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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SOO DUK KIM,	)	CASE NO. CV 16-5071-PJW
	)	
Petitioner,	)	MEMORANDUM OPINION AND ORDER
	)	DENYING PETITION, DISMISSING
v.	)	ACTION WITH PREJUDICE, AND
	)	DENYING CERTIFICATE OF
SHAWN HATTON, WARDEN,	)	APPEALABILITY
	)	
Respondent.	)	
_____	)	

I.

INTRODUCTION

Before the Court is a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. For the reasons set forth below, the Petition is denied and the action is dismissed with prejudice.

II.

SUMMARY OF PROCEEDINGS

A. State Court Proceedings

In 2012, after Petitioner was convicted of second degree murder by a jury in Los Angeles County Superior Court, the California Court of Appeal reversed his conviction because of instructional error and remanded for a new trial. (See Lodged Document No. 7 at 2.) Petitioner was retried in 2013, and a second jury convicted him of

1 second degree murder. (Clerk's Transcript ("CT") 161.) The trial  
2 court sentenced him to 16 years to life in prison. (CT 182-83.)

3 Petitioner appealed to the California Court of Appeal, which  
4 affirmed the judgment in a written decision. (Lodged Document Nos. 5-  
5 7.) He then filed a petition for review in the California Supreme  
6 Court, which was summarily denied. (Lodged Document Nos. 8-9.)  
7 Thereafter, he filed habeas corpus petitions in the Los Angeles County  
8 Superior Court, the California Court of Appeal, and the California  
9 Supreme Court, all of which were denied. (Docket No. 10, Exhs. A-B;  
10 Docket No. 17, Exh. A; Docket No. 31, Exh. G; Lodged Document Nos. 11-  
11 16.)

12 B. Federal Court Proceedings

13 In July 2016, Petitioner, proceeding with the assistance of  
14 counsel, filed a habeas corpus petition in this court, pursuant to 28  
15 U.S.C. § 2254, raising a single claim. In November 2016, the Court  
16 stayed the Petition to allow Petitioner to go back to state court to  
17 exhaust additional claims. On April 5, 2017, Petitioner filed an  
18 amended petition raising the following three claims:

- 19 1. There was insufficient evidence to prove that he committed  
20 second degree murder.
- 21 2. Trial counsel was ineffective for failing to present the  
22 expert witness's finding that Petitioner was in a psychotic  
23 state at the time of the killing.
- 24 3. Trial counsel was ineffective for failing to request a jury  
25 instruction on the lesser included offense of involuntary  
26 manslaughter.

27 (See Docket No. 31, First Amended Petition ("Petition") at ii.)

28

1 III.

2 FACTUAL SUMMARY

3 The following statement of facts was taken verbatim from the  
4 California Court of Appeal's opinion affirming Petitioner's  
5 conviction:

6 **A. Prosecution's Case**

7 In December 2007, Susan Kim lived in a two-story house  
8 on Raymond Avenue in Glendale. [Petitioner] was Kim's  
9 boyfriend and had moved in with her a year earlier.

10 [Petitioner] was unemployed and did not speak English  
11 very well. Kim's daughter, Jane Moon, attended college in  
12 San Diego but would periodically stay at Kim's house during  
13 weekends and winter and summer breaks. [Petitioner] made  
14 little effort to get to know Moon except when Kim was also  
15 present.

16 Moon was staying at Kim's home for winter break to  
17 attend two weddings on December 15, 2007. On that day, Kim  
18 confided in Moon that she wanted to "kick out" [Petitioner]  
19 from the house. Kim appeared scared when she confided in  
20 Moon.

21 On December 16, 2007, around 8:00 a.m., Moon was  
22 sleeping in an upstairs bedroom of Kim's house when she was  
23 awakened by the sound of Kim and [Petitioner] arguing in the  
24 downstairs hallway. Moon heard Kim "trying to kick  
25 [Petitioner] out," [Petitioner] saying "'Give me money and I  
26 will leave,'" and Kim responding "'Are you crazy?'" and  
27 "'Why would I give you money? It is my house. Get out.'"  
28 Moon heard [Petitioner] threaten Kim, "'What if I kill you

1 and then myself?" Although [Petitioner] and Kim had  
2 numerous heated arguments over the course of their  
3 relationship, with both [Petitioner] and Kim yelling at each  
4 other, Moon had never seen [Petitioner] strike or hit Kim  
5 and had never heard [Petitioner] talk about killing Kim  
6 before December 16, 2007.

7 After the argument ended, Kim went upstairs to Moon's  
8 bedroom and apologized to Moon for waking her and telling  
9 Moon to go back to sleep. Moon went back to sleep and woke  
10 up a few hours later. Moon went downstairs to use the  
11 shower connected to Kim's downstairs bedroom. When she  
12 reached the bottom of the stairs and was in front of Kim's  
13 closed bedroom door, Moon heard whispered arguing between  
14 Kim and [Petitioner]. She could only hear parts of their  
15 argument. In response to something that [Petitioner] said,  
16 Moon heard Kim say, "Oh, so you are going to kill me?"  
17 While Moon showered, she could not hear [Petitioner] or Kim.

