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

DAVID ALLEN NICHOLS,

Petitioner,

No. 2:11-cv-368-GEB-EFB P

vs.

WILLIAM KNIPP,

Respondent.

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner without counsel proceeding with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a 2007 judgment of conviction entered against him in the Placer County Superior Court for failure to register as a sex offender. In his petition before this court he raises ten grounds for federal habeas relief. Upon careful consideration of the record and the applicable law, it is recommended that petitioner’s application be denied.

I. Background¹

This case presented a simple factual question for the jury to resolve – did defendant David Allen Nichols, a convicted sex offender required to register under former Penal Code section 290,

¹ In its partially published opinion affirming petitioner’s judgment of conviction on appeal, the California Court of Appeal for the Third Appellate District provided the following factual summary.

1 register with the Rocklin Police Department within five days of
2 moving out of Rocklin? The jury determined he did not, in
3 violation of former Penal Code section 290, subdivision (f)(1).²
(See current §290.013, subd. (a).)

4 The jury also determined, however, that defendant had previously
5 been convicted of three felonies and found true the allegation that
6 these felonies constituted serious felonies within the meaning of
7 the “Three Strikes” law. (§§ 1170.12, subds. (a)-(d); 667, subd.
8 (b)-(I).) In addition, the trial court determined defendant had
9 served three prior prison terms within the meaning of section
10 667.5, subdivision (b).

11 The trial court denied defendant's motion to strike his prior “strike”
12 convictions, and it sentenced him to a prison term of 28 years to
13 life: 25 years to life on the failure to register, plus one year for
14 each of the prior prison terms.

15 * * *

16 Testifying at trial, defendant admitted three prior felony
17 convictions. He was convicted in 1978 in Oregon of robbery; in
18 1982 of armed bank robbery, a federal offense; and in 1996 in
19 Humboldt County of forcible oral copulation in violation of section
20 288a. Defendant committed this last offense in 1994 while he was
21 on federal parole.

22 Defendant knew he was required to register under section 290 as a
23 result of his sex offense conviction. Indeed, when asked if he was
24 aware of his requirement to register, defendant replied, “Yes,
25 pretty deeply actually.” After completing his state prison sentence
26 on the sex crime, he served four more years in prison due to the
federal parole violation. During this incarceration and while
serving as the head education clerk, he helped assemble a database
of resources inmates could use upon their release. As part of this
process, he specifically researched the registration requirements
imposed on him under California law. He knew he had to register
each time he moved.³

21 ² All subsequent undesignated references to sections are to the Penal Code.

22 ³ At the time of defendant's actions here, former section 290 required defendant to
23 register with the chief of police of the city where he was residing within five working days of
24 moving into the city. (Former § 290, subd. (a)(1)(A); Stats.2004, ch. 761, § 1.3.) If he moved
25 out of that city, he had to notify his former city's police chief of his new address within five
26 working days, as well as register with the police chief of his new city. (Former § 290, subd.
(f)(1); Stats.2004, ch. 761, § 1.3.) If he became transient, he had five working days within which
to register in the jurisdiction in which he was present on the fifth day, and he had to register once
every 30 days in whatever jurisdiction where he was present. (Former § 290, subd. (a)(1)(C)(I);

1 Defendant was released from custody in November 2004. Dayna
2 Ward, a federal parole officer, supervised defendant. She had
3 supervised him briefly in 1994 when he was first placed on federal
4 parole. She met with defendant upon his release from state prison
5 in 2004 and reviewed with him a notice of requirements for sex
6 offender registration. Defendant signed the form, and Officer
7 Ward directed him to register within five days.

8
9 Officer Ward also reviewed with defendant his conditions of
10 parole. One of those conditions required defendant to notify his
11 parole officer within two days of any change of his residence.
12 Another condition prohibited defendant from leaving or moving
13 out of the boundaries of the federal judicial Eastern District of
14 California without prior approval from a parole officer.

15
16 In December 2004, upon his release from custody, defendant
17 registered in Sacramento, the city where he lived. He registered
18 again in Sacramento on January 24, 2005, upon changing his
19 address. He registered in Sacramento a third time upon his
20 birthday, February 15, 2005, as required by former section 290.

21
22 In early March 2005, defendant moved to a new residence on
23 Aitken Dairy Road in Rocklin. He leased his Rocklin residence
24 along with five other tenants: Eliza Edwards; defendant's business
25 partner, Jim Dresser; a Russian couple; and the homeowner's
26 father.

Upon moving to Rocklin, defendant registered with the Rocklin
Police Department. He also informed Officer Ward of his new
address. (There was no record, however, that he notified the
Sacramento Police Department of his move to Rocklin. Defendant
was not charged with this omission.)

In early April 2005, defendant left the Eastern District without
permission from his parole officer and he moved out of the
Rocklin house. On or about April 4, defendant told cotenant
Edwards he had had an altercation with Dresser, and he asked if
she would take care of his cat. He said he had to go and that he
would be back. She heard him leave on his motorcycle. She never
saw him again at the house.

Defendant testified that he drove to Big Sur, looked at the ocean,
and then decided to go back. On April 7, 2005, he went into the
parole office to speak with Officer Ward. She was on vacation, so
he met with her supervisor, Officer Richard Ertola. He told
Officer Ertola he had left the district on April 4. Officer Ertola

25 Stats.2004, ch. 761, § 1.3.) Defendant also had to register annually within five working days of
26 his birthday, regardless of where he was living. (Former § 290, subd. (a)(1)(C)(iii), (a)(1)(D);
Stats.2004, ch. 761, § 1.3.)

1 took the violation under advisement, and he told defendant to
2 contact Officer Ward on April 18.

3 However, defendant testified that after meeting with Officer
4 Ertola, he got on his motorcycle and left. He never went back to
5 Rocklin. He also had no further contact with Officer Ward.

6 Defendant drifted around the country, attending shows and
7 festivals, and "hiding out with the hippies." He was arrested on
8 December 31, 2005, in San Francisco. He gave a false name to the
9 police when he was arrested because, he said, he knew he had
10 violated his parole.

11 The factual dispute at trial, which the jury decided against
12 defendant, centered on whether defendant complied with his
13 section 290 registration requirements when he "moved" from his
14 Rocklin residence. Clerks from the Rocklin Police Department
15 identified defendant's registration dated March 14, 2005, which
16 defendant filed when he moved to Rocklin. One of the clerks who
17 reviewed defendant's registration that day, Deeann Ralphs, noticed
18 he had not provided any information about vehicles he owned.
19 Defendant said he did not own any, so she wrote "NA" on the
20 form. She would not have written NA unless he had told her he
21 did not own any vehicles.

22 Ralphs, who was the police department's custodian of records, said
23 defendant did not register again with the Rocklin police
24 department because there were no additional registration forms in
25 the file. Defendant had submitted a copy of his lease for the Aitkin
26 Dairy Road residence, but there were no records in the file
indicating defendant had changed his address after March 14,
2005.

Defendant, however, testified he returned to the Rocklin police
department twice after registering there on March 14, both times in
response to the clerks' request that he provide proof of his
residence and vehicle information. On the first occasion, he went
in without an appointment to drop off a copy of his lease
agreement.

The second occasion occurred in April right before he left for Big
Sur. He claimed that on this visit, he completed a form to provide
the department with the vehicle identification number from his
motorcycle. Where the form asked for his address, defendant
wrote his Aitkin Dairy Road address and then wrote the words "in
transit" after it. He gave the completed form to a clerk and left.
He did not receive a copy of the form. It was defendant's
understanding that writing the word "transit" on the form satisfied
his obligation to inform the police department of his move out of
Rocklin since he did not know where he would be living and he
would be transient.

1 On the prosecution's rebuttal, department clerk Ralphs testified
2 that a registrant who is moving and is going to become transient
3 must note that information on a form. She also stated that
4 registrants always receive a copy of their completed registration
forms. The two other clerks who worked for the department
testified they had not processed any paperwork for defendant
regarding his move out of Rocklin.

5 Resp't's Lodg. Doc. 4 (Opinion) at 2-8.

6 After the California Court of Appeal affirmed petitioner's judgment of conviction, he
7 filed a petition for review in the California Supreme Court in which he raised all of the claims
8 contained in the petition before this court.⁴ Resp't's Lodg. Doc. 5 (Pet. for Review). That
9 petition was summarily denied. Resp't's Lodg. Doc. 6.

10 **II. Analysis**

11 **A. Standards for a Writ of Habeas Corpus**

12 An application for a writ of habeas corpus by a person in custody under a judgment of a
13 state court can be granted only for violations of the Constitution or laws of the United States. 28
14 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or
15 application of state law. *See Wilson v. Corcoran*, 562 U.S. ___, ___, 131 S. Ct. 13, 16 (2010);
16 *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Park v. California*, 202 F.3d 1146, 1149 (9th Cir.
17 2000).

18 Title 28 U.S.C. § 2254(d) sets forth the following standards for granting federal habeas
19 corpus relief:

20 An application for a writ of habeas corpus on behalf of a
21 person in custody pursuant to the judgment of a State court shall
22 not be granted with respect to any claim that was adjudicated on
the merits in State court proceedings unless the adjudication of the

23 ⁴ In the instant petition, petitioner raises a claim of ineffective assistance of trial counsel
24 but notes that the claim has not been exhausted in state court. Pet. at 5. Petitioner's motion for a
25 stay of these proceedings in order to exhaust his claim of ineffective assistance of counsel was
26 denied and petitioner did not renew his motion for a stay. Accordingly, petitioner's claim of
ineffective assistance of counsel is not properly before the court and petitioner is not entitled to
relief on any such claim. *See* 28 U.S.C. § 2254(b)(1) (an application for a writ of habeas corpus
shall not be granted unless the petitioner has exhausted the remedies available in state court).

1 claim -

2 (1) resulted in a decision that was contrary to, or involved
3 an unreasonable application of, clearly established Federal law, as
4 determined by the Supreme Court of the United States; or

5 (2) resulted in a decision that was based on an unreasonable
6 determination of the facts in light of the evidence presented in the
7 State court proceeding.

8 For purposes of applying § 2254(d)(1), “clearly established federal law” consists of
9 holdings of the United States Supreme Court at the time of the state court decision. *Stanley v.*
10 *Cullen*, 633 F.3d 852, 859 (9th Cir. 2011) (citing *Williams v. Taylor*, 529 U.S. 362, 405-06
11 (2000)). Nonetheless, “circuit court precedent may be persuasive in determining what law is
12 clearly established and whether a state court applied that law unreasonably.” *Stanley*, 633 F.3d
13 at 859 (quoting *Maxwell v. Roe*, 606 F.3d 561, 567 (9th Cir. 2010)).

14 A state court decision is “contrary to” clearly established federal law if it applies a rule
15 contradicting a holding of the Supreme Court or reaches a result different from Supreme Court
16 precedent on “materially indistinguishable” facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003).
17 Under the “unreasonable application” clause of § 2254(d)(1), a federal habeas court may grant
18 the writ if the state court identifies the correct governing legal principle from the Supreme
19 Court’s decisions, but unreasonably applies that principle to the facts of the prisoner’s case.⁵
20 *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *Williams*, 529 U.S. at 413; *Chia v. Cambra*, 360
21 F.3d 997, 1002 (9th Cir. 2004). In this regard, a federal habeas court “may not issue the writ
22 simply because that court concludes in its independent judgment that the relevant state-court
23 decision applied clearly established federal law erroneously or incorrectly. Rather, that
24 application must also be unreasonable.” *Williams*, 529 U.S. at 412. *See also Schriro v.*
25 *Landrigan*, 550 U.S. 465, 473 (2007); *Lockyer*, 538 U.S. at 75 (it is “not enough that a federal

26 ⁵ Under § 2254(d)(2), a state court decision based on a factual determination is not to be
overturned on factual grounds unless it is “objectively unreasonable in light of the evidence
presented in the state court proceeding.” *Stanley*, 633 F.3d at 859 (quoting *Davis v. Woodford*,
384 F.3d 628, 638 (9th Cir. 2004)).

