IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

KEITH UNDRAY FORD, *Petitioner*

vs.

SUZANNE PEERY, WARDEN, Warden, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Vol. 2 - Appendix

BARRY L. MORRIS
Attorney at Law
1407 Oakland Blvd., Suite 200
Walnut Creek, California 94596
(925) 934-1100
Fax: (925) 934-1122
barrymorris@mac.com

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH UNDRAY FORD,

Defendant and Appellant.

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A137496

(Solano County
Super. Ct. No. VCR211632)

A jury convicted Keith Undray Ford of first degree murder (Pen. Code, § 187, subd. (a))[1] and the court sentenced him to 25 years to life in state prison. On appeal, Ford argues: (1) the court erroneously responded to a jury question; (2) the jury convicted him on an invalid theory of guilt; (3) the prosecutor committed misconduct during closing argument; and (4) the court erred by admitting a message Ford posted on his Facebook page.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Ruben Martinez was shot and killed outside his girlfriend's house in Vallejo. The People charged Ford with the first degree murder of Martinez (§ 187, subd. (a)) and alleged various firearm use sentencing enhancements (§ 12022.53, subds. (b), (c) (d)).

[1] Unless noted, all further statutory references are to the Penal Code.

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Prosecution Evidence

In August 2010, then 20-year-old Martinez attended college and worked as a car salesman. Martinez owned a blue SUV with big rims and tinted windows. Martinez treasured the car and washed it several times a week. On an August 2010 night, Martinez planned to go to a family party with his girlfriend, Jessica Blanco. He washed the SUV before their date.

Around 10 p.m., Martinez picked Blanco up at her house in Vallejo. His car was "really clean and shiny." Martinez decided he wanted to see a movie instead of attending the family party, so he and Blanco returned to Blanco's house so she could "check the movie times and get a jacket." As they approached Blanco's street, Blanco noticed a white car. It had been driving in the same direction as Martinez's car, but then made an abrupt U-turn directly in front of Martinez's car and drove away in the opposite direction.

Martinez reached Blanco's house. He stopped the SUV in front of her house but left the engine running. Martinez sat in the driver's seat and the white light from his cell phone was visible from outside the car. Blanco got out of the car and went into her house to use the bathroom. While inside, she heard a "really loud popping noise" and "a screeching noise, tires peeling, gravel." Blanco went outside and saw Martinez's car had crashed into a neighbor's house, the engine still revving and tires spinning. Martinez was slumped in the driver's seat, dead from a gunshot wound in his head.

A neighbor, Bethel J., and her daughter, Tenley, lived across the street from Blanco. They were across the street from Blanco's house when Bethel saw Martinez's car parked in front of Blanco's house and a person in the driver's seat using a cell phone. Bethel and Tenley saw three young African American men walking toward them. Tenley's dog charged at one of the men, who appeared to be in his early twenties. Tenley "couldn't really" see that man's face because it was dark, but she noticed he had short hair cut close to his scalp. The man was "skinny" and taller than she. Initially, that man was with his two companions, but he started walking faster and separated from the two other men. One of the other men had dreadlocks and was wearing a hooded sweatshirt.

A fingerprint examiner found a latent palm print on the driver's side door of Martinez's SUV, just beneath the window. The latent print matched Ford's left palm print. The fingerprint examiner was certain "both impressions were made by the same palm." A few days after Martinez died — but before the fingerprint results were in — a Vallejo detective stopped Ford driving a white Oldsmobile sedan. Ford was 23 years old and was wearing short hair in a "fade." There were six cell phones in the center console of Ford's car, which Ford said he "bought [ ] stolen off the streets." Ford told the detective he was at his mother's house in Vallejo, about three miles from Blanco's residence, on the night Martinez was shot. Ford did "not remain in custody" and the detective did not speak to Ford again until December 2010, when Ford was in jail for an unrelated firearm possession charge.[2]

Ford called his girlfriend while he was in jail for the unrelated offense and before he was charged with Martinez's murder. In a recorded conversation, Ford said, "luckily I aint in here for murder, that's all I keep thinking about. . . . oh well I wish it didn't have to happen. . . ." He also said, "I just [wish] I was at home. . . . I know I gotta deal with my [unintelligible] it's too late for all that . . . to be wishin I was at home. . . . See I'm disappointed in myself. But [expletive] that's what happens when you carry a gun. Ain't nothin good gonna come of it. And I know this and [expletive] still happen, cause I tell other people the only thing you gonna get out of a gun is you gonna throw down with it or you gonna shoot somebody with it. And I tell everybody that and look at my [expletive]."

Several months after Martinez's murder, Ford posted the following message on his Facebook page: "I heard through the grapevine you was looking for the guy. Let me know something. And since you think I popped you, check this out. First off, I don't [expletive] with the Vistas. Second off, I am too good of a shooter to hit a nigga that many times and not knock they ass down. Last, when you getting shot, I was on Fifth

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[2] In December 2010, Ford told the detective he was at "home or . . . at his mother's home watching his son" on the night Martinez was shot. He denied knowing Martinez or recognizing a picture of him, and denied knowing anything about the incident.

buying some syrup off Jigs. Plus, I don't even [expletive] with niggas, so ain't nobody talked to me since I got out of jail last. Real killers move in silence. And would I brag on a job I didn't even complete? Niggas knocking [expletive] down. I don't need credit for an attempt, so take that how you want to."[3]

The police arrested Ford for Martinez's murder. When told his palm print was on the door of Martinez's car, Ford responded, "[T]hat don't mean nothing. That just means I came in contact with the vehicle at one time or another." Ford did not explain how he "came in contact" with Martinez's car "at one time or another."

Jury Instructions, Verdict, and Sentencing

The People prosecuted Ford for murder under two theories: felony murder and malice aforethought. The prosecution argued Ford attempted to rob Martinez of his cell phone and, in the commission of the robbery, shot Martinez. The court instructed the jury on first degree felony murder and second degree murder with malice aforethought. The court did not instruct the jury on an aiding and abetting theory.

During deliberations, the jury sent a note to the court asking, "If someone believes that the defendant was present at the time of the shooting and was an active participant in the attempted robbery, but was not the actual shooter, does that imply guilt of either the first or second degree murder charge?" With defense counsel's approval, the court responded, "You have received all of the evidence and all of the law pertaining to this case." The jury convicted Ford of the first degree murder of Martinez (§ 187, subd. (a)) but could not reach a verdict on the firearm use sentencing enhancements and the prosecution dismissed them.[4] The court sentenced Ford to 25 years to life in state prison.

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[3] The prosecution played a recording of the jailhouse phone call for the jury. A prosecution witness read Ford's Facebook message to the jury two times because the witness missed a line while reading the message the first time.

[4] When questioned by the court during deliberations, the foreman reported the jury voted 12-0 on personal and intentional discharge of a firearm during a felony (§ 12022.53, subd. (c)), 12-0 on personal and intentional discharge during a felony causing death (§ 12022.53, subd. (d)), but was deadlocked 7-5 on personal use of a firearm during a felony (§ 12022.53, subd. (b)). After a lunch recess, jurors confirmed the 7-5 deadlock and the court declared a mistrial on all of the firearm allegations. Ford moved for a new

DISCUSSION

I.
Ford's Claim Regarding the Court's Response to the Jury's Question Fails

Ford claims the court's "incomplete and misleading response" to the jury's question requires reversal. The People contend Ford waived this claim. They also contend the court's response complied with section 1138,[5] and any assumed error is harmless.

A. Background

During deliberations the jury asked the court: "If someone believes that the defendant was present at the time of the shooting and was an active participant in the attempted robbery, but was not the actual shooter, does that imply guilt of either the first or second degree murder charge?" The court's initial thought was "the answer would simply be 'No.' Even if somebody was a co-participant who did the killing . . . there are other elements to the intent to aid and abet." Defense counsel agreed, saying "since we didn't argue" aiding and abetting "and we didn't present it in instruction or through testimony . . . it is too late." Defense counsel urged the court to refer the jury to the instructions.

The prosecutor asked the court to read CALCRIM No. 3530[6] and advise the jury "the Court is not going to provide the law on that issue because the evidence does not

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trial, claiming the jury "was allowed to continue deliberations despite an incorrect directive" from the court on aiding and abetting, and that the jury's verdict "was not consistent with the law." The court denied the motion.

[5] Section 1138 provides in relevant part, "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, . . . the information required must be given. . . ."

[6] CALCRIM No. 3530, "Judge's Comment on the Evidence," provides, "Do not take anything I said or did during the trial as an indication of what I think about the evidence, the witnesses, or what your verdict should be. [¶] Now, I will comment on the evidence only to help you decide the issues in this case. [¶] However, it is not my role to tell you what your verdict should be. You are the sole judges of the evidence and believability of witnesses. It is up to you and you alone to decide the issues in this case.

support that factual scenario." Defense counsel objected, arguing it would be inappropriate for the court to comment on the evidence. As defense counsel explained, "The statement that [the prosecutor] would like the Court to read to the jury that the evidence does not support that factual scenario, that might be the prosecutor's position, but I think if the Court gives that statement, the Court is basically indicating the Court's position. [¶] It could be taken by the jury as a Court position and the Court would be risking directing a verdict or [ ] usurp[ing] the jury's ultimate fact-finding power, even simply by suggesting what the evidence actually is without them determining what the actual evidence is."

Defense counsel continued, "The evidence does support the possibility that somebody else is the shooter because there was somebody else who does not meet the general generic description of Mr. Ford, and that's the person who was seen by Bethel J[.] in the black hoodie with the dreadlocks on that side of the street walking towards the SUV. [¶] So there is evidence to support that, and I think the Court . . . can only tell the jury to refer back to the testimony that they heard and to refer to the jury instructions as given." The court agreed that telling the jury the evidence did not support that factual scenario "may be taking away a factual decision by the jury."

The prosecutor then proposed a "similar" but more "neutral" response, to which defense counsel objected. The court agreed with defense counsel and stated, "I think what I am inclined to do is simply something to the effect of 'You've received all of the evidence and all of the law pertaining to this case.' I think that's, in essence, what you're asking." Defense counsel responded, "Right." Then the court said, "So the response would be, 'You have received all of the evidence and all of the law pertaining to this case,'" and defense counsel stated she had no objection. When the court read the proposed response — "'You have received all of the evidence and all of the law pertaining to the this case'" — defense counsel said, "I think what the Court read is sufficient." The court then responded to the jury's question and defense counsel

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You may disregard any or all of my comments about the evidence or give them whatever weight you believe is appropriate."

reiterated her agreement with the court's response, noting it was proper because it referred the jury "to the law and they have the law and they can state it for themselves."

B. Ford Forfeited His Section 1138 Claim and Cannot Demonstrate Prejudice

"When a jury asks a question after retiring for deliberation, '[s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law.' [Citation.] But '[t]his does not mean the court must always elaborate on the standard instructions.'" (*People v. Eid* (2010) 187 Cal.App.4th 859, 881-882.) While the court "has an obligation to rectify any confusion expressed by the jury regarding instructions, [it] has discretion to determine what additional explanations are sufficient to satisfy the jury's request for information." (*People v. Smithey* (1999) 20 Cal.4th 936, 1009.)

Numerous courts have held a defendant waives or forfeits an objection to the trial "court's response to a jury inquiry through counsel's consent, or invitation or tacit approval of, that response." (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1048, citing cases; *People v. Hughes* (2002) 27 Cal.4th 287, 402 [claim "'waived by defense counsel's agreement with the trial court'"]; *People v. Thoi* (1989) 213 Cal.App.3d 689 (*Thoi*).) For example, in *Thoi*, the defendant argued "the trial court erred by failing to answer certain jury questions which arose during jury deliberations." (*Thoi,* at p. 697, fn. omitted.) The appellate court rejected this claim — noting defense counsel "actively and vigorously lobbied against further instruction" — and concluded "[c]ounsel's conduct either waived or invited any error by the court." (*Id.* at p. 698.)

The same is true here. As in *Thoi*, defense counsel repeatedly opposed the prosecution's suggested responses and urged the court to refer the jury to the instructions. The court proposed a response and defense counsel agreed with it, stating it was "sufficient." After the court responded to the jury's question, defense counsel opined the response was proper because it referred the jury "to the law and they have the law and they can state it for themselves." Under the circumstances, Ford has forfeited his claim regarding the court's response to the jury's question. (*People v. Rodrigues* (1994) 8

Cal.4th 1060, 1193 [claim waived where "defendant both suggested and consented to the responses given by the court"].)

Even if Ford had preserved this argument for appeal, we would reject it because Ford cannot demonstrate prejudice from any assumed error. (*People v. Roberts* (1992) 2 Cal.4th 271, 326 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) harmless error standard]). Ford claims the jury would have acquitted him of murder "absent the incomplete response to the jury's question" because at least one juror believed he "was not the shooter but was an aider and abettor." According to Ford, "one or more jurors did not believe that [he] personally fired the gun and thus convicted him of murder on an aiding and abetting theory."

We are not persuaded. The prosecution charged Ford with murder "during the course of Mr. Ford trying to take [Martinez's] phone" under two theories, first degree felony murder and second degree malice aforethought. The prosecution did not pursue an aiding and abetting theory. That the jury found Ford had not personally used a firearm when committing the murder does not mean it concluded Ford was not a perpetrator who shot Martinez, or that the jury could have only convicted him as an aider and abettor. The jury could have believed Ford had a firearm which accidentally discharged during the attempted robbery, killing Martinez; this would have been consistent with CALCRIM No. 540, which provides a "person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent."

At trial, the prosecution offered substantial evidence demonstrating Ford was guilty of murder: (1) Ford's palm print was found on Martinez's newly-washed car and Ford did not explain how his hand came into contact with Martinez's car; (2) shortly before the shooting, witnesses saw a man matching Ford's general appearance and a car similar to the one Ford drove; (3) Ford told his girlfriend he was happy he had not been charged with murder, he wished "it didn't have to happen," and was disappointed with himself because "the only thing you gonna get out of a gun is you gonna throw down with it or you gonna shoot somebody with it[;]" (4) Ford bragged on his Facebook page about being a good shooter ("knockin' [expletive] down") and not getting caught ("aint

nobody talked to me since I got outa jail . . . Real killas move n silence"); and (5) Ford was found with multiple cell phones in his car a few days after Martinez's murder, suggesting a motive to rob and/or kill Martinez. Based on this evidence, it is not reasonably probable the jury would have acquitted Ford of murder had the court — as Ford has suggested — answered the jury's question with a simple "'no.'" (*People v. Robinson* (2005) 37 Cal.4th 592, 634-635 [assumed error under section 1138 was harmless].)

II.

The Jury Did Not Convict Ford on a Legally Incorrect Theory

Ford contends the jury's guilty verdict on the murder charge "and its inability to reach a verdict on the personal use of a firearm enhancement" demonstrate the jury relied upon a "legally incorrect aiding and abetting theory" of guilt. We disagree. We have already explained the jury's failure to return a verdict on the firearm use allegations does not demonstrate the jury concluded Ford was not the perpetrator, nor that the jury could only have convicted Ford as an aider and abettor. It is well settled the "disposition of one count [has] no bearing upon the verdict with respect to other counts, regardless of what the evidence may have been. Each count must stand upon its own merit." (*People v. Ranney* (1932) 123 Cal.App. 403, 407; *People v. Amick* (1942) 20 Cal.2d 247, 252; see also § 954 ["An acquittal of one or more counts shall not be deemed an acquittal of any other count"].) This principle applies when there is a conflict between a verdict on an offense and an enhancement. (See *People v. Lopez* (1982) 131 Cal.App.3d 565, 570-571 [rejecting claim that jury must have found the defendant was an aider and abetter where jury convicted him of assault with a deadly weapon but found not true the allegation he personally used a weapon].) Here, the jury's failure to return a verdict on the firearm use allegations does not demonstrate the jury convicted Ford on an invalid theory of guilt.[7]

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[7] In his reply brief, Ford relies on an incomplete quotation from *People v. Godinez* (1992) 2 Cal.App.4th 492 (*Godinez*) to support his claim that "'[w]here there is an acquittal or a deadlock on a personal use of a firearm allegation, 'the inference is compelling that appellant was convicted upon a finding of aider and abettor status.'" (*Id.* at p. 505.) *Godinez* is distinguishable and Ford has taken the quotation out of context. In

Ford urges us to apply the *Green/Guiton* test (*People v. Green* (1980) 27 Cal.3d 1, 69 (*Green*), overruled on different grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239; *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*)), both of which hold "'[w]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.'" (*Guiton*, at p. 1122.) *Green* and *Guiton* do not apply here because the prosecutor did not suggest, nor did the trial court instruct on, a legally erroneous theory of the case.

III.

Even Assuming the Prosecutor Committed Misconduct, Ford Cannot Establish Prejudice

Ford argues the prosecutor committed misconduct during closing argument by telling the jury the "'presumption of innocence is over'" and Ford is "'not presumed innocent anymore.'" At the end of closing argument, the prosecutor stated: "I've provided you with all the information that you need to feel the abiding conviction in the truth of these charges. I have provided the information for you to make that decision.

Godinez, the prosecution relied on an aider and abetter theory in a prosecution arising from a fatal stabbing during a gang fight. (*Id.* at p. 499.) The trial court gave the jury an erroneous instruction on aiding and abetting liability for an unplanned offense. (*Id.* at p. 502.) The jury convicted the defendant of voluntary manslaughter on an aiding and abetting theory but found untrue the allegation he personally used a knife. (*Id.* at p. 495.) The appellate court determined the erroneous jury instruction was not harmless because it was "reasonably possible a jury might have concluded the victim's death was not a reasonable and natural consequence of the attack Godinez aided and abetted." (*Id.* at pp. 503-504.) In explaining why the error was not harmless, the court noted, "It is significant, moreover, that the jury *acquitted* Godinez of personally using a knife, and during its deliberations asked the court to reread instructions and answer questions concerning the extent of aider and abettor liability. The inference is compelling that appellant was convicted upon a finding of aider and abettor status." (*Id.* at pp. 504-505.) Here and in contrast to *Godinez*, the prosecution did not rely on an aider and abettor theory and the court did not instruct the jury on that theory. Ford's reliance on *Smith v. Lopez* (9th Cir. 2013) 731 F.3d 859 (petn. for review pending, petn. filed Feb. 5, 2014) (*Smith*) in a supplemental letter brief does not alter our conclusion."

You should be comfortable with that decision. I want you to be comfortable with that decision and, again, as I indicated before, to follow through with your promise to not hesitate to convict once the case has been proven to you beyond a reasonable doubt. [¶] This idea of this *presumption of innocence* is over. Mr. Ford had a fair trial. We were here for three weeks where . . . he gets to cross-examine witnesses; also an opportunity to present information through his lawyer. He had a fair trial. This system is not perfect, but he had a fair opportunity and a fair trial. *He's not presumed innocent anymore*. . . . [¶] And so we're past that point. We're at the point now where you go back, look at the information that you have before you, consider all that information. And again, I want you to feel comfortable with your decision and you should feel comfortable with your decision." (Italics added.)

Defense counsel objected that the prosecutor misstated the law. Outside the presence of the jury, defense counsel asked the court to give "a limiting instruction . . . letting the jury know that they have to deliberate first before the presumption falls." The prosecutor claimed his comment was an "entirely appropriate argument. All the evidence is in." The court agreed, overruled defense counsel's objection, and declined to give a limiting instruction.

The prosecutor resumed his closing argument, "And so we're past that point. We're at the point now where you go back, look at the information that you have before you, consider all that information. And again, I want you to feel comfortable with your decision and you should feel comfortable with your decision. [¶] Again, palm print, left palm print in the exact location where a right-handed shooter would be; victim having a cell phone within a minute or so of his death; the defendant having those multiple cell phones in his car five days after; the Facebook posts; the two jail calls; and no motive for anyone else to kill [Martinez]. And the evidence is no alibi information from the defendant. And the evidence before you, when you take all of that information together, is that the defendant is guilty of murder."

According to Ford, the prosecutor's comments about the presumption of innocence misstated the law and deprived him of a fair trial. Several cases have rejected

this argument, including *People v. Goldberg* (1984) 161 Cal.App.3d 170 (*Goldberg*) and *People v. Booker* (2011) 51 Cal.4th 141, 185 (*Booker*). In *Goldberg*, the prosecutor stated during closing argument: "'And before this trial started, you were told there is a presumption of innocence, and that is true, but once the evidence is complete, once you've heard this case, once the case has been proven to you—and that's the stage we're at now—the case has been proved to you beyond any reasonable doubt. I mean, it's overwhelming. *There is no more presumption of innocence*. Defendant Goldberg has been proven guilty by the evidence . . .'" (*Goldberg, supra,* 161 Cal.App.3d at p. 189.) The *Goldberg* court held the comment was not misconduct and determined the prosecutor was merely restating, "albeit in a rhetorical manner," the otherwise noncontroversial point that a defendant is presumed innocent "'until the contrary is proved . . .'" (*Ibid.*)

In *Booker*, the prosecutor told the jury: "I had the burden of proof when this trial started to prove the defendant guilty beyond a reasonable doubt, and that is still my burden. It's all on the prosecution. I'm the prosecutor. That's my job. [¶] 'The defendant was presumed innocent until the contrary was shown. That presumption should have left many days ago. He doesn't stay presumed innocent.'" (*Booker, supra,* 51 Cal.4th at p. 183.) The California Supreme Court rejected a contention of prosecutorial misconduct, concluding: "Although we do not condone statements that appear to shift the burden of proof onto a defendant (as a defendant is entitled to the presumption of innocence until the contrary is found by the jury), the prosecutor here simply argued the jury should return a verdict in his favor based on the state of the evidence presented." (*Id.* at p. 185; see also *People v. Panah* (2005) 35 Cal.4th 395, 463 (*Panah*) [prosecutor's closing argument statement that the evidence had "'stripped away' defendant's presumption of innocence" was not misconduct because it was made "in connection with [the prosecutor's] general point" that the strength of the evidence had overcome the presumption of innocence].)

After briefing was completed in this case, the Sixth District Court of Appeal reached a different conclusion in *People v. Dowdell* (2014) 227 Cal.App.4th 1388 (petns. for review pending, petns. filed Aug. 19 & 26, 2014) (*Dowdell*). There, the People

charged one of the defendants, Terrance Ray Lincoln, with various offenses arising out of a "robbery/carjacking/kidnapping." (*Id.* at p. 1393.) Before closing arguments, the trial court instructed dual juries "A defendant in a criminal case is presumed to be innocent. This presumption requires the people prove a defendant guilty beyond a reasonable doubt. Subsequently, in closing argument before the Lincoln jury, the prosecutor twice argued that the presumption of innocence was 'over.' First, he argued that 'The evidence is overwhelming. My goal was to give [Lincoln] a fair trial, he just got one. You have the evidence. *The presumption of innocence is over.* I have the evidence. It wasn't a fair fight, it wasn't supposed to be. Go and deliberate, be thorough and come back guilty on all counts.' Similarly, he later argued that 'It's fairly obvious that Mr. Lincoln committed all of the crimes we are accusing him of. *The presumption of innocence is over.* He has gotten his fair trial. Be thorough, deliberate, and come back with guilty verdicts on all counts.'" (*Id.* at p. 1407.) Defense counsel did not object to the prosecutor's comments and Lincoln raised an ineffective assistance of counsel claim on appeal. (*Id.* at p. 1405.)

