ROB BONTA
Attorney General of California
DANIEL ROGERS
Supervising Deputy Attorney General
KRISTEN KINNAIRD CHENELIA
Deputy Attorney General
State Bar No. 225152
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9007
Fax: (619) 645-2044
E-mail: Kristen.Chenelia@doj.ca.gov
Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BENJAMIN LEE BATHEN, Petitioner, **v.** **KATHLEEN ALLISON, et al. ,** Respondents.	3:20-cv-02063-MMA (MSB) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS** Judge: The Honorable Michael S. Berg Action Filed: 10/20/2020

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

Introduction 1
Statement of the Case 1
  A. Direct Appeal 1
  B. Collateral Review 2
  C. Federal Review 2
Statement of Facts 3
Argument 6
  I. Standard of Review 6
  II. The AEDPA Precludes Habeas Relief on Bathen’s Insufficient Evidence Claim in Ground One 8
    A. The Applicable Law 8
    B. The California Court of Appeal Decision 9
    C. Bathen’s Claim of Insufficient Evidence is Precluded by the AEDPA 10
  III. The AEDPA Precludes Habeas Relief on Bathen’s Lesser Included Instruction Claim in Ground Two 12
    A. Bathen Fails to State a Federal Claim 12
    B. The California Court of Appeal Decision 13
    C. Bathen’s Claim of Instructional Error is Precluded by the AEDPA 14
  IV. The AEDPA Precludes Habeas Relief on Bathen’s Ineffective Assistance of Counsel Claim in Ground Three 16
    A. The Applicable Law 16
    B. The California Supreme Court Reasonably Rejected Bathen’s Claim of Ineffective Assistance of Counsel 18
Conclusion 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

CASES

Babbitt v. Calderon
151 F.3d 1170 (9th Cir. 1998) 17

Beck v. Alabama
447 U.S. 625 (1980) 12, 13

Berghuis v. Thompkins
560 U.S. 370 (2010) 7

Brecht v. Abrahamson
507 U.S. 619 (1993) 16

Burt v. Titlow
571 U.S. 12 (2013) 16

Cavazos v. Smith
565 U.S. 1 (2011) 8

Coleman v. Johnson
566 U.S. 650 (2012) 8, 9

Davis v. Ayala
576 U.S. 257 (2015) 16

Douglas v. Woodford
316 F.3d 1079 (9th Cir. 2003) 18

Emery v. Clark
643 F.3d 1210 (9th Cir. 2011) 9

Estelle v. McGuire
502 U.S. 62 (1991) 12

Harrington v. Richter
(2011) 562 U.S. 86 .... *passim*

Henderson Kibbe
431 U.S. 145, 155 (1977) 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

Hendricks v. Calderon
70 F.3d 1032 (9th Cir. 1995) 19

In re David L.
234 Cal. App. 3d 1655 (1991) 10

In re Winship
397 U.S. 358 (1970) 8, 9

Jackson v. Virginia
443 U.S. 307 (1979) 7, 8, 9, 11

Johnson v. Williams
568 U.S. 289 (2013) 7

Jones v. Wood
207 F.3d 557 (9th Cir. 2000) 9, 11

Juan H. v. Allen
408 F.3d 1262 (9th Cir. 2005) 9, 10

Keeble v. United States
412 U.S. 205 (1973) 12

Kimmelman v. Morrison
477 U.S. 365 (1986) 17

Martin v. Virga
2012 WL 6680158 (N.D. Cal. Dec. 21, 2012) 19

McDaniel v. Brown
558 U.S. 120 (2010) 8

Menendez v. Terhune
422 F.3d 1012 (9th Cir. 2005) 15

Moses v. Payne
555 F.3d 742 (9th Cir. 2009) 3

Murtishaw v. Woodford
255 F.3d 926 (9th Cir. 2001) 17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

Park v. California
202 F.3d 1146 (9th Cir. 2000) 12

People v. Bolin
18 Cal. 4th 297 (1998) 10

People v. Chandler
60 Cal. 4th 508 (2014) 14

People v. Clark
52 Cal. 4th 856 (2011) 8

People v. Johnson
26 Cal. 3d 557 (1980) 8

People v. Lopez
74 Cal. App. 4th 675 (1999) 10, 11

People v. Mathson
210 Cal. App. 4th 1297 (2012) 19

People v. Melhaldo
60 Cal. App. 4th 1529 (1998) 10

People v. Nieves
11 Cal. 5th 404 (2021) 19

People v. Toledo
26 Cal. 4th 221 (2001) 9, 13, 15, 16

People v. Wyatt
55 Cal. 4th 694 (2012) 13

People v. Zamudio
43 Cal. 4th 327 (2008) 8

Renico v. Lett
559 U.S. 766 (2010) 6

Rupe v. Wood
93 F.3d 1434 (9th Cir. 1996) 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

