

United States District Court
For the Northern District of California

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

DANA MARK DEWEESE,

No. C 06-5632 WHA (PR)

Petitioner,

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

v.

TOM CAREY, Warden,

Respondent.

INTRODUCTION

This is a federal habeas corpus action filed by a state prisoner pursuant to 28 U.S.C. 2254. As grounds for habeas relief petitioner alleges, *inter alia*, that he received ineffective assistance of counsel and that his sentence is unconstitutional. For the reasons set forth below, the petition is **DENIED.**

STATEMENT

Petitioner was convicted by a Lake County Superior Court jury of assault with a deadly weapon (Cal. Pen. Code § 245(a)(1)). Also, the jury found true an allegation that he inflicted great bodily injury (*id.* § 12022.7), petitioner admitted to a prior strike allegation (*id.* §§ 667(b)–(i), 1170.12(a)–(d)), and the trial court found that petitioner had suffered a prior serious felony conviction (*id.* 667(a)). The trial court sentenced petitioner to sixteen years in state prison. Petitioner appealed. The California Court of Appeal for the First Appellate District affirmed the

1 judgment.¹ Evidence presented at trial showed that during the afternoon of May 24, 2001, petitioner
2 attacked persons who had given petitioner and his companion, both strangers to the vehicle's driver
3 and passengers, a ride (Ans., Exh. H (*People v. Deweese*, No. A098366, 2004 WL 1615590 (Cal. Ct.
4 App. Jul. 19, 2004)) at 1, 2–4). Petitioner contended at trial that he acted in self-defense (Ans., Exh.
5 B, Vol. 1 (Reporter's Transcript 12/05/01) at 21-22).

6 As grounds for federal habeas relief, petitioner alleges that (1) his Fifth Amendment rights
7 were violated; (2) the sentencing court's imposition of the aggravated term was based on facts not
8 found by a jury; (3) his first attorney was ineffective in revealing to the prosecutor a taped
9 statement made for the prosecutor by petitioner, and that his second trial counsel was ineffective in
10 not calling an eye-witness;² (4) the trial court violated his due process rights by admitting
11 impeachment evidence; (5) appellate counsel was ineffective in not presenting various issues;
12 (6) the prosecutor committed misconduct in specified ways; (7) the trial court violated his
13 Confrontation Clause rights when it excluded certain evidence; (8) his due process rights were
14 violated by the sentencing court's reliance on the same facts for imposition of the upper term as it
15 relied upon for imposing sentence enhancements; and (9) his due process rights were violated by
16 the trial court's denial of his motion to strike a prior conviction.

17 STANDARD OF REVIEW

18 Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, a district court may
19 not grant a petition challenging a state conviction or sentence on the basis of a claim that was
20 reviewed on the merits in state court unless the state court's adjudication of the claim:

21 (1) resulted in a decision that was contrary to, or involved an unreasonable
22 application of, clearly established Federal law, as determined by the Supreme Court
23 of the United States; or (2) resulted in a decision that was based on an
unreasonable determination of the facts in light of the evidence presented in the
State court proceeding.

24 28 U.S.C. 2254(d).

25 The first prong applies both to questions of law and to mixed questions of law and fact.

27 ¹ Judges Sepulveda, Kay, and Rivera sat on the state appellate panel.

28 ² Though this claim was presented as two separate claims in the order to show cause, this order
will consider these two under the same heading.

1 *Williams v. Taylor*, 529 U.S. 362, 407–09 (2001). The second prong applies to decisions based on
2 factual determinations. *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003).

3 A state court decision is “contrary to” Supreme Court authority, that is, falls under the first
4 clause of Section 2254(d)(1), only if “the state court arrives at a conclusion opposite to that
5 reached by [the Supreme] Court on a question of law or if the state court decides a case differently
6 than [the Supreme] Court has on a set of materially indistinguishable facts.” *Williams*, 529 U.S. at
7 412–13. A state court decision is an “unreasonable application of” Supreme Court authority, and
8 thus falls under the second clause of Section 2254(d)(1), if it correctly identifies the governing
9 legal principle from the Supreme Court’s decisions but “unreasonably applies that principle to the
10 facts of the prisoner’s case.” *Id.* at 413. A federal court on habeas review may not issue a writ
11 “simply because that court concludes in its independent judgment that the relevant state-court
12 decision applied clearly established federal law erroneously or incorrectly.” *Id.* at 411. Rather,
13 the application must be “objectively unreasonable” to support granting the writ. *Id.* at 409.

