal to the Washington State Supreme Court, the claim was not fairly presented).

The exhaustion requirement is not jurisdictional, but rather a matter of comity. See Granberry v. Greer, 481 U.S. 129, 133 34 (1987). However, a district court may not grant the writ unless state court remedies are exhausted, , or ineffective 28 U.S.C. § 2254(b)(1).

It is not sufficient to raise only the facts supporting the claim in state court; rather, "the constitutional claim . . . inherent in those facts" must be brought to the attention of the state court. See Picard v. Connor, 404 U.S. 270, 277 (1971). Furthermore, a petitioner does not exhaust all possible claims stemming from a common set of facts merely by raising one specific claim. See Gulbrandson v. Ryan, 738 F.3d 976, 993 (9th Cir. 2013) (mere submission of a relevant affidavit to state court not sufficient to place that court on notice of all potential constitutional challenges stemming from that affidavit); Koerner v. Grigas, 328 F.3d 1039, 1046-48 (9th Cir. 2003) (holding even though factual basis for the claim was submitted to state court, the claim itself was not fairly presented to that court because the facts were used exclusively to support another claim). Indeed, state courts must be alerted to the fact that prisoners are asserting claims under the United States Constitution in order to be given the opportunity to correct alleged violations of federal rights. Duncan v. Henry, 513 U.S. 364, 365-66 (1995); Gray v. Netherland, 518 U.S. 152, 162 63 (1996) (characterizing Picard as requiring "reference to a specific federal constitutional guarantee" in state court; presentation of facts underlying claim not sufficient); Fields v. Waddington, 401 F.3d 1018, 1021 (9th Cir. applicable provision, or an underlying federal legal theory, does not suffice to exhaust the

Castillo v. McFadden, 399 F.3d 993, 1000 02 (9th Cir. 2005) (requiring insufficient).

The petitioner bears the burden of proof that state judicial remedies were properly exhausted. Parker v. Kelchner, 429 F.3d 58, 62 (3d Cir. 2005); Caver v. Straub, 349 F.3d 340, 345 (6th Cir. 2003); Winck v. England, 327 F.3d 1296, 1304 n.6 (11th Cir. 2003); see Darr v. Burford, 339 U.S. 200, 218 19 (1950) ("petitioner has the burden . . . of showing that other available remedies have been exhausted"), overruled on other grounds, Fay v. Noia, 372 U.S. 391 (1963); Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981) (affirming summary judgment for respondent because, although petitioner alleged he had exhausted, "there is nothing in the record" to show it).

If available state remedies have not been exhausted as to all claims, the district court must dismiss the petition. See Rose, 455 U.S. at 510; Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988). The court may also deny a habeas petition on the merits even if it is unexhausted. See 28 U.S.C. § 2254(b)(2); Runningeagle v. Ryan, 686 F.3d 758, 777 n.10 (9th Cir. 2012); see also Jones v. Davis, 806 F.3d 538, 544-45 (9th Cir. 2015) (concluding that, just as courts have discretion to deny a claim on its underlying substantive validity under § 2254(b)(2) without reaching the exhaustion issue, they also have discretion to deny a claim as Teague-barred under § 2254(b)(2) without reaching the exhaustion issue). But it is not required to do so. See Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999).

b. Analysis Petitioner argues that the above-described evidence should have been excluded tate courts was that the admission of the evidence about McClendon was

irrelevant under Cal. Evidence Code section 210, inadmissible character evidence under Cal. Evidence Code section 1101(b), and more prejudicial than probative under Cal. Evidence Code section 352, and thus constituted a miscarriage of justice, the standard of prejudice for a state law, non- Answer petition for review, opening brief, and reply brief on appeal). Respondent argues that in relation to this claim in his state-court proceedings. Id. Petitioner

counters that the fact that his state- any federal cases or specific issue was brought to the attention of state courts prior to this this [sic]

Traverse at 24 (citing authority stating that citations to state-court cases that analyze federal issues serve the same purpose as citing federal cases). Although petitioner argues that citations to state-court cases analyzing federal authority are sufficient to present a federal issue, he does not point to any relevant case that he raised in his state- court briefing.

Here, petitioner fails to meet his burden to demonstrate that state judicial remedies were properly exhausted. He does not cite a single filing he made in state court in which -court filings, and upon review this court agrees that petitioner did not fairly present this issue as a federal, Due Process issue to any state court; the underlying facts and arguments were framed solely as state-law issues. See Petition to Exhaust State Remedies, Answer, Ex. 4 at 29 32 (Petition for Review addressing exclusively arguments based on state law); 73 78; failing to mention any federal issue); 3 at 51 55

As available state remedies have not been exhausted as to Claim 7, this court must dismiss the claim. See Rose, 455 U.S. at 510; Guizar, 843 F.2d at 372. Claim 7 is therefore DISMISSED.

3. Due Process Although the court need not do so, it may deny a habeas petition on the merits even if it is unexhausted. See 28 U.S.C. § 2254(b)(2).

irrelevant to the homicide at issue in the trial . Pet. at 81 86. Respondent argues that because the Supreme Court has not made a clear ruling that admission of irrelevant or prejudicial evidence constitutes a due process e cannot be an unreasonable application of clearly established Supreme Court law. Accordingly, respondent argues, habeas relief is unavailable for this claim. Answer at 49.

a. Legal Standard The admission of evidence is not subject to federal habeas review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of the fundamentally fair trial guaranteed by due process. See Henry v. Kernan, 197 F.3d 1021, 1031 (9th Cir. 1999); Colley v. Sumner, 784 F.2d 984, 990 (9th Cir.), cert. denied ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due Holley v. Yarborough, 568 but not

contrary to, or an unreasonable application of, clearly established Supreme Court precedent under § 2254(d)); Zapien v. Martel, 849 F.3d 787, 794 (9th Cir. 2016) (because there is no Supreme Court case establishing the fundamental unfairness of admitting multiple hearsay testimony, Holley bars any such claim on federal habeas review).

Failure to comply with state rules of evidence is not a sufficient basis for granting federal habeas relief on due process grounds. See Henry, 197 F.3d at 1031; Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated. See id. (citing Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984)). The due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. Walters, 45 F.3d at 1357; Colley, 784 F.2d at 990. Only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. See Jammal, 926 F.2d at 920.

b. Analysis Here, the California Court of Appeal found that the evidence concerning offense. Appellate Opinion at 41. From the evidence relating to McClendon that showed

permissible inf

G. Claim 9: Whether False Testimony Was Allowed to Be Presented at Trial

Petitioner argues that his right to due process was violated when the prosecutor knowingly introduced false evidence in the form of Kevin Johnson that there was still animosity between

petitioner and Patterson over the Willoughby job during the final days leading up to the homicide. Pet. at 95 97. The claim deals exclusively with the testimony of Kevin Johnson. Traverse at 29. Petitioner argues that the prosecutor was aware of allegedly conflicting statements from numerous other witnesses, such that -established Supreme Court precedent found in Napue v. Illinois, 360 U.S. 264 (1959).