18 After Moon showered, about 1:00 or 1:30 p.m., Moon  
19 heard Kim and [Petitioner] arguing again. She heard them in  
20 the kitchen and then in the driveway. Moon saw [Petitioner]  
21 on the driveway throwing shoes and other items; Kim was  
22 taking pictures and yelling at [Petitioner] that she was  
23 going to call the police and get a restraining order.

24 [Petitioner] then left. Kim left the house to run  
25 errands. At around 2:30 p.m., Moon's boyfriend, Christopher  
26 Rivera, came to the house and the two prepared to leave to  
27 run errands. Just as Moon and Rivera were about to leave,  
28

1 Kim returned to the house. They left Kim alone at the  
2 house.

3 Between 3:00 and 4:00 p.m., one of Kim's neighbors saw  
4 [Petitioner] backing his white Lexus out of Kim's driveway  
5 and speed away, almost clipping the house, as he left. The  
6 neighbor described [Petitioner's] driving as "erratic and in  
7 haste" that afternoon, although [Petitioner] was usually a  
8 careful and calm driver. A couple days before, the neighbor  
9 had heard loud yelling from inside the home, sounding like  
10 an argument between a man and a woman, although he could  
11 only hear the man.

12 Another neighbor was outside on her driveway between  
13 2:00 and 4:00 p.m., when she heard screeching tires and  
14 looked and saw [Petitioner] driving "crazily," backing out  
15 of the driveway in his white Lexus and leaving at a fast  
16 speed.

17 At around 6:00 or 6:30 p.m., Moon and Rivera returned  
18 to the house. Rivera stayed in the car while Moon went into  
19 the front door of the house to get the remote control for  
20 the gate from the kitchen. A few feet into the house, Moon  
21 saw Kim lying on the kitchen floor with a pool of blood  
22 around her and a kitchen towel over her face. Moon started  
23 yelling and Rivera came into the house and took Moon  
24 outside. Moon and Rivera called 911.

25 Glendale Police Officer Joshua Luna arrived at  
26 [Petitioner's] house at 6:45 p.m. and saw Kim's body lying  
27 on the kitchen floor. Homicide Detective Petros Kmbikyan  
28 examined the crime scene, documenting blood and blood

1 splatter and an indentation in the kitchen wall. Kmbikyan  
2 was present when the towel was removed from Kim's face,  
3 revealing blood on her face, open eyes and a puncture wound  
4 to the left side of her neck. In the sink was a knife with  
5 blood on it and a broken tip. The knife appeared to belong  
6 with those in a butcher block in the kitchen.

7 Lead Detective Arthur Frank, the investigating officer,  
8 was also present and observed the crime scene. Based on  
9 [Petitioner's] vehicle and Department of Motor Vehicle  
10 records, Frank sent Officer Michael Severo to conduct  
11 surveillance at an address on Occidental.

12 Early in the morning the next day, December 17, 2007,  
13 Police Officer Severo and his partner conducted surveillance  
14 from an unmarked vehicle at an apartment complex on South  
15 Occidental. Around 4:00 a.m., on December 17, 2007, the  
16 officers saw a white Lexus enter the subterranean garage and  
17 Severo's partner left their vehicle and followed, hearing a  
18 male and female talking but could not tell what was being  
19 said. Approximately five minutes later, a white Lexus left  
20 the garage and the officers followed it to a motel on  
21 Vermont. Five to 10 minutes later, the white Lexus left the  
22 motel and the officers followed it again. The officers  
23 stopped the vehicle which had one occupant, [Petitioner].  
24 When [Petitioner] got out of the car, Officer Severo noticed  
25 that he had a horizontal cut on his left wrist that was  
26 coagulating and blood on the left side of his pants.  
27 [Petitioner] was arrested and taken to the police station.

28

1           At the police station, Detective Frank was waiting for  
2 Detective Matthew Prokosch, the Korean translator, to arrive  
3 before interviewing [Petitioner] when [Petitioner] asked  
4 Frank in English, "'Is the girl dead? Is Susan dead?'"  
5 Detective Frank told [Petitioner] that they could talk about  
6 it later and continued to wait for a translator. Detective  
7 Frank noticed that [Petitioner] had minor lacerations or  
8 cuts on both of his wrists, which Detective Frank bandaged.

9           At about 7:00 a.m., [Petitioner] waived his *Miranda*  
10 rights and was interviewed by Detective Frank with Detective  
11 Prokosch translating.<sup>1</sup> [Petitioner] was cooperative and  
12 appeared remorseful. Detective Prokosch, trained in  
13 drug-recognition, observed that [Petitioner] did not exhibit  
14 signs of being under the influence of narcotics.

