UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TERRANCE LAMONT PARSON, Petitioner, v. KELLY SANTORO, Warden, Respondent.	NO. ED CV 17-136-CJC(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Cormac J. Carney, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on January 26, 2017. Respondent filed an Answer on March 13, 2017. Petitioner did not file a Reply within the allotted time.

BACKGROUND

An Information charged Petitioner with assault with a deadly weapon (Clerk's Transcript ["C.T."] 20-23).[1] The Information further alleged that Petitioner had suffered 1992 convictions for robbery and attempted murder, which qualified as "strikes" within the meaning of California's Three Strikes Law, California Penal Code sections 667(b) - (i) and 1170.12(a) - (d) (id.).[2] The Information also alleged that Petitioner had suffered a prior conviction for which he had served a prison term within the meaning of California Penal Code section 667.5(b) (id.).

The jury found Petitioner guilty of assault with a deadly weapon (Reporter's Transcript ["R.T."] 496-1 - 496-3; C.T. 127-28, 133). In a bifurcated proceeding on the prior conviction allegations, the prosecution introduced a "prior packet" pursuant to California Penal Code section 969b (R.T. 510-59). The court found that Petitioner was

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[1] The prosecution later filed a First Amended Information to correct a typographical error (Reporter's Transcript 564; C.T. 136-39).

[2] The Three Strikes Law consists of two nearly identical statutory schemes. The earlier provision, enacted by the Legislature, was passed as an urgency measure, and is codified as California Penal Code §§ 667(b) - (I) (eff. March 7, 1994). The later provision, an initiative statute, is embodied in California Penal Code § 1170.12 (eff. Nov. 9, 1994). See generally People v. Superior Court (Romero), 13 Cal. 4th 497, 504-05, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996). The State charged Petitioner under both versions (C.T. 20-23).

the person identified in the "prior packet" (R.T. 565; C.T. 155).[3] Following a jury trial on the prior conviction allegations, the jury found the allegations to be true (R.T. 620-26; C.T. 152-53, 156).

The trial court denied Petitioner's motion to strike the prior conviction allegations made pursuant to People v. Superior Court (Romero), 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996) (R.T. 902; C.T. 418). Petitioner received a sentence of twenty-five years to life (R.T. 903-04; C.T. 419-21).

The California Court of Appeal affirmed in a reasoned decision (Respondent's Lodgment 1; see People v. Parson, 2015 WL 6946013 (Cal. App. Nov. 10, 2015)). The California Supreme Court denied Petitioner's petition for review summarily (Respondent's Lodgment 2).

SUMMARY OF TRIAL EVIDENCE

The following summary is taken from the opinion of the California Court of Appeal in People v. Parson, 2015 WL 6946013 (Cal. App. Nov. 10, 2015). See Runningeagle v. Ryan, 686 F.3d 758, 763 n.1 (9th Cir. 2012), cert. denied, 133 S. Ct. 2766 (2013); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009).

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[3] In California, a defendant has a limited statutory right to a jury trial on prior conviction allegations. See Cal. Penal Code § 1025(b); People v. Epps, 25 Cal. 4th 19, 22-25, 104 Cal. Rptr. 2d 572, 18 P.3d 2 (2001). However, this statutory jury trial right does not extend to the issue of whether the defendant is the person who suffered the prior conviction. See Cal. Penal Code § 1025(c).

On July 17, 2011, Parson, who was in his house, and his wife, Tracey Jones-Parson, who was standing outside on the sidewalk, had a lengthy verbal altercation. Neighbors telephoned the police. Police officers left after Parson and his wife stopped arguing. Jones-Parson also left but returned a short time later with her 19-year-old son, Karl Palmer. Palmer began to scream and swear at Parson, challenging him to "come out of the house." Parson repeatedly said, "You don't want that, if, if I come down there there's gonna be problems, you don't want me to come down."

Palmer and Parson continued to swear at each other until Parson came out of his house carrying a kitchen knife with a four-inch wooden handle and four-inch blade. Parson shouted "you asked for it" and said that he was going to kill Palmer. Palmer ran into a neighbor's house and shut the door. Neighbors contacted the police.