1. Legal Standard "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976) (footnotes omitted); United States v. Bagley, 473 U.S. 667, 678 80 nn.8 9 (1985) (deliberate deception of court and jury by the presentation of testimony known to be perjured is inconsistent with the rudimentary demands of justice and a resulting conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict) (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

A claim under Napue succeeds when (1) the testimony was actually false, (2) the prosecution knew or should have known that the testimony or evidence was actually false, and (3) the false testimony or evidence was material. Henry v. Ryan, 720 F.3d 1073, 1084 (9th Cir. 2013).

First, the testimony must be actually false. Prosecutors will not be held accountable for discrepancies in testimony where there is no evidence from which to infer prosecutorial misconduct and the fairness of the trial was not materially affected. See United States v. Zuno-Arce, 44 F.3d 1420, 1423 (9th Cir. 1995) (no evidence of prosecutorial misconduct where discrepancies in testimony could as easily flow from errors in recollection as from lies) overruled in part on other grounds by Valerio v. Crawford, 306 F.3d 742, 764 (9th Cir. 2002) (en banc); Hayes v. Ayers, 632 F.3d 500, 520 (9th Cir. 2011) (defendant failed to show that witness's "mostly equivocal" statements about when she received immunity or whether she actively sought immunity were actually false or that the prosecutor knew as much).

Second, the prosecution must have known or should have known that the testimony or evidence was actually false. A claim that only the witness knew his testimony was false, and not that the prosecutor also had such knowledge, does not adequately allege a violation of clearly established federal law under Napue. Reis- Campos v. Biter, 832 F.3d 968, 977 (9th Cir. 2016) (rejecting claim that only police investigator knew his testimony was false). Conclusory assertions will not do. See id. truth must be not only inaccurate but also perjured, does not constitute evidence

sufficient to make out a Napue claim). Petitioner must establish a factual basis for attributing to the government knowledge that the testimony was perjured. See Morales v. Woodford, 388 F.3d 1159, 1179 (9th Cir. 2004).

reasonable likelihood that the false evidence or testimony could have affected the

judgment of the jury. Morris v. Ylst, 447 F.3d 735, 7 Napue requires us to determine only whether the error could have affected the judgment of the jury, whereas ordinary harmless error review requires us to determine whether the error would Dow v. Virga, 729 F.3d 1041, 1048 (9th Cir. 2013). This element may be satisfied by a showing that the perjured testimony or false evidence taken to put the whole case in such a different light as to undermine confidence in the

Kyles v. Whitley, 514 U.S. 419, 435 (1995).

2. Analysis A claim under Napue will succeed when (1) the testimony was actually false, (2) the prosecution knew or should have known that the testimony or evidence was actually false, and (3) the false testimony or evidence was material. Henry, 720 F.3d at 1084.

First, petitioner argues that Kevin Johnson falsely testified that there still existed animosity between petitioner and Patterson over the Willoughby job during the final days leading up to the homicide. Petitioner argues that statements of Steven Friendly, Cora testimony, petitioner and Patterson were on seemingly friendly terms the night before the

incident. Accordingly, petitioner argues that the truth was that there was no longer animosity between the two men over the Willoughby job. Pet. at 96.

the record indicating any false statements that Johnson made at trial, nor does he cite to

any conflicting statements made by other witnesses. Instead, he offers conclusory animosity between Petitioner and Patterson over the Willoughby job during the final days , Cora Coloma, Sandy Tellez and the Alcantars had already been taken by the People's own investigator, and the fact that Petitioner and Patterson were on seemingly friendly terms the night before Id. at 96. Contrary to petit citations to testified that he was not positive about the timing of his observations of animosity, but

estimated it was between a month and six months before Patterson died; he had told the half before Patterson died. RT 2698 2702. On cross-examination Johnson said he did

not recall the dates of those conversations. Id. at 2711 12. Of course, petitioner does not dispute that he and Patterson had disagreements during that general time period, but atements were false because they pinpointed the timing such testimony.

Even if petitioner had identified such time-specific testimony from Johnson, it is merely speculative that such testimony would have been false. Petitioner does not

it wa

on friendly terms, or that underlying animosity did not continue. Pet. at 96 97; Traverse at 30. And other record evidence suggest that animosity was in fact ongoing. E.g., RT 1851 RT 2384

(discussing Trial Ex. 100); Pet. a was large amounts of ill- RT 2681 82 & 2694).

was actually false or that the prosecution knew or should have known that the testimony or evidence was actually false under Napue.

Accordingly, Claim 9 is DENIED. H. Claims 5, 6, 8, and 10: Ineffective Assistance of Counsel

The court next addresses ineffective to a degree that violated his constitutional rights. These ineffective assistance of counsel arguments fifth, sixth, eighth, and tenth claims.

1. Legal Standard A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id.

In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 687 88, see also Andrus v. Texas, 140 S. Ct. 1875, 1881 (2020) (per curiam). Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694; Andrus, 140 S Ct. at 1881. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. See Strickland, 466 U.S. at 687. The defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms at the time counsel represented the defendant. See id. at 688; Wiggins v. Smith, 539 U.S. 510, 522-23 (2003) (citing American Bar Association professional standards and standard practice in capital defense at pertinent time); see also Jones v. Ryan, 52 F.4th 1104, 1117 (9th Cir. 2022) (citing ABA Guidelines in death penalty cases in support of determination that trial counsel was constitutionally ineffective by failing to secure mental health expert in advance of capital sentencing hearing).

Jones, 52 F.4th at 1116 (quoting Cullen, 563 U.S. at 196). The relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable.

See Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. See Strickland, 466 U.S. at 689. "Although courts may not indulge post hoc rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Harrington, 562 U.S. at 109 (quoting Yarborough v. Gentry, 540 U.S. 1, 8 (2003)) (citation omitted) (attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities); Cullen, 563 U.S. at 196 ("Strickland specifically commands that a court 'must indulge the strong presumption' that counsel made all significant decisions in the exercise of reasonable professional judgment.) (quoting Strickland, 466 U.S. at 689 90).

Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. See Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). Whether counsel's actions were indeed tactical is a question of fact considered under 28 U.S.C. § 2254(d)(2); whether those actions were reasonable is a question of law considered under 28 U.S.C. § 2254(d)(1). Edwards v. LaMarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). The petitioner bears the burden of rebutting the strong presumption that strategic decisions by counsel are reasonable, and the absence of evidence cannot overcome the presumption. Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) (per curiam).

It is unnecessary for a federal court considering a habeas ineffective assistance claim to address the prejudice prong of the Strickland test if the petitioner cannot even establish incompetence under the first prong. May v. Shinn, 954 F.3d 1194, 1203 (9th Cir. 2020) Strickland ; Siripongs v. Calderon, 133 F.3d 732, 737 (9th Cir. 1998).

Second, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Strickland, 466 U.S. at 688. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694.

On a claim of ineffectiveness for failure to request a jury instruction on a lesser included offense, the prejudice analysis requires an assessment of the likelihood the jury would have convicted only on the lesser included offense. Crace v. Herzog, 798 F.3d at 847 50 (9th Cir. 2015). Where the defendant is challenging his conviction, the

the factfinder would Hinton v. Alabama, 571 U.S. 263, 275 (2014) (quoting Strickland, 466 U.S. at 695);

Luna v. Cambra, 306 F.3d 954, 961 (9th Cir. 2002) (same).

In order to establish prejudice from failure to object, petitioner must show that (1) had his counsel objected, it is reasonable that the trial court would have sustained the objection as meritorious, and (2) had the objection been sustained, it is reasonable that there would have been an outcome more favorable to him. See Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999).

examining the prejudice suffered by the defendant as the result of the alleged deficiencies. See Strickland, 466 U.S. at 697; Williams v. Calderon, 52 F.3d 1465, 1470 & n.3 (9th Cir. 1995), cert. denied, 516 U.S. 1124 (1996).

A doubly deferential judicial review is appropriate in analyzing ineffective assistance of counsel claims under § 2254. See Cullen, 563 U.S. at 200 02; Harrington, 562 U.S. at 105 (same); Premo v. Moore, 562 U.S. 115, 122 (2011) (same). The general rule of Strickland gives the state courts greater leeway in reasonably applying that rule, which in turn

Cheney v. Washington, 614 F.3d 987, 995 (9th Cir. 2010) (citing Yarborough, 541 U.S. at 664). 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. Harrington fairminded jurist could agree with either [the] deficiency or prejudice holding, the

Shinn v. Kayer, 592 U.S. 111, 120 (2020) (quoting Wetzel v. Lambert, 565 U.S. 520, 524 (2012) (per curiam)).

2. Analysis In claims 6 and 10, petitioner contends he received ineffective assistance of counsel because (a) his attorney asked that the jury not be instructed on manslaughter. In Claim 6 petitioner argues that he received ineffective assistance when (b) his counsel failed to object when the trial court gave the CALCRIM jury instruction number 506 using . claims 5 and 6 both argue that he received ineffective assistance of counsel because (c) his attorney failed to object to prosecutorial misconduct. Finally alleges that (d) his trial counsel was ineffective in presenting his claim of self-defense.

a. Request to Forgo Instructions on Manslaughter Petitioner argues that his trial counsel's request that the jury not be instructed on the lesser included offense of manslaughter over the objection of his client constituted ineffective assistance. Petitioner argues that trial counsel [t]o go Traverse at 21; see also Pet. at 97 101.

Petitioner argues that any reasonable attorney would have realized that manslaughter instructions were imperative -seven (37) stab wounds, clearly giving rise to an argument of an over-reaction (i.e., imperfect self-defense). Traverse at 22.

Petitioner also argues that trial counsel did not understand the sua sponte obligations of the trial court to instruct on the lesser included offense even over his objection. unreasonable and in direct conflict with the law. Finally, petitioner argues that his argument should be found meritorious notwithstanding the treatment of the issue because there now exists additional evidence that differs from the appellate record concerning the decision to forgo manslaughter instructions. Pet. at 98.

The California Court of Appeal found no ineffective assistance as a result of trial

The decision to forego manslaughter instructions in this case, in order to avoid a compromise verdict, was a reasonable (Cooper, supra, 53 Cal.3d at p. 832.) Most significantly, after his fall or jump from a knife. He came at reasonably determine that this statement was consistent with a self-defense verdict but inconsistent with a manslaughter verdict. That is, if the jury had believed e believed that defendant did not kill Patterson in a sudden quarrel or heat of passion or due to an unreasonable belief in the need to defend himself. (See People v. Manriquez (2005) intentional killing is reduced to voluntary manslaughter if . . . the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation . . . , or kills in the unreasonable, but good faith, belief that deadly force is necessary in self- To have argued for a manslaughter verdi Cooper, supra, 53 Cal.3d at p. within the and that

defendant did not receive ineffective assistance of counsel when his trial counsel requested that the trial court not give manslaughter instructions. (Lopez, supra, 42 Cal.4th at p. 966.) Appellate Opinion at 38.

Both petitioner and trial counsel testified about this issue during the postconviction evidentiary hearing in Superior Court concerning the habeas petition. Petitioner testified that counsel informed him that counsel and that petitioner had no say in what jury instructions to request. Petitioner said he always wanted the jury to be instructed on manslaughter. See Evidentiary Hearing Reporter s Transcript of Proceedings Held on December 7, 10, 2018, Pet., Ex. L at 18 19. Trial counsel told the

instructions, but petitioner now argues that he told counsel at the time that he did not Id. at 44 46. Petitioner testified that his trial counsel Mr. Lempert lied to the court. Id. at 46 Court that I was in agreement with him when I was not. Petitioner claims he did not tell the during the trial because that would have Id. at 47. However, petitioner acknowledged that at a later time he spoke up and told the judge he wanted manslaughter instructions. Id. at 48 49.

Counsel did not recall seeing gestures during any discussion about lesser included instructions, and he testified that he would have informed the court if he had seen such conduct. Id. at 101 02. Counsel claimed that he would not have stated that petitioner agreed to omit the manslaughter instructions if that had not been true. Id. at 103 04. Counsel regularly informed his clients that the court is required to instruct on manslaughter if there is evidence to support a lesser included offense, even over Id. at 114.

In light of the foregoing testimony, the Superior Court addressed the question decision fell below the standard of care, finding that it did not because self-defense argument was not unreasonable. See Sup. Ct. Habeas Decision at 3962 64. Following the evidentiary hearing, that court reasoned:

The court finds Lempert to be a credible witness regarding the circumstances of the decision not to request manslaughter instructions. As noted above, there were sound reasons to self-serving and, in light of the circumstances surrounding his belated statement to the court that he wanted manslaughter instructions, his testimony does not persuade the court that he declined to express his disagreement with the decision testimony on this issue was not credible.

