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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JERRY EDDIE PATLAN,
Petitioner,
v.
C.E. DUCART,
Respondent.

Case No. [15-cv-2372-TEH](#)

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS; DENYING
CERTIFICATE OF APPEALABILITY

Jerry Eddie Patlan, a state prisoner, has filed this pro se petition seeking a writ of habeas corpus under 28 U.S.C. § 2254. Respondent was ordered to show cause why the petition should not be granted. Respondent has filed an answer. For the reasons set forth below, the petition is DENIED.

I

Petitioner was charged with possession of methamphetamine for sale and transportation of methamphetamine. Clerk's Transcript ("CT") at 80-81. Petitioner had prior convictions for possession of methamphetamine for sale and sale of PCP, two prior serious felony convictions, and a prior prison term. Id. at 82-83. At the first trial the jury was deadlocked and a mistrial was declared. Id. at 173-74. Petitioner was found guilty of both charges at a second trial. Id. at 372-73. He was sentenced to a term of 25 years to life in prison. Id. at 502-04.

1 found in the workbag and on the center
2 console. It was missing the middle finger
3 and contained eight baggies and one bindle.
4 The containers held an off-white crystalline
5 substance that was later identified as over
6 15 grams of methamphetamine.

7 Officer Byrd interviewed both occupants
8 separately shortly after the traffic stop and
9 provided Miranda warnings to each of them.
10 Though she had not actually seen whether
11 either occupant discarded the blue object,
12 she informed both of them that she saw
13 Contreras discard the drugs. Officer Byrd
14 testified at trial that this lie was part of
15 an investigative technique to attempt to gain
16 an admission from defendant that he was
17 responsible for the methamphetamine. After
18 learning that defendant and Contreras were
19 cousins, she theorized that defendant would
20 accept responsibility for the drugs rather
21 than seeing his cousin get in trouble.
22 Neither defendant nor Contreras accepted
23 responsibility.

24 During the traffic stop and interviews,
25 Officer Byrd determined that defendant
26 appeared to be under the influence of
27 methamphetamine but that Contreras did not.
28 Defendant also admitted to another officer
that he had "done a line earlier" that day,
which Officer Byrd understood as meaning he
had used methamphetamine. Based on
defendant's appearance, his admission of drug
use, and the presence of blue gloves in
defendant's workbag that matched the glove
containing the methamphetamine, Officer Byrd
arrested defendant. He was later charged
with possession for sale of methamphetamine
(Health & Saf.Code, § 11378) and
transportation of methamphetamine (Health &
Saf.Code, § 11379, subd. (a)).

Defendant's first trial resulted in a
mistrial. At defendant's second trial, the
People presented DNA evidence obtained from
samples taken from the baggies and bindle
that determined defendant was a likely
contributor to the DNA on the baggies. This
evidence had not been presented at the first
trial. At both trials, defendant's theory
was that the methamphetamine in the vehicle
belonged to Contreras, not defendant.

At the close of evidence in the second trial,
defendant requested a pinpoint jury

1 instruction regarding the legal definition of
2 "control" for purposes of possession for sale
3 of a controlled substance. After a hearing
4 on the issue, the court found CALCRIM No.
5 2302 adequately defined the term "control."
6 The second jury convicted defendant of both
7 possession for sale and transportation of
8 methamphetamine. After the jury was
9 discharged, the bifurcated issue of
10 defendant's prior convictions was tried to
11 the court, which found the existence of two
12 prior strikes. The court denied defendant's
13 Romero motion, and sentenced defendant to 25
14 years to life in prison. Defendant timely
15 appealed.

9 Patlan, 2014 WL 772608, at *1-2.

10 III

11 The Antiterrorism and Effective Death Penalty Act of 1996
12 ("AEDPA") amended § 2254 to impose new restrictions on federal
13 habeas review. A petition may not be granted with respect to any
14 claim that was adjudicated on the merits in state court unless
15 the state court's adjudication of the claim: "(1) resulted in a
16 decision that was contrary to, or involved an unreasonable
17 application of, clearly established Federal law, as determined by
18 the Supreme Court of the United States; or (2) resulted in a
19 decision that was based on an unreasonable determination of the
20 facts in light of the evidence presented in the State court
21 proceeding." 28 U.S.C. § 2254(d). Additionally, habeas relief
22 is warranted only if the constitutional error at issue had a
23 "substantial and injurious effect or influence in determining the
24 jury's verdict." Penry v. Johnson, 532 U.S. 782, 795 (2001)
25 (internal quotation marks omitted).

26 "Under the 'contrary to' clause, a federal habeas court may
27 grant the writ if the state court arrives at a conclusion
28 opposite to that reached by [the Supreme] Court on a question of

1 law or if the state court decides a case differently than [the]
2 Court has on a set of materially indistinguishable facts.”
3 Williams (Terry) v. Taylor, 529 U.S. 362, 412-13 (2000). “Under
4 the ‘unreasonable application’ clause, a federal habeas court may
5 grant the writ if the state court identifies the correct
6 governing legal principle from [the] Court’s decisions but
7 unreasonably applies that principle to the facts of the
8 prisoner’s case.” Id. at 413.

9 “[A] federal habeas court may not issue the writ simply
10 because that court concludes in its independent judgment that the
11 relevant state-court decision applied clearly established federal
12 law erroneously or incorrectly. Rather, that application must
13 also be unreasonable.” Id. at 411. A federal habeas court
14 making the “unreasonable application” inquiry should ask whether
15 the state court’s application of clearly established federal law
16 was “objectively unreasonable.” Id. at 409. Moreover, in
17 conducting its analysis, the federal court must presume the
18 correctness of the state court’s factual findings, and the
19 petitioner bears the burden of rebutting that presumption by
20 clear and convincing evidence. 28 U.S.C. § 2254(e)(1). As the
21 Court explained: “[o]n federal habeas review, AEDPA ‘imposes a
22 highly deferential standard for evaluating state-court rulings’
23 and ‘demands that state-court decisions be given the benefit of
24 the doubt.’” Felkner v. Jackson, 562 U.S. 594, 598 (2011).