1 habeas court, in its independent review of the legal question, is left with a ‘firm conviction’ that
2 the state court was ‘erroneous.’”). “A state court’s determination that a claim lacks merit
3 precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness
4 of the state court’s decision.” *Harrington v. Richter*, 562 U.S.____,____,131 S. Ct. 770, 786
5 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Accordingly, “[a]s a
6 condition for obtaining habeas corpus from a federal court, a state prisoner must show that the
7 state court’s ruling on the claim being presented in federal court was so lacking in justification
8 that there was an error well understood and comprehended in existing law beyond any possibility
9 for fairminded disagreement.” *Harrington*,131 S. Ct. at 786-87.

10 If the state court’s decision does not meet the criteria set forth in § 2254(d), a reviewing
11 court must conduct a de novo review of a habeas petitioner’s claims. *Delgadillo v. Woodford*,
12 527 F.3d 919, 925 (9th Cir. 2008); *see also Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008)
13 (en banc) (“[I]t is now clear both that we may not grant habeas relief simply because of §
14 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by
15 considering de novo the constitutional issues raised.”).

16 The court looks to the last reasoned state court decision as the basis for the state court
17 judgment. *Stanley*, 633 F.3d at 859; *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004).
18 If the last reasoned state court decision adopts or substantially incorporates the reasoning from a
19 previous state court decision, this court may consider both decisions to ascertain the reasoning of
20 the last decision. *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). “When
21 a federal claim has been presented to a state court and the state court has denied relief, it may be
22 presumed that the state court adjudicated the claim on the merits in the absence of any indication
23 or state-law procedural principles to the contrary.” *Harrington*, 131 S. Ct. at 784-85. This
24 presumption may be overcome by a showing “there is reason to think some other explanation for
25 the state court’s decision is more likely.” *Id.* at 785 (citing *Ylst v. Nunnemaker*, 501 U.S. 797,
26 803 (1991)). Where the state court reaches a decision on the merits but provides no reasoning to

1 support its conclusion, a federal habeas court independently reviews the record to determine
2 whether habeas corpus relief is available under § 2254(d). *Stanley*, 633 F.3d at 860; *Himes v.*
3 *Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). “Independent review of the record is not de novo
4 review of the constitutional issue, but rather, the only method by which we can determine
5 whether a silent state court decision is objectively unreasonable.” *Himes*, 336 F.3d at 853.
6 Where no reasoned decision is available, the habeas petitioner still has the burden of “showing
7 there was no reasonable basis for the state court to deny relief.” *Harrington*, 131 S. Ct. at 784.

8 When it is clear, however, that a state court has not reached the merits of a petitioner’s
9 claim, the deferential standard set forth in 28 U.S.C. § 2254(d) does not apply and a federal
10 habeas court must review the claim de novo. *Stanley*, 633 F.3d at 860; *Reynoso v. Giurbino*, 462
11 F.3d 1099, 1109 (9th Cir. 2006); *Nulph v. Cook*, 333 F.3d 1052, 1056 (9th Cir. 2003).⁶

12 **B. Petitioner’s Claims**

13 **1. Erroneous Admission of Evidence**

14 In his first ground for relief, petitioner claims that the trial court violated his right to due
15 process when it admitted “excessive, inflammatory and irrelevant” evidence at his trial. ECF
16 No. 1 (Pet.) at 4. Specifically, he argues that the trial court improperly admitted evidence, or
17 allowed evidence to be “leaked,” of his “anti-social history,” which “misabeled [him] as ‘child
18 molester’ talked about parole violations for absconding, etc – creating a bad and malignant
19 ‘character’ which the jury reacted to.” *Id.*; Pet. for Review at 6.

20 The California Court of Appeal denied petitioner’s claim regarding the erroneous
21 admission of inflammatory evidence, reasoning as follows:

22 *Admission of Excessive and Inflammatory Evidence*

23 Defendant claims he suffered a denial of due process when the trial
24 court admitted excessive, inflammatory, or propensity evidence.

25 ⁶ The United States Supreme Court has recently granted certiorari in a case apparently to
26 consider this issue. See *Williams v. Cavazos*, 646 F.3d 626, 639-41 (9th Cir. 2011), cert. granted
in part, ___ U.S. ___, 132 S. Ct. 1088 (2012).

1 He specifically targets: (1) the parole officers' testimony regarding
2 their explaining the registration requirements to him, disclosing his
3 parole status to the jury, and testifying that he absconded from
4 parole; (2) the court's failure to sanitize a certification of
5 registration prepared by the Department of Justice and admitted
6 into evidence that disclosed his underlying sex conviction as
7 possibly being an act against a minor; (3) the court's refusal to
8 admit evidence that defendant's listing in a public data base as a
9 child molester was error; and (4) the court's denial of his motion
10 for a mistrial due to Dresser's statement while on the stand that he
11 had received death threats after changing the locks at the house.
12 Defendant also claims these errors were cumulative. We review
13 each contention.

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A. *Parole officers' testimony*

Defendant claims the testimony of Officers Ward and Ertola was excessive, prejudicial, and improperly used to establish propensity. He asserts their testimony was not needed to show his knowledge of the registration requirements or that he left Rocklin, as those elements were established by clerks from the Rocklin Police Department and his former roommates. Also, the officers' titles as parole officers and their official forms could have been sanitized. Using the federal parole violation to show he left Rocklin was, in his words, "prejudicial overkill."

To prove a violation of section 290, the prosecutor had to establish, among other points, that defendant actually knew he was required to register within five days of his move out of his Rocklin residence. (Former § 290, subd. (b).) Officer Ward's testimony that she informed him of his registration requirements was relevant to establishing this element. That the Rocklin Police Department clerk also gave defendant a form with the same information on it the following year did not render Officer Ward's testimony cumulative. Both witnesses' testimony was relevant to establishing actual knowledge.

The prosecutor also had to establish that defendant moved from Rocklin. Officer Ertola's testimony that defendant told him he left Rocklin with the intent not to return was relevant to establishing this element. Although this was an admission by defendant of absconding from parole, it was not unduly prejudicial, as its probative value outweighed any prejudicial impact it may have had on the jury. As the trial court noted, if defendant absconded from parole, he could not argue that he did not change his address.

Defendant also faults this evidence because the prosecutor allegedly used it to argue propensity, i.e., that defendant's willingness to violate parole makes his assertion of complying with registration requirements unbelievable. We will address this argument below as one of prosecutorial misconduct.

1 detached conversation previously admitted into evidence
2 understood. As the issue at trial was defendant's credibility,
3 defendant asserts he was entitled to introduce the remainder of
4 Officer Ertola's conversation with him in order to blunt the
5 implication that he was a child molester, and to explain that he left
6 town for substantial reasons and not due to criminal propensity.

7 Due to the court's sustaining of the objection, there was no
8 implication to blunt. Officer Ertola said nothing that implied
9 defendant was a child molester. The court did not err in sustaining
10 the objection.

11 Assuming for purposes of argument only that the evidence should
12 have been admitted, we would find defendant suffered no
13 prejudice from the trial court's upholding the objection. Instead of
14 hearing defendant's statements on this issue through Officer
15 Ertola's testimony, the jury heard the same evidence directly from
16 defendant when he testified, and it still found him guilty.

17 Defendant explained to the jury what caused him to leave the
18 district. When he arrived at work in late March, his cubicle was
19 plastered with posters of his listing on Megan's List as a child
20 offender. His sex offense had originally been mislabeled as one
21 against a child, when in fact it was not. This and other factors led
22 him to abscond. He explained all of these problems to Officer
23 Ertola when he returned.

24 Thus, the jury heard the same evidence the court would not allow
25 Officer Ertola to discuss, and it nonetheless convicted defendant.
26 The court committed no prejudicial error by sustaining the
objection to defendant's question to Officer Ertola.

17 *D. Denial of motion for mistrial*

18 Defendant argues the trial court erred when it denied his motion
19 for a mistrial based on a statement defendant's former business
20 partner and roommate, Jim Dresser, made during his testimony at
21 trial. We disagree.

22 Prior to trial, the prosecutor stated he would not delve into details
23 of a personal conflict between defendant and Dresser, and the trial
24 court so ordered. During trial, the prosecutor asked Dresser if
25 defendant at some point stopped living at the Aitkin Dairy Road
26 residence. The dialog continued:

24 "A. Yes. I believe it was around the 15th of April.

25 "Q. And how do you know that he stopped living there?

26 "A. Because we changed the lock on the doors, and I tried to file a
police report and eventually – I started to get some death threats

1 and I tried to –

2 “[DEFENSE COUNSEL]: Objection.

3 “THE COURT: Sustained.

4 “[THE PROSECUTOR]: I don’t want to go into any of that. I am
5 just trying to understand time lines.

6 “A. Right.”

7 Minutes later and outside the jury’s presence, defense counsel
8 moved for a mistrial, claiming Dresser’s reference to death threats
9 implicated defendant and prejudiced the jury.

10 The trial court denied the motion but it offered to strike the
11 testimony at defense counsel’s request. Counsel refused. That
12 discussion went as follows:

13 “THE COURT: Well, first of all, I don’t know that [Dresser’s
14 testimony] was a clear inference that it was the responsibility of
15 [defendant]. The testimony stands on its own. I didn’t get that
16 impression necessarily. The objection was made, which I
17 sustained. There was no request to strike the answer. I can strike
18 the answer later on it you wish to do so in front of the jury. [¶]
19 From a tactical standpoint, I take it you wanted to simply object
20 and I sustained the objection. If you want me to go back and tell
21 the jury to forget that part of the testimony of Mr. Dresser which
22 dealt with death threats, I will do that, but that is a tactical decision
23 you have to make as to whether or not you want to emphasize it.

24 “[DEFENSE COUNSEL]: I am not going to punctuate it any
25 more.

26 “THE COURT: I understand, and however it does appear that Mr.
Dresser was acting on his own when he blurted out that statement.
So – but I find it not harmful. So I am going to deny the request
for mistrial.

The court did not abuse its discretion in denying the motion for
mistrial. It reasonably concluded Dresser’s comment did not cause
incurable prejudice. The comment was not expressly referenced
towards defendant. It is not clear the jury would have interpreted
it as referencing defendant. The court sustained the objection, and
it offered to strike the comment and to admonish the jury to
disregard it. Defendant rejected that option. The trial court did not
abuse its discretion in denying the motion under these
circumstances.

1 As set forth above, petitioner claims that the trial court violated his right to due process
2 when it admitted into evidence the testimony of parole officers Ward and Ertola and the
3 unredacted copy of the Department of Justice’s certification of his registration history, and when
4 it refused to grant his motion for mistrial after Jim Dresser testified about receiving death threats.

5 A writ of habeas corpus will be granted for an erroneous admission of evidence “only
6 where the ‘testimony is almost entirely unreliable and . . . the factfinder and the adversary
7 system will not be competent to uncover, recognize, and take due account of its shortcomings.’”
8 *Mancuso v. Olivarez*, 292 F.3d 939, 956 (9th Cir. 2002) (quoting *Barefoot v. Estelle*, 463 U.S.
9 880, 899 (1983)). Evidence violates due process only if “there are no permissible inferences the
10 jury may draw from the evidence.” *Jammal*, 926 F.2d at 920. Evidence must “be of such quality
11 as necessarily prevents a fair trial.” *Id.* (quoting *Kealohapauole v. Shimoda*, 800 F.2d 1463 (9th
12 Cir. 1986)).