The *Dowdell* court concluded Lincoln's attorney should have objected because the prosecutor misstated the law. As the court explained: "the presumption of innocence continues into deliberations, and the presumption was in no sense 'over' when the prosecutor declared it to be so. [Citation.] Second, the prosecutor *twice* made this misstatement of the law. Arguably, the first version of the statement—prefaced by a reference to the 'overwhelming' state of the evidence—was comparable to the prosecutors' statements in *Goldberg* and *Panah*. But then the prosecutor repeated the misstatement, together with the assertions that it was 'fairly obvious' Lincoln was guilty, and most critically, '*He has gotten his fair trial.*' This last statement implied that the 'fair trial' was over, and with it, the jury's legal obligation to respect the presumption of innocence. Defense counsel should have objected." (*Id.* at p. 1408.)[8] *Dowdell* also concluded, however, defense counsel's failure to object was not ineffective assistance because Lincoln did not show "a reasonable probability of a more favorable outcome had

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[8] The *Dowdell* court distinguished *Goldberg* and *Panah*, but not *Booker*. (*Dowdell, supra,* 227 Cal.App.4th at pp. 1407-1408.)

his trial counsel objected to the remarks. As set forth above . . . the prosecutor presented abundant evidence of Lincoln's guilt on all counts." (*Ibid.*)

As in *Goldberg*, the prosecutor here argued the evidence of Ford's guilt overcame the presumption of innocence and satisfied the prosecution's burden of proof. (*Goldberg, supra,* 161 Cal.App.3d at p. 189.) And like the prosecutor in *Booker*, the prosecutor here "simply argued the jury should return a verdict in his favor based on the state of the evidence presented." (*Booker, supra,* 51 Cal.4th at p. 185.) Ford does not discuss *Goldberg* and does not persuade us *Booker* is distinguishable or wrongly decided. We need not resolve any conflict between the *Goldberg*, *Booker*, and *Panah* cases on the one hand, and *Dowdell* on the other because we conclude any assumed error is harmless under either the state (*Watson, supra,* 46 Cal.2d 818) or federal constitutional standard (see *Chapman v. California* (1967) 386 U.S. 18, 24). The court instructed the jury Ford was presumed innocent until the contrary was proven beyond a reasonable doubt (CALCRIM No. 220) and to disregard any conflicting statements made by the attorneys concerning the law (CALCRIM No. 200). Additionally, the prosecutor repeatedly reminded the jury of his burden to establish guilt beyond a reasonable doubt. The jury was properly informed about the prosecution's burden. Finally, and as discussed above, the evidence of Ford's guilt was strong. (*Booker, supra,* 51 Cal.4th at p. 186.)

IV.

The Court Did Not Abuse Its Discretion by Admitting the Facebook Message and Any Error in Admitting the Message Was Harmless

Ford claims the court abused its discretion by admitting a message he posted on his Facebook page several months after the homicide. He claims the message was irrelevant, more prejudicial than probative, and that its admission violated his constitutional right to a fair trial.

A. Background

The prosecution moved in limine to admit the Facebook message and the court admitted it over Ford's objection, concluding it was "relevant and probative." The court explained the message "talks about the person being a good shooter, too good of a

shooter to hit someone and not knock them down, moving in silence. And apparently, the way that this killing occurred, these could be descriptions of how the killing occurred . . . so there seems to be some relevance there. [¶] Perhaps most or what is probative, though, is [Ford] says, 'Why would I brag on a job I didn't even complete?' . . . It says, 'I don't need credit for an attempt, so take how you want to.' [¶] I think there is some probative value to that, that there may be another killing out there; there may be the killing of a victim that could be referred to 'Why would I take credit for an attempt' when there's an actual killing."

The court analyzed the Facebook message under Evidence Code section 352 and concluded, "I don't see it being—any probative value being substantially outweighed. Again, I think it's very probative if the jury accepts the prosecution's version of what it means. I don't think there's going to be an undue consumption of time or misleading of jury issues or confusion issues. [¶] First of all, while it references some other, perhaps, attempted shooting or attempted killing, the defendant's denying it throughout the statement, so any incident—any other incidents not being brought up in front of the jury, such as an [Evidence Code section] 1101(b)-type situation. [¶] So it appears to me to be relevant. I would allow it subject to the proper foundation. And I have used my discretion under [Evidence Code section] 352. I don't see the prejudice outweighing the probative value."

A prosecution witness read the Facebook message to the jury twice because the witness missed a line while reading the message the first time. During closing argument, the prosecutor argued the Facebook message was an admission Ford shot Martinez.

B. The Admission of the Facebook Message Was Not an Abuse of Discretion

Only relevant evidence is admissible. (Evid. Code, § 350.) "'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court may "exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice. . . ." (Evid. Code, § 352.) "We review a trial court's rulings on the admission . . . of evidence

for abuse of discretion." (*People v. Chism* (2014) 58 Cal.4th 1266, 1291.) "'A trial court will not be found to have abused its discretion unless it "'exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice." [Citations.]'" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1180 (*Hajek*).)

Ford contends the Facebook message was irrelevant because "it was not an admission of, and had nothing to do with, the homicide for which [he] was standing trial." We disagree with Ford's self-serving interpretation of the Facebook message. A plausible reading of the message is Ford murdered Martinez, a disputed fact at trial. In the message, Ford implicitly admitted committing a recent murder when he claimed he did not have to take credit for an attempted murder. He stated, why "would I brag on a job I didn't even complete. . . . I don't need credit for an attempt. . . ." By claiming he was "too good of a shooter to hit a nigga that many times and not knock they ass down[,]" Ford implied that when he shot someone, he did not miss. Finally, Ford bragged that, unlike the accusation made by the recipient of the Facebook message, "Real killers move in silence[,]" suggesting he quickly shot Martinez in the head without being noticed and immediately disappeared. We conclude the court did not abuse its discretion by determining the Facebook message was relevant. (*Hajek, supra,* 58 Cal.4th at p. 1205 [determination of jailhouse recording's relevance was not an abuse of discretion].)[9]

We also conclude Ford has failed to demonstrate the risk of undue prejudice substantially outweighed the Facebook message's probative value, requiring exclusion under Evidence Code section 352. "Evidence is substantially more prejudicial than probative [citation] if . . . it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome. [Citation.]'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) "'"Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial,

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[9] Ford claims the message was inadmissible under Evidence Code section 1101 because he admitted the uncharged offense of "purchase and possession of a controlled substance" when he referred to "buying some syrup." We disagree. On this record, there is no reason to believe the jury would have understood "buying some syrup" as constituting a narcotics offense.

as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. . . . "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. . . ."'" (*People v. Doolin* (2009) 45 Cal.4th 390, 438-439, citations omitted.) Here, the Facebook message may have undermined Ford's case, but it was not more prejudicial than probative. It was relevant to the issues in the case and did not tend to evoke an emotional bias against Ford. We conclude the court did not abuse its discretion by admitting the Facebook message.

Even if we assume the court erred by admitting the message, any error was harmless given the strong evidence of Ford's guilt. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1295.) As previously discussed: (1) Ford's palm print was found on Martinez's newly-washed car and Ford did not explain how his hand came into contact with Martinez's car; (2) shortly before the shooting, witnesses saw a man matching Ford's general appearance and a car similar to the one Ford drove; (3) Ford told his girlfriend he was happy he had not been charged with murder, he "wish[ed] it didn't have to happen[,]" and conceded "the only thing you gonna get out of a gun is you gonna throw down with it or you gonna shoot somebody with it[;]" and (4) Ford was found with multiple cell phones in his car a few days after Martinez's murder, suggesting a motive to commit the crime. It is not reasonably probable the jury would have returned a more favorable verdict had the court excluded the Facebook message. (*Watson, supra,* 46 Cal.2d at p. 836.)

Finally, we reject Ford's final claim that the cumulative impact of the alleged errors deprived him of a fair trial. We have either rejected Ford's claims of error and/or found that any errors, assumed or not, were not prejudicial. "Viewed as a whole, such errors do not warrant reversal of the judgment." (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

DISPOSITION

The judgment is affirmed.

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Docket (Register of Actions)

PEOPLE v. FORD
Division SF
Case Number S221743

Date	Description	Notes
10/07/2014	Received premature petition for review	Defendant and Appellant: Keith Undray Ford Attorney: John Francis McCabe
10/14/2014	Case start: Petition for review filed	Defendant and Appellant: Keith Undray Ford Attorney: John Francis McCabe
11/19/2014	Petition for review denied	
12/02/2014	Returned record	petition for review

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KEITH UNDRAY FORD,

Petitioner,

v.

SUZANNE M. PEERY, Warden,

Respondent.

No. 2:15-cv-2463 MCE GGH P

FINDINGS AND RECOMMENDATIONS

Introduction and Summary

Petitioner, Keith Ford, in his well-written petition/traverse, seeks to vacate his conviction for first degree murder. As issues he presents:

1. The prosecutor's comment in final argument to the effect that the "presumption of innocence was over," and "petitioner was not presumed innocent anymore" violated due process and was not harmless error;

2. The trial court's response to the jury's question violated due process and was not harmless;

3. Ineffective assistance of counsel insofar as counsel did not object to the trial judge's response to the jury question;

4. It cannot be determined whether the jury convicted petitioner on a legally incorrect theory;

5. Improper admission of a Facebook post/message;

6. Cumulative error.

For the reasons discussed at length herein, the petition should be denied.

BACKGROUND FACTS

The facts as found by the California Court of Appeal are set forth below:

> Ruben Martinez was shot and killed outside his girlfriend's house in Vallejo. The People charged Ford with the first degree murder of Martinez (§ 187, subd. (a)) and alleged various firearm use sentencing enhancements (§ 12022.53, subds. (b), (c) (d)).
>
> Prosecution Evidence:
> In August 2010, then 20–year–old Martinez attended college and worked as a car salesman. Martinez owned a blue SUV with big rims and tinted windows. Martinez treasured the car and washed it several times a week. On an August 2010 night, Martinez planned to go to a family party with his girlfriend, Jessica Blanco. He washed the SUV before their date.
>
> Around 10 p.m., Martinez picked Blanco up at her house in Vallejo. His car was "really clean and shiny." Martinez decided he wanted to see a movie instead of attending the family party, so he and Blanco returned to Blanco's house so she could "check the movie times and get a jacket." As they approached Blanco's street, Blanco noticed a white car. It had been driving in the same direction as Martinez's car, but then made an abrupt U-turn directly in front of Martinez's car and drove away in the opposite direction.
>
> Martinez reached Blanco's house. He stopped the SUV in front of her house but left the engine running. Martinez sat in the driver's seat and the white light from his cell phone was visible from outside the car. Blanco got out of the car and went into her house to use the bathroom. While inside, she heard a "really loud popping noise" and "a screeching noise, tires peeling, gravel." Blanco went outside and saw Martinez's car had crashed into a neighbor's house, the engine still revving and tires spinning. Martinez was slumped in the driver's seat, dead from a gunshot wound in his head.
>
> A neighbor, Bethel J., and her daughter, Tenley, lived across the street from Blanco. They were across the street from Blanco's house when Bethel saw Martinez's car parked in front of Blanco's house and a person in the driver's seat using a cell phone. Bethel and Tenley saw three young African American men walking toward them. Tenley's dog charged at one of the men, who appeared to

be in his early twenties. Tenley "couldn't really" see that man's face because it was dark, but she noticed he had short hair cut close to his scalp. The man was "skinny" and taller than she. Initially, that man was with his two companions, but he started walking faster and separated from the two other men. One of the other men had dreadlocks and was wearing a hooded sweatshirt.

A fingerprint examiner found a latent palm print on the driver's side door of Martinez's SUV, just beneath the window. The latent print matched Ford's left palm print. The fingerprint examiner was certain "both impressions were made by the same palm." A few days after Martinez died—but before the fingerprint results were in—a Vallejo detective stopped Ford driving a white Oldsmobile sedan. Ford was 23 years old and was wearing short hair in a "fade." There were six cell phones in the center console of Ford's car, which Ford said he "bought [ ] stolen off the streets." Ford told the detective he was at his mother's house in Vallejo, about three miles from Blanco's residence, on the night Martinez was shot. Ford did "not remain in custody" and the detective did not speak to Ford again until December 2010, when Ford was in jail for an unrelated firearm possession charge.2

Ford called his girlfriend while he was in jail for the unrelated offense and before he was charged with Martinez's murder. In a recorded conversation, Ford said, "luckily I aint in here for murder, that's all I keep thinking about.... oh well I wish it didn't have to happen...." He also said, "I just [wish] I was at home.... I know I gotta deal with my [unintelligible] it's too late for all that ... to be wishin I was at home.... See I'm disappointed in myself. But [expletive] that's what happens when you carry a gun. Ain't nothin good gonna come of it. And I know this and [expletive] still happen, cause I tell other people the only thing you gonna get out of a gun is you gonna throw down with it or you gonna shoot somebody with it. And I tell everybody that and look at my [expletive]."

Several months after Martinez's murder, Ford posted the following message on his Facebook page: "I heard through the grapevine you was looking for the guy. Let me know something. And since you think I popped you, check this out. First off, I don't [expletive] with the Vistas. Second off, I am too good of a shooter to hit a nigga that many times and not knock they ass down. Last, when you getting shot, I was on Fifth buying some syrup off Jigs. Plus, I don't even [expletive] with niggas, so ain't nobody talked to me since I got out of jail last. Real killers move in silence. And would I brag on a job I didn't even complete? Niggas knocking [expletive] down. I don't need credit for an attempt, so take that how you want to."3

The police arrested Ford for Martinez's murder. When told his palm print was on the door of Martinez's car, Ford responded, "[T]hat don't mean nothing. That just means I came in contact with the vehicle at one time or another." Ford did not explain how he "came in contact" with Martinez's car "at one time or another."

People v. Ford, 2014 WL 4446166 *1-2 (Cal. App., First District, 2014)

AEDPA STANDARDS

The statutory limitations of federal courts' power to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The text of § 2254(d) provides:

> 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 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.

For purposes of applying § 2254(d)(1), clearly established federal law consists of holdings of the United States Supreme Court at the time of the last reasoned state court decision. Thompson v. Runnels, 705 F.3d 1089, 1095 (9th Cir. 2013) (citing Greene v. Fisher, 565 U.S. 34, 39 (2011); Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011) *citing* Williams v. Taylor, 529 U.S. 362, 405–06 (2000). Circuit precedent may not be "used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that th[e] [Supreme] Court has not announced." Marshall v. Rodgers, ___ U.S. ____, ____, 133 S.Ct. 1446, 1450 (2013) *citing* Parker v. Matthews, 567 U.S. 37, 41 (2012). Nor may it be used to "determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to th[e] [Supreme] Court, be accepted as correct. Id.

A state court decision is "contrary to" clearly established federal law if it applies a rule contradicting a holding of the Supreme Court or reaches a result different from Supreme Court precedent on "materially indistinguishable" facts. Price v. Vincent, 538 U.S. 634, 640 (2003). Under the "unreasonable application" clause of § 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. Lockyer v. Andrade, 538 U.S. 63, 75 (2003); Williams, 529 U.S. at 413; Chia v. Cambra, 360 F.3d 997, 1002

(9th Cir. 2004). In this regard, a federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams, 529 U.S. at 412. See also Schriro v. Landrigan, 550 U.S. 465, 473 (2007); Lockyer, 538 U.S. at 75 (it is "not enough that a federal habeas court, in its independent review of the legal question, is left with a 'firm conviction' hat the state court decision was 'erroneous.' "). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).[1] Accordingly, "[a]s 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." Harrington, 562 U.S. at 103. "Evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Id at 101. Emphasizing the stringency of this standard, which "stops short of imposing a complete bar of federal court relitigation of claims already rejected in state court proceedings[,]" the Supreme Court has cautioned that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Id. The petitioner bears "the burden to demonstrate that 'there was no reasonable basis for the state court to deny relief.'" Walker v. Martel, 709 F.3d 925, 939 (9th Cir. 2013) *quoting* Harrington, 562 U.S. at 98.

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[1] The undersigned also finds that the same deference is paid to the factual determinations of state courts. Under § 2254(d)(2), a state court decision based on a factual determination is not to be overturned on factual grounds unless it is "objectively unreasonable in light of the evidence presented in the state court proceeding." Stanley, 633 F.3d at 859 *quoting* Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004)). It makes no sense to interpret "unreasonable" in § 2254(d)(2) in a manner different from that same word as it appears in § 2254(d)(1) – i.e., the factual error must be so apparent that "fairminded jurists" examining the same record could not abide by the state court factual determination. A petitioner must show clearly and convincingly that the factual determination is unreasonable. See Rice v. Collins, 546 U.S. 333, 338, 126 S.Ct. 969, 974 (2006).

The court looks to the last reasoned state court decision as the basis for the state court judgment. Stanley, 633 F.3d at 859. If the last reasoned state court decision adopts or substantially incorporates the reasoning from a previous state court decision, this court may consider both decisions to ascertain the reasoning of the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). "[Section] 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" Harrington, 562 U.S. at 100. Rather, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Id. at 99. This presumption may be overcome by a showing "there is reason to think some other explanation for the state court's decision is more likely." Id. at 99-100 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)). Similarly, when a state court decision on a petitioner's claims rejects some claims but does not expressly address a federal claim, a federal habeas court must presume, subject to rebuttal, that the federal claim was adjudicated on the merits. Johnson v. Williams, ___ U.S. ____, ____, 133 S.Ct. 1088, 1091 (2013).

The state courts need not have cited to federal authority, or even have indicated awareness of federal authority in arriving at their decision. Early v. Packer, 537 U.S. 3, 8 (2002). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under § 2254(d). Stanley, 633 F.3d at 860; Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Id at 853. Where no reasoned decision is available, the habeas petitioner still has the burden of "showing there was no reasonable basis for the state court to deny relief." Harrington, 562 U.S. at 98. A summary denial is presumed to be a denial on the merits of the petitioner's claims. Stancle v. Clay, 692 F.3d 948, 957 & n. 3 (9th Cir. 2012). While the federal court cannot analyze just what the state court did when it issued a summary denial, the federal court must review the state court record to determine whether there was any

"reasonable basis for the state court to deny relief." Harrington, 562 U.S. at 98. This court "must determine 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 [the Supreme] Court." Id. at 102.

When it is clear, however, that a state court has not reached the merits of a petitioner's claim, the deferential standard set forth in 28 U.S.C. § 2254(d) does not apply and a federal habeas court must review the claim de novo. Stanley, 633 F.3d at 860.

DISCUSSION

A. Prosecutor's Comment on the Presumption of Innocence

The state Court of Appeal set forth the pertinent facts in a well stated, concise fashion:

> Ford argues the prosecutor committed misconduct during closing argument by telling the jury the "'presumption of innocence is over'" and Ford is "'not presumed innocent anymore.'" At the end of closing argument, the prosecutor stated: "I've provided you with all the information that you need to feel the abiding conviction in the truth of these charges. I have provided the information for you to make that decision. You should be comfortable with that decision. I want you to be comfortable with that decision and, again, as I indicated before, to follow through with your promise to not hesitate to convict once the case has been proven to you beyond a reasonable doubt. [¶] This idea of this presumption of innocence is over. Mr. Ford had a fair trial. We were here for three weeks where ... he gets to cross-examine witnesses; also an opportunity to present information through his lawyer. He had a fair trial. This system is not perfect, but he had a fair opportunity and a fair trial. He's not presumed innocent anymore .... [¶] And so we're past that point. We're at the point now where you go back, look at the information that you have before you, consider all that information. And again, I want you to feel comfortable with your decision and you should feel comfortable with your decision." (Italics added.)
>
> Defense counsel objected that the prosecutor misstated the law. Outside the presence of the jury, defense counsel asked the court to give "a limiting instruction ... letting the jury know that they have to deliberate first before the presumption falls." The prosecutor claimed his comment was an "entirely appropriate argument. All the evidence is in." The court agreed, overruled defense counsel's objection, and declined to give a limiting instruction.
>
> The prosecutor resumed his closing argument, "And so we're past that point. We're at the point now where you go back, look at the information that you have before you, consider all that information. And again, I want you to feel comfortable with your decision and you should feel comfortable with your decision. [¶] Again, palm print, left palm print in the exact location where a right-

> handed shooter would be; victim having a cell phone within a minute or so of his death; the defendant having those multiple cell phones in his car five days after; the Facebook posts; the two jail calls; and no motive for anyone else to kill [Martinez]. And the evidence is no alibi information from the defendant. And the evidence before you, when you take all of that information together, is that the defendant is guilty of murder."

People v. Ford, at *6.

The Court of Appeal reviewed several California cases which came to different conclusions about misconduct in this context. It is fair to say that under California law, the presumption of innocence continues into the jury deliberations, until the jury determines the evidence proves otherwise beyond a reasonable doubt. People v. Ford *citing* People v. Booker, 51 Cal. 4th 141, 185 (2011). The same appears to be the federal rule. Portuondo v. Agard, 529 U.S. 61, 76 (Stevens, J. concurring) (2000). However, in Booker and People v. Goldberg, 161 Cal. App. 3rd 170, 189 (1984) and People v. Panah, 35 Cal. 4th 395, 463 (2005), the courts held that no misconduct occurred when the prosecutor announced in argument that the presumption of innocence was over, at least no actionable misconduct, because the comments, fairly viewed, were simply prosecutorial rhetoric that the prosecution had proved its case. In People v. Dowdell, 227 Cal. App. 4th 1388 (2014), the court found that two final argument comments concerning the presumption-of-innocence-was- over, and that defendant had received his fair trial, were misconduct, but ultimately non-prejudicial. In this case the Ford court ultimately opined that it did not have to choose between these California cases because, in any event, any asserted error was harmless under California and federal standards.

However, the dispositive point in this AEDPA habeas is not how California courts have treated the issue, misconduct or not, but whether their treatment, and the Ford case itself, runs contrary to law established by the United States Supreme Court. The parties do not cite, and the court is not aware of, any direct Supreme Court holdings involving alleged prosecutorial misconduct in declaring the "presumption of innocence" "over" during final argument. Rather, only those cases which generally define prosecutorial misconduct are set forth.[2] The threshold

[2] [I]t "is not enough that the prosecutors' remarks were undesirable or even universally condemned." Darden v. Wainwright, 699 F.2d, at 1036. The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a

issue is therefore, whether generalized holdings about prosecutorial misconduct can be extrapolated to the present situation. The undersigned thinks not.

The Supreme Court has cautioned against extrapolations of its holdings to other situations. Carey v. Musladin, 549 U.S. 70 (2006). This analogous-in-principle case involved an assertion that established precedent involving state sponsored activities impinging on a fair trial, e.g. requiring a prisoner to wear prison attire during trial, having multiple law enforcement personnel standing guard during trial, could be extrapolated to a situation where *spectators* had occasioned the unfairness by wearing buttons depicting the murder victim. The Supreme Court found that the issue of non-court personnel causing the unfairness was a different issue, and hence, there was no established Supreme Court precedent on the spectator issue for AEDPA purposes. In surveying Supreme Court precedent, it appears that when a specific practice is essentially alleged to be erroneous as a matter of law, here the statement during final argument that "the presumption of innocence is over," extrapolations become rare indeed. Rather, general holdings of the Supreme Court, if extended at all, appear to be used generally for case-specific factual controversies, e.g., use of Strickland v. Washington, 466 U.S. 668 (1984), to analyze such factually intensive things as unreasonable actions of counsel to determine adequacy of case investigation, or failure to object, or failure to call a witness and the like. The undersigned first finds here, therefore, that petitioner's prosecutorial misconduct claim should be denied because of the absence of declared Supreme Court authority.

Nor does petitioner's citation of United States v. Perlaza, 439 F.3d 1149 (9th Cir. 2006), advance his case. This is so for two reasons. First, this Circuit federal authority may not be used to "sharpen" or "refine" generalized Supreme Court holdings. Marshall v. Rogers, supra. Secondly, although one part of the Perlaza case involved the prosecutor declaring the presumption of innocence over, it also involved the prosecutor utilizing a more egregious "presumption of guilt" argument. Even the Ninth Circuit is loath to extend Perlaza to situations

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denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." Id., at 642. Darden, 477 U.S. 168 (1986).

where the prosecutor has used the--presumption-of-innocence-is-over-- rubric simply as a means to emphasize that the prosecution has proven the case beyond a reasonable doubt. See United States v. Bell, 337 Fed. Appx. 663 (9th Cir. 2009).

