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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JESUS A MORENO,

Plaintiff,

v.

IVAN CLAY, Acting Warden,

Defendant.

No. C 07-00356 CW

ORDER DENYING
PETITION FOR WRIT OF
HABEAS CORPUS

On January 18, 2007, Petitioner Jesus A. Moreno, a state prisoner incarcerated at Pleasant Valley State Prison, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging a conviction and sentence imposed by the Contra Costa County superior court. On August 16, 2007, Respondent Acting Warden Ivan Clay filed an answer. Petitioner has not filed a traverse despite being granted an extension of time to do so. Having considered all of the papers filed by the parties, the Court DENIES the petition.

PROCEDURAL HISTORY

Following a jury trial, Petitioner was convicted on July 9, 2004 of attempted second degree murder with an enhancement for the use of a deadly weapon, assault with a deadly weapon upon a peace officer and second degree residential burglary. (Pet'r Ex. A, Sept. 14, 2005 California Court of Appeal Order at 1.) On August 12, 2004, the trial court sentenced Petitioner to an aggregate term of twenty-three years to life. (Id.)

1 On September 14, 2005, in an unpublished opinion, the
2 California court of appeal reversed Petitioner's assault conviction
3 and otherwise affirmed. (Id.) On October 3, 2005, the court of
4 appeal denied Petitioner's petition for rehearing. (Resp't Ex. H,
5 Oct. 3, 2005 California Court of Appeal Order at 1.) On December
6 21, 2005, the California Supreme Court denied review. (Resp't Ex.
7 I, Dec. 21, 2005 California Supreme Court Order at 1.)

8 Petitioner's timely federal habeas corpus petition raises four
9 claims: (1) that the trial court erred in precluding defense
10 testimony; (2) that the trial court erred in instructing the jury
11 on Petitioner's intent; (3) that the trial court failed to give the
12 jury necessary reasonable doubt and burden of proof instructions;
13 and (4) cumulative error.

14 STATEMENT OF FACTS

15 The California court of appeal summarized the factual
16 background as follows:

17 In his opening statement defendant's counsel told the
18 jury that defendant did not contest the burglary or the
19 assault charges against him. Defendant did contest the
20 attempted murder charge on the ground that he lacked
21 the requisite intent. Much of the evidence introduced
at trial may therefore be abbreviated into the
following summary:

22 In the early morning of April 11, 2003, defendant broke
23 into the Downer School in San Pablo. He ransacked a
classroom and took some school supplies. Defendant's
24 entry apparently triggered a silent alarm, and Cris
Grunseth, an officer with the West Contra Costa Unified
25 School District, was dispatched to investigate.
Grunseth discovered defendant hiding behind a filing
26 cabinet in the classroom. Grunseth told him he was
under arrest for burglary. He placed a handcuff on
27 only one of defendant's wrists, because, he testified:
"I cuffed his right hand, and . . . I tried to cuff his
28 left. He was complaining that his arm was hurting him
and it was stiff, and he was a big person. So I--

1 because he wasn't giving me any grief, I said, Okay,
2 fine, . . . I will just hold on to the cuff and we will
walk out to my car." "I still had my gun on him."

3 At his car, Officer Grunseth moved the gun from his
4 right hand to the left, in order to get his car keys
5 with his right hand; his left hand was now holding the
6 weapon and the single handcuff on defendant. It was at
7 this point that defendant "grabbed [the officer's] gun
8 handle" and "got into a wrestling match" with the
9 officer for control of the gun. Defendant struck
10 Grunseth a number of times with his fist, driving the
11 officer to his knees. Defendant then produced a knife
12 and began stabbing Grunseth. Finally breaking free of
13 the bleeding Grunseth, defendant fled.

14 San Pablo police were summoned, and Grunseth provided a
15 description of the suspect. The officers described
16 Grunseth as "completely soaked in blood." Grunseth was
17 taken to the hospital, where he was treated for 10 stab
18 wounds on his back, chest, knuckle, and one "by my
19 eye." Grunseth also suffered a collapsed lung and was
20 in the hospital for four days. Fingerprints recovered
21 from the scene led to discovery of defendant's identity
22 and his subsequent arrest.