13 Even so, as the Ninth Circuit has observed:

14 The Supreme Court has made very few rulings regarding the
15 admission of evidence as a violation of due process. Although the
16 Court has been clear that a writ should be issued when
17 constitutional errors have rendered the trial fundamentally unfair
(citation omitted), it has not yet made a clear ruling that admission
of irrelevant or overtly prejudicial evidence constitutes a due
process violation sufficient to warrant issuance of the writ

18 *Holley*, 568 F.3d at 1101. Therefore, “under AEDPA, even clearly erroneous admissions of
19 evidence that render a trial fundamentally unfair may not permit the grant of federal habeas
20 corpus relief if not forbidden by ‘clearly established Federal law,’ as laid out by the Supreme
21 Court.” *Id.* See also *Greel v. Martel*, No. 10-16847, 472 Fed.Appx. 503, 504, 2012 WL 907215,
22 *1 (9th Cir. Mar. 19, 2012) (“There is likewise no clearly established federal law that admitting
23 prejudicial evidence violates due process.”).

24 According to these authorities, the state court’s rejection of petitioner’s claim that the
25 trial court violated his right to due process in allowing the admission of overly prejudicial
26 information does not support habeas relief under AEDPA. The admission of testimony from

1 parole officers Ward and Ertola, the admission of the unredacted certification of registration, and
2 Jim Dresser’s testimony about death threats did not violate any clearly established federal law.
3 Nor has petitioner demonstrated that the admission of the challenged evidence rendered his trial
4 fundamentally unfair. The evidence was not “entirely unreliable” and the jury was certainly
5 “competent to uncover, recognize, and take due account of its shortcomings.” *Mancuso*, 292
6 F.3d at 956. This court also notes that the testimony of officers Ward and Ertola and the
7 certification of registration were relevant to demonstrate elements the prosecution was required
8 to prove in order to support a guilty finding on the charges against petitioner. These were
9 “permissible inferences the jury may draw from the evidence.” *Jammal*, 926 F.2d at 920.

10 Petitioner also claims that the trial court violated his right to due process by preventing
11 Officer Ertola from answering the question whether petitioner was upset because his name had
12 appeared on a “Megan’s Law” list of child molesters. He argues that the trial court’s exclusion
13 of Officer Ertola’s answer prevented him from explaining to the jury that he was not a child
14 molester. The United States Supreme Court has not “squarely addressed” whether a state court’s
15 exercise of discretion to exclude testimony violates a criminal defendant’s right to present
16 relevant evidence. *Moses v. Payne*, 555 F.3d 742, 758-59 (9th Cir. 2009). Accordingly, the
17 decision of the California Court of Appeal upholding the trial court’s evidentiary ruling is not
18 contrary to or an unreasonable application of clearly established United States Supreme Court
19 precedent and may not be set aside. *Id.* See *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (per
20 curiam) (relief is “unauthorized” under Section 2254(d)(1) when the Supreme Court’s decisions
21 “given no clear answer to the question presented, let alone one in [the petitioner’s] favor,”
22 because the state court cannot be said to have unreasonably applied clearly established Federal
23 law). See also *Anguiano v. Morales*, No. C 98-4751 SI(PR), 2000 WL 630870 at *9 (N.D. Cal.
24 May 2, 2000) (trial court’s exercise of discretion under Cal. Evid. Code § 1252 to exclude
25 untrustworthy evidence did not violate defendant’s right to present a defense).

26 ////

1 In any event, as noted by the California Court of Appeal, petitioner explained to the jury
2 that he left the district because his coworkers thought he had been convicted of child
3 molestation, when in fact his crime had been perpetrated against an adult. Opinion at 12.
4 Petitioner himself provided the testimony that Officer Ertola would have given had the
5 prosecutor's objection not been sustained. Therefore, even assuming *arguendo* that the trial
6 court's sustaining of the prosecutor's objection was constitutional error, the error could not have
7 had a "substantial and injurious effect or influence in determining the jury's verdict" under the
8 circumstances of this case. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

9 For all of the foregoing reasons, the decision of the California Court of Appeal rejecting
10 petitioner's claims of evidentiary error was not contrary to or an unreasonable application of
11 clearly established Federal law. Accordingly, petitioner is not entitled to relief on these claims.

12 **2. Prosecutorial Misconduct**

13 In his next ground for relief, petitioner claims that the prosecutor committed misconduct
14 during his closing argument when he improperly "constructed an image of [petitioner] that was
15 unfairly malignant and ugly and evil." Pet. at 4; Pet. for Review at 9-10.

16 The California Court of Appeal denied this claim, reasoning as follows:

17 Defendant claims the prosecutor committed misconduct in his
18 closing argument. He asserts the prosecutor unlawfully argued
19 that defendant's prior acts of absconding from parole and failing to
20 register in Sacramento when he moved to Rocklin demonstrated
21 that defendant failed to register when he left Rocklin. Defendant
22 raised no objection to the prosecutor's argument at trial. His
23 failure to object and seek an admonition forfeits his claim here.
(*People v. Wash* (1993) 6 Cal.4th 215, 265.)

22 Even were we to consider the claim on its merits or as a claim of
23 ineffective assistance of counsel, we would conclude the
24 prosecutor did not commit misconduct and the defendant suffered
25 no prejudice. It is clear from the record that the prosecutor was not
26 arguing propensity. He was arguing credibility. He informed the
jury to consider very carefully defendant's credibility, because "it
is the only evidence in this case that supports a finding of not
guilty. It's the only evidence. It stands completely alone."

1 The prosecutor spent the rest of his argument talking about
2 credibility. As part of that argument, the prosecutor stated the
3 circumstantial evidence showed defendant was not being truthful
4 in his testimony. Defendant had “a very strong motive to leave
5 Rocklin, to get out of there,” the prosecutor said. “Things were
6 not going well. People were accusing him of being some kind of
7 pervert. That’s not my word, but his. People were accusing him
8 and the business wasn’t going well, and he takes off, despite the
9 federal parole. Off he goes. Yet he wants us to believe that the
10 290 law is something that he holds sacred.” The prosecutor did not
11 argue in this statement that because defendant had violated parole,
12 he therefore failed to register. Rather, the prosecutor argued the
13 parole violation went to defendant’s credibility. That argument is
14 not misconduct.

15 The prosecutor made a similar argument regarding defendant’s
16 apparent failure to register with Sacramento upon his move to
17 Rocklin. The prosecutor stated defendant’s past was relevant to
18 determining whether defendant was telling the truth in this trial.
19 Emphasizing that point, the prosecutor asked rhetorically whether
20 defendant, who claimed to follow section 290 rigorously, thought
21 it more important to register in April when he left Rocklin than in
22 March when he left Sacramento. Again, this point did not go to
23 propensity. It challenged the credibility of defendant’s claim that
24 he registered in April when he left Rocklin. The prosecutor did
25 not commit misconduct in his closing argument.

26 Opinion at 15-17.

As set forth above, the California Court of Appeal concluded that petitioner’s claim of prosecutorial misconduct was waived because of petitioner’s failure to object to the prosecutor’s closing argument at the time it was made. Respondent argues that the state court’s finding of waiver constitutes a state procedural bar precluding this court from addressing the merits of this claim. ECF No. 28 (Answer) at 18-19.

State courts may decline to review a claim based on a procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977). As a general rule, a federal habeas court “will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). The state rule is only “adequate” if it is “firmly

1 established and regularly followed.” *Id.* (quoting *Ford v. Georgia*, 498 U.S. 411, 424 (1991));
2 *Bennett v. Mueller*, 322 F.3d 573, 583 (9th Cir. 2003) (“[t]o be deemed adequate, the state law
3 ground for decision must be well-established and consistently applied.”) The state rule must also
4 be “independent” in that it is not “interwoven with the federal law.” *Park v. California*, 202
5 F.3d 1146, 1152 (9th Cir. 2000) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)).
6 Even if the state rule is independent and adequate, the claims may be heard if the petitioner can
7 show: (1) cause for the default and actual prejudice as a result of the alleged violation of federal
8 law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice.
9 *Coleman*, 501 U.S. at 749-50.

10 Respondent has met his burden of adequately pleading an independent and adequate state
11 procedural ground as an affirmative defense. *See Bennett*, 322 F.3d at 586. Petitioner does not
12 deny that his trial counsel did not raise a contemporaneous objection to the prosecutor’s closing
13 argument. Although the state appellate court addressed petitioner’s claim on the merits, it also
14 expressly held that the claim was waived on appeal because of defense counsel’s failure to
15 object. Petitioner has failed to meet his burden of asserting specific factual allegations that
16 demonstrate the inadequacy of California’s contemporaneous-objection rule as unclear,
17 inconsistently applied or not well-established, either as a general rule or as applied to him.
18 *Bennett* 322 F.3d at 586; *Melendez v. Pliler*, 288 F.3d 1120, 1124-26 (9th Cir. 2002).

19 Petitioner’s claim of prosecutorial misconduct therefore appear to be procedurally barred. *See*
20 *Coleman*, 501 U.S. at 747; *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *Fairbank v. Ayers*,
21 650 F.3d 1243, 1246-47 (9th Cir. 2011) (“We have held that California consistently applies its
22 contemporaneous objection rule when a party fails to object to the admission of evidence”);
23 *Paulino v. Castro*, 371 F.3d 1083, 1092-93 (9th Cir. 2004). Petitioner has also failed to
24 demonstrate that there was cause for his procedural default or that a miscarriage of justice would

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1 result absent review of the claim by this court. *See Coleman*, 501 U.S. at 748; *Vansickel v.*
2 *White*, 166 F.3d 953, 957-58 (9th Cir. 1999). However, for the reasons discussed below, even if
3 this claim was not procedurally barred, it lacks merit and should be denied.

4 A defendant's due process rights are violated when a prosecutor's misconduct renders a
5 trial fundamentally unfair. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Prosecutorial
6 misconduct violates due process when it has a substantial and injurious effect or influence in
7 determining the jury's verdict. *See Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996).
8 In considering claims of prosecutorial misconduct involving allegations of improper argument
9 the court must examine the likely effect of the statements in the context in which they were made
10 and determine whether the comments so infected the trial with unfairness as to make the
11 resulting conviction a denial of due process. *Turner v. Calderon*, 281 F.3d 851, 868 (9th Cir.
12 2002); *Sandoval v. Calderon*, 241 F.3d 765, 778 (9th Cir. 2001); *see also Donnelly v.*
13 *DeChristoforo*, 416 U.S. 637, 643 (1974); *Darden*, 477 U.S. at 181-83. In fashioning closing
14 arguments, prosecutors are allowed "reasonably wide latitude," *United States v. Birges*, 723 F.2d
15 666, 671-72 (9th Cir. 1984), and are free to argue "reasonable inferences from the evidence."
16 *United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989). *See also Duckett v. Godinez*, 67
17 F.3d 734, 742 (9th Cir. 1995). However, prosecutors "may not, of course, employ argument
18 which could be fairly characterized as foul or unfair." *United States v. Gorostiza*, 468 F.2d 915,
19 916 (9th Cir. 1972).

20 This court agrees with the conclusion of the California Court of Appeal that any
21 misconduct by the prosecutor that occurred in connection with his closing argument was
22 harmless. The prosecutor's remarks were designed to support his argument that petitioner lacked
23 credibility when he stated he rigorously followed the requirements of California's registration
24 law. Viewed in the context in which they were made, the prosecutor's remarks did not portray
25 petitioner as "unfairly malignant and ugly and evil," as petitioner argues. Pet. at 4. The
26 prosecutor's closing argument was not prejudicial to the point of denying petitioner a fair trial.

