

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 7 2017

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

SAMUEL KWAME AMANKRAH,

Petitioner-Appellant,

v.

F. X. CHAVEZ,

Respondent-Appellee.

No. 11-57060

D.C. No.5:11-cv-00701-CAS
Central District of California,
Riverside

ORDER

Before: GOULD, CLIFTON, and HURWITZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Amankrah's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 71) are denied.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

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D.C. No. 5:11-cv-00701-CAS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Submitted April 11, 2017**

Before: GOULD, CLIFTON, and HURWITZ, Circuit Judges.

California state prisoner Samuel Kwame Amankrah appeals pro se from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction under 28 U.S.C. § 2253. We review de novo the denial of a habeas corpus petition, *see Fairbank v. Ayers*, 650 F.3d 1243, 1250 (9th Cir. 2011), and

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

we affirm.

Amankrah argues that the prosecutor made several remarks during closing argument that violated Amankrah's Fifth Amendment right not to testify under *Griffin v. California*, 380 U.S. 609, 615 (1965). The California Court of Appeal analyzed the prosecutor's entire closing argument and concluded that two of the comments were improper, but that the *Griffin* error was harmless under *Chapman v. California*, 386 U.S. 18, 24 (1967). The state court's rejection of Amankrah's claim was not contrary to, nor an unreasonable application of, either *Griffin* or *Chapman*, nor an unreasonable determination of facts based on the evidence presented. *See* 28 U.S.C. § 2254(d); *see also Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015). Moreover, given the significant evidence of his guilt at trial, Amankrah has not shown that the prosecutor's remarks had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotations omitted); *see also Davis*, 135 S. Ct. at 2198.

Amankrah's motion to present late new evidence is denied.

AFFIRMED.

FILED

UNITED STATES COURT OF APPEALS

NOV 28 2012

FOR THE NINTH CIRCUIT

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

SAMUEL KWAME AMANKRAH,

Petitioner - Appellant,

v.

F. X. CHAVEZ,

Respondent - Appellee.

No. 11-57060

D.C. No. 5:11-cv-00701-CAS-
MLG
Central District of California,
Riverside

ORDER

Before: THOMAS and BEA, Circuit Judges.

The request for a certificate of appealability is granted with respect to the following issue: whether the prosecutor's comments during closing arguments violated appellant's Fifth Amendment right not to testify under *Griffin v.*

California, 380 U.S. 609 (1965). *See* 28 U.S.C. § 2253(c)(3); *Rhoades v. Henry*, 598 F.3d 495, 510 (9th Cir. 2010); *Lincoln v. Sunn*, 807 F.2d 805, 809-10 (9th Cir. 1987); *see also* 9th Cir. R. 22-1(e).

Appellant is granted leave to proceed in forma pauperis based on the application he filed in the district court with his notice of appeal. The Clerk shall change the docket to reflect appellant's in forma pauperis status.

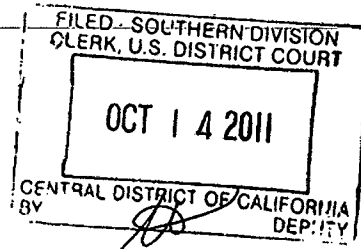
The court sua sponte appoints counsel for purposes of this appeal. The Clerk shall electronically serve this order on the appointing authority for the

Central District of California, who will locate appointed counsel. The appointing authority shall send notification of the name, address, and telephone number of appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel.

If appellant does not wish to have appointed counsel, appellant shall file a motion asking to proceed pro se within 14 days of the date of this order.

The opening brief is due February 19, 2013; the answering brief is due March 21, 2013; the optional reply brief is due within 14 days after service of the answering brief.

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



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

SAMUEL KWAME AMANKRAH,
Petitioner,
v.
F.X. CHAVEZ, Warden,
Respondent.

Case No. EDCV 11-0701-CAS (MLG)
ORDER ACCEPTING AND ADOPTING
FINDINGS AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the Petition, the records on file and the Report and Recommendations of the United States Magistrate Judge. The Court has also conducted a de novo review of those portions of the Report and Recommendations to which Petitioner has objected. The Court accepts the findings and recommendations of the Magistrate Judge.

Dated: October 13, 2011

Christina A. Snyder
Honorable Christina A. Snyder
United States District Judge

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 EASTERN DIVISION
11

12 SAMUEL KWAME AMANKRAH,)

Case No. EDCV 11-00701-CAS (MLG)

13 Petitioner,)

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

14 v.)

15 F. X. CHAVEZ, Warden,)

16 Respondent.)
17

18
19 I. Background

20 A. Procedural History

21 Petitioner Samuel Amankrah was convicted by a San Bernardino
22 County Superior Court jury of kidnap for rape (Cal. Penal Code §
23 209(b)(1)), kidnaping (Cal. Penal Code § 207(a)), forcible rape (Cal.
24 Penal Code § 261(a)(2), and forcible oral copulation (Cal. Penal Code
25 § 288a(c)(2)). The jury also found true the allegation that
26 Petitioner personally used a knife during the commission of the
27 crimes, (Cal. Penal Code §§ 12022(b)(1), 12022.3(a)), and that he
28 kidnaped the victim for the purpose of committing a sexual offense,

1 (Cal. Penal Code § 667.8(a)). (Clerk's Transcript ("CT") at 455-465.)
2 Petitioner was sentenced to a prison term of ninety years to life.
3 (CT at 720-723, 728.)

