Case No.

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM SADOWSKI,

Petitioner - Appellant,

v.

RANDY GROUNDS, Warden,

Respondent - Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the presence of uniformed police officers during a trial involving the death of a police officer violates a criminal defendant's right to due process and a fair trial?

The courts are split on this issue. See *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006); *Holbrook v. Flynn*, 475 U.S. 560, 570-572 (1986); *Woods v. Dugger,* 923 F.2d 1454, 1459 (11th Cir. 1991); *Johnson v. Sisto*, 327 F. App'x 19, 20 (2009).

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Case No.

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM SADOWSKI

Petitioner-Appellant,

v.

RANDY GROUNDS, Warden,

Respondent - Appellee.

Petitioner, **WILLIAM SADOWSKI**, petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's Memorandum affirming the district court's denial of the exhausted claims in Sadowski's habeas petition.[1] (Apx. A)

OPINION BELOW

On November 14, 2018, the Ninth Circuit Court of

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[1] Sadowski does not challenge the part of the Ninth Circuit's Memorandum that vacated in part and remanded the case with instructions for the district court to review *de novo* Sadowski's April 25, 2013, motion to stay his claims under *Rhines v. Weber*, 544 U.S. 269 (2005).

Appeals reviewed the district court's denial of Sadowski's exhausted claims *de novo* and affirmed the district court's denial. (Apx. A)

JURISDICTION

The jurisdiction of this Court is 28 U.S.C. § 2254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amends. V, VI, XIV; 28 U.S.C.§ 2254.

STATEMENT OF THE CASE

A. State Court Trial Proceedings

A jury convicted Sadowski of murdering a police officer, and found he committed the murder during a carjacking and used a deadly weapon, namely, the officer's patrol car, to commit the murder. Cal. Penal Code §§ 187(a), 190.2(a)(17), 12022(b)(1). The jury also convicted Sadowski of two counts of carjacking and one count of attempted carjacking. Cal. Penal Code § 215(a), 664/215(a).

In a bifurcated proceeding, the jury found Sadowski sane when he committed the crimes. The trial court

sentenced Sadowski to a term of life in prison without the possibility of parole (LWOP).

B. Direct Appeal

The Court of Appeal (CCA) affirmed Sadowski's conviction. (B221859.) (Apx. D) The California Supreme Court (CSC) denied review. (S194212)

C. State Habeas Proceedings

Sadowski exhausted his new claims in the CSC. (S217223)(ER 151-152) (Apx. C)

D. Federal Habeas Proceedings

On August 12, 2016, the district court denied Sadowski's habeas petition. Sadowski appealed. (No. 16-56166) (Apx. B)

E. Ninth Circuit Appeal

On November 14, 2018, the Ninth Circuit issued a Memorandum affirming the district court's denial of his exhausted claims. (Apx. A)

REASON FOR GRANTING CERTIORARI

The State Courts Unreasonably Denied a Claim Challenging the Presence of Uniformed Police Officers at the Criminal Trial of a Defendant Charged with the Murder of a Police Officer

A. Introduction

In a trial involving the death of a police officer, the trial court, over defense objection, allowed uniformed police officers to attend the trial. The trial court found no legal justification to "bar peace officers from appearing in uniform." (2CT 530; 2RT63-64,149.)(ER1580-1581)

The uniformed officers surrounded the family during closing arguments, opened doors for jurors and escorted the jurors into the court room. (8RT1185)(ER165) Uniformed officers attended opening statements and closing arguments. "A number of police officers [were]present in the courtroom . . . there clearly was a presence of law enforcement in the courtroom." (14RT 2526)(ER 1596)

The Ninth Circuit, citing *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006), finds no clearly established Supreme Court

precedent regarding "spectator conduct." The Ninth Circuit also finds the state court's denial of Sadowski's claim could not have been "contrary to, or [have] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). (Apx. A)

Certiorari should be granted because the pervasive presence of uniformed police officers at Sadowski's trial for killing a police officer violated clearly established Supreme Court law guaranteeing a criminal defendant due process and a fair trial. U.S. Const. amends. V, VI, XIV; *Estelle v. McGuire*, 502 U.S. 62, 73 (1991); *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974); *Holbrook v. Flynn*, 475 U.S. 560, 570-572 (1986).

B. Clearly Established Supreme Court Law Guarantees a Criminal Defendant Due Process, a Fair Trial, and an Impartial Jury

The Fourteenth Amendment incorporates the essence of the Sixth Amendment right to be tried "by a panel of impartial, 'indifferent' jurors [whose] verdict must be based

upon the evidence developed at the trial." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (citations omitted).

As Chief Justice Warren noted in his concurrence in *Estes v. Texas,* 381 U.S. 532, 552 (1965) (Warren, C.J., concurring), due process requires the courts to safeguard against "the intrusion of factors into the trial process that tend to subvert its purpose." *Id.* at 560. Courts must guard against "the atmosphere in and around the courtroom [becoming] so hostile as to interfere with the trial process, even though . . . all the forms of trial conformed to the requirements of law. . . ." *Id.* at 561.

Efforts by spectators at a trial to intimidate judge, jury, or witnesses violate the most elementary principles of a fair trial. *Moore v. Dempsey*, 261 U.S. 86 (1923)(Holmes, J.); *Woods v. Dugger*, 923 F.2d 1454, 1456-60 (11th Cir.1991); *Norris v. Risley*, 918 F.2d 828, 832-33 (9th Cir.1990).

C. Clearly Established Supreme Court Precedent Holds that the Presence of Uniformed Officers at Trial May Present an Unacceptable Risk of Impermissible Factors Affecting the Jury

A fair trial is free from "influence or domination by either a hostile or friendly mob. There is no room at any stage of judicial proceedings for such intervention; mob law is the very antithesis of due process." *Cox v. Louisiana*, 379 U.S. 559, 562 (1965); *Frank v. Mangum,* 237 U.S. 309 (1915).

Safeguards may be adopted to ensure that "the administration of justice at all stages is free from outside control and influence" without running afoul of the Constitution. *Cox*, 379 U.S. at 562. Indeed, the due process clause of the Federal Constitution obliges the judiciary to guard against the possibility that "the atmosphere in and around the courtroom might [become] so hostile as to interfere with the trial process, even though . . . all the forms of trial conformed to the requirements of law." *Estes*, 381 U.S. at 561, 85 S.Ct. at 1642 (1965) (Warren, C.J., concurring); see also *Mills v. Singletary,* 63 F.3d 999 (11th

Cir. 1995).

In *Holbrook v. Flynn*, 475 U.S. at 571-572, the Supreme Court held that four uniformed state troopers sitting in the spectator row directly behind the defendant throughout his trial for security purposes did not create such inherent prejudice that it denied the defendant a fair trial. *Holbrook* stated that the test must be "whether an unacceptable risk is presented of impermissible factors coming into play." *Id.* at 570.

The Supreme Court particularly linked "the deployment of troopers . . . to the State's legitimate interest in maintaining custody during the proceedings." *Holbrook v. Flynn,* 475 U.S. at 572. To that end, the Supreme Court advised federal courts to "look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *Id.*

Holbrook did ". . . not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial." *Id.* at 570-571. *Holbrook* also stated that guards who are not readily identifiable by the jury would have been the better practice. *Id.* at 572.

In *Carey v. Musladin*, 549 U.S. 70 (2006), the Supreme Court upheld the right of members of a murder victim's family to attend the defendant's trial wearing buttons with photographs of the victim. The Supreme Court distinguished *Flynn* as a case of "government-sponsored practice" and recognized that it "has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Musladin*, 549 U.S. at 76.

Woods v. Dugger, 923 F.2d 1454, 1459 (11th Cir. 1991) citing *Holbrook*, held that a large number of non- witness, off-duty, uniformed prison guards sitting as spectators at the defendant's high profile trial for the death of a prison guard

resulted in unjustifiable prejudice. The uniformed prison guards were present during voir dire, closing argument, and throughout sentencing. *Id.*

Dugger found that the state failed to show that the officers' presence furthered an essential state interest and failed to justify the presence of uniformed officers as spectators. *Id. Dugger* held the presence of the uniformed guards in substantial numbers extremely prejudiced Dugger. *Id.*; see also, *Bell v. True,* 413 F.Supp.2d 657, 719-721 (W.D. Va. 2006) (The presence of too many uniformed off-duty officers might create "oppressive" atmosphere. Trial court had duty to control the overt presence of law enforcement to avoid inherent prejudice to defendant's right to a fair trial.)

In a split with *Duggar*, in *Johnson v. Sisto*, 327 F. App'x 19, 20 (2009), the Ninth circuit found that "a substantial number of uniformed and armed California Highway Patrol officers" at a trial involving the shooting of a CHP officer, did not merit habeas relief because "no clearly established Supreme Court law [existed] on the subject of

nondisruptive 'spectator conduct'." (RB 36)

D. The Police Officer Spectators Had No Right to Wear Uniforms to Sadowski's Trial

The trial court believed ". . . that police officers have a right to attend court proceedings in uniform if they're on duty . . . " (14RT 2526) Before trial, the prosecutor told the airport police department's liaison that she ". . . had been given this 'guidance' on the subject: 'I said, . . . if [an officer] is on their way to work or in their uniform for some reason, they won't have to take their uniform off to come in [court]: But neither do they . . . have to put it on if they're on a day off and they're coming down because they're supportive or [sic] a friend or they want to see [and] that - it's perfectly fine to wear a suit, civilian clothes, that nobody is asking them to put on uniforms to come down here; ¶. . . But I also wasn't comfortable in saying . . . you can't wear your uniform if you want to wear your uniform.'" (2RT64)

The LAPD manual restricts the off-duty wearing of uniforms:

> Officers "*shall not wear a Department approved uniform, while off duty, without obtaining prior approval from their commanding officer to represent the Department in the activity for which the uniform is being worn . . .* Requests shall be made by submitting an Employees Report, Form 15.07.00, to their commanding officer. Commanding officers shall review the circumstances of the request and, if the representation of the Department that is signified by the wearing of the uniform is determined to be in the best interest of the Department, approve the request.
>
> Note: *Personnel may wear their uniforms off-duty when commuting directly to and from work and at off duty functions or employment for which the wearing of the uniform has been authorized by the Chief of Police.*
>
> All other activities require approval, as specified above, before wearing a Department uniform off-duty. (Italics added.)

LAPD manual, Vol. - Management rules and Procedures www.lapdonline.org/lapd manual section 606.15 Off Duty Wearing of the Uniform.

The uniformed officers at Sadowski's trial were not on duty nor commuting to or from work. (ER 166) They attended Sadowski's trial as spectators. The unformed LAPD officers were not present to escort any prisoners and

were not part of the courtroom security. Because the LAPD officers did not come to testify and appeared to watch the trial proceedings, including opening statements, closing arguments and sentencing, the officers attended on their own time.

During closing arguments, numerous LAX uniformed police officers surrounded the decedent's family. (2CT 530) During trial, a uniformed LAX officer, who sat by the Scott family, inappropriately held the door open for an exiting juror and touched a juror, who walked with a cane, as if to escort her. (8RT 1185.) After Sadowski's conviction, the trial court found "a presence of law enforcement in the courtroom during Sadowski's trial." A "number" of uniformed police officers attended trial during opening statements and closing arguments. (ER 258,929.)

The uniformed officers attended as spectators and not witnesses nor court functionaries. (8RT 1185; 14RT 2526.) During trial, the uniformed LAPD officers strategically placed themselves inside the courtroom and sat with the

decedent's family. (See 8RT 1185) The uniformed officers tried to bond with and evoke sympathy from the jurors. One uniformed officer held the door open for the jurors and seemed to "escort" a juror who walked with a cane. (8RT 1185.)

E. The Uniformed Officers' Presence Prejudicially Deprived Sadowski of Due Process and a Fair Trial

To prevail on a claim of being denied a fair trial, a criminal defendant must show either actual or inherent prejudice. *Holbrook v. Flynn*, 475 U.S. 560; *Irvin v. Dowd,* 366 U.S. 717 (1961). The test for inherent prejudice is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook v. Flynn,* 475 U.S. at 570 (quoting *Estelle v. Williams*, 425 U.S. 501.)

The uniformed officers attended Sadowski's trial to show solidarity with the killed police officer and to send a message to the jury. The officers wanted a conviction

followed by imposition of the highest possible penalty. See *Woods v. Dugger,* 923 F.2d at 1459-1460. The police officer's uniforms send the message that they attended the proceedings in an official, not a personal, capacity.

The Supreme Court has held that "some constitutional violations . . . by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). In *Holbrook*, the Supreme Court held that "some practices are so inherently prejudicial that they must be justified by an "essential state" policy or interest. *Holbrook v. Flynn*, 475 U.S. at 568-569; see also *Estelle v. Williams,* 425 U.S. at 505.

The uniformed police officers attended Sadowski's trial to intimidate the jury and violate the most elementary principles of a fair trial. See, *Moore v. Dempsey,* 261 U.S. 86, (1923) (Holmes, J.); *Woods v. Dugger*, 923 F.2d at 1456-60.

The uniformed officers aligned themselves with the prosecution. Two uniformed officers always sat on each side

of the decedent's parents. Several uniformed officers attended trial each day, but on some days, the uniformed officers occupied the back row on the entire right side of the courtroom. (ER 1119)

The uniformed officers held the door open for the jurors to go in and out, they would stare at the jury and, whenever the jury entered or left the courtroom, the uniformed officers would stand up as the jury walked right in front of their seats. (ER 1119)

The trial was held in close proximity to LAX where the incident occurred - only two miles or six minutes away. (ER 1375) The local press highly publicized Sadowski's case. When the incident happened, the Daily Breeze published nine articles about the incident. (ER 1378-1380) From March 2009 until November 2009, the local newspaper published about 20 articles dealing with the case. (ER 1381-1450)

"[A]n unacceptable risk [of] impermissible factors [came] into play [at trial]." *Holbrook v. Flynn*, 475 U.S. at 570. Under clearly established Supreme Court precedent,

the state had the duty to rebut the prejudice of a courtroom filled with uniformed officer spectators. The police officers' presence did not further an essential state interest to rebut the presumption of prejudice. (See ER 258-259)

The Ninth Circuit erred by upholding the district court's decision. The California courts reached a decision that was contrary to and involved an unreasonable application of, clearly established Supreme Court law and was based on an unreasonable determination of the facts in light of the evidence. 28 U.S.C.§2254(d)(1),(2).

Relief should be granted.

CONCLUSION

Sadowski respectfully requests that this Court grant Certiorari.

