Arvel M. Jackson v. Josie Gastelo Doc. 34 Att. 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ARVEL M. JACKSON, Petitioner, v. JOSIE GASTELO, Warden, Respondent.

NO. CV 16-7063-AB(E)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable André Birotte, Jr., United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On September 20, 2016, Petitioner filed: (1) a "Petition for Writ of Habeas Corpus By a Person in State Custody" ("Petition"), accompanied by a copy of Petitioner's petition for review filed in the California Supreme Court ("attachment"); and (2) a "Motion for Stay of

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Abeyance Procedure." The Petition was unverified, and the section of the form Petition provided for a statement of grounds for relief was blank. The California Supreme Court petition for review contained two claims of alleged instructional error and a claim challenging the sufficiency of the evidence to support Petitioner's conviction. Petitioner sought a stay to exhaust four new, unexhausted claims (apparently claims of alleged ineffective assistance of trial and appellate counsel).

On September 22, 2016, the Magistrate Judge issued a Minute Order directing Petitioner to file a verification of the Petition. The Minute Order further stated that the Court would presume that, in the present federal Petition, Petitioner intended to allege the grounds for relief contained in the California Supreme Court petition for review, unless Petitioner advised the Court otherwise.

On October 11, 2016, Petitioner filed a document titled "Notice of Verification of Habeas Petition[;] Motion for Grounds to Be Used in the Petition." This document provided a verification of the Petition and attached a memorandum setting forth the claims of instructional error and evidentiary insufficiency contained in the California Supreme Court petition for review. Petitioner stated that he had erred in sending the Court the California Supreme Court petition for review "to be used as ground [sic] in his Petition," but added that the Court should refer to the petition for review "if it may aid the Court in deciding [Petitioner's] case."

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On October 26, 2016, Respondent filed an opposition to Petitioner's motion for a stay. On January 19, 2017, the Court issued an "Order Denying Motion for Stay."

On February 14, 2017, Respondent filed an Answer, asserting, inter alia, that Grounds One and Two of the Petition are unexhausted because Petitioner did not present those grounds as federal claims to the California Supreme Court.

On March 23, 2017, Petitioner filed an "Application for Stay Abeyance [sic] Due to Unexhausted Claims, etc.," requesting a stay to permit Petitioner to exhaust Grounds One and Two of the Petition. On March 24, 2017, Petitioner filed a Traverse addressing the merits of the Petition. On April 12, 2017, Respondent filed an "Opposition to Petitioner's Application for Stay, etc."

BACKGROUND

A jury found Petitioner guilty of: (1) battery causing serious bodily injury on Petitioner's wife Mary Jones in violation of California Penal Code section 243(d), a lesser offense to mayhem; (2) possession of a firearm by a felon in violation of California Penal Code section 29800(a)(1); (3) misdemeanor spousal battery in violation of California Penal Code section 243(e)(1); and (4) assault with a firearm in violation of California Penal Code section 245(a)(2) (Reporter's Transcript ["R.T."] 1586-88; Clerk's Transcript ["C.T."] 169, 172-75, 178-80). The jury found true the allegations that Petitioner personally used a firearm in the commission of the

aggravated battery and the assault within the meaning of California Penal Code section 12022.5(a) and personally inflicted great bodily injury upon Mary Jones under circumstances of domestic violence within the meaning of California Penal Code section 12202.7(e) (R.T. 1586-88; C.T. 169, 174). The jury acquitted Petitioner of mayhem and infliction of corporal injury to a spouse (R.T. 1586-87; C.T. 168, 171). The court found true various prior conviction allegations (R.T. 2139-41; C.T. 244). Petitioner received a sentence of 29 years and four months in state prison (R.T. 3028-30; C.T. 298-302).

The California Court of Appeal ordered an amendment to the abstract of judgment but otherwise affirmed (Respondent's Lodgment 1; see People v. Jackson, 2015 WL 1951886 (Cal. App. Apr. 30, 2015)). The California Supreme Court denied Petitioner's petition for review summarily (Respondent's Lodgments 2, 3).

SUMMARY OF TRIAL EVIDENCE

The following summary is taken from the Court of Appeal's decision in People v. Jackson, 2015 WL 1951886 (Cal. App. Apr. 30, 2015).[1]

> In the months leading up to August 2012, defendant suspected he was being stalked by "the Mexicans," whom he

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[1] The Court has reviewed the Reporter's Transcript and has confirmed that the Court of Appeal's summary of the evidence is accurate except as otherwise noted herein.

believed meant to kill him.[2] He suspected that his wife was in league with them. At first, he threatened his wife with words, telling her, "Before I let them get me, you'll go first." She felt threatened.

