

1 failing to raise the prosecution's suppression of evidence; (6) appellate counsel was ineffective for
2 not raising trial counsel's failure to investigate and discover the prosecution's suppression of
3 evidence; (7) the trial court denied petitioner the right to represent himself at trial; (8) trial
4 counsel was ineffective during proceedings to determine whether petitioner should have received
5 the right of self-representation at trial; and (9) appellate counsel was ineffective for not raising
6 trial counsel's ineffectiveness during proceedings to determine whether petitioner should have
7 received the right of self-representation at trial. After careful review of the record, this court
8 concludes that the petition should be denied.

9 II. Relevant Procedural History

10 On February 27, 2013, a jury found petitioner guilty of five counts of second degree
11 robbery (Cal. Pen. Code, § 211), and found true five special allegations that petitioner personally
12 used a firearm during the commission of the crimes (Cal. Pen. Code, § 12022.53(b)). (2 CT 433-
13 37; 4 RT 955-62.) Petitioner had previously entered a no contest plea to the crime of being a
14 felon in possession of a firearm (Cal. Pen. Code, § 12021(a)(1)). (1 CT 21, 291; 1 RT 110-18.)

15 Petitioner filed a petition for writ of habeas corpus in the Sacramento County Superior
16 Court on March 28, 2013. (LD 5.) That court denied the petition on April 12, 2013. (LD 6.)

17 On May 22, 2013, petitioner filed a petition for writ of error coram nobis in the
18 Sacramento County Superior Court, asking the court to vacate a 2009 conviction for first degree
19 residential burglary. (LD 7.)

20 Ultimately, on June 3, 2013, petitioner was sentenced to a total of thirty years and four
21 months in state prison. (LD 1.)

22 On July 11, 2013, the superior court denied the previously-filed petition for writ of error
23 coram nobis. (LD 8.)

24 Petitioner appealed the conviction to the California Court of Appeal, Third Appellate
25 District. The Court of Appeal affirmed the conviction on November 4, 2014. (LD 2.)

26 Petitioner filed a petition for review in the California Supreme Court (LD 3), which was
27 denied on January 21, 2015 (LD 4).

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1 On September 8, 2015, petitioner filed a petition for writ of habeas corpus with the
2 Sacramento County Superior Court. (LD 9.) The superior court, in a reasoned decision dated
3 November 6, 2015, denied the petition. (LD 10.)

4 Petitioner filed a petition for writ of habeas corpus in the Third District Court of Appeal
5 on February 22, 2016. (LD 11.) The state appellate court denied the petition without comment
6 on February 25, 2016. (LD 12.)

7 Thereafter, on April 11, 2016, petitioner filed a second petition for writ of habeas corpus
8 with the Third District Court of Appeal. (LD 13.) The petition was summarily denied on April
9 14, 2016. (LD 14.)

10 On May 16, 2016, petitioner filed a petition for writ of habeas corpus with the California
11 Supreme Court. (LD 15.) On June 29, 2016, the state supreme court summarily denied the
12 petition. (LD 16.)

13 Petitioner filed the instant petition on July 11, 2016. (ECF No. 1.) Counsel was
14 appointed on November 9, 2016. (ECF No. 10.) A first amended petition for writ of habeas
15 corpus was filed on February 24, 2017. (ECF No. 18.)

16 On May 9, 2017, respondent filed a motion to dismiss. (ECF No. 24.) Following briefing
17 (ECF Nos. 27-28, 31, 34 & 37), the undersigned issued findings, recommending the motion to
18 dismiss be denied. (ECF No. 38.) Ultimately, the district judge adopted the findings and
19 recommendations and ordered the motion denied. (ECF No. 41.)

20 On May 18, 2018, respondent filed its answer. (ECF No. 44.) On June 13, 2018,
21 petitioner filed a traverse. (ECF No. 47.)

22 III. Facts¹

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

26
27 ¹ The facts are taken from the opinion of the California Court of Appeal for the Third Appellate
28 District in People v. Gray, No. C074022 (11/4/2014), a copy of which was lodged by respondent
as Lodged Document 2.

1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 We omit a recitation of the underlying facts, as they are immaterial
3 to our resolution of defendant's appeal. For our purposes, it is
4 sufficient to say that in May 2011, defendant was charged with
5 robbery and a number of other offenses stemming from an incident
6 two days earlier. At a hearing near the end of June 2011, defense
7 counsel expressed a doubt as to defendant's competence, and the trial
8 court (Judge Marjorie Koller) immediately suspended the
9 proceedings and ordered that defendant be examined.

10 Dr. Charles B. Schaffer, a psychiatrist and diplomate with the
11 American Board of Psychiatry and Neurology, conducted a
12 psychiatric evaluation of defendant and produced a report dated July
13 20, 2011. Dr. Schaffer concluded that defendant had the ability to
14 understand the proceedings and to assist his counsel in a rational
15 manner. Initially, defense counsel requested a trial on the issue of
16 defendant's competency. Subsequently, however, the matter was
17 referred back to Dr. Schaffer for a further evaluation,^[1] and he
18 produced a supplemental report dated October 3, 2011, in which he
19 once again concluded that defendant had the ability to understand the
20 proceedings and to assist his counsel in a rational manner. Two days
21 later, on October 5, the parties submitted the matter based on Dr.
22 Schaffer's supplemental report, and the court found defendant
23 competent and reinstated the criminal proceedings.

24 [FN 1:] Apparently the matter was referred back to Dr.
25 Schaffer at defense counsel's request based on defendant's
26 "limited cooperation during the initial evaluation and
27 additional information from counsel and defendant's family."

28 In April 2012, defendant filed a *Faretta*[] motion. The court (Judge
John Winn) appointed Dr. Paul G. Mattiuzzi to determine if
defendant was competent to represent himself. Dr. Mattiuzzi
examined defendant in May and concluded that defendant was not
competent to represent himself. At a hearing in June, the parties
submitted on Dr. Mattiuzzi's report, and the court denied the *Faretta*
motion.

Meanwhile, in preparation for trial, defense counsel arranged for a
comprehensive neuropsychological evaluation of defendant by Dr.
John J. Wicks, a forensic neuropsychologist. Dr. Wicks conducted
his evaluation over three days in April and May 2012 and produced
a report dated July 16, 2012. Based on that report, defense counsel
decided to have a PET scan conducted on defendant's brain to
determine if any organic neurological defect could be detected. In
August 2012, the parties agreed to continue the trial to September to
allow defense counsel to obtain the scan. In September, defense
counsel moved for a further continuance because she needed a
psychiatrist or neurologist to order the scan and had not yet been able
to get the order. Consequently, the court continued the trial again,
ultimately setting a trial date in January 2013.

A week before the scheduled trial date of January 17, 2013, defense
counsel put the case on calendar so that she could again express a

1 doubt about defendant's competence. This time, defense counsel
2 informed the court that she believed defendant had a developmental
3 "deficiency under [Penal Code section] 1368." She stated that the
4 brain scan was completed in November, and based on her
5 conversations with the neuropsychiatrist who ordered the scan (Dr.
6 Albert Globus), as well as review of the radiologist's report of the
7 scan, there were "confirmed areas of ... brain damage consistent ...
8 with Dr. Wicks' earlier report which was based on family history, on
9 educational records, [and] juvenile probation reports of Mr. Gray
10 dating back to when he was eight years old." Defense counsel
11 contended the scan results were "a hard science confirmation and
12 validation of Dr. Wicks' neuro psych evaluation..." She sought a
13 referral for further examination by "psychologists [who are]
14 available who can focus on developmental disabilities and focus
15 more on his abilities and lack of abilities...."

9 In opposition to the request for another competency hearing, the
10 People argued that Dr. Wicks's report did not justify a further
11 competency hearing because it did not disclose a substantial change
12 of circumstances or new evidence casting serious doubt on the
13 validity of the prior finding of competence.

12 The court stated that while both attorneys were "spending a lot of
13 time on Dr. Wicks' report," that report had never been submitted to
14 the court. Defense counsel provided a copy of the report to the court,
15 and the court reviewed the report before calling the matter again later
16 that afternoon. After both attorneys submitted without offering
17 further evidence, the court explained that it was a "difficult case"
18 because the competency issue was considered earlier based on
19 whether defendant "ha[d] a mental illness that require[d] psychiatric
20 treatment and medication," while "[t]he issue now is whether or not
21 it's a type of developmental disability." Noting again that it was "a
22 close case," the court concluded as follows: "[W]hen I review it all,
23 I think my thought is that based upon everything I've seen, I think
24 Mr. Gray is at this point competent to stand trial. So I'm not going to
25 suspend proceedings again. I've had some interaction with Mr. Gray
26 directly because at one point he wanted to represent himself.
27 Actually, if it wasn't for the fact that we suspended proceedings, I
28 would have never appointed a doctor probably to meet with Mr.
Gray. You know, even though it's a close case, I do feel that at this
point he is able to assist counsel and able to understand the nature of
the proceedings. So I am going to deny the request to suspend
criminal proceedings at this point."

23 The case was tried to a jury in February 2013. On the third day of
24 jury deliberations, the jury foreperson asked to speak to the court
(Judge Michael Kenny). After the court warned the foreperson not to
25 say anything about the jury's deliberations, the foreperson told the
26 court the following:

26 "My concern is with what a juror's literacy level is. We have a juror
27 who I do not believe has the comprehension to be able to read the
28 instructions as given to her. I'm concerned, because we have tried to
explain in different modes and modalities. I teach special needs
students, and I have tried numerous ways to see if we can get her to

1 comprehend what ‘reasonable’ means and what ‘beyond a reasonable
2 doubt’ means, and it's been stalling us.” The court then ascertained
3 from the foreperson that the juror at issue was participating in
4 deliberations and while the foreperson believed the juror had “limited
5 literacy,” the other jurors had read the instructions “out loud to her,”
6 “but it did not seem to help.”

7 The court then allowed the attorneys to ask questions, and the
8 prosecutor asked whether the juror appeared to understand the
9 instructions; the foreperson said it did not appear so. The court
10 prohibited the foreperson from explaining the basis of her conclusion
11 that the juror did not understand the instructions, however, because
12 “[t]hat is going into deliberations.” The foreperson then reiterated
13 that multiple people had read the instructions, the instructions had
14 been read slowly, and they “[e]ven had [the juror] track with her
15 finger along with the text.”

16 The court told the foreperson, “it sounds like you are doing
17 everything that the Court would request you to do,” and “individuals
18 have varying interpretations at times, based on the facts as they have
19 determined them through the process of the trial.” Accordingly, the
20 court directed the foreperson to return and continue deliberating.

21 Outside the presence of the foreperson, the prosecutor argued that the
22 problem appeared to be more than a difference of opinion; “[i]t
23 sounds like the juror does not understand the instruction itself, or the
24 juror cannot understand the instructions.” The court disagreed,
25 stating that “it all boils around what is reasonable and what is not
26 reasonable. And it sounds like substantial jurors have reached a
27 determination of facts of what is reasonable, and that this juror does
28 not believe that, in fact, that interpretation is reasonable.” The
prosecutor proposed that the court ask the juror if she understood the
instructions as they were read to her without asking her about her
opinion, but the court declined to do so because the court understood
“that there was a difference [of opinion] with regard to—as to what
reasonable doubt is.” Ultimately, the court decided to “wait and see.”
That afternoon, without further incident, the jury returned its verdict.

20 (People v. Gray, LD 2 at 1-3.)

21 IV. Standards for a Writ of Habeas Corpus

22 An application for a writ of habeas corpus by a person in custody under a judgment of a
23 state court can be granted only for violations of the Constitution or laws of the United States. 28
24 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or
25 application of state law. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010); Estelle v. McGuire, 502
26 U.S. 62, 67-68 (1991).

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

1 An application for a writ of habeas corpus on behalf of a person in
2 custody pursuant to the judgment of a State court shall not be granted
3 with respect to any claim that was adjudicated on the merits in State
4 court proceedings unless the adjudication of the claim -

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

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

11 28 U.S.C. § 2254(d).

12 For purposes of applying § 2254(d)(1), “clearly established federal law” consists of
13 holdings of the United States Supreme Court at the time of the last reasoned state court decision.
14 Thompson v. Runnels, 705 F.3d 1089, 1096 (9th Cir. 2013) (citing Greene v. Fisher, 132 S. Ct.
15 38, 44-45 (2011)); Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011) (citing Williams v.
16 Taylor, 529 U.S. 362, 412 (2000)). Circuit court precedent “may be persuasive in determining
17 what law is clearly established and whether a state court applied that law unreasonably.” Stanley,
18 633 F.3d at 859 (quoting Maxwell v. Roe, 606 F.3d 561, 567 (9th Cir. 2010)). However, circuit
19 precedent may not be “used to refine or sharpen a general principle of Supreme Court
20 jurisprudence into a specific legal rule that th[e] [Supreme] Court has not announced.” Marshall
21 v. Rodgers, 569 U.S. 58, 64 (2013) (citing Parker v. Matthews, 132 S. Ct. 2148, 2155 (2012) (per
22 curiam)). Nor may it be used to “determine whether a particular rule of law is so widely accepted
23 among the Federal Circuits that it would, if presented to th[e] [Supreme] Court, be accepted as
24 correct. Id. Further, where courts of appeals have diverged in their treatment of an issue, it
25 cannot be said that there is “clearly established Federal law” governing that issue. Carey v.
26 Musladin, 549 U.S. 70, 77 (2006).

