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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY RAUL BARRON,

Petitioner,

v.

MIKE STAINER,

Respondent.

No. C 11-02797 PJH

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS AND
ISSUING CERTIFICATE OF
APPEALABILITY**

Before the court is the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed by state prisoner Anthony Raul Barron (“Barron”). The briefs are fully submitted and court determines that the matter is suitable for decision without oral argument. Having reviewed the parties’ papers and the record, and having carefully considered the relevant legal authorities, the court DENIES the petition.

BACKGROUND**A. Procedural History**

On August 22, 2006, a jury convicted Barron of assault with a deadly weapon and found true the allegation that the crime was committed for the benefit of a criminal street gang. See Cal. Penal Code §§ 245(a)(1) and 186.22(b)(1)(B). Barron admitted a prior conviction that qualified as a serious felony and as a strike. On April 27, 2012, Barron was sentenced to 16 years in state prison.

Barron appealed, and the court of appeal affirmed the conviction in an unpublished decision dated November 19, 2009. The California Supreme Court denied review on February 24, 2010. Barron filed the current petition on June 8, 2011.

1 On August 30, 2011, the court issued an order to show cause why a writ of habeas
2 corpus should not issue. Respondent, Mike Stainer, filed an answer, and Barron filed a
3 traverse.

4 **B. Factual Background**

5 The following factual summary of the offense is taken directly from the order of the
6 court of appeal affirming the judgment. Answer, Ex. 6 (*People v. Barron*, No. H031590
7 (Cal. Ct. App. Nov. 19, 2009)).

8 *Overview*

9 On May 16, 2003, a fight broke out on Santa Clara Street in San Jose following a
10 concert at the San Jose Arena that had attracted a number of gang members. Four law
11 enforcement officers from the San Jose Police Department’s gang unit witnessed the fight
12 from their Ford Explorer. They testified that they saw what they believed to be a stabbing.
13 They identified Barron as the stabber. Carlos Rivas was identified as the probable victim.
14 Barron and Rivas were members of rival graffiti-tagging crews affiliated with the Norteño
15 street gang. One year earlier, Barron and two others had been charged and tried in
16 connection with a shooting involving Rivas and his tagging crew; Barron had been
17 acquitted, although the others had been convicted. The prosecution’s theory of the current
18 case posited lingering bad blood between Barron and Rivas as the motive for the stabbing.
19 Rivas and others identified as having been involved in the post-concert fracas variously
20 denied or admitted gang affiliations, bad blood between rival tagging crews, or knowledge
21 of the circumstances surrounding the fight.

22 Barron testified in his own behalf. He denied possession of a knife and claimed self
23 defense. Self defense and simple assault instructions were given, but the jury convicted
24 Barron of assault with a deadly weapon for the benefit of a street gang.

25 *The Gang Evidence* [Footnote omitted.]

26 Officer Joe Campagna testified as an expert in the field of “gangs and/or tagging
27 crews.” He defined “graffiti vandalism” as “going out and tagging with . . . spray paint or
28

1 pens in various areas of San Jose.” A tagging crew is a group which commits the crime of
2 graffiti vandalism together.

3 A regular tagger is a graffiti vandal who will commit vandalism on street poles and
4 signs to get fame among his peers. Regular taggers will often tag alone. In contrast, tag
5 bangers “will actually go to somebody’s neighborhood as a show of disrespect, ... looking
6 for problems or to show that ... they don’t back down to anybody. [T]hey’ll cross out
7 people’s tags or monikers and put theirs up. [T]hey’re more violent. Some of them carry
8 weapons. [¶] They associate with [Norteño or Sureño] criminal street gangs, . . . whereas
9 regular tagging crews don’t associate with any other gangs.” Tag bangers “will wear the
10 color red; they will have the hairstyles of a gang member; they’ll hang out with other gang
11 members, not only in their tagging crew but also ... whichever gang they’re associating
12 with.” Tag bangers often go out in groups “because they’re going out in ... other people’s
13 area to do damage. [T]hey know that most of the time they’re going to be confronted by
14 somebody from the opposite or rival gang.”

15 Members of the Norteño or Sureño gangs will also tag graffiti; it is one of the more
16 prolific activities of gang members. They do it “to show that this is their area, that other
17 gangs aren’t . . . allowed to come into their area.”

18 In 2000, there were well over 20 tagging crews in San Jose. Some crews joined
19 together so that they could cover a wider area with graffiti vandalism. Some of crews had
20 “evolved into almost like gangs.” TSU, DHT, AOT, and JSP [footnote omitted] were some
21 of the bigger tagging crews in San Jose and over the years they started engaging in assault
22 with a deadly weapon and other violent crimes. Many assaults between rival tag banger
23 crews are never reported to the police because gang members do not want to come to
24 court, do not want to be labeled as snitches and do fear reprisal from other gang members
25 for talking to the police or a judge.

26 In Officer Campagna’s expert opinion, TSU is associated with the Norteño criminal
27 street gang. Norteño criminal street gangs are associated with the color red, the number
28 14, and the letter N, which is the fourteenth letter of the alphabet and also stands for

1 Northern Structure or Nuestra Familia. Campagna also opined that Barron is the leader of
2 TSU and a Norteño gang member. Barron's original moniker was "Lost" but he later
3 changed it to "Chulo." Johnny Villafuerte is a cousin of Barron's girlfriend, Christina
4 Villafuerte, and is also a member of TSU. His moniker is "Deaf." On February 11, 2002,
5 Villafuerte told Campagna that Barron "allowed" him into the TSU tagging crew and gave
6 him "permission" to start tagging the initials "TSU."

7 It was also Officer Campagna's expert opinion that Efrain Maciel is a member of
8 TSU and a Norteño gang member. Maciel has admitted that he "associates with Norteño
9 gang members" but not that he is himself a Norteño gang member. Maciel's moniker is
10 "Arson."

11 Campagna opined that JSP and AOT are tag bangers also associated with the
12 Norteño criminal street gang. Carlos Rivas is a member of AOT-JSP; his moniker is
13 "Fraze." Jose Torres is also a member of JSP-AOT; his moniker is "Hoser."

14 Officer Campagna opined that the primary activities of the TSU gang are felony
15 vandalism and assault with a deadly weapon; that members of the TSU gang have
16 individually and collectively engaged in a pattern of criminal gang activity, including the
17 incident on May 16, 2003; and that the benefit that TSU received from the May 2003
18 incident is the reputation of being a strong and violent gang that does not back down.

19 Evidence was introduced about Barron's prior arrests and convictions for graffiti
20 vandalism and about his prior conviction for assault with a deadly weapon, in which Barron
21 stabbed the victim.

22 Officer Campagna investigated a shooting incident that took place on February 25,
23 2002. Barron and Efrain Maciel were charged with the shooting; Carlos Rivas was one of
24 the victims. Maciel confessed to the shooting to Campagna. Maciel said that he was in the
25 area of Sixth and Julian Streets to do graffiti vandalism. That neighborhood is the territory
26 of the tagging crews JSP, AOT and DHT, which joined together as one gang because each
27 crew had so few members. Maciel said he was with a juvenile member of TSU, and he
28 implied that Barron was also with him, although he was prevented from naming Barron by

1 the gang's code of conduct and his fear of being labeled a snitch. [Footnote omitted.]
2 Maciel recognized "Fraze" (Carlos Rivas) and "Hoser" (Jose Torres), both members of
3 AOT-JSP.

4 George Vargas, who is not a member of AOT-JSP, was also present and identified
5 members of TSU as the persons who shot at him.

6 On March 28, 2002, Campagna and another police officer interviewed Rivas at his
7 parole agent's office about the shooting. They wanted to know if Rivas could identify some
8 individuals involved in a shooting incident. They did not threaten to violate Rivas' parole or
9 otherwise get him in trouble if he failed to cooperate.

10 Rivas told the police that on February 25, 2002, he and some friends were "hanging
11 out" near Sixth and Julian Streets. Three men walked towards them yelling "TSU." One of
12 the men pulled out a small gun and started firing rounds at them. Rivas did not think it was
13 a real gun, and he started yelling back at the men, who jumped into a waiting car and sped
14 off. Rivas identified Barron's photo from a photo line-up as "the guy he chased down after
15 the initial shots." That same day, police did a probation search of Barron's home and
16 located a red cap with a red "T" on it and a black cap with a "T" on it which indicated to
17 Campagna that Barron was involved in gang activity. Barron was arrested for the shooting
18 that day.

19 Troy Benson of the district attorney's office prosecuted Barron, Maciel and a juvenile
20 for assault with a deadly weapon in connection with the February 2002 shooting. The
21 juvenile admitted guilt, but Barron and Maciel went to trial. Maciel was convicted, and
22 Barron was acquitted. At trial, Rivas denied anything had happened. Although he had
23 identified Barron to the police, he recanted his identification at trial.

24 In 2003, Benson also began prosecuting a second case involving Barron and Rivas
25 in which Rivas was the victim of a stabbing. He received phone calls from Rivas in which
26 Rivas said he did not want to testify because he was afraid of retaliation against him and
27 his family by Barron or Barron's gang. These phone calls were recorded and played for the
28 jury.

1 *The Assault on May 16, 2003*

2 On May 16, 2003, a “bomb concert” was held at the San Jose Arena in downtown
3 San Jose. A “bomb concert” is a large rap concert put on by the radio station Wild 94.6
4 that attracts large numbers of young adults, including “a lot of gang members.” The
5 concert let out right around midnight. Detective Jose Rodriguez and his partner, Stan
6 McFadden, along with a California Youth Authority (CYA) parole agent and a juvenile
7 probation officer, were assigned to monitor the crowd on the “Santa Clara corridor” which
8 runs from the Arena on Santa Clara Street to Highway 101. Typically, after such concerts,
9 the “crowd gets unruly” and “there’s always a lot of small scuffles, a lot of gang fights.”

10 On this night, Detective Rodriguez, dressed in civilian clothes, but with his police
11 badge visible on his chest, was driving an unmarked Ford Explorer. McFadden was in the
12 front passenger seat and the parole agent and probation officer were in the back seat. The
13 others were also dressed in civilian clothes. At that time, all four officers were assigned to
14 the gang investigations unit, and it was “common” for gang detectives from the San Jose
15 Police Department to work with juvenile probation officers and CYA parole officers in trying
16 to curb the gang problem.