The threats escalated.

In early August 2012, defendant again accused his wife of aiding "the Mexicans," again threatened to hurt her, and proceeded to shove her head into the sofa with his hand.

Three weeks later, in late August, he told his wife "the Mexicans" were coming to attack him in the apartment they shared. After telling her, "They're here," he retrieved a gun and watched the window shades of his second-story bedroom window as his wife lay on the bed. When he saw a shadow cross the window shade and heard noises, he fired a shot that penetrated the bed frame and box spring before dismembering two of his wife's toes. She later lost all of her toes on that foot to gangrene.

(Respondent's Lodgment 1, p. 2; see People v. Jackson, 2015 WL 1951886, at *1) (footnote renumbered).

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[2] Defendant's paranoia regarding "the Mexicans" was tied to his regular use of illegal narcotics. The trial court excluded any defense of voluntary intoxication, and defendant does not challenge that ruling on appeal.

PETITIONER'S CONTENTIONS

Petitioner contends:

1. The trial court allegedly erred by failing to instruct the jury that the defense of accident assertedly applied to the charge of assault with a firearm (Ground One);

2. The trial court allegedly erred by failing to give a mistake of fact instruction (Ground Two); and

3. The evidence allegedly did not suffice to show that Petitioner possessed the requisite intent to support the convictions for battery and assault with a firearm (Ground Three).

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v.

Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 132 S. Ct. 38, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application" prong of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state

court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 562 U.S. 86, 101 (2011). This is "the only question that matters under § 2254(d)(1)." Id. at 102 (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the 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 fairminded disagreement." Id. at 103.

In applying these standards, the Court looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, as where the state court summarily denies a claim, "[a] habeas court must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."

Cullen v. Pinholster, 563 U.S. 170, 188 (2011) (citation, quotations and brackets omitted).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

DISCUSSION[3]

I. Petitioner Is Not Entitled to Federal Habeas Relief on His Challenge to the Sufficiency of the Evidence.

Petitioner contends the evidence did not suffice to support Petitioner's convictions for battery causing serious bodily injury and aggravated assault, alleging that the evidence purportedly did not show that Petitioner intended to fire the gun at his wife (Traverse, p. 15). Petitioner contends the evidence showed that Petitioner assertedly pointed the gun downward throughout the incident and never aimed the gun at his wife (id., p. 17). Petitioner cites his own testimony that he supposedly did not intend to shoot his wife and allegedly had "no idea" the gun was pointing in her direction (id.). Petitioner also cites Mary Jones' testimony that prior to the incident

[3] For clarity of discussion, the Court has reordered Petitioner's claims.

she and Petitioner allegedly were not arguing and that Jones purportedly did not think Petitioner posed any threat to her (id.). Petitioner also refers to evidence that the bullet struck Jones on a downward trajectory (id.). The Court of Appeal rejected Petitioner's sufficiency of the evidence claim on the merits (Respondent's Lodgment 1, pp. 6-7; see People v. Jackson, 2015 WL 1951886, at *3).

A. Governing Legal Standards

On habeas corpus, the Court's inquiry into the sufficiency of evidence is limited. Evidence is sufficient unless the charge was "so totally devoid of evidentiary support as to render [Petitioner's] conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment." Fish v. Cardwell, 523 F.2d 976, 978 (9th Cir. 1975), cert. denied, 423 U.S. 1062 (1976) (citations and quotations omitted). A conviction cannot be disturbed unless the Court determines that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 317 (1979). A verdict must stand unless it was "so unsupportable as to fall below the threshold of bare rationality." Coleman v. Johnson, 566 U.S. 650, 132 S. Ct. 2060, 2065 (2012).

Jackson v. Virginia establishes a two-step analysis for a challenge to the sufficiency of the evidence. United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc). "First, a reviewing court must consider the evidence in the light most favorable to the prosecution." Id. (citation omitted); see also McDaniel v.

