

1 **I. Background**

2 In its unpublished memorandum and opinion affirming petitioner’s judgment of
3 conviction on appeal, the California Court of Appeal for the Third Appellate District provided the
4 following factual summary:

5 A jury found defendant, Andrew White, guilty of five robberies,
6 committed during four separate incidents, and other crimes and
7 weapons use clauses, conducted over several days involving two
8 convenience stores, one targeted on three occasions. The jury also
9 found defendant guilty of evading a peace officer and driving
10 recklessly during a high speed chase following the final robbery.
11 He was sentenced to 26 years eight months in state prison.

12 Defendant appeals.

13 We appointed counsel to represent him on appeal. Counsel filed an
14 opening brief setting forth the facts of the case and, pursuant to
15 *People v. Wende* (1979) 25 Cal.3d 436, requesting the court to
16 review the record and determine whether there are any arguable
17 issues on appeal. Defendant was advised by counsel of the right to
18 file a supplemental brief within 30 days of the date of filing of the
19 opening brief.

20 Defendant filed a supplemental brief in which he claims his
21 convictions must be reversed due to the erroneous admission of
22 evidence, insufficient evidence of identification, and prosecutorial
23 misconduct. He also claims various errors were made in his
24 sentencing, including the fines. We conclude all these claims lack
25 merit with the exception of one: the trial court did not apply the
26 correct legal standard when ruling on whether Penal Code section
27 6541 prohibited multiple punishment for counts one and two, the
28 robbery and false imprisonment committed during the first incident.
We remand solely to permit the trial court to apply the proper
analysis in the matter of counts one and two, and resentence if
appropriate.

PROCEDURAL AND FACTUAL BACKGROUND

All of the robberies were captured by video surveillance cameras.

The first robbery occurred on July 3, 2008, at American Food Store.
A store employee, Onkar Singh, was in the process of turning off
the lights and setting the alarm, when two robbers entered the store
with their faces covered, holding knives. One robber was wearing a
blue hooded sweatshirt, a hat, and gloves; and the other had on a
black sweater. The robber in the blue sweatshirt jumped over the
front counter, while the other came around the counter. The
robbers ordered Singh to open the cash register. They also told him
to put some Patron tequila in a bag. When Singh was not able to
open the store safe, one of the robbers punched him in the face.
The robbers broke the telephone in the store and took Singh's
wallet. The robber in the blue sweatshirt grabbed Singh by the neck

1 and walked him to a room at the back of the store, where he pushed
2 Singh onto the floor and locked him inside.² The two robbers then
left the store.

3 After 10 minutes, Singh was able to break out of the back room, at
4 which time he went to the home of the store's owner, Shamsher
5 Sandhu. Sandhu determined that approximately \$1,200 in cash was
6 stolen during the robbery, as well as a bottle of Hennessy cognac, a
7 bottle of Patron tequila, and approximately three cartons of Winston
8 cigarettes.

9 The second robbery occurred on August 25, 2008, at Circle D,
10 another convenience store. A sheriff's deputy responded to a report
11 of it. The deputy saw the cash register open and the store's
12 telephone broken. The owner of the store, Satpol Deol, who was
13 not present during the robbery, concluded approximately \$1,200
14 was missing from a drawer underneath the cash register. The clerk
15 on duty at the time was Harbhajan Singh Hothi. With Deol and
16 Hothi, the deputy viewed a surveillance video recording of the
17 robbery, which showed two robbers entering the store, one was
18 wearing a blue hooded jacket, gloves, and a bandana covering the
19 lower part of his face. The other wore a black jacket, a knit mask
20 over his face, and gloves. One of the robbers carried what appeared
21 to be a 12-gauge pump shotgun. The following day, Kanwar Deep
22 Singh, Deol's video equipment operator and technician, "burn[ed] a
23 CD" of the surveillance recording for the police department at the
24 request of Deol. The video recording was authenticated by Singh
25 and by Deol, and played for the jury. It showed the robbers taking
26 cash from the register. Hothi did not testify.

27 The third robbery occurred on August 28, 2008, at the same
28 American Food Store hit on July 3. Once again, there were two
robbers. According to Singh, they wore the same clothing as worn
in the first robbery. Singh and Sandhu were both present. The
robbers again wore gloves. The one in the blue sweatshirt carried a
shotgun. This robber jumped over the front counter as in the
previous robbery and told Sandhu to lie down, while poking him
with the barrel of the gun. The store phone was again smashed.
Sandhu saw some liquor bottles removed from the shelves while he
was lying face down on the ground. He did not recall exactly how
much cash was taken.

Following the second American Food Store robbery, Sandhu
complained of lack of responsiveness, so, on September 2, the
sheriff's department placed an electronic tracking device in the
store. It would activate if moved. Sandhu hid the device in some
currency.

The fourth and final robbery took place on September 8, 2008, at
the same American Food Store previously hit twice. Both Singh

² Although Singh initially testified it was the robber in black that took him to the back of the store, he acknowledged after watching the videotape of the incident that it was the robber in the blue sweatshirt.

1 and Sandhu were present. Two robbers entered the store wearing
2 the same clothes as in the previous robberies. The robber in the
3 blue sweatshirt was carrying a pump shotgun and a duffel bag.
4 Singh was told to lie down. During the robbery, \$500 to \$600 was
5 removed from Sandhu's cash register. A variety of cigarettes and
6 bottles of Hennessy and Patron were taken. The robbers also took
7 \$150 from Singh's wallet. The phone was ripped out of the wall.
8 According to Sandhu, the robber in the blue sweatshirt in each of
9 the robberies had the same build and posture, and the gun was the
10 same on each occasion.

11 While the robbery was in progress, a peace officer on patrol
12 received an activation signal from an electronic tracking device. He
13 followed it to the parking lot next to the American Food Store. His
14 electronic tracker was pointed right inside the store. While he
15 looked around the parking lot, he "glimpse[d]" someone running
16 out of the front door of the store. A second person then left out of
17 the front door of the store, wearing a blue hooded sweatshirt and
18 holding a shotgun and a duffel bag. The robber in the blue
19 sweatshirt disappeared behind the building. The officer was unable
20 to follow. A duffel bag was later located in a dumpster behind the
21 store, containing nine packs of "Swisher Sweets" cigars, 10 boxes
22 of Marlboro Lights cigarettes, a bottle of Hennessy, and a bottle of
23 Rémy Martin cognac champagne.