4 Petitioner appealed his conviction to the California Court of
5 Appeal. On December 10, 2009, the court of appeal affirmed
6 Petitioner's conviction in a written opinion. (Lodgment 6.) On
7 January 21, 2010, Petitioner filed a petition for review in the
8 California Supreme Court, raising the following claims: (1) his Fifth
9 Amendment rights were violated when the prosecutor impermissibly
10 commented on Petitioner's silence at trial, and (2) his due process
11 rights were violated by the trial court's failure to instruct the
12 jury on the presumption of innocence and the definition of reasonable
13 doubt. (Lodgment 7.) On February 24, 2010, the state supreme court
14 summarily denied the petition. (Lodgment 8.)

15 On June 28, 2010, Petitioner filed a petition for writ of habeas
16 corpus in the superior court, raising the following claims: (1)
17 Petitioner's Fifth Amendment rights were violated when the prosecutor
18 impermissibly commented on Petitioner's silence at trial; (2) the
19 prosecutor improperly vouched for a testifying witness; and (3) the
20 cumulative effect of the errors at trial violated Petitioner's due
21 process rights. (Lodgment 9.) The petition was denied on June 30,
22 2010. (Lodgment 10.)

23 On July 26, 2010, Petitioner filed a habeas corpus petition in
24 the California Court of Appeal, alleging the same claims he raised in
25 his habeas corpus petition in superior court. (Lodgment 11.) The
26 petition was summarily denied on August 5, 2010. (Lodgment 12.)

27 On August 26, 2010, Petitioner filed a petition for writ of
28 habeas corpus in the state supreme court, raising the same issues as

1 in his previous state habeas corpus petitions. (Lodgment 13.)
2 Petitioner filed a supplemental petition for writ of habeas corpus on
3 September 24, 2010, claiming that "the prosecutor's misstatement of
4 material facts were used to obtain Petitioner's conviction."
5 (Lodgment 14.) The state supreme court denied the petition on March
6 30, 2011, citing *In re Waltreus*, 62 Cal.2d 218, 225 (1965) and *In re*
7 *Dixon*, 41 Cal.2d 756, 759 (1953). (Lodgment 15.)

8 On May 3, 2011, Petitioner filed a petition for writ of habeas
9 corpus in this Court, raising the same claims for relief presented in
10 his direct appeals and state habeas corpus petitions. (Pet. at 5.) On
11 July 25, 2011, Respondent filed an answer. On August 18, 2011,
12 Petitioner filed a reply. The matter is now ready for decision.

13 **B. Facts**

14 The underlying facts are taken from the unpublished opinion of
15 the California Court of Appeal. *People v. Samuel Kwame Amankrah*, No.
16 E046952 (California Court of Appeal) (Lodgment 6.) In all quoted
17 sections of this Report, the term "Petitioner" is substituted for
18 "Defendant."

19 On January 21, 2005, Jane Doe, then 14 years old, was
20 waiting at a bus stop on a busy street to go to school.
21 Petitioner approached Doe and asked her what time the bus
22 would arrive. Doe said it would arrive in a few minutes.
23 Petitioner then grabbed her from behind, raised a knife to her
24 throat, and told her to be quiet. He took her around the
25 corner to his car, opened the car door, put the backseat down,
26 and placed Doe in the trunk through the backseat. Doe
27 testified that she did not hear the bus come by while she was
28 in the trunk; earlier, she had told the police that she heard

1 the bus come by. No one, including the bus driver, reported
2 anything resembling an abduction on the busy, open street that
3 morning.

4 Petitioner drove Doe to his house. After parking in his
5 driveway, he took her into the house. He dropped his knife on
6 the kitchen counter and led Doe to a bedroom. Petitioner told
7 her to be quiet, and stated that he would not hurt her. He
8 told Doe to take her clothes off; she complied because she was
9 scared. Petitioner kissed Doe on her breasts and vaginal area,
10 placing his tongue inside her vagina. Doe unsuccessfully
11 attempted to pull his head up to stop him. Petitioner then got
12 on top of Doe and attempted to insert his penis into her
13 vagina, which hurt, causing Doe to cry and say, "Stop." he
14 ignored Doe's pleas and continued to try to penetrate Doe's
15 vagina. Petitioner stopped, took Doe to another room, and put
16 Vaseline on his penis. He then took Doe back into the first
17 room and attempted to penetrate her again, causing her to cry
18 from the pain. Petitioner continued "for a long time" and then
19 stopped. He retrieved a "tub" of underwear, removed a pair,
20 and told Doe to put the underwear on. Petitioner then took
21 photographs of her wearing the underwear.

