UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SHEILA I. WEST,

Petitioner,

v.

DERRAL ADAMS, Acting Warden,[1]

Respondent.

Case No. 16-cv-03032-YGR (PR)

**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; AND DENYING CERTIFICATE OF APPEALABILITY**

Petitioner Sheila I. West ("Petitioner"), a state prisoner incarcerated at Central California Women's Facility, brings this *pro se* habeas action under 28 U.S.C. § 2254 relating to a March 16, 2012 incident in which she fired several gunshots at Sequoia Cutrer during an argument.

In an amended information filed in the Alameda County Superior Court on March 4, 2013, the District Attorney charged Petitioner as follows: count one—attempted murder (Cal. Penal Code §§ 187(a), 664), with allegations that Petitioner personally and intentionally discharged a firearm causing great bodily injury (Cal. Penal Code § 12022.53(d)) and personally inflicted great bodily injury on the victim (Cal. Penal Code § 12022.7); count two—assault with a firearm (Cal. Penal Code § 245(a)(2)), with allegations of personal firearm use (Cal. Penal Code § 12022.5(a)) and great bodily injury (12022.7(a)); count three—possession of a firearm by a felon (Cal. Penal Code § 29800(a)(1)). 1 Clerk's Transcript ("CT") 280-284.

On March 21, 2013, the jury found Petitioner guilty as charged on possession of a firearm by a felon and assault with a firearm (counts two and three), and guilty of the lesser included offense of attempted voluntary manslaughter (Cal. Penal Code §§ 192(a), 664) on count one. 2CT 339-344; 7 Reporter's Transcript ("RT") 1023-1026. The jury also found true the allegations of personal firearm use and personal infliction of great bodily injury on both counts one and two. 2CT 339-344; 7RT 1023-1026.

[1] Derral Adams, the current acting warden of the prison where Petitioner is incarcerated, has been substituted as Respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

In the instant habeas action, Petitioner challenges her aforementioned conviction and her resulting ten-year sentence. *See* Dkt. 1.

Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby DENIES all claims in the petition for the reasons set forth below.

## I. BACKGROUND[2]

### A. Factual Background[3]

#### 1. Introduction and Generally Agreed-Upon Background Facts

Prior to March 16, 2012, Petitioner and Cutrer had known each other for a few years because they met through a mutual friend, Kim Watson. 1RT 57-58. Petitioner and her wife, Dominque Handy, as well as Cutrer and Watson frequented Club 21, a bar located at 21st Street and Franklin Street in downtown Oakland. 1RT 62; 3RT 490; 6RT 783-784. Moore worked as a dancer at the club, as did another mutual friend, Danielle Hill, who worked as a promoter and put on special events there. 1RT 59, 66-68; 2RT 141, 149-150, 163-164; 3RT 490-493; 6RT 741, 743-744, 757, 773-774, 779. At some point prior to the incident, Watson and Petitioner had a falling out after Petitioner allegedly "snitched" on Watson. 1RT 58, 73; 2RT 160-162; 4RT 573; 6RT 744-745, 776. Cutrer blamed Petitioner for her role in Watson's arrest and stopped speaking to her. 1RT 59, 63-64, 70-71, 74; 2RT 144-145, 156, 160-162; 3RT 273; 6RT 745, 780.

On the evening of March 15, 2012, Petitioner and Handy met at Club 21. 6RT 775-777.

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[2] For reference, here is a list of the names and descriptions of those included in the background:

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|---|---|
| Sequoia Cutrer ("Cutrer") | - victim |
| Dominique Handy ("Handy") | - Petitioner's wife and witness to shooting |
| Danielle Hill ("Hill") | - mutual friend of Petitioner and Cutrer; promoter at Club 21 |
| Marianne Johnson ("Johnson") | - victim's friend and witness to shooting |
| Porshea Moore ("Moore") | - victim's friend and witness to shooting; dancer at Club 21 |
| Topaz Sanders ("Sanders") | - victim's adult daughter and witness to shooting |
| Crystal Thompsen (Thompsen") | - victim's friend and witness to shooting |
| Kim Watson ("Watson") | - mutual friend of Petitioner and Cutrer |

[3] The California Court of Appeal did not give a detailed summary of the underlying crimes because Petitioner's sole arguments on direct appeal pertained to jury selection and sentencing. This summary is consistent with that presented by Petitioner on direct appeal. *See* Dkt. 13-13 at 3-32.

Cutrer and Moore arrived at Club 21 around the same time that night. 1RT 59-63, 67-68; 2RT 148-149; 3RT 492; 6RT 777-778. After arriving at the club, Petitioner, Handy, Cutrer, and Moore spent the next several hours independently dancing, drinking, and mingling with other club patrons. 1RT 63, 68-69; 2RT 147-149, 159; 3RT 494-495; 4RT 577. At some point, Petitioner and Cutrer encountered each other, and Petitioner attempted to speak to Cutrer. 1RT 70-75; 3RT 495-497; 6RT 835-836. Cutrer asked that she not talk to her after which they separated. 1RT 71-75; 2RT 153, 155-156. Following this interaction, Cutrer told a few of her friends, including Moore and Hill, that she was upset by Petitioner's attempt to make conversation. 2RT 94-97, 98-99, 154-155; 3RT 495-498, 500; 6RT 778-780. Cutrer then called another friend, Marianne Johnson, and asked her for a ride home from the club. 1RT 75-76; 2RT 92-94; 3RT 311-312, 392-394, 499. Johnson agreed to drive from her Vallejo home to come pick up Cutrer from the club. 2RT 94; 3RT 314-315. Johnson's adult daughter, Topaz Sanders, and another friend, Crystal Thompsen, came along for the ride. 1RT 77; 3RT 315-316, 391-395.

Johnson, Sanders, and Thompsen arrived at Club 21 at around 2:00 AM. 2RT 213-216; 3RT 313-314, 393-395, 399. Cutrer and Moore left the club and met Johnson and the other women outside where they spent a few minutes talking and smoking cigarettes. 2RT 99-104, 219; 3RT 316-319, 399-402, 499-502. Around the same time, Petitioner and Handy also left the club and walked down the street to Petitioner's car. 6RT 789. Petitioner and Handy got into Petitioner's car and drove past the club where Petitioner dropped off Handy at her car. 2RT 102, 219, 225-228; 3RT 286, 320-322, 403, 502-504. Upon seeing Petitioner and Handy drive past them, Moore ran toward Petitioner's car. 2RT 104-105, 179, 182, 219, 228; 3RT 285-287, 322, 402, 404, 502, 504-507. Cutrer followed close behind. 2RT 106-107, 190-192, 219; 3RT 288-289, 323, 402, 404. Johnson, Sanders, and Thompsen ran after them shortly thereafter. 2RT 183; 3RT 290-293, 299-300, 323-325, 405-407.

When Moore and Cutrer arrived at Petitioner's car, they reached through the open driver's seat window and punched or slapped Petitioner multiple times. 2RT 107-114, 135, 187, 190-191, 193; 3RT 262, 323-326, 422-423, 507-511, 514-515; 4RT 590-591. Upon seeing Cutrer and Moore at Petitioner's car, Handy ran over and attempted to pull Moore and Cutrer away from

Petitioner. 2RT 197; 3RT 290, 324-325, 422-423. Petitioner fought back for a few moments before she displayed a small revolver and fired two or more gunshots. 2RT 111-116, 197-198; 3RT 292, 302-304, 324, 326-328, 336, 407-408, 411, 512, 514-516; 4RT 590, 598. Cutrer was struck by the gunshots and fell to the ground, following which Moore ran away from Petitioner's car. 2RT 116, 200-201; 3RT 262-263, 292-293, 304-305, 328, 332, 336, 411-412.