1 *Darden*, 477 U.S. at 181; *Turner*, 281 F.3d at 868; *Rodrigues*, 159 F.3d at 449-51; *Williams*, 139
2 F.3d at 745. *Cf. Dubria v. Smith*, 224 F.3d 995, 1004 (9th Cir. 2000) (prosecutor’s reference to
3 defense argument as “a piece of garbage” and defendant as “a liar” not improper); *Williams*, 139
4 F.3d at 744-45 (prosecutor’s reference to defense argument as “trash” not improper).
5 Accordingly, petitioner is not entitled to relief on his claim of prosecutorial misconduct.

6 **3. Cumulative Error**

7 In his next ground for relief, petitioner claims that the cumulative effect of the errors
8 described in grounds one and two, discussed above, deprived him of his right to a fair trial. Pet.
9 at 5. The California Court of Appeal denied this claim, reasoning that “because we find the
10 court did not commit prejudicial error, there is no cumulative error from these evidentiary
11 matters.” Opinion at 15.

12 The United States Court of Appeals for the Ninth Circuit has concluded that under clearly
13 established United States Supreme Court precedent, the combined effect of multiple trial errors
14 may give rise to a due process violation if it renders a trial fundamentally unfair, even where
15 each error considered individually would not require reversal. *Parle v. Runnels*, 505 F.3d 922,
16 927 (9th Cir. 2007) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) and *Chambers*
17 *v. Mississippi*, 410 U.S. 284, 290 (1973)). *See also Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir.
18 2011) (if no error of constitutional magnitude occurred at trial, “no cumulative prejudice is
19 possible”). “The fundamental question in determining whether the combined effect of trial
20 errors violated a defendant’s due process rights is whether the errors rendered the criminal
21 defense ‘far less persuasive,’ *Chambers*, 410 U.S. at 294, and thereby had a ‘substantial and
22 injurious effect or influence’ on the jury’s verdict.” *Parle*, 505 F.3d at 927 (quoting *Brecht*, 507
23 U.S. at 637).

24 This court has addressed petitioner’s claims raised in grounds one and two and has
25 concluded that no error of constitutional magnitude occurred. This court also concludes that the
26 alleged errors, even when considered together, did not render petitioner’s defense “far less

1 persuasive,” or have a “substantial and injurious effect or influence on the jury’s verdict.”

2 Accordingly, petitioner is not entitled to relief on his claim of cumulative error.

3 **4. Jury Instruction Error**

4 Petitioner raises several claims of jury instruction error. After setting forth the applicable
5 legal principles, the court will address these claims in turn below.

6 **a. Legal Standards**

7 In general, a challenge to jury instructions does not state a federal constitutional claim.
8 *Engle v. Isaac*, 456 U.S. 107, 119 (1982)); *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir.
9 1983). In order to warrant federal habeas relief, a challenged jury instruction “cannot be merely
10 ‘undesirable, erroneous, or even “universally condemned,”’ but must violate some due process
11 right guaranteed by the fourteenth amendment.” *Cupp v. Naughten*, 414 U.S. 141, 146 (1973).
12 To prevail on such a claim petitioner must demonstrate “that an erroneous instruction ‘so
13 infected the entire trial that the resulting conviction violates due process.’” *Prantil v. State of*
14 *Cal.*, 843 F.2d 314, 317 (9th Cir. 1988) (quoting *Darnell v. Swinney*, 823 F.2d 299, 301 (9th Cir.
15 1987)). In making its determination, this court must evaluate the challenged jury instructions
16 “‘in the context of the overall charge to the jury as a component of the entire trial process.’” *Id.*
17 (quoting *Bashor v. Risley*, 730 F.2d 1228, 1239 (9th Cir. 1984)). Where the challenge is to a
18 refusal or failure to give an instruction, the petitioner’s burden is “especially heavy,” because
19 “[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement
20 of the law.” *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). *See also Villafuerte v. Stewart*, 111
21 F.3d 616, 624 (9th Cir. 1997).

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1 **b. Overbroad Instruction on Failure to Report Changes in**
2 **Transient Locations**

3 Petitioner argues that the trial court violated his right to due process when it instructed
4 the jury “on a new theory of failure to report changes in transient locations,” thereby denying
5 him “due process of law, a fair trial, the right to notice of charges, and the right to a jury
6 determination on all issues.” Pet. for Review at 12-14.

7 The California Court of Appeal explained the background to this claim and its decision
8 thereon, as follows:

9 A. *Overbroad instruction*

10 Defendant claims the court’s instruction on the elements of section
11 290 presented the jury with an alternative theory to convict that
12 had not been pleaded. Considering the instructions’ entire charge,
13 we conclude the instruction was not in error.

14 The trial court informed the jury that the People had to prove:

15 “1. The defendant was previously found to have committed a sex
16 offense which requires registration;

17 “2. The defendant resided in the City of Rocklin, Placer County,
18 California;

19 “3. a. That the defendant registered as a sex offender with the
20 Police Chief of the City of Rocklin; and

21 “3. b. The defendant actually knew he had a duty to inform the
22 Police Chief of the City of Rocklin that he was moving within 5
23 working days of the move;

24 “AND

25 “4. The defendant willfully failed to inform the Chief of Police of
26 the Rocklin Police Department within five working days of
changing his residence address *or transient location . . .*” (Italics
added.)

 Defendant claims the alternative reference at the end of paragraph
four to moving from a transient location allowed the jury to decide
the case on grounds other than those charged. He testified at trial

1 that he never registered again after leaving Rocklin.⁸ He asserts
2 that under the instruction, the jury could have found him guilty for
3 failing to register while he was transient even if it concluded he
4 had in fact registered with Rocklin upon his moving from the city.

5 “[T]he correctness of jury instructions is to be determined from the
6 entire charge of the court, not from a consideration of parts of an
7 instruction or from a particular instruction.” (*People v. Burgener*
8 (1986) 41 Cal.3d 505, 528, *disapproved on other grounds in*
9 *People v. Reyes* (1998) 19 Cal.4th 743, 750-751.) Moreover, we
10 are to assume that jurors are intelligent and capable of
11 understanding, correlating, and following all given jury
12 instructions. (*People v. Kegler, supra*, 197 Cal.App.3d at p. 80.)

13 Defendant’s argument ignores the instruction’s entire charge. The
14 instruction centers on defendant residing in Rocklin and his
15 requirement to register upon moving from his Rocklin residence.
16 Because the prosecution had to prove that defendant resided in
17 Rocklin, the jury could not convict under this instruction on
18 evidence that defendant was transient, i.e., did not reside in any
19 particular place.

20 Defendant’s argument also misjudges the jurors’ capacity to
21 recognize this case hinged on defendant residing in Rocklin, and
22 their ability to understand that the jury instruction was based solely
23 on that contention. Not only this instruction, but the entire case
24 rested on defendant having resided in, and moved from, Rocklin,
25 and whether he notified Rocklin of his move from that city.
26 (Former § 290, subd. (f)(1); Stats. 2004, ch. 761, § 1.3.) The jury
would have interpreted this instruction correctly.

Most likely, the trial court was attempting to incorporate
defendant’s defense into the instruction. In light of his claim that
he became transient upon leaving Rocklin, the court was requiring
the prosecution to prove defendant failed to register upon
becoming transient. In so doing, the trial court did not instruct on
an uncharged theory, and it committed no error in giving the
instruction.

Opinion at 17-19.

Viewing the challenged jury instruction in the context of the jury instructions as a whole,
this court agrees with the California Court of Appeal that the instruction on the elements of Cal.

⁸ We note that although defendant was not charged with failing to register as a transient during the time he was transient, this statement by him constituted an admission of violating section 290. At a minimum, the jury could have considered this statement as going to his credibility on the charged offense.

1 Penal Code § 290 given at petitioner’s trial did not violate petitioner’s constitutional rights. As
2 noted by the state appellate court, petitioner’s entire trial was structured around the charge that
3 he failed to report his move from Rocklin. To that end, the jury instruction challenged by
4 petitioner focused on petitioner’s move from Rocklin and required the prosecution to prove that
5 petitioner lived in, and move from, Rocklin. Under these circumstances, there is no reasonable
6 likelihood the jury understood the instruction to be concerned with petitioner’s failure to report
7 his transient locations(s). Nor is there any evidence that the jury understood the instruction in
8 this way, or understood it to be adding an additional charge against petitioner, or a change in the
9 charges already brought. Under the circumstances presented here, petitioner has failed to show
10 that the giving of this instruction rendered his trial fundamentally unfair. Accordingly, petitioner
11 is not entitled to relief on this jury instruction claim.

12 **c. Unanimity Instruction**

13 In his next claim for relief, petitioner argues that the trial court’s failure to give a
14 “unanimity instruction,” in light of the addition of the additional charge against him, as alleged
15 in the claim above, violated his right to “due process and a jury determination on all issues.”
16 Pet. for Review at 15. Petitioner argues that the jurors may have improperly relied on the
17 uncharged theory of liability to find him guilty of the charged crimes. *Id.* at 15-16. The
18 California Court of Appeal rejected this argument with the following reasoning:

19 **B. *Unanimity instruction***

20 Next, defendant claims the court was required to give a unanimity
21 instruction because it instructed on an alternate theory of the
22 crime, as just discussed. Because we conclude the court did not
23 instruct on an alternate theory, the court was not required to give a
24 unanimity instruction. The only question presented to the jury by
25 the prosecutor’s argument and the instructions was whether
26 defendant registered with the Rocklin Police Department within
five days of moving from his residence in Rocklin. No unanimity
instruction is required where there is only one theory of guilt. (*See*
People v. Meyer (2003) 108 Cal.App.4th 403, 418.)

Opinion at 19-20.

1 Because this court also concludes that petitioner’s jury was not improperly instructed on
2 a new theory of liability by virtue of the jury instruction on the elements of Cal. Penal Code
3 § 290, the trial court’s failure to give a unanimity instruction did not violate petitioner’s right to
4 due process. As stated by the California Court of Appeal, there is no reason to give an
5 instruction on unanimity when only one theory of guilt is presented to the jury. Accordingly,
6 petitioner is not entitled to relief on this claim.

7 **d. False Statement Instruction**

8 In his next claim, petitioner argues that the trial court violated his right to due process by
9 giving “a false statement instruction.” Pet. for Review at 17. The California Court of Appeal
10 rejected this argument, reasoning as follows:

11 *C. False statement instruction*

12 Defendant faults the court for giving the jury CALCRIM No. 362
13 regarding the evidentiary value of false statements made by the
14 defendant. He claims the evidence of his giving a false name to
15 police upon his arrest did not relate to the charged offense, but
16 rather went only to the federal parole violation. His interpretation
17 of the statement’s meaning, however, is not the test for
18 determining whether to give the instruction.

19 As given by the trial court, the instruction read: “If the defendant
20 made a false or misleading statement relating to the charged crime,
21 knowing the statement was false or intending to mislead, that
22 conduct may show he was aware of his guilt of the crime and you
23 may consider it in determining his guilt. [¶] If you conclude that
24 the defendant made the statement, it is up to you to decide its
25 meaning and importance. However, evidence that the defendant
26 made such a statement cannot prove guilt by itself.”

 The trial court has a sua sponte duty to instruct on consciousness
of guilt when there is evidence that the defendant intentionally
made a false statement from which such an inference could be
drawn. (*People v. Atwood* (1963) 223 Cal.App.2d 316, 333-334,
disapproved on another ground in People v. Carter (2003) 30
Cal.4th 1166, 1197-1198.)

Defendant admitted giving a false name to police when he was
arrested in San Francisco. An inference of guilt could be drawn
from that statement. He was avoiding being caught because he
knew he had not registered. The court thus had a duty to instruct
on the statement.

1 Defendant, however, testified he gave a false name because he had
2 absconded from federal parole. He claimed he had no idea there
3 was a state warrant issued for his failure to register because “I had
4 notified them that I was going to be in transit.”