27 A state court decision is “contrary to” clearly established federal law if it applies a rule
28 contradicting a holding of the Supreme Court or reaches a result different from Supreme Court
precedent on “materially indistinguishable” facts. Price v. Vincent, 538 U.S. 634, 640 (2003).
Under the “unreasonable application” clause of § 2254(d)(1), a federal habeas court may grant the
writ if the state court identifies the correct governing legal principle from the Supreme Court’s

1 decisions, but unreasonably applies that principle to the facts of the prisoner’s case.² Lockyer v.
2 Andrade, 538 U.S. 63, 75 (2003); Williams v. Taylor, 529 U.S. at 413; Chia v. Cambra, 360 F.3d
3 997, 1002 (9th Cir. 2004). In this regard, a federal habeas court “may not issue the writ simply
4 because that court concludes in its independent judgment that the relevant state-court decision
5 applied clearly established federal law erroneously or incorrectly. Rather, that application must
6 also be unreasonable.” Williams v. Taylor, 529 U.S. at 411. See also Schriro v. Landrigan, 550
7 U.S. 465, 473 (2007); Lockyer, 538 U.S. at 75 (it is “not enough that a federal habeas court, in its
8 ‘independent review of the legal question,’ is left with a “‘firm conviction’” that the state court
9 was “‘erroneous’”). “A state court’s determination that a claim lacks merit precludes federal
10 habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s
11 decision.” Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541
12 U.S. 652, 664 (2004)). Accordingly, “[a]s a condition for obtaining habeas corpus from a federal
13 court, a state prisoner must show that the state court’s ruling on the claim being presented in
14 federal court was so lacking in justification that there was an error well understood and
15 comprehended in existing law beyond any possibility for fair-minded disagreement.” Richter,
16 562 U.S. at 103.

17 If the state court’s decision does not meet the criteria set forth in § 2254(d), a reviewing
18 court must conduct a de novo review of a habeas petitioner’s claims. Delgadillo v. Woodford,
19 527 F.3d 919, 925 (9th Cir. 2008); see also Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008)
20 (en banc) (“[I]t is now clear both that we may not grant habeas relief simply because of
21 § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by
22 considering de novo the constitutional issues raised”).

23 The court looks to the last reasoned state court decision as the basis for the state court
24 judgment. Stanley, 633 F.3d at 859; Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004).
25 If the last reasoned state court decision adopts or substantially incorporates the reasoning from a

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 previous state court decision, this court may consider both decisions to ascertain the reasoning of
2 the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). “When a
3 federal claim has been presented to a state court and the state court has denied relief, it may be
4 presumed that the state court adjudicated the claim on the merits in the absence of any indication
5 or state-law procedural principles to the contrary.” Richter, 562 U.S. at 99. This presumption
6 may be overcome by a showing “there is reason to think some other explanation for the state
7 court’s decision is more likely.” Id. at 99-100 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803
8 (1991)). Similarly, when a state court decision on petitioner’s claims rejects some claims but
9 does not expressly address a federal claim, a federal habeas court must presume, subject to
10 rebuttal, that the federal claim was adjudicated on the merits. Johnson v. Williams, 568 U.S. 289,
11 298 (2013) (citing Richter, 562 U.S. at 98). If a state court fails to adjudicate a component of the
12 petitioner’s federal claim, the component is reviewed de novo in federal court. Wiggins v. Smith,
13 539 U.S. 510, 534 (2003).

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

22 A summary denial is presumed to be a denial on the merits of the petitioner’s claims.
23 Stancle v. Clay, 692 F.3d 948, 957 & n.3 (9th Cir. 2012). While the federal court cannot analyze
24 just what the state court did when it issued a summary denial, the federal court must review the
25 state court record to determine whether there was any “reasonable basis for the state court to deny
26 relief.” Richter, 562 U.S. at 98. This court “must determine what arguments or theories . . . could
27 have supported the state court’s decision; and then it must ask whether it is possible fairminded
28 jurists could disagree that those arguments or theories are inconsistent with the holding in a prior

1 decision of [the Supreme] Court.” *Id.* at 101. The petitioner bears “the burden to demonstrate
2 that ‘there was no reasonable basis for the state court to deny relief.’” *Walker v. Martel*, 709 F.3d
3 925, 939 (9th Cir. 2013) (quoting *Richter*, 562 U.S. at 98).

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

8 V. Petitioner’s Claims

9 A. *Denial of Due Process: Incompetent to Stand Trial*

10 Petitioner claims that he was denied due process because he was incompetent to stand
11 trial. (ECF No. 18 at 19-33; ECF No. 47 at 5-10.) Respondent maintains the state court’s
12 determination was reasonable, thus, petitioner is barred from relief in this court. (ECF No. 44 at
13 18-24.)

14 The last reasoned rejection of petitioner’s first claim is the decision of the California
15 Court of Appeal for the Third Appellate District on petitioner’s direct appeal. The state court
16 addressed this claim as follows:

17 Defendant first contends that the trial court erred in failing to suspend
18 the criminal proceedings and appoint the director of the regional
19 center for the developmentally disabled to examine him in January
20 2013 because Dr. Wicks's report and the PET scan findings
21 constituted substantial evidence that he was not competent to stand
22 trial because he was suffering from a developmental disability. We
23 disagree.

24 Penal Code “[s]ection 1367, subdivision (a) states that a ‘defendant
25 is mentally incompetent ... if, as a result of mental disorder or
26 developmental disability, [he] is unable to understand the nature of
27 the criminal proceedings or to assist counsel in the conduct of a
28 defense in a rational manner.’ ““When the accused presents
substantial evidence of incompetence, due process requires that the
trial court conduct a full competency hearing. [Citation.] Evidence is
‘substantial’ if it raises a reasonable doubt about the defendant’s
competence to stand trial.”” (*People v. Weaver* (2001) 26 Cal.4th
876, 953.)

A different rule applies, however, after the trial court has found the

1 defendant to be competent and the issue of his or her competency is
2 being raised for a second time. “Once a defendant has been found
3 competent to stand trial, a second competency hearing is required
4 only if the evidence discloses a substantial change of circumstances
5 or new evidence is presented casting serious doubt on the validity of
6 the prior finding of the defendant's competence.” (*People v. Weaver*,
7 *supra*, 26 Cal.4th at p. 954.)

8 Defendant fails to argue his case in light of the foregoing rule and
9 instead insists on arguing the substantial evidence test that applies to
10 an initial determination of a defendant's competency.[] To justify this
11 approach, defendant contends that “two related but different
12 procedures” apply in this context depending upon whether the
13 defendant is suspected to be incompetent to stand trial because of a
14 mental disorder or because of a developmental disability. According
15 to defendant, “[i]n the typical case, where the question is whether a
16 defendant is incompetent due to a psychiatric illness or mental
17 disorder, ‘the court shall appoint a psychiatrist or a licensed
18 psychologist, and any other expert the court shall deem appropriate,
19 to examine the defendant.’ [Citation.] However, if it is suspected that
20 the defendant is incompetent and suffers from a developmental
21 disability, such as a neurological disorder, the court must ‘appoint
22 the director of the regional center for the developmentally disabled
23 ... to examine the defendant.’” (Fn. omitted.) In defendant's view,
24 because “Dr. Wicks' report presented new evidence of a neurological
25 impairment akin to intellectual disability based on multiple testing
26 corroborated by [defendant's] PET scan, as opposed to any mental
27 disease or illness that had previously been evaluated by Dr. Schaffer
28 [citation], the trial court was duty-bound to refer [defendant] to the
regional center....”

Defendant is mistaken. The duty of the trial court to declare a doubt
as to the defendant's competency, suspend proceedings, and conduct
a full-blown competency hearing arises “[w]hen defense counsel has
presented [or the court otherwise becomes aware of] substantial
evidence that a defendant is incompetent to stand trial.” (*People v.*
Jones (1991) 53 Cal.3d 1115, 1153; see also Pen.Code, § 1368.) It is
only after the court has declared a doubt and suspended proceedings
that the court must “appoint a psychiatrist or licensed psychologist,
and any other expert the court may deem appropriate, to examine the
defendant” (Pen.Code, § 1369, subd. (a)), unless “it is suspected the
defendant is developmentally disabled,” in which case “the court
shall appoint the director of the regional center for the
developmentally disabled ... or the designee of the director, to
examine the defendant” (*ibid.*).

Under the foregoing provisions, the duty to suspend proceedings and
conduct a competency hearing is triggered by substantial evidence
that a defendant is incompetent to stand trial—regardless of the basis
for that suspected incompetence. The basis for the defendant's
suspected incompetence comes into play only after the court has
ordered a competency hearing, and that basis affects only whether
the court is required to appoint a psychiatrist or licensed psychologist
to examine the defendant or instead is required to appoint the director
of the regional center for the developmentally disabled or the

1 director's designee.

2 Thus, the fundamental issue in each case is not what the basis is for
3 the defendant's suspected incompetence—a mental disorder or a
4 developmental disability—but rather whether the defendant is
5 incompetent, whatever the basis of that incompetence may be. In
6 light of this fact, the rule governing second competency hearings
7 applies regardless of the fact that the renewed questioning of the
8 defendant's competence rests on a different basis than the original
9 questioning of his competence. In other words, a court's initial
10 determination of competency is presumed correct, regardless of
11 whether the suspected incompetence was based on a mental disorder
12 or a developmental disability, and a second competency hearing is
13 required only if: (1) there is evidence of a substantial change of
14 circumstances; or (2) new evidence is presented that casts serious
15 doubt on the validity of the prior finding of competence. (*People v.*
16 *Weaver, supra*, 26 Cal.4th at p. 954.)

17 Here, defendant makes no attempt to show that Dr. Wicks's report
18 and the results of the PET scan of his brain cast serious doubt on the
19 determination of his competency that the trial court made in October
20 2011 based on Dr. Schaffer's two evaluations. While the PET scan
21 results may well have provided a basis for believing that defendant
22 was suffering from a developmental disability consisting of brain
23 damage dating back to his youth,[FN] defendant fails to explain how
24 those results, even when read along with Dr. Wicks's report, cast
25 serious doubt on the determination barely a year earlier that
26 defendant was *competent to stand trial*. It is not enough for defendant
27 to argue, as he does, that Dr. Wicks's “determination that [defendant]
28 suffered from significant neurological impairment documented from
an early age was sufficient to raise a doubt and most certainly a
suspicion of a handicapping condition found to be closely related to
intellectual disability that was of such a severe nature and affected
[defendant]'s brain everywhere to such a degree that the deficiencies
could not be compensated for.” Instead, defendant needed to show
how Dr. Wicks's conclusions, especially when considered in light of
the PET scan results, cast serious doubt on the trial court's prior
determination that defendant was competent to stand trial because he
was both able “to understand the nature of the criminal proceedings”
and “to assist counsel in the conduct of a defense in a rational
manner.” (Pen.Code, § 1367, subd. (a).) Having failed to make any
such showing, defendant has failed to overcome the ““great
deference”” we must give the trial court's ruling that a second
competency hearing was not required here. (*People v. Weaver, supra*,
26 Cal.4th at p. 953.) Accordingly, we find no error in the court's
refusal to suspend the proceedings and conduct a second hearing on
defendant's competence to stand trial.

25 [FN 4:] We note that the only evidence of the PET scan
26 results before the trial court at the time at issue here consisted
27 of defense counsel's statements to the court regarding those
28 results. For our purposes, however, we take those statements
as an offer of proof.

(*People v. Gray*, LD 2 at 3-4.)

1 Applicable Legal Standards

2 The trial of an incompetent defendant violates the Constitution's Due Process Clause.
3 Drope v. Missouri, 420 U.S. 162, 171 (1975). The federal constitutional standard for competence
4 to stand trial is whether the defendant has “sufficient present ability to consult with his lawyer
5 with a reasonable degree of rational understanding,” and whether he has “a rational as well as
6 factual understanding of the proceedings against him.” Dusky v. United States, 362 U.S. 402
7 (1960) (per curiam).

8 When a trial court possesses evidence that “raises a ‘bona fide doubt’” as to a defendant's
9 competence to stand trial, the judge must conduct a competency hearing. Pate v. Robinson, 383
10 U.S. 375 (1966). A “bona fide doubt” exists when “a reasonable judge, situated as was the trial
11 court judge whose failure to conduct an evidentiary hearing is being reviewed, should have
12 experienced a doubt with respect to competency to stand trial.” Maxwell v. Roe, 606 F.3d 561,
13 568 (9th Cir. 2010) (quoting de Kaplany v. Enomoto, 540 F.2d 975, 983 (9th Cir. 1976) (en
14 banc)). The responsibility to consider whether to conduct a competency hearing continues
15 throughout a trial. Drope, 420 U.S. at 181.