25 Section 2254(d)(1) restricts the source of clearly
26 established law to the Supreme Court’s jurisprudence. “[C]learly
27 established Federal law, as determined by the Supreme Court of
28 the United States” refers to “the holdings, as opposed to the

1 dicta, of [the Supreme] Court's decisions as of the time of the
2 relevant state-court decision." Williams, 529 U.S. at 412. "A
3 federal court may not overrule a state court for simply holding a
4 view different from its own, when the precedent from [the Supreme
5 Court] is, at best, ambiguous." Mitchell v. Esparza, 540 U.S.
6 12, 17 (2003).

7 When applying these standards, the federal court should
8 review the "last reasoned decision" by the state courts. See
9 Ylst v. Nunnemaker, 501 U.S. 797, 804 (1991); Barker v. Fleming,
10 423 F.3d 1085, 1091-92 (9th Cir. 2005). When there is no
11 reasoned opinion from the state's highest court, the court "looks
12 through" to the last reasoned opinion. See Ylst, 501 U.S. at
13 804.

14 With these principles in mind regarding the standard and
15 scope of review on federal habeas, the Court addresses
16 Petitioner's claims. Petitioner alleges: (1) trial court error
17 for denying his request to instruct the jury with his proposed
18 instructions on the terms "possession" and "control"; (2)
19 prosecutorial misconduct during the closing argument when the
20 prosecutor (a) disparaged defense counsel (b) inappropriately
21 vouched for a witness and commented on Petitioner's right to
22 remain silent; (3) ineffective assistance of counsel; (4)
23 cumulative error; and (5) insufficient evidence to prove a prior
24 strike conviction.

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IV
A

Petitioner first contends that the trial court erred by refusing to issue his proposed jury instruction with respect to the meaning of "possession" and "control." He also argues that by denying his proposed instruction the trial court prevented him from presenting his defense theory of the case.

The California Court of Appeal set forth the relevant background and denied this claim:

Defendant claims that by refusing to give his requested pinpoint instruction, the trial court failed to define an element of possession of a controlled substance for sale and failed to instruct the jury on a defense theory. The trial court included CALCRIM No. 2302 in the instructions read to the jury. This instruction lays out the following elements for possession for sale of methamphetamine: (1) possession of a controlled substance by defendant; (2) defendant's knowledge of the presence of a controlled substance; (3) defendant's knowledge that the substance was in fact a controlled substance; (4) defendant's intent to sell the substance; (5) the controlled substance was methamphetamine; and (6) the controlled substance was in a usable amount. (CALCRIM No. 2302.) Regarding possession and control, the court included bracketed language from the form instruction, stating: "A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person."

In addition to this form instruction, defendant requested that the court provide a pinpoint instruction paraphrased from the language of People v. Redrick (1961) 55 Cal. 2d 282, 285. The proposed instruction stated, in relevant part, "the defendant cannot be convicted of unlawful possession merely because he had an opportunity to access a place where controlled substances were found." Defendant's counsel claimed the

1 pinpoint instruction was necessary to
2 differentiate between mere access to the
3 methamphetamine in a car driven by defendant
4 and the control necessary to constitute a
5 violation of Health and Safety Code section
6 11378. The trial court denied defendant's
7 request, finding CALCRIM No. 2302 adequately
8 and accurately described the crime of
9 possession of methamphetamine for sale.

10 . . .

11 1. The Instructions Adequately Defined All
12 Elements of Possession of Methamphetamine For
13 Sale

14 Defendant claims the version of CALCRIM No.
15 2302 provided to the jury was inadequate
16 because a juror could have incorrectly
17 concluded defendant could be convicted based
18 on his mere proximity and access to the
19 methamphetamine in the vehicle. An identical
20 claim was considered and rejected in People
21 v. Montero (2007) 155 Cal. App. 4th 1170
22 (Montero). In Montero, after finding a
23 baggie containing methamphetamine during a
24 parole search of the defendant, officers
25 searched the garage where Montero had been
26 standing and discovered three additional
27 baggies containing methamphetamine that
28 matched the first baggie recovered from the
defendant. (Id. at pp. 1173-1174.) On
appeal from his conviction for possession for
sale, the defendant claimed that CALCRIM No.
2302 erroneously omitted the elements of
"dominion and control" from the definition
of possession for sale. (Montero, supra, at
p. 1174.)

In rejecting the defendant's claim, the court
noted that the instruction "requires the
defendant to have control over the
substance." (Montero, supra, 155 Cal. App.
4th at p. 1180.) Because of this control
requirement, the court concluded "the jury
could not find defendant guilty simply due to
his proximity to the substance" and that
"[n]o reasonable juror would have believed
that proximity alone equaled control."
(Ibid.)

We agree with Montero's reasoning and find
defendant's argument unpersuasive. The
relevant language of CALCRIM No. 2302 states
that a defendant possesses a controlled
substance if he or she "has control over it

1 or the right to control it...." (CALCRIM No.
2 2302.) From this, a reasonable juror would
3 understand that possession involves control
4 over the substance and would not encompass
5 merely having control over the vehicle in
6 which the substance was located. To hold
7 otherwise would assume jurors are incapable
8 of understanding instructions provided in
9 plain English, which is something we cannot
10 do. (See Ramos, supra, 163 Cal. App. 4th at
11 p. 1088.) If anything, the requested
12 instruction would have been duplicative of
13 CALCRIM No. 2302. Courts may refuse to give
14 instructions that are duplicative of other
15 instructions. (People v. Dieguez (2001) 89
16 Cal.App.4th 266, 277.)

