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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUNE THEPSOMBANDITH,)	Civil No. 07cv2248 BEN (RBB)
)	
Petitioner,)	REPORT AND RECOMMENDATION
)	DENYING PETITION FOR WRIT OF
v.)	HABEAS CORPUS [DOC. NO. 1]
)	
V.M. ALMAGER,)	
)	
Respondent.)	
_____)	

Petitioner June Thepsombandith, a state prisoner proceeding pro se and in forma pauperis, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on November 27, 2007 [doc. no. 1], stating three claims: (1) prosecutorial misconduct, (2) ineffective assistance of trial counsel for failing to object to the prosecutor's argument, and (3) a due process violation at sentencing. (Pet. 6-7.)

Respondent V.M. Almager filed an Answer on September 30, 2008 [doc. no. 13], asserting (1) the state courts reasonably rejected Petitioner's claims that the prosecutor committed misconduct and his counsel was ineffective for failing to object; (2) this Court should reject Petitioner's challenge to his upper term sentence;

1 and (3) Petitioner is not entitled to an evidentiary hearing.
2 (Answer Attach. #1 Mem. P. & A. 6, 9, 16.) Petitioner filed a
3 Traverse on October 28, 2008 [doc. no. 17], which included a
4 request for an evidentiary hearing. The Court has reviewed the
5 Petition, Respondent's Answer, Petitioner's Traverse, and the
6 lodgments. For the reasons discussed below, the Court recommends
7 that Thepsombandith's Petition be **DENIED**.

8 **I. FACTUAL BACKGROUND**

9 June Thepsombandith began dating Kathy Sayrath in December of
10 2004. (Lodgment No. 5, Rep.'s Tr., vol. 3, 64, Oct. 11, 2005.)
11 He lived in a one-room "shack" located in the backyard of his
12 parents' house. (Id. at 64-65.) On Friday, March 18, 2005,
13 Thepsombandith and Sayrath were alone inside the shack; Sayrath
14 was on the telephone with a friend and stated that she wanted to
15 end her relationship with Thepsombandith. (Id. at 66-67.)

16 Thepsombandith overheard this conversation and became very
17 upset. (Id. at 67.) He told Sayrath to hang up the telephone,
18 which she did. (Id.) Thepsombandith picked up a golf club and
19 repeatedly struck Sayrath in the legs, thigh, arm, and back while
20 she was sitting on the couch. (Id. at 68-71.) When Sayrath put
21 her arm up to defend herself from the blows, he struck her right
22 arm with the club and broke it between her wrist and elbow. (Id.
23 at 70; Lodgment No. 6, Rep.'s Tr., vol. 4, 304, Oct. 12, 2005.)

24 Thepsombandith stomped on Sayrath and kicked her; the beating
25 continued until Sayrath lied and told Thepsombandith she was
26 pregnant with his child. (Lodgment No. 5, Rep.'s Tr., vol. 3, 71-
27 72.) Sayrath was subsequently treated at the hospital emergency
28

1 room for her fractured right forearm. (Id. at 70; Lodgment No. 6,
2 Rep.'s Tr., vol. 4, 304.)

3 On Monday, March 21, 2005, Sayrath went back to
4 Thepsombandith's shack to recover her clothes. (Lodgment No. 5,
5 Rep.'s Tr., vol. 3, 81.) Sayrath's two cousins, Sherry Gonzales
6 and Jeniffer Souphy, accompanied her. (Id. at 81, 182.) The
7 cousins waited outside in the backyard while Sayrath entered the
8 shack. (Id. at 84-85, 187-88.) Thepsombandith was alone inside
9 the shack when Sayrath entered. (Id. at 85.) He told Sayrath to
10 sit down so they could talk and Sayrath complied. (Id. at 85-86.)

11 During their brief conversation, Thepsombandith had a handgun
12 next to him that was hidden underneath a towel. (Id. at 86-87)
13 He moved the towel to expose the handgun to Sayrath. (Id. at 86-
14 88.) Thepsombandith grabbed the gun, stood up, and yelled at
15 Sayrath that he was not afraid to shoot her and that he would
16 shoot himself as well. (Id. at 88-89.) He held the barrel of the
17 gun to Sayrath's temple while he threatened her. (Id. at 89-90.)
18 Thepsombandith then pointed the gun in the air and fired one shot;
19 Sayrath screamed, and Gonzales and Souphy -- who heard the
20 commotion -- came running to the door of the shack to see what had
21 happened. (Id. at 90, 189, 210.)

22 Gonzales opened the door while both she and Souphy looked
23 inside the shack. (Id. at 210; Lodgment No. 6, Rep.'s Tr., vol.
24 4, 350.) Gonzales observed Sayrath in a fetal position on the
25 couch saying, "No," while Thepsombandith pointed the gun at
26 Sayrath. (Lodgment No. 6, Rep.'s Tr., vol. 4, 350.)

27 Petitioner then turned the gun and pointed it at Gonzales and
28 said, "Are you going to be a fucking hero?" (Lodgment No. 5,

1 Rep.'s Tr., vol. 3, 90-91.) While Thepsombandith pointed the gun
2 at her, Gonzales saw him cock back and release the slide of the
3 gun. (Lodgment No. 6, Rep.'s Tr., vol. 4, 351-52, 428-29.) As
4 Souphy began to back out of the doorway, Petitioner's father,
5 mother, and grandfather appeared. (Id. at 353; Lodgment No. 5,
6 Rep.'s Tr., vol. 3, 192.) Gonzales came out of the shack as well.
7 (Lodgment No. 5, Rep.'s Tr., vol. 3, 194.) When Thepsombandith's
8 grandfather entered the shack, Sayrath left and the three women
9 ran to their car. (Id. at 91, 195.)

10 While leaving the scene in their car, the women were stopped
11 by a police officer for failing to have a rear license plate.
12 (Lodgment No. 5, Rep.'s Tr., vol. 3, 93; Lodgment No. 6, Rep.'s
13 Tr., vol. 4, 357, 425.) The women informed the police officer
14 about what had just occurred at Thepsombandith's shack. (Lodgment
15 No. 5, Rep.'s Tr., vol. 3, 93-94; Lodgment No. 6, Rep.'s Tr., vol.
16 4, 427-29.) Police searched the shack later that day and
17 discovered a shell casing on top of a speaker and a bullet hole in
18 the ceiling. (Lodgment No. 5, Rep.'s Tr., vol. 3, 272-75.)
19 Thepsombandith was not present during the search. (Id. at 258;
20 Lodgment No. 6, Rep.'s Tr., vol. 4, 431.)

21 Later that day, Thepsombandith called Gonzales and told her
22 he thought she was his friend; he asked her, "Why did you call the
23 cops?" (Lodgment No. 6, Rep.'s Tr., vol. 4, 357, 431.)
24 Thepsombandith asked Gonzales to pick him up from a nearby
25 location. (Id. at 358, 431.) Instead, Gonzales passed this
26 information along to the police. (Id. at 431) Police officers
27 went to the address given by Gonzales and found Thepsombandith
28 hiding in a closet. (Lodgment No. 5, Rep.'s Tr., vol. 3, 258;

1 Lodgment No. 6, Rep.'s Tr., vol. 4, 432.) Officers arrested
2 Thepsombandith. (Lodgment No. 5, Rep.'s Tr., vol. 3, 262.)

3 **II. PROCEDURAL BACKGROUND**

4 The San Diego County District Attorney filed an information
5 on April 15, 2005, charging Petitioner with assault with a firearm
6 against Kathy Sayrath (count one) and Sherry Ann Gonzales (count
7 two) on March 21, 2005. See Cal. Penal Code § 245(b) (West Supp.
8 2009); (Lodgment No. 1, Clerk's Tr., vol. 1, 5-6.) The
9 information also accused Petitioner of discharging a firearm in a
10 grossly negligent manner, being a felon in possession of a
11 firearm, being a felon in possession of ammunition, and committing
12 assault with a deadly weapon by means of force likely to cause
13 great bodily injury. See Cal. Penal Code §§ 245(a)(1), 246.3
14 (West Supp. 2009), 12021(a)(1), 12316(b)(1) (West 2000); (Lodgment
15 No. 1, Clerk's Tr., vol. 1, 5-6.) The information made additional
16 allegations: (1) As to counts one and two, Petitioner used a
17 firearm within the meaning of Cal. Penal Code § 12022.5(a); (2) as
18 to count six, Petitioner personally used a deadly weapon—a golf
19 club—within the meaning of Cal. Penal Code § 1192.7(c)(23); and
20 (3) as to count six, Petitioner inflicted great bodily injury
21 within the meaning of Cal. Penal Code § 12022.7(a). (Lodgment No.
22 1, Clerk's Tr., vol. 1, 5-6.)

23 On October 13, 2005, a jury convicted Petitioner of all
24 charges and found all allegations true. (Lodgment No. 2, Clerk's
25 Tr., vol. 2, 307-313.) He admitted having two prison priors
26 within the meaning of §§ 667.5(b) and 668. See Cal. Penal Code §§
27 667.5(b), 668 (West Supp. 2009); (Lodgment No. 2, Clerk's Tr. Vol.

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1 2, 307, 314.) The judge sentenced Petitioner to a prison term of
2 twenty-four years. (Lodgment No. 2, Clerk's Tr. vol. 2, 319.)

3 Petitioner filed his opening brief in the California Court of
4 Appeal on June 5, 2006, and supplemented it eight weeks later.
5 (Lodgment No. 8, Appellant's Opening Br., People v.
6 Thepsombandith, No. D047885 (Cal. Ct. App. Dec. 12, 2006);
7 Lodgment No. 9, Appellant's Supplemental Opening Br., People v.
8 Thepsombandith, No. D047885 (Cal. Ct. App. Dec. 12, 2006).) He
9 asserted in his opening brief that the "prosecutor committed
10 misconduct in argument by misstating the law of assault, and trial
11 counsel was ineffective for failing to object" (Lodgment
12 No. 8, Appellant's Opening Br. 5, People v. Thepsombandith, No.
13 D047885.) Petitioner also asserted he "was denied due process of
14 law by imposition of an increased term of imprisonment in
15 violation of Blakely v. Washington [542 U.S. 296 (2004)];
16 imposition of the prison prior enhancements was an impermissible
17 dual use of facts." (Lodgment No. 9, Appellant's Supplemental
18 Opening Br. 1, People v. Thepsombandith, No. D047885.)

