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28IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID L. BRENTLINGER,  
Petitioner,  
v.  
JAMES WALKER, Warden,  
Respondent.

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No. C 09-02635 CW (PR)

ORDER DENYING PETITION FOR WRIT  
OF HABEAS CORPUS; DENYING  
CERTIFICATE OF APPEALABILITY;  
DENYING MOTION FOR APPOINTMENT  
OF COUNSEL

Petitioner David Brentlinger is a prisoner of the State of California, incarcerated at the California Medical Facility. On July 8, 2009, Petitioner filed a pro se amended petition<sup>1</sup> for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the validity of his 2006 state conviction. Respondent filed an answer, and Petitioner filed a traverse. Having considered all of the papers filed by the parties, the Court DENIES the petition.

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<sup>1</sup> On June 15, 2009, Petitioner filed an original petition for writ of habeas corpus. Petitioner's July 8, 2009 amended petition was originally filed in error as a separate action in C 09-3089 CW (PR). On August 24, 2009, the Court ordered that action closed and ordered the Clerk of Court to re-file the July 8, 2009 petition as the amended petition in this action C 09-2635 CW (PR). On February 23, 2010, the Court directed Respondent to file a response showing cause why Petitioner's amended petition should not be granted.

BACKGROUND

1 The following is a summary of the facts taken from the  
2 December 15, 2008 state appellate court's unpublished opinion on  
3 direct appeal. Resp. Ex. 8<sup>2</sup>, People v. Brentlinger, No. H031241,  
4 2008 WL 5207561 at \*1-3 (Cal. Ct. App.).

5 In early October 2005, Samuel Ruby and Petitioner panhandled  
6 on the same corner in San Jose, California. They would take turns  
7 at the corner, but Petitioner would occasionally tell Ruby to leave  
8 when it was Ruby's turn. Ruby and Petitioner had argued over this.

9 On October 6, 2005, Ruby was fifty-six years old,  
10 approximately 5'6" tall, weighed about 216 pounds, and had walked  
11 with a cane for almost fifteen years. On that day, Ruby decided to  
12 talk to Petitioner about the panhandling situation. Ruby brought  
13 Eugene Wright with him. Ruby intended to have a couple of drinks  
14 with Petitioner whom he considered a friend.

15  
16 When Ruby and Wright arrived at Petitioner's homeless camp,  
17 Ruby was intoxicated. He had consumed about five beers and taken  
18 several prescription medications, including Vicodin, Valium, Paxil  
19 and Trazodone. Ruby hit Petitioner's tent with his cane in order  
20 to get his attention. After Petitioner exited the tent, Ruby asked  
21 Petitioner if he wanted to have a few beers and discuss the  
22 panhandling situation. Ruby did not recall what happened next, but  
23 Petitioner's girlfriend, Laurie Sheldahl, exited the tent at some  
24 point, and Petitioner became belligerent. Petitioner started to  
25 push Ruby. He then broke Ruby's cane and punched Ruby in his chest  
26 and ribs. At some point, Petitioner was slugging Ruby and Ruby  
27 blacked out. Petitioner and Ruby were wrestling, and when Ruby was

28 \_\_\_\_\_  
<sup>2</sup> All references herein to exhibits are to the exhibits  
submitted by Respondent in support of the Answer.

1 on top of Petitioner, Sheldahl got on Ruby's back, grabbed his  
2 mustache - which was about four inches long - and tore half of it  
3 off. In response, Ruby grabbed Sheldahl's hair and pushed her  
4 away. When Petitioner continued to hit Ruby in the chest area,  
5 Ruby took a swing at Petitioner. Ruby might also have pushed him.  
6 While Petitioner and Ruby were wrestling on the ground, Wright  
7 became involved in the fight by trying to take Petitioner off Ruby.

8 Petitioner hugged Ruby when the fight ended. Ruby then  
9 realized that he had been stabbed in the area where Petitioner had  
10 been pushing him. Ruby did not see Petitioner with a knife. Ruby  
11 did not know if Wright had pulled out a knife. Ruby did not  
12 remember being stabbed.

13 Officer Michael O'Neil was dispatched to the hospital where  
14 Ruby was receiving treatment for his injuries. Another officer had  
15 detained Wright, who misled the police about where the incident  
16 occurred. Wright also told the officer that they had been the  
17 victims of a random attack. Officer O'Neil seized a knife from  
18 Wright. Because Officer O'Neil did not see any blood on the knife,  
19 he did not send it to the crime laboratory for testing. Officer  
20 O'Neil noted a bite mark on Wright's cheek, but did not see any  
21 blood on him.

22 After he interviewed Wright, Officer O'Neil went to the  
23 homeless camp to search for a suspect named David. He found  
24 Petitioner, who was not wearing a shirt. Petitioner's abdomen was  
25 smeared with blood. The police did not locate any knives during a  
26 search of Petitioner and the surrounding area. Sheldahl was also  
27 present. She had a slight cut and swelling on her lip.  
28

1           The parties stipulated at trial that Ruby's blood alcohol  
2 level had been .205, and that he had suffered stab wounds in his  
3 abdominal cavity and chest. He was hospitalized for seven days.

4           At trial, Ruby also testified to an earlier incident that took  
5 place in August 2005 when Ruby became intoxicated and "called [ ]  
6 out" an individual named Rudy Zuniga. At that time, Ruby told his  
7 friends that he "would fight anybody around there that would keep  
8 on taking [the panhandling] spot." Zuniga was walking by, and  
9 Zuniga threw the first punch. Zuniga was not injured, but Ruby  
10 received a cut on his eye, which required five stitches. When Ruby  
11 was at the hospital, he told doctors that he had fallen, not that  
12 he had been in a fight. Ruby did not recall whether Petitioner was  
13 present during this earlier incident, but he knew that Sheldahl  
14 was.

15           On August 17, 2006, following trial, a Santa Clara County jury  
16 found Petitioner guilty of assault with a deadly weapon (Cal. Penal  
17 Code § 245(a)(1)) and found true an enhancement allegation that  
18 Petitioner had personally inflicted great bodily injury (Cal. Penal  
19 Code § 12022.7(a)). The trial court found that Petitioner had two  
20 prior strike convictions (Cal. Penal Code §667(b)-(I)) and two  
21 prior serious felony convictions (Cal. Penal Code § 667(a)). On  
22 February 8, 2007, the trial court sentenced Petitioner to thirty-  
23 eight years to life in prison.

24           On October 18, 2007, Petitioner appealed his conviction to the  
25 California Court of Appeal. On December 15, 2008, the state  
26 appellate court affirmed the judgment of conviction. On January  
27 28, 2009, Petitioner filed a petition for review in the California  
28 Supreme Court, which was denied on March 25, 2009. Meanwhile,

1 Petitioner filed a habeas petition in the California Court of  
2 Appeal on May 15, 2008, which was denied on December 15, 2008.  
3 Petitioner then filed a habeas petition in the California Supreme  
4 Court on September 8, 2009, which was denied on February 10, 2010.<sup>3</sup>  
5 Petitioner timely filed this federal habeas petition.

6 LEGAL STANDARD

7 A federal court may entertain a habeas petition from a state  
8 prisoner "only on the ground that he is in custody in violation of  
9 the Constitution or laws or treaties of the United States." 28  
10 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death  
11 Penalty Act (AEDPA), a district court may not grant a petition  
12 challenging a state conviction or sentence on the basis of a claim  
13 that was reviewed on the merits in state court unless the state  
14 court's adjudication of the claim: "(1) resulted in a decision that  
15 was contrary to, or involved an unreasonable application of,  
16 clearly established federal law, as determined by the Supreme Court  
17 of the United States; or (2) resulted in a decision that was based  
18 on an unreasonable determination of the facts in light of the  
19 evidence presented in the State court proceeding." 28 U.S.C.  
20 § 2254(d). A decision is contrary to clearly established federal  
21 law if it fails to apply the correct controlling authority, or if  
22 it applies the controlling authority to a case involving facts  
23 materially indistinguishable from those in a controlling case, but  
24 nonetheless reaches a different result. Clark v. Murphy, 331 F.3d  
25 1062, 1067 (9th. Cir. 2003). A decision is an unreasonable  
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27 <sup>3</sup> The California Court of Appeal's online Register of Actions  
28 shows that Petitioner filed subsequent habeas petitions in that court  
on July 8, 2009 and March 23, 2010, which were denied on July 30, 2009  
and March 26, 2010, respectively.

