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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

11 MIKHIEL JAKOB LEINWEBER,
12 Petitioner,
13 vs.
14 TILTON, et al.,
15 Respondents.
CASE NO. CV F 07-01429 LJO WMW HC
**ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS WITH
PREJUDICE; DIRECTING CLERK OF
COURT TO ENTER JUDGMENT FOR
RESPONDENT; DECLINING ISSUANCE
OF CERTIFICATE OF APPEALABILITY**

17 On August 30, 2007, Mikhiel Jakob Leinweber (“Petitioner”), a *pro se* California prisoner, filed
18 a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254
19 (“Petition”).¹ On February 4, 2008, Robert Horel (“Respondent”) filed an Answer to the Petition. On
20 February 26, 2008, Petitioner filed a Traverse. Thus, this matter is ready for decision.

PROCEDURAL HISTORY

22 On May 5, 2005, a Stanislaus County Superior Court jury convicted Petitioner of first degree
23 murder (Cal. Penal Code § 187(a)) and further found that Petitioner personally and intentionally
24 discharged a firearm causing death (*id.* § 12022.53(d)). (1 Clerk's Tr. ("CT") 234; 2 CT 423.) The
25 superior court found true that Petitioner had two prior serious felony convictions pursuant to California

¹ Although petitions for habeas corpus relief are routinely referred to a Magistrate Judge, *see L.R. 72-302*, the Court exercises its discretion to address the Petition pursuant to Local Rule 72-302(d).

1 Penal Code section 667(a), two prior felony convictions pursuant to section 667(d), and one prior prison
2 term pursuant to section 667.5(b). (1 CT 187; Lodged Doc. (“LD”) 4 at 2.) On August 1, 2005, the
3 superior court sentenced Petitioner to 111 years to life in state prison. (2 CT 423-24.)

4 On August 1, 2005, Petitioner appealed his conviction and sentence to the California Court of
5 Appeal. (2 CT 425-27.) On April 24, 2007, the court of appeal affirmed the murder conviction in a
6 reasoned opinion but remanded with directions to strike the prior prison term enhancement. (LD 4.)
7 On May 25, 2007, Petitioner filed a petition for review in the California Supreme Court, which
8 summarily denied the petition on July 25, 2007. (LD 7.)

9 On May 14, 2007, Petitioner filed a habeas petition in the California Supreme Court, which
10 denied the petition on October 24, 2007, with citation to *In re Dexter*, 25 Cal. 3d 921 (1979), *In re*
11 *Swain*, 34 Cal. 2d 300, 304 (1949), and *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). (LD 8.) On June
12 1, 2007, Petitioner filed a habeas petition in the California Court of Appeal, which summarily denied
13 the petition on June 7, 2007. (LD 6.) On June 26, 2007, Petitioner filed a second habeas petition in the
14 California Supreme Court, which summarily denied the petition on December 19, 2007.²

15 On August 30, 2007, Petitioner filed the instant federal Petition.

16 **FACTUAL BACKGROUND³**

17 **Prosecution**

18 On the afternoon of March 26, 2004, in Modesto, Levi Humphres, Michael
19 Vickerman, and [Petitioner] were in [Petitioner]’s car with 17-year-old Melissa G. and
15-year-old Heather Glover. As they drove, Vickerman saw that [Petitioner] had a gun
with him. The group ended up in front of Brandy Brown’s house.

20 Brown, who had five young children, was outside when [Petitioner] and the
21 others pulled up. [Petitioner] and Brown went inside and the two played dice. The people
22 in the car smoked methamphetamine. When [Petitioner] sent Brown outside to get his
wallet from the car, she told the group that they either had to come inside the house or
leave. Glover said she wanted to go home. Vickerman took the car to drive Glover home,
and the others went inside Brown’s house.

23 Vickerman drove Glover to where he thought Glover lived, but no one was home.
24 While they were in the car, [Petitioner] called the cell phone he had left in the car and
said he wanted his car back. Vickerman then drove Glover to her father’s house so that
she could pick up some clothing before returning to Brown’s.

25 ² The Court takes judicial notice of the state appellate court records for Petitioner’s case, which are available
26 on the Internet at <http://appellatecases.courtinfo.ca.gov>. See *Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002).

27 ³ The Court adopts the factual background from the April 24, 2007, California Court of Appeal opinion on
28 direct review as a fair and accurate summary of the evidence presented at trial. See 28 U.S.C. § 2254(e)(1); *Hernandez v. Small*, 282 F.3d 1132, 1135 n.1 (9th Cir. 2002).

1 Brown testified that when [Petitioner] realized, about an hour or so after he
2 arrived, that Vickerman had taken his car, he became “aggravated.” He called his cell
3 phone, which he had left in the car, but Vickerman hung up on him and then turned off
4 the cell phone.

3 While in Brown’s house, [Petitioner] was carrying a gun, which one of Brown’s
4 children asked to see. Brown overheard [Petitioner] say to Humphres, “I’m gonna kill
him.”

5 When Brown heard [Petitioner]’s car finally pull up, she was afraid something
6 was going to happen and went outside to gather her children. Brown went back inside the
7 house, but could see [Petitioner] yelling through the passenger side of the window, past
8 Glover, and pointing at Vickerman in the driver’s seat.

9 After Vickerman pulled up to the curb and turned off the car, [Petitioner] yelled
10 and told the two of them to get out of the car. [Petitioner] was holding a gun in his right
11 hand. Vickerman saw [Petitioner] transfer the gun into his left hand and then open the
12 car door with his right hand. [Petitioner] said, “Get the fuck out of the car,” and grabbed
13 Glover, as if to pull her out. Vickerman heard a shot and saw the gun hit the ground.
14 Glover turned toward Vickerman and laid her head down. Vickerman got out of the car
15 and ran away, and, as he did, he saw [Petitioner] pick up the gun and chase him. As
16 [Petitioner] was bent over, trying to run, he dropped the gun and said, “Mike, help me,
dawg, help me.”

17 Humphres described [Petitioner] as “pretty mad at [Vickerman]” and thought
18 [Petitioner] and Vickerman would get into a physical fight. Humphres testified that
19 [Petitioner] walked up to the car with the gun in his right hand and said, in a loud voice,
“Get out of my car.” [Petitioner] shifted the gun into his left hand and opened the door
20 to the car. Humphres turned back toward the house and heard a shot. He did not see the
shooting but then saw Glover’s body. Humphres and Melissa G. left the scene together.

21 Russell Shaw, who had been at Brown’s house, was pulling away in his car just
22 as Vickerman pulled up. Shaw heard [Petitioner] yell, “Get out of the car,” and
Vickerman say, “Don’t, Bro, don’t.” Shaw heard a shot, and, in his rearview mirror, he
23 saw [Petitioner] fumbling, as if trying to pick up something. Shaw testified that
[Petitioner] was known to carry a .22-caliber pistol with a “wood handle.”

24 Melissa G. was standing behind [Petitioner] as he tried to pull Glover out of the
car. She heard a gunshot, after which [Petitioner] looked stunned, dropped the gun, and
fumbled for it. Melissa G. thought that [Petitioner] had not meant to shoot Glover
25 because his head went backwards as the gun went off and he had a surprised look on his
face. Melissa G. thought both [Petitioner] and Vickerman were tugging on Glover, while
Glover was trying to get out of the car. Melissa G. repeated this version of the event to
two individuals one or two days after it occurred.

26 Brown, who was still in the house when she heard two or three shots, ran outside.
She saw the car’s passenger door open and a girl slumped in the seat. Brown’s children
27 told her that [Petitioner] took off running. Brown’s 11-year-old son told her that
[Petitioner] “just shot that girl.” After the shooting, Brown gathered her children and left.
She did not attempt to help Glover.

28 Brown’s 11-year-old son testified that [Petitioner] had been carrying a gun in a
pouch, which the boy wanted to see. Later, when the boy was outside, he saw [Petitioner]
holding the gun and heard two shots. The boy heard the man inside the car say “Mickey,
don’t shoot.” The driver of the car got out and ran away, and [Petitioner], holding the
gun, ran after him.

Karen Keating, who knew Shaw, testified that Shaw told her shortly after the
incident that [Petitioner] came out of the house with the gun in his hand, said “I’ll teach
you to take my car, bitch,” walked over to the car, and fired a shot into the open door.
Shaw also told her [Petitioner] then dropped the gun but picked it up and ran after
another man who had been in the car. But Keating also testified that Shaw always
maintained that the shooting could have been an accident. And Keating acknowledged
that men call each other “bitch” when they are mad.

1 Keating, who also knew Brown, testified that Brown told her that prior to the
2 shooting, [Petitioner] was highly agitated and paced with a gun in his hand “talking about
when that bitch gets back here, ... he was gonna shoot her.”

3 At sunset, a passerby noticed the car parked with both front doors open and a
4 body inside. The police were called and Glover was found seated in the passenger seat
but slumped toward the driver’s side of the car. She was alive, but had a severe brain
injury. A makeup kit containing syringes was found in the car, as were .22-caliber shell
cartridges. Brown’s house was empty, but the front door was wide open and the lights
were on. No gun ever was found.

5 Glover was examined at the hospital, where she was found to have sustained a
6 “nonsurvival injury” because the bullet had crossed her brain stem. Methamphetamine
7 was found in her system. Glover was declared brain dead two days later.