When police officers Shannon Vanderkallen and David Campa arrived, Parson dropped the knife and walked toward them. He refused to comply with their commands to get on the ground. The officers wrestled Parson to the ground and arrested him for assault with a deadly weapon.

At trial, a neighbor, Brandy Jackson Villarreal, testified that Parson was holding the knife at his side when he approached Palmer. Villarreal said that she stood

between Parson and Palmer, and pushed Palmer toward her house. Villarreal's cousin, Aubrey Beck, testified that Parson was holding the knife at his side when he approached Palmer and came within 20 feet of him. Nancy Marquez, another neighbor, testified that she was watching the incident from an upstairs window. She telephoned 911 when Palmer came out of his house with a knife, telling the dispatcher that Palmer was "waving the knife around right now" and "threatening a teenage kid." Marquez said that Parson came within 10 feet of Palmer.

Officer Vanderkallen testified that he interviewed the eyewitnesses at the scene. Beck told him that Parson had been chasing Palmer with a knife, saying that he was going to kill Palmer. Parson was swinging the knife at Palmer and was able to get within three to five feet of him. Villarreal told Vanderkallen that Parson had come very close to Palmer and appeared to be trying to stab him.

(Respondent's Lodgment 1, pp. 3-5; see People v. Parson, 2015 WL 6946013, at *2).

PETITIONER'S CONTENTIONS

Petitioner contends:

1. The trial court erred by failing to grant Petitioner's motion for a mistrial and a new trial on grounds of prosecutorial misconduct

(Ground One);

2. The trial court erred by failing to strike Petitioner's prior attempted murder and robbery convictions, which assertedly were obtained in violation of Petitioner's rights under Boykin v. Alabama ("Boykin")[4] and In re Tahl ("Tahl")[5] (Ground Two); and;

3. The sentencing court erred by failing to strike one of Petitioner's prior convictions pursuant to People v. Superior Court (Romero) (Ground Three).

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §

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[4] 395 U.S. 238 (1969).

[5] 1 Cal. 3d 122, 81 Cal. Rptr. 577, 460 P.2d 449 (1969), cert. denied, 398 U.S. 911 (1970), overruled in part, People v. Howard, 1 Cal. 4th 1132, 5 Cal. Rptr. 2d 268, 824 P.2d 1315 (1992), cert. denied, 506 U.S. 942 (1992).

2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 565 U.S. 34, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application" prong of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v.

Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 562 U.S. 86, 101 (2011). This is "the only question that matters under § 2254(d)(1)." Id. at 102 (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

In applying these standards, the Court looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, as where the state court summarily denies a claim, "[a] habeas court must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are

inconsistent with the holding in a prior decision of this Court." Cullen v. Pinholster, 563 U.S. 170, 188 (2011) (citation, quotations and brackets omitted).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

DISCUSSION

I. Petitioner's Claims of Prosecutorial Misconduct Do Not Merit Federal Habeas Relief.

A. Background

The Court of Appeal described the factual background for Petitioner's claims of prosecutorial misconduct:

1. Testimony in violation of a court order

> [Petitioner] filed a pretrial motion to exclude evidence concerning the circumstances of his arrest. He argued that the police were not percipient witnesses to the alleged assault and that any testimony about his behavior

after the police arrived was more prejudicial than probative. ([California] Evid. Code, § 352.) He specifically sought to exclude statements in Vanderkallen's report that Parson had been "very amped up and refused to comply with [Vanderkallen's] commands" and "refused to sit down and clenched his fist while puffing his chest out and [starting] to stiffen up." Vanderkallen also reported that Parson was muscular and appeared to be very irate, and that he determined that it was necessary to use physical force to arrest Parson because he [Vanderkallen] believed that Parson was going to attack and assault Officer Campa.

The prosecutor opposed the motion in limine. She argued that the evidence of Parson's conduct after police arrived on the scene was relevant to show the defendant's state of mind, and that Parson's assault on Palmer and Parson's actions toward the police constituted one continuous act of aggression.

The trial court issued a tentative ruling allowing testimony about Parson's rude and angry demeanor but excluding testimony of his aggressive behavior toward the officer and his lack of cooperation with the police.

On direct examination, the prosecutor asked Vanderkallen, "Can you describe how [Parson] appeared?"

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Vanderkallen: "He was irate. Kind of breathing heavily, appeared to be intoxicated."

