

1 **BACKGROUND**

2 **I. Factual History**

3 Federal habeas courts presume the correctness of a state court’s determination of factual
4 issues unless Petitioner “rebut[s] the presumption of correctness by clear and convincing
5 evidence.” 28 U.S.C. § 2254(e)(1). The court of appeal summarized the relevant facts as
6 follows:

7 In early December 2004, Williams began staying in the home of his
8 uncle, Alvin Davis. On the morning of December 4, Williams was
9 arrested after he aggressively confronted other people at a shopping
10 center and acted uncooperatively towards officers who responded to a
11 call for assistance. After he was placed in a patrol car, Williams
12 repeatedly said that it was “judgment day” and that it was “his time to
die.” Based on Williams’s erratic behavior, police took him to a county
13 mental health facility for evaluation. After his admission, Williams gave
14 a urine sample that later tested positive for the presence of
15 methamphetamines, cocaine and marijuana.

16 Late in the evening of that same day, San Diego police officers found
17 Davis’s dead body, face down, in a hallway of his home; Davis’s pants
18 were pulled down slightly below his knees, although they were still
19 fastened in the front and zipped, his face had a blood trail that ran from
20 his nose to his ear despite the face-down position of the body, his back
21 had an unexplained abrasion, and the tip of his nose had a rug burn.
22 There was blood near the body and on the living room carpet some
distance away, the telephone line had been disconnected, and the
bedroom near the body was in disarray.

23 The forensic pathologist who examined the body found numerous injuries
24 to Davis’s head, including hemorrhaging and bruising of both eyes,
25 swelling of the lips, a large, deep hemorrhage on the left cheek, an even
26 larger hemorrhage on the top left side, and two bruises on the right side,
27 one on the forehead and one on the upper back of the scalp. The body
28 also had substantial bruising on both sides of the neck that was consistent
with strangulation and bruises on the right arm, shoulder and armpit. The
pathologist opined that the death was a homicide, resulting from “blunt
force head and neck injuries” followed by cardiac arrest, and that Davis
had been dead for at least 24 hours.

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1 Police detectives interviewed Williams on December 5 after he was
2 discharged from the mental health facility. Williams expressed surprise
3 when the detective told him of Davis's death and indicated that Davis had
4 been at home, alive, when he left the home and that he had not been back
5 since then. He told the officers that Davis had allowed him to take one of
6 Davis's cars so that he could go to the store, but that he had driven it
7 around town, to visit friends and family, instead. During the interview,
8 Williams expressed frustration that the police had not spoken to him
9 earlier about Davis's death and referred to the fact that Davis had
10 "[gotten] killed," although the detective had previously told him that the
11 cause of death was unknown. Williams also acknowledged to the officers
12 that Davis had been "a very sick man."

13 One of the detectives noticed some blood on the back of Williams's shirt
14 and on one of Williams's shoes and asked to keep Williams's clothing for
15 investigative purposes. Williams indicated that the blood could not have
16 been his uncle's and agreed to turn over his clothing. DNA tests indicated
17 that Davis was the "most likely" source of bloodstains that were found
18 on the right front pocket of Williams's vest, on the ankle and heel areas
19 of one of Williams's socks and on the inside of one of Williams's shoes.

20 Although Williams consistently maintained that he had nothing to do
21 with Davis's death, he was ultimately arrested and charged with murder.
22 At his first trial, the court declared a mistrial after the jury was unable to
23 reach a unanimous verdict.

24 On retrial, the prosecution sought to establish that Williams was guilty
25 of first degree murder on a felony murder theory (premised on the
26 contention that Williams caused Davis's death during the commission of
27 a carjacking). It introduced evidence of the facts described above, as well
28 as evidence that Davis was very overweight, had high blood pressure and
an enlarged heart, had had a kidney transplant and a knee replacement
within the year preceding his death and was taking multiple medications,
including a blood thinner. Various witnesses also testified that Davis was
very protective of his cars and rarely allowed anyone else to drive them,
and his girlfriend testified that he had indicated he was not going to let
Williams take his car on the evening in question.