19 The California Court of Appeal affirmed the judgment in an
20 unpublished opinion filed December 12, 2006. (Lodgment No. 13,
21 People v. Thepsombandith, No. D047885, slip op. at 1 (Cal. Ct.
22 App. Dec. 12, 2006).) Thepsombandith filed a petition for review
23 in the California Supreme Court on January 16, 2007. (Lodgment
24 No. 14, Pet. for Review, People v. Thepsombandith, No.
25 SD2006700554 (Cal. Jan. 16, 2007).) On February 21, 2007, the
26 supreme court granted review of Thepsombandith's petition, but it
27 eventually dismissed the case on September 12, 2007. (Lodgment
28 No. 15, People v. Thepsombandith, No. S149522, order 1 (Cal. Feb.

1 21, 2007); Lodgment No. 16, People v. Thepsombandith, No. S149522,
2 order 2 (Cal. Sept. 12, 2007) (en banc).)

3 **III. STANDARD OF REVIEW**

4 The Antiterrorism and Effective Death Penalty Act ("AEDPA"),
5 28 U.S.C.A. § 2244 (West 2008), applies to all federal habeas
6 petitions filed after April 24, 1996. Woodford v. Garceau, 538
7 U.S. 202, 204 (2003) (citing Lindh v. Murphy, 521 U.S. 320, 326
8 (1997)). AEDPA sets forth the scope of review for federal habeas
9 corpus claims:

10 The Supreme Court, a Justice thereof, a circuit
11 judge, or a district court shall entertain an
12 application for a writ of habeas corpus in behalf of a
13 person in custody pursuant to the judgment of a State
14 court only on the ground that he is in custody in
violation of the Constitution or laws or treaties of the
United States.

15 28 U.S.C.A. § 2254(a) (West 2008); see also Reed v. Farley, 512
16 U.S. 339, 347 (1994); Hernandez v. Ylst, 930 F.2d 714, 719 (9th
17 Cir. 1991). Because Thepsombandith's Petition was filed on
18 November 27, 2007, AEDPA applies to this case. See Woodford, 538
19 U.S. at 204.

20 In 1996, Congress "worked substantial changes to the law of
21 habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.
22 1997). Amended § 2254(d) now reads:

23 An application for a writ of habeas corpus on
24 behalf of a person in custody pursuant to the judgment
25 of a State court shall not be granted with respect to
any claim that was adjudicated on the merits in State
court proceedings unless the adjudication of the claim

26 --
27 (1) resulted in a decision that was contrary
28 to, or involved an unreasonable application
of, clearly established Federal law, as
determined by the Supreme Court of the United
States; or

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

5 28 U.S.C.A. § 2254(d) (West 2008).

6 To present a cognizable federal habeas corpus claim, a state
7 prisoner must allege that his conviction was obtained "in
8 violation of the Constitution or laws or treaties of the United
9 States." 28 U.S.C. § 2254(a). A petitioner must allege that the
10 state court violated his federal constitutional rights.

11 Hernandez, 930 F.2d at 719; Jackson v. Ylst, 921 F.2d 882, 885
12 (9th Cir. 1990); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir.
13 1988).

14 A federal district court does "not sit as a 'super' state
15 supreme court" with general supervisory authority over the proper
16 application of state law. Smith v. McCotter, 786 F.2d 697, 700
17 (5th Cir. 1986); see also Lewis v. Jeffers, 497 U.S. 764, 780
18 (1990) (holding that federal habeas courts must respect a state
19 court's application of state law); Jackson, 921 F.2d at 885
20 (explaining that federal courts have no authority to review a
21 state's application of its law). Federal courts may grant habeas
22 relief only to correct errors of federal constitutional magnitude.
23 Oxborrow v. Eikenberry, 877 F.2d 1395, 1400 (9th Cir. 1989)
24 (stating that federal courts are not concerned with errors of
25 state law unless they rise to level of a constitutional
26 violation).

27 The Supreme Court, in Lockyer v. Andrade, 538 U.S. 63
28 (2003), stated that "AEDPA does not require a federal habeas court
to adopt any one methodology in deciding the only question that

1 matters under § 2254(d)(1) -- whether a state court decision is
2 contrary to, or involved an unreasonable application of, clearly
3 established Federal law." (Id. at 71) (citation omitted). In
4 other words, a federal court is not required to review the state
5 court decision de novo. (Id.) Rather, a federal court can
6 proceed directly to the reasonableness analysis under §
7 2254(d)(1). (Id.)

8 The "novelty" in § 2254(d)(1) is "the reference to 'Federal
9 law, as determined by the Supreme Court of the United States.'"
10 Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), rev'd
11 on other grounds, 521 U.S. 320 (1997). Section 2254(d)(1)
12 "explicitly identifies only the Supreme Court as the font of
13 'clearly established' rules." (Id.) "[A] state court decision
14 may not be overturned on habeas corpus review, for example,
15 because of a conflict with Ninth Circuit-based law." Moore, 108
16 F.3d at 264. "[A] writ may issue only when the state court
17 decision is 'contrary to, or involved an unreasonable application
18 of,' an authoritative decision of the Supreme Court." (Id.)
19 (citing Childress v. Johnson, 103 F.3d 1221, 1225 (5th Cir. 1997);
20 Devin v. DeTella, 101 F.3d 1206, 1208 (7th Cir. 1996); Baylor v.
21 Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996).)

22 Furthermore, with respect to the factual findings of the
23 trial court, AEDPA provides:

24 In a proceeding instituted by an application for a
25 writ of habeas corpus by a person in custody pursuant to
26 the judgment of a State court, a determination of a
27 factual issue made by a State court shall be presumed to
28 be correct. The applicant shall have the burden of
rebutting the presumption of correctness by clear and
convincing evidence.

28 28 U.S.C.A. § 2254(e)(1).

1 **IV. DISCUSSION**

2 **A. Prosecutorial Misconduct - Claim One**

3 During Thepsombandith's trial, defense counsel misstated the
4 law of assault in his closing argument when he explained that
5 Sayrath did not know the gun was loaded until after Thepsombandith
6 fired it:

7 The knowledge of the deadly capability, such as it
8 were of this firearm, was only known after the
discharge.

9 It never again was pointed at [Sayrath]. She never
10 stated that the firearm was pointed at her again.

11 I dare say that if that firearm had been pointed at
12 her a second time, we'd have an assault on Kathy by
means of a firearm.

13 (Lodgment No. 7, Rep.'s Tr., vol. 5, 522-23, Oct. 13, 2005.)

14 In the prosecutor's closing argument, he corrected the
15 defense attorney's misstatements and argued as follows:

16 It doesn't matter if Kathy [Sayrath] thought the
17 gun was loaded or not. It played no role and needs not
be shown.

18 Who cares if she knew it was loaded or not?

19 The fact is, [Thepsombandith] knew what was going
20 on. He knew it was a gun; he knew there were bullets in
there; he was the one pulling the trigger. Okay?

21 Don't be confused; don't be lead astray. Follow
22 what the law tells you. All right?

23 It doesn't matter whether Kathy knew that gun was
24 loaded.

25 Right after that, the defense concedes if Kathy did know
the gun was loaded, and he did what he did, it would have
26 been an assault. Okay?

27 That's a concession that he's guilty of count one
and because the law will tell you that Kathy did not
28 need to have knowledge.

1 (Id. at 536-37.) The prosecutor continued, "It doesn't matter
2 whether the gun was loaded or not, you can still assault somebody
3 with it. Okay?"

4 Also, there's no requirement that the gun be loaded for an
5 assault to be carried out. That's not an element of the assault
6 with a firearm." (Id. at 537.)

7 Thepsombandith alleges that (1) the prosecutor committed
8 misconduct in closing argument by misstating the law of assault;
9 (2) he was afforded ineffective assistance of counsel because his
10 counsel failed to object to the prosecutor's statement; and (3)
11 the error was prejudicial as to the charge of assault against
12 Gonzales. (Pet. 6.) Respondent Almager contends that (1)
13 Petitioner's prosecutorial misconduct claim is procedurally barred
14 by his failure to contemporaneously object at trial; (2) the court
15 of appeal reasonably applied Supreme Court precedent when it
16 determined there was no prosecutorial misconduct; and (3) the
17 court of appeal reasonably rejected Petitioner's claim that his
18 counsel was ineffective. (Answer Attach. #1 Mem. P. & A. 6-9.)

19 **1. Procedural Default**

20 "Just as in those cases in which a state prisoner fails to
21 exhaust state remedies, a habeas petitioner who has failed to meet
22 the State's procedural requirements for presenting his federal
23 claims has deprived the state courts of an opportunity to address
24 those claims in the first instance." Coleman v. Thompson, 501
25 U.S. 722, 731-32 (1991). A habeas petitioner who has defaulted
26 federal claims in state court by not complying with rules to raise
27 them meets the technical requirements for exhaustion, because
28 there are no longer any state remedies available. (Id. at 732)

1 (citing 28 U.S.C. § 2254(b)); Engle v. Issac, 456 U.S. 107, 125-
2 26, n.28 (1982)). But his claim is barred for a distinct reason.

3 A federal court “will not review a question of federal law
4 decided by a state court if the decision of that court rests on a
5 state law ground that is independent of the federal question and
6 adequate to support the judgment.” Calderon v. U.S. Dist. Ct.
7 (Bean), 96 F.3d 1126, 1129 (9th Cir. 1996) (quoting Coleman, 501
8 U.S. at 729). “In order to constitute adequate and independent
9 grounds sufficient to support a finding of procedural default, a
10 state rule must be clear, consistently applied, and well-
11 established at the time of the petitioner’s purported default.”
12 Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994) (citing Ford v.
13 Georgia, 498 U.S. 411, 424 (1991)).