16 Factors for a court to consider in determining whether there is a bona fide doubt about a
17 defendant's competence include evidence of a defendant's irrational behavior, his demeanor at
18 trial, and any prior medical opinion on competence to stand trial. Drope, 420 U.S. at 180. A trial
19 court should also consider the opinion of a defendant's trial lawyer, as that lawyer “is in the best
20 position to evaluate a client's comprehension of the proceedings.” Stanley v. Cullen, 633 F.3d
21 852, 861 (9th Cir. 2011) (quotation omitted). A trial lawyer's professed inability to communicate
22 with a defendant, “while not necessarily sufficient to create a bona fide doubt, should [be]
23 considered seriously by the court.” Torres v. Prunty, 223 F.3d 1103, 1109 (9th Cir. 2000). A
24 court should also evaluate its own interactions with the defendant, including whether “the
25 defendant is alert,” able to testify coherently, and participating in colloquies with the court.
26 United States v. Lewis, 991 F.2d 524, 528 (9th Cir. 1993).

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1 The Ninth Circuit has previously held the following:

2 The question as to when a second examination under the section is
3 required is a question which depends upon the showing made, and
4 the length of time elapsed from the prior psychiatric examination.
5 Obviously a court would not be required to order a hearing during
6 each week of a trial, absent unusual circumstances. The decision
whether to require a second examination rests in the sound discretion
of the trial court. The trial court's decision will not be upset unless
there is abuse of that discretion.

7 United States v. Bodey, 547 F.2d 1383, 1385-87 (9th Cir. 1977).

8 Under AEDPA, a state trial or appellate court's finding that a competency hearing was not
9 required is a factual determination entitled to deference unless it is unreasonable. 28 U.S.C.
10 § 2254(d)(2); Mendez v. Knowles, 556 F.3d 757, 771 (9th Cir. 2009).

11 Pertinent Proceedings

12 On June 27, 2011, defense counsel declared a doubt as to petitioner's competency
13 pursuant to California Penal Code section 1368; the court suspended proceedings as a result.
14 (Supp RT 5-6; 1 CT 2.) Dr. Charles Schaffer was appointed by the court to assess petitioner's
15 competency. (1 CT 33-34; see also 1 CT 61-63.) Dr. Schaffer submitted a report dated July 20,
16 2011. (Sealed CT 37-56.) Defense counsel requested a trial on the issue of petitioner's
17 competency in August 2011 (1 CT 3), but on September 16, 2011, counsel sought a continuance
18 and the court "re-refer[red]" to Dr. Schaffer (1 CT 4). Dr. Schaffer submitted a second report
19 dated October 3, 2011. (Sealed CT 66-99.)

20 On October 5, 2011, the parties submitted on Dr. Schaffer's report; the trial court declared
21 petitioner competent to stand trial and criminal proceedings were reinstated. (Supp RT 9-10; 1
22 CT 4.)

23 On January 11, 2013, defense counsel again declared a doubt as to petitioner's
24 competency. (Supp RT 13; see also 1 CT 18.) The trial court considered the parties' arguments
25 (Supp RT 13-20) before ruling that petitioner was competent to stand trial, and "is able to assist
26 counsel and able to understand the nature of the proceedings." (Supp RT 21.)

27 Thereafter, on February 5, 2013, defense counsel advised the court she had concerns
28 petitioner was "disengaged" and contemplating suicide. The court referred petitioner for a

1 psychiatric evaluation at the jail facility at counsel's request. (1 CT 276; ECF No. 46-4 at 56-59.)
2 The following afternoon, and in receipt of the psychiatric report prepared by jail psychiatric
3 services (Sealed CT 286) and after consideration of the parties' argument, the trial court declined
4 to declare petitioner incompetent to stand trial. (1 CT 284; ECF Doc. 46-4 at 61-77.)

5 Analysis

6 Petitioner's argument that he "presented substantial evidence that triggered the trial
7 court's duty to refer him to Regional Center" is unavailing. More specifically, petitioner
8 contends that by failing to suspend proceedings and "appoint the director of the regional center
9 for the developmentally disabled" (ECF No. 18 at 31), the trial court failed to "observe
10 procedures adequate to protect a petitioner's right "not to be tried or convicted while incompetent
11 to stand trial." (ECF No. 18 at 32.)

12 The undersigned agrees with respondent that the state court's decision is neither contrary
13 to Supreme Court precedent nor is it unreasonable.

14 On February 5, 2013, defense counsel indicated she had doubts as to petitioner's
15 competency, "not just for mental illness, which has been covered previously, but also on the basis
16 of his cognitive – his cognitive deficiencies." (1 RT 48.) The prosecutor objected, pointing out
17 that after an initial finding of competence, a new request requires a greater burden on petitioner's
18 part, and that the required showing had not been made. (1 RT 48-49.) The trial court responded:

19 THE COURT: Well, there do appear to be two issues that are raised
20 by [defense counsel]. One was the Defendant's current psychological
21 state in terms of a letter that he provided to her before lunchtime. And
22 it seems at a minimum the Court would actually refer Mr. Gray to
the jail psych ward for at least some psychological evaluation so we
could have that information.

23 In addition to that, the Court would note that in fact Mr. Gray did
24 seem disengaged through this morning. However, the Court has not
had a chance to review the doctors' reports that were previously
prepared in response to a 1368 determination.

25 So the Court would, actually, like a chance to review those, but also
26 give [the prosecutor] a chance to review anything he wishes to
27 review. [Defense counsel], you could have the same opportunity.
And then we could also have the benefit of any psychological
evaluation that might be prepared over night by the jail doctors.

28 So my suggestion at this point in time is a doubt would not be

1 declared by this court, and that we'll put the matter over for one day
2 so that we can get the benefit of jail psych report and the Court can
then have an opportunity to review previous reports.

3 (1 RT 48-50.) The next day, in receipt of the jail psychiatric unit report, the court indicated it did
4 not appear the issue needed to be revisited but inquired further of defense counsel. The following
5 colloquy then occurred:

6 [DEFENSE COUNSEL]: ... Well, first of all, I don't think [jail
7 psychiatric staff] had the time to engage in the same type of analysis
8 as, obviously, the other individuals have, since as far as reviewing
9 for competency I still believe -- I still believe that he's going to have
10 he had difficulty yesterday; that he will continue to have difficulty
11 understanding the Court proceedings, and I would ask that the Court
12 -- I made the request previously. Judge Winn did deny, basically,
13 because it was a subsequent -- a subsequent request under 1368. I
14 have researched and I found language of -- apparently the D.A. had
15 filed the document the last hearing in which he cited three cases about
16 that the burden would be on the defense which shows substantial
17 change of circumstances or new evidence casting serious doubt of
18 the validity of a prior finding on the defendant's competence. So if
19 you want me to address that.

20 THE COURT: If you like.

21 [DEFENSE COUNSEL]: The cases that they cited in People versus
22 Jones, for example, there have been -basically, there's no -- nothing
23 was offered other than -- nothing new was offered other than the --
24 that the attorney felt that the defendant was unable to cooperate with
25 the attorneys, and that was pretty much it. And there they actually --
26 the defendant had actually gone through an entire trial and -- with the
27 defendant -- had observed the defendant had actually participated, so
28 felt that the conditions were such that it had not changed from the
start of the trial, which is the first competency hearing, apparently.

And so I think there's a -- People versus Medina is a very similar
thing. In that case it actually had been a full-fledged competency
hearing at which the individual was eventually found competent.
And there no second hearings requested until about ten months later.
And the offer had been -- what was offered was his client was not
communicating with him, but there was no new evidence presented,
nothing additional than noncooperation.

And People versus Kelly, another case, there, there were apparently
three reports that had come back that all agreed that the individual
was competent during the first request, and it was submitted on those
three reports. And then when a second request was made all the
defense attorney did was allege the same facts that had been in
support of the first request.

So that, again, all three of those, there was nothing additional that
had occurred; that there were no intervening events or any other
information forthcoming.

1 In Mr. Gray's situation we have the original finding of the report
2 which was submitted by Dr. Schaffer. And it was submitted. And I
3 understand that in the case that I have very little latitude to argue
4 against it at this point, but that's what it was, and it was submitted in
5 a single report.

6 But I would say that since then, additional information, information
7 that Dr. Schaffer did not have available, I did not have available, but
8 did come forth several months later and was evaluated, reviewed
9 very carefully by Dr. Wicks, and some of it was also reviewed by Dr.
10 Mattiuzzi during a review for whether -- on the Court's request on
11 whether Mr. Gray should be allowed to represent himself, indicated
12 additional, I think far more information, far more in-depth testing;
13 the-history of my client was validated; furthermore, several of the
14 tools used by Dr. Wicks, apparently, countered or contradicted Dr.
15 Schaffer's finding of possible malingering by my client.

16 Finally, there was the, as I mentioned, I believe in chambers, there
17 was a referral to Dr. Globus, who is a neuropsychiatrist, an M.D., to
18 determine whether a brain PET scan would be -- would be called for,
19 would be helpful, would be, in terms of giving us what we call hard
20 science versus the soft science testing. And Dr. Globus, in fact, met
21 with Mr. Gray; did evaluate him, and then referred him for the PET
22 scan, which was then done in November. And the report, discussed
23 with counsel in December, and indicating that my client had
24 apparently my understanding there were three lobes of Mr. Gray's
25 brain that appeared to be abnormal, and that they did do some
26 technical findings of various parts and what they observed from
27 moderate to mild, the overall impression, according to the
28 radiologist, was that Mr. Gray presents as a -- very similar to an
Alzheimer's patient, which would be very unusual for somebody with
that, at the time of his testing, he was 22 years old.

But -- and Dr. Globus, in his report, as I indicated before we went on
the record, had submitted a written report. I have been told there was
a final one coming, but it just involved some minor changes, but that
his conclusion doesn't -- doesn't change, which basically, says that
the PET scan supports the finding of the neuropsychologist.

The PET scan allows one to view by anatomical indications and
reduced nerve function. This test is used to determine dementia.
Although Oliver is young, he showed extensive findings of brain
damage which are consistent with the neuropsychological testing.

There are four lobes of the brain which are impaired. They are
frontal, which is the area of the brain associated with secondary
functioning and personality; temporal, which is associated with
memory, pleasure, sexuality, and aggressivity; parietal, which is
associated with language functions in association with visual,
auditory, and somatosensory functions, and the occipital which is
associated with visual perception.

Oliver Gray shows reduced level of brain functioning in the anterior
part of the temporal lobes toward midline, bilaterally symmetrical
dysfunction in the parietal lobes, and more subtle decreased activity

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in both of the frontal lobes.

In summary, the pattern of brain damage in Oliver Gray is growing similar to findings in Alzheimer's disease in severity and extent.

These findings are consistent with the results of my psychiatric examination and Dr. Wicks' neuropsychological examination. His level of thinking and perception is so impaired as to affect day-to-day social functions, and would also impair his understanding of the consequences of the behaviors he displayed during and shortly after the alleged offense.

These functions are so impaired that his behavior cannot be rationally adjudged in the manner you adjudge someone's freedom with this brain damage.

THE COURT: Isn't part of the difficulty, though, with at least the information you were just providing to the Court that when one speaks of Alzheimer's there's a range. And all we have, at least in terms of doctor's statement, is a reference to Alzheimer's generally.

In addition, your report talks about consequences. We're not necessarily talking about consequences here. We're talking about purpose. Did Mr. Gray understand what he was doing in the context of did he have a specific purpose when he did what he did. And it's not so much a consequence of the actions; it's did he understand what he was doing.

[DEFENSE COUNSEL]: And I appreciate that, and I don't think the doctor meant consequences in the system, talking about legal consequences. But as far as my request that he be evaluated under 1368 with more focus on this aspect of competency, whether you know, whether -- what I -- I am not an expert in the mental health, and so I rely on who we turn to; who we use regularly; who do I believe have good reputations. My understanding is that, although we talked about developmentally disabled has been used as a code word for something else, that is -- that is mental retardation; that that is such a highly charged word it's no longer considered that. It's considered something that can actually encompass more than something like a low I.Q., which I think is what we're dealing with here.

The testing indicates overall that Oliver is in the normal range. But there are certain -- there are still certain aspects of -- or the categories that were tested which actually are well below normal, and those would be the ones that are affected, not just as far as his defense in trial, but certainly as far as his ability to process what is going on during the trial, to be of assistance -- I mean my primary concern is whether he's going to understand what is going on through trial and whether we're going to be stopping every hour, every hour and a half so I can spend half an hour explaining to him what happened. I'm not saying I won't do that. I'm just saying I don't think that's -- I don't think there will be a net gain there.

In any event, I think that because - -

1 THE COURT: Let me interrupt you. Can I also assume from that that
2 in such a situation it's somewhat difficult for your client to assist you
3 in his defense?

4 (1 RT 53-59.) Defense counsel agreed. (1 RT 59.) The court then heard from the prosecutor. (1
5 RT 59-60.) When the court asked defense counsel if she was asking the court to revisit a prior
6 judge's competency ruling, defense counsel replied affirmatively. (1 RT 61.) When the court
7 pointed out there was "nothing new" (1 RT 61), defense counsel argued to the contrary:

8 [DEFENSE COUNSEL]: Well, yes, the new thing would be the time
9 together, what it means, if the PET scan, as far as affirming Dr-
10 Wicks' report, and also showing the level -- the level of impairment
11 and how it affects my client.

