No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOE LOUIS ARMENTA

Petitioner,

v.

SCOTT KERNAN, Secretary of the California Department of Corrections

Respondents.

PETITIONER'S APPLICATION FOR RECALL AND STAY OF THE U.S. NINTH CIRCUIT'S MANDATE PENDING PETITION FOR WRIT CERTIORARI

Directed to the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit

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APPLICATION TO RECALL AND STAY THE MANDATE

Applicant, Joe Louis Armenta (hereafter "petitioner"), respectfully requests a recall and stay of the Ninth Circuit Court of Appeal's Mandate, pending this Court's disposition of his petition for writ of certiorari.

JURISDICTION

Petitioner filed a petition for Writ of Habeas Corpus in the Federal District Court, Central District of California. The habeas petition challenged petitioner's state court criminal convictions. The petition was grounded on the contention that the prosecutor committed misconduct during petitioner's criminal jury trial, in violation of the Fourteenth Amendment to the United States Constitution. The habeas petition was brought under the provisions of 28 U.S.C. section 2254(d).

After the habeas petition was denied in the Federal District Court, petitioner appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit granted petitioner's Request for Certificate of Appealability and heard petitioner's appeal. The Ninth Circuit thereafter issued a Memorandum Decision, affirming the decision of the Federal District Court on May 18, 2018.

Petitioner filed a Petition for Rehearing on May 18, 2018.

The Ninth Circuit entered its order denying petitioner’s Petition for Rehearing on September 20, 2018.

On September 28, 2018, the Ninth Circuit issued a Mandate.

On October 1, 2018, petitioner filed a Motion to Recall and Stay the Mandate in the Ninth Circuit.

On October 19, 2018, the Ninth Circuit issued an Order denying the Motion to Recall and Stay the Mandate.

The final judgment of the Ninth Circuit on appeal is subject to review by this Court under 28 U.S.C. § 1254(1), and this Court therefore has jurisdiction to entertain and grant a request for a recall and stay of the mandate pending filing of a petition for writ of certiorari under 28 U.S.C. § 2101(f).

STATEMENT OF THE CASE AND FACT

Facts

The salient facts of this case are that the police conducted a probation search of petitioner's home. During the initial part of the search, the police attempted to make a stealth entry at the rear of the home through a sliding glass window. But when they opened the window, a home alarm was sounded. Thereafter, appellant fired two to three warning shots from a lazar-sighted revolver, which ultimately precipitated the charges of attempt murder on police officers in this matter. (ER Vol. I, Tab 7 pp. 4-6; ER Vol. II, Tab 8 pp. 2-9; CT Vol. I pp. 30-31, 38, 46-47, 50-51, 80.)1/

Petitioner's trial defense was that when the police opened the sliding glass window at the rear of his home and set off the alarm, he assumed that Eastside

Riva's gang members had entered his home in an attempt to kill him. So he fired two or three warning shots from a lazar-sighted revolver in an attempt to dissuade the intruders. From here, the circumstances degenerated into an attempt at "suicide by cop" after petitioner realized that it was police officers who had entered his home. (ER Vol. I, Tab 7 pp. 4-8; ER Vol. II, Tab 8 pp. 2-9; CT Vol. I pp. 30-31, 38, 46-47, 50-51, 80.)

Procedural History

On July 18, 2011, following a jury trial in the Riverside County Superior Court, petitioner suffered state court convictions on four counts of attempted

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1 "ER" refers to the Excerpts of Record filed in conjunction with Appellant's Opening Brief in the Ninth Circuit Court of Appeals.

"CT" refers to the Clerk's Transcript of proceedings in the state trial court. (See, ER Vol. II, Tab 8; CT Vol. I; ER Vol. II, Tabs 9 & 10; CT Vol. II; ER Vol. II, Tab 11; CT Vol. III.)

"RT" refers to the Reporter's Transcript of proceedings in the state trial court. (See, ER Vol. III, Tab 12; RT Vol. I; ER Vol. III, Tab 13; RT Vol. IV; ER Vol. III, Tab 14; RT Vol. VI; ER Vol. III, Tab 15; RT Vol. VII; ER Vol. III, Tab 16; RT Augmented Vol. V.)

"Opn." refers to the Opinion of the state Court of Appeal. (ER Vol. I Tab 7; CT Vol. III.)

"Dec." refers to the Memorandum Decision of the Ninth Circuit in this matter.

"Appendices" refers to Document Appendices attached to this application.

murder on a police officer, along with various subsidiary counts of conviction and true findings on enhancement allegations. Petitioner was sentenced to a determinate term of 62 years 8 months in prison, plus three consecutive indeterminate terms of life in prison, with an aggregate minimum parole period of 29 years.

On September 11, 2015 the California Court of Appeal, Fourth Appellate District, Division Two, issued an opinion affirming petitioner's convictions and sentence on direct appeal.

On December 11, 2013, the California Supreme Court denied a petition for review on direct appeal.

On March 5, 2015, petitioner sought relief in the Federal District Court for the Central District of California by way of a Petition for Writ of Habeas Corpus. The petition was brought under the provisions of 28 U.S.C. § 2254(d). The petition is subject to the provisions of the AEDPA. The federal habeas petition challenged the state court judgment on grounds that petitioner's conviction was obtained in violation of his right to due process of law under the Fourteenth Amendment to the United States Constitution.

On May 27, 2016, the Federal District Court Magistrate issued a Report and Recommendation, denying the petition for writ of habeas corpus.

On June 29, 2016, The District Court Judge issued an Order Accepting the Findings, Conclusions, and Recommendations of the Magistrate and denying the petition for writ of habeas corpus.

On June 29, 2016, Judgment was filed in the Federal District Court, Central District of California.

On June 30, 2016, petitioner filed Notice of Appeal in the Ninth Circuit Court of Appeals. Petitioner also sought a Certificate of Appealability in the Ninth Circuit Court of Appeals. The grounds for issuance of the Certificate of Appealability were the same as those offered in his federal habeas petition.

On April 21, 2017, the Ninth Circuit Court of Appeals issued an Order Granting the Request for a Certificate of Appealability. (Appendices F-1.)

On May 18, 2018, the Ninth Circuit Court of Appeals issued a Memorandum Decision, affirming the decision of the Federal District Court, Central District of California, to deny the petition for writ of habeas corpus. (Appendices E-1.)

On May 25, 2018, petitioner filed a Petition for Rehearing in the Ninth Circuit Court of Appeals. The grounds raised in this Petition for Writ of Certiorari filed in this Court were raised in the Petition for Rehearing filed in the Ninth Circuit Court of Appeals.

On September 20, 2018, the Ninth Circuit Court of Appeals issued an Order Denying the Petition for Rehearing. (Appendices D-1.)

On September 28, 2018, The Ninth Circuit Court of Appeals issued a Mandate. (Appendices C-1.)

On October 1, 2018, petitioner filed a Motion to Recall and Stay the Mandate in the Ninth Circuit Court of Appeals. (Appendices B-1.)