14 The respondent has the burden of pleading an adequate and
15 independent procedural bar as an affirmative defense in a habeas
16 case. See Bennett v. Mueller, 322 F.3d 573, 585 (9th Cir. 2003).
17 The burden of proof shifts to the petitioner to place that defense
18 in issue; the burden then shifts back to the respondent to prove
19 the bar is applicable. See id. at 586.

20 Here, Respondent asserts procedural default as an affirmative
21 defense. He contends Petitioner waived the prosecutorial
22 misconduct claim when he failed to object at trial. (Answer
23 Attach. #1 Mem. P. & A. 6.) Respondent relies on the California
24 Court of Appeal’s holding that Petitioner waived his claim of
25 error on appeal when he failed to object to the alleged
26 misconduct. (Id. at 7; Lodgment No. 13, People v. Thepsombandith,
27 No. D047885, slip op. at 7.)

28

1 A federal habeas court looks to the last reasoned state court
2 opinion to determine whether a petitioner's claim is procedurally
3 barred. Vansickel v. White, 166 F.3d 953, 957 (9th Cir. 1999)
4 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)). The
5 California Supreme Court was presented with Thepsombandith's
6 prosecutorial misconduct claim. (See Lodgment No. 14, Petition
7 for Review 3, People v. Thepsombandith, No. S149522.) But because
8 the denial of the petition for review was based on People v. Black
9 (Black II), 41 Cal. 4th 799, 161 P.3d 1130, 62 Cal. Rptr. 3d 569
10 (2007), which does not address prosecutorial misconduct, the
11 federal habeas court must "look through" to the last reasoned
12 decision of the California Court of Appeal. See Ylst, 501 U.S. at
13 803; (Lodgment No. 16, Opinion Dismissing Review 2, People v.
14 Thepsombandith, No. S149522).

15 The court of appeal invoked the state procedural bar rule
16 requiring claims of prosecutorial misconduct to be raised at trial
17 to preserve them for appeal. (Lodgment No. 13, People v.
18 Thepsombandith, No. D047885, slip op. at 6). The Court presumes
19 "[w]here there has been one reasoned state judgment rejecting a
20 federal claim, later unexplained orders upholding that judgment or
21 rejecting the same claim rest upon the same ground." Ylst, 501
22 U.S. at 803. Thepsombandith's prosecutorial misconduct claim is
23 procedurally defaulted if the contemporaneous objection rule is
24 both adequate and independent.

25 **a. Adequacy**

26 A state procedural rule is adequate when the rule is "firmly
27 established and regularly followed" at the time of the alleged
28 default. Anderson v. Calderon, 232 F.3d 1053, 1077 (9th Cir.

1 law, or demonstrate that failure to consider the claim[] will
2 result in a fundamental miscarriage of justice." Coleman v.
3 Thompson, 501 U.S. at 749-50 (citing Murray v. Carrier, 477 U.S.
4 478, 485 (1986)); see also High v. Ignacio, 408 F.3d 585, 590 (9th
5 Cir. 2005) (citing Coleman, 501 U.S. at 750; Franklin v. Johnson,
6 290 F.3d 1223, 1230-31 (9th Cir. 2002)). Likewise, a habeas
7 petitioner who has failed to comply with a state's contemporaneous
8 objection rule at trial must show cause and prejudice to obtain
9 habeas relief under federal law. Murray, 477 U.S. at 485 (citing
10 Wainwright v. Sykes, 433 U.S. 72, 87 (1977)).

11 Petitioner contends that his claim is not waived because he
12 can establish cause and prejudice for any default. (Traverse 4,
13 8.) Thepsombandith argues that ineffective assistance of trial
14 counsel caused the default. (Id. at 4.) Specifically, he asserts
15 that counsel's failure to contemporaneously object to the
16 prosecutor's improper argument establishes cause for the default.
17 (Id.)

18 A petitioner establishes cause when he or she shows some
19 objective factor, external to the defense, that impeded counsel's
20 efforts to comply with the procedural rule. Murray, 477 U.S. at
21 488; see also McCleskey v. Zant, 499 U.S. 467, 493 (1991)
22 (discussing cause under abuse of writ doctrine). Constitutionally
23 ineffective assistance of counsel is an objective factor that
24 establishes cause. McCleskey, 499 U.S. at 493-94. "Attorney
25 error short of ineffective assistance of counsel, however, does
26 not constitute cause and will not excuse a procedural default."
27 Id. at 494.

28

1 To establish ineffective assistance, the inquiry is whether
2 counsel's performance fell below an objective standard of
3 reasonableness. Strickland v. Washington, 466 U.S. 668, 687-88
4 (1984). First, the petitioner must show that the attorney's
5 performance was deficient. Id. at 687. Second, "the [petitioner]
6 must show that the deficient performance prejudiced the defense."
7 (Id.) In other words, "[t]here is a reasonable probability that,
8 but for counsel's unprofessional errors, the result of the
9 proceeding would have been different. A reasonable probability is
10 a probability sufficient to undermine confidence in the outcome."
11 Id. at 694. For Petitioner to prevail on his ineffective
12 assistance of counsel claim, he must satisfy both prongs of the
13 Strickland test. Id. at 687.

14 The Court's review of counsel's performance is highly
15 deferential, and there is a strong presumption counsel rendered
16 adequate assistance and exercised reasonable professional
17 judgment. United States v. Ferreira-Alameda, 815 F.2d 1251, 1253
18 (9th Cir. 1987) (citations omitted); Butcher v. Marquez, 758 F.2d
19 373, 376 (9th Cir. 1985) (citing Strickland, 466 U.S. at 690).
20 Petitioner does not overcome the presumption of competency. See
21 Strickland, 466 U.S. at 689; Morris v. California, 966 F.2d 448,
22 456 (9th Cir. 1991), cert. denied, 506 U.S. 831 (1992).

23 The state court of appeal concluded that the prosecutor was
24 talking about count one, not count two, when he said, "Also,
25 there's no requirement that the gun be loaded for an assault to be
26 carried out." (Lodgment No. 7, Rep.'s Tr., vol. 5, 537; Lodgment
27 No. 13, People v. Thepsombandith, No. D047885, slip op. at 8.)
28 The record indicates that the prosecutor was clarifying the law

1 regarding the assault of Sayrath alleged in count one, and he
2 continued discussing the assault on her. (Lodgment No. 7, Rep.'s
3 Tr., vol. 5, 537.) The federal court "need not determine the
4 actual explanation for trial counsel's failure to object, so long
5 as his failure to do so falls within the range of reasonable
6 representation." Morris, 966 F.2d at 456-57 (citation omitted).

7 Trial counsel's failure to object did not fall below an
8 objective standard of reasonableness. See id. at 456 (stating
9 that an effective advocate could have reasonably decided not to
10 object). The prosecutor made several references to "Kathy," the
11 victim in count one, directly before and after the complained of
12 statement. (Lodgment No. 7, Rep.'s Tr., vol. 5, 536.) The court
13 of appeal found that the record was clear that the prosecutor's
14 argument was directed to the assault alleged in count one.
15 (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op.
16 at 8.) This conclusion is a reasonable determination of the
17 facts.

18 The state appellate court also found that even if the jury
19 construed the prosecutor's argument as applying to count two, as
20 Petitioner asserts, the result was not prejudicial. The
21 fundamental miscarriage of justice exception to a procedural
22 default is applied in extraordinary cases when a constitutional
23 violation results in the conviction of an innocent person. Schlup
24 v. Delo, 513 U.S. 298, 327 (1995) (citing Murray v. Carrier, 477
25 U.S. at 496). Thepsombandith "cannot establish prejudice because
26 there is no reasonable probability that but for counsel's error,
27 the result of the trial would have been different." Vansickel,

28

1 166 F.3d at 958 (citing White v. Lewis, 874 F.2d 599, 604 (9th
2 Cir. 1989)); see Strickland, 466 U.S. at 694.

3 In his Traverse, Petitioner acknowledges that "the
4 prosecutor's statement was specifically directed at count
5 one" (Traverse 5.) Nonetheless, Petitioner asserts "the
6 argument could erroneously be applied to count two." (Id. at 9.)
7 It is not reasonably probable that the jury convicted
8 Thepsombandith of count two, assaulting Gonzalez with a firearm,
9 if the jurors believed the gun was not loaded.

10 Additionally, the evidence indicates that the gun was loaded
11 when he pointed it at Gonzales. Merely seconds after Gonzales
12 heard what she thought was a gunshot, she ran into the shack and
13 saw Petitioner pointing a black object she thought was a gun at
14 Sayrath; he then pointed it at her. (Lodgment No. 6, Rep.'s Tr.,
15 vol. 4, 350-52.) Gonzales testified that she heard Thepsombandith
16 cock the gun; it sounded "[l]ike putting the bullet in the
17 chamber." (Id. at 351.) Thepsombandith said, "Are you going to
18 be a fucking hero?" (Lodgment No. 5, Rep.'s Tr., vol. 3, 90-91.)
19 The evidence was sufficient for the jury to believe the gun was
20 loaded and find Petitioner committed an assault upon Sherry
21 Gonzalez.

22 Petitioner cannot establish his counsel's deficient
23 performance rendered the result of the trial unreliable. See
24 Fretwell v. Lockhart, 506 U.S. 364, 372 (1993) (citing Strickland,
25 466 U.S. at 687). Nor can he demonstrate a reasonable probability
26 that he would have prevailed if his attorney had timely objected
27 to the prosecution's statement. See Strickland, 466 U.S. at 687.
28 Therefore, Thepsombandith cannot establish cause and prejudice to

1 excuse the procedural default of his prosecutorial misconduct
2 claim by asserting ineffective assistance of counsel.

3 **2. Whether Misconduct Occurred**

4 Even if Petitioner's prosecutorial misconduct claim is not
5 procedurally barred, there was no misconduct. Petitioner asserts
6 the prosecutor committed misconduct infecting count two by telling
7 the jury the gun did not have to be loaded to commit assault.¹
8 (Traverse 5.) He claims the statement, although directed at count
9 one, was general enough for the jury to believe it applied to both
10 counts of assault. (Id.) Respondent argues, and the court of
11 appeal concluded, that the statement was legally correct as to
12 count one, and the argument was harmless as to count two. (Answer
13 Attach. #1 Mem. P. & A. 8; Lodgment No. 13, People v.
14 Thepsombandith, No. D047885, slip op. at 8-9.)