15           In his statement to the police, [Petitioner] indicated  
16 that at around 3:00 p.m., the day before, he and Kim had an  
17 argument in the kitchen. Kim found out that [Petitioner]  
18 was using marijuana and the day before Kim's death, Kim had  
19 taken away [Petitioner's] key. During the argument,  
20 [Petitioner] "unconsciously or unknowingly, unintentionally  
21 grabbed her head and hit her head against the wall a couple  
22 of times."<sup>2</sup> When [Petitioner] hit Kim against the wall, she  
23 screamed and fell down. Then [Petitioner] grabbed a knife  
24

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25           <sup>1</sup> The interview was tape recorded. The tape recording of the  
26 interview was played for the jury. A transcript of the interview is  
27 contained in the record. Detective Prokosch made notations on the  
transcript with corrections to the translation.

28           <sup>2</sup> At trial, Prokosch testified that the Korean word used by  
[Petitioner] could also mean "actions are automatic."

1 from a knife block in the kitchen and "unintentionally, or  
2 without him knowing" stabbed her in the stomach two or three  
3 times.

4 During the interview, Detective Frank began drawing a  
5 diagram of the kitchen so that they could talk specifically  
6 about the indentation in the wall, the knife block and the  
7 location of Kim's body. [Petitioner] saw what Frank was  
8 doing and offered to draw the diagram and began drawing.  
9 [Petitioner] drew the chairs that he and Kim were sitting in  
10 to eat when they argued. He identified the location of the  
11 wall that he pushed Kim's head into and confirmed that the  
12 hole in the wall was from when Kim hit her head. He  
13 indicated that the knife he grabbed was by the sink, and  
14 where it was in relation to the gas range. He indicated the  
15 location Kim fell down, confirmed that she was screaming  
16 while she was on the floor, and drew on the diagram where  
17 she was lying down when he got the knife and stabbed Kim  
18 while she was on the ground.<sup>3</sup> [Petitioner] told the police  
19 he left the knife in the sink and then drove away intending  
20 to kill himself.

21 Instead [Petitioner] met Choi Sookja, a woman he used  
22 to date, and she paid for a room at a Best Western motel on  
23 New Hampshire. In room 412, [Petitioner] changed out of his  
24 shirt before cleaning up the room and throwing it away into  
25 a trash can in the hallway. [Petitioner] told Sookja that

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26  
27 <sup>3</sup> Detective Frank who had been at the crime scene and observed  
28 the blood spatters opined that [Petitioner's] description of stabbing  
Kim while she was on her back with her stomach up was consistent with  
the blood splatter he observed in the kitchen.



1 he had killed Kim but Sookja did not believe him and said  
2 that [Petitioner] was lying.

3 When asked why he got so angry during the argument,  
4 [Petitioner] stated that Kim took his key and was "verbally  
5 rude and abusive" and Kim had also told [Petitioner] in a  
6 belittling manner to go to Korea and live with his mother  
7 for six months. [Petitioner] stated that Kim had seen him  
8 taking out marijuana from his car several days earlier and  
9 that they had talked several days earlier about not seeing  
10 each other.

11 Homicide Detective Keith Soboleski went to the motel on  
12 New Hampshire to see room 412. In a trash can holding open  
13 the door from the fourth floor stairwell to the hallway,  
14 Detective Soboleski found a bloody towel, shirt, and  
15 sweatshirt. He also found a room key for room 412 in the  
16 trash can. In room 412, Detective Soboleski found what  
17 appeared to be blood smears on the bed, blood droplets on  
18 the bathroom floor, and some blood on the furniture. The  
19 room was checked out to a female named Ja Sook. The  
20 surveillance tape of the motel showed the arrival of a white  
21 Lexus with two occupants, one male and one female, and the  
22 female checking in at the front desk.

23 According to the medical examiner, Kim died from four  
24 fatal stab wounds. Specifically, two fatal stab wounds went  
25 through her heart, one went through her lung and one of them  
26 was five and a half inches deep and pierced both her heart  
27 and left lung. Kim also had two non-fatal stab wounds--a  
28 two-inch wound to the neck and a superficial wound behind

1 her left ear. In addition to the six stab wounds, Kim had a  
2 bruise on the back of her head.

3 **B. Defense's Case**

4 [Petitioner] did not testify in his defense.