23 Defendant did not testify. Lori Clendenin testified
24 that at the time of the incident she was defendant's
25 girlfriend and living with him. For several weeks
26 before April 10, defendant had been smoking
27 methamphetamine. He was doing so on the night of the
28 10th, and Clendenin thought he was "a little more hyper
than normal. . . ."

Douglas Tucker, M.D., testified as an expert on the
effects of methamphetamine use. He explained for the
jury how the euphoria of continuous methamphetamine
usage can easily go from euphoria to paranoia. It can
also lead to "impulsivity," which Dr. Tucker described
as actions taken "without adequate reflection or
consideration." Methamphetamine "impairs judgment" and
the ability to make reasoned decisions, including the
consequences of specific actions.

(Pet'r Ex. A at 2-3.)

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act
(AEDPA), a federal writ of habeas corpus may not be granted with

1 respect to any claim that was adjudicated on the merits in state
2 court unless the state court's adjudication of the claims:
3 "(1) resulted in a decision that was contrary to, or involved an
4 unreasonable application of, clearly established Federal law, as
5 determined by the Supreme Court of the United States; or
6 (2) resulted in a decision that was based on an unreasonable
7 determination of the facts in light of the evidence presented in
8 the State court proceeding." 28 U.S.C. § 2254(d).

9 "Under the 'contrary to' clause, a federal habeas court may
10 grant relief if the state court arrives at a conclusion opposite to
11 that reached by the [Supreme] Court on a question of law or decides
12 a case differently than the [Supreme] Court has on a set of
13 materially indistinguishable facts." William v. Taylor, 529 U.S.
14 362, 412-13 (2000). "Under the 'unreasonable application' clause,
15 a federal habeas court may grant the writ if the state court
16 identifies the correct governing legal principle from the [Supreme]
17 Court's decision but unreasonably applies that principle to the
18 facts of the prisoner's case." Id. at 413. The only definitive
19 source of clearly established federal law under 28 U.S.C. § 2254(d)
20 is in the holdings of the Supreme Court as of the time of the
21 relevant state court decision. Id. at 412.

22 If constitutional error is found, habeas relief is warranted
23 only if the error had a "'substantial and injurious effect or
24 influence in determining the jury's verdict.'" Penry v. Johnson,
25 532 U.S. 782, 795 (2001) (quoting Brecht v. Abrahamson,
26 507 U.S. 619, 638 (1993)).

27 In determining whether the state court's decision is contrary
28

1 to, or involved the unreasonable application of, clearly
2 established federal law, a federal court looks to the decision of
3 the highest state court to address the merits of a petitioner's
4 claim in a reasoned decision. Lajoie v. Thompson, 217 F.3d 663,
5 669 n.7 (9th Cir. 2000). Respondent concedes that Petitioner has
6 exhausted his state remedies by raising his claims on petition for
7 review in the California Supreme Court. Because the Supreme Court
8 issued a summary opinion which does not explain the rationale of
9 its decision, the last state court opinion to address the merits of
10 Petitioner's claims is the opinion of the California court of
11 appeal.

12 DISCUSSION

13 I. Preclusion of Expert Witness Testimony

14 Petitioner argues that the trial court denied him due process
15 by precluding defense counsel from asking the defense psychiatric
16 expert Dr. Douglas Tucker any fact-specific hypothetical questions.

17 A state court's evidentiary ruling is not subject to federal
18 habeas review unless it violates federal law, either by infringing
19 upon a specific federal constitutional or statutory provision or by
20 depriving the defendant of the fundamentally fair trial guaranteed
21 by due process. Pulley v. Harris, 465 U.S. 37, 41 (1984); Jammal
22 v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991); Middleton v.
23 Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985).

24 "State and federal rule makers have broad latitude under the
25 Constitution to establish rules excluding evidence from criminal
26 trials." Holmes v. South Carolina, 547 U.S. 319, 324 (2006)
27 (quotations and citations omitted); Montana v. Egelhoff, 518 U.S.