**2. The Testimony by the Prosecution Witnesses About the Number and Nature of the Gunshots**

The following witnesses testified that Petitioner, after firing gunshots at Cutrer, also exited her car and fired additional gunshots at Cutrer, who lay wounded on the ground.

**a. Cutrer**

Cutrer testified that her last memory before losing consciousness after being shot by Petitioner (from inside the car) was seeing Petitioner exit the car and stand above her. 2RT 118-119.

**b. Thompsen**

Thompsen testified that after hearing two gunshots fired and seeing Cutrer fall to the ground as Moore ran away, she saw Petitioner get out of the car and fire two or three additional gunshots at Cutrer as she attempted to crawl away to safety. 3RT 295-303. Thompsen also testified to seeing Petitioner kick Cutrer and say, "Now what?" 3RT 302.

**c. Johnson**

Johnson testified that she saw Petitioner fire two or three gunshots, following which Cutrer fell to the ground. 3RT 327-334, 380. Johnson then observed Petitioner get out of her car and fire two more gunshots at Cutrer as she lay on the ground trying to "scoot away." 3RT 332-334. She also recalled that it appeared as though Petitioner was speaking to Cutrer as she fired the final gunshots and that Cutrer's body seemed to "jerk" after the fourth or fifth shot, as if she had been struck by another bullet. 3RT 333-338.

**d. Sanders**

Sanders was twenty-five years old at the time of trial. 3CT 391. Sanders testified that she heard two gunshots and then saw Cutrer (her mother) lying on the ground. 3RT 408-409, 411.

She then observed Petitioner get out of her car, stand over Cutrer, and fire three more gunshots. Sanders also saw Petitioner kick Cutrer and overheard her say, "Now what?" 3RT 411-412, 416-419, 430, 470.

**e. Moore**

Moore also testified that, after running away upon hearing the first two gunshots fired, she witnessed Petitioner fire several more gunshots at Cutrer, including three shots while Cutrer was lying on the ground. 3RT 518-519; 4RT 548-550; 5RT 618-619. Moore then observed Petitioner kick Cutrer and say, "What now?" or "Now what, bitch?" 4RT 551-554; 5RT 619.

**3. The Police Investigation**

The police investigation recovered a video recording of the incident from a nearby building, which the jury watched several times and that conclusively showed the initial attack by Moore and Cutrer, a gun firing, Cutrer lying on the ground, Petitioner getting out of her car, and Petitioner standing over Cutrer and kicking her and pointing a gun at her. 5RT 666-668. The manager of security at the nearby building from which the video footage was received, Derek Gaskin, testified to the events as he had seen them on all four videotapes that recorded footage of the incident. 5RT 703-714. Only one of which was saved permanently, however. 5RT 703-704. His testimony was entirely consistent with that footage presented to the jury in the one remaining video. 5RT 703-737.

**4. Defense Witnesses**

The defense theory at trial was that of self-defense—that Petitioner had fired only two, defensive gunshots from inside her car while she was under attack by Moore and Cutrer. 1RT 45-54; 4RT 542; 7RT 953-956, 971-974. The only witnesses the defense called to testify at trial in support of its theory were Hill and Handy.

**a. Hill**

Hill testified that she had been aware of the unpleasant encounter between Petitioner and Cutrer not long before the shooting occurred. 6RT 744-747. She also observed that Cutrer was upset prior to the time that she and Moore left the club, and she recalled Cutrer saying that Petitioner "was going to get hers." 6RT 747-753, 768.

**b. Handy**

While Handy testified that only three gunshots were fired while Petitioner was still inside her car, her testimony nonetheless had inconsistencies and she made allegations that she had Thompsen "pinned" against Petitioner's car at the time the gunshots were fired, which the prosecutor told the jury in his closing argument was inconsistent with what the videotape showed. 6RT 785-787, 780, 848-849; *see* 7RT 984. Handy's credibility was challenged further when the prosecutor elicited admissions from her regarding her prior statements to a prosecution investigator. 6RT 811-816, 819-820, 827-829. Handy admitted that she told the investigator that she knew Petitioner had inherited a revolver from an uncle some time before the shooting, she had heard three gunshots while Petitioner was under attack by Moore and Cutrer, she had seen Petitioner get out of her car and kick Cutrer twice after firing the gunshots, and that Petitioner seemed "really angry" at the time. 6RT 811-820, 829, 831, 849-851, 853-859.

**5. Prosecution Rebuttal Evidence**

The prosecution called Tai Nguyen, the investigator for the Alameda County District Attorney's Office who had interviewed Handy, to testify regarding Handy's statements during their interview. 6RT 862-863. Nguyen testified that during this interview, Handy said the following: (1) she saw a gun in Petitioner's hand when Petitioner was attacked by Moore and Cutrer; (2) she tried to stop Thompsen from joining the attack by Moore and Cutrer by pinning Thompsen to a car; (3) she heard three gunshots during the incident; (4) she saw Petitioner standing over Cutrer after the shots were fired; and (5) she heard Petitioner say to Cutrer, "Bitch, I was about to leave." 6RT 863-865.

**B. Procedural History**

**1. Conviction, Sentencing and State Court Proceedings**

Petitioner's case was tried before a jury in the Alameda County Superior Court. She was represented by trial attorney Kellin Cooper, Esq. 1CT 8. As mentioned above, on March 21, 2013, the jury found Petitioner guilty of the lesser included offense of attempted voluntary manslaughter (count one), assault with a firearm (count two), and possession of a firearm by a felon (count three). 2CT 339-344; 7RT 1023-1026. The jury also found true the allegations of

personal firearm use and personal infliction of great bodily injury on both counts one and two. 2CT 339-344; 7RT 1023-1026.

On April 24, 2013, the trial court sentenced Petitioner to an aggregate prison term of ten years. The court stayed count two and the enhancements attached thereto, pursuant to California Penal Code § 654, and imposed a concurrent term for count three. 2CT 406, 425.

On January 10, 2014, Petitioner challenged her convictions on direct appeal, and through her appellate counsel, Victoria H. Stafford, Esq., argued that errors in the jury selection process and at sentencing tainted her trial. Dkt. 13-13 at 3-32, 63-72.[4] On August 14, 2014, the California Court of Appeal affirmed Petitioner's convictions, but remanded to the trial court to correct sentencing errors concerning counts two and three. Dkt. 13-13 at 74, 80; *People v. West*, No. A138978, 2014 WL 3960044, *1-4 (Aug. 14, 2014).

On September 16, 2014, Petitioner filed a petition for review in the California Supreme Court, which reiterated Petitioner's prior claim of error in the jury selection process. Dkt. 13-13 at 83-99. On October 22, 2014, the California Supreme Court summarily denied review. Dkt. 13-13 at 102.

On November 26, 2014, the trial court resentenced Petitioner to correct its prior sentencing errors as to counts two and three. Dkt. 13-13 at 108.

On November 25, 2015, Petitioner filed a state habeas petition in the Alameda County Superior Court, asserting multiple trial errors and related claims of ineffective assistance of trial and appellate counsel for failure to challenge properly the trial court's errors. Dkt. 13-13 at 111-125. On January 25, 2016, the state superior court denied the petition as untimely, adding that even if not procedurally barred, the petition failed to state a prima facie case for relief. Dkt. 13-13 at 127-128.

On March 16, 2016, Petitioner filed a state habeas petition in the California Supreme Court, which reiterated the prior claims of ineffective assistance of counsel and further argued that she

[4] Page number citations refer to those assigned by the Court's electronic case management filing system and not those assigned by the parties.

timely presented such claims to the Alameda County Superior Court. Dkt. 13-13 at 130-148. On May 18, 2016, the California Supreme Court denied the petition "on the merits," citing to *Harrington v. Richter*, 562 U.S. 86, 99-100 (2011), and *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Dkt. 13-13 at 150.