Brown, 558 U.S. 120, 133 (2010).[4] At this step, a court "may not usurp the role of the trier of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial." United States v. Nevils, 598 F.3d at 1164 (citation omitted). "Rather, when faced with a record of historical facts that supports conflicting inferences a reviewing court 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." Id. (citations and internal quotations omitted); see also Coleman v. Johnson, 132 S. Ct. at 2064 ("Jackson leaves [the trier of fact] broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that [the trier of fact] draw reasonable inferences from basic facts to ultimate facts") (citation and internal quotations omitted); Cavazos v. Smith, 132 S. Ct. 2, 4 (2011) ("it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial"). The State need not rebut all reasonable interpretations of the evidence or "rule out every hypothesis except that of guilt beyond a reasonable doubt at the first step of Jackson [v. Virginia]." United States v. Nevils, 598 F.3d at 1164 (citation and internal quotations omitted). Circumstantial evidence and the inferences drawn therefrom can be sufficient to sustain a conviction. Ngo v. Giurbino, 651 F.3d 1112, 1114-15 (9th Cir. 2011).

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[4] The Court must conduct an independent review of the record when a habeas petitioner challenges the sufficiency of the evidence. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997). The Court has conducted the requisite independent review.

At the second step, the court "must determine whether this evidence, so viewed, is adequate to allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." United States v. Nevils, 598 F.3d at 1164 (citation and internal quotations omitted; original emphasis). A reviewing court "may not ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Id. (citations and internal quotations omitted; original emphasis).

In applying these principles, a court looks to state law for the substantive elements of the criminal offense, but the minimum amount of evidence that the Constitution requires to prove the offense "is purely a matter of federal law." Coleman v. Johnson, 132 S. Ct. at 2064.

B. Analysis

In her interviews with police, Jones stated: (1) Petitioner previously had threatened Jones and shoved her face into a sofa; (2) during this previous incident, Petitioner accused Jones of working with the Mexicans who supposedly were after Petitioner and Petitioner said "I'll see you go first before they come after me"; (3) on the day of the shooting Petitioner said that the Mexicans were coming to get him, that Jones was working with and "fucking" the Mexicans and that the Mexicans were at the window; (4) Petitioner accused Jones of trying to get him killed; (5) Petitioner accused Jones of setting him up with the Mexicans and said "you're trying to get killed"; (6) after Petitioner entered the bedroom with the gun, he began "clicking" the

cylinder of the gun; (7) Jones' foot was elevated on the wood part of the bed when Petitioner shot her; (8) after Petitioner shot Jones, Petitioner dropped the house phone in a hamper and left; and (9) Jones thought Petitioner had shot her intentionally (C.T. 84-86, 91-92, 95-96, 98-99, 101, 108-11).

In recorded phone calls with Jones after the shooting, Petitioner told Jones: (1) Jones should tell police that someone was showing off with the gun and it went off; (2) Jones should go to her mother's home for at least a month; (3) Jones should not "show" because "if you don't pop up they have to drop it"; (4) if Jones did not "show," Petitioner would be "good to go"; (5) Jones should "plead the 5th"; (6) Petitioner hoped Jones was "smart enough to disappear"; (7) Jones should tell the police that her statements to police were coerced and that she was on medication when she made the statements; (8) Petitioner had "Bubba" come to the apartment after the shooting because Petitioner "had to get that thing out of the freezer"; (9) Petitioner thought the gun was pointed at the window; and (10) Jones should tell the police she had lied earlier when she said Petitioner was "high" (C.T. 108-12, 120-23).

At trial, Jones testified: (1) when Jones returned home on the day of the incident, Jones did not expect to see Petitioner because he and she had argued and Petitioner was supposed to move out; (2) Petitioner had a gun and was smoking a pipe containing white rocks; (3) Petitioner said the Mexicans were after him and were at the window; (4) Jones did not see the position of the gun because she was watching television; (5) Petitioner said "[t]hey're going to kill me

but I'm going to give you what you want," a statement which Jones considered a threat because she thought Petitioner would kill her before he killed the Mexicans;[5] (6) Petitioner said, "before I let them get me you'll go first";[6] (7) Petitioner said Jones was working with the Mexicans and setting Petitioner up; (8) following Petitioner's departure after the shooting, Jones hopped over to retrieve the phone and called 911; (9) Jones knew that Petitioner was violating a restraining order by calling her after the incident; (10) after the incident, Petitioner told Jones to tell police that either Petitioner or "Bubba" shot Jones and she did not know which one; (11) Petitioner told Jones not to meet with the prosecution and not to talk any more to the detective; (12) Petitioner told Jones to tell the police the shooting was an accident; and (13) Petitioner told Jones the case would go away if she did not come to court (R.T. 642-43, 644-45, 647-49, 658-60, 663-64, 667-69, 682, 699-701, 703-05, 736).