5 Forensic psychiatrist Manuel St. Martin evaluated  
6 [Petitioner] for a mental disorder in 2008 and found that he  
7 suffered from schizophrenia. Symptoms of the disorder  
8 include inability to plan and to speak in a way that would  
9 be understood by others. According to Dr. St. Martin, these  
10 patients "strike out at others for no apparent purpose." A  
11 schizophrenic that is not medicated loses touch with reality  
12 and hallucinations are often a sign. The mere fact that one  
13 has such a disorder does not necessarily prevent one from  
14 forming malice aforethought. However, an acute form of this  
15 disorder may prevent someone from forming malice  
16 aforethought. Dr. St. Martin opined that [Petitioner]  
17 suffered from schizophrenia at the time of the commission of  
18 the offense.

19 As to a hypothetical involving a person who, as a  
20 result of verbal abuse over a period of "a day or two,"  
21 yelled, threw things randomly, and broke glassware, Dr. St.  
22 Martin opined that the hypothetical subject showed signs of  
23 a person being in a psychotic state. Dr. St. Martin  
24 indicated that someone in a psychotic state could also come  
25 out of it hours later. When given a hypothetical involving  
26 a person who after killing someone, asked another woman to  
27 help him obtain a hotel room, and thereafter, in that room,  
28 changed out of the clothing worn during the time of the

1 crime, attempted to cut his own wrist, managed to leave the  
2 room with the woman to check into another hotel, and after  
3 encountering the police, gave a statement describing how and  
4 why they killed the victim, Dr. St. Martin opined that the  
5 person in the hypothetical did not "sound like a person" who  
6 was "involved in a psychotic state." As to the same  
7 hypothetical person, Dr. St. Martin was further asked to  
8 assume that in response to police questioning as to his  
9 motive for the killing, the person responded, "Because she  
10 was rude and telling me to leave the house," Dr. St. Martin  
11 acknowledged that the stated motive would be consistent with  
12 one based on reality as opposed to one caused by a psychotic  
13 state. Dr. St. Martin acknowledged that he did not treat  
14 [Petitioner].

15 Psychologist Veronica Thomas evaluated [Petitioner] and  
16 found that he suffered from paranoid schizophrenia. This  
17 type of illness affects someone's ability to process  
18 information and engage in routine decisionmaking and causes  
19 hallucinations and delusions. Such an illness, depending on  
20 several factors, can prevent someone from forming malice  
21 aforethought. A psychotic state is a period of time,  
22 whether minutes or hours or longer, wherein someone is  
23 unable to distinguish what is real from what is unreal and  
24 what is accurate from what is inaccurate. Dr. Thomas opined  
25 that [Petitioner] suffered from this kind of disorder at or  
26 around the time of the killing. Dr. Thomas acknowledged  
27 that it would be rare for a psychotic state to last simply  
28 minutes. Dr. Thomas also acknowledged that what was going

1 on in [Petitioner's] mind at the time of the crime remained  
2 a question as no one could "jump into a person's mind." Dr.  
3 Thomas had "no reason to believe one way or the other that  
4 [Petitioner] was in a psychotic state at the time" of the  
5 crime. The facts of the case were consistent with either  
6 presence or absence of a psychotic state. Dr. Thomas  
7 acknowledged that concealing clothing after a killing was  
8 consistent with hiding evidence of a crime as opposed to  
9 acting under a psychotic state.

### 10 **C. Rebuttal**

11 Forensic psychiatrist Sanjay Sahgal testified that  
12 everything that a schizophrenia patient does is intentional  
13 but the act would be responsive to an altered reality. To  
14 Dr. Sahgal, a hypothetical reflecting the facts of the case,  
15 including the killing, the concealing of clothing, and the  
16 police interview, did not contain information suggesting  
17 that the person was suffering from a psychotic state. Dr.  
18 Sahgal also opined that there was nothing in the  
19 hypothetical that would suggest that the person did not  
20 intend to kill or did not understand that what he was doing  
21 was violent. One significant indication to support this  
22 conclusion was that the subject smashed the victim's head  
23 repeatedly and thereafter found a knife which he then used  
24 to stab the victim in fatal areas. The absence of data  
25 suggesting psychosis and the available data as a whole  
26 suggested that there was "no psychosis." The fact that the  
27 subject drew a diagram to the police indicating where he  
28 struck the victim in the head and where she fell was an

1 additional indication that he likely was not psychotically  
2 impaired at the time of the crime. Dr. Sahgal testified  
3 that schizophrenia is serious enough that symptoms of it are  
4 usually visible. Dr. Sahgal testified that if violence was  
5 motivated by delusion, the subject usually would give a  
6 reason for the crime that is grounded in the delusion. For  
7 schizophrenia patients, the notion that they would have an  
8 hour of psychosis is absurd to Dr. Sahgal. The psychotic  
9 state would last on the order of days to weeks.

10 Dr. Sahgal testified that the prosecution's  
11 hypothetical could be converted to one that showed someone  
12 acting out of psychosis by adding a few facts. Dr. Sahgal  
13 acknowledged that there was no way to be certain whether one  
14 was acting out of psychosis or not for any given time.