Finally, even if the undersigned has been too stingy in extrapolating generalized holdings on prosecutorial misconduct to the present situation for analytical purposes, it is clear beyond peradventure or doubt that reasonable jurists, like the justices in petitioner's case or other California cases, or even in the Ninth Circuit, could place petitioner's case in the non-actionable misconduct category. That is, the conduct here, even though it involves two assertions that the presumption of innocence was over, was made in the context of simply arguing that the evidence had shown petitioner guilty under the reasonable doubt instructions given by the court. Such prosecutor conduct could not be construed as infecting the fairness of the entire proceedings. Footnote 2, supra. The Ford court is not to be AEDPA second-guessed here. No further analysis of this claim need be made.

B. The Trial Court's Response to a Juror Question

Petitioner argues that the trial judge did not adequately respond to a question by the jury involving whether it could "imply guilt" for an active participant in the robbery, but who was not the actual shooter of the robbery victim. The argument continues: since the answer must have been "no" yet the jury decided the case on an aider and abettor theory, a theory not instructed upon. Further, since the jury did not find petitioner to have used a firearm on the enhancement issue, this "proves" the jury went astray to find guilt on a non-presented theory, as the jury could not have found petitioner to be the shooter for murder purposes, but not have "used a firearm" for enhancement purposes. At the very least, petitioner insists, the verdicts were inconsistent. There are many twists and turns to these complicated claims, but eventually, the arguments fall short.

This issue is set up by the discussion in the state appellate opinion:

> During deliberations the jury asked the court: "If someone believes that the defendant was present at the time of the shooting and was an active participant in the attempted robbery, but was not the actual shooter, does that imply guilt of either the first or second degree murder charge?" The court's initial thought was "the answer would simply be 'No.' Even if somebody was a co-participant who

> did the killing ... there are other elements to the intent to aid and abet." Defense counsel agreed, saying "since we didn't argue" aiding and abetting "and we didn't present it in instruction or through testimony ... it is too late." Defense counsel urged the court to refer the jury to the instructions.
>
> The prosecutor asked the court to read CALCRIM No. 35306 and advise the jury "the Court is not going to provide the law on that issue because the evidence does not support that factual scenario." Defense counsel objected, arguing it would be inappropriate for the court to comment on the evidence. As defense counsel explained, "The statement that [the prosecutor] would like the Court to read to the jury that the evidence does not support that factual scenario, that might be the prosecutor's position, but I think if the Court gives that statement, the Court is basically indicating the Court's position. [¶] It could be taken by the jury as a Court position and the Court would be risking directing a verdict or [ ] usurp[ing] the jury's ultimate fact-finding power, even simply by suggesting what the evidence actually is without them determining what the actual evidence is."
>
> Defense counsel continued, "The evidence does support the possibility that somebody else is the shooter because there was somebody else who does not meet the general generic description of Mr. Ford, and that's the person who was seen by Bethel J[.] in the black hoodie with the dreadlocks on that side of the street walking towards the SUV. [¶] So there is evidence to support that, and I think the Court ... can only tell the jury to refer back to the testimony that they heard and to refer to the jury instructions as given." The court agreed that telling the jury the evidence did not support that factual scenario "may be taking away a factual decision by the jury."
>
> The prosecutor then proposed a "similar" but more "neutral" response, to which defense counsel objected. The court agreed with defense counsel and stated, "I think what I am inclined to do is simply something to the effect of 'You've received all of the evidence and all of the law pertaining to this case.' I think that's, in essence, what you're asking." Defense counsel responded, "Right." Then the court said, "So the response would be, 'You have received all of the evidence and all of the law pertaining to this case,'" and defense counsel stated she had no objection. When the court read the proposed response—"'You have received all of the evidence and all of the law pertaining to the this case'"—defense counsel said, "I think what the Court read is sufficient." The court then responded to the jury's question and defense counsel reiterated her agreement with the court's response, noting it was proper because it referred the jury "to the law and they have the law and they can state it for themselves."

People v. Ford at *3-4.

The jury went on to find petitioner guilty of murder under one or both of the theories presented at trial, but confusingly could not find that petitioner used a firearm against the victim.

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The Court of Appeal first held that the issue had been waived because defense counsel had agreed, tacitly or overtly, to the trial judge's actions in response to the jury question. However, because petitioner brings a related ineffective assistance of counsel claim on this same issue, see infra, the procedural default ruling on the straight error claim is of little practical consequence here. Therefore, the undersigned reaches the merits of the claim as did the Court of Appeal in the alternative.

The Court of Appeal assumed for the sake of argument that petitioner was correct in his state law supplemental jury instruction error assertion, and decided the claim adversely to petitioner on the lack of any requisite harm. However, the undersigned ultimately finds that no error occurred in the first place. The discussion commences with a general discussion of the felony murder rule, and proceeds to the circumstances of this case.

Petitioner specifically asserts herein that the jury was permitted to decide the case on an unproved, even unnoticed, aider and abettor theory due to the refusal of the trial judge to answer "no," to the jury's question, and based on the fact that the jury did not find petitioner to be the actual shooter. However, the jury was presented not only with a purposeful murder claim, but also was presented with a felony murder theory—a theory which normally does *not require* that petitioner be the shooter, nor even of an aiding and abetting mentality.

> "All murder ... which is committed in the perpetration of, or attempt to perpetrate [certain enumerated felonies including robbery and burglary] ... is murder of the first degree." (Pen.Code, § 189.) The mental state required is simply the specific intent to commit the underlying felony (People v. Gutierrez (2002) 28 Cal.4th 1083, 1140, 124 Cal.Rptr.2d 373, 52 P.3d 572), since only those felonies that are inherently dangerous to life or pose a significant prospect of violence are enumerated in the statute. (People v. Roberts (1992) 2 Cal.4th 271, 316, 6 Cal.Rptr.2d 276, 826 P.2d 274 ["the consequences of the evil act are so natural or probable that liability is established as a matter of policy"]; People v. Washington (1965) 62 Cal.2d 777, 780, 44 Cal.Rptr. 442, 402 P.2d 130; 2 La Fave, *Substantive Criminal Law* (2d ed.2003) § 14.5(b), p. 449.) "Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning—if a death results from his commission of that felony it will be first degree murder, regardless of the circumstances." (People v. Burton (1971) 6 Cal.3d 375, 387–388, 99 Cal.Rptr. 1, 491 P.2d 793 (Burton).)

****

> Defendants make little effort to grapple with the policies underlying the felony-murder rule and rely instead almost entirely on our oft-repeated observation in People v. Vasquez (1875) 49 Cal. 560 (Vasquez) that "'[i]f the homicide in question was committed by one of [the nonkiller's] associates engaged in the robbery, in furtherance of their common purpose to rob, he is as accountable as though his own hand had intentionally given the fatal blow, and is guilty of murder in the first degree.'" (Id. at p. 563, italics added.) Relying on Vasquez, defendants claim the felony-murder rule requires proof that the homicidal acts have advanced or facilitated the underlying felony. Defendants misread Vasquez. In the century and a quarter since Vasquez was decided, we have never construed it to require a killing to advance or facilitate the felony, so long as some logical nexus existed between the two. To the contrary, in People v. Olsen (1889) 80 Cal. 122, 125, 22 P. 125 (Olsen), overruled on other grounds in People v. Green (1956) 47 Cal.2d 209, 227, 232, 302 P.2d 307, we upheld an instruction that based a nonkiller's complicity on a killing that was committed merely "in the prosecution of the common design "—and, in Pulido, we observed that this instruction was "similar" to the Vasquez formulation. (Pulido, *supra*, 15 Cal.4th at 720, 63 Cal.Rptr.2d 625, 936 P.2d 1235.) The similarity, of course, is that both require a logical nexus between the homicidal act and the underlying felony. Although evidence that the fatal act facilitated or promoted the felony is unquestionably relevant to establishing that nexus, California case law has not yet required that such evidence be presented in every case. Such a requirement finds no support in the statutory text, either. Penal Code section 189 states only that "[a]ll murder ... which is committed in the perpetration of, or attempt to perpetrate" the enumerated felonies "is murder of the first degree." (Pen.Code, § 189.) Nowhere has the Legislature imposed a requirement that the killer intend the act causing death to further the felony. We are therefore reluctant to derive such a requirement from the "in furtherance" discussion in our case law, which is itself only a court-created gloss on section 189.

People v. Cavitt, 33 Cal. 4th 187, 197-199 (2004).

The Cavitt case speaks (almost) directly to the issue here—if, as the jury's question posited, petitioner was an "active participant" in the robbery, nothing more was necessary to convict petitioner of felony murder, aside from a nexus or connection of the murder to the robbery in which petitioner actively participated. Petitioner does not, and could not dispute the logical connection, both causally and temporally, between the robbery and the murder. Under these circumstances, petitioner's status as an active participant in the robbery *did imply* his guilt of murder, regardless of whether he was the actual shooter. So, in the abstract, the answer to the jury's question would be "yes."

////

However, although the law in general does not support petitioner's argument, the circumstances of his trial make relying on Cavitt problematic. California felony murder jury instructions are divided into several scenarios. Petitioner's jury was instructed with CALCRIM 540A—during the underlying felony, defendant committed the act which caused death (here the shooting). CT 193, RT 931.[3] The prosecutor emphasized this theory to the jury. RT 950.[4] The jury (for some unexplained reason) was *not* instructed with CALCRIM 540B which defines the doctrine when a *co-participant* in the robbery commits the fatal act. In this scenario, aiding and abetting is a potential, alternative situation set forth in a bracketed manner in the instruction, but the instruction, as is clear from California law, does not require such a finding. Being an active participant in the robbery which has a nexus to the death is all that is required.

Petitioner therefore posits the inconsistent verdict: he was found guilty of murder under the instructions given, with the inability of the jury to find for the enhancement that he used a firearm in the crime, as a demonstration that the trial judge's refusal to answer the jury's question caused petitioner to be convicted on another theory not before the jury—aiding and abetting the murder. No matter how respondent could spin this inconsistency, petitioner could not have been convicted of murder *under any theory presented to the jury* unless he *used* a firearm. Whether the shooting was purposeful, accidental, negligent, or what have you, in order to be found guilty of murder, the instructions given required the jury to find petitioner as the shooter, i.e., the person causing the victim's gunshot death during the robbery. However, petitioner's logical argument regarding inconsistency in the verdict is in search of a viable legal theory in this habeas action.

There is no constitutional requirement that a jury's question always be directly answered. While a trial court must attempt to clear away a jury's confusion, Bollenback v. United States, 326 U.S. 607 (1946), simply referring the jury back to correct jury instructions is a viable way to alleviate the confusion. Weeks v. Angelone, 528 U.S. 225, 231-232 (2000). No one here argues that the given instructions were incorrect under California law. And, because answering the

[3] The court appreciates respondent's electronic filing of the record, in addition to any paper filing, in that access to pounds of paper files is not always a judge's first choice.

[4] Of course, the other theory at trial, petitioner intentionally killed the victim, requires that petitioner be the shooter.

jury's question directly may well have been seen as directing the jury to find in a certain way, the trial judge wisely backed off answering the jury directly.

Petitioner insists, however-- that merely referring the jury back to the (correct) instructions, and not directly answering that (under the instructions given) simply being a participant in the robbery did not imply guilt (of the murder) -- gave them no option but to rely on an aiding and abetting the "real shooter" theory to convict petitioner of murder—because, after all, the jury could not find petitioner the shooter when it came to the personal use of a firearm enhancement. This hypothesis is not true. Given the correct instructions which permitted the jury to find guilt if petitioner was the shooter, instructions which indisputably did not present any aiding and abetting theory, the jury had the opportunity to find petitioner guilty of murder because he was the shooter— which it did. Under the only instructions given, the jury did find guilt, i.e., that petitioner either purposefully shot the robbery victim and/or was guilty of felony murder (as the actual shooter regardless of intent).[5]

Thus, at bottom, petitioner's real, and only remaining, argument is simply that the undoubtedly inconsistent verdict cannot stand, and that allowing such is a violation of due process. However logical that argument might seem, petitioner is incorrect. As respondent has noted, the Supreme Court has held, in United States v. Powell, 469 U.S. 57 (1984), that a jury's guilty finding on one count which is inconsistent with a not guilty finding on another count, is *not* Constitutional error. In Powell, as is the case here, there was no issue of incorrect jury instructions. However, the jury found its defendant not guilty of conspiracy to possess and distribute cocaine, and actual possession with intent to distribute cocaine, but guilty of using a telephone to commit the underlying possession/distribution felony. Powell argued that because the true existence of the underlying felony was a predicate to the telephone count, the verdicts were inconsistent. The Supreme Court did not doubt this logic. However, it held that because the jury's state of mind in acquitting on the underlying felony could not be actually explored post-

[5] Nor can petitioner present the post-trial statements of one juror as to what that juror's deliberative process might have been (aiding and abetting) to show that the jury reached its murder verdict on that basis. Tanner v. United States, 483 U.S. 107 (1987).

trial, and the unable-to-be-explained verdict could have been as a result of mistake or leniency or some other factor, all that was required was sufficient evidence on the count for which guilt was found. Powell at 66-67. It specifically held that no Constitutional error was presented by the inconsistent verdict scenario. Id. at 65.

Without discussion, the Court of Appeal here assumed error as a result of the trial court not directly answering the jury question, and ostensibly because of the inconsistent verdicts, and then found the error harmless. This is difficult logic, but ultimately of no consequence since there was no error in the first place.[6] Indeed, the Court of Appeal's harmless error analysis mirrors somewhat the reasoning of the Powell court. It is repeated here for that purpose as well as to show that there was ample evidence on which the jury could have found petitioner to be the shooter.

> Even if Ford had preserved this argument for appeal, we would reject it because Ford cannot demonstrate prejudice from any assumed error. (People v. Roberts (1992) 2 Cal.4th 271, 326 *applying* People v. Watson (1956) 46 Cal.2d 818, 836 (Watson) harmless error standard]). Ford claims the jury would have acquitted him of murder "absent the incomplete response to the jury's question" because at least one juror believed he "was not the shooter but was an aider and abettor." According to Ford, "one or more jurors did not believe that [he] personally fired the gun and thus convicted him of murder on an aiding and abetting theory."
>
> We are not persuaded. The prosecution charged Ford with murder "during the course of Mr. Ford trying to take [Martinez's] phone" under two theories, first degree felony murder and second degree malice aforethought. The prosecution did not pursue an aiding and abetting theory. That the jury found Ford had not personally used a firearm when committing the murder does not mean it concluded Ford was not a perpetrator who shot Martinez, or that the jury could have only convicted him as an aider and abettor. The jury could have believed Ford had a firearm which accidentally discharged during the attempted robbery, killing Martinez; this would have been consistent with CALCRIM No. 540, which provides a "person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent." [[7] undersigned's footnote]

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[6] If inconsistent verdicts were a Constitutional error, it is difficult to see how such could be harmless—it is what it is, i.e., a finding of yes you did, but no you did not, and there is no way to actually understand what the jury was really thinking.

[7] However, this last sentence begs the issue as one would have to have "used" a firearm even if the killing was unintentional, accidental, etc.

> At trial, the prosecution offered substantial evidence demonstrating Ford was guilty of murder: (1) Ford's palm print was found on Martinez's newly-washed car and Ford did not explain how his hand came into contact with Martinez's car; (2) shortly before the shooting, witnesses saw a man matching Ford's general appearance and a car similar to the one Ford drove; (3) Ford told his girlfriend he was happy he had not been charged with murder, he wished "it didn't have to happen," and was disappointed with himself because "the only thing you gonna get out of a gun is you gonna throw down with it or you gonna shoot somebody with it[;]" (4) Ford bragged on his Facebook page about being a good shooter ("knockin' [expletive] down") and not getting caught ("aint nobody talked to me since I got outa jail ... Real killas move n silence"); and (5) Ford was found with multiple cell phones in his car a few days after Martinez's murder, suggesting a motive to rob and/or kill Martinez. Based on this evidence, it is not reasonably probable the jury would have acquitted Ford of murder had the court—as Ford has suggested—answered the jury's question with a simple "'no.'" (People v. Robinson (2005) 37 Cal.4th 592, 634–635 [assumed error under section 1138 was harmless].)

People v. Ford, at *4-5.

The evidence that petitioner was the shooter was AEDPA sufficient, and sufficient in any event. Petitioner posits no legitimate argument that the above reasoning is so deficient that reasonable jurists could not find the same as the Court of Appeal.

C. Ineffective Assistance of Counsel—Juror Question

For the reasons set forth above regarding the merits of the juror question issue, counsel's actions could neither have been deficient nor prejudicial as those terms are defined in Strickland v. Washington, 466 U.S. 668 (1984).

Moreover, with the benefit of hindsight, it appears that defense counsel was very smart in not pushing the issue too far. The prosecution might have awoken to the fact that on the evidence presented, especially with the defense contending that another participant in the robbery committed the murder, CALCRIM 540B was a viable instruction—one which did not require petitioner to be the shooter, nor did it *require* an aiding and abetting mentality.

D. Conviction on a Legally Incorrect Theory

This issue is simply a reprise of the juror question issue framed in terms of the possibility that the jury convicted on a "legally invalid" theory, i.e., the not presented aiding and abetting theory. This is a difficult issue for petitioner in that all agreed in the trial court, and agree here,

that aiding and abetting was not a theory in the case, and no instructions were given to that effect. Petitioner's argument that the jury must have utilized this theory when it could not reach agreement on whether petitioner was the shooter has been rejected above, and is rejected here.

There were two theories before the jury—petitioner intentionally fired the shot which killed the victim during the robbery; petitioner caused the death during participation in the robbery, and hence was liable for first degree felony however the shooting went down, i.e., accidental, negligent purposeful. Petitioner's speculation as to what the jury "must have thought" in its deliberative process when it found petitioner guilty of murder, but could not unanimously agree that petitioner was the shooter for enhancement purposes, is simply non-actionable speculation.

E. Admission of Petitioner's Facebook Message

Petitioner contends that admission of his Facebook message(s) was a violation of due process. Part of the Facebook entries were characterized by the Court of Appeal and set forth above; the holding based on state law finding that the entries were sufficiently probative to outweigh any prejudice was as follows:

> Ford contends the Facebook message was irrelevant because "it was not an admission of, and had nothing to do with, the homicide for which [he] was standing trial." We disagree with Ford's self-serving interpretation of the Facebook message. A plausible reading of the message is Ford murdered Martinez, a disputed fact at trial. In the message, Ford implicitly admitted committing a recent murder when he claimed he did not have to take credit for an attempted murder. He stated, why "would I brag on a job I didn't even complete.... I don't need credit for an attempt...." By claiming he was "too good of a shooter to hit a nigga that many times and not knock they ass down [,]" Ford implied that when he shot someone, he did not miss. Finally, Ford bragged that, unlike the accusation made by the recipient of the Facebook message, "Real killers move in silence[,]" suggesting he quickly shot Martinez in the head without being noticed and immediately disappeared. We conclude the court did not abuse its discretion by determining the Facebook message was relevant.

People v. Ford, at *9.

Of course, in this federal habeas actions, the undersigned will not review any alleged error of state law. When construed as a federal due process claim, this claim should be denied because

the U.S. Supreme Court has never held that the admission of prejudicial evidence (assuming it could be found so here) is actionable due process error. Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009); Crawford v. Foulk, 2016 WL 4120613 (E.D. Cal. 2016).

F. Cumulative Error

There is no error to cumulate; this claim should be denied.

CONCLUSION

The petition should be denied. Petitioner should be granted a Certificate of Appealability on Claims 2-4.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: February 8, 2017

/s/ Gregory G. Hollows
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KEITH UNDRAY FORD,

Petitioner,

v.

SUZANNE M. PEERY,

Respondent.

No. 2:15-cv-02463 MCE GGH

ORDER

Petitioner, a state prisoner proceeding pro se, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On February 9, 2017 the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. ECF No. 18. After one extension of time Petitioner has filed objections to the findings and recommendations. ECF No. 21.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this Court has conducted a de novo review of this case. Having carefully reviewed the entire file, the Court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed February 9, 2017 (ECF No. 18), are ADOPTED IN FULL;

2. Petitioner's application for a writ of habeas corpus is DENIED, and a certificate of appealability is GRANTED with respect to claims 2 through 4; and

3. The District Court shall issue the certificate of appealability referenced in 28 U.S.C. § 2253.

IT IS SO ORDERED.

Dated: April 19, 2017

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE

Ford v. Peery, 976 F.3d 1032, 976 F.3d 1032

United States Court of Appeals for the Ninth Circuit

January 22, 2020, Argued and Submitted, San Francisco, California; September 28, 2020, Filed

No. 18-15498

Reporter

976 F.3d 1032 * | 2020 U.S. App. LEXIS 30750 **

KEITH UNDRAY FORD, Petitioner-Appellant, v. SUZANNE M. PEERY, Warden, Respondent-Appellee.

Subsequent History: Later proceeding at Ford v. Peery, 2020 U.S. App. LEXIS 39254 (9th Cir. Cal., Dec. 14, 2020)
Opinion withdrawn by, On rehearing at Ford v. Peery, 2021 U.S. App. LEXIS 17007 (9th Cir. Cal., June 8, 2021)
Substituted opinion at, Motion granted by Ford v. Peery, 2021 U.S. App. LEXIS 17006 (9th Cir. Cal., June 8, 2021)
Later proceeding at Ford v. Peery, 2021 U.S. App. LEXIS 17075 (9th Cir. Cal., June 8, 2021)

Prior History: [**1] Appeal from the United States District Court for the Eastern District of California. D.C. No. 2:15-cv-02463-MCE-GGH. Morrison C. England, Jr., District Judge, Presiding.
Ford v. Peery, 2017 U.S. Dist. LEXIS 226937, 2017 WL 11490100 (E.D. Cal., Apr. 19, 2017)

Disposition: REVERSED and REMANDED.

Core Terms

presumption of innocence, murder, misstated, closing argument, harmlessness, jurors, deliberations, print, shot, beyond a reasonable doubt, driver's, reasonable doubt, reasonable probability, instructions, window, due process, street, prosecutor's statement, fair trial, palm print, girlfriend, state court, convicted, comments, killed, guilt, cell phone, shooting, prosecutorial misconduct, deference

Case Summary

Overview

HOLDINGS: [1]-An inmate convicted of first degree murder was entitled to § 2254 habeas corpus relief because, in overruling the objection to the prosecutor's statements that the presumption of innocence no longer applied, the state court violated due process under Darden, and the state appellate court was objectively unreasonable in holding that any error was harmless beyond a reasonable doubt under Chapman; [2]-The prosecutor's closing argument statements that the presumption of innocence no longer applied to the inmate violated due process under Darden, and these misstatements of the law were not harmless particularly in light of the fact that the weight of the evidence against the inmate was not great, but rather, the evidence was circumstantial, incomplete, and in conflict and it was a very close case.

