

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

7

8

9

James Hubbs,

)

No. CV-10-1318-PHX-GMS

10

Petitioner,

)

ORDER

11

vs.

)

12

Thomas Horne, et al.,

)

13

Respondants.

)

14

15

16

17

Pending before the Court are an Amended Petition for Writ of Habeas Corpus filed by Petitioner James J. Hubbs and a Motion for Hearing or Conference. (Docs. 9, 31). Magistrate Judge Lawrence O. Anderson has issued a Report and Recommendation (“R & R”) recommending that the petition be denied because it is procedurally defaulted and because it would fail on the merits in any event, and recommending that the motion for a hearing be denied as well. (Doc. 36). Petitioner has filed objections to the R & R. (Doc. 37). Because objections have been filed, the Court will review the petition de novo. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). For the reasons stated below, the petition is denied.

18

19

20

21

22

23

24

25

26

BACKGROUND

27

On December 10, 2006, Officer John Butler of the Phoenix Police Department observed an F-150 truck make a wide right turn from traveling southbound on 44th Street to

28

1 traveling westbound on Camelback Road in Phoenix, crossing three lanes of traffic as it did
2 so. (Doc. 20, Ex. S at 94).¹ He continued to follow the vehicle, and observed it waver in its
3 lane and nearly hit the center median. (*Id.* at 96). At 40th Street, he observed as the truck
4 made a left hand turn in front of an oncoming vehicle, then pulled into a parking lot in which
5 a half-dozen cars remained. (*Id.* at 99–100). Officer Butler pulled into the parking lot, but
6 before he could get out of his car, Petitioner James Hubbs exited the truck and began to
7 approach the officer. (*Id.* at 100). As Hubbs walked towards him, Officer Butler observed
8 that Hubbs walked in “a real wide arc,” and that “he was swaying and staggering.” (*Id.* at
9 101). Hubbs’s eyes were “bloodshot and watery,” he “slurred his speech when he
10 conversed,” and “he had a distinct odor of alcoholic beverage on his breath.” (*Id.* at 102).

11 Officer Butler conducted a number of field sobriety tests on Petitioner. These tests
12 included the “walk and turn,” the “one leg stand,” the “Romberg Modified Test,” and, most
13 relevant to this petition, a test for Horizontal Gaze Nystagmus (“HGN”). (Doc. 20, Ex. S at
14 106, 109, 110, 113). Police officers test for HGN by waving a pen in front of a person’s face
15 and determining, among other things, whether or not “the eyes just move smoothly back and
16 forth” or not. (Doc. 20, Ex. S at 114). As Officer Butler later explained at trial, one cue of
17 a positive result of the HGN test is that “the eyes will continue to jerk, it’ll, and they, um, it
18 just keeps going inward.” (*Id.*). In Arizona, the results of an HGN test may not be admitted
19 to support the proposition that a person was intoxicated when the test was administered.
20 Instead, they may only be admitted “for the purpose of permitting the officer to testify that,
21 based on his training and experience, the results indicated possible neurological dysfunction,
22 one cause of which could be alcohol ingestion.” *State ex. rel. Hamilton v. City Ct. of the City*
23 *of Mesa (Lopresti)*, 165 Ariz. 514, 518–19, 799 P.2d 855, 859–860 (1990). After conducting
24 the field sobriety tests and administering a breathalyzer, Officer Butler arrested Petitioner for
25

26 ¹ In the ticket he wrote that evening, Officer Butler wrote that the incident took place
27 at 44th Street and Indian School, but at the later trial he confirmed that he had revisited the
28 location of the incident and it had taken place on Camelback Road. (Doc. 20, Ex. A, Ex. S
at 92)

1 driving while impaired by alcohol to the least degree, in violation of Arizona Revised
2 Statutes (“A.R.S.”) § 28-1381(A), having a breath alcohol concentration of .08 or greater
3 within two hours of driving in violation of A.R.S. § 28-1382(A), and extreme DUI, having
4 a breath alcohol concentration of .15 or greater within two hours of driving. (Doc. 9-1 at 1).