17 Detective Rodriguez, heading westbound on Santa Clara Street, stopped at the light
18 at the intersection with North Sixth Street. He saw “anywhere from ten to 15[,] maybe even
19 20” individuals “hanging out” at the street corner, many of them dressed in red. They
20 started to separate and “square off” against each other. Through the partially open
21 window, he could hear them screaming and yelling. Some were “raising up their arms,” as
22 if challenging people to fight. Pedestrians were walking by in both directions and the car
23 traffic was “stop-and-go, bumper to bumper.”

24 Suddenly, rocks, bottles and sticks were flying. “And then just chaos: everybody
25 starting fights everywhere; everybody spilling into the . . . streets; people running down
26 North Sixth Street; people just scattering and . . . fighting all over the place.” A couple of
27 groups started fighting in the outside lane of Santa Clara Street near the curb closest to the
28

1 Explorer. The Explorer was in the inside lane next to the center median, and there was a
2 vehicle next to the Explorer in the outside lane, next to the curb.

3 Rodriguez testified that he saw Barron, who was standing next to the passenger side
4 of the car beside the Explorer, towards the front of that car, “take something out of his
5 pocket.” It had a “shiny, like, blade” and Rodriguez thought it was like a folding knife.
6 Barron started attacking the person in front of him. Barron had the knife in his right hand
7 and “lunged” towards the victim. “He did a couple of slashes. And then he raised his arm,
8 with a clenched fist, and kind of went over the top . . . of the victim . . . about five times.”
9 Detective Rodriguez demonstrated the action by “us[ing] his arm in a slashing motion
10 originally that went from right to left, and then an . . . over-the-shoulder downward stabbing
11 motion.” Barron made contact with the victim’s “upper chest, arms area, and the . . . back
12 shoulder areas.” The victim tried to defend himself with his fists, fighting back. Rodriguez
13 believed Barron struck the victim from three to five times. Some of those strikes were
14 slashes and some were stabs. The knife was five or six inches long with the blade
15 extended and was less than a quarter-inch wide.

16 Other people jumped in between Barron and the victim and separated them. Barron
17 took a few steps back, still clenching the knife in his hand. Barron walked south across
18 Santa Clara Street. As Barron crossed the street, he walked in front of the Explorer, about
19 10 feet away, and Rodriguez was able to see Barron’s face clearly. Barron walked slowly,
20 still clenching the knife. He appeared to be looking around in all directions.

21 The officers stayed in their car because they were in civilian clothes and did not
22 have their full gear. Detective McFadden called for backup immediately. Detective
23 Rodriguez turned the car around and drove south on Sixth Street, following Barron, who
24 was walking in the middle of Sixth Street towards the Albertson’s parking lot. As Barron
25 entered the parking lot at Sixth Street, Detective Rodriguez drove in behind him. Two other
26 individuals walked into the parking lot behind Barron. When it appeared that Barron was
27 starting to walk back towards the scene of the attack, all four officers got out of the
28 Explorer.

1 Detective Rodriguez was the first officer to confront the three individuals. Rodriguez
2 identified himself as a San Jose police officer and told them to stop and get down on the
3 ground as he displayed his badge with his left hand and pointed his gun at them with his
4 right hand. Next, Detective McFadden came up with his gun drawn and pointed it at them,
5 followed by parole agent Gloria Ramirez, who also pointed her gun at the men. Two of the
6 men got down on the ground, but Barron made eye contact with Detective Rodriguez,
7 turned around, and ran into the traffic on Santa Clara Street. At that moment, Barron was
8 wearing dark gloves and still holding the knife. As Barron ran, a patrol car came from
9 South Sixth Street to the officers' location. Rodriguez yelled at the officer in the patrol car
10 to stop Barron. With lights and siren activated, the patrol car followed Barron.

11 Rodriguez saw the uniformed officer get out of the patrol vehicle and approach
12 Barron. Barron turned around and started running back to the Albertson's parking lot.
13 Rodriguez had started walking towards Barron and the uniformed officer, and cut off
14 Barron's escape through the parking lot. Rodriguez again identified himself as a police
15 officer and told Barron to stop. Barron looped back around and headed towards Santa
16 Clara Street. When Rodriguez intercepted Barron, he believed Barron still had the knife;
17 Barron had something clenched in his hands. Rodriguez assumed Barron was still armed,
18 but all he could see was the clenched hands and the gloves; he could not actually see a
19 blade of any sort.

20 Rodriguez gave chase. Barron hurdled over some foot-high bushes and "somehow
21 stumbled and went headfirst" into one of two round metal posts that supported an
22 Albertson's sign. Barron "kind of bounced back and fell on the ground there in the dirt
23 corner of that shopping center."

24 At that time, Detective Rodriguez handcuffed Barron. He did not have a knife on
25 him. Barron had a big gash on his forehead and was transported to the hospital. Barron
26 was bleeding from the head. Photos of Barron's injuries were taken at the hospital. No
27 knife was ever located. Detective Rodriguez had never met, contacted, or arrested Barron
28 before this incident.

1 Officer McFadden also saw a fight occurring among a large group of red-clad
2 Hispanic individuals to the right of the Explorer. Some of the people had hammers and
3 sharp instruments such as knives. During the course of the fight he observed Barron
4 wearing black gloves, “with what appeared to be a sharp instrument in his hand, shuffling
5 forward in a . . . stabbing manner.” He saw Barron “make contact with somebody,” but he
6 did not recall what that person looked like and did not get a good look at the victim. He
7 described the thing in Barron’s hand as “a stabbing instrument” and a “sharp instrument.”
8 Barron made multiple movements and made contact with the victim’s upper torso and arm
9 areas. McFadden stressed that he never saw Barron stab someone in the back area or left
10 shoulder area.

11 Barron then crossed the street in front of them, and they followed him in the
12 Explorer. McFadden and Rodriguez stopped Barron and two others at gunpoint, although
13 he did not recall who the two others were. McFadden detained the two subjects, believing
14 them to be Barron’s associates; meanwhile, Rodriguez chased Barron. The probation and
15 parole officers stayed with McFadden for crowd control and officer safety. He knew that
16 subsequently Barron was arrested, and he eventually saw Barron in Rodriguez’s custody.

17 Santa Clara County Probation Officer Carmen Hernandez-Murray supervises adult
18 and juvenile probationers with gang affiliations. Her unit “work[s] closely with San Jose PD,
19 especially with the GIU, the gang investigation unit . . . on a regular basis.” On May 16,
20 2003, she went with police officers Jose Rodriguez and Stan McFadden and parole agent
21 Gloria Ramirez to gather intelligence on gang activity by her probationers after the bomb
22 concert. She does not carry a gun. She was riding in the backseat of the Explorer behind
23 McFadden in the front passenger seat. As they were cruising down Santa Clara Street
24 near the intersection with Sixth Street, her attention was drawn to a “huge” group of males,
25 some wearing red. At least 20 individuals, white and Hispanic, were involved in an
26 altercation. She testified: “I saw the Barron with . . . another unknown male. I don’t know
27 who it was. He [Barron] had something in his hand. I couldn’t tell you if it was a knife or a
28 screwdriver. . . . I didn’t actually see it, but I saw the-the stabbing motion to his back,

1 maybe shoulder blade area.” She felt it was a stabbing object “just because of the motion
2 with his hand. And I saw something. . . . There was something that caught my eye.”
3 Barron was wearing black gloves. There were approximately four or five stabbing motions
4 aimed at a specific person. She saw Barron “lunge” at the victim, and that was when she
5 saw “the [Barron’s] hand go out.” She “assumed he was stabbing him, the way it looked.”
6 She saw “something shiny in the hand.” She saw “something going in that victim’s back
7 and . . . shoulder area.” However, she did not see any blood on his white T-shirt. She
8 mainly saw his shoulder blade and back area and could not positively identify him. There
9 was no doubt in her mind that Barron was the assailant. She recognized Barron from prior
10 contacts.

11 Barron passed in front of the car heading in the direction of the Albertson’s store.
12 She could not see a stabbing instrument. At that point, the officers drove into the
13 Albertson’s parking lot. Rodriguez and McFadden got out with their guns drawn. “They
14 said, ‘Stop. San Jose Police.’” Barron took off running. Hernandez-Murray lost sight of
15 Barron when he ran away, and also lost track of Detective Rodriguez when her attention
16 turned to “everything else that was going on.” As she recognized people involved in the
17 fight, she and parole agent Ramirez began “pulling over people.” She did not see Detective
18 Rodriguez take Barron into custody. Although she stated in her report that Barron “was
19 shortly apprehended by Officer Rodriguez,” she learned that information from Detective
20 McFadden. She hand-wrote her report at the hospital and gave it to Detective Rodriguez.
21 She referred to him by his first name during her testimony because she has weekly
22 meetings with the GIU, and they all go by first names.

23 Hernandez-Murray was one “hundred per cent” sure that she saw Barron stabbing
24 someone. There is no reason why she would lie for Detective Rodriguez about that, and
25 neither Rodriguez nor McFadden asked her to lie about it. She would not lie about
26 something like that even if they asked her to do so, because if she were caught lying on a
27 report or in testimony she would lose her job.

28

1 Gloria Ramirez is a parole agent with the California Department of Corrections and
2 Rehabilitation, Juvenile Division. She supervises juveniles who have been released from
3 the Youth Authority to the community on certain conditions, including the condition that they
4 not associate with gang members, or wear gang clothing, or participate in gang offenses or
5 parties. On May 16, 2003, she went to the bomb concert. There were a number of
6 Norteños at the concert. After the concert, she rode in the gang unit's car. She was sitting
7 in the back seat behind the driver, Rodriguez. There was a large crowd of people on the
8 sidewalk to her right and she noticed that someone was being assaulted. She could not tell
9 at this point whether the fight was between Norteños and Sureños. She did not hear
10 people yelling gang slogans or see gang hand signals. At first it looked as if "[s]omebody
11 was being hit." But then she noticed that the assailant's "hand was kind of in a clenched,
12 like he had something in there. And I could-you could see something, but I didn't know
13 exactly what it was." "It looked like he was stabbing, making a stabbing motion." Ramirez
14 could not give a description of what she saw because she could not even remember if it
15 appeared to be metal. In her report, Ramirez indicated she saw an unknown object in
16 Barron's hand. The victim was hit "maybe three or four" times in the back and shoulder
17 area. Ramirez identified Barron as the assailant. He wore black gloves, a black shirt and
18 jeans. Later that night, at the hospital, she realized that she knew Barron from juvenile hall,
19 five or six years earlier.