DATED: December 13, 2018

/s Fay Arfa

Fay Arfa, Attorney for Petitioner

NOT FOR PUBLICATION

FILED

NOV 14 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM SADOWSKI, Petitioner-Appellant, v. RANDY GROUNDS, Warden, Respondent-Appellee.	No. 16-56166 D.C. No. 2:12-cv-10623-PSG-E MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted November 5, 2018
Pasadena, California

Before: RAWLINSON and HURWITZ, Circuit Judges, and BOUGH,** District Judge.

William Sadowski, a California state prisoner, appeals the district court's judgment denying his petition for writ of habeas corpus. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We affirm in part, vacate in part, and remand

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.

APPENDIX A

with instructions for the district court to review *de novo* Sadowski's April 25, 2013, motion to stay.

1. Because Sadowski's petition contained both exhausted and unexhausted claims, he requested a stay to allow him to return to state court to complete exhaustion. The magistrate judge denied his request for a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), but granted a stay under *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), which required deletion of the unexhausted claims from the federal petition. Subsequently, the district court adopted the magistrate judge's Report and Recommendation, rejecting the remaining claims on the merits.

Reviewing *de novo*, *see Mitchell v. Valenzuela*, 791 F.3d 1166, 1168 (9th Cir. 2015), we conclude that the magistrate judge lacked the statutory authority to deny Sadowski's request for a *Rhines* stay.[1] *See id.* at 1170. ("[W]here the denial of a motion to stay is effectively a denial of the ultimate relief sought, such a motion is considered dispositive, and a magistrate judge lacks the authority to 'determine' the matter.") (citations omitted); *Bastidas v. Chappell*, 791 F.3d 1155, 1163–64 (9th Cir. 2015) (same).[2]

Accordingly, remand is necessary for the district court to consider *de novo*

[1] We commend the government for raising this jurisdictional issue.

[2] We note that neither the magistrate judge, nor the district court, had the benefit of *Mitchell* when they entered the orders at issue.

Sadowski's April 25, 2013, motion to stay. The judgment is vacated in part to allow this determination. The Supreme Court has recognized that "it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Rhines*, 544 U.S. at 278.

On remand, the district court may consider the magistrate judge's order denying the *Rhines* stay as a Report and Recommendation, and provide the parties an opportunity to lodge objections. *See Mitchell*, 791 F.3d at 1174. If the district court finds that no *Rhines* stay was warranted, it may re-impose its June 19, 2015, order. On the other hand, if a stay was warranted, the district court should consider the claims that were deleted from the petition as a result of the denial of the *Rhines* stay "as if they had never been dismissed." *Id*. The district court shall issue a new judgment once proceedings in that court are complete.

2. We review the district court's denial of the exhausted claims *de novo*, and affirm. *See Smith v. Ryan*, 823 F.3d 1270, 1278–79 (9th Cir. 2016).

a. Sadowski contends that the prosecutor committed misconduct during closing argument. None of the prosecutor's remarks, taken individually or together, constituted prejudicial misconduct. *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (habeas relief is warranted only when prosecutorial misconduct

"so infected the trial with unfairness as to make the resulting conviction a denial of due process").

b. Sadowski next contends that his constitutional rights were violated by the presence of uniformed officers during trial. There is no clearly established Supreme Court precedent regarding "spectator conduct." *See Carey v. Musladin*, 549 U.S. 70, 76-77 (2006). Accordingly, the state court's denial of this claim could not have been "contrary to, or [have] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

c. Finally, Sadowski challenges that the jury's finding that he was sane at the time of the crimes. He again fails to identify any clearly established Supreme Court precedent authorizing a constitutional challenge to the sufficiency of the evidence supporting an affirmative defense of insanity. Therefore, the state court's denial of this claim cannot be contrary to, or an unreasonable application of, Supreme Court precedent. *See id.*

3. We decline to reach the remaining certified issue regarding the timeliness of the claims Sadowski deleted from his habeas petition, as it may be rendered moot during the course of the remand.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM SADOWSKI, Petitioner, v. RANDY GROUNDS, Warden, Respondent.	NO. CV 12-10623-PSG(E) JUDGMENT

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

IT IS ADJUDGED that the Second Amended Petition is denied and dismissed with prejudice.

DATED: 8/12/16

PHILLIP S. GUTIERREZ
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM SADOWSKI, Petitioner, v. RANDY GROUNDS, Warden, Respondent.	NO. CV 12-10623-PSG(E) ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Second Amended Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which any objections have been made. The Court accepts and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Second Amended Petition with prejudice.

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APPENDIX B

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein on counsel for Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 8/12/16.

PHILLIP S. GUTIERREZ
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM SADOWSKI, Petitioner, v. RANDY GROUNDS, Warden, Respondent.	NO. CV 12-10623-PSG(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

RELEVANT PROCEEDINGS

Petitioner, represented by counsel, filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on December 11, 2012. The case was assigned to United States Magistrate Judge Ralph Zarefsky.

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On March 27, 2013, Respondent filed a "Motion to Dismiss Petition, etc.," contending that certain of Petitioner's claims and portions of claims were unexhausted. On April 25, 2013, Petitioner filed an opposition to the Motion to Dismiss and a motion for a stay. On June 18, 2013, Respondent filed an opposition to the motion for a stay in which Respondent did not oppose a stay pursuant to Kelly v. Small, 315 F.3d 1063 (9th Cir.), cert. denied, 548 U.S. 1042 (2003), overruled on other grounds, Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007). On September 17, 2013, Magistrate Judge Zarefsky granted the unopposed portion of the motion for a stay pursuant to Kelly v. Small and granted Petitioner leave to file a First Amended Petition omitting Petitioner's unexhausted claims.

On October 16, 2013, Petitioner filed a First Amended Petition. On May 22, 2014, Petitioner filed a Second Amended Petition containing seven claims for relief, accompanied by a Memorandum ("Pet. Mem.").

On August 15, 2014, Respondent filed a motion to dismiss Claims Two, Four, Six and portions of Claims Three and Seven of the Second Amended Petition as untimely. Petitioner filed an opposition to the motion to dismiss on December 18, 2014.

On March 25, 2015, Magistrate Judge Zarefsky issued a Report and Recommendation recommending dismissal of Grounds Two, Four and Seven and portions of Ground Three as untimely. Petitioner and Respondent both filed objections to the Report and Recommendation.

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APPENDIX B

On May 7, 2015, because of Magistrate Judge Zarefsky's retirement, the case was transferred to the undersigned Magistrate Judge.

On June 19, 2015, the Court issued an "Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge," accepting and adopting in part the March 25, 2015 recommendation, but making certain additional findings and conclusions. The Court thereby dismissed: (1) Claim Two; (2) the newly exhausted subclaims contained in Claim Three except for Petitioner's claims of ineffective assistance of counsel with respect to prosecutorial misconduct alleged in the original Petition; (3) Claim Four; (4) Claim Six; and (5) Claim Seven to the extent the alleged cumulative error was based on newly exhausted claims not raised in the original Petition.

Respondent filed an Answer to the remaining claims on September 21, 2015. Petitioner filed a Traverse on October 6, 2015.

BACKGROUND

A jury found Petitioner guilty of the first degree murder of Los Angeles Airport Police Officer Tommy Scott (Reporter's Transcript ["R.T."] 1523; Clerk's Transcript ["C.T."] 441-45; 449-51). The jury found not true the allegations that the murder was willful, deliberate and premeditated first degree murder and that Petitioner intentionally killed Scott while Scott was engaged in the performance of his duties and with knowledge that Scott was performing his duties (R.T. 1523-25; C.T. 441-42). However, the jury did find true the allegations that

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the murder was committed during a carjacking and that Petitioner used a deadly and dangerous weapon, a police car, in the commission of the murder (R.T. 1524-25; C.T. 441-42). The jury also found Petitioner guilty of the carjackings of Officer Scott and Craig Lazar and the attempted carjacking of Christine Koesler (R.T. 1525-28; C.T. 443-45). In a bifurcated proceeding, the jury found that Petitioner was sane at the time of the offenses (R.T. 2513; C.T. 522-24). Petitioner received a sentence of life without the possibility of parole (R.T. 2559-62; C.T. 548-55).[1]

The California Court of Appeal affirmed the judgment in a reasoned decision (Respondent's Lodgment 14; see People v. Sadowski, 2011 WL 2125039 (Cal. App. May 31, 2011). The California Supreme Court denied Petitioner's petition for review summarily (Respondent's Lodgment 16).

Petitioner filed a habeas corpus petition in the Los Angeles County Superior Court, which that court denied on August 30, 2013 (Second Amended Petition, ECF Dkt. 30, pp. 88-161, 163-65).

Petitioner filed a habeas corpus petition in the California Court of Appeal, which that court denied on March 3, 2014 (Second Amended Petition, ECF Dkt. 30, pp. 166-250).

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[1] Under California law, any murder committed during a carjacking is first degree murder. Cal. Penal Code § 189. California Penal Code section 190.2(a)(17)(L) authorizes a sentence of life without the possibility of parole for a defendant found guilty of murder in the commission of a carjacking.

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Petitioner filed a petition for review of the Court of Appeal's denial of habeas relief in the California Supreme Court (Second Amended Petition, ECF Dkt. 30, pp. 251-338). The California Supreme Court denied the petition for review summarily on May 15, 2014 (Second Amended Petition, ECF Dkt. 40, p. 339).

SUMMARY OF TRIAL EVIDENCE

The following summary is taken from the opinion of the California Court of Appeal in People v. Sadowski, 2011 WL 2125039 (Cal. App. May 31, 2011). See Runningeagle v. Ryan, 686 F.3d 758, 763 n.1 (9th Cir. 2012), cert. denied, 133 S. Ct. 2766 (2013) (presuming correct statement of facts drawn from state court decision); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009) (taking factual summary from state court decision).

[Guilt Phase]

> On April 29, 2005, Los Angeles Airport Police Officer Tommy Scott stopped his marked patrol car on Lincoln Boulevard to contact Sadowski. While the two men were talking, Sadowski suddenly pushed Officer Scott aside, ran to his patrol car, jumped in the driver's seat, and started driving away. As Officer Scott tried to gain control of the vehicle by way of the driver's door, Sadowski accelerated up to 50 miles per hour, and began swerving across all lanes. Officer Scott hung on to the vehicle. To an eyewitness, it looked like Sadowski was trying to "shake the policeman off"

the patrol car. Sadowski continued for a quarter-mile then crashed into a concrete wall at 45 to 55 miles per hour. Inside the patrol car, airbags saved Sadowski from significant injury. The driver's side door hit a fire hydrant, and Officer Scott was decapitated.

After the crash, Sadowski stumbled from the wreckage, and walked up to a car that had stopped near the accident. Sadowski tried unsuccessfully to drag Christina Koesler from the car through the locked driver's door. Sadowski then walked to a Ford Explorer stopped behind Koesler, and took it from its driver, Craig Lazar. Sadowski sped off for about 900 feet. He lost control of the Explorer, crashed into a fence, and flipped the Explorer upside down. Police took Sadowski into custody at the scene.

As he was being pulled from the Explorer, Sadowski stated, "I'm sorry. I know I did wrong. I did not try to hurt the guy. I know I fucked up. I fucked up real bad. I just want to kill myself." While being transported to UCLA Medical Center by ambulance, Sadowski kept repeating statements to the effect, "I want to die. Let me die. I deserve to die. I'm sorry, sorry for what I did." At one point he said something to the effect, "Please don't tell my mom what I did." While being transported from the hospital to police headquarters, Sadowski made statements to the effect that he needed a lawyer "to save [his] life," and to help him avoid "the electric chair or . . . the gas

chamber."

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Sadowski presented evidence showing that he had a history of mental illness, and that he had been acting unusual both in the days leading up to the events on April 29, 2005, and after being taken into custody. A psychiatrist at the Twin Towers jail facility testified that he diagnosed Sadowski as suffering from bipolar disorder.

[Sanity Phase]

The prosecution's primary witness, Barry Hirsch, Ph.D., a forensic psychologist, testified that the evidence showed Sadowski had been sane at the time of the events on April 29, 2005. Dr. Hirsch discounted the significance of an event in early April 2005, when Sadowski was "found naked trying to get into a church." Dr. Hirsch interviewed Sadowski about the incident in 2009, and had reviewed some hospital records related to the incident. He opined: "My impression was that this was a decision on this man's part to try to subvert authority and continue his $4,000 a month disability paycheck, and that this was a conscious decision that perhaps was influenced by some manic kinds or hypomanic kinds of thinking that propelled him in the direction of public exposure." Dr. Hirsch noted that Sadowski's "disrobing" came during a period of time related to a

conclusion by a "Dr. Zetin" that Sadowski's "disability check should stop."

Dr. Hirsch also noted evidence that Sadowski was defiant with authority figures, and that he had made a false claim for financial benefit. Sadowski accused CBS Studio security guards of assaulting him as they escorted him out of the studio. He filed a police report, and claimed he suffered from anxiety as a result of the assault. Dr. Hirsch talked to the security guards and watched the event on videotape. He concluded that Sadowski's representations were false and designed to work up medical claims for the purpose of a lawsuit.

Dr. Hirsch further observed that Sadowski's life activities around the time of his crimes also showed that he was functioning normally despite any mental illness. He had traveled oversees [sic], which belied a showing of mental disorganization or mania. Sadowski had little difficulty navigating through foreign countries and was able to make logical decisions during travels with extensive itineraries. Sadowski was able to understand and follow the tourism visa rules for extending his European visits.

Dr. Hirch [sic] interviewed Sadowski a number of times and found his memories of his crimes were selective and self-serving. When addressing his crimes, Sadowski recalled only memories that aided the claim that he was delusional

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and suicidal, whereas he had little problem recalling information unrelated to the crimes. As Dr. Hirsch explained, Sadowski had a good memory about the facts involved in his legal matters, but had memory lapses when discussing the instant crimes. Dr. Hirsch concluded "[i]t was a case of malingering through denial of knowledge, denial of memory."

Apart from his after-the-fact memory problems regarding his crimes, Dr. Hirsch also believed that Sadowski's behavior during the crimes showed he knew right from wrong at the time of the crimes. As Dr. Hirsch put it, Sadowski's behavior showed "he knew what he was doing. It was purposeful. It followed [a] specific direction in terms of the means that contributed to it." Sadowski's statements to paramedics and police after the crimes also showed he knew his actions were legally and morally wrong, and his statements about being executed for what he had done was also of legal significance in that it showed Sadowski was aware of his legal dilemma. Sadowski's show of regret for what he had done was of significance; his statement that he deserved to die showed he understood the moral wrong he had committed. To the extent that Sadowskis's [sic] motivations may have been irrational (e.g. to reunite with Satan), those motivations did not negate that Sadowski knew what he was doing, and knew that it was wrong from a societal perspective to do what he was doing.