24 Sometime later, the activation signal was tracked to a moving blue
25 Honda sport utility vehicle (SUV). When marked patrol cars
26 following the SUV activated their overhead lights and sirens, the
27 driver of the SUV accelerated to a high rate of speed, running
28 several stop signs and traffic lights. A "tack strip" set in the path of
the SUV finally disabled it.

There were two men in the SUV. They got out and ran, but
eventually were apprehended. They were later identified as
defendant and Antoine Morrison. Defendant was wearing a blue
hooded sweatshirt, black jeans, and a black "du-rag," matching the
clothes worn by the armed robber that night. The logo of
defendant's employer's name was printed on the sweatshirt, but
concealed because the sweatshirt was worn inside out. Defendant
had a left-handed black glove in his pocket. A corresponding right-
handed glove of the same make was found during a search of the
area. Also found in defendant's pocket was a bundle of one dollar
bills wrapped around an electronic tracking device. The shotgun
used in the robberies was never located.

Singh and Sandhu participated in a field show-up. Both witnesses
recognized the clothing worn by defendant and Morrison. Sandhu
also recognized their build and posture to be the same as the
robbers.

Defendant had a cell phone in his possession when arrested. In
addition to two photos of defendant, the phone contained one photo
of a bottle of Patron tequila and another photo of a pile of
cigarettes, cigars, "a wad of money," rolls of coins, bottles of
Hennessy, and other items.

1 The defense at trial was alibi. Defendant's mother testified she
2 learned her sister had died on July 3 (the date of the first robbery).
3 She said defendant arrived at her home that afternoon and stayed
4 the night. Defendant's brother testified defendant was there the
5 entire evening. Defendant's mother said defendant was at her home
6 on the dates of the first three robberies.

7 Defendant testified it was not him in the surveillance videos. He
8 claimed he had prearranged to pick up Morrison around 10:30 p.m.
9 on September 8, the date of their final robbery and arrest. He
10 claimed Morrison intended to turn himself in to the police on a
11 warrant the following morning. Defendant said the Morrison gave
12 him "a bunch of loose 1s" to buy gas, which defendant put in his
13 pocket. According to defendant, when he realized he was being
14 pursued by several police cars, he "hit the gas" because Morrison
15 panicked and said, "[W]e got to go."

16 *People v. White*, No. C065564, 2012 WL 4813278, at *1-3 (Cal. Ct. App. Oct. 10, 2012).

17 After the California Court of Appeal affirmed his judgment of conviction, petitioner filed
18 a petition for review in the California Supreme Court. Therein, he claimed that: (1) the
19 prosecutor's failure to call a percipient witness to the stand violated his Sixth Amendment right to
20 confrontation; (2) the evidence that he was one of the perpetrators of the robberies, which
21 included his identification by Singh and Sandhu at the field show-up, was insufficient, and his
22 trial counsel improperly failed to challenge his identification at the show-up; (3) prosecutorial
23 misconduct during closing argument violated his right to due process; and (4) his sentence was
24 erroneous and should be re-calculated. Resp't's Lodg. Doc. 12. The petition for review was
25 summarily denied. Resp't's Lodg. Doc. 13. Petitioner did not file any state habeas petitions with
26 respect to his 2010 conviction.

27 Petitioner filed a second amended habeas corpus petition in this court on May 19, 2015,
28 and a memorandum of points and authorities in support of that petition on the same day. ECF
Nos. 29, 30. This court will construe both of these documents together as the operative habeas
petition in this matter. Respondent filed an answer on June 9, 2015, and petitioner filed a traverse
on July 24, 2015. ECF Nos. 32, 35.

29 **II. Standards of Review Applicable to Habeas Corpus Claims**

30 An application for a writ of habeas corpus by a person in custody under a judgment of a
31 state court can be granted only for violations of the Constitution or laws of the United States. 28

1 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or
2 application of state law. *See Wilson v. Corcoran*, 562 U.S. 1,5 (2010); *Estelle v. McGuire*, 502
3 U.S. 62, 67-68 (1991); *Park v. California*, 202 F.3d 1146, 1149 (9th Cir. 2000).

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

6 An application for a writ of habeas corpus on behalf of a
7 person in custody pursuant to the judgment of a State court shall not
8 be granted with respect to any claim that was adjudicated on the
9 merits in State court proceedings unless the adjudication of the
10 claim -

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

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

17 For purposes of applying § 2254(d)(1), “clearly established federal law” consists of
18 holdings of the United States Supreme Court at the time of the last reasoned state court decision.
19 *Thompson v. Runnels*, 705 F.3d 1089, 1096 (9th Cir. 2013) (citing *Greene v. Fisher*, ___ U.S.
20 ___, 132 S.Ct. 38 (2011); *Stanley v. Cullen*, 633 F.3d 852, 859 (9th Cir. 2011) (citing *Williams v.*
21 *Taylor*, 529 U.S. 362, 405-06 (2000)). Circuit court precedent “may be persuasive in determining
22 what law is clearly established and whether a state court applied that law unreasonably.” *Stanley*,
23 633 F.3d at 859 (quoting *Maxwell v. Roe*, 606 F.3d 561, 567 (9th Cir. 2010)). However, circuit
24 precedent may not be “used to refine or sharpen a general principle of Supreme Court
25 jurisprudence into a specific legal rule that th[e] [Supreme] Court has not announced.” *Marshall*
26 *v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (citing *Parker v. Matthews*, 132 S. Ct. 2148, 2155
27 (2012) (per curiam)). Nor may it be used to “determine whether a particular rule of law is so
28 widely accepted among the Federal Circuits that it would, if presented to th[e] [Supreme] Court,
be accepted as correct. *Id.* Further, where courts of appeals have diverged in their treatment of
an issue, it cannot be said that there is “clearly established Federal law” governing that issue.
Carey v. Musladin, 549 U.S. 70, 77 (2006).