Petitioner has also failed to demonstrate that another attorney would have acted differently than Lempert under the same circumstances. Even if another attorney would have made a different decision, that would not prove that the decision Lempert made was outside the range of reasonable competence. Further, Petitioner has failed to persuade the court that he was prejudiced by incompetence. Petitioner failed to prove it is reasonably likely a different result would have occurred if manslaughter instructions had been given. For the reasons discussed above, the court finds it was not ineffective assistance of counsel to forego manslaughter instructions in the trial. Id. at 3966 67.

pursuant to § 2254, a "doubly" deferential judicial review is appropriate. See Cullen, 563 U.S. at 190 (performance through the deferential lens of § 2254(d) and quotation

marks omitted). determination under the Strickland standard was incorrect but whether that determination was unreasonable Knowles, 556 U.S. at 123 (internal quotation marks omitted); Harrington [T]he 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."). On a claim of ineffectiveness for failure to request a jury instruction on a lesser included offense, the prejudice analysis requires an assessment of the likelihood the jury would have convicted only on the lesser included offense. Crace, 798 F.3d at 847 50.

Regarding alleged deficiency in performance, a difference of opinion as to trial tactics does not constitute denial of effective assistance (see United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1981)), and tactical decisions are not ineffective assistance simply because in retrospect better tactics are known to have been available (see Bashor, 730 F.2d at 1241). Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. See Sanders, 21 F.3d at 1456.

First, although petitioner now disagrees with the merits of the decision, it is clear that trial counsel in fact based his decision to forego manslaughter instructions on strategic considerations. See RT 3159 61 (trial counsel explaining on the record at the time of trial why he did not want manslaughter instructions, which he believed were unwarranted and would detract from the self-defense

argument); see also, e.g., Sup. Ct. Habeas Decision at 3962 67; Appellate Opinion at 38. The Superior Court that presided over the post- - Sup. Ct. Habeas Decision at 3966.

Second and third, this court finds the California Court of Appeal and Superior Court conclusions that trial counsel made an informed, reasonable decision under the circumstances to be reasonable. While failure to give the manslaughter instruction was erroneous (Appellate Opinion at 24 26), the California Court of Appeal reasoned that [t]he decision to forego manslaughter instructions in this case, in order to avoid a (id. at 38). The Superior Court reached the same conclusion after conducting an evidentiary Sup.

Ct. Habeas Decision at 3966 67.

part and continues to do so came at him. This unambiguously supported petitioner -defense theory, and as trial

counsel and the California Court of Appeal reasoned, introduction of manslaughter instructions may have confused the focus on that theory. In light of the contemporaneous and post-conviction explanations s trial strategy, the fact that the self- defense-focused strategy was presented at trial presentation did not advance or meaningfully attempt to advance theories of heat of passion or unreasonable overreaction, this court finds that the California Court of Appeal s decision and the Superior Court not unreasonable. Respondent has advanced reasonable arguments that trial counsel satisfied Strickland s deferential standard when tactically pursuing a self-defense strategy to the exclusion of a manslaughter defense and associated jury instructions. See generally Butcher v. Marquez Strickland test, counsel's strategic choice to forgo an instruction for voluntary manslaughter was reasonable because counsel had good cause to believe that further efforts to obtain such an instruction would harm Butcher's case. . . . Defense counsel need not request Crow v. Haynes, No. 20-35911, 2021 WL 5122171, at *3 (9th Cir. Nov. 4, 2021) his statement that he had thought for a long time about whether to request manslaughter

instructions but ultimately declined to do so, was not ineffective assistance); Ruth v. Glebe - Matylinsky v.

Budge, 577 F.3d 1083, 1092 (9th Cir. 2009) (no ineffective assistance resulted from failure to request instructions on manslaughter and provocation). Accordingly, Claim 10 is DENIED, and Claim 6 is DENIED to the extent it relies manslaughter instructions.

a fairminded jurist could agree with the deficiency holding, the reasonableness of the other [prejudice question] Kayer, 592 U.S. at 120 (quoting Wetzel, 565 U.S. at 524).

b. CALCRIM No. 506 Next, petitioner argues that trial counsel's representation was ineffective when he failed to object to the error in the instruction on defense within the home, CALCRIM No. 506.

Traverse at 23. Petitioner argues that there can be no satisfactory explanation why Rachal's trial counsel would acquiesce in an instruction which increased the burden to show justifiable homicide in the home. As discussed above, the California Court of Appeal recognized that an erroneous instruction was given the Appellate Opinion at 39. This court inquires whether jurist could agree with either [the] Kayer, 592 U.S. at 120.

For the reasons discussed in Section D above concerning Claim 4, this court finds that a fairminded jurist could agree with the holding that the erroneous instruction was harmless beyond a reasonable doubt. claim of ineffective assistance of counsel based on the failure to object to the erroneous

CALCRIM No. 506 jury instruction fails and Claim 6 is DENIED to the extent it relies on No. 506 instruction.

c. Prosecutorial Misconduct Petitioner argues that his trial counsel was constitutionally deficient due to his failure to object to certain instances of alleged prosecutorial misconduct, when the prosecutor (1) misstated the law, (2) appealed to the sympathies of the jurors, (3) injected his personal opinion of the evidence into the trial, and (4) attacked defense counsel. Traverse at 18. He also argues these instances of ineffective assistance justify this court Id. at 20; Pet. at 68.

In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 687 88. The petitioner bears the burden of rebutting the strong presumption that strategic decisions by counsel are reasonable, and the absence of evidence cannot overcome the presumption. Dunn, 141 S. Ct. at 2410. Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694; Andrus, 140 S Ct. at 1881. On th must overcome the a doubly

counsel satisfied Strickland s deferential standard. Harrington, 562 U.S. at 105.

First, regarding he Ninth Circuit has repeatedly found that tactical decision. Demirdjian v. Gipson, 832 F.3d 1060, 1072-1073 (9th Cir. 2016) (state

court could reasonably presume that defense counsel made a reasonable tactical of objecting); Cunningham v. Wong, 704 F.3d 1143, 1159 (9th Cir. 2013) (defense

United States v. Molina,

ic perspective, for example, many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe

their objections to be a sign of desperation or hyper-te United States v. Necoechea objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is

Second, in order to establish prejudice from a failure to object, petitioner must show that (1) had his counsel objected, it is reasonable that the trial court would have Juan H., 408 F.3d at 1273); and

(2) had the objection been sustained, it is reasonable that there would have been an outcome more favorable to him. See Wilson, 185 F.3d at 990. In determining prejudice,

Furman v. Wood, 190 F.3d 1002, 1006 (9th Cir. 1999); accord Allen v.