Siripongs v. Calderon
133 F.3d 732 (9th Cir. 1998) 18, 19

Solis v. Garcia
219 F.3d 922 (9th Cir. 2000) 13

Stenson v. Lambert
504 F.3d 873 (9th Cir. 2007) 13

Strickland v. Washington
466 U.S. 668 (1984) .... *passim*

Turk v. White
116 F.3d 1264 (9th Cir.1997) 19

United States v. Torres-Flores
502 F.3d 885 (9th Cir. 2007) 13

Vasquez v. Kirkland
572 F.3d 1029 (9th Cir. 2009) 3

Villafuerte v. Stewart
111 F.3d 616 (9th Cir. 1997) 15

Walters v. Maass
45 F.3d 1355 (9th Cir. 1995) 9

Wiggins v. Smith
539 U.S. 510 (2003) 18

Williams v. Taylor
529 U.S. 362 (2000) 16

Windham v. Merkle
163 F.3d 1092 (9th Cir. 1998) 13

Ylst v. Nunnemaker
(1991) 501 U.S. 797 .... 2, 18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

28 U.S.C.
§ 2254(a) 12
§ 2254(d) 6, 7, 16, 17
§ 2254(d)(1) 9
§ 2254(e)(1) 3

Penal Code
§ 422 1
§ 422(a) 10

INTRODUCTION

Petitioner Benjamin Lee Bathen made three threatening calls to his former psychologist and was convicted of three counts of making criminal threats. He presents three grounds for relief; none have merit.

Bathen argues in Ground One there is insufficient evidence he committed criminal threats mainly because of his physical distance from the victim. Relying on state law, the California Court of Appeal reasonably applied Supreme Court precedent in finding sufficient evidence because proximity was not an element of the offense.

In Ground Two, Bathen claims he was entitled to an instruction on the lesser included offense of attempted criminal threats. This claim is not cognizable because the United States Supreme Court has never held a defendant has a federal constitutional right to lesser offense instructions.

Bathen claims in Ground Three his counsel was ineffective for not investigating and pursuing a defense that the antidepressant he was taking caused side effects such as violent behavior. There was no ineffective assistance of counsel because the evidence presented to counsel was the antidepressant was positive. Also, there was no prejudice because Bathen's own statements contradict a voluntary intoxication defense based on the use of the antidepressant.

STATEMENT OF THE CASE

A San Diego County jury convicted Bathen of three counts of making criminal threats, Cal. Penal Code § 422. (Lod. 1, 1 CT 264-67.) The trial court sentenced Bathen to two years in prison. (Lod. 1, 1 CT 268-69.)

A. Direct Appeal

Bathen appealed to the California Court of Appeal (D074538), alleging: insufficient evidence he committed criminal threats; the trial court should have instructed the jury on the lesser included offense of attempted criminal threats; and

the trial court erred in denying him probation and sentencing him. (Lod. 10.) The Court of Appeal affirmed the judgment. (Lod. 13.)

Bathen presented the same three claims to the California Supreme Court in a petition for review (S258922). (Lod. 14.) The court summarily denied review. (Lod. 15.)

B. Collateral Review

Bathen filed a petition for writ of habeas corpus in the San Diego Superior Court claiming ineffective assistance of counsel for the failure to investigate a mental health defense based on Bathen's use of the antidepressant Lexapro (HSC117777). (Lod. 16.) The Superior Court denied the petition finding Bathen had shown neither deficient performance nor prejudice. (Lod. 18.)

Bathen presented the same claim of ineffective assistance of counsel in a petition for writ of habeas corpus in the California Court of Appeal (D077657). (Lod. 19.) The Court of Appeal found the petition untimely. It also found Bathen failed to demonstrate ineffective assistance of counsel. (Lod. 20.)

Bathen presented the claim of ineffective assistance of counsel in a petition for writ of habeas corpus in the California Supreme Court (S264202). (Lod. 21.) The court denied the petition as follows: "The petition for writ of habeas corpus is denied on the merits. (See *Harrington v. Richter* (2011) 562 U.S. 86, citing *Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803.)" (Lod. 22.)

C. Federal Review

Bathen filed the current Petition in this Court on October 20, 2020. (Doc. 1.) The Court granted Bathen's motion to stay the proceedings while his petition in the California Supreme Court was pending. (Doc. 9.) The stay was lifted (Doc. 10), and this Answer follows.

///

///

///

STATEMENT OF FACTS[1]

C.J. is a psychologist in private practice in Chula Vista. She began treating Bathen in person from her office in 2004. Bathen eventually moved to Los Angeles and continued his treatment with C.J. telephonically. C.J. is only licensed to practice in the state of California. As a result, she was required to terminate her sessions with Bathen shortly after he moved to the east coast in 2008. After conducting a few more telephonic sessions with Bathen to ensure his "continuity of care," C.J. provided him referrals for psychologists in his area. Bathen "was not happy" and became "agitated" when he learned C.J. was ending his therapy sessions.