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> Finally, Dr. Hirsch also reviewed progress and treatment notes prepared by Dr. Zetin for his treatment of Sadowski from December 2001 to April 2005. Dr. Zetin's notes from the period around early April 2005 indicated that Sadowski was "recovered," and that his prognosis was for "no restrictions," and that he was "very ready for vocational rehab." The notes "reflect[ed] more communication" between Dr. Zetin and Sadowski, and showed that Sadowski as [sic] discussing "his job, the insurance, the Social Security, and that he was sending internet job applications out." Dr. Zetin recorded that Sadowski did not appear "pressured or grandiose," indicating that his speech or physical motions were not overly rapid, and that Sadowski was not "thinking that [he was] the best, . . . the greatest. . . ." Dr. Zetin's notes further indicated that Sadowski's "mood [was] pretty stable overall."

(Respondent's Lodgment 23, pp. 2-3, 14-16; see People v. Sadowski, 2011 WL 2125039, at *1-2, 9-10).

PETITIONER'S CONTENTIONS

1. The "overwhelming presence" of police officers in the courtroom during Petitioner's trial allegedly violated Petitioner's right to a fair trial; an officer allegedly held a door open for a juror and touched a juror as if to escort her; an officer allegedly glared at Petitioner's sister; officers allegedly talked within earshot of jurors, stared at the jury and stood as the jury entered

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(Ground One);

2. The prosecutor allegedly committed misconduct by assertedly: (a) appealing for sympathy; (b) misstating the law and facts; (c) vouching for the credibility of the prosecutor's contention that Petitioner was not insane by referring to her "own long walks"; and (d) disparaging defense counsel; Petitioner's trial and appellate counsel allegedly rendered ineffective assistance to the extent counsel did not object to the alleged prosecutorial misconduct at trial or raise these claims on appeal (Ground Three);

3. The evidence allegedly did not support the jury's finding that Petitioner was sane at the time of the offenses (Ground Five); and

4. The cumulative effect of the alleged errors asserted in Claims One and Three allegedly violated the Constitution (Ground Seven).

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was

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based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 132 S. Ct. 38, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). 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. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

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"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 562 U.S. 86, 101 (2011). This is "the only question that matters under § 2254(d)(1)." Id. at 102 (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

In applying these standards, the Court looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, as where the state court summarily denies a claim, "[a] habeas court must determine

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what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Cullen v. Pinholster, 563 U.S. 170, 188 (2011) (citation, quotations and brackets omitted).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

DISCUSSION

I. Petitioner's Claims Concerning the Presence and Alleged Actions of Uniformed Police Officers at Trial Do Not Merit Habeas Relief.

A. Background

In a pretrial proceeding, Petitioner's counsel observed that uniformed police officers had been coming to the proceedings and counsel asked that the officers not come in uniform (R.T. 63). Counsel argued that the presence of uniformed officers could deny Petitioner due process by allegedly sending a message to jurors "that someone's watching them" and by not contributing to "an atmosphere of

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impartiality" (R.T. 63). The trial court asked Petitioner's counsel to provide authority for the proposition that a court could order police officers not to wear their uniforms in court (R.T. 64). The prosecutor said she had told an airport police liaison officer that the courtroom was a public courtroom and that officers who wished to attend could wear a uniform or civilian clothing to court (R.T. 64). The court said it assumed the matter would not become an issue until trial commenced with opening statements (R.T. 64).

During jury selection, Petitioner's counsel again raised the issue of uniformed officers in the courtroom (R.T. 146). Counsel said having "two full rows of police officers in uniform" allegedly gave the impression that there were "authority figures in court who [were] very interested in the case and obviously want to have a particular verdict in the case. . . ." (R.T. 146-47). Counsel argued that the alleged juror intimidation would deny Petitioner due process (R.T. 147). The court did not make any ruling at that time (R.T. 148-50).

During trial, and out of the presence of the jury, Petitioner's counsel told the court that counsel had seen an officer hold the door for jurors, adding, "I don't see a problem with that" (R.T. 1185). Counsel went on to state that the officer had "touched the juror who walks with a cane, like gently escorting her" (R.T. 1185). Counsel asked that the officer be told not to have that type of contact with a juror (R.T. 1185). The court said: "That would be preferable. I'm sure it's just a matter of good manners, but not appropriate." (R.T. 1185). Petitioner's counsel did not request a hearing. A detective said he would talk to the officer (R.T. 1186).

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Following the verdict, Petitioner's counsel filed a motion for a new trial asserting, inter alia, that the court had erred in permitting uniformed officers to watch the trial (C.T. 530). Counsel did not then argue that officers purportedly had touched or stared at jurors, stood when jurors entered the courtroom or conversed with each other in earshot of jurors, or that an officer purportedly had "glared" at Petitioner's sister (R.T. 2530; C.T. 530). At the hearing on the motion, Petitioner's counsel contended that the presence of uniformed officers in the courtroom "gave an aura of, there's a legal enforcement that really wants a particular verdict," and that the officers' presence "may have swayed the proceedings in this case" (R.T. 2520). The court acknowledged that at the beginning and end of the case, during the arguments and opening statements, there had been a number of uniformed officers in the courtroom (R.T. 2526). The court denied the motion, stating: "I don't believe their presence was in any way oppressive or in any way intimidating, and I also believe that police officers have a right to attend court proceedings in uniform if they're on duty" (R.T. 2526).

The California Court of Appeal upheld the trial court's ruling. The Court of Appeal stated that, although the record showed that officers sat in the courtroom audience "at least at some parts of the trial," the record did not show the number of officers present at any given point, or show that a "roomful of uniformed and armed policemen" had been present throughout the trial or at any part of the trial (Respondent's Lodgment 14, pp. 6-7; see People v. Sadowski, 2011 WL 2125039, at *4). The Court of Appeal concluded that the record did not suggest that an "air of authority" from the presence of uniformed

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police officers had overshadowed Petitioner's trial, or that the presence of uniformed officers had affected the outcome of Petitioner's trial (Respondent's Lodgment 14, p. 7; see People v. Sadowski, 2011 WL 2125039, at *4).

B. Analysis

In Carey v. Musladin, 549 U.S. 70 (2006), members of a murder victim's family sat in the front row of the spectators' gallery during trial wearing buttons bearing the victim's photograph. Id. at 72. The Ninth Circuit held that the California Court of Appeal's ruling that the practice did not violate the Constitution was an unreasonable application of clearly established Supreme Court law. See Musladin v. Lamarque, 427 F.3d 653, 656 (9th Cir. 2005), rev'd, 549 U.S. 70 (2006). The United States Supreme Court reversed. The Supreme Court held that its prior decisions in Holbrook v. Flynn, 475 U.S. 560 (1986), and Estelle v. Williams, 425 U.S. 501 (1976), did not supply the relevant "clearly established law" because those cases involved government-sponsored courtroom practices: a requirement that the defendant stand trial in prison garb in Estelle v. Williams, and the seating of uniformed troopers directly behind the defendant as a security measure in Holbrook v. Flynn. Carey v. Musladin, 549 U.S. at 75-76. The Supreme Court in Carey v. Musladin deemed it an "open question" whether the effect of non-state-sponsored spectator conduct in a criminal courtroom could violate the Constitution, noting the divergent treatment of the issue in the state and lower federal courts. Carey v. Musladin, 549 U.S. at 76. Because no Supreme Court holding required the California Court of Appeal to apply Holbrook v.

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Flynn and Estelle v. Williams to the wearing of buttons by courtroom spectators, the Supreme Court held that habeas relief was unavailable under the AEDPA standard of review. Carey v. Musladin, 549 U.S. at 76-77.

In the present case, the officers were present in the courtroom of their own accord, as spectators, not as a result of any state-sponsored mandate. Accordingly, in the absence of any clearly established Supreme Court law deeming unconstitutional the presence of uniformed officers as courtroom spectators, this Court cannot deem unreasonable the California court's rejection of Petitioner's claim that the officers' presence rendered Petitioner's trial unfair. See Johnson v. Sisto, 327 Fed. App'x 19, 20 (9th Cir. 2009), cert. denied, 558 U.S. 1123 (2010) (in prosecution for shooting of a California Highway Patrol officer, presence in the courtroom gallery of a "substantial number of uniformed and armed California Highway Patrol officers" at trial did not merit habeas relief; "there is no clearly established Supreme Court law on the subject of nondisruptive "spectator conduct," citing Carey v. Musladin); Street v. Knipp, 2013 WL 5718718 (N.D. Cal. Oct. 21, 2013) (presence of 20-25 uniformed officers in courtroom gallery did not warrant habeas relief because there was no "clearly established Federal law" holding that conduct by courtroom spectators deprives a defendant of a fair trial; citing

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Carey v. Musladin).[2]

Petitioner also alleges that particular actions by the spectator officers purportedly prejudiced Petitioner because some of the officers allegedly interacted with jurors in various ways, such as assertedly talking within earshot of jurors, staring at the jury, glaring at Petitioner's sister and standing as the jury entered, and one officer allegedly touched a juror as if to escort her.

"Any unauthorized communication between a juror and a witness or interested party is presumptively prejudicial, but the government may overcome the presumption by making a strong contrary showing." Caliendo v. Warden of California Men's Colony, 365 F.3d 691, 694 (9th Cir.), cert. denied, 543 U.S. 927 (2004). The Supreme Court has recognized that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." United States v. Olano, 507 U.S. 725, 738 (1993) (quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)). "Certain chance contacts between witnesses and jury members - while passing in the hall or crowded together in an elevator - may be inevitable." Caliendo v. Warden of California Men's Colony, 365 F.3d at 696 (citation omitted). "[I]f an unauthorized communication with a juror is *de minimis*, the defendant must show that the communication could have influenced the verdict before the burden of proof shifts to the

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[2] In Petitioner's opening brief filed in the Court of Appeal, Petitioner acknowledged that there was "no controlling United States Supreme Court precedent as to whether private spectator conduct may be inherently prejudicial" (Respondent's Lodgment 20, p. 82, citing Carey v. Musladin, 549 U.S. at 76).

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prosecution . . . [and] must offer sufficient evidence to trigger the presumption of prejudice." Id. (citations and internal quotations omitted). "A communication is possibly prejudicial, not *de minimis*, if it raises a risk of influencing the verdict." Id. at 697. The Court may consider factors including the content of the communication, the length and nature of the contact, the identity and role of the parties involved, and evidence of actual impact on the jury. Id.

Here, given the circumstances of the crime, jurors reasonably could have expected the audience to include police officers. See Smith v. Farley, 59 F.3d 659, 664 (7th Cir. 1995), cert. denied, 516 U.S. 1123 (1996) ("if you kill a policeman and are put on trial for the crime, you must expect the courtroom audience to include policemen"). The record does not disclose the length of time officers purportedly conversed with each other within earshot of jurors, the subject of any such supposed conversations, or the content of any other alleged communications with jurors. There is no evidence that any of the officers assertedly involved in the alleged contacts testified at trial. The actions allegedly imputed to the spectator officers constitute only de minimus contacts insufficient to show prejudice. See Lee v. Marshall, 42 F.3d 1296, 1298-99 (9th Cir. 1994) (two police officers, one of whom was the investigating officer in the case, entered the jury room during deliberations without the court's permission to set up a VCR to replay a witness's testimony; one officer engaged in brief conversation with a juror concerning repairs to the machine; contacts held not prejudicial); Helmick v. Cupp, 437 F.2d 321, 322-23 (9th Cir.), cert. denied, 404 U.S. 835 (1971) (three arresting sheriff's deputies, one of them a prosecution witness, drove

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the jurors to the scene of the crime after being designated by the trial court as bailiffs for that purpose; contacts held not prejudicial); United States v. Greer, 2013 WL 4537294, at *4-5 (C.D. Cal. Aug. 27, 2013) (alternate juror's brief exchanges with mother of co-defendant at lunch and by an elevator were de minimus "spontaneous and friendly" comments only tangentially related to the court proceedings). Not only were the alleged contacts minimal, the jury's determination that Petitioner did not commit wilful, deliberate and premeditated murder tends to refute any suggestion that the alleged contacts rendered the jurors unable to follow their instructions and reach a verdict based on the evidence.

In sum, the state court's rejection of Petitioner's claim concerning the presence and alleged actions of uniformed police officers was not contrary to, or an unreasonable application of, any clearly established Federal law, as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 100-03 (2011).[3] Petitioner is not entitled to federal habeas relief on Ground One of the Second Amended Petition.

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[3] The Court has considered all of the evidence that was before the state court at the time of the decision under review. Where, as here, a state court adjudicated the claims on the merits and such adjudication was not "unreasonable" under section 2254(d), federal habeas relief is unavailable regardless of the nature of any additional evidence the petitioner might later present. See Cullen v. Pinholster, 563 U.S. 170, 185 (2011) ("if a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before the state court," even where the state court denied the petition summarily) (footnote omitted).

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II. Petitioner Is Not Entitled to Habeas Relief on His Claims Of Alleged Prosecutorial Misconduct and Related Alleged Ineffective Assistance of Counsel.[4]

A. The Prosecutorial Misconduct Claims Are Procedurally Defaulted.

Under California's contemporaneous objection rule, a failure to object to prosecutorial misconduct bars review where a timely objection and admonition would have cured the harm. See People v. Arias, 13 Cal. 4th 92, 51 Cal. Rptr. 2d 770, 813, 913 P.2d 980 (1996), cert. denied, 520 U.S. 1251 (1997). The Court of Appeal ruled that Petitioner had forfeited his claims that the prosecutor assertedly had made remarks in closing argument disparaging defense counsel and misstating the facts because Petitioner's counsel had failed to object to those remarks contemporaneously (Respondent's

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[4] In the Traverse, Petitioner contends the prosecutor improperly urged the jury to consider how the victim felt during the carjacking (Traverse, p. 6). The Court previously dismissed this claim without leave to amend and with prejudice. See "Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge," filed June 19, 2015.

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Lodgment 14, pp. 8-10).[5]

A federal court may be barred from reviewing the merits of a habeas petitioner's claim when the petitioner has violated a state law procedural rule. Coleman v. Thompson, 501 U.S. 722, 729 (1991). "For the procedural default rule to apply, however, the application of the state procedural rule must provide 'an adequate and independent state law basis' on which the state court can deny relief." Park v. California, 202 F.3d 1146, 1151 (9th Cir.), cert. denied, 531 U.S. 918 (2000) (citation omitted). If the court finds an independent and adequate state procedural ground, "federal habeas review is barred unless the prisoner can demonstrate cause for the procedural default and actual prejudice, or demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice." Noltie v. Peterson, 9 F.3d 802, 804-05 (9th Cir. 1993); see Coleman v. Thompson, 501 U.S. at 750; Park v. California, 202 F.3d at 1150.