Woodford, 395 F.3d 979, 997 (9th Cir. 2004).

(1) Misstatements of Law Petitioner argues that his trial counsel was constitutionally deficient because he s of law regarding the necessary requirements for Rachal to use force in self-defense while in his home during closing arguments. Specifically, defense counsel failed to object when the prosecutor said the following:

in your house, and they actually do break in your house, and you they are there to . . . . The law actually gives you a presumption that your fear would be reasonable. And I what happened here. And this presumption actually applies if If there was, in fact, an intruder unlawfully and forcefully entering or about to enter. . . . So, yes, there is a presumption. Ladies and gentlemen, you you find that Ricky Patterson broke into that house with murder on his mind, send this man what happened. RT 3449 50. Petitioner argues that the objectionable portion of that argument was: that Ricky Patterson broke into that house with murder on his mind, send this man

Id. (emphasis added). Petitioner correctly argues that the CALCRIM No. 506 instruction concerning self-defense in the home required less, namely only the reasonable belief that Patterson intended to or tried to commit the crime of assault with a deadly weapon, or tried to enter or did enter that home intending to commit an act of violence. See, e.g., RT 3393. Respondent argues that the prosecutor did not misstate the law. Even if he did, it closing argument by referring the jury to the instructions rather than by objecting. Finally,

respondent argues that petitioner has not shown that def was prejudicial. The California Court of Appeal held:

The challenged comment was made in the context of the the presumption set forth in section imminent peril or likely to cause death or great bodily injury within his or her broke into that house with murder on his mind, send [defendant]

(People v. Boyette (2002) 29 Cal.4th 381, 435.) find defendant acted in self-defense within his home only if prosecutor was telling the jury that it did not need to even consider whether the section 198.5 presumption applied if Patterson was thinking of killing defendant when he entered

Even assuming the prosecutor misstated the law, an objection would not have been futile and an admonition would have been effective. (See Fuiava, supra, 53 Cal.4 th

at p. trial counsel could have requested the trial court tell the jury the not ineffective for failing to object and request an admonition. failure to object will rarely establish ineffective assistance. People v. Maury (2003) 30 Cal.4th 342, 419.) The record indicates comments by reading the jury the requirements for CALCRIM No. 506 during his own argument. (See People v. Welch (1999) 20 Cal.4th 701, 764 (Welch).) This decision was reasonable, particularly since the jury was also instructed to follow the conflict CALCRIM No. 200.)

Appellate Opinion at 31 32. This court agrees with respondent that the California Court of Appeal made a misstatements of law. The prosecutor Ricky Patterson broke into

that house with murder on his mind, send this man home. This is not a misstatement of the law. And as the California Court of Appeal reasoned,

efendant acted in self-defense within his home only Appellate Opinion at 31 (emphasis added). Petitioner characterizing the law as requiring a much more difficult set of circumstances then [sic] is

actually required for the People to disprove self- Pet. at 70 (emphasis added)) namely, that Patterson had entered the home with murder on his mind. But the

prosecutor gave an example of way it might do so (RT 3449 50).

Moreover, that example followed a more complete discussion of the presumption set forth in section 198.5. In that context, he said immediately before the statement pe

. . . . The law actually gives you a

happened here. RT 3449

The California Appellate Opinion at 31. That is

because jury the requirements for CALCRIM No. 506 during his own argument. This decision was

Id. at 31 32 (citations and internal

quotation marks omitted). Nor did the conduct lead to a fundamentally unfair trial.

The California Court of Appeal based its ruling on a reasonable argument that counsel satisfied Strickland's deferential standard (Harrington, 562 U.S. at 105) such that the holding (Kayer, 592 U.S. at 120). And even if constitutional error occurred, petitioner has not shown that it was prejudicial for the reasons described above. Accordingly, effective assistance of

(2) Appeals to Sympathy

Petitioner argues that his trial counsel was constitutionally deficient because he eals to juror sympathy. Specifically, counsel failed to object when, during closing argument, the prosecutor made statements concerning killing animals, calling self-defense a license to kill, and referring to the fact that paid. Such statements include:

"Sometimes I think we, in the Bay Area, a lot of us are animal lovers.

Imagine what you might think if someone did this to a dog or cat. Who would think for one millisecond that that was anything but a sadistic, evil person?" RT 3445. So, let s just talk briefly about lawful self-defense. A license to kill." Id. at

3446. "There are certain rules that apply to this license to kill." Id. license to kill. This defendant had no license to kill in this case."

Id. at 3447. "What does her over $6,000 worth of testimony tell us? And I didn't have

the heart, ladies and gentlemen, to ask her how much she would make over that lunch hour." Id. at 3462. "There is an incentive to tell you about possibilities, no matter how

reasonable, no matter how unreasonable, because that gets them called into court to get paid $600 an hour to wait in that hallway and give you possibilities." Id. at 3537 38. First, the California Court of Appeal observed that the prosecutor did not in fact argue that petitioner had committed animal abuse and also in a jury instruction. Appellate Opinion at 32 33; see also CALCRIM Nos. 521 (first degree murder) & 733 (murder with torture). The court also reasoned that trial counsel was not ineffective for failing to object because he made a reasonable tactical decision to respond Appellate Opinion at 32 33. And defense counsel meaningfully responded to that argument, saying that the prosecutor

feelings if the knife wounds had been used on a dog or a cat in the hope that you would consider [Patterson] in the same way you would feel for a dog or a cat. A dog and a cat are defenseless animals. They love people, by and large. They Why would he use that example? Just to pull at your heart strings, to hope that you will make an emotional decision rather than one 3527.

Second, the California Court of Appeal reasoned object - was a

tactical decision. Trial counsel -defense as provided by CALCRIM No. wording of the self-defense instruction Appellate Opinion at 33.

Third, the California Court of Appeal found it was not improper for the prosecutor , and appeared to be a tactical decision to respond during his own argument. Appellate

Opinion at 34; see also Stevens v. Davis, No. C 09-00137 WHA, 2018 WL 659135, at *12 (N.D. Cal. Feb. 1, 2018) both sides are allowed to suggest that an expert witness is (citing United States v. Preciado-Gomez r prejudice of one who has expressed an expert opinion can always be examined into on cross-

compensation. That was paid to her by the county. Those fees were paid only after [the presiding judge] was satisfied that the fees were reasonable and proper. To suggest that she earns $840,000 a year and, therefore, for some reason you should disregard her 3527.

counsel satisfied Strickland Harrington, 562 U.S. at 105) such

Kayer, 592 U.S. at 120). And even if constitutional error occurred, petitioner has not shown that it was prejudicial for the reasons described above. Accordingly, coun juror sympathy fails.