9 2. The Instructions Informed the Jury of the
10 Defense Theory

11 We also find defendant's "theory of the case"
12 claim to be without merit. Defendant's
13 theory was that Contreras, not defendant,
14 possessed the methamphetamine. Defendant's
15 proposed instruction sought to further
16 clarify the elements of Health and Safety
17 Code section 11378 by informing the jury that
18 mere access to a controlled substance does
19 not prove possession for sale. However, as
20 discussed in greater detail above, CALCRIM
21 No. 2302 explains that possession requires
22 more than mere proximity by stating the
23 defendant must have "control over it or the
24 right to control it...." (CALCRIM No. 2302;
25 see Montero, supra, 155 Cal. App. 4th at p.
26 1180.)

19 While a specific additional instruction might
20 have been warranted if defendant had raised a
21 complex theory regarding his innocence, his
22 theory—essentially, "the other guy did it"—is
23 a commonly encountered defense. The
24 definition of possession in CALCRIM No. 2302,
25 coupled with defense counsel's closing
26 argument, which focused on evidence
27 supporting defendant's theory that Contreras
28 possessed the methamphetamine, provided
adequate information to the jury regarding
defendant's theory of the case.

Patlan, 2014 WL 772608, at *2-4 (footnotes omitted).

A challenge to a jury instruction solely as an error under
state law is not cognizable in federal habeas corpus proceedings.

1 See Estelle v. McGuire, 502 U.S. 62, 71-72 (1991). A state trial
2 court's refusal to give an instruction does not alone raise a
3 ground cognizable in a federal habeas corpus proceeding. See
4 Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988). The
5 error must so infect the trial that the defendant was deprived of
6 the fair trial guaranteed by the Fourteenth Amendment. See id.

7 Due process requires that "criminal defendants be afforded
8 a meaningful opportunity to present a complete defense.'" Clark
9 v. Brown, 450 F.3d 898, 904 (9th Cir. 2006) (quoting California
10 v. Trombetta, 467 U.S. 479, 485 (1984)). Therefore, a criminal
11 defendant is entitled to adequate instructions on the defense
12 theory of the case. See Conde v. Henry, 198 F.3d 734, 739 (9th
13 Cir. 2000).

14 Due process does not require that an instruction be given
15 unless the evidence supports it. See Hopper v. Evans, 456 U.S.
16 605, 611 (1982); Menendez v. Terhune, 422 F.3d 1012, 1029 (9th
17 Cir. 2005). The defendant is not entitled to have jury
18 instructions raised in his or her precise terms where the given
19 instructions adequately embody the defense theory. United States
20 v. Del Muro, 87 F.3d 1078, 1081 (9th Cir. 1996). Whether a
21 constitutional violation has occurred will depend upon the
22 evidence in the case and the overall instructions given to the
23 jury. See Duckett v. Godinez, 67 F.3d 734, 745 (9th Cir. 1995).

24 The omission of an instruction is less likely to be
25 prejudicial than a misstatement of the law. See Walker v.
26 Endell, 850 F.2d 470, 475-76 (9th Cir. 1987) (citing Henderson v.
27 Kibbe, 431 U.S. 145, 155 (1977)). Thus, a habeas petitioner
28 whose claim involves a failure to give a particular instruction

1 bears an "'especially heavy burden.'" Villafuerte v. Stewart,
2 111 F.3d 616, 624 (9th Cir. 1997) (quoting Henderson, 431 U.S. at
3 155).

4 Petitioner has failed to show that the state court's denial
5 of this claim was an unreasonable application of Supreme Court
6 authority. The California Court of Appeal found that the
7 standard instruction provided by the trial court properly and
8 adequately addressed the issue of control of the drugs as opposed
9 to mere proximity. The instruction noted that "[a] person does
10 not have to actually hold or touch something to possess it. It
11 is enough if the person has control over it or the right to
12 control it, either personally or through another person."
13 Patlan, 2014 WL 772608, at *2. The state court agreed with
14 previous case law and found that no reasonable juror would
15 believe that mere proximity would equal control. Nor has
16 Petitioner shown that the instruction given deleted an element of
17 the offense. The state court's determination was not objectively
18 unreasonable and Petitioner has not shown evidence to support his
19 claim that the trial court erred in not issuing his requested
20 instruction. Even if there was an error, it was harmless under
21 Brecht v. Abrahamson, 507 U.S. 619 (1993), based on the evidence
22 presented at trial that showed more than mere proximity between
23 Petitioner and the drugs.

24 The California Court of Appeal also held that denying
25 Petitioner's requested instruction did not deny him the ability
26 to present the defense theory of the case. The state court noted
27 that Petitioner's theory was that the drugs belonged to the other
28 individual in the car and that this is a common defense.

1 Therefore, no additional instruction was required. The
2 instruction provided to the jury adequately discussed possession
3 and control, and trial counsel still presented many strong
4 arguments to forward its theory that the drugs belonged to the
5 other individual. Because Petitioner has not shown an
6 unreasonable application of Supreme Court authority, this claim
7 is denied.

8 B

9 Petitioner next argues that the prosecutor committed
10 misconduct in closing argument by disparaging defense counsel,
11 vouching for a witness, and improperly commenting on Petitioner's
12 right to remain silent.

13 1

14 The California Court of Appeal set forth the relevant
15 background and denied this claim:

16 During her closing argument, the prosecutor
17 made the following statements: "It is my job
18 as a district attorney to prove to you the
19 case beyond a reasonable doubt. It is my job
20 to present to you facts, facts that lead you
21 to an abiding conviction to [sic] the truth
22 of the charge. [¶] The defense's role is
23 very different. The defense's role is to
24 cause you to doubt the truth." Defense
25 counsel objected to the foregoing statement
26 as improper argument, which the court
27 sustained. The court did not immediately
28 provide the jury admonition requested by
defense counsel.