22 After being photographed, Doe began to put her clothes
23 back on. While putting her shoes on, she noticed a cut on her
24 hand. Blood from the cut dripped on her shoes and clothing.
25 However, no blood was found in Petitioner's house or on his
26 property. Because her shirt had blood on it, Petitioner put
27 the shirt in the washing machine and gave Doe one of his
28 shirts to wear. They then left the house. Petitioner told her

1 he was going to buy her a new shirt.

2 Doe sat in the front passenger seat of Petitioner's car
3 so she would remember where Petitioner lived. They drove to a
4 Walmart, which was about five to ten minutes away. The two
5 went into the store. Videotape footage showed that Petitioner
6 kept his hand on Doe's shoulder. Doe picked out a shirt, which
7 Petitioner purchased with his credit card. When he signed his
8 name for the purchase, Doe noticed that he wrote the name
9 "Samuel." While walking back to the car, she observed "4VYY"
10 on the license plate of the car, and later told the police the
11 number.

12 Later, during an inspection of the trunk, a bloodstain
13 was found on a pillow. There were other bloodstains found on
14 the interior trunk seat support and on the rear deck support.
15 Subsequent DNA analysis on the bloodstains matched Doe's DNA
16 profile. The sexual assault examination showed that
17 Petitioner's DNA was found on Doe's left breast. However,
18 there was no male DNA found in the underwear sample. The
19 physical examination showed "very recent" bruising and tears
20 to Doe's hymen consistent with blunt force penetration trauma.
21 Also, in a photographic lineup, Doe identified Petitioner as
22 the man who kidnapped and had sex with her.

23 Petitioner told law enforcement that Doe flagged him
24 down; she told him that she was 18 years old and wanted to
25 have sex. Petitioner admitted that he tried to have sex with
26 her, but stated that it never got further than rubbing his
27 penis outside her vagina. He told law enforcement there was no
28 penetration. He also stated that the reason Doe had a cut on

1 her hand was from stripping a speaker wire with a knife at his
2 house.

3 (Lodgment 6 at 1-2.)
4

5 **II. Standard of Review**

6 Under the Antiterrorism and Effective Death Penalty Act of 1996
7 ("AEDPA"), federal habeas corpus relief is available to state
8 prisoners who are in custody "in violation of the Constitution or laws
9 or treaties of the United States." 28 U.S.C. § 2254(a). To establish
10 a right to relief, a petitioner must show that the state's highest
11 court rejected the petitioner's claim on the merits, and that this
12 rejection was "contrary to, or involved an unreasonable application
13 of, clearly established Federal law, as determined by the Supreme
14 Court of the United States," or was "based on an unreasonable
15 determination of the facts in light of the evidence presented in the
16 State court proceeding." *Id.* § 2254(d); *Harrington v. Richter*, ---
17 U.S. ---, 131 S.Ct. 770, 783-84 (2011). These standards apply
18 regardless of whether the state court explained its reasons for
19 rejecting a prisoner's claim. *Richter*, 131 S.Ct. at 784 ("Where a
20 state court's decision is unaccompanied by an explanation, the habeas
21 petitioner's burden still must be met by showing there was no
22 reasonable basis for the state court to deny relief.").

23 It is not enough that a federal court conclude "in its
24 independent judgment" that the state court decision is incorrect or
25 erroneous. *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (quoting
26 *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam)). "The
27 state court's application of clearly established law must be
28 objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003);

1 see also *Renico v. Lett*, --- U.S. ---, 130 S.Ct. 1855, 1865 (2010).
2 AEDPA imposes a "highly deferential standard for evaluating
3 state-court rulings; which demands that state-court decisions be given
4 the benefit of the doubt." *Bell v. Cone*, 543 U.S. 447, 455 (2005)
5 (quoting *Woodford*, 537 U.S. at 24); *Vasquez v. Kirkland*, 572 F.3d
6 1029, 1035 (9th Cir. 2009).

7 Habeas relief is unavailable if "fairminded jurists could
8 disagree" about the correctness of the state court decision. *Richter*,
9 131 S.Ct. at 786 (quoting *Yarborough*, 541 U.S. at 664) (internal
10 quotation marks omitted). For habeas relief to be granted, "a state
11 prisoner must show that the state court's ruling on the claim being
12 presented in federal court was so lacking in justification that there
13 was an error well understood and comprehended in existing law beyond
14 any possibility for fairminded disagreement." *Richter*, 131 S.Ct. at
15 786-87.

16 The claims raised in the instant petition were presented to the
17 California Supreme Court, but that court did not issue a reasoned
18 decision on any of them. (Lodgments 8, 15.) Accordingly, this Court
19 must "look through" the unexplained California Supreme Court decision
20 to the last reasoned decision as the basis for the state supreme court
21 judgment. See *Mendez v. Knowles*, 556 F.3d 757, 767 (9th Cir. 2009)
22 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)). The
23 California Court of Appeal, in a reasoned opinion on the merits,
24 rejected Petitioner's Fifth Amendment and instructional error claims.
25 (Lodgment 6.) The superior court rejected the prosecutorial misconduct
26 and cumulative error claims. Therefore, this Court will consider the
27 reasoning of those courts in evaluating whether the state court
28 decisions are contrary to, or an unreasonable application of, clearly

1 established federal law.