The primary focus of the defense was establishing that Davis's injuries
could have resulted from a fall rather than from a physical attack by
another person. For example, defense counsel cross-examined the
forensic pathologist at length regarding the nature of the injuries,
particularly the absence of any subdural hematomas or any fracture in the
larynx and the fact that the injuries were largely to soft tissue. He also
elicited testimony that Davis's medical condition or medications might
have made him prone to having nose bleeds or susceptible to more
extensive bruising and presented a defense forensic expert who testified
that none of the bloodstains on Williams's clothes or in various places in
the house were impact blood spatters. In closing arguments, defense
counsel contended that Williams and Davis were close, that Williams had
no motive to kill Davis, that there was no evidence that Williams showed
physical signs of having been involved in an assault on Davis (who was
a black belt in karate) and that Davis's death resulted from natural causes
rather than an assault.

1 The court instructed the jury on felony murder, second degree murder,
2 voluntary manslaughter, involuntary manslaughter and carjacking. The
3 jury acquitted Williams of first degree murder and carjacking, but
4 convicted him of second degree murder.

(Notice of Lodgment (“Lodgment”) 5 at 2-5.)

5 **II. Procedural History**

6 On December 14, 2006, Petitioner was convicted of second degree murder in violation
7 of California Penal Code (“Penal Code”) section 187(a). (Lodgment 2.) On March 6, 2007,
8 Petitioner was sentenced to an indeterminate prison term of eighteen years to life based on his
9 second degree murder conviction and three prior prison terms. (Lodgment 3.)

10 On December 1, 2007, Petitioner filed his opening brief challenging his conviction on
11 appeal. (Lodgment 4.) On November 13, 2008, the court of appeal affirmed Petitioner’s
12 conviction and sentence. (Lodgment 5.) Petitioner filed a petition for review in the California
13 Supreme Court on December 15, 2008. (Lodgment 6.) On January 21, 2009, the California
14 Supreme Court denied his petition for review. (Lodgment 20.)

15 On April 24, 2009, Petitioner filed a petition for a writ of habeas corpus in the
16 California Supreme Court arguing that his trial defense counsel was ineffective. (Lodgment
17 7.) That petition was denied on October 14, 2009. (Lodgment 21.) On November 20, 2009,
18 Petitioner filed the instant petition for a writ of habeas corpus.

19 **DISCUSSION**

20 **I. Scope of Review**

21 The district court “shall make a de novo determination of those portions of the report
22 . . . to which objection is made,” and “may accept, reject, or modify, in whole or in part, the
23 findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1).
24 Petitioner objects to the R&R. (Doc. No. 22.) Therefore, the Court will make a de novo
25 determination of all sections of the R&R.

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1 Federal habeas petitions filed after April 24, 1996, are governed by the Antiterrorism
2 and Effective Death Penalty Act (“AEDPA”). See 28 U.S.C. § 2254(d); Lindh v. Murphy, 521
3 U.S. 320, 326-27 (1997). The AEDPA provides the following standard of review applicable
4 to state court decisions:

5 (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant
6 to the judgment of a State court shall not be granted with respect to any claim that was
7 adjudicated on the merits in State court proceedings unless the adjudication of the
8 claim—

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

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

14 28 U.S.C. § 2254(d).

15 The AEDPA establishes a “highly deferential standard for evaluating state-court
16 rulings,” requiring that “state-court decisions be given the benefit of the doubt.” Woodford
17 v. Visciotti, 537 U.S. 19, 24 (2002). A state court’s decision is “contrary” to clearly
18 established federal law if it applies a rule that contradicts governing Supreme Court authority,
19 or it “confronts a set of facts that are materially indistinguishable from” a Supreme Court
20 decision and reaches a different result. Early v. Packer, 537 U.S. 3, 8 (2002). Clearly
21 established federal law refers to the holdings, not the dicta, of Supreme Court decisions at the
22 time of the relevant state court decision. Williams v. Taylor, 529 U.S. 362, 412 (2000). A
23 state court’s application of federal law is “unreasonable” only if it is “objectively
24 unreasonable.” Wiggins v. Smith, 539 U.S. 510, 520-21 (2003). An “incorrect or erroneous”
25 application is insufficient. Id. A state court’s adjudication rests on an unreasonable
26 determination of the facts if the state court’s factual findings are objectively unreasonable.
27 Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). The state court’s factual determinations are
28 presumed to be correct and Petitioner has the burden of rebutting this presumption by clear and
convincing evidence. 28 U.S.C. § 2254(e)(1).

In determining whether a state court decision is contrary to federal law, the Court looks
to the state’s last reasoned decision. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002).

1 Where there is no reasoned decision from the state’s highest court, the Court “looks through”
2 to the underlying appellate court decision and presumes that the unexplained opinion rests
3 upon the same ground. Ylst v. Nunnemaker, 501 U.S. 797, 801-06 (1991).

4 **II. Insufficient Evidence Claim**

5 Petitioner argues that his conviction for second degree murder violated his due process
6 rights because there was insufficient evidence of implied malice, which is an essential element
7 of second degree murder. (Doc. No. 1 at 6.) He maintains that the evidence presented at trial
8 failed to show that Petitioner had any knowledge regarding the victim’s heart condition. (Id.)
9 He also argues that he actually believed the victim to be healthy, because the victim had been
10 cleared to undergo two major surgeries in the months before his death. (Id.)

11 Under the Due Process clause of the Fourteenth Amendment, a criminal defendant may
12 only be convicted “upon proof beyond a reasonable doubt of every fact necessary to constitute
13 the crime with which he is charged.” In re Winship, 397 U.S. 358, 364 (1970). The standard
14 regarding sufficiency of evidence is “whether, after viewing the evidence in the light most
15 favorable to the prosecution, *any* rational trier of fact could have found the essential elements
16 of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 324 (1979)
17 (emphasis in original). When “no rational trier of fact could have found proof of guilt beyond
18 a reasonable doubt,” the petitioner is entitled to habeas corpus relief. Id. at 324. “The question
19 is not whether we are personally convinced beyond a reasonable doubt. It is whether rational
20 jurors could have reached the same conclusion that these jurors reached.” Roehler v. Borg,
21 945 F.2d 303, 306 (9th Cir. 1991). The prosecution is not required to “rule out every
22 hypothesis except that of guilt beyond a reasonable doubt.” Jackson, 443 U.S. at 326. Rather,
23 if any conflicting inferences arise, the reviewing court will assign the inference that favors the
24 prosecution. McMillan v. Gomez, 19 F.3d 465, 469 (9th Cir. 1994). Thus, when challenging
25 the sufficiency of evidence for a state law conviction on federal due process grounds, a
26 petitioner faces a heavy burden. Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005).

27 Under California law, second degree murder is “the unlawful killing of a human being
28 with malice aforethought but without the additional elements, such as willfulness,

1 premeditation, and deliberation that would support a conviction for first degree murder.”
2 People v. Knoller, 41 Cal. 4th 139, 151 (2007). “[M]alice may be express or implied. It is
3 express when there is manifested intention to take away the life of a fellow creature. It is
4 implied, when no considerable provocation appears, or when the circumstances attending the
5 killing show an abandoned and malignant heart.” Cal. Penal Code § 188. Second degree
6 murder based on implied malice “requires proof that a defendant acted with conscious
7 disregard of the danger to human life.” Knoller, 41 Cal. 4th at 156. It is not necessary to prove
8 that the defendant was aware that his conduct had a “high probability of resulting in death.”
9 Id.

10 Because the California Supreme Court denied the petition without comment or citation,
11 the Court “looks through” to the underlying appellate court decision and presumes that the
12 unexplained opinion rests upon the same ground. See Ylst, 501 U.S. at 801-06. The evidence
13 at trial showed that Petitioner had a long-time relationship with the victim, was staying in the
14 victim’s house, knew the victim was overweight, had high blood pressure, had a kidney
15 transplant and that he gave himself injections and pills. (Lodgment 5 at 10-11.) Petitioner also
16 admitted to the detectives that the victim was “a very sick man.” (Id.)