15 Petitioner must satisfy a two-part test to obtain federal
16 habeas relief. First, he must show the prosecutor's comment was
17 improper. Tak Sun Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir.
18 2005); see Darden v. Wainwright, 477 U.S. 168, 180-81 (1986).
19 Second, he must show the comment "so infected the trial with
20 unfairness as to make the resulting conviction a denial of due
21 process." Darden, 477 U.S. at 181 (quoting Donnelly v.

23 ¹ Thepsombandith maintains the prosecutor's theory on count
24 one was based on Thepsombandith pressing the gun barrel to
25 Sayrath's head. (Lodgment No. 7, Rep.'s Tr., vol. 5, 498-99;
26 Traverse 5.) Whereas, he argues count two was based on the
27 Petitioner pointing the gun at Gonzalez. (Lodgment No. 7, Rep.'s
28 Tr., vol. 5, 499; Traverse 5.) "The latter theory did require
proof Petitioner had the 'present ability' to apply force to
Gonzalez, i.e., that the gun was loaded. (Traverse 5) (citing
People v. Rodriguez, 20 Cal. 4th 1, 10 n.3, 971 P.2d 618, 623 n.3,
82 Cal. Rptr. 2d 413, 418 n.3 (1999); People v. Fain, 34 Cal. 3d
350, 357 n.6, 667 P.2d 694, 698 n.6, 193 Cal. Rptr. 890, 894 n.6
(1983)).

1 DeChristoforo, 416 U.S. 637 (1974)); accord Greer v. Miller, 483
2 U.S. 756, 765 (1987); Thompson v. Borg, 74 F.3d 1571, 1576 (9th
3 Cir. 1996); Tak Sun Tan, 413 F.3d at 1112).

4 **a. Improper Comments**

5 Habeas corpus relief may be granted if the adjudication of
6 the claim "resulted in a decision that was contrary to, or
7 involved an unreasonable application of, clearly established
8 Federal law, as determined by the Supreme Court of the United
9 States" 28 U.S.C. § 2254(d)(1). "The prosecutor's
10 comments must be evaluated in light of the defense argument that
11 preceded it" Darden, 477 U.S. at 182.

12 In his closing argument, defense counsel misstated the law on
13 assault when he emphasized that Sayrath did not know the gun was
14 loaded until after Thepsombandith fired it. (Lodgment No. 7,
15 Rep.'s Tr., vol. 5, 522; see Lodgment No. 13, People v.
16 Thepsombandith, No. D047885, slip op. at 5.) In response, the
17 prosecutor correctly explained that Sayrath's knowledge was not an
18 element of assault stating, "[Knowledge] played no role and need[]
19 not be shown." (Lodgment No. 13, People v. Thepsombandith, No.
20 D047885, slip op. at 6.) The prosecutor's following statement --
21 that the gun does not have to be loaded to commit assault -- was
22 not improper as applied to count one. (Id. at 8.)

23 "Counsel are given latitude in the presentation of their
24 closing arguments" Ceja v. Stewart, 97 F.3d 1246, 1253-54
25 (9th Cir. 1996) (quoting United States v. Baker, 10 F.3d 1374,
26 1415 (9th Cir. 1993), cert. denied, 513 U.S. 934 (1994)). "It is
27 helpful as an initial matter to place these remarks in context."
28 Darden, 477 U.S. at 179. In Darden, the prosecutors made several

1 improper statements in closing argument. For instance, the
2 prosecution recommended the death penalty for the defendant,
3 stating, "'That's the only way I know that he is not going to get
4 out on the public.'" Id. at 180 n.10. Then, the prosecutor
5 stated, "'As far as I am concerned, . . . [Defendant is] an animal
6'" Id. at n.11. "'I wish [the decedent] had had a shotgun
7 in his hand . . . and blown [Defendant's] face off. I wish that I
8 could see him sitting here with no face, blown away by a
9 shotgun.'" Id. at n.12. The Court held that the comments
10 "undoubtedly were improper." Id. at 180. Ultimately, however,
11 the Court determined the defendant was not deprived of a fair
12 trial. Id. at 181.

13 The prosecutor's argument must be viewed in context. The
14 comment came at the end of the trial. (See Lodgment No. 7, Rep.'s
15 Tr., vol. 5, 488-89.) The statement was made in response to
16 defense counsel's closing argument, which misstated the law of
17 assault by emphasizing that the victim must have known the gun was
18 loaded before Thepsombandith fired it. (Id. at 522.) Like the
19 argument in Darden, the prosecutor's argument here "was invited by
20 or was responsive to the opening summation of the defense."
21 Darden, 477 U.S. at 182. "The idea of 'invited response' is used
22 not to excuse improper comments, but to determine their effect on
23 the trial as a whole." Id. "[T]he challenged statement was one
24 comment by the prosecutor in his closing argument that consisted
25 of 36 pages of transcript." (Lodgment No. 13, People v.
26 Thepsombandith, No. D047885, slip op. at 9.)

27 The prosecution's isolated statement that "there's no
28 requirement that the gun be loaded for an assault to be carried

1 out[]" against Sayrath, is distinguished from the improper
2 statements made in Darden. (Lodgment No. 7, Rep.'s Tr., vol. 5,
3 537); see Darden, 477 U.S. at 180. The appellate court's decision
4 that the prosecutor's statements were not improper is neither
5 contrary to, nor an unreasonable application of, clearly
6 established law.

7 Habeas corpus may also be granted if the adjudication of the
8 claim "resulted in a decision that was based on an unreasonable
9 determination of the facts in light of the evidence presented in
10 the State court proceeding." 28 U.S.C. § 2254(d)(2). Although
11 the court of appeal held Petitioner waived the prosecutorial
12 misconduct claim, it nonetheless considered the claim on the
13 merits and determined reversal was not required. (Lodgment No.
14 13, People v. Thepsombandith, No. D047885, slip op. at 7.)

15 The factual basis for the court of appeal's conclusion is as
16 follows:

17 In closing argument defense counsel raised the fact
18 that Sayrath was not aware the gun was loaded until
19 after Thepsombandith fired it, misstating the law on
20 assault: "The knowledge of the deadly capacity, such as
21 it were of this firearm, was only known after the
22 discharge. [¶] It never again was pointed at her. She
never stated that the firearm was pointed at her again.
[¶] I dare say that if the firearm had been pointed at
her a second time, we'd have an assault on [Sayrath] by
means of a firearm."

23 On rebuttal, in response to this argument by
24 defense counsel, the prosecutor stated, "Now, here's one
25 you've got to be real careful with. [Sayrath] didn't
26 know the gun was loaded, so it can't be assault. Did
27 you hear that?" The prosecutor went on to explain,
28 correctly, that Sayrath's knowledge was not an element
of the charge of assault: "The person committing the
act -- that's him -- the person committing the act was
aware of facts that would lead a reasonable person to
realize that a direct, natural, and probable result of
this act, that physical force would be applied to
another person. [¶] It doesn't matter if [Sayrath]

1 thought the gun was loaded or not. It played no role and
2 needs not be shown. [¶] . . . [¶] The fact is, he knew
3 what was going on. He knew it was a gun; he knew there
were bullets in there; he was the one pulling the
trigger."

4 In further discussing count 1 assault against
5 Sayrath, however, the prosecutor then made the following
6 statements: "*It doesn't matter whether the gun was*
7 *loaded or not, you can still assault somebody with it.*
Okay? [¶] Also, *there's no requirement that the gun be*
loaded for an assault to be carried out. That's not an
element of the assault with a firearm." (Italics added.)

8 (Id. at 5-6.)

9 Defense counsel misstated the law of assault in closing
10 argument: "[Sayrath] testified she didn't even know [the gun] was
11 loaded at the point in time that it was up against her head."
12 (Lodgment No. 7, Rep.'s Tr., vol. 5, 522.) The prosecutor
13 subsequently clarified to the jury that knowledge is not an
14 element of assault. He made these statements in response to the
15 preceding defense argument. (Id. at 535-36); see Darden, 477 U.S.
16 at 179.

17 Moreover, the prosecutor referenced Sayrath ("Kathy")—the
18 victim in count one—directly before and after stating that
19 "there's no requirement that the gun be loaded." (Lodgment No. 7,
20 Rep.'s Tr., vol. 5, 536.) It is unlikely that the jury applied
21 the statement to Gonzales (the victim in count two). The argument
22 immediately preceding and following the statement at issue are in
23 the context of discussing "Kathy Sayrath." (Id. at 536-37.) The
24 prosecutor did not mention "Sherry Gonzales" until later by
25 stating, "When Sherry came in, she described how [Sayrath]
26 looked." (Id. at 537.)

27 In the context of the trial, the state court reasonably
28 determined the facts in the record when it held that the

1 prosecution's statement was limited to count one, which was a
2 correct statement of law. (Lodgment No. 13, People v.
3 Thepsombandith, No. D047885, slip op. at 8-9; see also 28 U.S.C. §
4 2254(d)(2).)

5 **b. Harmless Error**

6 When considering a claim of prosecutorial misconduct, the
7 court must also determine whether the error requires reversal or
8 was harmless. Thompson v. Borg, 74 F.3d 1571, 1577 (9th Cir.
9 1996); United States v. Kallin, 50 F.3d 689, 693 (9th Cir. 1995)
10 (citing Brecht v. Abrahamson, 507 U.S. 619, 629 (1993)); see also
11 Greer v. Miller, 483 U.S. 756, 765 (1987) (prosecutorial
12 misconduct is subject to harmless error review).

13 The issue is whether the prosecutor's comments rendered
14 Thepsombandith's trial so unfair that his conviction was a denial
15 of due process. Darden, 477 U.S. at 181 (quoting Donnelly v.
16 DeChristoforo, 416 U.S. 637, 643 (1974).) The misconduct is
17 reviewed in the context of the entire trial. See, e.g., Greer,
18 483 U.S. at 766 (holding that a single question, an immediate
19 objection, and two curative instructions "clearly" demonstrate the
20 prosecutor's improper question did not violate due process);
21 Donnelly, 416 U.S. at 639. Even if the prosecutor's statements
22 could be considered improper, they were not prejudicial.

23 Petitioner asserts there is a reasonable probability the jury
24 would have found the "present ability" element of assault had not
25 been proved beyond a reasonable doubt without the prosecutor's
26 misstatement. (Traverse 7.) He argues the evidence was equivocal
27 as to whether the gun was loaded, and taking that question away
28 from the jury infected the verdict as to count two. (Id.)

1 Petitioner claims the prosecutor's comment had a "substantial and
2 injurious effect" on the verdict. (Traverse 8 (citation
3 omitted).) But the prosecutor's statements were not "of
4 sufficient significance to result in the denial of the defendant's
5 right to a fair trial." Greer, 483 U.S. at 765 (quoting United
6 States v. Bagley, 473 U.S. 667, 676 (1985)); Darden, 477 U.S. at
7 180-81 (holding that even though the prosecutor's statements were
8 "undoubtedly improper," they still did not deny Petitioner of a
9 fair trial).

10 Even if the prosecutor's comment that "there's no requirement
11 that the gun be loaded" could have been construed by the jury to
12 apply to the second count of assault, the evidence clearly
13 suggested that the gun was loaded when Thepsombandith pointed it
14 at Gonzales. Thepsombandith held a gun to Sayrath's head; then he
15 fired a shot into the air, and Sayrath screamed. (Lodgment No. 5,
16 Rep.'s Tr., vol. 3, 90, 189, 210.) Gonzales ran to the shack and
17 opened the door to ensure Sayrath was safe. (Id.) Gonzales saw
18 Thepsombandith holding the gun and watched as he "cocked" it.
19 (Lodgment No. 6, Rep.'s Tr., vol. 4, 351-52, 428-29.) It is not
20 reasonably probable that the jury convicted Thepsombandith of
21 assaulting Gonzalez with a firearm while believing the gun was
22 unloaded when he pointed it at her. The weight of the evidence
23 against Thepsombandith is heavy, which "reduced the likelihood
24 that the jury's decision was influenced by argument." Darden, 477
25 U.S. at 182. Thus, the prosecutor's statement did not prejudice
26 Petitioner. Id. at 181.

27 Accordingly, the prosecutor's comments did not deny
28 Thepsombandith a fair trial. The state court reasonably concluded

1 "[i]t was not a pattern of misconduct. . . ." (Lodgment No. 13,
2 People v. Thepsombandith, No. D047885, slip op. at 9 (citation
3 omitted).) The court of appeal correctly held there was no
4 resulting prejudice. (Id.) The state court decision was neither
5 contrary to, nor an unreasonable application of, clearly
6 established United States Supreme Court law. 28 U.S.C. §
7 2254(d)(1). Moreover, the state court's decision was based on a
8 reasonable determination of the facts in light of the evidence
9 presented. See 28 U.S.C. § 2254(d)(2).

10 For all these reasons, ground one in Thepsombandith's
11 Petition does not entitle him to relief.

12 **B. Ineffective Assistance of Trial Counsel - Claim Two**

13 As part of ground one, Thepsombandith argues that his trial
14 counsel was ineffective for failing to object to the prosecutor's
15 closing argument. (Pet. 6.) Respondent urges that the California
16 Court of Appeal decision denying this argument on its merits was a
17 reasonable application of Supreme Court precedent. (Answer
18 Attach. #1 Mem. P. & A. 6.)

19 The last state court to address the merits of Petitioner's
20 ineffective assistance of counsel claim was the California Court
21 of Appeal. (See Lodgment No. 13, People v. Thepsombandith, No.
22 D047885, slip op. at 9-11.) This Court reviews that decision.
23 Ylst v. Nunnemaker, 501 U.S. at 806.

24 The state appellate court described the burden Thepsombandith
25 must satisfy to establish that his trial counsel was ineffective.
26 "A defendant claiming ineffective assistance of counsel has the
27 burden to show: (1) counsel's performance was deficient, falling
28 below an objective standard of reasonableness under prevailing

1 professional norms; and (2) the deficient performance resulted in
2 prejudice." (Lodgment No. 13, People v. Thepsombandith, No.
3 D047885, slip op. at 10.) Trial counsel is presumed to be
4 competent. Strickland, 466 U.S. at 689. "To rebut this
5 presumption, [Petitioner] must demonstrate that his counsel's
6 performance was unreasonable under prevailing professional norms
7 and was not the product of sound strategy." Sechrest v. Ignacio,
8 549 F. 3d 789, 815 (9th Cir. 2008). Counsel's representation is
9 deficient if "it falls outside the range of competence demanded of
10 attorneys in criminal cases." Id.

11 Still, the state court rejected Petitioner's ineffective
12 assistance claim, concluding that the prosecutor's closing comment
13 was not improper. As explained above, the California Court of
14 Appeal held that prosecutor's statement was not misconduct. The
15 court concluded that "[d]efense counsel could reasonably have
16 believed that the jury would only understand the statements as
17 applying to count 1, and, therefore, the failure to object did not
18 fall below an objective standard of reasonableness." (Lodgment
19 No. 13, People v. Thepsombandith, No. D047885, slip op. at 11.)
20 Federal courts have held that the failure to make a meritless
21 objection is not deficient performance and cannot constitute
22 ineffective assistance. Jones v. Smith, 231 F.3d 1227, 1239 n.8
23 (9th Cir. 2000) (citing Boag v. Raines, 769 F.2d 1341, 1344 (9th
24 Cir 1985); accord Green v. Johnson, 160 F.3d 1029, 1037 (5th Cir.
25 1998).

26 Furthermore, as discussed above, Petitioner cannot establish
27 that he suffered any prejudice because of the prosecutor's
28 comment. The state court concluded that "the evidence was

1 overwhelming that the gun was loaded when Thepsombandith pointed
2 it at Gonzales. Therefore, it is not reasonably probable that
3 [he] would have received a more favorable result but for counsel's
4 failure to object to the prosecutor's statement." (Id. (citing
5 Strickland, 466 U.S. at 693-94).) Because Petitioner cannot show
6 that the prosecutor's argument constituted prejudicial misconduct,
7 he cannot show that he was prejudiced by counsel's failure to
8 object.

9 The state court concluded that Thepsombandith did not
10 establish that his trial counsel's representation was below an
11 objective standard of reasonableness or that the result of his
12 trial would have been different if counsel had objected to the
13 prosecutor's closing argument. (Lodgment No. 13, People v.
14 Thepsombandith, No. D047885, slip op. at 9-11.) This decision was
15 neither contrary to, nor an unreasonable application of, clearly
16 established Supreme Court law. See 28 U.S.C. § 2254(d)(1). Nor
17 was the decision based upon an unreasonable determination of the
18 facts. See 28 U.S.C. § 2254(d)(2). Accordingly, he is not
19 entitled to habeas relief on this claim.

20 **C. Due Process Violation at Sentencing - Claim Three**

21 Thepsombandith argues that the imposition of the ten-year
22 upper term for the gun enhancement violated his right to due
23 process. (Pet. 7.) Petitioner was sentenced pursuant to
24 California's determinate sentencing law ("DSL"), which directs how
25 judges sentence defendants for certain offenses. California's
26 sentencing scheme proscribes three possible terms of imprisonment:
27 a lower, middle, and upper term. See, e.g., Cal. Penal Code §
28

1 12022.5(a) (West 2000) (setting additional and consecutive
2 imprisonment terms of three, four, or ten years).

3 On January 17, 2006, the trial judge sentenced Thepsombandith
4 to twenty-four years imprisonment. (Lodgment No. 2, Clerk's Tr.,
5 vol. 2, 319.) As to the first count of assault with a firearm
6 (Kathy Sayrath), the court imposed a six-year term and a ten-year
7 enhancement. (Lodgment No. 2, Clerk's Tr., vol. 2, 278.) For the
8 second count of assault with a firearm (Sherry Gonzalez), the
9 court imposed a two-year term and a sixteen-month enhancement.
10 (Id.) The court imposed an eight-month term for discharging a
11 firearm in a grossly negligent manner (count three) and a one-year
12 enhancement. (Id.) Petitioner was sentenced to one-year
13 imprisonment for assault with serious bodily injury (count six).
14 (Id.) The court also imposed one-year enhancements for each of
15 Petitioner's two prison priors under Cal. Penal Code § 667.5(b).
16 (Id.; see Cal. Penal Code § 667.5(b) (West Supp. 2009).) The
17 court stayed the sentence on being a felon in possession of a
18 firearm and being a felon in possession of ammunition (counts four
19 and five). (Lodgment No. 2, Clerk's Tr., vol. 2, 278, 319.)

20 At the time of sentencing, the judge stated his reasons for
21 imposing the ten-year upper term for the gun enhancement.

22 As to count one, I'll be imposing the mid term of
23 six years. [¶] On the 12022.5(A) allegation, I am going
to impose the upper term of ten years.

24 Now, I think this is significant. [¶] I have
25 definite concerns about this defendant. [¶] This is his
26 fourth time of having a gun in his possession. There
27 were three other times. [¶] Everything that we did to
28 convince him those three other times that you're not to
have a gun, obviously, didn't have an impact, and he
knew it. [¶] The gun is what makes this so dangerous.
[¶] I do think he has a lack of control, and he is

1 dangerous because of that. [¶] So, I think there is a
2 legal basis for that.

3 I didn't use the priors on the actual 245(B) count
4 one core offense. [¶] So, it's not a double use. I'm
5 using only the 12022.5 allegation. [¶] Not that that
6 would prohibit the court from doing it, but I have
7 chosen to approach it this way. [¶] The fourth time.
8 You can't have the gun, period.

9 (Lodgment No. 7, Rep.'s Tr., vol. 5, 596-97.)

10 On direct appeal, Thepsombandith argued the ten-year upper
11 term violated his right to due process under Blakely v.

12 Washington, 542 U.S. 296 (2004). (Lodgment No. 9, Appellant's
13 Supplemental Opening Br. 1-2, People v. Thepsombandith, No.

14 D047785.) The court of appeal rejected his contention that the
15 trial court impermissibly imposed the upper term on the firearm
16 enhancement "based upon facts beyond those found by the jury."

17 (Lodgment No. 13, People v. Thepsombandith, No. D047885, slip op.
18 at 12.) The California Supreme Court had rejected a similar claim
19 in People v. Black, 35 Cal. 4th 1238, 1244, 113 P.3d 534, 536, 29
20 Cal. Rptr. 3d 740, 742 (2005), vacated, 549 U.S. 1190 (2007).

21 Initially, the California Supreme Court granted Thepsombandith's
22 petition for review; the court later dismissed it after deciding

23 People v. Black (Black II), 41 Cal. 4th 799, 161 P.3d 1130, 62

24 Cal. Rptr. 3d 569 (2007). (Lodgment No. 15, People v.

25 Thepsombandith, No. S149522, order 1); Lodgment No. 16, People v.

26 Thepsombandith, No. S149522, order 2.)

27 **1. Retroactivity**

28 Federal habeas courts may not grant relief based on a rule
announced after a petitioner's conviction and sentence became

final. Caspari v. Bohlen, 510 U.S. 383, 389 (1994) (citing

Stringer v. Black, 503 U.S. 222, 227 (1992).) "A state prisoner

1 whose conviction is final may not automatically have the rule from
2 a subsequently decided case applied in a petition for habeas
3 corpus pursuant to § 2254." Schardt v. Payne, 414 F.3d 1025, 1033
4 (9th Cir. 2005) (citing Teague v. Lane, 489 U.S. at 310).

5 Teague lays out a three-part test for determining when a
6 decision of the Supreme Court setting forth a new procedural rule
7 will apply retroactively on collateral review:

8 First, the court must determine when the defendant's
9 conviction became final. Second, it must ascertain the
10 legal landscape as it then existed and ask whether the
11 Constitution, as interpreted by the precedent then
12 existing, compels the rule. That is, the court must
13 decide whether the rule is actually "new." Finally, if
14 the rule is new, the court must consider whether it
15 falls within either of the two exceptions to
16 nonretroactivity.

17 Beard v. Banks, 542 U.S. 406, 411 (2004) (internal citations and
18 quotation marks omitted). The two exceptions are well known: (1)
19 rules forbidding punishment for certain conduct or for defendants
20 of a particular status and (2) "watershed rules of criminal
21 procedure implicating the fundamental fairness and accuracy of the
22 criminal proceeding." Schardt, 414 F.3d at 1033-34 (quoting
23 Beard, 542 U.S. at 416-17).

24 This Court must determine whether Cunningham v. California,
25 549 U.S. 270 (2007), applies retroactively under the Teague
26 framework. Beard, 542 U.S. at 412 (holding that habeas courts
27 must analyze Teague's nonretroactivity principle prior to
28 considering the merits whenever a retroactivity issue is raised).
Petitioner's case was pending on direct review when Cunningham was
decided in 2007. (Lodgment No. 15, People v. Thepsombandith, No.
S149522, order 1.) Accordingly, the Court must move to the second
step and decide whether Cunningham announced a "new rule" under

1 Teague. The Supreme Court has outlined the analysis required to
2 determine when a "new rule" has been established.

3 In general, . . . a case announces a new rule when
4 it breaks new ground or imposes a new obligation on the
5 States or the Federal Government. . . . To put it
6 differently, a case announces a new rule if the result
7 was not dictated by precedent existing at the time the
8 defendant's conviction became final.

9 Teague, 489 U.S. at 301 (citations omitted) (emphasis added).

10 In a series of cases, the Supreme Court has announced the
11 contours of a defendant's right to trial by jury regarding facts
12 affecting the sentence. See Apprendi v. New Jersey, 530 U.S. 466
13 (2000); Blakely v. Washington, 542 U.S. 296; United States v.
14 Booker, 543 U.S. 220 (2005).

15 In Apprendi, the Supreme Court held, "Other than the fact of
16 a prior conviction, any fact that increases the penalty for a
17 crime beyond the prescribed statutory maximum must be submitted to
18 a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S.
19 at 490. In Blakely, the Court applied Apprendi and invalidated a
20 sentencing scheme that allowed a judge to increase a defendant's
21 sentence beyond the statutory maximum based on judicial
22 factfinding. Blakely, 542 U.S. at 303. "[T]he 'statutory
23 maximum' for Apprendi purposes is the maximum sentence a judge may
24 impose solely on the basis of the facts reflected in the jury
25 verdict or admitted by the defendant." Id. (citing Ring v.
26 Arizona, 536 U.S. 584, 602 (2002)). The Ninth Circuit has held
27 that both Apprendi and Blakely announced new rules of
28 constitutional law. Schardt, 414 F.3d at 1038; Jones v. Smith,
231 F.3d 1227, 1236 (9th Cir. 2000).

1 In Booker, the Court invalidated Federal Sentencing
2 Guidelines to the extent they allowed the judge to make
3 independent factfindings that placed the defendant in a higher
4 sentencing range. Booker, 543 U.S. at 233. "For when a trial
5 judge exercises his discretion to select a specific sentence
6 within a defined range, the defendant has no right to a jury
7 determination of the facts that the judge deems relevant." Id.
8 But in People v. Black (Black I), 35 Cal. 4th 1238, 113 P.3d 534,
9 29 Cal. Rptr. 3d 740, vacated, 549 U.S. 1190, the California
10 Supreme Court held that California's DSL was not invalidated by
11 Blakely. Id. at 1244, 113 P.3d at 536, 29 Cal. Rptr. 3d at 742.

12 In Cunningham, 549 U.S. 270, the Supreme Court held that DSL
13 violated Apprendi's "bright-line rule" that facts in aggravation
14 must be submitted to a jury and found beyond a reasonable doubt.
15 Id. at 291 (citing Blakely, 542 U.S. at 307-08). The Court
16 concluded that California's DSL resembled the sentencing systems
17 invalidated in Blakely. Id. at 294.

18 At the time Thepsombandith was sentenced, Apprendi,
19 Blakely, and Booker clearly established that sentencing schemes
20 that raise the maximum term based on facts not found by a jury
21 violate a defendant's due process rights. See Apprendi, 530 U.S.
22 466; Blakely, 542 U.S. 296; Booker, 543 U.S. 220.

23 Cunningham applied these precedents when it held that
24 aggravating factors must be submitted to a jury and found beyond a
25 reasonable doubt to preserve a defendant's basic jury-trial right.
26 Cunningham, 549 U.S. at 291 (citing Blakely, 542 U.S. at 307-08).
27 Therefore, the holdings of Apprendi, Blakely, Booker, and
28 Cunningham collectively constitute clearly established federal

1 law. This law, however, is not new. The Ninth Circuit, in Butler
2 v. Curry, 528 F.3d 624 (9th Cir. 2008), held that Cunningham
3 applies retroactively because it did not announce a new rule of
4 constitutional law within the meaning of Teague. Id. at 639,
5 cert. denied, Curry v. Butler, 77 U.S.L.W. 3359 (U.S. Dec. 15,
6 2008) (No. 08-517); accord Wright v. Dexter, 546 F.3d 1096, 1097
7 (9th Cir. 2008). In Butler, the Ninth Circuit found that
8 Apprendi, Blakely and Booker compelled the result in Cunningham.
9 Id. at 635.

10 "Apprendi, Blakely, and Booker made 'courts throughout the
11 land' aware that sentencing schemes that raise the maximum
12 possible term based on facts not found by a jury violate the
13 constitutional rights of defendants." Id. at 639 (citing Teague,
14 489 U.S. at 306). The court further held that "[n]o principles of
15 comity or federalism would be served by refusing to apply this
16 rule to functionally indistinguishable state sentencing schemes on
17 collateral review. Cunningham thus did not announce a new rule of
18 constitutional law and may be applied retroactively on collateral
19 review." Id.

20 Apprendi (2000), Blakely (2004) and Booker (2005) were
21 decided before Thepsombandith was convicted. See Apprendi, 530
22 U.S. 466; Blakely, 542 U.S. 296; Booker, 543 U.S. 220. Cunningham
23 was decided on January 22, 2007, when Thepsombandith's case was
24 pending on direct review in the California Supreme Court.
25 (Lodgment No. 15, People v. Thepsombandith, No. S149522, order 1.)
26 Cunningham is retroactive and applies to Petitioner's case.
27 Butler, 528 F.3d at 639.

28

1 rested on the reasoning of Black I. (Id.) In contrast,
2 Respondent argues, the California Supreme Court rejected
3 Thepsombandith's claim in light of Black II. (Id.; Lodgment No.
4 16, People v. Thepsombandith, No. S149522, order 2 (Cal. Sept. 12,
5 2007) (en banc).)) The California Supreme Court stated: "In
6 light of People v. Black (2007) 41 Cal.4th 799 [161 P.3d 1130; 62
7 Cal. Rptr. 3d 569] (Black II), review in the above-entitled
8 matters is dismissed." (Lodgment No. 16, People v.
9 Thepsombandith, No. S149522, order 2.)

10 The California Supreme Court denied Thepsombandith's petition
11 for review with a one-sentence explanation. Consequently, this
12 Court must determine whether that provides a sufficient basis for
13 review or whether it should look to the California Court of
14 Appeal's opinion. (Compare id.), with Ylst v. Nunnemaker, 501
15 U.S. at 803 (holding that where there has been one reasoned state
16 judgment rejecting a federal claim, it is presumed that later
17 unexplained orders upholding that judgment or rejecting the claim
18 rest upon the same ground).) In Ylst, the Court explained, "The
19 consequent question presented . . . is how federal courts in
20 habeas proceedings are to determine whether an unexplained order
21 (by which we mean an order whose text or accompanying opinion does
22 not disclose the reason for the judgment) rests primarily on
23 federal law." Id. at 802.

24 The state supreme court relied on the reasoning in Black II
25 when it dismissed Thepsombandith's petition. (Lodgment No. 16,
26 People v. Thepsombandith, No. S149522, order 2.) This Court must
27 examine Black II to decide whether the requirements of AEDPA have
28 been met. Butler, 528 F.3d at 640.

1 In Black II, the state court noted, "The United States
2 Supreme Court consistently has stated that the right to a jury
3 trial does not apply to the fact of a prior conviction." People
4 v. Black (Black II), 41 Cal. 4th at 818, 161 P. 3d at 1142, 62
5 Cal. Rptr. 3d at 583 (citing Cunningham, 549 U.S. at 288; Blakely,
6 542 U.S. at 301; Apprendi, 530 U.S. at 490; Almendarez-Torres v.
7 United States, 523 U.S. 224 (1998)). The California Supreme Court
8 correctly identified controlling federal law. It must also apply
9 that law reasonably.

10 Here, the sentencing judge explained the basis for the
11 sentence on count one.

12 On the 12022.5(A) allegation [personally used a
13 firearm], I am going to impose the upper term of ten years.

14 Now, I think this is significant. [¶] I have
15 definite concerns about this defendant. [¶] This is his
16 fourth time of having a gun in his possession. There
17 were three other times. [¶] Everything that we did to
18 convince him those three other times that you're not to
19 have a gun, obviously, didn't have an impact, and he
20 knew it.

21

22 I do think he has a lack of control, and he is
23 dangerous because of that. [¶] So, I think there is a
24 legal basis for that. [¶] I didn't use the priors on
25 the actual 245(B) count one core offense. [¶] So, it's
26 not a double use. I'm using only the 12022.5
27 allegation.

28 (Lodgment No. 7, People v. Thepsombandith, Rep.'s Tr., vol. 5,
596-97.)

When Thepsombandith was sentenced in 2006, California's DSL
stated that when a statute specifies three possible imprisonment
terms, the court shall order imposition of the middle term unless
there are circumstances in aggravation or mitigation of the crime.
Cal. Penal Code § 1170(b) (West Supp. 2009); Cal. R. Ct. 4.420(a-

1 b) (West 2009).² To determine whether the trial court imposed
2 the sentence in violation of the Constitution, the Court must
3 analyze the aggravating factors on which the judge relied.

4 Under California law, only one aggravating factor is
5 necessary to authorize an upper term sentence. Butler, 528 F.3d
6 at 642; People v. Black (Black II), 41 Cal. 4th at 815, 161 P.3d
7 at 1140, 62 Cal. Rptr. 3d at 581 (citing Cal. Penal Code §
8 1170(b); People v. Osband, 13 Cal. 4th 622, 728, 919 P.2d 640,
9 709, 55 Cal. Rptr. 2d 26, 55 (1996).) Moreover, Cunningham
10 explains that Thepsombandith's right to trial by jury is violated
11 if he was sentenced to the upper term based solely on
12 circumstances neither admitted nor submitted to the jury and
13 proved beyond a reasonable doubt. Cunningham, 549 U.S. at 293;
14 Apprendi, 530 U.S. at 475; see Booker, 543 U.S. at 244; see
15 Blakely, 542 U.S. at 301; see also Butler, 528 F.3d at 648.

16 Thepsombandith contends his sentencing violated clearly
17 established Supreme Court precedent because the trial judge
18 imposed the upper term based on factors a jury did not find.
19 (Traverse 21.) He argues that the prior conviction exception is
20 inapplicable to his case because the trial judge did not rely
21 solely on prior convictions. (Id. at 18.) Rather, the court also
22 considered that Petitioner's lack of control made him dangerous,
23 and he had not been deterred by his prior convictions. (Traverse
24

25 ² Parts of section 1170 of the California Penal Code were
26 amended in March of 2007 in response to Cunningham to read: "When
27 a judgment of imprisonment is to be imposed and the statute
28 specifies three possible terms, the choice of the appropriate term
shall rest within the sound discretion of the court." Cal. Penal
Code § 1170(b) (West Supp. 2009). Rule 4.420 of the California
Rules of Court was also amended in 2007. Cal. R. Ct. 4.420 (West
2009).

1 18; Lodgment No. 7, Rep.'s Tr., vol. 5, 597.) Thepsombandith
2 argues that one of his prior firearm possessions was a juvenile
3 adjudication, which is not a "prior conviction." (Traverse 19
4 (citing United States v. Tighe, 266 F.3d 1187, 1195 (9th Cir.
5 2001); Lodgment No. 2, Clerk's Tr., vol. 2, 212.)

6 Respondent contends the trial court properly relied on
7 Thepsombandith's prior convictions when imposing the upper term.
8 (Answer Attach. #1 Mem. P. & A. 14.) Respondent cites Butler,
9 stating that this finding did not require the trial court to make
10 any "qualitative evaluations of the nature or seriousness of past
11 crimes." (Id. (citing Butler, 528 F.2d at 644-46).)

12 Thepsombandith had two prison priors at the time of
13 sentencing: (1) taking a vehicle while in possession of a gun and
14 (2) being in possession of a firearm while on parole. (Lodgment
15 No. 1, Clerk's Tr., vol. 1, 7; Lodgment No. 2, Clerk's Tr., vol.
16 2, 213; Cal. Penal Code §§ 10851(a), 12022(a)(1), 12021(a)(1).)
17 Separately, he had numerous juvenile adjudications for burglary,
18 possession of a concealed firearm, and two instances of possession
19 of burglary tools. (Lodgment No. 2, Clerk's Tr., vol. 2, 212;
20 Cal. Penal Code §§ 459, 12025(b), 466 (West Supp. 2009).)

21 The United States Supreme Court has recognized two exceptions
22 to a defendant's Sixth Amendment right to a jury trial. First, a
23 fact admitted by the defendant may be used to increase his or her
24 sentence beyond the maximum. Blakely, 542 U.S. at 303. Second,
25 the right to a jury trial and the proof beyond a reasonable doubt
26 requirement do not apply to the fact of a prior conviction. Id.;
27 see Apprendi, 530 U.S. at 490.

28

1 At the time of Thepsombandith's sentence, he had two prior
2 felony convictions. (Lodgment No. 1, Clerk's Tr., vol. 1, 7;
3 Lodgment No. 2, Clerk's Tr., vol. 2, 213.) "[I]f at least one of
4 the aggravating factors on which the judge relied in sentencing
5 [defendant] was established in a manner consistent with the Sixth
6 Amendment, [Defendant's] sentence does not violate the
7 Constitution." Butler, 528 F.3d at 643. Accordingly, the fact of
8 Thepsombandith's prior convictions was sufficient by itself to
9 subject him to the upper term.

10 The prior conviction exception does not extend to qualitative
11 evaluations about the nature or seriousness of past crimes because
12 such determinations cannot be made solely by looking to the
13 documents of conviction. Butler, 528 F.3d at 644 (citing United
14 States v. Kortgaard, 425 F.3d 602, 607 (9th Cir. 2005) (holding
15 that the seriousness of past offenses and the likelihood of
16 recidivism are facts that fall outside of the prior conviction
17 exception); Stokes v. Schriro, 465 F.3d 397, 404 (9th Cir. 2006)
18 (deciding whether the present crime is strikingly similar to a
19 past crime also falls outside of the prior conviction exception)).
20 Nor does the exception apply to past convictions as a juvenile
21 because juvenile proceedings lack the Sixth Amendment protections
22 that adult trials provide. Butler, 528 F.3d at 644-45 (citing
23 United States v. Tighe, 266 F.3d at 1193-95) (explaining that "the
24 'prior conviction' exception to Apprendi's general rule must be
25 limited to prior convictions that were themselves obtained through
26 proceedings that included the right to a jury trial and proof
27 beyond a reasonable doubt[]") (citing Apprendi, 530 U.S. at 496).
28

1 The aggravating circumstance justifying Thepsombandith's
2 sentence was his prior convictions; specifically, he had been in
3 possession of a gun on three prior occasions in the course of his
4 prior convictions. "This is his fourth time of having a gun in
5 his possession. There were three other times." (Lodgment No. 7,
6 Rep.'s Tr., vol. 5, 597.) The aggravating factor could be
7 determined solely by looking to the documents of conviction.
8 Butler, 528 F.3d at 646. The determination was not based solely
9 on qualitative evaluations, the seriousness of his past crimes, or
10 the likelihood of recidivism. See Kortgaard, 425 F.3d at 607-08.
11 Nor was the determination based solely on Thepsombandith's
12 juvenile adjudication. See Butler, 528 F.3d at 644 (citing Tighe,
13 266 F.3d at 1193-95). Even if the sentencing judge considered the
14 juvenile adjudication when sentencing Thepsombandith, the judge
15 was permitted to rely on the prior gun possessions established by
16 the two remaining convictions. (Lodgment No. 1, Clerk's Tr., vol.
17 1, 7; Lodgment No. 2, Clerk's Tr., vol. 2, 213.) Importantly,
18 only one aggravating factor is necessary, and there were two adult
19 priors. Butler, 528 F.3d at 642-43; (Lodgment No. 1, Clerk's
20 Tr., vol. 1, 7; Lodgment No. 2, Clerk's Tr., vol. 2, 213.)

21 The Court must examine the whole record, including the
22 evidence presented at sentencing. Butler, 528 F.3d at 651.
23 Unlike Butler, the probation officer's report referred to at the
24 time of sentencing has been lodged; this Court is able to review
25 what evidence was submitted to the trial court. (Lodgment No. 1,
26 Clerk's Tr., vol. 1, 7; Lodgment No. 2, Clerk's Tr., vol. 2, 208-
27 21; see Butler, 528 F.3d at 651 ("[W]e have not found a probation
28 report or any other document that reflects [Defendant's]

1 probationary status at the time of the crime."); see also Williams
2 v. Scribner, No. CV 07-2694-R (AGR), 2008 U.S. Dist. LEXIS 51032,
3 at *2 (9th Cir. June 30, 2008). The sentencing judge had
4 sufficient evidence from which she could find the aggravating
5 factor to justify imposition of the upper term. Consequently, the
6 state supreme court's decision was not contrary to, or an
7 unreasonable application of, clearly established Supreme Court
8 law. 28 U.S.C. § 2254(d)(1). Moreover, the state court decision
9 was based on a reasonable determination of the evidence. See 28
10 U.S.C. § 2254 (d)(2).

11 **3. Harmless Error**

12 Even if there was a constitutional error, any error was
13 harmless. At least one aggravating factor supports Petitioner's
14 upper term sentence. Assuming federal law was clearly established
15 and the state court erred in its analysis of Thepsombandith's
16 sentencing claim, the Court must apply a harmless error analysis.
17 Washington v. Recuenco, 548 U.S. 212, 221 (2006); United States v.
18 Zepeda-Martinez, 470 F.3d 909, 910 (9th Cir. 2006); United States
19 v. Banuelos, 322 F.3d 700, 705 (9th Cir. 2003). Petitioner is
20 only entitled to habeas relief "if the sentencing error in his
21 case is not harmless." Butler, 528 F.3d at 648 (citing Recuenco,
22 548 U.S. at 220).

23 An error is harmless if it does not have a "substantial and
24 injurious effect on [Defendant's] sentence." Butler, 528 F.3d at
25 648) (citing Hoffman v. Arave, 236 F.3d 523, 540 (9th Cir. 2001));
26 see also Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).
27 Furthermore, an error is "harmless if it is not prejudicial as to
28 just one of the aggravating factors at issue." Butler, 528 F.3d

1 at 648. A court must grant relief if it is in grave doubt as to
2 whether a jury would have found the aggravating factors beyond a
3 reasonable doubt. Id. (citing O'Neal v. McAninch, 513 U.S. 432,
4 436 (1995)).

5 The record illustrates Thepsombandith was convicted of taking
6 a vehicle while in possession of a gun on December 9, 1994, and
7 sentenced to three years in prison, creating his first prison
8 prior. (Lodgment No. 1, Clerk's Tr., vol. 1, 7; Lodgment No. 2,
9 Clerk's Tr., vol. 2, 213.) On December 4, 1998, he was convicted
10 of being in possession of a firearm while on parole and sentenced
11 to two years in prison, creating his second prison prior. (Id.)
12 The trial judge was presented with evidence of both prior
13 convictions. In fact, the trial judge referenced the prior
14 convictions when she imposed the upper term. "This is his fourth
15 time of having a gun in his possession. There were three other
16 times." (Id. at 597.) Furthermore, Thepsombandith admitted to
17 having the prior convictions. (Lodgment No. 2, Clerk's Tr. Vol.
18 2, 307, 314.) Therefore, any error in using the fact of
19 Petitioner's prior convictions to impose the upper term was
20 harmless because there is no "grave doubt" that the jury would
21 have found the aggravating factors beyond a reasonable doubt. See
22 O'Neal, 513 U.S. at 436.

23 Habeas relief is not warranted on claim three. The state
24 court decision was not contrary to, and did not involve an
25 unreasonable application of, clearly established law as determined
26 by the United States Supreme Court. Nor was it based on an
27 unreasonable determination of the facts in light of the evidence.
28

1 For this reason, the Court should deny habeas relief based on this
2 ground in Thepsombandith's Petition.

3 **D. Evidentiary Hearing**

4 In his Traverse, Thepsombandith requests an evidentiary
5 hearing or declaration from his trial counsel regarding his
6 ineffective assistance of counsel claim. (Traverse 23.)
7 Specifically, Petitioner seeks testimony from defense counsel
8 regarding the failure to object to the prosecutorial misconduct at
9 trial. (Id.)

10 Respondent contends the California courts have already made
11 reasonable factual determinations under 28 U.S.C. § 2254(d), and
12 Thepsombandith's claims do not rely on evidence that is not in the
13 state court record. (Answer Attach. #1 Mem. P. & A. 16.) Warden
14 Almager argues that Thepsombandith failed to "present the need to
15 further develop evidence in additional proceedings." (Id.)

16 Under 28 U.S.C. § 2254(e)(2), as amended by AEDPA, a district
17 court presented with a request for an evidentiary hearing must
18 first determine whether the petitioner failed to develop the
19 factual basis of his claims in state court. Insyxiengmay v.
20 Morgan, 403 F.3d 657, 670 (9th Cir. 2005) (citing 28 U.S.C. §
21 2254(e)(2)(A-B)); Williams v. Taylor, 529 U.S. at 430. "[A]
22 failure to develop the factual basis of a claim is not established
23 unless there is a lack of diligence, or some greater fault,
24 attributable to the prisoner or the prisoner's counsel."
25 Williams, 529 U.S. at 432.

26 If a petitioner developed the record in state court, the
27 federal habeas court examines whether an evidentiary hearing is
28

1 appropriate or required under Townsend v. Sain, 372 U.S. 293
2 (1963). There are six Townsend factors to consider:

3 (1) the merits of the factual dispute were not resolved
4 in the state hearing; (2) the state factual
5 determination is not fairly supported by the record as a
6 whole; (3) the fact-finding procedure employed by the
7 state court was not adequate to afford a full and fair
8 hearing; (4) there is a substantial allegation of newly
9 discovered evidence; (5) the material facts were not
adequately developed at the state-court hearing; or (6)
for any reason it appears that the state trier of fact
did not afford the habeas applicant a full and fair fact
hearing.

9 Insyxiengmay, 403 F.3d at 670 (quoting Townsend, 372 U.S. at 313).

10 "An evidentiary hearing on a habeas corpus petition is
11 required whenever petitioner's allegations, if proved, would
12 entitle him to relief.'" Id. at 670 (quoting Turner v. Marshall,
13 63 F.3d 807, 815 (9th Cir. 1995)). If a petitioner failed to
14 develop the factual basis of a claim in the state courts, this
15 Court does not have discretion to conduct an evidentiary hearing
16 unless Petitioner shows that the following requirements of 28
17 U.S.C. § 2254(e)(2) are met:

18 (A) the claim relies on --

19 (i) a new rule of constitutional law, made
20 retroactive to cases on collateral review by
21 the Supreme Court, that was previously
unavailable; or

22 (ii) a factual predicate that could not have
23 been previously discovered through the
exercise of due diligence; and

24 (B) the facts underlying the claim would be sufficient
25 to establish by clear and convincing evidence that but
26 for constitutional error, no reasonable factfinder would
have found the applicant guilty of the underlying
offense.

27 28 U.S.C. § 2254(e)(2)(A)-(B) (West 2008). After satisfying §
28 2254(e)(2)(A)-(B), Petitioner must then "meet one of the Townsend

1 factors and make colorable allegations that, if proved at an
2 evidentiary hearing, would entitle him to habeas relief."
3 Insyxiengmay, 403 F.3d at 670.

4 The Supreme Court has been careful to limit the scope of
5 federal intrusion into state criminal adjudications and to
6 safeguard the states' interest in the integrity of their criminal
7 proceedings. Williams, 529 U.S. at 436 (citing Coleman v.
8 Thompson, 501 U.S. 722, 726, (1991); McCleskey v. Zant, 499 U.S.
9 467, 493 (1991). "Federal courts sitting in habeas are not an
10 alternative forum for trying facts and issues which a prisoner
11 made insufficient effort to pursue in state proceedings."
12 Williams, 529 U.S. at 437.

13 Thepsombandith appears to claim that he failed to develop the
14 state court record and maintains that to demonstrate ineffective
15 assistance of counsel, he must prove his counsel's omissions were
16 the result of negligence, oversight, or unreasonable strategy.
17 (Traverse 23.)

18 Indeed, an evidentiary hearing is appropriate if, among other
19 things, the state court hearing did not adequately develop the
20 facts or the fact-finding procedure was inadequate. Townsend, 372
21 U.S. at 313. But Thepsombandith's ineffective assistance claim
22 was fully developed in the state court record and considered by
23 the court of appeal. (See Lodgment No. 13, People v.
24 Thepsombandith, No. D047885, slip op. at 9-11.) A transcript of
25 the prosecutor's closing argument was included in the appellate
26 record. (See Lodgment No. 7, Rep.'s Tr., vol. 5.) The court of
27 appeal quotes from the transcript. (Lodgment No. 7, Rep.'s Tr.,
28

1 vol. 5, 522-23, 536-37; Lodgment No. 13, People v. Thepsombandith,
2 No. D047885, slip op. at 5-6.)

3 Because the factual basis of Thepsombandith's ineffective
4 assistance of counsel claim was developed in state court, he must
5 satisfy one of the six Townsend factors to be entitled to an
6 evidentiary hearing. Insyxiengmay, 403 F.3d at 670. None of the
7 factors requires a hearing in his case.

8 The merits of Petitioner's ineffective counsel claim were
9 resolved at the state appellate level. As discussed above, the
10 appellate court's factual determination regarding the alleged
11 negligence or oversight of trial counsel when he failed to object
12 is supported by the record. Additionally, the fact-finding
13 procedure employed was adequate to give Thepsombandith a full and
14 fair hearing. Thepsombandith has made no allegation of newly
15 discovered evidence. The material facts were adequately developed
16 at the state court hearing, and there is no indication that the
17 state trier of fact did not provide a full and fair fact hearing.

18 Even if Thepsombandith could meet one of the Townsend factors
19 for his ineffective assistance of counsel claim, a hearing is only
20 required where "petitioner's allegations, if proved, would entitle
21 him to relief.'" Id. (quoting Turner v. Marshall, 63 F.3d 807,
22 815 (9th Cir. 1995)). Assuming the facts are as Thepsombandith
23 alleges and his trial counsel's omissions were the result of
24 negligence, oversight, or unreasonable strategy, Thepsombandith is
25 not entitled to habeas relief. (See Traverse 23.) At most,
26 Petitioner's ineffective assistance claim would save his
27 prosecutorial misconduct claim from being procedurally defaulted.
28 But the prosecutorial misconduct claim fails on its merits.