On October 19, 2018, the Ninth Circuit Court of Appeals issued an Order denying the Motion to Recall and Stay the Mandate. (Appendices A-1.)

REASONS FOR GRANTING A RECALL AND STAY OF THE MANDATE

Standards

The standards for granting a stay pending review are "well settled." (*Deaver v. United States*, 483 U.S. 1301, 1302, 107 S.Ct. 3177, 97 L.Ed.2d 784 (1987) [Rehnquist, C.J., in chambers]; see also, *Teva Pharms. USA, Inc. v. Sandoz, Inc.* 134 S.Ct. 1621, 1621 (2014) [Roberts, CJ., in chambers] (applying same standards to application for recall and stay of mandate). Preliminarily, the appellant must show that "the relief is not viable from any other court or judge," Sup. Ct. R. 23.3-- a conclusion established here by the fact that the Ninth Circuit denied petitioner's motion to recall and stay the mandate filed in that court, pending the filing of a petition for writ of certiorari. (Appendices A-1.) A stay is

then appropriate if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgement below; and (3) a likelihood that irreparable harm will result room the denial of a stay." (*Hollingsworth v. Perry*, 558 U.S. 183, 189, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010) (per curiam). Moreover, in close cases the Circuit Justice or the Court will "balance the equities" to explore the relative harms to applicant and respondent, as well as the interests of the public at large. (*Rostker v. Goldberg*, 448 U.S. 1306, 1308, 101 S.Ct. 1, 65 L.Ed.2d 1098 (1980) [Brenan J., in chambers].) Each of these considerations points decisively toward issuing a recall and stay of the Ninth Circuit's mandate.

Claims I through IV

This case presents four claims involving issues of first impression in this Court. Each claim is set forth with particularity in the "Questions Presented" portion of this application.

Claim I presents the question of whether there can ever be a viable claim of prejudicial prosecutorial misconduct in 28 U.S.C. 2254(d) habeas proceedings if the jury is properly admonished and instructed. The Ninth Circuit Panel's decision in the instant case follows the dissent in *Deck v. Jenkins*, 814 F.3d 954, (9th Cir. 2014)-- verbatim-- and concludes that if a jury is properly admonished

and instructed, there cannot be a viable claim of prejudicial prosecutorial misconduct in 28 U.S.C. 2254(d) habeas proceedings. This is an extreme position. It would foreclose a viable claim of prejudicial prosecutorial misconduct in just about every section 2254(d) case, insofar as just about every viable section 2254(d) case would include the circumstance that the jury was properly admonished and instructed.

Claim II presents the question of whether the prejudice flowing from a procedurally defaulted claim (which is inexorably intertwined with prejudice from a non-procedurally defaulted claim) can be considered in the calculation of whether a federal habeas petitioner has stated a prejudicial prosecutorial misconduct violation under the Fourteenth Amendment. In this case, the prosecutor essentially told the jury in opening statement that petitioner and his counsel were going to fabricate a defense. The prosecutor essentially told the jury in closing statement that petitioner and his counsel did fabricate a defense. As it turned out, the statements in closing that applicant and his counsel had fabricated a defense was untrue: but the jury was never informed otherwise, although they could have been. Ultimately, the inexorably intertwined prejudice flowing from the bookend arguments of the prosecutor in opening and closing was never considered by the Ninth Circuit Panel, because the Panel concluded that the claim of prosecutorial misconduct as to the closing statement was

procedurally defaulted (and the Panel concluded that there can be no viable prosecutorial misconduct claim if a jury is properly admonished and instructed).

Claim III presents the question of whether, in the context of 28 U.S.C. 2254(d) federal habeas proceedings, California's briefing rule (Cal. Rules of Ct., Rule 8.204) is adequate as a procedural bar, insofar as it is purportedly firmly established and regularly followed. Petitioner is unaware that the Ninth Circuit or this Court has addressed the adequacy of California Rules of Court, Rule 8.204, as a procedural bar in any published or unpublished opinion. The question of whether this procedural bar is adequate is an issue of first impression in this Court. (Compare, *Johnson v. Lee*, 578 U.S. ___, 136 S. Ct. 1802 (2016) [a procedural bar is adequate where it is "longstanding, oft-cited, and shared by habeas courts across the Nation"].)

Claim IV presents the question of whether, in the context of 28 U.S.C. 2254(d) federal habeas proceedings, a state court's finding of procedural default is completely unassailable, no matter how spurious the finding may be. This question has existed for section 2254(d) habeas proceedings for many years. This Court has not decided this this specific question in any previous decision. In the final analysis, the state court's finding of procedural default in this matter is as spurious as it gets.

In support of the foregoing analysis, petitioner presents the following arguments pertaining to the questions presented.

QUESTIONS PRESENTED

I

DO PRIOR DECISIONS OF THIS COURT FORECLOSE THE POSSIBILITY THAT PETITIONER CAN STATE A PREJUDICIAL PROSECUTORIAL MISCONDUCT VIOLATION UNDER THE FOURTEENTH AMENDMENT IN SECTION 2254(d) HABEAS PROCEEDINGS UNDER THE AEDPA?

In *Deck v. Jenkins*, 814 F.3d at page 980 the Ninth Circuit held that the stringent AEDPA standard under *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) and *Harrington v. Richter*, 131 S. Ct. 770 (2011) was met in a case where prosecutor's misstatements were not inadvertent or isolated: "the prosecutor's closing rebuttal argument were not mere 'stray words,' they were a direct response to the central theory of Deck's case."

The dissent in *Deck v. Jenkins* took issue with the majority's conclusion that prior decisions of this Court supported a finding of prejudicial prosecutorial misconduct under the AEDPA, "particularly where the jury was properly instructed." (*Deck* at p. 969, dissent of Bea J. from denial of rehearing; see also, p. 990-991, dissent of M. Smith J.) The position taken by the dissent in *Deck* is that no prior decision of this Court supports a finding of constitutional error

based on prosecutorial misconduct, if the jury is properly instructed. This position includes an assertion that prior decisions of this Court in *Boyde v. California*, 494 U.S. 370, 386, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) and *Weeks v. Angelone*, 528 U.S. 225, 227, 237, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) compel the conclusion that there cannot be a valid finding of constitutional error based on prosecutorial misconduct, if the jury is properly instructed.

In petitioner's case, the police conducted a probation search of his home. During the initial part of the search, the police attempted to make a stealth entry at the rear of the home through a sliding glass window. But when they opened the window, a home alarm was sounded. Thereafter, petitioner fired two to three warning shots from a lazar-sighted revolver, which ultimately precipitated the charges of attempt murder on police officers in this matter. (ER Vol. I, Tab 7 pp. 4-6; ER Vol. II, Tab 8 pp. 2-9; CT Vol. I pp. 30-31, 38, 46-47, 50-51, 80.)

Petitioner's trial defense was that he believed that it was Eastside Riva's gang members who had entered his home with the intent to kill him-- thus prompting him to fire warning shots. On a previous occasion, Eastside Riva's gang members had shot petitioner in the face and leg in an attempt to kill him, because he left the gang without being "jumped out." (ER Vol. I, Tab 7 pp. 4-8; ER Vol. II, Tab 8 pp. 2-9; CT Vol. I pp. 30-31, 38, 46-47, 50-51, 80.)