5 Defendant’s testimony does not eliminate the inference that
6 defendant gave a false name also because he knew he had failed to
7 register. Because defendant made a statement from which an
8 inference of guilt could be drawn, the court had a duty to instruct
9 sua sponte on the possible effect of defendant’s false statement, no
10 matter what defendant subjectively believed the statement meant.
11 As the instruction states, it is for the jury to decide the false
12 statement’s meaning and importance. But because defendant made
13 a false statement from which an inference of guilt of failing to
14 register can be made, the trial court was mandated to give the
15 instruction. It committed no error in doing so.

16 Opinion at 20-21.

17 Petitioner has failed to show that the instruction given to his jury on the evidentiary value
18 of making a false statement so infected the entire trial that his conviction violates due process.
19 Informing the jury that if they found petitioner made a false statement they could consider it in
20 determining his guilt of the charged crime did not render petitioner’s conviction fundamentally
21 unfair, especially where the jurors were also instructed that it was up to them to determine the
22 meaning and importance of the false statement and that the statement could not, by itself, prove
23 petitioner’s guilt of the charged crime. In addition, as noted by the California Court of Appeal,
24 petitioner’s false statement at the time of his arrest was relevant to show that he was aware he
25 had not registered as a sex offender. In short, petitioner has failed to demonstrate that the giving
26 of this jury instruction rose to the level of a due process violation. Accordingly, he is not
entitled to relief on this claim.

27 **5. Insufficient Evidence of Prior Conviction Allegations**

28 Petitioner’s next claim is that the evidence is insufficient to support the trial court’s
29 finding that his prior felony convictions constituted serious or violent felonies for purposes of
30 sentencing under California’s Three Strikes Law. Pet. for Review at 18-23. He also claims the
31 evidence was insufficient to support the prior prison term sentence enhancement allegations. *Id.*

1 The California Court of Appeal denied these claims with the following reasoning:

2 *Evidence Supporting Prior Serious Felony Convictions*

3 As mentioned above, defendant at trial admitted three prior felony
4 convictions: a 1978 Oregon conviction for robbery; a 1982 federal
5 conviction for armed bank robbery, and a 1996 conviction in
6 Humboldt County for forcible oral copulation in violation of
7 section 288a. Defendant asserts insufficient evidence supports the
8 jury's finding that each of these convictions constituted
9 serious/violent felonies for purposes of the Three Strikes law.
10 After reviewing the evidence supporting each strike conviction, we
11 disagree.

12 A. *1996 California oral copulation conviction*

13 Defendant claims the evidence supporting his conviction for oral
14 copulation by force, by definition a serious felony, does not
15 eliminate the possibility he was convicted of oral copulation that
16 was accomplished against the victim's will by threats of future
17 retaliation, a former possible element of violating section 288a,
18 subdivision (c), that is not considered to be a serious felony. (*See*
19 *People v. Towers* (2007) 150 Cal.App.4th 1273, 1277.) He also
20 claims it was not until 2006 that forcible oral copulation was
21 deemed a "violent" or "serious" felony for purposes of Three
22 Strikes. Defendant is wrong on both counts.

23 First, there is no doubt defendant was convicted of committing oral
24 copulation with force. Although the original abstract of judgment
25 stated he was convicted of violating section 288a(c), "Oral
26 Cop/under 14," the trial court later ordered the abstract corrected
27 to show he was convicted of "Oral Copulation With Force, PC §
28 288a(c)(2)."

29 In addition, the court's minute order states defendant was
30 convicted of oral copulation "w/person under 14 or w/force."
31 Also, the information filed against defendant charged him with one
32 count of oral copulation with force, in violation of section 288a(c).
33 This is ample evidence to support the jury's strike finding on the
34 1996 oral copulation conviction.

35 Second, defendant is mistaken when he states oral copulation with
36 force was not a serious felony until 2006. Oral copulation with
37 force was listed as a "violent felony" under section 667.5,
38 subdivision (c)(5), and as a "serious felony" under section 1192.7,
39 subdivision (c) (5), as early as 1976. (*People v. Nava* (1996) 47
40 Cal.App.4th 1732, 1735-1736, fn. 4; § 667.5, subd. (c) (5); Stats.
41 1976, ch. 1139, § 268, p. 5138; § 1192.7, subd. (c) (5), added by
42 Initiative Measure (Prop. 8, § 7, approved June 8, 1982).)

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1 B. *1982 federal armed bank robbery conviction*

2 Defendant contends insufficient evidence supports the jury’s
3 determination that his 1982 federal armed bank robbery conviction
4 constituted a serious felony. We disagree.

5 Defendant in 1982 pleaded guilty to armed bank robbery. At the
6 time he entered his plea, he admitted being armed when he robbed
7 the bank. Specifically, the court asked him: “Part of the charge is
8 that the bank robbery was an armed robbery. Will you tell me
9 about that; was it armed?”

10 “[DEFENDANT]: I was holding a model 66 357 caliber pistol.

11 “THE COURT: You were?

12 “[DEFENDANT]: Yes.”

13 This evidence supports the jury’s determination that defendant
14 committed a robbery and was personally armed, both strikes under
15 California law. (§§ 667.5, subd. (c)(8),(9); 1192.7, subd. (c)(8),
16 (19).)

17 C. *1978 Oregon robbery conviction*

18 Defendant claims insufficient evidence supports the jury’s
19 determination that his 1978 robbery conviction in Oregon
20 constituted a California strike. He asserts his guilty plea to the
21 indictment does not establish that he personally used a weapon to
22 commit the crime, or that the crime was not performed by an
23 accomplice. We conclude the evidence is sufficient to support a
24 finding of a serious felony.

25 Defendant in 1978 pleaded guilty in Oregon to the following acts,
26 as charged by the indictment: that he, “acting together with Grant
27 Edward Conklin, did unlawfully and knowingly threaten the
28 immediate use of physical force upon Richard Remington Miller
29 by holding a knife to Richard Remington Miller’s throat, and was
30 armed with a dangerous weapon, to wit: a knife, while in the
31 course of committing theft of property, to wit: 1956 Chevrolet
32 pickup truck and United States currency, with the intent of
33 preventing resistance to the said defendants’ taking of the said
34 property”

35 Although the language indicates defendant did not act alone, it
36 clearly indicates defendant was party to what is defined as a
37 robbery under California law, “the felonious taking of personal
38 property in the possession of another, from his person or
39 immediate presence, and against his will, accomplished by means
40 of force or fear.” (§ 211) Moreover, the indictment specifically
41 alleges it was defendant who was armed with a knife and held it

1 against the victim's throat at the time of the robbery. Such acts
2 constitute serious and violent felonies for purposes of California's
3 Three Strikes law. (§§ 667.5, subd. (c)(9); 1192.7, subd. (c)(19).)
4 This is sufficient evidence to support the determination that
5 defendant committed what is the equivalent of a robbery under
6 California law, and thus a serious felony for purposes of Three
7 Strikes.

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V.

Evidence Supporting Prior Prison Term Determinations

Defendant claims the evidence supporting the two foreign prison
term determinations is inadequate as it failed to prove defendant
actually served one year in prison for each conviction, a
requirement for imposing the enhancement based on foreign prison
terms. (§ 667.5, subd. (f).) We conclude there is substantial
evidence to support the determinations.

At the enhancement allegations trial, the trial court relied on the
certified court documents provided by the prosecutor and on
defendant's testimony from his trial on the merits. Regarding the
Oregon conviction, defendant admitted at trial that he was
convicted in Oregon of robbery. The certified documents
confirmed defendant's testimony. Also, evidence from the federal
armed bank robbery action recorded that defendant there stated he
had served his sentence for the Oregon crime in an Oregon
penitentiary for three years. This is sufficient evidence to support
the trial court's determination that defendant served at least one
year in prison for the Oregon conviction.

Regarding the 1982 federal armed bank robbery conviction,
defendant admitted at trial that he was convicted of this crime. He
was sentenced to 25 years in prison. On recross-examination, he
testified that "in '93 I got out. Then I got back into the federal
system for a parole violation. Then I got out in '94." Officer Ward
testified she oversaw defendant on parole in 1994.

A release from parole supports an inference that defendant's period
of incarceration had been completed before his parole period
began. (*People v. Crockett* (1990) 222 Cal.App.3d 258, 263-266.)
Defendant's statement that he got out in 1993 suggests he served at
least 11 years in prison for the armed bank robbery. His violation
of parole implies he had been placed on parole in 1993, which in
turn suggests his period of incarceration was completed in 1993.
This is sufficient evidence on which the trial court could conclude
defendant served at least one year in prison for his federal armed
bank robbery conviction.

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1 Defendant asserts we cannot rely on his admissions at trial because
2 doing so amounts to relitigating the priors, or it forces us to rely on
3 “unduly unreliable evidence” to support the facts. We disagree
4 with his claim. “The testimony [concerning the priors] was given
5 during the trial of the underlying charge. [Defendant] cites no
6 authority to support his claim that evidence from the trial on the
7 underlying offense cannot be considered at the trial on the
8 subsequent enhancement allegations. To preclude the court from
9 considering evidence properly before it during another part of the
10 trial would be unnecessarily rigid and would hamper, rather than
11 further, the interests of justice.” (*People v. Elmore* (1990) 225
12 Cal.App.3d 953, 957.)

13 Opinion at 22-27.

14 Habeas corpus relief is unavailable for alleged errors in the interpretation or application
15 of state sentencing laws by either a state trial or appellate court, unless the error resulted in a
16 complete miscarriage of justice. *Hill v. United States*, 368 U.S. 424, 428 (1962); *Hendricks v.*
17 *Zenon*, 993 F.2d 664, 674 (9th Cir. 1993); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir.
18 1985). So long as a state sentence “is not based on any proscribed federal grounds such as being
19 cruel and unusual, racially or ethnically motivated, or enhanced by indigency, the penalties for
20 violation of state statutes are matters of state concern.” *Makal v. State of Arizona*, 544 F.2d
21 1030, 1035 (9th Cir. 1976). Thus, “[a]bsent a showing of fundamental unfairness, a state court’s
22 misapplication of its own sentencing laws does not justify federal habeas relief.” *Christian v.*
23 *Rhode*, 41 F.3d 461, 469 (9th Cir. 1994).

24 Applying these principles in federal habeas proceedings, the Ninth Circuit Court of
25 Appeals has specifically refused to consider alleged errors in the application of state sentencing
26 law. See, e.g., *Miller v. Vasquez*, 868 F.2d 1116 (9th Cir. 1989). Thus, in *Miller*, the court
refused to examine the state court’s determination that a defendant’s prior conviction was for a
“serious felony” within the meaning of the state statutes governing sentence enhancements. *Id.*
at 1118-19. The court did not reach the merits of the petitioner’s claim, stating that federal
habeas relief is not available for alleged errors in interpreting and applying state law. *Id.*
(quoting *Middleton*, 768 F.2d at 1085).

1 Whether or not a prior conviction properly constitutes a “serious” or “violent” felony, as
2 that term is defined in California’s Three Strikes Law, and whether the service of prior foreign
3 prison terms falls within the Three Strikes Law, involves interpretation of state sentencing law.
4 Federal courts are “bound by a state court’s construction of its own penal statutes,” *Aponte v.*
5 *Gomez*, 993 F.2d 705, 707 (9th Cir. 1993), and this court must defer to the California courts’
6 interpretation of the California Three Strikes Law unless its interpretation is “untenable or
7 amounts to a subterfuge to avoid federal review of a constitutional violation.” *Oxborrow v.*
8 *Eikenberry*, 877 F.2d 1395, 1399 (9th Cir. 1989.) There is no evidence of that here.