8 The medical examiner opined that, based on the soot ring around the wound, the
9 gun had been within one inch of Glover’s temple when she was shot. The .22-caliber
bullet traveled from the temple through the brain into the left sinus. At the time of the
10 autopsy, Glover’s head had been shaved. The examiner indicated that he could have
given a more accurate opinion of how close the gun was to Glover’s head when it was
fired had he seen the wound right after Glover was shot. Because there was no stippling
11 or tattooing, which does not wash off, the examiner knew for certain that the distance of
the gun was less than a foot, but that he thought it was closer to an inch.

12 [Petitioner] surrendered and was arrested in Crescent City on April 7, 2004. A
13 week or so later, while in jail, a fellow inmate, Derik Coronado, heard [Petitioner] say,
“Yeah, I shot her in the head” and “She wasn’t nothing to me, she was some bitch.”
14 Coronado had known [Petitioner] for about three or four years. Coronado repeated the
15 conversation to two deputy sheriffs.

16 Inmate informants Robert Lopez and Erik Austin testified that they overheard the
17 same conversation. Some of these statements were reported by the inmates to a deputy
18 at the jail, but the term “bitch” was not used. A deputy and another inmate, who also
were present at the time the purported statements were made, claimed not to have heard
them.

19 Greg Finley, who had been in a cell with Humphres before and during the trial,
20 testified that Humphres discussed the upcoming case with him. Before he testified,
Humphres told Finley that [Petitioner] transferred the gun from one hand to the other and
the gun went off accidentally. Later, after he testified, he told Finley that, prior to the
21 shooting, [Petitioner] was “irate” and was going to “kill [Vickerman]” for taking the car.

22 Lance Laranjo testified to an event that occurred at Clay Henson’s house prior to
the shooting. Melissa G. and Glover also were present. Melissa G. thought someone had
stolen her drugs and called [Petitioner]. When [Petitioner] arrived, he was holding a gun,
but it was not pointed at anyone. When Laranjo asked to see the gun, [Petitioner] became
23 threatening.

24 **Defense**

25 [Petitioner] testified that he picked up Vickerman and Humphres and the three
drove around trying to arrange a trade of some methamphetamine for audio speakers.
26 While they were driving, Melissa G. called for help from Henson’s house because her
drugs were missing. [Petitioner] drove to Henson’s house. It was about 4:30 or 5:00 p.m.

27 He entered Henson’s house with a gun in his hand since he knew there was a
methamphetamine lab on the premises and that a gun was kept there. Because Melissa
28 G. told him someone had taken methamphetamine from her purse, he searched Laranjo
and his girlfriend, and Humphres searched their truck, looking for the drugs. When
Laranjo asked to see the gun, [Petitioner] refused.

Glover arrived at some point and [Petitioner] left in his car with her, Humphres,
Vickerman, and Melissa G. He followed Henson to a motel to deliver drugs.

Eventually, [Petitioner], Humphres, Vickerman, Melissa G., and Glover went to
Brown’s house because it was a safe place to do a drug deal. While there, [Petitioner]
played dice with Brown. He kept his gun in a holster. The others stayed in the car and did

1 drugs. He sent Brown out to the car to get his wallet. He assumed everyone in the car had
2 followed Brown back inside.

3 When [Petitioner] discovered that Vickerman had taken his car to drive Glover
4 home, he called his own cell phone, which he had left in the car, and argued with
5 Vickerman. [Petitioner], who had a drug deal waiting, became irate when Vickerman
6 failed to return with the car and when Vickerman would not answer the cell phone.
7 While he was standing in front of Brown's house waiting for the return of his car,
8 Vickerman and Glover pulled up. [Petitioner] thought only Vickerman would be in the
9 car because Vickerman had borrowed the car to take Glover home.

10 [Petitioner] pulled out his gun, thinking there would be a fight, and he thought
11 Vickerman had a gun as well. But as he approached the passenger side of the car, he
12 could see that Vickerman did not have a gun. [Petitioner] moved the gun to his left hand.
13 When he realized that Glover was still in the car, he yelled at both of them to get out. He
14 tried to pull Glover out of the car.

15 [Petitioner] then testified, "I came to a ... stop and I lost the grip on the gun in my
16 ... left hand and I tried to catch it with my left hand and pop, the gun went off, and I tried
17 to catch it after it ... went off and I just dropped it. I just dropped the gun." [Petitioner]
18 stated that he was still holding Glover with his right hand when the gun went off. He saw
19 Glover lean to the left and her eyes roll back. Vickerman then said, "No, Mickey. Oh, my
20 God, Mickey."

21 [Petitioner] had a difficult time picking up and holding onto the gun. He fled the
22 scene because he was scared and on parole. He claimed to have thrown the gun in some
23 ivy and the holster onto a roof. He fled to Oregon until his mother convinced him to turn
24 himself in. He surrendered to officers in Crescent City. He denied he made any comment
25 about the case while in jail. He acknowledged that he knew it was a crime for him to
26 possess a gun because he was a convicted felon.

27 (LD 4 at 2-7.)

PETITIONER'S CLAIMS

1. The prosecutor misstated the law during closing argument, and the trial court erred by failing to
2 correct the prosecutor's misstatement (Pet. 4, 7);⁴
3. The prosecutor impugned the integrity of defense counsel and implied that defense counsel
4 suborned perjury, committed misconduct by misusing prior bad acts evidence, and engaged in
5 other purported misconduct (*id.* 4, 14-15); and
6. To the extent that Claims One and/or Two are waived for defense counsel's failure to object,
7 Petitioner alleges ineffective assistance of counsel (*id.* 5).

STANDARD OF REVIEW

28 The current Petition was filed after the Antiterrorism and Effective Death Penalty Act of 1996,
1 Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), was signed into law and is thus subject to its
2 provisions. *See Lindh v. Murphy*, 521 U.S. 320, 326-327 (1997). The standard of review applicable to
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4 For ease of reference, the Court utilizes the CM/ECF pagination for the Petition.

1 Petitioner's claims is set forth in 28 U.S.C. § 2254(d), as amended by the AEDPA:

2 (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant
3 to the judgment of a State court shall not be granted with respect to any claim that was
4 adjudicated on the merits in State court proceedings unless the adjudication of the claim—
5 (1) resulted in a decision that was contrary to, or involved an unreasonable
6 application of, clearly established Federal law, as determined by the Supreme
7 Court of the United States; or
8 (2) resulted in a decision that was based on an unreasonable determination of the
9 facts in light of the evidence presented in the State court proceeding.

10 28 U.S.C. § 2254(d).

11 Under the AEDPA, the “clearly established Federal law” that controls federal habeas review of
12 state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions “as of the
13 time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000). To determine
14 what, if any, “clearly established” United States Supreme Court law exists, the court may examine
15 decisions other than those of the United States Supreme Court. *LaJoie v. Thompson*, 217 F.3d 663, 669
16 n.6 (9th Cir. 2000). Ninth Circuit cases “may be persuasive.” *Duhaime v. Ducharme*, 200 F.3d 597, 598
17 (9th Cir. 2000) (as amended). On the other hand, a state court’s decision cannot be contrary to, or an
18 unreasonable application of, clearly established federal law if no Supreme Court precedent creates
19 clearly established federal law relating to the legal issue the habeas petitioner raised in state court.
20 *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004); *see also Carey v. Musladin*, 549 U.S. 70, 76-77
21 (2006).

22 A state court decision is “contrary to” clearly established federal law if the decision either applies
23 a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result
24 the Supreme Court reached on “materially indistinguishable” facts. *Early v. Packer*, 537 U.S. 3, 8
25 (2002) (per curiam); *Williams*, 529 U.S. at 405-06. When a state court decision adjudicating a claim is
26 contrary to controlling Supreme Court law, the reviewing federal habeas court is “unconstrained by
27 § 2254(d)(1).” *Williams*, 529 U.S. at 406. However, the state court need not cite or even be aware of
28 the controlling Supreme Court cases, “so long as neither the reasoning nor the result of the state-court
decision contradicts them.” *Early*, 537 U.S. at 8.

29 State court decisions which are not “contrary to” Supreme Court law may only be set aside on
30 federal habeas review “if they are not merely erroneous, but ‘an *unreasonable application*’ of clearly
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1 established federal law, or are based on ‘an *unreasonable* determination of the facts.’” *Early*, 537 U.S.
2 at 11 (quoting 28 U.S.C. § 2254(d)). Consequently, a state court decision that correctly identified the
3 governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case.
4 *Williams*, 529 U.S. at 406-10, 413; *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam).
5 However, to obtain federal habeas relief for such an “unreasonable application,” a petitioner must show
6 that the state court’s application of Supreme Court law was “objectively unreasonable.” *Woodford*, 537
7 U.S. at 24-25, 27. An “unreasonable application” is different from an “erroneous” or “incorrect” one.
8 *Williams*, 529 U.S. at 409-10; see also *Waddington v. Sarausad*, 129 S. Ct. 823, 831 (2009); *Woodford*,
9 537 U.S. at 25.

10 A state court factual determination must be presumed correct unless rebutted by clear and
11 convincing evidence. 28 U.S.C. § 2254(e)(1). Furthermore, a state court’s interpretation of state law,
12 including one announced on direct appeal of the challenged conviction, binds a federal court sitting in
13 habeas corpus. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005).