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1 A state court decision is “contrary to” clearly established federal law if it applies a rule
2 contradicting a holding of the Supreme Court or reaches a result different from Supreme Court
3 precedent on “materially indistinguishable” facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003).
4 Under the “unreasonable application” clause of § 2254(d)(1), a federal habeas court may grant the
5 writ if the state court identifies the correct governing legal principle from the Supreme Court’s
6 decisions, but unreasonably applies that principle to the facts of the prisoner’s case.³ *Lockyer v.*
7 *Andrade*, 538 U.S. 63, 75 (2003); *Williams*, 529 U.S. at 413; *Chia v. Cambra*, 360 F.3d 997, 1002
8 (9th Cir. 2004). In this regard, a federal habeas court “may not issue the writ simply because that
9 court concludes in its independent judgment that the relevant state-court decision applied clearly
10 established federal law erroneously or incorrectly. Rather, that application must also be
11 unreasonable.” *Williams*, 529 U.S. at 412. *See also Schriro v. Landrigan*, 550 U.S. 465, 473
12 (2007); *Lockyer*, 538 U.S. at 75 (it is “not enough that a federal habeas court, in its independent
13 review of the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”).
14 “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as
15 ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington v.*
16 *Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).
17 Accordingly, “[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner
18 must show that the state court’s ruling on the claim being presented in federal court was so
19 lacking in justification that there was an error well understood and comprehended in existing law
20 beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103.

21 If the state court’s decision does not meet the criteria set forth in § 2254(d), a reviewing
22 court must conduct a de novo review of a habeas petitioner’s claims. *Delgadillo v. Woodford*,
23 527 F.3d 919, 925 (9th Cir. 2008); *see also Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008)
24 (en banc) (“[I]t is now clear both that we may not grant habeas relief simply because of

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26 ³ Under § 2254(d)(2), a state court decision based on a factual determination is not to be
27 overturned on factual grounds unless it is “objectively unreasonable in light of the evidence
28 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 § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by
2 considering de novo the constitutional issues raised.”).

3 The court looks to the last reasoned state court decision as the basis for the state court
4 judgment. *Stanley*, 633 F.3d at 859; *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). If
5 the last reasoned state court decision adopts or substantially incorporates the reasoning from a
6 previous state court decision, this court may consider both decisions to ascertain the reasoning of
7 the last decision. *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). “When
8 a federal claim has been presented to a state court and the state court has denied relief, it may be
9 presumed that the state court adjudicated the claim on the merits in the absence of any indication
10 or state-law procedural principles to the contrary.” *Richter*, 562 U.S. at 99. This presumption
11 may be overcome by a showing “there is reason to think some other explanation for the state
12 court’s decision is more likely.” *Id.* at 785 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)).
13 Similarly, when a state court decision on a petitioner’s claims rejects some claims but does not
14 expressly address a federal claim, a federal habeas court must presume, subject to rebuttal, that
15 the federal claim was adjudicated on the merits. *Johnson v. Williams*, ___ U.S. ___, ___, 133
16 S.Ct. 1088, 1091 (2013).

17 Where the state court reaches a decision on the merits but provides no reasoning to
18 support its conclusion, a federal habeas court independently reviews the record to determine
19 whether habeas corpus relief is available under § 2254(d). *Stanley*, 633 F.3d at 860; *Himes v.*
20 *Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). “Independent review of the record is not de novo
21 review of the constitutional issue, but rather, the only method by which we can determine whether
22 a silent state court decision is objectively unreasonable.” *Himes*, 336 F.3d at 853. Where no
23 reasoned decision is available, the habeas petitioner still has the burden of “showing there was no
24 reasonable basis for the state court to deny relief.” *Richter*, 562 U.S. at 98.

25 A summary denial is presumed to be a denial on the merits of the petitioner’s claims.
26 *Stanley v. Clay*, 692 F.3d 948, 957 & n. 3 (9th Cir. 2012). While the federal court cannot analyze
27 just what the state court did when it issued a summary denial, the federal court must review the
28 state court record to determine whether there was any “reasonable basis for the state court to deny

1 relief.” *Richter*, 562 U.S. at 98. This court “must determine what arguments or theories ... could
2 have supported, the state court's decision; and then it must ask whether it is possible fairminded
3 jurists could disagree that those arguments or theories are inconsistent with the holding in a prior
4 decision of [the Supreme] Court.” *Id.* at 102. The petitioner bears “the burden to demonstrate
5 that ‘there was no reasonable basis for the state court to deny relief.’” *Walker v. Martel*, 709 F.3d
6 925, 939 (9th Cir. 2013) (quoting *Richter*, 562 U.S. at 98).

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

11 **III. Petitioner’s Claims**

12 **A. Right to Confrontation**

13 In his first ground for relief, petitioner claims that his Sixth Amendment right to confront
14 the witnesses against him was violated when the prosecutor failed to call Harbhajan Hothi, the
15 clerk at the Circle D convenience store, as a witness at his trial. ECF No. 29 at 3; ECF No. 30 at
16 13.⁴ As explained by the California Court of Appeal, the videotape of the Circle D robbery was
17 played for the jury. Petitioner’s trial counsel objected to the admission of this videotape on the
18 grounds that petitioner’s right to confrontation would be violated if Mr. Hothi did not testify. The
19 trial court ruled that the admission of the videotape without corroborating testimony by Mr. Hothi
20 did not violate petitioner’s Sixth Amendment rights because the videotape was not “testimonial”
21 evidence. Reporter’s Transcript on Appeal (RT) at 275-76. Accordingly, the court allowed “the
22 testimony regarding the videotape as long as the foundation is laid.” *Id.* at 276. Petitioner argues
23 that the videotape could not properly show the “ethnicity” of the perpetrators, if they spoke with
24 an accent, or their “height and weight.” ECF No. 30 at 14. He argues that testimony by Mr.
25 Hothi could have provided the jury with this information, thereby helping to exclude him as one

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27 ⁴ Page number citations such as this one are to the page numbers reflected on the court’s
28 CM/ECF system and not to page numbers assigned by the parties.

1 of the perpetrators. *Id.* Petitioner contends that “there were many unanswered questions due to
2 Mr. Hothi’s refusal to testify.” *Id.*

3 Petitioner also complains that Mr. Hothi did not testify even though he was on the
4 prosecution’s trial witness list. Petitioner states that Hothi refused to testify and he faults the
5 prosecutor for failing to issue a subpoena for his attendance. *Id.* He states that the prosecutor
6 simply “took Mr. Hothi at his word that he would appear for trial and testify.” *Id.* Petitioner
7 argues:

8 the People had months to prepare for trial, issue subpoenas, meet
9 with witnesses and use many of its office resources to insure that all
10 its witnesses would be present during trial. A verbal agreement is
not sufficient enough to prove a showing of “reasonable diligence.”