15 (Lodged Document No. 7 at 2-9 (footnotes renumbered).)

16 IV.

17 STANDARD OF REVIEW

18 The standard of review in this case is set forth in 28 U.S.C.  
19 § 2254:

20 An application for a writ of habeas corpus on behalf of a  
21 person in custody pursuant to the judgment of a State court  
22 shall not be granted with respect to any claim that was  
23 adjudicated on the merits in State court proceedings unless  
24 the adjudication of the claim--

25 (1) resulted in a decision that was contrary to, or  
26 involved an unreasonable application of, clearly established  
27 Federal law, as determined by the Supreme Court of the  
28 United States; or

1 (2) resulted in a decision that was based on an  
2 unreasonable determination of the facts in light of the  
3 evidence presented in the State court proceeding.

4 28 U.S.C. § 2254(d).

5 A state court decision is "contrary to" clearly established  
6 federal law if it applies a rule that contradicts Supreme Court case  
7 law or if it reaches a conclusion different from the Supreme Court's  
8 in a case that involves facts that are materially indistinguishable.  
9 *Bell v. Cone*, 535 U.S. 685, 694 (2002). To establish that the state  
10 court unreasonably applied federal law, a petitioner must show that  
11 the state court's application of Supreme Court precedent to the facts  
12 of his case was not only incorrect but objectively unreasonable.  
13 *Renico v. Lett*, 559 U.S. 766, 773 (2010). Where no decision of the  
14 Supreme Court has squarely decided an issue, a state court's  
15 adjudication of that issue cannot result in a decision that is  
16 contrary to, or involves an unreasonable application of, clearly  
17 established Supreme Court precedent. *See Harrington v. Richter*, 562  
18 U.S. 86, 101 (2011).

19 The claims raised in the instant Petition were raised in the  
20 California Supreme Court, but that court did not issue a written  
21 decision explaining why it was denying them. (Lodged Document Nos. 8-  
22 9, 12-16.) Ground One was discussed by the California Court of Appeal  
23 in its written decision affirming Petitioner's conviction on direct  
24 appeal. (See Lodged Document No. 7.) Grounds Two and Three were  
25 rejected by the Los Angeles County Superior Court in a reasoned  
26 decision on collateral review. (See Docket No. 31, Exh. G.) This  
27 Court presumes that the state supreme court rejected all three claims  
28 for the same reasons the lower state courts did. The Court,

1 therefore, looks to the lower courts' reasoning and will not disturb  
2 it unless it concludes that "fairminded jurists" would all agree that  
3 the decision was wrong. *Richter*, 562 U.S. at 102; see also *Johnson v.*  
4 *Williams*, 568 U.S. 289, 297 n.1 (2013) (approving reviewing court's  
5 "look through" of state supreme court's silent denial to last reasoned  
6 state-court decision); *Bonner v. Carey*, 425 F.3d 1145, 1148 n.13 (9th  
7 Cir. 2005) (applying *Ylst* look-through doctrine to superior court's  
8 reasoned denial of habeas petition when California Court of Appeal and  
9 California Supreme Court summarily denied subsequent petitions).

10 V.

11 DISCUSSION

12 A. Insufficient Evidence

13 In Ground One, Petitioner claims that the evidence at trial was  
14 insufficient to convict him of second degree murder because his  
15 un rebutted statements to police demonstrate that he simply "lost  
16 control" after the victim attempted to kick him out of her house and  
17 that his "unthinking" action of killing her only amounted to heat-of-  
18 passion voluntary manslaughter. (Petition at 10-11.) Petitioner  
19 contends that the jury had no choice but to accept his "honest account  
20 of the incident to the police," i.e., that he acted "unknowing[ly]"  
21 and "unintentional[ly]" when he killed Kim following a "sudden and  
22 violent argument" in the kitchen after Kim belittled him. (See Reply  
23 at 4.)

24 Petitioner is simply mistaken. The jury was free to accept or  
25 reject Petitioner's story in whole or in part. *United States v.*  
26 *Clevenger*, 733 F.2d 1356, 1359 (9th Cir. 1984); see also *Digsby v.*  
27 *McNeil*, 627 F.3d 823, 832 (11th Cir. 2010) ("It is well-established  
28 that a jury may believe a witness's testimony in whole or in part.").

1 Clearly, the jury rejected that portion of Petitioner's story in which  
2 he claimed that he killed Kim in the heat of passion. The evidence  
3 supports the verdict and, as such, will not be overturned.

4 To the extent that Petitioner is arguing that there was not  
5 enough evidence to establish that he acted with malice, this argument,  
6 too, is undermined by the record. As the state appellate court  
7 explained:

8 [Petitioner] stated that he killed Kim because she took away his  
9 key, was rude and verbally abusive and had told him in a  
10 belittling tone to live with his mother in Korea. He also stated  
11 that Kim had seen him getting out marijuana several days earlier,  
12 that they had talked about not seeing each other several days  
13 earlier, and that his key was taken away the day before.