14 Factual determinations by state courts are presumed correct absent clear and convincing
15 evidence to the contrary.” *Miller-El*, 537 U.S. at 340. This presumption is not altered by the fact
16 that the finding was made by a state court of appeal, rather than by a state trial court. *Sumner v.*
17 *Mata*, 449 U.S. 539, 546–47 (1981). A petitioner must present clear and convincing evidence to
18 overcome Section 2254(e)(1)’s presumption of correctness; conclusory assertions will not do.
19 *Ibid.*

20 Under Section 2254(d)(2), a state court decision “based on a factual determination will not
21 be overturned on factual grounds unless objectively unreasonable in light of the evidence
22 presented in the state-court proceeding.” *Miller-El*, 537 U.S. at 340.

23 When there is no reasoned opinion from the highest state court to consider the petitioner’s
24 claims, the court looks to the last reasoned opinion, in this case that of the California Court of
25 Appeal. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801–06 (1991).

1 Petitioner’s claim is without merit. The record shows that although he was in custody at
2 the time, petitioner, even if intoxicated, asked those questions and made those statements
3 voluntarily and without prompting by a police officer. As *Miranda* holds, voluntarily offered
4 statements are admissible. Furthermore, petitioner has not shown how these statements — which
5 were simple questions about the arrest and the incident, and would probably support petitioner’s
6 assertion of self-defense — had a substantial or injurious effect or influence in determining the
7 jury’s verdict. Based on these reasons, petitioner’s claim is denied.

8 **2. IMPOSITION OF AN AGGRAVATED TERM**

9 Petitioner claims that the trial court violated his constitutional rights as set forth in *Blakely*
10 *v. Washington*, 542 U.S. 296 (2004) and *Cunningham v. California*, 549 U.S. 270 (2007) when it
11 imposed an upper term (Pet. at 8). The trial court, finding no circumstances in mitigation and
12 several circumstances in aggravation, imposed the upper term of four years for the assault
13 conviction, and then doubled it because of petitioner’s admitted prior strike. The trial court then
14 added three years for the great bodily injury enhancement and five more years for petitioner’s
15 prior prison term (Ans., Exh. F (Reporter’s Transcript 2/14/2002) at 43–44). The trial court’s
16 stated reasons for the imposition of the upper term were that petitioner “ha[d] engaged in violent
17 conduct which indicates that he is a serious danger to society,” had “a prior felony conviction [for]
18 voluntary manslaughter,” and petitioner had “served a prior prison term” (*id.* at 42–43). The state
19 appellate court apparently did not rule on this specific claim.⁴

20 *Blakely* and *Cunningham*, on which petitioner bases his claim, are the progeny of an earlier
21 Supreme Court case, *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Supreme
22 Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a
23 crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a
24 reasonable doubt.” *Id.* at 488–90. According to *Blakely*, the “statutory maximum” discussed in
25 *Apprendi* is the maximum sentence a judge could impose based solely on the facts reflected in the
26 jury verdict or admitted by the defendant; in other words, the relevant “statutory maximum” is not

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28 ⁴ Petitioner presented a different claim on these same facts to the state appellate court, a claim
that is addressed below.

1 the sentence the judge could impose after finding additional facts, but rather the maximum he
2 could impose without any additional findings. 542 U.S. at 303–04.

3 In *Cunningham*, the Supreme Court applied the above reasoning to California’s
4 determinate sentencing law (“DSL”) and found such sentencing scheme violated the Sixth
5 Amendment because the DSL allowed the sentencing court to impose an elevated sentence based
6 on aggravating facts that the trial court found by a preponderance of the evidence, rather than facts
7 found by a jury beyond a reasonable doubt. 549 U.S. at 274.

8 Petitioner’s claim is without merit because the trial court based its decision on the fact that
9 petitioner had a prior felony conviction, a fact to which petitioner admitted (Ans., Exh. H at 1;
10 Exh. F at 29.⁵ *Apprendi* and its progeny specifically except the fact of a prior conviction from its
11 holdings. Therefore, the *Apprendi* line of cases — including *Blakely* and *Cunningham* — are
12 inapplicable to the trial court’s imposition of an upper term for petitioner’s sentence. Accordingly,
13 petitioner’s claim is denied.