Prosecutor: "Okay. And when you are - when you asked him - when you told him to sit down and he did not sit down, did he appear otherwise cooperative, or how did he appear?"

Vanderkallen: "He was not cooperative at all."

Prosecutor: "Okay. How did his body look? What did his body look like? Was there anything specific about what his body was doing that caused you to say that he was not cooperative?"

Defense counsel: "Objection, your Honor, 402."

The trial court sustained the objection, explaining to counsel that the court had ruled that testimony about Parson's rude, angry and intoxicated mannerisms could be admitted in evidence, but that any testimony about Parson's aggressive behavior with the police officers was inadmissible. The prosecutor said that she had instructed both police officers not to testify that they felt personally threatened by, or had physical contact with, Parson. The trial court said that it would allow the prosecutor to elicit that Parson was "amped up" but would not allow her to elicit testimony concerning any type of physical contact with the police.

When trial resumed, the prosecutor asked Vanderkallen to describe Parson's physical appearance. Vanderkallen replied, "He had his shirt off. He was very amped up, irate. We were giving him commands after we identified ourselves to sit down and get on the ground."

The prosecutor then asked, "When you use the word 'amped up,' what does that mean?"

Vanderkallen: "Clenching his fist, his chest puffed out, kind of ready to fight."

The trial court sustained defense counsel's objection and struck the statement from the record. During later discussions about Vanderkallen's testimony, the trial court said, "I don't think . . . the officer understood the [c]ourt's order."

On direct examination, Officer Campa testified that Parson smelled of alcohol and that he appeared to be intoxicated and extremely upset. The prosecutor asked, "[W]as there anything about his body and the way that he presented himself to you that suggested to you that maybe he was angry?"

Campa: "Yes, ma'm."

Prosecutor: "What was that?"

Campa: "During our investigation, that's as we're dealing with Mr. Parson, I noticed . . . he clenched his fist and started puffing his chest and became stiff."

Defense counsel objected. The trial court ordered the response stricken from the record. Defense counsel moved for a mistrial, stating that the jury now had heard improper evidence about Parson's conduct twice. The trial court proposed giving the jury a limiting instruction but defense counsel objected, saying that an instruction would only call attention to the damaging statement.

The trial court commented that Campa's response had clearly violated its order. The trial court stated that it had drawn a bright line between the officers' assessment of Parson's demeanor on their arrival at the scene and any physical contact they subsequently had with him. However, the trial court added that it did not believe that the prosecutor had intentionally crossed that line. In response to defense counsel's argument, the trial court acknowledged that the officer had violated an explicit order, but explained that the court was denying the motion for mistrial for lack of prejudice to the defendant. The court found that even if the jury were to find that Parson clenched his fists and puffed up his chest when he encountered the police, the violation of the ruling, in and of itself, was not prejudicial to the defendant.

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2. Speaking objection about victim's statement

During defense counsel's cross-examination of Vanderkallen, counsel verified that Palmer was 19 years old and then asked, "You know he's six foot one, correct?"

At this point, the prosecutor said, "Object. Foundation and also hearsay unless the People are allowed to inquire as to the entire statement of Mr. Palmer."[6]

Defense counsel objected. Outside the presence of the jury, the trial court told the prosecutor, "[There is] an unspoken rule against speaking objections . . . . [¶] [T]he speaking objection in this case is one that, basically, now tells the jury that a statement was made by the witness who apparently, I'm guessing, is not going to be here. So there may be some Crawford[7] issues with it. And . . . what you have, basically, done by the speaking objection is [tell] the jury there's a lot there and I want to get into it, but

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[6] The victim, Karl Palmer, did not testify at trial. In posttrial proceedings, Palmer testified that he had been attending college in another state and had not been aware of any efforts to locate him. The prosecution introduced records of telephone conversations between Parson and his wife in which they had discussed maintaining Palmer's absence. Parson apparently assumed that he would not be bound over for trial in Palmer's absence.

[7] *(Crawford v. Washington* (2004) 541 U.S. 36 [barring admission of out-of-court testimonial statements unless witness is unavailable and defendant had prior opportunity to cross-examine that witness].)

you guys don't know about it. I don't think that was your intent. But that's the effect speaking objections have."