This defense was supported by petitioner's trial testimony. The prosecutor had become personally aware of this defense through testimony provided at the preliminary hearing by Police Investigator LeClair. (ER Vol. II, Tab 8 pp. 2-4, 7-9; CT Vol. I pp. 30, 31, 38, 50-51, 80.) Furthermore, petitioner had told Investigator LeClair, point blank, during his interview with him that he initially thought it was Eastside Riva's gang members who had entered his home. (ER Vol. II, Tab 9 pp. 3, 5; CT Vol. II pp. 384, 388.)

During her opening statement at trial, the prosecutor essentially told the jury that petitioner and his counsel were going to fabricate a defense. Petitioner's trial counsel interposed an objection and moved to strike the statement. The trial judge sustained the objection and granted the motion to strike. (ER Vol. III, Tab 16 p. 7; Augmented RT Vol. V p. 920.) Later, the trial judge denied the motion of petitioner's trial counsel to make a finding of prosecutorial misconduct. At defense counsel's request that the jury be admonished, the court admonished the jury that the prosecutor's statement did not constitute evidence and should be disregarded. (ER Vol. I, Tab 5 p. 10-11.)

The statement that appellant and his counsel were going to fabricate a defense was just the beginning-- at the very beginning of trial-- of a vast expanse of relentless prosecutorial misconduct, much of it interwoven. In closing argument the prosecutor lied to jurors and essentially told them that petitioner

and his counsel had fabricated a defense, because he never mentioned fear of the Eastside Riva's to anyone at the time of the incident (and the jurors were not informed otherwise). This was a direct and calculated assault on the central theory of petitioner's case-- that he thought it was Eastside Riva's gang members who had entered his home when he fired warning shots. (See, *Deck v. Jenkins*, at 980 [stringent AEDPA standard met under *Lockyer v. Andrade*, 538 U.S. at 75 and *Harrington v. Richter*, 131 S. Ct. 770 where the prosecutor's misstatements in closing rebuttal argument were not mere stray words, and were a direct response to the central theory of Deck's case].)

In its opinion in the instant case, the Ninth Circuit holds that the trial court's admonition to the jury cured any potential prejudice from the prosecutor's opening statement remarks, because the court instructed jurors that arguments of counsel were not evidence and because the jury was instructed to disregard the prosecutor's statements. (Dec. pp. 3-4.) This holding mirrors the dissent in *Deck v. Jenkins*, which takes the position that prior opinions issued from this Court prohibit a viable finding of prejudicial prosecutorial misconduct under the AEDPA if a jury is properly admonished and instructed. (*Deck* at p. 969, dissent of Bea J. from denial of rehearing; see also, p. 990-991, dissent of M. Smith J.)

The decision from the Ninth Circuit in petitioner's case fails to even consider the interwoven prejudice as between the misconduct in opening

statement and subsequent statements by the prosecutor during closing argument, wherein the prosecutor lied to jurors and told them that petitioner had not indicated his fear of the Eastside Riva's to anyone prior to trial, or told anyone prior to trial that he thought it was the Eastside Riva's who had entered his home.

Contrary to this falsehood, petitioner did indicate to Investigator LeClair on the day of the incident that he feared the Eastside Riva's and thought they had entered his home. (ER Vol. III, Tab 15 pp. 64-65; RT Vol. VII pp. 1612-1613; ER Vol. II, Tab 9 pp. 1-2, 3-4, 5-9, 10-14, 15-20; CT Vol. II pp. 367-368, 384-385, 388-392, 399-403, 429-434.) Furthermore, the fact that petitioner had told LeClair he feared the Eastside Riva's, and thought it was them in his home, came out during the preliminary hearing in this matter. (ER Vol. II, Tab 8 pp. 1, 2-3, 4, 5-6, 7-8, 9; CT Vol. I pp. 30-31, 38, 46-47, 50-51, 80.)

The trial judge's admonition and jury instructions as to the prosecutor's misconduct in opening statement were patently insufficient to cure the inexorably intertwined harm created by the prosecutor's assertions in her closing statement to the effect that petitioner and his counsel had fabricated a defense, because petitioner never mentioned fear of the Eastside Riva's gang to anyone prior to trial. The combined prejudice from the prosecutor's statements struck at the heart of petitioner's defense and are more than sufficient to make out a prejudicial violation of the Fourteenth Amendment within the meaning of this Court's prior

decisions in *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1972); *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); and *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Ultimately, the interwoven harm here is "off the charts" prejudicial, because appellant and his attorney did not, in fact, fabricate the defense and because the jury was never made aware that the defense was not, in fact, fabricated. Nothing contained in the Ninth Circuit's opinion in this case, or in the dissent from *Deck v. Jenkins*, is persuasive in concluding that this case does not state a constitutional violation under *Donnelly v. DeChristoforo*, *Darden v. Wainwright*, and *Smith v. Phillips*, in the context of section 2254(d) habeas proceedings under the AEDPA.

II

CAN THE PREJUDICE FLOWING FROM A PROCEDURALLY DEFAULTED CLAIM (WHICH IS INEXORABLY INTERTWINED WITH PREJUDICE FROM A NON-PROCEDURALLY DEFAULTED CLAIM) BE CONSIDERED IN THE CALCULATION OF WHETHER THERE IS A PREJUDICIAL PROSECUTORIAL MISCONDUCT VIOLATION UNDER THE FOURTEENTH AMENDMENT?

Overall the prosecutor's arguments in opening and closing told the jury that petitioner and his attorney were going to fabricate a defense-- and did fabricate a defense, because petitioner never told anyone that he thought it was the Eastside

Riva's who had entered his home. And as far as the jury knew, a defense was fabricated, because the trial judge would not set the matter right by providing jurors with the transcript of petitioner's statements to LeClair, wherein he told LeClair that he feared the Eastside Riva's and initially thought it was them who had entered his home. Ultimately, the interwoven harm here is "off the charts" prejudicial, because appellant and his attorney did not fabricate the defense and because the jury was unaware that the defense was not fabricated. (ER Vol. II, Tab 9 pp. 3, 5; CT Vol. II 384, 388; ER Vol. III, Tab 15 pp. 48, 59-60; RT Vol. II pp. 1581, 1067-1068.) Clearly, the prosecutor's statements had a substantial and injurious effect on the jury's verdict. (*Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).)

The Ninth Circuit's decision holds that petitioner's prosecutorial misconduct claim as to the prosecutor's statements during closing argument is procedurally barred. In accordance with the finding of procedural bar, the decision fails to consider any prejudice flowing from the prosecutor's remarks in closing statement. (Dec. pp. 7-8.)

Petitioner respectfully submits that the Ninth Circuit's decision in this matter creates a construct whereby the interwoven prejudice at issue could never be considered, because: (1) so long as the jury was properly admonished and instructed as to opening statement misconduct, any error is automatically

harmless (Dec. pp. 3-4), and (2) under the procedural default rule, any prejudice flowing from the prosecutor's misconduct in closing statement cannot be considered (Dec. pp. 7-8).