14 The jury could reasonably conclude that in the  
15 circumstances of the case the verbal abuse and belittling  
16 tone would not naturally arouse heat of passion in an  
17 ordinarily reasonable person. Moreover, there was  
18 substantial evidence to support the conclusion that  
19 [Petitioner] did not subjectively kill Kim in a heat of  
20 passion. [Petitioner] had threatened to kill Kim in the  
21 morning and again in the early afternoon, and left for  
22 almost two hours before returning to the house and arguing  
23 with and killing Kim. Although [Petitioner] contends that  
24 he acted "unknowingly" or "unconsciously" when he killed  
25 Kim, he was able to describe and draw for the police in some  
26 detail hitting Kim against the wall and stabbing her in the  
27 kitchen.



1           While the testimony of a single witness, such as the  
2           defendant, can constitute substantial evidence requiring the  
3           court to instruct on heat of passion provocation . . .  
4           determining the weight and credibility of the witness is a  
5           task solely for the jury.

6 (Lodged Document No. 7 at 11-12 (internal citations omitted).)

7           The state court's rejection of this claim was sound and is  
8 supported by the record. For this reason, it will not be overturned.  
9 *See Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (explaining, to  
10 prevail on insufficiency claim, defendant must show that, considering  
11 the trial record in a light most favorable to the prosecution, "no  
12 rational trier of fact could have found proof of guilt beyond a  
13 reasonable doubt"); *see also Juan H. v. Allen*, 408 F.3d 1262, 1274-75  
14 (9th Cir. 2005) (noting, in habeas, federal court reviews state  
15 court's rejection of insufficiency claim "with an additional layer of  
16 deference," granting relief only when the state court's judgment was  
17 contrary to or an unreasonable application of *Jackson*).

18 B.   Ineffective Assistance of Counsel

19           In Grounds Two and Three, Petitioner claims that trial counsel  
20 was ineffective for failing to elicit direct testimony from his expert  
21 witness, Dr. St. Martin, that Petitioner was in a "psychotic state"  
22 when he killed Kim. (Petition at 12.) He also contends that trial  
23 counsel was deficient for failing to request a lesser included jury  
24 instruction (involuntary manslaughter). (Petition at 15.) These  
25 claims are without merit.

26           In order to prevail on a claim of ineffective assistance of  
27 counsel, Petitioner has to establish: (1) counsel's performance fell  
28 below an "objective standard of reasonableness" under prevailing

1 professional norms; and (2) the deficient performance prejudiced the  
2 defense, i.e., "there is a reasonable probability that, but for  
3 counsel's unprofessional errors, the result of the proceeding would  
4 have been different." See *Strickland v. Washington*, 466 U.S. 668,  
5 687-88, 694 (1984).

6 1. *Expert Witness Testimony*

7 In his defense, Petitioner offered the testimony of Dr. St.  
8 Martin, a licensed psychiatrist. (Reporter's Transcript ("RT") 2106-  
9 09.) Dr. St. Martin examined Petitioner after his arrest and  
10 diagnosed him with schizophrenia. (RT 2109-11.) Dr. St. Martin  
11 opined that schizophrenics can still form "malice aforethought" unless  
12 they are suffering an acute relapse and in a "psychotic state." (RT  
13 2112-14.) After identifying the symptoms of a person in a psychotic  
14 state, Dr. St. Martin testified that he believed that Petitioner was  
15 suffering from schizophrenia at the time of the killing. (RT 2114-  
16 16.) He further explained, in response to a hypothetical question  
17 about Petitioner's conduct that day, that Petitioner's actions showed  
18 signs of someone who was in a psychotic state. (RT 2132-35.)  
19 Nevertheless, he conceded that it was impossible to know "what was  
20 exactly in [Petitioner's] mind" at the time he killed Kim. (RT 2133.)  
21 Further, Dr. St. Martin admitted that some of Petitioner's actions--  
22 such as telling the police that he killed Kim because she was rude and  
23 because she kicked him out of the house--suggested that he was not in  
24 a psychotic state. (RT 2130-31.)

25 Petitioner contends that counsel's examination of Dr. St. Martin  
26 was deficient because he did not make clear to the jury that Dr. St.  
27 Martin believed that Petitioner was in a psychotic state when he  
28 killed Kim. (Petition at 12.) In support of this claim, Petitioner

1 has included a declaration from Dr. St. Martin stating that he "did  
2 not have the opportunity to inform the jury that [Petitioner] suffered  
3 a psychotic episode" and, thus, the jury was deprived of understanding  
4 that Petitioner's behavior that appeared to be rational may not have  
5 been. (Petition, Exh. A.)