11 *Id.* at 21.⁵

12 In a separate but related claim, petitioner argues that the trial court violated his right to
13 due process in allowing the prosecutor to introduce into evidence the videotape of the Circle D
14 robbery without corroborating testimony by Mr. Hothi. He contends that the trial court’s ruling
15 that Mr. Hothi was “unavailable” to testify “placed restrictions on the defense that they were
16 unable to overcome.” *Id.* at 21-22. Although these arguments are articulated as a separate claim,
17 the court will analyze them as part of petitioner’s Confrontation Clause claim.

18 **1. State Court Decision**

19 The California Court of Appeal denied petitioner’s claim based on the Confrontation
20 Clause, reasoning as follows:

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24 ⁵ The state court record reflects that the prosecutor issued a subpoena for Mr. Houthi’s
25 testimony for an earlier trial date but did not re-issue the subpoena for the trial date that actually
26 went forward. RT at 257. The prosecutor explained that Mr. Hothi had promised to appear for
27 trial “every other time he has been made aware of the dates.” *Id.* However, on the date he was
28 scheduled to testify, Mr. Hothi was out of state driving a truck as part of his job as a long-haul
truck driver. *Id.* at 256. The prosecutor offered to send Mr. Hothi a plane ticket but Hothi
“indicated he was unwilling to do a flight because if he was not present when the truck got there,
he would not get paid.” *Id.* at 257.

1 **A. Right of Confrontation regarding Victim of August 25**
2 **Robbery**

3 Defendant contends he was deprived of his right of confrontation
4 with regard to the August 25, 2008, robbery of Circle D because the
5 store clerk, Hothi, did not testify and, therefore, “was not present to
6 corroborate if the robbery occurred, if he was the victim[, and if it
7 was] him in the video.” We disagree.

8 The prosecution may prove the elements of an offense through any
9 admissible evidence. There is no requirement the testimony of the
10 clerk in a convenience store robbery be presented, or his identity
11 established to prove who committed a crime. Here, a surveillance
12 camera captured the robbery in its entirety, and a copy of the
13 surveillance video recording was fully authenticated and admitted
14 into evidence and played for the jury. Hothi's corroboration was
15 not required to prove defendant committed the crime.

16 Defendant maintains the testimony of the deputy sheriff regarding
17 the Circle D robbery was hearsay. To the contrary, the deputy
18 testified about what he observed when he entered the convenience
19 store and what he saw on the surveillance recording, which was
20 properly admitted into evidence. The surveillance recording itself
21 was not hearsay. “Photographs and videotapes are demonstrative
22 evidence, depicting what the camera sees. [Citations.] They are
23 not testimonial and they are not hearsay, that is, ‘evidence of a
24 statement that was made other than by a witness while testifying at
25 the hearing and that is offered to prove the truth of the matter stated
26 ’ [Citation.] Thus, the confrontation clause does not preclude
27 the[ir] admission” (*People v. Cooper* (2007) 148 Cal.App.4th
28 731, 746, fn. omitted; see *People v. Goldsmith* (2011) 193
 Cal.App.4th Supp. 1; see Evid.Code, § 1553 [video images
 presumed to be accurate representation of images they purport to
 represent].)

 Accordingly, defendant's right of confrontation was not violated.

White, 2012 WL 4813278, at *3-4.

2. Applicable Law

 The Sixth Amendment to the United States Constitution grants a criminal defendant the
right “to be confronted with the witnesses against him.” U.S. CONST. amend. VI. “The ‘main
and essential purpose of confrontation is to secure for the opponent the opportunity of cross-
examination.’” *Fenenbock v. Director of Corrections for California*, 692 F.3d 910, 919 (9th Cir.
2012) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986)). The Confrontation Clause
applies to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406
(1965).

1 In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held
2 that the Confrontation Clause bars the state from introducing into evidence out-of-court
3 statements which are “testimonial” in nature unless the witness is unavailable and the defendant
4 had a prior opportunity to cross-examine the witness, regardless of whether such statements are
5 deemed reliable. The *Crawford* rule applies only to hearsay statements that are “testimonial” and
6 does not bar the admission of non-testimonial hearsay statements. *Id.* at 42, 51, 68. *See also*
7 *Whorton v. Bockting*, 549 U.S. 406, 420 (2007) (“the Confrontation Clause has no application to”
8 an “out-of-court nontestimonial statement.”) Although the *Crawford* court declined to provide a
9 comprehensive definition of the term “testimonial,” it stated that “[s]tatements taken by police
10 officers in the course of interrogations are . . . testimonial under even a narrow standard.”
11 *Crawford*, 541 U.S. at 52. The court also provided the following “formulations” of a “core class”
12 of testimonial statements: (1) “ex parte in-court testimony or its functional equivalent – that is,
13 material such as affidavits, custodial examinations, prior testimony that the defendant was unable
14 to cross-examine, or similar pretrial statements that declarants would reasonably expect to be
15 used prosecutorially;” (2) “extrajudicial statements . . . contained in formalized testimonial
16 materials, such as affidavits, depositions, prior testimony, or confessions;” and (3) “statements
17 that were made under circumstances which would lead an objective witness reasonably to believe
18 that the statement would be available for use at a later trial.” *Id.* at 51-52.

19 **3. Analysis**

20 Petitioner’s claim that his Sixth Amendment right to confrontation was violated by the
21 trial court’s admission into evidence of the videotape of the Circle D robbery without
22 corroborating testimony by Mr. Hothi lacks merit and will be denied. The Confrontation Clause
23 “applies to ‘witnesses’ against the accused - in other words, those who ‘bear testimony.’”
24 *Crawford*, 541 U.S. at 51 (quoting 2 N. Webster, *An American Dictionary of the English*
25 *Language* (1828)). If the testimony of a witness is admitted at a trial through a tape recording or
26 other electronic device, the witness should be available for cross-examination. *Peak v. Webb*, 673
27 F.3d 465, 467, 472-73 (6th Cir. 2012). *See also Melendez-Diaz v. Massachusetts*, 557 U.S. 305
28 (2009) (the Confrontation Clause requires the prosecution to subpoena an available affiant if it

1 chooses to introduce that affiant's ex parte testimonial statement against a defendant). In this
2 case, however, the videotape of the Circle D robbery did not contain statements by Mr. Hothi or
3 anyone else. As explained by the California Court of Appeal, the videotape simply depicted what
4 the camera saw; it did not “bear testimony” and was not a substitute for Hothi’s live testimony.
5 Under these circumstances, no Confrontation Clause issue is raised because there was no
6 testimonial evidence to confront. *Id. Cf. Bullcoming v. New Mexico*, 564 U.S. 647, 672 (2011)
7 (conc. opn. of Sotomayor, J.) (the prosecution's introduction only of “machine-generated results,
8 such as a printout from a gas chromatograph,” may not violate the defendant’s confrontation
9 right); *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) (“the instruments’ readouts are
10 not ‘statements,’ so it does not matter whether they are ‘testimonial’”); *United States v.*
11 *Washington*, 498 F.3d 225, 231 (4th Cir. 2007) (the raw data generated by diagnostic machines do
12 not constitute “statements,” and the machines are not “declarants”).

