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

KEVIN MICHAEL SMITH, 2:06-cv-01762-RCT

Petitioner,

vs.

RICHARD KIRKLAND, et al.,

Respondents.

MEMORANDUM DECISION
AND ORDER

This matter comes before the Court on Kevin Michael Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

INTRODUCTION

Petitioner Smith is a state prisoner currently incarcerated at the Pelican Bay State Prison in Crescent City, California. He filed this petition for a writ of habeas corpus to challenge a judgment of conviction entered against him in the Sacramento County Superior Court in 2004 for first degree murder by means of lying in wait, with a firearm enhancement. A review of the record shows that the Superior Court and the California Court of Appeal, Third Appellate District, correctly applied United States Supreme Court law in rejecting all three claims presented in the petition. 28 U.S.C. § 2254(d). Accordingly, the petition is denied, and the case is dismissed with prejudice.

1 p.m. curfew. Mangram stood next to a sport utility vehicle, possibly a Toyota
2 RAV4.¹ Mangram spoke with the driver and smiled when she saw Cavanagh.
3 Mangram indicated to Cavanagh she would ask the driver to leave because she
knew visitors were not allowed. Ten minutes later the car and Mangram were
gone.

4 Deputy Sheriff Steve Lickiss testified he went to defendant's auto shop on
5 May 5, 2003. Defendant contacted police about threats from Mangram's family,
6 who blamed him for her disappearance. Later that day, defendant told Lickiss he
7 had met Mangram four years earlier and had hired her a year before as his
8 secretary. Defendant stated he, Mangram, and his wife were all involved in a
9 sexual relationship.

10 Defendant told Lickiss he had last seen Mangram at the shelter on May 2 at
11 around 10:15 p.m. Defendant sought Mangram's advice because his wife was
12 upset about his affair with his new secretary, Mangram's replacement. Defendant
13 said he had set Mangram up with a place to live and a car. According to
14 defendant, Mangram was unhappy that he and his new secretary were engaged in a
15 sexual relationship.

16 Defendant spoke with Mangram in his car for about nine minutes outside
17 the shelter. Mangram then got out of his car, lit a cigarette, and walked toward
18 the shelter.

19 Defendant left and met his wife at the auto shop. Defendant's father-in-law
20 came to the shop around 11:15 p.m. to repair faulty car lights. Defendant and his
21 wife left the shop around 2:00 a.m. He was unable to reach Mangram by phone
22 after that evening.

23 On May 6, 2003, the day after Lickiss spoke with defendant, Detective
24 Ron Garverick interviewed defendant. During the interview, defendant referred to
25 pages in a binder, which was later recovered during a search of his home. The
26 pages detailed defendant's version of the events the night of Mangram's
27 disappearance.

28 Sheriff's Sergeant Craig Hill interviewed defendant on May 7, 2003. Hill
testified he and Detective Grant Stomsvik interviewed defendant at a sheriff's
service center, a convenient location for defendant. During the interview, other
officers were obtaining search warrants for defendant's home and work, as well as
statements from others involved in the case. Hill told defendant of the ongoing
investigation.

Hill, who was overseeing the investigation, thought Mangram might have
met with foul play and told defendant he had assigned deputies to talk to those
who knew her. Defendant denied any involvement in Mangram's disappearance.
He also denied his wife was involved. According to defendant, if he had wanted to
concoct an alibi, he would not have included his wife because he cared about their
children. Hill told defendant he believed his wife was involved.

Approximately an hour and a half into the interview, defendant was placed
under arrest. Stomsvik began booking defendant, and defendant asked to speak
with Hill alone. Defendant told Hill he wanted a deal for his wife, who was not
involved in Mangram's murder. Defendant said he wanted to die but could not kill
himself because he was a Christian. Defendant wanted Hill to take off his
handcuffs so he could go for Hill's gun, and then Hill could shoot him.

Defendant then announced a desire to confess. Hill contacted the district
attorney and suggested they try to arrange a deal for defendant's wife in order to
find Mangram's body.

¹ Defendant told detectives he drove a customer's car, a Toyota RAV4, to the shelter that evening to meet Mangram.

1 The jury heard defendant's taped confession and audio-taped interviews
2 with Hill and Stomsvik. Defendant told the deputies he was depressed on May 2,
3 2003. He called his wife that night and asked her to bring him a rifle so he could
4 shoot Mangram. His wife brought the rifle, and defendant told her if she did not
5 see him by 2:00 a.m., he would be dead.

6 Defendant intended to shoot Mangram. He drove to the shelter and waited
7 for her. Defendant told Mangram that he needed help with his new secretary.
8 Mangram got into defendant's car and he drove across the street.

9 Defendant then drove Mangram to his auto shop and accused her of lying
10 to him. Defendant took the rifle out of his car and Mangram tried to flee. The
11 pair "got into a scuffle," and defendant struck Mangram with an automobile part, a
12 rotor. Defendant shot Mangram in the head and chest. He also intended to
13 commit suicide but changed his mind. Defendant called a friend, who came and
14 helped him dispose of Mangram's body in a field.

15 Stomsvik testified information from defendant and his friend led them to
16 Mangram's body. Mangram had gunshot wounds in the chest and head, either of
17 which would have been fatal. Detectives found two empty prescription bottles in
18 Mangram's name in defendant's home. A search of defendant's person uncovered
19 Vicodin and OxyContin. Defendant told Stomsvik he killed Mangram because of
20 their failed relationship and "one too many lies." Defendant never mentioned drug
21 use in connection with the murder.

