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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONELL THOMAS HAYNIE,
Petitioner,
v.
MARTIN BITER, Warden,
Respondent.

No. 2:13-cv-1876 TLN DAD P

AMENDED ORDER AND
FINDINGS AND RECOMMENDATIONS

On April 10, 2015, the undersigned issued an order denying petitioner’s motion for default judgment and findings and recommendations recommending that his application for a writ of habeas corpus be denied. (Dkt. No. 24.) Thereafter, on April 27, 2015, petitioner filed a motion requesting the court “to Reissue and Re-Hear Amended Habeas Petition.” (Dkt. No. 25.) Therein, petitioner points out that on July 25, 2014, he filed a document with this court entitled “Notice: Motion to Lift Habeas.” (See Dkt. No. 13.) Petitioner points out that attached to that filing was a second amended petition for federal habeas relief which updated the claims contained in his earlier filed first amended habeas petition of February 21, 2014. In the court’s April 10, 2015 findings and recommendations, the undersigned addressed the claims as presented in petitioner’s first amended petition. In his motion to “reissue and rehear,” petitioner requests that the court instead address the second amended habeas petition included as part of his July 25, 2014 filing. Good cause appearing, petitioner’s request will be granted. The court vacates the order and

1 findings and recommendations issued on April 10, 2015, and hereby issues the following
2 amended order and findings and recommendations addressing petitioner's second amended
3 petition.

4 Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus
5 pursuant to 28 U.S.C. § 2254 that was filed in this court on July 25, 2014 (ECF No. 13). Therein,
6 petitioner challenges a judgment of conviction entered against him on August 30, 2010, in the
7 Sacramento County Superior Court on one count of kidnapping.¹ He seeks federal habeas relief
8 on the grounds that: (1) his trial counsel rendered ineffective assistance; and (2) the decision of
9 the California Court of Appeal rejecting one of his arguments on appeal was "arbitrary," in
10 violation of his right to due process. Upon careful consideration of the record and the applicable
11 law, the undersigned will recommend that petitioner's application for habeas corpus relief be
12 denied.

13 **I. Background**

14 In its unpublished memorandum and opinion affirming petitioner's judgment of
15 conviction on appeal, the California Court of Appeal for the Third Appellate District provided the
16 following factual summary:

17 A jury found defendant Donell Thomas Haynie guilty of false
18 imprisonment (Penal Code, FN1 § 236; count 4), simple assault as a
19 lesser included offense to assault with a deadly weapon by means
20 likely to produce great bodily injury (§ 240; count 5), possession of
21 methamphetamine (Health & Saf. Code, § 11377, subd. (a); count
22 6), and kidnapping (§ 207, subd. (a); count 7). The jury found
23 defendant not guilty of oral copulation by force (§ 288a, subd.
24 (c)(2); count 1), two counts of rape by force (§ 261, subd. (a)(2);
25 counts 2 and 3), and pandering (§ 266i, subd. (a)(1); count 8). In a
bifurcated proceeding, the trial court found true allegations
defendant had two serious felony convictions within the meaning of
section 667, subdivision (a), which also qualified as "strikes" under
the three strikes law (§§ 667, subd. (b)-(i); 1170.12). Defendant
was sentenced to 85 years to life in prison, consisting of three terms
of 25 years to life for counts 4, 6, and 7, plus 5 years for each of his
serious felony convictions.FN2

26 ¹ Petitioner was also convicted of simple assault, as a lesser included offense to assault with a
27 deadly weapon, and possession of methamphetamine, along with kidnapping, and with a finding
28 that he had suffered two prior "strike" convictions pursuant to California's Three Strikes Law.
However, in his federal habeas petition before this court he challenges only his kidnapping
conviction. (ECF No. 9 at 4, 5.)

1 FN1. Further undesignated statutory references are to the Penal
2 Code.

3 FN2. As for the assault (count 5), the trial court indicated that it
4 was “not going to in light of the sentence order any additional time
5 even though probation is suggesting otherwise.”

6 Defendant appeals, contending his kidnapping conviction must be
7 reversed because the trial court did not instruct the jury on the
8 lesser included offense of false imprisonment, and his conviction
9 for false imprisonment must be reversed because the People cannot
10 establish beyond a reasonable doubt that the kidnapping and false
11 imprisonment convictions are not based on the same act. We shall
12 conclude that defendant is barred under the doctrine of invited error
13 from challenging the trial court’s failure to instruct the jury on false
14 imprisonment as a lesser included offense to kidnapping, and that it
15 is impossible to determine whether the same act forms the basis for
16 both his kidnapping and false imprisonment convictions.
17 Accordingly, we shall reverse defendant’s conviction for false
18 imprisonment (count 4), affirm the judgment in all other respects,
19 and remand the cause with directions.FN3

20 FN3. Because we shall reverse his conviction on count 4, we need
21 not consider defendant’s claims of sentencing error as to that count.

22 **FACTUAL AND PROCEDURAL BACKGROUND**

23 **The Prosecution**

24 At approximately 10:30 p.m. on August 12, 2009, G.A. met her
25 cousin and some friends at a bar in Sacramento. Sometime later,
26 the group was joined by a friend of G.’s cousin and defendant. G.
27 had never seen defendant before that night. After the bar closed,
28 she left with her cousin’s friend and defendant in defendant’s car.
After dropping off her cousin’s friend, G. and defendant went to
defendant’s apartment for a swim. When they finished swimming,
they returned to defendant’s apartment, and defendant gave G.
some dry clothes. G. asked defendant for a ride home. Defendant
said he had lent his car to his cousin, and G. fell asleep on
defendant’s bed.

G. woke up around 6:00 a.m. and asked defendant if his cousin had
returned. Defendant said “no,” and G. fell back to sleep. She woke
up about 9:00 a.m. when she “felt” defendant come into the
bedroom. Defendant lay down on the bed and tried to touch her.
She told him to get his hand off her, and defendant responded that
“he was going to fuck [her] up.” When G. reached for her cellular
telephone, defendant attempted to take it by wrestling with and
choking her. He then dragged her into the bathroom, told her take
off all her clothes, and said that he was going to sell her to a pimp.
Thereafter, defendant prevented her from leaving the bathroom.

Defendant eventually let G. out of the bathroom and told her to take
some blue Ecstasy pills. When she refused, he told her she either
had to take the pills or give him a “blow job.” When she refused to

1 take the pills, defendant dragged her back into the bathroom and
2 forced her to perform oral sex on him while he held a screwdriver
3 to her body. Thereafter, he fondled her breasts and forced her to
4 have sexual intercourse with him.

5 When defendant left the bathroom, G. ran out the front door and
6 down the stairs leading to the apartment. Defendant followed her
7 and dragged her back to his apartment by her hair while repeatedly
8 threatening to kill her. A neighbor who observed the altercation
9 called 911.

10 Once inside the apartment, defendant told G. to take a shower and
11 said he would kill her if the police came. When she finished
12 showering, defendant duct taped her hands, feet, and mouth. Five
13 or ten minutes later, the police knocked at the door. Defendant
14 removed the duct tape, flushed it down the toilet, and threw the roll
15 of tape into a laundry basket. Defendant apologized and told G. to
16 tell the police that it was his cousin and his cousin's girlfriend who
17 had been fighting outside the apartment. When the police entered
18 the apartment, G. initially told them defendant's cousin and his
19 cousin's girlfriend had been fighting outside the apartment. After
20 defendant was taken out of the room, G. told the police what
21 actually had happened and pointed out the duct tape in the toilet and
22 the laundry basket.

23 G. was taken to the hospital. She had visible bruising and abrasions
24 on her body and adhesive and sliver flecks consistent with duct tape
25 on her body. She also had redness and an abrasion "in the area
26 posterior to the vagina."