20 She did not see the victim's face and could not identify a photograph of Rivas. She
21 did not remember what the victim was wearing that night. She did not see any blood. She
22 recalled seeing Barron run past the side of the car, but did not remember if she could see
23 anything in his hands at that time.

24 Ramirez recalled that they made a U-turn into the Albertson's parking lot. Rodriguez
25 got out of the car and said, "Stop. San Jose Police." Barron kept running and Rodriguez
26 chased after him. She did not see Rodriguez apprehend Barron. She did not see Barron
27 again until she saw him at the hospital. She, Hernandez-Murray, McFadden, and other
28 officers at the scene were busy pulling people over. In her report, she wrote that Detective

1 Rodriguez apprehended Barron after a short chase, but that was based on radio traffic that
2 she heard.

3 At the time, Ramirez had been on “ride-alongs” with the gang unit possibly three
4 times before that night, but not with Rodriguez and McFadden. She testified that it would
5 not make it more difficult for her to interact with the officers in the gang unit if it were known
6 that she had testified contrary to what gang detectives testified, “if I was telling the truth.”
7 She would not lie for a San Jose police officer, and did not interact with Rodriguez or
8 McFadden anymore. If she were to falsify a police report she would be fired, and she could
9 be prosecuted for perjury and jailed. She also testified that she did not have any bad
10 feelings about Barron based on her prior interactions with him at juvenile hall.

11 Fifteen or 20 minutes after apprehending Barron, Detective Rodriguez contacted
12 Carlos Rivas, who was sitting in a police car. At that point, Rodriguez did not recognize
13 Rivas, know him, or know of him from other gang detectives. He had a cut on his arm and
14 a cut on his eyebrow. There was also blood dripping from a wound on the top of his head.
15 The injuries to Rivas’s arm and head were photographed. Rodriguez did not believe he
16 asked Rivas to lift his shirt up, and did not recall ever looking at the back of Rivas’s shirt to
17 see if it was bloody.

18 Rodriguez informed Rivas that he knew Rivas was on parole and asked him about
19 his involvement in the altercation that had taken place. Rivas said that he was a passenger
20 in a car that was traveling slowly through traffic when an unknown man approached the car
21 and punched him in the face, causing the gash on the top of his eye. Rivas got out of the
22 car to defend himself, but everybody started running and scattering. As he was walking
23 away, he was stopped by a police officer. Rivas said he could not identify his attackers; it
24 had happened so fast that he wasn’t sure.

25 At that time, Rodriguez did not immediately recognize Rivas as the person who had
26 been stabbed by Barron. He did not know the history between Barron and Rivas, and he
27 believed Rivas’s injuries were consistent with his explanation of how he got them.
28 Nevertheless, Rodriguez suspected Rivas had been stabbed by Barron. Rivas did not

1 complain of any injuries other than the wounds to his head and his arm. Rodriguez
2 informed Rivas that several people had been stopped and he wanted Rivas to look at these
3 individuals to see if he could identify anyone. Rivas was transported to the same hospital
4 to which Barron had been transported. Rivas was not treated there. A field identification
5 was conducted outside the hospital as Barron was in or about the ambulance prior to
6 entering the emergency room. Rivas did not identify Barron as his attacker.

7 *The Follow-up Investigation*

8 Detective Rodriguez was not involved in the investigation of the 2002 shooting case
9 in which Barron and Maciel were charged. Officer Campagna was not involved in the initial
10 investigation of the assault on May 16, 2003. When he learned of it, he told Detective
11 Rodriguez about the rivalry between TSU and AOT-JSP.

12 Rodriguez and Campagna interviewed Efrain Maciel on May 27, 2003. Maciel said
13 that he and Barron “were just in the wrong place at the wrong time on May 16th, 2003.” As
14 they were pulling out of a parking lot in the area, Maciel heard someone yell out “AOT.” He
15 looked out the car window and saw Carlos Rivas. Someone threw a metal pipe against the
16 back window of the car. Barron yelled back “F-AOT. TSU.” He jumped out of the car, and
17 Maciel reluctantly jumped out also to back Barron up. A large fight broke out among
18 Barron and the individuals who were present. At one point, Barron picked up a pipe and
19 threw it at the others. Maciel said that he himself did not throw anything or hit anyone.

20 On June 5, 2003, Detective Rodriguez called Rivas’s parole agent and invited her to
21 join him and three other officers in a parole search of Rivas’s house. Rodriguez, his
22 partner, his supervisor, a patrol officer, and the parole agent, Ms. Perez, re-contacted
23 Rivas at his home. Rodriguez interviewed Rivas for 30 minutes. He conducted the
24 interview alone and did not tape record it. Nor did he ask Rivas to sign a statement. At
25 that time, Rodriguez took a Polaroid photograph of Rivas’s back. The photograph depicts
26 “a scratch or something red” in the center of Rivas’s back, in the general area where
27 Rodriguez saw Barron stab someone. That was the only injury on Rivas’ back.

28

1 Detective Rodriguez first testified that Rivas identified Barron as the stabber on June
2 5. Rivas pointed out his injuries and said they were stab wounds. [Footnote omitted.]

3 Rodriguez later explained (on cross-examination) that Rivas “never flat out came out
4 and said, “Barron stabbed me.” He said someone else besides Mr. Barron stabbed him.
5 And then he gave a general description of a guy with a knife. . . . Without any names. And
6 then he added all this other information about his background with Mr. Barron and why,
7 even if he was the guy that stabbed him, he was not going to tell us; and that that was our
8 job, to figure out who stabbed him; and that that was all that he was going to come and
9 testify and do what he had to do; and we, the police, . . . had to work with what we had. . . .
10 [H]e felt that if he identified Mr. Barron . . . [he] was going to go through the same process
11 of being identified again as a snitch, putting his family in danger. So at that time he felt that
12 his own safety and his family’s safety outweighed him actually admitting to us or telling us
13 that it was Mr. Barron that had . . . stabbed him.” Rivas “was willing to go as far as saying
14 [Barron] was there, [Barron] charged at him, but then he said that someone else was the
15 one that did the stabbing.”

16 In further testimony, however, Rodriguez testified that Rivas contradicted himself.
17 Sometimes he said it was not Barron, and other times he said he couldn’t say it was Barron
18 because he or his family will get hurt.

19 Rodriguez acknowledged that Rivas gave two different versions of what happened;
20 in the first version, Rivas maintained that the fight involved Sureños. He said he was sitting
21 in the car and got struck. He indicated that the injury on his back was an old injury, and
22 that he injured his arm while at work. Rodriguez testified that Rivas’s change of story came
23 about in the following way.

24 Rodriguez asked Rivas if he remembered the night of May 16, 2003, and Rivas said
25 he did. Then Rodriguez and Rivas stepped outside of the residence to speak privately.
26 Rodriguez was dressed in civilian clothing. Rodriguez informed Rivas for the first time that
27 Rodriguez was aware of Rivas’s history with the tagging crews AOT and JSP; Rivas
28 seemed surprised by that. Rivas at first denied that Barron and Maciel assaulted him. He

1 stated that somebody approached him and attacked him with something that appeared to
2 be some kind of knife. That person swung at him and cut him above the eye. He was also
3 cut on his left elbow. When Rodriguez asked to see his back, Rivas admitted that the scar
4 on his back was also from a blow received the night of the incident. He said he thought the
5 same suspect slashed at him several times across his body. He described his assailant as
6 a “Hispanic male, approximately 17 to 20 years old, about 5’10” in height, medium built,
7 medium to dark complexion. He was clean shaven and was . . . wearing a black sweatshirt
8 and baseball cap.” Rivas then described being stopped by a police officer as he was trying
9 to walk away from the scene, and also talked about being taken to the hospital that night in
10 an attempt to identify someone, but that he failed to identify the person.

11 Rodriguez asked Rivas if he did not want to identify Barron because he did not want
12 to get involved. Rivas responded that he did not want to get involved, did not want to
13 mention Barron in any interview because he knew, based on his prior history with Barron,
14 that to do so would put his family in danger. Rivas pointed out that he had done what he
15 had to do to identify Barron the last time, but that Barron had “beat the case.” He said that
16 Barron “knows I testified against him in court before, and that’s why he is still trying to
17 retaliate against me.”

18 Prior to talking with Rivas, Rodriguez had obtained certain information from Rivas’s
19 parole agent, Ms. Perez. Rodriguez confronted him about lying to Ms. Perez. Rivas
20 responded that he had lied to her because he did not want to get in trouble with her or get
21 his parole violated. Rivas then said he would tell Rodriguez what he knew, indicating to
22 Rodriguez that his prior statements had been untruthful.

23 Rivas told Rodriguez that he used to be a member of AOT, but that he had gotten
24 out of AOT after he went to prison. He admitted that he still hung out with members of AOT
25 and JSP. On May 16, Rivas had been in the area of Sixth and Santa Clara Streets with
26 some friends, including Jose Torres and at least nine other JSP members. Rivas saw
27 George Vega, another member of JSP, and got out of his car to talk to him. As he stood on
28 the street corner chatting, a member of his group yelled out “AOT.” Then someone from a

1 moving car yelled back “F---AOT.” The occupants of the car, Maciel and Barron, got out of
2 the car and confronted them. A fight ensued in which Rivas was involved. He recognized
3 Barron and Maciel from prior altercations with them and from court proceedings the
4 previous year. Rivas said that Barron and Maciel were members of a rival tagging crew,
5 TSU. He also recognized Barron from jail. Rivas told Rodriguez that the year before, while
6 he and Barron were both housed in county jail, he learned that Barron had threatened him.
7 Because his life was in danger, Rivas was removed from his cell and placed in protective
8 custody.

9 On June 10, 2003, Campagna interviewed Luis Felix after arresting him on unrelated
10 charges. Campagna did not promise to let Felix go if he cooperated. Felix is a JSP gang
11 member who has “JSP tattooed on his stomach” and a very common Norteño tattoo on his
12 face-the number “1” by one eye, and four dots by the other. He admitted he was present
13 during the May 16, 2003 incident. Campagna asked him “What’s up with your boy ‘Fraze’
14 getting stuck,” meaning what happened when Carlos Rivas was stabbed. Felix replied, “If it
15 wasn’t for me, he probably would be worse.” He added that when Barron was stabbing
16 Rivas, he (Felix) jumped in and hit Barron, causing the attack to end. Felix also said that
17 the problems between JSP-AOT and TSU had been going on for years, and that he would
18 not testify in a case against Barron. Campagna had been asked to subpoena Felix for trial,
19 and Felix had been extremely uncooperative.