1 37, 42 (1996) (holding that due process does not guarantee a
2 defendant the right to present all relevant evidence). This
3 latitude is limited, however, by a defendant's constitutional
4 rights to due process and to present a defense, rights originating
5 in the Sixth and Fourteenth Amendments. Holmes, 547 U.S. at 324.
6 The exclusion of evidence does not violate the Due Process Clause
7 unless the defendant proves that "it offends some principle of
8 justice so rooted in the traditions and conscience of our people as
9 to be ranked as fundamental." Egelhoff, 518 U.S. at 42, 47.

10 In deciding if the exclusion of evidence violates the due
11 process right to a fair trial or the right to present a defense,
12 the court balances the following five factors: (1) the probative
13 value of the excluded evidence on the central issue; (2) its
14 reliability; (3) whether it is capable of evaluation by the trier
15 of fact; (4) whether it is the sole evidence on the issue or merely
16 cumulative; and (5) whether it constitutes a major part of the
17 attempted defense. Chia v. Cambra, 360 F.3d 997, 1004 (9th Cir.
18 2004); Drayden v. White, 232 F.3d 704, 711 (9th Cir. 2000). The
19 court must also give due weight to the state interests underlying
20 the state evidentiary rules on which the exclusion was based.
21 Chia, 360 F.3d at 1006; Miller v. Stagner, 757 F.2d 988, 995 (9th
22 Cir. 1985).

23 The appellate court upheld the ruling of the trial court
24 precluding Dr. Tucker's response to defense counsel's fact-specific
25 hypothetical. The trial court had conducted a hearing pursuant to
26 California Evidence Code Section 402 to determine what testimony
27 the jury would hear from Dr. Tucker. (Pet'r Ex. A at 3.) At the
28

1 hearing, Dr. Tucker offered testimony as an expert in forensic
2 psychiatry on the effects of methamphetamine usage. (Id.) Defense
3 counsel gave the following hypothetical fact pattern to Dr. Tucker:

4
5 I would like to ask you to just think about the
6 following fact pattern.

7 Assume that a man in his early 20s with a history of
8 methamphetamine use ingests some portion of one gram of
9 methamphetamine by means of smoking some time late in
10 the evening of -- call it April 10th.

11 Assume that sometime around 2:00 a.m. this man enters
12 the classroom, portable classroom in order to find some
13 items to steal.

14 Further assume this man is caught by a school police
15 officer.

16 Assume that the man tries to hide, but is seen. And
17 the officer begins the process of taking him into
18 custody.

19 Assume that the man is handcuffed by one hand and
20 escorted out of the classroom by the officer and that
21 the -- throughout the entire encounter, the officer has
22 his gun, service weapon drawn.

23 Assume further that the officer makes known to this man
24 that he is a police officer, that he is making an
25 arrest, and that he does have his gun drawn.

26 Assume that as they arrive outside of the classroom at
27 the officer's patrol vehicle, the officer moves his
28 firearm from his free hand into the same hand in which
he is holding onto the other end of the handcuff that
is attached to the man.

Assume that there are some moments of confusion, the
officer is fumbling for the keys, trying to get the
door open, and that this man reaches out toward the
officer's hand, the one where he has the gun and the
cuff, and the struggle begins.

(Resp't Ex. C, July 6, 2004 Superior Court Reporter's Transcript
(RT) at 618-619.)

Based on this hypothetical fact pattern indistinguishable from

1 the case before the court, defense counsel posed the question: "Do
2 you have an opinion as to how the man having ingested
3 methamphetamine would affect his reaction to that set of facts?"
4 (Id. at 619.) Dr. Tucker responded: "What you are describing
5 sounds like a situation where maybe an impulsive decision to act,
6 to grab the cop or wrestle or escape or make your move, would be
7 something that methamphetamine could certainly influence." (Id. at
8 620.) Defense counsel then asked: "Do you have an opinion as to
9 how that set of facts would affect the person who had ingested
10 methamphetamine, that person's ability to weigh options and make
11 choices?" (Id. at 621.) Dr. Tucker replied: "Methamphetamine
12 intoxication definitely reduces the ability to weigh options and
13 make choices. In fact, poor judgment is one of the diagnostic
14 criteria for making the diagnosis of methamphetamine intoxication."
15 (Id.)