But prejudice is prejudice. Prejudice cannot be procedurally defaulted if there is any valid claim to which it attaches. Therefore, interwoven prejudice emanating from a valid opening statement prosecutorial misconduct claim counts, whether or not a closing argument prosecutorial misconduct claim is procedurally barred. Furthermore, acceptance of the Ninth Circuit's construct would be a significant extension of the procedural default rule that is unwarranted in the circumstances of this case. The bottom line is that the prejudice from the misconduct in opening statement, coupled with interwoven prejudice generated from the prosecutor's closing remarks, is extreme as set forth above.

III

IS CALIFORNIA'S BRIEFING RULE (Cal. Rules of Ct., Rule 8.204) ADEQUATE AS A PROCEDURAL BAR IN THE CONTEXT OF 28 U.S.C. SECTION 2254(d) HABEAS PROCEEDINGS UNDER THE AEDPA, INSOFAR AS IT IS PURPORTEDLY FIRMLY ESTABLISHED AND REGULARLY FOLLOWED?

The Merits of Petitioner's Knock-Notice Claim

Appellant's counsel had argued to the jury that the police violated knock-notice when they opened the sliding glass door at the rear of appellant's home--

which set off an alarm. (ER Vol. I, Tab 7 pp. 21-22 & fn. 4; Opn. pp. 21-22 & fn. 4.)

In response, the prosecutor made the following argument during her closing statement:

> "Knock and announce is for those situations when officers walk up to somebody's house, kick a door open, with their guns blazing and someone is naked in the shower…" (ER Vol. I, Tab 7 p. 22; Opn. p. 22.)

From here, the prosecutor made additional statements to the jury in quick succession, which misstated the law on knock-notice with equal vigor. (ER Vol. I, Tab 7 pp. 22-24; Opn. pp. 22-24.)

This argument clearly misstates the law on knock-notice. Under California Penal Code section 844, the police have to knock and announce their presence before they can open a door or window to a home to conduct a search or make an arrest. Period.

Among the interests protected by the Knock Notice Rule under Penal Code section 844 is the preservation of human life, "because an unannounced entry may provoke violence in supposed self-defense by the surprised resident." (*Hudson v. Michigan*, 547 U.S. 586, 594, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006); *People v. Murphy*, 37 Cal.4th 490, 495-496 (2005).)

Petitioner's counsel interposed a prosecutorial misconduct claim in regards to the prosecutor's argument. (*People v. Hill*, 17 Cal.4th 800, 829-830 (1998) [it

is improper for the prosecutor to misstate the law generally, and particularly to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements].) In addition to constituting misconduct, the prosecutor's argument was also highly prejudicial, as evidenced by the jurors request for read-back of LeClair's testimony concerning knock-notice. (ER Vol. II, Tab 10 p. 1; CT Vol. II p. 456; ER Vol. III, Tab 15 p. 52; RT Vol. VII p. 1600.) What the prosecutor's arguments accomplished was to confuse the jury on the simple and straight forward question of whether the officers violated knock-notice with the unannounced entry at the back sliding glass door.

The Ninth Circuit's opinion holds that the state Court of Appeal reasonably applied federal law when it concluded that the prosecutor's statements were legally accurate. The Court cites to *Payton v. New York*, 445, 573, 616 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) in support of this conclusion. (Dec. pp. 6-7.)

The citation to *Payton v. New York* does follow the legality of the entry analysis in the state Court of Appeal's opinion, but legality of the entry was never the issue in this proceeding. The fact of an unannounced entry was the issue, and the fact that an unannounced entry violated Penal Code section 844 resulting in an eruption of violence, was the point of defense counsel's argument.

Petitioner's claim clearly constitutes actionable prosecutorial misconduct under the AEDPA in regard to the prosecutor's closing argument, which

misstated the law applicable to the Knock-Notice Rule. In the final analysis, the prosecutor's misconduct in misstating the Knock-Notice Rule was part of a pattern of misconduct which "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright*, 477 U.S. at 181, quoting *Donnelly v. DeChristoforo*, 416 U.S. at 642.)

Furthermore, petitioner's knock-notice violation claim lies at the heart of his trial defense. The knock-notice violation claim was intertwined with his assertion that he thought it was Eastside Riva gang members who had entered his home at the time he fired warning shots. (ER Vol. I, Tab 7 pp. 26-27; Opn. pp. 26-2.) The fact that the police made an unannounced entry in violation of Penal Code section 844 when they opened the back sliding glass door and set off an alarm was a critical part of petitioner's defense that he fired warning shots in response to an entry by gang members, and not the police. The prosecutor's endeavors to muddy the waters on the knock-notice violation (which has endured through trial and appellate proceedings, up to this point in this Court) was highly prejudicial and had a substantial and injurious effect or influence in determining the jury's verdict. (*Brecht v. Abrahamson*, at 637.)

Procedural Default Under Rule 8.204

In addition to denying petitioner's prosecutorial misconduct claim on the merits, the Ninth Circuit's opinion finds procedural default under California's

Briefing Rule. (Dec. p. 6.) California's Briefing Rule is codified under the provisions of California Rules of Court, Rule 8.204.

As for the mechanics of the procedural bar, petitioner respectfully submits that the Ninth Circuit Panel's holding that the procedural bar is adequate, "because it is firmly established and regularly followed" is not recognized in the case law issued from the Ninth Circuit Court of Appeals. The Ninth Circuit has never made this holding in any previously published case. Petitioner is unaware that the Ninth Circuit has even addressed Rule 8.204 in any unpublished opinion. Neither has the Ninth Circuit, or this Court, made a finding in any decision that Rule 8.204 represents a procedural bar that is "longstanding, oft-cited, and shared by habeas courts across the Nation." (*Johnson v. Lee*, 136 S. Ct. 1802.) The issue, therefore, is one of first impression in this Court, and in the Ninth Circuit.

Rule 8.204 is applied in civil proceedings in the vast majority of cases. (See, annotations for Rule 8.204 and cases cited therein.) More often than not, the Rule is applied in the criminal context in a case like *People v. Stanley*, 10 Cal.4th 764 (1995), where the defendant fails to specify argument and authority as to why there is insufficient evidence to support a conviction. (*Id*. at p. 793.)

But the Rule cannot qualify as procedural default bar under the jurisprudence of this Court, because it is inconsistently applied. In fact, the Rule itself contains provisions for inconsistent application. Under subdivision (e),

subsection (2), paragraph (C) of Rule 8.204, an appellate court can simply elect to disregard noncompliance with the rule-- as appellate courts often do. (See, *Nelson v. Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115, 1122 (2012); and see, *Liberty Mutual Insurance Company v. Kleinman et al.*, 149 Cal.App.2d 404, 406 (1957).)

Petitioner further emphasizes that this is not a case where there are mere exceptions to Rule 8.204, coupled with discretionary application. (See, *Johnson v. Lee*, at 1806.) In the vast majority of cases, Rule 8.204 is simply not applied.

