

1
2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 OAKLAND DIVISION
5

6 SIONE FAKALATA,

7 Petitioner,

8 vs.

9 LARRY SMALL, Warden,

10 Respondent.
11

Case No: C 10-00370 SBA (pr)

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS and
DENYING CERTIFICATE OF
APPEALIBILITY**

12 **I. INTRODUCTION**

13 Now before the Court is Petitioner Sione Fakalata's pro se petition for a writ of
14 habeas corpus under 28 U.S.C. § 2254 which seeks to challenge his 2001 conviction in San
15 Mateo County Superior Court for first degree murder and other crimes. Respondent
16 Warden Larry Small has filed an answer to the petition and Petitioner has filed a traverse.
17 For the reasons discussed below, the petition is DENIED.

18 **II. BACKGROUND**

19 **A. CASE HISTORY**

20 On September 22, 2006, an amended information was filed in the San Mateo County
21 Superior Court charging Petitioner with first degree murder under California Penal Code
22 section 187(a), three counts of robbery under California Penal Code section 212.5(c),
23 battery causing serious bodily injury under California Penal Code section 243(d) and
24 attempted robbery under California Penal Code sections 664 and 212.5(c). Court
25 Transcript (CT) at 677-682. On October 16, 2006, a jury acquitted Petitioner of battery
26 causing serious bodily injury but found him guilty of the remaining charges. CT at 883;
27 891-99. The trial court sentenced Petitioner to an aggregate term of twenty-nine years and
28 eight months-to-life in prison. CT at 993.

1 On November 26, 2007, Petitioner appealed his conviction in the California Court of
2 Appeal on the ground that the prosecutor engaged in prejudicial misconduct during his
3 cross-examination and closing argument. Resp.'s Exh. 4, People v. Fakalata, A116627
4 (Cal. Ct. App. Aug. 11, 2008). On August 11, 2008, the California Court of Appeal issued
5 a written opinion in which it rejected Petitioner's arguments and affirmed the judgment.
6 Resp.'s Exh. 6; Petition, Appendix F, Fakalata, A116627 at 8-9. On October 28, 2008, the
7 California Supreme Court summarily denied the petition for review. Resp.'s Exh. 8.

8 On January 26, 2010, Petitioner filed the instant petition for a writ of habeas corpus,
9 setting forth claims of prosecutorial misconduct based upon the prosecutor's improper
10 cross-examination of Petitioner and improper remarks during his closing argument. On
11 August 25, 2010, the Court issued an order to show cause why the writ should not be
12 granted. On December 7, 2010, Respondent filed an answer, as well as a memorandum of
13 points and authorities, and lodged a number of exhibits. On February 10, 2011, Petitioner
14 filed a traverse. The matter is now fully briefed and is ready for review on the merits.

15 B. STATEMENT OF FACTS

16 The following facts are taken from the state appellate court opinion on direct appeal:

17 Sometime after midnight on December 22, 2002, five friends,
18 Daniel Jesus, Miguel Martinez, Jose Martinez, Francisco
19 Molina, and Domingo Huerta, (fn. 1) were gathered at a cul-de-
20 sac on Garden Street in East Palo Alto drinking liquor to
21 celebrate Jesus's 20th birthday. As they were in the midst of
22 celebrating, four strangers approached them. The approaching
23 strangers, who appeared to be of Tongan descent, were
24 appellant, Remus Langi, Joe Ngaloafe and an unknown fourth
25 man. Appellant and his companions had come from another
26 party. The two groups began drinking and talking together in a
27 friendly manner.

28 fn 1: Although two of the victims have Martinez as their last
name, they are not related. In the interest of clarity, we will
refer to each of the victims by their first names. No disrespect
is intended.

As the two groups continued talking, Jose asked appellant if he
knew someone named Ashley, who he described as a Tongan.
This seemed to offend appellant. Appellant told Jose, "I'll
knock you out, fool." Then almost immediately after saying
this, appellant punched Jose in the face, knocking him to the
ground. Jose tried to get up and was hit again. As he was on
the ground, he felt more than one person going through his
pockets.