A few months later, C.J. began receiving e-mails from Bathen stating he was upset with her and asking her to apologize to him. He also threatened to lodge a complaint with her professional organization if she refused to listen to his grievances or failed to provide him with a face-to-face apology. The e-mails made C.J. feel "uneasy." Accordingly, she requested Bathen's new address so she could send him a formal termination letter, but he declined and would only have contact via e-mail. Except for this e-mail correspondence in early 2009, C.J. and Bathen did not speak telephonically or in person after his last session took place in 2008.

Almost nine years later, C.J. was home alone when she received the following message on her confidential office voicemail system:

> "Hey Dr. [C.J.], I just want to let you know that I'm going to bust your fucking skull open you worthless bitch. You don't ever fucking talk to me like that you fucking whore. Fuck you. I'll bash your fucking skull. You're fucking dead. I'm going to carve you up you fucking whore. Shut the fuck up!"

---

[1] This Statement of Facts is taken from the California Court of Appeal's opinion on direct appeal. (*See* Lod. 13.) A summary of the facts with citations to the record is contained in the respondent's brief from Bathen's direct appeal. (Lod. 11.) The factual summary in an opinion of the California Court of Appeal is entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). *See, e.g.*, *Vasquez v. Kirkland*, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009); *Moses v. Payne*, 555 F.3d 742, 746 n.1 (9th Cir. 2009).

C.J. became "terrified," "afraid," "nauseous," and "numb" when she heard the message. Not knowing if the person was nearby, she looked around the house and confirmed all the doors and windows were locked. She immediately called her husband and left a voicemail asking him to come home as soon as possible. C.J. sounded "concerned and nervous" when her husband returned the call and appeared "upset" when he arrived home. After C.J. played the message for him, he accessed her voicemail system through the telephone company's website and ascertained the telephone number that made the call. He then performed an Internet search to determine the name associated with the telephone number, revealing Bathen's name. He shared this information with C.J., who reported it to the Chula Vista Police Department.

Although C.J. did not initially recognize Bathen's voice on the message, she later recognized it when her husband mentioned Bathen's name. She recognized Bathen's inflection and high-pitched voice due to prior therapy sessions where he had become agitated. C.J. testified Bathen's voice sounded the same as when he was "anxious," "angry," or "stirred up" in his therapy sessions. C.J. did not know Bathen's location when she heard the voicemail.

After reporting the incident to law enforcement, C.J. remained afraid and on "pretty high alert." She reexamined her home security system and had security doors installed at her office. At work, she walked to and from her car in the office parking lot with coworkers and had her husband meet her at the office and drive home with her when she worked late. She also installed a doorbell system at her office to restrict entrance into the building. At home, she became more vigilant and focused on her safety and security. She kept her doors and windows locked and avoided shopping centers with garages.

About a month later, C.J. received the following voicemail:

> "Hey Dr. [C.J.], I just want to let you know what a fucking bitch you are. You don't talk to me about fucking dating you asshole. You should start dating. You should start dating. I can hurt you too you

> mother fucker. I'm going to carve you up, I'm going to rape you, I'm going to torture you, I'm going to fuck you up. I'll carve your fucking smile off your face you stupid bitch. I'm not going to fucking start dating! Fuck you!"

This time, C.J. immediately recognized Bathen's voice. She had a visceral reaction to the message and vomited. She noticed more intensity in Bathen's voice and the message "terrified," "frightened," and "humiliated" her given its sexual content. She "thought [her] life was in danger" because Bathen's threats had escalated, becoming more violent and explicit. At that time, she still did not know Bathen's location. She again reported the incident to her husband and the police.

Two days later, C.J. received the following voicemail:

> "Hey Dr. [C.J.], I just want to let you know that I'm still planning on coming out there kidnapping you, torturing you, raping the living shit out of you, and then I've come up with a great idea, I'm going to set you on fire. You dumb fucking bitch. Fuck you! Maybe you think, maybe get laid. Your friends think you need to get laid. You thought that shit was funny. You're going to fucking die. Then I'm going to find your daughter. I'm going to rape and murder that bitch too. You're fucking dead."

C.J. recognized Bathen's voice. This concerned C.J. as she did not recall ever mentioning her daughter to Bathen. C.J. thought she and her daughter were in danger. She called the police again to report the incident.

After receiving the third voicemail, C.J. applied for and received a civil restraining order against Bathen. She relied on law enforcement to locate Bathen and serve him with a notice to appear at the restraining order hearing. C.J. felt "really uncomfortable" during the hearing but "wanted to do what [she] could to try to put everything [she] could in [her] life around [her] to stay safe." According to her husband, C.J. became "very, very afraid" and placed their home on "lockdown." At trial, C.J. testified she still felt "upset" and "shaky" after hearing the first voicemail again in court. She kept her doors locked at home and continued to be afraid of Bathen. She also suffered from higher levels of anxiety and sleep issues due to her heightened vigilance toward protecting herself, added privacy and

security measures to her social media accounts, and deleted her professional social media account to decrease her and her family's online presence.

At trial, a district attorney investigator testified about the "call detail records" for the telephone number associated with the threatening messages and confirmed the telephone calls were placed near Bathen's home and work addresses. Another district attorney investigator testified as an expert witness about the technical details of cell phones connecting to cell towers and the cell tower tracker mapping program.

Bathen's defense at trial was the prosecutor could not prove he was the person who made the threatening telephone calls. Maintaining his innocence, Bathen presented expert witness testimony at trial challenging the accuracy of cell tower tracking.

The jury returned guilty verdicts on all three criminal threats counts. The court denied probation and sentenced Bathen to a total prison term of two years.

(Lod. 13 at 2-6.)

ARGUMENT

I. STANDARD OF REVIEW

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA), 28 U.S.C. § 2254(d) constitutes a "threshold restriction," *Renico v. Lett*, 559 U.S. 766, 773 n.1 (2010), on federal habeas corpus relief that "bars relitigation of any claim 'adjudicated on the merits' in state court" subject to two narrow exceptions. *Harrington v. Richter*, 562 U.S. 86, 98 (2011). These exceptions require a petitioner to show that the state court's previous adjudication of the claim either (1) was "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,'" or (2) was "'based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding.'" *Id*. at 97-98 (quoting 28 U.S.C. § 2254(d)).

"Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)). Accordingly, to overcome the bar of § 2254(d), a petitioner is required to show at the threshold that "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 103; *see also Johnson v. Williams*, 568 U.S. 289, 292, 298 (2013) (standard set forth in § 2254(d) is "difficult to meet" and "sharply limits the circumstances in which a federal court may issue a writ of habeas corpus to a state prisoner whose claim was 'adjudicated on the merits in State court proceedings'").

Here, Grounds One and Two were rejected on the merits by the California Court of Appeal. (Lods. 13, 20.) They were then presented to the California Supreme Court and summarily denied. (Lods. 15, 22.) The court of appeal's opinions are therefore the relevant adjudication for purposes of § 2254(d) review of these claims. *See Berghuis v. Thompkins*, 560 U.S. 370, 378-80 (2010) (where intermediate state appellate court denies claim on merits and state supreme court then denies discretionary review, "relevant state-court decision" for purposes of § 2254(d) is that of intermediate state appellate court).

As to Ground Three, the California Supreme Court denied the claim of ineffective assistance of counsel on the merits. (Lod. 22.) Therefore, the California Supreme Court decision is the relevant state court opinion for purposes of review. *Harrington v. Richter*, 562 U.S. at 98. The state court opinions are entitled to deference under the AEDPA. *See Id.*. As will be explained, the AEDPA precludes relitigation of Bathen's claims on federal habeas corpus.

///

II. THE AEDPA PRECLUDES HABEAS RELIEF ON BATHEN'S INSUFFICIENT EVIDENCE CLAIM IN GROUND ONE

In Ground One, Bathen contends that the evidence was insufficient to support his criminal threats convictions. He argues the evidence did not show an immediate prospect of executing the threats because he was living across the country from the victim. (Doc. 1 at 6.) The AEDPA bars relitigation of this claim because the California Court of Appeal did not contradict or unreasonably apply Supreme Court precedent in rejecting it on direct review.

A. The Applicable Law

Evidence is sufficient to support a conviction if, viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319; *accord McDaniel v. Brown*, 558 U.S. 120, 133 (2010); *see also In re Winship*, 397 U.S. 358, 364 (1970) (the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged). Under *Jackson*, the only question to be asked about a jury's finding is whether it was "so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 566 U.S. 650, 656 (2012) (per curiam). The same standard is used by California courts in determining the sufficiency of evidence. *See People v. Johnson*, 26 Cal. 3d 557, 575-78 (1980). The California Court of Appeal used this standard in determining that there was sufficient evidence to support Bathen's convictions. (Lod. 8 at 6-7 (citing *People v. Clark*, 52 Cal. 4th 856, 942-43 (2011), *People v. Zamudio*, 43 Cal. 4th 327, 357 (2008)).)

"[I]t is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U.S.

1, 2 (2011) (per curiam). Accordingly, the reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995).