16 On cross-examination at the § 402 hearing, the prosecutor
17 questioned Dr. Tucker on the hypothetical, asking: "You said that
18 under the fact pattern given that maybe that person was -- maybe
19 the decision to act was impulsive. How confident are you . . . by
20 this 'maybe?'" (Id. at 629.) Dr. Tucker answered: "[N]ot very
21 confident at all. I have not interviewed the defendant. I have
22 not read much in the way of records on this case or learned much
23 about it other than the very brief information that I reviewed, as
24 I mentioned, and what I was given in the hypothetical." (Id.) The
25 trial court did not allow defense counsel to elicit Dr. Tucker's
26 answer to the fact-specific hypothetical at trial. Dr. Tucker was
27 allowed to testify as to the general effects of methamphetamine.

1 In upholding the ruling of the trial court, the appellate
2 court explained that Dr. Tucker was correctly prevented from
3 offering an opinion about whether Petitioner possessed the mental
4 state for the crime and that the hypothetical so mirrored the facts
5 of the crime that it would have conveyed the message that Dr.
6 Tucker was testifying about Petitioner's mental state.

7 [T]he effect of the hypothetical question defendant
8 intended to pose to Dr. Tucker--whether a person using
9 methamphetamine would react with a "fight or flight"
10 response when apprehended under the specific facts of
11 the current case--so mirrored the current case that it
12 in essence would have conveyed the message that Dr.
13 Tucker was testifying about this defendant's mental
14 state. . . . Additionally, as the trial court noted,
15 there were gaps in the underlying foundation of Dr.
16 Tucker's proposed testimony: he did not know how much
17 methamphetamine defendant consumed or the effects on
18 this individual defendant due to his particular
19 sensitivity to the drug and history of abuse. . . .

20 The court's ruling did not entirely foreclose testimony
21 from Dr. Tucker; the court ruled he could testify about
22 the general effects of methamphetamine and that
23 methamphetamine use could increase impulsivity, and Dr.
24 Tucker did so testify.

25 (Pet'r Ex. A at 7.)

26 The appellant court's application of state evidentiary rules
27 in affirming the exclusion of some of Dr. Tucker's testimony did
28 not offend any fundamental principle of justice or deprive
29 Petitioner of a fair trial. Under California law, an expert cannot
30 testify whether the defendant has the required mental state to
31 commit the crimes charged. Cal. Penal Code § 29. As noted by the
32 trial and appellate courts, defense counsel's hypothetical was so
33 similar to the facts of the case that its effect would have been to
34 convey to the jury that Dr. Tucker was giving an opinion on
35 Petitioner's state of mind at the time of the offense. California

1 has broad latitude to exclude evidence from criminal trials. Like
2 California law, the federal rules of evidence prevent expert
3 testimony as to whether a defendant had the mental state
4 constituting an element of the crime. Fed. R. Evid. 704(b). Thus,
5 the exclusion of Dr. Tucker's testimony did not violate federal
6 law, nor deprive Petitioner of a fundamentally fair trial
7 guaranteed by due process.

8 Even if Dr. Tucker's answer to the hypothetical had been
9 admissible, its exclusion was not unreasonable. Under the Chia
10 balancing factors, the probative value and reliability of the
11 testimony was not great because there was no evidence of how much
12 methamphetamine Petitioner ingested, individual reactions to the
13 drug vary widely and Dr. Tucker had no personal knowledge of
14 Petitioner's medical history nor how he would react to
15 methamphetamine. (Resp't Ex. C at 702-708.) Dr. Tucker's answer
16 to the hypothetical would not have been a major part of
17 Petitioner's defense because he expressly indicated that he could
18 not determine Petitioner's intent, but could only speculate that
19 Petitioner may have been impulsive. (Id. at 634.) Furthermore,
20 Dr. Tucker was allowed to testify as to the general effects of
21 methamphetamine.