In Bennett v. Mueller, 322 F.3d 573, 581-83 (9th Cir.), cert. denied, 540 U.S. 938 (2003), the Ninth endorsed the following burden-shifting scheme for procedural default:

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[5] In his opening brief in the Court of Appeal, Petitioner argued that the failure to object did not forfeit the claims under California law (see Respondent's Lodgment 20, p. 101-02). The Court of Appeal ruled otherwise. This federal Court is bound by California courts' determination of California state law. See Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009) ("we have repeatedly held that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions") (citation and internal quotations omitted); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law").

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> Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Once having done so, however, the ultimate burden is the state's.

(Id. at 586.)

Here, Respondent has met his burden to plead California's contemporaneous objection rule as an adequate and independent state ground to deny habeas relief. Petitioner does not (and could not) deny the independence or adequacy of California's contemporary objection rule. See Fairbank v. Ayers, 650 F.3d 1243, 1256-57 (9th Cir. 2011), cert. denied, 132 S. Ct. 1757 (2012) (California's contemporaneous objection rule is an independent and adequate state procedural rule barring federal habeas review of claim of prosecutorial misconduct). Rather, in conclusory fashion, Petitioner suggests that a failure to consider his claims purportedly would result in a "fundamental miscarriage of justice" (see Traverse, pp. 2, 6).

The "fundamental miscarriage of justice" exception requires a showing of actual innocence. See Johnson v. Knowles, 541 F.3d 933, 937-38 (9th Cir. 2008), cert. denied, 556 U.S. 1211 (2009). In order

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to show actual innocence, a petitioner must "support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." Schlup v. Delo, 513 U.S. 298 (1995); see also Shumway v. Payne, 223 F.3d 982, 990 (9th Cir. 2000). A petitioner must demonstrate that "in light of new evidence, 'it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt.'" House v. Bell, 547 U.S. 518, 536-37 (2006) (quoting Schlup v. Delo, 513 U.S. at 327). Here, Petitioner has failed to submit any new reliable evidence not presented at trial that supposedly shows his actual innocence. Petitioner's conclusory allegations are insufficient. See Sweet v. Delo, 125 F.3d 1144, 1152 n.9 (8th Cir. 1997), cert. denied, 523 U.S. 1010 (1998) (conclusory allegations of actual innocence insufficient to excuse procedural default); Cabrera v. Yates, 2010 WL 890141, at *8 (S.D. Cal. Mar. 5, 2010), aff'd, 426 Fed. App'x 535 (2011) (same). Therefore, Petitioner's claims of prosecutorial misconduct as to which no contemporaneous objection was made are procedurally defaulted.

B. In Any Event, None of Petitioner's Claims of Prosecutorial Misconduct Succeed on the Merits.

Prosecutorial misconduct merits habeas relief only where the misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) ("Darden") (citation and internal quotations omitted); Bonin v. Calderon, 59 F.3d 815, 843 (9th Cir. 1995), cert.

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denied, 516 U.S. 1051 (1996) ("To constitute a due process violation, the prosecutorial misconduct must be so severe as to result in the denial of [the petitioner's] right to a fair trial.").

"In fashioning closing arguments, prosecutors are allowed reasonably wide latitude and are free to argue reasonable inferences from the evidence." United States v. McChristian, 47 F.3d 1499, 1507 (9th Cir. 1995) (citation omitted). "The arguments of counsel are generally accorded less weight by the jury than the court's instructions and must be judged in the context of the entire argument and the instructions." Ortiz-Sandoval v. Gomez, 81 F.3d 891, 898 (9th Cir. 1996) (citing Boyde v. California, 494 U.S. 370, 384-85 (1990)); see also Waddington v. Sarausad, 555 U.S. at 195 (same).

In Parker v. Matthews, 132 S. Ct. 2148 (2012) ("Parker"), the United States Supreme Court ruled that the prosecutorial misconduct alleged therein did not warrant habeas relief under the AEDPA standard of review. The Court of Appeals for the Sixth Circuit had granted habeas relief on a claim that the prosecutor committed misconduct in closing argument by suggesting that the petitioner had colluded with his lawyer and a witness to manufacture an "extreme emotional disturbance" defense. Applying the AEDPA standard of review, the United States Supreme Court reversed. The Supreme Court observed that, even if the comments directed the jury's attention to inappropriate considerations, the petitioner had not shown that the comments were "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 2155 (quoting

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Harrington v. Richter, 562 U.S. 86, 103 (2011)). The Supreme Court noted that in Darden the Court had upheld a closing argument "considerably more inflammatory" than the one at issue in Parker,[6] and that "particularly because the Darden standard is a very general one, leaving courts more leeway in reaching outcomes in case-by-case determinations," the Sixth Circuit's decision was unwarranted. Parker, 132 S. Ct. at 2155 (citing Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).

1. Alleged Appeal to Sympathy

During the prosecutor's guilt phase closing argument, the prosecutor said: "Don't let this defendant rob Officer Scott of the sympathy that each and every one of you would have for him" (R.T. 1418). The court sustained a defense objection to this statement, and stated that "sympathy is not an issue in this case" (R.T. 1418). Later, while instructing the jury, the court stated that the jury "must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" (R.T. 199, 1329; C.T. 413).

Petitioner sought a new trial based on, inter alia, alleged prosecutorial misconduct (C.T. 525-34). The trial court denied the motion (see C.T. 548).

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[6] In Darden, the prosecutor had told the jury that the petitioner was an "animal" whom the prosecutor wished to see "with no face, blown away by a shotgun." See Parker, 132 S. Ct. at 2155 (quoting Darden, 477 U.S. at 180 nn.11, 12; internal quotations omitted).

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The Court of Appeal ruled that, although the prosecutor should not have invoked sympathy for the victim, there was no reasonable probability that the result at the guilt phase would have been more favorable to Petitioner without the "lone, passing utterance of the word 'sympathy'" (Respondent's Lodgment 14, p. 11; see People v. Sadowski, 2011 WL 2125039, at *7). The Court of Appeal observed that the trial court had sustained defense counsel's objection with a statement that sympathy was not an issue, and also had instructed the jurors that they were to decide the case on the facts alone and were not to allow bias, sympathy, prejudice or public opinion to influence their decision (Respondent's Lodgment 14, pp. 11-12; see People v. Sadowski, 2011 WL 2125039, at *7).

The Court of Appeal's resolution of this claim was not unreasonable. The jury is presumed to have followed the trial court's instructions not to allow sympathy to influence its decision. See Weeks v. Angelone, 528 U.S. 225, 226 (2000). Furthermore, the evidence of Petitioner's guilt was substantial. Petitioner essentially admitted that he intended to take Officer Scott's police car. Moreover, the fact that the jury found not true the allegation that Petitioner committed wilful, deliberate and premeditated murder and the allegation that Petitioner committed the murder knowing Officer Scott was acting in the performance of his duties militates against any conclusion that the jury was influenced by the prosecutor's reference to sympathy for the victim. See United States v. Koon, 34 F.3d 1416, 1446 (9th Cir. 1994), rev'd in part on other grounds, 518 U.S. 81 (1996) (prosecutorial misconduct in closing harmless, where remarks were isolated comments, court instructed

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jurors to rely only on evidence at trial, substantial evidence supported finding of guilt and verdicts acquitting two defendants showed jury was able to "weigh the evidence without prejudice").

2. Alleged Misstatements of the Law

Petitioner claims the prosecutor allegedly misstated the law during the sanity phase closing argument by telling the jury that: (1) the sanity instruction stated the jury should consider whether Petitioner could distinguish moral right from moral wrong from the perspective of "a reasonable person with reasonable moral standards"; and (2) there was a previous jury instruction stating that if there were two reasonable interpretations of the evidence, jurors must adopt the interpretation against the party with the burden of proof (R.T. 2492, 2496). The trial court sustained defense objections to both of these statements (R.T. 2492, 2496). With respect to the first statement, the court told the jury, "you have been instructed in the law that applies to this case and the term reasonable is not in the instruction so you can ignore the argument of counsel in that regard and follow my instructions" (R.T. 2492). With respect to the second statement, the court said, "I'm sorry counsel, that instruction doesn't apply to this portion of the case," to which the prosecutor responded, "[s]trike that." (R.T. 2496).

The trial court denied Petitioner's motion for a new trial based on these alleged misstatements of law by the prosecutor (R.T. 2526-27). The Court of Appeal ruled that the trial court did not abuse its discretion by denying a new trial, in light of the immediate

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objection, the court's statement that the instruction to which the prosecutor had alluded did not apply at the sanity phase and the prosecutor's statement "strike that" (Respondent's Lodgment 14, pp. 12-13; see People v. Sadowski, 2011 WL 2125039, at *7).

The Court of Appeal's decision was not unreasonable. Immediately following the challenged statements the court corrected the prosecutor. Furthermore, the court instructed the jury: "If anything concerning the law is said by the attorneys in their arguments or at any other time during the course of the trial conflicts with my instructions on the law, you must follow my instructions" (R.T. 1328). Again, the jury is presumed to have followed its instructions. See Weeks v. Angelone, 528 U.S. at 226.

3. Alleged Misstatements of Facts

Petitioner contends the prosecutor made a number of factual misstatements in closing argument during the sanity phase, concerning such things as Petitioner's prior hospitalizations, Dr. Zetin's diagnoses and care of Petitioner, Dr. Zetin's opinion that Petitioner was in remission, the reasons Petitioner's counsel did not call Dr. Zetin to testify, the nature of bipolar disorder, whether any witness testified that Petitioner's religious statements were "crazy," whether anyone had consulted with Dr. Zetin, the testimony of a witness who saw Petitioner in the middle of the street, whether all of the witnesses testified that Petitioner knew what he was doing, whether any jury members had believed Petitioner had harbored intent to kill, and whether Petitioner had or did not have an airline ticket for

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flight on April 29, 2005 (Pet. Mem., pp. 50-58). All of these statements were permissible comments on the evidence. See United States v. McChristian, 47 F.3d at 1507 (a prosecutor is permitted to argue reasonable inferences from the evidence).

In one of the challenged statements, however, the prosecutor referred to her own personal experience. In her closing, Petitioner's counsel argued:

> Then later on we heard that Mr. Sadowski walked from Venice to LAX. Now, I could have done another slide of crazy things that were said by the prosecution such as Mr. Sadowski walked from Venice to LAX to save money. That doesn't make any sense. That is insane.

(R.T. 2435).[7]

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[7] The guilty phase evidence showed that, on April 19, 2015, Petitioner booked a flight to Kiev departing on May 4, 2005 (R.T. 270-72, 555-57, 559). A few days later, Petitioner attempted to accelerate the departure date (R.T. 273-274, 290). On April 23, 2005, Petitioner booked a departure for April 29, 2005, a change which later was cancelled, leaving the May 4 departure date intact (R.T. 564-66). On the morning of the incident, Petitioner went to an internet café in Venice, which he frequented, and reported that his truck had been towed (R.T. 346, 350-51).

The prosecution's theory, which the defense did not controvert (see R.T. 2435), was that Petitioner had walked from the Venice/Marina del Rey area to the location of the incident near the airport. In closing argument in the guilt phase, the prosecutor stated: "You have him [Petitioner] walking to the airport to save money" (R.T. 1402).

In response, the prosecutor said:

> [Petitioner] is angry and he is trying to get to Russia. He was trying to get there earlier than on May 4th.
>
> So he walks up the hill, he walks and I heard [defense counsel] tell you it would only be a crazy man that would walk, you have to be insane to walk. Well, I am insane. I walk and [sic] hour and a half every day and I am insane I guess. Who would walk? Is that true? That is what I am going to ask you. Is that true to walk up a hill from Marina del Rey to the airport [sic]. You have to be insane.

(R.T. 2471).

The prosecutor's own personal experience in walking was not in evidence. In context, however, the prosecutor's argument constituted an invited response to defense counsel's argument that it was "insane" to believe Petitioner had walked to the airport to save money. See United States v. Nobari, 574 F.3d 1065, 1079 (9th Cir. 2009), cert. denied, 562 U.S. 1066 (2010) (prosecutor's comments not improper where they were an "invited response" to defense closing arguments). Furthermore, it is not likely that jurors would have understood the prosecutor's reference to her personal experience in walking as anything more than an appeal to the common knowledge that sane people sometimes walk long distances.

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In any event, even if some of the prosecutor's statements were unsupported by the evidence, the court instructed the jury that the statements of counsel were not evidence and that the jury was to determine the facts from the evidence presented and not from any other source (R.T. 198, 200, 1327; C.T. 413).[8] Again, the jury is presumed to have followed its instructions. See Weeks v. Angelone, 528 U.S. at 226; see also United States v. Toro-Barboza, 673 F.3d 1136, 1153 (9th Cir.), cert. denied, 133 S. Ct. 586 (2012) and 133 S. Ct. 588 (2012) (prosecutor's false statement did not render trial fundamentally unfair, where court instructed jury that counsel's statements were not evidence). The challenged remarks did not render Petitioner's trial fundamentally unfair.

4. Alleged Vouching

"The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." United States v. Young, 470 U.S. 1, 18 (1985). "Improper vouching

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[8] The prosecutor herself reminded the jury that it was improper to make a factual argument without evidence to support the argument (R.T. 2480).

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typically occurs in two situations: (1) the prosecutor places the prestige of the government behind a witness by expressing his or her personal belief in the veracity of the witness, or (2) the prosecutor indicates that information not presented to the jury supports the witness's testimony." United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir. 2007) (citation and internal quotations omitted).

Petitioner contends the prosecutor improperly vouched for her witnesses and injected her personal opinions into argument by making the following comments:

> And every time [Petitioner's counsel] stood here and told you [Petitioner] was mumbling and incomprehensible, I said to myself am I in a different trial? I remember the witness saying he was very angry about his car being towed, not that he was incoherent and didn't know what he was saying.

(R.T. 2470).

> . . . Everyone came to court and said [Petitioner] knew what he was doing when he was doing it. I was shocked what [sic] Dr. Rothberg [a defense psychiatrist] wrote. In his report he said psychotic. Psychotic. The man couldn't know what he was doing. It seemed obvious that he knew what he was doing. He knew it was a police officer and he knew he was stealing his car and he knew what he was doing.

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(R.T. 2474-75).

> Before I forget, there were a couple things I wanted to mention in [defense counsel's] opening statement to you. One of the things that has troubled me, there has been this sort of attack or inference if you will, that somehow the police are at fault in this place because [Petitioner's] brother-in-law, you know, in March of I think 2004, testified that he had called LAPD and [Petitioner's counsel] showed you the phone numbers that he called, and said that there has been like an occasion if the police had responded appropriately back in 2004 and done something as the family had wanted him to do, that this wouldn't have happened.