13 The prosecution’s use at trial of testimonial out-of-court statements ordinarily violates the
14 defendant’s right to confront the maker of the statements unless the declarant is unavailable to
15 testify and the defendant had a prior opportunity for cross-examination. U.S.C.A. Const. Amend.
16 6. In other words, “[w]here testimonial evidence is at issue, the Sixth Amendment demands what
17 the common law required: unavailability and a prior opportunity for cross-examination.”
18 *Crawford*, 541 U.S. at 68. Witness unavailability only comes into play if the testimony of a
19 witness is introduced into evidence without that witness being present in the courtroom. Because
20 in this case there was no testimonial evidence to confront, petitioner did not have a federal
21 constitutional right to force the prosecution to call Mr. Hothi as a trial witness. Therefore,
22 Hothi’s availability or unavailability is irrelevant.

23 Petitioner’s claim that the prosecutor violated his Sixth Amendment right to cross-
24 examine Mr. Hothi about the robbery at the Circle D convenience store by failing to call Hothi as
25 a trial witness also fails. Neither the state, nor any other party, is under a duty, constitutional or
26 otherwise, to call any particular witness. *See United States v. Bond*, 552 F.3d 1092, 1097 (9th
27 Cir. 2009). Rather, “the ‘calling or not calling of witnesses is a matter normally within the realm
28 of the judgment of counsel’” *Frank v. Brookhart*, 877 F.2d 671, 674 (8th Cir. 1989)

1 (quoting *Sherrill v. Wyrick*, 524 F.2d 186, 190 (8th Cir. 1975)). The prosecutor’s duty is only to
2 prove every element of the charges beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358,
3 361-62 (1970).⁶

4 Nor was the prosecutor required to call every person on his pretrial witness list. “It is
5 elementary that litigants are not *required* to call every witness identified on their witness lists.”
6 *Bond*, 552 F.3d at 1097 (emphasis in original). “The witness list simply provides notice to the
7 court and to opposing counsel of the witnesses who may be presented at trial.” *See also United*
8 *States v. Fisher*, 484 F.2d 868, 870 (4th Cir. 1973) (“We agree that the Government must not
9 suppress evidence favorable to a defendant in any prosecution but, for obvious reasons, a United
10 States Attorney is not bound to call to the witness stand every person who appears pursuant to a
11 subpoena issued and served at Government direction”) (quoting *United States v. Wallace*, 300
12 F.2d 525, 530 (4th Cir. 1962)); *Buchanan v. Cate*, No. CIV. 10-0423 BTM NLS, 2011 WL
13 10730141, at *41 (S.D. Cal. Sept. 30, 2011), report and recommendation adopted as modified sub
14 nom. *Buchanan v. Beard*, No. CIV. 10-0423 GPC NLS, 2013 WL 2390435 (S.D. Cal. May 29,
15 2013) (“there is no federal constitutional requirement for the prosecutor to call any particular
16 witness”); *Othman v. City of Chicago*, No. 11-CV-5777, 2016 WL 612809, at *7 (N.D. Ill. Feb.
17 16, 2016) (same).

18 For the reasons set forth above, petitioner’s Sixth Amendment right to confront the
19 witnesses against him was not violated by the prosecutor’s failure to call Mr. Hothi as a trial
20 witness or by the trial court’s admission into evidence of the videotape of the Circle D robbery.
21 The state court reasonably applied federal law to find these Sixth Amendment claims meritless.
22 Accordingly, petitioner is not entitled to relief on his claims based on the Confrontation Clause.

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26 ⁶ Although the prosecution has no constitutional duty to call a witness, the failure to call
27 an important witness can lead to an inference that the witness’ testimony would have been
28 unfavorable to the government. *Graves v. United States*, 150 U.S. 118, 121 (1893) (“The rule,
even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses
whose testimony would elucidate the transaction, the fact that he does not do it creates the
presumption that the testimony, if produced, would be unfavorable.”).

1 **B. Improper Admission into Evidence of Photographs from Petitioner’s Cell Phone**

2 In his next ground for relief, petitioner claims that the trial court violated his right to due
3 process in allowing the introduction into evidence of photographs from his cell phone depicting
4 Patron tequila, money, alcohol, cigarettes, coin rolls, food, and other items. ECF No. 29 at 29;
5 ECF No. 30 at 15. Petitioner argues that these photographs (contained in People’s Exhibits 42
6 and 43) did not match the items taken during the robberies and that time stamps affixed to the
7 photographs shows they were not taken on or near the dates on which the robberies occurred.
8 ECF No. 30 at 19-20. Petitioner explains that the time stamps on some of the photographs show
9 that they were sent to him by someone else after the first three robberies were committed, and that
10 other photographs were time-stamped before the robberies were committed but were stored in his
11 cell phone only much later. *Id.* at 19. Petitioner includes as exhibits undecipherable photographs
12 that apparently came from his cellphone, with metadata and other information pertaining to these
13 photographs. *Id.* at 62-69. He argues this information demonstrates that the photographs were
14 not related to the robberies. In short, petitioner claims that the photographs did not actually
15 depict items that were stolen in the robberies but were introduced in an improper and prejudicial
16 attempt to convince the jury that they did. *Id.* at 19-20.⁷

17 **1. State Court Decision**

18 The California Court of Appeal denied this due process claim, reasoning as follows:

19 **B. Admissibility of Cell Phone Photos**

20 Defendant also claims the photos on his cell phone of a bottle of
21 Patron tequila and a pile of money, liquor, cigarettes, and other
22 items should not have been admitted because they were more
prejudicial than probative. Again, we disagree.