(3) Personal Opinion Petitioner argues that his trial counsel was constitutionally deficient because he Petitioner argues that during closing arguments, the prosecutor improperly stated his personal opinion concerning the facts a number of times, for example:

"I can't think of a more idiotic, stupid way to go over to your friend's house

with an intent to injure or kill him than to do it in your own truck, lock the doors so you can't make a speedy getaway, put the club device on the steering wheel so it takes even longer to get out of there, during the day when everybody can see you and your car, and then, of course, leave not one shred of evidence that he had murder or assault or an attack on his mind." RT 3447 48. "I think probably the thing that illustrates the lack of Mr. Patterson's intent in

this area is something as simple as Mr. Johnson was talking about why he was able to listen in on Mr. Patterson and the defendant's conversations as they are driving up to Berkeley. And the phone was on the speaker. Do you remember why he said the phone was on speaker? It's that hands-free law that we all know about, and so many people have intentionally or unintentionally flouted over the year and a half or so it's been around. This is a man who properly follows the hands-free law. Yet, they want to tell you he's an attempted murderer and attempted robber. It just doesn't make any sense." Id. at 3458 59. "I honestly can't explain why counsel took so much time with Miss Phan

when it's corroborated by Mr. Brillantes' testimony." Id. at 3461. "What Doctor Melinek needs to add to that statement is: Experts who are

paid $600 an hour to wait in the hallway to tell you people run out of fear. Okay. Id. at 3465. "The other thing about Deputy Valadez that, frankly, I just don't

understand." Id. at 3537. "The next possibility. Ricky Patterson, he's a journeyman. He's a

handyman. He's skilled in construction. That must mean that he knows how to tap a lock. Must mean he's clever enough to use the defendant's garage-door opener to get inside the house. I thought he broke in? I agree. Counsel's here to come up with possibilities, not reasonable doubt." Id. at 3541. Petitioner argues that [a] prosecutor may not express a personal opinion or belief in the guilt of the accused when there is a substantial danger that the jury will view the comments as based on information other than evidence adduced at trial. People v. Mincey, 2 Cal. 4th 408, 447 (1992), as modified on denial of reh'g (May 27, 1992). The California Court of Appeal reasoned that the prosecutor did no such thing. The first two statements are not problematic simply because the prosecutor referred to himself, Appellate Opinion at 35. The third comment concerning the

Id. at 36. The fourth comment concerning defense he last

guilt, imply there were additional facts not in evidence, vouch for the credibility of a Id.

The comments amounted to personal opinions, was reasonable. The California Court of

Strickland's Harrington Kayer, 592 U.S. at 120). And even if constitutional error occurred, petitioner has not shown that it was prejudicial for the reasons described above. Accordingly,

(4) Attacks on Counsel Petitioner argues that his trial counsel was constitutionally deficient because he defense counsel. Specifically, petitioner argues that the prosecutor attacked defense counsel during closing argument, stating:

"He calls that reasonable doubt. I think he more aptly characterized it in the

very beginning of his summation. His job is just to point out possibilities, whether they are reasonable or not possibilities." RT 3539. "The next possibility. Ricky Patterson, he's a journeyman. He's a

handyman. He's skilled in construction. That must mean that he knows how to tap a lock. Must mean he's clever enough to use the defendant's garage-door opener to get inside the house. I thought he broke in? I agree. Counsel's here to come up with possibilities, not reasonable doubt." Id. at 3541. Petitioner argues that characterizing potential avenues to find reasonable doubt as denigrates the

right to counsel.

The California Court of Appeal found that these comments were not improper, as is to give you possibilities, to give you a perspective, to ask you to look carefully at what

the evidence was in this case . RT 3472. responsive comments did not amount to improper personal attacks on opposing counsel,

nor did they accuse counsel of fabricating a defense or deceiving the jury. Appellate Opinion at 37. The appellate court also found no ineffective assistance. Id. at 39.

This court agrees. The conclusion was not argument. Darden v. Wainwright, 477 U.S. 168, 179 (1986)

must be evaluated in light of the defense argument that preceded it); United States v. Young, 470 U.S. 1, 11 13 (1985) No

attack on trial counsel. See, e.g., United States v. Ruiz, 710 F.3d 1077, 1086 (9th Cir. Williams v. Borg, 139 F.3d 737, 744 In addition,

because the remarks were not objectionable, the California Court of Appeal reasonably concluded that trial counsel was not ineffective for failing to object.

counsel satisfied Strickland Harrington, 562 U.S. at 105) such

Kayer, 592 U.S. at 120). And even if constitutional error occurred, petitioner has not shown that it was prejudicial for the reasons described above. Accordingly, petitioner , and Claims 5 and 6 are DENIED.

d. Self-Defense (1) Petitioner argues that his trial counsel was constitutionally defective be concerning the

twenty-four hour period leading up to the homicide. Pet. at 87 89. Petitioner argues that counsel should have investigated what statements those potential witnesses would have made, and then called them as witnesses to support a self-defense theory and counter Specifically, petitioner argues that those witnesses would have testified that Rachal no longer harbored any ill-will toward Patterson concerning the Willoughby job, but that it was only Patterson who harbored animosity. Id. at 90 92 (citing Rachal Declaration, Pet., Ex. J; Friendly Interview, Pet., Ex. D at 3699 & 3702). Petitioner argues that his attorney failed to put on evidence that attempting to steal from Rachal at the time of the homicide. Id. at 89.

Petitioner also argues that the state trial court conducting the habeas corpus proceeding and

overseeing the associated evidentiary hearing made incorrect credibility determinations when evaluating witness testimony. Traverse at 25. Respondent argues that counsel did not simply ignore the testimony Patterson identifies. Instead, trial counsel was aware of the witness statements and discussed whether to call those witnesses with petitioner. Answer at 56. The Superior Court ented suggesting he had made a sexual advance toward Patterson, and a tactical decision was made not to call those witnesses. That decision was reasonable, respondent argues, because calling those witnesses would have entailed arguing that they were lying about certain things (e.g., sexual advances), but telling the truth about other things (e.g., that petitioner no longer held animosity towards Patterson). Moreover, calling those witnesses could have exposed testimony about the sexual advances in any event, and

were not before the jury. 5

With regard to the Willoughby job, respondent argues that because he did not testify at trial there was no way to present evidence of his internal thoughts and feelings about the issue to the jury. his own post-conviction declaration, not testimony that was or could have been presented

at trial without him testifying. See Pet. at 92 (citing Pet., Ex. J).