Jones also testified that, when she turned around and saw Petitioner with the gun, she supposedly saw Petitioner holding the gun down, aimed at the floor (R.T. 718, 739). However, Jones said Petitioner fired the shot approximately fifteen minutes later, and also said that she did not see the gun at the time she was shot

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[5] Jones testified, however, that Petitioner made this statement months before the incident, and that she could not recall telling police about this statement because she supposedly was drowsy and on medication when interviewed in the hospital (R.T. 662, 680).

[6] Jones later said Petitioner made this statement earlier, on a different day (R.T. 682).

because she was watching television (R.T. 718, 733, 740).

When Petitioner testified, he contradicted much of Jones' version of events. However, Petitioner did state that: (1) although Petitioner was smoking cocaine before the shooting, he "knew what was happening"; (2) Petitioner retrieved the gun from under the pillow and crossed the room to the window, pulling the hammer back on the gun; (3) Petitioner either backed up or turned around and went back towards the dresser; (4) Petitioner did not aim the gun at the window or at his wife; (5) on his way back from the window, Petitioner attempted to uncock the gun, but the gun went off; (6) the gun was pointed toward the dresser and Petitioner thought the gun was "pointed straight"; (7) when Petitioner was trying to uncock the gun he did not see where it was pointing because he was "high"; (8) Petitioner thought the bullet had gone "straight"; (9) Petitioner initially thought the bullet went through the dresser or through the floor; and (10) after the shooting, Petitioner put the gun in the freezer and then left because he did not want to go to jail (R.T. 1216-20, 1222, 1241, 1243-48, 1251, 1258-60).

A defense firearms expert testified that the trajectory of the bullet into the footboard and box spring of the bed was a downward angle of 20 degrees and an angle 23 degrees from right to left (R.T. 1295). In rebuttal, a detective testified that measurements showed that the bullet entered the footboard of the bed approximately 22 1/2 inches above the ground and entered the box spring approximately 19 inches above the ground (R.T. 1331-32).

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A rational juror considering the evidence described above could have determined that Petitioner deliberately shot his wife. In arguing for a contrary conclusion, Petitioner faults the Court of Appeal for purportedly considering only "isolated bits of evidence" and "ignoring all conflicts in the evidence" (Petition, attachment, pp. 6, 14). However, under the Jackson v. Virginia standard, this Court must presume that the jury resolved all evidentiary conflicts in favor of the prosecution, and cannot revisit the jury's credibility determinations. See Cavazos v. Smith, 132 S. Ct. at 6-7 (jury entitled to credit prosecution experts' testimony despite conflicting testimony by defense experts); McDaniel v. Brown, 538 U.S. at 131-34 (ruling that the lower federal court erroneously relied on inconsistencies in trial testimony to deem evidence legally insufficient; the reviewing federal court must presume that the trier of fact resolved all inconsistencies in favor of the prosecution, and must defer to that resolution). The jury evidently credited Jones' version of the shooting rather than Petitioner's, and a federal habeas court must defer to that credibility determination. See Bruce v. Terhune, 376 F.3d 950, 957-58 (9th Cir. 2004) (jury's resolution of the issues concerning the witnesses' credibility is "entitled to near-total deference under [Jackson v. Virginia]") (citations omitted); United States v. Franklin, 321 F.3d 1231, 1239-40 (9th Cir.), cert. denied, 540 U.S. 858 (2003) (in reviewing the sufficiency of the evidence, a court does not "question a jury's assessment of witnesses' credibility" but rather presumes that the jury resolved conflicting inferences in favor of the prosecution).

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Accordingly, the Court of Appeal's rejection of Petitioner's challenge to the sufficiency of the evidence was not contrary to, or an unreasonable application of, any clearly established Federal law, as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 100-03 (2011). Petitioner is not entitled to federal habeas relief on this claim.

II. Petitioner's Claims of Instructional Error Do Not Merit Federal Habeas Relief.[7]

A. Governing Legal Standards

"[I]nstructions that contain errors of state law may not form the basis for federal habeas relief." Gilmore v. Taylor, 508 U.S. 333, 342 (1993); see also Estelle v. McGuire, 502 U.S. 62, 71-72 (1991) ("the fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief"); Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988) (instructional error "does not alone raise a