1 Around this time, appellant's co-participant Langi punched
2 Miguel, the 19-year-old murder victim, causing him to fall to
3 the ground. Miguel fell onto his back, his head hit the
4 pavement, and although he was unconscious, he continued to be
5 beaten.

6 Daniel was also hit in the face, and he fell to the ground and lay
7 on his side. He was kicked repeatedly in the back of his head,
8 and he felt someone going through his pockets, taking his wallet
9 and keys.

10 Domingo went to help Miguel, who was lying partially on the
11 sidewalk and partially in the street. At some point, Domingo
12 was hit on the right side of his face from behind. He staggered
13 and then turned to see appellant. Appellant, who was joined by
14 Langi, continued hitting Domingo in the face until he fell to the
15 ground. He lay on his side, covering his face with both hands.
16 They kicked him and stepped on his head with enough force
17 that his face was cut by the concrete. At the same time, he felt
18 his pockets being rummaged through, although nothing was
19 taken.

20 Francisco was able to leave the area and call 911 emergency for
21 police assistance. Officers responded to the scene, at which
22 time appellant and his companions were leaving on foot. They
23 were asked to stop and appellant and Langi complied. Ngaloafe
24 did not initially comply, but he was stopped down the street by
25 another officer. The fourth suspect was no longer in the area
26 and has never been identified.

27 The responding officers recovered two sets of keys from Langi
28 that belonged to the victims Jose and Miguel. Daniel's wallet
and keys were found thrown over a fence on Garden Street,
close to the cul-de-sac where the crime took place.

Miguel later died from brain swelling, which was caused by
blunt head trauma. The autopsy revealed eight areas of blunt
trauma to the head. He never regained consciousness after the
attack and was kept on life support until December 25, 2002.

Appellant testified at trial. He did not dispute that he was
present, that he participated in the fight, or that he told Jose, "I
will knock you out, fool." He believed that Jose was
"stereotyping towards my people" because he asked appellant if
he knew his friend Ashley "the big Tongan." He denied that he
had any intent to rob anyone and claimed he was unaware that
any property had been taken.

During trial, the prosecution advanced a felony-murder theory.
The prosecutor argued that appellant created a dispute in order
to advance the commission of the robbery, which the evidence
showed had been planned from the beginning, because without
discussion "they all knew what to do and they all did it
effectively and efficiently and violently and brutally . . ." In
contrast, the defense asserted that Miguel died during a drunken
brawl, triggered by a seemingly trivial slight, in which both sets
of young men participated; and there was no advance plan to
rob anyone.

1 Fakalata, A116626 at 1-3.

2 The record also shows that Petitioner admitted on cross-examination that his
3 testimony about what occurred on December 22, 2002, was different from the version of
4 events that he told the police after he was arrested. Reporter’s Transcript (RT) at 923-41;
5 946-47; 950-51; 960; 962. Also, blood from the murder victim and one of the beating
6 victims was found on Petitioner’s clothing. RT at 701-02

7 **III. STANDARD OF REVIEW**

8 The instant Petition is governed by the Antiterrorism and Effective Death Penalty
9 Act of 1996 (“AEDPA”), 28 U.S.C. § 2254. Under AEDPA, a federal court cannot grant
10 habeas relief with respect to any claim adjudicated on the merits in a state-court proceeding
11 unless the proceeding “resulted in a decision that was *contrary to*, or involved an
12 *unreasonable application of*, clearly established Federal law, as determined by the Supreme
13 Court of the United States.” 28 U.S.C. § 2254(d)(1) (emphasis added).

14 A state court decision is “contrary to” clearly established federal law “if the state
15 court applies a rule that contradicts the governing law set forth in [Supreme Court] cases or
16 if the state court confronts a set of facts that are materially indistinguishable from a
17 decision of [the Supreme] Court and nevertheless arrives at a result different from [its]
18 precedent.” Lockyer v. Andrade, 538 U.S. 63, 73 (2003) (internal quotation marks
19 omitted).