(R.T. 2478).[9]

> Remember from the earlier jury instructions you are not to speculate. That is totally improper. It's totally improper to say there is evidence of something of which there is no evidence at all in this case.
>
> But the thing that surprised me the most and I am going to spend sometime [sic] talking about it was when [Petitioner's counsel] said to you that the defendant didn't

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[9] In her closing, defense counsel had pointed to evidence that Petitioner's brother-in-law had called the police twice to have Petitioner "picked up," and was frustrated when nothing was done (R.T. 2433).

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know what was right or wrong because he was -- he had a belief that Olga was in hell and he had to rescue Olga from hell and there was an imperative to rescue somebody who is in hell, in danger, and that in evidence [sic] to do that, he had to push out Officer Scott.

I have never heard that in his tape recorded statements, and I know you haven't either. Maybe that is what [Petitioner's counsel] wishes he would have said in his tape recorded statements, but it was not what he said. It was not anywhere in that.

(R.T. 2480).[10]

Do I apologize for giving Dr. Hirsch the money for evaluating the evidence in this case? When you have an expert to take the time to review all the documents that you give them to take the time to help a lay person try to understand psychiatric records, the history of this defendant[,] so that I can bring that evidence in here into court for you to evaluate, I don't think I need to apologize for that.

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[10] The prosecution's evidence showed that, during 2004 and early 2005, Petitioner made a number of trips to Russia and the Ukraine to see Russian teenage girls named Olga and Zhanna (R.T. 258-60, 274-75, 348). In an interview with detectives after the incident, Petitioner claimed he had wanted to kill himself so that he could go to hell and bring Olga, whom he purported to align with Satan, out of hell (C.T. 315-16).

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> We expect competent, thorough work, and those are the people we are going to hire. Just to go down the list and say this person is a psychiatrist, psychiatrist, psychiatrist, you know what, I am going to go by the person who just says psychiatrist by his name. Is there some legitimacy to that argument that I could have hired a psychiatrist? I think all of you saw that Dr. Rothberg was ill-prepared. I think all of you heard that the opinions expressed were not on any solid basis. What Dr. Plotkin [a defense psychiatrist] said was this was driven by the bipolar illness. You are not going to see that word anywhere in your jury instructions. Driven. You are not going to see this was driven by his bipolar.

(R.T. 2490).

> I want to talk to you about the burden of proof. You know, I didn't have to prove anything here. It's not my job, not my burden, not my responsibility. You wouldn't have any of Dr. Zetin's information, if it wasn't for me. I didn't call him as a witness to come testify, but I brought to you [sic] and put into evidence all his progress notes, all his evaluations, and all the forms he filled out for the disability insurance company.
>
> It's important to look at why that wasn't brought to you by the defense. Because it contradicted the defense they have chosen of legal insanity here. And you wouldn't

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have that information if I hadn't have brought it here.

(R.T. 2495).[11]

Although the prosecutor used the first person in making the challenged arguments, those arguments, whether viewed singularly or collectively, did not constitute prejudicial misconduct.

The prosecutor's statements that she was "shocked" "troubled" or "surprised" by defense evidence or arguments arguably were improper. See United States v. Matthews, 240 F.3d 806, 819 (9th Cir. 2000) (prosecutor's statement that he was "shocked" at fingerprint expert's testimony "problematic"); United States v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1996) ("A prosecutor has no business telling the jury his individual impressions of the evidence."). However, none of the statements referred to facts or inferences unsupported by the evidence. Furthermore the "shocked" and "troubled" comments, while allegedly expressing the prosecutor's personal opinion, were made in response to defense counsel's arguments. See United States v. Nobari, 574 F.3d 1065, 1079 (9th Cir. 2009), cert. denied, 562 U.S. 1066 (2010) (prosecutions comments not improper where they were an "invited response" to defense closing arguments).

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[11] Defense counsel did not call Dr. Zetin as a witness, but argued in closing that "unfortunately we did not get to hear from Mr. Zetin, but we did hear about his theories. . . ." (R.T. 2434).

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Similarly, the prosecutor's statement that she (and the jury) did not hear a particular explanation defense counsel claimed Petitioner had given in a recorded interview was clearly an invited response to defense counsel's argument. See United States v. Nobari, 574 F.3d at 1079. The statement that the prosecutor thought all of the jurors saw that Dr. Rothberg was not well prepared was a proper comment on the evidence.

The statements concerning the prosecutor's presentation of evidence concerning Dr. Zetin's notes and evaluations were made in the context of arguing that the prosecutor did not bear the burden of proof at the sanity phase[12] and that the defense had chosen not to present this evidence because the evidence was adverse to the defense. "Criticism of defense theories and tactics is a proper subject of closing argument." United States v. Sayetsitty, 107 F.3d 1405, 1409 (9th Cir. 1996) (citation omitted).

The statements that the prosecutor did not need to "apologize" for paying Dr. Hirsch expert fees and hiring Dr. Hirsch in order to present evidence to the jury were not improper. The prosecutor did not vouch for the credibility of Dr. Hirsch's opinions. The prosecutor was responding to defense counsel's argument that Dr. Hirsch had received $24,000 for his services and that he was "one of

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[12] In California, a defendant asserting an insanity defense has the burden to prove insanity by a preponderance of the evidence. See California Penal Code § 25(b).

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the highest paid experts in this case" (see R.T. 2443-44).[13]

Moreover, the jury's verdict tends to show that the jury was not influenced by any alleged prosecutorial misconduct. The jury rejected the charge of premeditated first degree murder and found not true the allegation that Officer Scott was acting in the performance of his duties and that Petitioner knew that Scott was doing so. Also, as indicated above, the court instructed the jury that counsel's statements were not evidence and that the jury was to determine the facts from the evidence presented and not from any other source (R.T. 198, 200, 1327; C.T. 413). As previously indicated, the jury is presumed to have followed its instructions. See Weeks v. Angelone, 528 U.S. 225, 226 (2000); see also United States v. Toro-Barboza, 673 F.3d 1136, 1153 (9th Cir.), cert. denied, 133 S. Ct. 586 (2012) and 133 S. Ct. 588 (2012) (prosecutor's false statement concerning evidence did not render trial fundamentally unfair, where court instructed jury that counsel's statements were not evidence). In sum, the prosecutor's alleged misstatements of law did not render Petitioner's trial fundamentally unfair.

5. Alleged Disparagement of Defense Counsel

Petitioner also challenges the following comments the prosecutor made during closing argument in the sanity phase:

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[13] Although Petitioner's counsel initially referred to Dr. Hirsch as "Dr. Zetin," the context and subsequent argument make clear that counsel was referring to Dr. Hirsch (R.T. 2443-44).

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> Please use your critical thinking skills when something is said to you by [defense counsel] and not supported by the record. Just say to yourself, she is desperate, she really has nothing to work with, she is desperate. She has to stand here and say something, so she picks and chooses and takes things out of context. She never talks to you about buying tickets and all that stuff. She says he is crazy, he is crazy, you have to find him insane because he is crazy. He is angry. That is what he is.

(R.T. 2471.)

The challenged remarks "merely attacked the strength of the defense on the merits, not the integrity of defense counsel." United States v. Nobari, 574 F.3d at 1079 (accusing defense counsel of misstating the facts and the law and using a "red herring" argument as a "tactic to divert [the jury's] attention away from the truth" not misconduct);[14] see Cunningham v. Wong, 704 F.3d 1143, 1159 (9th Cir.), cert. denied, 134 S. Ct. 169 (2013) (defense counsel not ineffective in failing to object to prosecutor's comments that defense counsel's job was "to create straw men" and "put up smoke, red herrings"; prosecutor may argue reasonable inferences based on the evidence, including "whether one of the two sides is lying") (citation and internal quotations omitted); United States v. Toro-Barboza, 673 F.3d

[14] The challenged portion of the prosecutor's arguments in United States v. Nobari are quoted in the District Court's opinion in that case. See United States v. Nobari, 2006 WL 2535050 (E.D. Cal. Aug. 31, 2006).

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at 1150-52 (remarks that defense wanted to "make this into a game" and "tried to slip in some stuff" in closing argument "a reasonable response to the argument that had just been made by defense counsel"; exhortation not to allow defense counsel to "pull the Wizard of Oz trick" did not render trial unfair); Williams v. Borg, 139 F.3d 737, 744-45 (9th Cir.), cert. denied, 525 U.S. 937 (1998) (no misconduct where prosecutor referred to defense closing argument as "trash"): see also Parker, 132 S. Ct. at 2154-55 (prosecutor's statement that petitioner's defense was "a defense of last resort" and petitioner's "only way out" not misconduct); United States v. Blanco, 327 Fed. App'x 139, 146-47 (11th Cir.), cert. denied, 558 U.S. 1002 (2009) (arguing defense counsel was desperate for having invoked Adolph Hitler in closing not improper); United States v. Vásquez-Botet, 532 F.3d 37, 57-58 (1st Cir. 2008) (expressing reluctance to find prosecutor's argument that defense lawyers were "desperate" categorically constituted misconduct; remark was "simply not that egregious" and did not deny defendant a fair trial).

6. Conclusion

For the foregoing reasons, Petitioner is not entitled to federal habeas relief on his claims of prosecutorial misconduct.

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C. Petitioner's Related Claims of Ineffective Assistance of Trial Counsel Do Not Merit Habeas Relief.

1. Governing Legal Standards

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; see Gentry v. Sinclair, 705 F.3d 884, 889 (9th Cir.), cert. denied, 134 S. Ct. 102 (2013) ("[f]ailure to meet either [Strickland] prong is fatal to a claim"); Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted).

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466

U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight. . . ." Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009), cert. denied, 558 U.S. 1154 (2010) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Petitioner bears the burden to show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Harrington v. Richter, 562 U.S. 86, 104 (2011) (citation and internal quotations omitted); see Strickland, 466 U.S. at 689 (petitioner bears burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (citation and quotations omitted).

A state court's decision rejecting a Strickland claim is entitled to "a deference and latitude that are not in operation when the case involves review under the Strickland standard itself." Harrington v. Richter, 562 U.S. at 101. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. at 105.

"In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." Id. at 111 (citations omitted). Rather, the issue is whether, in the absence of counsel's

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alleged error, it is "'reasonably likely'" that the result would have been different. Id. (quoting Strickland, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." Id.

2. Analysis

Petitioner contends his trial counsel ineffectively failed to object to the alleged instances of prosecutorial misconduct discussed above (Pet. Mem., pp. 63-64). As mentioned previously, counsel did object to the "sympathy" comment and also pointed out the alleged misstatements of law. With respect to the prosecutor's comments to which Petitioner's counsel did not object, the Court of Appeal, applying the Strickland standards, rejected Petitioner's claim that counsel was ineffective for failing to object (Respondent's Lodgment 23, pp. 9-10; see People v. Sadowski, 2011 WL 2125039, at *6). The Court of Appeal stated that the record failed to demonstrate that there could have been no justifiable, tactical reason to forego an objection to the "desperate" comment, or that, if an objection had been made, that it might have resulted in a different outcome in the sanity phase of the trial (Respondent's Lodgment 23, p. 9; see People v. Sadowski, 2011 WL 2125039, at *6). The Court of Appeal explained that the "desperate" comment "exposed the jurors to little more than a "colloquially-phrased comment that the defense position in the case should be viewed as weak" (Respondent's Lodgment 23, pp. 9-10; see People v. Sadowski, 2011 WL 2125039, at *6). With respect to the alleged factual misstatements, the Court of Appeal indicated that, because defense counsel's "theme" in rebuttal was to argue to the jury

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that all of the things the prosecutor said "were not right" (see R.T. 2499), the record suggested a reasonable tactical reason for counsel's failure to object, i.e., to "let the prosecutor build a case based upon misstatements, and then to attack those misstatements in rebuttal" (Respondent's Lodgment 23, p. 10; see People v. Sadowski, 2011 WL 2125039, at *6). The Court of Appeal determined that the record showed defense counsel "believed it would be better to highlight that the prosecution needed to make misstatements to buttress its case, rather than make serial objections to every misstatement as it arose" (Respondent's Lodgment 23, p. 10; see People v. Sadowski, 2011 WL 2125039, at *6).

With respect to the "desperate" comment, Petitioner's counsel reasonably could have determined that objecting would only highlight the comment. See Cunningham v. Wong, 704 F.3d at 1159 (not unreasonable for defense counsel to refrain from objecting to prosecutor's comments likening defense counsel to "straw men" whose job was to "put up smoke, red herrings"; failure to object was "a reasonable strategic decision"); United States v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993) ("Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct.") (citation omitted). Furthermore, as the Court of Appeal reasonably determined, counsel's failure to object to the "desperate" comment did not prejudice Petitioner. It is not reasonably probable that the jury would have construed the comment as anything other than a comment on the weaknesses of the defense case,

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and the verdict showed the jury followed its instructions to base its decision on the evidence.

With respect to the alleged factual misstatements, as the Court of Appeal ruled, the tactic of allowing the prosecutor to make the challenged comments so as to position defense counsel to attack the comments in rebuttal was not unreasonable. Furthermore, Petitioner has not shown that counsel's failure to object prejudiced Petitioner under the Strickland standard. As previously mentioned, most of the comments were permissible comments on the evidence (the one exception being the "walking" comment, which was an invited reply to defense counsel's argument), and Petitioner has not shown that the trial court would have sustained any objection had one been made. Furthermore, the court instructed the jury that the comments of counsel were not evidence, and the jury's verdict shows the jury followed its instructions. In these circumstances, Petitioner has not shown counsel's unreasonableness or any resulting prejudice.

For the foregoing reasons, the state court's rejection of Petitioner's claims of ineffective assistance of counsel was not contrary to, or an unreasonable application of, any clearly established Federal law, as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. at 100-03. Petitioner is not entitled to federal habeas relief on these claims.

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D. Petitioner's Related Claim of Ineffective Assistance of Appellate Counsel Does Not Merit Habeas Relief.

The standards set forth in Strickland govern claims of ineffective assistance of appellate counsel. See Smith v. Robbins, 528 U.S. 259, 285-86 (2000); Bailey v. Newland, 263 F.3d 1022, 1028 (9th Cir. 2001), cert. denied, 535 U.S. 995 (2002). Appellate counsel has no constitutional obligation to raise all non-frivolous issues on appeal. Pollard v. White, 119 F.3d 1430, 1435 (9th Cir. 1997); see also Moormann v. Ryan, 628 F.3d 1102, 1109 (9th Cir. 2010), cert. denied, 132 S. Ct. 346 (2011) (appellate counsel is not required to raise a meritless issue on appeal). "A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court." Pollard v. White, 119 F.3d at 1435.