22 Thus, the exclusion of Dr. Tucker's testimony on defense
23 counsel's hypothetical was not a violation of Petitioner's
24 constitutional rights. The appellate court's decision was not
25 contrary to nor an unreasonable application of federal law.

26 II. Erroneous Jury Instructions

27 Petitioner argues that his due process rights were violated
28

1 when the trial court (a) instructed the jury that attempted
2 voluntary manslaughter could be premised on the theory of conscious
3 disregard for life and (b) failed on its own motion to instruct the
4 jury that it must acquit Petitioner of attempted murder if it had a
5 reasonable doubt whether the offense was murder or manslaughter and
6 that it was the government's burden to prove beyond a reasonable
7 doubt that Petitioner did not act in a sudden quarrel or heat of
8 passion.

9 A challenge to a jury instruction solely as an error under
10 state law does not state a claim cognizable in federal habeas
11 corpus proceedings. Estelle v. McGuire, 502 U.S. 62, 71-72 (1991).
12 To obtain federal collateral relief for errors in the jury charge,
13 a petitioner must show that the ailing instruction by itself so
14 infected the entire trial that the resulting conviction violates
15 due process. Id. at 72; Cupp v. Naughten, 414 U.S. 141, 147
16 (1973); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) ("[I]t
17 must be established not merely that the instruction is undesirable,
18 erroneous, or even 'universally condemned,' but that it violated
19 some right which was guaranteed to the defendant by the Fourteenth
20 Amendment.") (quoting Cupp, 414 U.S. at 146). The instruction "may
21 not be judged in artificial isolation," but must be considered in
22 the context of the instructions as a whole and the trial record.
23 Estelle, 502 U.S. at 72 (quoting Cupp, 414 U.S. at 147). In other
24 words, the district court must evaluate jury instructions in the
25 context of the overall charge to the jury as a component of the
26 entire process. United States v. Frady, 456 U.S. 152, 169 (1982).

27 It is well established that a criminal defendant is entitled
28

1 to adequate instructions on the defense theory of the case. Conde
2 v. Henry, 198 F.3d 734, 739 (9th Cir. 2000). Failure to instruct
3 on the theory of defense violates due process if "the theory is
4 legally sound and evidence in the case makes it applicable."
5 Clark v. Brown, 450 F.3d 898, 904-05 (9th Cir.2006) (quoting
6 Beardslee v. Woodford, 358 F.3d 560, 577 (9th Cir. 2004)).
7 However, the defendant is not entitled to have jury instructions
8 raised in his or her precise terms where the given instructions
9 adequately embody the defense theory, United States v. Del Muro, 87
10 F.3d 1078, 1081 (9th Cir. 1996); United States v. Tsinnijinnie, 601
11 F.2d 1035, 1040 (9th Cir. 1979), nor to an instruction embodying
12 the defense theory if the evidence does not support it, Menendez v.
13 Terhune, 422 F.3d 1012, 1029 (9th Cir. 2005).

14 The omission of an instruction is less likely to be
15 prejudicial than a misstatement of the law. Walker v. Endell, 850
16 F.2d 470, 475-76 (9th Cir. 1988). Thus, a habeas petitioner whose
17 claim involves a failure to give a particular instruction bears an
18 "'especially heavy burden.'" Villafuerte v. Stewart, 111 F.3d 616,
19 624 (9th Cir. 1997) (quoting Henderson v. Kibbe, 431 U.S. 145, 155
20 (1977)). The significance of the omission of such an instruction
21 may be evaluated by comparison with the instructions that were
22 given. Murtishaw v. Woodford, 255 F.3d 926, 971 (9th Cir. 2001).

23 A determination that there is a reasonable likelihood that the
24 jury has applied the challenged instructions in a way that violates
25 the Constitution establishes only that a constitutional error has
26 occurred. Calderon v. Coleman, 525 U.S. 141, 146 (1998). If
27 constitutional error is found, the court must also determine that

1 the error had a substantial and injurious effect or influence in
2 determining the jury's verdict before granting habeas relief. Id.
3 (citing Brecht, 507 U.S. at 637).