**2. Federal Court Proceedings**

On June 6, 2016, Petitioner filed the instant petition, in which she raised her claims of ineffective assistance of counsel. Dkt. 1.

On July 15, 2016, this Court ordered Respondent to show cause why the writ should not be granted. Dkt. 5. Respondent has filed an Answer, and Petitioner has filed a Traverse. Dkts. 12, 14. The matter is fully briefed and ripe for adjudication.

## II. LEGAL STANDARD

A petition for a writ of habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The Court may entertain such a writ petition "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A district court may not grant a petition challenging a state conviction on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, 28 U.S.C. § 2254(d)(1); or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

To determine whether a state court ruling was "contrary to" or involved an "unreasonable application" of federal law under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the United States Supreme Court that existed at the time the petitioner's state court conviction became final. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Harrington v. Richter*, 562 U.S. 86, 102 (2011). A state court decision is "contrary to" clearly established Supreme Court precedent if it "applies a rule that contradicts the

governing law set forth in [the Supreme Court's] cases," or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Williams*, 529 U.S. at 405-06. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

On federal habeas review, AEDPA "imposes a highly deferential standard for evaluating state-court rulings" and "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks omitted). In applying the above standards on habeas review, this Court reviews the "last reasoned decision" by the state court. *See Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under section 2254(d). *Stanley v. Cullen*, 633 F.3d 852, 860 (9th Cir. 2011). Here, Petitioner presented all her federal claims to the California Supreme Court in a state habeas petition, which the California Supreme Court summarily denied. *See* Dkt. 13-13 at 130-148, 150. Specifically, Petitioner had resubmitted the three ineffective assistance of counsel ("IAC") claims she raised in her state habeas petitions. *See* Dkt. 1. at 8-17. As such, Petitioner's claims may be reviewed independently by this Court to determine whether that decision was an objectively unreasonable application of clearly established federal law. *Plascencia v. Alameida*, 467 F.3d 1190, 1197-98 (9th Cir. 2006) ("Because there is no reasoned state court decision denying this claim, we 'perform an independent review of the record to ascertain whether the state court decision was objectively unreasonable.'") (citation omitted); *see Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003) ("Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively

unreasonable."). "[W]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98.

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

## III. DISCUSSION

Petitioner alleges the following claims: (1) IAC as to appellate counsel for failing to challenge an alleged instructional error on appeal; (2) IAC as to trial counsel for failing to call, secure, and subpoena witnesses; and (3) IAC as to trial counsel for failing to object to Petitioner's multiple convictions as a violation of the double jeopardy clause of the United States Constitution. Dkt. 1 at 8-18. Petitioner also alleges that the Alameda County Superior Court erred in denying her state habeas petition as untimely. *Id.* at 7-8. Finally, Petitioner requests appointment of counsel and an evidentiary hearing. *Id.* at 8.

### A. Timeliness of State Habeas Petitions

Under "Ground 1" of her petition, Petitioner does not raise an actual claim but instead argues that the Alameda County Superior Court erred in denying her state habeas petition with her IAC claims as untimely. *Id.* at 7-8. The Court notes that the record shows that the state superior court denied Petitioner's state habeas petition as untimely. *See* Dkts. 13-13 at 127-128; 1 at 21-23. The Court also notes that Petitioner presented the same IAC claims to the California Supreme Court in a state habeas petition filed on March 16, 2016. *See* Dkt. 13-13 at 130-148. As mentioned above, on May 18, 2016, the state supreme court denied the petition "on the merits," with citations to *Harrington v. Richter*, 562 U.S. at 99-100, and *Ylst v. Nunnemaker*, 501 U.S. at 803. *See* Dkts. 13-13 at 150; 1 at 27.

Respondent claims that "the superior court's ruling was correct at the time it was made," but Respondent recognizes that "the California Supreme Court later reversed that ruling by denying petitioner's habeas claims on the merits." Dkt. 12-1 at 19. Respondent thus concedes that "[a]s a result, the habeas claims must be deemed timely filed in the state courts." *Id.* Respondent also

recognized as follows: "according to the Ninth Circuit's view of California's habeas procedure as analogous to appellate review, the superior court's finding of untimeliness was 'overruled' by the California Supreme Court when that court denied petitioner's claims on the merits in May 2016." *Id.* at 20 (citing *Curiel v. Miller*, 830 F.3d 864, 871-72 (9th Cir. 2016) (where the California Supreme Court denies habeas corpus claims on the merits, even though a lower state court has previously denied the same claims as untimely, federal courts must assume that the claims were deemed timely by the California Supreme Court)).

The Court agrees with Respondent. According to *Curiel*, "in cases in which the California Supreme Court has explained its decision . . . the principles of comity and federalism underlying AEDPA's tolling rule compel us to fairly abide by the state court's timeliness determination." 830 F.3d at 871 (citing *Carey v. Saffold*, 536 U.S. 214, 222-23 (2002) (describing the purpose underlying AEDPA's statute of limitations). According to the Supreme Court in *Saffold*:

> A federal habeas petitioner must exhaust state remedies before he can obtain federal habeas relief. The statute makes clear that a federal petitioner has not exhausted those remedies as long as he maintains the right under the law of the State to raise in that State, by any available procedure, the question presented. We have interpreted this latter provision to require the federal habeas petitioner to invoke one complete round of the State's established appellate review process. The exhaustion requirement serves AEDPA's goal of promoting comity, finality, and federalism, by giving state courts the first opportunity to review the claim, and to correct any constitutional violation in the first instance. And AEDPA's limitations period—with its accompanying tolling provision—ensures the achievement of this goal because it promotes the exhaustion of state remedies while respecting the interest in the finality of state court judgments.

*Saffold*, 536 U.S. at 222-23 (internal citations, brackets, and quotation marks omitted).

Here, because the California Supreme Court's timeliness holding prevails, Petitioner's state habeas petitions must be deemed properly filed for their entire pendency in state court for purposes of tolling AEDPA's statute of limitations. *See Curiel*, 830 F.3d at 871 (citing *Trigueros v. Adams*, 658 F.3d 983, 991 (9th Cir. 2011) (holding that a habeas petitioner was entitled to statutory tolling for the period from the date he filed his state habeas petition in Los Angeles County Superior Court until the date his state habeas petition was denied by the California Supreme Court, because the California Supreme Court did not find the petitioner's state petition time barred). Specifically, the

Court finds Petitioner's IAC claims (which were presented in her state habeas petitions) were timely filed in state courts.

Accordingly, the Court will now address the merits of Petitioner's IAC claims below.

**B. IAC Claims**

Petitioner raises three IAC claims, which will be discussed below in a different order than how she listed them in her petition. Dkt. 1 at 8-17. As there is no reasoned state decision addressing these IAC claims, the Court will conduct "an independent review of the record" to determine whether the California Supreme Court's summary denial of these claims was contrary to or an unreasonable application of clearly established federal law. *Plascencia*, 467 F.3d at 1197-98; *Himes*, 336 F.3d at 853.

The clearly established federal law governing IAC claims is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must show that (1) his counsel's performance was deficient and that (2) the "deficient performance prejudiced the defense." *Id.* at 687. Counsel is constitutionally deficient if his or her representation "fell below an objective standard of reasonableness" such that it was outside "the range of competence demanded of attorneys in criminal cases." *Id.* at 687-88 (internal quotation marks omitted). Reviewing courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Where deficient performance is established, "[the] errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington*, 562 U.S. at 101 (quoting *Strickland*, 466 U.S. at 687). The *Strickland* standard applies to trial and appellate counsel. *Smith v. Murray*, 477 U.S. 527, 535-36 (1986); *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989).