IV

IN THE CONTEXT OF 28 U.S.C. SECTION 2254(d) HABEAS PROCEEDINGS UNDER THE AEDPA, IS A STATE COURT'S FINDING OF PROCEDURAL DEFAULT COMPLETELY UNASSAILABLE NO MATTER HOW SPURIOUS THE FINDING MAY BE?

Procedural Default and the Rule of *Wainwright and Coleman*

The context of the instant case is a federal habeas petition brought under the provisions of the AEDPA. (28 U.S.C. 2254(d).) Under this Court's previous decisions, a state court finding of procedural default bars federal review of a claim, unless a petitioner can show "cause and prejudice," or that a "fundamental miscarriage of justice" will result from the failure to consider the claim. (*Wainwright v. Sykes*, 433 U.S. 72, 81, 87-91, 97 S.Ct.2497, 53 L.Ed.2d 594

(1977); *Engle v. Isaac, supra*, 456 U.S. 107 129, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Coleman v. Thompson*, 501 U.S. 722, 728, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).) But this Court has not expressly decided the question of whether or not a state court's finding of procedural default will absolutely bar federal review, even where the state court's finding of procedural default is obviously spurious.

The State Court's Invocation of Procedural Default was Spurious

Petitioner respectfully submits that the state court's finding of procedural default in this case was spurious in the extreme.

Petitioner submitted Appellant' Opening Brief (hereafter "AOB") to the state Court of Appeal. The AOB is contained in the record from the Ninth Circuit Court of Appeals at DkEntry 3-20, pp. 2-100. The Opening brief was 91 pages in length. It copiously addressed every conceivable issue that could be addressed relating to the claims of prosecutorial misconduct in this matter.

As for the question of prosecutorial misconduct concerning misstatement of the law pertaining to knock-notice, the AOB specifically addressed the failure by police to provide knock-notice. The AOB specifically focused on the provisions of California Penal Code section 844, which require an announcement by police prior to entry. (AOB at pages 60-62, 64; see, *People v. Lilienthal*, 22 Cal.3d 891, 900 (1978) [knock-notice provisions of Pen. Code sections 844 and 1531 apply to probation searches].) The ultimate argument from the AOB was

that the knock-notice violation resulted in an explosion of gun fire, because petitioner initially thought it was Eastside Riva gang members who had entered his home to kill him. (AOB pp. 60-66.) These arguments from the AOB mirrored trial counsel's arguments in the state trial court. (ER Vol. II, Tab 11 pp. 9-10; CT Vol. III, pp. 9-10.) So the issue of the misstatements of the law surrounding knock-notice were thoroughly briefed, along with citation to the provisions of Penal Code section 844. No more was required under Rule 8.204.

Despite this, the state Court of Appeal ruled that petitioner never explained *how* the prosecutor's statements misstated the law, and petitioner never cited relevant authority. (ER Vol. I, Tab 7 p. 24; Opn. p. 24.) The Court of Appeal alternatively found that the officer's entry was "legal" under such cases as *People v. Hoxter*, 75 Cal.App.4th 406 (1999) and *People v. Hoag*, 83 Cal.App.4th 1198 (2000). This finding was premised on the actions of officers who entered the residence at the front door, after the officers at the back of the residence opened the sliding glass window and tripped the home alarm-- which was the provocation for "violence in supposed self-defense by the surprised resident." (*Hudson v. Michigan* at 594; *People v. Murphy* at 495-496.) But the "legality of entry" of officers at the front door was not at issue. The issue was an "unannounced entry" at the back sliding glass window which tripped the alarm, and which violated the provisions of Penal Code section 844.

Further, the opinion of the Ninth Circuit Court of Appeals holds that the state Court of Appeal reasonably applied federal law when it concluded that the prosecutor's statements were legally accurate. The Court cites to *Payton v. New York, supra*, 445 U.S. 573 in support of this conclusion. (Dec. pp. 6-7.) But here again, *Payton v. New York* represents a "legality of the entry" analysis, which is not on point (*Payton v. New York* is a suppression of evidence case). The point of petitioner's arguments on the prosecutorial misconduct claim in the AOB pertain to an "unannounced entry," which violated the provisions of Penal Code section 844, and which resulted in an explosion of gunfire.

Simply put, an unannounced entry in violation of the provisions of Penal Code section 844 does not require briefing under a complex analysis applicable to the question of an illegal entry under cases like *People v. Hoxter, supra*, 75 Cal.App.4th 406; *People v. Hoag, supra*, 83 Cal.App.4th 1198; and *Payton v. New York, supra*, 445 U.S. 573. Such an analysis is simply not required to understand that the police in this case violated the provisions of Penal Code section 844 by failing to announce entry, prior to the time they opened the back sliding glass window.

With this in mind, it is readily apparent that the Court of Appeal's requirement that an analysis under *Hoxter* and *Hoag* should have been briefed is spurious in the extreme. Likewise, the Ninth Circuit's requirement that an

analysis under *Payton v. New York* should have been briefed is spurious in the extreme. These cases are not even on point-- and neither is a "legality of the entry" analysis on point. The point is an "unannounced entry" which resulted in an explosion of gun fire; and the authority on point is Penal Code section 844. Period.

Ultimately, the state Court of Appeal completely misapplied Rule 8.204 in determining that petitioner's knock-notice claim had been procedurally defaulted. So did the Ninth Circuit.

CONCLUSION

This case presents persuasive prosecutorial misconduct claims of first impression in this Court pertaining to 28 U.S.C. section 2254(d) habeas petitions, under the AEDPA.

Under each of these four claims, there is "(1) a reasonable probability that four Justices will consider the issue(s) sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgement below; and (3) a likelihood that irreparable harm will result room the denial of a stay." (*Hollingsworth v. Perry*, at 189.)

For all the reasons expressed herein, petitioner respectfully requests that this Court grant his application for a recall and stay of the mandate.

Respectfully submitted,

Dated: November 2, 2018

/s/ Richard V. Myers

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Counsel for petitioner

STATUTORY APPENDICES

28 U.S.C. § 2254(d),(i) & (2)

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

(1) resulted in a decision that was contrary to, or involved or 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 based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding."

California Penal Code § 844

"To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired."

California Rules of Court, Rule 8.204(a)(1)(B) & (e)(1)-(2)(A)(B)(C)

"(a) Contents

(1) Each brief must:

(B) State each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority…

(e) Noncomplying briefs

If a brief does not comply with this rule

(1) The reviewing court clerk may decline to file it, but must mark it 'received but not filed' and return it to the party; or

(2) If the brief is filed, the reviewing court may, on its own or a party's motion, with or without, notice:

(A) Order the brief returned for corrections and refiling within a specified time;

(B) Strike the brief with leave to file a new brief within a specified time; or

(C) Disregard the noncompliance."

DOCUMENT APPENDICES INDEX

Appendix A-1:

The October 19, 2018 Order of the Ninth Circuit Court of Appeals denying the Motion to Recall and Stay the Mandate.