14 **DISCUSSION**

15 **Claim One**

16 In his first claim, Petitioner contends he was denied his right to due process when the prosecutor
17 allegedly misstated the law of involuntary manslaughter during closing arguments. (Pet. 4.) Petitioner
18 also claims that the trial court erred by not giving a corrective jury instruction to remedy the alleged
19 misstatement. (*Id.* 7.)⁵ Because the California Supreme Court summarily denied this claim, the Court
20 must “look through” to the last reasoned decision, that of the California Court of Appeal on direct
21 review. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-05 (1991). In denying Petitioner’s claim, the court
22 of appeal stated:

23 [Petitioner] contends his conviction should be reversed because the prosecutor
24 misstated the law of involuntary manslaughter during closing and rebuttal argument.
25 [Petitioner] claims the prosecutor repeatedly misstated the law by informing the jury that
[Petitioner] was an ex-felon in possession of a firearm at the time of the

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⁵ Respondent argues that these claims are procedurally defaulted. (Answer 16-17.) When the claims raised
27 in a habeas petition are easier to resolve on the merits, the interests of judicial economy counsel against deciding the more
28 complex or uncertain procedural default issues. *See Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) (citing
Lambrix v. Singletary, 520 U.S. 518, 525 (1997)); see also *Batchelor v. Cupp*, 693 F.2d 859, 864 (9th Cir. 1982). Because
such a situation exists here, the Court addresses these claims on the merits.

1 shooting, he was guilty of a felony dangerous to human life and could not, therefore, be
2 convicted of involuntary manslaughter. [Petitioner] also argues that, if we find the
3 argument waived, his trial counsel was ineffective for failing to object to the misconduct
4 and request admonitions. [Petitioner] also contends that the trial court erred when it
5 refused to give a clarifying instruction to rectify these misstatements. We conclude there
6 was no prejudicial error.

7 ***The record***

8 On cross-examination, [Petitioner] acknowledged that he had been convicted of
9 two felonies and that he knew it was a crime for him to possess a gun.

10 During closing argument, the prosecutor used a PowerPoint presentation and
11 argued that the killing of Glover was neither self-defense nor an accident, but was
12 murder, and he proceeded to explain the elements of the unlawful killing of a human
13 being with malice aforethought. The prosecutor also explained that, if the jury found that
14 the killing was the result of a “cold and rash impulse,” the killing would be second
15 degree murder, not first degree murder.

16 After discussing the issue of transferred intent, the prosecutor stated:

17 “[Petitioner] did a lot of ... dangerous things that day. It’s up to you to
18 determine what acts he did which bothered you more than others, but I
19 suggested a few things. He carried a loaded pistol with him everywhere.
20 That’s a very dangerous act. Okay? There was certainly no need to do
21 that. In fact, he’s a felon. He admitted it’s a felony for him to even
22 possess a gun, so that was very dangerous.”

23 The prosecutor then explained that the jury had four possible verdicts: “first
24 degree, second degree, voluntary manslaughter and involuntary manslaughter.” The
25 prosecutor proceeded to explain the three possible scenarios for finding second degree
26 murder: that [Petitioner] intended to kill, but lacked premeditation; that [Petitioner]
27 intentionally committed a dangerous act with conscious disregard for human life; or that
28 [Petitioner] intentionally fired his gun into the occupied car.

29 The prosecutor argued that, in order to find the shooting was an accident, the jury
30 would need to find there was “no criminal intent” or “criminal negligence.” As argued
31 by the prosecutor:

32 “It’s absolutely clear that [Petitioner] had all kinds of criminal intent out
33 there.... ¶ [Petitioner] knew that he was a felon in possession,
34 committing a felony, a status crime right there. [Petitioner] was
35 brandishing around a gun. [Petitioner] was making threats to kill
36 somebody. [Petitioner] admitted to you that he went over there to assault
37 [Glover] and ... [Vickerman], to physically get them out of the car. That’s
38 a battery. So there’s all kinds of criminal intent here that would defeat an
39 accident.”

40 The prosecutor contrasted this situation with that of “some guy [who] could legally have
41 a gun” which goes off accidentally.

42 The prosecutor then went through the elements of manslaughter, followed by the
43 elements of involuntary manslaughter:

44 “Involuntary manslaughter, [defense counsel is] going to argue for
45 involuntary manslaughter. That’s the lowest level of crime that you’re
46 instructed on here. I highlighted the requirements of this, that during the
47 commission of the unlawful act not amounting to a felony which is
48 dangerous to human life under the circumstances of its commission. So
49 [defense counsel] would argue that he’s brandishing a gun and that it
50 just—it accidentally went off during the brandishing so it was an

involuntary manslaughter, when, in fact, he was committing a felony just having a gun. Just having a gun, he was a felon in possession the whole day.”

The prosecutor highlighted the involuntary manslaughter instruction by underlining the statement that the killing was an involuntary manslaughter if it was done during the commission of an unlawful act “not amounting to a felony.” But, as argued by the prosecutor, [Petitioner] “was committing a felony just being there,” and “[i]t’s a violation of Penal Code Section 12021 for a felon to be in possession of a firearm.”

Defense counsel did not object to any of the above statements by the prosecutor. Instead, in closing, defense counsel stated:

“And, yes, [Petitioner has] got prior felony convictions. And the fact that he has a prior felony, [the prosecutor] seems to think that somebody who’s a felon loses all right to commit an involuntary manslaughter. That’s what he told you. He’s committing a felony by having a gun. That is not the law. If that was the law, you wouldn’t receive the instruction that we’re going to talk about later and the judge is going to give you.”

Defense counsel also stated that in order to find involuntary manslaughter, there must be an unlawful act. Defense counsel explained that an “[u]nlawful act is an act—you do something, not just the felon in possession of a gun. That’s not doing a physical act.” Defense counsel told the jurors that if [Petitioner] was brandishing a firearm, tripped and fell and “it goes off on a reactionary trigger pull,” then it was appropriate to convict [Petitioner] of involuntary manslaughter.

[Petitioner] or involuntary manslaughter. During rebuttal, the prosecutor addressed defense counsel's suggestion that the shooting was an accident and that the jury find involuntary manslaughter, stating "You don't get down to invol[untary manslaughter], as I said to start with, if you go through the proper charging and you review the evidence." The prosecutor then again addressed the issue of [Petitioner] being a felon in possession of a firearm and stated:

“[Defense counsel] suggests that being a felon in possession is not a felony that would kick him out of the involuntary manslaughter. That’s for you to decide. I mean ... if you were asked to, you could certainly convict this man of simple assault. You can convict this man of brandishing. You could convict this man of making threats. Yeah, he did a lot of crimes that day, but what we’re talking about here is murder, and he was also committing a felony, as being a felon in possession, when he committed the murder, and that kicks him out of the involuntary manslaughter....”

At this point, defense counsel objected, stating that the prosecutor had misstated the law. The trial court overruled the objection.

At the end of argument, defense counsel asked that the trial court instruct the jury “that the fact that a person is a felon in possession of a firearm does not preclude a finding—a verdict of involuntary manslaughter.” The trial court instructed defense counsel to draft such an instruction “to see what it is exactly that you have in mind,” and bring it to court the following day. The trial court expressed uncertainty because [Petitioner] had, on the stand, admitted that he was a felon in possession of a firearm, and “I think that is a correct statement of law, that a felon can’t be in possession of a firearm ... but I’m not sure.”

The next morning, out of the presence of the jury, the trial court stated that it had received communication from both parties and that it was not going to include the additional instruction on "felon in possession" that defense counsel asked for. It then stated:

1 “When I saw the instructions or when the instructions were in a draft
2 form, I did have a version that included the language about inherently
3 dangerous felony and that was in the [CALJIC No.] 3.30 special
4 instruction, so to speak, that I crafted. [Defense counsel] asked me to take
5 that out and, in fact, specifically referenced [section] 246,^[6] so I did that
6 at his request the other day. [¶] I think that [the prosecutor’s] reference to
7 felon in possession goes not towards any of the murder counts but instead
8 goes to the lawfulness of the act that supports the involuntary
9 manslaughter that [defense counsel] had argued, [Petitioner] was acting
10 lawfully when there was the discharge. So the felon in possession relates
11 to that, and for purposes of the record, [the prosecutor] had asked the
12 Court a long time ago never to even allow any instructions on involuntary
13 manslaughter in the first place because he, on behalf of the People, took
14 the view that involuntary manslaughter should not be allowed because it
15 was always that [Petitioner] was acting unlawfully. So I think I’ve
16 collected a number of thoughts on that and I’ll give each of you a chance
17 to say what you want to.”

18 Defense counsel argued again that the mere status of being a felon in possession
19 of a gun should not exclude the possibility that [Petitioner] could be convicted of
20 involuntary manslaughter, citing to *People v. Cunningham* (2001) 25 Cal.4th 926 and
21 *People v. Satchell* (1971) 6 Cal.3d 28, overruled on another ground in *People v. Flood*
22 (1998) 18 Cal.4th 470, 484. The prosecutor argued that the cases cited by defense
23 counsel

24 “only stand[] for the proposition that misdemeanor conduct can get you
25 to implied malice murder.... [¶] In the case of the Felony Murder rule, the
26 Courts have decided that certain felonies allow a finding of murder ...
27 without the element of malice, and that’s one of the theories in this case,
28 of course, for the [section] 246. There’s a whole long litany of felonies
29 that do not amount to a felony that is considered inherently dangerous
30 that would allow automatic second-degree murder. None of these cases
31 address the issue that [defense counsel] wanted this Court to address in
32 instructions and so, therefore, he cited no law that supported his argument
33 that was on point at all.”