14 **3. INEFFECTIVE ASSISTANCE OF COUNSEL**

15 Petitioner advances two claims of ineffective assistance of counsel.

16 **A. FIRST CLAIM**

17 Petitioner alleges that his first trial counsel, Karen Evans, rendered ineffective assistance
18 when she gave the prosecutor a copy of a statement petitioner had made to a private investigator
19 (Pet. at 24). The state appellate court apparently did not rule on this claim.

20 The relevant facts as found true by the trial court are as follows. Petitioner asked Evans to
21 hire an investigator to take a statement from petitioner and then to give the prosecutor a copy of
22 the statement, which related to petitioner’s assertion that he acted in self-defense. Evans hired an
23 investigator to take the statement, which in turn was given to the prosecution.

24 Later, petitioner, through his second counsel, Stephen Carter, sought to exclude the
25 statement from trial on the basis that petitioner did not give Evans permission to hand over the
26 statement. The trial court, after holding a hearing on the matter, found Evans credible and,
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28 ⁵ Under California law, a single aggravating factor is sufficient to render a defendant eligible
for the upper term. *People v. Osband*, 13 Cal. 4th 622, 728 (Cal. 1996) (citation removed).

1 therefore, found that petitioner had waived attorney-client privilege when he directed Evans to
2 give the prosecutor a copy of the statement (Ans., Exh. E (Reporter’s Transcript 12/25/01) at 187).
3 Respondent asserts, and petitioner does not dispute, that no part of the statement was used at trial
4 (Ans., P. & A. at 27).

5 Claims of ineffective assistance of counsel are examined under *Strickland v. Washington*,
6 466 U.S. 668 (1984). In order to prevail on a claim of ineffectiveness of counsel, petitioner must
7 establish two things. First, he must establish that counsel’s performance was deficient, *i.e.*, that it
8 fell below an “objective standard of reasonableness” under prevailing professional norms. *Id.* at
9 687–68. Second, he must establish that he was prejudiced by counsel’s deficient performance, *i.e.*,
10 that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the
11 proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability
12 sufficient to undermine confidence in the outcome. *Ibid.* Where the defendant is challenging his
13 conviction, the appropriate question is “whether there is a reasonable probability that, absent the
14 errors, the factfinder would have had a reasonable doubt respecting guilt.” *Id.* at 695.

15 Applying these principles to the instant action, this order concludes that petitioner’s claim
16 is without merit. As an initial matter, petitioner has not shown that Evans’s performance was
17 deficient. According to the record, Evans acted at petitioner’s direction, both in hiring the
18 investigator and handing over the statement to the prosecutor. Though he now disputes that he
19 gave Evans permission to so act, this order must accord the trial court’s credibility determination
20 regarding Evans the highest deference. *See Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.
21 1986). Furthermore, petitioner has not alleged that the contents of the note, though not presented
22 at trial, contained information that the prosecutor used against petitioner or that Evans should have
23 known not to disclose the note, despite petitioner’s urging. Rather, he alleges that Evans handing
24 over the statement constituted by itself ineffective assistance. This is insufficient. Also, petitioner
25 has not demonstrated prejudice. The statement was not used at trial and therefore petitioner has
26 not shown that a reasonable probability exists that but for its admission the factfinder would have
27 had a reasonable doubt respecting guilt. Accordingly, petitioner’s claim is denied.

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1 **B. SECOND CLAIM**

2 Petitioner also claims that Stephen Carter, his second trial counsel, rendered ineffective
3 assistance when he failed to call Cynthia Curry, petitioner’s companion on the day of the
4 commitment offense, to testify at trial. The state appellate court apparently did not rule on this
5 claim.

6 Before trial, the prosecutor moved to admit impeachment evidence against Curry. This
7 evidence included a prior felony conviction for a crime unrelated to the instant matter — Curry
8 had been convicted of being an accessory to a murder (Cal. Pen. Code §§ 30–33) for assisting her
9 brother-in-law dispose of a corpse (Ans., Exh. B, Vol. 6 (Reporter’s Transcript 12/19/01) at 795,
10 798). The trial court granted the prosecutor’s motion and specifically held that the prosecutor
11 could ask Curry about the fact of the conviction and the circumstances surrounding it (*id.* at 796).
12 Because Curry’s testimony could be easily impeached, Carter declined to call Curry to testify at
13 trial (*id.* at 798).