The *Jackson* test has been referred to as a "high standard." *See Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000). Insufficient evidence claims are reviewed by looking at the elements of the crime under state law. *Jackson v. Virginia*, 443 U.S. at 324 n.16. Under § 2254(d)(1), the issue is whether the state court's decision reflected an unreasonable application of *Jackson* and *Winship* to the facts of a particular case. *Emery v. Clark*, 643 F.3d 1210, 1213-14 (9th Cir. 2011); *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). *Jackson* claims "face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." *Coleman v. Johnson*, 566 U.S. at 651; *Juan H. v. Allen*, 408 F.3d at 1275 (acknowledging the deference owed to the trier of fact sharply limited nature of constitutional sufficiency review).

B. The California Court of Appeal Decision

Bathen argued there was insufficient evidence he committed criminal threats for two reasons: the threats were not immediate because he was not near the victim (C.J) when he placed the calls, and C.J knew he was living on the east coast. (Lod. 13 at 6-9.)

To prove criminal threats the prosecutor must show, in relevant part, "(3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, ... so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,'" (Lod. 13 at 7 (quoting *People v. Toledo*, 26 Cal. 4th 221, 227-28 (2001)).) The "immediate prospect of execution" included in element 3 "is

not one of geographic distance," but rather, "the communication was sufficiently unequivocal, unconditional, immediate and specific as to convey to the victim a gravity of purpose and immediate prospect of execution." (Lod. 13 at 8 (quoting *People v. Bolin,* 18 Cal. 4th 297, 340 (1998).) Plainly put, "[a]lthough the criminal threat statute requires an immediate prospect of execution, it 'does not require an immediate ability to carry out the threat.'" *Id*. (quoting *People v. Lopez,* 74 Cal. App. 4th 675, 679 (1999); *see People v. Melhaldo,* 60 Cal. App. 4th 1529, 1538 (1998) [the focus is the future prospect of the threat being carried out]; *see also In re David L*., 234 Cal. App. 3d 1655, 1658-60 (1991) [parties need not be in physical proximity when threat is made].)

Since California law does not require the defendant's immediate ability to act on the threat, the Court of Appeal reasoned: "It is of no consequence that Bathen lived on the east coast when he left the threatening messages because he specifically stated he was 'planning on coming out' to California to kidnap, torture, rape, and murder C.J. and her daughter. Thus, Bathen's threats caused C.J. to implement various security precautions at her home and office, even causing her to avoid shopping centers with garages. A specific date or time was not required to establish the immediacy of execution." (Lod. 13 at 8-9.) The court also rejected Bathen's argument that the threat was not immediate because the victim knew he had moved to the east coast. The victim may have known Bathen moved to the east coast nine years earlier, but she did not know Bathen's location when he left the threatening messages, and it was reasonable for her to believe he would carry out the threats. (Lod. 13 at 9.)

C. Bathen's Claim of Insufficient Evidence is Precluded by the AEDPA

Under California law, criminal threats require the threat be "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat." Cal.

1 Penal Code § 422(a). "Although the criminal threat statute requires an immediate
2 prospect of execution, it 'does not require an immediate ability to carry out the
3 threat.'" *People v. Lopez,* 74 Cal. App. 4th at 679.
4 Bathen argues that since he was living across the country from the victim he
5 did not have the immediate ability to carry out the threats. (Doc. 1 at 6.) Here, the
6 court of appeal reasonably applied the *Jackson* standard of review to California law
7 on criminal threats in finding that criminal threats did not require Bathen's
8 immediate ability to act on the threat, and his physical proximity was not a defense.
9 Rather, the threat must convey to the victim an immediate prospect of execution.
10 C.J. testified that Bathen delivered each of his three threats in a rage-filled voice,
11 and were explicit and graphic. (Lod. 1, 1 CT 50-55; lod. 4, 3 RT 241-42, 249-52,
12 293.) She understood Bathen's threats to mean that at any moment, he would
13 literally do any or all of the violent acts he described in his threats to her and to her
14 daughter. (Lod. 4, 3 RT 250-53.) There were outward manifestations of her fear;
15 she implemented security measures at her office and home, and even went so far as
16 to avoid shopping centers with garages. (Lod. 4, 3 RT 208-10, 244, 247-48.) And
17 while Bathen may have been living on the east coast, C.J. could reasonably have
18 feared based on the intensity and immediacy of the threats that Bathen had or would
19 imminently return to California for the purpose of carrying out his threats. Under
20 California law, this evidence is sufficient to support a finding that Bathen
21 committed criminal threats.
22 As noted above, the Ninth Circuit has observed that the *Jackson* test is a "high
23 standard." *See Jones v. Wood*, 207 F.3d at 563. Bathen has failed to show that the
24 California Court of Appeal unreasonably applied *Jackson*, or any other Supreme
25 Court precedent, in rejecting his claim of insufficient evidence. Viewing the
26 evidence in the light most favorable to the prosecution, the evidence was sufficient
27 to enable a rational jury to find, beyond a reasonable doubt, that Bathen was guilty
28 of criminal threats. *See Jackson v. Virginia*, 443 U.S. at 319.

Therefore, the California Court of Appeal's rejection of this claim was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent. Bathen's claim in Ground One does not warrant habeas relief.

III. THE AEDPA PRECLUDES HABEAS RELIEF ON BATHEN'S LESSER INCLUDED INSTRUCTION CLAIM IN GROUND TWO

In Ground Two, Bathen contends that the court denied his Sixth Amendment right to present a defense by failing to instruct the jury on the lesser included offense of attempted criminal threats. (Doc. 1 at 7.) Since a defendant has no federal constitutional right to lesser-included-offense instructions, Bathen fails to state a federal claim. In addition, the state court's determination that the trial court was not required to instruct on the lesser included offense of attempted criminal threats was not contrary to or an objectively unreasonable application of clearly established United States Supreme Court law.

A. Bathen Fails to State a Federal Claim

Federal habeas corpus is available only on behalf of a person in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). A violation of state law standing alone is not cognizable in federal court on habeas. *Park v. California*, 202 F.3d 1146, 1149 (9th Cir. 2000). Generally, jury instructions are a matter of state law and involve no constitutional question absent a showing due process was denied. *McGuire*, 502 U.S. at 71-72.

Moreover, the Supreme Court has specifically reserved judgment on "whether the Due Process Clause would require the giving of [lesser included offense] instructions in a noncapital case[.]" *Beck v. Alabama*, 447 U.S. 625, 638 n. 14 (1980); *see also Keeble v. United States*, 412 U.S. 205, 213 (1973) (The Supreme Court has "never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense[.]"). In addition, the Ninth Circuit Court of Appeals has held

that "the failure of a state trial court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question." *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998); *see United States v. Torres-Flores*, 502 F.3d 885, 887 n.3 (9th Cir. 2007) ("*Beck* left open whether the due process right extends to defendants in noncapital cases."); *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000) (per curiam).

Based on the above, Bathen's challenge of the trial court's failure to instruct the jury on the lesser included offense of attempted criminal threats necessarily fails. *See Stenson v. Lambert*, 504 F.3d 873, 881 (9th Cir. 2007) ("Where the Supreme Court has not addressed an issue in its holding, a state court adjudication of the issue not addressed by the Supreme Court cannot be contrary to, or an unreasonable application of, clearly established federal law."). Because Bathen's claim of instructional error is not cognizable on federal habeas review, it should be summarily denied. In any event, the state court's rejection of the claim was reasonable.

B. The California Court of Appeal Decision

Bathen argued the lesser included offense instruction should have been given because the jury might have convicted him of the lesser offense if it had lingering doubts about the immediacy element. In support, Bathen points to a juror note requesting further clarification of the meaning of "immediate" and "immediate prospect." (Lod. 13 at 11-12.) The California Court of Appeal determined that the trial court was not required to give the instruction on attempted criminal threats because it was not supported by substantial evidence. (Lod. 13 at 11-13.)

Instruction on lesser included offenses "are required only when there is substantial evidence that, if the defendant is guilty at all, he is guilty of the lesser offense, but not the greater." *People v. Wyatt,* 55 Cal. 4th 694, 704 (2012), internal quotations omitted. "An attempted criminal threat is a lesser included crime of a criminal threat." (Lod. 13 at 12 (citing *People v. Toledo*, 26 Cal. 4th at 226);

People v. Chandler, 60 Cal. 4th 508, 515 (2014) ("'[I]f a defendant, ... acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not actually cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat.'").)

The court of appeal held there was no instructional error because there was no evidence Bathen committed the lesser, and not the greater offense:

> Here, C.J.'s and her husband's testimony provided substantial evidence regarding the immediate prospect of execution of Bathen's threats. C.J. called her husband after receiving Bathen's first threatening message. She expressed fear to her husband and the police when she ascertained the name and telephone number associated with the call. She also changed her lifestyle and implemented security precautions at her home and workplace, which continued after she received Bathen's second threatening message. She worried enough about her safety that she locked all the doors and windows at her home, had security doors installed at her office, warned her coworkers about the threats, and required an escort to and from her car in the office parking lot. After receiving Bathen's third threatening message, she applied for and obtained a civil restraining order against him. At trial, C.J. testified she thought she and her daughter were in danger and that Bathen was serious about carrying out the threats. Based on the foregoing, there was substantial evidence that Bathen committed the greater offense.

(Lod. 13 at 12-13.)

C. Bathen's Claim of Instructional Error is Precluded by the AEDPA

In any event, the state court's determination that the evidence did not support an attempted criminal threats instruction is a presumptively correct factual finding.

1 A state court's determination that substantial evidence does not support an
2 instruction is based on the court's interpretation of state law, which cannot form the
3 basis of federal habeas relief and therefore "should be the final word on the
4 subject." *Menendez v. Terhune*, 422 F.3d 1012, 1029 (9th Cir. 2005). Where the
5 petitioner claims a violation of federal due process error for refusal to give an
6 instruction, "a state trial court's finding that the evidence does not support a claim
7 of imperfect self-defense is entitled to a presumption of correctness on federal
8 habeas review." *Id*. Thus, a habeas petitioner whose claim involves a failure to
9 give a particular instruction bears an "'especially heavy burden.'" *Villafuerte v.*
10 *Stewart*, 111 F.3d 616, 624 (9th Cir. 1997) (quoting *Henderson v. Kibbe*, 431 U.S.
11 145, 155 (1977)).

12 Here, the evidence established that C.J. was actually in fear of Bathen's threats
13 in light of all the security precautions she took for her safety and the safety of her
14 family. Bathen fails to overcome the state court's presumptively correct factual
15 finding that the evidence did not support an attempted criminal threats instruction.
16 *Menendez*, 422 F.3d at 1029. The crime of criminal threats was complete when C.J.
17 listened to the phone messages and experienced the sustained fear Bathen intended
18 his messages to provoke. *See People v. Toledo*, 26 Cal. 4th at 227-28. California
19 law did not require Bathen to take additional steps towards carrying out the threats
20 in order to be guilty of the completed crimes and, as discussed above, his physical
21 proximity to the victim at the time of the threats was irrelevant. In contrast, an
22 attempted criminal threat would amount to essentially a failed or incomplete
23 attempt to communicate a threat to a victim. *See id*. at 230-31. In describing an
24 attempted criminal threat, the California Supreme Court offered a number of
25 examples. These include circumstances where: a written threat is intercepted prior
26 to its receipt by the victim; an oral threat is communicated to the victim, but in such
27 a way that the victim does not understand what is being communicated, or a threat
28 is communicated to the victim with the requisite intent, but for some reason the

threat does not cause the victim to experience sustained fear. *See id*. at 230-31. Here, there is simply no scenario suggested by the evidence whereby the jury would have believed Bathen left the phone messages, but that the act of doing so constituted only an attempt to commit the crime of making a criminal threat and not the completed crime. Bathen also fails to offer anything to suggest the court of appeal's rejection of his claim was unreasonable.

Moreover, even if error occurred however, it did not have a substantial and injurious effect on the verdict. Since the evidence did not support an attempted criminal threats instruction, the jury would not have found Bathen guilty of that offense had it been given. Bathen has not established that the omission of the instruction resulted in prejudice or had a substantial and injurious effect on the verdict. *See Davis v. Ayala*, 576 U.S. 257, 268 (2015); *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). Consequently, the state appellate court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established United States Supreme Court precedent, and the claim should also be rejected by this Court. 28 U. S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 405-06, 411, 413 (2000).

IV. The AEDPA Precludes Habeas Relief on Bathen's Ineffective Assistance of Counsel Claim in Ground Three

In Ground Three, Bathen contends that his counsel rendered ineffective assistance by failing to present a defense based on the side effects of the antidepressant Lexapro. (Doc. 1 at 8.) The California Supreme Court reasonably rejected the claim on the merits.

A. The Applicable Law

Under the Sixth Amendment, "counsel should be strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (*Strickland*); *accord Burt v. Titlow*, 571 U.S. 12, 22 (2013). To establish a

claim of ineffective assistance of counsel, a petitioner is required to show that his attorney engaged in deficient performance so serious that he failed to function as the "counsel" guaranteed by the Sixth Amendment and that he was so prejudiced by counsel's conduct that he was deprived of a fair trial whose result was reliable. *Strickland*, 466 U.S. at 687.

An attorney's performance is deficient under *Strickland* if his or her conduct fell below objective standards of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688. This is a "highly demanding" standard, which requires a petitioner to prove "gross incompetence." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986); *see also Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998) (relevant inquiry under *Strickland* is not what defense counsel could have done, but rather whether counsel's choices were reasonable); *Murtishaw v. Woodford*, 255 F.3d 926, 939 (9th Cir. 2001) (habeas court can neither second-guess counsel's decisions nor "apply the fabled twenty-twenty vision of hindsight," but, "rather, will defer to counsel's sound strategy").

Prejudice under *Strickland* is established where there is a reasonable probability that, absent counsel's alleged errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the verdict. *Id*.

"Surmounting *Strickland*'s high bar is never an easy task." *Harrington v. Richter*, 562 U.S. at 105 (quotation marks and citation omitted). "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. . . . Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Id.* (citations omitted). Here, Bathen cannot overcome this doubly deferential standard.

///

B. The California Supreme Court Reasonably Rejected Bathen's Claim of Ineffective Assistance of Counsel

The California Supreme Court denied Bathen's petition for writ of habeas corpus "on the merits," citing *Harrington v. Richter,* 562 U.S. 86, and *Ylst v. Nunnemaker,* 501 U.S. at 803. (Lod. 22.)

Bathen contends that his trial attorney rendered deficient performance because counsel failed to investigate and present evidence that he was on the antidepressant Lexapro, which has the possible side effect of causing a person to engage in violence and make threats. (Doc. 1 at 8.) Not only does Bathen fail to show that counsel knew or should have known about the potential side effects of Lexapro, but the proffered testimony established that Bathen had knowledge of the side effects so it was not voluntary intoxication. The state court decision rejecting Bathen's claim of ineffective assistance of counsel was not an objectively unreasonable application of *Strickland*.

Effective counsel are required to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. In particular, "trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired." *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003), cert. denied, 540 U.S. 810 (2003). In assessing the reasonableness of an attorney's investigation, the Court considers the evidence known to counsel and "whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). The relevant inquiry, however, is not what could have been pursued, but whether the choices that were made were reasonable. *Siripongs v. Calderon*, 133 F.3d 732, 736 (9th Cir. 1998).

Here, trial counsel had Bathen undergo a psychological evaluation; he was interviewed by Dr. Raymond Murphy on five occasions. (Lod. 21 at 49.) Dr. Murphy relayed that Bathen was taking Lexapro for depression, and Bathen

1 reported to him that Lexapro was helpful. *Id*. Further, trial counsel explained that
2 based on conversations with Bathen and his family, and Dr. Murphy's report, she
3 did not explore a defense of medication. (Lod. 21 at 50; *see gen. Hendricks v.*
4 *Calderon*, 70 F.3d 1032, 1039 (9th Cir. 1995) (attorney not deficient when hired
5 two mental health experts and relied on their conclusion that there was no basis for
6 a mental defense).) Counsel's decision was objectively reasonable considering
7 there was no evidence Lexapro was having a negative effect on Bathen. Indeed, the
8 evidence was that Lexapro was helping Bathen with his depression.
9 Counsel asked Bathen if medication could be a possibility, and Bathen was
10 adamant about denying the allegations and maintaining his innocence. (Lod. 21 at
11 50.) "Once counsel reasonably elects to pursue one defense theory, 'the need for
12 further investigation [of the other theory] may be considerably diminished or
13 eliminated altogether,' *Strickland*, 466 U.S. at 694, especially if the two defenses
14 are incompatible. *Turk v. White*, 116 F.3d 1264, 1267 (9th Cir. 1997)." *Martin v.*
15 *Virga*, No. C-12-1351 EMC PR, 2012 WL 6680158, at *3 (N.D. Cal. Dec. 21,
16 2012). Counsel was professionally competent when choosing not to present
17 psychiatric evidence which would have contradicted the primary defense theory
18 that Bathen was innocent of the threats.
19 Also, the California Supreme Court did not unreasonably apply *Strickland* by
20 deciding that Bathen failed to demonstrate the required prejudice to prove
21 ineffective assistance of counsel. Voluntary intoxication is a defense to a criminal
22 charge when an individual used medication but "did not know or have reason to
23 anticipate the drug's intoxicating effects." *People v. Mathson*, 210 Cal. App. 4th
24 1297, 1313 (2012); *see also People v. Nieves*, 11 Cal. 5th 404, 485 P.3d 457, 505
25 (2021). Bathen's own declaration contradicts a theory that he did not know or have
26 reason to anticipate Lexapro would have an effect on the days he made the
27 threatening phone calls because the potential and actual side effects had been taking
28 place for months, if not years.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The California Supreme Court did not unreasonably apply *Strickland* in denying this claim on the merits. Counsel was not ineffective for failing to investigate and present a defense that was not only not supported by the evidence, but was contradicted by it. *See Rupe v. Wood*, 93 F.3d 1434, 1444-45 (9th Cir. 1996) (defense counsel's failure to raise a meritless argument or to take a futile action does not constitute ineffective assistance of counsel).

CONCLUSION

Accordingly, for the aforementioned reasons, the Petition should be denied and dismissed with prejudice.

Dated: August 4, 2021

Respectfully submitted,

ROB BONTA
Attorney General of California
DANIEL ROGERS
Supervising Deputy Attorney General

/S/ Kristen Kinnaird Chenelia

KRISTEN KINNAIRD CHENELIA
Deputy Attorney General
Attorneys for Respondents

KKC:ela
SD2020801514
82987593.docx