When the prosecutor continued the same line
of argument by stating "they have built the
case around . . . what the defense believes
that the evidence actually is," defense
counsel objected again and the court, after
holding a sidebar, provided the following
admonition to the jury: "Ladies and gentlemen
of the jury, I want to remind you that it is
your role as jurors to serve as independent
judges of the facts, all right. That is, you

1 are to determine from the evidence presented
2 in this court and the evidence alone what
3 facts have been proven, and you will
4 ultimately, from those facts, determine
5 whether or not the People have met their
6 burden of proving the defendant's guilt
7 beyond a reasonable doubt. [¶] You are not
8 to be sidetracked, confused or in any way to
9 deviate from that role by your attempts to or
10 in any attempt to evaluate how you feel
11 either party may have done their job as an
12 attorney in this trial, all right. Your only
13 job is to deal with evidence and what it does
14 or does not prove."

8 On appeal, defendant claims the prosecutor's
9 remarks constitute misconduct requiring
10 reversal of defendant's conviction because
11 they improperly disparaged defense counsel.
12 "Personal attacks on the integrity of
13 opposing counsel constitute prosecutorial
14 misconduct." (Herring, supra, 20 Cal. App.
15 4th at p. 1076.) Defendant claims the
16 prosecutor's conduct in this case is "almost
17 identical" to the prosecutor's conduct in
18 Herring and encourages us to follow that
19 opinion and reverse defendant's conviction.
20 We disagree.

15 In Herring, the prosecutor stated during the
16 closing argument: "'My people are victims.
17 His people are rapists, murderers, robbers,
18 child molesters. . . . He does not want you
19 to hear the truth.'" (Herring, supra, 20
20 Cal. App. 4th at p. 1073.) Based on these
21 statements, as well as others targeting the
22 defendant using racially insensitive
23 language, the Herring court reversed the
24 defendant's conviction, holding that "[i]t is
25 improper for the prosecutor to imply that
26 defense counsel has fabricated evidence or to
27 otherwise malign defense counsel's
28 character." (Id. at p. 1075.)

23 Unlike the prosecutor's statements in
24 Herring, here the prosecutor's main improper
25 statement was that the role of defense
26 counsel "is to cause you to doubt the truth."
27 Her statement, while incorrect and improper,
28 is far from "identical" to those made in
Herring and did not make the trial so
fundamentally unfair as to require reversal.
Further, the trial court here mitigated any
damage by admonishing the jury soon after the
prosecutor's statement to "serve as
independent judges of the facts" and not

1 "attempt to evaluate how you feel either
2 party may have done their job as an attorney.
3 " For these reasons, we find the
4 prosecutor's improper statement did not rise
5 to the level of misconduct requiring
6 reversal.

7 Patlan, 2014 WL 772608, at *4-5.

8 Prosecutorial misconduct is cognizable in federal habeas
9 corpus. The appropriate standard of review is the narrow one of
10 due process and not the broad exercise of supervisory power.
11 Darden v. Wainwright, 477 U.S. 168, 181 (1986). A defendant's
12 due process rights are violated when a prosecutor's misconduct
13 renders a trial "fundamentally unfair." Id.; Smith v. Phillips,
14 455 U.S. 209, 219 (1982) ("the touchstone of due process analysis
15 in cases of alleged prosecutorial misconduct is the fairness of
16 the trial, not the culpability of the prosecutor"). Under
17 Darden, the first issue is whether the prosecutor's remarks were
18 improper; if so, the next question is whether such conduct
19 infected the trial with unfairness. Tan v. Runnels, 413 F.3d
20 1101, 1112 (9th Cir. 2005). A prosecutorial misconduct claim is
21 decided "'on the merits, examining the entire proceedings to
22 determine whether the prosecutor's remarks so infected the trial
23 with unfairness as to make the resulting conviction a denial of
24 due process.'" Johnson v. Sublett, 63 F.3d 926, 929 (9th Cir.
25 1995).

26 A prosecutor may not gratuitously attack a defendant's
27 choice of counsel or defense counsel's integrity and veracity.
28 See Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983)
 (prosecutor's comments equating defendant's hiring of counsel
 with guilt and comments attacking integrity of defense counsel
 without evidence are improper and are errors of constitutional

1 dimension). Nor may the prosecutor attack defense counsel's
2 legitimate trial tactics. See United States v. Frederick, 78
3 F.3d 1370, 1379-80 (9th Cir. 1996) (prosecutor's back-handed
4 compliment to defense lawyer for confusing witness, which
5 appeared to imply that his methods were somewhat underhanded and
6 designed to prevent truth from coming out, was improper but not
7 alone reversible error). However, there is no constitutional
8 error unless the comments were prejudicial to the point of
9 denying the defendant a fair trial. Compare United States v.
10 Rodrigues, 159 F.3d 439, 449-51 (9th Cir. 1998) (combination of
11 prosecutor's misstatement of the law with slander of defense
12 counsel was prejudicial where there was no rebuke of false
13 accusations by the court, no response by the vilified lawyer
14 allowed and no curative instruction given), amended, 170 F.3d 881
15 (9th Cir. 1999) with United States v. Foster, 711 F.2d 871, 883
16 (9th Cir. 1983) (implication that defense counsel was part of
17 conspiracy to distribute heroin was neutralized by prosecutor's
18 corrective statement in response to objection by defense
19 counsel). In addition, Brecht requires that a state prisoner
20 show that the error had a substantial and injurious effect or
21 influence in determining the jury's verdict. See Williams v.
22 Borg, 139 F.3d 737, 745 (9th Cir. 1998).