2
3 **III. Discussion**

4 **A. Prosecutor's Comments on Petitioner's Silence at Trial**

5 Petitioner contends that the prosecutor's multiple comments on
6 his silence at trial violated his Fifth Amendment rights, relying on
7 *Griffin v. California*, 380 U.S. 609 (1965). (Pet. at 5.) During
8 closing argument, the prosecutor stated: "The only evidence you have
9 that tells us what happened at that house came from Jane Doe on that
10 stand ... Remember, all we can consider in this case is what was
11 presented on that witness stand. That's the evidence." Later, the
12 prosecutor said, "Now, again, why should we believe Ms. Doe in her
13 testimony because there's no evidence of anything contradicting what
14 she said. Her version on that stand is the only version we heard. It's
15 the only thing that we heard that happened in that house. And there's
16 nothing about her testimony that would make you not want to believe
17 her." (Lodgment 6 at 2.)

18 The court of appeal found that the prosecutor impermissibly
19 commented upon Petitioner's silence at trial because only Petitioner
20 could have testified about any other version of what had happened in
21 the house. However, the Court found that any error was harmless under
22 *Chapman v. California*, 386 U.S. 18, 24 (1967), because the two
23 offending comments were only fleeting, there was overwhelming evidence
24 supporting Doe's version of the events, Petitioner's version of the
25 events had been put before the jury through an investigating officer's
26 testimony about Petitioner's post-arrest statements, and because Doe's
27 testimony was corroborated in almost all other respects. (Lodgment 6
28 at 5.) The harmless error finding was a reasonable application of

1 Chapman and the error did not prejudice Petitioner.

2 Griffin errors are trial errors and are subject to harmless error
3 review. *Rice v. Wood*, 77 F.3d 1138, 1143 (9th Cir. 1996). Here, the
4 court of appeal found the error to be harmless under *Chapman*. Under
5 these circumstances, "habeas relief is appropriate only if the [state
6 court] applied harmless-error review in an 'objectively unreasonable'
7 manner." *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003) (per curiam); see
8 also *Fry v. Pliler*, 551 U.S. 112, 119 (2007) (under *Esparza*, a federal
9 court cannot award habeas relief under Section 2254 "unless the
10 harmlessness determination itself was unreasonable.") (emphasis in
11 original.) Even then, trial type errors do not give rise to habeas
12 corpus relief unless the error "had a substantial and injurious effect
13 or influence in determining the jury's verdict." *Brecht v. Abrahamson*,
14 507 U.S. 619, 637 (1993).

15 Here, the harmless error analysis was reasonable and Petitioner
16 did not suffer prejudice under *Brecht*. As noted by the court of
17 appeal, the prosecutor's two comments were brief, only one sentence
18 in length and found four pages apart in the reporter's transcript, and
19 the comments only indirectly implicated *Griffin*. (RT at 822, 826.) In
20 addition, the trial court instructed the jury with CALCRIM No. 355
21 regarding the defendant's right not to testify¹ (CT at 525) and with
22 CALCRIM No. 104 (CT at 500; Reporter's Transcript ("RT") at 228),
23 which provides that statements and arguments of counsel are not
24

25 ¹ CALCRIM No. 355 provides as follows: "A defendant has an
26 absolute constitutional right not to testify. He or she may rely on the
27 state of the evidence and argue that the People have failed to prove
28 the charges beyond a reasonable doubt. Do not consider, for any reason
at all, the fact that the defendant did not testify. Do not discuss
that fact during your deliberations or let it influence your decision
in any way."

1 evidence. Juries are presumed to follow the instructions in reaching
2 its verdicts. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

3 Furthermore, there was more than substantial evidence of
4 Petitioner's guilt. The victim's detailed testimony regarding the
5 kidnaping and rape was substantially corroborated by the physical
6 evidence. A sexual assault examination performed hours after the
7 events showed "very recent" bruising and tearing to the hymen,
8 consistent with blunt force penetration trauma. (RT at 581, 583-585.)
9 The victim had cuts on her hand consistent with a defensive injury and
10 made with a sharp instrument. (RT at 581, 586.) The victim's blood was
11 found in the trunk of Petitioner's car, consistent with her claim that
12 he put her in the trunk when driving her to his home. (RT at 692-697.)
13 Petitioner's DNA was found on the victim's breast. (RT at 697-701.)
14 The victim identified Petitioner both in a photographic lineup and in
15 court. (RT at 276-277, 413-414.) Given the substantial evidence of
16 Petitioner's guilt, the Court cannot conclude that the prosecutor's
17 fleeting improper comments had "substantial and injurious effect or
18 influence in determining the jury's verdict" as required under the
19 *Brecht* standard. Accordingly, Petitioner is not entitled to habeas
20 corpus relief on this claim.