1 application of federal law if the state court identifies the  
2 correct legal principle but unreasonably applies it to the facts of  
3 the prisoner's case. Id.

4 The only definitive source of clearly established federal law  
5 under 28 U.S.C. § 2254(d) is the holdings of the Supreme Court as  
6 of the time of the relevant state court decision. Williams v.  
7 Taylor, 529 U.S. 362, 412 (2000).

8 To determine whether the state court's decision is contrary  
9 to, or involved an unreasonable application of, clearly established  
10 law, a federal court looks to the decision of the highest state  
11 court that addressed the merits of a petitioner's claim in a  
12 reasoned decision. LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th  
13 Cir. 2000). In the present case, the only state court to address  
14 the merits of Petitioner's claims is the California appellate court  
15 on direct review.

16 DISCUSSION

17 Petitioner asserts eleven claims relating to jury  
18 instructions, the admissibility of evidence, and the competency of  
19 trial counsel. The claims are addressed in turn below.

20 I. Self-Defense Instruction (CALCRIM No. 3470)

21 Petitioner claims that the trial court erred in its  
22 instruction to the jury on self-defense. Specifically, the trial  
23 court instructed the jury with CALCRIM No. 3470 (Self-Defense) as  
24 follows:

25 The defendant is not guilty of assault with a  
26 deadly weapon or simple assault if he used  
27 force against the other person in lawful self-  
28 defense. The defendant acted in lawful self-  
defense if: [¶] One. The defendant reasonably  
believed that he was in imminent danger of  
suffering bodily injury. [¶] Two. The  
defendant reasonably believed that the

1 immediate use of force was necessary to defend  
2 against that danger. [¶] And three. The  
3 defendant used no more force than was  
4 reasonably necessary to defend against that  
5 danger. [¶] Belief in future harm is not  
6 sufficient no matter how great or how likely  
7 the harm is believed to be. [¶] The defendant  
8 must have believed there was imminent danger of  
9 violence to himself. Defendant's belief must  
10 have been reasonable and he must have acted  
11 only because of that belief. The defendant is  
12 only entitled to use that amount of force that  
13 a reasonable person would believe is necessary  
14 in the same situation. [¶] If the defendant  
15 used more force than was reasonable, the  
16 defendant did not act in lawful self-defense.  
17 [¶] When deciding whether the defendant's  
18 beliefs were reasonable, consider all the  
19 circumstances as they were known to and  
20 appeared to the defendant and consider what a  
21 reasonable person in the similar situation with  
22 similar knowledge would have believed. If the  
23 defendant's beliefs were reasonable, the danger  
24 does not need to have actually existed. [¶] If  
25 you find Samuel Ruby threatened or harmed the  
26 defendant or others in the past, you may  
27 consider that information in deciding whether  
28 defendant's conduct and beliefs were  
reasonable. [¶] The People have the burden of  
proving beyond a reasonable doubt that  
defendant did not act in lawful self-defense.  
[¶] If the People have not met this burden, you  
must find the defendant not guilty of assault  
with a deadly weapon or simple assault.

19 Ex. 2 at 265-67.

20 Petitioner argues that the instruction was erroneous because  
21 there was no evidence that he knew about Ruby's prior violent  
22 conduct or that Ruby had previously threatened him. According to  
23 Petitioner, the instruction "nullified" the effect of his lack of  
24 knowledge.

25 A. State Appellate Court Opinion Addressing Petitioner's  
26 Claim

27 The state court of appeal rejected Petitioner's claim on the  
28 basis that the instruction nowhere referred to Petitioner's  
knowledge of Ruby's past conduct. People v. Brentlinger, 2008 WL

1 5207561 at \*9. Rather, as indicated by the portion of the  
2 instruction that refers to Ruby, the jury could simply consider  
3 whether Ruby had "threatened or harmed . . . others in the past" in  
4 deciding whether Petitioner's conduct and beliefs were reasonable.  
5 Id.

6 B. Analysis of Petitioner's Claim Under AEDPA

7 A challenge to a jury instruction solely as an error under  
8 state law does not state a claim cognizable in federal habeas  
9 corpus proceedings. See Estelle v. McGuire, 502 U.S. 62, 71-72  
10 (1991). To obtain federal collateral relief for errors in the jury  
11 charge, a petitioner must show that the ailing instruction by  
12 itself so infected the entire trial that the resulting conviction  
13 violates due process. Id. at 72. The instruction may not be  
14 judged in artificial isolation, but must be considered in the  
15 context of the instructions as a whole and the trial record. Id.

16 Petitioner does not show how CALCRIM No. 3470 so infected his  
17 trial. As the state appellate court noted, the instruction did not  
18 require that Petitioner know of Ruby's past conduct. Rather the  
19 instruction allowed the jurors to infer that Ruby may have acted  
20 aggressively with Petitioner based on Ruby's past conduct. Indeed,  
21 eliminating any requirement that Petitioner know of the conduct  
22 made it easier for the jury to find that Petitioner acted in self-  
23 defense and therefore benefitted Petitioner.

24 Accordingly, the state court's denial of this claim was not  
25 contrary to, or an unreasonable application of, established federal  
26 authority.  
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1 II. Jury Instruction Regarding Petitioner's Prior Acts of Violence

2       Petitioner claims that the trial court improperly instructed  
3 the jury as to his prior offenses. Specifically, after the defense  
4 introduced evidence of Ruby's character for violence, the  
5 prosecution introduced evidence at trial of Petitioner's two prior  
6 convictions for assault with a deadly weapon and one prior  
7 conviction for battery with serious bodily injury. Ex. 2 at 240-  
8 41, 249-50. The trial court then instructed the jury pursuant to a  
9 modified version of CALCRIM No. 852 (Evidence of Uncharged Domestic  
10 Violence) as follows:

11               The People presented evidence that the  
12 defendant committed prior acts of violence that  
13 were not charged in this case. You may  
14 consider this evidence only if the People have  
15 proved by a preponderance of the evidence that  
16 the defendant in fact committed the prior acts.  
17 [¶] Proof by a preponderance of the evidence is  
18 a different burden of proof from proof beyond a  
19 reasonable doubt. A fact is proved by a  
20 preponderance of the evidence if you conclude  
21 that it's more likely than not the fact is  
22 true. [¶] If the People have not met this  
23 burden of proof, you must disregard this  
24 evidence entirely. If you decide that the  
25 defendant committed the prior acts of violence,  
26 you may, but are not required to, conclude from  
27 that evidence that the defendant was disposed  
28 or inclined to acts of violence, and based on  
that decision, also conclude that the defendant  
was likely to commit and did commit assault  
with a deadly weapon as charged here. [¶] If  
you conclude that defendant committed the prior  
acts of violence, that conclusion is only one  
factor to consider along with all the other  
evidence. It is not sufficient by itself to  
prove that the defendant is guilty of assault  
with a deadly weapon. The People must still  
prove each element of every charge beyond a  
reasonable doubt.

27 Ex. 2 at 261-62. Petitioner argues that the instruction was  
28 erroneous in that it allowed the jury to use character evidence to

1 conclude that Petitioner was disposed or inclined to acts of  
2 violence and thus likely to have committed the assault against  
3 Ruby.

4 A. State Appellate Court Opinion Addressing Petitioner's  
5 Claim

6 The state court of appeal relied on state law, specifically  
7 People v. Reliford, 29 Cal. 4th 1007 (2003), in finding that the  
8 challenged jury instruction met constitutional requirements.  
9 People v. Brentlinger, 2008 WL 5207561 at \*11. While Reliford  
10 addressed CALJIC No. 2.50.01,<sup>4</sup> the state court found no significant  
11 difference between the language of 2.50.01 and the modified version  
12 of CALCRIM No. 852 given at Petitioner's trial. Id.

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16 <sup>4</sup> CALJIC 2.50.01 permits an inference of guilt on a charged  
17 sexual offense based on evidence of a past sexual offense and reads  
in relevant part:

18 If you find that the defendant committed a  
19 prior sexual offense, you may, but are not  
20 required to, infer that the defendant had a  
21 disposition to commit sexual offenses. If you  
22 find that the defendant had this disposition,  
you may, but are not required to, infer that  
[he] [she] was likely to commit and did commit  
the crime [or crimes] of which [he] [she] is  
accused.