Outcome

Reversed and remanded with instructions to conditionally grant writ.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard
Evidence > Burdens of Proof > Allocation

HN1 **Standards of Review, Contrary & Unreasonable Standard**

In order to obtain habeas relief in federal court, petitioners must show that the state court proceedings 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 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. 28 U.S.C.S. § 2254(d). Appellate courts defer to the last reasoned decision of the state court. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > ... > Review > Specific Claims > Prosecutorial Misconduct

HN2 **Procedural Due Process, Scope of Protection**

Prosecutorial misconduct under Darden includes misstatements of law. Improper prosecutorial statements violate due process if they so infect the trial with unfairness as to make the resulting conviction a denial of due

process. Prosecutorial misconduct within the meaning of Darden does not require improper motive on the part of the prosecutor; it requires only an improper statement. But such misconduct rises to the level of Darden error only if there is a reasonable probability that it rendered the trial fundamentally unfair. More like this Headnote

Shepardize® - Narrow by this Headnote (2)

Evidence > Inferences & Presumptions > Presumptions > Creation

HN3 **Presumptions, Creation**

The presumption of innocence is the undoubted law, axiomatic and elementary; the presumption of innocence is vital and fundamental. The presumption is a basic component of a fair trial under our system of criminal justice. Its enforcement lies at the foundation of the administration of our criminal law. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Evidence > Inferences & Presumptions > Presumptions > Creation

HN4 **Presumptions, Creation**

The U.S. Supreme Court has repeatedly made clear that criminal defendants lose the presumption of innocence only after they have been convicted. Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. Once the defendant has been convicted fairly in the guilt phase of a capital trial, the presumption of innocence disappears. A conviction terminates the presumption of innocence. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > ... > Review > Specific Claims > Prosecutorial Misconduct

HN5 **Procedural Due Process, Scope of Protection**

Under Darden, habeas court ask whether there is a reasonable probability that the prosecutor's misstatement of law rendered the trial fundamentally unfair and thus violated due process. More like this Headnote

Shepardize® - Narrow by this Headnote (2)

Criminal Law & Procedure > ... > Review > Specific Claims > Prosecutorial Misconduct
Evidence > Weight & Sufficiency

HN6 **Specific Claims, Prosecutorial Misconduct**

The Darden factors — i.e., the weight of the evidence, the prominence of the comment in the context of the entire trial, whether the prosecution misstated the evidence, whether the judge instructed the jury to disregard the comment, whether the comment was invited by defense counsel in its summation and whether defense counsel had an adequate opportunity to rebut the comment—require courts to place improper argument in the

context of the entire trial to evaluate whether its damaging effect was mitigated or aggravated. More like this Headnote

Shepardize® - Narrow by this Headnote (2)

Criminal Law & Procedure > ... > Review > Specific Claims > Prosecutorial Misconduct

HN7 Specific Claims, Prosecutorial Misconduct

In essence, what Darden requires reviewing courts to consider appears to be equivalent to evaluating whether there was a reasonable probability of a different result. The reasonable probability test is not whether the inmate would more likely than not have received a different verdict absent the prosecutor's misconduct. Rather, the test is whether the inmate received a trial resulting in a verdict worthy of confidence. More like this Headnote

Shepardize® - Narrow by this Headnote (3)

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > Proof of Prejudice

HN8 Cause & Prejudice Standard, Proof of Prejudice

Federal habeas relief is available only if there was actual prejudice resulting from an error. On collateral review, appellate courts determine prejudice by applying the harmlessness standard of whether a constitutional violation had a substantial and injurious effect or influence in determining the jury's verdict. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > ... > Review > Specific Claims > Prosecutorial Misconduct

HN9 Procedural Due Process, Scope of Protection

In Darden cases, prejudice is incorporated into the analysis of the due process violation itself. There is a due process violation under Darden when there was a reasonable probability of a different result absent the prosecutor's misconduct. Once there has been a determination that absent the error there was a reasonable probability of a different outcome, the error cannot subsequently be found harmless under Brecht. More like this Headnote

Shepardize® - Narrow by this Headnote (3)

Criminal Law & Procedure > ... > Review > Standards of Review > Deference
View more legal topics

HN10 Standards of Review, Deference

A determination of prejudice constitutes an adjudication on the merits for purposes of triggering AEDPA deference. Under AEDPA, if a state court articulates its reasoning, it is only that reasoning that receives deference. More like this Headnote

Shepardize® - Narrow by this Headnote (0)

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > ... > Review > Specific Claims > Prosecutorial Misconduct

HN11 **Procedural Due Process, Scope of Protection**

A holding of a due process violation under Darden necessarily entails a conclusion that the prosecutor's misstatements of the law were prejudicial. More like this Headnote

Shepardize® - Narrow by this Headnote (3)

Summary:

SUMMARY**

Habeas Corpus

The panel reversed the district court's denial of Keith Ford's habeas corpus petition challenging his first-degree murder conviction, and remanded with instructions to conditionally grant the writ, in a case in which the prosecutor, at the end of his closing-argument rebuttal, told the jury that the presumption of innocence no longer applied.

Because there was no state-court decision to which the panel could defer in determining whether the prosecutor misstated federal law and, if so, whether that statement violated due process under *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986), the panel reviewed Ford's *Darden* claim de novo. The panel held that the prosecutor's repeated statements, endorsed by the trial judge, that the presumption of innocence no longer applied violated due process under *Darden*. The panel explained that a holding of a due process violation under *Darden* necessarily entails a conclusion that the prosecutor's misstatements of the law were prejudicial. The panel further held that the California Court of Appeal unreasonably concluded under *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), that the prosecutor's misstatements of the law were harmless beyond a reasonable doubt.

Dissenting, Judge R. Nelson wrote that the majority ignores the highly deferential standard owed to the California Court of Appeal's harmlessness conclusion under AEDPA and instead adopts a broad exercise of supervisory power over a state court's trial proceedings, inconsistent with the narrow legal standard for habeas review.

Counsel: Barry Morris (argued), Walnut Creek, California, for Petitioner-Appellant.

Kristin Liska (argued), Associate Deputy Solicitor General; Jill M. Thayer, Deputy Attorney General; Peggy S. Ruffra, Supervising Deputy Attorney General; Jeffrey M. Laurence, Senior Assistant Attorney General;

Lance E. Winters, Chief Assistant Attorney General; Xavier Becerra, Attorney General; Attorney General's Office, San Francisco, California; for Respondent-Appellee.

Judges: Before: William A. Fletcher and Ryan D. Nelson, Circuit Judges, and Donald W. Molloy, * District Judge. Opinion by Judge W. Fletcher; Dissent by Judge R. Nelson.

Opinion by: W. FLETCHER

Opinion

[*1034] W. FLETCHER, Circuit Judge:

In August 2010, Ruben Martinez was shot and killed in Vallejo, California. Keith Ford was charged with first degree murder with three [**2] firearm enhancements. Ford was tried in the California Superior Court for Solano County in August 2012.

During closing argument, at the end of his rebuttal, the prosecutor told the jury that the presumption of innocence no longer applied. He said:

> *This idea of this presumption of innocence is over*. Mr. Ford had a fair trial. We were here for three weeks where . . . he gets to cross-examine witnesses; also an opportunity to present evidence information through his lawyer. He had a fair trial. This system is not perfect, but he had a fair opportunity and a fair trial. *He's not presumed innocent anymore*.

(Emphases added.) The defense attorney objected, "That misstates the law." The court overruled the objection. The prosecutor resumed, *"And so we're past that point*."

The jury began deliberating later that day, on Tuesday, August 21, 2012. On Friday, August 24, the fourth day of deliberations, the jury reported that it was "hopelessly deadlocked," with one juror holding out for acquittal. The court sent the jury back to deliberate further. The following Tuesday, August 28, the jury returned a unanimous verdict that defendant Ford **[*1035]** was guilty of first-degree murder. The jury was still "hopelessly [**3] deadlocked" on three firearm enhancements, including an enhancement for "personal use of a firearm during the commission of the crime." The final vote on the "personal use" enhancement was seven to five. The court declared a mistrial as to all three firearm enhancements.

Martinez had been killed with a single shot to his head. The prosecutor had contended that Ford had shot Martinez. The prosecutor had never contended, or even suggested, that anyone other than Ford had fired the shot that killed Martinez.

After exhausting his state-court remedies, Ford sought federal habeas relief under 28 U.S.C. § 2254. We answer two principal questions. First, in overruling the objection to the prosecutor's statements that the presumption of innocence no longer applied did the California Superior Court violate due process under *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)? Second, was the California Court of Appeal objectively unreasonable in holding that any error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)? We answer "yes" to both questions.

I. The Trial

A. Summary of Evidence Presented

On August 7, 2010, a Saturday evening, Ruben Martinez was killed in his SUV in front of his girlfriend's house on a short block of Beach Street between Benicia Road and Central [**4] Avenue in Vallejo, California. At about 10:00 p.m., Martinez had driven his girlfriend Jessica Blanco home so she could use the bathroom, check movie times, and get her jacket. Just before Martinez turned left onto Beach Street from Benicia Road, a white car ahead of them made a U-turn and went back past them the other way on Benicia Road. Blanco later testified at trial that she had not been able to see anyone in the car and that she could not identify the make or model of the car.

When they arrived at her house, Blanco went inside while Martinez stayed in his SUV with the motor still running. Martinez had washed the SUV earlier in the day. Blanco testified at trial that a few minutes after walking into the house, she heard a loud popping noise and the revving of an engine. She "heard a screeching noise, tires peeling, gravel." Blanco went outside and saw that Martinez's SUV had crashed into a neighbor's garage down the street.

A few minutes before Martinez was shot, Bethel Johnson ("Johnson") and two of her children arrived at their house across the street from Blanco's house. When Johnson got out of her car, she saw Martinez sitting in his SUV with the motor running and headlights [**5] on, and with the driver's side window rolled up. Johnson testified that she could see through the tinted window that Martinez was looking at his lighted cell phone. She testified that there was a party on Beach Street at a black motorcycle club about half a block away on the other side of Benicia Road. There was a party at the club "almost every Saturday that month." Johnson testified that three young black men were walking up Beach Street toward the party. Two of them were "maybe 16, 17, 18 years old," and the other was "much older," "19, 21. Between there." Johnson testified that the older man was "somewhere" between 5'6" and 5'9", that he was wearing a dark hooded sweatshirt, and that he had dreads.

Johnson's daughter, Tenley Johnson ("Tenley"), got out of the back seat on the passenger side with the family Rottweiler on a leash. Johnson testified that the dog charged the man she had described as older. She called to Tenley, "Control your **[*1036]** dog." Johnson testified that the man "said something like, 'Hi girly,' and then kind of like turned around away from the dog" and walked in the opposite direction toward Central Avenue, away from the party. She testified that she saw no weapons, [**6] and that the man said nothing threatening to Tenley. Between two and three minutes after getting into her house, Johnson heard what sounded like a shot and broken glass. Johnson went outside to check on her car. She found her own car intact and saw no one on the street.

Tenley testified that she, too, had seen Martinez's cell phone light through the window of the SUV. She testified that when she got out of the car, she saw three young black men walking from Central Avenue toward the party on Benicia Road. She described them to a police officer that night as "teenagers." Tenley said her dog "started barking and . . . pulling me." The dog pulled her toward a man with "short hair." She said, "I couldn't really see the face. It was dark." She testified that the man was "skinny." Tenley is 5'3". She described the man as taller than she was and shorter than a 6'0" police officer who interviewed her. Tenley testified that the man was wearing a blue jacket with one or more white stripes "on the sleeves." She said it was "like a track jacket" and that it did not cover his head. One of the other men had dreads. She did not see any of the men's faces. When later shown six photographs,

including [**7] a photograph of Ford, Tenley did not identify Ford as one of the three "teenagers" she had seen that night.

Another neighbor, Moises Cervantes, was walking out of his house on Beach Street. His house was between Blanco's house and Central Avenue. Cervantes heard a "pop" and saw Martinez's SUV coming toward him. After the SUV crashed, Cervantes looked up and down the street and saw no one.

Martinez was killed with a single shot. His foot was pressed on the gas pedal, causing the SUV to accelerate down the street until it crashed into the neighbor's garage. The engine continued to run, and the rear wheels to spin, even after the SUV came to a stop. Martinez's cell phone was found on the floorboard of the front passenger seat. The driver's side window was intact and about "a quarter of the way down." The other windows on the driver's side were closed and intact. A photograph introduced into evidence shows two rear side windows on the passenger side that were shattered. At least one of the windows had been broken by first responders.

Five days later, on August 12, two Vallejo detectives lawfully stopped Keith Ford. Ford was twenty-three years old. He is black, is 5'8" tall, and weighs 165 [**8] pounds. At the time of the stop, he had short hair. He was driving a white Oldsmobile sedan. The detectives found Ford's cell phone inside his car and discovered six additional cell phones in the center console.

Ford was read his *Miranda* rights. One of the detectives, Les Bottomley, testified that Ford said that he had "bought [the cell phones] stolen off the street." Later in the same interview, however, Ford told Bottomley he did not know whether they had been stolen. Ford told Bottomley that he was right-handed. Bottomley asked Ford where he had been on the night of August 7. Ford answered that he "was at his mother's home and at that time would have been in bed." Bottomley testified that Ford's mother's house is about three and half miles from Blanco's neighborhood. Bottomley did not ask Ford about Martinez's murder.

When Ford was stopped, he had a jacket in his car. Detective Bottomley testified that he later showed the jacket to Tenley. Tenley told him that it was not the jacket **[*1037]** she had seen on the young man with the short hair on August 7.

Ford was arrested on September 26 and charged with having a concealed firearm in his vehicle on that date. It was stipulated to the jury that [**9] the firearm was unrelated to Martinez's murder. Ford was held on the charge in the Solano County Jail until December 14. On December 13, Detective Bottomley interviewed Ford again. He asked Ford if he knew Martinez. Bottomley testified that Ford said "he did not think he did." Ford repeated that he had been at his mother's house on the night of August 7 and had spent the night there. Bottomley told Ford that his palm print had been found on Martinez's SUV. Ford replied, "That don't mean nothing. That just mean I came in contact with the vehicle at one time or another."

While Ford was in jail on the firearm charge, he spoke to his girlfriend on the telephone. The call was recorded. Ford said:

> [L]uckily I ain't in here for murder, that's all I keep thinking about . . . oh well I wish it didn't have to happen . . . I just [wish] I was at home . . . I know I gotta deal with my (unintelligible) it's too late for all that . . . to be wishing I was at home . . . See I'm disappointed in myself. But [expletive] that's what happens when you carry a gun. Ain't nothin good gonna come of it. And I know this and [expletive] still

> happen, cause I tell other people the only thing you gonna get out of [**10] a gun is you gonna throw down with it or you gonna shoot somebody with it. And I tell everybody that and look at my [expletive].

A recording of the call was played for the jury.

Several months after the murder, the following message appeared on Ford's Facebook page, directed at someone who had accused Ford of shooting him:

> I heard through the grapevine you was looking for the guy. Let me know something. And since you think I popped you, check this out. First off, I don't [expletive] with the Vistas. Second off, I am too good of a shooter to hit a [expletive] that many times and not knock they [expletive] down. Last, when you getting shot, I was on Fifth buying some syrup off Jigs. Plus, I don't even [expletive] with [expletive], so ain't nobody talked to me since I got out of jail last. Real killers move in silence. And would I brag on a job I didn't even complete? [Expletive] knocking [expletive] down. I don't need credit for an attempt, so take that how you want to.

The message was read to the jury.

The prosecution presented testimony from four fingerprint analysts about the partial latent palm print found on Martinez's SUV. Niki Zamora of the San Mateo County Forensics Laboratory testified [**11] that she examined the SUV on August 11. She discovered a latent partial left palm print on the outside of the driver's door, just below the window. The exterior of the vehicle was "rather dirty," with dirt and a sticky white substance on the door where she found the print. Fire extinguishers had been used on the SUV after the crash. Zamora testified that she cleaned off only some of the "dirt and debris" before "dusting" and taking her "first lift" of the print. She did not indicate on the "fingerprint card" that the area from which the print was lifted "had debris on it." Zamora was not "certified as a crime scene processor" because she "hadn't had enough experience yet."

Frankie Franck, a certified latent print examiner, matched Zamora's "first lift" to Ford's palm print. Franck compared the latent print to "several" electronically taken prints ("Live Scan prints") that he had been given, including one from Ford taken **[*1038]** in October 2009 in Butte County, California. Franck testified that the latent print obtained by Zamora "was not of the best quality," and that it covered "probably 30 percent" of the total palm. Despite the quality of the latent print, and despite the fact that it was [**12] only a partial print, Franck testified that he was certain of the match—"[a]s certain as I am sitting here."

Zamora then confirmed Franck's match. She conceded that she had not followed the lab's normal protocol, which required that a confirming print analyst "not, in any way, [be] associated with the work that . . . had [been] done." Zamora was, of course, directly associated with that work, for she had lifted the latent print from the SUV. Zamora was not certified as a latent print examiner. She had taken the certification test and was awaiting the result.

Darrell Klasey, a certified latent print examiner at the Solano County Sheriff's Office, took a rolled ink print of Ford's hands in May 2011. Klasey compared the ink print of Ford's left palm to the Live Scan print that Franck had been given. Klasey concluded that the ink print and the Live Scan print were from the same person. Cross-examination revealed Klasey's questionable performance at a previous agency.

Lynne Lazzari, a latent fingerprint analyst at the Solano County Sheriff's Office, confirmed Klasey's conclusion. Her analysis was based only on the two prints that Klasey had given her (Ford's ink print and the Live Scan print [**13]

analyzed by Franck), and she knew that Klasey had already concluded that they matched. Lazzari testified, "I did my own independent study and came up with why it was the same person." She testified that she "more or less" followed a standard method for comparing prints. When questioned about the standard method, which requires examining the unknown print before the known print, she responded that she compared the prints side by side: "Well, that's why I said 'more or less.' I do it my way." When asked whether her method had "ever been tested or validated for accuracy," she responded, "No." Lazzari had never taken the test to be certified as a latent print examiner.

There was also testimony about the condition of Martinez's SUV after it crashed into the garage. As noted above, Zamora had examined the SUV on August 11, 2010. She testified that the driver's side window was intact and was "partially down." Detective Bottomley, who had been at the crime scene on the night of the murder, had earlier testified that the driver's side window was intact and was "about a quarter of the way down." According to the prosecution's crime scene reconstructionist, the driver's side window was 1.2 feet [**14] open, and a 5'8" individual could stand by the SUV and reach through the window without contortion. The prosecutor asked whether there was a "[l]arge enough space to put a hand in." Bottomley had answered, "Absolutely." Zamora testified that the other driver's side windows were intact but that the "two rear passenger side windows" were "shattered," with "[n]o glass there." Photographs of the SUV, supporting Zamora's testimony, were shown to the jury. Zamora testified that there were no bullet holes "either inside . . . or outside" the SUV.

Finally, Susan Hogan, M.D., a forensic pathologist, testified about the bullet wound and the manner of shooting. She testified that Martinez was killed by a single shot to the back left side of his head. The bullet entered about an inch and a half from the top of his head and two inches left from the posterior (back) midline. It traveled downward, forward, and to the right, coming to rest in the soft tissue of the right side of the neck. Dr. Hogan testified that death was "[v]irtually instantaneous **[*1039]** ." She testified that there was no soot or "stippling" at or near the entry point, which meant that the shot was fired from "at least three feet away."

[**15] Defense counsel presented evidence that other than a brief conversation on the night of the murder, law enforcement did not identify or contact anyone at the motorcycle party down the street. Law enforcement collected license plate numbers of all of the vehicles on the street, but did not follow up on any of them. Law enforcement never showed Blanco a picture of Ford's white Oldsmobile to determine whether it was the car she had seen on the night of the murder. No one reviewed the contents of the stolen cell phones recovered from Ford's car. Though one witness reported hearing multiple shots, the only bullet found was the one that killed Martinez. No gun or shell casings were ever found. There was gunshot residue on the inside of the driver's side door, but there was no residue on the window seal of the door or on Martinez's clothes. The only DNA found at the scene belonged to Martinez.

B. Attorneys' Arguments

In his closing argument, the prosecutor contended that Martinez's murder was "a robbery gone bad." His theory was that Ford had put his left hand on the outside of the driver's side door, had reached through the partially opened driver's window with his right hand, and had shot [**16] Martinez in the head:

> There is compelling evidence in this case, . . . and that would be the defendant's palm print on the victim's car on his driver's door, right in the position where a person, a right-handed person with a

> firearm in their right hand, would have shot and killed the victim. . . . No unusual contortion would have to take place for a person of 5'8" to stick their hand in there and fire.

The prosecutor further argued that Ford's recorded telephone conversation with his girlfriend and his Facebook post supported his contention that Ford shot Martinez.

The prosecutor did not try to reconcile his contention that Ford had reached through the driver's side window and shot Martinez as he sat in the driver's seat with Dr. Hogan's testimony, which required the gun to have been "at least" three feet away. The prosecutor also did not try to reconcile his contention with Johnson's testimony that she had heard the sound of a shot and broken glass and with the photograph of the SUV showing that two rear side passenger windows had been shattered.

In her responsive closing argument, Ford's attorney contended that the fingerprint identification was unreliable. She emphasized the poor quality [**17] of the latent palm print lifted from the SUV by Zamora and contended that the unqualified fingerprint analysts were not to be trusted. She contended that in his telephone conversation with his girlfriend, Ford was "talking about the fact that he's in custody for a gun and thank God, thank God he didn't kill anyone." She characterized Ford's Facebook post as "talking smack to someone behind a computer screen."

At the end of his rebuttal closing argument, the prosecutor told the jury:

> *This idea of this presumption of innocence is over*. Mr. Ford had a fair trial. We were here for three weeks where . . . he gets to cross-examine witnesses; also an opportunity to present information through his lawyer. He had a fair trial. This system is not perfect, but he had a fair opportunity and a fair trial. *He's not presumed innocent anymore*.

(Emphases added.) Ford's attorney objected, "That misstates the law." The court held a sidebar. The court then said in front of the jury, "All right. The objection is **[*1040]** overruled." The prosecutor resumed, "*And so we're past that point*." The jury began its deliberations shortly thereafter, on the same day.

C. Jury Deliberations

On the second day of deliberations, the [**18] jury sent out a written question: "If someone believes that the defendant was present at the time of the shooting and was an active participant in the attempted robbery, but was not the actual shooter, does that imply guilt of either the first or second-degree murder charge?" The court commented to the attorneys, "It's certainly an unusual question, given there was really no one [who] argued that there was someone else while the defendant was present." The prosecutor suggested the question might have reflected the fact that two other people had been described in the testimony, "although I didn't even make any arguments about them at all in my closing or that they had any involvement." With the agreement of both counsel, the court simply referred the jury to the instructions already given. The jury also requested a readback of Johnson's testimony.

On the fourth day of deliberations, Friday, August 24, the jury reported that they were "hopelessly deadlocked," with one juror holding out for acquittal. After taking testimony from jury members individually, the court sent them back to deliberate further.

The following Tuesday, August 28, the jury returned a unanimous verdict that Ford was [**19] guilty of first-degree murder. The jury reported that they were "hopelessly deadlocked" on the three firearm enhancements. The court inquired as to the firearm enhancements. It learned that the final vote on the first enhancement—"personal use of a firearm during the commission of the crime"—had been seven to five. It did not learn whether the guilty or not-guilty votes predominated. The court declared a mistrial as to all three firearm enhancements.

II. Post-Trial Procedural History

Ford appealed his conviction to a California Court of Appeal. The court wrote, "According to Ford, the prosecutor's comments about the presumption of innocence misstated the law and deprived him of a fair trial."