[7] Respondent previously took the position that Petitioner's instructional error claims (Grounds One and Two of the Petition) appeared to be exhausted. See "Opposition to Petitioner's Motion for Stay of [sic] Abeyance Procedure, etc.," filed October 26, 2016, p. 6) (stating that Petition "appeare[d] to be neither fully unexhausted nor mixed" but also stating that Respondent could not yet determine the exhaustion issue pending the receipt of documents from Petitioner's direct appeal). Respondent now contends that Ground One and Two of the Petition are unexhausted. For the reasons discussed herein, because Grounds One and Two are not "colorable," the Court should deny these claims on the merits. See Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005), cert. denied, 546 U.S. 1172 (2006). Accordingly, Petitioner's application for a stay to complete the exhaustion of these claims should be denied as moot.

ground cognizable in a federal habeas corpus proceeding"). When a federal habeas petitioner challenges the validity of a state jury instruction, the issue is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. at 72; Clark v. Brown, 450 F.3d 898, 904 (9th Cir.), cert. denied, 549 U.S. 1027 (2006). The court must evaluate the alleged instructional error in light of the overall charge to the jury. Middleton v. McNeil, 541 U.S. 433, 437 (2004); Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997), cert. denied, 522 U.S. 1079 (1998). The court must decide whether "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Rhoades v. Henry, 638 F.3d 1027, 1042 (9th Cir. 2010), cert. denied, 565 U.S. 946 (2011) (citation and internal quotations omitted). The question is not whether the jury *could have* done so, but whether there is a reasonable likelihood it *did*. Id. (citation omitted; original emphasis). The court should not engage in a "technical parsing" of the challenged instruction, but rather should consider the instruction as the jury would, "with a commonsense understanding of the instructions in the light of all that has taken place at trial." Id. at 1042-43 (citation and internal quotations omitted).

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B. <u>The Failure to Give an Accident Instruction on the Aggravated Assault Charge Does Not Merit Federal Habeas Relief.</u>

In California, one who commits a crime "through misfortune or by accident" is not criminally liable "when it appears that there was no evil design, intention or culpable negligence." Cal. Penal Code § 26(5). A defendant's contention that he or she committed the crime by accident "amounts to a claim that the defendant acted without forming the mental state necessary to make his or her action a crime." <u>People v. Jennings</u>, 50 Cal. 4th 616, 674, 114 Cal. Rptr. 3d 133, 237 P.3d 474 (2010) (citation and internal quotations omitted). Under California law, an accident instruction is a "pinpoint" instruction which the court need give only upon request by the defense, provided that other instructions inform the jury of the requisite mental element of the offense. <u>People v. Anderson</u>, 51 Cal. 4th 989, 999, 125 Cal. Rptr. 3d 408, 252 P.3d 968 (2011).

Using CALCRIM 3404, the trial court instructed the jury that Petitioner was not guilty of mayhem, battery with serious bodily injury or corporal injury to a spouse "if he acted without the intent required for that crime, but acted instead accidentally," and the court stated that the jurors "could not find [Petitioner] guilty of these crimes unless [the jurors were] convinced beyond a reasonable doubt that [Petitioner] acted with the required intent" (R.T. 1543; C.T. 159). However, the court refused a defense request to give the accident instruction with respect to the charge of assault with deadly

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weapon (R.T. 1268-70).[8]

Petitioner contends the trial court erred by failing to give the accident instruction with respect to the aggravated assault charge. The California Court of Appeal ruled that any alleged error was harmless because the jury obviously rejected any accident defense (Respondent's Lodgment 1, pp. 4-5; see People v. Jackson, 2015 WL 1951886, at *2). The Court of Appeal reasoned that: (1) Defendant testified, and his counsel argued, that the shooting purportedly was an accident; and (2) the trial court gave an accident instruction with respect to the charge of battery causing serious bodily injury, a charge as to which the jury convicted Petitioner (Respondent's Lodgment 1, pp. 4-5 ; see People v. Jackson, 2015 WL 1951886, at *2).

Petitioner's claim is not colorable for several reasons. First, Petitioner appears to allege only a claim of state law error not cognizable on federal habeas corpus review. See Estelle v. McGuire, 502 U.S. at 67-68; see also Wilson v. Corcoran, 562 U.S. 1, 5 (2010) (per curiam) ("it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts") (original emphasis); Hendricks v. Vasquez, 974 F.2d 1099, 1105 (9th Cir. 1992) ("Federal habeas will not lie for errors of state law").