4 A. Attempted Voluntary Manslaughter Jury Instruction

5 Petitioner argues that the trial court erred by instructing
6 the jurors that attempted voluntary manslaughter could be premised
7 on conscious disregard for life and by failing to answer the jury's
8 related question whether a person can attempt to kill without an
9 intent to kill.

10 Under California law, a person can commit voluntary
11 manslaughter either with an intent to kill or with a conscious
12 disregard for life. People v. Lasko, 23 Cal. 4th 101, 110 (2000).
13 However, attempted voluntary manslaughter cannot rest on a theory
14 of conscious disregard for life and it is an error to so instruct.
15 People v. Gutierrez, 112 Cal. App. 4th 704, 710 (2003); People v.
16 Montes, 112 Cal. App. 4th 1543, 1546-1547 (2003).

17 Respondent admits that the trial court erroneously instructed
18 the jury on conscious disregard for life in connection with the
19 charge of attempted voluntary manslaughter. The court improperly
20 gave the jury instructions for voluntary manslaughter rather than
21 attempted voluntary manslaughter. (Resp't Ex. C at 734; CALJIC No.
22 8.40.) However, the appellate court reasonably found that the
23 error did not have a substantial and injurious effect or influence
24 in determining the jury's verdict. The court found that the error
25 favored Petitioner because it gave the jury the option of
26 convicting him of the lesser offense of attempted voluntary
27 manslaughter if it found that he had acted with only a conscious

1 disregard for life. This is a less culpable state of mind than
2 the malice required for conviction of attempted murder.
3 Nonetheless, the jury found that Petitioner had acted with malice
4 and was therefore guilty of murder.

5 Petitioner argues that the erroneous definition of intent
6 required for voluntary manslaughter carried over prejudicially into
7 the jury's consideration of attempted murder. Petitioner argues
8 that confusion was evidenced in the jury's question, "Could you
9 please explain the definition of attempt to kill versus intent to
10 kill?" (Resp't Ex. B, July 13, 2004 Clerk's Transcript at 474.)
11 The trial court did not answer the question, but instead asked, "By
12 using the phrase 'attempt to kill' are you referring to the crime
13 of attempted murder?" (Id.) The jury did not respond further and
14 thus, the trial court never explicitly answered the original
15 question.

16 The jury was explicitly instructed that it needed to find
17 "express malice aforethought, namely, a specific intent to kill" to
18 convict Petitioner of attempted murder. (Resp't Ex. C at 725;
19 CALJIC No. 8.66.) Thus, if the jury thought Petitioner had acted
20 only out of conscious disregard for human life, it would have found
21 him guilty of attempted voluntary manslaughter, not attempted
22 murder. Because the jury convicted Petitioner of attempted murder,
23 it must have found that he had the intent to kill. Given that the
24 jury did not respond to the trial court's request for clarification
25 of its question, it must have resolved it for itself. Because the
26 erroneous jury instruction on attempted voluntary manslaughter had
27 no substantial and injurious effect or influence in determining the
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1 jury's verdict, the appellate court's rejection of Petitioner's
2 challenge was not contrary to or an unreasonable application of
3 federal law.

4 B. Reasonable Doubt and Burden of Proof Instructions

5 Petitioner argues that the appellate court unreasonably found
6 that the trial court had no duty on its own motion to instruct the
7 jury (1) that if the jury had a reasonable doubt whether Petitioner
8 committed attempted murder or attempted voluntary manslaughter, it
9 had to choose the latter verdict and (2) that the government had
10 the burden of proving Petitioner was not motivated by a sudden
11 quarrel or heat of passion.

12 (1) Reasonable Doubt as to Attempted Murder and Attempted
13 Manslaughter

14 Petitioner argues that the trial court should have instructed
15 the jury on its own motion with CALJIC No. 8.72 which requires that
16 if the jury had any reasonable doubt between attempted murder and
17 attempted voluntary manslaughter, it should find attempted
18 voluntary manslaughter.