The Court of Appeal identified a conflict among the California Courts of Appeal with respect to the presumption of innocence. Several Courts of Appeal had held that there was no prosecutorial misconduct when the prosecutor told the jury that the presumption of innocence no longer applied once sufficient evidence of guilt had been presented. For example, in *People v. Goldberg*, 161 Cal. App. 3d 170, 189, 207 Cal. Rptr. 431 (1984), the court affirmed the conviction and found no prosecutorial misconduct in a case in which the prosecutor had said in closing argument, "[O]nce [**20] you've heard this case, once the case has been proven to you—*and that's the stage we're at now*—the case has been proved to you beyond any reasonable doubt. I mean, it's overwhelming. *There is no more presumption of innocence*." (First emphasis added.) But a different Court of Appeal later reached a contrary conclusion. In *People v. Dowdell*, 227 Cal. App. 4th 1388, 1407, 174 Cal. Rptr. 3d 547 (2014), the prosecutor twice told the jury during closing argument, in light of the strength of the State's evidence, that "[t]he presumption of innocence is over." The court in *Dowdell* distinguished *Goldberg* and ruled that defense counsel should have objected because the prosecutor misstated the law, but it held, on the record before it, that the error was harmless.

In the case before us, the Court of Appeal declined to reach the question whether the prosecutor had misstated the law. **[*1041]** Assuming without deciding that the prosecutor had done so, the court held that any error was harmless: "We need not resolve any conflict between *Goldberg* [and other cases] on the one hand, and *Dowdell* on the other because we conclude any assumed error is harmless under either the state ([*People v.*] *Watson*, [(1956)] 46 Cal.2d 818, 299 P.2d 243[, 836]) or federal constitutional standard (*see Chapman v. California* (1967) 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705)."

The California Supreme Court denied Ford's [**21] petition for review in a one-line order. Ford then sought state habeas in California Superior Court, claiming, inter alia, that the prosecutor had committed misconduct by telling the jury that "the presumption of innocence is over." The Superior Court did not reach the merits of the claim because it had been raised and rejected on direct appeal.

Ford then sought federal habeas relief under 28 U.S.C. § 2254. He made several claims: (1) the prosecutor's statements during closing argument that the "presumption of innocence is over" and "petitioner is not presumed innocent anymore" violated due process and were not harmless; (2) the trial court's response to a question asked by the jury violated due process; (3) defense counsel provided ineffective assistance in failing to object to the trial court's response to the jury's question; (4) it cannot be determined whether the jury convicted Ford on a legally incorrect theory; (5) improper admission of the Facebook post; and (6) cumulative error. A magistrate judge

recommended denying Ford's petition and granting a Certificate of Appealability on Claims (2), (3), and (4). The district judge adopted the magistrate judge's Report and Recommendation in full.

Ford [**22] appealed the denial of Claims (1) and (4). We asked the State to brief Claim (1) and now grant a Certificate of Appealability as to that claim. We reverse the district court on Claim (1). We do not reach Claim (4).

III. Standard of Review

HN1 In order to obtain habeas relief in federal court, petitioners must show that the state court proceedings "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 . . . 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." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 402, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). We defer to the last reasoned decision of the state court. *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); *Mann v. Ryan*, 828 F.3d 1143, 1151 (9th Cir. 2016). Here, that is the decision of the California Court of Appeal on direct appeal.

IV. Discussion

A. Due Process Violation under *Darden*

The question before us is whether the prosecutor's statements during closing argument that the presumption of innocence was now "over" amounted to prosecutorial misconduct in violation of due process under *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). The California Court of Appeal declined to reach the substantive question of whether the prosecutor misstated the [**23] law. It did not mention *Darden*. It held only that any presumed error was harmless beyond a reasonable doubt under *Chapman*. There is no state-court decision to which we can defer in determining whether the prosecutor misstated federal law and, if so, whether that misstatement violated due process **[*1042]** under *Darden*. We therefore review the *Darden* claim de novo.

For the reasons that follow, we hold that the prosecutor's statements violated due process under *Darden*. ***HN2*** Prosecutorial misconduct under *Darden* includes misstatements of law. *See Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2016) (finding *Darden* error where "the prosecutor gave incorrect direction to the jury about an element of California law under which Deck was convicted"). Improper prosecutorial statements violate due process if they "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (citation omitted). Prosecutorial misconduct within the meaning of *Darden* does not require improper motive on the part of the prosecutor; it requires only an improper statement. But such misconduct "rises to the level of *Darden* error only if there is a reasonable probability that it rendered the trial fundamentally unfair." *Deck*, 814 F.3d at 985.

In stating that the presumption [**24] of innocence was now "over," the prosecutor misstated federal law. ***HN3*** The presumption of innocence is "the undoubted law, axiomatic and elementary"; the presumption of innocence is "vital and fundamental." *Coffin v. United States*, 156 U.S. 432, 453, 460, 15 S. Ct. 394, 39 L. Ed. 481 (1895). The

presumption is "a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Its "enforcement lies at the foundation of the administration of our criminal law." *Coffin*, 156 U.S. at 453; *see also Reed v. Ross*, 468 U.S. 1, 4, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984).

HN4 The Supreme Court has repeatedly made clear that criminal defendants lose the presumption of innocence only after they have been convicted. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 399, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) ("Once a defendant has been afforded a fair trial *and convicted* of the offense for which he was charged, the presumption of innocence disappears.") (emphasis added); *Delo v. Lashley*, 507 U.S. 272, 278, 113 S. Ct. 1222, 122 L. Ed. 2d 620 (1993) ("Once the defendant has been *convicted* fairly in the guilt phase of [a capital] trial, the presumption of innocence disappears.") (emphasis added); *Betterman v. Montana*, 136 S. Ct. 1609, 1618, 194 L. Ed. 2d 723 (2016) (a conviction "terminates the presumption of innocence").

HN5 Under *Darden*, we ask whether "there is a reasonable probability" that the prosecutor's misstatement of law "rendered the trial fundamentally unfair" and thus violated due process. *Deck*, 814 F.3d at 985. In *Hein v. Sullivan*, 601 F.3d 897 (9th Cir. 2010), we listed the multiple factors considered by the Supreme Court in *Darden* in determining whether [**25] improper prosecutorial statements rise to the level of a due process violation. We wrote:

> ***HN6*** The *Darden* factors—i.e., the weight of the evidence, the prominence of the comment in the context of the entire trial, whether the prosecution misstated the evidence, whether the judge instructed the jury to disregard the comment, whether the comment was invited by defense counsel in its summation and whether defense counsel had an adequate opportunity to rebut the comment—require courts to place improper argument in the context of the entire trial to evaluate whether its damaging effect was mitigated or aggravated.

Id. at 914. ***HN7*** "In essence, what *Darden* requires reviewing courts to consider appears to be equivalent to evaluating whether there was a 'reasonable probability' of a different result." *Id.* at 914-15; *see also Deck*, 814 F.3d at 979. The reasonable probability test is not whether Ford **[*1043]** "would more likely than not have received a different verdict" absent the prosecutor's misconduct. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Rather, the test is whether Ford received "a trial resulting in a verdict worthy of confidence." *Id.*

We hold that the prosecutor's repeated statement during closing argument that the presumption of innocence no longer applied constituted *Darden* error. [**26] We take in turn the "*Darden* factors" listed in *Hein*.

"The weight of the evidence" against Ford, *Hein*, 601 F.3d at 914, was not great. As recounted above, the evidence was circumstantial, incomplete, and in conflict. While there was some inculpatory evidence (the partial palm print, the stolen cell phones, Ford's conversation with his girlfriend, and Ford's Facebook post), no one saw the shooting. Neither of the two witnesses who had seen three young black men on the street shortly before the shooting could identify Ford. The manner of shooting hypothesized by the prosecutor conflicted with his expert's testimony the gun had been at least three feet away from Martinez when it was fired. The hypothesized manner of shooting was also inconsistent with Johnson's testimony that she heard the sound of a shot and broken glass, and with the fact that passenger side, rather than driver side, windows were shattered.

The jury clearly had trouble with the evidence. After four days of deliberations, they reported to the court that they were "hopelessly deadlocked." The court sent them back to deliberate further. When the jury returned, their answer was internally inconsistent. It was uncontested that Martinez had been [**27] killed with a single shot to the head.

Ford had been charged with shooting and killing Martinez. The jury found Ford guilty of the murder charge. But the jury was split with a vote of seven to five on whether Ford had used a firearm in killing Martinez.

The "prominence" of the prosecutor's statements, *id.*, could hardly have been greater. During the course of his closing argument, the prosecutor had repeatedly said that the state had the burden of proof to show guilt beyond a reasonable doubt. But then, at the end of his rebuttal in his closing argument, the prosecutor stated three times that the presumption of innocence no longer applied. The prosecutor's rebuttal was the last thing the jury heard from either of the attorneys. The jury retired to begin deliberations later that same day.

Although the prosecutor did not "misstate[] the evidence," *id.*, he misstated the law. He did so three times, in the space of a few moments.

The judge did not "instruct[] the jury to disregard the comment." *Id.* Quite the opposite. When Ford's attorney objected to the prosecutor's misstatements, the judge held a sidebar and then overruled the objection. A written instruction told the jury about the existence [**28] of the presumption of innocence: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt." However, the written instruction did not tell the jury when the presumption applied and when it was "over." The judge supplied that instruction. When he overruled the defense's objection to the prosecutor's misstatements, the judge told the jury, in effect, that the presumption of innocence was "over" before they retired to begin deliberations.

Ford's attorney neither "invited" the prosecutor's misstatements, nor was she given "an adequate opportunity to rebut" them. *Id.* The prosecutor did not state in his initial closing argument that the presumption of innocence was "over." Had he **[*1044]** done so, Ford's attorney could have emphatically—and correctly—stated in her responsive closing argument that the presumption of innocence lasts unless and until a defendant is convicted. Instead, the prosecutor made his misstatements in rebuttal. At that point, Ford's attorney could only make an objection, which the judge improperly overruled.

We conclude that there was a reasonable probability of a different outcome in [**29] this thin, circumstantial case had the prosecutor not misstated the law. Therefore, we hold under *Darden* that the prosecutor's error violated due process.

B. No Need for a Separate Prejudice Determination

HN8 Federal habeas relief is available only if there was "actual prejudice" resulting from an error. *Davis v. Ayala*, 576 U.S. 257, 267, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015) (citation omitted); *Deck*, 814 F.3d at 985. On collateral review, we determine prejudice by applying the harmlessness standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), whether a constitutional violation had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)).

HN9 In *Darden* cases, prejudice is incorporated into the analysis of the due process violation itself. There is a due process violation under *Darden* when there was a "reasonable probability of a different result" absent the prosecutor's misconduct. *Hein*, 601 F.3d at 914-15 (internal quotation marks omitted). The Supreme Court explained in *Kyles* that

a determination that there is a "reasonable probability" of the different outcome "necessarily entails the conclusion that the suppression must have had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Kyles*, 514 U.S. at 435 (quoting *Brecht*, 507 U.S. at 623). Once there has been a determination that absent the error there was [**30] a "reasonable probability" of a different outcome, the error "cannot subsequently be found harmless under *Brecht*." *Id.* at 436.

C. AEDPA Deference

On direct appeal, the California Court of Appeal declined to decide whether the prosecutor had misstated the law. Assuming without deciding that he had done so, the Court of Appeal held under *Chapman* that any error was "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. The Court of Appeal did not mention *Darden* and made no holding with respect to whether there was a "reasonable probability" that the prosecutor's misstatements affected the outcome of the proceeding.

HN10 A determination of prejudice constitutes an "adjudication on the merits" for purposes of triggering AEDPA deference. *See Davis*, 576 U.S. at 269 (holding that the state court's determination of harmlessness "undoubtedly constitutes an adjudication of [petitioner's] constitutional claim 'on the merits'"). We recognize, of course, that the *Chapman* test is more favorable to Ford than *Darden*'s "reasonable probability" test. A determination that an error was harmless under *Chapman* would therefore necessarily entail a determination that the error did not have a "reasonable probability" of changing the result under *Darden*. But under [**31] AEDPA, if a state court articulates its reasoning, it is only that reasoning that receives deference. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018) (instructing courts to "look through" a summary affirmance for the relevant rationale provided by the lower **[*1045]** court); *Ylst*, 501 U.S. at 803; *cf. Harrington v. Richter*, 562 U.S. 86, 98, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). The Court of Appeal's reasoning was based on *Chapman*. We therefore ask whether the state court was unreasonable in holding that the prosecutor's misstatement of the law was "harmless beyond a reasonable doubt" under *Chapman*. We conclude that it was.

As we outlined in detail above, this was a very close case. The evidence against Ford was circumstantial, incomplete, and in conflict. The jury was unable, despite extensive deliberations, to reach an internally consistent decision on Ford's guilt. The jury deliberated for four days and reported to the court that it was "hopelessly deadlocked." After further deliberation, the jury returned a verdict that Ford was guilty of murdering Martinez by shooting him in the head, but hung on the question of whether Ford had used a firearm. In these circumstances, we conclude that it was "objectively unreasonable" for the Court of Appeal to conclude under *Chapman* that the prosecutor's misstatements of the law were harmless [**32] beyond a reasonable doubt.

Conclusion

We hold that the prosecutor's repeated statements, endorsed by the trial judge, that the presumption of innocence no longer applied violated due process under *Darden*. ***HN11*** A holding of a due process violation under *Darden* necessarily entails a conclusion that the prosecutor's misstatements of the law were prejudicial. We further hold that

the Court of Appeal unreasonably concluded under *Chapman* that the prosecutor's misstatements of the law were harmless beyond a reasonable doubt. We reverse the decision of the district court and remand with instructions to conditionally grant the writ, subject to the State's retrying Ford within a reasonable time not to exceed 180 days.

REVERSED and REMANDED.

Dissent by: R. NELSON

Dissent

R. NELSON, Circuit Judge, dissenting:

The majority vacates Keith Ford's first degree felony murder conviction on habeas review only by ignoring the highly deferential standard we owe to the California Court of Appeal's harmlessness conclusion under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Instead, the majority adopts a "broad exercise of supervisory power" over a state court's trial proceedings, inconsistent with the narrow legal standard [**33] for habeas review. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). Applying the correct legal standard, I would affirm the district court's denial of the habeas petition.

Misstatements of the law by a prosecutor only amount to a due process violation under *Darden* if they render the trial fundamentally unfair. In their proper context, the prosecutor's closing argument statements regarding the presumption of innocence merely emphasized the government had carried its burden of proving Ford's guilt beyond a reasonable doubt. There is no reasonable probability that the jury was confused about this presumption, given the prosecutor's repeated reaffirmation of the presumption and the trial court's repeated, explicit instructions to the jury regarding both the government's burden of proof *and* the presumption of innocence. These instructions were more than sufficient to remedy any potential unfairness that may have resulted from the isolated comments. And even if there was *Darden* error, the majority misapplies AEDPA deference in finding that the California Court of Appeal's harmlessness conclusion was objectively unreasonable. Therefore, I respectfully dissent. 1

[*1046] I

A brief review of the relevant background is warranted. Ruben Martinez was [**34] shot at point blank range in his car, while he waited to take his girlfriend on a date, after quickly dropping her off at her house. After a three-week trial, petitioner Keith Ford was convicted of first degree felony murder.

During trial, the jury heard that Martinez had washed his car just hours before he picked his girlfriend up for the date and his car was "clean and shiny." *People v. Ford*, No. A137496, 2014 Cal. App. Unpub. LEXIS 6374, 2014 WL 4446166, at *1 (Cal. Ct. App. Sept. 10, 2014). A fingerprint examiner testified that after the murder, "a latent palm print on the driver's side of the door of Martinez's SUV, just beneath the window[,] . . . matched Ford's left palm print." 2014 Cal. App. Unpub. LEXIS 6374, [WL] at *2. The examiner "was certain 'both impressions were made by the same palm.'" *Id.* Ford never explained how his left palm print was on Martinez's car, in the exact location

consistent with a right-handed man leaning into the driver window, particularly where the car had just been washed.

The jury also heard that a white car was seen driving in the same direction as Martinez and "made an abrupt U-turn directly in front of Martinez's car" moments before Martinez stopped at his girlfriend's house and just before Martinez was murdered. 2014 Cal. App. Unpub. LEXIS 6374, [WL] at *1. Ford drove a white car.

The jury also heard that three young [**35] African American men were walking toward Martinez as he waited in his car for his girlfriend. One had short hair cut close to his scalp. Ford is African American and at the time was 23 years old, had short hair and was the approximate height described.

The jury also heard that as Martinez waited for his girlfriend, he was on his cell phone, which was visible through his car window. A few days after the murder, Ford was stopped by a detective and six stolen cell phones were found in the center console of Ford's car. Ford indicated to the detective that on the night Martinez was murdered, Ford was at his mother's house in Vallejo, about three miles from where Martinez was shot.

The jury also heard that four months after Martinez was murdered, Ford was in jail for an unrelated firearm possession charge. Ford called his girlfriend from jail and said, "'luckily I aint in here for murder'" and noted that he knew he should not carry guns because "'the only thing you gonna get out of a gun is you gonna throw down with it or you gonna shoot somebody with it.'" *Id.* Several months after Martinez's murder, Ford posted on Facebook comments about being suspected of a murder and described in detail [**36] how he would conduct a murder.

Before closing argument, the state trial court orally instructed the jury regarding the presumption of innocence and the government's burden to prove its case beyond a reasonable doubt. The jury was instructed to form no opinion about the case until after jury deliberations began. And the jury was instructed to follow the law as detailed in the written jury instructions and to disregard any of counsel's comments **[*1047]** that may conflict with the jury instructions.

In closing, the prosecutor repeatedly reminded the jury that the government bore the burden to prove its case beyond a reasonable doubt. The prosecutor then walked through the evidence detailed above. In rebuttal, the prosecutor stated, "This idea of this presumption of innocence is over. . . . He's not presumed innocent anymore." This drew an objection from defense counsel, overruled by the trial court because the jurors have "been reminded continuously that they're not to form or express any opinions until after they deliberate with their fellow jurors, so I don't think there's any particular harm in that . . . ." The prosecutor then stated, "And so we're past that point."

After closing, the district [**37] court provided the jury written instructions, including regarding the presumption of innocence, which were taken back into the jury room for deliberations. Defense counsel made no request for any additional jury instruction on the presumption of innocence.

The jury heard evidence more than sufficient to support, beyond a reasonable doubt, Ford's first degree felony murder conviction. The California Court of Appeal affirmed Ford's conviction on direct appeal, finding that any alleged prosecutorial misconduct was harmless. The California Supreme Court denied review. The federal magistrate judge recommended denial of Ford's habeas petition and the district court adopted the magistrate's recommendation in full. While the district court certified three questions for appeal, the district court did not certify the question regarding potential prosecutorial misconduct which the majority relies on to reverse and vacate Ford's first degree felony murder conviction.

II

The majority holds that the prosecutor's comments "during closing argument that the presumption of innocence no longer applied constituted *Darden* error." Majority at 22. In my view, however, the prosecutor's isolated comments, taken in full context [**38] of the closing statements and jury instructions, were not misconduct that "so infected the trial with unfairness as to make [Ford's] conviction a denial of due process" under *Darden*, 477 U.S. at 181 (internal quotation marks and citation omitted). By cherry-picking and examining the prosecutor's comments in isolation, the majority disregards the Supreme Court's admonition that "the arguments of counsel . . . must be judged in the context in which they are made." *Boyde v. California*, 494 U.S. 370, 385, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). The majority misconstrues the prosecutor's comments rather than interpreting them in context of his full closing and rebuttal arguments. In context, the comments do not rise to the level of prosecutorial misconduct. But even assuming a risk of juror confusion from the prosecutor's comments, no reasonable probability exists that Ford was deprived of a fair trial in light of the trial court's oral instruction to the jury before the prosecutor's closing, and its written instruction—after the prosecutor's closing and taken into the jury deliberation room—regarding the presumption of innocence.

First, "a court should not lightly infer that a prosecutor intend[ed] an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy [**39] exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). The majority reaches its conclusion only by skewing the evidence and inferences in the light most favorable to Ford. **[*1048]** It thus infers that the jury drew the most damaging interpretation of the challenged comments, rather than the more likely, less damaging interpretation. In context, the prosecutor argued in closing that the government had met its burden of proving its case beyond a reasonable doubt, thereby overcoming the presumption of innocence. His challenged comments were not (as the majority concludes) inviting the jurors to disregard the presumption of innocence when they retired to the deliberation room.

The prosecutor made numerous statements supporting the more reasonable interpretation (largely ignored by the majority). For instance, the prosecutor introduced his closing argument, noting, "I'm going to go back over the facts of this case and show you why I have proven beyond a reasonable doubt that the defendant committed murder in this case . . . ." He hewed closely to this theme, repeating, "I want to tell you why it is that I have proven to you beyond a reasonable doubt that the defendant [**40] in this case committed an act that caused the death of Ruben Martinez . . . ." The prosecutor returned to this refrain repeatedly throughout his closing argument, stating the following:

- "Let me tell you . . . why it is that I have proven to you beyond a reasonable doubt that the defendant is guilty";
- "My burden of proof in the case to prove the charge that Mr. Ford is charged with is proof beyond a reasonable doubt";
- "In combination with the other information, that's proof beyond a reasonable doubt . . . . I have never shied away from what my standard of proof is in this case, but it's not an impossible standard. It's proof beyond a reasonable doubt";

• "[W]hen you . . . follow all the evidence and you follow all the law, you're going to reach the same conclusion that I asked you to reach at the beginning of this case that the defendant is guilty of murder";

• "[Y]ou did all make that promise at the beginning and I will hold you to that promise, if I prove my case beyond a reasonable doubt, that you would not hesitate for a second to convict the defendant."

On rebuttal, the prosecutor reiterated that defense counsel "doesn't have to present any evidence. *It is my burden of proof*." [**41] (emphasis added). He even called the jurors' attention to the written instructions they would take with them into the deliberation room, inviting them to "just read the [reasonable doubt] instruction itself and . . . look at the instruction and what it says in particular."

Finally, just before making the challenged statements, the prosecutor walked through the evidence and reiterated, "I've provided you with all the information that you need to feel the abiding conviction in the truth of these charges." Each of his points (including the challenged statements) combine to form an unremarkable overarching argument: the evidence of defendant's guilt was so strong that the prosecutor had successfully proved his case beyond a reasonable doubt and thus overcome the presumption of innocence.[2] The majority fails to show any reasonable likelihood **[*1049]** that these statements, taken together, misled the jurors or caused them to believe the presumption of innocence terminated before they had reached a verdict of guilty beyond a reasonable doubt.

Contrast this with the facts in *Kentucky v. Whorton*, 441 U.S. 786, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979), where the Supreme Court held the Due Process Clause does not require a jury instruction on the presumption of innocence at all. *Id.* at 789-90. In *Whorton* [**42], the jury was instructed that they "could return a verdict of guilty only if they found beyond a reasonable doubt" that the defendant was guilty of the acts charged. *Id.* at 787. This instruction alone —even without the presumption of innocence instruction—was deemed constitutionally sufficient. *See id.* at 789-90. Here, the trial court exceeded the standard in *Whorton*. Not only did the prosecutor repeatedly emphasize that his burden was to demonstrate Ford's guilt beyond a reasonable doubt, *see supra* at 33-34, the jury was also formally instructed by the trial court that Ford was entitled to a presumption of innocence and that this presumption requires proof of guilt beyond a reasonable doubt. Thus, as in *Whorton*, weighing the prosecutor's challenged statements against "all the instructions [provided] to the jury" and "the arguments of counsel," Ford was not "deprived . . . of due process of law in light of the totality of the circumstances." 441 U.S. at 789-90.[3]

The surrounding context of the prosecutor's statements also explains the trial court's decision to overrule defense counsel's objection to the contested statements. The court undoubtedly knew the presumption of innocence continued until jury deliberations, and also understood [**43] what the prosecutor meant and reasonably determined the comments in context presented no risk of juror confusion. The court stated (outside the presence of the jury), in response to counsel's objection: "[The jurors have] been reminded continuously that they're not to form or express any opinions until after they deliberate with their fellow jurors, so I don't think there's any particular harm in that . . . ." The court was also aware the jurors had been explicitly instructed orally on the presumption of innocence and the written instructions would be taken with them into jury deliberations. In short, no reasonable juror would interpret the prosecutor's statements, when considered in context, consistent with the majority's isolated gloss. Despite indications the jurors were confused on other issues, there is no suggestion any single juror was confused on the presumption of innocence. Indeed, the jury acquitted Ford on separate firearm enhancement allegations, which undermines the majority's conclusion that the jurors believed the presumption of innocence was over during the prosecutor's closing.