5 Prior to trial, Petitioner requested disclosure of the performance records of the
6 Intoxilyzer 8000, the device Officer Butler used to test Petitioner’s blood alcohol level.
7 Rather than provide the results, the state stipulated to the dismissal of the blood alcohol level
8 charges and stated it would not introduce breath test evidence at trial. (Doc. 20, Ex. B).
9 Petitioner then moved to exclude the HGN evidence altogether, and the court ruled that
10 “HGN testimony is allowable to show impairment or that defendant was under the
11 influence.” (Doc. 25, Ex. 1). Arguing that this ruling conflicted with the standard in *Lopresti*,
12 Petitioner moved to stay the trial in order to file a special action regarding the HGN
13 testimony. (Doc. 25, Ex. 2). In response, the state wrote that it “has no objection now, nor
14 has it ever objected, to limiting direct testimony regarding HGN to language consistent with
15 *Lopresti*” and continued that it “does not intend to elicit conclusory testimony from any
16 witness that observations made during HGN show impairment or that the defendant was
17 ‘under the influence.’” (Doc. 25, Ex. 3). The parties proceeded to trial on the charge of
18 driving while impaired by alcohol to the slightest degree, in violation of A.R.S. § 28-
19 1381(A)(1).

20 At trial, Officer Butler testified about following Petitioner’s truck, observing him in
21 the parking lot, and administering field sobriety tests. After describing how he administered
22 the HGN test, the trial proceeded as follows:

23 **State:** Ok, um, is alcohol detoxification [*sic*] one possible
24 explanation for Horizontal Gaze Nystagmus?

25 **Butler:** Um, yes.
(Doc. 20, Ex. S at 114).

26 Officer Butler was then asked about other possible causes of HGN, and replied that
27 people who have been spun around, or people who have been watching rapidly moving
28 objects may display signs of HGN. (*Id.* at 115). His only statement under direct examination

1 relating to HGN and alcohol was that a positive HGN could be the result of “detoxification,”
2 which as Petitioner notes, refers to the removal of toxins or alcohol from the body. When
3 Butler was under cross-examination, however, the following exchange took place:

4 **Defense:** It would be a fair statement that if there are six cues
5 of HGN, that that might indicate a possible
6 neurological dysfunction, one cause of which, of
7 which could be alcohol ingestion?

8 **Butler:** That is a correct statement.
9 (Doc. 20, Ex. S at 133).

10 In his summation, the prosecutor made the following statement: “And in fact on the
11 HGN, the one that the criminalist testified was the most accurate of all the tests, there are six
12 possible keys of impairment, the Defendant exhibited all six.” (Doc. 20, Ex. S at 194).
13 Defendant objected, arguing that the description violated *Lopresti*, stating at sidebar that,
14 “the only thing the officer can testify to based on his training [and] experience, and this is
15 what the officer testified to (inaudible), based on his training [and] experience, results
16 indicate a possible neurological dysfunction (inaudible) but impairment, one cause of which
17 could be alcohol ingestion, that’s it.” (Doc. 20, Ex. S at 195). The judge stated that “I think
18 it can probably be cleared up (inaudible) on both sides, so (inaudible)” and the prosecutor
19 continued. (Doc. 20, Ex. S at 196). The prosecutor then made the following statement:

20 I’ve been told that [the] weapon of lawyers is words, so I wanted
21 to make sure that I’ve, I’ve spoken correctly to you. The HGN,
22 as you heard testified to by the officers, measures, there are six
23 cues, uh, that indicate possible neurological dysfunction, one of
24 which is intoxication.
25 (Doc. 20, Ex. S at 196).

26 The Defense again objected to the prosecutor’s failure to abide by the language of
27 *Lopresti*, and at sidebar, when challenged about whether he said “impairment” or “ingestion,”
28 the prosecutor stated, “I did say alcohol ingestion,” when in fact he said “intoxication.” (Doc.
29 20, Ex. S at 197). The judge allowed the closing argument to continue, and when Petitioner
30 filed a motion for a mistrial, the judge stated “certainly there’s, uh, some latitude given in
31 closing arguments, and . . . I don’t think you’ve gone beyond the bounds of that.” (Doc. 20,
32 Ex. S at 203). The judge did not issue any statement to the jury regarding the prosecutor’s
33 description of HGN, and the jury convicted petitioner. (Doc. 20, Ex. C). On June 18, 2008,

1 the justice court suspended imposition of sentence and placed Petitioner on probation for
2 three years, under the condition that he spend ten days in jail, pay fines totaling \$1,670, and
3 have an alcohol interlock detecting device installed on his car. (Doc. 20, Ex. D).