20 Relief under the “unreasonable application” clause is appropriate “if the state court
21 identifies the correct governing legal principle from [the Supreme] Court’s decisions but
22 unreasonably applies that principle to the facts of the prisoner’s case.” Id. Habeas
23 petitioners bear the burden of showing that a state court’s decision applied some Supreme
24 Court precedent in an objectively unreasonable manner. Woodford v. Visciotti, 537 U.S.
25 19, 25 (2002) (per curiam).

26 In determining whether a state court’s decision is contrary to, or involves an
27 unreasonable application of, clearly established federal law, courts in this Circuit look to
28 the decision of the highest state court to address the merits of the petitioner’s claim in a

1 reasoned decision. See Ylst v. Nunnemaker, 501 U.S. 797, 803-804 (1991); LaJoie v.
2 Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000).¹ Moreover, “a determination of a factual
3 issue made by a State court shall be presumed to be correct,” and the petitioner “shall have
4 the burden of rebutting the presumption of correctness by clear and convincing evidence.”
5 28 U.S.C. § 2254(e)(1).

6 **IV. DISCUSSION**

7 Petitioner claims that the prosecutor engaged in misconduct during cross-
8 examination and closing argument and that the cumulative effect of this conduct constituted
9 a violation of his Fourteenth Amendment Due Process right to a fair trial. These claims are
10 discussed seriatim.

11 **A. APPLICABLE LAW**

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

25
26
27 ¹ Because the California Supreme Court summarily denied relief on Petitioner’s
28 claims, this Court looks to the California Court of Appeal’s August 11, 2008 written
decision denying Petitioner’s direct appeal.

1 The first factor in determining if misconduct amounted to a violation of due process
2 is whether the trial court issued a curative instruction. When a curative instruction is
3 issued, a court presumes that the jury has disregarded inadmissible evidence and that no
4 due process violation occurred. Greer v. Miller, 483 U.S. 756, 766 n.8 (1987); Darden,
5 477 U.S. at 182; Tan, 413 F.3d at 1115. This presumption may be overcome if there is an
6 “overwhelming probability” that the jury would be unable to disregard evidence and a
7 strong likelihood that the effect of the misconduct would be “devastating” to the defendant.
8 Greer, 483 U.S. at 766 n.8.

9 Other factors which a court may take into account in determining whether
10 misconduct rises to a level of due process violation are: (1) the weight of evidence of guilt,
11 United States v. Young, 470 U.S. 1, 19 (1985); (2) whether the misconduct was isolated or
12 part of an ongoing pattern, Lincoln v. Sunn, 807 F.2d 805, 809 (9th Cir. 1987); (3) whether
13 the misconduct relates to a critical part of the case, Giglio v. United States, 405 U.S. 150,
14 154 (1972); and (4) whether a prosecutor’s comment misstates or manipulates the evidence,
15 Darden, 477 U.S. at 182.

16 **B. ANALYSIS**

17 **1. Prosecutorial Misconduct—Cross-Examination**

18 Prior to trial, the court severed Petitioner’s case from the case of Remus Langi, one
19 of the other individuals involved in the events that took place on December 22, 2002. RT
20 at 155. One of the reasons for the severance was to prevent the spillover prejudicial effect
21 of Langi’s prior juvenile record, in which he was found to have committed a robbery. Id.;
22 People v. Fakalata, A116627 at 4. Petitioner claims that the prosecution improperly
23 injected Langi’s record into Petitioner’s case by cross-examining Petitioner about his
24 knowledge of Langi. Specifically, Petitioner objects to the following exchange during his
25 cross-examination by the prosecutor:
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Q: And even though you don't remember Remus going to Tonga, do you remember any other time where he sort of disappeared for a while?

A: No.

Q: Did you know of anything that happened to him when he was at Menlo-Atherton, at the high school?

A: No.

Q: Were you aware that he had gone away from the high school for about nine months.

A: No, I wasn't aware.

Q: Remember him being out of circulation for nine months, let me give you the dates.