22 (Lodged Doc. 3, at 2-7).

23 On May 21, 2003, the district attorney filed a complaint in the Sacramento County
24 Superior Court charging Smith with premeditated murder (Count I). The complaint also alleged
25 two special circumstances, that Smith committed the murder by means of (1) kidnaping and (2)
26 lying in wait. Further, the complaint alleged that Smith discharged a firearm causing death.

27 (Lodged Doc. 1, at 11-12).

28 On September 16, 2003, Smith moved to suppress his confession, arguing that it was
involuntary and in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).

(Lodged Doc. No.1, at 23). He also moved to dismiss the lying-in-wait special circumstance

allegation. (Lodged Doc. No.1, at 14). An evidentiary hearing followed, at which the
investigating officers testified and the court heard recordings made during the interview of

Smith. The next day, the trial court denied Smith's motions and bound the defendant over for
trial. (Lodged Doc. No.1, at 4.) On November 17, 2003 the trial court granted the

prosecution's motion to dismiss the kidnaping special circumstance allegation. (Lodged Doc.

No. 1, at 314). That same day, Smith renewed his motion to suppress his confession pursuant to

Miranda. Specifically, he maintained that the *Miranda* warnings given to him prior to his

confession were defective and that his confession was involuntary because it was obtained after

1 he invoked his right to counsel. (Lodged Doc. No.1, at 288-310). On November 18, 2003, the
2 court denied these motions. (Lodged Doc. No.1, at 426).

3 A jury found Smith guilty of first degree murder with a lying-in-wait special
4 circumstance. (Lodged Doc. No.1, at 565). It also found him guilty of the firearm
5 enhancement. On January 9, 2004, the trial court sentenced Smith to life imprisonment without
6 the possibility of parole on Count I, plus a consecutive term of twenty-five years to life for the
7 discharge-of-a-firearm enhancement. (Lodged Doc. No.1, at 604-05). Smith then filed a notice
8 of appeal. (Lodged Doc. No.1, at 606.) In an unpublished decision, the California Court of
9 Appeal affirmed the superior court's judgment on May 24, 2005. (Lodged Doc. No. 3). Smith
10 thereafter filed a petition for review in the California Supreme Court, which was denied on
11 August 31, 2005, without comment or citation to authority. (Lodged Doc. No. 5).

12 On August 10, 2006, Smith filed this federal petition for a writ of habeas corpus.
13 Respondents concede that Smith's claims have been fully exhausted, but argue that the California
14 courts' determinations are not contrary to or an unreasonable application of United State
15 Supreme Court precedent. 28 U.S.C. § 2254(d).

16 CLAIMS

17 Smith raises the following claims in his petition:

- 18 1. Smith's confession was involuntary because (1) the officers engaged in an
19 impermissible two-step interrogation process, and (2) the confession was the result of
20 police coercion.
- 21 2. The trial court erred by providing the jury with pinpoint instructions favorable to the
22 prosecution, while failing to permit Smith's own modified pinpoint instruction.
- 23 3. The trial court's instruction on lying in wait omitted an essential element of the crime
24 and was facially erroneous.

25 LEGAL STANDARD

26 In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
27 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), which established that a
28 federal habeas corpus petition shall not be granted with respect to any claim adjudicated on the
merits in the state courts unless the adjudication either: (1) resulted in a decision that was
contrary to, or involved an unreasonable application of, clearly established federal law, as

1 determined by the United States Supreme Court; or (2) resulted in a decision that was based on
2 an unreasonable determination of the facts in light of the evidence presented to the state courts.
3 28 U.S.C. § 2254(d). Under the "contrary to" clause, a federal habeas court may grant the writ
4 if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a
5 question of law or if the state court decides a case differently than the Supreme Court has on a
6 set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).
7 Under the "unreasonable application" clause, a federal habeas court may grant the writ if the
8 state court identifies the correct governing legal principle from the Supreme Court's decisions
9 but unreasonably applies the principle to the facts of the prisoner's case. *Id.* at 413.
10 Furthermore, federal courts are to presume that factual findings made by a state court are
11 correct unless the petitioner rebuts that presumption with clear and convincing evidence. 28
12 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be
13 presumed to be correct.").

14 Under AEDPA, the federal courts review the "last reasoned decision" of the state courts.
15 *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991). Because the California Supreme Court denied
16 Smith's petition for review without comment or citation to authority, the Court will here review
17 the decision of the California Court of Appeal. The Court has also reviewed the transcripts of
18 the homicide interview, transcripts of the preliminary hearing, and the Sacramento County
19 Superior Court's oral ruling denying the motions to suppress the incriminating confession.

20 DISCUSSION

21 **I. Voluntariness of Confession**

22 Smith first claims the trial court erred in denying his motion to suppress his confession.
23 Smith contends that his confession was given involuntarily, after he had invoked his *Miranda*
24 rights. He asserts that the police officers employed a two-step interrogation method to coerce
25 his confession, evidenced by delaying his formal arrest and *Miranda* warnings in a deliberate
26 effort to pressure him into a confession. Further, he claims that he only confessed under duress,
27 after his will was broken by the coercive tactics of interrogating officers.