12 But additionally, I think what -- I can take it up on a writ if the Court
13 I can take it up on a writ, because my view of it was in some ways
14 the proof might be in the pudding. When we get to court let's see
15 what happens -- how my client operates; how he behaves; how he's
16 able to function. And, quite frankly, you know, so far I am
17 increasingly concerned. And I think that it's not going to get -- I think
18 the fact that we started at a slow start without a lot of, you know
19 fairly, you know, not a -- even though it's formal it's not
20 overwhelming. And it's starting with him not sleeping; it's starting
21 with him -- having a call from him yesterday trying to find out what
22 was happening. We came back after lunch yesterday, and basically
23 said, "Can we start over? Maybe I'll understand if we start over.

24 Sort of beyond that -- I don't -- I think that's pretty I think that's a
25 very good illustration, I think, of what we can be looking forward to.
26 And it's not to take anything away from Judge Winn. I think he had
27 to -- he had to make a judgment call. And, you know, that was -- he
28 thought that Dr. Wicks presented a close, you know, a fairly close
question.

And the other thing that Judge Winn relied on is actually improper,
and case law says this, he relied on conversation he had with my
client several months prior. And that's not appropriate.

So that's why I'm asking this court, having sat and watched my client,
and then taking into consideration the information that I can provide.

THE COURT: Well, I think I'm taking in the same information as
Judge Winn heard. So I do think in the end [the prosecutor] has a
valid point; that what you're asking this court to do is to revisit, in a
sense, the exact material presented to Judge Winn and simply to
render a different opinion with regard to competency.

The only thing that might be different is the PET scan material. But
it sounds like that also may have been provided to Judge Winn. And
then with regard to the PET scan material I haven't seen anything. I

1 have just simply had the information read into the record that you
2 read. And I'm not quite sure what it means.

3 And so I'm in a situation where there is some material with regard to
4 PET scans that were done, and they showed some abnormalities, and
5 I'm using that word loosely; that one might say are similar to a patient
6 with Alzheimer's. But as we started this conversation, Alzheimer's
7 can be minor to severe. And I don't know where your client may or
8 may not fit, and whether or not I should accept the assumption that
9 it's similar to. So there's a whole host of issues there.

10 And that sounds like it may be, and I'm not sure whether Judge Winn
11 heard that or not, but that may be the only difference that may have
12 existed between what Judge Winn heard and what I am hearing
13 today. And I'm not quite sure how that is different. It doesn't mean
14 anything in the context in any kind of context.

15 [DEFENSE COUNSEL]: As well as the Court's own observation of
16 my client's conduct during a very short period of time that he was in
17 court.

18 THE COURT: He seemed disengaged yesterday. But I'm not sure
19 disengaged means incompetence. They're quite different.

20 [DEFENSE COUNSEL]: If he's not able to understand what is going
21 on and assist in his defense should I just keep raising it after every
22 court session and bring up more facts that - -

23 THE COURT: Yes.

24 [DEFENSE COUNSEL]: Okay.

25 THE COURT: I don't have a problem with that. If, in fact, you think
26 your client is not able to assist you in his defense - -

27 [DEFENSE COUNSEL]: That's fine.

28 THE COURT: - - then we have an issue and we have to address it.
I'm not precluding you from doing that. I'm simply not going to take
the position that without additional information that this court is
going to overrule the determination that was made by Judge Winn.
It doesn't sound like there's anything of any significance that is
different. Because it sounds like Judge Winn may have also had the
PET scan available to him.

[DEFENSE COUNSEL]: He did not have the report, which I did
leave with the Court yesterday.

THE COURT: I don't have the report as well.

[DEFENSE COUNSEL]: I left with the Court yesterday.

THE COURT: Well, I have two reports. Maybe this is the one you
are talking about. I have one from Dr. Wicks. And then I have a three-
page - -

1 [DEFENSE COUNSEL]: Yes.

2 THE COURT: -- I don't want to call it a report. It's, essentially,
3 imaging results.

4 [DEFENSE COUNSEL]: It's the findings. That is the only report that
5 the neuroradiologist provided.

6 THE COURT: But the difficulty with -- and is this Dr. Globus' or
7 somebody else?

8 [DEFENSE COUNSEL]: No, that's Dr. Hagge.

9 THE COURT: The only thing this has is under the heading
10 "Impression" it talks about bilaterally symmetric pattern of decreased
11 F.D.G. activity, most severe in the anterior temporal lobes.
12 Moderately decreased, bilaterally symmetric F.D.G. activity in the
13 posterior superior parietal lobes. Small, subtle, symmetric regions of
14 mildly decreased activity paramedian anterior pole of bilateral
15 frontal lobes of questionable significance. And an overall pattern is
16 most suggestive of Alzheimer's, but this would be unusual, or very
17 unusual diagnosis in a 22-year-old.

18 I don't know what that means. When I hear all of that all it tells me
19 is that there's something different about the brain activity of your
20 client as compared to what the doctor normally would see on the
21 imaging. But what that means in terms of competency, that's a
22 connection I don't see or find anywhere in the report.

23 [DEFENSE COUNSEL]: Correct. And taken in conjunction with Dr.
24 Wicks' report, however, I think that there's sufficient showing that
25 my client is, indeed, neurologically impaired and moderately --
26 actually, in some areas moderately to severely impaired. And so
27 taken in light of that, and in light of his conduct, his communications,
28 and I can't say it any plainer than what I have, is that I have a doubt
that he will be able to understand what is happening; what has
happened; what will happen during this trial, and that he will not be
able to assist in his defense. And that's all I can do. Frankly, under
the law that should be sufficient. And I brought additional
information.

And the fact that Judge Winn on, you know, basically, a very busy
calendar day in department 61 made the decision he made, again, I
don't mean to belittle it, I'm simply saying that I believe my client
has not shown, or I believe my client -- my client's functioning while
in court does not -- is not contradicting my earlier impression when
I was in front of Judge Winn.

THE COURT: The reports also indicate, however, that your client's
functioning in court seems to be at odds with his functioning on
numerous occasions outside of court. And although Dr. Schaffer may
at least have made some references to malingering, at least when I
also see references to the interaction with jail staff, the interactions
outside of custody status, I'm not seeing quite the same thing that I'm
seeing in court in terms of the reports that. I'm reading. Any

1 comments on that?

2 [DEFENSE COUNSEL]: Because I think that this is a much more
3 formal -- those will be areas that I think spaces, places that my client
4 may feel more comfortable, more secure. You know, he has a
5 memory. He knows how to -- he knows certain ways to behave as
6 he's grown older.

7 I mean the fact that the police reports from several years ago may
8 report or reflect certain conduct, frankly, some of that is still
9 consistent. It is very much consistent with what we believe to be a
10 longstanding neurological impairment -- the outbursts, behavioral
11 aggression, things like that. But as far as just being able to get from
12 point A to point B, from the jail to the courtroom, and to function
13 with medical staff, he's grown a little bit more trusting of that.
14 Although, quite frankly, when he first met with Dr. Schaffer that was
15 not -- that was not the situation.

16 But because of his continued interaction with mental health
17 professionals I believe that that -- that that's -- that has changed. And
18 because, again, because he's become more accustomed and more
19 used to it. And he can -- when he's not -- when he's in a good space
20 he can accept that that's -- that they're not there to harm him.

21 But, you know, as far as how he's going to function here, you know,
22 if the Court is not ready yet, is not inclined to find that the way he
23 acted yesterday or conducted himself, and on top of all of this other
24 information is sufficient, obviously, I will have to accept that.

25 THE COURT: The Court is not prepared to declare a doubt at this
26 point.

27 (1 RT 61-68.)

28 Here, the state trial court followed the state-created procedure for ascertaining whether it
had doubt as to petitioner's competence under the California Penal Code where the court
previously found petitioner to be competent.³

“Once a defendant has been found competent to stand trial, a second
competency hearing is required only if the evidence discloses a
substantial change of circumstances or new evidence is presented
casting serious doubt on the validity of the prior finding of the
defendant's competence. [Citations.]” (*People v. Medina* (1995) 11
Cal.4th 694, 734 [47 Cal.Rptr.2d 165, 906 P.2d 2].)

³ California Penal Code section 1367(a) reads: “A person cannot be tried or adjudged to
punishment . . . while that person is mentally incompetent. A defendant is mentally incompetent
for purposes of this chapter if, as a result of mental disorder or developmental disability, the
defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the
conduct of a defense in a rational manner.”

1 People v. Weaver, 26 Cal.4th 876, 954 (2001).

2 The state appellate court determined that the applicable statute calls for a duty to suspend
3 proceedings and conduct a second or subsequent competency hearing requires a substantial
4 change or new evidence casting serious doubt on the prior competency hearing. It further held
5 that the duty does not depend on the basis asserted for the purported incompetence to stand trial.
6 Rather, the statute requires a thorough inquiry into a defendant's competency to stand trial, not
7 into the basis upon which the asserted competency relies. The state court's interpretation binds
8 this court. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (“[A] state court's interpretation of
9 state law, including one announced on direct appeal of the challenged conviction, binds a federal
10 court sitting in habeas corpus”).

11 In any event, the state appellate court's determination that, where there has been a prior
12 competency finding, the process does not begin anew depending upon the basis asserted for the
13 purported incompetency, is neither unreasonable nor contrary to Supreme Court authority.

14 As the record reveals, there was no substantial change or new evidence casting serious
15 doubt on the prior competency finding. Defense counsel's comments, argument notwithstanding,
16 support the state court findings.

17 More particularly, during the argument excerpted above, defense counsel characterized
18 the PET scan as “validat[ing]” her client's “history,” which counsel referred to as a “longstanding
19 neurological impairment,” a history previously considered by the trial court as a part of Wicks'
20 report. Defense counsel characterized the PET scan and Dr. Wicks' report⁴ as “hard science
21 versus soft science testing,” and the PET scan as “affirming Dr. Wicks.” It was not unreasonable
22 for the state court to conclude the required showing – a substantial change in circumstances or
23 new evidence casting serious doubt on the validity of the prior finding – was not made.

24 The undersigned has reviewed the entire record carefully, including those portions
25 highlighted by petitioner in his reply to respondent's answer in support of his claim. (ECF No. 47
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27 ⁴ Notably, Dr. Wicks was not asked to assess petitioner's competency. (See Supp RT at 15.)
28 Additionally, back in 2013, during argument to Judge Winn, defense counsel referenced the PET
scan findings. (Supp RT 15-16.)

1 at 7-10.) The excerpted portions cited by petitioner do not serve to make the state court's
2 determination unreasonable or contrary to Supreme Court precedent.

3 The state appellate court's determination that the trial court did not err in refusing to
4 suspend the proceedings and conduct a second hearing on petitioner's competence to stand trial
5 following defense counsel's request and submission of PET scan findings was not unreasonable,
6 nor was it contrary to Supreme Court precedent. 28 U.S.C. § 2254(d); Mendez v. Knowles, 556
7 F.3d at 771. Therefore, the undersigned recommends petitioner's claim be denied.

8 B. *Juror Competency*

9 Petitioner claims that the trial court violated his due process rights and right to a fair trial
10 when it failed to conduct an inquiry into a juror's ability to comprehend jury instructions. (ECF
11 No. 18 at 33-38 & ECF No. 47 at 10-14.) Respondent maintains the state appellate court's
12 determination of the claim was neither unreasonable nor contrary to Supreme Court precedent,
13 and as a result, petitioner's claim must be denied. (ECF No. 44 at 24-26.)

14 The last reasoned rejection of petitioner's claim is the decision of the California Court of
15 Appeal for the Third Appellate District on petitioner's direct appeal. The state court addressed
16 this claim as follows:

17 *Juror Competence*

18 Defendant next contends the trial court erred in failing to conduct
19 any inquiry after the jury foreperson reported that one of the jurors
20 did not understand the reasonable doubt instruction. Again, we
disagree.

21 "If at any time ... a juror dies or becomes ill, or upon other good cause
22 shown to the court is found to be unable to perform his or her duty,
... the court may order the juror to be discharged..." (Pen.Code, §
23 1089.) "Once a trial court is put on notice that good cause to
24 discharge a juror may exist, it is the court's duty 'to make whatever
inquiry is reasonably necessary' to determine whether the juror
25 should be discharged." (*People v. Espinoza* (1992) 3 Cal.4th 806,
821.) "However, "not every incident involving a juror's conduct
26 requires or warrants further investigation. 'The decision whether to
investigate the possibility of juror bias, incompetence, or
27 misconduct—like the ultimate decision to retain or discharge a
juror—rests within the sound discretion of the trial court.'"
28 [Citation.] "[A] hearing is required only where the court possesses

1 information which, if proven to be true, would constitute “good
2 cause” to doubt a juror's ability to perform his duties and would
3 justify his removal from the case.””” (People v. Cowan (2010) 50
4 Cal.4th 401, 506.) Where the trial court “reasonably could have
5 concluded that there were no grounds for believing good cause to
6 excuse [a juror] might exist,” it is not an abuse of discretion for the
7 court to decline to hold a hearing or conduct a further inquiry. (Id. at
8 pp. 507–508.)