Defense counsel moved for a mistrial. The trial court denied the motion, stating that although the court was "not happy" with the prosecutor, the speaking objection was not prejudicial to the defendant in view of the totality of the evidence. The trial court instructed the jury that objections made by the attorneys were not evidence and not to consider the attorney's statements during deliberations.

3. Improper statements during rebuttal argument

During closing argument, the prosecutor asked the jury to find the defendant guilty of assault with a deadly weapon. She said, "We ask that you hold him accountable; that you protect the victim that wasn't here to talk to you — "

Defense counsel objected. The trial court sustained the objection and ordered the remark stricken. The prosecutor continued, " — that you do the right thing; that you look after the safety of your community; that you uphold — "

Defense counsel objected again and asked the remark to be stricken.

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Prosecutor: " — the law."

The Court: "Sustained."

Prosecutor: " — that you uphold the law; that you convict the defendant. Thank you."

After the jury retired to deliberate, the court addressed the prosecutor, stating, "[W]hen you tell the jury to 'protect the community,' that's improper argument. I mean, you have to know for future reference, that's not something you can argue . . . . [Y]ou're asking the jury to do more than what their job is. Their job is to decide what the facts are."

Defense counsel moved for a mistrial. The trial court denied the motion, stating that if the defendant was convicted, counsel could bring a motion for a new trial, and the court would review the transcripts to make sure its ruling was correct. The trial court said that it had been concerned about several issues during the trial and each time took immediate steps to correct any possible confusion on the jury's part. The trial court was satisfied that those steps were sufficient to ensure that the defendant received a fair trial.

After the jury returned its verdict, Parson filed a motion for a new trial, claiming prosecutorial misconduct

> for eliciting improper evidence, making a speaking objection, and making improper statements during argument. The trial court commented that in some instances, the prosecutor's conduct had been "shock[ing]." With the exception of Vanderkallen's improper response to her question, which the court believed the prosecutor had not expected, the prosecutor had been "remiss." However, the court stated that the appropriate analysis was whether the cumulative effect of the prosecutor's conduct was prejudicial to the defendant. The trial court had sustained defense counsel's objections and struck the answers and statements from the record. The trial court found beyond a reasonable doubt that the errors complained of had not contributed to the jury's verdict, and denied the motion for new trial.

(Respondent's Lodgment 1, pp. 7-13; see People v. Parsons, 2015 WL 6946014, at *3-5) (original footnotes renumbered).

Petitioner contends the prosecutor committed misconduct by allegedly: (1) eliciting excluded testimony; (2) making a speaking objection; and (3) improperly exhorting the jury, in closing argument, to protect the victim and the community. The Court of Appeal rejected these claims on the merits (Respondent's Lodgment 1, pp. 14-18; see People v. Parson, 2015 WL 6946013, at *6-7). The Court of Appeal ruled that the prosecutor's errors were not "so egregious that they deprived [Petitioner] of a fundamentally fair trial under federal constitutional standards" (Respondent's Lodgment 1, p. 15; see People

v. Parson, 2015 WL 6946013, at *6). The Court of Appeal also ruled that, under state law standards, Petitioner had not shown that the alleged errors prejudiced Petitioner (Respondent's Lodgment 1, pp. 16-18); see People v. Parsons, 2015 WL 6946013, at *6).

B. Discussion

Prosecutorial misconduct merits habeas relief only where the misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) ("Darden") (citation and internal quotations omitted); Bonin v. Calderon, 59 F.3d 815, 843 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996) ("To constitute a due process violation, the prosecutorial misconduct must be so severe as to result in the denial of [the petitioner's] right to a fair trial."). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219 (1982). Furthermore, on habeas review, a federal court will not disturb a conviction for prosecutorial misconduct unless the misconduct had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993) (citation and internal quotations omitted) ("Brecht"); Shaw v. Terhune, 380 F.3d 473, 478 (9th Cir. 2004) (Brecht applies to claim of prosecutorial misconduct).