23 However, if you find by a preponderance of the  
24 evidence that the defendant committed [a] prior  
25 sexual offense[s], that is not sufficient by  
26 itself to prove beyond a reasonable doubt that  
27 [he] [she] committed the charged crime[s]. If  
28 you determine an inference properly can be  
drawn from this evidence, this inference is  
simply one item for you to consider, along with  
all other evidence, in determining whether the  
defendant has been proved guilty beyond a  
reasonable doubt of the charged crime.

1 B. Analysis of Petitioner's Claim Under AEDPA

2 Jury instructions on prior uncharged offenses may violate due  
3 process where they lessen the prosecution's burden of proof by  
4 allowing the "jury to find that [petitioner] committed the  
5 uncharged [offenses] by a preponderance of the evidence and thus to  
6 infer that he had committed the charged acts based upon facts found  
7 not beyond a reasonable doubt, but by a preponderance of the  
8 evidence." Gibson v. Ortiz, 387 F.3d 812, 822 (9th Cir. 2004)  
9 (emphasis in original) overruled in part on other grounds by Byrd  
10 v. Lewis, 566 F.3d 855, 866 (9th Cir. 2009). A jury may, however,  
11 infer that a defendant committed the charged crime based on  
12 previous, uncharged crimes, as long as those previous offenses were  
13 proven beyond a reasonable doubt. Gibson, 387 F.2d at 822.

14 In the instant case, Petitioner was found guilty and convicted  
15 of the prior offenses. Accordingly, there is no concern that his  
16 2006 jury used a preponderance of evidence standard, because the  
17 prior conduct had been proved beyond a reasonable doubt. See  
18 Mendez v. Knowles, 556 F.3d 757, 768-70 (9th Cir. 2009) (no  
19 likelihood that jury applied lower standard of proof because  
20 evidence of prior offenses was prior convictions upon guilty pleas  
21 for those offenses).

22 To the extent Petitioner is challenging California's use of  
23 propensity evidence, the claim also fails. The Supreme Court has  
24 left open the question whether a state law allowing admission of  
25 propensity evidence violates due process. Estelle v. McGuire, 502  
26 U.S. 62, 75 n.5 (1991) ("[W]e express no opinion on whether a state  
27 law would violate the Due Process Clause if it permitted the use of  
28

1 'prior crimes' evidence to show propensity to commit a charged  
2 crime." ). Based on the Supreme Court's express reservation of this  
3 issue as an "open question," the Ninth Circuit has held that a due  
4 process right barring the admission of propensity evidence is not  
5 "clearly established" within the meaning of 28 U.S.C. § 2254(d).  
6 Alberni v. McDaniel, 458 F.3d 860, 866-67 (9th Cir. 2006); accord  
7 Mejia v. Garcia, 534 F.3d 1036, 1046 (9th Cir. 2008) (reaffirming  
8 Alberni).

9 Accordingly, the state court's denial of this claim was not  
10 contrary to, or an unreasonable application of, clearly established  
11 federal authority.

### 12 III. Instruction on Third Party Culpability

13 Petitioner claims that the trial court erred when it refused  
14 to instruct the jury on third party culpability. While the amended  
15 petition does not state the basis for such an instruction, it  
16 appears from Petitioner's state appellate and state habeas briefing  
17 (Exs. 3, 9) and from the state appellate court opinion that the  
18 proposed instruction was intended to focus the jury's attention on  
19 Wright's alleged involvement in the injuries. See People v.  
20 Brentlinger, 2008 WL 5207561 at \*12. Petitioner argued that Wright  
21 was the only individual found with a knife and that the police  
22 never tested the knife for the presence of blood. Id.

23 Specifically, the defense submitted three proposed  
24 instructions on third party culpability at trial. Ex. 1 at 199-  
25 202. The trial court denied all three, finding that: (1) the third  
26 party culpability instructions were duplicative and cumulative of  
27 other instructions; (2) the evidence of third party culpability was  
28

1 so thin that it did not justify pinpointing the issue; and (3) the  
2 fact that a knife was not found on Petitioner did not support a  
3 theory of third party culpability, because it was not clear how  
4 long after the incident Petitioner was searched. Ex. 2 at 243-45.

5 A. State Appellate Court Opinion Addressing Petitioner's  
6 Claim

7 The state appellate court affirmed the trial court's ruling  
8 denying the proposed instructions on three grounds. People v.  
9 Brentlinger, 2008 WL 5207561 at \*13. First, the court found  
10 insufficient evidence of third party culpability. Id.  
11 Specifically, while Wright was found with a knife at the hospital,  
12 there was no evidence that Wright ever touched Ruby's chest or  
13 abdomen. Id. Further, the fact that Petitioner did not have a  
14 knife when police searched him "did not support a theory of third  
15 party culpability, because so much time had passed after the  
16 incident." Id.

17 Second, the appellate court found that the trial court  
18 accurately instructed the jury on the prosecution's burden of proof  
19 beyond a reasonable doubt as to each element of assault with a  
20 deadly weapon. Id. This included the requirement that Petitioner  
21 --as opposed to someone else--had to be found to have committed the  
22 charged crime. Id.

23 Finally, the appellate court found that, even assuming the  
24 trial court's ruling was erroneous, any error was harmless. Id. at  
25 \*14. Specifically, in addition to the jury's instructions on the  
26 prosecution's burden of proof, the jury knew from defense counsel's  
27 argument the defense theory that someone else had committed the  
28 assault. Id. Accordingly, the state court found no reasonable

1 probability the jury would have reached a different conclusion even  
2 if given one of the proposed instructions. Id.

3 B. Analysis of Petitioner's Claim Under AEDPA

4 A state trial court's failure to give an instruction does not  
5 alone raise a ground cognizable in federal habeas corpus  
6 proceedings. Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir.  
7 1988). The omission of an instruction is less likely to be  
8 prejudicial than a misstatement of the law. Walker v. Endell, 850  
9 F.2d 470, 475 (9th Cir. 1987). A habeas petitioner whose claim  
10 involves failure to give a particular instruction, as opposed to a  
11 claim that involves a misstatement of the law in an instruction,  
12 bears an "especially heavy burden." Villafuerte v. Stewart, 111  
13 F.3d 616, 624 (9th Cir. 1997) (quoting Henderson v. Kibbe, 431 U.S.  
14 145, 155 (1977)).

15 Due process does not require that an instruction be given  
16 unless the evidence supports it. See Hopper v. Evans, 456 U.S.  
17 605, 611 (1982); Menendez v. Terhune, 422 F.3d 1012, 1029 (9th Cir.  
18 2005). Further, defendant is not entitled to have jury  
19 instructions raised in his or her precise terms where the given  
20 instructions adequately embody the defense theory. United States  
21 v. Del Muro, 87 F.3d 1078, 1081 (9th Cir. 1996); United States v.  
22 Tsinnijinnie, 601 F.2d 1035, 1040 (9th Cir. 1979). Whether a  
23 constitutional violation has occurred will depend upon the evidence  
24 in the case and the overall instructions given to the jury. See  
25 Duckett v. Godinez, 67 F.3d 734, 745 (9th Cir. 1995).

26  
27 Under these legal principles, Petitioner's claim fails. After  
28 a thorough review of the record, this Court finds that the state

1 appellate court reasonably rejected the claim on the basis of  
2 insufficient evidence of third party culpability. Petitioner's  
3 claim that Wright was responsible for the assault was not supported  
4 by the evidence. Menendez, 422 F.3d at 1029. To the contrary, the  
5 evidence showed that Petitioner was the only person who hit Ruby's  
6 chest and abdomen. Ex. 2 at 89-93, 176-78.

7 Furthermore, the state trial court gave the jury several  
8 instructions regarding the required elements of the assault and the  
9 prosecution's burden of proof. Ex. 1 at 183, 185, 190-92. These  
10 instructions guided the jury to find beyond a reasonable doubt that  
11 Petitioner--and not somebody else--had committed the charged crime.  
12 Accordingly, viewed in the context of the record as a whole, the  
13 instructions given adequately embodied the defense's theory.  
14 Duckett, 67 F.3d at 745. Moreover, given the instructions as a  
15 whole, if error occurred, it was harmless. See Brecht v.  
16 Abrahamson, 507 U.S. 619, 637 (1993).