9 Here, defendant suggests the trial court abused its discretion by not
10 conducting a further inquiry because the court was “presented with
11 evidence that a juror m[ight] be unable to deliberate.” Not so. In fact,
12 the jury foreperson told the court that the juror in question was, in
13 fact, “participating” in deliberations.

14 To the extent defendant's argument rests on the concern that,
15 although able to deliberate, the juror in question might have been
16 unable to comprehend the jury instructions, the statements by the jury
17 foreperson were ambiguous as to what the problem actually was, and
18 under the circumstances it was reasonable for the trial court to
19 conclude that the problem was not, in fact, with the juror's ability to
20 comprehend the jury instructions and thus perform her duties but
21 was, instead, reflective of a disagreement over what constituted
22 reasonable doubt. At first, the jury foreperson expressed concern
23 with the juror's “literacy level.” Ultimately, however, the court
24 ascertained that the instructions had been read to the juror; thus, the
25 juror's ability to read was not really the issue. And while the
26 foreperson generally expressed doubt about whether the juror had
27 “the comprehension to be able to read the instructions as given to
28 her,” the foreperson's only specific concern was about the juror's
ability “to comprehend what ‘reasonable’ means and what ‘beyond a
reasonable doubt’ means.” Under these circumstances, it was not
unreasonable for the trial court to conclude that the real problem was
not with the juror's ability to read or with her ability to comprehend
the instructions generally, but rather the problem lay in a
disagreement among the jurors over what constituted reasonable
doubt under the facts of the case.

Because, under these circumstances, the trial court reasonably could
have concluded that there were no grounds for believing good cause
to excuse the juror might exist, the trial court did not abuse its
discretion in refusing to hold a hearing or conduct a further inquiry.

26 (LD 2 at 4-6.)

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before me.

JUROR NO. 9: Yes. [¶] Thank you for telling me that, first off.

My concern is with what a juror's literacy level is. We have a juror who I do not believe has the comprehension to be able to read the instructions as given to her. I'm concerned, because we have tried to explain in different modes and modalities. I teach special needs students, and I have tried numerous ways to see if we can get her to comprehend what "reasonable" means and what "beyond a reasonable doubt" means, and it's been stalling us.

THE COURT: Is she participating?

JUROR NO. 9: She is participating. [¶] I have seen some evidence that she has limited literacy. Her handwriting is sporadic. It's hard to read. I am just telling you observations.

THE COURT: Have you read the instructions out loud to her?

JUROR NO. 9: We have. And had her read them, but it did not seem to help.

THE COURT: Okay, there may not be anything I can do to help you on that. In some situations, people - - if she is hearing the instructions, even if she can't read them, then it may be simply a difference of opinion.

JUROR NO. 9: Okay.

THE COURT: All right. [¶] Do counsel have any questions they wish to raise?

[PROSECUTOR]: Yes. [¶] Does it appear that she is understanding the instructions?

JUROR NO. 9: It does not appear she is understanding the instructions.

[PROSECUTOR]: The instructions have been read. [¶] What is it that indicates to you that she does not understand the - -

THE COURT: I don't want you to answer that. That is going into deliberations. You cannot talk about the deliberations.

[Juror No. 9] has informed us that, in fact, there is an issue with regard to perceived comprehension, but the instructions have been read aloud. Now we have a situation in which a juror has not reached a similar conclusion, potentially, as others.

JUROR NO. 9: I am the foreperson, so the instructions have been read. They have pointed out to her - - we had multiple people read them. I have read them slowly enough. Even had her track with her finger along with the text.

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How would you like us to proceed? How would you like me to proceed?

THE COURT: I cannot answer that for you, is the problem, because it sounds like you are doing everything that the Court would request you to do. You have read the instructions aloud. Like you said, you focused on different aspects of the instructions. And individuals have varying interpretations at times, based on the facts as they have determined them through the process of the trial.

So at this point in time, I am simply going to have you return to deliberations and continue those deliberations.

JUROR NO. 9: Okay.

THE COURT: All right.

JUROR NO. 9: Thank you.

THE COURT: Counsel, any comments?

[PROSECUTOR]: Yes, Your Honor. [¶] I would not say it is a difference of opinion. It sounds like the juror does not understand the instruction itself, or the juror cannot understand the instructions. There is no way for that jury to - -

THE COURT: How would the Court ever make a determination without intruding completely into deliberations?

What you have is, it appears, a factual determination, and it all boils around what is reasonable and what is not reasonable. And it sounds like substantial jurors have reached a determination of facts of what is reasonable and that this juror does not believe that, in fact, that interpretation is reasonable.

How would the Court ever make such a determination?

[PROSECUTOR]: I think you could have the juror that is - - who is apparently not understanding the instruction - - ask them if they understand. You simply ask the juror: Do you understand the instruction as I read them to you? You don't have to ask them about their opinion.

THE COURT: Let's assume I do that and they say, Yes, I understand them? Or let's assume I do that and they say, No, I don't understand them. What do I do?

[PROSECUTOR]: If a juror cannot understand and comprehend the law as given to them, I think we have to replace that juror with an alternate.

[THE COURT]: But that's not what I was hearing. What I heard is that there was a difference with regard to - - as to what a reasonable doubt is. At the very heart of every jury trial - - that is what [Juror No. 9] talked about - - she was having trouble understanding what

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reasonable doubt is.

What you are asking me to do is make a determination for the jurors as to what reasonable doubt is.

[PROSECUTOR]: That is not what I am asking. I am simply asking that we confirm with the juror that they do, in fact, understand the instruction as it was read to them.

THE COURT: How do I do that with reasonable doubt if that is the issue, which it appears to be?

[PROSECUTOR]: I don't think we have to ask them about the content, simply, do you understand the words I'm telling you? Yes or no.

THE COURT: Well, we will see where we go. I'm not sure how - - basically, from what [Juror No. 9] indicated, the issue is over reasonable doubt.

And even if the juror says, no, I don't understand what reasonable doubt is, what would you have me tell the juror then?

[PROSECUTOR]: I think that's different. The way - - she made it sound like the person doesn't understand the instruction at all because of their inability to apparently read and write. She talked about it in the context of literacy issue. If the person says, I don't understand what reasonable doubt is, you simply give them the instruction. That's it.

But if they don't understand, they can't comprehend it - - the entire instruction or any of the instructions - - I think that's the issue. That's the distinction I'm asking the Court to make, is find out if the person can comprehend the instructions. We don't have to use reasonable doubt. We can ask about a different instruction. Can they comprehend the instructions? Or is it simply that they don't get something, in which case we just give them the instruction again.

[THE COURT]: Well, let's wait and see. They'll get back to us at some point today.

But this is an area where one treads gingerly. The bottom line here is that I don't want to influence their deliberations. I don't want to put a particular juror on the spot - - which is what could ultimately happen - - at least at this stage in the proceedings. So let's wait.

Any other comments?

[PROSECUTOR]: No, Your Honor.

[DEFENSE COUNSEL]: My client is here. [¶] I want to put on the record any of the communications thus far and the responses - - the jury - - any of the jury communications thus far and the responses, what's been read back. Just wondered if the Court wanted to put that on the record.

1 THE COURT: I don't. There's no need. It's on the record.
2 (4 RT 941-47.)

3 California Penal Code section 1089 provides, in relevant part:

4 If at any time, whether before or after the final submission of the case
5 to the jury, a juror dies or becomes ill, or upon other good cause
6 shown to the court is found to be unable to perform his or her duty,
7 or if a juror requests a discharge and good cause appears therefor, the
8 court may order the juror to be discharged and draw the name of an
alternate, who shall then take a place in the jury box, and be subject
to the same rules and regulations as though the alternate juror had
been selected as one of the original jurors.

9 Here, the California Court of Appeal determined that the trial court conducted an adequate
10 investigation with regard to juror in question's ability to discharge her duties as a juror. The
11 Court of Appeals finding is reasonably supported by this record, and thus is presumed correct.
12 Lambert v. Blodgett, 393 F.3d 943, 972 (9th Cir. 2004).

13 This record reveals the trial court exercised its discretion with care. See People v.
14 Barnwell, 41 Cal.4th 1038, 1052 (2007); People v. Salinas-Jacobo, 33 Cal.App.5th 760, 776
15 (2019) ("whether to discharge a juror because of the juror's conduct during deliberation is a
16 delicate matter"), citing People v. Cleveland, 25 Cal.4th 466, 484 (2001). The trial court relied
17 upon the foreperson's responses to questions to reasonably conclude the issue was not the juror's
18 "literacy level" (4 RT 941), as originally described by the jury foreperson, but rather the juror's
19 application of the term "reasonable" and "reasonable doubt" to the facts and evidence during
20 deliberations. The jury foreperson acknowledged the juror at issue was participating in
21 deliberations (4 RT 942) and that the instructions had been read aloud during deliberations on
22 more than one occasion (4 RT 942-43).

23 When the juror foreperson reported that she believed the juror at issue did not have "the
24 comprehension to be able to read the instructions as given" (4 RT 941), continuing that she and
25 the other jurors were trying "numerous ways to see if we can get her to comprehend what
26 'reasonable' means and what 'beyond a reasonable doubt means,'" the trial court's first question
27 was whether the juror was participating (4 RT 942). When the foreperson replied affirmatively
28 and added that she had "seen some evidence that [the juror at issue] has limited literacy" and that

1 her “handwriting was sporadic” and “hard to read” (4 RT 942), the court clarified that the
2 instructions had been read aloud and then stated “even if she can’t read them, then it may be
3 simply a difference of opinion.” (4 RT 942.) The undersigned notes the trial judge’s
4 interpretation of the foreperson’s report is reasonable – the foreperson indicated the other jurors
5 were trying to “get” the juror at issue to “comprehend” the meaning of “reasonable” and
6 “reasonable doubt” – certainly that could reasonably be heard to signal a disagreement concerning
7 the application of the law to the facts. After the jury foreperson was excused and returned to the
8 deliberation room, the trial court further explained its concern in this regard when the prosecutor
9 expressed a desire to question the juror at issue as to competency. (4 RT 944:13-18 & 945:3-8.)

10 A deliberating juror should not be discharged for failing to agree with the majority of
11 other deliberating jurors. People v. Armstrong, 1 Cal.5th 432, 452 (2016); People v. Salinas-
12 Jacobo, 33 Cal.5th at 777. On this record, the jury foreperson’s comments could be reasonably
13 understood to be that the juror in question did not ““deliberate well or uses faulty logic or
14 analysis,”” which is an invalid reason for discharging a participating juror. Armstrong, 1 Cal.5th
15 at 452, citing Cleveland, 25 Cal.4th at 485.

16 The undersigned disagrees with petitioner that the state court’s finding is unreasonable
17 because the record here amounts to demonstrable reality that the juror in question was unable to
18 perform her duties.

19 When the state appellate court held “it was not unreasonable for the trial court to conclude
20 that the real problem was not with the juror's ability to read or with her ability to comprehend the
21 instructions generally, but rather the problem lay in a disagreement among the jurors over what
22 constituted reasonable doubt under the facts of the case,” the finding was not so lacking in
23 justification that there was an error well understood and comprehended in existing law beyond
24 any possibility for fair-minded disagreement.” Richter, 562 U.S. at 103.

25 In sum, the state appellate court’s determination of petitioner’s claim was not contrary to,
26 nor did it involve an unreasonable application of, Supreme Court precedent. 28 U.S.C. § 2254(d).
27 Therefore, the undersigned recommends the claim be denied.

28 ////

1 C. *Exculpatory Evidence & Related Ineffective Assistance of Counsel Claims*

2 In ground three, petitioner contends the prosecutor withheld exculpatory evidence in
3 violation of his due process and equal protection rights. (ECF No. 18 at 38-39.) In ground four,
4 petitioner contends trial provided ineffective assistance of counsel by failing to investigate and
5 discover the prosecution's suppression of evidence. (*Id.* at 39-41.) In ground five, petitioner
6 asserts appellate counsel was ineffective for failing to raise the prosecution's suppression of
7 evidence. (*Id.* at 41-43.) And, in ground six, petitioner contends that appellate counsel was
8 ineffective for not raising trial counsel's failure to investigate and discover the prosecutor's
9 suppression of evidence. (*Id.* at 43-44.) Because the claims are related, grounds three, four, five
10 and six will be addressed together by the undersigned.

11 Respondent counters that the state court's conclusion that petitioner failed to establish
12 prejudice as to the Brady claim was reasonable. (ECF No. 44 at 26-28 [ground 3].) Further,
13 respondent argues the state court's determinations that neither trial counsel nor appellate counsel
14 rendered ineffective assistance of counsel were reasonable because petitioner could not establish
15 prejudice. (*Id.* at 29-31 [grounds 4-6].)