27 **II. The Defense**

28 Christopher Reed was living with defendant at the time of the
incident and sat in the Jacuzzi while defendant and G. swam in the
pool. Defendant and G. were talking, hugging, and kissing in the
pool; and when they returned to the apartment, they appeared
affectionate toward each other. Reed heard them talking and
laughing in the bedroom before he fell asleep. At approximately
6:00 a.m., defendant asked Reed to take his mother to work. When
Reed returned, defendant asked him to take his brothers to school.
Reed returned about 20 minutes later but left again to pick up some
money from his estranged wife. Reed did not see G. that morning.

At approximately 9:30 a.m. on August 13, 2009, defendant's
neighbor visited defendant's apartment for about five minutes. G.
was lying on the couch and did not appear to be in any distress.

Defendant testified that on the night in question, G. left the bar with
him and a couple of other men. Defendant invited her to go
swimming, and she accepted. G. jumped into the pool wearing her
dress, but later removed it and was wearing only her panties. He
and G. kissed in the pool, and he penetrated her vagina with his
finger. When they returned to defendant's apartment, defendant
showed G. the bathroom and gave her a toothbrush and a dry shirt
to put on. While defendant was talking to Reed in the living room,

1 G. left the bathroom and went into defendant's bedroom.
2 Defendant joined her there, and they had sexual intercourse. When
3 they were finished, defendant left the bedroom and fell asleep on
4 the couch. Around 6:00 a.m., he asked Reed to drive his mother to
5 work. Reed agreed and returned about 20 minutes later. Defendant
6 then asked Reed to drive his brothers to school, and Reed agreed.
7 When Reed returned, Reed asked defendant if he could borrow his
8 car. Defendant agreed and walked with Reed outside to the car.
9 Defendant was gone about 15 minutes. When he returned, G. was
10 laying on the couch. The two talked, and defendant began
11 wondering where he had left his money. When he was unable to
12 find it, he began questioning G. about the money. She did not
13 appreciate being questioned and refused to show him her wallet.
14 When defendant left the room, G. ran out the front door and down
15 the stairs. Defendant chased after her, and the two scuffled as she
16 screamed for help. Defendant may have pulled her hair a couple of
17 times and choked her, but he denied dragging her by her hair or
18 stomping on her. Eventually, he picked her up and carried her to
19 the base of the stairs leading to his apartment. When two
20 acquaintances walked by, defendant told them, "[T]his bitch stole
21 my money," and they helped him look for G.'s wallet. Defendant
22 followed G. to the apartment and suggested she take a shower
23 because her feet were bleeding. While defendant was not going to
24 let her go until he got his money, he denied duct taping her.

25 When defendant told G. the police were there, she told him not to
26 answer the door and maybe they would go away. At that point,
27 defendant told her to tell the police that it was his cousin and his
28 cousin's wife who were fighting.

16 People v. Haynie, No. C066352, 2013 WL 518616, at *1 -3 (Cal. App. 3 Dist. Feb. 13, 2013)

17 On March 3, 2013, petitioner filed a petition for rehearing in the California Supreme
18 Court. (Resp't's Lod. Doc. 10.) On March 7, 2013, that petition was summarily denied. (Id.)
19 On September 6, 2013, petitioner filed a motion to recall the remittitur. (Resp't's Lod. Doc. 10a.)
20 The California Supreme Court summarily denied that motion on September 12, 2013. (Id.) On
21 March 25, 2013, petitioner filed a petition for review in the California Supreme Court. (Resp't's
22 Lod. Doc. 11.) The Supreme Court denied that petition on May 1, 2013. (Id.)

23 Petitioner subsequently filed a petition for writ of habeas corpus in the Sacramento
24 County Superior Court, claiming that his trial counsel had rendered ineffective assistance in
25 asking the trial court not to instruct the jury on false imprisonment as a lesser included offense to
26 kidnapping, and that his appellate counsel had rendered ineffective assistance in failing to raise a
27 claim of ineffective assistance of trial counsel on appeal. (Resp't's Lod. Doc. 12.) On October
28 21, 2013, the Sacramento County Superior Court denied that petition in a reasoned decision

1 addressing the merits of petitioner's claims. (Id.) On November 18, 2013, petitioner filed a pro
2 se petition for writ of habeas corpus in the California Court of Appeal. (Id.) Liberally construed,
3 that petition raised the same two claims that petitioner raised in his habeas petition filed in the
4 Sacramento County Superior Court. (Id.) On November 21, 2013, that petition was summarily
5 denied by the California Court of Appeal. (Id.)

6 On January 8, 2014, petitioner filed a petition for writ of habeas corpus in the California
7 Supreme Court, raising the same two claims. (Resp't's Lod. Doc. 13.) On March 25, 2014, the
8 Supreme Court directed respondent to file an informal response to this petition and granted
9 petitioner time to file a reply. (Id.) Respondent filed an informal response on April 15, 2014.
10 (Resp't's Lod. Doc. 14.) Petitioner filed a reply on May 9, 2014. (Resp't's Lod. Doc. 15.) On
11 June 25, 2014, the California Supreme Court summarily denied petitioner's application for a writ
12 of habeas corpus. (Resp't's Lod. Doc. 13.)

13 **II. Standards of Review Applicable to Habeas Corpus Claims**

14 An application for a writ of habeas corpus by a person in custody under a judgment of a
15 state court can be granted only for violations of the Constitution or laws of the United States. 28
16 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or
17 application of state law. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010); Estelle v. McGuire, 502
18 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000).

19 Title 28 U.S.C. § 2254(d) sets forth the following standards for granting federal habeas
20 corpus relief:

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

26 (1) resulted in a decision that was contrary to, or involved
27 an unreasonable application of, clearly established Federal law, as
28 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.

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1 For purposes of applying § 2254(d)(1), clearly established federal law consists of holdings
2 of the United States Supreme Court at the time of the last reasoned state court decision.
3 Thompson v. Runnels, 705 F.3d 1089, 1096 (9th Cir. 2013) (citing Greene v. Fisher, ___ U.S.
4 ___, ___, 132 S. Ct. 38, 44 (2011); Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011) (citing
5 Williams v. Taylor, 529 U.S. 362, 405-06 (2000)). Circuit court precedent “may be persuasive in
6 determining what law is clearly established and whether a state court applied that law
7 unreasonably.” Stanley, 633 F.3d at 859 (quoting Maxwell v. Roe, 606 F.3d 561, 567 (9th Cir.
8 2010)). However, circuit precedent may not be “used to refine or sharpen a general principle of
9 Supreme Court jurisprudence into a specific legal rule that th[e] [Supreme] Court has not
10 announced.” Marshall v. Rodgers, ___ U.S. ___, ___, 133 S. Ct. 1446, 1450 (2013) (citing
11 Parker v. Matthews, 132 S. Ct. 2148, 2155 (2012)). Nor may it be used to “determine whether a
12 particular rule of law is so widely accepted among the Federal Circuits that it would, if presented
13 to th[e] [Supreme] Court, be accepted as correct. Id. Further, where courts of appeals have
14 diverged in their treatment of an issue, it cannot be said that there is “clearly established Federal
15 law” governing that issue. Carey v. Musladin, 549 U.S. 70, 77 (2006).