6 The Los Angeles County Superior Court rejected this claim on the  
7 grounds that Petitioner had not established that counsel was deficient  
8 or that Petitioner suffered prejudice:

9 Petitioner . . . offers no explanation as to how the  
10 questioning fell short or how counsel could have brought out  
11 this opinion. [Petitioner] also fails to discuss the fact  
12 that Dr. Saint Martin did in fact opine in response to a  
13 hypothetical involving a person who, as a result of verbal  
14 abuse over a period of "a day or two," yelled, threw things  
15 randomly, and broke glassware, that the hypothetical subject  
16 showed signs of a person being in a psychotic state.

17 Additionally, [Petitioner] has failed to show prejudice  
18 . . . . First, it is mere speculation on [Petitioner's]  
19 part that any further testimony on the question of a  
20 psychotic state would have been admissible. Second, the  
21 subject of [Petitioner's] sanity at the time of the crime  
22 was fully explored in the sanity phase of the trial where  
23 the jury found that [Petitioner] was legally sane at the  
24 time of the offense.<sup>[4]</sup>

25 (Docket No. 31, Exh. G (internal citation omitted).)

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27  
28 <sup>4</sup> At Petitioner's first trial, he was found to be sane when he  
committed the murder. (See Lodged Document No. 5 at 3-4.) That  
finding was not overturned on appeal.

1           The Court agrees that counsel was not ineffective. At best,  
2 Petitioner's claim that counsel was deficient in his questioning of  
3 Dr. St. Martin is one of degree, not kind. Petitioner does not  
4 suggest that counsel failed to proffer a diminished capacity defense  
5 based on Dr. St. Martin's testimony that Petitioner was a  
6 schizophrenic who could have suffered a psychotic episode at the time  
7 of the killing. Rather, he suggests that counsel's examination failed  
8 to make clear that Dr. St. Martin believed that Petitioner was in a  
9 psychotic state when he killed Kim. The Court disagrees. In response  
10 to counsel's questioning, Dr. St. Martin explained how Petitioner's  
11 actions could be consistent with a schizophrenic in the throes of a  
12 psychotic episode and hence not acting with malice. (RT 2132-35.)  
13 Considering the whole of the examination, counsel acted within the  
14 range of competence expected of attorneys in presenting expert witness  
15 testimony. See *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000)  
16 (finding "counsel's representation must be only objectively  
17 reasonable, not flawless or to the highest degree of skill").

18           Moreover, the state court's conclusion that there was no  
19 prejudice from counsel's examination of Dr. St. Martin was reasonable.  
20 Dr. St. Martin's declaration offers no additional evidence supporting  
21 his belief that Petitioner was in a psychotic state at the time of the  
22 killing. Nor does it undermine his trial testimony that it was  
23 impossible to know Petitioner's state of mind when he committed the  
24 crime. (RT 2133.) This fact was reinforced by the other two doctors  
25 (Drs. Sahgal and Thomas) who also testified that it was impossible to  
26 be certain whether a person's actions were the result of a psychotic  
27 state. (RT 2156, 2167, 2194-95.) In fact, all three doctors agreed  
28 that some of Petitioner's statements to the victim and the police

1 suggested that he was not delusional when he killed Kim. (RT 2130-31,  
2 2162-63, 2182-83.) Thus, it is not reasonably likely that additional  
3 testimony by Dr. St. Martin would have changed the outcome of the  
4 trial. *Strickland*, 466 U.S. at 687-88, 694. For these reasons, this  
5 claim is denied.

## 6 2. Jury Instructions

7 At the close of the evidence, the trial court instructed the jury  
8 on second degree murder--which required a showing of malice  
9 aforethought--and voluntary manslaughter--which did not and would  
10 apply if the jury found that Petitioner killed Kim in the heat of  
11 passion. (CT 154-55.) The court did not, however, instruct the jury  
12 on involuntary manslaughter. It appears that Petitioner's counsel  
13 never requested such an instruction. Petitioner claims that counsel  
14 was ineffective for failing to do so. There is no merit to this  
15 claim.

16 In California, involuntary manslaughter is generally defined as  
17 the unlawful killing of a human being without malice. See Cal. Penal  
18 Code § 192. Malice is implied when the defendant engages in conduct  
19 which could naturally lead to danger to life or acts with a conscious  
20 disregard for life. *People v. Chun*, 45 Cal.4th 1172, 1181 (2009). A  
21 defendant is entitled to an involuntary manslaughter instruction on a  
22 diminished capacity theory when evidence demonstrates that he suffered  
23 from a mental illness at the time of the crime and, because of that  
24 mental illness, did not act with malice and did not intend to kill.  
25 See *People v. Nelson*, 1 Cal.5th 513, 555-56 (2016).