16 These claims were raised in habeas proceedings before the state courts. (LD 9, 11, 13 &
17 15.) The Sacramento County Superior Court denied petitioner's claim in a reasoned decision
18 filed November 6, 2015:

19 The State Court Determination

20 Petitioner first claims that he was denied due process and equal
21 protection, by the prosecution's suppression of its knowledge of the
22 existence of percipient witness Quang Hua, who could have given
23 exculpatory testimony on petitioner's behalf, and that he is entitled
24 to relief under Brady v. Maryland (1963) 373 U.S. 83. Petitioner
25 claims that after trial, he discovered a document generated by the
26 investigative branch of the Sacramento County District Attorney's
27 office, obtained by prosecutor Brad Ng and prepared by "Beardsly,"
28 dated February 6, 2013, stating that Beardsly had received a request
from Ng to contact Qua Hua, who might be a victim/witness in a
case; that Beardsly contacted Hua and made arrangements to meet
with Hua; that Beardsly met with Hua on February 6, 2013, at which
time Hua told him that Hua was at the McDonald's on Power
Inn/Fruitridge on May 29, 2013 [*sic*] at 8:00 a.m. and was standing
in line, that two subjects entered with their faces partially covered,
that they yelled for everyone to lie down on the ground, that one was
taller than the other, that the taller was pointing a handgun at them,

1 that Hua was not sure if the other had a gun, the shorter one jumped
2 over the counter and ran towards the employee working the drive-
3 through window, the taller remained where Hua was lying then
4 walked behind the counter, that Hua heard the taller one yell at the
5 employee to open the register or he would shoot, that Hua saw the
6 subject go through the register and heard the subject scooping out the
7 change drawer, that a few seconds later the subject approached Hua
8 and Hua felt the barrel of the gun pressed against his back, the subject
9 reached into Hua's pocket and tried to remove Hua's wallet but could
10 not get it out, that the other yelled out that someone was calling 911
11 and they had to leave, that both ran out of the east doors, that after
12 that, Hua got up and saw them run southbound on Power Inn and
13 then westbound onto a street one block away; that Hua described the
14 first suspect, who had tried to steal his wallet, as a black male, 6',
15 200 lbs., muscular, dark colored baseball hat, unknown colored
16 short-sleeved t-shirt, dark colored jeans; that Hua described the
17 second suspect as a shorter and heavier black male, possibly wearing
18 a baseball hat, white short sleeved t-shirt, and dark-colored jeans;
19 that Hua said both suspects had their faces covered possibly with a
20 bandanna and that Hua could only see the bridge of their noses and
21 their eyes; that Hua said the first suspect had a dark colored gun.
22 Petitioner attaches a copy of the report as Exhibit A to the petition.
23 Petitioner claims that suppression of this witness was material to his
24 case, because the case was premised in large part upon identification
25 testimony that one suspect was white and the other was black.
26 Petitioner claims that presenting Hua's testimony could have
27 bolstered petitioner's version of the facts that there was a "J" person
28 at the scene during the commission of the crime. Petitioner also
claims that trial counsel was ineffective in failing to investigate and
discover this evidence and to present it at trial, and that appellate
counsel was ineffective in failing to raise the issue on appeal.

Petitioner fails to show prejudice. Although petitioner is white,
petitioner admits that the testimony that was presented was that one
suspect was white and the other black; the suspects were seen getting
away in a green minivan and an officer followed them; by the time
the officer got to the van, no one was inside; neighbors told the
officer that the two suspects had fled the van and hopped a fence
heading east; the police set up a perimeter; a resident in the area was
confronted by petitioner who asked to use her phone; the resident
saw him with a light skinned black male and called police, and upon
police arrival pointed to where they were headed and said petitioner
was wearing her son's Ecko shirt; the officer saw both suspects
heading south on foot and saw petitioner drop a black t-shirt on the
ground and that petitioner had a gun in his hand; the officer detained
the other suspect but not petitioner and radioed for backup; officer
Peirsol responded, saw petitioner in the area, and got petitioner to
drop his gun; Peirsol saw petitioner drop cash and coins from his
pocket; petitioner was not wearing a shirt when captured; petitioner
was put in the back of the patrol car and made an apparently
spontaneous statement outside of Peirsol's presence, described more
fully below, that he had "robbed them mother _kers" for his family;
a witness identified the van that was found, and a .38 revolver, rubber
gloves, loose cash, one of the robbery victim's purse stuffed with
money of various denominations, a gray sweatshirt, and a robbery

1 alarm monitor were found inside the van; one robbery victim
2 identified petitioner as being similar in height to the person who
3 robbed her and that he was wearing baggy clothing; another robbery
4 victim identified petitioner as matching the white suspect's height,
5 weight, and skin tone and as wearing the gray sweatshirt found in the
6 van, and also recognized the .38 revolver; another robbery victim
7 identified petitioner as being similar to the white suspect in height
8 and skin tone, and that petitioner was wearing similar shoes to that
9 suspect; the petitioner dropped money while fleeing; he also dropped
10 a note written by one of the restaurant managers; and, at petitioner's
11 bail hearing he stated, "I can't deny the allegations are true."

12 After a review of petitioner's recitation of the evidence presented at
13 trial that petitioner set forth in the habeas petition, discussed in the
14 paragraph above, it is clear beyond a reasonable doubt that petitioner
15 was one of the two robbers at the restaurant, and that any testimony
16 that might have been presented by witness Hua that both suspects
17 were black, rather than that one was black and one was white, would
18 not have been reasonably likely to have made a difference in the
19 outcome of the trial. Petitioner was identified by several witnesses
20 as being similar in height, weight, and skin tone to the white suspect
21 they had seen, and petitioner does not present any evidence to show
22 that Hua had ever been shown petitioner or petitioner's photograph
23 and stated that petitioner was not one of the two suspects. As the
24 faces of the perpetrators were covered except for the eyes and bridge
25 of the noses, race could have been easily mistaken. More tellingly,
26 petitioner himself admitted the crime while in the back of the patrol
27 car, speaking in an apparently spontaneous manner, as discussed
28 below, that he had robbed people and had done it for his family.
That, coupled with the chase that resulted in his dropping not only a
gun but money that was probably stolen, as well as a note written by
the manager of the restaurant about that day's earnings, point
conclusively to his guilt. As such, there is no prejudice, and the claim
is denied.

(LD 10 at 1-3.)

The Applicable Legal Standards

In Brady v. Maryland, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The duty to disclose such evidence is applicable even though there has been no request by the accused. United States v. Agurs, 427 U.S. 97, 107 (1976). The duty encompasses impeachment evidence in addition to exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676 (1985). A Brady violation may also occur when the government fails to turn over evidence that is "known only to police investigators and not to the

1 prosecutor.” Youngblood v. West Virginia, 547 U.S. 867, 870 (2006) (quoting Kyles v. Whitley,
2 514 U.S. 419, 437, 438 (1995) [“the individual prosecutor has a duty to learn of any favorable
3 evidence known to the others acting on the government’s behalf in the case, including the
4 police”]).

5 As stated in Strickler v. Greene, 527 U.S. 263, 281-82 (1999), three components are
6 required to establish a Brady violation: “[t]he evidence at issue must be favorable to the accused,
7 either because it is exculpatory, or because it is impeaching; the evidence must have been
8 suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” See
9 also Banks v. Dretke, 540 U.S. 668, 691 (2004); Silva v. Brown, 416 F.3d 980, 985 (9th Cir.
10 2005). “The prosecutor, although ‘not required to deliver his entire file to defense counsel,’ is
11 required to turn over evidence that is both favorable to the defendant and material to the case.”
12 Amado v. Gonzalez, 758 F.3d 1119, 1134 (9th Cir. 2014) (quoting Bagley, 473 U.S. at 675).

13 A defendant is prejudiced by a Brady violation if the evidence that was not produced is
14 material. Amado v. Gonzalez, 758 F.3d at 1134. Evidence is material if “‘there is a reasonable
15 probability’ that the result of the trial would have been different if the suppressed documents had
16 been disclosed to the defense.” Strickler, 527 U.S. at 289. “The question is not whether
17 petitioner would more likely than not have received a different verdict with the evidence, but
18 whether ‘in its absence he received a fair trial, understood as a trial resulting in a verdict worthy
19 of confidence.” Id. (quoting Kyles, 514 U.S. at 434); see also Silva, 416 F.3d at 986. Once the
20 materiality of the suppressed evidence is established, no further harmless error analysis is
21 required. Kyles, 514 U.S. at 435-36; Silva, 416 F.3d at 986. “When the government has
22 suppressed material evidence favorable to the defendant, the conviction must be set aside.” Silva,
23 416 F.3d at 986.

24 To prevail on a claim of ineffective assistance of counsel, a petitioner must show that his
25 trial counsel’s performance “fell below an objective standard of reasonableness” and that “there is
26 a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
27 would have been different.” Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984).

28 Under the first prong of the Strickland test, a petitioner must show that counsel’s conduct

1 failed to meet an objective standard of reasonableness. Strickland, 466 U.S. at 687. There is “a
2 ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable
3 professional assistance.” Harrington v. Richter, 562 U.S. at 104 (quoting Strickland, 466 U.S. at
4 689). Petitioner must rebut this presumption by demonstrating that his counsel’s performance
5 was unreasonable under prevailing professional norms and was not the product of “sound trial
6 strategy.” Strickland, 466 U.S. at 688-89. Judicial scrutiny of defense counsel’s performance is
7 “highly deferential,” and thus the court must evaluate counsel’s conduct from her perspective at
8 the time it occurred, without the benefit of hindsight. Id. at 689. “[S]trategic choices made after
9 thorough investigation of law and facts relevant to plausible options are virtually
10 unchallengeable.” Strickland, 466 U.S. at 690.

11 The second prong of the Strickland test requires a petitioner to show that counsel’s
12 conduct prejudiced him. Strickland, 466 U.S. at 691-92. Prejudice is found where “there is a
13 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
14 would have been different.” Id. at 694. A reasonable probability is one “sufficient to undermine
15 confidence in the outcome.” Id. at 693. “This does not require a showing that counsel’s actions
16 ‘more likely than not altered the outcome,’ but the difference between Strickland’s prejudice
17 standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’”
18 Richter, 562 U.S. at 112 (quoting Strickland, 466 U.S. at 693). “The likelihood of a different
19 result must be substantial, not just conceivable.” Id.

20 A habeas claim alleging appellate counsel was ineffective is evaluated under Strickland.
21 See Williams v. Taylor, 529 U.S. at 390-91. As the high court has observed, appellate counsel
22 performs properly and competently when he or she exercises discretion and presents only the
23 strongest claims instead of every conceivable claim. Jones v. Barnes, 463 U.S. 745, 752 (1983);
24 Smith v. Murray, 477 U.S. 527, 536 (1986). “In many instances, appellate counsel will fail to
25 raise an issue because she foresees little or no likelihood of success on that issue; indeed, the
26 weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate
27 advocacy.” Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989). The relevant inquiry is not
28 what counsel could have done; rather, it is whether the choices made by counsel were reasonable.

1 Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998). Even if petitioner could demonstrate
2 his appellate attorney acted unreasonably, he must still show prejudice. Smith v. Robbins, 528
3 U.S. 259, 285-286 (2000). Habeas relief for ineffective assistance of counsel may only be
4 granted if the state-court decision unreasonably applied the Strickland standard. Knowles v.
5 Mirzayance, 556 U.S. at 122.

6 Analysis

7 To begin, although the undersigned tends to agree with respondent that petitioner has
8 failed to establish the factual basis of his claim – that the prosecution withheld the evidence at
9 issue – it will be assumed for purposes of this analysis. Thus, the second Strickler component is
10 met. Strickler, 527 U.S. at 281-82.

11 The investigative report prepared by a district attorney investigator concerns the statement
12 of Quang Hua, a McDonald’s customer during the robbery. Hua advised, in pertinent part, that
13 the two suspects were black because he could see their arms as each was wearing a short-sleeved
14 t-shirt. (ECF No. 1 at 98.) Because petitioner is Caucasian, the statement is exculpatory, making
15 the first Strickler component met. Strickler, 527 U.S. at 281-82.

16 The final requirement required to establish a Brady violation involves a showing of
17 prejudice. Strickler, 527 U.S. at 281-82. More particularly, petitioner must show a reasonable
18 probability that the trial result would have been different had Quang Hua’s witness statement
19 been disclosed to the defense; the undersigned considers whether, in the absence of Hua’s
20 statement identifying both suspects as black, petitioner received a fair trial “resulting in a verdict
21 worthy of confidence.” Strickler, 527 U.S. at 289 (quoting Kyles, 514 U.S. at 434).