Second, even assuming that the prosecutor's statements viewed in context rose to the level [**44] of a misstatement of federal law, they did not "so infect[] the trial with unfairness as to make the resultant conviction a denial of due process." *Darden*, 477 U.S. at 181 (internal quotation marks and citation omitted). "[E]ven if the [prosecutor's] comment[s are] understood as directing the jury's attention to inappropriate considerations," that does not by itself establish a due process violation under *Darden* absent something more **[*1050]** to show that the comments prejudiced the defendant. *See Parker v. Matthews*, 567 U.S. 37, 47, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012) (per curiam). Courts must consider "whether the jury was instructed to decide solely on the basis of the evidence rather than counsel's arguments, and whether the state's case was strong." *Furman v. Wood*, 190 F.3d 1002, 1006 (9th Cir. 1999); *see also Allen v. Woodford*, 395 F.3d 979, 998 (9th Cir. 2005). Here, the state trial court did not violate due process under *Darden* because the court's instructions eliminated any "reasonable probability that [the prosecutor's statements] rendered the trial fundamentally unfair." *See Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2016).

Before closing arguments, the trial court properly orally instructed the jury that the defendant was presumed innocent *and* that the prosecution had to prove each element of the charged offenses beyond a reasonable doubt. The court instructed, "You may not convict the defendant unless the People have proved [**45] his guilt beyond a reasonable doubt." The court also informed jurors that they must apply the law as explained by the court's instructions, and that they must disregard any comments or arguments by counsel that conflicted with the court's instructions. Further, the court admonished the jurors that "[n]othing that the attorneys say is evidence. In their . . . closing arguments, the attorneys discuss the case, but their remarks are not evidence." The written jury instructions were subsequently taken into the deliberation room. In light of the written instructions on the presumption of innocence being taken into the jury room, the majority's conclusion that the instructions did not indicate when the presumption ceases falls flat. No court has ever required a temporal statement regarding the presumption of innocence, as suggested by the majority. *See* Majority at 23. And the trial court proceedings clarify why none was necessary.

The majority contends that when the trial court "overruled the defense's objection to the prosecutor's misstatements, the [court] told the jury, in effect, that the presumption of innocence was 'over' before they retired to begin deliberations." Majority at 24. But there is no reasonable support [**46] for the majority's interpretation. And certainly none that would compel this interpretation or preclude far more reasonable and less damaging interpretations. As noted, *supra* at 30-31, 35-36, the district court reasonably explained that it overruled the objection because the prosecutor's statements had caused no harm as the jurors had been repeatedly reminded not to form any opinion until after they deliberated. Moreover, if the majority's interpretation were correct, then the trial court would not have sent the written instruction regarding the presumption of innocence into the jury room.

Ultimately, by dismissing these instructions—both oral and written, and temporally bookending the challenged comments—as inadequate, the majority disregards that we "presume jurors follow the court's instructions absent extraordinary situations." *See Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1115 (9th Cir. 2005); *see also Allen*, 395 F.3d at 998 (although prosecutor's statement was misconduct, "given the trial court's instruction that statements by counsel were not evidence, and given the weight of the evidence against him, the prosecutor's comments did not deprive Allen of a fair trial"); *United States v. Necoechea*, 986 F.2d 1273, 1280 (9th Cir. 1993) (holding the prosecutor's improper remarks in closing argument did not constitute a miscarriage of justice where [**47] the court gave a general instruction that attorneys' arguments were not evidence in the case). "[P]rosecutorial misrepresentations **[*1051]** . . . are not to be judged as having the same force as an instruction from the court." *Boyde*, 494 U.S. at 384-85. By disregarding the presumption that jurors follow the court's instructions, and giving the

prosecutor's isolated statements significantly more force than those instructions, the majority errs.

For these reasons, there is no reasonable likelihood the jury misunderstood the prosecutor's comments and convicted Ford without finding guilt beyond a reasonable doubt. The state trial court did not violate due process under *Darden*.

III

In concluding that the California Court of Appeal's finding of harmlessness was "objectively unreasonable," the majority misapplies AEDPA deference. Under AEDPA, we cannot order habeas relief unless the state court proceedings "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 . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court [**48] proceeding." 28 U.S.C. § 2254(d).

"[A] state court decision is contrary to our clearly established precedent if the state court applies a rule that *contradicts* the governing law set forth in [the Supreme Court's] cases or if the state court confronts a set of facts that are *materially indistinguishable* from a decision of [the Supreme] Court and nevertheless arrives at a result different from our precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (emphases added) (internal quotation marks and citation omitted). Furthermore, "an unreasonable application of federal law is different from an incorrect application of federal law." *Williams v. Taylor*, 529 U.S. 362, 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). This means that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the state court decision must be "objectively unreasonable." *Id.* at 409. "This distinction creates 'a substantially higher threshold' for obtaining relief than *de novo* review." *Renico v. Lett*, 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)).

Thus, AEDPA "imposes a highly deferential standard for evaluating state-court rulings" and "demands that [they] be given the benefit of the doubt." *Id.* (internal quotation marks and citation omitted). [**49] 4 **[*1052]** "There must be more than a 'reasonable possibility' that the error was harmful." *Davis v. Ayala*, 576 U.S. 257, 268, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)). The *Brecht* standard for determining harmlessness reflects the view that a "[s]tate is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Calderon v. Coleman*, 525 U.S. 141, 146, 119 S. Ct. 500, 142 L. Ed. 2d 521 (1998) (per curiam); *see also Larson v. Palmateer*, 515 F.3d 1057, 1064 (9th Cir. 2008) ("Review for harmless error under *Brecht* is more forgiving to state court errors than the harmless error standard the Supreme Court applies on its direct review of state court convictions." (internal quotation marks and citation omitted)).

Here, the majority does not correctly apply this standard of review—or cite any of these principles—in reviewing the California Court of Appeal's harmlessness conclusion. First, the majority frames the question erroneously by suggesting that our reasonableness review is informed by *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17

L. Ed. 2d 705 (1976), which requires finding a constitutional error to be "harmless beyond a reasonable doubt." Majority at 5, 26. But *Chapman* has no relevance to this Court's habeas review, either directly or through a back-door gloss on our review. In *Brecht*, the Supreme Court [**50] held the *Chapman* standard too "onerous" for "determining whether habeas relief must be granted." 507 U.S. at 623. "When a *Chapman* decision is reviewed under AEDPA, 'a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable.'" *Ayala*, 576 U.S. at 269 (quoting *Fry v. Pliler*, 551 U.S. 112, 119, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007)); *see also Rademaker v. Paramo*, 835 F.3d 1018, 1023 (9th Cir. 2016). AEDPA's language is clear. We review only whether the state court decision "was based on an unreasonable **[*1053]** determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Moreover, the majority fails to cite a single Supreme Court case showing the California Court of Appeal's decision was "contrary to . . . clearly established Federal law." 28 U.S.C. § 2254(d). It does not establish that the Court of Appeal applied a rule contradicting the governing law, or that the Court of Appeal deviated from Supreme Court precedent with materially indistinguishable facts. *See Lockyer*, 538 U.S. at 73.

The majority also elided aspects of the trial that cured any prejudicial effect of the supposed error. This oversight is particularly egregious because it disregards almost the entire rationale provided by the California Court of Appeal. The Court of Appeal wrote four sentences explaining its rationale for finding any error harmless. [**51] Three of those sentences have to do with instructions given to the jury, which the majority ignores in its harmlessness analysis. The Court of Appeal noted:

> The court instructed the jury Ford was presumed innocent until the contrary was proven beyond a reasonable doubt (CALCRIM No. 220) and to disregard any conflicting statements made by the attorneys concerning the law (CALCRIM No. 200). Additionally, the prosecutor repeatedly reminded the jury of his burden to establish guilt beyond a reasonable doubt. The jury was properly informed about the prosecution's burden.

These conclusions are reasonable. "Jurors do not sit in solitary isolation booths parsing instructions"—or prosecutors' comments—"for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 380-81. And based on the instructions given—which the jury is presumed to have followed, *see Tak Sun Tan*, 413 F.3d at 1115—the jury understood everything it needed to render a constitutional verdict. The jury knew, based on the instructions, that it should not take whatever was said in closing arguments as the law. More importantly, it understood the concept that the presumption exists to drive home "that the State has the burden of establishing every element of the offense beyond a reasonable [**52] doubt." *Delo v. Lashley*, 507 U.S. 272, 278, 113 S. Ct. 1222, 122 L. Ed. 2d 620 (1993). Put differently, the jury was not misled into thinking that it could decide the case based on suspicion or extra-record evidence. It knew that the burden of proof was beyond a reasonable doubt. *See Taylor v. Kentucky*, 436 U.S. 478, 484-85, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (explaining the dual purpose of the presumption of innocence); *see also Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) (noting that the presumption of innocence embodies "the principle that guilt is to be established by probative evidence and beyond a reasonable doubt"). The Court of Appeal's reliance on the jury instructions as support for its harmlessness conclusion was therefore reasonable.

The Supreme Court's decision in *Brown v. Payton*, 544 U.S. 133, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005), reversing our court's decision, supports this conclusion. There, a prosecutor erroneously stated during closing

argument that the jury was not allowed to consider mitigation evidence. *Id.* at 138. Defense counsel's objection was overruled without an instant curative instruction. *Id.* But "[t]he jury was not left without any judicial direction." *Id.* at 146. The jury was instructed before deliberations began that it could consider all evidence presented at trial unless told otherwise. *Id.* Because it was never instructed that it could not consider the mitigation evidence, it was not unreasonable for the Court of **[*1054]** Appeal to conclude [**53] that any error caused by the prosecutor's misstatement of the law was harmless. *Id.* at 147.

The majority largely overlooks the effect of the jury instructions and instead focuses on the evidence of guilt. Here, too, it errs. According to the majority, this was "a very close case" based in large part on "circumstantial" and "incomplete" evidence, so any error must have been harmful. Majority at 26. But the majority's view of the closeness of the case is not determinative under AEDPA's analysis. There was nothing "objectively unreasonable" about the Court of Appeal's conclusion that "the evidence of Ford's guilt was strong." So under AEDPA, we must defer to that finding.

To be sure, the evidence of guilt may not have been "overwhelming." *Brecht*, 507 U.S. at 639. But it was "certainly weighty." *Id.* One need look no further than the main piece of direct evidence in this case: the partial palm print. That print was found on the victim's car, just four hours after it was washed. As the prosecutor observed, the print was also a left palm print, in the exact location where a right-handed shooter would be expected to place his left hand when leaning into the window. And Ford had no explanation for why his left palm print might be on that [**54] exact location within proximate timing of the murder other than that he touched the car some other time. As Ford put it, "[T]hat don't mean nothing. That just means I came in contact with the vehicle at one time or another." This evidence, paired with the multiple pieces of circumstantial evidence suggesting Ford's guilt—including Ford's Facebook post; his phone call with his girlfriend; the multiple stolen cell phones; his height, general appearance, and general age consistent with witness descriptions; and the white vehicle he was driving—provide a reasonable basis for concluding that the evidence of guilt was strong enough that some passing statements during a closing argument did not create a "reasonable probability of a different result." *Hein v. Sullivan*, 601 F.3d 897, 906 (9th Cir. 2010) (internal quotation marks and citation omitted).

The majority's conclusion to the contrary relies in large part on the purported inconsistency between the jury's guilty conviction for murder and its divided vote on one of the firearm enhancements. But assessing the reason for any potential inconsistency is "pure speculation" because there is no way of knowing whether the inconsistency was "the product of lenity" for Ford. *See United States v. Powell*, 469 U.S. 57, 66, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). Nor is the result [**55] necessarily inconsistent, as the jury could have determined that Ford was involved in a felony in which Martinez was murdered, but did not actually pull the trigger. Regardless, even a potentially inconsistent jury verdict provides no support for any error being harmful here. And it fails to justify disregarding the Court of Appeal's finding of harmlessness which is entitled to substantial deference under AEDPA.

The majority also focuses on the length of deliberations and the jury being "hopelessly deadlocked." Majority at 22-23, 26. But the majority's simplistic discussion of this issue grossly overstates the deadlock. The deadlock was caused by one juror. The other 11 were not deadlocked at all; they were ready to convict. One holdout juror—who eventually voted to convict—cannot bear the weight the majority gives it. And it certainly does not provide a basis for deeming the Court of Appeal's harmlessness conclusion "unreasonable."

* * *

Under AEDPA, "[o]ur aim is not to punish society for the misdeeds of the prosecutor; rather, our goal is to ensure **[*1055]** that the petitioner received a fair trial." *Trillo v. Biter*, 769 F.3d 995, 1001 (9th Cir. 2014). Ford received a fair trial, and we must defer to the Court of Appeal's eminently reasonable finding of harmlessness [**56] in any event. I would deny relief, and thus respectfully dissent.

Footnotes

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

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1 The majority grants a Certificate of Appealability as to Ford's claim that the prosecutor's statements regarding the presumption of innocence violated due process. Majority at 18-19. I would deny the Certificate of Appealability because Ford has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2). *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) ("Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.").

2 By repeatedly emphasizing the government's burden of proving guilt "beyond a reasonable doubt," the prosecutor simultaneously emphasized it was his burden to overcome the presumption of innocence to which Ford was entitled. This is because the government's burden to prove a defendant's guilt beyond a reasonable doubt is closely linked with the presumption of innocence. *See Cool v. United States*, 409 U.S. 100, 104, 93 S. Ct. 354, 34 L. Ed. 2d 335 (1972); *Schultz v. Tilton*, 659 F.3d 941, 943 (9th Cir. 2011).

3 Although not controlling, the California Supreme Court has twice rejected the specific argument that a prosecutor's misstatement of the presumption of innocence in closing was constitutional *Darden* error. *See People v. Booker*, 51 Cal. 4th 141, 119 Cal. Rptr. 3d 722, 245 P.3d 366, 401-02 (Cal. 2011); *People v. Panah*, 35 Cal. 4th 395, 25 Cal. Rptr. 3d 672, 107 P.3d 790, 834-35 (Cal. 2005).

4 Our court has struggled to correctly apply AEDPA's highly deferential standard. *See, e.g., Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558, 201 L. Ed. 2d 986 (2018) (per curiam) ("[t]he Ninth Circuit failed to . . . apply" the proper standard and instead "spent most of its opinion conducting a *de novo* analysis"); *Kernan v. Cuero*, 138 S. Ct. 4, 9, 199 L. Ed. 2d 236 (2017) (per curiam) (finding "several problems with the Ninth Circuit's reasoning," including that it failed to recognize that "fairminded jurists could disagree" about how to construe Supreme Court precedent (citation omitted)); *Davis v. Ayala*, 576 U.S. 257, 260, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015) ("The Ninth Circuit's decision was based on the misapplication of basic rules regarding harmless error."); *Lopez v. Smith*, 574 U.S. 1, 6, 135 S. Ct. 1, 190 L. Ed. 2d 1 (2014) (per curiam) (criticizing "the Ninth Circuit in particular" for applying a legal standard nowhere found in AEDPA); *Johnson v. Williams*, 568 U.S. 289, 297, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013) (holding that "the Ninth Circuit declined to apply the deferential standard of review" mandated by AEDPA); *Cavazos v. Smith*, 565 U.S. 1, 7, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011) (per curiam) ("When the deference to state court decisions

required by § 2254(d) is applied to the state court's already deferential review, there can be no doubt of the Ninth Circuit's error below." (citation omitted)); *Felkner v. Jackson*, 562 U.S. 594, 598, 131 S. Ct. 1305, 179 L. Ed. 2d 374 (2011) (per curiam) ("[t]here was simply no basis for the Ninth Circuit" to grant habeas relief under AEDPA's highly deferential standard, "particularly in such a dismissive manner"); *Premo v. Moore*, 562 U.S. 115, 123, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011) ("The [Ninth Circuit] was wrong to accord scant deference to counsel's judgment, and doubly wrong to conclude it would have been unreasonable to find that the defense attorney qualified as counsel for Sixth Amendment purposes."); *Harrington v. Richter*, 562 U.S. 86, 92, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) ("[J]udicial disregard [for the sound and established principles of when to issue a writ of habeas corpus] is inherent in the opinion of the Court of Appeals for the Ninth Circuit here under review."); *Knowles v. Mirzayance*, 556 U.S. 111, 121, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009) (holding the Ninth Circuit's erroneous issuance of a writ was "based, in large measure, on its application of an improper standard of review"); *Uttecht v. Brown*, 551 U.S. 1, 22, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (2007) ("[t]he Court of Appeals neglected to accord" the proper deference to the state trial court); *Schriro*, 550 U.S. at 473 ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."); *Woodford v. Visciotti*, 537 U.S. 19, 25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam) (criticizing the Ninth Circuit for "substitut[ing] its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)"). Despite the Supreme Court's repeated admonitions, the majority repeats our court's sadly regular error.

Ford v. Peery, 999 F.3d 1214, 999 F.3d 1214

United States Court of Appeals for the Ninth Circuit

January 22, 2020, Argued and Submitted, San Francisco, California; June 8, 2021, Filed

No. 18-15498

Reporter

999 F.3d 1214 * | 2021 U.S. App. LEXIS 17006 **

KEITH UNDRAY FORD, Petitioner-Appellant, v. SUZANNE M. PEERY, Warden, Respondent-Appellee.

Subsequent History: Rehearing denied by, En banc Keith Undray Ford v. Peery, 9 F.4th 1086, 2021 U.S. App. LEXIS 24628 (9th Cir., Aug. 18, 2021)

Prior History: [**1] Appeal from the United States District Court for the Eastern District of California. D.C. No. 2:15-cv-02463-MCE-GGH. Morrison C. England, Jr., District Judge, Presiding.
Ford v. Peery, 2017 U.S. Dist. LEXIS 226937, 2017 WL 11490100 (E.D. Cal., Apr. 19, 2017)
Ford v. Peery, 976 F.3d 1032, 2020 U.S. App. LEXIS 30750 (9th Cir. Cal., Sept. 28, 2020)

Disposition: AFFIRMED.

Core Terms

murder, presumption of innocence, harmless, misstated, print, jurors, driver's, prosecutor's statement, deliberations, beyond a reasonable doubt, shot, convicted, street, window, due process violation, closing argument, instructions, cell phone, palm print, expletive, comments, firearm, reasonable probability, latent print, fair trial, girlfriend, deference, guilt, night, side window

Case Summary

Overview

HOLDINGS: [1]-A district court's denial of 28 U.S.C.S. § 2254 relief was affirmed because, while in stating that the presumption of innocence was "over," the prosecutor misstated clear and long-standing federal law as articulated in a number of United States Supreme Court decisions, the California Court of Appeal applied the functional equivalent of the Darden harmlessness test in holding that the prosecutor's statement was harmless, and, under the Powell decision, the Court of Appeal did not err, much less unreasonably apply clearly established federal law, by denying his due process claim under the Dunn decision.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

HN1 **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's denial of a petition for a writ of habeas corpus. In order to obtain federal habeas relief from a state court conviction, a petitioner must show that the state court proceedings 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 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. 28 U.S.C.S. § 2254(d), An appellate court defers to the last reasoned decision of the state court. More like this Headnote

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Criminal Law & Procedure > Appeals > Reversible Error > Prosecutorial Misconduct

HN2 **Reversible Error, Prosecutorial Misconduct**

Prosecutorial misconduct includes misstatements of law. Prosecutorial misconduct within the meaning of the Darden decision does not require improper motive on the part of the prosecutor; it requires only an improper statement. But such misconduct rises to the level of Darden error only if there is a reasonable probability that it rendered the trial fundamentally unfair. More like this Headnote

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Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Presumption of Innocence

HN3 **Particular Instructions, Presumption of Innocence**

A jury must evaluate the evidence based on the presumption that the defendant is innocent. If the jury concludes beyond a reasonable doubt that the defendant is guilty, then--and only then--does the presumption disappear. More like this Headnote

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Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Presumption of Innocence

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HN4 **Particular Instructions, Presumption of Innocence**

The presumption of innocence is the undoubted law, axiomatic and elementary. The presumption of innocence is vital and fundamental. It is a basic component of a fair trial under our system of criminal justice. Its enforcement lies at the foundation of the administration of our criminal law. More like this Headnote

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Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Evidence > Inferences & Presumptions > Presumptions > Creation

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HN5 **Capital Punishment, Bifurcated Trials**

Criminal defendants lose the presumption of innocence only once they have been convicted. Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. Once the defendant has been convicted fairly in the guilt phase of a capital trial, the presumption of innocence disappears. A conviction terminates the presumption of innocence. More like this Headnote

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Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN6 **Procedural Due Process, Scope of Protection**

A violation of due process under the Darden decision requires more than a prosecutorial misstatement. There must be a reasonable probability that the misstatement rendered the trial fundamentally unfair. In essence, what the Darden decision requires reviewing courts to consider appears to be equivalent to evaluating whether there was a reasonable probability of a different result. More like this Headnote

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Criminal Law & Procedure > Appeals > Reversible Error > Evidence

HN7 **Reversible Error, Evidence**

The California Supreme Court wrote in the Watson decision: A miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. More like this Headnote

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Criminal Law & Procedure > ... > Review > Standards of Review > Deference

HN8 **Standards of Review, Deference**

A determination of prejudice constitutes an adjudication on the merits for purposes of AEDPA deference. More like this Headnote

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Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN9 **Procedural Due Process, Scope of Protection**

To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. More like this Headnote

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Criminal Law & Procedure > Trials > Verdicts > Inconsistent Verdicts

HN10 **Verdicts, Inconsistent Verdicts**

There is no rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them. More like this Headnote

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Summary:

SUMMARY

Habeas Corpus

The panel filed (1) an order granting Warden Suzanne Peery's petition for panel rehearing and denying as moot Peery's petition for rehearing en banc, (2) a superseding opinion affirming the district court's denial of Keith

Undray Ford's habeas corpus petition challenging his California conviction for first-degree murder, and (3) a partial dissent/concurrence.

In the superseding opinion, the panel granted Ford's motion to expand the Certificate of Appealability as to his claim that the prosecutor's statements during closing argument that the "presumption of innocence is over" and Ford "was not presumed innocent anymore" violated due process under *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). Because the California Court of Appeal assumed without deciding that the prosecutor misstated the law, there was no state-court decision to which the panel could defer on this point. The panel wrote that even if there were a state-court decision holding that prosecutor did not misstate the law, the panel would conclude that such a holding would have [**2] been unreasonable because the prosecutor misstated clear and long-standing federal law as articulated in a number of Supreme Court decisions.

As to prejudice, the panel observed that the Court of Appeal applied the functional equivalent of the *Darden* harmlessness test in holding that the prosecutor's statement was harmless. The panel was required to give deference to that decision because a determination of prejudice constitutes an "adjudication on the merits" for AEDPA purposes. Even with AEDPA deference, the panel viewed this as a close case. The panel held, however, that because there was substantial evidence of guilt, a reasonable jurist could have concluded that there was no reasonable probability that, in the absence of the prosecutor's statements that the presumption of innocence was "over," the jury would have reached a different conclusion.

In a claim certified for appeal by the district court, Ford asserted that the jury found him guilty under an aiding-and-abetting theory that was neither charged nor argued to the jury, in violation of due process under *Dunn v. United States*, 442 U.S. 100, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979). The panel wrote that the apparent inconsistency between the jury's guilty verdict on the murder charge and its inability [**3] to decide on three firearm enhancements is not a reason to set aside the guilty verdict. The panel concluded that the Court of Appeal did not err, much less unreasonably apply clearly established federal law, by denying Ford's claim under *Dunn*.