Under AEDPA, a federal court's review of a state court's decision on an IAC claim is "doubly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). The question is not whether counsel's actions were reasonable; rather, the question is whether "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105; *Bemore v. Chappell*, 788 F.3d 1151, 1162 (9th Cir. 2015) (same). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from

asking whether defense counsel's performance fell below *Strickland*'s standard." *Griffin v. Harrington*, 727 F.3d 940, 945 (9th Cir. 2013) (quoting *Harrington*, 562 U.S. at 101).

A difference of opinion as to trial tactics does not constitute denial of effective assistance, *United States v. Mayo*, 646 F.2d 369, 375 (9th Cir. 1981), and tactical decisions are not ineffective assistance simply because, in retrospect, better tactics are known to have been available. *Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984); *see also Brodit v. Cambra*, 350 F.3d 985, 994 (9th Cir. 2003) (state court reasonably concluded that trial counsel provided effective assistance of counsel where attorney declined to present evidence favorable to defense out of concern that it would open door to unfavorable evidence). Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). The reasonableness of counsel's decisions must be measured against the prevailing legal norms at the time counsel represented the defendant. *See e.g., Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003).

It is unnecessary for a federal court considering a habeas ineffective assistance of counsel claim to address the prejudice prong of the *Strickland* test if the petitioner cannot even establish incompetence, sufficient to constitute deficient performance, under the first prong. *See Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998). Likewise, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as the result of the alleged deficiencies. *See Strickland*, 466 U.S. at 697; *Williams v. Calderon*, 52 F.3d 1465, 1470 & n.3 (9th Cir. 1995) (applauding district court's refusal to consider whether counsel's conduct was deficient after determining that Petitioner could not establish prejudice), *cert. denied*, 516 U.S. 1124 (1996).

Federal courts should not overlook the "wide latitude counsel must have in making tactical decisions;" therefore, there are no "strict rules" for counsel's conduct "[b]eyond the general requirement of reasonableness." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1406-07 (2011) ("'No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of

circumstances faced by defense counsel or the range of legitimate decisions . . . . '") (quoting *Strickland*, 466 U.S. at 688-89). A court must consider not only the quantum of evidence known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *Wiggins*, 539 U.S. at 526-27; *see also Pinholster*, 131 S. Ct. at 1407.

The United States Supreme Court never has required defense counsel to pursue every nonfrivolous claim or defense, regardless of its merit, viability, or realistic chance of success. *Knowles v. Mirzayance*, 556 U.S. 111, 125, 127 (2009). Thus, counsel's abandonment of a defense that has "almost no chance of success" is reasonable, even if there is "nothing to lose" by preserving the defense. *Id.* at 1419-20.

The *Strickland* standard applies to claims of ineffective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). A petitioner must satisfy both prongs of the *Strickland* test in order to prevail on her claim of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 289 (2000). "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes—and when page limits on briefs are widely imposed." *Jones v. Barnes*, 463 U.S. 745, 752-53 (1983). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id*. at 751-52; *id*. at 752 ("Multiplicity hints at lack of confidence in any one [claim]."); *Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997) ("A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court."); *Miller v. Keeney*, 882 F.2d 1428, 1433-34 (9th Cir. 1989) ("the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy"). Thus, "it is still possible to bring a *Strickland* claim based on [appellate] counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

### 1. IAC as to Trial Counsel - Failure to Call, Secure, and Subpoena Witnesses

Petitioner alleges that trial counsel provided ineffective assistance of counsel by failing to call, secure, and subpoena two witnesses. Dkt. 1 at 12-14. Specifically, Petitioner contends that trial counsel was ineffective for failing to call Club 21 Security Officer Luqman Rahman ("Rahman") and Oakland Police Officer Astrid Goddard ("Goddard") as defense witnesses. *Id.* at 12-13. Petitioner argues that both of these witnesses could have provided exculpatory evidence in their testimonies to undermine the prosecution's theory that Cutrer was shot five times while lying on the ground. *Id.* at 13; *see also* Dkt. 1-1 at 9-12, 17. Further, Petitioner asserts that had the jury heard the testimony of these two witnesses, they would not have found her guilty of the lesser included offense, attempted voluntary manslaughter. *Id.* Therefore, Petitioner claims that but for trial counsel's deficient performance, there was a reasonable probability the outcome of the trial would have been different.[5] *Id.* at 13 (citing *Rogers v. Israel*, 746 F.2d 1288 (7th Cir. 1984) and *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972)).

#### a. Rahman

Petitioner claims that Rahman, who was working as a security guard at Club 21, witnessed at least some of the incident outside the club on March 16, 2012. Dkts. 1 at 12-13; 1-1 at 9-10. Petitioner notes that Rahman gave a statement to the police shortly thereafter, in which he stated

[5] Petitioner also alleges in her traverse for the first time that trial counsel coerced her wife, Handy, into testifying falsely at trial that Petitioner inherited the gun she used from her uncle. Dkt. 14 at 2, 6, 13-14. Petitioner instead now alleges that the gun used to shoot Cutrer actually belonged to Moore. *Id.* at 6. Petitioner claims Moore hit her in the face with the gun when she got to Petitioner's car, following which the gun fell to floor. *Id.* Petitioner then grabbed it only to fire two shots in self-defense. *Id.* However, Petitioner neither describes nor provides any evidence, aside from her own personal account of the events on the night of the incident, showing that Moore was originally in possession of the gun. Further, this allegation runs directly contrary to comments she made in an interview regarding the offense wherein Petitioner reportedly told officers of the Oakland Police Department that she "had the gun because [she] was afraid for [her] life after that rumor came out" (referring to the rumor that Petitioner had "snitched" on Watson). Dkt. 13-2 at 159; *see also* Dkt. 13-2 at 190. Finally, Petitioner alleges in her traverse that trial counsel failed to solicit admissions regarding their prior convictions from prosecution witnesses Moore, Cutrer, and Thompsen for impeachment purposes. *Id.* at 8. Petitioner fails to provide any compelling evidence in support of the claims she raises for the first time in her traverse or cause for failing to raise them previously. As such, these claims will not be considered because Petitioner may not raise new grounds for relief in a traverse. *Cacoperdo v. Demosthenes*, 37 F.3d 504, 508 (9th Cir. 1994). Further, such claims have not been exhausted because Petitioner did not present them in her petition to the California Supreme Court. *See* Dkt. 13-13 at 130-148.

that he saw Petitioner stand over Cutrer with a handgun but did not shoot. Dkts. 1 at 12; 1-1 at 10. Rahman also allegedly told the police in this statement that Cutrer "was not shot while laying [sic] on the ground." Dkt. 1 at 13. Rahman then testified at Petitioner's preliminary hearing wherein he reiterated the same statement that Petitioner did not shoot while Cutrer was on the ground. 1CT 190-206.

The Court finds no merit to Petitioner's IAC claim involving Rahman. First, the same trial counsel, Attorney Cooper, represented Petitioner at both the preliminary hearing and at trial. Dkt. 12-1 at 28. This presents an additionally challenging hurdle to Petitioner's claim of ineffective assistance of counsel, because trial counsel was fully informed of the content of Rahman's testimony following the preliminary hearing and therefore likely made a tactical decision not to call him to testify at trial. Where counsel abandons a defense that has "almost no chance of success," it is reasonable no matter if there is "nothing to lose" by preserving the defense. *Knowles*, 556 U.S. at 125, 127. Furthermore, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Cacoperdo v. Demosthenes*, 37 F.3d 504, 508 (9th Cir. 1994).