21 **B. Witness Vouching**

22 In claim two, Petitioner contends that his Fifth, Sixth and
23 Fourteenth Amendment rights were violated when the prosecutor
24 improperly vouched for the credibility of several of its witnesses.
25 (Pet. at 5; Mem. of P & A at 13.) Petitioner raised this claim in a
26 habeas corpus petition filed in the state superior court, which denied
27 the claim, finding that "Petitioner has provided the court with no new
28 facts that would justify habeas relief." (Lodgment 9 at 18.) The

1 California Supreme Court rejected the claim on procedural grounds,
2 citing *In re Waltreus*, 62 Cal.2d 218, 225 (1965) and *In re Dixon*, 41
3 Cal.2d 755, 759 (1953).

4 Respondent contends that Petitioner's claim is procedurally
5 barred based upon an independent and adequate state law ground for
6 decision. (Ans. at 14.) Because the claim fails on the merits,
7 Respondent's procedural default argument will not be addressed. See
8 *Lambrix v. Singletary*, 520 U.S. 518, 524 (1997) (where it is easier
9 to resolve a petitioner's claims on the merits, the interests of
10 judicial economy counsel against deciding the often more complicated
11 issue of procedural default); *Walters v. Maass*, 45 F.3d 1355, 1360 n.6
12 (9th Cir. 1995).

13 Vouching occurs when the prosecution places the prestige of the
14 government behind a witness through personal assurances of the
15 witness's veracity. See *United States v. Weatherspoon*, 410 F.3d 1142,
16 1147 (9th Cir. 2005); *United States v. Necoechea*, 986 F.2d 1273, 1276
17 (9th Cir. 1993). Vouching is "especially problematic in cases where
18 the credibility of the witnesses is crucial." *Molina*, 934 F.2d at
19 1445. Nevertheless, prosecutors must have reasonable latitude to make
20 closing arguments and can argue reasonable inferences based on the
21 evidence. *Id.*

22 Petitioner first contends that the prosecutor's comments found
23 to have violated *Griffin* also constituted improper vouching for the
24 credibility of the victim. In addition, Petitioner contends that the
25 following series of comments by the prosecutor constitute improper
26 vouching:

27 During closing argument, the prosecutor was discussing the trauma
28 the victim had to endure in having the sexual assault examination. The

1 prosecutor stated that the victim had testified that she cried during
2 the examination, and also that she was emotional when she testified
3 about the examination. (RT at 822.) The prosecutor then said, "Why
4 would she put herself on that stand? Why would she go through all of
5 this if what she said did not happen? It does not make sense. In fact
6 there's no evidence in this case to suggest that she's not (sic)
7 lying." (Id.)

8 Later in closing argument, the prosecution stated:

9 What she wasn't consistent with were minor details. I
10 think she told you that she realized that she had cut her
11 finger when she was tying her shoes after the photo. But from
12 the evidence you saw, it's obvious that she had the gauze in
13 her hand before the photo.

14 So does that make her a liar? No. It doesn't make her a
15 liar. All it tells us is that she remembered them in a
16 different order. And does it really matter in the end? Does it
17 matter whether or not she realized she was cut before or after
18 she tied her shoes? Does that really matter? Does it change
19 the fact that she was cut?

20 (RT at 830.)

21 During rebuttal argument, the prosecutor stated:

22 And, you know, be careful, Mr. Amankrah's trying to make
23 everything Miss Doe says very little. I doubt Jane Doe had a
24 time - watch clock when she was going over what was happening.
25 She wasn't looking at a watch. There's no evidence of that
26 [¶] I forgot to mention on my opening argument that the
27 defendant admitted a lot of this stuff to Detective Tanner. In
28 his first interview after he was arrested, Mr. Amankrah told

1 Detective Tanner that he tried to have sex with her, but she
2 said, "Stop. It hurts me. Stop."

3 (RT at 885-887.)

4 Finally, Petitioner contends that the prosecution improperly
5 vouched for the testifying crime lab analysts:

6 Again, you see the blood evidence, presumptive blood
7 evidence on the rear passenger side of the car, not on the
8 rear driver's side of the car. Which brings me to my next
9 point and I want you to consider this. You heard there was a
10 broken seal on the back of the defendant's trunk. If the crime
11 lab really wanted to plant blood and if Heather Harlacker
12 heard from Detective Tanner that Jane Doe entered from the
13 rear side driver's door, then why wouldn't the crime lab put
14 the blood on the rear driver's door. That would be consistent
15 with what the story was. And the truth and reality is that it
16 didn't happen.

17 You heard several crime lab analysts get up there and
18 tell you that they have never tampered with evidence. If they
19 did, they'd be fired. And it just makes no sense. It makes no
20 sense and there's no reason why anyone would do it.

21 (RT at 823.)

22 After reviewing the prosecutor's various comments within the
23 context of the trial record, it is clear that these comments did not
24 constitute improper vouching. In reaching this conclusion, the
25 statements of the prosecutor must be placed in context. Petitioner's
26 defense focused on the theory that Jane Doe was lying about the
27 encounter and that her blood, which was found in his car trunk, was
28 either deliberately planted by lab technicians or deposited there

1 through negligence.

