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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JOSE LUIS VALDEZ,
12 Petitioner,
13 v.
14 RAYMOND MADDEN, et al.,
15 Respondents.
16

Case No.: 18cv734-LAB (BGS)

**ORDER OVERRULING
OBJECTIONS TO REPORT AND
RECOMMENDATION; AND**

**ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS**

17
18 Petitioner Jose Luis Valdez, a prisoner in state custody, filed his petition for
19 writ of habeas corpus under 28 U.S.C. § 2254. The petition was referred to
20 Magistrate Judge Bernard Skomal for report and recommendation. After receiving
21 briefing, Judge Skomal on May 17, 2019 issued his report and recommendation
22 (the "R&R"), which recommended denying the petition. Valdez has filed objections
23 to the R&R.

24 A district court has jurisdiction to review a Magistrate Judge's report and
25 recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "The district judge
26 must determine de novo any part of the magistrate judge's disposition that has
27 been properly objected to." *Id.* "A judge of the court may accept, reject, or modify,
28 in whole or in part, the findings or recommendations made by the magistrate

1 judge.” 28 U.S.C. § 636(b)(1). The Court is not required to review de novo those
2 portions of the R&R to which no objections are made. *Thomas v. Arn*, 474 U.S.
3 140, 149–50 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.
4 2003) (en banc).

5 The R&R correctly sets forth the legal standards and principles of law
6 governing habeas review, which the Court does not repeat here except as needed
7 for discussion. The Court accepts the R&R’s unobjected-to factual recitations as
8 correct.

9 **Background**

10 Valdez was convicted in 2015 of the first degree murder of Daniel R. in 2005,
11 and the second degree murder of Joseph M. in 2002, as well as conspiracy to
12 commit murder. Claims in his petition relate to the conviction for the murder of
13 Joseph. As to both these murders, the jury found true the criminal street gang and
14 firearms allegations, and the allegation that Valdez has been convicted of one or
15 more murders in the first or second degree. The jury hung on a third 2003 murder.

16 Testimony at trial established that Valdez was a member of the Notorious
17 Vandals System (NVS), and that he and other gang members were cruising
18 around, armed with guns and looking for rival gang members to attack. Joseph,
19 along with Lozano and Pojas (who was a member of a rival gang) were hanging
20 out at the Pojas home when they noticed a car driving suspiciously. They went
21 outside to investigate. Lozano armed himself with a wrench, and Pojas armed
22 himself with a bat; Joseph was unarmed. Valdez and Renteria (another NVS
23 member) got out of the car, leaving three others in the car. Valdez asked Joseph,
24 Lozano, and Pojas where they were from, which was intended to elicit gang
25 membership. Joseph and Lozano responded with geographic information,
26 indicating they were not gang members, but Pojas identified himself as a member
27 of a rival gang. Renteria insulted the rival gang, then began shooting at Pojas, who
28 ran. Mascareno, a witness inside the car, said that Valdez then went towards the

1 group and fatally shot Joseph. Mascareno testified that Joseph did not fight. Other
2 witnesses, however, testified that Joseph punched Valdez several times before
3 Valdez shot him. Joseph died from a single gunshot wound to the chest. Bruising
4 on his knuckles was consistent with his punching someone or blocking something.
5 There was no evidence Valdez was injured.

6 Various instructions on defenses and lesser included offenses were given,
7 including an instruction on complete self-defense, but an instruction on imperfect
8 self-defense was not given.

9 **Discussion**

10 Valdez brings two claims: the trial court's failure to instruct the jury on
11 imperfect self-defense, and ineffective assistance of trial counsel. The second
12 claim is derivative of the first.

13 Valdez's claims are governed by the Antiterrorism and Effective Death
14 Penalty Act (AEDPA). Respondent concedes that the claims are both timely and
15 exhausted. The California Supreme Court denied Valdez's petition for review
16 without comment, and there is no reason to believe its decision rested on grounds
17 different from the last reasoned decision, which is the California Court of Appeals'
18 denial of Valdez's appeal. The Court therefore "looks through" the California
19 Supreme Court's denial to the Court of Appeals' reasoned decision. See *Wilson v.*
20 *Sellers*, 138 S. Ct. 1188, 1192 (2018); *Ylst v. Nunnemaker*, 501 U.S. 797, 805–06
21 (1991).

22 **Claim One: Failure to Instruct on Imperfect Self-Defense Theory**

23 In his traverse, Valdez conceded that this claim was not cognizable on
24 federal habeas review. (Docket no. 10 (Traverse) at 2:9–12.) He admitted that the
25 state court's decision was not contrary to or an unreasonable application of federal
26 law, and that the state court properly rejected this claim. (*Id.* at 3:17–21.) He
27 therefore withdrew it (*id.* at 2:11–12), and requested an evidentiary hearing as to
28 his second claim only. (*Id.* at 4:18–19.) Judge Skomal accepted this concession

1 and withdrawal, but also determined that Valdez’s claim would fail even if he had
2 not withdrawn it. In his objections to the R&R, Valdez now seeks to resurrect his
3 abandoned claim.

4 Imperfect self-defense occurs when a person kills another because he
5 actually, but unreasonably, believes he needs to defend himself from imminent
6 death or great bodily injury. *See People v. Simon*, 1 Cal. 5th 98, 132 (2016). Such
7 a person is deemed to have acted without malice, which reduces the crime to
8 voluntary manslaughter. *Id.* It is not an affirmative defense, but rather represents
9 a lesser-included offense. *Id.* Under California law, a trial court must *sua sponte*
10 instruct the jury on a lesser included uncharged offense if substantial evidence
11 would absolve the defendant on the greater but not the lesser charge. *Id.*

12 But federal habeas relief is unavailable to remedy errors of state law.
13 *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). Under federal law, habeas relief
14 based on error in instructing a jury is available only where the error so infected the
15 entire trial that the resulting conviction violates due process under the U.S.
16 Constitution. *Estelle v. McGuire*, 502 U.S. 62, 71–72 (1991); *Dunckhurst v. Deeds*,
17 859 F.2d 110, 114 (9th Cir. 1988).

18 Due process requires that the jury be instructed on a lesser-included offense
19 only where the evidence warrants such an instruction. *Hopper v. Evans*, 456 U.S.
20 605, 611 (1982). The Court of Appeals determined that no instruction on imperfect
21 self-defense was needed, because the record lacked substantial evidence to merit
22 giving the instruction. Its decision discusses the evidence in detail, noting for
23 example that Valdez and those with him were armed with guns, were planning to
24 attack and kill rival gang members, and provoked the confrontation by issuing a
25 gang challenge. It noted the conflicting testimony about a fistfight, as well as the
26 lack of any injuries to Valdez. Even if there were a fistfight, it noted, Joseph did not
27 use deadly force. It pointed out that Valdez shot Joseph from five feet away, just
28 after Renteria fired. And it noted the significant size difference between Valdez and

1 Joseph. Valdez's objections reject the Court of Appeals' version of the evidence
2 and give his own interpretation of it. His own interpretation omits several key
3 points, and includes his own conjectures about what the jury must have been
4 thinking, or the reasons for its verdicts.

5 The Court generally defers to state courts' factual determinations. 42 U.S.C.
6 § 2254(d)(1) and (e)(2). This includes determinations by both trial and appellate
7 courts. See *Pollard v. Galaza*, 290 F.3d 1030, 1033, 1035 (9th Cir. 2002). The
8 Court may not treat them as unreasonable merely because the Court might have
9 reached a different conclusion. *Wood v. Allen*, 558 U.S. 290, 301 (2010). The
10 Court need not distinguish between § 2254(d)(2) deference and § 2254(e)(2)
11 deference because under either standard, the state court's factual determinations
12 are reasonable. See *Wood* at 301.

13 Nor did the trial court's failure to instruct on voluntary manslaughter and
14 imperfect self-defense so infect the trial that Valdez's due process rights were
15 violated. See *Estelle*, 502 U.S. at 71–72 (1991); *Dunckhurst*, 859 F.2d at 114.

16 **Claim Two: Ineffective Assistance of Counsel**

17 Valdez claims his trial counsel was ineffective for failing to request the
18 instruction on voluntary manslaughter based on imperfect self-defense.

19 To establish this claim, Valdez must show that his counsel's representation
20 fell below an objective standard of reasonableness, and that he was prejudiced by
21 his counsel's unprofessional errors. See *Strickland v. Washington*, 466 U.S. 668,
22 688, 694 (1984). If a petitioner fails to make a sufficient showing as to either, the
23 Court need not address the other. *Id.* at 697.

24 This by itself is a high standard, and requires Valdez to show that his
25 counsel's errors were so serious as to deprive him of a fair trial. *Id.* at 687. The
26 Court is required to be highly deferential of counsel's performance, *id.* at 689, and
27 to presume that it falls within the wide range of reasonable professional assistance.
28 *Id.* at 686–87.

1 This Court must also defer to the state court's determination of Valdez's
2 ineffective assistance claim. See *Harrington v. Richter*, 562 U.S. 86, 105 (2011)
3 (citing § 2254(d)). The Supreme Court has described the application of both
4 standards together as "doubly deferential." *Id.* "The question is whether there is
5 any reasonable argument that counsel satisfied *Strickland's* deferential standard."
6 *Id.*

7 As discussed, the Court must accept the state court's reasonable
8 determination that the instruction on voluntary manslaughter and imperfect self-
9 defense was not warranted. Valdez's counsel's failure to request an unwarranted
10 instruction (or even an instruction he reasonably believed to be unwarranted)
11 cannot support an ineffective assistance claim. See *Rupe v. Wood*, 93 F.3d 1434,
12 1445 (9th Cir. 1996) (holding that counsel's failure to take a futile action is not
13 deficient performance). Furthermore, the state court's determination of this issue
14 was not unreasonable nor contrary to clearly established federal law as
15 established by the Supreme Court. See § 2254(d).

16 **Other Arguments**

17 Valdez raises other arguments based on his own interpretation of the verdict
18 and what he believes jurors must have been thinking. But the jury's verdicts and
19 findings support his conviction. For example, when finding Valdez guilty of second
20 degree murder for the killing of Joseph, the jury also found true the allegation that
21 he committed the murder for the benefit of a criminal street gang. (See Docket no.
22 7-4 at 216 (verdict form).) This is inconsistent with Valdez's contentions that he
23 was motivated by fear.

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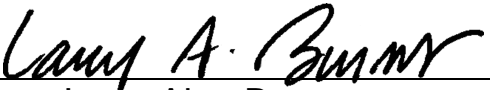
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1 **Conclusion and Order**

2 For these reasons, the Court **OVERRULES** Valdez’s objections to the R&R,
3 and **ADOPTS** the R&R. The petition is **DENIED** and a certificate of appealability is
4 also **DENIED**. See 28 U.S.C. § 2253(c)(2).

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6 **IT IS SO ORDERED.**

7 Dated: July 8, 2020

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10 Hon. Larry Alan Burns
11 Chief United States District Judge
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