20 On August 11, 2004, Rodriguez and Campagna interviewed Rivas a final time at
21 Rivas’s parole officer’s office in an effort to persuade him to testify against Barron. At that
22 time, Rivas made statements that “indirectly tied Mr. Barron to . . . being [Rivas’s]
23 assailant.” Rivas said he did not want to testify against Barron because he did not want to
24 be labeled a snitch. He told Campagna that when he and Barron had been in custody
25 together, they had to be separated because Barron had threatened to harm him. Referring
26 to the May 16, 2003 incident, Campagna told Rivas: “Look what happened downtown last
27 time Barron got out after he beat that case. He came after you.” Rivas responded: “And
28 you saw what happened to him. They took Anthony away in a stretcher, not me.”

1 Campagna replied, “Anthony still got you a couple times.” Rivas responded, “I got him too.”
2 Rivas indicated he would not admit he had made those statements to Campagna in court.
3 He also said he knew that Barron would have his boys in court and would come after him if
4 he said anything in court. When Detective Rodriguez offered to bring him to court and take
5 him home, Rivas responded: “You guys just do your job with the evidence you have, and I’ll
6 do what I have to do.” However, Rivas immediately followed up that statement by saying
7 he was no snitch and would not say that in court. He expressed fear that Barron and his
8 friends would come after him and his family in retaliation. Rodriguez did not feel that either
9 he or Officer Campagna threatened or put undue pressure on Rivas, nor did they have the
10 ability to violate Rivas’s parole.

11 Carlos Rivas, Efrain Maciel, and Luis Torres were called as hostile witnesses at trial.

12 Rivas admitted that he became involved in a “tagging crew” called AOT or “Always
13 on Top” when he was 16 or 17 years old and that his tagging moniker was “Fraze.” Rivas
14 suffered three felony and two misdemeanor vandalism convictions in 2002 and one
15 misdemeanor vandalism conviction in 1999 for acts of graffiti. He denied that he was a
16 Norteño gang member, and denied that his involvement with the crew was gang-related.
17 His tagging crew did not associate with the color red. He just happened to be wearing a
18 red shirt in court. He never heard of a tagging crew called TSU. He knew Barron from
19 school and was friends with Barron when they were teenagers. They never stopped being
20 friends; they never had previous altercations and Barron “hasn’t done anything for me to
21 dislike him.” He never knew that Barron was part of a crew called TSU or “Tearing Shit
22 Up.” Rivas displayed his tattoos to the jury. He denied they were gang tattoos. He denied
23 that his crew had fights with rival crews. He denied knowing Luis Felix.

24 On May 16, 2003, he was a passenger in a car driven by his friend Jose Torres that
25 was stopped in traffic on Santa Clara Street. A group of Sureños began yelling at them and
26 banging on the car. Through the open car window, one of the people in the group hit him in
27 the eye with something heavy that was in his fist and cut him above the eye. He got out of
28 the car to defend himself and the Sureños fled. Rivas denied that he was in a knife fight or

1 was injured with a knife. The wound on his arm was a work-related scratch from a rose
2 bush.

3 Rivas denied that he ever identified Barron as his attacker to Rodriguez or
4 Campagna; denied telling them he was attacked with a knife; denied that he ever made the
5 statements ascribed to him by Detective Rodriguez and Officer Campagna on June 5,
6 2003, and August 11, 2004; denied that he was afraid of Barron, or afraid of talking to the
7 police, or fearful for his family. Finally, he denied that Barron and Maciel were involved in
8 the 2002 shooting, and denied that he identified either Barron or Maciel to the police.

9 At the time of trial, Maciel was in Solano State Prison for possession of drugs. He
10 admitted that he used to be a tagger; his tagger moniker was "Arson." He knew of a tagger
11 crew called TSU for "Tearing Shit Up" but he was not a part of it. He denied that he was a
12 gang member. He grew up with Barron.

13 In February of 2002 he was carrying a .22 caliber Beretta because some people
14 don't like tagging in their neighborhoods. He was tagging on Sixth and Julian Streets when
15 10 people came out with bats. He discharged his gun in the air. Barron was not there. He
16 would not tell on friends if they were there, because it is dangerous to be a snitch. Maciel
17 pleaded guilty to two counts of assault with a deadly weapon as a result of that incident.

18 On May 15, 2003 he went to the concert with his girlfriend, Yvonne; Barron and
19 Barron's girlfriend, Christina; and his friend, Lorenzo. After the concert, Christina drove to
20 the Albertson's on Sixth and Santa Clara Streets where she dropped Lorenzo off. Maciel
21 was in the back seat and Barron was in the front passenger seat. Something hit the car,
22 shattering the back window and barely missing him. He and Barron jumped out to assess
23 the damage and were attacked by 10 to 15 people throwing bottles at them.

24 Maciel testified that Barron did not have a knife when he got out of the car, but
25 acknowledged that he could not see Barron during the fight. He denied seeing Rivas, but
26 acknowledged that when he was interviewed later, he identified a photo of Rivas and wrote
27 "Fraze from court" on it. However, he denied that the fight was gang related, and denied
28

1 telling police that the fight was preceded by shouts of AOT or TSU. He accused the police
2 of lying in their reports about statements he allegedly made to them.

3 Luis Felix denied being a Norteño gang member, although he acknowledged that his
4 facial tattoos were Norteño gang symbols. He did not remember being in the area of the
5 concert on May 16 or seeing Rivas in a fight that night. He did not know Barron, or TSU, or
6 Rivas's moniker "Fraze." He denied telling Campagna that Barron stabbed Rivas or that he
7 stopped the attack.

8 *The Defense Case*

9 Christina Villafuerte is the mother of Barron's son. She testified that she was driving
10 the car in which Barron and Maciel were riding on May 16, 2003. After dropping Lorenzo
11 off at the Albertson's parking lot, she continued to Santa Clara Street, where someone
12 threw an object at her rear windshield and shattered it. She did not hear anyone yell
13 "AOT." Barron did not yell back, "F----AOT." A group of 15 guys came towards her car,
14 and Barron and Maciel got out to confront them. She then made a U-turn and drove away.
15 She testified that Barron does not carry a knife and was not holding one when he got out of
16 the car.

17 Veronica Prado was dating Lorenzo in May of 2003 and is best friends with Yvonne
18 Sanchez, who was dating Maciel. She was waiting for a ride at the Albertson's lot after the
19 concert when Villafuerte's car cruised by and stopped. Lorenzo and Maciel got out of the
20 car to talk to the girls, but Maciel got back in to continue cruising. She heard the glass
21 shatter. She saw Barron being chased by a police officer who had his gun drawn and told
22 Barron "to freeze." She saw him run into the Albertson's sign post and fall down
23 unconscious. He was then arrested. Prado did not see anything in Barron's hands while
24 he was running.

25 Barron testified in his own behalf. On May 16, 2003, he was cruising on Santa Clara
26 Street with Maciel, Lorenzo and Christina after the concert. They saw Veronica and
27 Yvonne, and Lorenzo and Maciel got out of the car to talk to them. Maciel got back in the
28 car and they continued cruising.

1 Christina's car was stuck in traffic on Santa Clara Street when suddenly something
2 shattered the rear windshield. Barron and Maciel got out of the car and were confronted by
3 15 guys who started fighting with them. He was punched by six or seven of the men and
4 fought back with his fists. He was being hit over the head with bottles, so he put his head
5 down and punched someone several times with his right hand while grabbing someone
6 with his left. When he realized he was bleeding from the back of the head, he broke away
7 from the fight and ran towards the parking lot. Barron received seven stitches and has a
8 scar on his head from being hit with bottles; he also received stitches for other injuries he
9 received that night. Barron denied that he had a weapon, or stabbed anyone, or assaulted
10 anyone with a weapon that night.

11 Barron noticed a car driving slowly into the Albertson's parking lot and saw that the
12 driver was watching him. He did not know that the driver, Rodriguez, was a police officer,
13 and never he heard him identify himself as a police officer. He thought Rodriguez was part
14 of the group that had attacked him, and so he ran from him across Santa Clara Street. But
15 when he saw a group of people pointing at him and coming towards him, he ran back
16 towards Albertson's, where he again saw Rodriguez. When Rodriguez ran towards him,
17 Barron became afraid and ran from him. He ran into the Albertson's sign and was arrested
18 while he was on the ground, still dazed and semiconscious from hitting the pole. At that
19 point, he told a uniformed officer that he had been attacked. He was taken to the hospital
20 by ambulance a few minutes later. At the hospital, he told McFadden that he did not stab
21 anyone.

22 Barron denied that anyone yelled "AOT" or "F---AOT, TSU" before the fight. He
23 denied that he was the leader of TSU and testified that he had left TSU in 2001. He
24 acknowledged that Rivas was in AOT but denied that AOT and TSU were rival gangs. He
25 claimed that he and Rivas were friends. He denied that Rivas was one of the men who
26 attacked him on May 16, 2003.

27

28

1 Barron also denied any involvement in the 2002 shooting incident. He denied
2 making or passing along threats to Rivas on account of his testimony in the 2002 or 2003
3 cases.

4 Defense investigator Shirley Bernal testified that she interviewed Rivas on May 13,
5 2004. He admitted to her that he had been stabbed on May 16, 2003, but said he did not
6 know who the stabbed him. Rivas also told her that he feared Barron might retaliate
7 against him for having identified him in connection with the 2002 shooting incident.

8 **ISSUES**

9 Barron raises the following claims for habeas relief:

- 10 (1) his due process and Confrontation Clause rights were violated by the trial court’s
11 exclusion of evidence that an officer used excessive force against him;
12 (2) the prosecutor committed misconduct in specified ways; and
13 (3) the cumulative effect of the above errors prejudiced him.

14 **ANALYSIS**

15 **I. Standard of Review**

16 A district court may not grant a petition challenging a state conviction or sentence on
17 the basis of a claim that was reviewed on the merits in state court unless the state court’s
18 adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an
19 unreasonable application of, clearly established Federal law, as determined by the
20 Supreme Court of the United States; or (2) resulted in a decision that was based on an
21 unreasonable determination of the facts in light of the evidence presented in the State court
22 proceeding.” 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to
23 mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407–09, (2000),
24 while the second prong applies to decisions based on factual determinations, *Miller-El v.*
25 *Cockrell*, 537 U.S. 322, 340 (2003).