A 2012 Supreme Court case illustrates the difficulty of succeeding on a claim of prosecutorial misconduct under the AEDPA

standard of review. See Parker v. Matthews, 567 U.S. 37, 132 S. Ct. 2148 (2012) ("Parker"). In Parker, the Court of Appeals for the Sixth Circuit had granted habeas relief on a claim that the prosecutor committed misconduct in closing argument by suggesting that the petitioner had colluded with his lawyer and an expert witness to manufacture an "extreme emotional disturbance" defense. Applying the AEDPA standard of review, the United States Supreme Court reversed the Sixth Circuit. Id. at 2155. The Supreme Court reasoned that, even if the prosecutor's comments had directed the jury's attention to inappropriate considerations, the petitioner had not shown that the state court's rejection of the prosecutorial misconduct claim was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 2155 (quoting Harrington v. Richter, 131 S. Ct. at 786-87) internal quotations omitted).

1. Eliciting Allegedly Excluded Evidence

The prosecutor's alleged misconduct in eliciting assertedly excluded evidence did not render Petitioner's trial fundamentally unfair. The challenged evidence consisted of the officers' testimony that Petitioner had clenched his fist, stiffened his body and puffed out his chest. Other evidence (not excluded) showed Petitioner was angry and uncooperative with the officers. Beck testified that Petitioner refused the officers' order to get down on the ground and that the officers had to wrestle Petitioner to the ground and put him in handcuffs (R.T. 141). Vanderkallen testified that Petitioner appeared "very amped up," "irate" and "intoxicated," and Petitioner

did not heed the officers' command to sit down (R.T. 244, 250). Campa testified Petitioner smelled of alcohol and appeared "extremely upset" and angry (R.T. 316). Thus, the challenged evidence would have added little to what the jury already knew from other evidence concerning Petitioner's demeanor and conduct during his confrontation with police. Moreover, the trial court struck the challenged evidence, instructed the jury not to consider stricken evidence and also instructed the jury not to consider as evidence the statements and questions of counsel (see R.T. 251, 316-17, 377-78, 424, 465-1; C.T. 61-62). The jury is presumed to have followed its instructions. See Weeks v. Angelone, 528 U.S. 225, 226 (2000). Under these circumstances, the Court of Appeal reasonably determined that the challenged evidence did not render Petitioner's trial fundamentally unfair. See Parker, 132 S. Ct. at 2155; Darden, 477 U.S. at 181; 28 U.S.C. § 2254(d).

2. Making a Speaking Objection Referencing the Victim's Statement to Police

Assuming arguendo the prosecutor's speaking objection suggested to the jury that the victim had made a statement to police which was not in evidence, the suggestion did not render Petitioner's trial fundamentally unfair. The evidence elsewhere showed that the police had interviewed the victim shortly after the incident, so the jury already knew the victim had made statements to the police (see R.T. 252-53, 255-56). Furthermore, after denying a defense motion for mistrial based on the challenged objection, the court gave the following curative instruction:

> . . . [The] "objections by attorneys are not evidence. You're not to consider objections made by the attorneys for any reason at all during deliberations. . . . [¶] So only the thing that's evidence [sic] is what the witness -- what the witnesses' answers are in response to certain questions and also anything else I tell you you can consider as evidence. I'm telling you the objections are not evidence.

(R.T. 288). As indicated above, the court also instructed the jury not to consider stricken evidence and not to consider the statements and questions of counsel as evidence (see R.T. 377-78, 424, 465-1; C.T. 61-62). Again, the jury is presumed to have followed its instructions. See Weeks v. Angelone, 528 U.S. at 226. Accordingly, the Court of Appeal reasonably determined that the speaking objection did not deny Petitioner a fundamentally fair trial. See Parker, 132 S. Ct. at 2155; Darden, 477 U.S. at 181; 28 U.S.C. § 2254(d).

3. Arguing That the Jury Should Protect the Victim and the Community

"In fashioning closing arguments, prosecutors are allowed reasonably wide latitude and are free to argue reasonable inferences from the evidence." United States v. McChristian, 47 F.3d 1499, 1507 (9th Cir. 1995) (citation omitted). "The arguments of counsel are generally accorded less weight by the jury than the court's instructions and must be judged in the context of the entire argument and the instructions." Ortiz-Sandoval v. Gomez, 81 F.3d 891, 898 (9th Cir. 1996) (citing Boyde v. California, 494 U.S. 370, 384-85 (1990));

see also Waddington v. Sarausad, 555 U.S. at 195 (same).