17 The state court's denial of this claim was not contrary to, or  
18 an unreasonable application of, clearly established federal  
19 authority.

20  
21 IV. Admissibility of Wright's Statement to the Police

22 Petitioner claims that the trial court erred in excluding a  
23 statement that Wright made to the police that Ruby was the one who  
24 started the altercation. Wright was unavailable at trial.  
25 Accordingly, the defense filed a motion in limine requesting that  
26 the trial court admit Wright's statements to the police in lieu of  
27 his live testimony. Ex. 1 at 127-37. The following is a summary,  
28

1 taken from the court of appeal opinion, of Wright's statements to  
2 the police:

3 Wright initially misled the police about the  
4 location of the incident, but later took them  
5 to the homeless camp. He also lied and told  
6 them that he and Ruby were "jumped by a couple  
7 of white dudes." However, in his subsequent  
8 statement to Officer O'Neil, Wright stated that  
9 Ruby asked him to accompany him to the homeless  
10 camp to "'watch his back' while he went to  
11 speak with a guy he (Ruby) had a disagreement  
12 with." When they arrived, Ruby and defendant  
13 began to argue and fight. Wright tried to  
14 assist Ruby, and defendant bit Wright on the  
15 cheek. When Sheldahl tried to pull Ruby off  
16 defendant, Ruby hit her in the face with his  
17 cane. After defendant stabbed Ruby several  
18 times, Wright pulled out his own knife to scare  
19 defendant and stop his attack on Ruby. Wright  
20 also told Officer O'Neil that "he believed that  
21 Ruby was the aggressor and went to  
22 [defendant's] camp to start a fight." Ruby did  
23 not use his cane against defendant.

24 Several months later, the police interviewed  
25 Wright again. He stated that when Ruby and he  
26 arrived at the camp, Ruby "began 'tearing up  
27 the camp' by pulling the tents down and  
28 throwing objects around the campsite." Ruby  
was yelling, "'Where are you? I know you're in  
here somewhere.'" When Wright asked him why he  
was destroying the camp, Ruby ignored him.  
Wright also told the police that he did not see  
Ruby hit Sheldahl and that Sheldahl told him  
that Ruby had done so.

21 People v. Brentlinger, 2008 WL 5207561 at \*3.

22 The trial court denied Petitioner's motion in limine, finding  
23 that Wright's statement was "absolutely and inherently unreliable."  
24 Ex. 2 at 30. Specifically, the court noted that there was no way  
25 to determine Wright's motive for changing his statements. Id. at  
26 35. Petitioner argues that Chambers v. Mississippi, 410 U.S. 284  
27 (1973), demanded that the statement be admitted as an exculpatory  
28 statement against penal interest.



1           A. State Appellate Court Opinion Addressing Petitioner's  
2           Claim

3           The state appellate court distinguished the Supreme Court's  
4           opinion in Chambers, finding the probative value of Wright's  
5           statement much weaker than that of the witness in Chambers. People  
6           v. Brentlinger, 2008 WL 5207561 at \*4. Specifically, in Chambers,  
7           the defendant was charged with murder, and the witness whose  
8           statement the defendant sought to admit had previously signed a  
9           sworn confession stating that he--not the defendant--was the one  
10          who committed the murder. Chambers, 410 U.S. at 294. Here, in  
11          contrast, the court of appeal found that Wright never incriminated  
12          himself and that it was not clear from Wright's statement how the  
13          fight actually began. People v. Brentlinger, 2008 WL 5207561 at  
14          \*5.

15          The state appellate court also rejected Petitioner's claim  
16          that Wright made a statement against his own penal interest when he  
17          admitted that Ruby had asked Wright to accompany Ruby "to watch  
18          [Ruby's] back." Id. The court found that this at most indicated  
19          that Ruby was concerned that someone might attack him and did not  
20          show that Wright went to the camp with the intent of initiating an  
21          attack. Id. Accordingly, Wright's statement lacked the assurances  
22          of reliability found in Chambers that would justify an exception to  
23          the state's rules against using hearsay evidence. Id.

24          B. Analysis of Petitioner's Claim Under AEDPA

25          Due process may be violated when excluded hearsay testimony  
26          bears "persuasive assurances of trustworthiness" and is "critical"  
27          to the defense. Chambers, 410 U.S. at 302; see also Chia v.  
28          Cambra, 360 F.3d 997, 1003 (9th Cir. 2004). "State and federal

1 rulemakers have broad latitude under the Constitution to establish  
2 rules excluding evidence from criminal trials." Holmes v. South  
3 Carolina, 547 U.S. 319, 324 (2006) (quotations and citations  
4 omitted); see also Montana v. Egelhoff, 518 U.S. 37, 42 (1996)  
5 (holding that due process does not guarantee a defendant the right  
6 to present all relevant evidence). Such latitude is limited,  
7 however, by a defendant's constitutional rights to due process and  
8 to present a defense, rights originating in the Sixth and  
9 Fourteenth Amendments. See Holmes, 547 U.S. at 324.

10 In deciding whether the exclusion of evidence violates the due  
11 process right to a fair trial or the right to present a defense,  
12 the court balances the following five factors: (1) the probative  
13 value of the excluded evidence on the central issue; (2) its  
14 reliability; (3) whether it is capable of evaluation by the trier  
15 of fact; (4) whether it is the sole evidence on the issue or merely  
16 cumulative; and (5) whether it constitutes a major part of the  
17 attempted defense. Chia, 360 F.3d at 1004 (9th Cir. 2004) (citing  
18 Miller v. Stagner, 757 F.2d 988, 994 (9th Cir. 1985)). The court  
19 also must give due weight to the state interests underlying the  
20 state evidentiary rules on which the exclusion was based. See  
21 Chia, 360 F.3d at 1006; Miller, 757 F.2d at 995.

22 Under the applicable Miller factors, the exclusion of Wright's  
23 statement did not violate Petitioner's due process rights. The  
24 fourth factor arguably weighs in favor of Petitioner because Wright  
25 was one of the only witnesses to the incident. The fifth factor  
26 also arguably weighs in favor of Petitioner because Wright's  
27 statement would have a been a major part of Petitioner's defense  
28

1 that Ruby initiated the assault. On the other hand, Petitioner  
2 propounded several other defense theories at trial, including  
3 defense of others and third-party culpability, as discussed  
4 elsewhere in this order. In any event, these two factors are  
5 outweighed by the remaining three factors. The first factor--  
6 probative value--weighs against Petitioner because, as the court of  
7 appeal noted, it was not clear from Wright's statement how the  
8 fight actually began. Thus Wright's statement would not have gone  
9 far to impeach Ruby. The second factor--reliability--weighs  
10 against Petitioner because, as the trial court noted, Wright had  
11 lied to the police, and there was no way to determine his motive  
12 for doing so. The fact that the excluded evidence was hearsay also  
13 made it unreliable. The third factor--whether the statement is  
14 capable of evaluation by the trier of fact--weighs against  
15 Petitioner because, although the investigating officers took notes  
16 from the interviews, the jury cannot evaluate notes of someone  
17 else's comments as effectively as it could have evaluated in-person  
18 testimony or even a transcript, and the state would have no  
19 opportunity to challenge the statements on cross-examination.  
20 Therefore, according the state court's determination the high  
21 degree of deference to which it is entitled under the AEDPA,  
22 exclusion of Wright's statement was not a violation of due process.  
23 See Chia, 360 F.3d at 1004.

24 Further, in order to obtain habeas relief on the basis of an  
25 evidentiary error, Petitioner must show that the error was one of  
26 constitutional dimension *and* that it was not harmless under Brecht  
27 v. Abrahamson, 507 U.S. 619 (1993). Specifically, he would have to  
28 show that the error had "a substantial and injurious effect' on

1 the verdict." Dillard v. Roe, 244 F.3d 758, 767 n.7 (9th Cir.  
2 2001) (quoting Brecht, 507 U.S. at 623). Here, however, as  
3 discussed above, the statement was internally inconsistent and  
4 lacked substantial exculpatory value because Wright never  
5 explicitly said that Ruby initiated the attack. Indeed, parts of  
6 the statement clearly inculpated Petitioner in Ruby's stabbing.  
7 Accordingly, any error was harmless.