16 A state court decision is “contrary to” clearly established federal law if it applies a rule
17 contradicting a holding of the Supreme Court or reaches a result different from Supreme Court
18 precedent on “materially indistinguishable” facts. Price v. Vincent, 538 U.S. 634, 640 (2003).
19 Under the “unreasonable application” clause of § 2254(d)(1), a federal habeas court may grant the
20 writ if the state court identifies the correct governing legal principle from the Supreme Court’s
21 decisions, but unreasonably applies that principle to the facts of the prisoner’s case.² Lockyer v.
22 Andrade, 538 U.S. 63, 75 (2003); Williams, 529 U.S. at 413; Chia v. Cambra, 360 F.3d 997, 1002
23 (9th Cir. 2004). In this regard, a federal habeas court “may not issue the writ simply because that
24 court concludes in its independent judgment that the relevant state-court decision applied clearly
25 established federal law erroneously or incorrectly. Rather, that application must also be

26 ² Under § 2254(d)(2), a state court decision based on a factual determination is not to be
27 overturned on factual grounds unless it is “objectively unreasonable in light of the evidence
28 presented in the state court proceeding.” Stanley, 633 F.3d at 859 (quoting Davis v. Woodford,
384 F.3d 628, 638 (9th Cir. 2004)).

1 unreasonable.” Williams, 529 U.S. at 412. See also Schriro v. Landrigan, 550 U.S. 465, 473
2 (2007); Lockyer, 538 U.S. at 75 (it is “not enough that a federal habeas court, in its independent
3 review of the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”).
4 “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as
5 ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” Harrington v.
6 Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).
7 Accordingly, “[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner
8 must show that the state court’s ruling on the claim being presented in federal court was so
9 lacking in justification that there was an error well understood and comprehended in existing law
10 beyond any possibility for fairminded disagreement.” Richter, 562 U.S. at 103.

11 If the state court’s decision does not meet the criteria set forth in § 2254(d), a reviewing
12 court must conduct a de novo review of a habeas petitioner’s claims. Delgado v. Woodford,
13 527 F.3d 919, 925 (9th Cir. 2008); see also Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008)
14 (en banc) (“[I]t is now clear both that we may not grant habeas relief simply because of §
15 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by considering
16 de novo the constitutional issues raised.”).

17 The court looks to the last reasoned state court decision as the basis for the state court
18 judgment. Stanley, 633 F.3d at 859; Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004).
19 If the last reasoned state court decision adopts or substantially incorporates the reasoning from a
20 previous state court decision, this court may consider both decisions to ascertain the reasoning of
21 the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). “When a
22 federal claim has been presented to a state court and the state court has denied relief, it may be
23 presumed that the state court adjudicated the claim on the merits in the absence of any indication
24 or state-law procedural principles to the contrary.” Richter, 562 U.S. at 99. This presumption
25 may be overcome by a showing “there is reason to think some other explanation for the state
26 court’s decision is more likely.” Id. at 785 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803
27 (1991)). Similarly, when a state court decision on a petitioner’s claims rejects some claims but
28 does not expressly address a federal claim, a federal habeas court must presume, subject to

1 rebuttal, that the federal claim was adjudicated on the merits. Johnson v. Williams, ___ U.S. ___,
2 ___, 133 S. Ct. 1088, 1091 (2013).

3 Where the state court reaches a decision on the merits but provides no reasoning to
4 support its conclusion, a federal habeas court independently reviews the record to determine
5 whether habeas corpus relief is available under § 2254(d). Stanley, 633 F.3d at 860; Himes v.
6 Thompson, 336 F.3d 848, 853 (9th Cir. 2003). “Independent review of the record is not de novo
7 review of the constitutional issue, but rather, the only method by which we can determine whether
8 a silent state court decision is objectively unreasonable.” Himes, 336 F.3d at 853. Where no
9 reasoned decision is available, the habeas petitioner still has the burden of “showing there was no
10 reasonable basis for the state court to deny relief.” Richter, 562 U.S. at 98.

11 A summary denial is presumed to be a denial on the merits of the petitioner’s claims.
12 Stancle v. Clay, 692 F.3d 948, 957 & n. 3 (9th Cir. 2012). While the federal court cannot analyze
13 just what the state court did when it issued a summary denial, the federal court must review the
14 state court record to determine whether there was any “reasonable basis for the state court to deny
15 relief.” Richter, 562 U.S. at 98. This court “must determine what arguments or theories ... could
16 have supported, the state court’s decision; and then it must ask whether it is possible fairminded
17 jurists could disagree that those arguments or theories are inconsistent with the holding in a prior
18 decision of [the Supreme] Court.” Id. at 786. The petitioner bears “the burden to demonstrate
19 that ‘there was no reasonable basis for the state court to deny relief.’” Walker v. Martel, 709 F.3d
20 925, 939 (9th Cir. 2013) (quoting Richter, 562 U.S. at 98).

21 When it is clear, however, that a state court has not reached the merits of a petitioner’s
22 claim, the deferential standard set forth in 28 U.S.C. § 2254(d) does not apply and a federal
23 habeas court must review the claim de novo. Stanley, 633 F.3d at 860; Reynoso v. Giurbino, 462
24 F.3d 1099, 1109 (9th Cir. 2006); Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003).

25 **III. Petitioner’s Claims**

26 **A. Exhaustion of State Remedies**

27 In his first ground for federal habeas relief, petitioner claims that his trial counsel rendered
28 him ineffective assistance in failing to request that the trial court instruct the jury at his trial on

1 false imprisonment as a lesser included offense to the kidnapping charge. (ECF No. 13 at 6.) In
2 his second ground for relief, petitioner claims that the state appellate court’s rejection of his
3 argument on appeal that the trial court erred in failing to instruct the jury on false imprisonment
4 as a lesser included offense to the kidnapping charge was “arbitrary” and therefore violated his
5 “liberty interest” protected by the Due Process Clause. (Id.) In opposition, respondent argues
6 that neither of these two claims has been exhausted in state court and that they should be rejected
7 on that basis. (ECF No. 20 at 10-12.)

8 The exhaustion of available state remedies is a prerequisite to a federal court's
9 consideration of claims sought to be presented in habeas corpus proceedings. See Rose v. Lundy,
10 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner can satisfy the exhaustion requirement by
11 providing the highest state court with a full and fair opportunity to consider all claims before
12 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
13 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1986). However, a federal court considering a habeas
14 petition may deny an unexhausted claim on the merits when it is perfectly clear that the claim is
15 not “colorable.” Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005). See also 28 U.S.C. §
16 2254(b)(2) (“An application for a writ of habeas corpus may be denied on the merits,
17 notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the
18 State”). For the reasons explained below, the undersigned need not address whether petitioner
19 has properly exhausted his claims because it is perfectly clear that petitioner has not raised even
20 colorable claims for federal habeas relief.

21 **B. Ineffective Assistance of Trial Counsel**

22 As set forth above, petitioner’s first claim for federal habeas relief is that his trial counsel
23 rendered ineffective assistance in failing to request that the trial court instruct the jury on false
24 imprisonment as a lesser included offense to the kidnapping charge. (ECF No. 13 at 6.) That
25 claim is clearly not colorable and the undersigned recommends that it be rejected.

26 **1. Background**

27 On appeal in state court petitioner claimed that the trial court erred in failing to instruct his
28 jury on false imprisonment as a lesser included offense to the kidnapping charged in count 7 of

1 the information. The California Court of Appeal concluded that petitioner had waived this claim
2 pursuant to the doctrine of “invited error” by failing to request the jury instruction. In so ruling,
3 the state appellate court reasoned as follows:

4 DISCUSSION

5 I.

6 Defendant Is Barred Under the Doctrine of Invited Error From 7 Challenging the Trial Court’s Failure to Instruct the Jury on False 8 Imprisonment as a Lesser Included Offense to Kidnapping

8 Defendant contends that the trial court committed reversible error
9 by honoring his request not to instruct the jury on false
10 imprisonment as a lesser included offense of kidnapping. As we
11 shall explain, he is barred from raising this claim on appeal.