23 Evidence is relevant if it has “any tendency in reason to prove or
24 disprove any disputed fact that is of consequence to the
25 determination of the action.” (Evid.Code, § 210.) Under Evidence
Code section 352, the trial court has discretion to “exclude evidence
if its probative value is substantially outweighed by the probability

26 ⁷ Testimony at trial established that People’s Exhibit 42 contained “numerous items . . . ,
27 including a couple bottles of Hennessy whiskey, some Marlboro, Newport cigarettes, some other
28 type of cigars, Black Wild cigars, . . . a wad of money at the one corner, and some rolls of coins at
the bottom corner.” RT at 214. People’s Exhibit 43 was a photograph of “a close-up shot of a
bottle of Patron Tequila.” *Id.* at 215.

1 that its admission will . . . create substantial danger of undue
2 prejudice, of confusing the issues, or of misleading the jury.”
3 “[T]he trial court is ‘vested with wide discretion in determining
4 relevance under this standard.’ [Citation.]” (*People v. Cain* (1995)
5 10 Cal.4th 1, 32.) “Prejudice for purposes of Evidence Code
6 section 352 means evidence that tends to evoke an emotional bias
7 against the defendant with very little effect on issues” (*People*
8 *v. Crew* (2003) 31 Cal.4th 822, 842.) The trial court's
9 determination is reviewed for abuse of discretion.

10 We conclude the photos in question were properly admitted. The
11 main issue at trial was identity, and the photos were probative on
12 this issue. One of the photos was of a bottle of Patron tequila, an
13 item that was taken in at least two of the robberies. The other photo
14 depicted a pile of money, cigarettes, liquor bottles - and in
15 particular, bottles of Patron and Hennessy - and other convenience
16 store type items that were consistent with the types of items stolen
17 in the robberies. Although not all of the items in this photo were
18 specifically described by the robbery victims, this went to the
19 weight of the evidence, not its admissibility. We discern no undue
20 prejudice from the admission of this evidence.⁸

21 *White*, 2012 WL 4813278, at *4.

22 **2. Analysis**

23 The California Court of Appeal concluded that the introduction into evidence of the
24 photographs from petitioner’s cell phone did not violate the California Evidence Code. That
25 conclusion is binding on this court. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (“We have
26 repeatedly held that a state court's interpretation of state law, including one announced on direct
27 appeal of the challenged conviction, binds a federal court sitting in habeas corpus”). In federal
28 court, a writ of habeas corpus will be granted for an erroneous admission of evidence “only where
the ‘testimony is almost entirely unreliable and . . . the factfinder and the adversary system will
not be competent to uncover, recognize, and take due account of its shortcomings.’” *Mancuso v.*
Olivarez, 292 F.3d 939, 956 (9th Cir. 2002), *overruled on other grounds by Slack v. McDaniel*,
529 U.S. 473 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983)). Evidence violates
due process only if “there are no permissible inferences the jury may draw from the evidence.”
Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991). Evidence must “be of such quality

⁸ Defendant also contends his attorney “failed to properly investigate [the] photos.” As
defendant does not develop this claim, and as there is nothing in the record to support it, we
decline to address it.

1 as necessarily prevents a fair trial.” *Id.* (quoting *Kealohapauole v. Shimoda*, 800 F.2d 1463 (9th
2 Cir. 1986)).

3 Even so, as the Ninth Circuit has observed:

4 The Supreme Court has made very few rulings regarding the
5 admission of evidence as a violation of due process. Although the
6 Court has been clear that a writ should be issued when
7 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

8 *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). Therefore, “under AEDPA, even
9 clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit
10 the grant of federal habeas corpus relief if not forbidden by ‘clearly established Federal law,’ as
11 laid out by the Supreme Court.” *Id.* See also *Greel v. Martel*, No. 10-16847, 472 F. App’x. 503,
12 504, 2012 WL 907215, *1 (9th Cir. Mar. 19, 2012) (“There is likewise no clearly established
13 federal law that admitting prejudicial evidence violates due process.”).

14 In light of these authorities, the state courts’ rejection of petitioner’s claim that the trial
15 court violated his right to due process in allowing the introduction into evidence of the
16 photographs on his cellphone does not support habeas relief under AEDPA. Petitioner has cited
17 no “clearly established Federal law” to demonstrate that evidence of this nature is so irrelevant or
18 overtly prejudicial as to constitute a due process violation. Under the strict standards of AEDPA,
19 the trial court’s decision to admit these photographs into evidence – even if it was clearly
20 erroneous – cannot warrant issuance of the writ. *Yarborough*, 568 F.3d at 1101.

21 On collateral review of a state court criminal judgment under 28 U.S.C. § 2254, an error is
22 harmless unless it had “a substantial and injurious effect or influence in determining the jury’s
23 verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). In *Fry v. Pliler*, 551 U.S. 112, 121-
24 22 (2007), the United States Supreme Court clarified that “in § 2254 proceedings a federal court
25 must assess the prejudicial impact of constitutional error in a state-court criminal trial under the
26 ‘substantial and injurious effect’ standard set forth in *Brecht* 507 U.S. 619.” *Fry*, 551 U.S. at
27 121-22. See also *Davis v. Ayala*, ___ U.S. ___, 135 S. Ct. 2187, 2197-98 (2015). Assuming
28 *arguendo* that the trial court erred in allowing the introduction into evidence of these photographs

1 from petitioner’s cell phone, petitioner has failed to demonstrate that the error had a “substantial
2 and injurious effect or influence in determining the jury’s verdict.” The photographs petitioner
3 attaches to his habeas petition are too dark to decipher and the attached metadata and other
4 identifying information is not self-explanatory and does not confirm the exact circumstances
5 under which these photographs got on petitioner’s cellphone.⁹ Thus, petitioner is unable to prove
6 his allegations about when the photographs were taken and/or were sent to his phone. Further,
7 given the strength of the evidence against petitioner, which included the fact that petitioner and
8 Morrison fled from the police after the tracking device led them to petitioner’s car, that petitioner
9 and Morrison were wearing clothes that matched the clothing worn by the armed robber, that
10 petitioner was apprehended with cash taken from the fourth robbery, and that petitioner and
11 Morrison were identified at a showup as resembling the robbers in three of the robberies, the
12 introduction into evidence of the above-described photographs, although admittedly prejudicial to
13 the defense case, would not have had a substantial effect on the verdict.

14 Accordingly, for the reasons set forth above, petitioner is not entitled to habeas relief on
15 this due process claim.