4 Petitioner filed a timely appeal to the Superior Court, in which he presented the
5 following four issues:

- 6 1. Did the prosecution improperly, unfairly, and intentionally
7 misstate the law to the jury regarding the relevance of
8 Horizontal Gaze Nystagmus testing in order to gain tactical
9 advantage over the Defendant during closing arguments by
10 stating that it meant, first “cues of impairment,” then “cues”
11 of “intoxication” over Defense objections?
12
- 13 2. Did the trial court abuse its discretion by not correcting and
14 directing the prosecutor after Defense objections to the
15 State’s closing argument that HGN meant the Defendant
16 could have had a neurological dysfunction one cause of
17 which could have been alcohol ingestion.
- 18 3. Should the case be dismissed with prejudice, jeopardy
19 having attached, the prosecution having ignored case law
20 and acted in bad faith, in arguing that HGN meant
21 impairment and intoxication?
- 22 4. Was Defendant prejudiced by having an electronic record
23 that did not audibly record all side bars with the Court?

24 (Doc. 20, Ex. E).

25 Although the appeal focuses primarily on state law issues, it cites to *Berger v. United*
26 *States*, 294 U.S. 78, 88 (1935) in arguing that the prosecutor overstepped his authority.
27 (“[W]hile he may strike hard blows, he is not at liberty to strike foul ones”). In affirming the
28 judgment of the justice court, the superior court wrote that “[c]losing arguments must be
based upon evidence in the record, but counsel may argue the reasonable inferences that can
be drawn from the evidence and suggest ultimate conclusions.” (Doc. 20, Ex. G at 2). The
Court concluded that “[t]he prosecutor’s use of the word ‘intoxication’ rather than ‘ingestion’
in his closing, which Appellant contends was unfairly prejudicial, did no more than
summarize the evidence and suggest the inferences that could be drawn from it.” (Doc. 20,
Ex. G at 3). Petitioner’s motion for reconsideration was denied on September 20, 2009. (Doc.
20, Ex. H).

1 Since the Arizona Superior Court Rules of Appellate Procedure prohibit further appeal
2 from a limited jurisdiction court, Petitioner filed a special action in the Arizona Court of
3 Appeals. In the motion for a special action, he again cited to *Berger* and, unlike in his direct
4 appeal to Superior Court, included the fact that Officer Butler had only testified that HGN
5 can be a sign of “detoxification” in his direct testimony. (Doc. 20, Ex. I at 7). The Court of
6 Appeals declined to accept jurisdiction. (Doc. 20, Ex. J). The Arizona Supreme Court
7 declined review of the motion for a special action. (Doc. 20, Ex. K). On June 22, 2010, the
8 justice court stayed Petitioner’s sentence pending the filing of a Habeas Corpus petition with
9 the District Court.

10 Petitioner filed this action on July 23, 2010. (Doc. 1). He filed his Amended Petition
11 on August 4, 2010, and a motion for oral argument on April 6, 2011. (Doc. 9, 31).² In the
12 amended petition, he claimed that he was denied due process of law by the closing statement
13 of the prosecutor. (Doc. 9-1 at ii). In particular, he claims that A) the prosecutor’s statement
14 “inferred quantification of alcohol,” B) the statement “was not based on trial testimony,” C)
15 the state ignored its promise not to introduce HGN evidence except as limited by *Lopresti*,
16 D) the prosecutor intentionally only introduced testimony that HGN was evidence of
17 “detoxification” and then argued that it was evidence of the opposite (“intoxication”) in
18 closing, and E) the prosecutor’s statement lacked scientific basis because there is no
19 scientific basis to equate HGN with “intoxication.” (Doc. 9-1 at ii–iii). Petitioner also argues
20 that adverse state court rulings violated his right to due process and that the errors were
21 material. (Doc. 9-1 at iii). Although Petitioner puts forward five claims, they are closely
22 related, and can be described adequately in merely two counts: 1) By describing the impact
23 of a positive HGN test in terms exceeding the scope of *Lopresti* in his closing, the prosecutor
24 violated Petitioner’s right to due process (Petitioner’s claims A, C, and E), and 2) by stating
25

26 ² The motion for oral argument is denied because the parties have had an adequate
27 opportunity to discuss the law and evidence and oral argument will not aid the Court’s
28 decision. *See Lake at Las Vegas Investors Group, Inc. v. Pac. Malibu Dev.*, 933 F.2d 724,
729 (9th Cir. 1991).

1 that Officer Butler testified that HGN could signify “intoxication,” when in fact Officer
2 Butler testified that it could signify “detoxification,” the prosecutor violated Petitioner’s due
3 process rights (Petitioner’s claims B and D). These claims will be discussed individually
4 below.