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[8] The court omitted the accident instruction from the initial reading of the final instructions. During a break during the defense closing, however, the court read the accident instruction to the jury (R.T. 1541-43)

Second, the United States Supreme Court has never held that a trial court's failure to give a pinpoint instruction violates the constitution where the jury received instructions concerning the elements of the offense. See Villela v. Kirkland, 2010 WL 6195251, at *13 (C.D. Cal. Dec. 28, 2010), adopted, 2011 WL 977020 (C.D. Cal. Mar. 14, 2011) (recognizing absence of any such United States Supreme Court jurisprudence); see also Pese v. Runnels, 2009 WL 248374, at *10 (N.D. Cal. Jan. 29, 2009), aff'd, 551 Fed. App'x 434 (9th Cir.), cert. denied, 135 S. Ct. 87 (2014) (denying habeas relief on claim of improper pinpoint instruction, given the lack of United States Supreme Court authority prohibiting the use of pinpoint instructions). In the absence of such Supreme Court authority, Petitioner cannot obtain federal habeas relief on this claim. See Carey v. Musladin, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court [on the issue presented], it cannot be said that the state court "unreasonabl[y] applied clearly established Federal law.") (internal brackets and citation omitted); Moses v. Payne, 555 F.3d 742, 758-59 (9th Cir. 2009) (habeas relief unavailable where the Supreme Court had articulated no "controlling legal standard" on the issue); 28 U.S.C. § 2254(d).

Rather, the United States Supreme Court has held that the failure to give an instruction will not violate the constitution where other instructions adequately inform jurors of the required elements of the offense. In Henderson v. Kibbe, 431 U.S. 145 (1977), the defendant and a confederate robbed a severely intoxicated man and left the victim partially clothed on an unlit rural road on a snowy night. Id. at 147. A speeding truck hit the victim and killed him. Id. The

trial court failed to give a causation instruction, although the court did read the indictment and the second-degree murder statute to the jury and explained the meaning of some of the statutory language Id. at 148-49.[9] The Supreme Court held that the significance of the omission should be evaluated "by comparison with the instructions that were given," and that, in light of the instructions that were given "the omission of more complete instructions on the causation issue" did not render the trial unfair so as to violate due process. Id. at 156-57; see also Duckett v. Godinez, 67 F.3d 734, 743 (9th Cir. 1995) ("it is not reversible error to reject a defendant's proposed instruction on his theory of the case if other instructions, in their entirety, adequately cover that defense theory") (citation and quotations omitted; original emphasis).

Here, other instructions adequately informed the jury of the requisite intent for the crime of assault with a firearm. The court instructed the jury that various charged crimes, including the crime of assault with a firearm, required proof of "wrongful intent," and that a person acted with wrongful intent "when he or she intentionally [did] a prohibited act" (R.T. 1354-55; C.T. 135). With respect to the charge of assault with a firearm, the court told the jury that the prosecution was required to prove that Petitioner committed the

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[9] The trial court in Henderson v. Kibbe instructed the jury that second degree murder required proof that the defendant acted recklessly in conduct which created a grave risk of death to another or caused the death of another, and that the defendant "act[ed] recklessly with respect to a result or to a circumstances [sic] described by a statute defining an offense when he was aware of and consciously disregarded a substantial and unjustifiable risk that such result will occur or that such circumstance exists." Id. at 149.

assault "willfully" and that Petitioner "was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone" (R.T. 1505-06; C.T. 151). The court told the jury that "[s]omeone commits an act willfully when he or she does it willingly or on purpose" and that it was "not required that he or she intend to break the law, hurt someone else or gain any advantage" (R.T. 1506; C.T. 151). The court also instructed the jury to "[p]ay careful attention to all of [the] instructions and consider them together" (R.T. 1345; C.T. 125). By convicting Petitioner of assault with a firearm, the jury necessarily found that Petitioner did not shoot his wife by accident. In these circumstances, the court's failure to give a pinpoint accident instruction with respect to the assault charge did not render Petitioner's trial fundamentally unfair. See Bell v. Soto, 2016 WL 8735695, at *28 (C.D. Cal. Sept. 13, 2016) (failure to give accident instruction with respect to charge of assault with a deadly weapon not unconstitutional, where jury received instructions concerning the elements of the offense).[10] Accordingly, the Court of

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[10] The Ninth Circuit has suggested that "the defendant's right to adequate jury instructions on his or her theory of the case might, in some cases," raise a cognizable ground for federal habeas relief. See Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000), cert. denied, 534 U.S. 839 (2001); see also Clark v. Brown, 450 F.3d at 904 (state court's jury instructions violate due process if they deny the criminal defendant "a meaningful opportunity to present a complete defense") (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). It is questionable whether this proposition is supported by any clearly established United States Supreme Court law with respect to an accident instruction, particularly in light of Henderson v. Kibbe, supra. In any event, for the reasons discussed herein, the failure to give an accident instruction on the aggravated assault charge did not deny Petitioner the right to present a defense. Other
(continued...)

Appeal's rejection of this claim was not contrary to, or an unreasonable application of, any clearly established Federal law, as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 100-03 (2011).

Finally, and in any event, any alleged error was harmless under the harmless error standard applicable to federal habeas cases set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993) ("Brecht"). Brecht forbids a grant of habeas relief for a trial-type error unless the error had a "substantial and injurious effect or influence in determining the jury's verdict." Id. at 637-38. As the Court of Appeal observed, Petitioner testified repeatedly that the shooting purportedly was an accident, and his attorney vigorously argued accident in closing (see R.T. 1223, 1225, 1227, 1244, 1249, 1254, 1530, 1539-40, 1554). Petitioner's counsel told the jury that "[a]ccident means without intent" (R.T. 1540). Furthermore, the trial court instructed the jury on the elements of aggravated assault using the same definition of "willfully" as that used in the charge of battery causing serious injury (see R.T. 1505-06; C.T. 149, 151) (instructing that someone committed an act "willfully" when he did it "willingly or on purpose"). The jury found Petitioner guilty of battery and assault. See People v. Huggins, 38 Cal. 4th 175, 41 Cal. Rptr. 3d 593, 131 P.3d 995, cert. denied, 549 U.S. 998 (2006) ("Defendant claimed that the gun discharged accidentally. By

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[10](...continued)
instructions permitted Petitioner's counsel to argue, as counsel did argue, that Petitioner lacked the requisite intent to commit aggravated assault.

accepting the prosecution's version, the jury necessarily concluded that defendant intended to kill the victim."). Additionally, with respect to the firearm enhancements, the court instructed the jury that, to show Petitioner personally used a firearm within the meaning of California Penal Code section 12022.5(a), the jury was required to find that Petitioner intentionally displayed a weapon in a menacing manner, hit someone with a weapon or fired the weapon (R.T. 1509; C.T. 155). The jury found true this personal use allegation, thus finding that Petitioner had acted intentionally, not accidentally (R.T. 1586; C.T. 174). See White v. Foulk, 2016 WL 492794, at *14 (E.D. Cal. Feb. 9, 2016) (jury's finding that the petitioner personally and intentionally discharged a firearm "necessarily means that the jury found that the firearm was not accidentally discharged"; hence counsel's failure to request an accident instruction not prejudicial under Strickland v. Washington, 466 U.S. 668 (1984) (citations omitted)).[11] For these reasons, the omission of the accident instruction with respect to the aggravated assault charge did not have any "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637-38.

For all of the foregoing reasons, Petitioner's claim that the failure to give an accident instruction on the aggravated assault charge rendered Petitioner's trial unfair is not a "colorable" claim. See Cassett v. Stewart, 406 F.3d 614, 623–24 (9th Cir. 2005), cert.

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[11] Under Strickland v. Washington, to obtain federal habeas corpus relief a petitioner alleging ineffective assistance of counsel must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 694.

denied, 546 U.S. 1172 (2006). Petitioner is not entitled to habeas relief on this claim.

C. The Failure to Give a Mistake of Fact Instruction Does Not Merit Federal Habeas Relief.

Petitioner also faults the trial court for failing to give a mistake of fact instruction (Petition, attachment, pp. 12-13). The trial court and counsel discussed such an instruction (R.T. 1269-74). The court characterized the purported mistake of fact as Petitioner's alleged ignorance that the gun was pointed at his wife and the supposed accident as the alleged accidental discharge of the gun (see R.T. 1269-70, 1273-74). Petitioner's counsel concurred with these characterizations (R.T. 1273). The court told counsel that it had added a mistake of fact instruction to the jury instructions (R.T. 1362). However, for reasons not apparent from the record, the court did not give any mistake of fact instruction.

"[T]he particular 'defense' of mistake of fact requires, at a minimum, an actual belief in the existence of circumstances which, if true, would make the act with which the person is charged an innocent one." People v. Lawson, 215 Cal. App. 4th 108, 115, 155 Cal. Rptr. 3d 236 (2013) (internal quotations and citations omitted). "[F]or a general intent crime any mistake of fact must be both reasonable and actual before it is presented to the jury." People v. Givan, 233 Cal. App. 4th 335, 350, 15 Cal. Rptr. 3d 592 (2015) (citation omitted). Under California law, a mistake of fact instruction is a "pinpoint" instruction which a trial court need not give sua sponte when other

instructions adequately inform the jury of the mental elements of the crime. Id. at 344; see also People v. Lawson, 215 Cal. App. 4th at 117.

Petitioner claims that, had the jury received a mistake of fact instruction, the jury allegedly "could have found that Petitioner believed that the gun was pointed down and not in his wife['s] direction" (Traverse, p. 9). The Court of Appeal rejected this claim, stating that, regardless of the distinction the trial court drew between the accident and mistake theories, "as far as the jury was concerned, the defendant's aim and his trigger-pulling were both presented - in the evidence, during argument, as in the jury instructions - as a single course of accidental conduct," and that the jury's verdict showed the jury had determined that the shooting was willful (Respondent's Lodgment 1, p. 5; see People v. Jackson, 2015 WL 1951886, at *3). The Court of Appeal also ruled that, in any event, any error was harmless because the record did not support the proffered mistake (i.e. that Petitioner purportedly thought the gun was pointed down when he fired the shot) (Respondent's Lodgment 1, pp. 5-6; see People v. Jackson, 2015 WL 1951886, at *3). Rather, the record rather showed that Petitioner reportedly had no idea where the gun was pointed and that in fact the gun was pointed at his wife (id.).

Again, Petitioner's claim of instructional error is not "colorable." To the extent Petitioner contends the trial court misapplied state law in failing to give a mistake of fact instruction, any such claim is not cognizable on federal habeas review. See

Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also Wilson v. Corcoran, 562 U.S. 1, 5 (2010). Moreover, because the United States Supreme Court has never held unconstitutional a trial court's failure to give a pinpoint instruction such as a mistake of fact instruction, Petitioner cannot obtain federal habeas relief on this claim. See Carey v. Musladin, 549 U.S. 70, 77 (2006); Moses v. Payne, 555 F.3d 742, 758–59 (9th Cir. 2009); see also Henderson v. Kibbe, 431 U.S. 156-57.

In any event, the failure to give a pinpoint mistake of fact instruction did not render Petitioner's trial fundamentally unfair. There was little, if any, evidence to support a mistake of fact instruction based on a supposed "mistake" as a result of which Petitioner purportedly believed that the gun was pointed down at the time he fired the shot. As the Court of Appeal observed, at the time of the shooting the gun obviously was pointed at Petitioner's wife. Petitioner was standing at the time of the shot and his wife was lying on the bed with her feet on the footboard, so the trajectory of the bullet necessarily was at a downward angle. Petitioner gave confused and sometimes conflicting testimony at trial concerning the direction the gun was pointing at the time of the shot. As indicated above, Petitioner testified that the gun allegedly was pointed "straight" and at the dresser before he supposedly attempted to uncock the gun, and that the gun went off as he attempted to uncock it. However, Petitioner also testified that, at the time he assertedly was attempting to uncock the gun, Petitioner allegedly did not see the direction in which the gun was pointing. Petitioner also told Jones, in a recorded conversation, that Petitioner allegedly thought the gun

was pointed at the window. Petitioner did not then say that he fired the gun at his wife mistakenly, thinking the gun was pointed down.

Additionally, with respect to the crimes of battery with serious bodily injury, misdemeanor battery and aggravated assault, the trial court instructed the jury that: (1) to find Petitioner guilty of battery, jurors were required to find that Petitioner willfully touched Jones in a harmful or offensive manner; and (2) to find Petitioner guilty of assault, jurors were required to find that Petitioner willfully did an act with a firearm that by its nature would directly and probably result in the application of force to a person (R.T. 1505-07; C.T. 150, 151, 153). As indicated above, the court instructed the jury that a person acted willfully when he or she acted willingly and on purpose and that the prosecution was not required to show that Petitioner intended to break the law, hurt someone or gain any advantage (see R.T. 1505-07; C.T. 150, 151, 153). These instructions adequately informed the jury of the mental state necessary to prove these charges. Accordingly, the failure to give a pinpoint mistake of fact instruction did not deny Petitioner a fair trial. See Henderson v. Kibbe, 431 U.S. at 156-57 Duckett v. Godinez, 67 F.3d 734, 743 (1995).

For all of these reasons, the Court of Appeal's rejection of this claim was not contrary to or an unreasonable application of, any clearly established Federal law, as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. at 100-03. Petitioner is not entitled to federal habeas relief on this non-colorable claim.

RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the Court issue an order: (1) accepting and adopting this Report and Recommendation; (2) denying Petitioner's application for a stay as moot; and (3) denying and dismissing the Petition with prejudice.

DATED: May 5, 2017.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.