Moreover, as Respondent points out, on cross-examination at the preliminary hearing, Rahman reviewed a copy of a handwritten statement he gave to the police shortly after the shooting. 1CT 195-206; *see also* Dkt. 12-1 at 29. Following his review of this statement, Rahman admitted to having heard four gunshots in total and that after the first shot was fired, he "retreated" inside the club. 1CT 196. Rahman further admitted that he could not say where Petitioner had been standing when she fired the remaining three shots. 1CT 196, 202-205. However, Rahman also acknowledged, upon further questioning by the prosecutor, that he had written in his statement, "The woman with the gun in her left hand walked over to and stood over the female black girl laying in the street and pointed the barrel of the black handgun at the woman on the ground and yelled at her for a moment but did not shoot." 1CT 204. In light of the aforementioned inconsistent statements made by Rahman (i.e., his written statement compared to his preliminary hearing testimony), it hardly can be said that the decision of trial counsel not to call such a witness was unreasonable sufficient to constitute deficient performance. A claim of failure

to interview a witness cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel. *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986). Moreover, when the record shows that the lawyer was well-informed and the defendant fails to state what additional information would be gained by the additional testimony she now claims was necessary, an ineffective assistance claim fails. *Id.*

Lastly, Rahman's ultimate testimony at the preliminary hearing—in which he admitted hearing four gunshots fired—is directly contrary to the defense's theory that Petitioner only fired *two gunshots* at Cutrer in self-defense. Therefore, had Rahman been called to testify at trial, there is at least a reasonable likelihood that his testimony would only damage Petitioner's defense. *See id.*; *see also Zapien v. Davis*, 849 F.3d 787, 796 (9th Cir. 2015) (if risks associated with calling witness to testify outweigh potential benefits, counsel not ineffective in failing to call witness).

A defendant's mere speculation that a witness might have given helpful information if interviewed is not enough to establish ineffective assistance. *See Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.), *amended*, 253 F.3d 1150 (9th Cir. 2001). Even though, as Respondent observes, the transcript of Rahman's testimony at the preliminary hearing does not reflect his demeanor on the witness stand, the Court agrees that this is nonetheless an insufficient basis on which to deem trial counsel's decision deficient or incompetent. Dkt. 12-1 at 30, n.10 (citing *United States v. Meija*, 69 F.3d 309, 315 (9th Cir. 1995)). Ineffective assistance of counsel must be demonstrated affirmatively, not assumed. *Strickland*, 466 U.S. at 689.

Finally, Petitioner has failed to show that trial counsel's failure to call Rahman to testify prejudiced her case. To establish prejudice caused by the failure to call a witness, a petitioner must show that the witness was likely to have been available to testify, that the witness would have given the proffered testimony, and that the witness's testimony created a reasonable probability that the jury would have reached a verdict more favorable to the petitioner. *Alcala v. Woodford*, 334 F.3d 862, 872-73 (9th Cir. 2003). In light of the overwhelming number of eyewitnesses who recalled hearing five shots fired and saw Petitioner standing over Cutrer with a gun pointed at her as she lay wounded on the ground, Petitioner cannot establish that absent trial counsel's alleged deficient performance (in not calling Rahman), the outcome of the trial would have been different.

**b. Goddard**

Petitioner cites to a police report showing that Goddard had examined the crime scene and found no "strike marks" in the pavement from stray bullets in support of her argument. Dkts. 1 at 13; 1-1 at 11-12. Petitioner argues that such testimony would have supported her defense that she fired only *two gunshots* from *inside* the car in self-defense and none from *outside*. *See id.* For the similar reasons as those listed above, this claim also fails.

As Respondent notes, the record shows that Petitioner's trial counsel did in fact subpoena Goddard as a defense witness and that Goddard appeared at the courthouse prepared to testify, but Petitioner's counsel ultimately decided to release her without calling her to the stand. 6RT 817-818; *see also* Dkt. 12-1 at 30. While it remains unclear from the record why counsel decided not to call Goddard to the stand, there are sufficiently plausible explanations for this decision. 6RT 817-818. Respondent provides the most readily discernible explanation as trial counsel may have feared that Goddard might explain her report in a manner harmful to the defense. Dkt. 12-1 at 30. Officer Jason Andersen, who examined the crime scene with Goddard, similarly reported that they found no strike marks nearby and further explained why the absence of such was not particularly significant. 5RT 671-672; Dkt. 12-1 at 30-31. As such, it would not be unreasonable for trial counsel to fear Goddard might provide more damaging testimony if called to the stand. *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986).

This Court agrees. Failing to call a defendant to the stand—or in this case a witness—does not constitute ineffective assistance of counsel when defense counsel reasonably could have concluded that such testimony would have harmed the defense because it could have "alienated [that witness] in the eyes of the jury." *Gulbrandson v. Ryan*, 738 F.3d 976, 989 (9th Cir. 2013) (quoting *Bell v. Cone*, 535 U.S. 685, 700 (2002)). Moreover, a defense attorney cannot be deemed ineffective for merely failing to present marginal and cumulative evidence. *Mickey v. Ayers*, 606 F.3d 1223, 1247-48 (9th Cir. 2010). As it is unnecessary for a federal court considering a habeas ineffective assistance of counsel claim to address the prejudice prong of the *Strickland* test if Petitioner cannot even establish incompetence sufficient to constitute deficient performance under the first prong, this Court need not analyze Petitioner's argument for prejudice in relation to her

claim involving Goddard. *See Siripongs*, 133 F.3d at 737.

Accordingly, the state supreme court's summary rejection of this IAC claim on collateral review was not an objectively unreasonable application of the *Strickland* standard. Petitioner is not entitled to relief on this IAC claim, and it is DENIED.

**2. IAC as to Trial Counsel - Failure to Object to Petitioner's Multiple Convictions**

Petitioner contends that she was denied effective assistance of counsel by trial counsel when he failed to object to her multiple convictions as a violation of the Double Jeopardy Clause. Dkts. 1 at 14-17; 1-1 at 17-20.

Failure to bring to the court's attention a major constitutional error in the prosecution's case is most likely incompetency, not reasonable professional judgment, which, if prejudicial, satisfies *Strickland*. *See Wilcox v. McGee*, 241 F.3d 1242, 1246 (9th Cir. 2001).

Here, Petitioner argues that trial counsel was ineffective for failing to object to her multiple convictions for attempted voluntary manslaughter and assault with a firearm as a violation of the Double Jeopardy Clause on the basis that they are both "based on 'one single' criminal act." Dkt. 1 at 14-16 (citing *United States v. Jones*, 403 F.3d 604 (8th Cir. 2005) and *People v. Vargas*, 206 Cal. App. 4th 97 (2014)). Specifically, Petitioner contends that trial counsel's "representation fell below the standard that the Sixth Amendment requires when he failed to move to have Assault with a Firearm stricken, which is virtually the same as Attempted Voluntary Manslaughter an (Aggravated Assault)." *Id.* at 16. While Petitioner does not dispute the fact that her multiple convictions did not increase the length of her sentence, she asserts that the additional conviction could increase future sentences or subject her to an enhanced punishment for a future offense under the Three Strikes law,[6] which she alleges as sufficient to constitute prejudice. *Id.* at 16-17.

For the following reasons, Petitioner's claim fails. The Court first notes that the trial court stayed Petitioner's sentence on count two. 2CT 428. Further, as Respondent observes, Petitioner's "multiple convictions do not even implicate, much less violate, double jeopardy." Dkt. 12-1 at 32;

[6] California's Three Strikes law appears in California Penal Code § 667(b)-(i). The heart of the Three Strikes law is section 667(e), which prescribes increased terms of imprisonment for defendants who have previously been convicted of certain "violent" or "serious" felonies.