2 With respect to the comments regarding Jane Doe's testimony, the
3 prosecutor did not give personal assurances as to her veracity nor did
4 the prosecutor attempt to bolster her credibility by referring to
5 matters outside the record. Rather, viewing these comments in context,
6 it is apparent that the prosecutor was merely attempting to undermine
7 the defense claim that the victim had fabricated the allegations of
8 kidnaping and rape by pointing out to the jury that she had no reason
9 to lie and that her testimony was consistent with the physical
10 evidence.

11 With respect to the comments regarding the crime analysts'
12 testimony, the prosecutor was again simply rebutting Petitioner's
13 contention that the crime analysts had planted the blood evidence in
14 his car. When read in context, the statements did not imply that the
15 prosecutor was guaranteeing the truthfulness of the crime analysts'
16 testimony. See *United States v. Perez*, 144 F.3d 204, 210 (9th Cir.
17 1998) (prosecutor's statements were not improper vouching where the
18 prosecutor did not "imply the existence of extraneous proof").

19 Even if the prosecutor engaged in misconduct, any possible
20 prejudice was ameliorated by the trial court's instruction to the jury
21 that the attorneys' arguments were not evidence and that their
22 decision should be based only on the evidence in the case. (CT at 500;
23 RT at 228.) It is presumed the jurors followed the court's
24 instruction. *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985) (the
25 Supreme Court "presumes that jurors, conscious of the gravity of their
26 task, attend closely [to] the particular language of the trial court's
27 instructions in a criminal case and strive to understand, make sense
28 of, and follow the instructions given them"); *People v. Boyette*, 29

1 Cal.4th 381, 436 (2002) (finding no prejudice from alleged
2 prosecutorial misconduct because the trial court properly instructed
3 on the law and the jury is presumed to have followed its
4 instructions). Accordingly, Petitioner is not entitled to habeas
5 corpus relief on this claim.

6 **C. Prosecutorial Misconduct**

7 Petitioner claims that the prosecutor misstated various facts in
8 order to obtain his conviction. (Pet. at 6; Mem. of P & A at 30-31.)
9 Petitioner raised this claim for the first time in a supplemental
10 habeas corpus petition filed in the California Supreme Court.
11 (Lodgment 14.) The state court denied the petition on procedural
12 grounds. Nonetheless, the issue will be addressed on the merits.

13 Petitioner first contends that the prosecutor misstated the
14 testimony of Detective Tanner. Detective Tanner testified at trial
15 that during an interview, Petitioner told him that during one of his
16 attempts to have sex with Doe, she tried to stop him by "yell[ing] out
17 that she had hepatitis." (RT at 411.) In closing argument, the
18 prosecutor informed the jury that Petitioner admitted to Detective
19 Tanner during an interview after he was arrested that "he tried to
20 have sex with [Doe], but she said 'Stop. It hurts me. Stop.'" (RT at
21 887.) Petitioner objected, stating that the prosecutor had misstated
22 Detective Tanner's testimony. (Id.) The trial court immediately
23 instructed the jury, "Again, the jury is admonished to view argument
24 as argument, not evidence." (Id.)

25 Here, the prosecutor's characterization of what Detective Tanner
26 testified that Petitioner told him was merely a minor misstatement. It
27 cannot be said to have so infected the trial with unfairness as to
28 make the resulting conviction a denial of due process, nor one which

1 had a substantial or injurious effect upon the jury's verdict,
2 particularly given the overwhelming evidence of Petitioner's guilt.

3 Petitioner also contends that the prosecutor misstated facts when
4 he argued that several crime lab analysts testified that they never
5 tampered with evidence, when only one analyst was actually asked that
6 question. At trial, lab analyst Hazel Jane Whitworth was asked what
7 would happen if someone in her position intentionally broke the seal
8 on a car that they were not authorized to investigate. (RT at 471.)
9 Whitworth answered that the employee would be fired and that she would
10 never maliciously tamper with a seal on a car. (Id.) Crime scene
11 specialist Heather Harlacker was assigned to process Petitioner's car.
12 (RT at 484.) During her testimony, she noted that one of the seals on
13 Petitioner's car was torn. (RT at 487.) The prosecutor then asked her
14 if "anybody in [her] department ever maliciously tampered with the
15 seals." (Id.) Harlacker responded, "No." The prosecutor then asked,
16 "What would happen if somebody in your department maliciously tampered
17 with the seals?" Harlacker answered, "Result in termination." (RT at
18 488.) During closing arguments, the prosecutor stated, "You heard
19 several crime lab analysts get up there and tell you that they have
20 never tampered with evidence. If they did, they'd be fired. And it
21 just makes no sense. It makes no sense and there's no reason why
22 anyone would do it." (RT at 823.)

23 It is evident that the challenged statements were merely fair
24 comment on the evidence presented at trial. A prosecutor is given wide
25 latitude in arguing to the jury, and is entitled to argue reasonable
26 inferences from the evidence. *United States v. Birges*, 723 F.2d 666,
27 671-72 (9th Cir. 1984); *Duckett v. Godinez*, 67 F.3d 734, 742 (9th Cir.
28 1995). Here, the prosecutor accurately summarized the testimony of

1 crime analysts Whitworth and Harlacker regarding the consequences of
2 tampering with evidence.