26 A state court decision is “contrary to” Supreme Court authority, that is, falls under
27 the first clause of § 2254(d)(1), only if “the state court arrives at a conclusion opposite to
28 that reached by [the Supreme] Court on a question of law or if the state court decides a

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

10 A state court’s determination that a claim lacks merit precludes federal habeas relief
11 so long as “fairminded jurists could disagree” on the correctness of the state court’s
12 decision. *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011) (citing *Yarborough v.*
13 *Alvarado*, 541 U.S. 652, 664 (2004)). “[E]valuating whether a rule application [i]s
14 unreasonable requires considering the rule’s specificity. The more general the rule, the
15 more leeway courts have in reaching outcomes in case-by-case determinations.” *Id.* “As a
16 condition for obtaining habeas corpus [relief] from a federal court, a state prisoner must
17 show that the state court’s ruling on the claim being presented in federal court was so
18 lacking in justification that there was an error well understood and comprehended in
19 existing law beyond any possibility for fairminded disagreement.” *Id.*

20 Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual
21 determination will not be overturned on factual grounds unless objectively unreasonable in
22 light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. at 340.
23 Review under § 2254(d)(1) is limited to the record that was before the state court that
24 adjudicated the claim on the merits. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011).

25 **II. Confrontation Clause Claim**

26 Barron seeks habeas relief on the ground that the trial court’s exclusion of evidence
27 of misconduct to impeach Detective Rodriguez violated his right to due process and the
28 right to confrontation.

1 **A. Legal Standard**

2 The Confrontation Clause of the Sixth Amendment guarantees a defendant in a
3 criminal case an opportunity for effective cross-examination of the witnesses against him.
4 *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); *Murdoch v. Castro*, 609 F.3d 983, 989 (9th
5 Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442, *reh’g denied*, 132 S. Ct. 47 (2011).

6 “A criminal defendant can prove a violation of his Sixth Amendment rights by
7 ‘showing that he was prohibited from engaging in otherwise appropriate cross-examination
8 designed to show a prototypical form of bias on the part of the witness, and thereby to
9 expose to the jury the facts from which jurors . . . could appropriately draw inferences
10 relating to the reliability of the witness.’” *Holley v. Yarborough*, 568 F.3d 1091, 1098 (9th
11 Cir. 2009) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)) (internal quotation
12 marks omitted). “However, ‘it does not follow, of course, that the Confrontation Clause of
13 the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel’s
14 inquiry into the potential bias of a prosecution witness.’” *Id.* (quoting *Van Arsdall*, 475 U.S.
15 at 679). “On the contrary, the right to cross-examination may, in appropriate cases, bow to
16 accommodate other legitimate interests in the criminal trial process.” *Id.* (citations and
17 quotation marks omitted). As the Supreme Court recognized in *Van Arsdall*, “trial judges
18 retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable
19 limits on such cross-examination based on concerns about, among other things,
20 harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is
21 repetitive or only marginally relevant.” *Van Arsdall*, 475 U.S. at 679. “Any such ‘restrictions
22 on a criminal defendant’s rights to confront adverse witnesses,’ however, ‘may not be
23 arbitrary or disproportionate to the purposes they are designed to serve.’” *Ortiz v. Yates*, –
24 F.3d —, 2012 WL 6052251 (9th Cir. Dec. 6, 2012) (quoting *Michigan v. Lucas*, 500 U.S.
25 145, 151 (1991)) (internal citation and quotation marks omitted).

26 To determine whether the trial court’s restriction on a defendant’s ability to
27 cross-examine an adverse witness violates the Sixth Amendment right of confrontation
28 under *Lucas*, the court must make a two-part inquiry. *Ortiz*, 2012 WL 6052251 at *7 (citing

1 *Fowler v. Sacramento Co. Sheriff's Dept.*, 421 F.3d 1027, 1038 (9th Cir. 2005)). “First, we
2 ask ‘whether the proffered cross-examination sufficiently bore upon the witness’ reliability
3 or credibility such that a jury might reasonably have questioned it.” *Id.* If the first element
4 is satisfied, the court must then consider “‘whether the trial court’s preclusion of this cross
5 examination was unreasonable, arbitrary or disproportionate’ in light of any ‘countervailing
6 interests’ justifying preclusion, such as ‘waste of time, confusion and prejudice.’” *Id.*
7 (quoting *Fowler*, 421 F.3d at 1038, 1040).

8 Even where a violation of the Confrontation Clause is found, the court must assess
9 whether the error had prejudicial impact under *Brecht v. Abrahamson*, 507 U.S. 619, 623
10 (1993). *Merolillo v. Yates*, 663 F.3d 444, 455 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 102
11 (2012). Under harmless error analysis, “[h]abeas relief is warranted only if the error had a
12 ‘substantial and injurious effect or influence in determining the jury’s verdict.’” *Id.* (quoting
13 *Brecht*, 507 U.S. at 637–38). To determine whether a violation of the Confrontation Clause
14 had “substantial and injurious effect,” the court applies the five non-exclusive factors set
15 forth in *Van Arsdall*: (1) the importance of the witness’ testimony in the prosecution’s case;
16 (2) whether the testimony was cumulative; (3) the presence or absence of evidence
17 corroborating or contradicting the testimony of the witness on material points; (4) the extent
18 of cross-examination otherwise permitted; and (5) the overall strength of the prosecution’s
19 case. *Id.* (citing *Van Arsdall*, 475 U.S. at 679).

20 **B. Trial Record**

21 With respect to Barron’s Confrontation Clause claim, the court of appeal
22 summarized the relevant trial court record as follows. Answer, Ex. 6 at 24-26.

23 Prior to trial, defense counsel sought to introduce undisputed evidence that in the
24 process of arresting defendant, Detective Rodriguez “kicked [defendant] three times after
25 he ran into the signpost and was on the ground.” [Footnote: Detective Rodriguez admitted
26 he had done so in his police report.] According to the prosecutor, after defendant fell to the
27 ground upon hitting a pole, “he has his hands underneath him. When the officers make
28 contact with him, they’re ordering him repeatedly to remove his hands from underneath

1 him. He does not do that. And then he is kicked several times. [¶] The defendant . . . has
2 no injuries . . . where he allegedly was kicked.” Rodriguez’s supervisor, Sergeant Wilson,
3 interviewed defendant that night about the kicking and recorded defendant's statement.

4 The defense argued that the evidence of Detective Rodriguez’s misconduct was
5 relevant to show that Rodriguez had a motive to lie about seeing defendant stab another
6 person with a knife. The defense theory was that Rodriguez claimed, untruthfully, that he
7 saw defendant stab someone with a knife in order to be able to justify the kicking as
8 reasonable in light of his stated belief that defendant was armed with a knife when he was
9 arrested. As the prosecutor put it: “The argument is absolutely that Officer Rodriguez is
10 lying to cover his own butt for then kicking the defendant subsequent to this altercation.”
11 The defense argued that the physical evidence did not support a stabbing: no knife was
12 found, the victim denied that he was stabbed, and he did not have any stab wounds to his
13 back.

14 The court observed that there were “three or four other witnesses who say that he
15 was stabbed.” Defense counsel responded: “[I]f the jurors want to accept the testimony of
16 the other three witnesses, fine. But I don't believe that the defense should be hampered in
17 its attempt to discredit at least one of those officers. [¶] And that is the principal officer in
18 this case. This officer contacted the victim subsequent to that night. This officer is . . .
19 going to be testifying with regards to the gang allegations. He’s going to be sitting here
20 throughout the trial. He is going to be the witness that I believe the jurors will be looking to
21 . . . principally in terms of making their decision. If I can discredit him, then I think it calls
22 into question the credibility of his partner officer, McFadden” because “they work together,
23 they’re both undercover.”

24 The prosecutor argued that the evidence was not relevant under Evidence Code
25 section 352 because “four independent law enforcement personnel . . . all say,
26 independently, that they witnessed Mr. Barron stabbing somebody. [¶] Given that, it is not
27 very likely that Officer Rodriguez is lying about what he saw in order to protect himself from
28 the fact that he had to kick Mr. Barron.”

1 The trial court ruled: “I don't think it's relevant if the testimony comes out the way I'm
2 hearing it's going to come out. [But] if the witnesses don't testify that they all saw the
3 defendant with a knife, then I will change my ruling, and I may consider it to be relevant
4 what this witness says. . . . If people saw the defendant with a knife, then I don't think what
5 happened afterwards, in terms of the officer's response to it, is improper. And therefore, I
6 think it's really just trying to inflame the jury with the fact that the officer kicked the
7 defendant. [¶] However, if these other witnesses, three other independent witnesses, don't
8 say they saw defendant with a knife, then I would, of course, let this in, because I think it
9 goes to the credibility of the one witness who indicates the defendant had a knife. . . . So I
10 think the prejudice of this testimony coming in outweighs the probative, based on the offers
11 of proof . . . that I've heard about what the testimony is going to be.”

12 After the four officers had testified about the altercation, the defense moved for
13 reconsideration of the court's initial ruling. The court inquired of defense counsel “how the
14 kicking shows bias.” Defense counsel explained that “The motive is that he doesn't want
15 Mr. Barron to be in a situation where he could potentially file a suit against him down the
16 road, if Mr. Barron chose to do that.” When the court inquired about the statute of
17 limitations, counsel further explained that defendant did not file a citizen complaint
18 immediately. Because he was on parole, “he was whisked away to state prison on a
19 violation.” He served one year on the violation. When he returned from state prison, he
20 attempted to file a complaint but was told the statute of limitations had run.

21 The court ruled: “I don't think the probative value of this evidence is . . . there. I don't
22 think it logically and reasonably . . . leads to the conclusion that the witness has a . . .
23 motive to lie. I just don't think the dots connect up with the reason that I'm given as the
24 motivation here. [¶] The prejudicial evidence under 352 is not evidence that would
25 naturally flow from highly relevant probative evidence. It's that prejudice which would
26 cause a person to make a decision based on an extraneous factor. And I . . . think that this
27 evidence that the defense is seeking to get in is that kind of evidence. So I am going to
28 deny their request.”