Appendix B-1:

The October 1, 2018 Motion to Recall and Stay the Mandate, filed in the Ninth Circuit Court of Appeals.

Appendix C-1:

The September 28, 2018 Mandate issued from the Ninth Circuit Court of Appeals.

Appendix D-1:

The September 20, 2018 Order of the Ninth Circuit Court of Appeals denying the Petition for Rehearing.

Appendix E-1:

The May 18, 2018 Memorandum Decision of the Ninth Circuit Court of Appeals, Affirming the Decision of the Federal District Court, Central District of California.

Appendix F-1:

The April 21, 2017 Order of the Ninth Circuit Court of Appeals, Granting the Request for Certificate of Appealability.

APPENDICES A-1

FILED

OCT 19 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE LOUIS ARMENTA, Petitioner-Appellant, v. SCOTT KERNAN, Secretary, California Department of Corrections, Defendant-Appellee.	No. 16-55930 D.C. No. 5:15-cv-00415-DOC-RAO ORDER

Before: BEA and MURGUIA, Circuit Judges, and KEELEY,* District Judge.

Appellant's motion to recall and stay the mandate is DENIED (Doc. 37).

* The Honorable Irene M. Keeley, United States District Judge for the Northern District of West Virginia, sitting by designation.

APPENDICES B-1

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UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

JOE LOUIS ARMENTA, Petitioner-Appellant, v. SCOTT KERNAN, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS, Respondent-Appellee.	CASE No. 16-55930 Dist. Ct. No. 5:15-cv-00415-DOC (RAO)

MOTION TO RECALL AND STAY THE MANDATE PENDING FILING OF A PETITION FOR A WRIT OF CERTIORARI

Counsel for appellant, Joe Louis Armenta (hereafter "counsel"), hereby moves the Court to issue an order to recall and stay the Mandate issued by this Court in this matter on September 28, 2018 for 90 days

pending the filing of a petition for writ of certiorari with the U.S. Supreme Court.

This motion is brought pursuant to the provisions of FRAP Rule 41(d)(2) and Ninth Circuit Court of Appeals General Order 4.6(d).

The motion is brought on the grounds that the filing of a petition for writ of certiorari to the U.S. Supreme Court will present substantial questions and there is good cause for a stay. The petition for writ of certiorari will not be frivolous and will not be filed for purposes of delay.

This motion is brought on the further grounds that appellant's counsel was unable to move to stay the Mandate prior to its issuance. This was due to time delays in communicating with appellant at the California Department of Corrections, in order to determine if appellant desired to have a petition for writ of certiorari brought on his behalf.

Counsel has not previously applied for the order sought by this motion.

Appellant Joe Armenta is not on bail. He is currently serving a determinate term of 62 years 8 months in prison, plus three consecutive indeterminate terms of life in prison, with an aggregate minimum parole period of 29 years.

THE CERTIORARI PETITION WILL PRESENT SUBSTANTIAL QUESTIONS

I

A SUBSTANTIAL QUESTION IS PRESENTED UNDER THE AEDPA REGARDING THE HOLDING OF *Deck v. Jenkins*, 814 F.3d 954 AND REGARDING THE PROCEDURAL DEFAULT RULE

Appellant has asserted that the prosecutor in his case engaged in actionable misconduct under the standards of the AEDPA by telling his jury in opening statement that appellant and his counsel were going to fabricate a defense. (PR pp. 8.)1/ As appellant has argued, this misconduct was just the beginning-- at the very beginning of trial-- of a vast expanse of relentless prosecutorial misconduct, much of it interwoven. (*Deck v. Jenkins*, 814 F.3d 954, 980 (9th Cir. 2014) [stringent AEDPA standard met under *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) and *Harrington v. Richter*, 131 S. Ct. 770 (2011) in a case where prosecutor's misstatements were not inadvertent or isolated: "the prosecutor's closing

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1 "PR" refers to appellant's petition for rehearing filed in this matter on May 25, 2018.

"Dec." refers to this Court's Memorandum Decision in this matter on May 18, 2018.

rebuttal argument were not mere 'stray words,' they were a direct response to the central theory of Deck's case."]; PR p. 9.)

In its opinion, this Court holds that the trial court's admonition to the jury cured any potential prejudice from the prosecutor's remarks, because the court instructed jurors that arguments of counsel were not evidence and because the jury was instructed to disregard the prosecutor's statements. (Dec. pp. 3-4.) Appellant has argued that this holding essentially adopts the dissent in *Deck v. Jenkins* as the holding of that case. According to the dissent in *Deck*, opinions of the U.S. Supreme Court dictate that there cannot be actionable prosecutorial misconduct under the AEDPA if jurors are properly admonished and instructed, in the wake of a prosecutor's misconduct. (*Deck*, at pp. 970-971, 990-992; PR p. 11.)

But, as appellant has argued, the Court's decision in the instant case fails to consider the interwoven prejudice as between the misconduct in opening statement and subsequent statements by the prosecutor during closing argument, wherein the prosecutor lied to jurors and essentially told them appellant and his counsel had fabricated a defense. (PR p. 9.)

This Court's decision holds that appellant's prosecutorial misconduct claim as to the prosecutor's statements during closing argument is procedurally barred. (Dec. pp. 7-8.) Appellant has argued that under the

construct created by the Court's decision, the interwoven prejudice at issue could never be considered under the procedural default rule. (PR p. 10.)

Appellant has argued that acceptance of the Court's construct would be an unwarranted and significant extension of the procedural default rule. (PR p. 10.)

Appellant has argued further that the extreme interwoven prejudice from the prosecutor's opening and closing statements cannot be obviated by the procedural default rule and that a finding that the jury was properly admonished and instructed is insufficient to overcome appellant's prosecutorial misconduct claim. (PR pp. 10-11.) In the final analysis, the jury was not admonished and instructed as to the prosecutor's closing statement misconduct.

Appellant respectfully submits here that this Court's decision expands the procedural default rule beyond parameters established by existing U.S. Supreme Court authority. Appellant additionally, and respectfully, submits that this Court's decision advances a reading of existing U.S. Supreme Court authority under the AEDPA that a cognizable prosecutorial misconduct claim does not exist if the jury is properly admonished and instructed.

For these reasons, appellant submits that his certiorari writ presents a substantial question and there is good cause to recall and stay the Mandate.

II

A SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER CALIFORNIA'S BRIEFING RULE IS ADEQUATE AS A PROCEDURAL BAR, INSOFAR AS IT IS PURPORTEDLY FIRMLY ESTABLISHED AND REGULARLY FOLLOWED

Appellant has argued that the prosecutor in his case engaged in actionable misconduct under the standards of the AEDPA by misstating the law on knock-notice. (*People v. Hill*, 17 Cal.4th 800, 829-830 (1998) [it is improper for the prosecutor to misstate the law generally, and particularly to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements]; PR pp. 15-18.)