11 After the parties and the trial court finished discussing the requested
12 jury instructions, the trial court sought to confirm that the parties
13 were not requesting the jury be instructed on any lesser included
14 offenses except as to count 5, assault with a deadly weapon by
15 means likely to produce great bodily injury. The parties responded
16 in the affirmative.

14 The following court day, the trial court again raised the issue of
15 lesser included offenses. In particular, the court indicated that it
16 thought the jury should be instructed on false imprisonment as a
17 lesser included offense to kidnapping (count 7).

17 “THE COURT: . . . [¶] . . . [W]e have had some dialogue by e-mail
18 back and forth about the instructions and my thinking about a lesser
19 false imprisonment [instruction] as to Count 7, the kidnap charge.
20 [¶] The reason I think that is because we already had a discussion
21 about the different acts that potentially had constituted a 236 [false
22 imprisonment] as charged.

20 “[PROSECUTOR]: Correct.

21 “THE COURT: And then the reason why I think that we need to
22 give a lesser to 236 [false imprisonment] on the kidnap is the jury
23 could find that [defendant] did not commit a kidnap for the conduct
24 that occurred outside, and thus find him guilty of false
25 imprisonment in the lesser-included offense.

24 “[PROSECUTOR]: Basically if they found it was not a substantial
25 distance but the other element [sic] were satisfied.

26 “THE COURT: Yes. That he detained her against her will, so that
27 they could find him guilty of that. And I think the People are - I
28 still, unless the defense is going to demand that I not give a lesser -
[¶] I don't know if - I didn't ask [defense counsel] about this yet
because we just got together this morning. [¶] Do you have any

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position about the giving of a lesser on Count 4. I'm sorry. On count 7, the kidnap?

“[DEFENSE COUNSEL]: Submitted your Honor, No.

“THE COURT: You do or don't want to give one? If you don't want to give one then I won't give a lesser. But I'll have to give - I think it is wise to make the election.

“[¶] ... [¶]

“[DEFENSE COUNSEL]: We are not requesting it, your Honor.

“THE COURT: Are you specifically asking me not to give the lesser then of false imprisonment?

“[DEFENSE COUNSEL]: Are you indicating that he is still charged with the false imprisonment?

“THE COURT: He is charged with false imprisonment in Count 4. He is charged with the kidnap in Count 7, and so they could find him not guilty of a kidnap but find him guilty of a lesser false imprisonment to the kidnap.

“[DEFENSE COUNSEL]: Can I explain to him what's happening?

“THE COURT: Yes.

“[DEFENSE COUNSEL]: We are asking that it not be read.

“[¶] ... [¶]

“[DEFENSE COUNSEL]: Unless my client is requesting if there is a lesser on Count 4 [false imprisonment], then you add the lesser on Count 7 [kidnap].

“THE COURT: I don't know what the lesser would be on a Count 4 [false imprisonment]. What lesser are you asking for? 236?

“[PROSECUTOR]: I don't believe there is one.

“[DEFENSE COUNSEL]: I don't believe there is one either. I just - [¶] . . . And my concern is the confusion if - this is a life case anyway, and if he is already charged with [false imprisonment] in Count 4, I don't think it would be necessary or useful to the defense to have the lesser in Count 7.”

Defendant contends the trial court committed reversible error by failing to instruct the jury on false imprisonment as a lesser included offense to kidnapping because the jury was left with an “unwarranted all-or-nothing choice’ between a conviction for kidnapping and acquittal.” The People respond that under the invited error doctrine, defendant may not raise this issue on appeal because “[f]rom [defense counsel's] remarks, it is apparent that

1 [she] was pursuing a deliberate all-or-nothing strategy in the hopes
2 of securing an acquittal on the kidnapping charge.”

3 False imprisonment is a lesser included offense of the crime of
4 kidnapping. (People v. Magana (1991) 230 Cal.App.3d 1117,
5 1120–1121.) In criminal cases, the trial court must instruct on
6 lesser included offenses “if there is substantial evidence the
7 defendant is guilty of the lesser offense, but not the charged
8 offense.” (People v. Moya (2009) 47 Cal.4th 537, 556.) “[A]
9 defendant[, however,] may not invoke a trial court’s failure to
10 instruct on a lesser included offense as a basis on which to reverse a
11 conviction when, for tactical reasons, the defendant persuades a
12 trial court not to instruct on a lesser included offense supported by
13 the evidence. [Citations.] In that situation, the doctrine of invited
14 error bars the defendant from challenging on appeal the trial court’s
15 failure to give the instruction.” [Citations.]” (People v. Beames
16 (2007) 40 Cal.4th 907, 927.)

17 Here, the record clearly reflects that defendant and his counsel
18 expressed a deliberate tactical purpose in resisting an instruction on
19 false imprisonment as a lesser included offense of kidnapping, the
20 very instruction he now complains should have been given. As the
21 trial court mentioned, there were two potential false imprisonments
22 in this case - one outside the apartment and one inside. Rather than
23 run the risk of the jury finding defendant guilty of two counts of
24 false imprisonment, defendant and his counsel elected to forego an
25 instruction on the lesser included offense of false imprisonment as
26 to the kidnapping offense, hoping the jury would find him not
27 guilty of kidnapping and guilty of, at most, one count of false
28 imprisonment. Unfortunately for them, things did not go as they
had hoped, and the jury found defendant guilty of kidnapping and
false imprisonment. Having made the tactical decision to take an
all-or-nothing approach on count 7, the kidnapping offense, we find
that any error was invited, and that defendant therefore is barred
from invoking such error as a basis for reversing his conviction.

19 Haynie, 2013 WL 518616, at *3-4.

20 After the California Court of Appeal rejected petitioner’s argument of trial court
21 instructional error, petitioner filed a petition for a writ of habeas corpus in the Sacramento County
22 Superior Court. Therein, he claimed that his trial counsel rendered ineffective assistance in
23 refusing a jury instruction on the lesser included offense to the kidnapping charge, and also
24 claimed that his appellate counsel rendered ineffective assistance in failing to raise the argument
25 of the ineffective assistance of trial counsel on appeal. (Resp’t’s Lod. Doc. 12.) The Sacramento
26 County Superior Court denied relief on both claims, reasoning as follows:

27 Petitioner claims that his trial counsel rendered him ineffective
28 assistance of counsel in failing to request the court to give a lesser

1 included instruction on kidnapping, and that appellate counsel was
2 ineffective in failing to raise the issue on appeal.

3 Petitioner admits that the trial court had indicated that it thought the
4 jury should be instructed on false imprisonment as a lesser included
5 offense to kidnapping because the evidence was susceptible of a
6 finding that the distance of asportation was not substantial enough
7 to constitute kidnapping, and the prosecution agreed, but that it was
8 petitioner's own defense counsel who did not want the instruction
9 and told the court that counsel was not asking for the instruction.
10 Petitioner claims that trial counsel erroneously advised petitioner to
11 decline the lesser included offense instruction, which made it an all-
12 or-nothing choice on the count for the jury. He claims there was a
13 substantial evidentiary basis for acquittal on kidnapping and guilt
14 on the lesser included false imprisonment, due to the asportation
15 issue, and that but for counsel's error it is reasonably probable that
16 a different result would have ensued. He further claims that had he
17 only been convicted of false imprisonment on the charge, he would
18 now be eligible for Penal Code § 1170.126 recall of sentence and
19 resentencing.

20 On appeal, appellate counsel did raise the issue of whether the trial
21 court erred in honoring the defense's request to not instruct the jury
22 on false imprisonment as a lesser-included offense to kidnapping,
23 because that left the jury with an all-or-nothing choice between
24 conviction for kidnapping and acquittal. The Third District Court
25 of Appeal found that petitioner was estopped from raising this
26 claim on appeal[.]

27 * * *

28 Petitioner's appellate counsel did not specifically raise an
ineffective assistance of trial counsel claim on the appeal, but it
would appear that had the issue been raised it would have been
rejected, as the Third District clearly found that trial counsel's
choice had been a tactical one that counsel hoped would lead to an
acquittal on the kidnapping charge. The Third District also quoted
prior case that indicates that trial counsel may make a tactical
choice not to want a lesser included instruction given, and that
when counsel does so the defendant is barred from raising the claim
on appeal. It would appear that this means such a tactical choice by
counsel may be an informed tactical choice within the range of
reasonable competence, which does not deprive a criminal
defendant of effective assistance of counsel (see Strickland v.
Washington, (1984) 466 U.S. 668; People v. Pope, (1979) 23
Cal.3d 412). Nor would it appear in the instant case that the tactical
choice of counsel was unreasonable. Petitioner was charged in
Count 7 with kidnapping and in Count 4 with false imprisonment.
There was one instance in which the evidence showed kidnapping,
that had the asportation issue; there were different acts shown,
however, by the evidence, that constituted only false imprisonment.
The People had chosen not to elect which act it sought the
conviction for, for Count 4. As such, the jury could have rejected
false imprisonment on the different acts and then been faced with
the issue of whether the kidnapping lacked asportation and thus

1 should result in an acquittal of the kidnapping but a conviction on
2 the false imprisonment. As such, Count 4 acted as a lesser included
3 offense instruction for Count 7, and counsel saw no need to
4 separately instruct on a lesser included offense for Count 7. That
5 was not unreasonable, and in any event prejudice is not shown in
6 this situation.

7 (Resp't's Lod. Doc. 13.)

8 **2. Petitioner's Arguments**

9 Petitioner argues that his trial counsel's waiver of the lesser included offense jury
10 instruction offered by the trial judge was not based on a tactical decision because counsel failed to
11 conduct sufficient investigation before making the decision to waive the instruction. (ECF No. 13
12 at 11.) Petitioner states that his counsel was not even aware that the trial judge would be willing
13 to give a lesser included offense instruction on count 7 until the trial judge brought up the matter
14 and essentially forced counsel to make an immediate decision. (*Id.*) According to petitioner, trial
15 counsel's decision to waive the instruction was made "on the spot" and without sufficient
16 investigation. (*Id.* at 11-12.) He argues this "on the spot" decision "was neither tactical or
17 strategic." (*Id.* at 11.) Petitioner asks, "How, then, did defense counsel in the brief discussion
18 with the court make a professionally reasonable decision when she did not even have sufficient
19 information to make an informed decision?" (*Id.* at 12.) Petitioner argues that if his trial counsel
20 had taken more time to research her decision, she "would have requested the instruction on count
21 7, as she had requested the lesser included offense on count 5." (*Id.* at 11.)

22 Petitioner contends that trial counsel's "on the spot" decision was "the result of an
23 incompetent counsel who was in no position to make any critical decisions in the matter because
24 she was not familiar with the laws and facts surrounding petitioner's defense." (*Id.*) Petitioner
25 argues, "any reasonable competent attorney in that situation would have immediately called a
26 "Time Out" and realized that pursuing an investigation was necessary to making an informed
27 choice among possible defenses, especially in a situation where the trial court was willing to give
28 a lesser offense because the evidence was not substantial enough to constitute the greater
offense." (*Id.* at 12-13.) In support of his arguments in this regard, petitioner cites the decision in
United States v. Span, 75 F.3d 1383 (9th Cir. 1996). In Span, the Ninth Circuit Court of Appeals

1 held that trial counsel's performance may be constitutionally deficient if counsel fails to request
2 appropriate jury instructions, including lesser included offense instructions. The court cautioned
3 that labeling such a choice "trial strategy" does not "automatically immunize an attorney's
4 performance from Sixth Amendment challenges." Id. at 1389. Rather, trial counsel's
5 performance is constitutionally deficient if "[c]ounsel's errors with the jury instructions were not
6 a strategic decision to forego one defense in favor of another" but, instead, "the result of a
7 misunderstanding of the law." Id. at 1390.

8 Petitioner claims that he suffered prejudice as a result of his trial counsel's error in failing
9 to request the lesser included offense jury instruction. (ECF No. 13 at 14.) He argues that the
10 lesser included offense instruction with regard to the kidnapping count against him was "critical
11 and necessary" to his defense because it was possible the jury in his case could have found he
12 committed false imprisonment, and not kidnapping, with respect to the events that occurred
13 outside his apartment. (Id.) Petitioner notes that, unlike kidnapping, "false imprisonment does
14 not include the element of asportation," and he points out that "the trial court itself recognized
15 that the evidence was susceptible of a finding that the distance of asportation from outside to
16 inside the apartment was not substantial enough to constitute the crime of kidnapping." (Id.)

17 Petitioner also notes that the jury acquitted him of "all the crimes that depended solely on
18 the victim's testimony which means that petitioner was acquitted of all crimes that took place
19 inside the apartment before the victim fled." (Id. at 15.) Petitioner speculates that had the jurors
20 at his trial received the lesser included offense instruction as to Count 7, they probably would
21 have found that the "asportation" required for a kidnapping conviction was not proven because
22 there was no risk of harm to the victim in moving her from outside the apartment to inside the
23 apartment. (Id.) Petitioner concludes that "there was a substantial evidentiary basis for an
24 acquittal on the kidnapping charge in favor of a lesser included offense of false imprisonment."
25 (Id.)

26 In support of this claim of ineffective assistance of trial counsel, petitioner has filed his
27 own declaration under penalty of perjury, in which he declares, in pertinent part, as follows: (1)
28 prior to the jury instruction conference held in open court and described by the California Court

1 of Appeal, his trial counsel had never spoken to him about lesser included offense jury
2 instructions with respect to count 7; (2) when his trial counsel finally did discuss the issue with
3 him during a recess, she told him that “she was not going to ask for the instruction to be read,”
4 and then stated ‘I believe the court has to give it to us anyway;’ (3) trial counsel did not ask
5 petitioner whether or not he wanted a lesser included offense jury instruction given with respect
6 to the charge against him in count 7; (4) trial counsel also did not ask him whether he wanted a
7 lesser included offense jury instruction given on count 7 if the court gave a lesser included
8 offense jury instruction with respect to the charge in count 4; (5) if petitioner had been asked, he
9 would have requested “the lesser included offense instruction on any count the court was willing
10 to give;” and (6) trial counsel did not advise him of the possible consequences of waiving the
11 lesser included offense jury instruction on count 7. (Id. at 22.) Petitioner states that his trial
12 counsel never advised him “that it would be her plan to pursue a tactical decision on the
13 kidnapping offense.” (Id. at 13.)

14 **3. Applicable Law**

15 The clearly established federal law governing ineffective assistance of counsel claims is
16 that set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To
17 succeed on a Strickland claim, a defendant must show that (1) his counsel’s performance was
18 deficient and that (2) the “deficient performance prejudiced the defense.” Id. at 687. Counsel is
19 constitutionally deficient if his or her representation “fell below an objective standard of
20 reasonableness” such that it was outside “the range of competence demanded of attorneys in
21 criminal cases.” Id. at 687–88 (internal quotation marks omitted). “Counsel’s errors must be ‘so
22 serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” Richter, 562
23 U.S. at 114 (quoting Strickland, 466 U.S. at 687). Reasonable tactical decisions, including
24 decisions with regard to the presentation of the case, are “virtually unchallengeable.” Strickland,
25 466 U.S. at 687-90. However, defense counsel has a “duty to make reasonable investigations or
26 to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466
27 U.S. at 691. Counsel must, “at a minimum, conduct a reasonable investigation enabling him to
28 make informed decisions about how best to represent his client.” Hendricks v. Calderon, 70 F.3d

1 1032, 1035 (9th Cir. 1995) (quoting Sanders, 21 F.3d at 1456 (internal citation and quotations
2 omitted).

3 A reviewing court is required to make every effort “to eliminate the distorting effects of
4 hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the
5 conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 669. See also Richter,
6 131 S. Ct. at 789 (same). Reviewing courts must “indulge a strong presumption that counsel’s
7 conduct falls within the wide range of reasonable professional assistance.” Strickland, 466 U.S.
8 at 689. There is in addition a strong presumption that counsel “exercised acceptable professional
9 judgment in all significant decisions made.” Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990)
10 (citing Strickland, 466 U.S. at 689). This presumption of reasonableness means that the court
11 must “give the attorneys the benefit of the doubt,” and must also “affirmatively entertain the
12 range of possible reasons [defense] counsel may have had for proceeding as they did.” Cullen v.
13 Pinholster, ___ U.S. ___, ___, 131 S. Ct. 1388, 1407 (2011) (internal quotation marks and
14 alterations omitted). The Ninth Circuit has observed:

15 [AEDPA] limits our authority to grant a federal writ by establishing
16 two “highly deferential” standards. Premo v. Moore, ___ U.S. ___
17 –, 131 S. Ct. 733, 740, 178 L.Ed.2d 649 (2011). “The pivotal
18 question is whether the state court’s application of the Strickland
19 standard was unreasonable. This is different from asking whether
20 defense counsel’s performance fell below Strickland’s standard.”
21 Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 785, 178
22 L.Ed.2d 624 (2011). Thus, a state court’s determination that a
23 claim lacks merit bars federal habeas relief so long as ‘fairminded
24 jurists could disagree’ on the state court’s decision. Yarborough v.
Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L.Ed.2d 938
(2004). Moreover, to grant a habeas petition under § 2254(d)(2), a
state court’s factual findings must be ‘clearly erroneous,’ not just
merely debatable. Torres v. Prunty, 223 F.3d 1103, 1107–08 (9th
Cir. 2000). These stringent standards ‘guard against extreme
malfunctions in the state criminal justice systems, not as a
substitute for ordinary error correction through appeal.’ Richter, —
– U.S. ___, 131 S. Ct. at 786 (internal quotation marks omitted).

25 Griffin v. Harrington, 727 F.3d 940, 945 (9th Cir. 2013).

26 “The standards created by Strickland and § 2254(d) are both “highly deferential,” and
27 when the two apply in tandem, review is ‘doubly’ so.” Richter, 562 U.S. at 105 (citations
28 omitted). Thus, in federal habeas proceedings involving “claims of ineffective assistance of

1 counsel, . . . AEDPA review must be ““doubly deferential”” in order to afford “both the state
2 court and the defense attorney the benefit of the doubt.” Woods v. Daniel, ___U.S.____, ____,
3 2015 WL 1400852, at *3 (U.S. Mar. 30, 2105) (quoting Burt v. Titlow, 571 U.S. ____, ____, 134 S.
4 Ct. 10, 13 (2013)). As the Ninth Circuit has recently acknowledged:

5 “The question,” therefore, “is whether there is any reasonable
6 argument that counsel satisfied Strickland’s deferential standard.”
7 Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Even where this
8 court believes the state court decision was “wrong,” that result must
be upheld if “fairminded jurists could disagree on [its] correctness.”
Id. at 786.

9 Camp v. Nevins, ___F.3d____, ____, 2015 WL 1347350, at * 4 (9th Cir. Mar. 26, 2015).

10 With these demanding standards in mind, the undersigned turns to address petitioner’s
11 claims.

12 **4. Analysis**

13 At his trial petitioner testified that G. went to his apartment voluntarily and had
14 consensual sex with him. This testimony was supported by another witness who recounted
15 observing petitioner and G. “talking, hugging, and kissing” in the swimming pool prior to going
16 into petitioner’s apartment. This same witness testified that petitioner and G. appeared
17 affectionate toward each other when they returned to the apartment, and that they were
18 subsequently talking and laughing in the bedroom of petitioner’s apartment. Petitioner further
19 testified at his trial that G. later stole his wallet and left the apartment after they had an argument
20 about it. Although he agreed there was a physical altercation between them outside the apartment
21 related to his attempts to get his wallet back from G., he denied hitting, dragging, or kicking G, or
22 forcing her back into his apartment. (Reporter’s Transcript on Appeal at 452-58, 483-84.)
23 Petitioner explained that he believed his behavior was justified because he thought G. had stolen
24 his wallet and he didn’t want her to leave with it. (Id. at 452-58, 479-80)

25 In light of petitioner’s extensive testimony at trial supporting his defense that no
26 kidnapping occurred and the trial testimony of another witness presented by the defense that
27 petitioner and G. appeared to be on very good terms before the fight outside the apartment
28 occurred, it is reasonable to conclude that petitioner’s trial counsel made a tactical decision to

1 give the jury an all-or-nothing choice on the kidnapping charge based on the expectation that
2 petitioner would be acquitted of that charge. While some lawyers may have chosen to request the
3 lesser included offense jury instruction, the decision by petitioner’s trial counsel to employ a
4 different tactic was not unreasonable under the facts of this case. Petitioner himself concedes that
5 there was a substantial evidentiary basis for an acquittal on the kidnapping charge against him.
6 Nor was it unreasonable for petitioner’s trial counsel to be concerned that giving the jury two
7 instructions on false imprisonment might result in two convictions for false imprisonment instead
8 of an acquittal on the kidnapping charge and a conviction on only one count of false
9 imprisonment.

10 The Ninth Circuit Court of Appeals has opined that when trial counsel makes a “difficult
11 but thoughtful tactical decision,” a reviewing court must presume that counsel’s conduct was
12 “within the range of competency.” Harris v. Pulley, 885 F.2d 1354, 1368 (9th Cir. 1988). Of
13 course, the defense “need not request instructions inconsistent with its trial theory.” Butcher v.
14 Marquez, 758 F.2d 373, 377 (9th Cir. 1985) (concluding that counsel was not ineffective for
15 choosing to forego a voluntary manslaughter jury instruction when the defense theory was that
16 defendant did not commit the charged act, not that he committed it under provocation). As the
17 Ninth Circuit stated under somewhat similar circumstances to those presented here:

18 It is true that counsel did not offer a negligent homicide instruction
19 and that he objected to the mitigated deliberate homicide
20 instruction. The record discloses that counsel did so not out of
21 ignorance of the law but as the result of a tactical decision that the
22 jury should be forced to the choice of finding Bashor guilty of
23 deliberate homicide or acquitting him outright. With the benefit of
24 hindsight we know that this strategy was incorrect; however, it did
25 not constitute ineffective assistance of counsel. United States v.
26 Stern, 519 F.2d 521, 524–25 (9th Cir.), cert. denied, 423 U.S. 1033,
27 96 S. Ct. 565, 46 L.Ed.2d 407 (1975), (reasoned tactical decisions
28 are not faulted, even if in retrospect better tactics were available).

24 Bashor v. Risley, 730 F.2d 1228, 1241 (9th Cir. 1984). See also Doucet v. Swarthout, No. 2:12-
25 cv-0031 GEB KJN P, 2014 WL 1884218, at *9-10 (E.D. Cal. May 12, 2014) (no ineffective
26 assistance where counsel specifically requested that the jury not be instructed on attempted
27 voluntary manslaughter, and that despite evidence in the record supporting the instruction on the
28 lesser included offense, counsel stated in open court that he made this decision in consultation

1 with petitioner in light of the chosen alternate theory of defense); Carrillo v. Hernandez, No. CV
2 08-5616-ODW(CW), 2014 WL 103109, at *18 (C.D. Cal. Jan. 8, 2014) (no ineffective assistance
3 in not requesting a lesser included instruction that was arguably inconsistent with the defense
4 theory presented at trial). Under the governing legal standards, the decision by petitioner’s trial
5 counsel to decline the lesser included offense jury instruction was “not outside the range of
6 competence demanded of attorneys in criminal cases.” Strickland, 466 U.S. at 687-88.

7 As explained above, petitioner suggests that his trial counsel merely decided on the spur
8 of the moment, and only after the trial judge raised the issue, to decline the lesser included
9 offense jury instruction. He argues this implies that his counsel had not conducted adequate
10 “investigation” into the issue before making that decision. Petitioner offers no support for this
11 conclusory allegation, and it is therefore insufficient to support his claim for relief based upon
12 alleged ineffective assistance of counsel. Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995);
13 James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994)) (“[c]onclusory allegations which are not
14 supported by a statement of specific facts do not warrant habeas relief”). Rather, it is entirely
15 possible that trial counsel made her decision based on previous investigation into the choice of
16 defense strategy. The fact that defense counsel did not request additional time to consider the
17 lesser included jury instruction is not evidence that her representation was deficient.

18 Petitioner declares that he would have requested the lesser included offense instruction if
19 he had been consulted by his counsel.³ This argument also does not support petitioner’s claim for
20 federal habeas relief. Even if petitioner’s trial counsel did not consult with petitioner regarding
21 whether to request or reject a lesser included offense instruction, counsel cannot be said to have

22 _____
23 ³ It is not at all clear that petitioner was not consulted regarding the decision to reject a lesser
24 included instruction. Indeed, the record before the court includes the following exchange
between petitioner’s trial counsel and the court:

25 “[DEFENSE COUNSEL]: Can I explain to him what’s happening?

26 “THE COURT: Yes.

27 “[DEFENSE COUNSEL]: We are asking that it not be read.

28 Haynie, 2013 WL 518616, at *3-4.

1 rendered ineffective assistance by failing to obtain petitioner’s permission to decline the
2 instruction or to determine the overall defense strategy. This is because “[t]he appointed counsel
3 manages the lawsuit and has the final say in all but a few matters of trial strategy.” Faretta v.
4 California, 422 U.S. 806, 812 (1975). Further, “a lawyer may properly make a tactical
5 determination of how to run a trial in the face of his client’s incomprehension or even explicit
6 disapproval.” Brookhart v. Janis, 384 U.S. 1, 8 (1966). See also Raley v. Ylst, 470 F.3d 792, 799
7 (9th Cir.2006) (“A disagreement with counsel’s tactical decisions does not provide the basis for
8 declaring that the representation was constitutionally deficient.”); United States v. Corona-Garcia,
9 210 F.3d 973, 977, n. 2 (9th Cir. 2000) (“Even if we were to conclude that the conflict with
10 respect to trial tactics was severe, however, we would still be disinclined to reverse on that
11 ground because trial tactics are clearly within the realm of powers committed to the discretion of
12 defense counsel in any event.”); United States v. Wadsworth, 830 F. 2d 1500, 1509 (9th Cir.
13 1987) (“It is equally clear that appointed counsel, and not his client, is in charge of the choice of
14 trial tactics and the theory of defense”); Rhay v. Browder, 342 F.2d 345, 349 (9th Cir. 1965)
15 (“[C]ounsel is the manager of the lawsuit; this is of the essence of the adversary system of which
16 we are so proud. In the nature of things he must be, because he knows how to do the job and the
17 defendant does not. That is why counsel must be there.”) Here, trial counsel’s apparent belief that
18 the evidence on the kidnapping charge against petitioner might lead to a not guilty verdict on that
19 count was reasonable, regardless of whether she discussed this issue with petitioner.

20 In rejecting petitioner’s argument on appeal that the trial court had erred in failing to give
21 the lesser included instruction, the California Court of Appeal determined that trial counsel’s
22 decision not to request a lesser-included offense instruction was based on a tactical decision to
23 proceed with an all-or-nothing defense to the kidnapping charge. In rejecting petitioner’s
24 subsequently presented ineffective assistance of counsel claim, the Sacramento County Superior
25 Court agreed with that conclusion, and further found that trial counsel’s tactical choice was a
26 reasonable one under the circumstances of petitioner’s case. The Sacramento County Superior
27 Court’s decision in this regard is clearly not “so lacking in justification that there was an error
28 well understood and comprehended in existing law beyond any possibility for fairminded

1 disagreement.” Richter, 562 U.S. at 103. Accordingly, petitioner is not entitled to federal habeas
2 relief with respect to his claim that he received ineffective assistance from his trial counsel.

3 **C. Violation of Due Process**

4 In the introductory page to his Amended Petition filed on July 25, 2014, petitioner states
5 that he “only raises a single claim of ineffective assistance of trial counsel.” (ECF No. 13 at 1.)
6 However, the amended petition attached thereto also includes a claim that “the state court
7 arbitrarily deprived petitioner due process of law guaranteed by the 14th Amendment to the
8 United States Constitution.” (ECF No. 13 at 6.) In an abundance of caution, the undersigned will
9 also address this claim that petitioner’s right to due process was violated.

10 Petitioner argues that the decision of the California Court of Appeal rejecting his
11 argument that the trial court erred in failing to give the lesser included offense jury instruction
12 violated its own prior decision in People v. Golde, 163 Cal.App.4th 101 (2008). He contends that
13 this erroneous ruling by the Court of Appeal also violated his Fourteenth Amendment “liberty
14 interest” in being “protected from having the state arbitrarily deny him relief.” (Id. at 20.)
15 Petitioner argues that, under state law, the trial court had a sua sponte duty to instruct the jury on
16 all lesser included offenses supported by the evidence introduced at trial and that the trial court’s
17 failure to do so in this case violated state law. (Id. at 20-21.) Furthermore, petitioner argues that
18 his state created right to a lesser included offense jury instruction was arbitrarily abrogated by the
19 California Court of Appeal’s erroneous holding that his claim of trial court error was waived
20 under the doctrine of invited error.⁴

21 ⁴ In People v. Breverman, 19 Cal.4th 142, 154-55 (1998), the California Supreme Court held
22 that a trial court’s obligation to instruct the jury sua sponte on lesser included offenses supported
23 by the evidence exists even when as a matter of trial tactics a defendant not only fails to request
24 the instruction but expressly objects to its being given. In Golde, the California Court of Appeal
25 for the Third Appellate District, relying on the Breverman decision, found that the trial court in
26 that case had a duty to instruct on all lesser included offenses supported by the evidence and erred
27 in leaving it up to the defendant to make that decision. The court in Golde concluded, however,
28 that the lesser included offense in that case was not supported by the evidence and, therefore, a
jury instruction on that offense need not have been given. Golde, 163 Cal. App.4th at 115-16.
The court also held that, in the context of that case, the law concerning invited error is
“inapposite.” Id. at 116. In People v. Beames, 40 Cal.4th 907, 926 (2007), however, the
California Supreme Court rejected the defendant’s argument that the trial court’s failure to
instruct the jury on a lesser included offense violated his federal constitutional rights because any
error by the trial court in this regard was “both invited and harmless.” See also Bortis v.
Swarthout, No. 2:11-cv-3186-KJM-EFB P, 2013 WL 4012833, at * 11 (E.D. Cal. Aug. 6, 2013).

1 In essence, although petitioner places a “due process violation” label on this claim, he is
2 actually arguing that the decision of the California Court of Appeal was an erroneous application
3 of California law. As noted above, federal habeas relief is not available for alleged error in the
4 application of state law, and habeas corpus cannot be utilized in federal court to try state issues de
5 novo. Milton v. Wainwright, 407 U.S. 371, 377 (1972); see also Wilson, 562 U.S. at 16;
6 Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009) (“[W]e have repeatedly held that ‘it is not
7 the province of a federal habeas court to reexamine state-court determinations on state-law
8 questions.’”); Wood v. Ryan, 693 F.3d 1104, 1115 (9th Cir. 2012). Accordingly, questions of
9 whether the trial court violated state law in failing to give the lesser-included offense jury
10 instruction and/or whether the appellate court’s decision addressing that issue was erroneous
11 under state law are not properly presented to this federal habeas court.

12 A habeas petitioner may not “transform a state-law issue into a federal one” merely by
13 asserting a violation of the federal constitution. Langford v. Day, 110 F.3d 1380, 1389 (9th Cir.
14 1997). Rather, petitioner must show that the decision of the state courts somehow “violated the
15 Constitution, laws, or treaties of the United States.” Little v. Crawford, 449 F.3d 1075, 1083 (9th
16 Cir. 2006) (quoting Estelle, 502 U.S. at 68). Petitioner has failed to make this showing.

17 The Fourteenth Amendment Due Process Clause applies when government action
18 deprives a person of life, liberty or property. U.S. Const., Amend. IV. “The Supreme Court has
19 ‘repeatedly held that state statutes may create liberty interests that are entitled to the procedural
20 protections of the Due Process Clause of the Fourteenth Amendment.’” Carlo v. City of Chino,
21 105 F.3d 493, 497 (9th Cir. 1997) (quoting Vitek v. Jones, 445 U.S. 480, 488 (1980)). Here,
22 petitioner has not cited any case establishing that he has a state created liberty interest in having
23 his jury in a state criminal prosecution instructed on a lesser included offense.⁵ It is correct that
24 the United States Supreme Court has held that the failure to instruct on a lesser included offense
25 in a capital case constitutes constitutional error if there was evidence to support the giving of the
26 instruction. Beck v. Alabama, 447 U.S. 625, 638 (1980). The Supreme Court has not decided,

27
28 ⁵ Let alone that such an instruction must be given over defense counsel’s objection.

1 however, whether this rationale extends to non-capital cases. The Ninth Circuit, like several other
2 federal circuits, has declined to find constitutional error arising from the failure to instruct on a
3 lesser included offense in a non-capital case. See Solis v. Garcia, 219 F.3d 922, 929 (9th Cir.
4 2000); Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998) (“[T]he failure of a state trial
5 court to instruct on lesser included offenses in a non-capital case does not present a federal
6 constitutional question”); Bashor, 730 F.2d at 1240 (“[T]he failure of a state court to instruct on a
7 lesser offense [in a non-capital case] fails to present a federal constitutional question and will not
8 be considered in a federal habeas corpus proceeding.”); James v. Reese, 546 F.2d 325, 327 (9th
9 Cir. 1976) (“Failure of a state court to instruct on a lesser offense fails to present a federal
10 constitutional question and will not be considered in a federal habeas corpus proceeding”); see
11 also United States v. Rivera-Alonzo, 584 F.3d 829, 834 n.3 (9th Cir. 2009) (“In the context of a
12 habeas corpus review of a state court conviction, we have stated that there is no clearly
13 established federal constitutional right to lesser included instructions in non-capital cases. . . .
14 On direct review, we have not resolved whether there is a Constitutional right to a lesser-included
15 instruction in noncapital cases.”)

16 In the absence of a liberty interest, the fact that a state court decision may arguably appear
17 to contravene state law does not make that decision “arbitrary,” in violation of the federal due
18 process clause. See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442
19 U.S. 1 (1979). Moreover, to find a constitutional right to a lesser-included offense instruction
20 here would require the application of a new rule of law in the context of a federal habeas petition,
21 something the court cannot do under the holding in Teague v. Lane, 489 U.S. 28 (1989). See
22 Solis, 219 F.3d at 929 (habeas relief for failure to instruct on lesser included offense in non-
23 capital case barred by Teague because it would require the application of a new constitutional
24 rule); Turner v. Marshall, 63 F.3d 807, 819 (9th Cir. 1995), overruled on other grounds by Tolbert
25 v. Page, 182 F.3d 677 (9th Cir. 1999) (en banc) (same).

26 For all of these reasons, petitioner is not entitled to federal habeas relief with respect to his
27 claim that his right to due process was violated by the California Court of Appeal’s rejection of
28 his instructional error argument on appeal.

1 **IV. Motion for Default Judgment**

2 On October 14, 2014, petitioner filed a motion entitled “Objection to the Delay in Time
3 Constraints.” (ECF No. 22.) Therein, petitioner argues that this court should grant his habeas
4 petition because of respondent’s failure to file a timely answer to his petition. The court will
5 construe petitioner’s filing as a motion for default judgment.

6 A default judgment is unavailable in a habeas action. See Gordon v. Duran, 895 F.2d 610,
7 612 (9th Cir. 1990). In any event, respondent was never in default, nor was respondent’s answer
8 untimely. A review of the court docket reflects that on August 1, 2014, respondent was ordered
9 to file a response to petitioner’s February 21, 2014 amended petition for writ of habeas corpus
10 within sixty days. (ECF No. 14.) Respondent filed a timely answer on September 30, 2014, as
11 ordered. (ECF No. 20.) Accordingly, petitioner’s motion for default judgment will be denied.

12 **V. Motion to Reissue and Rehear Amended Habeas Petition**

13 As noted at the outset of this amended order and findings and recommendations, on April
14 27, 2015, petitioner filed a document entitled “Motion: to Reissue and Rehear Amended Habeas
15 Petition.” Therein, petitioner requests that the court address the habeas petition included as part
16 of his July 25, 2014 filing. Petitioner’s request has been granted and above the undersigned has
17 addressed his habeas petition included as part of his July 25, 2014 filing.

18 **VI. Motion for Extension of Time**

19 On May 4, 2015, petitioner filed a motion for extension of time to file objections to the
20 undersigned’s April 10, 2015 findings and recommendations. In light of the fact that those
21 findings and recommendations have now been vacated, petitioner’s request for extension of time
22 is unnecessary and will be denied on that basis. Petitioner may file objections to these amended
23 findings and recommendations within fourteen days from the date of service.

24 **VII. Conclusion**

25 Accordingly, IT IS HEREBY ORDERED that:

- 26 1. The findings and recommendations issued on April 10, 2015, are withdrawn;
27 2. Petitioner’s Motion to Reissue and Rehear Amended Habeas Petition (ECF No. 25) is
28 granted;

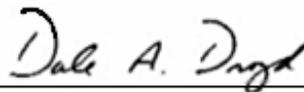
1 3. Petitioner's May 4, 2015 motion for extension of time to file objections to the April 10,
2 2015 findings and recommendations is denied as unnecessary; and

3 4. Petitioner's motion for default judgment (ECF No. 22) is denied;

4 IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas
5 corpus be denied.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
8 after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
11 shall be served and filed within fourteen days after service of the objections. Failure to file
12 objections within the specified time may waive the right to appeal the District Court's order.
13 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
14 1991). In his objections petitioner may address whether a certificate of appealability should issue
15 in the event he files an appeal of the judgment in this case. See Rule 11, Federal Rules Governing
16 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it
17 enters a final order adverse to the applicant).

18 Dated: June 5, 2015

19 

20 _____
21 DALE A. DROZD
22 UNITED STATES MAGISTRATE JUDGE

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