8         Based on the above, the state court's denial of this claim was  
9 not contrary to, or an unreasonable application of, established  
10 federal authority.

11 V. Admissibility of Ruby's Past Conduct

12         Petitioner claims that the trial court erred in excluding  
13 evidence of two incidents of Ruby's past violent conduct.  
14 Specifically, at trial, the defense sought to introduce evidence of  
15 three instances of prior assaultive behavior committed by Ruby  
16 while intoxicated. Ex. 2 at 37-38. The defense sought to  
17 introduce the evidence under Cal. Evidence Code § 1103 to prove  
18 conduct in conformity with past behavior, specifically that Ruby  
19 becomes violent when he is intoxicated. Id. The three instances  
20 were summarized by the court of appeal as follows:  
21

22                 In the first incident, Ruby was under the  
23 influence of alcohol and several prescription  
24 drugs when he "called [ ] out" Zuniga for a  
25 fight. In the next incident, Ruby punched out  
26 a car window while he was intoxicated. In the  
27 third incident, the police responded to a  
28 domestic disturbance call. Ruby, who was  
intoxicated, waved his arms around when the  
police tried to subdue him. After the police  
pushed him to a prone position, he continued to  
be uncooperative. He was then placed into  
custody for resisting arrest and being drunk in  
public.

1 People v. Brentlinger, 2008 WL 5207561 at \*6.

2       The trial court allowed the defense to introduce evidence of  
3 the first incident--the one involving Ruby and Zuniga--but excluded  
4 the other two incidents. Ex. 2 at 41. The trial court reasoned  
5 that the act of vandalism "in no way demonstrates a willingness to  
6 engage in physical violence towards another human being," and the  
7 incident involving the police "suggests a withdrawal from restraint  
8 and physical violence. There's no indication he swung at the  
9 officer, kicked at an officer or in any way engaged in an act of  
10 physical aggression, which is the issue in this case." Id.

11       A. State Appellate Court Opinion Addressing Petitioner's  
12       Claim

13       The court of appeal affirmed the trial court's ruling on the  
14 grounds that neither of the excluded incidents was probative on the  
15 issue of who initiated physical violence in the assault. People v.  
16 Brentlinger, 2008 WL 5207561 at \*6. Specifically, the court found  
17 that the first excluded incident involved property damage--not  
18 physical violence against another person. Id. In the second  
19 excluded incident, involving the police, Ruby was not shown to have  
20 threatened or initiated an attack on the officers. Id. Rather,  
21 his resistance was a response to police attempts to subdue him.  
22 Id.

23       B. Analysis of Petitioner's Claim Under AEDPA

24       Applying the Miller factors discussed above, the state court  
25 was not unreasonable in concluding that the exclusion of the two  
26 prior incidents did not violate Petitioner's due process rights.  
27 See Miller, 757 F.2d at 994. The first factor cuts against  
28

1 Petitioner because, as noted by the appellate court, the two prior  
2 incidents were not probative on the issue of whether Ruby had a  
3 propensity to initiate violent assaults on others. The evidence,  
4 therefore, did not bear on the identity of the aggressor in the  
5 fight between Petitioner and Ruby. The second and third factors--  
6 the reliability of the evidence and whether it was capable of ready  
7 evaluation by the jury--likely weigh in favor of Petitioner.  
8 Though it is not clear how the defense sought to introduce the  
9 evidence and there is no indication that Ruby would have conceded  
10 the alleged episodes, it does appear that Ruby had suffered  
11 criminal charges--and possibly convictions--for these incidents.  
12 See Ex. 2 at 37-40 (referring to Ruby's actions as "misdemeanor  
13 vandalism" and a "148(A)"). Accordingly, the acts presumably could  
14 have been shown in a quick and direct evidentiary presentation.  
15 The fourth factor weighs against Petitioner because the excluded  
16 evidence was not the sole evidence on the issue of who initiated  
17 the attack. Ruby testified at trial and was subject to cross-  
18 examination. Ex. 2 at 97-123, 156-78. Further, the issue of  
19 Ruby's alcohol and drug use in general were explored at trial. Id.  
20 at 65-66, 113-15, 122-23, 158-61, 168-71, 181. Moreover, as noted  
21 above, Petitioner was permitted to present evidence on the Zuniga  
22 incident. Id. at 166-71. The fifth factor weighs against  
23 Petitioner because, as discussed above, the defense theory that  
24 Ruby initiated the assault was only one of several defense  
25 theories. Further, Petitioner was able to advance the theory that  
26 Ruby had a propensity toward initiating violent conduct when  
27 intoxicated because the trial court specifically allowed evidence  
28 of the Zuniga incident. The Court cannot definitively say that the

1 two excluded incidents were a "major part" of the attempted  
2 defense. According the state court's determination the high degree  
3 of deference to which it is entitled under the AEDPA, exclusion of  
4 the two prior incidents of Ruby's conduct was not a violation of  
5 due process. See Chia, 360 F.3d at 1004.

6 Based on the above, the state court's denial of this claim was  
7 not contrary to, or an unreasonable application of, established  
8 federal authority.

9 VI. Defense of Others Instruction (CALCRIM No. 3470)

10 Petitioner claims that the trial court erred in failing to sua  
11 sponte instruct the jury on defense of others. Again, while the  
12 amended petition does not state the basis for the proposed  
13 instruction, a review of Petitioner's briefing to the state court  
14 of appeal and of the court of appeal's opinion reveals that  
15 Petitioner sought to argue that any assault was committed in his  
16 defense of his girlfriend, Sheldahl. See People v. Brentlinger,  
17 2008 WL 5207561 at \*11-12.

18 A. State Appellate Court Opinion Addressing Petitioner's  
19 Claim

20 In rejecting this claim, the state appellate court found there  
21 was insufficient evidence to merit a defense of others instruction.  
22 People v. Brentlinger, 2008 WL 5207561 at \*12. Specifically, the  
23 court found that the evidence showed that Sheldahl became involved  
24 in the assault only after Petitioner attacked Ruby. Id. Because  
25 Ruby did not instigate an attack on Sheldahl, there was no evidence  
26 that Petitioner acted in her defense. Id.

27 The appellate court also noted that defense counsel's argument  
28 focused on the self-defense theory and on reasonable doubt. Id.

1 While defense counsel made one passing reference to protecting  
2 Sheldahl, this was not enough to indicate that the defense was  
3 relying on a "defense of others" theory. Id.

4 B. Analysis of Petitioner's Claim Under AEDPA

5 As noted above, due process does not require that an  
6 instruction be given unless the evidence supports it. See Hopper  
7 v. Evans, 456 U.S. 605, 611 (1982); Menendez v. Terhune, 422 F.3d  
8 1012, 1029 (9th Cir. 2005). A "mere scintilla" of evidence  
9 supporting the defendant's theory is not sufficient to warrant a  
10 defense instruction. United States v. Morton, 999 F.2d 435, 437  
11 (9th Cir. 1993) (citing United States v. Jackson, 726 F.2d 1466,  
12 1468 (9th Cir. 1984)).

13 After a thorough review of the record, the Court finds no  
14 evidence that Ruby initiated an attack on Sheldahl against which  
15 Petitioner defended. As found by the state appellate court, the  
16 evidence showed that Sheldahl jumped on Ruby only after Petitioner  
17 attacked Ruby. Ex. 2 at 90-91, 176-77. Petitioner does not meet  
18 his "heavy burden" to show that the trial court's failure to  
19 instruct on defense of others deprived him of the fair trial  
20 guaranteed by due process. See Villafuerte, 111 F.3d at 624.

21 The state court's rejection of this claim was neither contrary  
22 to, nor an unreasonable application of, federal law.