*see also United States v. Overton*, 573 F.3d 679, 690 (9th Cir. 2009). This Court agrees. Multiple convictions and sentences would have been permissible in Petitioner's case because the evidence strongly supported that Petitioner firing multiple gunshots at Cutrer did not constitute a single act. As discussed at length above, there was no dispute at trial as to whether Petitioner fired at least the first two gunshots. 2RT 111-116, 197-198; 3RT 292, 302-304, 324, 326-328, 336, 407-408, 411, 512, 514-516; 4RT 590, 598. Furthermore, multiple eyewitnesses testified at trial that there were at least three gunshots fired in total, and that they had observed or heard Petitioner fire gunshots at Cutrer *after* getting out of the car. 3RT 295-303, 327-334, 380, 408-409, 411, 518-519; 4RT 548-550; 5RT 618-619. Lastly, almost all of these witnesses testified to seeing or hearing Petitioner stand over Cutrer, kick her, point a gun at her, and yell something at her to the effect of "Now, what?" 3RT 302, 333-338, 411-412, 416-419, 430, 470; 4RT 551-554; 5RT 619. This testimony was corroborated by the video footage recovered from a nearby building. 5RT 666-668. Therefore, under the circumstances, Petitioner was properly convicted under state law of both attempted voluntary manslaughter and assault with a deadly weapon, and she could have been sentenced for both crimes. *See People v. Trotter*, 7 Cal. App. 4th 363, 368 (1992) (finding assault with a firearm case did not amount to one volitional act giving rise to multiple offenses because each shot required separate trigger pull, all three assaults were volitional and calculated, and there was sufficient time for reflection in between each). Because Petitioner cannot show that her multiple convictions constituted a major constitutional error, any failure of trial counsel to object to her multiple convictions is not indicative of incompetence or an unreasonable professional judgment. Therefore, any analysis of the prejudice prong under *Strickland* is unnecessary. *Cf. Wilcox*, 241 F.3d at 1246 (counsel ineffective for failing to raise double jeopardy challenge to second indictment, where there was no apparent or alleged strategic reason for the omission).

Accordingly, the state supreme court's summary rejection of this IAC claim on collateral review was not an objectively unreasonable application of the *Strickland* standard. Therefore, this claim is DENIED.

### 3. IAC as to Appellate Counsel - Failure to Raise Claim of Instructional Error[7]

Petitioner claims that her appellate counsel provided ineffective assistance by failing to challenge an erroneous instruction on direct appeal.[8] Dkt. 1 at 8-12. Specifically, Petitioner contends that the trial court erred in instructing the jurors that they could not reach a verdict on the lesser included offense of attempted voluntary manslaughter without first acquitting Petitioner of the greater charged offense of attempted murder. *Id.* at 8-11; Dkt. 1-1 at 6. Petitioner further contends that she would have been acquitted of attempted voluntary manslaughter but for the trial court's erroneous instruction to the jury that it could "*only*" accept a verdict of guilty of the lesser included offense of attempted voluntary manslaughter. Dkts. 1 at 8-9, 1-1 at 6 (emphasis added).

#### a. Factual Background

The trial court provided the jury with approximately forty individual instructions, the majority of which were taken directly from the pattern CALCRIM instructions. *See* 2CT 345-385. Of relevance to the issues raised in the instant IAC claim, the court provided the following instructions: CALCRIM No. 600 (instructing on the elements of count one, attempted murder); CALCRIM No. 603 (instructing on the elements of the lesser included offense of count one, attempted voluntary manslaughter based on heat of passion); CALCRIM No. 604 (instructing on the elements of the lesser included offense of count one, attempted voluntary manslaughter based on imperfect self-defense); CALCRIM No. 875 (instructing on the elements of count two, assault with a deadly weapon); CALCRIM Nos. 3146, 3148, 3149, and 3160 (instructing on the elements of the enhancements to counts one and two as to personal use of a firearm, intentional discharge of

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[7] The Court notes that Petitioner's IAC claim involving instructional error only relates to appellate counsel's failure to challenge such instruction. Dkt. 1 at 8-12. Respondent had construed her claim to include an IAC claim against trial counsel for failing to challenge the instruction. Dkt. 12-1 at 13-20. However, the Court only considers Petitioner's claim as it relates to *appellate* counsel's failure to challenge the alleged erroneous instruction on direct appeal.

[8] In her traverse, Petitioner alleges for the first time another claim against her appellate attorney, stating that appellate counsel made improper and false admissions to the California Court of Appeal regarding the number of gunshots fired and that Petitioner said, "Now what bitch?" after firing the last shot at Cutrer. Dkt. 14 at 12-13. To the extent that Petitioner is attempting to raise a new claim, such a claim will not be considered as Petitioner may not raise new grounds for relief in a traverse. *Cacoperdo*, 37 F.3d at 507. Moreover, such a claim has not been exhausted as it was not included in either the petition for review or the habeas petition filed in the California Supreme Court. Dkt. 13-13 at 130-148.

a firearm, personal and intentional use and discharge of a firearm causing injury or death, and great bodily injury, respectively); CALCRIM No. 505 (instructing on the elements of self-defense or defense of another as a justifiable homicide, defense to count one); CALCRIM No. 3470 (instructing on the elements of the right to self-defense or defense of another as a defense to count two, assault with a deadly weapon); CALJIC 5.31 (instructing on assault with fists as insufficient provocation to justify use of a deadly weapon as self-defense); and CALCRIM No. 3518 (instructing on how to consider the various counts and complete the verdict forms). 2CT 368-376, 378-380, 382.

Petitioner claims that the trial court erred in instructing the jury when it responded to the jury's question regarding how to consider the various counts as explained in CALCRIM No. 3518. The relevant language from CALCRIM No. 3518 was read to the jury as follows:

> If all of you find that the defendant is not guilty of a greater charged crime, you may find her guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant *may not be convicted of both a greater and lesser crime for the same conduct*.
>
> Now I will explain to you which crimes are affected by this instruction:
>
> Attempted voluntary manslaughter is a lesser crime of Attempted Murder charged in Count One.
>
> It is up to you to decide the order in which you consider each crime and the relevant evidence, but *I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.*

2CT 382 (emphasis added).

CALCRIM No. 3518 goes on to provide step-by-step instructions on how to complete the final verdict forms where the jury comes to a unanimous decision of guilty or not guilty as to both the greater charged offense of attempted murder and the lesser included offense of attempted voluntary manslaughter, as well as instructions not to complete any verdict form should they not reach a unanimous verdict. Each enumerated instruction for how to prepare a verdict form following unanimous agreement of guilt reiterates that the jury must complete only one verdict form. 2CT 382.

During deliberations, the jury sent a note to the trial court asking, "Do we need to find her not guilty of attempted murder before considering the manslaughter charge? Can we discuss both at the same time?" 2CT 393. The trial court responded with the following:

> You can consider both the attempted murder charge and the lesser attempted voluntary manslaughter charge at the same time.
>
> You can also consider these charges in any order you wish.
>
> I can *only accept a verdict of guilty of the lesser crime* of attempted voluntary manslaughter *only if* you have found the defendant *not guilty* of the attempted murder charge.

2CT 393 (emphasis added).

**b. Analysis**

Petitioner claims that but for appellate counsel's failure to challenge the trial court's instructional error, there is a "reasonable probability" that the outcome of her appeal would have been different because "Petitioner did not form any specific intent to commit the crime of attempted voluntary manslaughter." Dkt. 1 at 11. However, as outlined below, Petitioner fails to show the following: (1) deficient performance, i.e., the actual existence of instructional error or evidence to support her allegations that appellate counsel's failure to raise such a challenge was not the result of a tactical decision; or (2) prejudice.