23 The California Court of Appeal found that the prosecutor's
24 two statements were incorrect and improper. Yet, the court held
25 that the statements did not render the trial fundamentally unfair
26 to require reversal. This conclusion was not objectively
27 unreasonable. The California Court of Appeal noted that nearly
28 immediately after the statements, the trial court admonished the

1 jury that they were the independent judges of the facts and were
2 not to be confused by the attorneys or by the attorneys'
3 performance of their duties. The statements were two isolated
4 incidents and Petitioner has failed to show that the state
5 court's finding that he received a fair trial despite these two
6 isolated incidents was unreasonable. Because Petitioner has
7 failed to meet his high burden, this claim is denied.

8 2

9 The California Court of Appeal also denied Petitioner's
10 claim that vouching for a police witness and making improper
11 comments about Petitioner's right to remain silent constituted
12 prosecutorial misconduct:

13 Defendant's closing argument attacked Officer
14 Byrd's testimony by highlighting her
15 inconsistent testimony regarding who threw
16 the blue object as well as her demeanor
17 throughout her testimony. Specifically, the
18 defense focused on Officer Byrd's testimony
19 at trial regarding the interview with
20 defendant immediately after the traffic stop,
21 where she told defendant she had seen
22 Contreras, not defendant, throw the blue
23 object. This testimony reflected only what
24 Officer Byrd stated during the interview and
25 did not address defendant's responses to
26 Officer Byrd's questions.

27 During the People's rebuttal to defendant's
28 closing argument, the prosecutor stated: "And
perhaps Officer Byrd was a little naive to
think that she could appeal to the
defendant's sense of family when she took the
strategy, the interrogation strategy that she
did. It clearly did not work. But that's
what she was trying to do. She was trying to
say to [Petitioner], your cousin's going to
go down for this. She knew Mr. Contreras did
not possess those drugs. She was hoping,
naively, that he would step up and not let
his cousin take the fall." The trial court
overruled defendant's objection that the
prosecutor was commenting on defendant's
post-Miranda silence in violation of the

1 United States Supreme Court opinions of
2 Griffin and Doyle.

3 Focusing on the prosecutor's statement that
4 Officer Byrd's tactic of attempting to elicit
5 a confession from defendant by claiming she
6 saw Contreras throw the methamphetamine "did
7 not work," defendant argues the prosecution
8 impermissibly relied on defendant's post-
9 Miranda silence and the trial court erred in
10 overruling his objection. Assuming defendant
11 actually invoked his right to remain silent,
12 his argument is without merit because, if
13 anything, his silence raised an inference of
14 innocence rather than guilt.

15 Implicit in the Fifth Amendment's right
16 against self-incrimination as well as the
17 rationale behind Miranda warnings is an
18 understanding "that exercise of the right of
19 silence will not be penalized." (People v.
20 Eshelman (1990) 225 Cal. App. 3d 1513, 1520.)
21 Eshelman illustrates this concept. There,
22 during both cross examination of the
23 defendant and the prosecutor's closing
24 argument, the prosecutor focused on the
25 defendant's refusal to answer questions the
26 murder victim's mother had previously asked
27 the defendant. (Id. at p. 1519.) During the
28 closing argument, the prosecutor went so far
as to ask the jury "What was [the defendant]
trying to hide?" (Ibid.) The appellate
court reversed the defendant's conviction,
holding "the improper purpose of the
prosecutor's questions was to utilize
appellant's silence to impeach his defense
and thereby to solemnize the silence into
evidence of guilt." (Id. at p. 1521.)

29 Unlike the prosecutor's statements in
30 Eshelman, which focused on defendant's
31 conduct, here the prosecutor discussed
32 Officer Byrd's interview strategy in order to
33 rehabilitate the officer. The prosecutor's
34 rebuttal came in response to attacks on
35 Officer Byrd's credibility during the
36 defense's closing argument. Moreover, as
37 stated above, to the extent the prosecutor's
38 statements discussed defendant's post-Miranda
silence, that silence creates no inference of
guilt. Officer Byrd's statements implicated
Contreras, not defendant, as the person
responsible for the methamphetamine. Because
the prosecutor did not rely on post-Miranda
silence to defendant's detriment, we find no
prosecutorial misconduct.

1 Patlan, 2014 WL 772608, at *5-6 (footnote omitted).

2 Post-arrest silence after Miranda warnings cannot be
3 commented upon or used by the prosecution. See Doyle v. Ohio,
4 426 U.S. 610, 611 (1976). However, a prosecutor may comment on
5 post-Miranda silence in response to defense argument. See United
6 States v. Robinson, 485 U.S. 25, 32 (1988); see also United
7 States v. Norwood, 603 F.3d 1063, 1070 (9th Cir. 2010) (reversal
8 not warranted where prosecutor's comments merely responded to
9 defense counsel's implication of investigative misconduct, the
10 comment was an isolated incident that did not stress an inference
11 of guilt from silence, and was followed by a curative
12 instruction).

13 Furthermore, as a general rule, "a prosecutor may not
14 express his personal opinion of the defendant's guilt or his
15 belief in the credibility of [government] witnesses." United
16 States v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1985). Improper
17 vouching for the credibility of a witness occurs when the
18 prosecutor places the prestige of the government behind the
19 witness or suggests that information not presented to the jury
20 supports the witness's testimony. United States v. Young, 470
21 U.S. 1, 7 n.3, 11-12 (1985). To warrant habeas relief,
22 prosecutorial vouching must so infect the trial with unfairness
23 as to make the resulting conviction a denial of due process.
24 Davis v. Woodford, 384 F.3d 628, 644 (9th Cir. 2004).