34 After argument, the trial court stated that it was going to stand by its earlier ruling.
35 The jury was subsequently instructed, in pertinent part, pursuant to CALJIC No.
36 8.45 as follows:

37 “Every person who unlawful[ly] kills a human being without malice
38 aforethought and without an intent to kill and without conscious disregard
39 for human life is guilty of the crime of involuntary manslaughter.... [¶] A
40 killing in conscious disregard for human life occurs when the killing
41 results from an intentional act, the natural consequences of which are
42 dangerous to life, which act was deliberately performed by a person who
43 knows that his conduct endangers the life of another and who acts with
44 conscious disregard for human life. [¶] A killing is unlawful within the
45 meaning of this instruction if it occurred: [¶] One, during the commission
46 of an unlawful act not amounting to a felony which is dangerous to
47 human life under the circumstances of its commission; or [¶] Number
48 two, in the commission of an act ordinarily lawful which involves a high

29 6 [California Court of Appeal footnote 2:] Section 246 prohibits shooting at an occupied vehicle.

degree of risk of death or great bodily harm without due caution and circumspection. ¶ A violation of ... Section 417(a)(2) is an unlawful act not amounting to a felony. ¶ The commission of an unlawful act without due caution and circumspection would necessarily be an act that was dangerous to human life in its commission....”

The jury was also instructed with CALJIC No. 3.30, which states:

"In the crime of involuntary manslaughter, which is a lesser crime, there is a union of joint operation of act or conduct and criminal negligence in either of the following: [¶] A, the killing occurred during the commission of an unlawful act of brandishing a firearm, ... Section 417a, which is dangerous to human life under the circumstances of its commission. This is a general intent crime. General intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, one is acting with general criminal intent, even though the person may not know that the act or conduct is unlawful; or [¶] B, the killing occurred in the commission of an act which involves a high degree of risk or great bodily harm without due caution and circumspection. This is known as criminal negligence."

The instruction requested by defense counsel, but refused by the trial court, read:

“The crime of ‘ex-felon in possession of a firearm’ is not an inherently dangerous felony. Therefore, an ex-felon in possession of a firearm may be convicted of the crime of involuntary manslaughter.”

Prosecutorial misconduct

It is misconduct for the prosecutor to misstate the applicable law, and particularly to attempt to release the prosecution from its obligation to overcome reasonable doubt on all elements. (*People v. Marshall* (1996) 13 Cal.4th 799, 831; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215.) A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) In other words, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97, 108 [addressing prosecutorial duty of disclosure].) A prosecutor's misconduct, "that does not render a criminal trial fundamentally unfair" violates California law "only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" (*People v. Farnam* (2002) 28 Cal.4th 107, 167.) The ultimate question is whether it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from such misconduct. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Here, defense counsel failed to object to the claimed instances of improper argument during closing, and objected only to the claimed instance of misconduct during rebuttal. [Petitioner] has therefore forfeited his claims on the purported instances of misconduct made during closing for purposes of this appeal. (*People v. Frye* (1998) 18 Cal.4th 894, 970.) [Petitioner] asserts, however, that defense counsel's failure to object constituted ineffective assistance. In any event, we find no prejudicial misconduct.

[Petitioner] claims that the prosecutor repeatedly misstated the law of involuntary manslaughter by arguing that by being a felon in possession of a firearm, he was guilty of a felony dangerous to human life.

The People concede that the mere possession of a firearm by a felon is not an inherently dangerous felony. In the abstract, possession of a firearm by a felon does not

1 necessarily pose a threat to human life. Section 12021, subdivision (a)(1) simply
2 prohibits a person convicted of a felony from having in his or her possession any firearm.
3 Entirely different penal provisions punish concealing, using, and brandishing such a
4 weapon. (See, e.g., §§ 12025, 245, 417.) While the use of a firearm is obviously
5 inherently dangerous to human life, the simple act of carrying the firearm by a felon is
6 not necessarily dangerous.

7 This conclusion is consistent with our Supreme Court's determination that a felon
8 who owns or possesses a concealable firearm does not commit an
9 inherently-dangerous-to-human-life felony for purposes of the felony-murder rule.
10 (*People v. Satchell, supra*, 6 Cal.3d at pp. 40-41; see also *People v. Cunningham, supra*,
11 25 Cal.4th at pp. 1008-1009 [court noted, citing *Satchell*, that being a convicted felon in
12 possession of a firearm was not a felony inherently dangerous to human life].)

13 We next address the words of the prosecutor to determine if he misstated the law
14 to the jury. The record shows that the prosecutor stated numerous times that [Petitioner]
15 committed a felony by being in possession of the gun. This is an accurate statement. (§
16 12021, subd.(a)(1).) [Petitioner] admitted this. But the prosecutor never stated that mere
17 possession of the gun by [Petitioner] was a felony inherently dangerous to life, although
18 his words conveyed an ambiguous message and he "hedged" close to this statement
19 several times.

20 For instance, the prosecutor argued that many of [Petitioner]'s actions on the day
21 of the shooting were dangerous, including his carrying a loaded pistol with him
22 everywhere. The prosecutor argued, "He admitted it's a felony for him to even possess
23 a gun, so that was very dangerous."

24 While arguing that [Petitioner] had "all kinds of criminal intent" to "defeat an
25 accident," the prosecutor stated that [Petitioner] "knew that he was a felon in possession,
26 committing a felony, a status crime right there," but he also gave other examples of
27 [Petitioner]'s criminal intent: he brandished a gun, he made threats to kill, he admitted
28 he went over to the car to assault Glover and Vickerman to get them out of the car, and
he committed a battery when he did so.

29 In discussing the elements of involuntary manslaughter, the prosecutor argued
30 that defense counsel would claim the gun accidentally went off while [Petitioner] was
31 brandishing it, when "in fact, [Petitioner] was committing a felony just having a gun. Just
32 having a gun, he was a felon in possession the whole day." The prosecutor then
33 underscored that in order for the killing to be an involuntary manslaughter, it had to be
34 done during the commission of an unlawful act not amounting to a felony, but that
35 [Petitioner] "was committing a felony just being there."

36 After defense counsel claimed that the prosecutor's argument that [Petitioner]
37 "loses all right to commit an involuntary manslaughter" was "not the law," the prosecutor
38 argued that it was for "you [the jury] to decide" whether [Petitioner]'s possession was
39 "a felony that would kick him out of involuntary manslaughter." As summed up by the
40 prosecutor, "he did a lot of crimes that day, but what we're talking about here is murder,
41 and he was also committing a felony, as being a felon in possession, when he committed
42 the murder, and that kicks him out of the involuntary manslaughter...."

43 Whether the prosecutor meant that [Petitioner], as a felon in possession of a gun,
44 could not, as a matter of law, be found guilty of involuntary manslaughter, or whether
45 he was attempting to urge the jury to find that the circumstances of the shooting
46 precluded [Petitioner] from being found guilty of involuntary manslaughter, is not
47 entirely clear. For the most part, the prosecutor's remarks, taken in context, urged the
48 jury to find that [Petitioner]'s actions on the day of the shooting showed intent and in no
49 way could be construed as accidental. "At closing argument a party is entitled both to
50 discuss the evidence and to comment on reasonable inferences that may be drawn
51 therefrom." (*People v. Morales, supra*, 25 Cal.4th at p. 44.)

52 In order to prevail on a claim of prosecutorial misconduct based on remarks to
53 the jury, the defendant must show a reasonable likelihood the jury understood or applied
54 the complained-of statements in an improper or erroneous manner. (*People v. Clair*

1 (1992) 2 Cal.4th 629, 663.) In conducting this inquiry, “we do not lightly infer” that the
2 jury drew the most damaging rather than the least damaging meaning from the
3 prosecutor’s statements. (*People v. Howard* (1992) 1 Cal.4th 1132, 1192.)

4 Here, we do not think the prosecutor’s remarks caused the jury to misapply the
5 law to [Petitioner]’s detriment. Viewing the prosecutor’s comments in the context of the
6 argument as a whole, we conclude that it is not reasonably likely that the jury construed
7 or applied the complained-of remarks in an objectionable manner. (*People v. Samayoa*
8 (1997) 15 Cal.4th 795, 841.)

9 The trial court instructed correctly on the various theories of first degree
10 premeditated murder, second degree murder, voluntary manslaughter, and involuntary
11 manslaughter. The jury also was instructed, in CALJIC No. 0.50, that any statement by
12 an attorney inconsistent with the trial court’s instructions as to the law must be
13 disregarded. “[W]e presume the jury treated the court’s instructions as statements of
14 law, and the prosecutor’s comments as words spoken by an advocate in an attempt to
15 persuade.” (*People v. Seaton* (2001) 26 Cal.4th 598, 646, quoting *People v. Sanchez*
16 (1995) 12 Cal.4th 1, 70.) Consequently, there was no reasonable likelihood any juror
17 would have applied the prosecutor’s comments erroneously. (*People v. Frye, supra*, 18
18 Cal.4th at p. 970.)

19 *Failure to give additional instruction*

20 [Petitioner] claims the trial court erred when it refused to give a defense-crafted
21 clarifying or “pinpoint” instruction. Defense counsel requested the trial court to instruct
22 the jury that the crime of “ex-felon in possession of a firearm” is not an inherently
23 dangerous felony and that an ex-felon in possession of a firearm may be convicted of the
24 crime of involuntary manslaughter. Although the requested instruction states a correct
25 principle of law, we conclude the trial court did not err in refusing to give the instruction
26 to the jury.