16 **C. Prosecutorial Misconduct**

17 In his next ground for relief, petitioner claims that the prosecutor committed misconduct
18 during closing argument. He argues that the prosecutor “intentionally introduced evidence known
19 to be false,” which deliberately misled the court and the jury about whether he was one of the
20 perpetrators of the robberies. He also argues that the prosecutor “misstated facts of the
21 photographs.” ECF No. 30 at 23. Petitioner attaches excerpts of the prosecutor’s closing
22 argument wherein he argued that the photographs taken from petitioner’s cell phone depicted “the
23 same items” that were taken in the robberies, and speculated that petitioner must have come back
24 from the robberies and photographed the items he stole. *Id.* at 50, 52. Petitioner contends that the
25 prosecutor knew this argument was false and misleading and that the misconduct had a
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27 ⁹ The Clerk’s Transcript on Appeal contains a photograph of the items contained in
28 People’s Exhibits 42 and 43, but they are also too dark to decipher. *See, e.g.*, Clerk’s Augmented
Transcript on Appeal at 18-19.

1 “substantial and injurious effect or influence in determining the jury’s verdict” and “infected the
2 integrity of the proceedings.” *Id.* at 24.

3 **1. State Court Decision**

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

5 **Prosecutorial Misconduct**

6 Defendant alleges the deputy district attorney committed
7 prosecutorial misconduct during his closing argument by making
8 various alleged misstatements about the evidence. They included:
9 (1) arguing that defendant's mother and brother did not sit with him
10 the entire night of the first robbery and “misstat [ing]” some details
11 of his brother's testimony; (2) suggesting that the jury compare
12 defendant's voice to the voice of the robber on the surveillance
13 videos; (3) noting that defendant fit the general description of the
14 robber; and (4) stating that one of the cell phone photos depicted
15 “the same stuff” as was taken in the robberies. But defendant's trial
16 attorney did not object to any of these comments. “[A] defendant
17 may not complain on appeal of prosecutorial misconduct unless in a
18 timely fashion - and on the same ground - the defendant made an
19 assignment of misconduct and requested that the jury be
20 admonished to disregard the impropriety.” [Citations.]” (*People v.*
Stanley (2006) 39 Cal.4th 913, 952.) Consequently, defendant has
21 forfeited this argument for purposes of appeal.

22 Even if we were to ignore the failure to object, we would find
23 defendant's claim meritless. “Regarding the scope of permissible
24 prosecutorial argument, ““a prosecutor is given wide latitude
25 during argument. The argument may be vigorous as long as it
26 amounts to fair comment on the evidence, which can include
27 reasonable inferences, or deductions to be drawn therefrom.””
28 [Citations.]” (*People v. Stanley, supra*, 39 Cal.4th at pp. 951–952.)
None of the comments by the prosecuting attorney exceeded these
limitations.

29 *White*, 2012 WL 4813278, at *5.

30 **2. Procedural Default**

31 As set forth above, the California Court of Appeal ruled, in part, that petitioner forfeited
32 his challenges to the prosecutor’s closing argument because his trial counsel failed to make a
33 contemporaneous objection to that argument. Respondent argues the state court’s finding of
34 waiver based on the lack of a contemporaneous objection constitutes a state procedural bar
35 precluding this court from addressing the merits of petitioner’s claim of prosecutorial misconduct.
36 ECF No. 32 at 17-18.

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1 State courts may decline to review a claim based on a procedural default. *Wainwright v.*
2 *Sykes*, 433 U.S. 72 (1977). As a general rule, a federal habeas court “will not review a question
3 of federal law decided by a state court if the decision of that court rests on a state law ground that
4 is independent of the federal question and adequate to support the judgment.” *Calderon v.*
5 *United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (quoting *Coleman v.*
6 *Thompson*, 501 U.S. 722, 729 (1991)). The state rule is only “adequate” if it is “firmly
7 established and regularly followed.” *Id.* (quoting *Ford v. Georgia*, 498 U.S. 411, 424 (1991));
8 *Bennett v. Mueller*, 322 F.3d 573, 583 (9th Cir. 2003) (“[t]o be deemed adequate, the state law
9 ground for decision must be well-established and consistently applied.”) The state rule must also
10 be “independent” in that it is not “interwoven with the federal law.” *Park v. California*, 202 F.3d
11 1146, 1152 (9th Cir. 2000) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). Even if
12 the state rule is independent and adequate, the claims may be heard if the petitioner can show: (1)
13 cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2)
14 that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman*,
15 501 U.S. at 749-50.

16 Respondent has met his burden of adequately pleading an independent and adequate state
17 procedural ground as an affirmative defense. *See Bennett*, 322 F.3d at 586. Although the state
18 appellate court addressed petitioner’s prosecutorial misconduct claims on the merits, it also
19 expressly held that the claims were waived on appeal because of defense counsel’s failure to
20 object. Petitioner has failed to meet his burden of asserting specific factual allegations that
21 demonstrate the inadequacy of California’s contemporaneous-objection rule as unclear,
22 inconsistently applied or not well-established, either as a general rule or as applied to him.
23 *Bennet*, 322 F.3d at 586; *Melendez v. Pliler*, 288 F.3d 1120, 1124-26 (9th Cir. 2002). There is no
24 dispute that petitioner’s trial counsel failed to object to the prosecutor’s remarks at the time they
25 were made. Petitioner’s claim of prosecutorial misconduct therefore appears to be procedurally
26 barred. *See Coleman*, 501 U.S. at 747; *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *Paulino v.*
27 *Castro*, 371 F.3d 1083, 1092-93 (9th Cir. 2004). However, assuming *arguendo* that the claim is
28 not barred, it fails on its merits.

3. Applicable Legal Principles

1
2 A criminal defendant's due process rights are violated when a prosecutor's misconduct
3 renders a trial fundamentally unfair. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Claims of
4 prosecutorial misconduct are reviewed "on the merits, examining the entire proceedings to
5 determine whether the prosecutor's [actions] so infected the trial with unfairness as to make the
6 resulting conviction a denial of due process." *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir.
7 1995) (citation omitted). See also *Greer v. Miller*, 483 U.S. 756, 765 (1987); *Donnelly v.*
8 *DeChristoforo*, 416 U.S. 637, 643 (1974); *Towery v. Schriro*, 641 F.3d 300, 306 (9th Cir. 2010).
9 Relief on such claims is limited to cases in which the petitioner can establish that prosecutorial
10 misconduct resulted in actual prejudice. *Darden*, 477 U.S. at 181-83. See also *Towery*, 641 F.3d
11 at 307 ("When a state court has found a constitutional error to be harmless beyond a reasonable
12 doubt, a federal court may not grant habeas relief unless the state court's determination is
13 objectively unreasonable"). Prosecutorial misconduct violates due process when it has a
14 substantial and injurious effect or influence in determining the jury's verdict. See *Ortiz-Sandoval*
15 *v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996).