3 However, even if the prosecutor could be said to have misstated
4 the evidence, his statements were not so egregious as to rise to the
5 level of prosecutorial misconduct. *Smith v. Phillips*, 455 U.S. at 219;
6 *Samayoa*, 15 Cal.4th at 841; see also *United States v. Parker*, 241 F.3d
7 1114, 1119-20 (9th Cir. 2001) (concluding that prosecutor's minor
8 misstatement did not require reversal where other evidence pointing to
9 guilt made misstatement not central to the case). Moreover, any
10 possible prejudice was ameliorated by the trial court's admonishment
11 that the lawyers' comments were not to be considered evidence. See
12 *Francis*, 471 U.S. at 324, n. 9. Accordingly, Petitioner is not
13 entitled to relief on this claim.

14 **D. Cumulative Error**

15 Petitioner next argues that the cumulative effect of the multiple
16 errors underlying the foregoing claims of prosecutorial misconduct
17 violated his rights to due process and a fair trial. (Pet. at 6.)

18 The combined effect of multiple trial errors may give rise to a
19 due process violation if it renders a trial fundamentally unfair, even
20 where each error considered individually would not require reversal.
21 *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers*
22 *v. Mississippi*, 410 U.S. 284, 290 n.3 (1973)). The fundamental
23 question in determining whether the combined effect of trial errors
24 violated a defendant's due process rights is whether the errors
25 rendered the criminal defense "'far less persuasive than it might
26 [otherwise] have been.'" *Parle*, 505 F.3d at 927 (quoting *Chambers*, 410
27 U.S. at 294). Cumulative error warrants habeas relief "only if the
28 error[s] had a 'substantial or injurious effect' on the verdict." *Id.*

1 (quoting *Brecht*, 507 U.S. at 637-38); *Alcala v. Woodford*, 334 F.3d
2 862, 893 (9th Cir. 2003). The cumulative effect of multiple errors is
3 considered harmless "[i]f the evidence of guilt [was] otherwise
4 overwhelming." *Parle*, 505 F.3d at 928.

5 Here, Petitioner's cumulative error claim fails. While there may
6 have been *Griffin* error, the error was harmless and cannot be deemed
7 particularly egregious given the limited nature of the statements.
8 Moreover, as discussed above, there was no other constitutional error
9 which could be deemed prejudicial because of the strong evidence of
10 Petitioner's guilt. Accordingly, Petitioner is not entitled to relief
11 on his claim of cumulative error.

12 **E. Failure to Instruct the Jury on Presumption of Innocence and**
13 **Burden of Proof**

14 Petitioner claims that his Fifth and Fourteenth Amendment rights
15 were violated by the trial court's failure to instruct the jury on the
16 presumption of innocence and to define reasonable doubt at the close
17 of trial. (Pet. at 6.) For the reasons discussed below, the decision
18 of the California Court of Appeal denying this claim was neither
19 contrary to nor an unreasonable application of federal law, nor was it
20 an unreasonable determination of the facts in light of the evidence.

21 The court of appeal provided the relevant facts:

22 At the beginning of trial and after the jury panel was
23 sworn, the court instructed on the presumption of innocence,
24 as well as defined "reasonable doubt." In this regard, the
25 jury was specifically instructed with Judicial Council of
26 California Criminal Jury Instructions, CALCRIM No. 103: "The
27 fact that a criminal charge has been filed against the
28 defendant is not evidence that the charge is true. You must

1 not be biased against the defendant just because he has been
2 arrested, charged with a crime, or brought to trial. A
3 defendant in a criminal case is presumed to be innocent. This
4 presumption requires that the People prove each element of a
5 crime and special allegation beyond a reasonable doubt.
6 Whenever I tell you the People must prove something, I mean
7 that they must prove it beyond a reasonable doubt. Proof
8 beyond a reasonable doubt is proof that leaves you with an
9 abiding conviction that the charge is true. The evidence need
10 not eliminate all possible doubt because everything in life is
11 open to some possible or imaginary doubt. [¶] In deciding
12 whether the People have proved their case beyond a reasonable
13 doubt, you must impartially compare and consider all the
14 evidence that was received throughout the trial. Unless the
15 evidence proves the defendant guilty beyond a reasonable
16 doubt, he is entitled to an acquittal and you must find him
17 "not guilty." The court further instructed the jury that:
18 "After you have heard all of the evidence and before the
19 attorneys give their final arguments, I will instruct you as
20 to the law that applies to the case."