27 ““It is settled that in criminal cases, even in the absence of a request, the trial
28 court must instruct on the general principles of law relevant to the issues raised by the
evidence. [Citations.] The general principles of law governing the case are those
principles closely and openly connected with the facts before the court, and which are
necessary for the jury’s understanding of the case.”[Citation.]....”” (*People v. Breverman*
1998) 19 Cal.4th 142, 154.) Here, the trial court gave the standard instructions on
involuntary manslaughter.

20 We recognize that a defendant has a right on request to a pinpoint instruction on
21 a particular defense theory, so long as it does not highlight specific evidence regarding
22 the defense. (*People v. Earp* (1999) 20 Cal.4th 826, 886.) “But a trial court need not give
23 a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions
24 [citation], or is not supported by substantial evidence [citation].” (*People v. Bolden*
2002) 29 Cal.4th 515, 558.) A trial court also may refuse to give an instruction if it is
25 confusing. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275, disapproved on another point
26 in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

21 In *People v. Satchell*, the court found prejudicial error when the trial court, while
22 instructing on the theory of second degree murder, stated that the crime of possession of
23 a concealable firearm by a felon was a felony inherently dangerous to human life.
24 (*People v. Satchell, supra*, 6 Cal.3d at pp. 31-32.) But no such instruction was given
25 here, and [Petitioner] has cited no authority requiring the giving of the requested
26 instruction.

27 Assuming there was any error by the trial court in rejecting the pinpoint
28 instruction, we will reverse the judgment only if we conclude there is a reasonable
probability the error affected the verdict adversely to the defendant. (*People v. Ervin*
2000) 22 Cal.4th 48, 91.) The jury concluded beyond a reasonable doubt that
[Petitioner] was guilty of first degree murder and also found that he personally and
intentionally shot Glover. These findings necessarily preclude a finding of involuntary
manslaughter because involuntary manslaughter requires there be no intent to harm. (See,
e.g., *People v. Earp, supra*, 20 Cal.4th at p. 886 [by finding true two special

1 circumstance allegations, jury necessarily determined the killing was first degree felony
2 murder and not any lesser form of homicide; failure to give implied malice second degree
3 murder and involuntary manslaughter instructions was harmless].) For this reason we
conclude that, even assuming the propriety of the pinpoint instruction, any error in
rejecting it was harmless.

4 (LD 4 at 8-18.)

5 A habeas petition alleging prosecutorial misconduct will be granted only when the misconduct
6 did “so infect the trial with unfairness as to make the resulting conviction a denial of due process.”
7 *Greer v. Miller*, 483 U.S. 756, 765 (1987) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643
8 (1974)); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986). “[T]he touchstone of due process
9 analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the
10 prosecutor.” *Smith v. Phillips*, 455 U.S. 209, 219 (1982). A prosecutor’s challenged remarks are viewed
11 in the context of the entire trial. *See Greer*, 483 U.S. at 765-66; *see also Donnelly*, 416 U.S. at 639-43.

12 In addition, a prosecutor is permitted to argue reasonable inferences from the evidence. *Duckett*
13 *v. Godinez*, 67 F.3d 734, 742 (9th Cir. 1995). “Counsel are given latitude in the presentation of their
14 closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence
15 presented and all reasonable inferences therefrom.” *Ceja v. Stewart*, 97 F.3d 1246, 1253-54 (9th Cir.
16 1996).

17 Here, the Court agrees with the court of appeal’s analysis. Petitioner does not show that the
18 prosecutor misstated the law of involuntary manslaughter to the jury, or that possession of a gun by
19 Petitioner precluded a finding of involuntary manslaughter by the jury.

20 Even assuming the prosecutor’s comments to the jury were improper, they did not “so infect[]
21 the trial with unfairness.” *Darden*, 477 U.S. at 181; *see also Brecht v. Abrahamson*, 507 U.S. 619, 623
22 (1993) (holding errors are harmless if they do not have a “substantial and injurious effect or influence
23 in determining the jury’s verdict”). The trial court instructed the jurors that their decision was to be
24 based only on the evidence produced in court (*see* 1 CT 197), and the jurors were specifically
25 admonished that counsel’s statements were not evidence (*see id.* 190). These admonishments and
26 instructions significantly limited any prejudice caused by the prosecutor’s remarks. *See Weeks v.*
27 *Angelone*, 528 U.S. 225, 234 (2000) (stating jury is presumed to have followed court’s instructions);
28 *Hall v. Whitley*, 935 F.2d 164, 165-66 (9th Cir. 1991) (holding prosecutor’s improper comments were

1 isolated moments in a three day trial, and their effect was mitigated by judge's instructions that closing
2 arguments were not evidence, and the strong proof of the defendant's guilt). In addition, there was
3 extensive evidence to support the jury's finding of first degree murder including Petitioner's brandishing
4 a gun, making threats to kill, admitting he went over to the car to assault Glover and Vickerman to get
5 them out of the car, and committing a battery doing so.

6 Petitioner also contends that the trial court committed error by failing to give a curative
7 instruction in light of the prosecutor's alleged misstatements. “[N]ot every ambiguity, inconsistency,
8 or deficiency in a jury instruction rises to the level of a due process violation.” *Middleton v. McNeil*,
9 541 U.S. 433, 437 (2004). Rather, the question is whether “the ailing instruction by itself so infected
10 the entire trial that the resulting conviction violates due process.” *Estelle v. McGuire*, 502 U.S. 62, 72
11 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)); *Henderson v. Kibbe*, 431 U.S. 145, 154
12 (1977). An ambiguous or erroneous instruction is reviewed to determine “whether there is a reasonable
13 likelihood that the jury has applied the challenged instruction in a way” that violated the Constitution.
14 *Estelle*, 502 U.S. at 72. The instruction must be considered in the context of the trial record and the
15 instructions as a whole. *Id.* Where a claim of instructional error involves failure to give an instruction,
16 the petitioner's burden is “especially heavy” because “[a]n omission, or an incomplete instruction, is less
17 likely to be prejudicial than a misstatement of the law.” *Henderson*, 431 U.S. at 155.

18 Here, as discussed, the prosecutor did not commit misconduct, and the trial court therefore was
19 not required to give a curative instruction. Even assuming prosecutorial misconduct, the jury was given
20 instructions elaborating the law of involuntary manslaughter (see 1 CT 208, 213), admonished that
21 statements by counsel did not constitute evidence (*id.* 190), and was instructed to follow the judge's
22 instructions over counsel's statements in case of any conflict (*id.* 189).

23 Accordingly, and for the foregoing reasons, Petitioner's trial was not rendered fundamentally
24 unfair. *Darden*, 477 U.S. at 181. The Court finds that the California courts' rejection of Petitioner's
25 claim was neither contrary to, nor an unreasonable application of, clearly established federal law as
26 determined by the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

27 **Claim Two**

28 In his second claim, Petitioner asserts that the prosecutor impugned the integrity of defense

1 counsel and implied that defense counsel suborned perjury; committed misconduct by misusing prior
2 bad acts evidence; and engaged in other purported misconduct. (Pet. 4, 14-15.)⁷ Because the California
3 Supreme Court summarily denied this claim, the Court must “look through” to the last reasoned
4 decision, that of the California Court of Appeal on direct review. *Ylst*, 501 U.S. at 803-05. In rejecting
5 Petitioner’s claim, the court of appeal stated:

6 [Petitioner] contends the prosecutor committed misconduct on numerous
7 occasions during the trial, which resulted in an infringement of his federally guaranteed
8 due process rights, his right to assistance of defense counsel, the right to confront
9 witnesses against him, and the right to present a defense. (U.S. Const., 5th, 6th, & 14th
10 Amends.) [Petitioner] acknowledges that he objected to some instances but not others
11 because such objections would have been futile. In the alternative, [Petitioner] argues
12 counsel was ineffective for failing to object. A review of the record reveals no prejudicial
13 misconduct on the part of the prosecutor.

14 ***Attacks on the integrity of defense counsel***

15 [Petitioner] cites to various instances where he contends the prosecutor “engaged
16 in a reprehensible effort to persuade the jury through impugning [the] integrity of defense
17 counsel.” (Unnecessary capitalization omitted.) The statements [Petitioner] objects to
18 are:

19 (1) After the prosecutor made a hearsay objection during defense counsel’s
20 cross-examination of a witness, which the trial court sustained, the prosecutor added,
21 “[Defense counsel] knows that that’s improper.”

22 (2) After the prosecutor elicited from Vickerman that he had told defense counsel,
23 but not the police, that [Petitioner] after the shooting had said “Help me, dawg, help me,”
24 the prosecutor asked Vickerman whether he understood that defense counsel “only had
25 a loyalty to try to help [Petitioner], not to try to do anything else?” Defense counsel did
26 not object. Shortly thereafter the trial court sustained a defense objection to the
prosecutor’s question to Vickerman whether, in light of his statement to defense counsel,
his earlier statement to the officer that did not include this information, was a “bald-faced
lie.” According to [Petitioner], “This set the theme that colored the rest of the trial: that
defense counsel[’s] ... loyalty to [Petitioner] caused him to suborn perjury and
circumvent discovery rules to try to win [Petitioner’s] case by any means.”

27 (3) During redirect of Vickerman, the prosecutor asked him if, during his
28 conversation with defense counsel, defense counsel had asked him questions “like he is
here in court, like suggesting what might have happened and then you agreeing with
him?” Vickerman responded that defense counsel had asked him to tell the truth.
[Petitioner] contends the prosecutor obviously knew leading questions on
cross-examination were permissible, but he made the comment to continue his “smear
campaign” against defense counsel.