1 **C. Discussion**

2 In the “last reasoned state-court opinion” for purposes of habeas review under
3 § 2254(d), *Ortiz*, 2012 WL 6052251 at *8, the court of appeal determined that the exclusion
4 of evidence that Detective Rodriguez kicked Barron several times while he lay
5 semiconscious on the ground was a violation of the Sixth Amendment right to cross-
6 examine a witness, but that the error was harmless beyond a reasonable doubt. Answer,
7 Ex. 6 at 34 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). The court of appeal
8 found that the evidence that Rodriguez admitted that he kicked Barron while arresting him
9 would have tended to show both a reason to fabricate the existence of a knife and a
10 willingness to lie. *Id.* at 31-32. The court of appeal determined that the trial court violated
11 Barron’s right to confront the witness by prohibiting all cross-examination on this point. *Id.*
12 at 32-33. The state court further determined that the Sixth Amendment violation was
13 harmless error, reasoning as follows:

14 In our view, “[a] reasonable jury might have received a
15 significantly different impression of [the witness’s] credibility had
16 [defendant’s] counsel been permitted to pursue his proposed line of
17 cross-examination.” (*Van Arsdall, supra*, 475 U.S. at p. 680.)
18 However, we must nevertheless assess whether the error requires
19 reversal. (*Chapman v. California, supra*, 386 U.S. at p. 24; *Van*
20 *Arsdall, supra*, 475 U.S. at p. 684 [*Chapman* standard applies to
21 restriction of cross-examination to expose bias] .) “The correct inquiry
22 is whether, assuming that the damaging potential of the cross-
23 examination were fully realized, a reviewing court might nonetheless
24 say that the error was harmless beyond a reasonable doubt. Whether
25 such an error is harmless in a particular case depends upon a host of
26 factors, all readily accessible to reviewing courts. These factors
27 include the importance of the witness’s testimony in the prosecution’s
28 case, whether the testimony was cumulative, the presence or
absence of evidence corroborating or contradicting the testimony of
the witness on material points, the extent of cross-examination
otherwise permitted, and, of course, the overall strength of the
prosecution’s case.” (*Van Arsdall, supra*, 475 U.S. at p. 684.)

 Applying this analytical framework to the facts before us, we
first note that through cross-examination of the civilian witnesses such
as Maciel and Rivas, defense counsel was able to draw out the
accusation that Rodriguez and Campagna had lied in their reports
about statements the witnesses had allegedly made to them. Through
cross-examination, defense counsel was also able to force Detective
Rodriguez to explain the full circumstances of his interview with Carlos
Rivas and expose the inconsistencies among Detective Rodriguez’s
various versions of that exchange. And, through cross-examination of

1 the three other law enforcement witnesses, defense counsel was also
2 able to bring out the differences between the four officers'
observations of the assault.

3 It is true that Rodriguez was a key witness, but he was not the
4 only witness to the assault. Although each officer's description of the
5 fight differed in some respects, in the end Officers McFadden,
6 Hernandez-Murray, and Ramirez all agreed they saw something in
7 defendant's hands as he made stabbing motions towards the victim. If
8 Carlos Rivas's wounds did not tally perfectly with all of the slashing
9 motions described by witnesses, they were nevertheless consistent
10 with his admissions that he had been stabbed during a fight.
11 Furthermore, on August 11, 2004, Rivas made admissions to Officer
12 Campagna, as well as to Detective Rodriguez, that suggested he
13 had been stabbed by defendant. Luis Felix also admitted to Officer
14 Campagna that defendant stabbed Rivas with a knife. The civilian
witnesses who testified were plainly hostile to the proceedings and
were impeached with their prior statements to police. Finally, evidence
concerning the 2002 shooting and subsequent trial provided
powerful evidence of motive for the current assault. In short, aside
from Detective Rodriguez's testimony, the case against defendant
was strong, and there was ample evidence that defendant stabbed
Rivas. Under these circumstances, the trial court's error in excluding
evidence that Detective Rodriguez kicked defendant three times while
arresting him was harmless beyond a reasonable doubt. (*Chapman v.*
California, supra, 386 U.S. at p. 24.)

15 Answer, Ex. 6 at 33-34.

16 Barron does not dispute the court of appeal's determination that the trial court's
17 exclusion of evidence of Detective Rodriguez's use of force impaired Barron's right to
18 cross-examine a key adverse witness, but contends that the state court's harmless error
19 analysis was an unreasonable application of clearly established federal law.

20 The court of appeal, on direct review of the criminal judgment, applied the *Chapman*
21 standard for harmless error, which holds that "constitutional error can be considered
22 harmless only if a court is 'able to declare a belief that it was harmless beyond a
23 reasonable doubt.'" *Fry v. Pliler*, 551 U.S. 112, 116 (2007) (quoting *Chapman*, 386 U.S. at
24 24). On habeas review, however, the court "must assess the prejudicial impact of
25 constitutional error in a state-court criminal trial under the 'substantial and injurious effect'
26 standard set forth in *Brecht*, [] whether or not the state appellate court recognized the error
27 and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard
28 set forth in *Chapman*." *Id.* at 121-22. Under the *Brecht* standard, "[i]f a habeas court is left

1 with “grave doubt” about whether a constitutional error substantially influenced the verdict,
2 then the error was not harmless.” *Ortiz*, 2012 WL 6052251 at *10 (quoting *Parle v.*
3 *Runnels*, 387 F.3d 1030, 1044 (9th Cir. 2004)).

4 Looking to the *Van Arsdall* factors to determine whether the trial court’s error had a
5 “substantial and injurious effect or influence in determining the jury’s verdict,” the court
6 concludes that the restriction on Barron’s ability to cross-examine Detective Rodriguez was
7 harmless error. First, Rodriguez’s testimony was important in the prosecution’s case, but
8 he was not the only witness to the assault. Three other officers testified to seeing Barron
9 making stabbing motions toward another person, and each testified to seeing something in
10 Barron’s hands. During the course of the group fight, Officer McFadden saw a “sharp
11 instrument in [Barron’s] hand, shuffling forward in a – in a stabbing manner.” 10 RT 751.¹
12 Probation Officer Hernandez-Murray testified that Barron “had something in his hand. I
13 couldn’t tell you if it was a knife or a screwdriver. . . . I didn’t actually see it, but I saw the –
14 the stabbing motion to his back, maybe shoulder blade area.” 8 RT 308. Parole Agent
15 Ramirez, from the Juvenile Division of the California Department of Corrections and
16 Rehabilitation, testified that she saw Barron making a “stabbing motion” and that Barron’s
17 “hand was kind of in a clenched, like he had something in there. And I could – you could
18 see something, but I didn’t know exactly what it was.” 8 RT 372.

19 Second, Rodriguez’s testimony was not cumulative, in light of the record which
20 indicates that “not one other officer testified unequivocally that he or she saw defendant
21 wield a knife, even though all were sitting in the same car,” as the court of appeal noted.
22 Answer, Ex. 6 at 29-30. Further, no other officer testified that he or she saw Barron’s arrest
23 by Rodriguez.

24 Third, other evidence presented at trial corroborated Rodriguez’s testimony that he
25 saw Barron stab the victim, including the testimony of Officer McFadden, Probation Officer
26 Hernandez-Murray and Parole Agent Ramirez seeing Barron holding some kind of object in

27 ¹ Respondent has lodged the Reporter’s Transcript of the trial court proceedings
28 as Exhibit 1 to the Answer.

1 his hand while making a stabbing motion. At an interview of the victim about twenty days
2 after the assault, Rodriguez took a Polaroid photograph of the victim's back, showing a
3 wound in the general area of where Rodriguez saw a person being stabbed by Barron
4 during the night of the assault, which was admitted into evidence. 7 RT 212-13, 223.
5 Further, Officer Campagna testified that Luis Felix, a friend of the victim, stated that Barron
6 stabbed the victim and that Felix claimed to hit Barron to stop the attack on the victim. 12
7 RT 1258-60. Officer Campagna also testified that the victim made statements during an
8 interview with Campagna and Rodriguez indicating that Barron stabbed him, corroborating
9 Rodriguez's testimony about the victim's statements. 11 RT 1071-72; 12 RT 1262.

10 Fourth, Rodriguez was subject to extensive cross-examination and impeachment.
11 As the court of appeal noted, during cross-examination of the civilian witnesses, including
12 the victim, defense counsel drew out their accusations that Rodriguez and Campagna had
13 lied in their reports about the witnesses' statements. See 9 RT 546, 550-53; 10 RT 737-38;
14 10 RT 788-90. The victim also testified that he felt harassed by Rodriguez into getting him
15 to testify that Barron had stabbed him. 8 RT 468. Furthermore, on cross-examination,
16 Rodriguez was required to explain the circumstances of his interview with the victim and to
17 expose the inconsistencies in his different versions of that interview. See 7 RT 214-19,
18 263-64.

19 Finally, considering the overall strength of the prosecution's case, and assuming that
20 the damaging potential of the precluded cross-examination would have been fully realized,
21 the exclusion of evidence that Rodriguez admitted to kicking Barron while arresting him did
22 not have a substantial and injurious effect on the outcome of the trial. In addition to the
23 testimony of three other officers about the assault, the prosecution introduced evidence of
24 motive for the assault on the stabbing victim, namely, the February 2002 shooting incident
25 in which the victim had identified Barron to police. Barron was charged with the shooting
26 but was acquitted after the victim recanted his identification at trial.

27 Barron argues that exclusion of the proffered impeachment evidence was not
28 harmless because the jury would have believed the civilian witnesses, namely, the stabbing

1 victim who “testified that he was not a victim,” and the corroborating civilian witnesses who
2 “alleged the police pressured them to testify against Mr. Barron and attributed statements
3 to them that they did not make.” Traverse at 11. Barron further argues that impeaching
4 Detective Rodriguez would also have impeached the other officers. *Id.* at 9. In light of the
5 evidence in the record, however, evidence that Rodriguez had kicked Barron during the
6 arrest would not have had a substantial influence on the jury’s credibility determinations of
7 the civilian witnesses, who had given statements to Officer Campagna as well as
8 Rodriguez. Nor would the proffered impeachment evidence have substantially influenced
9 the credibility determinations of the three other officers who testified that they saw Barron
10 with an object in his hand and making stabbing motions during the assault. Even if
11 Detective Rodriguez’s testimony had been rendered non-credible by his admission that he
12 kicked Barron on the ground, there was no evidence from which the jury would infer that
13 the other three officers were lying to protect Rodriguez, particularly in light of the testimony
14 by Probation Officer Hernandez-Murray and Agent Ramirez that they would be subject to
15 reprimand and/or perjury charges if they falsified their reports. 8 RT 360, 413-14.
16 Furthermore, the circumstances of the arrest were not relevant to Barron’s motive for
17 stabbing the victim, nor to the civilian witnesses’ reasons for recanting their earlier
18 statements expressing fear of retaliation for testifying or being labeled a snitch. See 8 RT
19 468-69; 13 RT 1592-93.

20 Having balanced the *Van Arsdall* factors, in light of the strong evidence in the record
21 of guilt, the court agrees with the court of appeal that the preclusion of the proffered
22 impeachment evidence of Detective Rodriguez violated Barron’s confrontation rights, and
23 further agrees that the error was harmless. The state court’s determination that the Sixth
24 Amendment violation was harmless error was neither contrary to, nor an unreasonable
25 application or, clearly established federal law. This claim for habeas relief is therefore
26 DENIED.

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1 **III. Prosecutorial Misconduct**

2 **A. Legal Standard**

3 Prosecutorial misconduct is cognizable in federal habeas corpus. The appropriate
4 standard of review is the narrow one of due process and not the broad exercise of
5 supervisory power. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). A defendant's due
6 process rights are violated when a prosecutor's misconduct renders a trial "fundamentally
7 unfair." *Id.*; *Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("the touchstone of due process
8 analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the
9 culpability of the prosecutor"). Under *Darden*, the first issue is whether the prosecutor's
10 remarks were improper; if so, the next question is whether such conduct "so infected the
11 trial with unfairness as to make the resulting conviction a denial of due process." *Tan v.*
12 *Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005) (quoting *Darden*, 477 U.S. at 181).

13 A prosecutor may not vouch for the credibility of a witness. *United States v.*
14 *Moreland*, 604 F.3d 1058, 1066 (9th Cir. 2010); *United States v. Lopez*, 803 F.2d 969, 973
15 (9th Cir. 1986). Improper vouching for the credibility of a witness occurs when the
16 prosecutor places the prestige of the government behind the witness or suggests that
17 information not presented to the jury supports the witness's testimony. *United States v.*
18 *Young*, 470 U.S. 1, 7 n.3, 11-12 (1985); *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir.
19 1995) (prosecutor's endorsement of witness to jury improper vouching, but did not have
20 substantial impact on verdict necessary to establish reversible constitutional error).
21 Improper vouching includes a broad range of circumstances such as expressing an opinion
22 of the defendant's guilt, denigrating the defense as a sham, implicitly vouching for a
23 witness's credibility, or vouching for his or her own credibility. *United States v. Wright*, 625
24 F.3d 583, 610 (9th Cir. 2010) (citing *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th
25 Cir. 2002)). The inherent danger of vouching is that "the prosecutor's opinion carries with it
26 the imprimatur of the Government and may induce the jury to trust the Government's
27 judgment rather than its own view of the evidence." *United States v. Weatherspoon*, 410
28 F.3d 1142, 1148 (9th Cir. 2005) (quoting *Young*, 470 U.S. at 18-19).

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B. Discussion

Barron contends that the prosecutor committed misconduct in closing argument by vouching for the credibility of police witnesses and suggesting that the officers had no reason to lie, and by mischaracterizing the evidence by arguing that Barron could have gotten rid of the knife before he was arrested.

As a threshold matter, respondent argues that Barron forfeited the prosecutorial misconduct claim because he failed to object to the closing argument. Answer at 33. Respondent concedes, however, that the state court addressed and rejected this claim on the merits. *Id.* at 33-34. Because the state court considered the prosecutorial misconduct claim on the merits, procedural default does not bar habeas review and the court may reach the merits of the claim. See *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (“If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available.”).

1. Vouching

Barron challenges the following statements made by the prosecutor in closing argument:

Now, do I think [Officer Campagna’s] been on a three-and-a-half year vendetta against the defendant? No.

14 RT 1872.

What I can tell you, though, is that Officer Rodriguez has never come into contact with Mr. Barron before that night. And Gloria [Ramirez] and Carmen [Hernandez-Murray] knew him when he was in juvenile hall, and it appears that they were on a friendly -- on friendly terms with him. They never had any prior bad blood with him. And Stan McFadden had never seen him before that night.

So here are four individuals with no bias or motive to lie about what they saw. None whatsoever. They saw the defendant stabbing someone. End of story. They don’t have any reason to make that up.

So the fact that the defense attorney is making a big deal out of his prior contact with Officer Campagna has nothing to do with four other officers seeing the defendant stab somebody May 16th, 2003.

14 RT 1872.

1 [D]efendant's seen by no less than four people with no motive to lie.

2 14 RT 1881.

3 The officers' testimony. Why would these officers get together
4 and falsely accuse the defendant? Have you heard any rational
5 reason why a probation officer, a parole officer, who don't hang out
6 with these two San Jose officers, and then two San Jose officers
7 would get together and, out of all this group of people, pick out the
8 defendant and decide to falsely accuse him for a stabbing he didn't
9 commit? What rational basis would you have for believing that? They
10 have no reason for fabrication.

11 14 RT 1900.

12 Now, while the defense attorney criticizes the People's case,
13 criticizes all of the witnesses, he then stands up in the end and says
14 to you, "You don't have to find that these people are lying." Because
15 he doesn't -- he wants it to appear to you that you can buy the
16 defendant's story and acquit him and also say that the officers didn't
17 lie.

18 But that's actually not the case, ladies and gentlemen. You will
19 have to find that these officers lied, that they conspired together to
20 come up with a false accusation. Each one of the witnesses,
21 including Gloria Ramirez and Carmen Hernandez, who are probation
22 officers and parole officers, they don't work day in and day out with
23 San Jose PD. You would have to believe that when they looked
24 across the room and pointed at that man and said, "I saw him -- I'm a
25 hundred percent sure -- stabbing somebody that night. And I wrote a
26 report about it," you would have to find that they were lying.

27 There was nothing in their testimony where they were, like, "I
28 think it was him. I'm pretty sure it was him." They said, "I definitely
can tell you that's what I saw."

19 So what the defense is asking you to believe is that these
20 individuals, for no real reason, got together and decided to frame
21 somebody. And in doing so, Detective Rodriguez and Detective
22 Campagna then came in and fabricated witness statements; they
23 fabricated Mr. Maciel's statement; they fabricated Luis Felix's
24 statement; and they fabricated a number of statements by Mr. Rivas;
25 and they came in here and lied about those statements, because
26 those statements are admissions of what happened that night.
27 What they are asking you to do is find that these officers are liars and
28 that they conspired to frame an innocent person. And that is not what
happened here, folks. While, yes, there have been problems in this
case, admittedly, this is a strong case as far as that assault with a
deadly weapon.

26 14 RT 1961-62 (rebuttal).

27 The court of appeal held that the prosecutor had committed improper vouching only
28 in the statement regarding the veracity of Campagna's testimony, and that this error did not

1 result in denial of due process. Answer, Ex. 6 at 35-36. Barron argues, however, that this
2 entire series of statements, taken together, allowed the prosecutor to argue that there was
3 no evidence of bias on the part of the officers, after successfully seeking to exclude such
4 evidence of bias. Barron contends that because the prosecutor knew that Barron had
5 evidence that could lead the jury to believe that the officers were not being truthful and then
6 argued that no such evidence existed, the prosecutor vouched for the witnesses by
7 misrepresenting that no impeachment evidence existed. Traverse at 16.

8 To warrant habeas relief, prosecutorial vouching must so infect the trial with
9 unfairness as to make the resulting conviction a denial of due process. *Davis v. Woodford*,
10 384 F.3d 628, 644 (9th Cir. 2004) (citing *Darden*, 477 U.S. at 181). “Analysis of a claim of
11 prosecutorial misconduct focuses on its asserted impropriety and substantial prejudicial
12 effect.” *United States v. Weatherspoon*, 410 F.3d 1142, 1145 (9th Cir. 2005) (citation
13 omitted). “To determine whether the prosecutor's misconduct affected the jury's verdict, we
14 look first to the substance of a curative instruction.” *Weatherspoon*, 410 F.3d at 1151
15 (quoting *Kerr*, 981 F.2d at 1053)). Another important factor contributing to the prejudicial
16 effect of misconduct is the strength of the case against the defendant. “When the case is
17 particularly strong, the likelihood that prosecutorial misconduct will affect the defendant's
18 substantial rights is lessened because the jury's deliberations are less apt to be influenced.
19 But as the case becomes progressively weaker, the possibility of prejudicial effect grows
20 correspondingly.” *Id.* “Moreover, the possibility of prejudicial effect stemming from
21 vouching is increased in cases where credibility is of particular importance.” *Id.*

22 **a. Campagna's Credibility**

23 As the court of appeal found, the prosecutor improperly vouched for Officer
24 Campagna's credibility by giving his personal opinion that Campagna, who had
25 investigated the 2002 shooting for which Barron had been charged and later acquitted, has
26 not been on a “three-and-a-half year vendetta against the defendant.” See *United States v.*
27 *Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992) (“A prosecutor has no business telling the jury
28 his individual impressions of the evidence. Because he is the sovereign's representative,

1 the jury may be misled into thinking his conclusions have been validated by the
2 government's investigatory apparatus.”). This was a brief commentary on Campagna’s
3 credibility, which was cured by the trial court’s instruction to the jury that “[n]othing that the
4 attorneys say is evidence,” and “[y]ou alone must judge the credibility or believability of the
5 witnesses.” 14 RT 1814, 1817. See *Wright*, 625 F.3d at 613 (prosecutor’s misconduct was
6 mitigated by the court’s general jury instructions).

7 **b. Rodriguez’s Credibility**

8 The prosecutor’s statements that the officers who testified at trial had “no motive to
9 lie,” to suggest that they had impeccable credibility, amounts to improper conduct as to
10 Rodriguez, in light of the prosecutor’s knowledge that Rodriguez had admitted to kicking
11 Barron during the arrest. The prosecutor’s argument was not based on extra-record facts
12 or a personal assurance of Rodriguez’s credibility, and does not strictly amount to
13 vouching. But when a prosecutor asks the jury to draw an inference about a prosecution
14 witness’s believability from facts he “knows to be false, or has very strong reason to doubt,”
15 such argument runs afoul of the bounds of fair advocacy and constitutes improper conduct.
16 See *United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002).