Judge R. Nelson dissented in part and concurred in the judgment. He would deny the Certificate of Appealability because Ford has not made a substantial showing that the prosecutor's statements, when viewed in context, caused the denial of a constitutional right. He wrote that the majority identifies no Supreme Court precedent clearly establishing that the prosecutor's statements in context were a constitutional violation.

Counsel: Barry Morris (argued), Walnut Creek, California, for Petitioner-Appellant.

Kristin Liska (argued), Associate Deputy Solicitor General; Jill M. Thayer, Deputy Attorney General; Peggy S. Ruffra, Supervising Deputy Attorney General; Jeffrey M. Laurence, Senior Assistant Attorney General; Lance E. Winters, Chief Assistant Attorney General; Xavier Becerra, Attorney General; Attorney General's Office, San Francisco, California; for Respondent-Appellee.

Judges: Before: William A. Fletcher and Ryan D. Nelson, Circuit Judges, and Donald W. Molloy, [**4] * District Judge.

Opinion by: W. FLETCHER

Opinion

[*1217] W. FLETCHER, Circuit Judge:

In August 2010, Ruben Martinez was shot and killed in Vallejo, California. Keith Ford was charged with first degree murder with three firearm enhancements. Ford was tried in the California Superior Court for Solano County in August 2012.

During closing argument, at the end of his rebuttal, the prosecutor told the jury that the presumption of innocence no longer applied. He said:

> *This idea of this presumption of innocence is over*. Mr. Ford had a fair trial. We were here for three weeks where . . . he gets to cross-examine witnesses; also an opportunity to present evidence information through his lawyer. He had a fair trial. This system is not perfect, but he had a fair opportunity and a fair trial. *He's not presumed innocent anymore*.

(Emphases added.) The defense attorney objected, "That misstates the law." The court overruled the objection. The prosecutor resumed, "*And so we're past that point*." After four days of deliberations, the jury returned a verdict finding Ford guilty of first-degree murder.

After exhausting his state-court remedies, Ford sought federal habeas relief under 28 U.S.C. § 2254. The district court denied relief. On appeal to us, [**5] Ford claims: (1) that the prosecutor's statements during closing argument misled the jury, in violation of due process under *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); and (2) that the jury convicted on a theory that was not presented, in violation of due process under *Dunn v. United States*, 442 U.S. 100, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979).

We previously issued an opinion reversing the district court and directing that court to grant habeas corpus relief to Ford. *Ford v. Peery*, 976 F.3d 1032 (9th Cir. 2020). We now grant Peery's petition for panel rehearing. In this superseding opinion, we affirm the district court.

I. The Trial

A. Summary of Evidence Presented

On August 7, 2010, a Saturday evening, Ruben Martinez was killed in his SUV in front of his girlfriend's house on a short block of Beach Street between Benicia Road and Central Avenue in Vallejo, California. At about 10:00 p.m., Martinez had driven his girlfriend Jessica Blanco home **[*1218]** so she could use the bathroom, check movie times, and get her jacket. Just before Martinez turned left onto Beach Street from Benicia Road, a white car ahead of them made a U-turn and went back past them the other way on Benicia Road. Blanco later testified at trial that she had not been able to see anyone in the car and that she could not identify the make or model of the car.

When they arrived at her house, [**6] Blanco went inside while Martinez stayed in his SUV with the motor still running. Martinez had washed the SUV earlier in the day. Blanco testified at trial that a few minutes after walking into the house, she heard a loud popping noise and the revving of an engine. She "heard a screeching noise, tires peeling, gravel." Blanco went outside and saw that Martinez's SUV had crashed into a neighbor's garage down the street.

A few minutes before Martinez was shot, Bethel Johnson ("Johnson") and two of her children arrived at their house across the street from Blanco's house. When Johnson got out of her car, she saw Martinez sitting in his SUV with the motor running and headlights on, and with the driver's side window rolled up. Johnson testified that she could see through the tinted window that Martinez was looking at his lighted cell phone. She testified that there was a party on Beach Street at a black motorcycle club about half a block away on the other side of Benicia Road. There was a party at the club "almost every Saturday that month." Johnson testified that three young black men were walking up Beach Street toward the party. Two of them were "maybe 16, 17, 18 years old," and the other [**7] was "much older," "19, 21. Between there." Johnson testified that the older man was "somewhere" between 5'6" and 5'9", that he was wearing a dark hooded sweatshirt, and that he had dreads.

Johnson's daughter, Tenley Johnson ("Tenley"), got out of the back seat on the passenger side with the family Rottweiler on a leash. Johnson testified that the dog charged the man she had described as older. She called to Tenley, "Control your dog." Johnson testified that the man "said something like, 'Hi girly,' and then kind of like turned around away from the dog" and walked in the opposite direction toward Central Avenue, away from the party. She testified that she saw no weapons, and that the man said nothing threatening to Tenley. Between two and three minutes after getting into her house, Johnson heard what sounded like a shot and broken glass. Johnson went outside to check on her car. She found her own car intact and saw no one on the street.

Tenley testified that she, too, had seen Martinez's cell phone light through the window of the SUV. She testified that when she got out of the car, she saw three young black men walking from Central Avenue toward the party on Benicia Road. She described [**8] them to a police officer that night as "teenagers." Tenley said her dog "started barking and . . . pulling me." The dog pulled her toward a man with "short hair." She said, "I couldn't really see the face. It was dark." She testified that the man was "skinny." Tenley is 5'3". She described the man as taller than she was and shorter than a 6'0" police officer who interviewed her. Tenley testified that the man was wearing a blue jacket with one or more white stripes "on the sleeves." She said it was "like a track jacket" and that it did not cover his head. One of the other men had dreads. She did not see any of the men's faces. When later shown six photographs, including a photograph of Ford, Tenley did not identify Ford as one of the three "teenagers" she had seen that night.

Another neighbor, Moises Cervantes, was walking out of his house on Beach **[*1219]** Street. His house was between Blanco's house and Central Avenue. Cervantes heard a "pop" and saw Martinez's SUV coming toward him. After the SUV crashed, Cervantes looked up and down the street and saw no one.

Martinez was killed with a single shot. His foot was pressed on the gas pedal, causing the SUV to accelerate down the street until it [**9] crashed into the neighbor's garage. The engine continued to run, and the rear wheels to spin, even after the SUV came to a stop. Martinez's cell phone was found on the floorboard of the front passenger seat. The driver's side window was intact and about "a quarter of the way down." The other windows on the driver's side were closed and intact. A photograph introduced into evidence shows two rear side windows on the passenger side

that were shattered. At least one of the windows had been broken by first responders.

Five days later, on August 12, two Vallejo detectives lawfully stopped Keith Ford. Ford was twenty-three years old. He is black, is 5'8" tall, and weighs 165 pounds. At the time of the stop, he had short hair. He was driving a white Oldsmobile sedan. The detectives found Ford's cell phone inside his car and discovered six additional cell phones in the center console.

Ford was read his *Miranda* rights. One of the detectives, Les Bottomley, testified that Ford said that he had "bought [the cell phones] stolen off the street." Later in the same interview, however, Ford told Bottomley he did not know whether they had been stolen. Ford told Bottomley that he was right-handed. Bottomley [**10] asked Ford where he had been on the night of August 7. Ford answered that he "was at his mother's home and at that time would have been in bed." Bottomley testified that Ford's mother's house is about three and half miles from Blanco's neighborhood. Bottomley did not ask Ford about Martinez's murder.

When Ford was stopped, he had a jacket in his car. Detective Bottomley testified that he later showed the jacket to Tenley. Tenley told him that it was not the jacket she had seen on the young man with the short hair on August 7.

Ford was arrested on September 26 and charged with having a concealed firearm in his vehicle on that date. It was stipulated to the jury that the firearm was unrelated to Martinez's murder. Ford was held on the charge in the Solano County Jail until December 14. On December 13, Detective Bottomley interviewed Ford again. He asked Ford if he knew Martinez. Bottomley testified that Ford said "he did not think he did." Ford repeated that he had been at his mother's house on the night of August 7 and had spent the night there. Bottomley told Ford that his palm print had been found on Martinez's SUV. Ford replied, "That don't mean nothing. That just mean I came in contact [**11] with the vehicle at one time or another."

While Ford was in jail on the firearm charge, he spoke to his girlfriend on the telephone. The call was recorded. Ford said:

> [L]uckily I ain't in here for murder, that's all I keep thinking about . . . oh well I wish it didn't have to happen . . . I just [wish] I was at home . . . I know I gotta deal with my (unintelligible) it's too late for all that . . . to be wishing I was at home . . . See I'm disappointed in myself. But [expletive] that's what happens when you carry a gun. Ain't nothin good gonna come of it. And I know this and [expletive] still happen, cause I tell other people the only thing you gonna get out of a gun is you gonna throw down with it or you gonna shoot somebody with it. And I tell everybody that and look at my [expletive].

[*1220] A recording of the call was played for the jury.

Several months after the murder, the following message appeared on Ford's Facebook page, directed at someone who had accused Ford of shooting him:

> I heard through the grapevine you was looking for the guy. Let me know something. And since you think I popped you, check this out. First off, I don't [expletive] with the Vistas. Second off, I am too good of a [**12] shooter to hit a [expletive] that many times and not knock they [expletive] down. Last, when you getting shot, I was on Fifth buying some syrup off Jigs. Plus, I don't even [expletive] with [expletive], so ain't nobody talked to me since I got out of jail last. Real killers move in silence. And would I brag on a job I didn't even complete? [Expletive] knocking [expletive] down. I don't need credit

for an attempt, so take that how you want to.

The message was read to the jury.

The prosecution presented testimony from four fingerprint analysts about a partial latent left palm print found on Martinez's SUV. Niki Zamora of the San Mateo County Forensics Laboratory testified that she examined the SUV on August 11. She discovered the latent print on the outside of the driver's door, just below the window. The exterior of the vehicle was "rather dirty," with dirt and a sticky white substance on the door where she found the print. Fire extinguishers had been used on the SUV after the crash. Zamora testified that she cleaned off only some of the "dirt and debris" before "dusting" and taking her "first lift" of the print. She did not indicate on the "fingerprint card" that the area from which [**13] the print was lifted "had debris on it." Zamora was not "certified as a crime scene processor" because she "hadn't had enough experience yet."

Frankie Franck, a certified latent print examiner, matched Zamora's "first lift" to Ford's palm print. Franck compared the latent print to "several" electronically taken prints ("Live Scan prints") that he had been given, including one from Ford taken in October 2009 in Butte County, California. Franck testified that the latent print obtained by Zamora "was not of the best quality," and that it covered "probably 30 percent" of the total palm. Despite the quality of the latent print, and despite the fact that it was only a partial print, Franck testified that he was certain of the match —"[a]s certain as I am sitting here."

Zamora then confirmed Franck's match. She conceded that she had not followed the lab's normal protocol, which required that a confirming print analyst "not, in any way, [be] associated with the work that . . . had [been] done." Zamora was, of course, directly associated with that work, for she had lifted the latent print from the SUV. Zamora was not certified as a latent print examiner. She had taken the certification test and [**14] was awaiting the result.

Darrell Klasey, a certified latent print examiner at the Solano County Sheriff's Office, took a rolled ink print of Ford's hands in May 2011. Klasey compared the ink print of Ford's left palm to the Live Scan print that Franck had been given. Klasey concluded that the ink print and the Live Scan print were from the same person. Cross-examination revealed Klasey's questionable performance at a previous agency.

Lynne Lazzari, a latent fingerprint analyst at the Solano County Sheriff's Office, confirmed Klasey's conclusion. Her analysis was based only on the two prints that Klasey had given her (Ford's ink print and the Live Scan print analyzed by Franck), and she knew that Klasey had already concluded that they matched. Lazzari testified, "I did my own independent study **[*1221]** and came up with why it was the same person." She testified that she "more or less" followed a standard method for comparing prints. When questioned about the standard method, which requires examining the unknown print before the known print, she responded that she compared the prints side by side: "Well, that's why I said 'more or less.' I do it my way." When asked whether her method had "ever [**15] been tested or validated for accuracy," she responded, "No." Lazzari had never taken the test to be certified as a latent print examiner.

There was also testimony about the condition of Martinez's SUV after it crashed into the garage. As noted above, Zamora had examined the SUV on August 11, 2010. She testified that the driver's side window was intact and was "partially down." Detective Bottomley, who had been at the crime scene on the night of the murder, had earlier testified that the driver's side window was intact and was "about a quarter of the way down." According to the prosecution's crime scene reconstructionist, the driver's side window was 1.2 feet open, and a 5'8" individual could

stand by the SUV and reach through the window without contortion. The prosecutor asked whether there was a "[l]arge enough space to put a hand in." Bottomley had answered, "Absolutely." Zamora testified that the other driver's side windows were intact but that the "two rear passenger side windows" were "shattered," with "[n]o glass there." Photographs of the SUV, supporting Zamora's testimony, were shown to the jury. Zamora testified that there were no bullet holes "either inside . . . or outside" [**16] the SUV.

Finally, Susan Hogan, M.D., a forensic pathologist, testified about the bullet wound and the manner of shooting. She testified that Martinez was killed by a single shot to the back left side of his head. The bullet entered about an inch and a half from the top of his head and two inches left from the posterior (back) midline. It traveled downward, forward, and to the right, coming to rest in the soft tissue of the right side of the neck. Dr. Hogan testified that death was "[v]irtually instantaneous." She testified that there was no soot or "stippling" at or near the entry point, which meant that the shot was fired from "at least three feet away."

Defense counsel presented evidence that other than a brief conversation on the night of the murder, law enforcement did not identify or contact anyone at the motorcycle party down the street. Law enforcement collected license plate numbers of all of the vehicles on the street, but did not follow up on any of them. Law enforcement never showed Blanco a picture of Ford's white Oldsmobile to determine whether it was the car she had seen on the night of the murder. No one reviewed the contents of the stolen cell phones recovered from Ford's [**17] car. Though one witness reported hearing multiple shots, the only bullet found was the one that killed Martinez. No gun or shell casings were ever found. There was gunshot residue on the inside of the driver's side door, but there was no residue on the window seal of the door or on Martinez's clothes. The only DNA found at the scene belonged to Martinez.

B. Attorneys' Arguments

In his closing argument, the prosecutor contended that Martinez's murder was "a robbery gone bad." His theory was that Ford had put his left hand on the outside of the driver's side door, had reached through the partially opened driver's window with his right hand, and had shot Martinez in the head:

> There is compelling evidence in this case, . . . and that would be the defendant's **[*1222]** palm print on the victim's car on his driver's door, right in the position where a person, a right-handed person with a firearm in their right hand, would have shot and killed the victim. . . . No unusual contortion would have to take place for a person of 5'8" to stick their hand in there and fire.

The prosecutor further argued that Ford's recorded telephone conversation with his girlfriend and his Facebook post supported his contention [**18] that Ford shot Martinez.

The prosecutor did not try to reconcile his contention that Ford had reached through the driver's side window and shot Martinez as he sat in the driver's seat with Dr. Hogan's testimony, which required the gun to have been "at least" three feet away. The prosecutor also did not try to reconcile his contention with Johnson's testimony that she had heard the sound of a shot and broken glass with the photograph of the SUV showing that two rear side passenger windows had been shattered.

In her responsive closing argument, Ford's attorney contended that the fingerprint identification was unreliable. She

emphasized the poor quality of the latent palm print lifted from the SUV by Zamora and contended that the unqualified fingerprint analysts were not to be trusted. She contended that in his telephone conversation with his girlfriend, Ford was "talking about the fact that he's in custody for a gun and thank God, thank God he didn't kill anyone." She characterized Ford's Facebook post as "talking smack to someone behind a computer screen."

At the end of his rebuttal closing argument, the prosecutor told the jury:

> *This idea of this presumption of innocence is over*. Mr. Ford [**19] had a fair trial. We were here for three weeks where . . . he gets to cross-examine witnesses; also an opportunity to present information through his lawyer. He had a fair trial. This system is not perfect, but he had a fair opportunity and a fair trial. *He's not presumed innocent anymore*.

(Emphases added.) Ford's attorney objected, "That misstates the law." The court held a sidebar. The court then said in front of the jury, "All right. The objection is overruled." The prosecutor resumed, "*And so we're past that point*." The jury began its deliberations shortly thereafter, on the same day.

C. Jury Deliberations

The jury was instructed on the elements of the charged crimes of murder and felony murder. The jury was further instructed on charged enhancements based on the use of a firearm.

On the second day of deliberations, the jury sent out a written question: "If someone believes that the defendant was present at the time of the shooting and was an active participant in the attempted robbery, but was not the actual shooter, does that imply guilt of either the first or second-degree murder charge?" The court commented to the attorneys, "It's certainly an unusual question, given there was [**20] really no one [who] argued that there was someone else while the defendant was present." The prosecutor suggested the question might have reflected the fact that two other people had been described in the testimony, "although I didn't even make any arguments about them at all in my closing or that they had any involvement." With the agreement of both counsel, the court simply referred the jury to the instructions already given. The jury also requested a readback of Johnson's testimony. On the fourth day of deliberations, Friday, August 24, the jury reported that they were "hopelessly deadlocked," with one juror holding out for acquittal. After taking testimony from jury members individually, **[*1223]** the court sent them back to deliberate further.

The following Tuesday, August 28, the jury returned a unanimous verdict that Ford was guilty of first-degree murder. The jury reported that they were "hopelessly deadlocked" on the three firearm enhancements. The court inquired and learned that the final vote on the first enhancement—"personal use of a firearm during the commission of the crime"—had been seven to five. The court declared a mistrial as to all three firearm enhancements.

II. Post-Trial [**21] Procedural History

On direct appeal, the California Court of Appeal affirmed Ford's conviction.

On the presumption-of-innocence issue, the Court of Appeal identified a conflict among the Courts of Appeal. Several Courts of Appeal had held that there was no prosecutorial misconduct when the prosecutor told the jury that the presumption of innocence no longer applied once sufficient evidence of guilt had been presented. For example, in *People v. Goldberg*, 161 Cal. App. 3d 170, 189, 207 Cal. Rptr. 431 (1984), the court affirmed the conviction and found no prosecutorial misconduct in a case in which the prosecutor had said in closing argument, "[O]nce you've heard this case, once the case has been proven to you—*and that's the stage we're at now*—the case has been proved to you beyond any reasonable doubt. I mean, it's overwhelming. *There is no more presumption of innocence*." (First emphasis added.) But a different Court of Appeal later reached a contrary conclusion. In *People v. Dowdell*, 227 Cal. App. 4th 1388, 1407, 174 Cal. Rptr. 3d 547 (2014), the prosecutor twice told the jury during closing argument, in light of the strength of the State's evidence, that "[t]he presumption of innocence is over." The court in *Dowdell* distinguished *Goldberg* and ruled that defense counsel should have objected because the prosecutor misstated the law, [**22] but it held, on the record before it, that the error was harmless.

The Court of Appeal declined to reach the question whether the prosecutor had misstated the law in Ford's case. Assuming without deciding that the prosecutor had done so, the court held that any error was harmless: "We need not resolve any conflict between *Goldberg* [and other cases] on the one hand, and *Dowdell* on the other because we conclude any assumed error is harmless under either the state ([*People v.*] *Watson*, [(1956)] 46 Cal.2d 818[, 836, 299 P.2d 243]) or federal constitutional standard (*see Chapman v. California* (1967) 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705)."

On the jury-instruction issue, the Court of Appeal held that the jury's verdict did not show that it relied on a legal theory that had not been presented. It recognized the apparent conflict between the jury's verdict that Ford was guilty of first-degree murder and its inability to decide whether he had used a firearm. But it concluded that "disposition of one count [has] no bearing upon the verdict with respect to other counts, regardless of what the evidence may have been. Each count must stand on its own merit."

The California Supreme Court denied Ford's petition for review in a one-line order. Ford then sought state habeas in California Superior Court. The Superior Court did not [**23] reach the merits of the claims at issue here because they had been raised and rejected on direct appeal.

Ford sought federal habeas relief under 28 U.S.C. § 2254. He raised several claims, all of which were rejected by the district court. He appeals the denial of two claims: (1) That the prosecutor's statements during **[*1224]** closing argument that the "presumption of innocence is over" and Ford was "not presumed innocent anymore" violated due process under *Darden* 1 ; and (2) That the jury found Ford guilty under a theory not presented, in violation of due process under *Dunn*. We discuss the claims in turn.

III. Standard of Review

HN1 We review *de novo* a district court's denial of a petition for a writ of habeas corpus. *Moses v. Payne*, 555 F.3d 742, 750 (9th Cir. 2009). In order to obtain federal habeas relief from a state court conviction, a petitioner must show that the state court proceedings "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 . . . 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." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 402-03, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). We defer to the last reasoned [**24] decision of the state court. *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); *Mann v. Ryan*, 828 F.3d 1143, 1151 (9th Cir. 2016). Here, that is the decision of the California Court of Appeal on direct appeal.

IV. Discussion

A. Due Process Violation under *Darden*

The first question is whether the prosecutor's repeated statement during closing argument that the presumption of innocence was "over" was misconduct in violation of due process under *Darden*. ***HN2*** Prosecutorial misconduct includes misstatements of law. *See Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2016) (finding *Darden* error where "the prosecutor gave incorrect direction to the jury about an element of California law under which Deck was convicted"). Improper prosecutorial statements violate due process if they "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (citation omitted). Prosecutorial misconduct within the meaning of *Darden* does not require improper motive on the part of the prosecutor; it requires only an improper statement. But such misconduct "rises to the level of *Darden* error only if there is a reasonable probability that it rendered the trial fundamentally unfair." *Deck*, 814 F.3d at 985.

1. Misstatement of the Law

Because the California Court of Appeal assumed without deciding that the prosecutor misstated the law, there is no state-court [**25] decision to which we can defer on this point. However, even if there were a state-court decision holding that the prosecutor did not misstate the law, we would conclude that such a holding would have been unreasonable. In stating that the presumption of innocence was "over," the prosecutor misstated clear and long-standing federal law as articulated in a number of Supreme Court decisions. ***HN3*** A jury must evaluate the evidence based on the presumption that the defendant is innocent. If the jury concludes beyond a reasonable doubt that the defendant is guilty, then—and only then—does the presumption disappear.

HN4 The presumption of innocence is "the undoubted law, axiomatic and elementary." **[*1225]** *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895). The presumption of innocence is "vital and fundamental." *Id.* at 460. It is "a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). "[I]ts enforcement lies at the foundation of the administration of our criminal law." *Coffin*, 156 U.S. at 453; *see also Reed v. Ross*, 468 U.S. 1, 4-5, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984).

HN5 Criminal defendants lose the presumption of innocence only once they have been convicted. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 399, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) ("Once a defendant has been afforded a fair trial *and convicted* of the offense for which he was charged, the presumption of innocence

disappears.") (emphasis added); *Delo v. Lashley*, 507 U.S. 272, 278, 113 S. Ct. 1222, 122 L. Ed. 2d 620 (1993) [**26] ("Once the defendant has been *convicted* fairly in the guilt phase of [a capital] trial, the presumption of innocence disappears.") (emphasis added); *Betterman v. Montana*, 136 S. Ct. 1609, 1618, 194 L. Ed. 2d 723 (2016) (a conviction "terminates the presumption of innocence").

2. Prejudice

HN6 A violation of due process under *Darden* requires more than a prosecutorial misstatement. There must be "a reasonable probability" that the misstatement "rendered the trial fundamentally unfair." *Deck*, 814 F.3d at 985. "In essence, what *Darden* requires reviewing courts to consider appears to be equivalent to evaluating whether there was a 'reasonable probability' of a different result." *Hein v. Sullivan*, 601 F.3d 897, 914-15 (9th Cir. 2010); *see also Deck*, 814 F.3d at 979.