Petitioner's appellate counsel did raise on appeal the claim that trial counsel ineffectively had failed to object to some of the alleged prosecutorial misconduct in closing (see Respondent's Lodgment 20, pp. 100-03). Petitioner contends appellate counsel ineffectively "overlooked several instances of prosecutorial misconduct" and failed to raise on appeal "additional issues about improper vouching and disparagement of defense counsel" (Pet. Mem., pp. 45, 63-64). However, to the extent appellate counsel failed to challenge some of the alleged prosecutorial misconduct, for the reasons stated above, Petitioner has not shown that the alleged failures were unreasonable or prejudicial.

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III. Petitioner's Challenge to the Sufficiency of the Evidence to Support the Jury's Sanity Finding Does Not Merit Habeas Relief.

A. Standards Governing Challenge to Sufficiency of the Evidence

On habeas corpus, the Court's inquiry into the sufficiency of evidence is limited. Evidence is sufficient unless the charge was "so totally devoid of evidentiary support as to render [Petitioner's] conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment." Fish v. Cardwell, 523 F.2d 976, 978 (9th Cir. 1975), cert. denied, 423 U.S. 1062 (1976) (citations and quotations omitted). A conviction cannot be disturbed unless the Court determines that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 317 (1979). A verdict must stand unless it was "so unsupportable as to fall below the threshold of bare rationality." Coleman v. Johnson, 132 S. Ct. 2060, 2065 (2012).

Jackson v. Virginia establishes a two-step analysis for a challenge to the sufficiency of the evidence. United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc). "First, a reviewing court must consider the evidence in the light most favorable to the prosecution." Id. (citation omitted); see also McDaniel v. Brown, 558 U.S. 120, 133 (2010).[15] At this step, a court "may not

[15] The Court must conduct an independent review of the record when a habeas petitioner challenges the sufficiency of the evidence. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997).

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usurp the role of the trier of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial." United States v. Nevils, 598 F.3d at 1164 (citation omitted). "Rather, when faced with a record of historical facts that supports conflicting inferences a reviewing court must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Id. (citations and internal quotations omitted); see also Coleman v. Johnson, 132 S. Ct. at 2064 ("Jackson leaves [the trier of fact] broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that [the trier of fact] draw reasonable inferences from basic facts to ultimate facts") (citation and internal quotations omitted); Cavazos v. Smith, 132 S. Ct. 2, 4 (2011) ("it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial"). The State need not rebut all reasonable interpretations of the evidence or "rule out every hypothesis except that of guilt beyond a reasonable doubt at the first step of Jackson [v. Virginia]." United States v. Nevils, 598 F.3d at 1164 (citation and internal quotations omitted). Circumstantial evidence and the inferences drawn therefrom can be sufficient to sustain a conviction. Ngo v. Giurbino, 651 F.3d 1112, 1114-15 (9th Cir. 2011).

At the second step, the court "must determine whether this evidence, so viewed, is adequate to allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." United States v. Nevils, 598 F.3d at 1164 (citation and

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internal quotations omitted; original emphasis). A reviewing court "may not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Id. (citations and internal quotations omitted; original emphasis).

In applying these principles, a court looks to state law for the substantive elements of the criminal offense, but the minimum amount of evidence that the Constitution requires to prove the offense "is purely a matter of federal law." Coleman v. Johnson, 132 S. Ct. at 2064.

B. Analysis

Petitioner contends the "overwhelming evidence" showed Petitioner was insane at the time of the carjackings and murder (Pet. Mem., p. 74). The Court of Appeal deemed the evidence sufficient to support the jury's sanity finding. The Court of Appeal stated that the sanity phase "boiled down to the jury's election between the testimony of opposing mental health experts," and that the testimony of Dr. Hirsch, Petitioner's statements to paramedics and police after the crimes and the evidence that Petitioner's treating therapist generally considered Petitioner to be functional during the time frame closely associated with the murder amply supported the jury's finding of sanity (Respondent's Lodgment 14, pp. 14-16; see People v. Sadowski, 2011 WL

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2125039, at *8-10).[16]

As discussed below, Petitioner's sufficiency claim fails for at least two reasons. First, no clearly established Supreme Court law authorizes Petitioner's claim. Second, and in any event, the evidence sufficed to support the jury's sanity finding.

Under California law, insanity is not an element of an offense, but rather an affirmative defense to a criminal charge. See People v. Hernandez, 22 Cal. 4th 512, 522, 93 Cal. Rptr. 2d 509, 994 P.2d 354 (2000). At the sanity phase, there is a rebuttable presumption that the defendant was sane at the time the crime was committed. See Cal. Evid. Code § 522; In re Dennis, 51 Cal. 2d 666, 673, 335 P. 2d 657 (1959). The defendant bears the burden to prove insanity by a preponderance of the evidence. Cal. Penal Code § 25(b).

The United States Supreme Court has never recognized a constitutional right to present a sanity defense. See Medina v. California, 505 U.S. 437, 449 (1992) ("we have not said that the Constitution requires the States to recognize the insanity defense") (citation omitted). The Supreme Court has not authorized a constitutional challenge to the sufficiency of the evidence to negate an affirmative defense such as insanity. See Hawkins v. Horel, 572 Fed. App'x 480, 480-81 (9th Cir.), cert. denied, 135 S. Ct. 303 (2014) ("Hawkins has not identified any case where the Supreme Court

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[16] The trial court instructed the jury that in determining the sanity issue the jury should consider evidence presented at both phases of the trial (R.T. 2717; C.T. 515).

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addressed challenges to the sufficiency of the evidence regarding sanity when a defendant bears the burden of proving insanity as an affirmative defense by a preponderance of the evidence. Therefore, he has not shown that there is a state or federal right to have the State prove sanity where it is not an element of the crime."); Maria v. Grounds, 2015 WL 4608086, at *4 (C.D. Cal. Mar. 27, 2015), adopted, 2015 WL 4608304 (C.D. Cal. July 30, 2015) ("Numerous judges in this district have concluded that there is no clearly established decision from the Supreme Court extending the Jackson/sufficiency-of-the-evidence analysis under the Due Process Clause to an insanity defense claim."); Pop v. Yarborough, 354 F. Supp. 2d 1132, 1138 (C.D. Cal. 2005) ("it does not appear that Petitioner's claim relating to his insanity defense is even cognizable under habeas because sanity was not an element of the offenses for which he was convicted") (citations omitted); Gonzalez v. Harrison, 2011 WL 7429400, at *6 (C.D. Cal. June 6, 2011), adopted, 2012 WL 630442 (C.D. Cal. Feb. 27, 2012) ("The Supreme Court has not addressed challenges to the sufficiency of the evidence where, as here, a criminal defendant bears the burden of proving the affirmative defense of insanity by a preponderance of the evidence."); see also Gall v. Parker, 231 F.3d 265, 307 (6th Cir. 2000), cert. denied, 533 U.S. 941 (2011) (claim that evidence was insufficient to show sanity not cognizable on federal habeas where sanity was not an element of the crime). A challenge to the sufficiency of the evidence to show sanity constitutes only a state law claim not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also Wilson v. Corcoran, 562 U.S. 1, 5 (2010) ("it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack

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in the federal courts") (original emphasis). In the absence of any clearly established Supreme Court law authorizing Petitioner's sufficiency challenge, Petitioner cannot obtain federal habeas relief. See Moses v. Payne, 555 F.3d 742, 758-59 (9th Cir. 2009) (habeas relief unavailable where the Supreme Court had articulated no "controlling legal standard" on the issue); Larson v. Palmateer, 515 F.3d 1057, 1066 (9th Cir.), cert. denied, 555 U.S. 871 (2008) (where Supreme Court "expressly left [the] issue an 'open question,'" habeas relief unavailable); 28 U.S.C. § 2254(d).

Second, and in any event, the Court of Appeal's rejection of this claim was not unreasonable. To prove insanity, a defendant must show that "he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." People v. Hernandez, 22 Cal. 4th at 51; Cal. Penal Code § 25(b). The word "wrong" encompasses both legal wrong and moral wrong. See People v. Coddington, 23 Cal. 4th 529, 608, 97 Cal. Rptr. 2d 528, 2 P.3d 1081 (2000), cert. denied, 531 U.S. 1195 (2001), overruled on other grounds, Price v. Superior Court, 25 Cal. 4th 1046, 1069 n.13, 108 Cal. Rptr. 2d 409, 25 P.3d 618 (2001), cert. denied, 534 U.S. 1045 (2001). Thus, a defendant incapable of distinguishing moral right from wrong is insane, even though he may understand the act is unlawful. See id. "Moral obligation in the context of the insanity defense means generally accepted moral standards and not those standards peculiar to the accused." Id. (citation and internal quotations omitted). Petitioner's jury was so instructed (R.T. 2418-19; C.T. 515).

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In support of his sufficiency challenge, Petitioner relies on the testimony of Doctors Plotkin and Rothberg favorable to the defense (Pet. Mem., pp. 77-78). Petitioner also points to evidence showing the alleged progress of Petitioner's mental illness, Petitioner's alleged prior suicide attempts and hospitalizations, the loss of Petitioner's job and marriage, Petitioner's "strange" emails, Petitioner's homelessness and alleged inability to work, Petitioner's appearance and alleged habit of talking to himself or imaginary friends, Petitioner's alleged statements concerning Satan and Olga, and Petitioner's allegedly delusional statements concerning why he supposedly wanted to die (id., pp. 78-80).

Nevertheless, a rational juror could have concluded that, at the time of the incident, Petitioner knew what he did was morally and legally wrong, based on evidence including the following:

1. Petitioner's statements to paramedics immediately after the incident, including statements that Petitioner: (a) was "sorry"; (b) knew he "did wrong"; and (c) knew he had "fucked up real bad";

2. Petitioner's statement, on the way to the hospital, that he "deserve[d] to die";

3. Petitioner's statements to officers on the ride from the hospital to the jail, including statements that Petitioner said: (a) Petitioner was a "bad boy" and had "done bad things"; (b) Petitioner "deserve[d] to die for what [Petitioner had] done"; and (c) Petitioner needed an attorney to "save [Petitioner's] life and

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avoid the electric chair or the gas chamber";

4. Petitioner's statements during a jail interview the night of the incident, including statements that Petitioner: (a) was disrespectful to Officer Scott; (b) became angry because Scott did not leave Petitioner alone; (c) "did a bad thing"; (d) was "stealing" the police car; (e) pushed Scott and took his car; (f) pushed Scott because Petitioner "wanted him to go away" and "didn't care"; and (g) "knew it was wrong" to drag the officer; and

5. Petitioner's statements in a subsequent interview that: (a) after Officer Scott stopped to talk to Petitioner and Petitioner gave the officer identification, Petitioner then decided to "throw caution to the wind" and take the police car; and (b) Petitioner had made a mistake and was very sorry;

6. Evidence that Petitioner's psychiatrist, Dr. Zetin, recorded that: (a) on February 17, 2005, Petitioner was improved but lacked motivation to return to work, and "should have been off disability and in vocational rehab long ago"; (b) on March 15, 2005, Petitioner's bipolar condition was in remission and Petitioner was "ready for rehab, beginning job search"; and (c) on April 10, 2005, Petitioner's bipolar condition was in remission, and Petitioner was taking his medication and was "recovered"; and

7. Dr. Hirsch's testimony that: (a) Petitioner's extensive history of foreign travel showed Petitioner was capable of functioning despite his diagnosis; (b) Petitioner's purchase of a plane ticket and

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attempt to advance his departure date showed Petitioner was able to function (R.T. 2107-08); (c) Petitioner's purported lack of memory of the incident was "a case of malingering through denial of knowledge, denial of memory"; (d) Petitioner knew what he was doing when he pushed Officer Scott, took the police car and struggled with the officer as the officer attempted to gain control of the car, and knew that what Petitioner was doing was legally and morally wrong (R.T. 640, 654-55, 1740, 1742-45, 1749, 2101-02, 2107-08, 2156, 2159-61; C.T. 248-50, 255, 267, 342-46,365, 487-89).

Although Petitioner points to contrary evidence and inferences, under the Jackson v. Virginia standard, this Court must presume that the jury resolved evidentiary conflicts in favor of the prosecution, and cannot revisit the jury's credibility determinations. See Cavazos v. Smith, 132 S. Ct. 2, 6-7 (2011) (jury entitled to credit prosecution experts' testimony despite conflicting testimony by defense experts); McDaniel v. Brown, 538 U.S. 120, 131-34 (2010) (ruling that the lower federal court erroneously relied on inconsistencies in trial testimony to deem evidence legally insufficient; the reviewing federal court must presume that the trier of fact resolved all inconsistencies in favor of the prosecution, and must defer to that resolution); United States v. Franklin, 321 F.3d 1231, 1239-40 (9th Cir.), cert. denied, 540 U.S. 858 (2003) (in reviewing the sufficiency of the evidence, a court does not "question a jury's assessment of witnesses' credibility" but rather presumes that the jury resolved conflicting inferences in favor of the prosecution).

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Accordingly, the state court's rejection of Petitioner's challenge to the sufficiency of the evidence to support the sanity finding was not contrary to, or an unreasonable application of, any clearly established Federal law, as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 100-03 (2011). Petitioner is not entitled to federal habeas relief on Ground Five of the Second Amended Petition.

IV. Petitioner's Claim of Cumulative Error Does Not Merit Habeas Relief.

"While the combined effect of multiple errors may violate due process even when no single error amounts to a constitutional violation or requires reversal, habeas relief is warranted only where the errors infect a trial with unfairness." Payton v. Cullen, 658 F.3d 890, 896-97 (9th Cir. 2011), cert. denied, 133 S. Ct. 426 (2012). Habeas relief on a theory of cumulative error is appropriate when there is a "'unique symmetry' of otherwise harmless errors, such that they amplify each other in relation to a key contested issue in the case." Ybarra v. McDaniel, 656 F.3d 984, 1001 (9th Cir. 2011), cert. denied, 133 S. Ct. 424 (2012) (citation omitted). Here, no such symmetry of otherwise harmless errors exists. Accordingly, the state court's rejection of Petitioner's cumulative error claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal Law as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. at 100-03. Petitioner is not entitled to federal habeas relief on Ground Seven of the Second Amended Petition.

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RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) denying and dismissing the Second Amended Petition with prejudice.

DATED: December 4, 2015.

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

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NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM SADOWSKI, Petitioner, v. RANDY GROUNDS, Warden, Respondent.	NO. CV 12-10623-PSG(E) ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Second Amended Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which any objections have been made. The Court accepts and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Second Amended Petition with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein on counsel for Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: _____.