Defense: For the record, I am objecting to the form of the question.

Court: Sustained as to the form.

Prosecutor: At the end of the year 2000, the beginning of 2001, do you remember Mr. Langi disappeared again for about nine months?

A: I don't know nothing about that.

Q: Do you remember, did you know that he had some trouble up in the juvenile court?

Defense: Objection. Irrelevant.

Prosecutor: Just for his knowledge.

Court: Sustained at this point.

RT at 918-19. At that juncture, the prosecutor asked to approach the bench, and the jury was dismissed. RT at 919. After hearing argument from the attorneys, the court sustained the defense objection, stating, "This is not an area of questioning that will be dealt with here." RT at 923. Later that day, counsel moved for a mistrial on the ground that the prosecutor's questions implied that the jury could find Petitioner guilty by association with Langi. RT at 967.

1 The trial court denied the motion for a mistrial and, at counsel’s request, instructed
2 the jury as follows:

3 Nothing that the attorneys say is evidence. In their opening
4 statements and closing arguments the attorneys will discuss the
5 case, but their remarks are not evidence. Their questions are
6 not evidence. Only the witness’s answers are evidence. The
7 attorneys’ questions are significant only if they help you to
8 understand the witness’s answers. Do not assume that
9 something is true just because an attorney asks a question that
10 suggests it is true.

11 RT at 972. On appeal, Petitioner raised a claim based on improper questioning by the
12 prosecutor. The California Court of Appeal denied this claim as follows:

13 We must presume . . . that the trial court’s admonition
14 ameliorated whatever small prejudicial effect the prosecutor’s
15 questioning may have had. As a result of the trial court
16 promptly sustaining defense counsel’s objection, the prosecutor
17 never had an opportunity to develop this line of questioning, so
18 neither the prosecutor’s questions nor appellant’s responses
19 conveyed any damaging information about Langi’s criminal
20 past to the jury.

21 Fakalata, A116627 at 7.

22 On federal habeas review, improper questioning of a witness by the prosecutor is
23 not, standing alone, sufficient to warrant reversal. Ortiz v. Stewart, 149 F.3d 923, 934 (9th
24 Cir. 1998). Rather, the relevant inquiry is “whether the prosecutor’s behavior so infected
25 the trial with unfairness as to make the resulting conviction a denial of due process.” Id.
26 (quoting Darden, 477 U.S. at 181). In considering whether the questioning deprived the
27 defendant of a fair trial, the witness’ testimony should be viewed as a whole to determine
28 the impact of the improper questioning. Id. at 934-35.

 Based on the record presented, it is clear that the prosecutor’s questioning of
Petitioner regarding his knowledge of the whereabouts of Remus Langi did not deprive
Petitioner of a fair trial. First, this was a brief and isolated instance in the prosecutor’s
otherwise lengthy cross-examination of Petitioner. See RT 904-987. Second, the trial court
sustained defense counsel’s objection to the prosecutor’s sole question about Langi’s
“trouble in juvenile hall,” which, in turn, immediately extinguished this line of questioning

1 and minimized any prejudicial effect from the question. Thus, even if the prosecutor was
2 attempting improperly to put Langi's criminal record into evidence, he was prevented from
3 doing so. Third, because a jury is presumed to follow its instructions, see Greer, 483 U.S.
4 at 766 n.8, the trial court's admonition to the jury that "the attorneys' questions are not
5 evidence," rectified whatever marginal prejudice was created by the prosecutor's improper
6 question. Further, as discussed below, the prosecution's case against Petitioner was strong.
7 All these factors weigh against the finding of a due process violation. Therefore, the Court
8 finds that the state appellate court's denial this claim was not unreasonable under AEDPA.