17 Petitioner knew about Davis’ multitude of medical problems. As Petitioner specifically
18 notes in his petition, Davis had been cleared for two major surgeries in the year leading up to
19 his death. (Doc. No. 1 at 6.) Davis had a kidney transplant in January 2004. (Lodgment 9 at
20 284.) In November 2004, less than a month before his death, Davis also had a total knee
21 replacement. (Lodgment 10 at 364.) Davis had to use a cane after his knee surgery.
22 (Lodgment 11 at 547.) There were railings in his bathroom to help him use the facilities.
23 (Lodgment 9 at 318.) Contrary to Petitioner’s suggestion, clearance for two major surgeries
24 in the same year does not indicate good health under these facts in the record. Petitioner
25 acknowledged that the victim was not a healthy man. (Lodgment 5 at 10-11.)

26 At trial, the prosecution introduced evidence to show that the victim died of sudden
27 cardiac death as a result of being beaten and choked. (Lodgment 12 at 815.) His body
28 exhibited signs of being beaten including: blood on his face and hand, swollen eyes, and an

1 abrasion on his nose. (Id. at 818.) The bleeding in the victim's eyes was consistent with either
2 blunt force trauma or neck compression. (Id. at 836.)

3 The record includes sufficient evidence for a jury to conclude that Petitioner acted with
4 a conscious disregard of the danger of his actions to human life. A rational trier of fact could
5 find the essential elements of second degree murder beyond a reasonable doubt. See Jackson,
6 443 U.S. at 319. Therefore, the evidence presented at trial to the state court jury was sufficient
7 to convict Petitioner of second degree murder.

8 **III. Trial Court Jury Instruction Error Claim**

9 Petitioner argues that the trial court erred in failing to completely instruct the jury on
10 an involuntary manslaughter instruction. (Doc. No. 1 at 7.) He explains that the jury may have
11 felt compelled to convict Petitioner of second degree murder rather than acquit him due to a
12 partial omission in the jury instruction defining involuntary manslaughter. (Id.) The relevant
13 jury instruction is Cal. Crim. No. 580. The trial court gave the following jury instruction and
14 omitted the underlined portion:

15 When a person commits an unlawful killing without malice aforethought and
16 does not intend to kill and also does not act with conscious disregard for human
17 life, then the crime is involuntary manslaughter.

17 The difference between other homicide offenses and involuntary manslaughter
18 depends on whether the person was aware of the risk to life that his or her
19 actions created and consciously disregarded that risk. An unlawful killing caused
20 by a willful act done with full knowledge and awareness that the person is
21 endangering the life of another and done in conscious disregard of that risk is
22 either voluntary manslaughter or second-degree murder. An unlawful killing
23 resulting in a willful act committed without an intent to kill and without
24 conscious disregard of the risk to human life is involuntary manslaughter.

25 The defendant also committed involuntary manslaughter if:

- 26 1. The Defendant (committed a crime that posed a high risk of death or great
27 bodily injury because of the way in which it was committed) [or] committed a
28 lawful act but acted with criminal negligence; and
2. The Defendant's act unlawfully caused the death of another person.

(Lodgment 18 at 1614-15.)

26 The Supreme Court has never decided whether a defendant in a non-capital case is
27 entitled to a lesser included offense instruction and expressly declined to answer the question
28 in Beck v. Alabama, 447 U.S. 625, 633 n.8 (1980). The Ninth Circuit has declined to extend

1 the right to have the jury instructed on a lesser included offense to non-capital defendants.
2 Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000). A failure by a state court to include a lesser
3 included offense instruction “does not present a federal constitutional question.” Windham
4 v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998). When there is no Supreme Court precedent
5 that clearly establishes federal law on the legal issue in question, “the state court’s decision
6 cannot be contrary to or an unreasonable application of clearly established federal law.”
7 Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004). Because there is no clearly established
8 federal law regarding any requirement of lesser included offense instruction in a non-capital
9 case, Petitioner’s claim is not cognizable.

10 However, even if petitioner had stated a cognizable claim, his argument would fail. The
11 question for whether a collateral attack can be sustained on an erroneous instruction is whether
12 the omitted instruction “so infected the entire trial that the resulting conviction violates due
13 process.” Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (quoting Cupp v. Naughten, 414 U.S.
14 141, 147 (1973)). This is a heavy burden where a petitioner must show “that the violation had
15 a substantial and injurious effect on the jury’s deliberation and verdict.” Beardslee v.
16 Woodford, 358 F.3d 560, 577 (9th Cir. 2004) (citation omitted). The court of appeal issued
17 the last reasoned state court decision on November 13, 2008. (Lodgment 5.) It held that the
18 omission was not prejudicial error. (Id. at 9.) Because the court had actually instructed the
19 jury on voluntary manslaughter or second degree murder and involuntary manslaughter, the
20 jury was not faced with an all-or-nothing choice of conviction or acquittal. (Id.) The jury
21 found that Petitioner had acted with implied malice, which meant that there was no reasonable
22 probability that the jury would have convicted Petitioner of involuntary manslaughter even if
23 the omitted section of the lesser included offense instruction had been given. (Id.)

24 The Court agrees. The jury necessarily found that Petitioner had acted with implied
25 malice for the second degree murder conviction. Petitioner must demonstrate “actual
26 prejudice” from the alleged trial error and has failed to do so. See Brecht v. Abrahamson, 507
27 U.S. 619, 637 (1993). Even if the trial court erred in its omission of a portion of the jury
28 instruction, the error was harmless. Thus, the state court’s decision was not contrary to or an

1 unreasonable application of clearly established federal law, as determined by the Supreme
2 Court. See 28 U.S.C. § 2254.

3 **IV. Ineffective Assistance of Counsel Claim**

4 Petitioner also argues that his defense counsel was ineffective due to the failure of
5 defense counsel to object to the jury instruction. (Doc. No. 1 at 7.) He claims that the jury
6 may have felt obligated to convict him of second degree murder rather than acquit him. (Id.)

7 To make a claim for ineffective assistance of counsel, a habeas petitioner must meet
8 both of the requirements established in Strickland v. Washington, 466 U.S. 668 (1984). First,
9 the counsel’s performance must have been deficient. Id. at 687. To meet this requirement, the
10 errors made by counsel must have been “so serious that counsel was not functioning as the
11 ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. Second, this deficient
12 performance must have prejudiced the defense. Id. The errors made by counsel must have
13 been serious enough to have deprived the defendant of a fair trial. Id. at 687. To show
14 prejudice, a petitioner must show “that there is a reasonable probability that, but for counsel’s
15 unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A
16 review of counsel’s performance is based on an objective standard of reasonableness. Id. at
17 688. This review is “highly deferential and there is a strong presumption that counsel’s
18 conduct fell within the wide range of reasonable representation.” United States v. Ferreira-
19 Alameda, 815 F.2d 1251, 1253 (9th Cir. 1987). If a petitioner fails to meet either requirement,
20 the ineffectiveness claim is defeated. Strickland, 466 U.S. at 700.

21 Based on the record, Petitioner cannot show that the jury would have returned a
22 different verdict had counsel objected to a portion of the instruction. Petitioner cannot meet
23 the requirements of Strickland, and, therefore, his claim for ineffective assistance of counsel
24 fails. See id.

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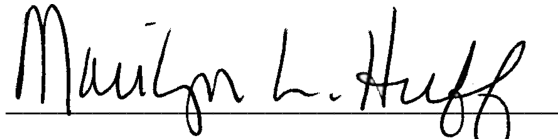
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CONCLUSION

For the reasons state above, the Court DENIES Petitioner's petition for writ of habeas corpus. The Court also denies a certificate of appealability.

IT IS SO ORDERED.

DATED: September 21, 2010



MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT

COPIES TO:

All parties of record.