Finally, respondent argues that petitioner has not shown prejudice. Even if the morning of the stabbing, that evidence would not have overcome the fact that petitioner

had been assaulted by Patterson before he drove away, and asserted that Patterson was

the aggressor only after his attempted suicide. Even still, respondent argues, petitioner clearly used excessive force, even if the jury had believed he was on good terms with Patterson and initially acted in self-defense.

(2) im presented here was raised in the state habeas petition and

5 Petit conviction that involved a sexual assault on his estranged spouse, and a 1985 indecent exposure conviction. See Declaration of Dennis Alan Lempert, Answer, Ex. 5, Ex. 3, Dkt. 28-3 at ECF p. 560 ; see also CT 539 42. addressed at the evidentiary hearing in Superior Court, which rejected the claim. Pet., Exs. N & O. It was then exhausted in the habeas petition in the California Supreme Court, which summarily denied relief. See Pet., Ex. T. This court looks through the silent denial and reviews the last reasoned decision by the state court. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018).

Petitioner testified at the evidentiary hearing that he told trial counsel that Patterson had come to his house the night before and the morning of the stabbing. Evidentiary Hearing Reporter's Transcript of Proceedings Held on December 7, 10, 2018, Pet., Ex. L at 9. Petitioner had reviewed witness statements obtained by the District Tellez, Laura Alcantar, and Henry Alcantar would be

able to testify about the nature of his

relationship with Patterson at the time of the homicide and the fact that Patterson had been to his house the night before and/or the morning of the stabbing. Id. at 10, 31 33. rson on those occasions; they would only have been able to report what Patterson told them. Id. at 33.

Petitioner acknowledged that the witnesses said in their statements that Patterson told them petitioner had made a sexual advance toward him that morning, which was inconsistent with what petitioner was claiming. Id. at 33 35. Petitioner nevertheless wanted counsel to call the witnesses to show that Patterson had been at his house that morning, left, and came back. At the evidentiary hearing, p advances. Id. at 34 36.

Petitioner also thought counsel should have called Tellez because she could show

Tellez did not actually say that in her statement, but it was petit Id. at 39 40. Petitioner claimed that Patterson had taken his truck

without permission that morning, and when petitioner later got into his truck to drive away after the stabbing, he discovered that Patterson had stolen $5,000 in cash from the truck. Id. at 54 55. Petitioner acknowledged that none of the witnesses knew anything about that alleged theft. Id. at 59 60.

Trial counsel testified at the evidentiary hearing that he had been provided with statement See Evidentiary Hearing Transcripts, Dec. 10, 2018, Pet., Ex. M at 96. He did not believe anything in those statements amounted to an affirmative defense for petitioner. Id. at 97 98. to avenge an unwanted sexual advance. Id. at 98.

Moreover, petitioner did not want the jury to know that he had made a sexual advance toward Patterson. Id. e was very sensitive about his sexuality and the issue of sexuality in this case, and pretty much precluded me from getting into that, other than Id. at 99. Petitioner told counsel he would fire him if counsel presented that evidence to the jury. Id. at 99 & 151. present any evidence which would have suggested that he was a participant in any

because of his Id. at 152.

I felt it was sufficiently strong and absolutely essential, I would have put it in, notwithstanding his opposition. But I did not want to get into a position of alienation of the attorney-client relationship and to foreclose him from being a participant in the strategy. There were times when we had animated discussions about where we would be going with the evidence, and he was concerned about the appearance of his -- of the potential sexual interest between he and Mr. Patterson, that he did not want that to come into Id. at 152 53. Counsel also was concerned that if that evidence were which

counsel wanted to keep from the jury. Id. at 99.

The Superior Court denied the habeas claim that counsel was ineffective because he did not call the witnesses who had provided statements indicating that of the stabbing:

Notwithstanding evidence that Petitioner did not call the police he had been assaulted by the victim before he drove away, and only asserted the victim was the aggressor after his jump (or fall) from the freeway overpass in Santa Barbara County, there was additional justification for not presenting such evidence. First, at the hearing, Petitioner denied any actions on his part that could be considered a sexual advance toward the victim. He specifically denied pulling his pants down or touching the victim. Second, he testified that any witness who said any sexual advance by him occurred would be lying. Third, Lempert testified that the Petitioner was adamant that no evidence be presented suggesting he made a sexual advance toward the victim. Lempert said that Petitioner threatened to fire him if he tried to offer such evidence. Nevertheless, Lempert stated he would have tried to introduce the evidence that the victim attacked the petitioner in retaliation for a sexual advance if he felt it was sufficiently strong and absolutely necessary, which he did not. Fourth, Lempert said he was concerned that offering eviden such as other crimes the petitioner had committed. These were

sound considerations justifying the decision to forego manslaughter instructions. Sup. Ct. Habeas Decision at 3965 66.

Superior Court denied the habeas claim that counsel was ineffective because he should

have presented evidence that petitioner believed the controversy about the Willoughby job had been resolved and he was on friendly terms with Patterson by the time of the stabbing. The Superior Court observed that trial counsel did try to present such evidence through Kevin Johnson, but the trial court did not allow that evidence to be admitted. See Addendum to Order Re: Habeas Corpus, Pet., Ex. O at 3972 73; see also RT 2679 84, 2712 16 & 2736 39. The Superior Court noted that petitioner did not testify at trial about the alleged amicable visits by Patterson, and no one else was present who could have so testified. See Addendum to Order Re: Habeas Corpus, Pet., Ex. O at 3973. The Superior Court stated that it was not clear that the insurance company had resolved its investigation into potential fraud in favor of petitioner, or when such an investigation had concluded, as petitioner did not provide any supporting documentation. Id. The Superior Court also found that -serving Id. at 3974.

(3) Analysis A "doubly" deferential judicial review is appropriate in analyzing ineffective assistance of counsel claims under § 2254. See Cullen

§ a federal court believes the state court's determination under the Strickland standard was incorrect but whether that determination was unreasonable a substantially higher Knowles, 556 U.S. at 123 (internal quotation marks omitted). The United States Supreme Court has never required defense

counsel to pursue every nonfrivolous claim or defense, regardless of its merit, viability, or realistic chance of success. Id. at 125. Thus Id. at 123.

Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. See Sanders, 21 F.3d at 1456.