9 In any event, petitioner’s sufficiency of the evidence claims lack merit. For the reasons
10 set forth by the California Court of Appeal, and considering all of the evidence before the
11 sentencing judge in this case, this court also concludes that there was sufficient evidence to
12 support petitioner’s sentence enhancement allegations. *See Jackson v. Virginia*, 443 U.S. 307,
13 319 (1979) (there is sufficient evidence to support a conviction if, "after viewing the evidence in
14 the light most favorable to the prosecution, any rational trier of fact could have found the
15 essential elements of the crime beyond a reasonable doubt."); *Boyer v. Belleque*, 659 F.3d 957,
16 964 (9th Cir. 2011) (when a federal habeas court assesses a sufficiency of the evidence challenge
17 to a state court conviction under AEDPA, “there is a double dose of deference that can rarely be
18 surmounted.”). *See also Dretke v. Haley*, 541 U.S. 386, 395 (2004) (“But the constitutional hook
19 in *Jackson* was *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), in which we
20 held that due process requires proof of each element of a criminal offense beyond a reasonable
21 doubt. We have not extended *Winship’s* protections to proof of prior convictions used to support
22 recidivist enhancements.”).

23 **6. Sixth Amendment Right to Jury Trial**

24 Petitioner’s next claim is that his Fourteenth Amendment right to due process and his
25 Sixth Amendment right to trial by jury were violated when the trial court, and not the jury, found
26 that his prior convictions resulted in qualifying prison terms and constituted “serious felonies”

1 for purposes of California’s Three Strikes Law. Pet. for Review at 24. He argues that the trial
2 court’s actions in making findings outside of the bare fact that he suffered these prior convictions
3 “goes far beyond any *Cunningham* prior conviction exception and violates state and federal rules
4 limiting proof to the prior records.” *Id.* at 25.

5 The California Court of Appeal rejected petitioner’s arguments in this regard, reasoning
6 as follows:

7 Defendant contends the trial court denied him his federal
8 constitutional right to a jury trial on the prior serious felony
9 conviction findings and the prior prison term findings. We
10 disagree.

11 Trial on the prior conviction issues was bifurcated. Regarding the
12 prior serious conviction allegations, the jury received documentary
13 evidence on defendant’s three prior convictions, along with
14 instructions to decide whether the evidence proved defendant had
15 been convicted of the alleged crimes. The jury found the
16 allegations were true.

17 As to the prior prison term allegations, however, the trial court
18 determined that no issues regarding those allegations had to be
19 submitted to the jury. At sentencing, it found the prior prison term
20 allegations were true.

21 Defendant asserts he had a federal constitutional right under
22 *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856]
23 (*Cunningham*) to have all of the issues regarding the prior
24 conviction allegations, including the determination of whether the
25 prior convictions constituted serious felonies for purposes of the
26 Three Strikes Law, and prior prison terms determined by the jury.

This court has already rejected that argument with regards to prior
conviction allegations. (*People v. Jefferson* (2007) 154
Cal.App.4th 1381, 1386-1389 (*Jefferson*.) We repeat our holding
in that case here:

“In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d
435] (*Apprendi*) the United States Supreme Court held,
recognizing its prior decision in *Almendarez-Torres v. United
States* (1998) 523 U.S. 224 [140 L.Ed.2d 350] (*Almendarez-
Torres*) that: ‘Other than the fact of a prior conviction, any fact
that increases the penalty for a crime beyond the prescribed
statutory maximum must be submitted to a jury, and proved
beyond a reasonable doubt.’ (*Apprendi, supra*, 530 U.S. at p. 490
[147 L.Ed.2d at p. 455].)

1 “In [*People v. McGee* (2006) 38 Cal.4th 682 (*McGee*)], the
2 California Supreme Court considered whether *Apprendi* compelled
3 the conclusion that a criminal defendant has a right under the
4 federal Constitution to have a jury examine the record of a prior
5 criminal proceeding to determine whether the nature of the earlier
6 conviction subjects the defendant to an increased sentence under
7 the applicable sentencing statutes. (*Id.* at pp. 685-686.) The
8 Supreme Court reviewed a number of its prior decisions (*id.* at pp.
9 692-695, 699-700), reviewed *Apprendi* (*id.* at pp. 695-699),
10 recognized numerous cases have interpreted the *Almendarez-*
11 *Torres* exception for recidivism as not being ‘limited simply to the
12 bare fact of a defendant’s prior conviction, but extend[ing] as well
13 to the nature of that conviction’ (*id.* at p. 704, italics omitted), and
14 observed that under California law, the inquiry involved in
15 determining the nature of a prior conviction ‘is a limited one [that]
16 must be based upon the record of the prior criminal proceeding.’
17 (*Id.* at p. 706.) Based on the ‘significant difference between the
18 nature of the inquiry and the factfinding involved in the type of
19 sentence enhancements at issue in *Apprendi* and its progeny as
20 compared to the nature of the inquiry involved in examining the
21 record of a prior conviction to determine whether that conviction
22 constitutes a qualifying prior conviction for purposes of a
23 recidivist sentencing statute,’ the California Supreme Court
24 concluded there was no federal constitutional right to a jury trial as
25 to whether a prior conviction qualified as a serious felony under
26 California law. (*Id.* at p. 709.) The court stated ‘the examination
of court records pertaining to a defendant’s prior conviction to
determine the nature or basis of the conviction’ was ‘a task to
which *Apprendi* did not speak and “the type of inquiry that judges
traditionally perform as part of the sentencing function.”’ (*Ibid.*,
italics omitted.)

17 “In *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d
18 403], the United States Supreme Court reiterated its holding in
19 *Apprendi*, *supra*, 530 U.S. 466, 490, that, “[o]ther than the fact of
20 a prior conviction, any fact that increases the penalty for a crime
21 beyond the prescribed statutory maximum must be submitted to a
22 jury, and proved beyond a reasonable doubt.” (*Blakely v.*
23 *Washington*, *supra*, 542 U.S. at p. 301 [159 L.Ed.2d at p. 412].) In
24 *Cunningham*, *supra*, 549 U.S. 270 [166 L.Ed.2d 856], the United
25 States Supreme Court repeated again: ‘Except for a prior
26 conviction, “any fact that increases the penalty for a crime beyond
the prescribed statutory maximum must be submitted to a jury, and
proved beyond a reasonable doubt.”’ (*Cunningham*, *supra*, at p.
___ [166 L.Ed.2d at p. 873].) Thus, the United States Supreme
Court continues to recognize the *Almendarez-Torres* exception for
recidivism. As the California Supreme Court’s analysis in *McGee*,
supra, 38 Cal.4th 682, rested largely on such exception, we believe
it remains good authority even after *Blakely* and *Cunningham*.”
(*Jefferson*, *supra*, 154 Cal.App.4th at pp. 1386-1389.)

1 Regarding the prior prison term findings, there was no
2 constitutional right to a jury trial on a section 667.5 allegation
3 under pre-*Cunningham* law. In *People v. Thomas* (2001) 91
4 Cal.App.4th 212 (*Thomas*), the Court of Appeal determined the
5 *Almendarez-Torres* jury trial exception for prior convictions
6 referred broadly to recidivism enhancements, and specifically to
7 prior prison term allegations under section 667.5. (*Thomas, supra*,
8 at pp. 222-223.)

9 Similarly, in *People v. Belmares* (2003) 106 Cal.App.4th 19, the
10 Court of Appeal determined a defendant did not have a
11 constitutional right to a jury trial on the issue of whether he was
12 the person whose name appeared on the section 696b packet
13 admitted into evidence to show he had served prior prison terms
14 for purposes of section 667.5. It held the right to a jury trial on
15 prior conviction allegations derives from state statute, not the
16 federal Constitution. (*Id.* at p. 27.)

17 As we found in *Jefferson*, *Cunningham* did not overrule the
18 *Almendarez-Torres* exception. Nothing in *Cunningham* limits the
19 prior conviction exception to the narrow finding of the existence of
20 a prior conviction. And, since *Cunningham*, the California
21 Supreme Court has cited *Thomas* with approval to emphasize the
22 prior conviction exception is to be read broadly to include
23 allegations based on recidivism. (*See People v. Towne* (2008) 44
24 Cal.4th 63, 79-81; *People v. Black* (2007) 41 Cal.4th 799, 819.)

25 For these reasons, *Thomas* remains good authority after
26 *Cunningham*. Accordingly, defendant did not have a federal
constitutional right to have the section 667.5 allegations heard by a
jury.

However, defendant continues to have a limited statutory right to a
jury trial on section 667.5 allegations under sections 1025 and
1158. (*People v. Winslow* (1995) 40 Cal.App.4th 680, 687.) The
trial court did not recognize and enforce that right here. A trial
court's failure to provide a jury trial for section 667.5 allegations
in violation of section 1025 is subject to harmless error analysis
under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v.*
Epps (2001) 25 Cal.4th 19, 29.)

Applying the *Watson* test, we conclude it is not reasonably
probable that a result more favorable to defendant would have
been reached if a jury, instead of the court, had determined that
defendant served two prior prison terms in foreign jurisdictions
lasting at least one year. The evidence is indisputable that
defendant served prison terms of more than one year for both the
Oregon robbery conviction and the federal armed bank robbery
conviction. A jury thus would not have reached a different
conclusion.

1 Opinion at 27-32.

2 A criminal defendant is entitled to a trial by jury and to have every element necessary to
3 sustain his conviction proven by the state beyond a reasonable doubt. U.S. CONST. amends. V,
4 VI, XIV. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the United States Supreme
5 Court held that the Due Process Clause of the Fourteenth Amendment requires any fact other
6 than a prior conviction that “increases the penalty for a crime beyond the prescribed statutory
7 maximum” to be “submitted to a jury and proved beyond a reasonable doubt.” In *Blakely v.*
8 *Washington*, 542 U.S. 296, 303-04 (2004), the Supreme Court decided that a defendant in a
9 criminal case is entitled to have a jury determine beyond a reasonable doubt any fact that
10 increases the statutory maximum sentence, unless the fact was admitted by the defendant or was
11 based on a prior conviction. In *Cunningham v. California*, 549 U.S. 270 (2007), the Supreme
12 Court held that California’s Determinate Sentencing Law (DSL) violates a defendant’s right to a
13 jury trial to the extent it permits a trial court to impose an upper term based on facts found by the
14 court rather than by a jury. The Ninth Circuit has held that *Cunningham* may be applied
15 retroactively on collateral review. *Butler v. Curry*, 528 F.3d 624, 639 (9th Cir. 2008).

16 In *Almendarez-Torres v. United States*, 523 U.S. 224, 239-47 (1998), the United States
17 Supreme Court held that the fact of a prior conviction does not have to be determined by a jury
18 before a sentencing court may rely upon the conviction as the basis for a sentencing
19 enhancement. Rather, prior convictions may be found by the judge based on a preponderance of
20 evidence. *Id.* at 239-47; *see also United States v. Medina-Villa*, 567 F.3d 507, 520 (9th Cir.
21 2009) (“*Almendarez-Torres* remains good law”). The task of determining the precise contours of
22 the “narrow” *Almendarez-Torres* prior convictions exception “has been left to the federal
23 appellate courts.” *Kessee v. Mendoza-Powers*, 574 F.3d 675, 677 (9th Cir. 2009) (holding that
24 the state court’s use of a finding that the petitioner was on probation at the time of the offense to
25 increase his sentence was not contrary to clearly established federal law).

26 ////

1 In California, various sentencing statutes provide for a longer prison sentence if the
2 defendant has had prior serious or violent felonies denoted as strikes. Under California law, the
3 inquiry to determine whether a prior conviction qualifies under California’s various sentencing
4 enhancement statutes is the responsibility of the court, and not a jury. *People v. Kelii*, 21 Cal.4th
5 452, 456 (1999) (“Determining whether a prior conviction qualifies as a strike under the Three
6 Strikes law is also the type of inquiry that judges traditionally perform as a part of the sentencing
7 function.”). Furthermore, as petitioner acknowledges, the California Supreme Court has held
8 that a court conducting such an inquiry does not violate *Apprendi*. *People v. McGee*, 38 Cal.4th
9 682, 687 (2006).