Even extremely inflammatory comments in closing argument may not render a trial fundamentally unfair. In Darden, the prosecutor had told the jury that the petitioner was an "animal" whom the prosecutor wished to see "with no face, blown away by a shotgun." See Parker, 132 S. Ct. at 2155 (quoting Darden, 477 U.S. at 180 nn. 11, 12; internal quotations omitted). Nevertheless, the Darden Court upheld the fundamental fairness of the trial. The Parker Court observed that in Darden the Court had upheld a closing argument "considerably more inflammatory" than the one at issue in Parker. Parker, 132 S. Ct. at 2155. The Parker Court stated that "particularly because the Darden standard is a very general one, leaving courts more leeway in reaching outcomes in case-by-case determinations," the Sixth Circuit's grant of habeas relief in Parker had been unwarranted. Parker, 132 S. Ct. at 2155 (citing Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). The closing argument in Darden was also "considerably more inflammatory" than the closing argument in the present case.

In pre-AEDPA cases and federal criminal cases, the Ninth Circuit has held that prosecutors may not urge jurors to convict defendants in order to protect community values or to send a message to the community. See United States v. Sanchez, 659 F.3d 1252, 1256 (9th Cir. 2011); United States v. Weatherspoon, 410 F.3d 1142, 1149 (9th Cir. 2005). However, the United States Supreme Court has never addressed this issue. In the absence of controlling Supreme Court law, Petitioner cannot obtain federal habeas relief on this claim. See Parker, 132 S. Ct. at 2154 (chiding the Sixth Circuit for relying

on its own precedent, rather than Supreme Court precedent for the proposition that due process prohibited a prosecutor from emphasizing a criminal defendant's motive to exaggerate exculpatory facts); see also Lopez v. Smith, 135 S. Ct. 1, 4 (2014) (per curiam) (Ninth Circuit erred in relying on its own precedent in affirming grant of habeas petition); Carey v. Musladin, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court [on the issue presented], it cannot be said that the state court "unreasonabl[y] applied clearly established Federal law.") (internal brackets and citation omitted); Moses v. Payne, 555 F.3d 742, 758–59 (9th Cir. 2009) (habeas relief unavailable where the Supreme Court had articulated no "controlling legal standard" on the issue).

In any event, Petitioner's prosecutor did not urge the jury to convict Petitioner solely to protect community values or to send a message to the community. The prosecutor discussed the evidence at length (e.g., R.T. 401-22, 465-2 - 465-20). The prosecutor also told the jury that the attorney's questions were not evidence and that anything that did not "come from the witness stand" was not evidence (R.T. 407). The court struck the prosecutor's reference to protecting the victim and sustained an objection to the reference to community safety (R.T. 465-20 - 465-21). Furthermore, as indicated above, the court instructed the jury that the attorney's remarks were not evidence and that the jury should not consider stricken matter. The court also instructed the jury not to be swayed by bias, sympathy, prejudice or public opinion (R.T. 372-73). As previously stated, the jury is presumed to have followed its instructions. See Weeks v. Angelone, 528 U.S. at 226.

Under these circumstances, this Court cannot properly conclude that the state court's rejection of this claim was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Parker, 132 S. Ct. at 2155; see Tak Sun Tan v. Runnels, 413 F.3d 1101, 1115-18 (9th Cir. 2005), cert. denied, 546 U.S. 1110 (2006) (trial court's instructions, including instructions that statements made by the attorneys are not evidence and the jury must not be influenced by passion or prejudice, eliminated any risk that petitioners were denied due process from prosecutor's statements arguably appealing to the jurors' passions); Drayden v. White, 232 F.3d 704, 713-14 (9th Cir. 2000), cert. denied, 532 U.S. 984 (2001) (prosecutor's soliloquy in voice of the victim did not render trial fundamentally unfair, where evidence supported statements and court instructed jury that attorneys' statements were not evidence and that jury should not be influenced by sentiment, sympathy, passion, prejudice or public opinion); Sublett v. Dormire, 217 F.3d 598, 600 (8th Cir. 2000), cert. denied, 531 U.S. 1128 (2001) (prosecutor's improper urging of jury to "send a message" so that the petitioner's lengthy sentence could be advertised on billboards to deter crime did not "infect the trial with unfairness"; state court's rejection of prosecutorial misconduct claim based on the improper closing argument was not "contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States"); Tolliver v. Greiner, 2005 WL 2179298, at *11-13 (N.D.N.Y. Sept. 8, 2005), adopted, 2005 WL 2437021 (N.D.N.Y. Sept. 30, 2005) (prosecutor's inappropriate argument in closing that conviction of the petitioner was necessary for the safety of the community did not entitle the petitioner to

federal habeas relief).