29 (4) The prosecutor asked Vickerman about the existence of any record of what
30 Vickerman had said to defense counsel. Defense counsel then asked that the trial court
31 take judicial notice that the defense was under no obligation to turn over any notes or
32 statements taken of prosecution witnesses. The trial court stated, “So noted.” When the
33 prosecutor suggested to Vickerman that it would have been better to have had a record
34 and been able to examine what had been said during his interview with defense counsel,
Vickerman stated, “We are examining it right now.” The prosecutor responded, “Well,
if you’re a credible person then we’re okay; right?” The trial court then sustained defense

7 The Court addresses the merits of these claims despite Respondent’s argument of a procedural bar. (See
28 Answer 21); *supra* note 5; *Franklin*, 290 F.3d at 1232; *Batchelor*, 693 F.2d at 864.

1 counsel's objection that the prosecutor was being argumentative.

2 (5) During the presentation of the defense, the prosecutor complained that he had
3 received no discovery of witness Randall Walker's statement that [Petitioner] had not
made any comment to the jail inmates. Following a sidebar conference, Walker testified
that he had spoken to defense counsel three weeks earlier.

4 (6) During redirect questioning of Melissa G., a defense witness, the trial court
5 twice admonished the prosecutor to stop making reference to what he thought defense
counsel was doing wrong. In the first instance, the trial court told the prosecutor—when
he complained that defense counsel was asking a leading question—that he need not
propose how to ask questions. In the second instance, when the prosecutor again
complained that defense counsel was asking a leading question, he stated “Who's
7 testifying here?” to which the trial court responded, “Just state your objection[.]”

8 (7) According to [Petitioner], the prosecutor used a PowerPoint presentation
9 during closing argument. It included a slide that defined the interviews by defense
counsel as “suspicious” as they were not recorded, were not close in time to the shooting,
and stated that the witnesses “all came up with the same accident story after talking with
10 [defense counsel].” According to [Petitioner], the prosecutor used the PowerPoint
presentation to “further develop[] his theme for the jury that the prosecution witnesses
had created or changed their stories after speaking with defense counsel.”

11 (8) During closing, the prosecutor argued that defense counsel had acted
12 suspiciously because he had not generated reports or recordings of his interviews, and
13 that defense counsel had interviewed people of “low character who weren't telling the
14 whole story[.]” Defense counsel objected, and the prosecutor explained that he was not
15 saying defense counsel had broken the law, only that the jury should question the
16 authenticity of the witnesses' statements. Defense counsel objected again, and the trial
17 court sustained the objection “to inferences to improper conduct on the part of [defense
counsel].” Immediately thereafter, the prosecutor stated that defense counsel had
demonstrated his ability to guide witnesses to say what he wanted them to say and that
the jury should “extrapolate that back to talking to a witness multiple times, for whatever
length of time you want to talk to, without any record of what was said or how it was
said. Okay?” Following a renewed objection by defense counsel, an unreported sidebar
was held. The prosecutor then listed for the jury the witnesses who had spoken with
defense counsel and whose testimony the prosecutor questioned. During closing, defense
counsel told the jury he had not told the witnesses what to say.

18 (9) During rebuttal, [Petitioner] contends the prosecutor disparaged both defense
19 counsel and the defense theory by stating that defense counsel had managed to keep a
20 straight face while arguing in favor of a manslaughter conviction, that he had never heard
of a defense counsel who conducted unrecorded interviews, and that defense counsel was
21 not honorable, but unprofessional and unreliable. Defense counsel made various
objections, which were overruled.

22 Following closing argument, the trial court disclosed a request from defense
23 counsel for “an instruction on prosecutorial misconduct,” and that the prosecutor had
24 objected to such an instruction, but that the prosecutor did acknowledge that there “might
25 be some instruction that could be offered on the believability of witnesses[.]” The trial
court then revealed that a discussion was had in chambers with the attorneys, and that
there was “plenty of evidence that there was opportunity that [Petitioner] had to contact
26 people in advance, which was long before anybody met [defense counsel], and so there
was ample evidence on that subject, that these were not versions that were created by
[defense counsel].” The trial court also indicated that it was including an instruction on
27 defense counsel's concerns “about interview with or without a recording.”

28 Defense counsel then argued that the prosecutor had, in essence, told the jury
29 defense counsel had suborned perjury by telling the witnesses what to say. Although
30 defense counsel had objected to the misconduct before the jury, he “got to a point where
31 I couldn't do much.” Defense counsel then asked that the jury be admonished that the
32 prosecutor committed misconduct, and he also moved for a mistrial. The motion for

1 mistrial was denied. Subsequently, the trial court instructed as follows:

2 “That a witness has been interviewed by an attorney or an investigator,
3 with or without recording, must not prejudice you for or against any
4 party. You may consider this for the issue of the credibility of the
5 witness’s testimony only. The personal integrity of [defense counsel]
6 who, like [the prosecutor], is an officer of the court, is not in dispute.”

7 The People do not address any of the particular statements highlighted by
8 [Petitioner], but state that “[t]his is a case of the pot calling the kettle black,” and list
9 numerous instances where defense counsel used similar tactics in his defense of
10 [Petitioner].

11 For instance, during closing argument, defense counsel suggests that the
12 prosecutor was saying, “Let’s see if we can snooker some jury into making this a murder
13 because [Petitioner’s] got prior felony convictions and he runs with a rough crowd and
14 they do bad things. Let’s ignore the evidence.” Defense counsel told the jury the
15 prosecution “was taking the case they had solved in 11 days and using the next 11
16 months to distort, manipulate and misrepresent what had occurred.” A number of times,
17 defense counsel accused the prosecution of “trying to distort the evidence.” Defense
18 counsel told the jury that inmates who face long prison sentences gladly fabricate lies in
19 order to get a deal and “the DA is more than happy to bring in somebody that says I got
20 a confession or I got an admission from a witness or a defendant or whatever.” Finally,
21 defense counsel told the jury the prosecutor “knows he’s going to get a conviction for
22 involuntary manslaughter. He’s going for all this other stuff because he says this is a bad
23 guy and if I can get the jury to convict him not because of what he did but who he is,
24 well, I’ll get something more[.]”

25 Before addressing the statements made by the prosecutor, we first address the
26 issue raised by the People—that somehow defense counsel’s actions excused any
27 misconduct on the part of the prosecutor. If a prosecutor’s remarks are responsive to
28 defense counsel’s arguments and do not go beyond the record, no misconduct can be
29 charged. (*People v. Hill* (1967) 66 Cal.2d 536, 562.) But lapses of behavior by defense
30 counsel do not excuse professional misconduct by a prosecutor. (E.g., *People v. Bain*
31 (1971) 5 Cal.3d 839, 849 [“A prosecutor’s misconduct cannot be justified on the ground
32 that defense counsel ‘started it’ with similar improprieties”].)

33 “*A prosecutor commits misconduct if he or she attacks the integrity of defense
34 counsel, or casts aspersions on defense counsel .*” (*People v. Hill* (1998) 17 Cal.4th 800,
35 832.) It is generally improper for the prosecutor to accuse defense counsel of fabricating
36 a defense, or to imply that counsel is free to deceive the jury, although a prosecutor has
37 wide latitude in describing the deficiencies in opposing counsel’s tactics and factual
38 account. (*People v. Bemore* (2000) 22 Cal.4th 809, 846.)

39 [Petitioner] relies on *People v. Bain*, where our Supreme Court found
40 prosecutorial misconduct when the prosecutor asserted that defense counsel assisted the
41 defendant in fabricating a defense, and then attacked counsel’s integrity. (*People v. Bain*,
42 *supra*, 5 Cal.3d at pp. 845-846.)

43 In *Bain*, the defendant, a Black man, was prosecuted for forcible rape. The
44 defendant and the victim were the only witnesses. The victim testified the defendant
45 raped her in a bus station after a bus ride. The defendant testified that he “picked-up” the
46 victim and that the encounter was consensual. (*People v. Bain, supra*, 5 Cal.3d at pp.
47 843-844.) At trial, the prosecutor repeatedly asserted that the defendant and his counsel
48 fabricated the “pick-up” defense, and that he, as a Black man, would not be prosecuting
49 a Black defendant unless he personally believed the man to be guilty. The prosecutor also
50 attacked the integrity of the defense attorney, and he repeatedly referred to racial matters.
51 (*Id.* at p. 845.) Defense counsel objected to the statements about a fabricated defense and
52 the prosecution’s expression of personal belief in the defendant’s guilt, but did not object
53 to the attack on his integrity or the racial comments. (*Ibid.*) When the prosecutor repeated

1 the accusation of fabrication in closing, the trial judge did not reprimand the prosecutor,
2 but instead told the jury that defense counsel had “acted properly” and was not
3 “drumming up any stories.” (*Ibid.*) In rebuttal, the prosecutor reiterated his personal
4 belief that the defendant was guilty of the crime charged. The prosecutor also referred
5 to defense counsel as the “Golden Boy,” and vilified the public defender’s office several
6 times.

7 The *Bain* court held it to be prejudicial misconduct “in the circumstances” of that
8 particular case. (*People v. Bain, supra*, 5 Cal.3d at p. 849.) As explained by the *Bain*
9 court,

10 “In most sex offense cases the alleged perpetrator of the crime and the
11 alleged victim are the sole or principal witnesses, and as in the instant
12 case, there is a sharp conflict between their testimony. In these
13 circumstances, there is grave danger that misconduct of counsel may tip
14 the scales of justice. In the circumstances of the instant case, there is a
15 reasonable probability that absent the prosecutor’s misconduct objected
16 to by the defense the jury might have reached a different result. [¶] The
17 combination of the two elements of such misconduct—the unsupported
18 assertion that the defendant and his counsel fabricated the ‘pick-up’ story
19 and the statements of personal belief in defendant’s guilt, built on a racial
20 foundation—may well have swayed the jury in what was otherwise a
21 close case.” (*Ibid.*)

22 While several of the comments made by the prosecutor here could be labeled
23 misconduct, we do not think that the statements deprived [Petitioner] of a fair trial nor
24 caused a miscarriage of justice.

25 First, the trial court admonished the jury not to take into consideration whether
26 the interview of a witness had been recorded. This instruction was in direct response to
27 a number of the statements [Petitioner] now objects to. It is presumed that jurors
28 understood and followed instructions, and [Petitioner] has not established otherwise.
(*People v. Delgado* (1993) 5 Cal.4th 312, 331; *People v. Mickey* (1991) 54 Cal.3d 612,
689, fn. 17.)

29 Second, while there were statements that implied that defense counsel coaxed the
30 witnesses to change their story to help [Petitioner], there are other statements, which,
31 when read in context, do not so much claim that defense counsel fabricated a story, but
32 rather that the witnesses, who were friends of [Petitioner]’s and afraid of him, did so after
33 he contacted them. The prosecutor’s bases for asserting defense counsel “lied” were
34 alleged discrepancies between various witnesses’ statements right after the shooting and
35 at trial. Whether such discrepancies existed could be determined by the jury. Because the
36 factual basis for the prosecutor’s disparaging comments could be evaluated by the jury,
37 the comments do not carry the risk of an unfair trial as much as the kind of “unsupported
38 implication” by the prosecutor that defense counsel fabricated a defense present in
39 *People v. Bain, supra*, 5 Cal.3d at page 847.

40 Finally, the case here, unlike that in *Bain*, was not close. The evidence against
41 [Petitioner] was strong. Numerous witnesses, including [Petitioner], testified that, prior
42 to the shooting, he was upset, angry, and had a gun in hand. He was reported to have
43 made several comments to the effect that he was either going to kill Vickerman or
44 Glover. Most of the witnesses to the shooting expected “something” was going to happen
45 when Vickerman returned with [Petitioner]’s car. The medical evidence showed that
46 Glover was shot at very close range. On such a record only egregious error at trial could
47 be deemed prejudicial.

48 We conclude that any arguable prosecutorial misconduct did not prejudice
49 [Petitioner]’s case, and any misconduct on the part of the prosecutor does not require
50 reversal of the judgment of conviction.

51 ///

Improper use of evidence

In arguing for admission of evidence that [Petitioner] had been at Henson's house prior to the shooting, the prosecutor stated that he would use this evidence to prove absence of mistake or accident, [Petitioner]'s state of mind, and the reckless handling of the gun that later killed Glover. Defense counsel opposed the admission, stating there was nothing to indicate a common scheme or plan, and the identity of the shooter was not at issue. The trial court admitted the evidence to show an absence of mistake as "it appears that that may be part of the defense in this case...."

[Petitioner] now contends that the prosecutor committed misconduct through “purposeful misuse” of Evidence Code section 1101, subdivision (b)^[8] evidence. The challenged evidence includes the following:

(1) During the cross-examination of Melissa G., the prosecutor asked whether she had seen [Petitioner] with a gun before. She stated that she had. The trial court overruled defense counsel's objections on grounds of "relevance," "352," and "collateral." The trial court stated it thought the issue went to "accident issues." The prosecutor then asked if Melissa G. had seen [Petitioner] shoot a gun before, but she claimed she had not. Defense counsel made another objection on grounds of "402" and, outside the presence of the jury, the trial court stated that it thought the questioning was appropriate "because of the defense of accidental discharge." The prosecutor argued the evidence was relevant to show bias toward [Petitioner], in that Melissa G. was lying to help [Petitioner]. Defense counsel objected, stating the evidence was collateral and an attempt to get character evidence in through the back door. The prosecutor added that he wanted to use the evidence to prove that the shooting was not an accident, but intentional. The trial court allowed the evidence, and Melissa G. later testified that she had seen [Petitioner] shoot a gun before.

(2) During cross-examination, the prosecutor asked [Petitioner] about a statement he supposedly made to police about scaring people. Defense counsel objected and the trial court asked the prosecutor to "move on from that particular question" and that the issue would be taken up during recess. The prosecutor then asked [Petitioner] "who makes the rules" in a 12-man jail cell. Defense counsel objected, but the prosecutor stated that he wanted to show "what kind of person this is." Outside the presence of the jury, defense counsel argued that the prosecutor was trying to bring in improper character evidence. The prosecutor argued that, since intimidation was a "big issue" in the case, he wanted to show "what kind of person he is." After some research, the trial court determined that the statements made were not offered for the purpose of establishing conduct on a specific occasion, and it would allow questioning [Petitioner] about "three comments that are related to the issue of potential intimidation of witnesses." Two statements subsequently were read to the jury during cross-examination of [Petitioner]—one where [Petitioner] stated to an officer that the officer "should take some lessons from me ... on pumping fear into people," and one where [Petitioner] stated "I make up my own rules when I'm in [jail]."

(3) During closing argument, the prosecutor referred to [Petitioner]'s "callous nature" and his intimidation of witnesses.

We fail to follow [Petitioner]’s argument. [Petitioner] makes no assertion that the trial court erred in admitting the challenged evidence, only that the prosecutor committed

⁸ California Evidence Code section 1101(b) provides:

Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

Cal. Evid. Code § 1101(b) (1996).

1 misconduct by “openly and repeatedly” using the evidence to show “what a bad person
2 [Petitioner] was.” We do not agree. In any event, the trial court specifically instructed the
3 jury that:

4 “Evidence has been introduced for the purpose of showing that the
5 defendant committed acts similar to those constituting a crime other than
6 that for which he is on trial. This evidence, if believed, may not be
7 considered by you to prove that the defendant is a person of bad character
8 or that he has a disposition to commit crimes. It may be considered by
9 you only for the limited purpose of determining if it tends to show the
10 existence of the intent, which is a necessary element of the crime charged,
11 or the absence of mistake or accident by the defendant.”

12 Again, we presume the jurors understood and followed the instructions, and [Petitioner]
13 has not shown otherwise. (*People v. Mickey, supra*, 54 Cal.3d at p. 689, fn. 17.)

14 ***Additional acts of prosecutorial misconduct***

15 [Petitioner] contends that, in addition to the prosecutorial misconduct discussed
16 above, “there were a host of other errors” by the prosecutor, especially during
17 examination of the witnesses. According to [Petitioner], the prosecutor committed
18 misconduct by being offensive not only to defense counsel, but to his own witnesses, by
19 repeatedly asking improper questions despite successful objections by defense counsel,
20 and by vouching for witnesses.

21 [Petitioner] presents a litany of instances in which he claims the prosecutor
22 committed misconduct. They are: six instances where the trial court sustained defense
23 counsel’s objections after the prosecutor asked a witness to speculate; 11 instances where
24 the trial court sustained defense counsel’s objections to the prosecutor being
25 argumentative; an instance where, after the trial court ruled that [Petitioner] could be
26 impeached with one nonviolent prior felony and a sanitized violent prior felony, the
27 prosecutor elicited from [Petitioner] that he had three prior felonies; one instance where
28 the trial court sustained defense counsel’s objection to the prosecutor “testifying rather
29 than asking a question”; one instance where the trial court asked the prosecutor not to
30 engage in dialogue with [Petitioner] during cross-examination; one instance where the
31 trial court sustained defense counsel’s objections to the prosecutor asking [Petitioner]
32 why people were afraid of him; one instance when the trial court sustained a defense
33 objection to improper rebuttal; and one instance where the prosecutor brought a
34 photograph of Glover into court before defense counsel had a chance to object to its
35 admission.

36 Each of [Petitioner]’s allegations of misconduct has been waived for purposes of
37 appeal as [Petitioner] did not object to any of them on that ground. Defense counsel did
38 not object, on any possible grounds, to numerous instances about which [Petitioner] now
39 complains. Even assuming the objections that were made were sufficient to raise a
40 misconduct claim, there was no request that the jury be admonished. Since an admonition
41 could have cured any harm, the matter has not been preserved. (*People v. Cooper* (1991)
42 53 Cal.3d 771, 822; *People v. Simon* (1989) 208 Cal.App.3d 841, 849.)

43 In any event, we do not think there was any misconduct. While the prosecutor
44 should have refrained from asking argumentative questions or questions that asked the
45 witness to speculate, we are satisfied that, under any standard of prejudice, those
46 questions did not affect the outcome of the trial. The trial court sustained the defense
47 objections on these grounds, and a party is generally not prejudiced by a question to
48 which an objection has been sustained. (*People v. Mayfield* (1997) 14 Cal.4th 668, 755;
49 *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236.)