23 VII. Admissibility of Ruby's Testimony Regarding Petitioner's  
24 Girlfriend

25  
26 Petitioner claims that the trial court erred in refusing to  
27 strike certain of Ruby's testimony regarding Petitioner's  
28



1 girlfriend, Sheldahl. Specifically, the following colloquy took  
2 place during defense counsel's cross-examination of Ruby at trial:

3 Q. Is this the woman you know as Laurie  
4 Sheldahl? [¶] A. Yes. [¶] Q. And is this the  
5 woman you know as [defendant's] girlfriend? [¶]  
6 A. She was everybody's girlfriend. [¶] Q. Is  
7 that what you wanted to tell me about her? [¶]  
8 A. No. [¶] Q. When you say she was everybody's  
9 girlfriend, you mentioned earlier on direct  
10 examination that Laurie Sheldahl was  
11 [defendant's] girlfriend or so-called  
12 girlfriend. What did you mean by that? [¶] A.  
13 I meant that he was very jealous of anybody  
14 else talking to her and that he would always  
15 keep her in a tent because he was always  
16 beating her up. [¶] [DEFENSE COUNSEL]: Your  
17 Honor, I'm going to object, move to strike.  
18 May we approach? [¶] THE COURT: All right.  
19 [¶] (A sidebar conference was held out of the  
20 hearing of the jury as follows:) [¶] [DEFENSE  
21 COUNSEL]: There has been no evidence of this  
22 ever before. This just comes out of the blue.  
23 I'm going-[¶] THE COURT: What's your objection?  
24 I need a legal ground. [¶] [DEFENSE COUNSEL]:  
25 Lack of foundation, 352. [¶] THE COURT: Well,  
26 the problem is you asked him what he meant when  
27 he said so-called girlfriend. He's explaining  
28 it to you, counsel. [¶] [DEFENSE COUNSEL]: But  
he can't just explain she is with a lot of  
different guys. [¶] THE COURT: That's not what  
he is saying. He called her that because he  
kept her in the tent and beat her up a lot.  
That's his explanation. [¶] You needed to ask  
the why question. What do you mean question,  
you are stuck with the answer. [¶] [DEFENSE  
COUNSEL]: Okay.

21 Ex. 2 at 101-02. Petitioner argues that this testimony was so  
22 prejudicial that its admission amounted to a due process violation.

23  
24 A. State Appellate Court Opinion Addressing Petitioner's  
25 Claim

26 On direct review, the appellate court applied California law  
27 to find that defense counsel's failure to object timely at trial  
28 forfeited the claim on appeal. People v. Brentlinger, 2008 WL

1 5207561 at \*15. Specifically, defense counsel stated that he was  
2 objecting to Ruby's testimony that "[Sheldahl] was everybody's  
3 girlfriend." Accordingly, defense counsel's failure to object to  
4 Ruby's testimony about Petitioner beating Sheldahl and keeping her  
5 in a tent was effectively waived. Id.

6 The appellate court also applied California law to find that  
7 Petitioner could not complain of testimony that he himself had  
8 elicited at trial. Id. Specifically, the court stated that "[a]  
9 defendant cannot complain of the admissibility of evidence that he  
10 or she introduced through the examination of a witness." Id.  
11 (citing People v. Tennyson, 127 Cal. App. 2d 243, 246 (1954)).

12 B. Analysis of Petitioner's Claim Under AEDPA

13 In cases in which a state prisoner has defaulted his federal  
14 claims in state court pursuant to an independent and adequate state  
15 procedural rule, federal habeas review of the claims is barred  
16 unless the prisoner can demonstrate cause for the default and  
17 actual prejudice as a result of the alleged violation of federal  
18 law, or demonstrate that failure to consider the claims will result  
19 in a fundamental miscarriage of justice. See Coleman v. Thompson,  
20 501 U.S. 722, 749-50 (1991). The Ninth Circuit has recognized and  
21 applied the California contemporaneous objection rule in affirming  
22 the denial of a federal petition on grounds of procedural default  
23 where there was a complete failure to object at trial, see  
24 Inthavong v. Lamarque, 420 F.3d 1055, 1058 (9th Cir. 2005), and  
25 also where, as here, the petitioner raised only an evidentiary, not  
26 a constitutional objection, at trial. See Davis v. Woodford, 384  
27 F.3d 628, 653-54 (9th Cir. 2004).  
28

1           Because Petitioner has not shown cause and prejudice or a  
2 miscarriage of justice, Coleman, 501 U.S. at 749-50, this claim is  
3 barred. To the extent Petitioner claims ineffective assistance of  
4 counsel for counsel's failure to object or for counsel's act of  
5 eliciting the challenged testimony, such claim is addressed in  
6 section IX below.

7  
8 VIII. Ineffective Assistance of Counsel - Failure to Object to  
9 Alleged Prosecutorial Misconduct

10           Petitioner claims that he was deprived of the effective  
11 assistance of counsel because trial counsel failed to object to two  
12 instances of alleged prosecutorial misconduct. The first allegedly  
13 improper statement, made by the prosecution in closing argument,  
14 was as follows:

15                   What would [a] reasonable person think they had  
16 to do to protect themselves against Samuel  
17 Ruby. The same Samuel Ruby you saw labor or  
18 walk into court. [¶] 57 years old, maybe 56 at  
19 the time, height and weight, physical condition  
20 as you observed and heard about, what would  
21 they have had to do? What would they think is  
22 reasonable? This is all very difficult to  
23 translate when we don't know what is being  
24 thought of. What we have here is the testimony  
25 of Mr. Ruby about what happened.

26 Ex. 2 at 274.

27           The second allegedly improper statement, made by the  
28 prosecutor in rebuttal, was as follows:

29                   I said I was desperate to hear the reasonable  
30 interpretation of the evidence that the  
31 defendant was going to advance that would  
32 suggest innocence. In the end, what we were  
33 told, I actually wrote it down, that there is  
34 circumstantial evidence of a reasonable doubt.  
35 [¶] Well, no. That's not what the law says.  
36 The law says you have to have circumstantial

1 evidence of a reasonable interpretation of  
2 facts pointing to innocence. So the next step  
3 of course is, okay, ladies and gentlemen, here  
4 are the facts that point to him. I challenged  
5 him to do it and he didn't do it. What does  
6 that tell you? [¶] If the defense cannot  
7 articulate the facts that are the basis of his  
8 reasonable interpretation for innocence, or  
9 facts--even a reasonable interpretation of  
10 anyone else, just said a reasonable  
11 interpretation of circumstantial evidence of  
12 reasonable doubt, they don't exist.

13 Ex. 2 at 310-11.

14 Petitioner claims that the first statement, specifically, the  
15 prosecutor's statement that "we don't know what is being thought  
16 of," was an impermissible comment on his right not to testify, in  
17 violation of Griffin v. California, 380 U.S. 609 (1965). Regarding  
18 the second statement, Petitioner claims that the prosecutor  
19 improperly shifted the burden of proof and the presumption of  
20 innocence to him by arguing that the defense had to articulate  
21 facts pointing to a reasonable interpretation of innocence.  
22 Because defense counsel failed to object to these statements,  
23 Petitioner argues that he received ineffective assistance of  
24 counsel.

25 A. State Appellate Court Opinion Addressing Petitioner's  
26 Claim

27 Applying the federal standard set forth in Strickland v.  
28 Washington, 466 U.S. 668 (1984), which is discussed below, the  
state appellate court rejected Petitioner's claim. Regarding the  
first statement, the court found that, taken in context of the  
self-defense instruction, the prosecution was emphasizing that the  
jury could not presume what Petitioner was thinking but rather, was

1 required to consider what a reasonable person would have done.

2 People v. Brentlinger, 2008 WL 5207561 at \*17.

3       Regarding the second statement, the appellate court agreed  
4 that the prosecution committed misconduct by suggesting that  
5 Petitioner was required to produce evidence pointing to innocence.  
6 Id. at \*18. Such a comment improperly shifted the burden of proof  
7 to the defense. Id. Thus, the court agreed, trial counsel  
8 rendered ineffective assistance when he failed to object. Id. The  
9 court nonetheless rejected Petitioner's claim, finding that  
10 counsel's error did not prejudice Petitioner at trial. Id.  
11 Specifically, the trial court correctly instructed the jury on the  
12 presumption of innocence and further instructed the jury that, if  
13 an attorney's comments conflicted with the trial court's  
14 instruction, the jury was required to follow the latter. Id. The  
15 appellate court pointed to other presumably curative instructions  
16 addressing the prosecution's burden of proof in concluding that  
17 there was no prejudice to Petitioner. Id.