On the assumption that the prosecutor misstated the law, the Court of Appeal held that the prosecutor's misstatement was harmless under either of two standards. It wrote: "[A]ny assumed error is harmless under either the state ([*People v.*] *Watson*, [(1956)] 46 Cal.2d 818[, 836, 299 P.2d 243]) or federal constitutional standard (*see Chapman v. California* (1967) 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705)." The *Chapman* standard for determining harmlessness is different from the *Darden* standard, so we put it to one side. But the *Watson* standard is indistinguishable from the *Darden* "reasonable probability" standard. ***HN7*** The California Supreme Court wrote in *Watson*: "[A] miscarriage of justice should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is *reasonably probable [**27] that a result more favorable to the appealing party would have been reached in the absence of the error*." *People v. Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243 (1956) (quotation marks omitted) (emphasis added). We recognize, of course, that in applying *Watson* the Court of Appeal was applying a state-law rather than a federal-law standard of harmlessness, but the *Watson* test is *in haec verba* the same as the *Darden* test. We therefore conclude that the Court of Appeal applied the functional equivalent of the *Darden* harmlessness test in holding that the prosecutor's statement was harmless.

If we were to decide harmlessness *de novo* under *Darden*, we would conclude that there was a reasonable probability of a different outcome absent the prosecutor's misstatement of the law. The evidence against Ford was circumstantial, incomplete, and to some degree in conflict. The jury took four days to reach a verdict and did so only after having reported to the judge that it was "hopelessly deadlocked." **[*1226]** Finally, the jury's verdict was logically inconsistent—an almost sure sign of a compromise verdict—finding Ford guilty of murder but failing to find that he used a firearm in the commission of the murder. ***HN8*** A determination of prejudice constitutes an "adjudication [**28] on the merits" for purposes of AEDPA deference. *See Davis v. Ayala*, 576 U.S. 257, 269, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015) (holding that the state court's determination of harmlessness "undoubtedly constitutes an adjudication of [petitioner's] constitutional claim 'on the merits'"). We are therefore required to give deference to the decision of the Court of Appeal that the prosecutor's misstatements were harmless under the *Darden* standard. Even with AEDPA deference, we view this as a close case. But we hold that a reasonable jurist could have concluded that there was no reasonable probability that, in the absence of the prosecutor's statements that the presumption of innocence was "over," the jury would have reached a different conclusion, for there was substantial evidence of guilt: Ford's unexplained left palm print just below the window on the outside of the driver's side door; a

man matching Ford's (albeit general) description on the street next to Martinez's SUV just before the shooting; the stolen cell phones in Ford's car; Ford's recorded telephone conversation to his girlfriend while he was in jail ("[L]uckily I ain't in here for murder, that's all I keep thinking about . . . oh well I wish it didn't have to happen"); and Ford's Facebook post [**29] bragging about his shooting prowess.

B. Due Process Violation under *Dunn*

HN9 "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Dunn*, 442 U.S. at 106. Ford contends that he was found guilty on a charge of aiding and abetting even though no such charge was made in the indictment, and no such argument was made to the jury. In support of his contention, Ford points to the apparent inconsistency in the jury's decision: On the one hand, the jury convicted Ford of first degree murder in the shooting of Martinez. On the other hand, the jury hung on the three firearm enhancements, unable to decide whether Ford had used a firearm in committing the murder.

We are willing to assume that on the evidence presented Ford could have been convicted of an aiding and abetting crime. But that is not enough to show a violation of due process, for Ford could equally have been (and was) convicted of first-degree murder. The apparent inconsistency between the jury's guilty verdict on the murder charge and its inability to decide on the firearm enhancements is not a reason to set aside its guilty verdict. ***HN10*** There is no "rule that [**30] would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them." *United States v. Powell*, 469 U.S. 57, 66, 67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984) (noting also that "a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts."); *see also Harris v. Rivera*, 454 U.S. 339, 345, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981) ("Inconsistency in a [jury's] verdict is not a sufficient reason for setting it aside."). Under *Powell*, the Court of Appeal did not err, much less unreasonably apply clearly established federal law, by denying his claim under *Dunn*.

Conclusion

We conclude that the prosecutor's repeated statements to the jury during final **[*1227]** argument that the presumption of innocence no longer applied were misstatements of clearly established law as articulated by the Supreme Court. We defer, however, to the state court's finding, applying the *Darden* standard, that there was not a reasonable probability of a different outcome had the prosecutor not misstated the law. We also conclude that the state court did not err under *Dunn* in upholding the jury's arguably inconsistent verdict. We therefore affirm [**31] the district court's denial of relief.

AFFIRMED.

Concur by: R. NELSON [In Part]

Dissent by: R. NELSON [In Part]

Dissent

R. NELSON, Circuit Judge, dissenting in part and concurring in the judgment:

Today is a somber day of justice for Ruben Martinez, an innocent young man with a full life ahead of him who was ruthlessly murdered. Petitioner Keith Ford was convicted of first degree felony murder of Martinez by a jury of his peers. The majority first held that Ford's petition for habeas relief should be granted. On rehearing, the majority reverses course. As a result, Ford remains legally accountable for Martinez's murder.

It is unusual, but not unheard of, for a panel majority to concede error on rehearing. *See* *Mendez v. Mukasey*, 525 F.3d 216 (2d Cir. 2008) (Sotomayor, J.), *on reh'g sub nom.* *Mendez v. Holder*, 566 F.3d 316 (2d Cir. 2009) (per curiam). For a panel majority to publicly recognize and correct its error requires a healthy dose of judicial humility. Ultimately, the art of good judging is tethering so closely to the rule of law and the Constitution that personal beliefs do not dictate the outcome of any issue or case. That ideal of judging, simple in theory, can test even veteran judges. But this ideal reflects the noblest role of an Article III judge. And, by reversing itself, the majority may avoid [**32] yet another reversal in our misapplication of deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See* *Shinn v. Kayer*, 141 S. Ct. 517, 522, 208 L. Ed. 2d 353 (2020) (per curiam) (noting the Supreme Court "has reversed the Ninth Circuit's application of AEDPA" in 14 cases in 18 years). I thus concur in the majority's judgment to deny Ford's habeas petition.

But the majority, even in its reversal on rehearing, is only half noble. I continue to dissent because I would deny the Certificate of Appealability ("COA"). Ford has not made a "substantial showing" that the prosecutor's statements, when viewed in context, caused "the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The majority identifies no Supreme Court precedent "clearly establish[ing]" that the prosecutor's statements in context were a constitutional violation. 28 U.S.C. § 2254(d)(1).

No prosecutor should ever state or imply that the presumption of innocence is over before the jury returns a guilty verdict. The majority correctly notes the "vital and fundamental" role the presumption of innocence plays in our criminal justice system. *See* Majority at 21 (quoting *Coffin v. United States*, 156 U.S. 432, 460, 15 S. Ct. 394, 39 L. Ed. 481 (1895)). But due process violations under *Darden v. Wainwright* require more than such generalities. 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). And the majority still errs on rehearing in failing to grapple with the context of the prosecutor's [**33] statements and in finding legal error sufficient to support a due process violation. We should not have granted the COA merely to affirm the state court's harmlessness finding.

Moreover, the majority remains equivocal on the harmlessness of the prosecutor's statements, which is surprising, given the strong evidence tying Ford to the murder and the context surrounding the prosecutor's statements. Under appropriate **[*1228]** AEDPA deference—but even under the majority's make-believe, hypothetical de novo review —the state court's harmlessness finding warrants denial of habeas relief.

I

Martinez was shot at point blank range in his car in front of his girlfriend's house before their date. After a three-week trial, Ford was convicted of first degree felony murder.

During trial, the jury heard that Martinez had washed his car just hours before his date and his car was "clean and shiny." *People v. Ford*, No. A137496, 2014 Cal. App. Unpub. LEXIS 6374, 2014 WL 4446166, at *1 (Cal. Ct. App. Sep. 10, 2014). A fingerprint examiner testified that after the murder, "a latent palm print on the driver's side of the door of Martinez's SUV, just beneath the window[,] . . . matched Ford's left palm print." 2014 Cal. App. Unpub. LEXIS 6374, [WL] at *2. The examiner "was certain 'both impressions were made by the same palm.'" *Id.* The jury heard Ford's explanation to police [**34] that his palm print meant that "I came into contact with the vehicle at one time or another." *Id.* The prosecutor's theory was that Ford's left palm print on Martinez's car, in the exact location consistent with a right-handed man leaning into the driver window, particularly where the car had just been washed, placed Ford at the murder scene.

The jury also heard that a white car was seen driving in the same direction as Martinez and "made an abrupt U-turn directly in front of Martinez's car" moments before Martinez stopped at his girlfriend's house and just before Martinez was murdered. 2014 Cal. App. Unpub. LEXIS 6374, [WL] at *1. Ford drove a white car.

The jury also heard that three young African American men were walking toward Martinez as he waited in his car. One had short hair cut close to his scalp. Ford is African American and at the time was 23 years old, had short hair, and was the approximate height described.

The jury also heard that as Martinez waited, he was on his cell phone, visible through his car window. A few days after the murder, Ford was stopped by a detective and six stolen cell phones were found in the center console of Ford's car. Ford told the detective that on the night Martinez was murdered, [**35] Ford was at his mother's house in Vallejo, about three miles from where Martinez was shot.

The jury also heard that four months after Martinez was murdered, Ford was in jail for an unrelated firearm possession charge. Ford called his girlfriend from jail and said, "'luckily I aint in here for murder'" and noted that he knew he should not carry guns because "'the only thing you gonna get out of a gun is you gonna throw down with it or you gonna shoot somebody with it.'" 2014 Cal. App. Unpub. LEXIS 6374, [WL] at *2. Several months after Martinez's murder, Ford posted comments on Facebook about being suspected of a murder and described in detail how he would conduct a murder.

Before closing arguments, the state trial court orally instructed the jury about the presumption of innocence and the government's burden to prove its case beyond a reasonable doubt. The jury was instructed to form no opinion about the case until after jury deliberations begin. And the jury was instructed to follow the law as detailed in the written jury instructions and to disregard any of counsels' comments that may conflict with the jury instructions.

In closing, the prosecutor repeatedly reminded the jury that the government bore the burden to prove [**36] its case beyond a reasonable doubt. The prosecutor then walked through the evidence detailed above. In rebuttal, the prosecutor stated, "This idea of this presumption of innocence **[*1229]** is over. . . . He's not presumed innocent anymore." 2014 Cal. App. Unpub. LEXIS 6374, [WL] at *6. This drew an objection from defense counsel, overruled by the trial court because the jurors have "been reminded continuously that they're not to form or express any opinions until after they deliberate with their fellow jurors, so I don't think there's any particular harm in that . . . ." The prosecutor then stated, "And so we're past that point." *Id.*

After closing, the district court provided the jury written instructions, including properly detailing the presumption of innocence, which were taken back into the jury room for deliberations. Defense counsel made no request for any additional jury instruction on the presumption of innocence.

The jury heard evidence more than enough to support, beyond a reasonable doubt, Ford's first degree felony murder conviction. The California Court of Appeal affirmed Ford's conviction on direct appeal, finding that any alleged prosecutor misconduct was harmless. The California Supreme Court denied review. The federal [**37] magistrate recommended denial of Ford's habeas petition and the district court adopted the magistrate's recommendation in full. While the district court certified three questions for appeal, it did not certify the question on potential prosecutorial misconduct.

II

The majority holds that the prosecutor's comments about the presumption of innocence misstate the law on de novo review—because the issue was not addressed by the Court of Appeal.[1] Majority at 21. But the prosecutor's isolated comments, taken in full context of the closing statements and jury instructions, were not misconduct that "so infected the trial with unfairness as to make [Ford's] conviction a denial of due process" under *Darden*, 477 U.S. at 181 (citation omitted). By cherry-picking and examining the prosecutor's comments in isolation, the majority disregards the Supreme Court's admonition that "the arguments of counsel . . . must be judged in the context in which they are made." *Boyde v. California*, 494 U.S. 370, 385, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). The majority misconstrues the prosecutor's comments rather than interpreting them in context of his full closing and rebuttal arguments. In context, the comments do not rise to the level of prosecutorial misconduct.

"[A] court should not lightly infer that a prosecutor [**38] intend[ed] an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). The majority reaches its conclusion only by skewing the evidence and inferences in the light most favorable to Ford. It thus infers that the jury drew the most damaging interpretation of the challenged comments, rather than the more likely, less damaging interpretation. In context, the prosecutor argued in closing that the government had met its burden of proving its case beyond a reasonable doubt, thereby overcoming the presumption of innocence. **[*1230]** His challenged comments were not (as the majority concludes) inviting the jurors to disregard the presumption of innocence when they retired to the deliberation room.

The prosecutor made numerous statements supporting the more reasonable interpretation (still largely ignored by the majority on rehearing). For instance, the prosecutor introduced his closing, noting, "I'm going to go back over the facts of this case and show you why I have proven beyond a reasonable doubt that the defendant committed murder in this case . . . ." He hewed closely to this [**39] theme, repeating, "I want to tell you why it is that I have proven to you beyond a reasonable doubt that the defendant in this case committed an act that caused the death of Ruben Martinez . . . ." The prosecutor returned to this refrain repeatedly throughout his closing, stating the following:

- "Let me tell you . . . why it is that I have proven to you beyond a reasonable doubt that the defendant is guilty";

• "My burden of proof in the case to prove the charge that Mr. Ford is charged with is proof beyond a reasonable doubt";

• "In combination with the other information, that's proof beyond a reasonable doubt. . . . I have never shied away from what my standard of proof is in this case, but it's not an impossible standard. It's proof beyond a reasonable doubt";

• "[W]hen you . . . follow all the evidence and you follow all the law, you're going to reach the same conclusion that I asked you to reach at the beginning of this case that the defendant is guilty of murder"; and

• "[Y]ou did all make that promise at the beginning and I will hold you to that promise, if I prove my case beyond a reasonable doubt, that you would not hesitate for a second to convict the defendant."

On rebuttal, [**40] the prosecutor reiterated that defense counsel "doesn't have to present any evidence. It is my burden of proof." He also called the jurors' attention to the written instructions they would take with them into the deliberation room, inviting them to "just read the [reasonable doubt] instruction itself and . . . look at the instruction and what it says in particular."

Finally, just before making the challenged statements, the prosecutor walked through the evidence and reiterated, "I've provided you with all the information that you need to feel the abiding conviction in the truth of these charges." Each of his points (including the challenged statements) combined to form an unremarkable overarching argument: the evidence of defendant's guilt was so strong that the prosecutor had successfully proved his case beyond a reasonable doubt and thus overcame the presumption of innocence. 2 The majority shows no reasonable likelihood that these statements, taken together, misled the jurors or caused them to believe the presumption of innocence terminated before they had reached a verdict of guilty beyond a reasonable doubt.

Contrast this with the facts in *Kentucky v. Whorton*, 441 U.S. 786, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979), where the Supreme **[*1231]** Court held the Due Process Clause does [**41] not require a jury instruction on the presumption of innocence at all. *Id.* at 789-90. In *Whorton*, the jury was instructed that they "could return a verdict of guilty only if they found beyond a reasonable doubt" that the defendant was guilty of the acts charged. *Id.* at 787. This instruction alone—even without the presumption of innocence instruction—was deemed constitutionally sufficient. *See id.* at 789-90. Here, the trial court exceeded the standard in *Whorton*. Not only did the prosecutor repeatedly emphasize that his burden was to prove Ford's guilt beyond a reasonable doubt, *see supra* at 32-33, the jury was formally instructed that Ford was entitled to a presumption of innocence and that this presumption required proof of guilt beyond a reasonable doubt. Thus, as in *Whorton*, weighing the prosecutor's challenged statements against "all the instructions [provided] to the jury" and "the arguments of counsel," Ford was not "deprived . . . of due process of law in light of the totality of the circumstances." 441 U.S. at 789-90.

The surrounding context of the prosecutor's statements also explains the trial court's decision to overrule defense counsel's objection to the contested statements. The court undoubtedly knew the presumption of innocence [**42] continued until jury deliberations, understood what the prosecutor meant, and reasonably determined the comments in context presented no risk of juror confusion. The court stated (outside the jury's presence), in response to counsel's objection: "[The jurors have] been reminded continuously that they're not to form or express any opinions until after they deliberate with their fellow jurors, so I don't think there's any particular harm in that . . . ." The court was also

aware the jurors had been explicitly instructed orally on the presumption of innocence and the written instructions would be taken with them into jury deliberations.

In short, no reasonable juror would interpret the prosecutor's statements, in context, consistent with the majority's isolated gloss. Despite indications the jurors were confused on other issues, there is no suggestion any juror was confused on the presumption of innocence. Indeed, the jury acquitted Ford on separate firearm enhancement allegations, which undermines the majority's conclusion that the jurors believed the presumption of innocence was over during the prosecutor's closing.

III

The majority also needlessly opines that if it were "decid[ing] harmlessness [**43] *de novo* under *Darden*, [it] would conclude that there was a reasonable probability of a different outcome absent the prosecutor's misstatement of the law." Majority at 23. Even assuming the prosecutor's statements viewed in context rose to the level of a misstatement of clearly established Supreme Court precedent, the statements are harmless under any standard. More fundamentally, the majority has no basis to analyze a hypothetical de novo review which is contrary to the law. Like the majority's separate dictum, *see supra* at 31 n.1, this dictum is not germane, not well-reasoned, and thus not binding on any future panel. In reversing course on harmlessness, the majority ultimately backs into the correct result. But the majority's analysis remains riddled with unnecessary errors.

"[E]ven if the [prosecutor's] comment[s are] understood as directing the jury's attention to inappropriate considerations," that does not by itself establish a due process violation under *Darden* absent something more to show that the comments prejudiced the defendant. *Parker v.* **[*1232]** Matthews, 567 U.S. 37, 47, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012) (per curiam). Courts must consider "whether the jury was instructed to decide solely on the basis of the evidence rather than counsel's arguments, [**44] and whether the state's case was strong." *Furman v. Wood*, 190 F.3d 1002, 1006 (9th Cir. 1999); *see also Allen v. Woodford*, 395 F.3d 979, 998 (9th Cir. 2005). Here, the state trial court did not violate due process under *Darden* because the court's instructions eliminated any "reasonable probability that [the prosecutor's statements] rendered the trial fundamentally unfair." *See Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2016).

Before closing arguments, the trial court orally instructed the jury that the defendant was presumed innocent and the prosecution had to prove each element of the charged offenses beyond a reasonable doubt. The court instructed, "You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt." The court also instructed the jury to apply the law as explained by the court's instructions and disregard any comments or arguments by counsel that conflicted with the court's instructions. Further, the court admonished the jurors that "[n]othing that the attorneys say is evidence. In their . . . 23 closing arguments, the attorneys discuss the case, but their remarks are not evidence." The written jury instructions were taken into the deliberation room.

Ultimately, by dismissing these instructions—both oral and written—as inadequate, the majority disregards that "we presume jurors follow [**45] the court's instructions absent extraordinary situations." *See Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1115 (9th Cir. 2005); *see also Allen*, 395 F.3d at 998 (explaining that although prosecutor's statement was misconduct, "given the trial court's instruction that statements by counsel were not evidence, and given the

weight of the evidence against him, the prosecutor's comments did not deprive Allen of a fair trial"); *United States v. Necoechea*, 986 F.2d 1273, 1280 (9th Cir. 1993) (holding the prosecutor's improper remarks in closing did not constitute a miscarriage of justice when the court gave a general instruction that attorneys' arguments were not evidence in the case). "[P]rosecutorial misrepresentations . . . are not to be judged as having the same force as an instruction from the court." *Boyde*, 494 U.S. at 384-85.

In concluding the prosecutor's statements were not harmless under a de novo standard of review, the majority relies in large part on the purported inconsistency between the jury's guilty conviction for murder and its divided vote on one of the firearm enhancements. *See* Majority at 23. But assessing the reason for any potential inconsistency is "pure speculation" because there is no way of knowing whether the inconsistency was "the product of lenity" for Ford. *See United States v. Powell*, 469 U.S. 57, 66, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). Nor is the result necessarily inconsistent, as the jury could have [**46] determined that Ford was involved in a predicate felony in which Martinez was murdered (as the state charged), but that Ford may not have pulled the trigger. *Ford v. Peery*, No. 2:15-cv-2463-MCE-GGH, 2017 U.S. Dist. LEXIS 18726, 2017 WL 527898, at *7 (E.D. Cal. Feb. 9, 2017), *adopted by* 2017 U.S. Dist. LEXIS 226937, 2017 WL 11490100 (E.D. Cal. Apr. 20, 2017). Regardless, a potentially inconsistent verdict provides no support for any error being harmful here, even under the majority's hypothetical de novo review.

The majority also focuses on the length of deliberations and the jury being "hopelessly deadlocked." Majority at 23. But the majority's simplistic discussion of this issue grossly overstates the deadlock. The **[*1233]** deadlock was caused by one juror. The other 11 were not deadlocked at all; they were ready to convict. One holdout juror—who eventually voted to convict—cannot bear the weight the majority would otherwise give it.

There is no reasonable likelihood the jury misunderstood the prosecutor's comments and convicted Ford without finding guilt beyond a reasonable doubt. Therefore, even if the de novo standard hypothetically applied (and no judge contends it does), the prosecutor's comments would still be harmless. I disagree that this was "a close case" under AEDPA deference. Majority at 24.

* * *

On rehearing, I concur in the judgment to affirm the district court's [**47] denial of habeas relief. Likewise, I agree that there was no separate due process violation under *Dunn v. United States*, 442 U.S. 100, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979). However, I disagree with the decision to grant the COA and much of the majority's convoluted reasoning.

Footnotes

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

1 This claim was uncertified on appeal. We now **GRANT** Ford's motion to expand the Certificate of Appealability as to that claim.

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1 In dictum, the majority posits that "even if there were a state-court decision holding that the prosecutor did not misstate the law, we would conclude that such a holding would have been unreasonable." Majority at 21. This hypothetical conclusion is dictum, not "germane to the eventual resolution of the case," *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (Kozinski, J., concurring), not "well-reasoned," *Enying Li v. Holder*, 738 F.3d 1160, 1164 n.2 (9th Cir. 2013), and therefore not binding on any future panel.

2 By repeatedly emphasizing the government's burden of proving guilt "beyond a reasonable doubt," the prosecutor simultaneously emphasized it was his burden to overcome the presumption of innocence to which Ford was entitled. This is because the government's burden to prove a defendant's guilt beyond a reasonable doubt is closely linked with the presumption of innocence. *See Cool v. United States*, 409 U.S. 100, 104, 93 S. Ct. 354, 34 L. Ed. 2d 335 (1972); *Schultz v. Tilton*, 659 F.3d 941, 943 (9th Cir. 2011).

Proof of Service by Mail

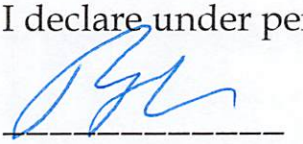
Petition for Certiorari and Appendix

I, Barry Morris, declare that I am a citizen of the United States of America, over the age of 18 years; my business address and place of business is 1407 Oakland Blvd., #200, Walnut Creek, California, 94596; and I am not a party to the within action. On the date shown below, I deposited a true copy of the above entitled document(s) in the mail in the City of Walnut Creek by placing said document(s) in a sealed envelope with postage thereon fully prepaid and addressed as follows:

Ms. Jill Thayer
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Executed on November 16, 2021, at Walnut Creek, CA

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



BARRY L. MORRIS