The state Court of Appeal conflated appellant's "unannounced entry" knock-notice argument with an "unlawful entry" knock-notice argument from the line of case authority represented by *Payton v. New York*, 445, 573, 616 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). From here, the state Court of Appeal found procedural default under California's Briefing Rule (California Rules of Court, Rule 8.204) for appellant's failure to brief the knock-notice issue under the *Payton* analysis.

This Court's decision follows the state Court of Appeal in ruling that knock-notice should have been briefed under the *Payton v. New York*-- "legality of the entry"-- analysis. (Dec. pp. 6-7.) But legality of the entry

was never the issue in this proceeding. The fact of an unannounced entry is the issue, and the fact that an unannounced entry violated Penal Code sections 844 and 1531, resulting in an eruption of violence, was the point of defense counsel's argument. An unannounced entry argument under Penal Code sections 844 and 1531 does not require extensive briefing and analysis under the *Payton v. New York* line of authority. Either the entry was announced under Penal Code sections 844 and 1531, or it was not.

Accordingly, appellant respectfully submits that the premise of the procedural default relied on by the state Court of Appeal and this Court is spurious. Ultimately, the state Court of Appeal simply misapplied Rule 8.204 in determining that appellant's knock-notice claim had been procedurally defaulted.

More importantly, appellant respectfully submits that this Court's holding that the procedural bar is adequate, "because it is firmly established and regularly followed" is not recognized in the case law issued from the Ninth Circuit Court of Appeals. (Dec. p. 6.) The Ninth Circuit has never made this holding in any previous published case. Appellant is unaware that the Ninth Circuit has even addressed Rule 8.204 in any published opinion. He is also unaware that any other Circuit Court of Appeals has addressed the briefing rule as grounds for procedural default in any published case.

Neither has the United States Supreme Court addressed Rule 8.204 in any decision, or made a finding that Rule 8.204 represents a procedural bar that is "longstanding, oft-cited, and shared by habeas courts across the Nation." (*Johnson v. Lee*, ___ U.S. ___, 136 S. Ct. 1802 (2016).) Thus, a question of first impression is presented in this case as to whether the procedural bar represented by Rule 8.204 is adequate.

For these reasons, appellant submits that his petition for a writ of certiorari presents a substantial question and there is good cause for to recall and stay the Mandate.

Respectfully submitted,

Dated: October 1, 2018.

/S/ Richard V. Myers

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Attorney for Appellant, Joe Armenta

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 28 2018

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

JOE LOUIS ARMENTA,

Petitioner - Appellant,

v.

SCOTT KERNAN, Secretary, California Department of Corrections,

Defendant - Appellee.

No. 16-55930

D.C. No. 5:15-cv-00415-DOC-RAO
U.S. District Court for Central California, Riverside

MANDATE

The judgment of this Court, entered May 18, 2018, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rhonda Roberts
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDICES C-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 28 2018

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

JOE LOUIS ARMENTA,

Petitioner - Appellant,

v.

SCOTT KERNAN, Secretary, California Department of Corrections,

Defendant - Appellee.

No. 16-55930

D.C. No. 5:15-cv-00415-DOC-RAO
U.S. District Court for Central California, Riverside

MANDATE

The judgment of this Court, entered May 18, 2018, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rhonda Roberts
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDICES D-1

FILED

SEP 20 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE LOUIS ARMENTA, Petitioner-Appellant, v. SCOTT KERNAN, Secretary, California Department of Corrections, Defendant-Appellee.	No. 16-55930 D.C. No. 5:15-cv-00415-DOC-RAO Central District of California, Riverside ORDER

Before: BEA and MURGUIA, Circuit Judges, and KEELEY,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Bea and Judge Murguia vote to deny the petition for rehearing en banc, and Judge Keeley recommends that en banc rehearing be denied. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable Irene M. Keeley, United States District Judge for the Northern District of West Virginia, sitting by designation.

APPENDICES E-1

NOT FOR PUBLICATION

FILED

MAY 18 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE LOUIS ARMENTA, Petitioner-Appellant, v. SCOTT KERNAN, Secretary, California Department of Corrections, Defendant-Appellee.	No. 16-55930 D.C. No. 5:15-cv-00415-DOC-RAO MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted April 9, 2018
Pasadena, California

Before: BEA and MURGUIA, Circuit Judges, and KEELEY,** District Judge.

Joe Louis Armenta, a California state prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition. After a jury trial, Armenta was convicted of four counts of attempted murder of a peace officer, *see* Cal. Pen. Code

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

** The Honorable Irene M. Keeley, United States District Judge for the Northern District of West Virginia, sitting by designation.

§§ 187(a), 664(e)-(f); four counts of assault with a firearm on a peace officer, *see* Cal. Pen. Code § 245(d)(1); one count of unlawful possession of a firearm, *see* Cal. Pen. Code § 12021(a)(1); and one count of unlawful possession of ammunition, *see* Cal. Pen. Code § 12316(b)(1). In his habeas petition, and now on appeal, Armenta asserts that he was denied due process because of five alleged instances of prosecutorial misconduct—one during opening statement, two while presenting evidence, and two during closing argument. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we may grant relief only when a state court's adjudication of a claim "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 "that was 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).

To prevail on a claim of prosecutorial misconduct, a petitioner must show that the prosecutor's comments "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) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Prosecutorial misconduct warrants relief only if the alleged error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v.*

Abrahamson, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Here, none of the prosecutor's remarks, taken individually or together, constituted prejudicial misconduct under the Supreme Court's clearly established law.

1. During opening statement, the prosecutor accused the defense of fabricating stories to rationalize Armenta's behavior. The trial court admonished the jury that the prosecutor's statement did not constitute evidence and should be disregarded. Rather than determine whether the prosecutor engaged in misconduct, the California Court of Appeal[1] held that the trial court's admonition cured any potential prejudice from the prosecutor's remarks. This conclusion is not contrary to, nor an unreasonable application of, any clearly established federal law. *See, e.g.*, *Darden*, 477 U.S. at 181–82 (finding that prosecutors' improper comments during closing argument did not deprive petitioner of a fair trial because the trial court instructed jurors that arguments of counsel were not evidence); *Donnelly*, 416 U.S. at 644–45 (same, where jury was instructed to disregard prosecutor's improper statements during closing argument). Indeed, a jury is presumed to have understood and followed the trial court's instructions. *Weeks v. Angelone*, 528 U.S.

[1] Because the California Supreme Court denied Armenta's state court habeas petition without substantive comment, we review the California Court of Appeal's unpublished opinion as the "last reasoned decision" in the state proceedings. *Maxwell v. Roe*, 628 F.3d 486, 495 (9th Cir. 2010).

225, 234 (2000). Any risk of undue prejudice was further mitigated when the trial court sustained defense counsel's objection and struck the prosecutor's remarks from the record. *See Greer v. Miller*, 483 U.S. 756, 766 & n.8 (1987).