Although petitioner now disagrees with the merits of the decision not to call Friendly, Tellez, Coloma or Alcantar to testify, it is clear that trial counsel in fact based his decision on multiple strategic considerations. Critically, counsel made a tactical decision when deciding not to rely on testimony regarding some facts (e.g., visit) while simultaneously arguing the falsity of other statements expected to be

consistent across those witnesses (. See, e.g., Sup. Ct. Habeas Decision at 3965 ; Evidentiary Hearing Transcripts, Dec. 10, 2018, Pet., Ex. M at 99, 151 53 (petitioner told Lempert that he did not want evidence of any unwanted sexual advances presented to the jury and threatened to fire Lempert should that evidence come in); id. at 99 (Lempert found that petitioner was "very sensitive about his sexuality"). Moreover, calling those sexual crimes that otherwise were not before the jury. See, e.g., id. at 99 (Lempert was

concerned about opening the door to impeachment evidence against petitioner becoming relevant should the defense attack the victim's character). These are reasonable considerations for trial counsel to account for when calling even witnesses that may present helpful testimony, as [a]n attorney need not pursue an investigation that would Harrington, 562 U.S. at 108; see also Lord v. Wood, 184 F.3d 1083, 1085 [I]t is impossible to judge any one piece of evidence without understanding the rest of the case. Omission of an item of proof may seem foolish until one understands the tradeoffs counsel would Moreover, where a defendant interferes with his the attorney's failure to investigate and present such evidence. See Schriro v. Landrigan,

550 U.S. 465, 478 (2007) (holding that "it was not objectively unreasonable for [the state] court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish Strickland prejudice based on his counsel's failure to investigate further possible mitigating evidence" in capital case); see also Cox v. Del Papa, 542 F.3d 669, 682 83 (9th Cir. 2008) (counsel's decision not to investigate or present additional evidence regarding defendant's drug use not prejudicial where defendant had continuously and strenuously protested any suggestions that his behavior was the result of his drug use).

Petitioner also argues at length about the significance of Patterson positioning and stealing $5,000 from him, but these arguments largely rely on -conviction testimony (which the Superior Court found self-serving and less- than-credible with respect to other topics, and petitioner offers little reason to believe those facts would have been elicited in testimony at trial from the witnesses he argues

counsel erroneously failed to call). See, e.g., Sup. Ct. Habeas Decision at 3966 - Addendum to Order Re: Habeas Corpus, Pet., Ex. O -serving and that Pet. at 90; Declaration of Andrew Mark Rachal in Support of Petition for Writ of Habeas Corpus, Pet., Ex. J; RT at 1851 53 (Pet, Ex. L at 37 41 on the day of the killing). The same is true of

insurance investigation vindicated Rachal of any wrongdoing and although petitioner also argues that animosity

was ongoing because . . . still desired to get back the $5,000 to pay to the . Pet. at 92 93; see also, e.g., Addendum to Order Re: Habeas Corpus, Answer, Ex. 6, Ex. M at 3, Dkt. 28-5 at ECF p. 126 documentation relating to Farmer's Investigation and conclusion, or the date the

conclusion was reached, but it is not clear that the issues had already been resolved months prior to the arguments in April, considering the petitioner wasn't interviewed until late February. Nor is it clear Farmer's resolution was in petitioner's favor, as counsel claims. The People stated that Farmer's found the claim submitted on behalf of the

Particularly in sexual advances, a fairminded jurist could agree with declining to call those witnesses constituted an informed and reasonable trial decision based on strategic considerations. E.g., Sup. Ct. Habeas Decision at 3965 hearing, Petitioner denied any actions on his part that could be considered a sexual

by him Evidentiary Hearing Transcripts, Dec. 10, 2018, Pet., Ex. M at 99, 151 53 (petitioner told Lempert that he did not want evidence of any unwanted sexual advances presented to the jury and threatened to fire Lempert should that evidence come in); id. at 99 (Lempert found that petitioner was "very sensitive about his sexuality"). Kayer, 592 U.S. at

120 (quoting Wetzel, 565 U.S. at 524).

Even so, a fairminded petitioner failed to show that his alleged error was prejudicial. Even if the jury had

stabbing, that evidence would not have necessarily established the inferences petitioner

now posits. A fairminded jurist could agree with the Superior Court reasoning that petitioner failed to show it was reasonably likely that a different result would have occurred, especially in light of the evidence presented supporting conclusions that alleged assault, did not tell the neighbors that he had been assaulted by Patterson before he drove away, asserted that Patterson was the aggressor only after his attempted suicide, and used excessive force even if he was defending himself against Patterson.

counsel satisfied Strickland's deferential stanHarrington, 562 U.S. at 105) such

Kayer, 592 U.S. at 120). And even if constitutional error occurred, petitioner has not shown that it was prejudicial for the reasons described above. Accordingly, Claim 8 is DENIED.

counsel fail.

I. Claim 11: Whether Cumulative Constitutional Errors Caused Petitioner

Undue Prejudice Petitioner argues that given the totality of the arguments presented to this court, he has demonstrated that the cumulative effect of the many errors in this case demonstrates that the prejudice he faced was not harmless. Pet. at 101 02; Traverse at 32. Respondent argues that this claim is not cognizable because it was not exhausted, as petitioner did not first raise it in the California Court of Appeal on direct review. Further, respondent argues that because petitioner identifies only a single harmless error the mistaken instruction on CALCRIM No. 506 there can be no cumulative,

First, respondent argues, and petitioner does not dispute, that this claim was not properly exhausted because petitioner did not raise it in the California Court of Appeal on only time to th

Casey, 386 F.3d at 918. Accordingly, this court may

stat . 28 U.S.C. § 2254(b)(1). Petitioner satisfies neither of these prerequisites.

argument that multiple errors where each single error independently is considered

harmless accreted in impact to render his criminal trial fundamentally unfair. However, petitioner has identified only defendant fa United States v. Solorio, 669 F.3d 943,

956 (9th Cir. 2012).

For the foregoing reasons, this court DENIES Claim 11. See 28 U.S.C. § 2254(b)(2) (district court may deny a habeas petition on the merits even if it is unexhausted); accord Runningeagle, 686 F.3d at 777 n.10; Jones, 806 F.3d at 544 45.

CONCLUSION

habeas corpus is DENIED. This order fully adjudicates the petition and terminates all pending motions. The clerk shall close the file.

CERTIFICATE OF APPEALABILITY

Andrew Rachal v. Robert W. Fox

2024 | Cited 0 times | N.D. California | February 12, 2024

§ e a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists claims debatable or Slack v. McDaniel, 529 U.S. 473, 484 (2000). Section 2253(c)(3) requires a court granting a COA to indicate which issues satisfy the COA standard. Here, the court finds that all claims presented by petitioner in the first amended petition other than Claim 7 which was procedurally defaulted meet that standard and GRANTS the COA as to all claims with the exception of Claim 7. IT IS SO ORDERED. Dated: February 12, 2024

/s/ Phyllis J. Hamilton PHYLLIS J. HAMILTON United States District Judge