18       B. Analysis of Petitioner's Claim Under AEDPA

19  
20       The Sixth Amendment guarantees the right to effective  
21 assistance of counsel. Strickland, 466 U.S. at 684-86. To prevail  
22 on a claim of ineffective assistance of counsel, Petitioner must  
23 show that counsel's performance was deficient and that the  
24 deficient performance prejudiced Petitioner's defense. Id. at 688,  
25 692. To prove deficient performance, Petitioner must demonstrate  
26 that counsel's representation fell below an objective standard of  
27 reasonableness under prevailing professional norms. Id. at 688.  
28 To prove counsel's performance was prejudicial, Petitioner must

1 demonstrate a "reasonable probability that, but for counsel's  
2 unprofessional errors, the result of the proceeding would have been  
3 different. A reasonable probability is a probability sufficient to  
4 undermine confidence in the outcome." Id. at 694.

5       Regarding the first statement, Petitioner's counsel may have  
6 reasonably chosen not to object, and chosen not to seek a curative  
7 instruction, for the tactical reason of not calling further  
8 attention to the comments. Further, the appellate court was not  
9 unreasonable in finding that the statement was not improper. Here,  
10 by referring to the lack of evidence, the prosecution was not  
11 necessarily suggesting that guilt should be inferred from  
12 Petitioner's failure to testify. Taken in context, the prosecution  
13 was referring to the lack of evidence to show that a reasonable  
14 person would have believed he needed to stab an older, physically  
15 challenged man in order to defend himself. See Cook v. Schriro,  
16 538 F.3d 1000, 1020 (9th Cir. 2008) ("Prosecutors may comment on  
17 the failure of the defense to produce evidence to support an  
18 affirmative defense so long as it does not directly comment on the  
19 defendant's failure to testify."). In short, the record does not  
20 show prosecutorial misconduct, and defense counsel was not  
21 deficient for failing to object.

22       Regarding the second statement, accepting as correct the  
23 appellate court's determination that counsel erred in failing to  
24 object, the state court was not unreasonable in finding that there  
25 was no resulting prejudice to Petitioner. Specifically, the trial  
26 court directed the jurors to the legal standards they were charged  
27 with applying to the case. The trial court instructed the jury  
28 that it must follow the law as explained by the court, and that if

1 the attorneys' comments conflicted with the trial court's  
2 instructions, the jury was required to follow the latter. Ex. 1 at  
3 182. The trial court then correctly instructed the jury on the  
4 presumption of innocence and the People's burden of proof in  
5 general. Id. at 183. The jury was also specifically instructed:  
6 "Before you may rely on circumstantial evidence to conclude that a  
7 fact necessary to find the defendant guilty has been proved, you  
8 must be convinced that the People have proved each fact essential  
9 to that conclusion beyond a reasonable doubt." Id. at 185.  
10 Moreover, the jury was instructed that the People had "the burden  
11 of proving beyond a reasonable doubt that defendant did not act in  
12 lawful self-defense." Id. at 193.

13 The Court concludes that, considered as a whole, the jury  
14 instructions were adequate to correct the improper comment made by  
15 the prosecution in rebuttal. Tan v. Runnels, 413 F.3d 1101, 1115  
16 (9th Cir. 2005) ("we presume jurors follow the court's instructions  
17 absent extraordinary situations"); Boyde v. California, 494 U.S.  
18 370, 384 (1989) (Arguments of counsel "generally carry less weight  
19 with a jury than do instructions from the court."). Accordingly,  
20 Petitioner has not demonstrated a reasonable probability that the  
21 result of the proceeding would have been different had counsel  
22 challenged the second statement. The state court's rejection of  
23 this claim was neither contrary to, nor an unreasonable application  
24 of, federal law.

1 IX. Ineffective Assistance of Counsel - Failure to Object to  
2 Ruby's Testimony Regarding Sheldahl

3 Petitioner claims that trial counsel rendered ineffective  
4 assistance by failing to object to certain portions of Ruby's  
5 testimony regarding Petitioner's girlfriend, Sheldahl. As  
6 discussed above at section VII, during the cross-examination of  
7 Ruby, defense counsel asked Ruby what he meant when he referred to  
8 Sheldahl as Petitioner's "so-called girlfriend." When defense  
9 counsel objected to the answer for lack of foundation and undue  
10 prejudice, the trial court overruled the objection. Ex. 2 at 101-  
11 02. Petitioner claims that defense counsel erred by failing to  
12 federalize the objection. Petitioner does not specify what federal  
13 grounds counsel should have raised at trial. A review of  
14 Petitioner's opening brief on appeal, however, refers to the  
15 elicited testimony as a "violation of the Confrontation Clause."  
16 Ex. 3 at 63.

17 A. State Appellate Court Opinion Addressing Petitioner's  
18 Claim

19 This specific claim was not raised on direct appeal. The  
20 appellate court did, however, address a very similar claim that  
21 defense counsel rendered ineffective assistance in eliciting Ruby's  
22 testimony about Petitioner's conduct toward Sheldahl in the first  
23 place. People v. Brentlinger, 2008 WL 5207561 at \*15. The  
24 appellate court, applying the Strickland standard, found that  
25 defense counsel did err in this line of questioning. Id.  
26 Specifically, Ruby had already earlier identified Sheldahl as  
27 Petitioner's girlfriend, obviating any need for further  
28 clarification as to her identity. Id. Further, because the



1 adjective "so-called" is pejorative, "there could have been no  
2 helpful or benign answer to the question of why Ruby referred to  
3 Sheldahl as [Petitioner's] 'so-called' girlfriend." Id. Based on  
4 this analysis, the appellate court concluded that "[a] reasonably  
5 competent attorney would not have asked Ruby to explain himself."  
6 Id.

7         The court nonetheless rejected Petitioner's ineffective  
8 assistance of counsel claim on the grounds that Petitioner failed  
9 to establish prejudice as required under Strickland's second prong.  
10 Id. Specifically, the court found that the uncontradicted evidence  
11 of Petitioner's guilt introduced at trial made it not reasonably  
12 probable that the absence of Ruby's prejudicial testimony would  
13 have resulted in a more favorable verdict. Id.

14         B. Analysis of Petitioner's Claim Under AEDPA

15         Turning to the claim raised here, the Court finds that  
16 Petitioner has failed to establish ineffective assistance of  
17 counsel for failure to federalize his objection. The Confrontation  
18 Clause of the Sixth Amendment provides that in criminal cases the  
19 accused has the right to "be confronted with witnesses against  
20 him." U.S. Const. amend. VI. Here, Petitioner had the opportunity  
21 to cross-examine Ruby on these statements and did so. Accordingly,  
22 he had the opportunity afforded by the Confrontation Clause to show  
23 that the witness was biased as well as to show that testimony was  
24 exaggerated or otherwise unbelievable. Accordingly, there was no  
25 Confrontation Clause violation, and a reasonably competent attorney  
26 would not have made the futile argument that there was one.  
27  
28

1           Moreover, to the extent Petitioner claims ineffective  
2 assistance of counsel for eliciting this testimony or for failing  
3 to object to certain parts of this testimony, the appellate court  
4 reasonably found that Petitioner failed to show prejudice. As  
5 found by the appellate court, the evidence adduced at trial was  
6 uncontradicted that Petitioner instigated the attack by breaking  
7 Ruby's cane, pushing him and then punching him in the chest and  
8 ribs. Ex. 2 at 89-90, 119, 158, 198. Further, Petitioner was the  
9 only person who touched Ruby in the areas where he was stabbed.  
10 Id. at 89-93, 119, 176-78. Ruby first realized he had been stabbed  
11 after he and Petitioner physically separated. Id. at 93, 165.  
12 Petitioner was found by police with blood covering his abdomen.  
13 Id. at 62, 135. Petitioner had two prior felony convictions for  
14 assault with a deadly weapon and one prior conviction for battery  
15 with serious bodily injury. Id. at 240-41, 249-50. In light of  
16 the overwhelming evidence of guilt, Petitioner cannot show that the  
17 result of trial would have been more favorable absent Ruby's  
18 testimony about Sheldahl.