2. Armenta next contends that the prosecutor elicited false testimony about the nature of his prior conviction. Special Agent Rudolph, who participated in Armenta's arrest, testified that he had received information from other officers that Armenta was "on felony probation for a firearms offense." Defense counsel objected to Rudolph's testimony, since Armenta was on probation for possession of metal knuckles, not a firearm. The California Court of Appeal concluded that there was no prosecutorial misconduct because the prosecutor did not elicit false testimony. Rudolph honestly described his state of mind when he executed the arrest warrant, including what he knew about Armenta's criminal history. Moreover, even if Rudolph's testimony was false, the Court of Appeal reasonably concluded that any prejudice was cured by the trial court's admonition to the jury that Armenta was on probation for possession of metal knuckles. *See Greer*, 483 U.S. at 766 n.8. This conclusion is not contrary to, nor an unreasonable application of, any clearly established federal law. *See Darden*, 477 U.S. at 181–82; *see also Donnelly*, 416 U.S. at 644–45; *Weeks*, 528 U.S. at 234.

3. Armenta next argues that the prosecutor improperly elicited testimony about his encounter with an East Side Riva (ESR) gang member in 1999. At a pre-

trial hearing, the trial court issued an in limine ruling excluding any evidence that the victim of that encounter was a four-year-old minor. While cross-examining Armenta, the prosecutor elicited testimony that Armenta had fired a shotgun and killed an "innocent bystander" during the 1999 incident. Defense counsel objected, arguing that the prosecutor had violated the in limine ruling.

While a prosecutor's clear violation of a state trial court's in limine ruling constitutes prosecutorial misconduct for the purpose of habeas relief, *see Hardnett v. Marshall*, 25 F.3d 875, 877–78, 880 (9th Cir. 1994), here, the trial court found no violation of its limine ruling, and, instead, conceded that its in limine ruling was "unclear." Armenta's prosecutorial misconduct claim therefore requires us to interpret the trial court's evidentiary order, and in doing so to make our own findings on state law issues of admissible evidence. Habeas relief may not be granted on this basis. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); *Leinweber v. Tilton*, 490 Fed. App'x 54, 57 (9th Cir. 2012) (citing *Estelle*, 502 U.S. at 63) ("[Petitioner] complains of instances in which the state trial court admitted prior bad act evidence over defense counsel's objection . . . . This contention does not address prosecutorial misconduct [for purposes of habeas relief] but rather goes to the state trial court's admission of that evidence, an issue of state law.").

4. Armenta next contends that, during closing argument, the prosecutor misstated the knock-and-announce rule for executing arrest warrants. The California Court of Appeal held that Armenta waived this allegation because he failed to comply with the court's briefing rule. California courts require every party to "support each point [in a brief] by argument, and if possible, by citation of authority." Cal. Ct. R. 8.204(a)(1)(B). If this requirement is not satisfied, "the court may treat [the point] as waived, and pass it without consideration." *People v. Stanley*, 897 P.2d 481, 497 (Cal. 1995). This rule is adequate, because it is firmly established and regularly followed. *See, e.g.*, *People v. Hovarter*, 189 P.3d 300, 333 (Cal. 2008). It also does not require state courts to inquire into federal law, and is therefore independent. *Coleman v. Thompson*, 501 U.S. 722, 734–35 (1991). Thus, Armenta's claim is procedurally defaulted, and he is not entitled to habeas relief on this claim. *See id*. at 729 ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.").

Additionally, even if Armenta had not procedurally defaulted this claim, Armenta fails to show that the prosecutor's closing argument misstated the knock-and-announce rule. The California Court of Appeal reasonably applied federal law when it concluded that the prosecutor's statements were legally accurate. *See* 18

U.S.C. § 3109; *Payton v. New York*, 445 U.S. 573, 616 (1980). Moreover, if the prosecutor had misstated the law on knock-and-announce, the California Court of Appeal reasonably concluded that there was no prejudice, because the trial court admonished the jury multiple times to rely exclusively on its instructions for the governing law. *See Boyde v. California*, 494 U.S. 370, 384 (1990) ("[A]rguments of counsel [that misstate the law] generally carry less weight with a jury than do instructions from the court.").

5. Finally, Armenta asserts that, during closing argument, the prosecutor misstated a fact when she said Armenta never informed anyone prior to trial about his fear of the ESR gang. The California Court of Appeal concluded that Armenta waived this allegation when defense counsel failed to timely object to the prosecutor's alleged misstatement of fact during closing argument.

To preserve a claim for appeal, California's contemporaneous objection rule (COR) requires a defendant to "make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety," unless doing so would be futile or an admonition would not cure the harm. *People v. Clark*, 261 P.3d 243, 327 (Cal. 2011) (internal citations omitted). The COR is controlling when an objection is "so obviously late as to preclude the trial judge from giving it meaningful consideration." *Melendez v. Pliler*, 288 F.3d 1120, 1126 n.7 (9th Cir. 2002). Here, defense counsel's objection was raised two days after closing

argument, when the jury had already begun deliberations. *See People v. Jenkins*, 40 Cal. App. 3d 1054, 1057 (1974) (finding defendant's objections and requests for admonitions untimely where not asserted until after jury deliberations had begun). Because the California Court of Appeal concluded that Armenta waived this claim by failing to object contemporaneously, in violation of the California COR, Armenta is not entitled to habeas relief on this claim. *Fairbank v. Ayers*, 650 F.3d 1243, 1256 (9th Cir. 2011) (independent state grounds bars federal courts from reconsidering issues in habeas review as long as the "state court explicitly invokes a state procedural bar rule as a separate basis for its decision.").

AFFIRMED.

APPENDICES F-1

FILED

APR 21 2017

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE LOUIS ARMENTA, Petitioner-Appellant, v. SCOTT KERNAN, Secretary, California Department of Corrections, Defendant-Appellee.	No. 16-55930 D.C. No. 5:15-cv-00415-DOC-RAO Central District of California, Riverside ORDER

Before: GOODWIN and HURWITZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is granted with respect to the following issue: whether the prosecutor committed misconduct in violation of appellant's right to due process, including whether any portion of this claim is procedurally defaulted. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

The opening brief is due July 18, 2017; the answering brief is due August 17, 2017; the optional reply brief is due within 14 days after service of the answering brief.

Counsel in this case may access the state lodged documents by logging into Appellate ECF and then choosing Reports > PACER Report.

The Clerk shall serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

If Scott Kernan is no longer the appropriate appellee in this case, counsel for appellee shall notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOE LEWIS ARMENTA, PETITIONER
vs.
SCOTT KERNAN, RESPONDENT

I, Richard V. Myers, do swear and declare that on this date, November 2, 2018, as required by Supreme Court Rule 29, I have served the enclosed APPLICATION TO RECALL AND STAY THE MANDATE on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States Mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days; together with electronic service.

The names and addresses of those served are as follows:

Vincent P. LaPietra
Deputy Attorney General
600 West Broadway
Suite 1800
San Diego, CA 92101

I declare under Penalty of perjury that the foregoing is true and correct.

Executed on November 2, 2018.

/s/ Richard V. Myers
Richard V. Myers (133027)
Attorney at Law
1908 Marcus Abrams Blvd.
Austin, TX 78748
909-522-6388
Counsel for Petitioner