14 Tactical decisions of trial counsel, such as not calling Curry to testify, deserve deference
15 when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an
16 informed decision based upon investigation; and (3) the decision appears reasonable under the
17 circumstances. *See Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). It is important to note
18 that a difference of opinion as to trial tactics does not constitute denial of effective assistance. *See*
19 *United States v. Mayo*, 646 F.2d 369, 375 (9th Cir. 1981).

20 Under this standard, petitioner’s claim is without merit. The record supports a conclusion
21 that trial counsel made an informed decision not to call Curry based on the strategic consideration
22 that her impeachability might damage the defense. Whatever merit Curry’s testimony may have
23 had, her credibility would be impeached profoundly when the jury was informed of her prior
24 conviction, which not only was a felony, but directly involved deception relating to a murder.
25 Petitioner has pointed to no evidence that defense counsel could have used to rehabilitate the
26 witness, or that the importance of Curry’s testimony outweighed any adverse effects her testimony
27 might cause. Considering all this, trial counsel’s decision appears reasonable. Accordingly,
28 petitioner’s claim is denied.

1 **4. TRIAL COURT’S EVIDENTIARY RULING**

2 Petitioner contends that the trial court violated various constitutional rights when it granted
3 the prosecution’s motion to admit the Curry impeachment evidence (Pet. at 46). Petitioner alleges
4 that by admitting this evidence, the trial court caused trial counsel to forgo calling Curry to testify,
5 thereby depriving petitioner of his right to a defense (*ibid.*). The state appellate court apparently
6 did not rule on this claim.

7 Petitioner’s claim is without merit. First, the trial court did not prevent trial counsel from
8 calling Curry to testify. Curry could have testified, though she would have been subject to
9 questions about her prior conviction. The decision not to call Curry was defense counsel’s, not the
10 trial court’s, and it was a tactical decision that appeared reasonable under the circumstances.
11 Second, petitioner has not shown that the trial court’s admission of the evidence violated any
12 constitutional right. The admission of evidence is not subject to federal habeas review unless a
13 specific constitutional guarantee is violated or the error is of such magnitude that the result is a
14 denial of the fundamentally fair trial guaranteed by due process. *See Henry v. Kernan*, 197 F.3d
15 1021, 1031 (9th Cir. 1999). As to the question whether a specific constitutional guarantee was
16 violated, petitioner has not shown that he was denied his Sixth Amendment right to present a
17 defense, or that he was not afforded criminal proceedings that comport with prevailing notions of
18 fairness, as guaranteed by due process. Again, petitioner could have presented Curry’s testimony,
19 though such a decision may have been costly. As to the question of the magnitude of the error,
20 only if there are no permissible inferences that the jury may draw from the evidence can its
21 admission violate due process such that petitioner was denied a fundamentally fair trial. *See*
22 *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). Using prior convictions to impeach a
23 witness is constitutionally permissible, and is routine under Federal Rule of Evidence 609.
24 Petitioner was not “entitled” to present an alibi witness and to have her immunized from effective
25 cross-examination. Based on this reasoning, petitioner’s claim is denied.

26 **5. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL**

27 Petitioner contends that appellate counsel rendered ineffective assistance when he failed to
28 raise petitioner’s *Miranda* and ineffective assistance claims on appeal (Pet. at 47).

1 Claims of ineffective assistance of appellate counsel are reviewed according to the standard
2 set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Miller v. Keeney*, 882 F.2d 1428, 1433
3 (9th Cir. 1989). A habeas petitioner therefore must show that appellate counsel’s advice fell
4 below an objective standard of reasonableness and that there is a reasonable probability that, but
5 for counsel’s unprofessional errors, he would have prevailed on appeal. *Miller*, 882 F.2d at 1434 &
6 n.9 (citing *Strickland*, 466 U.S. at 688, 694). It is important to note that appellate counsel does not
7 have a constitutional duty to raise every nonfrivolous issue requested by defendant. *See Jones v.*
8 *Barnes*, 463 U.S. 745, 751-54 (1983); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997);
9 *Miller*, 882 F.2d at 1434 n.10. The weeding out of weaker issues is widely recognized as one of
10 the hallmarks of effective appellate advocacy. *See Miller* at 1434. Appellate counsel therefore
11 will frequently remain above an objective standard of competence and have caused his client no
12 prejudice for the same reason — because he declined to raise a weak issue. *Ibid.*

13 Petitioner’s claim is without merit. As stated above, the Court has determined that
14 petitioner has failed to show that his *Miranda* and his ineffective assistance of trial counsel claims
15 have merit. Petitioner adds nothing in the instant claim that shows that these claims would have
16 had merit on appeal. Because these claims are without merit, it cannot have been a constitutional
17 error for appellate counsel to not raise them on appeal.