5 Respondent argues that Petitioner’s federal claim was not “fairly presented” in state
6 court, and in the alternative that it lacks merit because “the prosecutor’s argument was
7 entirely proper.” (Doc. 20 at 16).

8 DISCUSSION

9 1. Legal Standard

10 A. AEDPA Generally

11 Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),
12 the Court may not grant habeas relief unless either the petitioner has exhausted his claims in
13 state court, there is an absence of available state corrective process to exhaust the claim, or
14 circumstances exist which render the state process ineffective to protect the petitioner’s
15 rights. 28 U.S.C. § 2254(b)(1). Nor may the Court grant habeas relief unless the state’s
16 adjudication of the claims resulted in a decision that was contrary to, or involved an
17 unreasonable application of, clearly established federal law, as determined by the Supreme
18 Court of the United States, or resulted in a decision that was based on an unreasonable
19 determination of the facts in light of the evidence presented in the state court proceedings.
20 28 U.S.C. § 2254(d)(1); *see Baldwin v. Reese*, 541 U.S. 27, 27 (2004); *O’Sullivan v.*
21 *Boerckel*, 526 U.S. 838, 839 (1999). “The Supreme Court has said that § 2254(d)(1) imposes
22 a ‘highly deferential standard for evaluating state-court rulings,’ and ‘demands that state
23 court decisions be given the benefit of the doubt.’” *Clark v. Murphy*, 331 F.3d 1062, 1067
24 (9th Cir. 2003) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997); *Woodford v.*
25 *Visciotti*, 537 U.S. 19, 24 (2002)).

26 Only those persons who are “in custody” may pursue habeas relief. The Supreme
27 Court has found that those persons released on their own recognizance pending execution of
28 a sentence are “in custody” for the purposes of the habeas statute. *See Hensley v. Municipal*

1 Ct., 411 U.S. 345, 351 (1973).

2 **B. Fair Presentation**

3 Before seeking a federal writ of habeas corpus, a state prisoner must give the state the
4 opportunity to pass upon and correct the alleged violations of the prisoner’s federal rights.
5 *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275
6 (1971)). To provide the state with the necessary “opportunity,” the prisoner “must ‘fairly
7 present’ his claim in each appropriate state court . . . thereby alerting that court to the federal
8 nature of the claim.” *Baldwin*, 541 U.S. at 29 (citing *Duncan*, 513 U.S. at 365; *O’Sullivan*,
9 526 U.S. at 845). The prisoner does not “fairly present” a federal claim to the appropriate
10 state court unless he “explicitly indicated” that “the claim was a *federal* one.” *Lyons v.*
11 *Crawford*, 232 F.3d 666, 669 (9th Cir. 2000), *as amended*, 247 F.3d 904 (9th Cir. 2001)
12 (emphasis in original). A claim must not only reference the constitutional guarantee which
13 has been violated, but must also include “a statement of the facts that entitle the petitioner
14 to relief.” *Gray v. Netherland*, 518 U.S. 152, 163 (1996). If a petitioner’s state court actions
15 contain only “conclusory scattershot citation of federal constitutional provisions, divorced
16 from any articulated federal legal theory,” he has not fairly presented the federal issue to state
17 court. *Castillo v. McFadden*, 399 F.3d 993, 1002 (9th Cir. 2005).

18 If a claim has not been fairly presented in state court, the claim is said to be
19 procedurally defaulted if state court procedural rules are such that bringing the case back to
20 state court would be “futile.” *Teague v. Lane*, 489 U.S. 288, 297–99 (1989). If a claim is
21 procedurally defaulted, it is not available for habeas review absent either “cause and
22 prejudice” or “a fundamental miscarriage of justice.” *Dretke v. Haley*, 541 U.S. 386, 393–94
23 (2004); *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

24 **2. Analysis**

25 All parties agree that Petitioner is “in custody” for the purposes of the habeas corpus
26 statute, and that his petition was timely under the 1-year statute of limitations in AEDPA.
27 (Doc. 20 at 5).