17 When examined in the context of the entire proceeding, however, this argument
18 about Rodriguez’s credibility did not render the trial fundamentally unfair. As noted by the
19 court of appeal, the verdict was supported by the testimony of three other law enforcement
20 officers about seeing something in Barron’s hand as he made stabbing motions. Answer,
21 Ex. 6 at 34. Further, although Barron contends that Rodriguez’s admission that he kicked
22 Barron would impeach Rodriguez by providing evidence of a motive to lie about seeing
23 Barron holding a knife, a jury may otherwise reasonably infer that Rodriguez was credible
24 in light of the evidence that he admitted to kicking Barron in his own report, documenting
25 his own misconduct. Answer, Ex. 2 at 1 CT 159. Based ““on the merits, examining the
26 entire proceedings to determine whether the prosecutor’s remarks so infected the trial with
27 unfairness as to make the resulting conviction a denial a due process,”” the court
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1 determines that the prosecutor's misconduct was harmless error. *Johnson v. Sublett*, 63
2 F.3d 926, 929 (9th Cir. 1995) (citation omitted).

3 **c. Other Officers' Credibility**

4 The prosecutor's closing arguments regarding the credibility of the other three law
5 enforcement officers who saw Barron assaulting the victim do not amount to improper
6 vouching, where these officers testified that they had no reason to lie about their
7 observations. Further, Probation Officer Hernandez-Murray and Parole Agent Ramirez
8 testified that falsifying their reports would lead to reprimand in their respective agencies and
9 possible prosecution for perjury. 8 RT 360, 413-14. A prosecutor may argue that
10 witnesses have no motive to lie if such arguments are based on reasonable inferences
11 from evidence in the record. *United States v. Nash*, 115 F.3d 1431, 1439 (9th Cir. 1997).
12 By arguing that the officers "have no reason for fabrication" and that "what the defense is
13 asking you to believe is . . . that these officers are liars and that they conspired to frame an
14 innocent person," the prosecutor was not offering personal assurances of the officers'
15 credibility or referring to facts outside the record. *See United States v. Necoechea*, 986
16 F.2d 1273, 1276 (9th Cir. 1993) ("prosecutors must have reasonable latitude to fashion
17 closing arguments, and thus can argue reasonable inferences based on the evidence,
18 including that one of the two sides is lying"). The arguments suggesting that these officers
19 had no reason to fabricate their testimony about seeing Barron holding a weapon do not,
20 therefore, amount to misconduct. *Cf. United States v. Combs*, 379 F.3d 564, 574 (9th Cir.
21 2004) (prosecutor compounded error from improper cross-examination of defendant by
22 also arguing that government agent would risk losing his job by lying on the stand, where
23 no such evidence was introduced).

24 **2. Misstatement of Evidence**

25 Barron also argues that the prosecutor misstated Rodriguez's testimony during
26 closing argument. Barron contends that during cross-examination, Rodriguez testified that
27 as he was chasing Barron, he was able to see a knife in Barron's hand until Barron crashed
28 into a signpost near a parking lot. *See* 7 RT 222. In closing argument, however, the

1 prosecutor argued that Rodriguez testified that he could not see whether a knife was in
2 Barron's hand after first seeing Barron in the parking lot, and that Barron must have ditched
3 the knife before his arrest:

4 But what you do know, even from the defendant's own
5 admission, is that he ran all over this area, folks. The knife could be
6 anywhere. There is no way that law enforcement could have covered
7 every inch of where defendant was that night.

8 . . . The knife could have been anywhere, folks. He easily
9 could have ditched it at any point.

10 What Detective Rodriguez says is that he knows the
11 defendant still had the knife in his hand at the point when he comes
12 into contact with [Barron,] when he first drives into the Albertson's
13 parking lot. The defendant sees him and runs this direction. And
14 then he says, "At that point I didn't see anything in his hands, but I
15 still believe he had it in his hands." But he testified that he no longer
16 saw whether or not it was for sure in his hand.

17 14 RT 1957-58.

18 The court of appeal held that the prosecutor did not mischaracterize the evidence
19 and found no error:

20 We have carefully reviewed the totality of Detective
21 Rodriguez's testimony about seeing defendant with the knife. In our
22 view, the prosecutor did not mischaracterize the evidence. Detective
23 Rodriguez testified that when he saw a uniformed officer get out of
24 the patrol vehicle, he approached defendant. Defendant turned
25 around and started running back to the Albertson's parking lot.
26 Rodriguez had started walking towards defendant and the uniformed
27 officer, and cut off defendant's escape through the parking lot.
28 Rodriguez again identified himself as a police officer and told
defendant to stop. Defendant looped back around and headed
towards Santa Clara Street. When Rodriguez intercepted defendant,
he believed defendant still had the knife; defendant had something
clenched in his hands. Rodriguez assumed defendant was still
armed, but all he could see was the clenched hands and the gloves;
he could not actually see a blade of any sort. Rodriguez gave chase.
Defendant hurdled over some foot-high bushes and "somehow
stumbled and went headfirst" into one of two round metal posts that
supported an Albertson's sign. Defendant "kind of bounced back and
fell on the ground there in the dirt corner of that shopping center."

 One reasonable inference from Detective Rodriguez's
testimony is that defendant no longer had the knife in his hand when
Rodriguez started chasing him; he had already "ditched" it. The
prosecutor was entitled to argue that inference to the jury. No
misconduct appears.

1 Answer, Ex. 6 at 37. Barron contends that the state court's finding was unreasonable
2 because it interjected the court's own inferences from its review of the record. Traverse at
3 16.

4 Where a state court decision is based on a factual determination, habeas relief is not
5 granted under 28 U.S.C. § 2254(d)(2) unless the state court determination is "objectively
6 unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El*,
7 537 U.S. at 340. Here, Rodriguez testified on direct examination that when he first
8 intercepted Barron at the parking lot, before Barron started running and then ran into the
9 signpost, he assumed that Barron was still armed, but could not actually see a blade in
10 Barron's hands:

11 Q: Detective Rodriguez, when you intercepted the defendant
12 at that location [in the Albertson's parking lot], can you tell us whether
or nor he still had the knife?

13 A: I believed he still had the knife. He had something clenched
14 in his hands. And all I could see was the clenched hands and -- and
the gloves. And I assumed he was still armed.

15 Q: But at that point you couldn't actually see a blade of any
16 sort?

17 A: Right.

18 Q: When he turned and continued running in the opposite
direction now, did it -- what occurred?

19 A: What happened was he started running. I gave chase
20 again. And right at that corner there's that -- there's some more -- on
the corner there's -- it's a dirt corner. And it's got the Albertson's sign
21 on it, and it's supported by two round metal posts. And it's got a little
bit of a hill. . . .

22 And he ran in that direction, and he tried jumping, like hurdling,
23 over the bushes and somehow stumbled and went headfirst into one
of the posts and kind of bounced back and fell on the ground there in
24 the dirt corner of that shopping center.

25 7 RT 195-96. Later, on cross-examination, Rodriguez testified that he saw what he
26 suspected was a knife, and that he believed that Barron still had a knife, but did not
27 conclusively testify that he saw a knife in Barron's hand as he gave chase:

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Q: And during all of that, you were able to see the – what you suspected was a knife in his hand; correct?

A: Yes.

Q: And, in fact, up until the point that he crashes into the signpost at Albertson's, you – you still believed that he had the knife in his hand; correct?

A: Yes.

7 RT 222. In light of Rodriguez's testimony, the prosecutor's argument that Rodriguez "no longer saw whether or not [the knife] was for sure in his hand," did not mischaracterize the evidence presented at trial, and the state court's finding is not objectively unreasonable.

Even if Rodriguez's cross-examination testimony could be construed to state, inconsistent with his prior testimony, that he saw a knife in Barron's hand as he gave chase, the prosecutor's purported misstatement was harmless error in light of the entire proceedings. First, the trial court gave a curative instruction that "[n]othing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence." 14 RT 1814. See *Wright*, 625 F.3d at 613. Further, defense counsel took the opportunity to argue the adverse inference from Rodriguez's testimony to suggest that there never was a knife, based on Rodriguez's testimony that he "believed – up until the time Mr. Barron crashed and basically went unconscious on the ground, he still believed he had the knife. So it's pure speculation that the knife was somehow dumped someplace." 14 RT 1919. Finally, where, as here, the prosecution's case against Barron is particularly strong, "the jury's deliberations are less apt to be influenced" by the prosecutor's argument emphasizing Rodriguez's testimony that he did not see a knife in Barron's hand during their initial encounter at the parking lot. *Weatherspoon*, 410 F.3d at 1151. Any error made by the prosecutor in closing argument was therefore harmless.

The state court's denial of Barron's claims for prosecutorial misconduct was neither contrary to, nor an unreasonable application of, clearly established federal law. These claims do not merit habeas relief.

1 **IV. Cumulative Error**

2 Barron also argues that he was deprived of a fair trial because of the cumulative
3 impact of the several constitutional errors he has alleged in the instant petition. In some
4 cases, although no single trial error is sufficiently prejudicial to warrant reversal, the
5 cumulative effect of several errors may still prejudice a defendant so much that his
6 conviction must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893-95 (9th Cir.
7 2003).

8 This is not one of those cases. Here, as examined above, the Confrontation Clause
9 violation and the instances of prosecutorial misconduct at Barron’s trial were harmless
10 error. Thus, Barron’s cumulative error claim fails.

11 **CONCLUSION**

12 For the reasons set forth above, Barron’s petition for a writ of habeas corpus is
13 DENIED. This order fully adjudicates the petition and terminates all pending motions. The
14 clerk shall close the file.

15 **CERTIFICATE OF APPEALABILITY**

16 To obtain a certificate of appealability, Barron must make “a substantial showing of
17 the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Where a district court has
18 rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is
19 straightforward. “The petitioner must demonstrate that reasonable jurists would find the
20 district court’s assessment of the constitutional claims debatable or wrong.” *Slack v.*
21 *McDaniel*, 529 U.S. 473, 484 (2000). Section 2253(c)(3) requires a court granting a
22 COA to indicate which issues satisfy the COA standard. Here, the court finds that the
23 following issue presented by Barron in his petition meets that standard: whether the state
24 court’s exclusion of evidence to impeach Detective Rodriguez violated the Sixth
25 Amendment right of confrontation and was not harmless error. Accordingly, the court
26 GRANTS the COA as to that issue. *See generally Miller-El*, 537 U.S. at 322.

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The clerk shall forward the file, including a copy of this order, to the Court of Appeals. See Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

IT IS SO ORDERED.

Dated: January 25, 2013



PHYLLIS J. HAMILTON
United States District Judge