18 Petitioner also contends that his appellate counsel failed to raise a Fourth Amendment
19 claim on appeal, specifically that an officer illegally seized a knife — allegedly the weapon
20 petitioner used to attack the victims — from petitioner’s brother’s residence (Pet. at 47–48).
21 Petitioner’s claim is without merit. Specifically, however, he has not shown that he had a
22 reasonable expectation of privacy at his brother’s house, which is the threshold issue in
23 determining whether there was a Fourth Amendment violation. *United States v. Bautista*, 362 F.3d
24 584, 589 (9th Cir. 2004) (citation removed). Furthermore, the record indicates that the officer did
25 not seize the knife, but rather had the knife given to him by petitioner’s sister-in-law (Pet. at 48).⁶
26 Because there was no evidence of a seizure within the meaning of the Fourth Amendment,

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28 ⁶ Petitioner contends that because his relations were intoxicated, they could not have given valid
consent (Pet. at 49–50). Even if this were true and relevant to the Fourth Amendment issue, petitioner
still has not shown that he had a reasonable expectation of privacy at his brother’s house.

1 petitioner’s claim was and is without merit. Because the claim is without merit, appellate
2 counsel’s failure to raise it on appeal cannot have been an instance of ineffective assistance.
3 Because petitioner’s Fourth Amendment claim is without merit, his additional claims that it was
4 error for the prosecutor to have the knife tested for blood and that it was error for the trial court to
5 admit the knife are without merit. Likewise, his claim that appellate counsel was ineffective for
6 raising these claims on appeal is without merit. Accordingly, all petitioner’s claims alleging
7 ineffective assistance of appellate counsel are denied.

8 **6. PROSECUTORIAL MISCONDUCT**

9 Petitioner raises four claims of prosecutorial misconduct.

10 **A. ALLEGED *GRIFFIN* ERROR**

11 Petitioner contends that the prosecutor commented on petitioner’s failure to testify at trial
12 in violation of his Fifth Amendment right as articulated in *Griffin v. California*, 380 U.S. 609
13 (1965). Specifically, the prosecutor, during her closing argument, as part of her discussion of
14 petitioner’s assertion that he acted in self-defense, queried, “Have you heard any evidence of
15 [petitioner’s] belief that he needed to use self-defense?” Trial counsel immediately made a *Griffin*
16 objection, which the trial court overruled. Trial counsel then moved to dismiss the action, which
17 the trial court denied (Ans., Exh. B, Vol. 7 (Reporter’s Transcript 12/20/01) at 965–67). The state
18 appellate court denied petitioner’s *Griffin* claim, finding that “the prosecutor’s comment [] to be a
19 permissible reference to the state of the evidence rather than a comment on [petitioner’s] failure to
20 testify” (Ans., Exh. H at 9).

21 The Fifth Amendment prohibits the prosecutor from commenting to the jury on the
22 defendant’s failure to take the stand in his own defense. *Griffin*, 380 U.S. at 615. Where a
23 prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant’s
24 silence, or to treat the defendant’s silence as substantive evidence of guilt, the defendant’s
25 privilege against compulsory self-incrimination is violated. *Ibid.* However, “[a] comment on the
26 failure of the defense as opposed to the defendant to counter or explain the testimony presented or
27 evidence introduced is not an infringement of the defendant’s Fifth Amendment privilege.”
28 *United States v. Lopez-Alvarez*, 970 F.2d 583, 595–596 (9th Cir. 1992) (internal quotation marks

1 and citations removed). Yet, while it is proper for the prosecution to address the defense
2 arguments, a comment is impermissible if it is manifestly intended to call attention to the
3 defendant’s failure to testify, or is of such a character that the jury would naturally and necessarily
4 take it to be a comment on the failure to testify. *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir.
5 1987) (citing *United States v. Bagley*, 772 F.2d 482, 494 (9th Cir. 1985)).

6 However, if the commentary is impermissible, such commentary by the prosecutor requires
7 reversal only if “(1) the commentary is extensive; (2) an inference of guilt from silence is stressed
8 to the jury as a basis for the conviction; and (3) where there is evidence that could have supported
9 acquittal.” *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir. 1993) (citation omitted). Put
10 differently, such improper commentary warrants reversal only if it appears that it may have
11 affected the verdict. *See Lincoln*, 807 F.2d at 809; *see also Cook v. Schriro*, 516 F.3d 802, 822
12 (9th Cir. 2008).