28 *A. Smith's Confession*

1 The California Court of Appeal determined the following sequence of events surrounding
2 Smith's confession. (Lodged Doc. No. 3, at 13-18). On May 7, 2003, Smith was given a
3 polygraph and advised of his *Miranda* rights by officers investigating Mangram's disappearance.
4 He was then interviewed by detectives, who informed him that he had failed the polygraph.
5 Smith originally denied any involvement in Mangram's disappearance, and said that his intention
6 in speaking with the officers was to clear his name from the list of suspects. Detective Stomsvik
7 informed him that he was not under arrest, but that he had failed a polygraph test given to him.
8 Smith explained that around 10:00 p.m. on the night Mangram disappeared he drove to the
9 shelter where she was staying. After he left, he made a three-way call between Mangram and his
10 secretary. He then called his wife, who was at the auto shop, and agreed to meet her there.
11 They left the shop together around 1:30 a.m.

12 At this point, Smith told the officers that he needed to leave to put money into a bank
13 account, and that a check of his telephone records would confirm his story. Detective Stomsvik
14 asked if they could speak for another ten minutes, and Smith agreed. Smith again explained that
15 he had left Mangram at the shelter and returned to his auto shop, where he inspected his father-
16 in-law's car. Smith and his wife left the shop together. Smith again asked the officers if he
17 could leave, but stated that he understood the interview was "very important." He noted that he
18 was worried about his shop, but also realized an interview could take two hours.

19 Though Detective Stomsvik informed Smith that he was free to leave, Sergeant Hill told
20 him that other officers were currently serving search warrants on Smith's home and shop, so
21 heading home would not be convenient. Sergeant Hill also stated that he wanted to make an
22 "extra effort" to talk to Smith, to which Smith replied, "Okay." Sergeant Hill then began to
23 reference discrepancies between Smith's factual recollection and his wife's version of events.
24 Detective Stomsvik told Smith that if he wanted to keep his wife "out of it," Smith needed to tell
25 the police what happened to Mangram. Sergeant Hill told Smith that he knew Smith had
26 something to do with her disappearance.

27 Smith asked the officers whether he should forget about going back to his shop and
28 paying his bills, though he reiterated his desire to return home. Sergeant Hill informed him that

1 he could not return home because other officers were currently searching his residence, auto
2 shop, and had obtained the vehicle he had driven the night of Mangram's disappearance.
3 Defendant explained that the police would not find anything, because neither he nor his wife had
4 harmed Mangram. Sergeant Hill told Smith that his wife was angry and that his story would not
5 hold up.

6 Smith asked the officers whether he "[s]hould be calling a lawyer at this point?" He was
7 told that he was not under arrest and could leave if he wished, but that he had better tell them
8 what happened because the truth would eventually come out. He stated that he would not have
9 consented to an interview if he had been involved. When Sergeant Hill asked if he could pose
10 personal questions to Smith, Smith replied, "Go for it."

11 Sergeant Hill then asked about Mangram's and Smith's sexual encounters. He explained
12 that, while he and Mangram had met at the auto shop around 6:00 p.m. on May 2, he did not
13 threaten her with a gun. He told the police about past trips he and Mangram had taken together
14 and then asked, "for the last time," whether he should seek legal counsel. Smith acknowledged
15 that he had not been placed under arrest, and Detective Stomsvik confirmed this as a fact. When
16 Smith asked if he could leave to take care of some business, Detective Stomsvik said that he was
17 free to leave at any time.

18 Smith began to explain about his wife's high blood pressure, and then asked if he could
19 use his cellular telephone. The officers replied that, for officer safety, they would appreciate if
20 defendant did not make any calls. Smith replied that "[he] was going to call and try to find
21 [himself] a lawyer or something." (Lodged Doc. No. 1, at 734). He was concerned that officers
22 were searching his home and business, but he said he felt he had to stay in the interview.

23 Detective Stomsvik again said that Smith could leave at any time, but that he was trying to
24 verify Smith's story. Smith replied that he was not worried about the verification, but noted he
25 had thought the interview would be short.

26 The interview then took a turn. Sergeant Hill stated that he needed to call the district
27 attorney, and that he would be back in two minutes. Smith asked Sergeant Hill to contact a
28 lawyer for him. Hill returned and said "There is a . . . good chance you might be under arrest at

1 this point." (Lodged Doc. No.1, at 745). Smith asked if he could call a lawyer, and the
2 detective responded that he absolutely would be able to contact counsel. The officers then
3 reviewed Smith's voice-mail messages. Sergeant Hill told Smith: "Your status is up in the air.
4 What do we do with you? You're the last person to see her alive, okay? Some inconsistencies
5 in your stories, okay I want you to sit still for a minute while we try to figure this out.
6 . . . That acceptable to you?" Smith replied: "It's going to have to be." (Lodged Doc. No. 1, at
7 750).

8 After requesting and receiving a snack, Smith asked if he could leave. Detective
9 Stomsvik informed him that he was not free to leave and was being detained. He then told
10 Smith that he was under arrest. When asked by the officers if they could swab his cheek for a
11 DNA sample, Smith responded that he wanted to check with a lawyer first. A search of Smith's
12 person revealed medication.

13 One hour later, during the booking process, Smith asked to speak with Sergeant Hill.
14 Other officers stopped Sergeant Hill as he was about to exit the building; he returned and
15 reentered the room where Smith was being held. Detective Stomsvik confirmed with Smith that,
16 though Smith had previously requested a lawyer, he had changed his mind. Smith agreed that
17 this was a correct recitation of the events. He also acknowledged that he was previously read his
18 *Miranda* rights. Detective Stomsvik then again advised Smith of his constitutional rights,
19 stating:

20 So you have the right to remain silent. Anything you say can and will be used
21 against you in a court of law. You also have the right to have an attorney present
22 before and during questioning, if you desire. If you could not afford an attorney,
one will be appointed free of charge. Do you understand all your rights?