25 During closing argument, Petitioner's trial counsel argued
26 that the police officer's testimony was inconsistent. In a
27 rebuttal argument, the prosecutor noted that the police officer,
28

1 when questioning Petitioner, had been deliberately using a
2 strategy in hopes that Petitioner would make an admission
3 regarding the drugs. The prosecutor stated that the police
4 officer, "was hoping, naively, that [Petitioner] would step up
5 and not let his cousin [the other person in the car] take the
6 fall." Patlan, 2014 WL 772608, at *5. The state court found
7 that this statement by the prosecutor was not an improper
8 statement regarding Petitioner's post-Miranda silence.
9 Petitioner has not shown that this was an unreasonable
10 determination.

11 The state court noted that it was not clear if Petitioner
12 even invoked his right to remain silent and if he did, the
13 silence was an inference of innocence, not guilt. Moreover, the
14 prosecutor's comment was in her rebuttal argument and was a
15 specific response to statements made by trial counsel in closing
16 argument. Even if the prosecutor was commenting on Petitioner's
17 post-Miranda silence, it was a reasonable response to trial
18 counsel's argument and was not improper. See Norwood, 603 F.3d
19 at 1070.

20 Nor has Petitioner shown that the prosecutor's statement,
21 made on rebuttal regarding the police officer's interrogation
22 strategy, improperly bolstered the police officer's testimony.
23 The statement did not place the prestige of the government behind
24 the witness, and the prosecutor was specifically responding to
25 trial counsel's closing argument. The prosecutor was merely
26 repeating the police officer's explanation of her strategy in
27 attempting to obtain an admission from Petitioner. Petitioner
28 has failed to show that the state court opinion denying this

1 claim and finding no prejudice from the prosecutor's response was
2 unreasonable. See Young, 470 U.S. at 11-12 (prosecutor's
3 response to defense counsel's argument must be viewed in the
4 context of the entire trial and the probable effect on the jury's
5 ability to judge the evidence fairly).

6 C

7 Petitioner next argues that trial counsel was ineffective
8 for failing to object to the prosecutor's closing argument on the
9 ground that it assumed facts not in evidence.

10 The California Court of Appeal denied this claim:

11 Defendant argues the prosecutor's statement
12 that the defense's role was to make the jury
13 "doubt the truth" assumed facts not in
14 evidence because it suggested that the
15 prosecutor knew what "the truth" was. Even
16 assuming counsel was deficient for not
17 objecting on that basis, defendant can show
18 no prejudice because, as discussed above, the
19 trial court sustained counsel's objection as
20 it was presented and admonished the jury to
21 be "independent judges of the facts. . . ."
In essence, the court's admonition, which it
related to the jurors soon after the
objectionable statement, reminded them that
they were responsible for determining "the
truth." As such, defendant suffered no
prejudice from this omission. (People v.
Pigage (2003) 112 Cal. App. 4th 1359, 1375
["a timely admonition from the court
generally cures any harm"].)

22 Defendant also claims defense counsel was
23 deficient for failing to object to the
24 prosecutor's reference to facts not in
25 evidence to bolster Officer Byrd's
26 credibility. Defense counsel spent the
27 majority of his closing argument assailing
28 Officer Byrd's credibility by pointing out
inconsistencies in her statements at various
points during the investigation and the two
trials. In particular, defendant argued
Officer Byrd's testimony could not be trusted
because she initially told both defendant and
Contreras that she saw Contreras throw the
methamphetamine-filled glove out of the

1 vehicle but later testified that she did not
2 actually see who discarded the glove.

3 The prosecutor's rebuttal argument attempted
4 to rehabilitate the officer's credibility.
5 The prosecutor referred to Officer Byrd's
6 testimony that the inconsistent statements
7 were part of a tactical lie designed to
8 elicit a confession from defendant. Had the
9 prosecutor developed this explanation
10 herself, argument on that point would
11 constitute improper vouching. However,
12 because the prosecutor was merely relating an
13 explanation offered by Officer Byrd in her
14 testimony, the prosecution's conduct involved
15 permissible "argument from facts in the
16 record directed to the credibility of
17 witnesses. . . ." (People v. Sully (1991) 53
18 Cal. 3d 1195, 1235-1236 [rejecting claim of
19 improper vouching when prosecutor relied on
20 facts in the record to bolster witness
21 credibility].) A prosecutor may not refer to
22 evidence outside the record to vouch for the
23 credibility of witnesses or bolster the
24 veracity of witnesses' testimony. (People v.
25 Cook (2006) 39 Cal. 4th 566, 593.) But this
26 prohibition is not implicated where, as here,
27 the prosecutor relies on evidence in the
28 record.

Patlan, 2014 WL 772608, at *6-7.

17 A claim of ineffective assistance of counsel is cognizable
18 as a claim of denial of the Sixth Amendment right to counsel,
19 which guarantees not only assistance, but effective assistance of
20 counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984).

21 The benchmark for judging any claim of ineffectiveness must be
22 whether counsel's conduct so undermined the proper functioning of
23 the adversarial process that the trial cannot be relied upon as
24 having produced a just result. Id.

25 In order to prevail on a Sixth Amendment ineffectiveness of
26 counsel claim, petitioner must establish two things. First, he
27 must establish that counsel's performance was deficient, i.e.,
28 that it fell below an "objective standard of reasonableness"

1 under prevailing professional norms. Strickland, 466 U.S. at
2 687-88. Second, he must establish that he was prejudiced by
3 counsel's deficient performance, i.e., that "there is a
4 reasonable probability that, but for counsel's unprofessional
5 errors, the result of the proceeding would have been different."
6 Id. at 694. "A reasonable probability is a probability
7 sufficient to undermine confidence in the outcome." Id.