_____
PHILLIP S. GUTIERREZ
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM SADOWSKI, Petitioner, v. RANDY GROUNDS, Warden, Respondent.	NO. CV 12-10623-PSG(E) JUDGMENT

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

IT IS ADJUDGED that the Second Amended Petition is denied and dismissed with prejudice.

DATED: _____.

_____
PHILLIP S. GUTIERREZ
UNITED STATES DISTRICT JUDGE

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Court of Appeal, Second Appellate District, Division Eight - No. B254076

S217223

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re WILLIAM SADOWSKI on Habeas Corpus.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re

WILLIAM SADOWSKI

on Habeas Corpus.

B254076

(Super. Ct. No. SA054153)

ORDER

THE COURT:

We have read and considered the petition for writ of habeas corpus filed on February 3, 2014. We have also reviewed our file in case number B221859, petitioner's direct appeal from the conviction at issue in this writ proceeding.

The petition is denied.

BIGELOW, P. J. RUBIN, J. GRIMES, J.

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EXHIBIT A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM SADOWSKI, Defendant and Appellant.	B221859 (Los Angeles County Super. Ct. No. SA054153)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lance A. Ito, Judge. Affirmed.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted William Sadowski of murdering a police officer, with findings that the murder was committed during a carjacking and that he had used a deadly weapon – the officer's patrol car – to commit the murder. (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17), 12022 subd. (b)(1).)[1] The jury found the murder had not been premeditated.[2] The jury further convicted Sadowski of two counts of carjacking and one count of attempted carjacking. (§§ 215, subd. (a), 664/215, subd. (a).) In a bifurcated proceeding, the jury found that Sadowski had been sane at the time he committed the crimes. The trial court sentenced Sadowski to a term of life without the possibility of parole, plus a determinate aggregate concurrent term of 15 years. We affirm.

FACTS

The Crimes

On April 29, 2005, Los Angeles Airport Police Officer Tommy Scott stopped his marked patrol car on Lincoln Boulevard to contact Sadowski. While the two men were talking, Sadowski suddenly pushed Officer Scott aside, ran to his patrol car, jumped in the driver's seat, and started driving away. As Officer Scott tried to gain control of the vehicle by way of the driver's door, Sadowski accelerated up to 50 miles per hour, and began swerving across all lanes. Officer Scott hung on to the vehicle. To an eyewitness, it looked like Sadowski was trying to "shake the policeman off" the patrol car. Sadowski continued for a quarter-mile then crashed into a concrete wall at 45 to 55 miles per hour. Inside the patrol car, airbags saved Sadowski from significant injury. The driver's side door hit a fire hydrant, and Officer Scott was decapitated.

After the crash, Sadowki stumbled from the wreckage, and walked up to a car that had stopped near the accident. Sadowski tried unsuccessfully to drag Christina Koesler from the car through the locked driver's door. Sadowski then walked to a Ford Explorer stopped behind Koesler, and took it from its driver, Craig Lazar. Sadowski sped off for

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1 All further references are to the Penal Code unless otherwise indicated.

2 The information alleged that Sadowski knew or should have known that the victim was a peace office engaged in the performance of his duties within the meaning of section 190.2, subdivision (a)(7). The jury found this allegation not true.

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about 900 feet. He lost control of the Explorer, crashed into a fence, and flipped the Explorer upside down. Police took Sadowski into custody at the scene.

As he was being pulled from the Explorer, Sadowski stated, "I'm sorry. I know I did wrong. I did not try to hurt the guy. I know I fucked up. I fucked up real bad. I just want to kill myself." While being transported to UCLA Medical Center by ambulance, Sadowski kept repeating statements to the effect, "I want to die. Let me die. I deserve to die. I'm sorry, sorry for what I did." At one point he said something to the effect, "Please don't tell my mom what I did." While being transported from the hospital to police headquarters, Sadowski made statements to the effect that he needed a lawyer "to save [his] life," and to help him avoid "the electric chair or . . . the gas chamber."

The Criminal Case

In September 2006, the People filed an information charging Sadowski with the murder of Officer Scott (§ 187, subd. (a)), two counts of carjacking (§ 215, subd. (a)), and one count of attempted carjacking (§§ 664/215, subd.(a)). The murder count included ancillary allegations that Sadowski committed the offense in the course of a carjacking (§ 190.2(a)(17)), and that he used a deadly weapon, a motor vehicle (§ 12022, subd. (b)(1)) , and that he knowingly killed a police officer engaged in the performance of his duties (§ 190.2 (a)(7)). The charges were tried to a jury during the fall of 2009. The prosecution evidence established the facts summarized above.

Sadowski presented evidence showing that he had a history of mental illness, and that he had been acting unusual both in the days leading up to the events on April 29, 2005, and after being taken into custody. A psychiatrist at the Twin Towers jail facility testified that he diagnosed Sadowski as suffering from bipolar disorder. Sadowski's defense counsel's argument to the jury implored the jurors to find that Sadowski was not guilty because he did not have the required intent for the charged crimes as he was mentally ill. On November 16, 2009, the jury returned verdicts finding Sadowski guilty of the murder of Officer Scott, with findings that the murder was committed while Sadowski was engaged in the commission of a carjacking, and that Sadowski used a deadly weapon to commit the murder. (§§ 187, subd. (a), 190.2, subd. (a)(17), 12022

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subd. (b)(1).) The jury found that the murder was not premeditated. The jury also convicted Sadowski of the two carjacking counts and the one attempted carjacking count. (§§ 215, subd. (a), 664/215, subd. (a).)

On November 25, 2009, at the conclusion of a bifurcated proceeding, the jury returned a verdict finding that Sadowski had been sane at the time he committed the crimes. On January 15, 2010, the trial court sentenced Sadowski as noted at the outset of this opinion.

DISCUSSION

I. Uniformed Police Officers as Trial Spectators

Sadowski filed a motion for new trial based on several claims, one of which was that his trial had been unfair because uniformed police officers were permitted to sit in the courtroom audience during the trial. The trial court denied Sadowski's claim. On appeal, Sadowski contends the trial court abused its discretion in denying his motion for new trial. We disagree.

A fair trial is a fundamental due process right guaranteed under the Fourteenth Amendment. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 570 (*Holbrook*).) Whether the presence of uniformed police officers in a courtroom is so inherently prejudicial as to render a trial unfair is largely a matter of degree. The test is whether the police officers' presence creates an " 'unacceptable risk . . . of impermissible factors coming into play.' " (*Ibid.*) In *Holbrook*, the United States Supreme Court ruled that four uniformed state troopers sitting in a spectators' row immediately behind the defendant to supplement the court's ordinary security personnel did not create such an inherent risk of prejudice that it denied the defendant a fair trial. (*Holbrook, supra*, 475 U.S. at p. 570.) At the same time, the court cautioned that "a roomful of uniformed and armed policemen might pose [a risk] to a defendant's chances of receiving a fair trial." (*Id.* at pp. 570-571.)

In *People v. Cummings* (1993) 4 Cal.4th 1233 (*Cummings*), our Supreme Court addressed the issue of police officer spectators at trial using this language: "Defendants argue . . . that the [trial] court abused its discretion in permitting any uniformed officers to attend the trial as spectators. We find no abuse of discretion on the part of the trial

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court. The right to a public trial is not that of the defendant alone. [Citations.] . . . Only if restriction is necessary to preserve a defendant's right to a fair trial may the court restrict attendance by members of the public. Because a First Amendment right of access to judicial proceedings is also recognized, they may not be closed 'unless specific, on the record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest.' " [Citations.]

"In this case there was no effort to close the proceedings . . . [but Defendant] sought to exclude a segment of the public. As members of the public, the police officers had both common law and constitutionally based rights to attend the trial. Exclusion of any group on the basis of the members' status would be impermissible. The trial court sought to balance the rights of those officers whose duty assignments precluded attendance in civilian clothes against the possibility that seeing large numbers of uniformed officers among the spectators would somehow influence the jury. The concerns expressed by [Defendant] were not sufficient to establish that excluding all uniformed officers was essential to a fair trial, and the record does not support his claim of actual prejudice." (*Cummings, supra*, 4 Cal.4th at pp. 1298-1299.)

In his opening brief on appeal, Sadowski cites to five instances during trial he believes demonstrate uniformed officers were improperly in the courtroom during trial. They include:

(1) The denial of a request by defense counsel that police officer spectators be required to wear civilian clothes, rather than uniforms. Even though the court denied this request, we note that the prosecutor nevertheless advised the court that she had been asked by an airport police department's liaison "about who could come [to the trial]," and that she had given this "guidance" on the subject: "I said, . . . if [an officer] is on their way to work or in their uniform for some reason, they won't have to take their uniform off to come in [court]. But neither do they . . . have to put it on if they're on a day off and they're coming down because they're supportive or a friend or they want to see [and] that it's perfectly fine to wear a suit, civilian clothes, that nobody is asking them to put on

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uniforms to come down here. [¶] . . . But I also wasn't comfortable in saying . . . you can't wear your uniform if you want to wear your uniform."

(2) Before voir dire, the court indicated that it was willing to further consider the issue of uniformed police officers in the courtroom and that counsel was free to question prospective jurors on the issue of whether their presence might influence them in some way.

(3) Sadowski posits that the prosecutor expressed sympathy for Scott during closing argument at the guilt phase, and "turned to the family who were surrounded by numerous uniformed . . . officers." However, the citation to the record he set forth, page 530 of the clerk's transcript, is a page from his motion for new trial.

(4) At one point during the guilt phase, defense counsel advised the trial court that a uniformed police officer had held the door open for jurors. Counsel said, "I don't see a problem with that [but] he touched the juror that walks with a cane, like gently escorting her, and I have a problem with that type of contact." Counsel asked the court to instruct the officer "not to have that type of contact with the jurors." The court agreed with defense counsel's position, stating the gesture was probably "just a matter of manners, but not appropriate." The investigating detective accompanying the prosecutor promised the court that he would "have a talk" with the officer.

(5) During the motion for new trial, the trial court stated: "[O]ne of the items that is not clearly explained in the court record is the attendance of the Los Angeles World Airport police officers . . . during the course of the trial in uniform. . . . [¶] Although, at the beginning and end of the case, . . . during the arguments and opening statements, we did have a number of police officers here present in the courtroom. We also had sheriffs as well, who wear a different uniform, but there clearly was a presence of law enforcement in the courtroom."

We reject Sadowski's claim that the presence of uniformed officers in the courtroom audience rendered his trial unfair. It is undisputed that police officers sat in the courtroom audience, at least at some parts of trial. At the same time, the record does not support any conclusions concerning the number of officers present at any given point.

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In addressing Sadowski's motion for new trial based on the uniformed police officers factor, the trial court expressly noted that officers had been present, but then stated: "However, I don't believe [the officers'] presence was in any way oppressive or in any way intimidating, and I also believe that police officers have a right to attend court proceedings in uniform if they're on duty."

The record does not establish that "a roomful of uniformed and armed policemen" had been present throughout Sadowski's trial or at any part of the trial (*Holbrook, supra*, 475 U.S. at pp. 570-571), nor does the record establish that there had been "large numbers of uniformed officers among the spectators" at any particular time during Sadowski's trial (*Cummings, supra*, 4 Cal.4th at pp. 1298-1299). We do not see that the trial court abused its discretion. The record does support a conclusion that the trial court acted unreasonably in declining to find that Sadowski's trial had been unfair. We reach this conclusion after considering the issue in the light of either an "unacceptable risk" of possible prejudice (*Holbrook, supra*, 475 U.S. at pp. 570-571), or "actual prejudice" (*Cummings, supra*, 4 Cal.4th at pp. 1298-1299). The record simply does not persuade us that there was any taint arising from the presence of police officers.

Finally, Sadowksi takes issue with the trial court's statement that police officers had "a right to attend court proceedings in uniform if they're on duty." We acknowledge that the record does not show whether they officers who were present in uniform were actually on duty. But, the bottom line is this -- the record does not show that the presence of uniformed officers resulted in a denial of a fair trial. The record does not suggest that an "air of authority" from the presence of uniformed police officers overshadowed Sadowski's trial, nor does it suggest a possibility that the outcome of Sadowski's trial may have been affected by uniformed officers.

II. The Prosecutorial Misconduct Issue

Another claim presented in Sadowski's motion for new trial was that prosecutorial misconduct rendered his trial unfair. The trial court denied the motion on this ground also. On appeal, Sadowski contends the trial court abused its discretion in denying his motion for new trial based on his claim of prosecutorial misconduct. We find otherwise.

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Prosecutorial misconduct occurs when a prosecutor employs either a reprehensible or deceptive method to persuade a jury. The defendant need not show bad faith on the part of the prosecutor to establish misconduct because a defendant is injured by an improper trial tactic, regardless of whether it occurred inadvertently or through an intentional design. (*People v. Hill* (1998) 17 Cal.4th 800, 822-823.) Where a reviewing court finds that misconduct infected a trial with such unfairness as to make the defendant's resulting conviction a denial of due process, the misconduct is an error of constitutional magnitude compelling reversal of the defendant's conviction. (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Where a reviewing court finds that misconduct merely exposed jurors to some form of improper evidentiary matter, the error is reviewed under the harmless error test articulated in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Frye* (1998) 18 Cal.4th 894, 976, disapproved on another ground on *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

1. Forfeiture

Sadowski alleges four categories of misconduct: (1) appealing for sympathy for the victim's family; (2) misstating the law; (3) disparaging defense counsel; and (4) misstating facts. Before examining any of Sadowski's misconduct claims, we must address the People's argument that Sadowski forfeited certain of his misconduct claims because he did raise a timely objection, and request an admonition to the jury at the time of the alleged misconduct. (See. e.g., *People v. Brown* (2003) 31 Cal.4th 518, 553.)

We agree with the People that Sadowski forfeited his claim that the prosecutor disparaged defense counsel in the course of her closing argument during the sanity phase of trial. The prosecutor's argument encompasses 51 pages of the reporter's transcript; Sadowski claims the prosecutor committed misconduct by belittling defense counsel in this one passage from the prosecutor's closing argument: "Please use your critical thinking skills when something is said to you by Ms. Nunez [defense counsel] and not supported by the record. Just say to yourself, she is desperate, she really has nothing to work with, she is desperate. She has to stand here and say something, so she picks and chooses and takes things out of context. She never talks to you about [Sadowski's

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rational acts]. She says he is crazy, he is crazy, you have to find him insane because he is crazy." There was no objection. As a result, we find the claim of misconduct must be considered forfeited.

We disagree with Sadowski's argument that we should veer from the general requirement for an objection as the record does not persuade us that an objection would have been futile. The trial court sustained defense counsel's objections to other statements made by the prosecutor, and admonished the jury. We have no reason to believe the trial court would have disregarded an objection to other portions of the prosecutor's arguments.

Neither do we find ineffective assistance based on a failure to object. In *Strickland v. Washington* (1984) 466 U.S. 668, the Supreme Court established that "[t]he claim of ineffective assistance of counsel involves two components, a showing the counsel's performance was deficient and proof of actual prejudice. (*Strickland v. Washington*[, *supra*,] 466 U.S. 668 . . . ; *People v. Ledesma* (1987) 43 Cal.3d 171 . . .)" (*People v. Garrison* (1989) 47 Cal.3d 746, 786.) On a direct appeal, a conviction will be reversed for ineffective assistance of counsel only where the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058 [" 'If the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," [citation], the contention [that counsel provided ineffective assistance] must be rejected.' "].)

Here, the record does not demonstrate that there could have been no justifiable, tactical reason to forego an objection. Further, the record does not demonstrate that if an objection had been made, that it might have resulted in a different outcome of the sanity phase of the trial. Although it may have been better for the prosecutor to say that that the defense's *position* was desperate, rather than saying that defense *counsel* was desperate, we see no harm in the decision to forego an objection. The respective lines in Sadowski's case were drawn cleanly for the jurors. Assuming without deciding that the

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prosecutor employed improperly focused language, she exposed the jurors to little more than a colloquially-phrased comment that the defense position in the case should be viewed as weak. We will not abandon the forfeiture rule to avoid an ineffective assistance claim that does not withstand scrutiny.

We next agree with the People's argument that Sadowski forfeited his claim that the prosecutor misstated facts. Sadowski's opening brief on appeal cites us to 19 points in the prosecutor's closing argument at the sanity phase, during which, claims Sadowski, the prosecutor misstated facts. We have examined the reporter's transcript at all 19 points cited, and find that no objection was interposed.[3] Because no objection was made at any point, all of Sadowski's claims of prosecutorial misconduct based on allegedly misstated facts are forfeited.

We again reject Sadowski's argument that we should apply an exception to the requirement for an objection. We are not persuaded that an objection would have been futile. More importantly, the record suggests that Sadowski's trial counsel had a reasonable tactical reason for not objecting to the prosecutor's misstatements of facts. On reviewing the argument by Sadowski's trial counsel, we find that the very first words by defense counsel presented a theme to this effect: let me tell you all the things that the prosecutor said that "were not right." In short, the record supports a conclusion that the reason no objections were interposed to the prosecutor's allegedly improper statements is that a tactical decision was made to let the prosecutor build a case based upon misstatements, and then to attack those misstatements in rebuttal. In other words, the record shows that defense counsel believed it would be better to highlight that the prosecution needed to make misstatements to buttress its case, rather than make serial objections to every misstatement as it arose. We will not apply an exception to the forfeiture rules for misconduct given the record before us.

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[3] Two passages that Sadowski claims are objectionable came closely connected, near the outset of the prosecutor's argument. Sadowski's defense counsel requested a sidebar, but there was no express objection, and no request for an admonishment. The sidebar is not reported; the prosecutor's argument continued after the sidebar without any comment from the trial court.

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We now turn to the claims of prosecutorial misconduct preserved by objection.

2. Sympathy for the Victim

Sadowski argues the prosecutor improperly invoked sympathy for Officer Scott in an effort to persuade the jury. The citation to the record offered by Sadowski shows this exchange during the prosecutor's argument to the jury at the penalty phase of the trial: "[The Prosecutor]: In the opening statement, [defense counsel] said [Sadowski] has lost everything. No, he didn't lose everything. And I thought to myself, Officer Scott lost everything because he lost his life. . . . He didn't lose it. He was robbed of his life. It was violently taken from him. . . . [¶] Don't let this defendant rob Officer Scott of the sympathy that each and every one of you would have for him.

[Defense Counsel]: Objection. Your Honor.

[The Court]: Sustained. [The Prosecutor], sympathy is not an issue in this case."

[The Prosecutor]: Did the defendant lose everything? . . ."

We find no abuse of discretion in the trial court's decision not to grant a new trial based on the prosecutor's passing reference to sympathy for Officer Scott. It is true that the prosecutor should not have invoked sympathy for Officer Scott in an effort to persuade the jury that Sadowski was guilty (*People v. Fields* (1983) 35 Cal.3d 329, 362 [appeals to sympathy or the passions of the jurors are improper at the guilt phase of a criminal trial]). However, only misconduct that prejudices a defendant's right to a fair trial requires reversal. (*Id.* at pp. 363-364.) We see no reasonable probability that the jury's verdicts at the guilt phase of trial may have been more favorable to Sadowski without the prosecutor's lone, passing utterance of the word "sympathy." The trial court sustained defense counsel's objection with a statement that sympathy was not an issue. Beyond this, the court instructed the jurors that they were to decide the case on the facts alone, and were not to allow bias, sympathy, prejudice, or public opinion influence their decision. (CALCRIM No. 200.) In the absence of something in the record to indicate otherwise, we presume that the jurors treated the trial court's instructions as a statement of law from a judicial authority, and treated the prosecutor's comments as the words of an

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advocate who was attempting to persuade. (*People v. Mayfield* (1993) 5 Cal.4th 142, 179.) We see no possibility of prejudice.

3. Misstatement of Law

Sadowski next contends the prosecutor improperly misstated the law in an attempt to persuade the jury during the sanity phase of the trial. We disagree.

During the sanity phase of the trial, the prosecutor tried to emphasize that the burden was on Sadowski to prove that he was not sane, and tried to explain that, if the evidence was "a tie," then Sadowski had not met his burden. Sadowski points to the following reference in the trial record to establish that the prosecutor engaged in misconduct by misstating the law:

"[The Prosecutor]: So given the fact that it is [defendant's] burden, let's say, you say maybe he is [insane], maybe he was [insane]. That is not enough, not maybe. [¶] Well, it's possible [he was insane]. . . . That is not enough. Those things are not enough. [¶] And . . . you will remember there was a jury instruction from before that says if there [are two] reasonable interpretations from the evidence, you must adopt the one against the person who has the burden. . . .

[Defense Counsel]: That isn't the law.

[The Court]: I'm sorry counsel, that instruction doesn't apply to this portion of the case.

[The Prosecutor]: Strike that. [¶] If you say to yourself, well, one side says this, one side says that, it's a tie. That then means he is not legally sane, [he] has not carried [his] burden. And you must find that he is sane. . . ."

Even if the prosecutor misstated the law, we find no abuse of discretion in the trial court's decision that the prosecutor's misconduct did not compel a new trial. Again, we discern no reasonable probability of prejudice arising from the misconduct. The prosecutor was not deceptively or reprehensibly persuasive. Further, Sadowski's counsel immediately objected, and the trial court stated that the instruction to which the prosecutor had alluded did not apply to the sanity phase of the trial. The prosecutor promptly backed off the point by saying "strike that," and moved on to her point

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regarding the burden of proof, and a "tie" in the evidence. We see no possibility that the prosecutor's words regarding "two reasonable interpretations" of the evidence had any effect on the outcome of the sanity phase of Sadowski's trial.

III. The Jury's Sanity Finding

Sadowski contends the jury's finding that he was sane at the time he committed his crimes is not supported by substantial evidence. We disagree.

Our criminal law presumes a defendant was sane at the time he or she committed a crime. (§ 1026, subd. (a).) A defendant may plead not guilty to an offense, and deny any special allegations, and join that plea with a plea of not guilty by reason of insanity. (§ 1016, subd. (2) & (6).) When such pleas are entered, the court conducts a bifurcated trial, and the issues of guilt and sanity are separately tried. (*People v. Hernandez* (2000) 22 Cal.4th 512, 520.) The sanity phase of trial is part of the same criminal proceeding as the guilt phase, but differs procedurally from the guilt phase of trial in that the issue is confined to sanity and the burden is on the defendant to prove by a preponderance of the evidence that he was not sane at the time he or she committed an offense. (*Id.* at p. 521.) In addressing the issue of whether the defendant was sane at the time of a criminal offense, a trier of fact determines whether the defendant proved by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the crime. (§ 25, subd. (b).)

A jury's finding on the issue of sanity is reviewed under the substantial evidence test. (*People v. Hernandez, supra,* 22 Cal.4th at p. 527.) This means a reviewing court must consider the whole record, examining the evidence in the light most favorable to the finding, presuming every fact the jury could reasonably deduce from the evidence, and deferring to the jury's assessment of the weight and credibility of the evidence. (*People v. Padilla* (2002) 98 Cal.App.4th 127, 134-135.) In other words, before we may overturn the jury's finding that Sadowski was sane, we must find as a matter of law that the finder of fact could not reasonably have rejected the evidence of insanity. (*People v. Skinner* (1986) 185 Cal.App.3d 1050, 1059.)

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The sanity phase of Sadowski's trial boiled down to the jury's election between the testimony of opposing mental health experts. The defense and the prosecution presented their respective experts' conclusions about what was or was not established by the evidence of Sadowski's behavior and his mental health treatment, both past and present. The jury accepted the prosecution's presentation, and we cannot find as a matter of law that its decision was unreasonable.

The prosecution's primary witness, Barry Hirsch, Ph.D., a forensic psychologist, testified that the evidence showed Sadowski had been sane at the time of the events on April 29, 2005. Dr. Hirsch discounted the significance of an event in early April 2005, when Sadowski was "found naked trying to get into a church." Dr. Hirsch interviewed Sadowski about the incident in 2009, and had reviewed some hospital records related to the incident. He opined: "My impression was that this was a decision on this man's part to try to subvert authority and continue his $4,000 a month disability paycheck, and that this was a conscious decision that perhaps was influenced by some manic kinds or hypomanic kinds of thinking that propelled him in the direction of public exposure." Dr. Hirsch noted that Sadowski's "disrobing" came during a period of time related to a conclusion by a "Dr. Zetin" that Sadowski's "disability check should stop."

Dr. Hirsch also noted evidence that Sadowski was defiant with authority figures, and that he had made a false claim for financial benefit. Sadowski accused CBS Studio security guards of assaulting him as they escorted him out of the studio. He filed a police report, and claimed he suffered from anxiety as a result of the assault. Dr. Hirsch talked to the security guards and watched the event on videotape. He concluded that Sadowski's representations were false and designed to work up medical claims for the purpose of a lawsuit.

Dr. Hirsch further observed that Sadowski's life activities around the time of his crimes also showed that he was functioning normally despite any mental illness. He had traveled oversees, which belied a showing of mental disorganization or mania. Sadowski had little difficulty navigating through foreign countries and was able to make logical

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decisions during travels with extensive itineraries. Sadowski was able to understand and follow the tourism visa rules for extending his European visits.

Dr. Hirch interviewed Sadowski a number of times and found his memories of his crimes were selective and self-serving. When addressing his crimes, Sadowski recalled only memories that aided the claim that he was delusional and suicidal, whereas he had little problem recalling information unrelated to the crimes. As Dr. Hirsch explained, Sadowski had a good memory about the facts involved in his legal matters, but had memory lapses when discussing the instant crimes. Dr. Hirsch concluded "[i]t was a case of malingering through denial of knowledge, denial of memory."

Apart from his after-the-fact memory problems regarding his crimes, Dr. Hirsch also believed that Sadowski's behavior during the crimes showed he knew right from wrong at the time of the crimes. As Dr. Hirsch put it, Sadowski's behavior showed "he knew what he was doing. It was purposeful. It followed [a] specific direction in terms of the means that contributed to it." Sadowski's statements to paramedics and police after the crimes also showed he knew his actions were legally and morally wrong, and his statements about being executed for what he had done was also of legal significance in that it showed Sadowski was aware of his legal dilemma. Sadowski's show of regret for what he had done was of significance; his statement that he deserved to die showed he understood the moral wrong he had committed. To the extent that Sadowskis's motivations may have been irrational (e.g. to reunite with Satan), those motivations did not negate that Sadowski knew what he was doing, and knew that it was wrong from a societal perspective to do what he was doing.

Finally, Dr. Hirsch also reviewed progress and treatment notes prepared by Dr. Zetin for his treatment of Sadowski from December 2001 to April 2005. Dr. Zetin's notes from the period around early April 2005 indicated that Sadowski was "recovered," and that his prognosis was for "no restrictions," and that he was "very ready for vocational rehab." The notes "reflect[ed] more communication" between Dr. Zetin and Sadowski, and showed that Sadowski as discussing "his job, the insurance, the Social Security, and that he was sending internet job applications out." Dr. Zetin recorded that

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Sadowski did not appear "pressured or grandiose," indicating that his speech or physical motions were not overly rapid, and that Sadowski was not "thinking that [he was] the best, . . . the greatest . . . ." Dr. Zetin's notes further indicated that Sadowski's "mood [was] pretty stable overall."

The evidence in the form of Dr. Hirsch's testimony is substantial evidence that Sadowski was sane at the time of his crimes, and the evidence showing the contrary does not mean that the jury's sanity finding cannot be sustained. While Dr. Zetin's assessment of Sadowski may have been overly optimistic in April 2005, it cannot be ignored that Sadowski's own treating therapist generally considered him to be functional during the time frame closely approaching the murder of Officer Scott. The remaining evidence in Sadowski's favor does not defeat that substantial evidence supports the jury's verdict.

IV. The Sentencing Issue

Sadowski contends his sentence of life without the possibility of parole amounts to cruel or unusual punishment under the California Constitution. We disagree.

A sentence is cruel or unusual within the meaning of article I, section 17, of our state Constitution when it is so disproportionate to the crime for which it is imposed that " 'it shocks the conscience and offends fundamental notions of human dignity.' " (*People v. Dillon* (1983) 34 Cal.3d 441, 478.)

We reject Sadowski's argument that his sentence must be considered shocking to the conscience and offensive to fundamental human dignity. Sadowski murdered a police officer who was performing his duty. The murder was committed during the course of a carjacking, and was followed by an attempted carjacking and a carjacking in an effort to escape. The events were horrifically violent, even for a case of murder. We have little doubt, as Sadowski's trial counsel ably argued, and as his appellate counsel has ably argued, that a mental health factor was involved in Sadowski's actions. Still, we cannot accept his argument that his sentence must be found disproportionate under constitutional precepts because he suffered from mental health problems. A jury found that Sadowski was sane when he committed his crimes, and we do not agree that his sentence must be lessened in order to reach a constitutionally permissible period of incarceration. The

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alleged failures of the mental health profession and mental health support system noted by Sadowski may posit important questions insofar as public policies and expenditures are concerned, but they do not persuade us that Sadowski's sentence of life without the possibility of parole for murdering a police officer during the commission of a violent felony violates our state's Constitution. The punishment fits the crimes.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.

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