50 [Petitioner] also lists four instances where we fail to see misconduct. They are:
51 the prosecutor tried to intimidate Humphres (Humphres’ actual words were that the
52 prosecutor tried to “kind of” intimidate him when he first got to his office); Vickerman
53 stating during testimony that the prosecutor was trying to confuse him by the way he

1 questioned him; (Vickerman stated “you keep asking different questions to mix me up
2 and I’m not trying to get mixed up here”); The trial court had to tell the prosecutor once
3 to stop asking Vickerman to repeat his testimony (when Vickerman asked, in response
4 to a question, if he was to repeat the whole thing again, the trial court stated, “No, no, not
the whole thing again, so get your question in mind, [prosecutor] ”); And, in another
5 instance, Vickerman asked, when referring to the prosecutor, “Can this guy get out of my
6 face?” (the trial court noted the prosecutor was trying, apparently vigorously, to refresh
7 Vickerman’s responses, but had then moved back and “that’s appropriate”).

8 We also reject [Petitioner]’s contention that the prosecutor committed misconduct
9 by “vouching” for several witnesses. [Petitioner] points to testimony where the
10 prosecutor “elicited” from an officer that he believed the inmate informants. And, during
11 closing, the prosecutor himself vouched for Greg Finley, because he stated Finley’s story
12 “rings true.”

13 In the first instance, the record shows that the prosecutor, in questioning the
14 officer who spoke with the inmate informants, asked whether “there [was] anything
15 about you not believing what they were telling you?” The officer responded, stating,
16 “Well, I mean, I’ll be honest with you, I was suspicious. I had to—that’s my job is to
17 figure out what the truth is and—but by the time I interviewed every one of them in that
18 cell, I believed them.” This was not the personal opinion of the prosecutor, but of a
19 witness.

20 As to the second instance, during closing, the prosecutor argued that it was clear
21 “to anybody that was awake that ... Humphres was lying in trial, but what wasn’t clear
22 was what he saw. Okay? It wasn’t clear what he saw until you heard that out of ...
23 Finley’s mouth, and it rings true. It has the ring of truth to it, even though you didn’t hear
24 that from other people, and we’re going to talk about that.”

25 The instances complained of by [Petitioner] were not improper vouching on the
26 part of the prosecutor. A prosecutor is prohibited from vouching for the credibility of
27 witnesses or otherwise bolstering the veracity of their testimony by referring to evidence
28 *outside the record*. (*People v. Sully* (1991) 53 Cal.3d 1195, 1235; *People v. Anderson*
(1990) 52 Cal.3d 453, 479.) But, as long as a prosecutor’s assurances regarding the
apparent honesty or reliability of prosecution witnesses are based on the “facts of [the]
record and the inferences reasonably drawn therefrom, rather than any purported personal
knowledge or belief,” those comments cannot be characterized as improper vouching.
(*People v. Medina* (1995) 11 Cal.4th 694, 757.)

18 ***Cumulative error***

19 Finally, [Petitioner] argues that the cumulative impact of the prosecutor’s
20 “pervasive” misconduct deprived him of a fair trial. We disagree. We have either rejected
21 [Petitioner]’s claims of error or found any errors, assumed or not, not to be prejudicial
22 on an individual basis. Viewing the errors as a whole, we conclude that the errors do not
23 warrant reversal of the judgment. (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

24 (LD 4 at 18-30.)

25 The Court agrees with the court of appeal’s thorough and reasoned analysis. Even assuming
26 misconduct on the part of the prosecutor, Petitioner fails to show the prosecutor “so infected the trial
27 with unfairness,” *Darden*, 477 U.S. at 181, or that the prosecutor’s actions had a “substantial and
28 injurious effect or influence in determining the jury’s verdict,” *Brech*, 507 U.S. at 623. In addition, the
harmless error analysis from Claim One, *supra*, applies: extensive evidence supported Petitioner’s first
degree murder conviction, and the jury was admonished that counsel’s statements were not evidence.

1 Accordingly, the Court finds that the California courts' rejection of Petitioner's prosecutorial
2 misconduct claims was neither contrary to, nor an unreasonable application of, clearly established federal
3 law as determined by the United States Supreme Court. Thus, habeas relief is not warranted on this
4 claim.

Claim Three

6 In his third and final claim, Petitioner states that he received ineffective assistance of counsel to
7 the extent that Claims One and Two, *supra*, are waived. (Pet. 5, 36-37.) Because the California
8 Supreme Court summarily denied this claim, the Court must “look through” to the last reasoned
9 decision, that of the California Court of Appeal on direct review. *See Ylst*, 501 U.S. at 803-05.
10 Although the court of appeal did not directly deny Petitioner’s ineffective assistance claims, it indirectly
11 did so by denying Petitioner’s prosecutorial misconduct claims, of which the ineffective assistance
12 claims on defense counsel’s failure to object are premised upon.

13 For a petitioner to prevail on an ineffective assistance of counsel claim, he must show: (1) that
14 counsel's performance was deficient, and (2) that he was prejudiced by the deficient performance.
15 *Strickland*, 466 U.S. at 687. A court evaluating an ineffective assistance of counsel claim does not need
16 to address both components of the test if the petitioner cannot sufficiently prove one of them. *Id.* at 697;
17 *Thomas v. Borg*, 159 F.3d 1147, 1151-52 (9th Cir. 1998).

18 To prove deficient performance, a petitioner must show that counsel’s representation fell below
19 an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. Because of the difficulty in
20 evaluating counsel’s performance, there is a “strong presumption that counsel’s conduct falls within the
21 wide range of reasonable professional assistance.” *Id.* at 689. Only if counsel’s acts or omissions,
22 examined in light of all the surrounding circumstances, fell outside this “wide range” of professionally
23 competent assistance will the petitioner prove deficient performance. *Id.* at 690; *United States v.*
24 *Quintero-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995). The petitioner must overcome the presumption
25 that, under the circumstances, the challenged action “might be considered sound trial strategy.”
26 *Strickland*, 466 U.S. at 689.

Establishing counsel's deficient performance does not warrant setting aside the judgment if the error had no effect on the judgment. *Id.* at 691; *Seidel v. Merkle*, 146 F.3d 750, 757 (9th Cir. 1998). A

1 petitioner must show prejudice such that there is a reasonable probability that, but for counsel's
2 unprofessional errors, the result would have been different. *Strickland*, 466 U.S. at 694. Thus, the
3 petitioner will only prevail if he can prove that counsel's errors resulted in a "proceeding [that] was
4 fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

5 Here, defense counsel's failure to object to any alleged instances of prosecutorial misconduct did
6 not constitute deficient performance because, as discussed in Claims One and Two, *supra*, the prosecutor
7 did not commit any misconduct. Even assuming prosecutorial misconduct, a reasonable attorney, upon
8 hearing an improper remark by the prosecutor, may elect not to highlight the harmful statement by
9 objecting to it. *See United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991) (finding competent
10 counsel may decide to "refrain from objecting during closing argument to all but the most egregious
11 misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign
12 of desperation or hyper-technicality"); *see also United States v. Necoechea*, 986 F.2d 1273, 1281 (9th
13 Cir. 1993) (stating that the failure to object during closing argument is generally within the range of
14 permissible professional legal conduct). Instead, counsel may reasonably choose to rely on the standard
15 jury instruction that counsel's statements are not evidence.

16 Based on the foregoing, Petitioner has failed to show trial counsel's performance was deficient.
17 *Strickland*, 466 U.S. at 687-88. Moreover, even if trial counsel's performance was deficient, Petitioner
18 has failed to show the result of the trial would have been any different. *Id.* Accordingly, the Court finds
19 that the California courts' rejection of Petitioner's ineffective assistance of trial counsel claim was
20 neither contrary to, nor an unreasonable application of, clearly established federal law as determined by
21 the United States Supreme Court. Thus, habeas relief is not warranted on this claim.

22 **Certificate of Appealability**

23 An applicant seeking to appeal a district court's dismissal of a habeas petition under 28 U.S.C.
24 § 2254 must first obtain a certificate of appealability ("COA") from a district judge or circuit judge. 28
25 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). A judge should either grant the COA or state reasons
26 why it should not issue, and the COA request should be decided by a district court in the first instance.
27 Fed. R. App. P. 22(b)(1); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

28 The applicant for a COA must make a "substantial showing of the denial of a constitutional

1 right.” 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529
2 U.S. 473, 483 (2000). A “substantial showing” is defined as a demonstration (1) that the issues are
3 debatable among jurists of reason; (2) that a court could resolve the issues differently; or (3) that issues
4 are adequate to deserve encouragement to proceed further. *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4
5 (1983); *see Slack*, 529 U.S. at 483-84 (stating that except for substituting the word “constitutional” for
6 the word “federal,” § 2253 codified the pre-AEDPA standard announced in *Barefoot v. Estelle*).

7 Where, as present here, a district court has rejected constitutional claims on their merits, the COA
8 standard is straightforward. “The petitioner must demonstrate that reasonable jurists would find the
9 district court’s assessment of the constitutional claims debatable or wrong.” *Slack*, 529 U.S. at 484. The
10 Court has reviewed the record of this case and finds that reasonable jurists would not find the Court’s
11 assessment of the constitutional claims debatable or wrong. On the merits of this case, reasonable jurists
12 would not debate the constitutionality of Petitioner’s conviction and sentence. Accordingly, the Court
13 declines to issue a certificate of appealability.

14 **CONCLUSION AND ORDER**

15 For the reasons discussed above, the Court DENIES the Petition for Writ of Habeas Corpus with
16 prejudice and DECLINES the issuance of a certificate of appealability. The Clerk of Court is
17 ORDERED to enter Judgment for Respondent and to close Case No. CV F 07-01429 LJO WMW HC.
18

19 IT IS SO ORDERED.

20 **Dated: February 19, 2009**

21 /s/ Lawrence J. O'Neill
22 UNITED STATES DISTRICT JUDGE
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