19 However, as noted by the appellant court, pursuant to CALJIC
20 No. 17.10, the jury was told: "If you are not satisfied beyond a
21 reasonable doubt that the defendant is guilty of the crime charged,
22 you may nevertheless convict him of any lesser crime if you are
23 convinced beyond a reasonable doubt that the defendant is guilty of
24 the lesser crime. [¶] The crime of attempted voluntary
25 manslaughter . . . [is] the lesser to that of attempted
26 murder. . . ." (Resp't Ex. C at 732; CALJIC No. 17.10.) This
27 provides the same information as CALJIC No. 8.72. The appellate
28

1 court's rejection of Petitioner's challenge was not contrary to or
2 an unreasonable application of federal law. Petitioner suffered no
3 due process violation from the court's failure to instruct the jury
4 with CALJIC No. 8.72.

5 (2) Heat of Passion Instruction

6 Petitioner contends that the trial court should have
7 instructed the jury on its own motion with CALJIC No. 8.50 that the
8 prosecution bore the burden of proving that Petitioner did not act
9 upon a sudden quarrel or heat of passion. Under California law, in
10 a murder case, it is the defendant's obligation to proffer some
11 evidence that the murder was due to a sudden quarrel or heat of
12 passion unless the government's evidence suggests that the killing
13 may have been provoked. See People v. Rios, 23 Cal. 4th 450, 461-
14 462 (2000).

15 The appellate court held that there was no evidence of a
16 sudden quarrel or heat of passion, it was not argued as a theory at
17 trial and thus there was no need for the trial court to instruct
18 with CALJIC 8.50. (Pet'r Ex. A at 11.) There is no evidence in
19 the record suggesting Petitioner's knife attack on Officer Grunseth
20 was provoked. In fact, the evidence suggests that after he
21 arrested Petitioner, Officer Grunseth was unusually lenient because
22 he responded to Petitioner's complaint about arm pain and
23 handcuffed only one of Petitioner's wrists. Federal law does not
24 entitle Petitioner to an unrequested instruction the evidence does
25 not support.

26 III. Cumulative Error

27 Petitioner argues that the cumulative effect of the errors
28

1 discussed above deprived him of due process and a fair trial.

2 In some cases, although no single trial error is sufficiently
3 prejudicial to warrant reversal, the cumulative effect of several
4 errors may still prejudice a defendant so much that his conviction
5 must be overturned. Alcala v. Woodford, 334 F.3d 862, 893 (9th
6 Cir. 2003). Where no single constitutional error exists, nothing
7 can accumulate to the level of a constitutional violation. Mancuso
8 v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002); Rupe v. Wood, 93
9 F.3d 1434, 1445 (9th Cir. 1996).

10 Here, only the jury instruction that attempted voluntary
11 manslaughter could be predicated on conscious disregard for life
12 was in error. However, the appellate court reasonably held that
13 this error did not have a substantial and injurious effect or
14 influence in determining the jury's verdict because the jury
15 convicted Petitioner of the more serious offense of attempted
16 murder. Thus, there was no cumulative error and the appellate
17 court's decision was neither contrary to nor an unreasonable
18 application of federal law.

19 CONCLUSION

20 For the foregoing reasons, the petition for a writ of habeas
21 corpus is DENIED. The Clerk of the Court shall enter judgment and
22 close the file.

23 IT IS SO ORDERED.

24 Dated: 12/2/08



25 CLAUDIA WILKEN
26 United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 JESUS A MORENO,

5 Plaintiff,

6 v.

7 I D CLAY et al,

8 Defendant.

Case Number: CV07-00356 CW

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
10 Court, Northern District of California.

11 That on December 2, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

15 David M. Baskind
16 State Attorney General's Office
17 455 Golden Gate Avenue, Suite 11000
18 San Francisco, CA 94102-7004

19 Jesus A. Moreno V-47127
20 Pleasant Valley State Prison
21 24863 W. Jayne Avenue
22 P.O. Box 8503
23 Coalinga, CA 93210

24 Dated: December 2, 2008

25 Richard W. Wieking, Clerk
26 By: Sheilah Cahill, Deputy Clerk