9 2. **Prosecutorial Misconduct—Closing Argument**

10 Petitioner claims that the prosecutor, during his closing argument, repeatedly
11 implied that he possessed information, not disclosed to the jury, that the suspects had
12 previously robbed and beaten people in the past. Petitioner cites the following sections of
13 the prosecutor's closing argument:

14 We talked in voir dire about the idea of corroboration. We
15 talked about it with witnesses who were testifying. But it—the
16 concept applies to crimes also in terms of knowing what the
17 defendant intended and what the suspects intended, that they if
18 they do it, and over and over and over again the same way,
19 well, guess what, that's why they are doing it.

20 ...

21 And then the instant that they're on the ground, the beating goes
22 on and on and on, and property was taken from them. How
23 does that happen? It is not just a random occurrence in the
24 universe. There's a plan and an intention from these guys. This
25 is what they do. They beat people to the ground, and they take
26 stuff from them while they're doing it.

27 ...

28 Now, what's—I put here is modus operandi. There's nothing in
the instructions that you have about—it's a phrase in the law
that talks about it's a plan. It's—it's in shorthand, there's an
MO, how someone does something. They do it over and over
again. It can apply to a lot of things, serial killers, killing the
same way, people rob banks in certain ways. It becomes a
pattern. I put that up there to, again, talk about the idea there
were no instructions given here but they all knew what to do
because they all did it together over and over and over again. It
suggests a modus operandi, a way that they do things.

...

1 There's no real fight or battle or animosity with Danny Jesus or
2 Miguel Martinez or Domingo Huerta except that it's a crime of
3 opportunity that these three thugs took to beat and rob these
4 guys for fun because they were angry because this is what they
5 do.

6 . . .

7 So now it shifts and changes into something other than what it
8 was, was the signal, the punch to start the beating and robbery
9 because that's what these guys do. That's what they do over
10 and over again like they practiced it a thousand times.

11 RT at 1053, 1061, 1068, 1069, 1074.

12 At this point, defense counsel objected on the ground that there was no evidence that
13 pointed to a conspiracy. RT at 1074. The trial court agreed and instructed the jury:

14 "Ladies and gentlemen, this is argument by counsel. The evidence that's been introduced is
15 dealing with what occurred on this night. That's what the focus is here, that night." Id.

16 On appeal, Petitioner alleged that the prosecution's remarks during closing argument
17 amounted to prosecutorial misconduct. The California Court of Appeal rejected such
18 claim, stating as follows:

19 When prejudicial prosecutorial misconduct in closing argument
20 was raised as a ground for appellant's motion for a new trial,
21 the prosecutor explained that the objected-to comments referred
22 to the repetitive nature of the conduct as suggesting a
23 preexisting plan or tacit agreement to beat and rob the victims.
24 His remarks, "clearly referred to the fact that after beating Jose
25 Martinez they did the same thing over and over again
26 accounting for all four of the victims who were beaten and
27 robbed."

28 The trial court denied counsel's motion for a new trial after
 finding the prosecutor's arguments properly related to the
 circumstances of the crime. The court ruled that, "words
 spoken by [the prosecutor] in that context certainly could have
 been as it relates to the comment over and over again relating to
 the multiple victims in this case . . . in terms of the lack of any
 speaking, the actions that were taken, the beatings, going
 through the pockets, and the like, I certainly don't believe that it
 rose to any level of prosecutorial misconduct. In addition to
 that, I would note that when [defense counsel] made his
 objection the Court in an abundance of caution instructed and
 advised the jury at that point in time that they were only to be
 focused on and concerned with the events of the night in
 question as it relates to their fact finding purpose here.

1 We agree with the trial court's analysis of this issue. In viewing
2 the prosecutor's comments in the context of the argument as a
3 whole, it is not reasonably likely that the jury construed or
4 applied the complained-of remarks in an objectionable manner.
5 The state of evidence in this case was that all four of the victims
6 who were attacked by appellant and his cohorts had property
7 taken from them or attempted to be taken from them while they
8 were on the ground being beaten and kicked. During each of
9 the robberies, the victims did not hear any of the suspects
10 communicating with each other or giving each other
11 instructions on what course of action to take next, as they went
12 from one victim to the next in a continuous pattern of beating
13 and robbing. The prosecutor was entitled to argue the
14 evidentiary significance of the repetitive and methodical
15 manner in which the robberies and assaults were carried out to
16 support his theory that there was a preexisting intent to rob the
17 victims. Furthermore, the court's admonition that the jury was
18 to focus only on the night in question ensured that the
19 prosecutor's comments were not interpreted in an improper or
20 erroneous manner.