4. Harmless Error

For the same reasons the alleged prosecutorial misconduct did not render Petitioner's trial fundamentally unfair, the alleged misconduct also did not have any "substantial and injurious effect or influence in determining the jury's verdict" within the meaning of Brecht. See Brecht, 507 U.S. at 637-38; Shaw v. Terhune, 380 F.3d at 478.

5. Conclusion

For all of the foregoing reasons, Petitioner is not entitled to habeas relief on Ground One of the Petition. Considered individually or in combination, the alleged prosecutorial misconduct did not (1) "so infect the trial with unfairness as to make the resulting conviction a denial of due process"; or (2) have any "substantial and injurious effect or influence in determining the jury's verdict."

II. Petitioner's Boykin Claim Does Not Merit Federal Habeas Relief.

Under Boykin, a conviction may be constitutionally invalid if the defendant pled guilty without waiving: (1) the right to a jury trial; (2) the right to confront adverse witnesses; and (3) the privilege against self-incrimination. Boykin, 395 U.S. at 243; see also Tahl, 1 Cal. 3d at 132. In People v. Sumstine, 36 Cal. 3d 909, 206 Cal. Rptr. 707, 687 P.2d 904 (1984) ("Sumstine"), the California Supreme Court authorized a criminal defendant to bring a motion to strike a prior

conviction on Boykin-Tahl grounds. Petitioner challenges the trial court's refusal to strike Petitioner's 1992 convictions on such grounds. Petitioner argues that a minute order recording the giving and the waiver of Petitioner's Boykin/Tahl rights during the 1992 guilty plea did not suffice to prove Petitioner's waiver of those rights at that time.

The 1992 minute order bears an "x" in the box next to the statement: "DEFENDANT PERSONALLY AND ALL COUNSEL WAIVE TRIAL BY JURY AND BY COURT. COURT ACCEPTS WAIVER(S)." (C.T. 462). The minute order also bears an "x" in the box next to the statement: "Defendant advised and personally waives his right to confrontation of witnesses for the purpose of further cross-examination, and waives privilege against self incrimination." (C.T. 462).

The California Court of Appeal rejected Petitioner's Boykin/Tahl claim on the merits. The Court of Appeal ruled that the 1992 minute order sufficed to prove that Petitioner then had received and personally waived his Boykin/Tahl rights (Respondent's Lodgment 1, pp. 20-21; see People v. Parson, 2015 WL 6946013, at *9).

Petitioner's claim fails for at least two reasons. First, "the United States Supreme Court has never recognized California's *Sumstine* doctrine as creating a liberty interest that is protected by the Fourteenth Amendment." Nunes v. Ramirez-Palmer, 485 F.3d 432, 443 (9th Cir.), cert. denied, 552 U.S. 962 (2007).

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Second, under Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394 (2001) ("Coss"), a habeas petitioner may challenge a prior conviction used to enhance the petitioner's current sentence only where: (1) there was a failure to appoint counsel in violation of the Sixth Amendment; or (2) the petitioner cannot be faulted for failing to obtain a timely review of a constitutional claim, either because a state court refused to rule on a constitutional claim properly presented to it, or because the petitioner uncovered "compelling evidence" of his innocence after the time for review had expired that could not have been timely discovered. Id. at 403-05. Petitioner's challenge to his prior convictions fails to satisfy either of these criteria. Petitioner does not assert a failure to appoint counsel. The minute order recording Petitioner's plea and waiver of rights indicates that Petitioner was represented by counsel at that proceeding (see C.T. 462). Nor is there any indication in the record that a state court ever refused to rule on Petitioner's properly presented challenge to his prior conviction, or that Petitioner has uncovered new "compelling evidence" of his innocence that could not have been timely discovered. Therefore, Petitioner's challenge to the constitutionality of his prior robbery convictions does not merit federal habeas relief. See Coss, 532 U.S. at 403-04; Nunes v. Ramirez-Palmer, 485 F.3d at 443 (Coss barred claim that prior conviction was obtained in violation of Boykin/Tahl). Accordingly, Petitioner is not entitled to habeas relief on Ground Two of the Petition.