13 Petitioner’s claim is without merit. The record supports the conclusion that the
14 prosecutor’s comments related to the state of the evidence and to petitioner’s assertion that he
15 acted in self-defense, and not to petitioner’s failure to testify. As such, these statements are not
16 error under *Griffin*, but rather a response to a defense argument and to the defense’s failure to
17 present evidence supporting its assertion. Furthermore, even if the prosecutor’s comment was
18 impermissibly intended to call attention to petitioner’s failure to testify, it is not of a nature
19 sufficient to warrant the granting of habeas relief. First, this commentary was not extensive, but
20 rather a single sentence. Second, the comments did not encourage the jury to infer guilt from
21 petitioner’s silence, but rather asked the jury whether the defense had presented evidence on its
22 assertion that petitioner committed the acts in self-defense. Third, petitioner has pointed to no
23 evidence that would have supported acquittal. Based on this record, the Court cannot say that the
24 prosecutor’s comments warrant the granting of habeas relief. This claim is denied.

25 **B. BURDEN OF PROOF**

26 Petitioner contends that the prosecutor violated his rights by misstating the burden of proof
27 for a conviction. Petitioner bases his claim on the prosecutor’s allegedly erroneous statement to
28 the jury that, “there is no self-defense in this case. I don’t have to prove to you that self-defense

1 does not exist. I only have to prove to you the elements of the crime” (Ans., Exh. B, Vol. 7
2 (Reporter’s Transcript 12/20/10) at 968. The trial court correctly instructed the jury on the burden
3 of proof: “The People have the burden to prove that the application of physical force was not in
4 lawful self-defense. If you have a reasonable doubt that the application of physical force was
5 unlawful, you must find [petitioner] not guilty” (*id.* at 1063). The state appellate court denied
6 petitioner’s claim, finding that the trial court’s instruction cured whatever harm the prosecutor’s
7 statement may have caused (Ans., Exh. H at 10–11).

8 Claims of prosecutorial misconduct are reviewed under the narrow standard of due process
9 and not the broad exercise of supervisory power. *See Darden v. Wainwright*, 477 U.S. 168, 181
10 (1986). A defendant’s due process rights are violated when a prosecutor’s misconduct renders a
11 trial “fundamentally unfair.” *See ibid.* Under *Darden*, the first issue is whether the prosecutor’s
12 remarks were improper; if so, the next question is whether such conduct infected the trial with
13 unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005).

14 Petitioner’s claim is without merit. The prosecutor’s first statement was not a misstatement
15 of the law, but rather a comment on the state of the evidence. The prosecutor’s last comment was
16 largely correct in that it was his duty to prove the elements of the crime, though it was not true that
17 that was her only burden. The second sentence could be seen as a misstatement of the law because
18 the prosecution under California law has the burden to prove that the use of physical force was not
19 in self-defense, and therefore, was unlawful. However, the trial court correctly instructed the jury
20 as to the prosecution’s burden of proof. Without evidence to the contrary, the Court must assume
21 that the jury followed its instructions. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987).
22 Accordingly, petitioner has not shown that the prosecutor’s statement infected the trial with
23 unfairness. This claim is denied.

24 Petitioner also contends that the prosecutor committed misconduct by misstating the law of
25 self-defense. Specifically, petitioner claims that the prosecutor omitted that self-defense has both
26 objective and subjective components (Pet. at 73). This claim is without merit. The trial court
27 properly instructed the jury on the legal meaning of self-defense (Ans., Exh. B, Vol. 7 at 1056).
28 The Court must assume that the jury followed its instructions. This claim is denied.

1 **C. ALLEGED MISSTATEMENTS**

2 Petitioner claims that the prosecutor made “numerous misstatements of facts, or attempted
3 to smuggle facts before the jury that were not in the record” (Pet. at 67). Petitioner alleges that the
4 prosecutor stated that petitioner’s knife tested presumptively positive for human blood, that the
5 prosecutor tried to introduce the fact that a witness was stabbed in the back before evidence that
6 such an act occurred was presented, that he elicited two hearsay objections, that the prosecutor
7 asked a question that called for the witness to speculate, and she asked three improper questions of
8 a witness. The state appellate court denied this claim, finding that not only had petitioner had not
9 explained why these examples amounted to misconduct, but that none of the examples, taken
10 individually or together, was sufficient to infect the trial with unfairness (Ans., Exh. H at 12).