8 Petitioner has not shown that the state court's denial of
9 this claim was an unreasonable application of Supreme Court
10 authority. Even assuming that Petitioner could show that trial
11 counsel was deficient, he cannot demonstrate prejudice. Trial
12 counsel did object to the prosecutor's statement regarding
13 defense counsel's role being to make the jury doubt the truth.
14 While it was for different grounds, the trial court sustained the
15 objection and admonished the jury. Petitioner has not shown that
16 the outcome of the trial would have been different had trial
17 counsel objected on different grounds.

18 Similarly, trial counsel also objected to the prosecutor's
19 statement, made in an attempt to explain the police officer's
20 testimony, that may have alluded to Petitioner's post-Miranda
21 silence. While the trial court overruled the objection,
22 Petitioner has not shown that trial counsel was deficient.
23 Petitioner argues that trial counsel should have objected on
24 additional grounds; namely, that the statement contained facts
25 outside of the record. The California Court of Appeal correctly
26 noted that the prosecutor's statement reflected testimony from
27 the police officer. Because the prosecutor was describing
28 evidence presented to the jury, any objection regarding facts

1 outside of the record would have also been overruled. Petitioner
2 cannot show that trial counsel was deficient or that he suffered
3 prejudice, therefore this claim is denied.

4 D

5 Petitioner asserts that the cumulative effect of the errors
6 discussed above deprived him of his right to due process and a
7 fair trial. The California Court of Appeal denied this claim.
8 Patlan, 2014 WL 772608, at *7.

9 In some cases, although no single trial error is
10 sufficiently prejudicial to warrant reversal, the cumulative
11 effect of several errors may still prejudice a defendant so much
12 that his conviction must be overturned. See Alcala v. Woodford,
13 334 F.3d 862, 893-95 (9th Cir. 2003) (reversing conviction where
14 multiple constitutional errors hindered defendant's efforts to
15 challenge every important element of proof offered by
16 prosecution). Cumulative error is more likely to be found
17 prejudicial when the government's case is weak. See id.; see,
18 e.g., Thomas v Hubbard, 273 F.3d 1164, 1180 (9th Cir. 2002)
19 (noting that the only substantial evidence implicating the
20 defendant was the uncorroborated testimony of a person who had
21 both a motive and an opportunity to commit the crime), overruled
22 on other grounds by Payton v. Woodford, 299 F.3d 815, 829 n.11
23 (9th Cir. 2002). However, where there is no single
24 constitutional error existing, nothing can accumulate to the
25 level of a constitutional violation. See Hayes v. Ayers, 632
26 F.3d 500, 524 (9th Cir. 2011). Similarly, there can be no
27 cumulative error when there has not been more than one error.
28 United States v. Solorio, 669 F.3d 943, 956 (9th Cir. 2012).

1 the conviction may be examined to resolve the
2 issue." (Ibid.) Such evidence can include
3 "certified documents from the record of the
4 prior court proceeding . . . including the
5 abstract of judgment describing the prior
6 offense." (Id. at p. 1066.)

7 Certified documents create a presumption of
8 conviction that can only be overcome by
9 evidence calling into question "the
10 authenticity, accuracy, or sufficiency of the
11 prior conviction records. . . .'
12 [Citation.]" (Delgado, supra, 43 Cal. 4th at
13 p. 1066.) "[I]f the prior conviction was for
14 an offense that can be committed in multiple
15 ways, and the record of the conviction does
16 not disclose how the offense was committed, a
17 court must presume the conviction was for the
18 least serious form of the offense." (Ibid.)
19 Once a trial court has found the existence of
20 a prior strike conviction, however, on appeal
21 "we examine the record in the light most
22 favorable to the judgment to ascertain
23 whether it is supported by substantial
24 evidence." (Id. at p. 1067.)

25 While defendant concedes the existence of one
26 strike, he argues the record does not
27 adequately establish his 1982 conviction
28 under section 245, subdivision (a) was a
strike. During the sentencing phase of
defendant's current possession for sale case,
the prosecution introduced an abstract of
judgment from 1982 (Santa Clara County Super.
Ct. Case No. 82018) (1982 Felony) indicating
defendant pleaded guilty to "PC 245(a)
Assault with a Deadly Weapon." The criminal
complaint from the 1982 Felony was also
entered into evidence. Count two of that
complaint charged defendant with violating
section 245, subdivision (a) by committing
"an assault upon the person . . . with a
deadly weapon or instrument, to wit: a TIRE
IRON, and by means of force likely to produce
great bodily injury." Defendant claims the
inconsistency between the complaint and
abstract made it impossible to determine
whether defendant's prior conviction was for
assault with a deadly weapon—a serious felony
pursuant to section 1192.7, subdivision
(c)(31)—or merely assault by means of force
likely to produce great bodily injury, which
is not serious or violent for purposes of
section 667. (See Delgado, supra, 43 Cal.
4th at p. 1065 ["assault merely by means
likely to produce [great bodily injury],

1 without the additional element of personal
2 infliction, is not included in the list of
3 serious felonies"].)

4 In support, defendant relies on Delgado,
5 where the Supreme Court considered a prior
6 conviction for a violation of a version of
7 section 245 similar to that in effect in
8 1982. (Delgado, supra, 43 Cal. 4th at p.
9 1065.) To determine whether substantial
10 evidence supported the prior strike finding,
11 the court turned to the official abstract of
12 judgment for the defendant's section 245,
13 subdivision (a) prior felony. That official
14 abstract "first identifie[d] the statute
15 under which the conviction occurred as 'PC'
16 '245(A)(1),' then separately describe[d] the
17 offense as 'Asslt w DWpn.'" (Delgado, supra,
18 at p. 1069.) The court rejected the
19 defendant's assertion that the foregoing
20 description was ambiguous and concluded it
21 "tracks one, but only one, of the two
22 specific, discrete, disjunctive, and easily
23 encapsulated forms of aggravated assault. . .
24 ." (Ibid.)

25 Like the abstract in Delgado, the abstract
26 for defendant's 1982 conviction unambiguously
27 states the conviction was for "Assault with a
28 Deadly Weapon." Applying Delgado, the
abstract provides substantial evidence to
support the trial court's finding that
defendant's 1982 conviction was a qualifying
strike. Defendant attempts to overcome this
result by pointing to the alleged
inconsistency between the abstract of
judgment and the complaint, which charged
defendant with both assault with a deadly
weapon and assault by means of force likely
to produce great bodily injury. Defendant
relies on a line of cases where ambiguities
in abstracts of judgment led courts to
overturn prior strike findings. (See, e.g.,
People v. Rodriguez (1998) 17 Cal. 4th 253,
261-262 [overturning prior strike finding
when abstract of judgment ambiguously listed
§ 245 violation as "ASLT GBI/DLY WPN"].)
Here, however, because the abstract is
unambiguous, we find these authorities
inapposite.

We also find defendant's more general
inconsistency argument unavailing. The
complaint and abstract arose at different
junctures in the case. The 1982 Felony
complaint charged defendant with assault with

1 a deadly weapon and assault by means of force
2 likely to produce great bodily injury, which
3 may be viewed as alternative bases for the
4 charged offense. But the abstract of
5 judgment unambiguously identified the single
6 type of assault for which defendant was
7 convicted and no evidence calls into question
8 its "authenticity, accuracy, or
9 sufficiency." (Delgado, supra, 43 Cal. 4th
10 at p. 1066, quoting People v. Epps (2001) 25
11 Cal. 4th 19, 27.) The trial court's strike
12 finding is therefore supported by substantial
13 evidence.

14 Patlan, 2014 WL 772608, at *7-8 (footnote omitted).

15 The Due Process Clause "protects the accused against
16 conviction except upon proof beyond a reasonable doubt of every
17 fact necessary to constitute the crime with which he is charged."
18 In re Winship, 397 U.S. 358, 364 (1970). A state prisoner who
19 alleges that the evidence in support of his state conviction
20 cannot be fairly characterized as sufficient to have led a
21 rational trier of fact to find guilt beyond a reasonable doubt
22 therefore states a constitutional claim, see Jackson v. Virginia,
23 443 U.S. 307, 321 (1979), which, if proven, entitles him to
24 federal habeas relief, see id. at 324.

25 The Supreme Court has emphasized that "Jackson claims face a
26 high bar in federal habeas proceedings" Coleman v.
27 Johnson, 132 S. Ct. 2060, 2062, 2064 (2012) (per curiam) (finding
28 that the Third Circuit "unduly impinged on the jury's role as
factfinder" and failed to apply the deferential standard of
Jackson when it engaged in "fine-grained factual parsing" to find
that the evidence was insufficient to support petitioner's
conviction). A federal court reviewing collaterally a state
court conviction does not determine whether it is satisfied that
the evidence established guilt beyond a reasonable doubt. Payne

1 v. Borg, 982 F.2d 335, 338 (9th Cir. 1992). The federal court
2 "determines only whether, 'after viewing the evidence in the
3 light most favorable to the prosecution, any rational trier of
4 fact could have found the essential elements of the crime beyond
5 a reasonable doubt.'" Payne, 982 F.2d at 338 (quoting Jackson,
6 443 U.S. at 319). Only if no rational trier of fact could have
7 found proof of guilt beyond a reasonable doubt has there been a
8 due process violation. Jackson, 443 U.S. at 324; Payne, 982 F.2d
9 at 338.

10 In denying this claim the California Court of Appeal found
11 that under state law the evidence used to establish the 1982
12 conviction as a strike was sufficient. The court noted that the
13 abstract for this conviction clearly stated that the conviction
14 was for "Assault with a Deadly Weapon," which was a qualifying
15 strike. The Jackson standard must be applied with explicit
16 reference to the substantive elements of the criminal offense as
17 defined by state law. Jackson, 443 U.S. at 324 n.16. The state
18 court's ruling on the state law issue is binding on this Court.

19 However, "the minimum amount of evidence that the Due
20 Process Clause requires to prove the offense is purely a matter
21 of federal law," Coleman, 132 S. Ct. at 2064, yet, Petitioner has
22 not shown that the state court was objectively unreasonable in
23 finding sufficient evidence to support the prior conviction as a
24 strike in light of the high bar for Jackson claims. Nor has he
25 demonstrated an unreasonable determination of the facts. The
26 state court analyzed the documents used to make the determination
27 and found there was sufficient evidence. Petitioner has failed
28 to demonstrate this finding was unreasonable; therefore, this

1 claim is denied.

2 v

3 For the foregoing reasons, the petition for a writ of habeas
4 corpus is DENIED.

5 Further, a Certificate of Appealability is DENIED. See Rule
6 11(a) of the Rules Governing Section 2254 Cases. Petitioner has
7 not made "a substantial showing of the denial of a constitutional
8 right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner demonstrated
9 that "reasonable jurists would find the district court's
10 assessment of the constitutional claims debatable or wrong."
11 Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not
12 appeal the denial of a Certificate of Appealability in this Court
13 but may seek a certificate from the Court of Appeals for the
14 Ninth Circuit under Rule 22 of the Federal Rules of Appellate
15 Procedure. See Rule 11(a) of the Rules Governing Section 2254
16 Cases.

17 The Clerk is directed to enter Judgment in favor of
18 Respondent and against Petitioner, terminate any pending motions
19 as moot and close the file.

20 IT IS SO ORDERED.

21 Dated: 03/16/2016



THELTON E. HENDERSON
United States District Judge

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