22 In this case, a review of the record reveals petitioner received a fair trial resulting in a
23 verdict worthy of confidence because numerous witnesses testified that one of the suspects was
24 Caucasian. McDonald’s manager Vivian Serrato testified the suspects were “a black guy and a
25 white guy” (ECF No. 46-4 at 157-58), throughout her testimony concerning the circumstances of
26 the robbery, Serrato identified the actions taken by the black and white suspects (ECF No. 46-4 at
27 158-67), and indicated she saw the black and white suspects flee together (ECF No. 46-4 at 167-
28 68). Serrato also detailed the white suspects interaction with McDonald’s employee Sandy Le

1 (ECF No. 46-4 at 168-69). Serrato also testified as to her identification of the white suspect
2 detained by police, noting the build, shoes and skin tone were the same; Serrato identified
3 petitioner as the white suspect in court. (ECF No. 46-4 at 171-73, 186.) Serrato also testified
4 both suspects were wearing gray hooded sweatshirts. (ECF No. 46-4 at 156, 180.) McDonald's
5 employee Sandy Le testified she was on a break when two suspects entered the restaurant, but she
6 was unable to discern skin color. (ECF No. 46-4 at 197.) One of the suspects took Le's purse
7 and bag at gunpoint. (ECF No. 46-4 at 199-200.) Le's statements to responding officers on the
8 date of the incident were truthful and "[m]ore fresh than now." (ECF No. 46-4 at 202-03; see
9 also 211-12.) Le also testified the suspects were wearing gray sweatshirts or sweaters. (ECF No.
10 46-4 at 208.) McDonald's Giovanni Mendoza Cruz testified the two robbers were a "white male"
11 and a black male. (ECF No. 46-4 at 227-28.) The white male was wearing a gray sweatshirt and
12 carried a handgun. (ECF No 46-4 at 228-30.) Both suspects fled together. (ECF No. 46-4 at
13 231.) Mendoza Cruz recalled being shown a photograph of a white suspect and identifying
14 similarities between the photograph he was shown and the white male who robbed the
15 McDonald's. (ECF No. 46-4 at 232-35, 257.) McDonald's employee Jose Alvarez-Saenz
16 testified two men entered the restaurant wearing hooded sweatshirts, one gray and one darker in
17 color; the light-skinned man wore the gray sweatshirt and was armed with a gun. (ECF No. 46-4
18 at 264-65.) The light-skinned suspect took "stuff" from people in the lobby or dining area,
19 including employee Le. (ECF No. 46-4 at 267.) The "white suspect and the dark suspect" fled
20 together and got into a green van. (ECF No. 46-4 at 268-69.) He only saw two people get into
21 the van and they appeared to be its only occupants. (ECF No. 46-4 at 289-90.) Alvarez-Saenz
22 recalled being shown a photograph of a light-skinned male who matched the white suspect in
23 height and "body weight, or size," gray hooded sweatshirt and shoes. (ECF No. 46-4 at 272-74.)
24 McDonald's employee Larry Xiong testified two suspects entered the restaurant and one was
25 light-skinned in a gray sweater and armed with a gun (ECF No. 46-5 at 118-20).

26 Sacramento Police Officer Rosalia Cabrera confirmed that Le indicated there were two
27 suspects and that one wearing jeans took her bag off of her shoulder (ECF No. 46-4 at 298-99),
28 Serrato identified the suspects as a black male and white male (ECF No. 46-4 at 308, 310).

1 Alvarez-Saenz stated one was black and the other was male “Hispanic” with “light skin” and
2 both had fled and gotten into a green van. (ECF No. 46-4 at 303-04, 312.) Sacramento Police
3 Officer Michael Lange was dispatched about a robbery of a McDonald’s involving suspect
4 descriptions of one black male and one white male. (ECF No. 46-5 at 184.) Sacramento Police
5 Officer Carlyle Mok received descriptions of the two persons seen fleeing a green van by
6 neighbors: one a black male and the other a white or Hispanic male. (ECF No. 46-5 at 210.)

7 Additionally, there was evidence that when petitioner was confronted by police, he was in
8 possession of paper money and coins. (ECF No. 46-5 at 85, 131.) And, while detained in
9 Sacramento Police Officer Michael Peirsol’s patrol car, petitioner was recorded stating, “I robbed
10 them motherfuckers for my family bra.” (ECF No. 46-5 at 91.)

11 The record reveals significant evidence of a white or light-skinned male and a black male
12 suspect. Hua’s statement that both suspects were black would stand alone against the testimony
13 of numerous other witnesses. Moreover, Hua’s statement differs greatly from the testimony of all
14 other witnesses as to the suspects’ clothing: all who testified agreed the suspects were wearing
15 sweatshirts rather than the short-sleeved t-shirts Hua claimed allowed him to discern the suspects’
16 skin color.

17 In light of the significant evidence pointing to two suspects, one black and one Caucasian
18 or light skinned Hispanic, it is not reasonably probable Quang Hua’s statement or testimony – had
19 it been admitted - would have resulted in an untrustworthy trial or unfair verdict. Therefore, the
20 state court’s determination in this regard was reasonable. 28 U.S.C. § 2254(d).

21 As a result, petitioner’s remaining related claims should also be denied. More
22 particularly, petitioner cannot show trial counsel or appellate counsel acted deficiently. Defense
23 counsel has a “duty to make reasonable investigations or to make a reasonable decision that
24 makes particular investigations unnecessary.” Strickland, 466 U.S. at 691. “This includes a duty
25 to ... investigate and introduce into evidence records that demonstrate factual innocence, or that
26 raise sufficient doubt on that question to undermine confidence in the verdict.” Bragg v. Galaza,
27 242 F.3d 1082, 1088 (9th Cir. 2001), amended by 253 F.3d 1150 (9th Cir. 2001) (citing Hart v.
28 Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999)). On the other hand, where an attorney has

1 consciously decided not to conduct further investigation because of reasonable tactical
2 evaluations, his or her performance is not constitutionally deficient. See Babbitt v. Calderon, 151
3 F.3d at 1173. Whether trial counsel had received Quang Hua’s statement is not known; perhaps
4 she did receive it and elected not to pursue it in light of the dearth of other witness statements
5 pointing to a white male suspect. Certainly, Hua’s statement is the only statement to identify both
6 suspects as black, and those that did indicate a possible Hispanic suspect indicated the suspect
7 was light skinned. Even assuming deficiency, petitioner’s claims fail.

8 For the reasons outlined in the facts cited above, petitioner cannot establish prejudice
9 under the Strickland standard, for it is not reasonably probable that had defense counsel
10 investigated and discovered the withholding of exculpatory evidence, the outcome of the trial
11 would have been different. Strickland, 466 U.S. at 694. “The likelihood of a different result must
12 be substantial, not just conceivable.” Richter, 562 U.S. at 112. Here, while perhaps a different
13 result is theoretically conceivable, such a result is not substantial.

14 The same can be said of appellate counsel. Petitioner was required to show that counsel’s
15 performance was objectively unreasonable, which in the appellate context requires the petitioner
16 to demonstrate that counsel acted unreasonably in failing to discover and brief a merit-worthy
17 issue. Smith, 528 U.S. at 285; Miller v. Keeney, 882 F.2d at 1434 (counsel is not deficient for
18 failing to raise a weak issue). Petitioner did not overcome the “strong presumption that
19 [appellate] counsel's conduct [fell] within the wide range of reasonable professional assistance.”
20 Strickland, 466 U.S. at 689. Nor did petitioner show prejudice, which in this context means that
21 the petitioner must demonstrate a reasonable probability that, but for appellate counsel's failure to
22 raise the issue, the petitioner would have prevailed in his appeal. Smith, 528 U.S. at 285-286.

23 In sum, petitioner’s claims, as presented in grounds three through six, should be denied as
24 the state court determinations regarding these claims were reasonable, and were not contrary to
25 Supreme Court precedent. 28 U.S.C. § 2254(d). Therefore, petitioner is not entitled to habeas
26 relief.

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1 D. *The Faretta Claim & Related Ineffective Assistance Claims*

2 In ground seven, petitioner contends the trial court erroneously denied him the right to
3 represent himself. (ECF No. 18 at 44-46.) In ground eight, petitioner contends trial counsel was
4 ineffective during the Faretta proceedings (ECF No. 18 at 46-47) and that appellate counsel was
5 ineffective for failing to raise trial counsel's ineffectiveness in that regard (ECF No. 18 at 47-48).
6 Respondent maintains the state superior court's determination was reasonable. (ECF No. 44 at
7 32-34.)

8 The State Court's Determination of the Claim

9 The Sacramento County Superior Court denied this claim in a reasoned decision following
10 a petition for writ of habeas corpus filed in that court:

11 Petitioner also claims that the court erred in denying his timely
12 request to represent himself based on the opinion of a mental health
13 expert that petitioner did not have the ability to think on linear terms,
14 when the record showed he was of present sound mind. He claims
15 that trial counsel was ineffective in failing to properly represent him
16 in his effort to obtain the self-representation, and that appellate
17 counsel was ineffective in failing to raise the issue on appeal. In
18 support, he attaches Exhibit B, which is a copy of reporter's
19 transcript from the judgment and sentencing hearing after trial and
20 conviction, of his motion to self-represent at that time; the transcript
21 shows petitioner's request for self-representation, the prosecutor's
22 reference to a recent report by Dr. Mattiuzzi opining that although
23 petitioner was competent to stand trial he was not competent to
24 represent himself; petitioner agreeing to talk to Dr. Mattiuzzi again
25 and the court considering the issue after that occurred; that at a
26 subsequent hearing, the court had read Mattiuzzi's second report and
27 noted Mattiuzzi's opinion that petitioner has a severe mental disorder
28 that would prevent petitioner from self-representing without the
assistance of counsel that being the inability to engage in linear and
analytical thinking; and that the court denied the self-representation
motion under People v. Johnson (2012) 53 Cal.4th 519.

Petitioner fails to show any error on the trial court's part in denying
the self-representation motion. The United States Supreme Court
held in Indiana v. Edwards (2008) 554 U.S. 164 that the right to self-
representation is not absolute and allows the states to deny self-
representation when the defendant lacks the mental capacity to
conduct a defense at trial without the assistance of counsel, even
though the defendant is competent to stand trial, and Johnson adopted
this rule for California courts. Thus, the trial court had authority to
deny self-representation even though defendant had been found
competent to stand trial. Nor does petitioner attach any reasonably
available documentary evidence that could have been introduced to
counter Dr. Mattiuzzi's two expert psychiatric reports on the issue
and show that the trial court erred in following those reports, despite

1 the court's conclusions about the sophistication of petitioner's
2 criminal behavior that were stated later in the sentencing hearing. As
3 such, the claim is denied.

4 (LD 10 at 4.)

5 The Applicable Legal Standards

6 A criminal defendant has a Sixth Amendment right to self-representation. Faretta v.
7 California, 422 U.S. 806, 835 (1975). This right, however, is neither automatic nor without
8 qualification. To properly invoke the right, the defendant must be competent, and the request
9 must be “timely, not for purposes of delay, unequivocal, voluntary, [and] intelligent[.]” United
10 States v. Maness, 566 F.3d 894, 896 (9th Cir. 2009) (per curiam). No specific colloquy is
11 required by the Constitution or the decision in Faretta. Lopez v. Thompson, 202 F.3d 1110, 1117
12 (9th Cir. 2000) (en banc).

13 The United States Supreme Court held the same standard is used to determine a
14 defendant's competence to stand trial, and his or her competence to waive counsel under Faretta.
15 Godinez v. Moran, 509 U.S. 389, 396-402 (1993). This unitary competency standard is “whether
16 the defendant has ‘sufficient present ability to consult with his lawyer with a reasonable degree of
17 rational understanding’ and has ‘a rational as well as factual understanding of the proceedings
18 against him.’ [Citations.]” Id. at 396.

19 In Indiana v. Edwards, 554 U.S. 164 (2008), the United States Supreme Court stepped
20 back from Godinez and held the trial court was not required to permit a defendant to represent
21 himself at trial if he evidenced mental illness even though he had been found competent to stand
22 trial. The Edwards court determined the ability to conduct one's own defense requires a higher
23 degree of functionality than does the lesser role of a represented defendant. Id. at 173-75.
24 Therefore, one may be mentally competent to stand trial yet lack the expanded degree of
25 competence necessary to represent oneself in that trial. Id. at 176-78.

26 [T]he Constitution permits judges to take realistic account of the
27 particular defendant's mental capacities by asking whether a
28 defendant who seeks to conduct his own defense at trial is mentally
competent to do so. That is to say, the Constitution permits States to
insist upon representation by counsel for those competent enough to

1 stand trial ... but who still suffer from severe mental illness to the
2 point where they are not competent to conduct trial proceedings by
3 themselves.

4 Edwards, 554 U.S. at 177-78.

5 In reaching this conclusion, Edwards distinguished Godinez: the defendant in that case
6 only sought to represent himself to enter a guilty plea rather than to conduct trial proceedings;
7 Godinez never considered the defendant’s ability to conduct a defense. Edwards, 554 U.S. at
8 173. “Godinez involved a State that sought to *permit* a gray-area defendant [trial-competent but
9 otherwise mentally impaired] to represent himself. Godinez’s constitutional holding is that a State
10 may do so. But that holding simply does not tell a State whether it may deny a gray-area
11 defendant the right to represent himself—the matter at issue here.” Id. at 173, italics in original.

12 Mental illness itself is not a unitary concept. It varies in degree. It
13 can vary over time. It interferes with an individual's functioning at
14 different times in different ways.... In certain instances an individual
15 may well be able to satisfy [the] mental competence standard, for he
16 will be able to work with counsel at trial, yet at the same time he may
17 be unable to carry out the basic tasks needed to present his own
18 defense without the help of counsel.

