

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 26 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOSHUA SETH ROMERO,

Petitioner - Appellant,

v.

RICHARD MORGAN,

Respondent - Appellee.

No. 05-35644

D.C. No. CV-04-05004-LRS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Lonny R. Suko, District Judge, Presiding

Argued and Submitted March 10, 2008
Seattle, Washington

Before: B. FLETCHER, PAEZ, and N.R. SMITH, Circuit Judges.

Joshua Seth Romero appeals from the district court's denial of his 28 U.S.C. § 2254 petition, challenging his jury-trial conviction for first degree manslaughter and first degree unlawful possession of a firearm. We granted a certificate of

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

appealability as to three ineffective assistance of trial counsel claims. We have jurisdiction pursuant to 28 U.S.C. § 2253. We affirm.

We review *de novo* the district court’s denial of a habeas corpus petition. *Tanner v. McDaniel*, 493 F.3d 1135, 1139 (9th Cir. 2007). To obtain habeas relief, Romero must demonstrate that the Washington state court’s decision¹ 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).

Where the state court makes “mistakes in reasoning” or adopts “the wrong legal rule or framework,” however, this court evaluates *de novo* petitioner’s constitutional claims in an inquiry that is not limited to the reasoning of the state court. *Frantz v. Hazey*, 513 F.3d 1002, 1012, 1016 (9th Cir. 2008) (en banc). Accordingly, we ask with respect to each of Romero’s claims whether the state court properly applied the prejudice prong from *Strickland v. Washington* such that our review should be *de novo*. See 466 U.S. 668, 694 (1984) (holding that a petitioner must show “there is a reasonable probability that, but for counsel’s

¹ In conducting our review, we look to the last reasoned state-court decision. See *Gautt v. Lewis*, 489 F.3d 993, 1002 (9th Cir. 2007). In this case, that decision was rendered by the Commissioner of the Washington Supreme Court because the Washington Supreme Court summarily denied Romero’s Motion to Modify the Commissioner’s ruling.

unprofessional errors, the result of the proceeding would have been different”); *see also Jackson v. Calderon*, 211 F.3d 1148, 1155 n.3 (9th Cir. 2000) (citing *Strickland* for the proposition that we “need not decide whether counsel’s performance was deficient when the claim of ineffectiveness may be rejected for lack of prejudice”).

With respect to Romero’s claim that his trial counsel’s failure to present a diminished capacity defense constituted ineffective assistance of counsel, the Commissioner correctly applied the standard set forth in *Strickland*. Romero’s testimony regarding his actions immediately before and after the shooting suggests that he understood that his actions were reckless and that he was concocting an elaborate alibi. Accordingly, habeas corpus relief is not warranted on this claim.

As to Romero’s counsel’s use of an excusable homicide defense, the Commissioner’s decision was “contrary to” Supreme Court precedent because the Commissioner utilized Washington’s “actual and substantial prejudice” standard rather than the standard under *Strickland*. *Frantz*, 513 F.3d at 1012; *Barker v. Fleming*, 423 F.3d 1085, 1095 n.5 (9th Cir. 2005) (noting the conflict between Washington’s “actual and substantial prejudice” standard and other federal prejudice standards). We apply *de novo* review, but conclude that Romero cannot demonstrate a reasonable possibility that the outcome of his trial would have been

different if counsel had not submitted a jury instruction setting forth the statutory defense of excusable homicide and also stipulated to facts making the defense legally impossible. *See Strickland*, 466 U.S. at 694. The evidence against Romero was substantial. Additionally, the excusable homicide jury instruction indicated that excusable homicide was a defense to the charge of second degree murder and both charges of manslaughter. Romero suffered no prejudice because the jury acquitted him of second degree murder, demonstrating that it did not mistakenly believe that it must convict Romero of the most serious charge against him if it rejected the excusable homicide defense.

Likewise, the Commissioner's decision regarding trial counsel's failure to interview the state's expert witness was also "contrary to" Supreme Court precedent because the Commissioner applied an incorrect legal standard. *See Frantz*, 513 F.3d at 1012; *Barker*, 423 F.3d at 1095 n.5. Even applying *de novo* review, however, Romero cannot show that there is a reasonable probability that the outcome would have been different if trial counsel had interviewed the state's pathologist prior to trial. *See Strickland*, 466 U.S. at 694. During his testimony, the state's pathologist clarified that his characterization of Russian roulette was not a legal definition and might not even extend to other pathologists. Additionally, even assuming that the pathologist's testimony made the version of events in

Romero's videotaped interview more likely, Romero expressly refuted his videotaped statement at trial. As a result, Romero cannot demonstrate prejudice.

AFFIRMED.