16 "Improper argument does not, per se, violate a defendant's constitutional rights." *Jeffries*
17 *v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993). In considering claims of prosecutorial misconduct
18 involving allegations of improper argument, the court must examine the likely effect of the
19 statements in the context in which they were made and determine whether the comments so
20 infected the trial with unfairness as to render the resulting conviction a denial of due process.
21 *Darden*, 477 U.S. at 181-83; *Donnelly*, 416 U.S. at 643; *Turner v. Calderon*, 281 F.3d 851, 868
22 (9th Cir. 2002). In fashioning closing arguments, prosecutors are allowed "reasonably wide
23 latitude," *United States v. Birges*, 723 F.2d 666, 671-72 (9th Cir. 1984), and are free to argue
24 "reasonable inferences from the evidence." *United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir.
25 1989). See also *Ducket v. Godinez*, 67 F.3d 734, 742 (9th Cir. 1995). "[Prosecutors] may strike
26 'hard blows,' based upon the testimony and its inferences, although they may not, of course,
27 employ argument which could be fairly characterized as foul or unfair." *United States v.*
28 *Gorostiza*, 468 F.2d 915, 916 (9th Cir. 1972). "[I]t 'is not enough that the prosecutors' remarks

1 were undesirable or even universally condemned.” *Darden*, 477 U.S. at 181 (citation omitted).
2 The issue is whether the “remarks, in the context of the entire trial, were sufficiently prejudicial to
3 violate [petitioner’s] due process rights.” *Donnelly*, 416 U.S. at 639; *United States v. Robinson*,
4 485 U.S. 25, 33 (1988) (“[P]rosecutorial comment must be examined in context. . . .”)

5 **4. Analysis**

6 Petitioner argues, as he did in the preceding claim, that the time stamp on his cell phone,
7 which allegedly registered when the photographs were taken and downloaded on the phone,
8 demonstrates that the items depicted in the photographs were not taken from the store robberies.
9 He also contends that the brand of tequila and cigarettes depicted in the photographs does not
10 match the exact brands of tequila and cigarettes taken in the robberies, and that “the sheriff report
11 of inventoried stolen items are different from the items in People’s exhibit 42 and 43.” ECF No.
12 35 at 28. Petitioner contends that since the items in the cell phone photograph don’t match the
13 stolen items exactly, they have no relevance to any issue at his trial.¹⁰ *Id.*

14 Petitioner also argues that the prosecutor was in possession of the time stamp information
15 that made it clear the photographs did not depict stolen property. He alleges that “the prosecution
16 knew the dates/times these photo were took those dates/times are not consistent with the dates of
17 the robberies” and that “the items in the photos are a completely different brand of alcohol and
18 cigarettes.” *Id.* at 26. Petitioner argues that “the prosecution misrepresented the photos to fit his
19 theory and connect petitioner to the first three robberies which petitioner wasn’t identified nor
20 was there physical evidence to connect petitioner to the robberies.” *Id.* at 27.

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23 ¹⁰ More specifically, petitioner explains that items stolen in the first robbery included
24 cash, a pocket knife, seven videos, one bottle of “Patron Tequila,” one bottle of “Hennessy’s”
25 cognac, and three cartons of Winston cigarettes. *Id.* at 21. He goes on to explain that the items
26 depicted in People’s Exhibit 42 were cash, coin rolls, two bottles of Hennessy “V.S.O.P.” cognac
27 (which is not the same as Hennessy’s cognac), Marlboro cigarettes (as distinct from the Winston
28 cigarettes stolen in the first robbery), cigars, and a can of peanuts. *Id.* Petitioner explains that
only cash was stolen during the second and third robberies and that the items stolen during the
fourth robbery were recovered at the scene. Accordingly, he focuses his arguments on the items
stolen from the first robbery, which were never recovered.

1 As noted above, although petitioner has attached some photographs to his petition they do
2 not establish all of the specific circumstances surrounding the taking and storage of these
3 photographs and/or how they got on his phone. In his argument challenging the admission of
4 these photographs into evidence, petitioner’s trial counsel conceded that the items depicted were
5 “similar to the merchandise that was taken in some of these robberies.” However, he argued that
6 “what we don’t know is how the photographs got there or when they got there or under what
7 circumstances they got there, whether they were taken by that phone or whether they were
8 downloaded or sent to that phone.” ECF No. 30 at 31. There is no competent evidence before
9 this court that the prosecutor knew the photographs on petitioner’s cell phone did not depict items
10 stolen in the robberies.

11 The court also notes that petitioner testified that the pictures contained in People’s Exhibit
12 42 were forwarded to his cell phone by Antoine Morrison and that he took the picture of the
13 Patron tequila himself about three years prior to his trial testimony. *See* RT at 377-78, 393.
14 Through this testimony, the jury was made aware of petitioner’s argument that the photographs
15 did not depict the items stolen in the robberies but were either taken by him prior to the robberies
16 or were transferred to his phone from another phone.¹¹ Notwithstanding petitioner’s testimony in
17 this regard, the jury rendered a guilty verdict.

18 Under the circumstances of this case, and for the reasons set forth above, the prosecutor’s
19 argument that the pictures on the cell phone were most likely taken by petitioner to document the
20 items he had stolen during the robberies did not render petitioner’s trial fundamentally unfair.
21 The prosecutor’s remarks were a fair inference from the evidence and were therefore not
22 improper. In addition, as noted above, there is no evidence before the court that the prosecutor
23 made any argument that he knew to be false. Because the prosecutor’s comments did not violate
24 petitioner’s right to due process, he is not entitled to relief on this claim.

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27 ¹¹ In his ruling allowing the introduction of the photographs into evidence, the trial judge
28 opined that “the origin of the photos goes to the weight of this evidence, not the admissibility of
it, so I’m going to allow it.” RT at 19.

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IV. Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Petitioner’s application for a writ of habeas corpus is denied.
2. The court declines to issue the certificate of appealability referenced in 28 U.S.C. § 2253.
3. The Clerk is directed to close this case.

DATED: December 21, 2016.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE