No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOE LOUIS ARMENTA

Petitioner,

v.

SCOTT KERNAN, Secretary of the California Department of Corrections

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME II

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APPENDIX INDEX

Volume II[1]

[1] Bates stamps have been added to these documents such that the pages within the tabs must are consecutively paginated. The Bates stamps appear at the lower right hand corner of the documents.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOE LOUIS ARMENTA, Petitioner-Appellant, v. SCOTT KERNAN*, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS, Respondent-Appellee.	CASE No. 5:15-cv-00415-DOC (RAO) NOTICE OF APPEAL (FRAP Rule 3(a)&(c), Rule 3-1, Rule 4, Rule 22(b)(1), Rule 24(a)(3); 9th Cir. Rule 22-1(a)&(d))

Notice is hereby given that Joe Louis Armenta appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 29, 2016, denying a 28 U.S.C. § 2254 petition for writ of habeas corpus.

Appellant need not pay a docket fee, because he was permitted to proceed in forma

*Scott Kernan has been substituted in place of Jeffrey A. Beard. Scott Kernan has succeeded Jeffrey A. Beard as the Secretary of the California Department of Corrections. (See FRAP 43(c)(2) ["The public officer's successor is automatically substituted as a party."].)

pauperis in the District Court action, within the meaning of FRAP Rules 3-1 and 24(a)(3).

///

///

Dated: July 30, 2016.

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JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOE LOUIS ARMENTA,

Petitioner,

v.

JEFFREY A. BEARD,

Respondent.

Case No. CV 15-00415 DOC (RAO)

JUDGMENT

Pursuant to the Court's Order Accepting Findings, Conclusions, and Recommendations of United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the Petition is denied, and this action is dismissed with prejudice.

DATED: June 29, 2016

David O. Carter

DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOE LOUIS ARMENTA,

Petitioner,

v.

JEFFREY A. BEARD,

Respondent.

Case No. CV 15-00415 DOC (RAO)

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records and files herein, and the Magistrate Judge's Report and Recommendation. Further, the Court has engaged in a *de novo* review of those portions of the Report to which Petitioner has objected. The Court accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge.

IT IS ORDERED that the Petition is denied, and Judgment shall be entered dismissing this action with prejudice.

DATED: June 29, 2016

David O. Carter

DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

Tab 11

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOE LOUIS ARMENTA,

Petitioner,

v.

JEFFREY A. BEARD,

Respondent.

Case No. CV 15-00415 DOC (RAO)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable David O. Carter, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. INTRODUCTION

On July 19, 2011, a Riverside County Superior Court jury convicted Joe Louis Armenta ("Petitioner") of four counts of attempted murder of a peace officer, including two counts that it found the charged offenses to be willful, deliberate, and premeditated (Pen. Code, § 187, subd. (a), 664, subds. (e), (f)), all with personal firearm discharge enhancements (Pen. Code § 12022.53, subd. (c)); four counts of assault with a firearm on a peace officer (Pen. Code, § 245, subd. (d)(1)), all with

personal firearm discharge enhancements (Pen. Code, § 12022.53, subd. (c)); one count of unlawful possession of a firearm (Pen. Code, former § 12021, subd. (a)(1)); and one count of unlawful possession of ammunition (Pen. Code, former § 12316). (Clerk's Transcript ["CT"] 1-3, Lodg. No. 1.) Petitioner was sentenced to a determinate term of 62 years 8 months in prison, plus three consecutive indeterminate terms of 29 years to life in prison with an aggregate minimum parole period of 29 years. (*Id.* at 762-63.)

Petitioner then appealed his conviction and sentence. (Lodg. Nos. 3-4.). The California Court of Appeal affirmed the judgment in a reasoned decision. (Lodg. No. 5.) The California Supreme Court denied review without comment on December 11, 2013. (Lodg. No. 7.)

Petitioner filed the instant Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"), pursuant to 28 U.S.C. § 2254, and a Memorandum of Points and Authorities in Support of the Petition ("Pet. Mem."), on March 5, 2015. Respondent filed an Answer to the Petition ("Answer") and a Memorandum of Points and Authorities in Support of the Answer ("Resp. Mem."). Respondent also lodged the relevant state records. Petitioner then filed a Traverse ("Traverse") and a Memorandum of Points and Authorities in Support of the Traverse ("Traverse Mem.").

In his Petition and Memorandum of Points and Authorities in support thereof, Petitioner raises three grounds for relief. First, Petitioner claims that the prosecutor engaged in repeated acts of misconduct in violation of his due process rights. Petitioner's second claim is that the trial court erroneously admitted evidence that Petitioner killed an innocent bystander in violation of his due process rights and right to a fair trial. Finally, Petitioner claims that the trial court erroneously refused to instruct the jury on attempted voluntary manslaughter based on a heat of passion defense in violation of his constitutional rights.

II. FACTUAL SUMMARY[1]

On January 6, 2009, shortly after 9:00 p.m., six law enforcement officers from a multiagency task force went to Petitioner Joe Louis Armenta's ("Petitioner") residence in Riverside, California to execute a felony warrant. At the time, Petitioner was on felony probation with full search terms.

Two officers knocked on the front door and rang the doorbell for at least five minutes. The officers did not, however, announce their presence because their standard procedure was to wait until someone answered the door. After a break, one of the officers purportedly said, "Police Department. It's the Riverside Police Department."

Meanwhile, the other officer and a third officer went around the back of Petitioner's residence, climbed up a ladder to the second-floor balcony, and pushed the sliding glass door on the balcony, causing an alarm to beep. They, along with a fourth officer, then entered the master bedroom.

At that point, Petitioner began yelling out asking who entered his residence, but purportedly did not hear a response. The officers, on the other hand, claimed that they responded, "Riverside Police. Probation Search." After the officers entered into the residence, Petitioner, who was armed, swept the red dot of a laser attached to his gun toward the bedroom wall and fired two shots. The two officers in the bedroom fired back. Petitioner barricaded himself in the laundry room during the confrontation. A few more shots were fired, although it is unclear whether any of the shots came from Petitioner. A standoff then ensued, lasting approximately six hours, during which Petitioner spoke to a police negotiator. Petitioner was eventually arrested.

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[1] The relevant facts are drawn substantially from the California Court of Appeal's unpublished decision on direct appeal. (*See* Lodg. No. 5 at 2-10.) Petitioner has not rebutted the Court of Appeal's statement of facts with clear and convincing evidence, and the facts must therefore be presumed correct. 28 U.S.C. § 2254(e)(1).

III. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). In particular, this Court may grant habeas relief only if the state court adjudication was contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court or was based upon an unreasonable determination of the facts. *Id.* at 100 (citing 28 U.S.C. § 2254(d)). In a habeas action, this Court reviews the state courts' last reasoned decision. *Maxwell v. Roe*, 628 F.3d 486, 495 (9th Cir. 2010).

A state court's decision is "contrary to" clearly established federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts … materially indistinguishable" from a decision of the Supreme Court but reaches a different result. *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002).

A state court's decision is based upon an "unreasonable application" of clearly established federal law if it applies the correct governing Supreme Court law but unreasonably applies it to the facts of the prisoner's case. *Williams*, 529 U.S. at 412-13. A federal court may not grant habeas relief "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be *unreasonable*." *Id.* at 411 (emphasis added).

In determining whether a state court decision was based on an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), such a decision is not

unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010). The "unreasonable determination of the facts" standard may be met where: (1) the state court's findings of fact "were not supported by substantial evidence in the state court record;" or (2) the fact-finding process was deficient in some material way. *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (citing *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004)).

Overall, Section 2254(d) presents "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt[.]" *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011) (quotations omitted).

Here, Petitioner raised all three grounds in both the California Court of Appeal and the California Supreme Court on direct appeal. (*See* Lodg. No. 3 at 35-86; Lodg. No. 6 at 3-36.) The California Court of Appeal rejected Petitioner's claims on the merits in a reasoned opinion, and the California Supreme Court denied them without comment or citation. (*See* Lodg. No. 5 at 4, 10-32; Lodg. No. 7.) Accordingly, under the "look through" doctrine, Petitioner's claims for federal habeas relief are deemed to have been rejected for the reasons given in the last reasoned decision on the merits, which was the California Court of Appeal's decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 802-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991).

IV. DISCUSSION

A. Petitioner's Claim Of Prosecutorial Misconduct (Claim 1) Does Not Warrant Habeas Relief.

Petitioner contends that the prosecutor engaged in multiple instances of misconduct, which prejudicially undercut his defense. (*See* Pet. Mem. at 13-14.) Petitioner alleges five instances of misconduct, claiming that they comprise a

pattern of deceit that deprived Petitioner of a fair trial and his due process rights. (*See id.* at 14-23.) Respondent argues that Petitioner's claim of misconduct is partially procedurally barred or, alternatively, fails on its merits. (Resp. Mem. at 9-11.)

1. *Background*

On June 14, 2011, during a pretrial hearing, Petitioner's trial counsel moved the trial court to exclude any evidence of his 1999 conviction concerning an incident in which Petitioner was shot at by a gang member named Rudy Gil.[2] (Lodg. No. 2 at 183-84.) In that incident, Petitioner defended himself by shooting back, accidently striking and killing a four-year old bystander. (*Id.* at 185.) Petitioner cooperated and Gil was convicted under a provocative act murder theory. (*Id.*) The prosecutor, however, disputed some of the facts summarized by Petitioner's trial counsel. (*Id.* at 188-89.) The trial court found that the incidents from the 1999 conviction were admissible for purposes of impeachment. (*Id.* at 186-87.)

However, the court expressed concern that the facts of the 1999 incident could become the subject of additional litigation during trial. (*Id.* at 190.) In response, Petitioner's trial counsel gave a lengthier recital of the facts concerning the 1999 incident and explained that the Riverside County District Attorney's Office never took the position that Petitioner was responsible for killing the four-year-old victim. (Lodg. No. 2 at 191-92.) Counsel then argued that any evidence concerning the four-year-old victim's death was irrelevant to the trial and would be highly prejudicial to Petitioner. (*Id.* at 192-93.) The trial court agreed that any mention of the identity of the four-year-old victim would not be material to the case. (*Id.* at 193.) The court thus held that any reference to the identity of the innocent minor victim should be excluded. (*Id.* at 195, 196.) However, the court

[2] In exchange for testifying against Gil, Petitioner pleaded guilty to being a felon in possession of a firearm and sentenced to time served. (Lodg. No. 5 at 8.)

clarified that it was allowing the prosecutor to present any impeachment or rebuttal evidence concerning the 1999 incident and that it was *not* ruling on whether the prosecutor may introduce evidence that Petitioner accidently struck a bystander. (*See id.* at 196-98.)

Petitioner's trial counsel requested clarification whether the prosecutor could introduce evidence that Petitioner shot and killed an individual. (Lodg. No. 2 at 198.) The trial court responded that it was "still in the dark about that, really." (*Id.*) Counsel argued that the evidence should be limited to only that Petitioner was assaulted by Gil, resulting in the death of another individual. (*Id.*) The court agreed to that limitation, so long as Petitioner did not testify more extensively:

> All right. And I'll limit the references to that incident to the scope that you've just suggested, … unless [Petitioner] testifies more extensively … during his testimony.

(*Id.*)

On June 23, 2011, the prosecutor gave her opening statement. (Lodg. No. 1 at 292-93.) The prosecutor began by describing the expected testimony of several police officers who would testify about the night of Petitioner's arrest. (*See* Lodg. No. 2, Augmented Tr. at 915-21.) She stated that the officers planned to make a routine arrest at Petitioner's residence for an outstanding warrant, made a "soft knock and announce" by the front door of the residence, and later pounded the door and yelled, "This is the Riverside Police Department," when nobody responded. (*Id.* at 915-17.) The prosecutor also stated that two officers walked to the back of the residence, climbed up a ladder to the master bedroom, and opened the sliding door to the bedroom once they heard, "This is the Riverside Police Department." (*Id.* at 917-18.) The two officers walked through the bedroom onto a balcony when Petitioner yelled, "Who's up there?" (*Id.* at 918.) The prosecutor stated that the officers responded, "This is Riverside Police Department. We're here for Joe

Armenta. We're conducting a probation search." (*Id.*)

At that point, the prosecutor stated, Petitioner shot at the officers with a .45 Sig Sauer. (Lodg. No. 2 at 918.) The prosecutor described the shooting, where the officers were positioned inside the residence, and Petitioner's statements and demeanor during these events. (*See id.* at 918-20.)

The prosecutor then claimed that she anticipated hearing concocted excuses from the defense to rationalize Petitioner's behavior:

> [Prosecutor]: I anticipate that you are going to hear some excuses from defense, some made up stories. When people are caught, they try to get out of it. Two years is a lot of time to make up something. After you heard –
>
> [Petitioner's counsel]: I'm going to object to that, Your Honor, as argument.
>
> The Court: Sustained.
>
> [Petitioner's counsel]: Move to strike it.
>
> The Court: Granted.
>
> [Prosecutor]: After you've heard the evidence and you listen and evaluate the testimony of each officer from that evening, you will return a guilty verdict because it will be beyond a reasonable doubt that when [Petitioner] aimed his firearm at these officers, he intended to kill them.

(*Id.* at 920-21.)

Petitioner's trial counsel then gave his opening statement. (Lodg. No. 1 at 292-93.) He began by explaining that Petitioner had feared for his life because "he had been assaulted and shot by a man named Rudy Gil," a gang member, "in an incident that resulted in the death of an innocent victim." (Lodg. No. 2 at 921.) Counsel stated that Petitioner cooperated with the authorities, resulting in Gil's conviction and life sentence. (*Id.*) He claimed that because of Petitioner's cooperation, Petitioner was a "marked man ever since." (*Id.* at 922.)

Counsel stated that, against this backdrop, Petitioner panicked when officers entered his residence unannounced. (Lodg. No. 2 at 922.) He claimed that Petitioner "fired a couple of warning shots to keep [the entering officers] at bay," but never intentionally fired at them, and stopped shooting immediately when Petitioner realized the officers were the police. (*Id.* at 923.) Counsel also claimed that Petitioner contemplated committing suicide because he was likely to be killed in prison, but never intended to harm anyone else. (*Id.* at 923-24.) He then said that because the police officers improperly entered Petitioner's residence, they attempted to cover up their wrongdoing:

> But because the police screwed this warrant execution, or probation search, or whatever it was up[,] and because the police are more reluctant than most to admit mistakes, especially when it results in a shooting incident, their first reaction was to close ranks. And they got [Petitioner's] family at the scene and they tried to get them to say that [Petitioner] would have killed the police rather than go back to prison, which of course, as we now know and as you will hear, never happened.
>
> And then they embellished their reports, and they put words in his mouth that he never said, and they gave him motivation that he never had … in an effort to turn this fiasco into an attempted murder case. And they even came into court and fabricated testimony in this very case about what he said and didn't say and did and didn't do.
>
> Now, I don't know how all of this is going to play out here. I'm not clairvoyant, but I can tell you one thing: You're going to get more of the same, more lies, more fabricated testimony from the police, to cover their own mistakes. But facts are stubborn things, ladies and gentlemen. You can't change 'em if you don't like 'em, no matter how much you wish they were different. No matter how inconvenient they are, they are what they are.

(*Id.* at 924-25.)

///

The next day, Petitioner's trial counsel asked the trial court to consider as misconduct the prosecutor's statement that the defense was going to present excuses and make up stories and admonish the jury that the statement was improper, without any basis, and should not be considered. (Lodg. No. 2 at 258-59.) The prosecutor explained that her statement was intended to address the defense theory that Petitioner was afraid as the result of a ten-year-old assault incident, which Petitioner's trial counsel raised in several pre-trial hearings. (*Id.* at 259-60.) She also explained that Petitioner had made different statements at the time of his arrest. (*Id.* at 260.) After reading the trial transcript, the trial court found that the prosecutor's statement about "made up stories" improperly implied that Petitioner would be testifying, but that the statement did not amount to misconduct or was done in bad faith. (*Id.* at 263-64.)

The trial court then reconvened the jury, read to them the pertinent statement made by the prosecutor during her opening statement, and admonished them to completely disregard it. (*Id.* at 268.) The court explained that the statement was improper and that it should not be treated as evidence:

> I'll remind you that the comments of counsel are not evidence and they're not to be considered in any way as evidence of the facts in this case.
>
> I have determined that [the prosecutor's] comments were to some extent inadvertent, but they were inappropriate, and argumentative, and were not properly part of an opening statement.
>
> To the extent that a further inference might be made that defense counsel is in any way complicit in possibly fabricating something, such an inference is entirely inappropriate. There is absolutely no suggestion of such at this time, and any suggestion that defense counsel might be engaged in such is inappropriate.
>
> And I have determined that [the prosecutor] did not so intend, but an inadvertent inference might be made from

> those comments[,] so that is why I am admonishing you to completely disregard that portion of [the prosecutor's] opening statement.

(*Id.* at 268-69.)

On July 5, 2011, the prosecutor called to the stand Adam Rudolph, a special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives. (Lodg. No. 2 at 881-82.) Rudolph testified that he was a member of a task force with several Riverside police officers that participated in Petitioner's arrest. (*See id.* at 884-85.) Rudolph further testified that earlier in January 2009, he received information from other officers in the task force that Petitioner was on probation for a firearms offense:

> Q: Special Agent Rudolph, in January 2009, did you receive information about a suspect by the name of [Petitioner]?
>
> A: Yes.
>
> Q: What information did you have?
>
> A: I received information from PACT Officers Hibbard and Hill that [Petitioner] had a felony warrant for his arrest, was on felony probation for a firearms offense in the county, and was reportedly living in a residence in Indian Hills.

(*Id.* at 892.) During cross-examination, Petitioner's counsel asked Rudolph whether Petitioner was actually on probation for a firearms offense:

> Q: [Petitioner] wasn't on probation for a firearms offense, was he?
>
> A: I believe it was some type of weapons offense, yes.
>
> Q: Yeah. But you said firearms offense on direct. It wasn't firearms, was it?
>
> A: I don't recall the specific offense.
>
> Q: Brass knuckles sound more like it to you?

***

A: I couldn't say.

(*Id.* at 928.) Upon redirect, the prosecutor asked Rudolph whether the information he received and the no-bail warrant showed that Petitioner was on probation for a firearms or weapons charge:

> Q: Special Agent Rudolph, defense counsel asked you about the defendant being on felony probation out of Riverside. Isn't the information that you had that he was on felony probation because he was convicted of manufacturing[,] importing, selling, an undetectable firearm?
>
> A: I believe that's correct, yes.
>
> Q: And also for the warrant out of San Bernardino, your information was that there was a no-bail warrant for weapons or explosives, correct?
>
> A: Correct

(*Id.* at 937-38.)

Following the conclusion of Rudolph's testimony, Petitioner's trial counsel objected to Rudolph's testimony concerning what Petitioner was on probation for. (Lodg. No. 2 at 957.) Counsel argued that the prosecutor misled the jury because Petitioner was on probation for possession of brass knuckles, not firearms. (*See id.* at 957-60, 965-66.) The prosecutor responded that the officers only knew Petitioner pleaded guilty to a violation of California Penal Code § 12020(a)(1), which is prefaced as pertaining to possession, sale, or manufacture of a firearm. (*See id.* at 959-64, 967-68.) The trial court recognized that the officers may have believed Petitioner was on probation for a firearms-related offense, but stated that Rudolph's testimony may still be misleading because Petitioner pleaded guilty to possessing metal knuckles. (*See id.* at 962, 964.) The court noted, though, that the statutory provision was poorly drafted. (*Id.* at 963.) The court concluded that the

prosecutor was not engaging in misconduct, but agreed with Petitioner's trial counsel that the jury should be apprised of what Petitioner actually pleaded to:

> [I] don't believe that you are guilty of misconduct, [the prosecutor], because you were relying to some degree upon documentation that I think is – the way I view it, what you're looking at and reciting right now is more or less clerk shorthand. In addition, the statute, which we have just discussed under the heading and otherwise, is not as clear as it should be.
>
> And I think it is okay for you to elicit testimony as to what was in the officer's mind at the time that they approached the house, whether it was erroneous or not, if it was in good faith, which seems to me to be the case. I don't think that the officers are required to go back and comb the record. You can rely on the CII or other official information, even if it's not as clear as we'd like, in order to form their plan of attack.
>
> But on the other hand, I agree with [Petitioner's counsel] that the jury should be apprised of what [Petitioner] was actually on probation for.

(*Id.* at 968-69; *see also id.* at 971.) The Court later instructed the jury that as a matter of law, Petitioner was on probation for a violation of California Penal Code § 12020(a)(1) for manufacturing, importing, selling, offering and exposing, or possessing metal knuckles. (*Id.* at 971-72.)

On July 7, 2011, Petitioner's trial counsel called Petitioner to the stand. (Lodg. No. 2 at 1098-99.) Petitioner stated that he believed a gang wanted to kill him because he testified against Gil in 1999. (*Id.* at 1104.) Petitioner further testified that Gil was charged with first-degree murder and attempted murder. (*Id.; see also id.* at 1109.) Petitioner also testified that he was the victim of the attempted murder charge. (*Id.* at 1104.) During cross-examination, Petitioner acknowledged that the 1999 events involved a murder, aside from the attempted murder of Petitioner. (*Id.* at 1159.) Petitioner then explained that he got out of a

car and aimed a gun at Gil and attempted to shoot Gil. (*See id.* at 1159-60.) Petitioner confirmed that his firearm killed a bystander:

> [Prosecutor:] And when you pulled the trigger, did your firearm kill an innocent bystander?
>
> [Petitioner:] Yes, ma'am.

(*Id.* at 1160.) Petitioner's trial counsel immediately called for a sidebar. (*Id.*) At sidebar, the parties disputed whether any evidence that Petitioner killed a bystander was previously ordered excluded. (*See id.* at 1161-63.) The court deferred ruling on the issue until after receiving the transcript of the relevant pre-trial hearing. (*Id.* at 1163.)

After the jury adjourned for their lunch break, the trial court returned to the issue of Petitioner's testimony. (Lodg. No. 2 at 1183-84.) Petitioner's trial counsel moved for a mistrial. (*Id.* at 1184.) After reading a rough transcript of the relevant pre-trial hearing, the court stated the prosecutor was allowed to cross-examine Petitioner regarding the bystander. (*Id.* at 1187.) The parties continued to dispute the limits of the court's evidentiary order and the court conceded that its ruling was "insufficiently delineated," but suggested that the prosecutor "took the ball and ran with it." (*Id.* at 1189.) The court stated that the intent of its evidentiary ruling was that "there would be absolutely no reference to a minor child as having been the victim." (*Id.* at 1190.)

After taking a brief recess, the trial court reaffirmed its conclusion and findings. (*See* Lodg. No. 2 at 1191-93.) The court stated that its evidentiary ruling was not done with sufficient particularity for either party to understand the limits, but it was clear neither party was to introduce evidence that a minor was killed. (*Id.* at 1192.) The court further stated that, based on the evidentiary ruling, the prosecutor's questioning was permissible, but that the prosecutor should not have used the term, "innocent bystander":

///

> I still think that, within the scope of the order that I made, it was permissible to show that a third-party … was killed in the interaction, and it explains and I think makes more complete, [Petitioner's] direct testimony with respect to the circumstances of the 1999 incident, and for that reason is the fair subject of cross-examination.
>
> The use of the term innocent bystander can be somewhat inflammatory, but under all of the circumstances, I believe that it's a minor reference, so long as there's no further repetition of that, that will not inflame or influence the jury in its decision, and as I've determined does not demonstrate that [Petitioner] is quick to shoot or that he's ever been an aggressor in any type of firearms use.
>
> So I don't believe that it would be improperly utilized by the jury for the purposes you're concerned about … and for those reasons, I'll deny the motion for mistrial.

(*Id.* at 1193.) Petitioner's trial counsel protested the court's finding, arguing that the plain meaning of the evidentiary ruling and the discussions beforehand indicate that any evidence that Petitioner shot a bystander was to be excluded. (*See id.* at 1193-96.) The trial court agreed to revisit the issue once it received a complete copy of the transcripts. (*Id.* at 1196.)

Later, Petitioner's trial counsel contended that a mistrial should be declared because the prosecutor's questioning of Petitioner about killing a bystander was specifically prohibited by the evidentiary ruling and was the fourth instance of prosecutorial misconduct. (*See* Lodg. No. 2 at 1207-14, 1217-18.) The trial court denied Petitioner's motion for a mistrial and declined to find prosecutorial conduct, stating that the prosecutor's questioning was permitted under the evidentiary ruling. (*See id.* at 1218.) The court also found that while the evidentiary ruling was unclear, it did not actually intend to rule on whether the prosecutor could bring evidence that Petitioner's firearm killed a bystander:

///

> My ruling was unclear. To the extent that there is any blame to be assigned to this, I think it is the Court's fault, that my ruling was less than transparent with respect to the extent to which the district attorney could inquire into the circumstances of the 1999 shooting.
>
> My review of the full transcript suggests that we discussed at the beginning the concern about the status of the victim as a four-year-old minor. We got into the discussion that [the prosecutor] has just eluded to, with respect to differences of opinion as to the exact circumstances of the – of the incident in 1999. I was still in the dark, as I've suggested in the transcript, about what went on and who shot who when, and afforded at that time [the prosecutor] a further opportunity to explicate on that.
>
> But then at that point, [Petitioner's counsel], you did raise an issue that I think was not as – not clear to me. I think that you certainly had a certain intent, but it was not clear to me that you asked for an order that there be no reference to [Petitioner] having fired any weapon or being – I don't even want to say responsible – that he fired a weapon which caused the death of another person.
>
> If I had understood that to be the scope of your motion, I can't say how I would have ruled, but I may very well have let it in because I think the district attorney would be allowed to inquire as to the circumstances of that incident to a full extent, and that I excluded reference to the status of the victim in order to avoid inflaming the jury and causing an emotional response to their knowledge of the fact of the status of the victim.

(*Id.* at 1218-19.)

On July 13, 2015, the prosecutor and Petitioner's trial counsel gave their closing arguments. Petitioner's counsel argued that the police violated the knock-and-announce rule by failing to announce their presence before entering into Petitioner's residence. (*See, e.g.*, Lodg. No. 2 at 1550-52, 1570-71.) He also

argued that Petitioner was frightened by the police's unannounced entrance into his residence given the threats to his life by his former gang and that the evidence showed Petitioner explained this fear to the police after his arrest:

> [Petitioner] thought [the police officers] were trying to kill him. He thought they were the East Side Rivas or other intruders with evil intentions, and he had reason to think so. You heard the evidence. We talked about it in opening statement. I told you what the evidence would show in this case, ladies and gentlemen, and I went through it. I told you that about ten years before he had been assaulted, shot by a guy named Rudy Gil, an incident which resulted in the death of somebody else. I told you that Gil was a member of the Rivas. I told you the D.A. prosecuted Rudy Gil for murder, and [Petitioner] testified against him.
>
> ***
>
> Was any of this evidence refuted by the People? Anybody come in and say, "No, that's not so. He's making it up?" The only thing we heard was in opening, "Oh, [Petitioner] has had two years to make up a story." Baloney. Absolute baloney.
>
> He told the same thing to you that he said to the officers when he was interviewed. He didn't change anything. He's the only one that did give a consistent version of events.

(*Id.* at 1564.)

In her rebuttal, the prosecutor argued to the jury that there was no violation of the knock-and-announce rule. (*See id.* at 1576-79.) She argued what the legal standard was for the knock-and-announce rule, which Petitioner's trial counsel objected to multiple times. (*See id.* at 1577-79.) The trial court admonished the jury members after each objection that if they believed the prosecutor misstated the law, they were to rely upon the instructions given to them by the Court. (*Id.*) The prosecutor also argued that Petitioner had never told anyone before the trial that he believed gang members, rather than the police, had entered into his residence:

> It's unreasonable that [Petitioner] thought that those officers were the East Side Rivas. What, are the East Side Rivas hiring White hitmen? Are the East Side Rivas now coming with helicopters and sirens? No. Do the East Side Rivas knock for ten minutes at your front door and let you answer it? That's what you'd have to believe.
>
> And you'd have to believe that [Petitioner] is being honest when he's telling you he thought it was the East Side Rivas, which he never mentioned to Mr. Flores for three and a half hours. He never uttered the words "East Side Rivas" until this trial. He never told that to anyone.

(*Id.* at 1581.)

Two days later, on July 15, 2011, Petitioner's trial counsel requested admonitions for the prosecutor's purported two acts of misconduct during closing argument. (Lodg. No. 2 at 1600.) He argued that the prosecutor misstated the law concerning the knock-and-announce rule. (*Id.* at 1600-01.) He also claimed that the prosecutor falsely argued Petitioner had not informed anyone before trial that he was threatened by a gang, feared for his life, and that he believed gang members were inside his residence rather than the police. (*See id.* at 1601-08, 1613.) Counsel read a partial transcript of Petitioner's interview with Investigator LeClair to support his claim.[3] (*See id.* at 1602-03; *see also id.* at 1612-1613.) The prosecutor contended that she corrected her statement on the knock-and-announce rule by arguing that Petitioner had told the police not to come into his residence, thus amounting to a refusal. (*Id.* at 1608-09.) The prosecutor also disagreed with counsel's claim that Petitioner had told a police investigator of his fear and belief regarding the gang. (*See id.* at 1609-11.) The court declined to find any prosecutorial misconduct, but reserved its ruling on treating Petitioner's arguments as a motion for a mistrial. (*Id.* at 1614.)

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[3] The portion of the interview read by Petitioner's trial counsel was not in evidence for the jury to consider, though a different portion was in evidence. (*See id.* at 1611, 1613-14.)

On July 18, 2011, Petitioner's trial counsel asked to submit the recording of Petitioner's interview with Inspector LeClair as a court exhibit. (Lodg. No. 2 at 1621.) The trial court granted the request. (*Id.* at 1621-22; *see also* Lodg. No. 1 at 477.)

On July 19, 2011, the jury returned a guilty verdict against Petitioner for attempted murder of a police officer (counts 1-2), premeditated attempted murder of a police officer (counts 3-4), assault with a firearm on a police officer (counts 5-8), possession of a firearm by a felon (count 9), and possession of ammunition by a prohibited person (count 10). (Lodg. No. 1, Supplemental at 1-4.) The trial court declared a mistrial as to the special allegation of premeditated murder for counts 1 and 2. (*Id.* at 3.)

On August 31, 2011, Petitioner's trial counsel filed an application for a new trial on the basis of prosecutorial misconduct. (Lodg. No. 1 at 627-44.) The trial court held a hearing on the application on September 9, 2011. (*Id.* at 741.) After the parties argued, the trial court denied the application. (*See* Lodg. No. 2 at 1646-85.) The court found that none of the instances that Petitioner alleged was prosecutorial misconduct resulting in prejudice. (*See id.* at 1677-85.)

In his direct appeal, Petitioner argued, in part, that his due process rights were violated because the prosecutor committed misconduct in six separate instances during the trial. (*See* Lodg. No. 3 at 35-77.)

The California Court of Appeal denied Petitioner's claim. (*See* Lodg. No. 5 at 4, 10-28.) The appellate court found that Petitioner either forfeited the claim or the alleged instances were not misconduct and/or did not amount to prejudice:

- The prosecutor's opening statement about made up stories was not prejudicial because the trial court admonished the jury to disregard the comment;

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- The prosecutor's examination on the layout of Petitioner's residence was forfeited by failing to request an admonition, nor was it misleading or prejudicial;[4]

- The prosecutor's examination of Special Agent Rudolph regarding Petitioner's felony probation was not false because it pertained to the officers' state of mind in executing an arrest warrant and was not prejudicial because the trial court admonished the jury;

- The prosecutor's cross-examination of Petitioner regarding the death of a bystander did not constitute misconduct because the trial court's evidentiary order did not clearly prohibit that evidence;

- The prosecutor's closing argument regarding the knock-and-announce rule was forfeited because Petitioner failed to explain on appeal how the argument misstated the law and, even then, the prosecutor did not misstate the law and it was not prejudicial; and

- The prosecutor's closing argument regarding Petitioner's fear of the gang was forfeited because Petitioner failed to object and request an admonition when the alleged misconduct occurred and, even then, was not prejudicial because the trial record did not include Petitioner's interview with Inspector LeClair and was merely an overstatement that the prosecutor could have made more narrowly.

(*See id.* at 10-28.)

2. *Federal Legal Standard and Analysis*

In rejecting Petitioner's ground for relief, the California Court of Appeal applied the proper legal standard for analyzing federal law challenges involving prosecutorial misconduct. (*See id*. at 10-11.) Accordingly, the court of appeal's resolution of Petitioner's claim was not contrary to the Supreme Court's clearly established precedents. Petitioner, therefore, cannot obtain habeas relief on this claim unless he can show that the court of appeal unreasonably applied the Supreme Court's clearly established precedent – that is, he must show that the court of appeal unreasonably applied the governing legal standard to the facts of his case. *See*

[4] Petitioner did not raise this claim in the instant Petition.

Penry v. Johnson, 532 U.S. 782, 792, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001). As explained below, Petitioner cannot make that showing.

Allegations of prosecutorial misconduct are governed by the standard set forth by the Supreme Court in *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *see Parker v. Matthews*, __ U.S. __, 132 S. Ct. 2148, 2155, 183 L. Ed. 2d 32 (2012) (*per curiam*) (identifying *Darden* as "[t]he 'clearly established Federal law'" relevant to claims of prosecutorial misconduct arising from prosecutor's closing arguments). In *Darden*, the Supreme Court explained that prosecutorial misconduct does not rise to the level of a constitutional violation unless it "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)); *Comer v. Schriro*, 480 F.3d 960, 988 (9th Cir. 2007). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982); *see also Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment.").

To determine whether a prosecutor's comments amount to a due process violation, the reviewing court must examine the entire proceedings so that the prosecutor's remarks may be placed in their proper context. *Boyde v. California*, 494 U.S. 370, 384-85, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). In making this determination, the reviewing court must be mindful that the standard set forth in *Darden* is a "very general one." *Parker*, 132 S. Ct. at 2155. Consequently, it "leav[es] courts more leeway . . . in reaching outcomes in case-by-case determinations." *Id.* (citations and internal quotations omitted). Thus, to establish that a state court's application of the *Darden* standard is unreasonable, the petitioner must show that the state's decision "was so lacking in justification that

there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Parker*, 132 S. Ct. at 255. Assuming, however, that a petitioner can establish that the prosecutor engaged in misconduct, habeas relief nevertheless is unwarranted unless the petitioner can show that the misconduct had a substantial and injurious impact on the jury's verdict. *Karis v. Calderon*, 283 F.3d 1117, 1128 (9th Cir. 2002) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)).

The Supreme Court has long recognized, "arguments of counsel generally carry less weight with a jury than do instructions from the court." *Boyde v. California*, 494 U.S. 370, 384, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990); *Waddington v. Sarausad*, 555 U.S. 179, 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009). Nevertheless, "[i]t is clearly established under Supreme Court precedent that a prosecutor's 'misleading . . . arguments' to the jury may rise to the level of a federal constitutional violation." *Deck v. Jenkins*, 814 F.3d 954, 977-78 (9th Cir. 2016) (citation omitted).

In determining whether a misleading argument amounts to a constitutional violation, courts consider the following factors: (1) whether the prosecutor's misstatement was intentional or unintentional; (2) whether the record contains any evidence suggesting that the jury relied on, or had difficulty applying the correct law due to, the prosecutor's misstatement; (3) whether the trial court took any curative steps to address the prosecutor's offending statement; and (4) whether the evidence implicating the defendant in the charged crime was strong or weak. *See id.* at 20-24.

a. The prosecutor's opening statement concerning Petitioner's defense.

Petitioner claims the prosecutor engaged in misconduct during her opening statement by accusing Petitioner and his trial counsel of fabricating a defense. (*See* Pet. Mem. at 14-15.) However, the trial court rebuked the prosecutor for her

statements before the jury and admonished the jury to ignore the statements and not consider the accusations as evidence. Accordingly, the California Court of Appeal's conclusion that any potential misconduct by the prosecutor was not prejudicial was neither contrary to nor an unreasonable application of clearly established federal law. *See, e.g.*, *Sassounian v. Roe*, 230 F.3d 1097, 1106 (9th Cir. 2000) (finding no prejudice for prosecutor suggesting defense counsel had fabricated evidence because the trial court sustained several objections to it and instructed the jury that lawyers' comments and argument were not evidence).

b. Eliciting testimony from Special Agent Randolph.

Petitioner's next claim of misconduct is that the prosecutor improperly elicited testimony from Special Agent Randolph that Petitioner was on probation for a firearms offense when Petitioner was actually on probation for possession of metal knuckles. (Pet. Mem. at 15.) Petitioner, though, fails to show improper conduct. The prosecutor specifically asked questions concerning what Special Agent Randolph knew around the time the officers arrived at Petitioner's residence. Indeed, Petitioner has not shown that Special Agent Randolph knew Petitioner was actually on probation for possession of metal knuckles. *See Jones v. Ryan*, 691 F.3d 1093, 1102 (9th Cir. 2012) (to show a due process claim based on the presentation of false evidence, a petitioner must show: "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) … the false testimony was material").

In any event, Petitioner has not adequately shown prejudice because the trial court instructed the jury that, as a matter of law, Petitioner was on probation for possessing metal knuckles, not firearms. *See Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987) (finding that the Court "normally presume[]s that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it").

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Accordingly, the California Court of Appeal's decision was neither contrary to nor an unreasonable application of clearly established federal law.

c. Eliciting testimony from Petitioner regarding the death of a bystander.

Petitioner's third claim of misconduct is that the prosecutor intentionally elicited testimony from Petitioner that had been previously ruled inadmissible. (*See* Pet. Mem. at 16-18.) In particular, Petitioner contends that the court precluded any evidence that Petitioner fired a shotgun in self-defense and killed an innocent bystander, but the prosecutor elicited testimony from Petitioner that he had shot and killed an innocent bystander while defending himself from a gang. (*Id.* at 16.)

Petitioner fails to show that the prosecutor violated the court's evidentiary ruling, thus failing to show any misconduct. In fact, the trial court expressly held that the prosecutor's cross-examination did not violate its evidentiary ruling. The California Court of Appeal affirmed the trial court's finding. Therefore, while Petitioner protests the state courts' findings, claiming that the prosecutor did violate the evidentiary order and thus engaged in misconduct (*see* Pet. Mem. at 17-18), Petitioner's claim lies as a state law challenge to the interpretation of the trial court's evidentiary order, which is not cognizable for federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to examine state-court determinations on state-law questions."); *Johnson v. Sublett*, 63 F.3d 926, 931 (9th Cir. 1995) (state law foundational and admissibility questions raise no federal question); *see also Leinweber v. Tilton*, 490 F. App'x 54, 57 (9th Cir. 2012) ("[Petitioner] complains of instances in which the state trial court admitted prior bad act evidence over defense counsel's objection, and the prosecutor then referred to the evidence at closing argument. This contention does not address prosecutorial misconduct, but rather goes to the state trial court's admission of that evidence, an issue of state law.")

Accordingly, the California Court of Appeal's decision was neither contrary to nor an unreasonable application of clearly established federal law.

d. Defining the knock-and-announce rule during closing argument.

Petitioner's fourth claim of misconduct is that the prosecutor repeatedly misstated the law applicable to the knock-and-announce rule during her closing argument. (Pet. Mem. at 19-20.) Respondent, however, argues that Petitioner's claim is procedurally barred because the California Court of Appeal denied it for failure to explain how the prosecutor misstated the law. (Resp. Mem. at 11); *see also, e.g.*, *Patterson v. Beard*, Case No. 13-CV-1536-MMA, 2015 WL 412841, at *15 (S.D. Cal. Jan. 30, 2015) (finding that California's inadequate briefing rule is an "independent and adequate state law procedural rule that bars federal relief"). Petitioner responds that California's inadequate briefing rule is inconsistently applied by the state courts, citing to several cases where the state courts declined to apply the inadequate briefing rule. (Traverse Mem. at 16); *see also Walker v. Martin*, 562 U.S. 307, 315-16, 131 S. Ct. 1120, 179 L. Ed. 2d 62 (2011).

Nonetheless, proceeding to the merits of the claim, the Court finds that Petitioner's fourth claim of misconduct fails. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); *Lambrix v. Singletary*, 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 711 (1997) (noting that courts may consider and deny habeas petitions on the merits notwithstanding asserted procedural bars); *Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005) (holding that an unexhausted claim may be denied where "it is perfectly clear that the applicant does not raise even a colorable federal claim").

Here, Petitioner fails to show prejudice as a result of the prosecutor's purported misstatements of the knock-and-announce rule. The trial court

admonished the jury members several times that if they believed the prosecutor misstated the law regarding the knock-and-announce rule, they were to rely upon the written jury instructions given to them. In particular, the jury was given the following instruction on the knock-and-announce rule:

> To make an arrest, a peace officer may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired.
>
> This requirement applies to both the execution of arrest warrants and probation searches.
>
> "Breaking" includes opening a door or window, even if not locked, or not even latched. It is not necessary to force open, break down, or otherwise physically damage the door or window.

(Lodg. No. 1 at 538.) Petitioner does not contend that the written jury instruction was incorrect or that it did not address the specific misstatements made by the prosecutor. Furthermore, absent circumstances showing otherwise, a jury is presumed to have followed its instructions. *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000).

Accordingly, the California Court of Appeal's conclusion that any potential misconduct by the prosecutor was not prejudicial was neither contrary to nor an unreasonable application of clearly established federal law. *See, e.g.*, *Boyde v. California*, 494 U.S. 370, 384-85, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990) (jury instructions from the court carry more weight than arguments of counsel, and consequently, "[a]rguments of counsel which misstate the law are subject to objection and to correction by the court"); *Leinweber*, 490 F. App'x at 55-56 (finding no prejudice from prosecutor's misstatement of law when, in part, the trial judge instructed the jury of the correct law and that "any statement by an attorney

regarding the law inconsistent with the jury instructions was to be disregarded"); *see also Deck*, 768 F.3d at 1034 (Smith, J., dissenting) ("Critically, the Supreme Court has never held, nor even suggested, that a defendant's constitutional rights are violated where a prosecutor misstates the law in closing argument, but the trial court judge correctly instructs the jury. In fact, the Supreme Court has indicated just the opposite.").

e. The prosecutor's closing argument concerning Petitioner's fear of a gang.

Petitioner's fifth claim of misconduct is that the prosecutor lied to the jury during closing argument that Petitioner had never mentioned fear of a gang to anyone prior to trial. (Pet. Mem. at 19, 20.) Petitioner argues that an interview Petitioner had with a police investigator pointedly demonstrated otherwise. (*See id.* at 20-21.) He further argues that he was prejudiced from the prosecutor's comments because it supported the prosecutor's claim during opening statement that the defense would make up stories. (*Id.*)

Respondent, however, argues that Petitioner's claim is procedurally barred because Petitioner's trial counsel failed to make a contemporaneous objection at trial. (Resp. Mem. at 11.) The Court agrees.

"A federal habeas court will not review a claim rejected by a state court if the decision rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Walker*, 562 U.S. at 315. Indeed, federal habeas relief is unavailable when (1) "a state court has declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement[;]" and (2) "the state judgment rests on independent and adequate state procedural grounds." *Id.* at 316. And the procedural rule still applies even though a state court alternatively addressed the merits in rejecting the petitioner's claims. *Harris v. Reed*, 489 U.S. 255, 264 n.10, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989); *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992).

In order for a state procedural rule to bar federal habeas relief, the state's rule has to be "independent" and "adequate" at the time the petitioner purportedly failed to comply with it. A state procedural rule is considered an "independent" bar if it is not interwoven with federal law. *Cooper v. Neven*, 641 F.3d 322, 332 (9th Cir. 2011). Furthermore, a state procedural rule is considered an "adequate" bar if it is "firmly established and regularly followed." *Walker*, 562 U.S. at 316.

The Ninth Circuit has uniformly concluded that California's contemporaneous objection rule is an independent and adequate state procedural ground requiring denial of a subsequent federal habeas petition. *See, e.g.*, *Fairbank v. Ayers*, 650 F.3d 1243, 1256 (9th Cir. 2011); *see also Melendez v. Pliler*, 288 F.3d 1120, 1125-26, 1126 n.7 (9th Cir. 2002) (contemporaneous objection rule not "adequate" when objections are made, not immediately, but still during trial, and "at point when the trial judge realistically could have considered them," but "[o]ur reasoning does not apply to circumstances in which no objection is made at all, or in which the objection is obviously late as to preclude the trial judge from giving it meaningful consideration").

Here, Petitioner's trial counsel failed to register a timely objection to the prosecutor's false argument. Counsel instead requested an admonition two days later, after the jury was already deliberating. The California Court of Appeal thus rejected Petitioner's claim on the ground that Petitioner's trial counsel failed to object and request an admonition when the misconduct occurred. (Lodg. No. 5 at 27.) And because the California Court of Appeal's decision is the last reasoned state court decision, Petitioner's claim is procedurally barred. *See Ylst*, 501 U.S. at 803 ("[W]here, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.").

Petitioner contends, however, that the contemporaneous objection rule is not an independent and adequate state procedural ground because the instant case is an

"extreme case" of prosecutorial misconduct and a due process violation and futility exceptions exist to the contemporaneous objection rule. (*See* Traverse Mem. at 11-14.) Not so. Petitioner has not shown sufficient evidence that the contemporaneous objection rule is not an independent and adequate state procedural ground. *See Walker*, 562 U.S. at 316 ("A discretionary state procedural rule … can serve as an adequate ground to bar federal habeas review. A rule can be firmly established and regularly followed even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others.").

A federal habeas court may consider a procedurally barred claim if the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

In this case, Petitioner does not attempt to make a showing of cause and prejudice for the default or a fundamental miscarriage of justice. Nor does the face of the Petition or the attached exhibits make the required showing. Accordingly, Petitioner's claim is denied as procedurally defaulted.

The California Court of Appeal concluded that any potential error or misstatement of fact by the prosecutor was harmless. Moreover, this Court concludes that Petitioner has not shown that the comment had a substantial and injurious effect or influence in determining the jury's verdict. Prior to closing argument, the trial court instructed the jurors that the statements made by the attorneys were not evidence, and they must decide the case based on the evidence presented at trial. (*See* Lodg. No. 2 at 1511.) Further, Petitioner's trial counsel preemptively rebutted the prosecutor's comment (as well as the comment in opening statement about the defense's made up stories) by presenting substantial evidence regarding Petitioner's fear and arguing to the jury during closing argument

that Petitioner conveyed his fear to the officers when he was interviewed. (*See, e.g.*, Lodg. No. 2 at 1683 (trial court noting that "it was undisputed that [Petitioner] told at least the officers inside the residence that there was a green light on him"); *see also Tatmon v. Haviland*, 504 F. App'x 631, 632 (9th Cir. 2013) (finding that a prosecutor's improper comments during opening statement were not prejudicial because, in part, defense counsel had an opportunity to rebut the comments).

Accordingly, the California Court of Appeal's conclusion that any potential misconduct by the prosecutor was not prejudicial was neither contrary to nor an unreasonable application of clearly established federal law.

f. Cumulative error.

Petitioner argues that the trial court erred in denying his motion for a new trial, and by extension, the California Court of Appeal erred by affirming the trial court's decision, based on the multiple instances of prosecutorial misconduct. (*See* Pet. Mem. at 22-23.) In effect, Petitioner alleges cumulative error based on prosecutorial misconduct.

When individual errors do not on their own rise to the level of a constitutional violation, the cumulative impact of multiple deficiencies might violate a petitioner's constitutional rights. *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995). In particular, habeas relief may be granted on a cumulative-error claim if the errors together "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Hein v. Sullivan*, 601 F.3d 897, 917 (9th Cir. 2010) (quotations and citation omitted).

Here, the California Court of Appeal's conclusion that the trial court properly denied Petitioner's motion for a new trial was neither contrary to nor an unreasonable application of clearly established federal law. Petitioner has not shown a reasonable probability that the evidence of prosecutorial misconduct, considered cumulatively, so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See, e.g., Ybarra v. McDaniel*, 656

F.3d 984, 1001 (9th Cir. 2011) (finding no cumulative error because, in part, the defense was not prevented from presenting counterbalancing arguments to the improper prosecutorial statements); *Hein*, 601 F.3d at 917-18 (finding no cumulative error because, in part, the trial court sustained objections and gave curative instructions to the jury to negate the prosecutor's improper comments).

In sum, under AEDPA, Petitioner's claim of prosecutorial misconduct does not merit federal habeas relief.

B. Petitioner's Claim That The Trial Court Erroneously Admitted Evidence That Petitioner Killed An Innocent Bystander (Claim 2) Does Not Warrant Habeas Relief.

Petitioner contends that the court erroneously admitted evidence that Petitioner shot his firearm in self-defense and killed an innocent bystander in violation of Petitioner's rights to a fair trial and due process. (Pet. Mem. at 24.) He argues that the admitted evidence was irrelevant, inflammatory, and highly prejudicial, causing a substantial and injurious effect or influence in determining the jury's verdict. (*See id.* at 25-26.) Respondent, on the other hand, argues that Petitioner's claim is procedurally barred for failure to object with specificity. (*See* Resp. Mem. at 11-12.) Respondent also argues that Petitioner's claim is unsupported by clearly established federal law. (*Id.* at 12.)

1. *Background*

In his direct appeal, Petitioner argued, in part, that if the trial court did not exclude evidence that he shot and killed an innocent bystander, the trial court nevertheless prejudicially erred in admitting the evidence in violation of his constitutional rights. (*See* Lodg. No. 3 at 78-80.)

The California Court of Appeal denied Petitioner's claim. (*See* Lodg. No. 5 at 4, 28.) The appellate court found that Petitioner failed to object to the evidence with sufficient specificity, causing confusion for the trial court on the scope of its evidentiary order. (*Id.*)

2. *Analysis*

Notwithstanding that Petitioner's claim may be procedurally barred, the claim fails on the merits. *See* 28 U.S.C. § 2254(b)(2). "Under AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by clearly established [Supreme Court precedent]." *Zapien v. Martel*, --- F.3d ----, 2015 WL 6843241, at *3 (9th Cir. Nov. 9, 2015) (quoting *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009)). Because the Supreme Court has yet to decide whether admission of irrelevant or overtly prejudicial evidence constitutes a due process violation, the admission of evidence that Petitioner killed an innocent bystander is not contrary to clearly established federal law to warrant federal habeas relief. *Holley*, 568 F.3d at 1101; *see also, e.g.*, *Zapien*, 2015 WL 6843241, at *3; *Walker v. Davis*, 617 F. App'x 794, 795 (9th Cir. 2015) ("We cannot say that the state court's decision to admit potentially irrelevant and prejudicial autopsy photographs over [petitioner's] objection was contrary to clearly established federal law."); *Pena v. Tilton*, 578 F. App'x 695, 695 (9th Cir. 2014) (finding the state court's determination that admission of gang-related evidence did not violate the petitioner's due process rights was not contrary to clearly established federal law); *Garza v. Yates*, 472 F. App'x 690, 691-92 (9th Cir. 2012) ("[W]e cannot conclude that the California Court of Appeal acted in an objectively unreasonable manner in concluding that the propensity evidence introduced against [the petitioner] did not violate de process.").

Accordingly, Petitioner's claim regarding the trial court's admission of evidence that Petitioner killed an innocent bystander does not merit federal habeas relief.

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C. Petitioner's Claim That The Trial Court Erroneously Refused To Instruct The Jury Of Attempted Voluntary Manslaughter Based On Heat Of Passion (Claim 3) Does Not Warrant Habeas Relief.

Petitioner contends that the trial court erroneously refused to instruct on the lesser included offense of attempted voluntary manslaughter. (Pet. Mem. at 26-30.) As a result of the trial court's refusal, Petitioner claims he was prejudiced because the jury did not give consideration to his claim that he acted rashly from heat of passion, which significantly differs from claims of self-defense and imperfect self-defense. (*See id.* at 28, 30.)

1. *Background*

On July 12 and 13, 2011, the court reviewed with the parties the proposed jury instructions. (*See* Lodg. No. 2 at 1445-1507.) During the conference, Petitioner did not request that the trial court instruct the jury on attempted voluntary manslaughter on a heat of passion theory. (*See id.*)

In his direct appeal, Petitioner argued, in part, that the trial court erred by failing to instruct on the lesser included offense of attempted voluntary manslaughter on a heat of passion theory. (*See* Lodg. No. 3 at 81-86.)

The California Court of Appeal denied Petitioner's claim, finding that any error was harmless. (*See* Lodg. No. 5 at 4, 30-32.) The appellate court reasoned the jury found that Petitioner knew or should have known each victim was a peace officer engaged in the performance of his duties, and that Petitioner was guilty of assault with a deadly weapon on *a peace officer* as opposed to simple assault with a deadly weapon. (*Id.* at 31-32.) The appellate court also reasoned that the jury rejected Petitioner's claims of self-defense and imperfect self-defense. (*Id.* at 32.)

2. *Analysis*

There is no clearly established federal law that requires a state trial court to give a lesser included offense instruction as would entitle a petitioner to relief. *See, e.g.*, 28 U.S.C. § 2254(d)(1); *Beck v. Alabama*, 447 U.S. 625, 638, 638 n.16, 100 S.

Ct. 2382, 65 L. Ed. 2d 392 (1980) (holding that failure to instruct on lesser included offense in a capital case is constitutional error if there was evidence to support the instruction, but expressly reserving "whether the Due Process Clause would require the giving of such instructions in a non-capital case"); *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000) (per curiam) (in non-capital case, failure of state court to instruct on lesser included offense does not alone present a federal constitutional question cognizable in a federal habeas corpus proceeding). Accordingly, Petitioner's jury instruction claim, to the extent predicated upon the trial court's failure to give a lesser included offense instruction, is not cognizable for federal habeas relief.

The Ninth Circuit has recognized that "the refusal by a court to instruct a jury on lesser included offenses, when those offenses are consistent with defendant's theory of the case, may constitute a cognizable habeas claim" under clearly established federal law. *Solis*, 219 F.3d at 929. However, Petitioner never asked the trial court for an instruction on attempted voluntary manslaughter on a heat of passion theory.[5] Petitioner's contention, therefore, is more akin to the claim that the trial court failed to *sua sponte* instruct the jury on the lesser included offense. Petitioner has not cited – and the Court is unaware of – any authority for the proposition that it is a violation of due process for the trial court not to *sua sponte* instruct the jury on a lesser included offense. *See Bradley v. Biter*, Case No. 13-CV-1865-AG, 2014 WL 5660682, at *7 (C.D. Cal. Nov. 4, 2014) (finding no authority for proposition that a trial court's failure to *sua sponte* instruct the jury on a lesser included offense violates a petitioner's due process rights).

Even assuming there was constitutional error, the California Court of Appeal's decision that Petitioner was not prejudiced was not contrary to, or an unreasonable application of, clearly established federal law. Petitioner's trial

[5] Moreover, there is no evidence in the record that Petitioner's trial counsel argued a heat of passion theory to the jury.

counsel strenuously argued that Petitioner acted in self-defense and/or imperfect self-defense. Yet, the jury found Petitioner guilty of premeditated attempted murder as to two police officers (counts 3-4), thus finding that Petitioner acted deliberately. The jury also found Petitioner guilty of assault with a deadly weapon on *a peace officer*, which requires a finding that when Petitioner "acted, he knew, or reasonably should have known, that the person assaulted was a peace officer who was performing his duties," which is inconsistent with Petitioner's heat of passion theory. (*See* Lodg. No. 1 at 525); *see also* CALCRIM No. 860. Consequently, since the jury effectively rejected the factual basis for the claims of reasonable and unreasonable self-defense, "it is not reasonably probable the jury would have found the requisite objective component of a heat of passion defense (legally sufficient provocation) even had it been instructed on that theory of voluntary manslaughter." *People v. Moye*, 47 Cal. 4th 537, 557 (2009).

Accordingly, Petitioner's claim that the trial court erroneously refused to instruct the jury on the lesser included offense of attempted voluntary manslaughter does not merit federal habeas relief.

VII. RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the District Court issue an Order (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: May 27, 2016

Rozella A. Oliver

ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

Tab 12

LODGMENT # 7

Court of Appeal, Fourth Appellate District, Division Two - No. E054533

S214066

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOE LOUIS ARMENTA, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Tab 13

LODGMENT # 5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOE LOUIS ARMENTA, Defendant and Appellant.	E054533 (Super.Ct.No. RIF147935) OPINION

APPEAL from the Superior Court of Riverside County. Richard Todd Fields and Jeffrey Prevost, Judges.* Affirmed with directions.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

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* Judge Fields denied the motion for discovery of peace officer records. Judge Prevost presided over the trial and made all of the other challenged rulings.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Lise Jacobson and Vincent P. La Pietra, Deputy Attorneys General, for Plaintiff and Respondent.

Police officers arrived at the home of defendant Joe Louis Armenta to arrest him on an outstanding warrant. One officer claimed that, in addition to knocking on the front door, he announced that they were the police; his supervisor, however, who was also knocking, did not remember this announcement.

Meanwhile, other officers opened a sliding glass door in the rear of the house. This caused an alarm to sound. Defendant started yelling. At this point, officers in both the front and rear announced their identity and purpose. Some officers then entered through the rear sliding glass door.

Defendant fired at least two shots at the officers. They fired back at him. There was a standoff for at least 40 minutes, during which the officers continued to announce their identity and purpose. Defendant fired one last shot before the officers managed to escape the house. It took a police negotiator about four hours to talk defendant into surrendering.

Defendant claimed that he mistook the officers for members of his former gang, which had put out a "green light" on him. When he realized his mistake, he tried to commit "suicide by cop."

A jury found defendant guilty of four counts of attempted murder of a peace officer, including two counts that it found to be willful, deliberate, and premeditated (Pen.

Code, § 187, subd. (a), 664, subds. (e), (f)), all with personal firearm discharge enhancements (Pen. Code, § 12022.53, subd. (c)); four counts of assault with a firearm on a peace officer (Pen. Code, § 245, subd. (d)(1)), all with personal firearm discharge enhancements (Pen. Code, § 12022.53, subd. (c)); one count of unlawful possession of a firearm (Pen. Code, former § 12021, subd. (a)(1); see now Pen. Code, § 29800, subd. (a)(1)); and one count of unlawful possession of ammunition (Pen. Code, former § 12316, subd. (b)(1); see now Pen. Code, § 30305, subd. (a)).

The trial court sentenced defendant to a determinate term of 62 years 8 months in prison, plus three consecutive indeterminate terms of life in prison with an aggregate minimum parole period of 29 years.

Defendant now contends:

1. The prosecutor committed misconduct in six separate instances.

2. The trial court erred by admitting evidence that, in a previous shootout with another gang member, defendant had killed an "innocent bystander."

3. The trial court erred by failing to instruct on attempted voluntary manslaughter on a "heat of passion" theory.

4. This court should independently review the materials produced in camera in response to defendant's *Pitchess* motion.[1]

5. The abstract of judgment is erroneous.

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[1] A "*Pitchess* motion" is a motion for discovery of a peace officer's confidential personnel records. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

The People concede that the abstract of judgment is erroneous and must be corrected. Otherwise, we find no reversible error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *Prosecution Evidence.*

On January 6, 2009, shortly after 9:00 p.m., six officers from a multiagency task force went to defendant's house in Rubidoux. They were there to arrest defendant pursuant to a felony warrant. Defendant was also on felony probation, with full search terms. The officers were in uniform, including vests with the word "police" on the back.

Sergeant David Amador and Officer Eric Hibbard knocked on the front door and rang the doorbell off and on for at least five minutes. There was no response.

According to Sergeant Amador, they did not say anything, because their standard procedure was to wait until someone answered the door. According to Officer Hibbard, however, toward the end, he said, "Police Department. It's the Riverside Police Department," though he still did not say why they were there.

After a short break, Sergeant Amador started knocking on the front door and ringing the doorbell again. He still did not say anything.

Meanwhile, Officer Hibbard and Officer David Castenada went around to the back of the house. They used a ladder in the back yard to climb up to a second-floor balcony. On the balcony, there was a sliding glass door. Officer Castenada pushed the sliding

glass door to determine whether it was locked or not. It slid open some one to three inches. This caused an alarm to beep.

At that point, defendant started yelling, "What do you want? Who are you? Go away." At the front door, Sergeant Amador and Officer Darrell Hill immediately responded, "The Riverside Police Department. We're here to do a probation search. If you don't answer the door, we will force entry." Defendant replied, "Go away." "Get the fuck out of here . . . ." This exchange was repeated five or six times. Officer Hill and Officer Michael Crawford tried to kick in the front door, but without success.

Meanwhile, back at the sliding glass door, when defendant yelled, "Who is it?," Officer Hibbard responded, "Riverside Police. Probation search." He said it twice. After making this announcement, Officer Hibbard, along with Officer Castenada, entered through the sliding glass door.

They found themselves in the master bedroom. They decided to try to apprehend defendant using a taser. They summoned Officer Crawford, because he was the only officer who had a taser. They waited in the bedroom for several minutes until Officer Crawford came in through the sliding glass door.

As these three officers walked out of the bedroom toward a staircase, Officer Hibbard heard the sound of a zipper. He thought it might be the zipper of a gun case, so he told the others to stop. He then saw defendant, with a gun in his hand, on the first floor, running into a hallway.

Officer Hibbard said, "Gun, gun, he's got a gun." He and Officer Castenada retreated back into the bedroom. Officer Crawford ran forward; he was separated from the other officers for several minutes, until he managed to dash back into the bedroom.

Meanwhile, defendant swept the red dot of a laser gunsight around the stairwell and toward the bedroom. Defendant fired two shots. Estimates of the time between the shots varied from one to two seconds to one or two minutes.

After the second shot, Officer Hibbard and Officer Castenada fired back. Before firing, Officer Castenada said, "Riverside police. Riverside police." After firing, Officer Hibbard yelled, "Police Department. . . . Drop the gun and come out."

At some point, there was a third volley of shots. It is not at all clear whether defendant fired any of these. According to Officer Hibbard, defendant did fire a third shot, so he (Officer Hibbard) fired back. According to Officer Castenada, however, he noticed the laser dot on his own chest, so he "started throwing rounds down range."

Defendant barricaded himself inside the laundry room; he moved the dryer to give himself cover. Officer Hill then came in the upstairs bedroom through the sliding glass door. He tried to negotiate with defendant. He talked to defendant for about 40 minutes, telling him, "Nobody wants to hurt you. You need to surrender. . . . We are the police department."

When Officer Hill addressed defendant as "Joe," defendant claimed that his name was John. Defendant said there was a "green light" on him, adding, "I can't go back to prison. You're going to have to kill me." He referred to committing "suicide by cop."

He was also heard saying (presumably on a cell phone), "I love you, dad. The cops are here. They're shooting at me. They're trying to kill me."

Defendant was still turning the laser on and off and moving it around. All of a sudden, he fired one last shot. Both Officer Hill and Officer Crawford fired back.

Meanwhile a helicopter and a Special Weapons and Tactics (SWAT) team had arrived. Around 10:15 p.m., while the SWAT team set off flash-bang grenades as a diversion, the four officers left the house.

Around 11:20 p.m., Investigator Justino Flores, a police negotiator, began talking to defendant by phone. Finally, around 3:30 or 4:00 a.m., defendant left the house and surrendered. He was interviewed by one Investigator LeClair.

Defendant's gun had one bullet in the chamber, plus two bullets in the seven-bullet magazine. Inside the laundry room, the police found one live bullet matching the ones in defendant's gun. They found three shell casings matching defendant's bullets — one in the entryway and two in the hallway to the laundry room. They also found 19 shell casings matching the bullets in the officers' weapons. Gunshot residue was found on defendant's hands.

B. *Defense Evidence.*

Defendant testified that he was a former member of the East Side Riva gang. He had an "ESR" tattoo.

In 1995, he left the gang by moving to Arizona. He did not get jumped out, because he knew that that could cause crippling injuries and even brain damage. He

heard through friends and family members that the gang would kill him if they caught him.

In 1999, after defendant moved back to California, an East Side Riva member named Rudy Gil shot him in the face and leg. Defendant shot back and killed an innocent bystander.

Defendant testified against Gil, despite receiving two or three separate threats to kill him and his family. Gil was convicted of first degree murder and sentenced to 65 years to life. Defendant, in exchange for his testimony, was allowed to plead guilty to being a felon in possession of a firearm and sentenced to time served.

Because defendant had testified against Gil, there was a "green light on [his] life." He believed he would be "a dead man in prison." He got a gun to protect himself, even though he knew he was not allowed to have one.

On January 6, 2009, around 9:00 p.m., defendant heard knocking at his front door. It went on for five or ten minutes. Whoever was knocking did not say anything.

Then defendant heard an alarm beep. This meant that someone had just opened a door or a window. Once again, no one said anything.

Defendant got his gun and yelled, "Who the fuck's in my house?" There was no response.[2] He could hear multiple people moving through the upstairs bedroom. He concluded that they were East Side Rivas coming to kill him.

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[2] Defendant had told both Investigator Flores and Investigator LeClair, however, that the intruders responded, "It's the police . . . ."

Defendant announced that he had a gun; he fired a "warning shot," without aiming, in the general direction of the bedroom. The people kept coming, so he fired again. They then fired back at him. He retreated into the laundry room. At that point, for the first time, they said, "Police." However, defendant did not believe them, because he did not think the police would break into his house.

Defendant's gun had jammed; he cleared it by removing one live bullet. He kept "moving the laser back and forth and up and down" to "keep[] them at bay."

When defendant heard sirens and a helicopter, he "figured if they weren't police[,] that would make them leave. . . . But these people kept shooting at me, telling me . . . they're the police, come out. And that's when I started to believe them . . . ." He decided that he would rather have the police kill him than go to prison. Later, once he believed the officers were out of the house, he fired a third shot, to shoot out a light. Defendant claimed that the one bullet found in the laundry room, plus the three found in the gun, proved that he fired only three times.

Defendant denied that there was any second round of knocking. He also denied that the officers tried to kick in the front door. He pointed out that the door had glass, which they could have broken to get in.

Defendant admitted that he had "[n]o logical reason" to claim that his name was John. He also could not explain why he did not call 911.

According to defendant, his statements immediately after the shootout were largely consistent with his testimony at trial. However, the negotiator, Investigator Flores,

testified that defendant did not mention East Side Riva, nor did he say that somebody was trying to kill him.

II

PROSECUTORIAL MISCONDUCT

Defendant asserts some six separate instances of prosecutorial misconduct.

A. *General Legal Principles.*

"The standards governing this claim are well established. A prosecutor's conduct violates the federal Constitution when it infects the trial with such unfairness as to make the resulting conviction a denial of due process. Conduct by a prosecutor that does not rise to this level nevertheless violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citations.] To preserve a prosecutorial misconduct claim for appeal, the defendant '"must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety"' unless doing so would be futile or an admonition would not cure the harm. [Citation.]" (*People v. Whalen* (2013) 56 Cal.4th 1, 52.)

"'A defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.] . . . [Citation.]' [Citation.]" (*People v. Tully* (2012) 54 Cal.4th 952, 1010.) "When a trial court sustains defense objections and admonishes the jury to disregard the comments, we assume the jury followed the

admonition and that prejudice was therefore avoided. [Citation.]" (*People v. Bennett* (2009) 45 Cal.4th 577, 595.)

B. *Opening Statement: Impugning Defense Counsel.*

Defendant contends that the prosecutor committed misconduct in opening statement by impugning defense counsel.

1. *Additional factual and procedural background.*

In her opening statement, the prosecutor said: "I anticipate that you are going to hear some excuses from defense, some made up stories. When people are caught, they try to get out of it. Two years is a lot of time to make up something."

Defense counsel objected to this, "as argument." The trial court sustained the objection and granted defense counsel's motion to strike.

The next day, defense counsel asked the trial court "to assign [the remark] as misconduct."

The trial court declined "to formally cite [the prosecutor] for misconduct," but it agreed to give an admonition. Thus, when the jury reconvened, it instructed:

"During her opening statement, [the prosecutor] stated that 'I anticipate that you are going to hear some excuses from defense, some made up stories. When people are caught, they try to get out of it. Two years is a lot of time to make up something.'

"I did grant the objection to that statement and did strike that entire portion of [the prosecutor]'s opening statement. You're admonished at this time to completely disregard that portion of [the prosecutor]'s opening statement.

"I'll remind you that the comments of counsel are not evidence and they're not to be considered in any way as evidence of any facts in this case.

"I have determined that [the prosecutor]'s comments were to some extent inadvertent, but they were inappropriate, and argumentative, and were not properly part of an opening statement.

"To the extent that a further inference might be made that defense counsel is in any way complicit in possibly fabricating something, such an inference is entirely inappropriate. There is absolutely no suggestion of such at this time, and any suggestion that defense counsel might be engaged in such is inappropriate.

"And I have determined that [the prosecutor] did not so intend, but an inadvertent inference might be made from those comments so that is why I am admonishing you to completely disregard that portion of [the prosecutor]'s opening statement."

2. *Analysis.*

"Personal attacks on opposing counsel, including accusations that counsel fabricated a defense or misstated facts in order to deceive the jury, are forbidden. [Citations.] On the other hand, the prosecutor may vigorously argue his or her case, including the inferences to be drawn from the evidence. [Citation.]" (*People v. Tate* (2010) 49 Cal.4th 635, 692-693.)

In this instance, we need not decide whether the challenged statement constituted misconduct. The trial court declared that the statement was "inappropriate" and "not evidence" and admonished the jury to disregard it. Thus, any prejudice was cured.

(*People v. Bennett*, *supra*, 45 Cal.4th at p. 595; *People v. Mendoza* (2007) 42 Cal.4th 686, 701.)

C. *Misrepresenting Facts.*

Defendant contends that the prosecutor committed misconduct in direct examination by misrepresenting the layout of defendant's house.

1. *Additional factual and procedural background.*

During her redirect examination of Officer Hibbard, the prosecutor showed him exhibit 97. Exhibit 97 has not been transmitted to us, but it is described as "Photo of stairs inside of home." The prosecutor then asked:

"Q. . . . If you were standing in that front hallway area, would that be the view up to that front hallway area?

"[DEFENSE COUNSEL]: Vague as to 'hallway area.' What hallway area?

"THE COURT: Rephrase.

"Q. (By [the prosecutor]) The hallway area where you saw the gun appearing from the wall, from the corner.

"A. Honestly, this picture looks like it's taken from the hallway."

On recross-examination, defense counsel asked a series of questions about exhibit 97 and three other photos (exhibits B, G, and T). Without having in front of us not only the exhibits but also a floor plan of the house, this testimony is pretty much impossible to follow. Officer Hibbard did repeatedly express uncertainty about what exactly exhibit 97 showed. However, there was this exchange:

"Q. [T]hat's a photograph that's taken from inside the front door and over to the left in the living room area, is it not?

"A. It almost looks like it's to the right of the front door to me."

The trial court raised and sustained its own objection to this line of questioning under Evidence Code section 352, stating: "[This witness] was never on the first floor. . . . He's not in a position to offer an opinion with respect to the layout of the other rooms on the first floor."

Defense counsel then said, " . . . I would ask the Court to strike his testimony elicited on direct that that picture was taken from the front entrance." The court denied the motion.

The next day, outside the presence of the jury, defense counsel argued that the prosecutor had committed misconduct by trying to elicit testimony that exhibit 97 showed "the view from the entry," because it did not. However, he did not ask for any particular relief; to the contrary, he stated, " . . . I just wanted to make a record on that."

The trial court opined that there was a problem because the various photos had not been authenticated by the person who took them, and none of the officers who had testified so far had been in a position to authenticate any photos taken from the first floor. It ruled: "If proper foundation is not laid at some point for . . . [exhibit] 97, I'll entertain a motion to strike any testimony relying on that particular photograph as a base for a witness's opinion . . . ."

Officer Hill later testified that exhibit 97 included a wall that was to the left of the front entry. Defendant testified that exhibit 97 was taken from "the left of the entry."

2. *Analysis.*

Defendant argues that the prosecutor's question about whether exhibit 97 showed the view from the "hallway" misrepresented his ability to see the officers.

Defense counsel forfeited the claimed misconduct by failing to request an admonition. (*People v. Whalen*, *supra*, 56 Cal.4th at p. 52.)

Separately and alternatively, we reject the misconduct claim because the record fails to show that the question was either misleading or prejudicial. From the reporter's transcript alone, the layout of the house is far from clear. Officer Hibbard testified that exhibit 97 was taken from the front hallway; however, he also testified that it was taken from the right of the front door. We cannot tell whether he meant from the right looking in or the right looking out. We cannot tell whether he was talking about just one location or two. The exhibits themselves have not been transmitted to us. (See Cal. Rules of Court, rules 8.122(a)(3), 8.224(a).) Most significantly, we do not have exhibit 97. Thus, we cannot tell whether the challenged question and answer were misleading or not.

For much the same reason, we cannot tell whether they were prejudicial. Numerous exhibits relating to the layout of the house were admitted. Even assuming the challenged question and answer, standing alone, were misleading, in light of the record in its entirety, for all we know, the jury would have had no trouble understanding the layout of the house.

D. *Eliciting False Testimony.*

Defendant contends that the prosecutor committed misconduct in direct examination by eliciting false testimony regarding his criminal record.

1. *Additional factual and procedural background.*

The prosecutor asked Special Agent Adam Rudolph whether other officers told him that defendant was on probation for "manufacturing[,] importing, selling, an undetectable firearm?" Rudolph answered, "I believe that's correct, yes."

After Rudolph was excused, and outside the presence of the jury, defense counsel asserted that defendant's conviction had actually been for possession of brass knuckles under Penal Code former section 12020, although he conceded that that statute also covered firearms. He further asserted that the prosecutor had committed misconduct.

The prosecutor responded that all that the officers knew was that defendant had been convicted under Penal Code section 12020, subdivision (a)(1), so they reasonably assumed that the conviction related to firearms.

The trial court ruled: " . . . I think it is okay for you to elicit testimony as to what was in the officer's mind at the time that they approached the house, whether it was erroneous or not, if it was in good faith, which seems to me to be the case. . . . [¶] But, on the other hand, I agree with [defense counsel] that the jury should be apprised of what Mr. Armenta was actually on probation for."

It therefore instructed the jury that defendant had actually been on probation for unlawfully possessing, manufacturing, importing, or selling metal knuckles.

2. *Analysis.*

"'Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 711.)

Here, however, the prosecutor did not present false evidence. Other officers apparently understood, and told Special Agent Rudolph, that defendant was on probation for unlawful possession of a firearm. Even though they were mistaken, this was relevant, as the trial court ruled, to the officers' state of mind in executing the arrest warrant.

Separately and alternatively, any possible prejudice was cured by the trial court's admonition to the jury. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 595.)

E. *Violating the Trial Court's in Limine Ruling.*

Defendant contends that the prosecutor committed misconduct by violating an in limine ruling.

1. *Additional factual and procedural background.*

Prior to trial, defense counsel indicated that he wanted to introduce evidence that an East Side Rivas member (i.e., Rudy Gil) had shot defendant. He noted that, in the confrontation, defendant shot back and killed a four-year-old child. However, he objected to "any testimony about this four-year-old that died . . . ."

The trial court excluded any evidence that the person who was shot was a four-year-old child.[3] When the prosecutor asked if the trial court was excluding evidence "that the gunfire . . . struck someone," it said, "No . . . ."

Defense counsel then asked, "[I]s the Court going to allow the People to introduce evidence that it was Mr. Armenta's shot that killed the individual?" The court responded, "Well, I'm still in the dark about that really."

Defense counsel proceeded to state: "The theory was provocative act murder. [Defendant] was not held culpable or responsible for that. It was simply inadvertent. All I propose to say [i]s that there was an assault on Mr. Armenta that resulted in the death of someone else. Mr. Armenta testified for the People in that prosecution. The individual who was convicted was Rudy Gil." The trial court responded, "All right. And I'll limit the references to that incident to the scope that you've just suggested . . . unless Mr. Armenta testifies more extensively . . . ."

On direct, defendant testified that Rudy Gil, an East Side Riva member, shot him twice because he left the gang; Gil was charged with murder and attempted murder; defendant testified against Gil; in return, defendant was sentenced to time served for

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[3] The trial court described the excluded evidence in several different ways: (1) "reference to the innocent minor victim"; (2) "identification of the actual victim of the homicide"; (3) "refer[ence] to the four-year-old victim of the homicide as . . . a four-year-old minor" (paragraph breaks omitted); (4) "reference to the minor homicide victim"; and (5) "reference to the status of the homicide victim . . . as being a bystander four-year-old minor."

unlawful possession of a firearm; and Gil was convicted of murder. The fact that Gil's assault "resulted in the death of someone else," however, was not mentioned.

On cross-examination, the prosecutor asked:

"Q. And when you pulled the trigger, did your firearm kill an innocent bystander?

"A. Yes, ma'am."

Defense counsel objected and argued, "I thought you made an order that she wasn't supposed to go into this." Defense counsel also asserted that the prosecutor had committed misconduct and requested a mistrial.

The trial court reviewed the transcript of its in limine ruling. It then stated: "It was well understood there would be no reference to a minor homicide victim, but beyond that, I think there was some wiggle room within my order for either party." "[I]t was permissible to show that a third[ ]party . . . was killed . . . ." "The use of the term innocent bystander can be somewhat inflammatory, but under all of the circumstances, I believe that it's a minor reference . . . ." It therefore denied the motion for a mistrial.

After a break, defense counsel raised the issue again, arguing, "This is . . . the fourth instance of misconduct by the prosecution . . . ."

The trial court responded, "I'm treating this as a renewed motion for a mistrial. That is denied. [¶] . . . [¶] I did rule that [the fact that] a person was a victim of a homicide is allowable." "My ruling was unclear. To the extent that there is any blame to be assigned [for] this, I think it is the Court's fault . . . ." "[I]t was not clear to me that you asked for an order that there be no reference to Mr. Armenta having fired . . . a

weapon which caused the death of another person. [¶] If I had understood that to be the scope of your motion, I can't say how I would have ruled, but I may very well have let it in because I think the district attorney would be allowed to inquire as to the circumstances of that incident to a full extent . . . ."

B. *Analysis*.

On one hand, defense counsel arguably forfeited the claimed misconduct by failing to request an admonition. On the other hand, it was also arguable that the misconduct (if such it was) was not curable by an admonition. Defense counsel implicitly took that position by moving for a mistrial. Rather than decide whether there was a forfeiture, we will address the merits.

"It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. [Citation.]" (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Here, however, the trial court found that its ruling was unclear and that it never actually excluded evidence that defendant shot somebody.

We agree that the trial court's ruling was unclear. Defense counsel's original objection was to the fact that a four-year-old child was shot. Thus, the trial court repeatedly stated that what it was excluding was the fact that the victim was a four-year-old child. In response to a question by the prosecutor, it specifically said that it was *not* excluding evidence "that the gunfire . . . struck someone[.]" When defense counsel asked

if the prosecutor could show that defendant fired the fatal shot, it was noncommittal, saying, "Well, I'm still in the dark about that really."

It is defendant's position that the evidence was effectively excluded when defense counsel made an offer of proof and the trial court responded, " . . . I'll limit the references to that incident to the scope that you've just suggested . . . unless Mr. Armenta testifies more extensively . . . ." The offer of proof, however, included the fact that "there was an assault on Mr. Armenta that resulted in the death of someone else." Moreover, the offer of proof was clearly just a summary of the proffered testimony; both sides were allowed to bring out additional details, as long as they were within the scope of the offer of proof. For example, defense counsel went on to show that the "assault" was actually an attempted murder; that it consisted of a shooting; and that defendant was hit in the face and leg. The trial court's ruling therefore at least implied that the prosecutor was allowed to bring out the details of how the assault "resulted in the death of someone else."

F. *Misstatement of Law in Closing Argument.*

Defendant contends that the prosecutor misstated the law in closing argument.

1. *Additional factual and procedural background.*

In her rebuttal closing argument, the prosecutor noted that the claimed knock-notice violation occurred when Officer Castenada opened the sliding glass door on the balcony a couple of inches.[4] She argued, however, that compliance was excused as futile:

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[4] Defendant states, "[T]he prosecutor *acknowledged* that a knock notice violation took place. . . ." (Italics added.) Not so. She stated, "*Defense counsel spent*

[footnote continued on next page]

"[THE PROSECUTOR:] '[A]n officer entering a residence to serve an arrest warrant need not comply with the requirement of demanding admittance and explaining the purpose if the officer has a reasonable suspicion that knocking and announcing, under the particular circumstances, would be dangerous or futile.'

"Useless, in other words. Them announcing, after everybody knows they're outside, the officers have been outside for 10 to 15 minutes knocking on his front door . . . .

"Knock and announce is for those situations when officers walk up to somebody's house, kick a door open, with their guns ablazing, and someone is naked or in the shower and they need to get up and get dressed. We didn't have that here.

"[DEFENSE COUNSEL]: Objection. Misstates the law.

"THE COURT: All right. ladies and gentlemen, if you believe that counsel have misstated the law, you're to rely on the instructions . . . .

"[THE PROSECUTOR]: 'A homeowner,' Mr. Armenta, 'has no right to prevent officers with a warrant from entering his or her home.' Defense counsel made a big brouhaha about how the defendant didn't have to answer the front door. And he's right,

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[footnote continued from previous page]
quite a bit of time about how the officers did this illegal breaking. [¶] Just so we're all clear, the knock notice violation *that we're talking about* is when Officer Castenada checked the back slider door and cracked it open one inch to three inches. That is the violation. Nothing else is considered a violation." (Italics added.) She evidently meant that this was the only violation that defense counsel was claiming.

he didn't. That just gives the officers the ability to break open and use force to enter the house.

"Your officers at RPD decided, instead of smashing through those front windows of the house, to go around the back door to see if they could go in an unlocked door. It's easier. It was logical to them. That's what they did. They have a right to do it.

"[DEFENSE COUNSEL]: Objection. Misstates the law.

"THE COURT: All right. Again, ladies and gentlemen, the law is stated in the written instructions you will receive. You must rely exclusively on the instructions of law.

"[THE PROSECUTOR]: In addition, the law tells you, 'The refusal of entry need not be verbal.' So at the point where they've been knocking and pounding at the front door, and the defendant is not responding, his lack of response for over ten minutes is, in essence, a refusal.

"[DEFENSE COUNSEL]: That is absolutely not the law."

The trial court then held an unreported sidebar conference. Defense counsel later asserted that, during the sidebar, "the Court advised [the prosecutor] that that was not the law, and that a refusal as a matter of law can't take place before an announcement."

The prosecutor then resumed:

"[THE PROSECUTOR]: Here, when the officers go back to the front door and they continue to knock and the beeping happens, and the defendant responds 'Who is in there?' and the officers are yelling at him to 'open the front door or we're going to force

entry,' him not responding or not opening the front door for the period of time that he waited is a refusal.

"[DEFENSE COUNSEL]: That is not the law.

"THE COURT: Again, ladies and gentlemen, you are to rely upon the written instructions given to you."

After the jury retired to deliberate, defense counsel argued that the prosecutor had committed misconduct in closing argument, by, among other things, saying "that the officers didn't need to follow the letter of the statute because Mr. Armenta refused to answer the door, and if there's a refusal, then strict compliance with the statute is forgiven." He requested an admonition.

The trial court refused to find misconduct or to grant a mistrial.

2. *Analysis.*

Defendant never explains *how* the prosecutor's quoted remarks misstated the law. He cites no relevant authority. Thus, he has forfeited this contention. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 ["'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration . . . .'"].)

Even if we were to review the remarks independently, we would find no misstatement of the law. "'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood

or applied the complained-of comments in an improper or erroneous manner.' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 371.)

The prosecutor's statement, "Knock and announce is for those situations when officers walk up to somebody's house, kick a door open, with their guns ablazing, and someone is naked or in the shower and they need to get up and get dressed" must be taken in context. She was arguing that knock-notice would have been futile. She did not mean that knock-notice literally applies *only* when someone is naked or in the shower. Rather, she gave this as an *example* of a situation in which knock-notice *does* serve a purpose, and she contrasted that with this case.

Next, the prosecutor argued that the officers, rather than breaking the front door in, had the right to try to find an unlocked door. She did not argue that they have a right to open and enter through an unlocked door *without knock-notice*. We perceive nothing legally erroneous about this argument. (See *People v. Hoxter* (1999) 75 Cal.App.4th 406, 410-411 [knock-notice requirements apply to entry through unlocked door].)

Defense counsel's major objection seems to have been that defendant did not "refuse" entry because the officers had not yet knocked and given notice. However, there was ample evidence that even after the officers *did* knock and *did* give notice of their identity and purpose, defendant still did not respond. This constituted a refusal. (See *People v. Hoag* (2000) 83 Cal.App.4th 1198, 1207 ["unreasonable delay in responding to a knock and announce is tantamount to a refused admittance"].)

Defense counsel also claimed that the prosecutor had argued that, once there is a refusal, strict compliance with the knock-notice requirement is excused. We find nothing in her argument so stating. In any event, strict compliance is never required; all that is required — refusal or no — is substantial compliance. (*People v. Miller* (1999) 69 Cal.App.4th 190, 201.)

Finally, every time defense counsel objected, the trial court admonished the jury to rely solely on the jury instructions in determining what the law was. We presume that the jury obeyed this admonition. Thus, defendant cannot show prejudice. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 595.)

G. *Misstatement of Fact in Closing Argument.*

Defendant contends that the prosecutor made a false statement of fact in closing argument.

1. *Additional factual and procedural background.*

In closing argument, the prosecutor stated:

"In order for you to believe the defense, . . . [¶] . . . [¶] . . . you'd have to believe that the defendant is being honest when he's telling you he thought it was the East Side Rivas, which he never mentioned to [Investigator] Flores for three and a half hours. He never mentioned the words 'East Side Rivas' until this trial. He never told that to anyone." Defense counsel did not object.

During its deliberations, however, the jury requested "Joe Armenta's interview with Le[C]lair."

At that point, defense counsel asserted that Investigator LeClair's interview with defendant would show that the prosecutor's statement quoted above was "a lie." He noted that (other than a very short passage) the interview had been not been introduced into evidence. In it, however, defendant had said that he thought the people knocking on his door were from "East Side" and had come to kill him. Defense counsel asked that these portions of the interview be admitted. He also asked that the jury be admonished. The trial court refused both requests.

2. *Analysis.*

Defense counsel forfeited the claimed misconduct by failing to object and request an admonition when the misconduct occurred. (*People v. Whalen*, *supra*, 56 Cal.4th at p. 52.) Defendant argues that, when defense counsel did object, it was not too late to cure the misconduct with an admonition. It is generally recognized, however, that objections made after the jury has already begun deliberating come too late. (*People v. Jenkins* (1974) 40 Cal.App.3d 1054, 1057.)

In any event, the claimed misconduct was not prejudicial. Defendant never mentioned East Side Riva to any of the officers in the house or to Investigator Flores. The prosecutor could and did argue that this showed that defendant was lying. The additional claim that defendant never mentioned East Side Riva "to anyone" "until this trial" was technically false in light of Investigator LeClair's interview with defendant; however, it correctly described the state of the record, because Investigator LeClair's interview was not in evidence. Moreover, it was merely an overstatement of a point that

the prosecutor was allowed to make more narrowly. It is simply inconceivable that the claimed misconduct affected the verdict.

III

MOTION FOR NEW TRIAL

Defendant filed a motion for new trial, based on most of the same asserted instances of prosecutorial misconduct as he is raising in this appeal.

Defendant discusses the motion in his opening brief. However, he does not appear to contend that it adds anything to his underlying misconduct claims. For example, he does not contend that, if defense counsel failed to preserve a given claim of misconduct, that claim could still be grounds for a new trial. It could not. (*People v. Hinton* (2006) 37 Cal.4th 839, 869.)

In part II, *ante*, we rejected defendant's claims of misconduct. For the same reasons, we conclude that the trial court properly denied defendant's motion for new trial.

IV

FAILURE TO EXCLUDE EVIDENCE THAT

DEFENDANT SHOT AN INNOCENT BYSTANDER

In part II.E, *ante*, we discussed defendant's contention that the prosecutor violated an in limine ruling excluding evidence that defendant shot and killed an innocent bystander; we held that the trial court's in limine ruling was unclear and could have been understood as not excluding this evidence.

Defendant also argues, alternatively, that if the trial court did not exclude this evidence, it erred. Defense counsel contributed to the problem, however, by failing to object to this evidence with sufficient specificity. (Evid. Code, § 353, subd. (a).) Initially, he objected exclusively to the fact that the person defendant shot was a four-year-old child. The trial court sustained that objection. Then he asked, "[I]s the Court going to allow the People to introduce evidence that it was Mr. Armenta's shot that killed the individual?" He did not indicate that this was actually an objection, rather than a request for clarification, nor did he state any particular grounds for the objection.

Defense counsel further muddied the waters by making an offer of proof that included the fact that "there was an assault on Mr. Armenta that resulted in the death of someone else." As a result, he did not make it clear to the trial court or the prosecutor that he was in any way objecting to the fact that defendant shot and killed another person.

Defendant relies on the trial court's remarks to the effect that, even if it had understood that it was being asked to exclude evidence that defendant shot an innocent bystander, it might not have done so. It made these remarks, however, after the evidence had already come in. Moreover, it also stated, " . . . I can't say how I would have ruled . . . ." Thus, we cannot assume that a specific objection would have been futile.

We therefore conclude that this contention has not been preserved.

V

FAILURE TO INSTRUCT ON

"HEAT OF PASSION" VOLUNTARY MANSLAUGHTER

Defendant contends that the trial court erred by failing to instruct on the lesser included offense of attempted voluntary manslaughter on a heat of passion theory.

The trial court did instruct on attempted voluntary manslaughter on an imperfect self-defense theory. (CALCRIM No. 571.) However, it was not asked to instruct, and it did not instruct, on attempted voluntary manslaughter on a heat of passion theory. (E.g., CALCRIM No. 570.)

"In criminal cases, even absent a request, a trial court must instruct on the general principles of law relevant to the issues the evidence raises. [Citation.] '"That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]"' [Citation.] '[T]he existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.]' [Citation.]" (*People v. Taylor* (2010) 48 Cal.4th 574, 623.)

"Voluntary manslaughter is a lesser included offense of murder. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 181.) Hence, attempted voluntary manslaughter

is a lesser included offense of attempted murder. (See, e.g., *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1304, fn. 35.)

"Voluntary manslaughter is 'the unlawful killing of a human being, without malice' 'upon a sudden quarrel or heat of passion.' [Citation.] An unlawful killing is voluntary manslaughter only 'if the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'" [Citations.]' [Citation.] 'The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment. Adequate provocation . . . must be affirmatively demonstrated.' [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 813.)

We may assume, without deciding, that the trial court erred, because here the error was harmless under any standard. In addition to finding defendant guilty of attempted murder, the jury specifically found that defendant knew or should have known that each victim was a peace officer engaged in the performance of his duties. Moreover, it found defendant guilty of assault with a deadly weapon on a peace officer, as opposed to simple assault with a deadly weapon; thus, once again, it necessarily found that each victim was a peace officer engaged in the performance of his duties. Defendant's entire provocation argument is that there was evidence that he did not know who was in his house or why they were there. In light of the jury's findings, however, it plainly rejected this evidence.

As a matter of law, a peace officer's performance of his or her duties cannot constitute legally adequate provocation.

We also note that the jury rejected defendant's claims of self-defense and imperfect self-defense. "Once the jury rejected defendant's claims of reasonable and imperfect self-defense, there was little if any independent evidence remaining to support his further claim that he killed in the heat of passion, and no direct testimonial evidence from defendant himself to support an inference that he *subjectively* harbored such strong passion, or acted rashly or impulsively while under its influence for reasons unrelated to his perceived need for self-defense." (*People v. Moye* (2009) 47 Cal.4th 537, 557.)

We conclude that under other, proper instructions, the jury necessarily resolved the question posed by the assertedly omitted instruction adversely to defendant. (See *People v. Castenada* (2011) 51 Cal.4th 1292, 1359-1360; see also *People v. Jones* (1997) 58 Cal.App.4th 693, 716 [Fourth Dist., Div. Two].)

VI

PITCHESS

Defendant asks us to review the trial court's in camera ruling on his *Pitchess* motion. The People do not oppose the request.

A. *Additional Factual and Procedural Background.*

Before trial, defendant filed a *Pitchess* motion regarding two sheriff's deputies who were not directly involved in the standoff. The Riverside County Sheriff's Department (the Department) opposed the motion.

The trial court found that defendant had shown good cause for an in camera hearing. The hearing was attended only by the Department's attorney and the Department's custodian of records. After swearing in the custodian, questioning him, and reviewing the materials he had brought, the trial court found that there were no discoverable materials.

B. *Analysis*.

Under *Pitchess*, "on a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. [Citation.] . . . If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citation], 'the trial court should then disclose to the defendant "such information [that] is relevant to the subject matter involved in the pending litigation."' [Citations.]" (*People v. Gaines* (2009) 46 Cal.4th 172, 179.)

The record of the in camera hearing is sealed, and appellate counsel for the defendant as well as for the People are not allowed to read it. (See *People v. Hughes* (2002) 27 Cal.4th 287, 330.) Thus, on request, the appellate court must independently review the sealed record. (*People v. Prince* (2007) 40 Cal.4th 1179, 1285.)

Here, the record of the trial court's in camera examination of the officers' personnel files is adequate for our review. It demonstrates that the trial court followed

the proper procedures (see *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229) and that there were no discoverable materials. In sum, we find no error.

VII

CLERICAL ERROR IN THE ABSTRACT OF JUDGMENT

The abstract of judgment reflects the following fines and fees: (1) a $5,000 restitution fine (Pen. Code, § 1202.4, subd. (b)); (2) a $5,000 parole revocation restitution fine (Pen. Code, § 1202.45); (3) $400 in court security fees (Pen. Code, § 1465.8, subd. (a)(1)); and (4) $300 in criminal conviction assessments (Gov. Code, § 70373, subd. (a)).

The trial court, in its oral pronouncement of judgment, did not expressly impose any of these fines and fees.

Defendant does not appear to challenge either the court security fees or the criminal conviction assessments. However, with respect to the restitution fine and the parole revocation restitution fine, he contends that the abstract of judgment is erroneous because the trial court's pronouncement of judgment is controlling, and the prosecution forfeited these fines by failing to request them in the trial court.

The People concede the point. We agree. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [prosecution's failure to object to trial court's omission to impose restitution fines bars prosecution from seeking fines on appeal]; *People v. Zackery* (2007) 147 Cal.App.4th 380, 387-388 [oral pronouncement of judgment not imposing fines controls over conflicting minute order and abstract].) In our disposition, we will direct the trial court clerk to correct the abstract.

VIII

DISPOSITION

The judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment that does not include either a restitution fine or a parole revocation restitution fine and to forward a certified copy of the amended abstract to the Director of the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

RICHLI
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.