11 Petitioner’s claims are without merit because he has failed to show that any of these
12 incidents resulted in a trial that was fundamentally unfair. First, the prosecutor’s statement
13 regarding the blood appears to be inaccurate. The criminologist testified that the blood on the
14 knife tested “presumptively positive” for “just” blood — he testified that he could not determine
15 whether the blood was human (Ans., Exh. B, Vol 5 (Reporter’s Transcript 12/18/01) at 730).
16 However, because petitioner’s asserted that his actions were taken in self-defense — thereby
17 rendering the type of blood found on the knife irrelevant — the record does not support a claim
18 that these statements resulted in a fundamentally unfair trial. Second, even if prosecutor had tried
19 to “smuggle in” the fact a victim had been stabbed in the back, admissible evidence of the stabbing
20 was properly introduced at trial at other times. Third, the trial court upheld petitioner’s objections
21 to the hearsay statements and instructed the jury to disregard the answers. Without evidence to the
22 contrary, the Court must assume that the jury followed its instructions. *See Richardson*, 481 U.S.
23 at 206. Fourth, as to the prosecutor’s question that allegedly called for speculation, the witness
24 responded, “I don’t know anything about his motives, no. How would I know?” (Ans., Exh. B,
25 Vol. 6 (Reporter’s Transcript 12/19/01) at 825). Petitioner has not shown how such a statement,
26 even if caused by an improper question, deprived him of a fundamentally fair trial. Fifth, the trial
27 court sustained trial counsel’s objections to the three allegedly improper questions, and,
28 consequently, the witnesses provided no answers (Pet. at 76–77). The trial court instructed the

1 jury that the statements and questions from the prosecutor and defense counsel are not evidence
2 (Ans., Exh. B, Vol. 7 at 1046). Again, the Court must assume that the jury followed its
3 instructions. *See Richardson*, 481 U.S. at 206. Petitioner’s claim is denied.

4 **D. MISREPRESENTATION**

5 Petitioner contends that the prosecutor committed misconduct when she represented to the
6 trial court that she did not have notice that petitioner’s mother would be called to testify that
7 petitioner had black eyes and a swollen nose when petitioner was bailed out of jail (Pet. at 79). As
8 the parties came to agree, a copy of an interview with petitioner’s mother had been disclosed to the
9 prosecutor before trial. After the prosecutor’s representation, petitioner moved to dismiss on the
10 basis that the prosecutor committed misconduct (Ans., Exh. B, Vol. 7 at 917). In a hearing on the
11 matter, the prosecutor testified that she had not intentionally misled the trial court, but rather that
12 she had overlooked the interview in the hundred pages of discovery materials given to her (*id.* at
13 918–19). The trial court found the prosecutor credible (*id.* at 926). The state appellate court found
14 that the alleged misconduct did not render petitioner’s trial unfair, “nor was it a deceptive or
15 reprehensible method of persuasion” (Ans., Exh. H at 12).

16 Petitioner’s claim is without merit. This Court will accord great deference to the trial
17 court’s credibility finding in the prosecutor’s favor. *See Knaubert*, 791 F.2d at 727. Also,
18 petitioner has not shown how the prosecutor’s representation adversely affected his defense.
19 Accordingly, petitioner has not shown that the prosecutor committed misconduct or that any
20 alleged misconduct resulted in an unfair trial. This claim is denied.

21 **E. CUMULATIVE ERROR**

22 Petitioner contends that prosecutor’s errors, taken in the cumulative, deprived him of a fair
23 trial (Pet at 80).

24 In some cases, although no single trial error is sufficiently prejudicial to warrant reversal,
25 the cumulative effect of several errors may still prejudice a defendant so much that his conviction
26 must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893–95 (9th Cir. 2003). However,
27 where there is no single constitutional error existing, nothing can accumulate to the level of a
28 constitutional violation. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002).

1 Petitioner's claim is without merit. Because there exists no single constitutional error,
2 there are no errors to accumulate to the level of a constitutional violation.