19 Edwards, 554 U.S. at 175-76.

20 Hence, Edwards recognized “a mental-illness-related limitation on the scope of the self-
21 representation right.” Edwards, 554 U.S. at 171. Nevertheless, the Supreme Court declined to
22 adopt “a more specific standard” (id. at 178), leaving it instead to the discretion of the “trial judge
23 ... [who] will often prove best able to make more fine-tuned mental capacity decisions, tailored to
24 the individualized circumstances of a particular defendant.” Id. at 177.

25 The Relevant Proceedings

26 Following jury trial, on April 26, 2013, petitioner advised the court he wished to represent
27 himself. (1 CT 34.) Paul G. Mattiuzzi, M.D., was appointed that same date to determine whether
28 petitioner was competent to represent himself. (1 CT 34; 2 CT 189-90.)

More particularly, the following colloquy occurred on April 26:

THE COURT: All right. With regard to the matter of People versus
Oliver Gray, Mr. Gray has made a Faretta motion.

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And, Mr. Gray, we have had some discussion about that, and you wanted also to further talk about that.

What would you like to say?

THE DEFENDANT: Tami Buscho brought up the issue of doctors evaluating me on my competency to represent myself. I would like to say that I am not on any psychotropic medication or anything like that. I believe that I am competent to represent myself.

If you would like to have another doctor come and evaluate me, I would be willing to conversate with that doctor, but I would just like to exercise my right to represent myself and ask for a continuance to prepare my own new trial motion.

THE COURT: All right. I will say this: I have had a fairly extensive amount of time to talk with you, both in the Marsden motion today and the previous Marsden motion, and in both of those motions, it is apparent to this Court that, in fact, you were able to follow the proceedings that occurred throughout this entire trial.

You seem to have a fairly good understanding of what happened throughout the trial.

I would also comment, however, that you seem to have limited education, as reflected a little bit in the way you speak. It's also reflected in some of the words that you use.

The Court has provided you with a document that reflects the pro per privileges that would be available to you, and the Court has also already advised you in part that representing yourself does not come with any special privileges.

Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Representing yourself means that you are held to the same standard as an attorney.

Do you understand that?

THE DEFENDANT: I understand that.

Can I say that I have a GED. I understand my limited education, but I would like to say I speak English and I speak clearly, and I'm gonna leave it at that.

THE COURT: I will comment on that. As we have had our conversations, both today and last week, we were able to converse with one another. I understood what you were saying. I understood your points, and that is fundamental to the communication skills, which reflects for me that you do understand what's going on.

So this Court is actually willing to entertain allowing you to represent

1 yourself, but I do want you to read that document that I have provided
2 to you so you know specifically what it entails when you represent
yourself.

3 The Court will then give you an opportunity to request it, to provide
4 or to prepare a new trial motion, and the Court would then consider
5 that, but I want you to be aware of the serious step you're taking, the
6 consequences of that step and the potential exposure you have with
7 regard to sentencing in this case, and the fact that those are all things
8 that you're understanding.

9 You also need to understand that if you make mistakes in
10 representing yourself, it's not going to essentially result in some kind
11 of benefit to you on appeal. You don't get a benefit from that.

12 Do you understand that?

13 THE DEFENDANT: Yes, I do.

14 I would like to say I have already previously attempted to file a
15 Faretta motion. So I understand it. I have read it, and I'm gonna leave
16 it up to you to make a judgment.

17 THE COURT: All right. Well, if you have read all that, why don't
18 you go ahead and sign it, if you're familiar with it all.

19 You have no questions about anything on that document?

20 THE DEFENDANT: None at all.

21 (Defendant now signing the document.)

22 THE COURT: Did you fill it all out?

23 THE DEFENDANT: What's the date today?

24 [PROSECUTOR]: The 26th of April.

25 THE COURT: At the very bottom there, there is a signature, that's
26 for me, not for you.

27 THE DEFENDANT: Yes, I understand. It says Superior Court judge.

28 THE COURT: I want you to fill out everything else.

[PROSECUTOR]: Your Honor, may I have an opportunity to be
heard?

THE COURT: You will.

[PROSECUTOR]: Thank you.

(Pause.)

THE COURT: We provided you with a second sheet.

1 Have you seen that, Mr. Gray?

2 THE DEFENDANT: Yes.

3 THE COURT: All right. Let's walk through it and make sure you
4 understand it.

5 You have the right to be represented by an attorney at all stages of
6 the case.

7 If you can't afford one, one will be appointed for you, just like it has
8 been. Ms. Buscho has been representing you.

9 Do you understand that?

10 THE DEFENDANT: Yes, I do.

11 THE COURT: You also understand, as I have already explained to
12 you, it's not a wise move to proceed without an attorney when you
13 are going against skilled and experienced attorneys like [the
14 prosecutor].

15 Do you understand that?

16 THE DEFENDANT: We all have our opinion of why it is, but I can
17 agree with that.

18 THE COURT: That is a fair statement.

19 Do you understand that the maximum exposure in this case is what
20 is reflected in the probation report, and that's 47 years -- I believe it's
21 47 years, 8 months.

22 THE DEFENDANT: Yeah, I seen the probation.

23 THE COURT: Do you understand this Court's not going to help you
24 present any arguments during any of the proceedings?

25 THE DEFENDANT: Yeah, I do.

26 THE COURT: All right. You have to comply with all the rules of
27 criminal procedure and evidence.

28 Do you understand that?

THE DEFENDANT: Uh-huh, yes.

THE COURT: Is that yes?

And if you are -- and if you basically are dissatisfied with the process
of judgment and sentencing, you can't use your incompetence at
representing yourself for any basis for appeal.

Do you understand that?

1 THE DEFENDANT: Yeah.

2 THE COURT: You always have the right to hire an attorney.

3 Do you understand that as well?

4 THE DEFENDANT: Yes, I do.

5 THE COURT: Okay.

6 THE DEFENDANT: But I don't have the money to fund an attorney,
7 but all right. I understand that I could buy an attorney if I had the
8 money, but go ahead.

8 THE COURT: Okay. We've talked about your background and the
9 fact that you have limited education.

10 We've talked about the knowledge you have with regard to the court
11 s[ys]tem. You've been in the court system a fair amount, so you
12 probably have some experience from that, but you think you're
13 knowledgeable about the way the court system works?

12 THE DEFENDANT: I know how to read, write, and I can see what's
13 going on, and I understand what's going on, and I basically can
14 comprehend what I am reading and seeing, yes.

14 THE COURT: All right. Do you think that that's -- do you think any
15 deficiency exists that might prevent you from representing yourself?

15 THE DEFENDANT: Can you say -- can you be specific on
16 deficiencies?

16 THE COURT: Sure. We have talked in this trial about the fact that
17 had some at least some neurological impairment.

18 Do you think that that neurological impairment is gonna affect you
19 as you try to represent yourself?

20 THE DEFENDANT: No, I do not. Not at the moment.

21 THE COURT: All right. Do you want to represent yourself in this
22 matter?

23 THE DEFENDANT: Yes, I do. That's what I am requesting.

24 (ECF No. 46-7 at 80-86.) The court then heard from the prosecutor who expressed concern that a
25 defendant legally competent to stand trial may not likewise be competent to represent himself at
26 trial. (ECF No. 46-7 at 86-87.) Petitioner thereafter agreed to meet with Dr. Mattiuzzi on the
27 issue. (Id. at 88-89.) On June 3, 2012, once the trial court had reviewed the doctor' report,
28 further proceedings were held:

1 [THE COURT]: And Dr. Mattiuzzi concludes⁵ that in fact the
2 defendant should not represent himself as a result of various --
3 various difficulties and disorders that have been identified by Dr.
4 Mattiuzzi.

5 The Court has also had a chance to go back and his narrative that in
6 fact your linear -- your thinking is more linear and you are more in
7 command of case relevant information than when he previously
8 spoke with you.

9 But despite those conclusions, he does still believe that, in fact, it
10 would be an injustice for you to represent yourself in this matter.

11 Is there some reason why I shouldn't follow his recommendation that
12 you think would be appropriate for the Court to hear?

13 THE DEFENDANT: Can I ask that you specify in detail what exactly
14 is enabling me from representing myself due to mentally disorder?
15 Can you specify on what task or what he believes that I'm not
16 competent to represent myself?

17 THE COURT: He thinks that in fact the complexity of the trial
18 process and the inability to engage in linear thinking and analytical
19 thinking would prevent you from representing yourself in this matter.

20 THE DEFENDANT: What is linear?

21 THE COURT: Linear means you're doing it progressively, along the
22 line. So, for example, a simple linear thinking would be you have a
23 line that goes from this point to this point and you walk along the
24 line. That's linear thinking.

25 Does that make sense to you?

26 THE DEFENDANT: Yeah, it makes sense.

27 THE COURT: Pardon me?

28 THE DEFENDANT: Yes.

THE COURT: All right. Any other comment you'd like you're not
competent to represent yourself.

THE DEFENDANT: All right. Can I say one thing on fundamentally
fair. The whole reason that I initiated representing myself was
because Tami Buscho refused to do a new trial motion. And I don't
believe that it would be fundamentally fair being represented by
counsel who are refusing basically to do an obligation as counsel and
protect my rights in this case.

⁵ Dr. Mattiuzzi's report concluded that petitioner "suffers from a severe mental disorder that would prevent him from carrying out the tasks needed to represent him or herself in court without the assistance of counsel, and that he is therefore not mentally competent to represent himself..." (SEALED CT 574-86 [5/30/13 Mattiuzzi, at 5].)

1 THE COURT: All right. I understand that. I think I understood that
2 previously.

3 Anything else by counsel on this matter?

4 [PROSECUTOR]: No, your Honor.

5 [DEFENSE COUNSEL]: No, your Honor.

6 THE COURT: All right. The Court is going to deny the request to
7 represent yourself Mr. Gray. The Court has indicated it does think
8 this falls into the gray area specified in the Johnson case. The Court
9 also thinks in this particular case representation of yourself would be
10 an injustice.

11 Faretta motion is denied.

12 THE DEFENDANT: Actually could I say that I disagree with the
13 ruling and you abuse your discretion. And that I would like to move
14 for a different judge-to hear this matter.

15 THE COURT: You can say that. Your request is denied.

16 (ECF No. 46-7 at 93-95; see also 1 CT 35.)

17 Analysis

18 As noted above, the United States Supreme Court has held that an individual found
19 competent to stand trial may be incompetent for purposes of self-representation. The latter
20 requires a higher degree of functionality. Edwards, 554 U.S. at 173-75.

21 Here, the trial court considered its own observations of petitioner during trial proceedings,
22 among other concerns raised by the prosecutor, before ultimately obtaining petitioner's
23 acquiescence to meeting with a mental health professional who would assess petitioner's
24 competency for purposes of self-representation during sentencing and post-trial motions. When
25 Dr. Mattiuzzi's report indicated that in his expert opinion petitioner was unable to competently
26 represent himself due to impairments in linear and analytical thinking, among other factors, the
27 trial court denied petitioner's Faretta request on that basis. In so doing, the trial court acted
28 within its discretion, making a "more fine-tuned mental capacity" decision, "tailored to the
individualized circumstances" particular to petitioner. Edwards, at 177.

The undersigned finds the record supports the state court's denial of petitioner's claim as
it involves neither an unreasonable application of, nor is it contrary to, Supreme Court precedent.

1 As a result, petitioner's claim as asserted in ground seven should be denied.

2 Finally, because grounds eight and nine are dependent upon a finding that petitioner is
3 entitled to relief on the claim asserted in ground seven, and as acknowledged yet not conceded by
4 petitioner (ECF No. 18 at 47-48), because the claim asserted in ground seven is found to be
5 without merit, the undersigned also recommends the related claims asserted in grounds eight and
6 nine lack merit and should be denied. Where petitioner cannot prevail on the merits of his Faretta
7 based claim, neither can he prevail on the related claims that trial and appellate counsel provided
8 ineffective assistance in this regard. Strickland v. Washington, 466 U.S. at 687-688, 694; Jones
9 v. Barnes, 463 U.S. at 753.

10 In sum, the state court determination was reasonable and precludes relief on petitioner's
11 claims as asserted in grounds seven, eight and nine. 28 U.S.C. § 2254(d). Thus, those claims too
12 should be denied.

13 VI. Conclusion

14 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of
15 habeas corpus be denied.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." If petitioner files objections,
21 he shall also address whether a certificate of appealability should issue and, if so, why and as to
22 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the
23 applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.
24 § 2253(c)(3). Any response to the objections shall be filed and served within fourteen days after
25 service of the objections. The parties are advised that failure to file objections within the

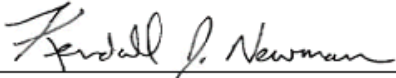
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1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
2 F.2d 1153, 1156 (9th Cir. 1991).

3 Dated: March 25, 2020

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KENDALL J. NEWMAN
6 UNITED STATES MAGISTRATE JUDGE

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