10 Here, the California Court of Appeal concluded that in imposing the sentence on
11 petitioner, the trial court was entitled to determine whether petitioner’s prior convictions were
12 qualifying felonies for purposes of the Three Strikes Law without submitting those issues to the
13 jury. The United States Supreme Court has not defined the exact scope of the *Almendarez-*
14 *Torres* prior conviction exception. Accordingly, there is no “clearly established” United States
15 Supreme Court authority holding that a trial court may not make findings outside the bare fact of
16 a defendant’s commission of a prior conviction. *See United States v. Santiago*, 268 F.3d 151,
17 156 (2d Cir. 2001) (“ . . . In short, we read *Apprendi* as leaving to the judge, consistent with due
18 process, the task of finding not only the mere fact of previous convictions but other related issues
19 as well. Judges frequently must make factual determinations for sentencing, so it is hardly
20 anomalous to require that they also determine the “who, what, when, and where” of a prior
21 conviction”); *Bird v. Brown*, No. C05-02454 MJJ, 2008 WL 793827 at *5 (N.D. Cal. Mar. 21,
22 2008) (“there is nothing in *Apprendi* or other Supreme Court precedent that requires a trial court,
23 for purposes of sentence enhancement, to treat disputed facts surrounding a prior conviction
24 differently from the basic fact of the prior conviction”). Petitioner has not cited any United
25 States Supreme Court case which holds that the *Almendarez-Torres* prior conviction exception
26 does not encompass the Three Strikes matters found by the trial court in this case. Accordingly,

1 he has failed to demonstrate that the decision of the California Court of Appeal was contrary to,
2 or an unreasonable application of federal law. *See Boyd v. Newland* , 467 F.3d 1139, 1152 (9th
3 Cir. 2006) (“in the absence of explicit direction from the Supreme Court, we cannot hold that the
4 California courts’ use of Petitioner’s juvenile adjudication as a sentencing enhancement was
5 contrary to, or involved an unreasonable application of, Supreme Court precedent.”).

6 In any event, to the extent the trial court violated petitioner’s Sixth Amendment rights in
7 connection with petitioner’s sentence, any error is harmless. *See Washington v. Recuenco*, 548
8 U.S. 212, 218-22 (2006) (*Apprendi* errors are subject to harmless error analysis). Petitioner is
9 entitled to habeas relief only upon a showing that the violation of his constitutional rights had a
10 “substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht*, 507 U.S.
11 at 623. As explained above, this court has determined that sufficient evidence supported the trial
12 court’s finding that petitioner’s prior convictions constituted “serious” and “violent felonies for
13 purposes of the Three Strikes Law, and that petitioner served at least one year in prison on each
14 of those felonies. Based on the record before the trial court, as described by the California Court
15 of Appeal, there is no doubt that a jury would have found petitioner’s prior convictions were
16 “serious” or “violent” felonies and that he had served the requisite prison sentences on those
17 prior convictions. Accordingly, the result would have been the same if these issues had been
18 submitted to the jury. Any error by the trial judge in sentencing petitioner under the Three
19 Strikes law was harmless.

20 Petitioner also claims that the cumulative effect of the jury instruction and *Apprendi*
21 errors at his trial deprived him of a fair trial, in violation of his right to due process. Pet. for
22 Review at 26. The California Court of Appeal denied this claim on the grounds that “our
23 discussion rejecting all of defendant’s claims but one and finding on that one no prejudicial error
24 demonstrates there was no cumulative error.” Opinion at 32. This court has also addressed
25 petitioner’s jury instruction and sentencing claims and has concluded that no error of
26 constitutional magnitude occurred. The court concludes that the alleged errors, even when

1 considered together, did not render petitioner’s defense “far less persuasive,” nor did they have a
2 “substantial and injurious effect or influence on the jury’s verdict.” *Chambers*, 410 U.S. at 294.
3 Accordingly, petitioner is not entitled to relief on this claim of cumulative error.

4 **7. Denial of Motion to Strike Prior Strike Allegations**

5 Petitioner’s next claim is that the trial court abused its discretion when it denied his
6 motion to dismiss one or more of his prior felony “strike” convictions in the furtherance of
7 justice at the time of his sentencing. Pet. for Review at 27. He explains that one of the reasons
8 he left Rocklin was his distress over “false website records he was a child molester impacting his
9 home and work alike – records he had been trying to correct for years.” *Id.* at 29. Petitioner
10 states that this situation is “not likely to recur (especially if care is taken to correct the Megan’s
11 Law records).” *Id.* at 30. Petitioner also argues that the Three Strikes sentence that resulted
12 from the trial judge’s decision not to strike any of his prior conviction allegations constituted
13 cruel and unusual punishment. *Id.* at 27. He argues: “in sum, the overall picture of this offender
14 and his offenses falls outside the spirit of the Three Strikes law, at least in part.” *Id.* at 30.

15 The California Court of Appeal rejected these arguments, reasoning as follows:

16 *Denial of Motion to Strike Prior Strikes*

17 Defendant claims the trial court abused its discretion when it
18 denied his *Romero*⁹ motion to strike one of his prior serious felony
19 convictions. He asserts his situation places him outside the spirit
20 of the Three Strikes law. We conclude the court did not abuse its
21 discretion.

22 Deciding defendant’s motion, the trial court was required to
23 “consider whether, in light of the nature and circumstances of his
24 present felonies and prior serious and/or violent felony
25 convictions, and the particulars of his background, character, and
26 prospects, the defendant may be deemed outside the scheme’s
spirit, in whole or in part, and hence should be treated as though he
had not previously been convicted of one or more serious and/or
violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

⁹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

1 “In reviewing for abuse of discretion, we are guided by two
2 fundamental precepts. First, “[t]he burden is on the party
3 attacking the sentence to clearly show that the sentencing decision
4 was irrational or arbitrary. [Citation.] In the absence of such a
5 showing, the trial court is presumed to have acted to achieve
6 legitimate sentencing objectives, and its discretionary
7 determination to impose a particular sentence will not be set aside
8 on review.” [Citations.] Second, a “decision will not be reversed
9 merely because reasonable people might disagree. ‘An appellate
10 tribunal is neither authorized nor warranted in substituting its
11 judgment for the judgment of the trial judge.’” [Citations.] Taken
12 together, these precepts establish that a trial court does not abuse
13 its discretion unless its decision is so irrational or arbitrary that no
14 reasonable person could agree with it.” (*People v. Carmony*
15 (2004) 33 Cal.4th 367, 376-377 (*Carmony I*.)

9 The court’s decision here is not so irrational or arbitrary. After
10 reviewing defendant’s motion, his probation report, and the
11 prosecution’s statement in aggravation, the court denied the
12 motion due to the lack of evidence showing defendant had
13 sufficiently changed his lifestyle and due to the nature of his
14 current crime. The court explained: “I look at a *Romero* motion as
15 being akin to judicial clemency. And the Court understands that it
16 has discretion in this case, but in order for there to be an exercise
17 of discretion, I view the issue as one that neither the defendant has
18 shown a material departure from a previous lifestyle indicating a
19 turnaround in his outlook towards his role in society and as being
20 an arrest-free, conviction-free person, and that’s demonstrated by a
21 moment of period of time that we would be assured that he’s going
22 to remain crime-free save except the existing crime.

17 “And secondly, the existing crime is one we can also take into
18 consideration, the facts surrounding the existing crime, and in this
19 particular case this is a fairly aggravated case of a 290, in my
20 opinion. It is not a technical violation. It is a deliberate violation,
21 and one in which I don’t find the criteria necessary to seriously
22 consider the fact of the crime as leading toward the granting of
23 judicial clemency and so having weighed all those factors and
24 applying them up against the grid of the guided discretion that the
25 Court has, the Court will now confirm its ruling that the *Romero*
26 motion is denied.”

22 The record shows the trial court considered whether defendant was
23 outside the spirit of Three Strikes in light of the nature and
24 circumstances of the present felony, his prior serious felony
25 convictions, and his background, character, and prospects. Having
26 reviewed the same information, we conclude the court did not
reach its conclusion arbitrarily or irrationally.

1 Petitioner’s federal habeas challenge to the trial court’s denial of his *Romero* motion
2 essentially involves an interpretation of state sentencing law. As explained above, “it is not the
3 province of a federal habeas court to reexamine state court determinations on state law
4 questions.” *Wilson*, 131 S. Ct. at 16 (quoting *Estelle*, 502 U.S. at 67). The sentencing judge in
5 this case declined to strike any of petitioner’s prior convictions only after considering all of the
6 relevant circumstances and applying the applicable law. As indicated by the California Court of
7 Appeal, the sentencing judge’s conclusion that petitioner did not fall outside the spirit of
8 California’s Three Strikes Law was not unreasonable under the circumstances of this case. After
9 a careful review of the sentencing proceedings, the undersigned finds no federal constitutional
10 violation in the state trial judge’s exercise of his sentencing discretion.¹⁰

11 The decision of the California Court of Appeal with respect to the application of state
12 sentencing law is not contrary to or an unreasonable application of federal law and does not
13 justify the granting of federal habeas relief. Accordingly, petitioner is not entitled to relief on
14 this claim.

15 **8. Cruel and Unusual Punishment**

16 Petitioner also argues that his sentence of twenty-eight years to life under the Three
17 Strikes Law constitutes cruel and unusual punishment, in violation of the Eighth Amendment.
18 Pet. for Review at 31-36.

19 ////

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21 ////

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23 ¹⁰ If petitioner’s sentence had been imposed under an invalid statute and/or was in excess
24 of that actually permitted under state law, a federal due process violation would be presented.
25 See *Marzano v. Kincheloe*, 915 F.2d 549, 552 (9th Cir. 1990) (due process violation found where
26 the petitioner’s sentence of life imprisonment without the possibility of parole could not be
constitutionally imposed under the state statute upon which his conviction was based).
However, petitioner has not made a showing that such is the case here.

1 In the published portion of its opinion, the California Court of Appeal denied this claim.

2 The court reasoned as follows:

3 Defendant contends his indeterminate life sentence for failing to
4 register within five days of moving from Rocklin violates federal
5 and state constitutional prohibitions against cruel and/or unusual
6 punishment. We disagree.

7 Our court has seen both sides of this issue. In *People v. Carmony*
8 (2005) 127 Cal.App.4th 1066, 26 Cal.Rptr.3d 365 (*Carmony II*),
9 we determined a 25-year-to-life sentence imposed on a registered
10 sex offender for failing to register within five days of his birthday
11 was unconstitutional. However, in *People v. Meeks* (2004) 123
12 Cal.App.4th 695, 20 Cal.Rptr.3d 445 (*Meeks*), we determined a 25-
13 year-to-life sentence imposed on a registered sex offender for
14 failing to register within five days of changing his address was not
15 unconstitutional.

16 In both cases, we sought to determine under federal law whether
17 “an inference of gross disproportionality” (*Harmelin v. Michigan*
18 (1991) 501 U.S. 957, 1005, 111 S.Ct. 2680, 2707, 115 L.Ed.2d
19 836, 871 (conc. opn. of Kennedy, J.)) could be made by weighing
20 the crime and defendant's sentence “in light of the harm caused or
21 threatened to the victim or to society, and the culpability of the
22 offender.” (*Solem v. Helm* (1983) 463 U.S. 277, 292, 103 S.Ct.
23 3001, 3011, 77 L.Ed.2d 637, 651.)

24 Similarly, we sought to determine under state law whether the
25 sentence was so disproportionate to the crime that it “shocks the
26 conscience” in light of the defendant's history and the seriousness
of his offenses. (*In re Lynch* (1972) 8 Cal.3d 410, 424, 105
Cal.Rptr. 217, 503 P.2d 921.)