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III. The Denial of Petitioner's Romero Motion Does Not Entitle Petitioner to Federal Habeas Relief.

Petitioner contends the trial court erred by denying Petitioner's motion to strike one of Petitioner's prior convictions pursuant to People v. Romero, supra. The Court of Appeal rejected this claim, ruling that Petitioner had not shown the trial court abused its discretion (Respondent's Lodgment 1, pp. 25-26; see People v. Parson, 2015 WL 6946013, at *10-11). The Court of Appeal reasoned:

> . . . Parson's actions in 1992 could have resulted in the death of the liquor store clerk. In 2005, he assaulted a girlfriend's daughter and was convicted of felony child cruelty. He was placed on probation, only to be reincarcerated on probation violations. He was released from prison in 2008. Beginning in 2010, it appears that Parson was improving his circumstances. He was released from parole. He went back to school and trained as an electrician. Parson married and was helping to support his family. His marriage, however, was not without conflict. In June, the neighbors telephoned the police when he and his wife had a screaming argument after he locked her out of their home. When his wife returned with her son, escalating the argument, neither the presence of the neighbors nor the knowledge that they had telephoned the police for emergency assistance deterred Parson from leaving his home, chasing his teenage stepson with a knife, and threatening to kill him.

> The trial court found that after having had numerous opportunities to improve his life, Parson still resorted to homicidal violence when he became upset while inebriated. The record supports the trial court's findings. Parson has a history of violence spanning three decades. In 1992, he shot a store clerk. In 2005, he physically assaulted a teenager. In 2011, he chased his stepson with a knife, threatening to kill him. If his stepson had not been able to reach a place of safety, the consequences of Parson's anger and intoxication could have been deadly.

(Respondent's Lodgment 1, pp. 25-26; see People v. Parsons, 2015 WL 6946013, at *11).

Matters relating to sentencing and serving of a sentence generally are governed by state law and do not raise a federal constitutional question. See Wilson v. Corcoran, 562 U.S. 1, 4-5 (2010); Rhoades v. Henry, 611 F.3d 1133, 1142 (9th Cir. 2010), cert. denied, 565 U.S. 946 (2011); Miller v. Vasquez, 868 F.2d 1116, 1118-19 (9th Cir. 1989), cert. denied, 499 U.S. 963 (1991). Petitioner's allegation that the trial court improperly refused to strike a prior conviction under Romero does not state any cognizable claim for federal habeas relief. See Brown v. Mayle, 283 F.3d 1019, 1040 (9th Cir. 2002), vacated on other grounds, 538 U.S. 901 (2003); Clements v. Rackley, 2017 WL 1129948, at *11 (C.D. Cal. Feb. 13, 2017), adopted, 2017 WL 1115149 (C.D. Cal. Mar. 24, 2017) ("A California state trial court's refusal to grant a *Romero* motion, or to strike a defendant's prior conviction that will be used to enhance a defendant's sentence

under California's Three Strikes Law, does not present constitutional violations that warrant federal habeas relief.") (citations omitted); Morrishow v. Price, 2014 WL 2003047, at *11 (E.D. Cal. May 15, 2014) ("a claim that a state court abused its discretion in denying a *Romero* motion is not cognizable on federal habeas review.") (citations omitted).

In any event, in light of Petitioner's violent history, the trial court did not abuse its discretion under California law in declining to strike the prior convictions. See People v. Carmony, 33 Cal. 4th 367, 378, 14 Cal. Rptr. 3d 880, 92 P.3d 369 (2004) ("[T]he circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very statutory scheme within which he squarely falls since he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack.'") (citation and internal quotations omitted); see also Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law").

For the foregoing reasons, Petitioner is not entitled to habeas relief on Ground Three of the Petition.

RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the Court issue an order: (1) accepting and adopting this Report and

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Recommendation; and (2) denying and dismissing the Petition with prejudice.

DATED: April 17, 2017.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.