21 On this record, we find appellant's claim that cumulative
22 instances of prosecutorial misconduct deprived him of a fair
23 trial is totally without merit.

24 Fakalata, A116627 at 7-8.

25 Where a habeas claim of prosecutorial misconduct during closing argument is
26 alleged, the likely effects of the prosecutor's statements are examined "in the context in
27 which they were made to determine 'whether the prosecutors' comments so infected the
28 trial with unfairness as to make the resulting conviction a denial of due process.'" Turner
v. Calderon, 281 F.3d 851, 868 (9th Cir. 2002) (quoting Darden, 477 U.S. at 181)). "A
court should not lightly infer that a prosecutor intends an ambiguous remark to have its
most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that
meaning from the plethora of less damaging interpretations." Donnelly v. DeChristoforo,
416 U.S. 637, 647 (1974). During closing arguments, a prosecutor is allowed a reasonably
wide latitude and can argue reasonable inferences from the evidence. Fields v. Brown, 431
F.3d 1186, 1206 (9th Cir. 2005); United States v. Gray, 876 F.2d 1411, 1417 (9th Cir.
1989). However, it is improper for a prosecutor to make statements or inferences to the
jury that he knows to be false or has a strong reason to doubt. United States v. Reyes, 577
F.3d 1069, 1077 (9th Cir. 2009).

1 In reviewing the prosecutor's comments to which Petitioner objects, the Court of
2 Appeals concluded that "the prosecutor was entitled to argue the evidentiary significance of
3 the repetitive and methodical manner in which the robberies and assaults were carried out
4 to support his theory that there was a preexisting plan to rob the victims." Fakalata,
5 A116627 at 8. The Court agrees that the gravamen of the prosecutor's comments clearly
6 relate to the night of the crime when the evidence showed that, after the victims had been
7 knocked down to the ground, they were beaten over and over and had property taken from
8 their pockets. However, two of the prosecutor's comments arguably could be interpreted as
9 referring to previous crimes committed by Petitioner and his companions. For instance, the
10 prosecutor's "modus operandi" comment and comparisons to "serial killers or bank robbers
11 who carry out their crimes using the same pattern implied that Petitioner and his
12 companions previously engaged in the same type of conduct that led to the charged
13 offenses. Likewise, the comment that "they do it over and over like they practiced it a
14 thousand times," could be interpreted as inferring that Petitioner had engaged in this
15 conduct many times before. These comments could thus be construed as improper because
16 there was no evidence of previous crimes. However, as will be set forth below, these
17 comments did not infect the trial with unfairness such that the resulting conviction
18 amounted to a denial of due process. See Darden, 477 U.S. at 181.

19 First, the trial court admonished the jury that the evidence focused only on the night
20 in question that the attacks occurred. As stated previously, when a curative instruction is
21 given, it is presumed that the jury follows it and that no due process violation occurred.
22 See Greer, 483 U.S. at 766 n.8. No reason or evidence has been offered to show that the
23 jury was not able to follow the instruction in this instance. Second, there was no pattern of
24 continuing misconduct, see Lincoln, 807 F.2d at 809, because these two comments were
25 made in the context of the prosecutor's lengthy closing argument. See RT 1044-82
26 (closing); 1111-23 (rebuttal). Finally, the weight of the evidence of guilt against Petitioner
27 was strong. See Young, 470 U.S. at 19. Each of the four surviving victims testified
28 essentially to the same events that occurred on the night of the murder. RT at 461-71; 573-

1 98; 711-35; 789-806. Furthermore, Petitioner’s testimony had serious credibility issues
2 because he admitted that, after he was arrested, he told the police an entirely different
3 version of events than he told at trial. RT at 923-41; 946-47; 950-51; 960; 962. Finally,
4 blood from the murder victim, Miguel Martinez, was found on Petitioner’s jacket cuff and
5 blood from one of the beating victims, Jose Martinez, was found on Petitioner’s shoe. RT
6 at 701-02.