19           Accordingly, the state courts' decision denying relief on this  
20 claim was not contrary to, or an unreasonable application of,  
21 clearly established federal law.

22  
23 X. Ineffective Assistance of Counsel - Failure to Request  
Conformity Instruction

24           Petitioner claims that trial counsel rendered ineffective  
25 assistance by: (1) requesting CALCRIM 3470 because it "imputed to  
26 Petitioner knowledge of the victim's prior bad act"; and  
27 (2) failing to request an instruction that would have allowed the  
28

1 jury to consider evidence of Ruby's prior violent act as conformity  
2 evidence. As discussed in section I above, CALCRIM 3470 did not  
3 include a knowledge requirement. Accordingly, the claim based on  
4 the first alleged error lacks merit, and the Court need only  
5 address the second alleged error. While Petitioner does not  
6 specify what kind of instruction he sought, the appellate court  
7 opinion described the proposed instruction as follows:

8  
9 Evidence was received of the violent character  
10 of the complaining witness. [¶] The purpose of  
11 such evidence is to show that it is probable  
12 that a person of such character acted in  
13 conformity with that character trait during the  
14 events constituting this case. [¶] Any conflict  
15 in evidence of the complaining witness's  
16 character and the weight to be given to such  
17 evidence is for you to determine.

18 People v. Brentlinger, 2008 WL 5207561 at \*9.

19 A. State Appellate Court Opinion Addressing Petitioner's  
20 Claim

21 The state appellate court rejected Petitioner's claim, finding  
22 that defense counsel could have reasonably concluded that such  
23 instruction was unnecessary. People v. Brentlinger, 2008 WL  
24 5207561 at \*10. Specifically, the instruction that the complaining  
25 witness acted in conformity with his violent character was already  
26 covered by CALCRIM 3470 to the extent CALCRIM 3470 permitted the  
27 jury to consider Ruby's past threats and acts in deciding the  
28 reasonableness of Petitioner's beliefs and conduct. Id.  
Similarly, other parts of the proposed instruction were merely  
introductory or covered by other instructions. Id.

B. Analysis of Petitioner's Claim Under AEDPA

The state appellate court found that there was a reasonable  
explanation for counsel's failure to request the instruction. As

1 noted above in section I, CALCRIM 3470 benefitted Petitioner by  
2 allowing the jurors to infer that Ruby acted aggressively with  
3 Petitioner based on Ruby's past conduct, regardless of whether  
4 Petitioner knew of that conduct. Further, as noted by the  
5 appellate court, defense counsel used CALCRIM 3470 to argue that  
6 Ruby had "already demonstrated the character for aggression and  
7 asking other people to fight," and that he had "a character and  
8 history of being violent and assaultive." Ex. 2 at 286, 290-91.  
9 In short, counsel was not deficient for failing to request  
10 Petitioner's proposed conformity instruction. See Strickland, 466  
11 U.S. at 688. Moreover, because CALCRIM 3470 already permitted a  
12 conformity inference, it simply cannot be said that there was a  
13 reasonable probability that, but for counsel's failure to request  
14 such an instruction, the result of the proceeding would have been  
15 different. See id. at 694.

16 The state court's denial of this claim of ineffective  
17 assistance of counsel was not contrary to, or an unreasonable  
18 application of, established Supreme Court authority.

19 XI. Cumulative Error

20 Petitioner claims that the cumulative effect of the errors at  
21 his trial denied him of his constitutional rights.

22 In some cases, although no single trial error is sufficiently  
23 prejudicial to warrant reversal, the cumulative effect of several  
24 errors may still prejudice a defendant so much that his conviction  
25 must be overturned. See Alcala v. Woodford, 334 F.3d 862, 893-95  
26 (9th Cir. 2003). However, where there is no single constitutional  
27 error existing, nothing can accumulate to the level of a  
28

1 constitutional violation. See Mancuso v. Olivarez, 292 F.3d 939,  
2 957 (9th Cir. 2002).

3 Because this Court finds that, based on its assessment of  
4 Petitioner's claims, no single constitutional error exists,  
5 Petitioner is not entitled to federal habeas relief on his claim of  
6 cumulative error.

7  
8 PETITIONER'S REQUEST FOR COUNSEL

9 Petitioner has also filed a letter with this Court requesting  
10 appointment of an attorney. Docket no. 18.

11 The Sixth Amendment right to counsel does not apply in habeas  
12 corpus actions. See Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th  
13 Cir. 1986). Title 18 U.S.C. § 3006A(a)(2)(B), however, authorizes  
14 a district court to appoint counsel to represent a habeas  
15 petitioner whenever "the court determines that the interests of  
16 justice so require" and such person is financially unable to obtain  
17 representation. The decision to appoint counsel is within the  
18 discretion of the district court. See Chaney v. Lewis, 801 F.2d  
19 1191, 1196 (9th Cir. 1986); Knaubert, 791 F.2d at 728; Bashor v.  
20 Risley, 730 F.2d 1228, 1234 (9th Cir. 1984). The courts have made  
21 appointment of counsel the exception rather than the rule by  
22 limiting it to: (1) capital cases; (2) cases that turn on  
23 substantial and complex procedural, legal or mixed legal and  
24 factual questions; (3) cases involving uneducated or mentally or  
25 physically impaired petitioners; (4) cases likely to require the  
26 assistance of experts either in framing or in trying the claims;  
27 (5) cases in which the petitioner is in no position to investigate  
28 crucial facts; and (6) factually complex cases. See generally 1 J.

1 Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure  
2 § 12.3b at 383-86 (2d ed. 1994). Appointment is mandatory only  
3 when the circumstances of a particular case indicate that appointed  
4 counsel is necessary to prevent due process violations. See  
5 Chaney, 801 F.2d at 1196; Eskridge v. Rhay, 345 F.2d 778, 782 (9th  
6 Cir. 1965).

7 The Court finds that appointment of counsel is not warranted  
8 in this case. Petitioner's claims are typical claims that arise in  
9 criminal appeals and are not especially complex. This is not an  
10 exceptional case that would warrant representation on federal  
11 habeas review. Further, no evidentiary hearing is required under  
12 28 U.S.C. § 2254(e). Petitioner's claims do not rely upon extra-  
13 record evidence and a factual basis exists in the record to  
14 determine the claims.

15 Accordingly, Petitioner's motion for appointment of counsel is  
16 DENIED.

17 CONCLUSION

18 For the foregoing reasons, the Petition for a Writ of Habeas  
19 corpus is DENIED. Petitioner's request for appointment of counsel  
20 is also DENIED.

21 Further, a Certificate of Appealability is DENIED. See Rule  
22 11(a) of the Rules Governing Section 2254 Cases. Petitioner has  
23 not made "a substantial showing of the denial of a constitutional  
24 right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner demonstrated  
25 that "reasonable jurists would find the district court's assessment  
26 of the constitutional claims debatable or wrong." Slack v.  
27 McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not appeal this  
28 Court's denial of a Certificate of Appealability but may seek a


1 certificate from the Court of Appeals under Rule 22 of the Federal  
2 Rules of Appellate Procedure. See Rule 11(a) of the Rules  
3 Governing Section 2254 Cases.

4 The Clerk shall terminate any pending motions as moot, enter  
5 judgment in favor of Respondent and close the file.

6

7 IT IS SO ORDERED.

8 Dated: 6/23/2011



CLAUDIA WILKEN  
UNITED STATES DISTRICT JUDGE

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1  
2 UNITED STATES DISTRICT COURT  
3 FOR THE  
4 NORTHERN DISTRICT OF CALIFORNIA

5 DAVID BRENTLINGER,

6 Plaintiff,

7 v.

8 JAMES WALKER et al,

9 Defendant.

Case Number: CV09-02635 CW

**CERTIFICATE OF SERVICE**

10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
11 Court, Northern District of California.

12 That on June 23, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said  
13 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
14 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located  
15 in the Clerk's office.

16 David L. Brentlinger F-62982  
17 T-138  
18 California Medical Facility  
19 P.O. Box 2500  
20 Vacaville, CA 95696-2500

21 Dated: June 23, 2011

22 Richard W. Wieking, Clerk  
23 By: Nikki Riley, Deputy Clerk  
24  
25  
26  
27  
28

United States District Court  
For the Northern District of California