3 **7. CROSS-EXAMINATION**

4 Petitioner claims that the trial court violated his Confrontation Clause rights by limiting his
5 cross-examination of two witnesses. More specifically, the trial court sustained the prosecutor's
6 objection to trial counsel's questions regarding Martin, a victim (Pet. at 84). Petitioner sought to
7 introduce evidence of Martin's poverty in order to show that Martin had a motive to rob petitioner,
8 thereby justifying petitioner's acting in self-defense. The state appellate court denied this claim,
9 finding that such testimony was irrelevant and duplicative (Ans., Exh. H at 16).

10 The Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses
11 appearing before the trier of fact. *See Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). The ultimate goal
12 of the Confrontation Clause is to ensure reliability of evidence, but it is a procedural rather than a
13 substantive guarantee. *Crawford v. Washington*, 541 U.S. 36, 61 (2004). It commands, not that
14 evidence be reliable, but that reliability be assessed in a particular manner: by testing in the
15 crucible of cross-examination. *Ibid*. This right may be restricted in certain situations, however.
16 *See Maryland v. Craig*, 497 U.S. 836, 855 (1990). The Confrontation Clause does not prevent a
17 trial judge from imposing reasonable limits on cross-examination based on concerns of
18 harassment, prejudice, confusion of issues, witness safety or interrogation that is repetitive or only
19 marginally relevant. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Also, while the
20 Confrontation Clause guarantees an opportunity for effective cross-examination, it does not
21 guarantee an opportunity for a cross-examination that is effective in whatever way, and to
22 whatever extent, the defense might wish. *See Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per
23 curiam).

24 Petitioner's claim is without merit because evidence of Martin's poverty was presented at
25 trial, though not through petitioner's cross-examination. Though petitioner asserts that it would
26 have benefitted his defense had the prosecutor not asked that question, the authorities above hold
27 that does not have a right to a cross-examination in whatever way he thinks proper. Petitioner's
28 claim is denied.

1 **8. TRIAL COURT’S DUAL USE OF A SINGLE FACT IN SENTENCING**

2 Petitioner claims that the trial court violated his constitutional rights when it used the same
3 fact as the basis for selecting the upper term and as the basis to enhance his sentence (Pet. at 90–
4 91). The state appellate court denied petitioner’s claim, finding that there were “aggravating
5 factors that did not involve a prohibited dual use of facts that support the [trial] court’s imposition
6 of the aggravated term” (Ans., Exh. H at 20).

7 Petitioner’s claim fails. Petitioner has not cited any persuasive federal authority that the
8 dual use of a single fact — if such a use occurred in this case — in a sentencing determination
9 violates his federal constitutional rights. A reviewing federal court sits only to address violations
10 of federal, and not state, law. *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing
11 *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991).
12 Because petitioner has not presented a federal allegation, his claim is denied.

13 **9. TRIAL COURT’S DENIAL OF PETITIONER’S MOTION TO STRIKE A CONVICTION**

14 Petitioner claims that the trial court violated his rights when it refused to grant his motion
15 to strike his prior felony conviction (Pet. at 92).⁷

16 A California sentencing court may strike a prior felony conviction allegation “in
17 furtherance of justice,” an “amorphous concept” requiring the trial court to consider both “the
18 rights of the defendant and the interests of society as represented by the People.” *See People v.*
19 *Superior Court (Romero)*, 13 Cal. 4th 497, 507, 530 (Cal. 1996). While petitioner may have the
20 right to bring such a motion under California law, petitioner has not shown that he has a federal
21 constitutional right to bring such a motion. Accordingly, petitioner’s claim is denied.

22 As to all petitioner’s claims, the Court concludes that the state court’s determinations were
23 not contrary to, or unreasonable applications of, clearly established Supreme Court precedent, nor
24 were they based on an unreasonable determination of the facts in light of the evidence presented
25 under 28 U.S.C. 2254 (d)(1), (2). Accordingly, petitioner’s claims are denied.

26 _____
27 ⁷ Petitioner includes a footnote in which he alleges that trial counsel rendered ineffective
28 assistance for failing to object to the imposition of the upper term (Pet. at 87 n.1). Petitioner’s claim
insufficiently detailed for this Court to determine its merits. Without specifics as to what about trial
counsel’s conduct allegedly resulted in a deficient performance how this deficiency resulted in
prejudice to petitioner, the Court cannot address this claim, which, accordingly, must be denied.

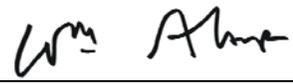
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CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is **DENIED**. The clerk shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: December 9, 2008



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE