

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL JOSEPH PRATT,

Petitioner,

No. 2:02-cv-0872-MCE-JFM (HC)

vs.

MIKE EVANS, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges on several grounds his 2000 conviction on charges of second degree murder with use of a firearm. This action is proceeding on petitioner’s second amended petition, filed August 4, 2005.

FACTS¹

On November 8, 1998, [petitioner] was at the residence of his cousin, Timothy Carver (Carver), using the telephone to arrange a ride to Reno, Nevada, where he had a November 12, 1998, court date in a criminal matter. Later that day, [petitioner] entered Carver’s residence unannounced and became angry and argumentative with Carver’s wife, Renae Carver. [Petitioner]

¹ The facts are taken from the opinion of the California Court of Appeal for the Third Appellate District in People v. Pratt, No. C036203 (July 30, 2001), a copy of which was lodged by respondent on January 11, 2006 as Lodged Document 7.

1 implied that she had given wrong directions to an individual who
2 was planning to take him to Reno. Carver told [petitioner] to leave
3 the residence and picked up the telephone to call the police. A shot
4 rang out. When [petitioner] turned around, Renae saw that he was
5 holding a chrome gun with a pearl or white handle. [Petitioner]
6 had acquired the gun a couple of weeks earlier during one of
7 several burglaries he had committed with Carver.

8 Renae telephoned 911 and police arrived shortly thereafter.
9 Paramedics found Carver lying on the floor. He was conscious and
10 able to speak. He was taken to hospital where he underwent
11 surgeries, lapsed into a coma, and died several days later.
12 [Petitioner] was apprehended in Reno.

13 [Petitioner] testified on his own behalf that he saw Carver
14 coming at him from the kitchen to his left. Carver had a knife in
15 his left hand. Carver said nothing but lunged at [petitioner] to stab
16 him. [Petitioner] used his left hand to block and grab Carver's
17 arm. They slammed into a wall where a blood smear is visible.
18 [Petitioner] got knocked down to the area of Carver's knees.
19 [Petitioner] saw a handgun lying next to a telephone; a quilt
20 partially covered the gun. He picked up the gun in his left hand as
21 Carver swung at him. [Petitioner] jumped back and the gun went
22 off. [Petitioner] dropped the gun and ran out of the apartment.

23 People v. Pratt, slip op. at 2-3.

24 ANALYSIS

25 I. Standards for a Writ of Habeas Corpus

26 Federal habeas corpus relief is not available for any claim decided on the merits in
state court proceedings unless the state court's 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).

Under section 2254(d)(1), a state court decision is "contrary to" clearly
established United States Supreme Court precedents if it applies a rule that contradicts the
governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially

1 indistinguishable from a decision of the Supreme Court and nevertheless arrives at different
2 result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406
3 (2000)).

4 Under the “unreasonable application” clause of section 2254(d)(1), a federal
5 habeas court may grant the writ if the state court identifies the correct governing legal principle
6 from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the
7 prisoner’s case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ
8 simply because that court concludes in its independent judgment that the relevant state-court
9 decision applied clearly established federal law erroneously or incorrectly. Rather, that
10 application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 75
11 (2003) (it is “not enough that a federal habeas court, in its independent review of the legal
12 question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”) The court looks
13 to the last reasoned state court decision as the basis for the state court judgment. Avila v. Galaza,
14 297 F.3d 911, 918 (9th Cir. 2002).

15 II. Petitioner’s Claims

16 A. Reasonable Doubt Instruction

17 Petitioner’s first claim for relief is that his federal constitutional right to equal
18 protection was violated by the “essentially standardless” definition of reasonable doubt in
19 CALJIC 2.90, the reasonable doubt instruction given at petitioner’s trial. Second Amended
20 Petition, at 7. The last reasoned state court rejection of this claim is the decision of the state
21 court of appeal on petitioner’s direct appeal, which rejected the claim as follows:

22 [Petitioner] contends the trial court violated his federal right to
23 equal protection when it instructed the jury with CALJIC 2.90,
24 which, he claims, “*provides no adequate and uniform standard for*
25 *determining the level of certainty to which the jury must be*
26 *persuaded . . .*” (Italics added.) An almost identical contention,
that the instruction “*gave the jury no guidance as to the level*

////

1 of certainty,” was held to be frivolous in *People v. Hearon* (1999)
2 72 Cal.App.4th 1285, at pages 1286, 1287.²

3 [Petitioner] claims a result contrary to *Hearon* is now requires
4 by the United States Supreme Court’s landmark decision in *Bush v.*
5 *Gore* (2000) 531 U.S. __, __ [148 L.Ed.2d 388, 399]. We
6 disagree.

7 In *Victor v. Nebraska* (1994) 511 U.S. 1 [127 L.Ed.2d 582] the
8 high court held that, “The beyond a reasonable doubt standard is a
9 requirement of due process, but the Constitution neither prohibits
10 trial court’s from defining reasonable doubt nor requires them to do
11 so.” (511 U.S. at p. 5 [127 L.Ed.2d at p. 590].) Because no
12 definition is necessary, the definition in CALJIC 2.90 cannot be
13 challenged as inadequate.

14 None of the opinions in *Bush, supra*, 531 U.S. __ [148 L.Ed.2d
15 388], purports to reject *Victor, supra*, 511 U.S. 1 [127 L.Ed.2d
16 583], or to hold that trial courts must define reasonable doubt. It is
17 fundamental that a case is not authority for an issue neither raised
18 nor considered. (*People v. Wells* (1996) 12 Cal.4th 979, 984, fn.
19 4.)³

20 Rather, in *Bush, supra*, 531 U.S. __ [148 L.Ed.2d 388] the court
21 majority carefully distinguished the election contest before it from
22 the ordinary case in which a jury evaluates evidence at a criminal
23 trial. In the election context, “The factfinder confronts a thing, not
24 a person. The search for intent can be confined by specific rules
25 designed to ensure uniform treatment.” (*Id.* at p. __ [148
26 L.Ed.2d at p. 399].) Here, in contrast, the fact finder confronted
numerous *persons* who appeared as live witnesses and had to
decide “whether to believe [each] witness.” (*Ibid.*) [Petitioner]
does not argue that the assessment of credibility can be confined by
a series of specific rules, as in *Bush*. Nor does *Bush* suggest that
the next step in the process, the determination whether the facts
found by the trier establish guilt beyond a reasonable doubt, is
“susceptible to much further refinement” through “specific rules
designed to ensure uniform treatment.” (*Ibid.*)⁴

21 ² [Petitioner] claims that *Hearon, supra*, 72 Cal.App.4th 1285 upheld CALJIC No. 2.90
22 against a due process challenge, not an equal protection challenge. In fact, *Hearon* did not
23 mention due process or equal protection.

24 ³ In another context, [petitioner] admits that *Bush, supra*, 531 U.S. __ [148 L.Ed.2d 388]
25 is sui generis.

26 ⁴ Justice Stevens’s dissent did not call *Victor* into question. On the contrary, it argues
there is “no reason to think that the guidance provided to the factfinders, specifically the various
canvassing boards, by the ‘intent of the voter’ standard is any less sufficient – or will lead to
results any less uniform – than, for example, the ‘beyond a reasonable doubt’ standard employed

1 [Petitioner] contends that further refinement can easily be
2 accomplished, but his only specific suggestion is that the jury “be
3 informed that there are at least three standards of proof in the law,
preponderance of the evidence, clear and convincing evidence, and
proof beyond a reasonable doubt.” The point has no merit.

4 None of the closing summations in this case described the lesser
5 standards of proof or related them to the standard of beyond a
6 reasonable doubt. However, there mere omission of inapplicable
7 standards from a particular case does not raise the specter that the
8 applicable standard will be applied in an unequal manner. The jury
9 had to decide whether the evidence placed [petitioner]’s guilt in
doubt and whether that doubt was reasonable. The definitions of
“preponderance of evidence” and “clear and convincing evidence”
do not tell the jury how to determine whether a doubt is reasonable;
they are not essential or even particularly helpful to that task.
Their omissions from this case did not violate equal protection.

10 People v. Pratt, slip op. at 5-8.

11 The jury in petitioner’s trial was instructed with CALJIC 2.90, as follows:

12 A defendant in a criminal action is presumed to be innocent
13 until the contrary is proved, and in case of a reasonable doubt
14 whether his guilt is satisfactorily shown, he is entitled to a verdict
of guilty. This presumption places upon the People the burden of
proving him guilty beyond a reasonable doubt.

15 Reasonable doubt is defined as follows: It is not a mere possible
16 doubt; because everything relating to human affairs is open to
17 some possible or imaginary doubt. It is that state of the case
18 which, after the entire comparison and consideration of all the
evidence, leaves the minds of the jurors in that condition that they
cannot say they feel an abiding conviction of the truth of the
charge.

19 Clerk’s Transcript on Appeal (CT) at 237. In Victor v. Nebraska, 511 U.S. 1 (1994), the United
20 States Supreme Court held that a reasonable doubt instruction “need not follow a prescribed
21 formula, and . . . require[s] only that the trial court (1) convey to the jury that it must consider
22 only the evidence and (2) properly state the government’s burden of proof. See id. at 13, 114
23 S.Ct. at 1246, 127 L.Ed.2d 583. The Court specifically stated that: ‘An instruction cast in terms

24 _____
25 everyday by ordinary citizens in courtrooms across this county.’ (*Bush, supra*, 531 U.S. at p. ___
[148 L.Ed.2d at p. 411] (dis. opn. of Stevens, J.); fn. omitted.)

26 The court’s holding that the “intent of the voter” standard is insufficient does not disclose any
belief that the beyond-a-reasonable-doubt standard is similarly inadequate.

1 of an *abiding conviction* as to guilt, without reference to moral certainty, correctly states the
2 government’s burden of proof.’ *Id.* at 14-15, 114 S.Ct. at 1247, 127 L.Ed.2d 583 (emphasis
3 added).” *Lisenbee v. Henry*, 166 F.3d 997, 999 (9th Cir. 1999). CALJIC 2.90, as given at
4 petitioner’s trial, meets these standards. *Drayden v. White*, 232 F.3d 704, 715 (9th Cir. 2000).

5 In *Bush v. Gore*, 531 U.S. 98 (2000), the United States Supreme Court held that
6 “recount mechanisms” implemented in the State of Florida following a Florida Supreme Court
7 decision requiring a recount of votes cast in the 2000 presidential election did not “satisfy the
8 minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental
9 right” to vote because of “an absence of specific standards” to ensure the equal application of the
10 “basic command” to “consider the ‘intent of the voter.’” *Bush v. Gore*, 531 U.S. at 105-106
11 (internal citation omitted). Nothing in *Bush v. Gore* in any way undermined the holding of
12 *Victor v. Nebraska*, nor is there any clearly established United States Supreme Court precedent
13 extending the holding in *Bush v. Gore* to jury trials. The state court’s rejection of this claim was
14 neither contrary to nor an unreasonable application of clearly established federal law. This claim
15 should be denied.

16 B. Requiring Petitioner to Testify

17 Petitioner’s second claim is that the trial court violated petitioner’s Fifth
18 Amendment privilege against self-incrimination by requiring him to testify in order to receive a
19 jury instruction on self-defense, which was the primary defense theory. Petitioner presented this
20 claim to the California Supreme Court in a petition for writ of habeas corpus filed in that court
21 on May 19, 2004 and denied in an order filed June 8, 2005 that contains no statement of reasons
22 for the decision. See Lodged Documents 10 and 11.

23 The facts relevant to this claim are as follows. After the defense had called seven
24 witnesses, there was a lengthy discussion between the court, the prosecutor and defense counsel,
25 out of the presence of the jury, as to whether there was sufficient evidence at that point to support

26 ////

1 a self-defense instruction. At the conclusion of the discussion the court took a recess to review
2 cases submitted by counsel. Following the recess the court made the following statement:

3 Having reviewed the evidence and the cases that have been
4 submitted and referred to by counsel, at this point in the evidence,
5 it does not appear that it would be appropriate to give the self-
6 defense instructions. So that being the state of the evidence, I think
7 that's the decision I have to make.

8 So, Mr. Ross, you need to talk to your client about whether or
9 not he wants to testify.

10 Reporter's Transcript of Proceedings (RT) at 486-487. Thereafter, petitioner took the stand and
11 testified in his own defense, and the jury was subsequently instructed on both self-defense and
12 imperfect self-defense.

13 Petitioner claims that the trial court's ruling "forced [him] to waive his Fifth
14 Amendment privilege not to testify in order to exercise his constitutional right to a self-defense
15 instruction despite the fact that there was sufficient, if weak, evidence that the shooting occurred
16 in self-defense before [petitioner] testified." Traverse, filed February 6, 2006, at 11. The state
17 court's findings concerning whether the evidence supports a self-defense instruction are entitled
18 to a presumption of correctness in this federal habeas corpus proceeding. Petitioner is only
19 entitled to relief on this claim, if at all, if the trial court's decision that there was insufficient
20 evidence, without petitioner's testimony, to instruct the jury on self-defense was "an
21 unreasonable determination of the facts based on the evidence presented." Bradley v. Duncan,
22 315 F.3d 1091, 1096 (9th Cir. 2002) (quoting 28 U.S.C. § 2254(d)(2)).

23 Under California law,

24 [f]or killing to be in self-defense, the defendant must actually and
25 reasonably believe in the need to defend. (*People v. Flannel* (1979)
26 25 Cal.3d 668, 674, 160 Cal.Rptr. 84, 603 P.2d 1.) If the belief
 subjectively exists but is objectively unreasonable, there is
 "imperfect self-defense," i.e., "the defendant is deemed to have
 acted without malice and cannot be convicted of murder," but can
 be convicted of manslaughter. (*In re Christian S.* (1994) 7 Cal.4th
 768, 783, 30 Cal.Rptr.2d 33, 872 P.2d 574.) [Footnote omitted.] To
 constitute "perfect self-defense," i.e., to exonerate the person

1 completely, the belief must also be objectively reasonable. (*Id.* at
2 p. 783, 30 Cal.Rptr.2d 33, 872 P.2d 574; see also *People v. Aris*
3 (1989) 215 Cal.App.3d 1178, 1186, 264 Cal.Rptr. 167.) As the
4 Legislature has stated, “[T]he circumstances must be sufficient to
5 excite the fears of a reasonable person....” (Pen. Code, § 198; see
6 also § 197, subs. 2, 3.) Moreover, for either perfect or imperfect
7 self-defense, the fear must be of imminent harm. “Fear of future
8 harm-no matter how great the fear and no matter how great the
9 likelihood of the harm-will not suffice. The defendant’s fear must
10 be of *imminent* danger to life or great bodily injury.” (*In re*
11 *Christian S.*, *supra*, 7 Cal.4th at p. 783, 30 Cal.Rptr.2d 33, 872
12 P.2d 574, italics in original.)

13 People v. Humphrey, 13 Cal. 4th 1073, 1082 (1996). A jury instruction on self-defense “must be
14 given upon request whenever the claim of self-defense has been properly tendered and the
15 evidence warrants submitting the issue to the jury.” People v. Adrian, 135 Cal.App.3d 335, 336
16 (Cal.App. 1982); see also Menendez v. Terhune, 442 F.3d 1012, 1028 (9th Cir. 2005).

17 The record reflects that there were a total of five people present when Carver was
18 killed: Carver, his wife Renae, his father John Joseph Carver, Jr., Carver’s infant son, and
19 petitioner. Neither the testimony of Carver’s wife nor the testimony of his father supported a
20 finding that petitioner actually believed that he needed to defend himself against Carver.⁵ Thus,
21 the only other person present at the time of the shooting who could have offered testimony to
22 support a self-defense theory was petitioner. The trial court did not require petitioner to testify or
23 to give up his Fifth Amendment rights; the court found, correctly, that petitioner would not be
24 entitled to an instruction on self-defense unless he offered testimony that supported the defense.
25 The state court’s rejection of this claim was neither contrary to nor an unreasonable application
26 of clearly established federal law. This claim should be denied.

//////

⁵ Petitioner contends that evidence of Carver’s history of violence and possession of a
knife as well as evidence of a fight between petitioner and Carver about two weeks prior to the
shooting and the strained relationship between them after the fight were sufficient to support a
self-defense instruction. However, at the time of the trial court’s ruling nothing in either that
evidence or the testimony concerning events at the time of the shooting were sufficient to suggest
that when he shot Carver petitioner actually believed that he needed to defend himself.

1 C. Ineffective Assistance of Counsel

2 Petitioner raises several claims of ineffective assistance of trial counsel and one
3 claim of ineffective assistance of appellate counsel. Petitioner presented these claims to the
4 California Supreme Court in a petition for writ of habeas corpus filed in that court on May 19,
5 2004 and denied in an order filed June 8, 2005 that contains no statement of reasons for the
6 decision. See Lodged Documents 10 and 11.

7 The Sixth Amendment guarantees the effective assistance of counsel. The United
8 States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in
9 Strickland v. Washington, 466 U.S. 668 (1984). First, a petitioner must show that, considering
10 all the circumstances, counsel's performance fell below an objective standard of reasonableness.
11 Strickland, 466 U.S. at 688. To this end, petitioner must identify the acts or omissions that are
12 alleged not to have been the result of reasonable professional judgment. Id. at 690. The federal
13 court must then determine whether in light of all the circumstances, the identified acts or
14 omissions were outside the wide range of professional competent assistance. Id. "We strongly
15 presume that counsel's conduct was within the wide range of reasonable assistance, and that he
16 exercised acceptable professional judgment in all significant decisions made." Hughes v. Borg,
17 898 F.2d 695, 702 (9th Cir. 1990) (citing Strickland, 466 U.S. at 689).

18 Second, a petitioner must affirmatively prove prejudice. Strickland, 466 U.S. at
19 693. Prejudice is found where "there is a reasonable probability that, but for counsel's
20 unprofessional errors, the result of the proceeding would have been different." Id. at 694. A
21 reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id.;
22 see also Williams v. Taylor, 529 U.S. at 391-92; Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir.
23 2000). A reviewing court "need not determine whether counsel's performance was deficient
24 before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . .
25 . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice

26 ////

1 . . . that course should be followed.” Pizzuto v. Arave, 280 F.3d 949, 955 (9th Cir. 2002)
2 (quoting Strickland, 466 U.S. at 697).

3 The Strickland standards apply to appellate counsel as well as trial counsel. Smith
4 v. Robbins, 528 U.S. 259, 285 (2000); Smith v. Murray, 477 U.S. 527, 535-36 (1986); Miller v.
5 Keeney, 882 F.2d 1428, 1433 (9th Cir. 1989). In order to demonstrate prejudice in this context,
6 petitioner must demonstrate that, but for counsel’s errors, he probably would have prevailed on
7 appeal. Miller, 882 F.2d at 1434 n.9.

8 1. Failure to Investigate/Present Mental Health Defense

9 _____ Petitioner’s third claim for relief is that his trial counsel was ineffective in failing
10 to “fully investigate and present a mental health defense.” Second Amended Petition at 13.⁶
11 Petitioner contends that he has a long history of mental illness and brain damage and that his trial
12 attorney was on notice of this history but failed to conduct a sufficient investigation to make a
13 proper assessment of whether a mental health defense should have been presented at trial.
14 Petitioner also contends that he was prejudiced by counsel’s failure to present the defenses of
15 diminished actuality and imperfect self-defense, both of which would were supported by
16 petitioner’s history of mental illness.

17 _____ In his declaration, petitioner’s trial counsel, Eric Ross, averred that he “was aware
18 of [petitioner]’s mental health issues” and that “[b]ased on the investigation conducted and
19 conversations with [petitioner], [he] concluded that a mental health defense would not be
20 successful and that the defense proffered at trial was appropriate.” Ross Declaration at ¶ 2. At
21 the evidentiary hearing, Ross testified that he had two psychiatric experts provide him with
22 reports. Transcript of Proceedings, October 10, 2007, (hereafter EHT) at 15:14-24. He testified
23 that he had learned about petitioner’s “personal history, and his reporting of physical and mental
24 _____

25 ⁶ This claim was the subject of an evidentiary hearing held before the undersigned on
26 October 10, 2007. Three witnesses testified at the hearing: Eric J. Ross, petitioner’s trial
counsel; Fred Dawson, an attorney; and Dr. Natasha Khazanov.

1 abuse from his family, which along with his seizure history and mood swings, . . . need to be
2 evaluated by a mental health care professional” in order to get “insight for purposes of preparing”
3 petitioner’s defense. Id. at 15:24-16:5. The focus of the evaluations were on petitioner’s
4 competence to stand trial, id. at 15:22-24; 18:8-9, although part of Ross’ affidavit in support of
5 funding for one of the experts involved seeking information about the availability of a mental
6 health defense. Id. at 84:8-14. Ross received reports “containing abundant evidence that
7 [petitioner] might have suffered from a variety of psychological conditions or disorders.” Id. at
8 89:2-6. Ross also testified that petitioner “basically told [him] that this was an act of self-
9 defense” and that petitioner’s version of events remained “largely” consistent. Id. at 86:19-
10 87:18. Ross’ “best recollection” was that petitioner did not want to pursue a mental state
11 defense. Id. at 105:8-11; see also id. at 145:15-20 (testimony of Dr. Khazanov that during cross-
12 examination at trial petitioner “steadfastly denied any mental health problems.”).

13 As a result of the criminal charges at issue, petitioner faced “an open count of
14 murder with use of a firearm and he had allegations of two former strikes.” Id. at 22:12-13.
15 Thus, if convicted of involuntary manslaughter on a theory of imperfect self-defense, petitioner
16 faced a sentence of 25 years to life in prison. Id. at 22:13-17. Based on the mental health
17 information available to him and his conversations with petitioner, Ross opted to pursue a
18 defense of straight self-defense, which, if successful, would have resulted in an acquittal. See id.
19 at 40:10. Ross’ first strategy was to present enough evidence that petitioner would not have to
20 testify; once petitioner testified, Ross “believed that it was inconsistent to have mental health
21 testimony proffered on his behalf when I was trying to portray him as a person that had an actual
22 belief, and a reasonable belief that he was being attacked” by the victim. Id. at 40:17-21; see also
23 id. at 48:7-17. Ross was also concerned that putting on a mental health defense would open the
24 door to questioning about petitioner’s history of methamphetamine abuse. Id. at 100:19-22.

25 Once Ross made the decision to pursue a defense of self-defense, he did not obtain any other

26 ////

1 mental health records or conduct any further testing, despite the fact that one of his experts had
2 recommended further testing and getting all of the records. Id. at 58:11-25.

3 “Once counsel reasonably selects a defense, it is not deficient performance to fail
4 to pursue alternative defenses.” Rios v. Rocha, 299 F.3d 796, 807 (9th Cir. 2002) (citing Bean v.
5 Calderon, 163 F.3d 1073 (9th Cir.1998); Turk v. White, 116 F.3d 1264, 1267 (9th Cir.1997)).

6 The record shows that petitioner’s trial counsel had sufficient information about petitioner’s
7 mental health history, petitioner’s version of events, and the gravity of the sentence petitioner
8 faced if convicted, to render the choice to pursue an all-or-nothing chance at acquittal a
9 reasonable, if risky, one. Counsel’s tactical decisions concerning the defense in this case did not
10 fall outside the wide boundaries of reasonably competent professional assistance. The state
11 court’s rejection of this claim was neither contrary to nor a unreasonable application of clearly
12 established principles of federal law. This claim should be denied.

13 2. Failure to Call Witnesses re: Self-Defense

14 Petitioner’s fourth claim is that his trial counsel was ineffective in failing to call
15 witnesses who could have provided evidentiary support for petitioner’s theory of self-defense.
16 Had these witnesses been called, petitioner contends, the trial court’s ruling on the sufficiency of
17 evidence to support a self-defense instruction discussed supra would have been avoided. In
18 support of this claim, petitioner has presented declarations from several individuals. See Ex. G
19 to Second Amended Petition.

20 As discussed in section II.B, supra, absent from the record at the time the trial
21 court ruled there was insufficient evidence to support a self-defense instruction was any evidence
22 that petitioner actually believed he had to defend himself at the time he shot Carver. The only
23 statement in any of the declarations that is relevant to this issue is the averment of petitioner’s
24 sister, Donna Pratt, that during phone calls the night before the shooting petitioner had told her
25 “he was afraid something bad was going to happen to him” and that he thought Carver and
26 Carver’s father were “conspiring to try to kill” him. Ex. G to Second Amended Petition,

1 Declaration of Donna Pratt (Pratt Declaration) at ¶¶ 3-4. Respondent contends these statements
2 are inadmissible hearsay. Respondent also contends that counsel had a reasonable tactical reason
3 for not calling Ms. Pratt to testify because she was subject to impeachment through a criminal
4 conviction for which she was on probation and because she had not told police “everything she
5 knew” because of her “fear of a probation violation.” Pratt Declaration at ¶ 12. Petitioner’s trial
6 counsel has averred that he “recall[s] speaking with her and that [he] believed that there was
7 nothing she provided that I felt would add to the presentation of the case.” Lodged Document
8 12, Declaration of Eric J. Ross lodged Jan. 11, 2006 (Ross Declaration) at ¶ 3.

9 This court finds no reasonable probability that either the trial court’s ruling or the
10 outcome of petitioner’s trial would have been different had counsel called petitioner’s sister as a
11 witness. Even assuming arguendo that petitioner’s alleged statements might have been
12 admissible under a state-of-mind exception to the hearsay rule, see California Evidence Code §
13 1250, petitioner’s alleged belief, expressed the night before the events at bar, that Carver and his
14 father were “conspiring to try to kill him” is at odds with petitioner’s repeated visits to Carver’s
15 apartment on November 8 to use the telephone to arrange a ride to Reno.⁷ The state court’s
16 rejection of this claim was neither contrary to nor an unreasonable application of clearly
17 established federal law. This claim should be denied.

18 3. Failure to Introduce Evidence Regarding Petitioner’s Mental Health and Effect
19 of Medications on his Demeanor Prior to His Testimony

20 Petitioner also claims that counsel was ineffective in failing to present evidence of
21 petitioner’s mental health status and the effect of medications on his demeanor prior to his
22 testimony. In support of this claim, petitioner has presented declarations from several jurors
23 attesting to the adverse impact petitioner’s testimony and demeanor had on the defense. See Ex.

24 ////

25
26 ⁷ Carver’s father was present at least two of the times petitioner came to the apartment on
November 8.

1 A to Second Amended Petition. Citing Federal Rule of Evidence 605(b), respondent contends
2 these declarations are inadmissible to impeach the verdict in this case.

3 For the reasons set forth in section II.B.1, supra, counsel had reasonable tactical
4 reasons for not offering evidence of petitioner's mental health status. The evidence before the
5 court does not show a reasonable probability that the outcome of the proceedings against
6 petitioner would have been different had counsel tried to explain petitioner's demeanor in
7 advance of his testimony. The state court's rejection of this claim was neither contrary to nor an
8 unreasonable application of relevant principles of clearly established federal law. This claim
9 should be denied.

10 4. Failure to Introduce Evidence of Petitioner's Employment History

11 Petitioner's sixth claim is that his trial counsel was ineffective in failing to present
12 evidence that petitioner had worked for an organization called "Day Labor" to rehabilitate
13 petitioner's credibility after cross-examination by the prosecution.

14 On cross-examination, the following exchange took place between the prosecutor
15 and petitioner:

16 Q Four to five weeks, you were just hanging out at a hotel.
17 What do you do with your time? Did you go get a job?

18 A Yeah.

19 Q Where did you work?

20 A I worked for Day Labor.

21 Q Day Labor, where is that?

22 A I don't know. That's where I got pulled over in Timmy's
23 car. That's where I was going.

24 Q You didn't actually get a job, you just were going there?

25 A No, I worked there. I worked there. He sent me on two
26 jobs, then I worked under the table behind for like a company that
they didn't want. I went to work for them a second time. And they
told me, don't tell Day Labor that you're going to come back here
and work because they get a percentage or something.

1 Q Let me guess, you don't have any receipts for any of that,
2 right?

3 A I'm sure they do. If you'd like to check you can.

4 Q I'm asking, where are they?

5 A In my wallet. They were confiscated at some time.

6 Q Where is Day Labor located? Is this a company?

7 A I'm not from Sacramento, sir. I don't even know where I
8 am at, okay?

9 Q Where did you go to high school?

10 A I went to Folsom High School, eleventh grade. I never left
11 Folsom.

12 Q Do you have any idea where this place is that you went to
13 work?

14 A No, I don't.

15 Q How about the place where you went and that they sent you
16 out on a job; where is that?

17 A Timmy is – I was with Timmy, and he went to work with
18 me.

19 Q I don't care who worked with you. I am asking you where
20 is this?

21 A I don't know. It's been a long time. I don't know.

22 Q Just a name?

23 A I don't know. It was a union job, that's all I know.

24 Q Okay. You didn't really work anywhere, did you? We can
25 impeach you on this.

26 A I worked – I did work. There is documentation that Day
Labor where – I have it to prove this. I can back up my claims, can
you?

RT at 555-557. During closing argument, the prosecutor commented on the foregoing exchange
in the context of arguing about the lack of corroborating evidence for petitioner's version of
events:

1 How about this, how about anybody from Day Labor to say yes, he
2 used to work at Day Labor. He used to work here during this time
3 when, in fact, he wasn't out committing burglaries? How about
4 somebody saying he worked for us? How about a pay stub? How
5 about to show that he worked a day during the day or two prior to
6 this happening?

7 RT at 734.

8 Prior to sentencing, petitioner made a motion to relieve his attorney pursuant to
9 People v. Marsden, 2 Cal.3d 118 (1970). During that hearing, counsel acknowledged that
10 petitioner had given him a W-2 form that showed petitioner had earned "a hundred and fifty
11 dollars at one point for working for Day Labor." RT at 857.⁸ Counsel did not offer the W-2 into
12 evidence because he thought it was "de minimis" and "not a substantial issue." Id.

13 After review of the record, this court finds that petitioner has failed to establish
14 that he was prejudiced by counsel's failure to introduce this evidence of his employment history.
15 Viewed in the context of the entire record, the question of petitioner's credibility concerning his
16 employment history was indeed minimal and this court cannot find there is a reasonable chance
17 that the outcome of petitioner's trial would have been different had counsel tendered this
18 evidence. The state court's rejection of this claim was neither contrary to nor an unreasonable
19 application of clearly established federal law. Petitioner's sixth claim for relief should be denied.

20 5. Failure to Call Ballistics Expert in Support of Self-Defense Theory

21 Petitioner's seventh claim is that his trial counsel was ineffective in failing to call
22 a ballistics expert to testify that the bullet wound suffered by the victim was consistent with
23 petitioner's testimony that he shot the victim from below, in an upward direction. Petitioner
24 points to testimony from the county coroner that the "directionality" of the bullet wound was
25 "from down to up," and contends testimony from a defense ballistics expert would have

26 ⁸ The entire transcript of the Marsden hearing has been filed under seal provisionally.
See Order filed February 21, 2006. Neither party has moved to maintain this transcript under
seal permanently, and the court finds no reason why portions of that transcript relevant to the
claim at bar cannot be cited in these findings and recommendations.

1 “bolstered” petitioner’s claim of self-defense. Second Amended Petition, at 23 (quoting RT at
2 283). Petitioner has failed to present any evidence in support of this claim. It should be denied.

3 6. Ineffective Assistance of Appellate Counsel

4 Finally, petitioner claims that his appellate attorney was ineffective in failing to
5 raise on direct appeal the claims raised in Grounds Two and Seven of the Second Amended
6 Petition. For the reasons set forth in these findings and recommendations, those claims are
7 without merit. A fortiori, petitioner’s appellate counsel was not ineffective in failing to raise the
8 claims on direct appeal.

9 For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that
10 petitioner’s application for a writ of habeas corpus be denied.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
13 days after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
16 objections shall be filed and served within fourteen days after service of the objections. The
17 parties are advised that failure to file objections within the specified time may waive the right to
18 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: February 23, 2010.

20
21 
22 UNITED STATES MAGISTRATE JUDGE

23 12
24 prat0872.157