7 The aforementioned factors weigh against a finding that the prosecutor’s conduct
8 infected the trial with unfairness such that his conviction was a violation of due process.
9 Furthermore, under Brecht, 507 U.S. at 637, Petitioner has not demonstrated that any error
10 had a substantial and injurious effect on the verdict. As discussed above, the court cured
11 any error by admonishing the jury that the attorneys’ questions were not evidence and that
12 the evidence in question related only to the night the crimes were committed. In addition,
13 the prosecutor’s errors, if any, were only isolated instances and not part of an ongoing
14 pattern; and the prosecutor’s case against Petitioner was strong, particularly in light of
15 Petitioner’s credibility issues. Therefore, the Court finds that the California Court of
16 Appeal’s denial of this claim was not unreasonable under AEDPA.

17 **3. Cumulative Error**

18 Finally, Petitioner contends that the cumulative effect of the prosecutor’s
19 misconduct violated his constitutional right to a fair trial. After reviewing both claims of
20 prosecutorial misconduct and finding none, the state Court of Appeal denied the claim of
21 cumulative error, stating, “On this record, we find appellant's claim that cumulative
22 instances of prosecutorial misconduct deprived him of a fair trial is totally without merit.”
23 Fakalata, A116627 at 8.

24 In some cases, although no single trial error is sufficiently prejudicial to warrant
25 reversal, the cumulative effect of several errors may still prejudice a defendant so much that
26 his conviction must be overturned. Alcala v. Woodford, 334 F.3d 862, 893-95 (9th Cir.
27 2003). However, where no single constitutional error exists, nothing can accumulate to the
28 level of a constitutional violation. Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011);

1 Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002). Similarly, no cumulative error is
2 found where only one error exists. United States v. Solorio, 669 F.3d 943, 956 (9th Cir.
3 2012).

4 Because this Court has found that the state Court of Appeal’s rulings on Petitioner’s
5 claims were not unreasonable under AEDPA, no constitutional error has been found and,
6 thus, there can be no cumulative error. Accordingly, the claim based on cumulative error is
7 denied.

8 **V. CONCLUSION**

9 The state court’s adjudication of Petitioner’s prosecutorial misconduct claims did not
10 result in a decision that was contrary to, or an unreasonable application of, clearly
11 established federal law, nor did it result in a decision that was based on an unreasonable
12 determination of the facts in light of the evidence presented in the state court proceeding.

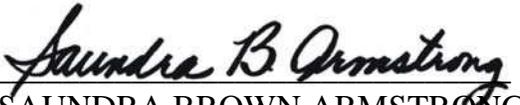
13 A certificate of appealability will not issue. Reasonable jurists would not “find the
14 district court’s assessment of the constitutional claims debatable or wrong.” Slack v.
15 McDaniel, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability
16 from the Court of Appeals. Accordingly,

17 IT IS HEREBY ORDERED THAT:

- 18 1. The petition for a writ of habeas corpus is DENIED.
19 2. A certificate of appealability is DENIED.
20 3. The Clerk shall close the file and terminate any pending matters.

21 IT IS SO ORDERED.

22 Dated: March 18, 2013


SAUNDRA BROWN ARMSTRONG
United States District Judge

23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SIONE FAKALATA,

Plaintiff,

v.

LARRY SMALL et al,

Defendant.

_____ /

Case Number: CV10-00370 SBA

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 21, 2013, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Sione Fakalata F-57505
Calipatria State Prison (CSP-CAL)
P.O. Box 5005
Calipatria, CA 92233

Dated: March 21, 2013

Richard W. Wieking, Clerk
By: Lisa Clark, Deputy Clerk

G:\PRO-SE\SBA\HC.10\Fakalata10-370-REVISED-OrderDenyPetition.docx