28 **A. Fair Presentation**

1 The bulk of Petitioner’s post-conviction litigation relies on application of *Lopresti*.
2 His discussion of federal law is minimal, but does include a citation to *Berger*, for the
3 proposition that due process rights may be violated by the acts of overzealous prosecutors.
4 (Doc. 20, Ex. E at 8). Besides the citation to *Berger* and the claim of prosecutorial
5 misconduct, the state appeal contains only “conclusory, scattershot citation of federal
6 constitutional provisions.” *Castillo*, 399 F.3d at 1002. No other federal claims, therefore,
7 were fairly presented in state court.³

8 In his initial appeal, Petitioner discussed the fact that the prosecutor’s closing
9 statement exceeded the bounds of what testimony may be elicited regarding HGN under
10 *Lopresti*. He did not, however, mention that Officer Butler had used the word
11 “detoxification” while the prosecutor used the word “intoxication” in closing. (Doc. 20, Ex.
12 E). Therefore, only Claim One (Petitioner’s claims A, C, and E) was fairly presented to the
13 appeals court. Petitioner did not include “a statement of the facts that entitle the petitioner
14 to relief” on Claim Two (Petitioner’s claims B and D), namely that the prosecutor’s closing
15 was diametrically opposed to the testimony at trial. *Gray*, 518 U.S. at 163

16 Petitioner did make such a factual statement regarding Claim Two in his petition for
17 a special action to the Court of Appeals. In that petition, he wrote, “the State elicited
18 testimony from the arresting Officer that six cues of HGN could mean ‘detoxification,’ . . .
19 [but] [t]he Officer did not mention intoxication or alcohol impairment as a cause of HGN.”
20 (Doc. 20, Ex. I at 7). He cited *Berger* for the proposition that a prosecutor may not make
21 statements in closing that directly contradict evidence in the record, and wrote that “[t]he
22 argument of the prosecutor was not based on evidence in the record.” (*Id.* at 12, 14). In the
23 traditional setting, a prisoner may “fairly present” a federal claim by filing a collateral action
24 in state court challenging the conviction on federal grounds, whether or not he presented that
25 claim to a state appeals court. *Wade v. Mayo*, 334 U.S. 672, 677–78 (1948) (“The fact that

26
27 ³ For example, to the extent that Petitioner’s Claim E argues that state court rulings
28 on the presentation of scientific evidence may violate the due process clause, the claim was
not fairly presented in state court.

1 he might have appealed his conviction and made the same claim and received the same
2 answer does not detract from the completeness from which Florida has disposed of his claim
3 on habeas corpus.”). Nevertheless, a motion for special proceeding after an appeal from the
4 justice court to the superior court is not analogous to a state habeas petition filed after
5 conviction in a superior court. The Court of Appeals accepts jurisdiction for a special action
6 only when “there is no equally plain, speedy or adequate remedy available by appeal, . . . or
7 when the case presents a narrow question of law of statewide importance.” *State ex rel.*
8 *Romley v. Superior Ct.*, 198 Ariz. 164, 165–66, 7 P.3d 970, 971–72 (App. 2000). A claim is
9 not “fairly presented” when “the claim has been presented for the first and only time in a
10 procedural context in which its merits will not be considered unless there are special and
11 important reasons therefor.” *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

12 Petitioner never fairly presented Claim Two (Petitioner’s claims B and D) in state
13 court, and it has therefore not been exhausted. He is time-barred from returning to state court,
14 and therefore has procedurally defaulted on the claim. He makes no claim, nor are there
15 grounds to find, that he defaulted through cause and prejudice, or that failure to provide
16 habeas review would result in a fundamental miscarriage of justice.

17 **B. Merits**

18 Petitioner periodically argues that the prosecutor’s actions violated state law. For
19 example, Petitioner asserts that the prosecutor violated the dictates of *Lopresti* by using the
20 terms “intoxicated” and “impaired” in his closing when the standard only allows HGN
21 evidence to be admitted “for the purpose of permitting the officer to testify that, based on his
22 training and experience, the results indicated possible neurological dysfunction, one cause
23 of which could be alcohol ingestion.” *Lopresti*, 165 Ariz. at 518–19. To the extent that
24 Petitioner argues that the state court misinterpreted state law by permitting the prosecutor to
25 make the statements without providing a curative instruction, this Court is without power to
26 question state court adjudications of state law. *See Estelle v. McGuire*, 502 U.S. 62, 71–72,
27 (1991).

28 Petitioner’s sole federal claims are that the closing argument violated his due process

1 rights because it exceeded the bounds set by *Lopresti* regarding testimony, and because it
2 grossly misrepresented the testimony that had in fact been given. Although only the first of
3 these was fairly presented, both claims would fail on the merits.