23 (Lodged Doc. No. 1, at 775).

24 Smith stated that he understood his rights, and after being asked by the officer if he
25 wished to speak with them, he stated that he still wanted to speak with Sergeant Hill. He then
26 confessed to killing Mangram. (Lodged Doc. No. 1, at 782-786).

27 *C. The California Court of Appeal Decision*

28 On direct review, Smith claimed that the trial court erred in admitting his involuntary

1 confession in violation of his constitutional rights. He argued that the officers used impermissible
2 means "calculated to break [his] will." (Lodged Doc. No. 3, at 21). He insisted that the officers
3 misled him regarding his custodial status and that his invocation of the right to counsel were
4 disregarded. Finally, he argued that his confession was premised on a promise of leniency for his
5 wife.

6 The California Court of Appeal rejected each claim. It first noted the rule that all
7 questioning must cease following a defendant's invocation of his rights. (Lodged Doc. No. 3, at
8 22). However, it properly observed that if a "defendant initiates further communication when he
9 or she conveys by words or conduct a desire to engage in a discussion relating directly or
10 indirectly to the investigation[,] . . . officers may interrogate the defendant if he or she validly
11 waives *Miranda* rights." Furthermore, when a defendant claims that officers coerced his
12 confession, the court observed that it "consider[s] whether the influences brought to bear on the
13 defendant were such as to overbear the defendant's free will to resist and bring about statements
14 not freely determined." (Lodged Doc. No. 3, at 22). "In determining whether defendant's will
15 was overborne, we examine all the surrounding circumstances." (Lodged Doc. No. 3, at 22).

16 The California Court of Appeal found that Smith was free to leave at any time until he
17 was placed under formal arrest. It noted that while Smith mentioned on multiple occasions that
18 he wanted to return home to pay bills or stop by his business, he always agreed with officers that
19 it was best for him to stay and discuss Mangram's disappearance and his relationship with her.
20 He believed this was the best way to establish his innocence. The Court of Appeal concluded
21 that this was "a give and take between defendant and the detectives, . . . [and did] not reveal
22 coercion or an attempt to deprive the defendant of his free will." (Lodged Doc . No. 3, at 24).

23 Next, the Court of Appeal considered whether Smith's confession was involuntary
24 because it was obtained without a waiver of his *Miranda* rights. Smith claimed that the officers
25 discouraged him from invoking his right to counsel, and failed to permit him to seek a lawyer's
26 advice after Smith requested it. The State argued that while Smith pondered whether he should
27 obtain counsel, and even expressed the fact that he planned to call an attorney, he never explicitly
28 invoked his right. The Court of Appeal said: "In determining whether or not a defendant's

1 confession is voluntary, the totality of circumstances must be considered. On appeal, we
2 independently examine the record, but to the extent the facts conflict, we accept the version
3 favorable to the People if supported by substantial evidence." (Lodged Doc. No. 3, at 25). It
4 found the facts undisputed. Smith twice asked whether he should obtain counsel, then later
5 announced an intent to find an attorney, and finally asked to call an attorney.

6 The Court of Appeal determined that this case was similar to *People v. Clark*, 833 P.2d
7 561 (Cal. 1992). There, prior to waiving his right to counsel, the defendant asked how long it
8 would take to get an attorney, told the officers he would like to try to obtain counsel, and that he
9 intended to get an attorney during the process. *Id.* at 602. He also said that he wanted to stop
10 the interview to speak with counsel, and want to have counsel join the interrogation as soon as
11 possible, but was "willing to go ahead without him in the interim." *Id.* The California Supreme
12 Court ruled that this was not a proper invocation of the right to counsel because, while he
13 expressed his desire to speak with counsel, he never showed a reluctance to speak without an
14 attorney present. *Id.* at 603.

15 The Court of Appeal found analogous Smith's scenario to the point where he clearly
16 invoked his wish to call counsel, finding that "defendant ruminated about contacting counsel, and
17 detectives reiterated he was free to leave and not under arrest. Defendant willingly continued the
18 interview, showing no reluctance to talk to detectives." (Lodged Doc. No. 3, at 26). This
19 evidenced a desire to speak to an attorney in the future, but not hesitation to continue an
20 interview without the presence of counsel. Furthermore, after questioning ceased, Smith
21 reinitiated contact with the officers. They then re-administered his rights, and he agreed that he
22 wished to waive his right to counsel. (Lodged Doc. No. 3, at 26). The Court of Appeal found
23 as a fact that "defendant renewed contact with the detective, knowingly waived his right to
24 counsel, and confessed." (Lodged Doc. No. 3, at 26).

25 Third, the court considered whether the officers coerced Smith's statement by promising
26 leniency for his wife as an accessory. It stated that the officers warned Smith that his and his
27 wife's statements conflicted, and Smith should tell the truth so as to not implicate his wife. It
28 said that Smith brought up the idea of leniency, not the detectives, and he "set the conditions, not

1 the detectives." (Lodged Doc. No. 3, at 28). The court determined that this was not coercive
2 behavior by the officers under California law. (Lodged Doc. No. 3, at 28 (citing *People v.*
3 *Jackson*, 96 Cal. Rptr. 414 (Cal. Ct. App. 1971)).

4 Finally, Smith argued that his *Miranda* admonitions were inadequate because the officers
5 told him he had the right to have an attorney "present during questioning." (Lodged Doc. 3, at
6 28). This, he claimed, was different from being told he had the right to "consult" an attorney.
7 The court found that Smith knew that "he was entitled to consult with and seek the advice of an
8 attorney. [He] was not under the impression he had only the right to the physical presence of an
9 attorney." (Lodged Doc. No. 3, at 28).

10 *D. Analysis*

11 Before this Court, Smith reiterates his arguments that (1) the police employed an
12 impermissible deliberate two-step interrogation tactic, and (2) his confession was the result of
13 police coercion.

14 *1. Two-step interrogation tactic*

15 A two-step interrogation process is one where "a confession [is] obtained after a *Miranda*
16 warning but preceded [sic] by the suspect's earlier, unwarned incriminating statements." *United*
17 *States v. Williams*, 435 F.3d 1148, 1152 (9th Cir. 2006) (emphasis removed). It is impermissible
18 to employ this technique if the midstream *Miranda* warnings do not effectively apprise the
19 defendant of his constitutional rights. *Id.* at 1157-58. The test here is whether (1) the use of this
20 interrogation technique by officers was deliberate, *id.* at 1159, and (2) the midstream *Miranda*
21 warnings "adequately and effectively apprised the suspect that he had a 'genuine choice whether to
22 follow up on [his] earlier admission,'" *id.* at 1160 (quoting *Missouri v. Seibert*, 542 U.S. 600, 615
23 (2004)).

24 The officers' interrogation of Smith cannot be categorized as a two-step interrogation. He
25 neither divulged incriminating evidence nor made inculpatory admissions prior to the invocation
26 of his rights. (Lodged Doc. No. 1, at 775). His confession was not obtained until after he
27 received formal *Miranda* warnings, stated that he understood those warnings, and agreed that he
28 waived the constitutional protection. (Lodged Doc. No. 1, at 775). This is not a case like

1 *Oregon v. Elstad*, 470 U.S. 298 (1985), or *Seibert*, where officers withheld the warnings until
2 after the suspect confessed, and then offered them at a "particularly opportune time . . . , after the
3 suspect ha[d] already confessed." 542 U.S. at 611. Unlike the defendants in *Elstad* and *Seibert*,
4 Smith did not make incriminating statements both before and after receiving a *Miranda* warning.
5 All his incriminating statements were given after the officers explained his constitutional rights
6 three times and he freely waived them.

7 2. Officers' coercion

8 Smith argues that the officers coerced his statements by (1) deliberately violating
9 *Miranda*, and (2) exploiting parental instincts and promising leniency for his wife in exchange for
10 a confession. This, he argues, led to an involuntary waiver of his rights prior to his confession.

11 The Fifth Amendment guarantees that "no person . . . shall be compelled in any criminal
12 case to be a witness against himself" and an involuntary statement by a defendant violates the Due
13 Process Clause of the Fifth Amendment. U.S. CONST. AMEND. V; *see also United States v. Miller*,
14 984 F.2d 1028, 1030 (9th Cir. 1993). A confession is involuntary if coerced "either by physical
15 intimidation or psychological pressure." *United States v. Crawford*, 372 F.3d 1048, 1060 (9th
16 Cir. 2004), *cert. denied*, 543 U.S. 1057 (2005). "The test for determining whether a confession is
17 voluntary is 'whether, considering the totality of the circumstances, the government obtained the
18 statement by physical or psychological coercion or by improper inducement so that the suspect's
19 will was overborne.'" *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (9th Cir. 1997) (quoting
20 *Derrick v. Peterson*, 924 F.2d 813, 817 (9th Cir. 1990)). The pivotal question is whether the
21 defendant's will was overborne when he confessed. *Miller*, 984 F.2d at 1031.

22 The California Court of Appeal found that, looking at the totality of the circumstances,
23 Smith's will was not overborne by the officers' interrogation. This determination is not contrary
24 to, or an unreasonable application of, United States Supreme Court precedent.

25 First, Smith claims that his invocation of the right to an attorney went unheeded by the
26 investigating officers. The Supreme Court has declared that courts must "determine whether the
27 accused actually invoked his right to counsel" by way of objective inquiry. *Davis v. United*
28 *States*, 512 U.S. 452, 458-59 (1994). "Invocation of the *Miranda* right to counsel 'requires, at a

1 minimum, some statement that can reasonably be construed to be an expression of a desire for the
2 assistance of an attorney." *Id.* at 459 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)).
3 However, "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a
4 reasonable officer in light of the circumstances would have understood only that the suspect *might*
5 be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.*
6 The request must be unambiguous and clear such "that a reasonable police officer in the
7 circumstances would understand the statement to be a request for an attorney." *Id.* "If the
8 statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers
9 stop questioning the suspect." *Id.*; *see also Moran v. Burbine*, 475 U.S. 412, 433, n.4 (1986)
10 ("[T]he interrogation must cease until an attorney is present *only* [i]f the individual states that he
11 wants an attorney.").

12 Smith's references to an attorney did not rise to the level of an unambiguous and clear
13 request for counsel. After each reference to an attorney, Smith acknowledged that he was not
14 under arrest and agreed with officers that it was best for him to stay and speak with them to
15 establish his innocence. (Lodged Doc. No. 1, at 716, 734-35, 737-38). These ambiguous
16 references asking the officers for advice on whether he needed a lawyer "[did] not require the
17 cessation of questioning." *Davis*, 512 U.S. at 459. It was only when the officers told him he was
18 under arrest and requested a DNA swab that Smith affirmatively and unequivocally stated that he
19 wanted a lawyer. (Lodged Doc. No. 1, at 754-55). However, after the hour-long break, when he
20 himself reinitiated conversation with the officers, he chose to waive the right he had previously
21 invoked. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). He expressly waived that right
22 when officers re-administered his *Miranda* warnings, and he acknowledged that he understood his
23 constitutional rights and sought to speak with them without an attorney present. (Lodged Doc.
24 No. 1, at 775-77). It was only after this waiver that Smith then confessed to murdering LaTrenda
25 Mangram and covering up the crime by burying her body in shallow grave and destroying physical
26 evidence.

27 Second, Smith argues that the officers coerced him into an involuntary confession by
28 promising leniency to his wife, Felicia. Express or implied promises of leniency can be evidence

1 of involuntariness. *Cf. Brady v. United States*, 397 U.S. 742, 750 (1970) (noting that direct or
2 indirect promises of a benefit in plea bargaining can indicate that the plea was coerced).
3 However, such implied promises of leniency, when considered against the totality of the
4 circumstances, must still overbear the will of the suspect in order to render the confession
5 involuntary. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). As the California Superior
6 Court and the Court of Appeal found, it was Smith who first requested leniency for his wife upon
7 reinitiating his contact with officers. (Lodged Doc. No. 1, 778-79). This shows that his
8 confession was still within the realm "governing self-direction," and was "the product of an
9 essentially free and unconstrained choice by its maker." *Culombe*, 367 U.S. at 602.

10 Smith has offered no evidence—let alone clear and convincing evidence as required by 28
11 U.S.C. § 2254(e)(1)—to rebut the factual finding by the California state courts that he "was at all
12 times cognizant of his right and ability to have a lawyer present and chose not to do that."
13 (Lodged Doc. No. 3, at 11-12). With regard to the voluntariness of Smith's confession, the
14 California courts did not decide this issue in a manner that was contrary to, or an unreasonable
15 application of, Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Thus, federal habeas relief is
16 not warranted on this claim.

17 **II. California Jury Instruction -- Criminal 2.03 and 2.06**

18 Smith claims that the trial court's California jury instructions pursuant to Instructions 2.03
19 and 2.06 unconstitutionally pinpointed particular evidence in the case for an inference of guilt, and
20 that the court impermissibly denied Smith's analogous pinpoint instruction under Instruction 3.32.

21 The trial court supplied both Instructions 2.03 and 2.06 for the jury. At the time,
22 Instruction 2.03 stated,

23 If you find that before this trial the defendant made a willfully false or deliberately
24 misleading statement concerning the crime for which he is now being tried, you
25 may consider that statement as a circumstance tending to prove a consciousness of
guilt. However, that conduct is not sufficient by itself to prove guilt, and its
weight and significance, if any, are for you to decide.

26 (Lodged Doc. No. 1, at 466; Lodged Doc. No. 3, at 29-30). Instruction 2.06 permitted the
27 following instruction:

28 If you find the defendant attempted to suppress evidence against himself in any

1 manner, such as by destroying evidence or concealing evidence, this [attempt] may
2 be considered by you as a circumstance tending to show consciousness of guilt.
3 However, this conduct is not sufficient by itself to prove guilt, and its weight and
4 significance, if any, are for you to decide.

5 (Lodged Doc. No. 1, at 467; Lodged Doc. No. 3, at 30). Both of these instructions were
6 presented to the jury over Smith's objection.

7 The trial court refused Smith's request for a modification of Instruction 3.32, which
8 would have instructed the jury that it could consider expert witness testimony regarding
9 depressive disorder. The court permitted Instruction 3.32 in its unmodified form: "You have
10 received evidence regarding a mental disease, defect or disorder of the defendant at the time of
11 the commission of the crime You should consider this evidence solely for the purpose of
12 determining whether the defendant actually formed the required specific intent" (Lodged
13 Doc. No. 3, at 31). It also presented Instructions 2.80 and 2.82, which informed the jury that
14 experts could present opinions and that the jury could weigh those opinions as it saw fit.
(Lodged Doc. No. 1, at 482, 484; Lodged Doc. No. 3, at 31).

15 Smith argues that including Instruction 3.32 would have permitted the jury to consider
16 his expert's testimony on whether his depressive disorder prohibited him from forming the
17 specific intent to kill Mangram. The California Court of Appeal rejected Smith's claims
18 regarding Instructions 2.03 and 2.06 because the California Supreme Court had rejected an
19 identical argument in *People v. Kelly*, 822 P.2d 385, 1 Cal. 4th 495, 531-32 (Cal. 1992).
20 (Lodged Doc. No. 1, at 30). With regard to Instruction 3.32, the Court of Appeal stated that

21 Upon request, a trial court must give jury instructions that pinpoint the theory of
22 the defense, but the court can refuse instructions that highlight specific evidence as
23 such. Because the latter type of instruction invites the jury to draw inferences
24 favorable to one of the parties from specified items of evidence, it is considered
25 argumentative and therefore should not be given.

26 (Lodged Doc. No. 3, at 30-31). It found that the trial court did not err by prohibiting the
27 modification because though Smith's expert, Wicks, testified that Smith's chronic back pain and
28 long-term prescription drug use could lead to depression, Wicks's evaluation was made after
Mangram's death and without any indication of what Smith's mental state was prior to or on the
day of Mangram's murder. (Lodged Doc. No. 3, at 31-32). Furthermore, Wicks's analysis was

1 based on an estimation of the amount of drugs he believed Smith to be taking. Wicks also
2 acknowledged that Smith could still plan and carry out a murder while taking the medications.
3 (Lodged Doc. No. 3, at 32).

4 *A. California Jury Instruction -- Criminal 2.03 and 2.06*

5 In his federal habeas petition, Smith argues that, while the instructions are permissible
6 under California law, they violate the United States Constitution because they direct the jury's
7 attention to particular pieces of evidence which could demonstrate the defendant's consciousness
8 of guilt. He claims that these jury instructions pinpointed his confession and the evidence related
9 to it.

10 A challenge to a jury instruction solely as an error under state law does not state a claim
11 cognizable in a federal habeas corpus action. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991)
12 ("[T]he fact that the instruction was allegedly incorrect under state law is not a basis for habeas
13 relief."). To obtain a federal writ of habeas corpus for errors in the jury charge, a petitioner must
14 show that "the ailing instruction by itself so infected the entire trial that the resulting conviction
15 violates due process." *Id.* at 72 (quotation marks and citation omitted). "It is well established
16 that the instruction 'may not be judged in artificial isolation,' but must be considered in the
17 context of the instructions as a whole and the trial record." *Id.* (quoting *Cupp v. Naughten*, 414
18 U.S. 141, 147 (1973)). Furthermore, even if it is determined that the instruction violated the
19 petitioner's right to due process, a petitioner can only obtain relief if the unconstitutional
20 instruction had a substantial influence on the conviction and thereby resulted in actual prejudice
21 under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

22 The Ninth Circuit has previously held that Instruction 2.03 is constitutional. *Turner v.*
23 *Marshall*, 63 F.3d 807, 819-20 (9th Cir. 1995), *overruled on other grounds by Tolbert v. Page*,
24 182 F.3d 677 (9th Cir. 1999). In *Turner*, the court held that "[s]o long as the instruction does
25 not state that inconsistent statements constitute evidence of guilt, but merely states that the jury
26 may consider them as indicating a consciousness of guilt, the instruction would not violate
27 constitutional rights." *Id.* at 820. In this case, the jury was instructed that *if* they found that
28 Smith had made willfully false or deliberately misleading statements before trial they *could*, but

1 were not required to, consider that as evidence tending to show a consciousness of guilt. This
2 does not improperly relieve the State of its burden of proof or require the jury to infer guilt or
3 even consciousness of guilt. *See Francis v. Franklin*, 471 U.S. 307, 314-15 (1985) (holding that
4 a permissive inference in a jury instruction is not a violation of due process). The same is true of
5 Instruction 2.06, which essentially mirrors Instruction 2.03 regarding consciousness of guilt.

6 Based on the foregoing, this Court holds that the California Court of Appeal's rejection
7 of Smith's instructional error claim as to Instructions 2.03 and 2.06 was neither contrary to, nor
8 an unreasonable application of, clearly established federal law as determined by the United States
9 Supreme Court. *See* 28 U.S.C. § 2254(d). Thus, federal habeas relief is not warranted on this
10 claim.

11 *B. California Jury Instruction -- Criminal 3.32*

12 Smith also argues that the trial court erred by not giving Instruction 3.32, as modified,
13 when it chose to allow Instructions 2.03 and 2.06. He insists that Instructions 2.03 and 2.06
14 supported the prosecution's theory of the case, and he should have been permitted to present to
15 the jury an instruction based on his own theory. "As a general proposition, a defendant is
16 entitled to an instruction as to any recognized defense for which there exists evidence sufficient
17 for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). A
18 violation of the defendant's right to due process occurs when the failure to give an instruction
19 precludes the jury from considering a viable theory of defense. *Bashor v. Risley*, 730 F.2d 1228,
20 1240 (9th Cir. 1984). Courts again look to whether the missing instruction "so infected the
21 entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72. "An
22 omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the
23 law." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). Therefore, "[i]n this case, the
24 [petitioner]'s burden is especially heavy because no erroneous instruction was given." *Id.*

25 Here, Smith was able to present his theory that a depressive disorder prevented him from
26 committing a premeditated and deliberate murder. The jury heard testimony from expert
27 witnesses regarding Smith's depression. (Lodged Doc. No. 2, at 483-508). Smith's counsel
28 argued in closing that Smith's depressive disorder prevented him from forming the specific intent

1 required for first degree murder. (Lodged Doc. No. 2, at 622-23). Counsel said that Smith's
2 "mind was not the same from prescription drug use and chronic pain." (Lodged Doc. No. 2, at
3 622). He continued:

4 [I]n this case, the chronic pain alone, combined . . . with his prescription abuse
5 disorder, caused depression disorder. Yes, you can plan and do things when you're
6 depressed or suffering from chronic pain or substance abuser withdrawing, but you
7 don't do them with the same deliberate quality in the legal sense of the word.

8 (Lodged Doc. No. 2, at 623).

9 Smith was not denied his defense that a depressive disorder impacted his decision-
10 making ability, hindering his capability to premeditate or deliberate. He has not met his
11 burden by showing that the jury was unable to consider his viable defense, or that the
12 absence of the instruction rendered the trial fundamentally unfair. Therefore, this Court
13 holds that the California Court of Appeal's determination was neither contrary to, nor an
14 unreasonable application of, Supreme Court precedent. 28 U.S.C. § 2254(d)(1). He is
15 not entitled to habeas relief on this claim.

16 **III. Lying-in-Wait Special Circumstance**

17 Smith's final claim is that the trial court's use of Instruction 8.25 on lying in wait was
18 unconstitutional both on its face and as applied because it failed to instruct the jury on elements
19 of the offense and impermissibly reduced the government's burden of proof. He argues that the
20 instruction (1) lessens the government's burden of proof because it requires that the jury find
21 either premeditation *or* deliberation, and (2) fails to specify any durational component for
22 premeditation. Instruction 8.25 as given at trial states:

23 Murder which is immediately preceded by lying in wait is murder of the
24 first degree.

25 The term "lying in wait" is defined as a waiting and watching for an
26 opportune time to act, together with a concealment by ambush or by some other
27 secret design to take the other person by surprise even though the victim is aware
28 of the murderer's presence. The lying in wait need not continue for any particular
period of time provided that its duration is such as to show a state of mind
equivalent to premeditation or deliberation as defined in the prior instruction.

The word "premeditation" means considered beforehand.

The word "deliberation" means formed or arrived at or determined up as a
result of careful thought and weighing of considerations for or against the
proposed course of action.

(Lodged Doc. No. 1, at 496).

1 The California Court of Appeal rejected Smith's arguments that Instruction 8.25 is
2 unconstitutional:

3 [C]ourts have also rejected defendant's argument that the lying in wait special
4 circumstance is unconstitutionally vague because it provides insufficient notice of
5 what conduct is prohibited. (*People v. Edwards* (1991) 54 Cal.3d 787, 824;
6 *People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 310-311.) In
7 light of this authority, we find no merit in defendant's constitutional challenges to
8 the lying in wait special circumstance allegation.

9 (Lodged Doc. No. 3, at 33).

10 Smith's first argument is that, by the instruction's use of disjunctive, the jury was able to
11 convict him without finding both premeditation and deliberation as required for first-degree
12 murder. However, when considered alongside the other instructions provided to the jury, a
13 reasonable juror would have concluded that she must find both premeditation and deliberation.
14 Instruction 4.21 stated that, "In the crime of first degree murder of which the defendant is
15 accused in Count One, necessary elements are the existence in the mind of the defendant of
16 malice aforethought, a specific intent to kill, premeditation, *and* deliberation." (Lodged Doc.
17 No. 1, at 489) (emphasis added). Instruction 8.20 stated that, "All murder which is perpetrated
18 by any kind of willful, deliberate *and* premeditated killing with express malice aforethought is
19 murder of the first degree." (Lodged Doc. No. 1, at 494) (emphasis added). Instruction 8.20
20 also contains the following language:

21 If you find that the killing was preceded and accomplished by clear, deliberate intent
22 on the part of the defendant to kill, which was the result of deliberation *and*
23 premeditation, so that it must have been formed upon pre-existing reflection and
24 not under a sudden heat of passion or other condition precluding the idea of
25 deliberation, it is murder of the first degree.

26 (Lodged Doc. No. 1, at 494) (emphasis added). Finally, the trial court instructed that, "In the
27 special circumstance of intentional murder by means of lying in wait a necessary element is the
28 existence in the mind of the defendant of a specific intent to kill and the mental state of
premeditation *and* deliberation." (Lodged Doc. No. 1, at 511) (emphasis added).

Smith's second argument is that his right to due process was violated because the
Instruction fails to specify a durational component. He believes that "[s]ince the facts of this
case did not provide support for the finding that Smith observed Mangram for any period of

1 time, the instruction permitted the jury to find Smith guilty without proof that he watched and
2 waited for any length of time." He claims that the jury should have been instructed that there
3 needed to be a "substantial period of watching and waiting" in order to find this special
4 circumstance. However, the California Supreme Court has said that "[t]he true test is not the
5 duration of time as much as it is the extent of reflection. Thoughts may follow each other with
6 great rapidity and cold, calculated judgement may be arrived at quickly." *People v. Cole*, 95
7 P.3d 811, 857 (Cal. 2004).

8 In *Edwards v. Ayers*, 542 F.3d 759, 767 (9th Cir. 2008), the Ninth Circuit considered
9 whether the rights of a petitioner—who was convicted of first-degree murder and sentenced to
10 death—were violated because the lying-in-wait special circumstance instructed at the guilt phase
11 did not require a "substantial period" of waiting and watching." The court found the instruction
12 did not violate Edwards's constitutional rights, stating: "Edwards' jury was instructed . . . that
13 the period of waiting and watching had to be of sufficient duration to prove beyond a reasonable
14 doubt the elements of waiting, watching, and concealment, and that the defendant intended to kill
15 the victim during the period of lying in wait." *Id.* It agreed with the California Supreme Court
16 that " these requirements necessarily conveyed a 'substantial temporal element.'" *Id.*

17 Smith's jury received an analogous instruction requiring that the jury find each of the
18 elements of the special circumstance—including that the duration of time be sufficient to "show a
19 state of mind equivalent to premeditation or deliberation—beyond a reasonable doubt. (Lodged
20 Doc. No. 1, at 510). The California Court of Appeal's determination regarding the
21 constitutionality of the lying-in-wait special circumstance was neither contrary to, nor an
22 unreasonable application of, established Supreme Court precedent. 28 U.S.C. § 2254(d)(1).
23 Thus, federal habeas relief is not warranted on this claim.

24 Therefore, it is hereby

25 ORDERED that Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C.
26 § 2254 is DENIED. The case is DISMISSED with prejudice.

27 The Clerk is directed to enter the accompanying Judgment and to send uncertified copies
28 of this Order and the Judgment to all counsel of record and to any party appearing pro se at said

1 party's last known address.

2 DATED this 25th day of November, 2009.

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4 /s/ Richard C. Tallman
5 UNITED STATES CIRCUIT JUDGE
6 Sitting by designation
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