18 In *Carmony II*, we determined an inference of gross
19 disproportionality existed. “While a violation of section 290 is
20 classified as a felony,” we wrote, “the instant offense was a
21 passive, nonviolent, regulatory offense that posed no direct or
22 immediate danger to society. Defendant committed this offense by
23 violating the annual registration requirement (former § 290, subd.
24 (a)(1)(C)), having correctly registered the proper information the
25 month before. Obviously, no change had occurred in the
26 intervening period and defendant's parole agent was aware of this
fact. Thus, because defendant did not evade or intend to evade law
enforcement officers, his offense was the most technical and
harmless violation of the registration law we have seen.”
(*Carmony II, supra*, 127 Cal.App.4th at p. 1078, 26 Cal.Rptr.3d
365.)

26 ////

1 “Although this requirement [to register annually] serves a
2 legitimate purpose,” we continued, “it is nevertheless a backup
3 measure to ensure that authorities have current accurate
4 information. In this case, when defendant failed to register within
5 five days of his birthday, he was still on parole, had recently
6 updated his registration, had not moved or changed any other
7 required registration information during the one month since he
8 registered, and was in contact with his parole officer. Therefore,
9 his failure to register was completely harmless and no worse than a
10 breach of an overtime parking ordinance. [Citation.]” (*Carmony*
11 *II, supra*, 127 Cal.App.4th at p. 1079, 26 Cal.Rptr.3d 365.)

12 In light of these circumstances, and the fact that the defendant's
13 three strikes offenses were remote in time and nature, we
14 concluded the indeterminate life sentence was grossly
15 disproportionate to the gravity of the offense. (*Carmony II, supra*,
16 127 Cal.App.4th at p. 1081, 26 Cal.Rptr.3d 365.)

17 By comparison, in *Meeks*, we determined an inference of gross
18 disproportionality did not exist. In that case, the defendant, over
19 the course of more than two years, had moved three times and
20 lived for a period of time on the street without ever registering his
21 new addresses or his transient status. (*Meeks, supra*, 123
22 Cal.App.4th at pp. 700–701, 20 Cal.Rptr.3d 445.)

23 We concluded the indeterminate life sentence for his offense was
24 no more disproportionate than the indeterminate life sentence
25 upheld in *Ewing v. California* (2003) 538 U.S. 11, 123 S.Ct. 1179,
26 155 L.Ed.2d 108, for a third strike of grand theft for shoplifting
three golf clubs. “[Defendant] has violated a law that is intended
to avoid, or at least minimize, the danger to public safety posed by
those who have been convicted of certain sexual offenses. It is at

least as serious as theft of three golf clubs.” (*Meeks, supra*, 123
Cal.App.4th at p. 708, 20 Cal.Rptr.3d 445.)

The *Carmony II* court distinguished the seriousness of the
registration offense before it with the one before the *Meeks* court.
The *Carmony II* court noted “the offense committed by Meeks was
not the technical violation committed by defendant. Meeks failed
to register after changing his residence and therefore, unlike in the
present case, law enforcement authorities did not have Meek's
correct address and information.” (*Carmony II, supra*, 127
Cal.App.4th at p. 1082, fn. 11, 26 Cal.Rptr.3d 365.; *see also*
Gonzalez v. Duncan (9th Cir. 2008) 551 F.3d 875, 885 (*Gonzalez*)
[“California courts have recognized that the distinction between a
conviction for failure to register after a change of address . . . and a
conviction for failure to update registration annually . . . is
critical,” citing *Meeks and Carmony II.*]]

1 It is this distinction that supports the sentence given in this case.
2 Unlike the failure in *Carmony II*, defendant's failure to register
3 thwarted the fundamental purpose of the registration law, thereby
4 leaving the public at risk. "The purpose of the sex offender
5 registration law is to require that the offender identify his present
6 address to law enforcement authorities so that he or she is readily
7 available for police surveillance." (*Carmony II, supra*, 127
8 Cal.App.4th at p. 1072, 26 Cal.Rptr.3d 365.)

9 The registration law's "mandate that sex offenders register any
10 change of address relates directly to the state's interest in ensuring
11 that it knows the whereabouts of its sex offenders. As noted by the
12 California Supreme Court, '[e]nsuring offenders are readily
13 available for police surveillance depends on timely
14 change-of-address notification.' ([*Wright v. Superior Court* (1997)
15 15 Cal.4th 521, 527, 63 Cal.Rptr.2d 322, 936 P.2d 101] (internal
16 quotation marks and citation omitted).)" (*Gonzalez, supra*, 551
17 F.3d at p. 884.)

18 Here, for a period of over eight months, defendant's whereabouts
19 were unknown. Even his federal parole officer did not know
20 where he was. He was drifting around the country and "hiding out
21 with the hippies." That is hardly a condition of being readily
22 available for police surveillance. Such blatant disregard of the
23 registration act and complete undercutting of the act's purposes is a
24 serious offense.

25 Defendant's failure to register when he left Rocklin and his
26 thwarting the purpose of the registration act of being able to be
located, coupled with the seriousness of his prior convictions and
his sustained criminality, all demonstrate his sentence was not
grossly disproportionate to his offense. Under these
circumstances, his sentence does not shock the conscience. The
sentence thus does not constitute cruel and/or unusual punishment
under the federal or California Constitutions.

176 Cal.App.4th 428, 435-38 (2009).

20 The United States Supreme Court has held that the Eighth Amendment includes a
21 "narrow proportionality principle" that applies to terms of imprisonment. *See Harmelin v.*
22 *Michigan*, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring). *See also Taylor v. Lewis*, 460
23 F.3d 1093, 1097 (9th Cir. 2006). However, the precise contours of this principle are unclear, and
24 successful challenges in federal court to the proportionality of particular sentences are
25 "exceedingly rare." *Solem v. Helm*, 463 U.S. 277, 289-90 (1983). *See also Ramirez v. Castro*,
26 365 F.3d 755, 775 (9th Cir. 2004). "The Eighth Amendment does not require strict

1 proportionality between crime and sentence. Rather, it forbids only extreme sentences that are
2 ‘grossly disproportionate’ to the crime.” *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring)
3 (citing *Solem v. Helm*). Thus, in *Lockyer v. Andrade*, the United States Supreme Court held that
4 it was not an unreasonable application of clearly established federal law for the California Court
5 of Appeal to affirm a “Three Strikes” sentence of two consecutive 25 year-to-life imprisonment
6 terms for a petty theft with a prior conviction involving theft of \$150.00 worth of videotapes.
7 *Andrade*, 538 U.S. at 75. In *Ewing v. California*, 538 U.S. 11, 29 (2003), the Supreme Court
8 held that a “Three Strikes” sentence of 25 years-to-life in prison imposed on a grand theft
9 conviction involving the theft of three golf clubs from a pro shop was not grossly
10 disproportionate and did not violate the Eighth Amendment.

11 In assessing the compliance of a non-capital sentence with the proportionality principle, a
12 reviewing court must consider “objective factors” to the extent possible. *Solem*, 463 U.S. at 290.
13 Foremost among these factors are the severity of the penalty imposed and the gravity of the
14 offense. “Comparisons among offenses can be made in light of, among other things, the harm
15 caused or threatened to the victim or society, the culpability of the offender, and the absolute
16 magnitude of the crime.” *Taylor*, 460 F.3d at 1098.¹¹

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18 ¹¹ As noted in *Taylor*, the United States Supreme Court has also suggested that reviewing
19 courts compare the sentences imposed on other criminals in the same jurisdiction, and also
20 compare the sentences imposed for commission of the same crime in other jurisdictions. 460
21 F.3d at 1098 n.7. However,

22 consideration of comparative factors may be unnecessary; the *Solem* Court “did
23 not announce a rigid three-part test.” See *Harmelin*, 501 U.S. at 1004, 111 S.Ct.
24 2680 (Kennedy, J., concurring). Rather, “intra-jurisdictional and inter-jurisdictional
25 analyses are appropriate only in the rare case in which a threshold comparison of
26 the crime committed and the sentence imposed leads to an inference of gross
disproportionality.” *Id.* at 1004-05, 111 S.Ct. 2680; see also *Rummel v. Estelle*,
445 U.S. 263, 282, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (“Absent a
constitutionally imposed uniformity inimical to traditional notions of federalism,
some State will always bear the distinction of treating particular offenders more
severely than any other State.”).

26 *Id.*

1 As noted by the California Court of Appeal, in *Gonzalez v. Duncan*, 551 F.3d 875 (2008),
2 the United States Court of Appeals for the Ninth Circuit concluded that a Three Strikes sentence
3 imposed for failing to annually register pursuant to Cal. Penal Code § 290 constituted cruel and
4 unusual punishment under the circumstances of that case. *Id.* at 884. The court in *Gonzalez*
5 noted that the annual registration requirement violated by the defendant was only tangentially
6 related to the state’s interest in ensuring that sex offenders are available for police surveillance,
7 and that it was merely a backup measure to ensure the authorities had accurate information about
8 the defendant. *Id.* The court opined, however, that the address change requirement, which
9 petitioner violated in this case, was directly related to the state’s interest in knowing the
10 whereabouts of its sex offenders. *Id.* The *Gonzalez* court advised that the distinction between
11 the two registration requirements was “critical” to its analysis. *Id.* at 885.

12 Later, in *Crosby v. Schwartz*, 678 F.3d 784, 791-92 (9th Cir. 2012), the Ninth Circuit
13 held that a sentence of 26 years to life under California’s Three Strikes Law for defendant’s
14 failure to annually update his registration as a sex offender and his failure to register within five
15 days of a change of address did not constitute cruel and unusual punishment, in violation of the
16 Eighth Amendment. The court again noted the distinction between the “mere technical” offense
17 of failing to update annually and the more serious offense of failing to register an actual change
18 of address. *Id.* at 793. In *Crosby*, as in this case, the defendant “was no longer living at his last
19 registered address at the time of his arrest, and his failure to register impeded the police’s ability
20 to find him for surveillance.” *Id.* at 794.

21 Here, petitioner did not merely fail to update his registration. Rather, he moved from his
22 registration address and failed to inform the authorities of his new address. Petitioner’s failure to
23 comply with the registration requirement was not a passive, harmless and technical violation of
24 the registration law because it “arose in the context of failing to register, not simply the formality
25 of an annual update to re-register the same information already provided.” *White v. Dexter*, 2009
26 WL 1424373, at *18 n.11 (E.D. Cal. May 20, 2009). Petitioner’s failure to register his new

1 whereabouts was particularly significant given the violent nature of his prior convictions for
2 robbery, armed bank robbery, and forcible oral copulation. *See Crosby*, 678 F.3d at 794 (taking
3 violent nature of prior offenses into account in gross disproportionality analysis).

4 In light of the *Harmelin* decision, as well as the decisions in *Andrade* and *Ewing*, which
5 imposed sentences of twenty-five years to life for petty theft convictions, and *Crosby*, which
6 imposed a sentence of twenty-six years to life for failing to register as a sex offender after a
7 change of address, the sentence imposed on petitioner is not grossly disproportionate. Because
8 petitioner does not raise an inference of gross disproportionality, this court need not compare
9 petitioner's sentence to the sentences of other defendants in other jurisdictions.

10 The California Court of Appeal correctly identified the applicable federal law, and its
11 analysis of petitioner's Eighth Amendment claim was neither contrary to nor an unreasonable
12 application of that controlling authority. Accordingly, this ground for relief should be denied.

13 **III. Conclusion**

14 For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's
15 application for a writ of habeas corpus be denied.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
21 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
22 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In
23 his objections petitioner may address whether a certificate of appealability should issue in the
24 event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing

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1 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it
2 enters a final order adverse to the applicant).

3 DATED: August 6, 2013.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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