**i. Deficient Performance**

In support of her argument that an instructional error occurred, Petitioner quotes only the first clause of the trial court's response to the jury's question, which is as follows: "I can only accept a verdict of guity [sic]" of the lesser included crime of attempted voluntary manslaughter. Dkts. 1 at 10; 1-1 at 6; *see* 2CT 393. Petitioner then cites to the definition of the word "only" from Merriam Webster's Dictionary in support of her contention that the above quote constitutes instructional error. Dkt. 1 at 8-9. It is unclear from Petitioner's argument whether she asserts that the trial court erred: (1) in failing to define the term "only" as used in its response to the jury's question; or (2) by using what Petitioner believes was mandatory language, i.e., requiring of the jury to "only" find her guilty of the lesser included offense. Regardless, this argument fails. Whether a term in a jury instruction requires definition depends on whether the term expresses a

concept within jury's ordinary experience. *United States v. Tirouda*, 394 F.3d 683, 689 (9th Cir. 2005) (holding no error resulting from failure to define "accomplice" in an accomplice instruction). Furthermore, Petitioner's partial quotation of the trial court's instructions to the jury overlooks essential limiting language that was included in the instructions. The record shows that the trial court repeatedly told the jurors that it could only accept a verdict of attempted voluntary manslaughter *if the jurors first agreed that Petitioner was not guilty of the greater crime of attempted murder*. *See* 2CT 382, 393; *see also* 7RT 1016-1017. As explained below, the trial court's instructions correctly stated the law, and the instructions did not direct the jury to "only" convict Petitioner of attempted voluntary manslaughter. By excluding the *second c*lause of the trial court's response, Petitioner fails to note the following essential limiting language contained therein: ". . . only if you have found the defendant not guilty of the attempted murder charge." 2CT 393. This limiting language provides the foundation of the acquittal-first rule, which serves to protect defendants from potentially erroneous jury verdicts where the jury may consider the lesser-included offense of a particular charge. *See People v. Fields*, 13 Cal. 4th 289, 309 (1996). Because an instructional error must not be considered in isolation, this Court may not rely on Petitioner's truncated construction of the trial court's language to the jury. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991).

Petitioner cites to the bench notes accompanying CALCRIM No. 3518,[9] relying on the authority set forth in *Fields*, 13 Cal. 4th at 309-10 (court has a duty to tell the jury you may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense), and *Stone v. Superior Court*, 31 Cal. 3d 503, 519 (1982) (court has a duty to instruct that the jury cannot convict of a lesser included offense unless it has concluded that defendant is not guilty of the greater offense), to support her contention that such instructional

[9] Respondent notes in its Answer that the bench notes of CALCRIM No. 3518 state that when a defendant is charged with murder or manslaughter, the trial court should explain the acquittal-first rule with one of the pattern instructions found in CALCRIM Nos. 640 through 643. Dkt. 12-1 at 26, n.8. As Respondent observed, while these instructions are somewhat longer and more complicated, they do not differ in substance from CALCRIM No. 3518. *Id.* Furthermore, the Court's review of the relevant case law also failed to produce any published authority holding it is error for a trial court to give CALCRIM No. 3518 in an attempted homicide case.

error was harmful. Dkt. 1 at 10.[10] While Petitioner cites to proper controlling authority on the issue of instructional error in cases where one of the counts charged against the defendant includes a lesser offense, she fails to explain how the trial court's alleged error violates either *Fields* or *Stone*. The law set forth in both *Fields* and *Stone*, as it pertains to the acquittal-first rule and as properly defined in Petitioner's claim, is indistinguishable from the instructions given the jury in CALCRIM No. 3518 and then reiterated by the trial court in its answer to the jury's question. *See Fields*, 13 Cal. 4th at 309 (explaining that "the jury may deliberate on the greater and lesser included offenses in whatever order it chooses, but . . . [the jury] must acquit the defendant of the greater offense before returning a verdict on the lesser offense. [Citation.] In this manner, when the jury renders its verdict on the lesser offense, it will also have expressly determined that the accused is not guilty of the greater offense."); *see also Stone*, 31 Cal. 3d at 519. As noted by Respondent, in light of the aforementioned authorities, the trial court stated the law correctly when telling the jury that, pursuant to CALCRIM No. 3518, it could not accept a verdict on the lesser included offense of attempted voluntary manslaughter unless the jurors first acquitted Petitioner of the greater charged crime of attempted murder by unanimous verdict. *See* Dkt. 12-1 at 26. This Court agrees. Therefore, it follows that appellate counsel made a reasonable tactical decision not to pursue an objection that would have been meritless. *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) (finding state court not objectively unreasonable in holding counsel's performance did

[10] Petitioner also alleges for the first time in her Traverse that the trial court erred by not giving the jury CALCRIM No. 3517 as required for use when the greater crime and lesser included offense are not charged separately, and when the jury is given guilty and not guilty verdict forms for the greater and lesser offenses. Dkt. 14 at 12. However, the record does not reveal conclusively that the jury was given multiple guilty and not guilty verdict forms, although it seems to suggest as much. *See* 2CT 386-387. Furthermore, the substantive instructions in CALCRIM No. 3517 do not differ from those in CALCRIM No. 3518, nor can we find any authority finding trial error existed where the court gave CALCRIM No. 3518 instead of CALCRIM No. 3517. *See People v. Kurtzman*, 46 Cal. 3d 322, 329 (1988) (finding the judicially declared rule of criminal procedure set forth in *Stone*, suggesting the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser included offenses, as not mandatory). According to the bench notes of CALCRIM No. 3517, "[i]f the court chooses not to follow the procedure suggested in *Stone*, the court may give CALCRIM No. 3518 in place of [the CALCRIM No. 3517] instruction." Regardless, the Court need not further address this claim because Petitioner may not raise new grounds for relief in a traverse. *Cacoperdo*, 37 F.3d at 507. Moreover, such a claim has not been exhausted as it was not included in either the petition for review or the habeas petition filed in the California Supreme Court. *See* Dkt. 13-13 at 130-148.

not fall below objective standard of reasonableness by not raising meritless objection).

Furthermore, the judge gave a proper answer to the jury's question by directing its attention to the precise paragraph of CALCRIM No. 3518. Dkt. 13-2 at 393. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946). The trial judge has a duty to respond to the jury's request for clarification with sufficient specificity to eliminate the jury's confusion. *See Beardslee v. Woodford*, 358 F.3d 560, 574-575 (9th Cir. 2004) (harmless due process violation occurred when, in responding to request for clarification, court refused to give clarification and informed jury that no clarifying instructions would be given). When a trial judge responds to a jury question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry, and the jury asks no follow up question, a reviewing court may "presume[] that the jury fully understood the judge's answer and appropriately applied the jury instructions." *Waddington v. Sarausad*, 555 U.S. 179, 196 (2009). The trial judge has wide discretion in charging the jury, and such discretion carries over to the judge's response to a question from the jury. *Arizona v. Johnson*, 351 F.3d 988, 994 (9th Cir. 2003). Similarly, just as a jury is presumed to follow its instructions, it is presumed to understand a judge's answer to a question. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Here, while the jury subsequently requested trial testimony and exhibits from the court, they did not seek further clarification of the judge's answer. Dkt. 13-2 at 394-395.

Therefore, Petitioner fails to make either a successful showing of instructional error or provide evidence that appellate counsel's failure to raise this claim on appeal constituted deficient performance.