4 The test for prosecutorial misconduct has been significantly refined in the nearly
5 seventy years since the Supreme Court decided *Berger v. United States*, 295 U.S. 78, 88
6 (1935). By current standards, improper statements by prosecutors in closings only violate due
7 process when they “infect[] the trial with unfairness.” *Donnelly v. DeChristoforo*, 416 U.S.
8 637, 643 (1974). A prosecutor’s closing statement, even if inflammatory, did not amount to
9 a constitutional deprivation when it “did not manipulate or misstate the evidence.” *Darden*
10 *v. Wainwright*, 477 U.S. 168, 182 (1986).

11 Petitioner’s claim that the prosecutor’s statement so exceeded the bounds of *Lopresti*
12 as to violate due process fails. *Lopresti* governs only what testimony may be elicited, and in
13 their closing arguments prosecutors may discuss the “reasonable inferences” that may be
14 drawn from the testimony. *Menendez v. Terhune*, 422 F.3d 1012, 1034, 1037 (9th Cir. 2005)
15 (no prosecutorial misconduct when a prosecutor, in closing “merely presented his view of
16 the evidence,” where evidence had been admitted that supported differing propositions).
17 Although Petitioner is correct that “ingestion” of alcohol does not necessarily imply
18 “impairment” or “intoxication,” it is a reasonable inference to describe neurological
19 dysfunction possibly caused by the ingestion of alcohol as “intoxication.” The jury was
20 instructed that statements by the attorneys “are not evidence.” (Doc. 20, Ex. S at 82). The
21 prosecutor’s statement was well within the bounds permitted under governing federal law.

22 Petitioner’s argument that the prosecutor denied him due process when the prosecutor
23 said HGN could be caused by “intoxication” when Officer Butler testified in his direct
24 examination only that it could be evidence of “detoxification,” likewise fails. (Doc. 9-1 at
25 17–18). Officer Butler’s testimony was not limited to direct examination. During Officer
26 Butler’s cross-examination, Petitioner’s attorney recited the *Lopresti* standard nearly word
27 for word, and asked Officer Butler if it was an accurate description of a positive test for
28 HGN. (Doc. 20, Ex. S at 133). Officer Butler answered, “that is a correct statement.” (*Id.*).

1 In his closing, the prosecutor did not state that he was referring solely to the officer's direct
2 examination. (Doc. 20, Ex. S at 194, 196) ("the officer you heard testify"; "as you heard
3 testified to by the officers"). Officer Butler had in fact testified as to what a positive HGN
4 test showed in accordance to *Lopresti*; he merely had done so during cross-examination.
5 Given the fact that he had testified that the HGN test "might indicate a possible neurological
6 dysfunction, one cause of which could be alcohol ingestion," the prosecutor's closing
7 statement did no more than ask the jury to draw "reasonable inferences" from the officer's
8 testimony. (Doc. 20, Ex. S at 133); *Menendez*, 422 F.3d at 1037. The prosecutor's statements,
9 while at odds with the direct testimony, "did not manipulate or misstate the evidence" when
10 the officer's testimony is considered as a whole. *Darden v. Wainwright*, 477 U.S. 168, 182
11 (1986).

12 The petition is therefore denied.

13 CONCLUSION

14 The petition is properly read as presenting two federal claims, one that the prosecutor
15 violated due process because his closing statement exceeded the language of *Lopresti* and
16 one that it mischaracterized the actual testimony. Only the first was fairly presented in state
17 court.

18 The fairly presented claim fails on the merits, and the claim that was not fairly
19 presented would have been denied had it been fairly presented. The prosecutor merely asked
20 the jury to draw reasonable inferences from the testimony presented. To the extent that the
21 prosecutor's summary mischaracterized the officer's statements in direct examination, they
22 represented a fair representation of the officer's statements under cross-examination.

23 Although the grounds for the Court's conclusions are slightly different than those
24 detailed in the R&R, the Court adopts the conclusions of the R&R both as to exhaustion and
25 the merits, and therefore accepts the R&R.

26 IT IS THEREFORE ORDERED:

- 27 1. The Amended Petition for Writ of Habeas Corpus (Doc. 9) is **denied**.
- 28 2. The Motion for Hearing or Conference re: Oral Argument (Doc. 31) is **denied**.

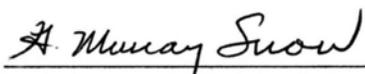
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3. Judge Anderson’s Report and Recommendation (Doc. 36) is **accepted**.

4. The Clerk of Court shall **terminate this action**.

5. Since the Court ruled on the merits of the constitutional claim as well as the procedural issue, it declines to issue a Certificate of Appeal (COA) because reasonable jurists would not “find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

DATED this 13th day of February, 2012.



G. Murray Snow
United States District Judge