26 Petitioner argues that, based on Dr. St. Martin's testimony, he  
27 may have been in a "psychotic state at the time of the killing" and,  
28 thus, lacked the mental capacity to "conscious[ly] disregard" Kim's

1 life when he stabbed her. (Petition at 16.) The Los Angeles County  
2 Superior Court, however, rejected this claim because Petitioner had  
3 not demonstrated that he was prejudiced from counsel's failure to  
4 request the involuntary manslaughter instruction:

5 [Petitioner] has failed to show that there was any  
6 evidence that would support the trial court giving the  
7 involuntary manslaughter instruction. In [Petitioner's]  
8 argument, the petition quotes from "[P]eople v. [C]leaves"  
9 (1991) 229 [C]al. App. 3d 367[, ] which states, "if the  
10 defendant commits an act which endangers human life without  
11 realizing the risk involved, he is guilty of involuntary  
12 manslaughter . . . [.]" [I]t appears that [Petitioner] is  
13 arguing that his mental illness prevented him from realizing  
14 that stabbing the victim several times in the chest would  
15 endanger human life. The argument fails for several  
16 reasons. First, there is no evidence from the testimony of  
17 any of the expert witnesses that testified that this is the  
18 case. Second, even if there had been some discussion on it,  
19 it would be pure speculation that the evidence would rise to  
20 the level that would require the court to give the  
21 involuntary manslaughter instruction.

22 (Docket No. 31, Exh. G.)

23 Here, again, the Court agrees. There was no persuasive evidence  
24 that Petitioner was suffering from some type of mental delusion that  
25 would have negated a finding that he acted with malice when he banged  
26 Kim's head through the wall and stabbed her with a knife six times.  
27 Although Dr. St. Martin testified that Petitioner suffered from  
28 schizophrenia, he admitted that schizophrenia does not "necessarily

1 prevent a person from forming a mental state of malice aforethought."  
2 (RT 2111-12, 2121.) Moreover, in response to hypotheticals based on  
3 the facts of the case, he also admitted that some of Petitioner's  
4 actions--such as his admission to police that he killed Kim because  
5 she was rude and kicked him out of the house--made it less likely that  
6 Petitioner was in a psychotic state and acted without malice when he  
7 killed her. (RT 2130-31.) Finally, Dr. St. Martin concluded his  
8 testimony by explaining that he was unable to definitively assess  
9 Petitioner's state of mind because he was not there at the time. (RT  
10 2138.)

11 Other evidence at trial also undercut any argument that  
12 Petitioner did not realize that he was endangering Kim's life when he  
13 slammed her head against the wall and stabbed her. For example,  
14 Petitioner fled the murder scene, intending to kill himself for what  
15 he had done. (RT 1841; CT 85.) He made efforts to hide from  
16 authorities by hiding out in several hotels with his former  
17 girlfriend. He also told his former girlfriend that he had killed  
18 Kim. And, before being told by police why he was under arrest, he  
19 asked one of them if Kim was dead. (RT 1812-13.) He then explained  
20 to police that the reason he had killed Kim was because she had ended  
21 their relationship, forced him out of her house, and ridiculed him in  
22 the process, not because he had had a psychotic break.

23 In light of the dearth of evidence that Petitioner was unable to  
24 form the requisite mental state for second degree murder, there is no  
25 reasonable possibility that the trial court would have given an  
26 involuntary manslaughter instruction, even if counsel had requested  
27 one. Trial counsel's "failure to take a futile action can never be  
28 deficient performance." *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir.

1 1996); see also *Cain v. Chappell*, 870 F.3d 1003, 1019 (9th Cir. 2017)  
2 (“[I]t is not ineffective for counsel to refrain from pursuing jury  
3 instructions that have no basis in the evidence.”). Further, even if  
4 the court had given an involuntary manslaughter instruction, there is  
5 absolutely no reason to believe that it would have altered the jury’s  
6 verdict. As such, counsel’s inaction could not have prejudiced  
7 Petitioner. See *Pirtle v. Morgan*, 313 F.3d 1160, 1179 (9th Cir. 2002)  
8 (finding no prejudice under *Strickland* because, even if “counsel erred  
9 by failing to seek a diminished capacity instruction,” there was “no  
10 reasonable probability” that it affected the verdict). Accordingly,  
11 this claim must be denied.

12 VI.

13 CONCLUSION

14 For these reasons, the Petition is denied and the action is  
15 dismissed with prejudice. Further, because Petitioner has not made a  
16 substantial showing of the denial of a constitutional right, he is not  
17 entitled to a certificate of appealability. See 28 U.S.C.

18 § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack*  
19 *v. McDaniel*, 529 U.S. 473, 484 (2000); see also Fed. R. App. P. 22(b).

20 IT IS SO ORDERED.

21 DATED: January 4, 2018.

22 

23 \_\_\_\_\_  
24 PATRICK J. WALSH  
25 UNITED STATES MAGISTRATE JUDGE  
26  
27