**ii. Prejudice**

Petitioner contends that she was prejudiced by her appellate counsel's ineffectiveness in failing to challenge the instructional error of the trial court on direct appeal. Dkt. 1 at 8-12. In support of this proposition, Petitioner fails to provide any evidence from the record or convincing authority in support of this argument. Instead, Petitioner asserts the resulting prejudice as a conclusory statement that she was prejudiced "specifically because Appellate Attorney failed to

challenge trial courts erroneous instructions to the jury." *Id.* at 8. Petitioner then cites only to *Brown v. United States*, which holds that reasonable-doubt instructions that equated "reasonable doubt" with "substantial doubt" were clearly constitutionally deficient such that defendant was deprived of effective assistance of appellate counsel when they failed to raise the issue on appeal and such an omission was prejudicial. *Id.* (citing *Brown v. United States*, 167 F.3d 109, 110-11 (2nd Cir. 1999). However, the instructional error at issue in *Brown*, as well as those facts provided in support thereof, is clearly distinguishable from the instant case. In *Brown*, the challenged instructional error was presented before the Second Circuit after that same court previously had decided three cases involving the exact same challenge to the same instruction given by the same judge. *Id.* Therefore, the court in *Brown* did not conduct any analysis of the constitutional deficiency of the reasonable-doubt instruction, having done so already, and instead considered only the claim of ineffective assistance of appellate counsel for failing to raise the instructional error claim on direct appeal in timely fashion. *Id.* at 110. Further, there was ample evidence from the record in support of this claim, because appellate counsel filed a supplemental appellate brief (some six months after the original appeal was filed) raising the issue and providing a declaration showing cause for the delay and untimely filing. *Id.* at 110-11. The court in *Brown* found that appellate counsel's "failure to timely challenge the instructions plainly was not the result of strategy but was the result of performance that fell below an objective standard of reasonableness." *Id.* at 111.

Unlike in *Brown*, Petitioner provides no such factual support for her claim that appellate counsel provided ineffective assistance of counsel for failing to raise her claim of instructional error, no evidence to demonstrate that such a decision was not the result of strategy, and no evidence to show how this failure resulted in prejudice, except to reiterate that she lacked any specific intent to kill. Therefore, Petitioner's reliance on *Brown* is improper.

Independent review of the record further supports the conclusion that Petitioner suffered no prejudice from appellate counsel's alleged ineffectiveness, or even any as a result of the trial court's alleged harmless error. The record shows that the jury expressly found Petitioner not guilty of attempted murder. 2CT 386; 7RT 1023; *see also* Dkt. 12-1 at 26. When considered in the

totality of all the evidence presented at trial, any alleged instructional error had no harmful or injurious effect on the jury's verdict, as they acquitted her of the greater charged offense. 2CT 386. If anything, it appears such error only could have worked to Petitioner's benefit, because there was substantial and compelling evidence that Petitioner in fact had fired several gunshots after the first two she fired defensively from inside her car. In and of itself, such evidence is sufficient to render Petitioner's defense theory that the shooting occurred in self-defense improbable in the eyes of reasonable jurors. While this Court will not evaluate the factual determinations of a jury's verdict, we note that the aforementioned would give a reasonable jury considerable evidence to support a conviction for attempted murder. However, the jury here acquitted Petitioner of the greater charge of attempted murder. Therefore, Petitioner's IAC claim still fails under the prejudice prong of the *Strickland* analysis.

In sum, based on the facts of this case and the instructions as a whole, there is not a reasonable likelihood that the jury misapplied the instruction from the trial court in response to its answer. *Estelle*, 502 U.S. at 72. Based on the above and without support to the contrary, it cannot be presumed that appellate counsel's failure to raise such a claim was not a tactical decision or strategy but rather was the result of performance that fell below an objective standard of reasonableness. Finally, Petitioner has not shown any potential prejudice resulting from any alleged error, nor has the court found evidence in support thereof from its independent review of the record. *See Calderon v. Coleman*, 525 U.S. 141, 146 (1998) ("A federal court upsets this careful balance when it sets aside a state-court conviction or sentence without first determining that the error had a substantial and injurious effect on the jury's verdict."). Therefore, Petitioner's claim of ineffective assistance of appellate counsel fails.

Accordingly, the state supreme court's summary rejection of this IAC claim on collateral review was not an objectively unreasonable application of the *Strickland* standard. Petitioner is not entitled to relief on this claim, and it is DENIED.

## IV. REQUEST FOR APPOINTMENT OF COUNSEL AND EVIDENTIARY HEARING

Petitioner requests appointment of counsel and an evidentiary hearing. *See* Dkt. 1 at 8-17.

The Sixth Amendment's right to counsel does not apply in habeas corpus actions. *See*

*Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986). However, a district court is authorized to appoint counsel to represent a habeas petitioner whenever "the court determines that the interests of justice so require" and such person is financially unable to obtain representation. 18 U.S.C. § 3006A(a)(2)(B). The decision to appoint counsel is within the discretion of the district court. *See Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *Knaubert*, 791 F.2d at 728; *Bashor*, 730 F.2d at 1234. Appointment is mandatory only when the circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations, *see Chaney*, 801 F.2d at 1196; *Eskridge v. Rhay*, 345 F.2d 778, 782 (9th Cir. 1965), *cert. denied*, 382 U.S. 996 (1966), and whenever an evidentiary hearing is required, *see* Rule 8(c) of the Rules Governing Section 2254 Cases; *United States v. Duarte-Higareda*, 68 F.3d 369, 370 (9th Cir. 1995); *Bashor*, 730 F.2d at 1234.

The Court finds that the appointment of counsel is not warranted, as the issues presented in the petition were straightforward and the Court has resolved all claims on the merits.

There also is no indication that an evidentiary hearing is required under 28 U.S.C. § 2254(e). The Court concludes that no additional factual supplementation is necessary, and that an evidentiary hearing is unwarranted with respect to the claims raised in the instant petition. For the reasons described above, the facts alleged in support of these claims, even if established at an evidentiary hearing, would not entitle Petitioner to federal habeas relief. Further, Petitioner has not identified any concrete and material factual conflict that would require the Court to hold an evidentiary hearing in order to resolve. *See Cullen v. Pinholster*, 563 U.S. 170 (2011).[11]

Accordingly, Petitioner's request for appointment of counsel and an evidentiary hearing are DENIED.

## V. CERTIFICATE OF APPEALABILITY

No certificate of appealability is warranted in this case. For the reasons set out above,

[11] The Supreme Court has held that federal habeas review under 28 U.S.C. § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits" and "that evidence introduced in federal court has no bearing on" such review. *Pinholster*, 563 U.S. at 181-82. The Ninth Circuit also has recognized that *Pinholster* "effectively precludes federal evidentiary hearings" on claims adjudicated on the merits in state court. *Gulbrandson*, 738 F.3d at 993; *see also Sully v. Ayers*, 725 F.3d 1057, 1075 (9th Cir. 2013).

jurists of reason would not find this Court's denial of Petitioner's claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may not appeal the denial of a Certificate of Appealability in this Court but may seek a certificate from the Ninth Circuit under Rule 22 of the Federal Rules of Appellate Procedure. *See* Rule 11(a) of the Rules Governing Section 2254 Cases.

## VI. CONCLUSION

For the reasons outlined above, the Court orders as follows:

1. All claims from the petition are DENIED, and a certificate of appealability will not issue. Petitioner's request for appointment of counsel and an evidentiary hearing are DENIED. Petitioner may seek a certificate of appealability from the Ninth Circuit Court of Appeals.

2. The Clerk of the Court shall terminate any pending motions and close the file.

IT IS SO ORDERED.

Dated: July 21, 2017

YVONNE GONZALEZ ROGERS
United States District Judge

United States District Court
Northern District of California