21 Eighteen days passed between these initial instructions
22 and the beginning of jury deliberation. Following the close of
23 evidence and before closing arguments, the court instructed
24 the jury, in part, by saying: "I will now instruct you on the
25 law that applies to this case. I will give you a copy of the
26 instructions to use in the jury room." (CALCRIM No. 200.) The
27 court did not, however, instruct on the presumption of
28 innocence nor define the concept of beyond a "reasonable

1 doubt." (CALCRIM No. 220.) A written copy of CALCRIM No. 103
2 was provided to the jury; CALCRIM No. 220 was not included.²

3 In other jury instructions read and given to the jury,
4 the jury was told that a fact could be proven by either direct
5 or circumstantial evidence and the jury "must decide whether
6 a fact in issue has been proved based on all the evidence."
7 "Reasonable doubt" was mentioned repeatedly. The jury was told
8 that the People had the burden of proving beyond a reasonable
9 doubt that it was defendant who committed the crime. Within
10 the context of the corpus delicti instruction, it was informed
11 that it could not convict defendant unless the People proved
12 his guilt beyond a reasonable doubt. In regard to
13 circumstantial evidence, it was told that each fact must be
14 proved beyond a reasonable doubt. In each of four separate
15 instructions relative to the substantive crimes, the jury was
16 told of the elements of the crimes and was instructed that the
17 prosecutor must prove a lack of consent by the victim beyond
18 a reasonable doubt.

19 (Lodgment 6 at 6.)

20 The court of appeal held that "the trial court should have
21 instructed on the presumption of innocence and defined reasonable
22 doubt at the conclusion of the trial." (Lodgment 6 at 7.) However, the
23 court of appeal concluded that any error was harmless:

24 We do not believe, however, that the court's failure to
25 reinstruct violated Petitioner's due process rights; nor do we
26

27 ² CALCRIM No. 220 is identical in its verbiage to the portion of
28 CALCRIM No. 103 which was read to the jury shortly after it was
impaneled.

1 think that the failure to reinstruct was prejudicial. Here:
2 (1) after the jury was impaneled, it was specifically
3 instructed as to the presumption of innocence and the
4 definition of "reasonable doubt;" (2) the jury was told, in
5 its pre-deliberation instructions, that it could base its
6 verdict only on the evidence as established by the facts; (3)
7 the jury was instructed that the People's burden of proof in
8 numerous regards was to prove its case "beyond a reasonable
9 doubt;" (4) the jury was given, in written form, CALCRIM No.
10 130, which included the verbatim rendition of CALCRIM No. 220;
11 and (5) although this was a long trial, there is nothing in
12 the record to hint at a jury confusion relative to the
13 applicable burden of proof.

14 (Lodgment 6 at 7.)

15 The failure to instruct the jury on the presumption of innocence
16 may violate the Due Process Clause of the Fourteenth Amendment, even
17 when a proper instruction on the burden of proving guilt beyond a
18 reasonable doubt has been given. *Middleton v. McNeil*, 541 U.S. 433,
19 437 (2004); *Taylor v. Kentucky*, 436 U.S. 478, 485-86 (1978). However,
20 the Supreme Court has held that the omission of a presumption of
21 innocence instruction altogether does not in and of itself violate the
22 Constitution. *Kentucky v. Whorton*, 441 U.S. 786, 789 (1979). Rather,
23 "[s]uch a failure must be evaluated in light of the totality of the
24 circumstances - including all the instructions to the jury, the
25 arguments of counsel, whether the weight of the evidence was
26 overwhelming, and other relevant factors - to determine whether the
27 defendant received a constitutionally fair trial." *Id.* In addition,
28 the Supreme Court has held that "[t]he beyond a reasonable doubt

1 standard is a requirement of due process, but the Constitution neither
2 prohibits trial courts from defining reasonable doubt nor requires
3 them to do so as a matter of course." *Victor v. Nebraska*, 511 U.S. 1,
4 5 (1994).

5 Here, the totality of circumstances demonstrates that no
6 constitutional error occurred. The jury was accurately instructed
7 regarding the presumption of innocence and the definition of "beyond
8 a reasonable doubt" at the beginning of trial.³ (RT at 222, 226-228.)
9 The prosecutor restated its burden of proof during closing argument.
10 (RT at 836, 837, 843.) The jury was provided written instructions
11 describing the presumption of innocence and reasonable doubt for its
12 reference during deliberations. These instructions accurately informed
13 the jury that the prosecution had the burden to prove beyond a
14 reasonable doubt that Petitioner had committed a crime, and that they
15 needed to find the various elements of the substantive crimes and the
16 special allegations beyond a reasonable doubt. (CT at 521, 530-531,
17 534, 536, 537-546.) Finally, as discussed above, the evidence against
18 Petitioner was overwhelming. Thus, the sole fact that the jury was not
19 instructed on the concepts of reasonable doubt and presumption of
20 innocence at the close of evidence does not, without more, establish
21 a constitutional violation.

22 Accordingly, the decision of the California Court of Appeal
23 denying this claim was neither contrary to nor an unreasonable
24 application of federal law. Therefore, Petitioner is not entitled to
25 relief.

26
27 ³ See *United States v. Garcia-Guizar*, 160 F.3d 511, 523-24 (9th
28 Cir. 1998) (failure to instruct on presumption of innocence at close of
trial is not plain error where trial court repeatedly referred to it
during voir dire).

1 **IV. Conclusion**

2 For the reasons stated above, it is recommended that the petition
3 for writ of habeas corpus be **DENIED**.

4
5 Dated: September 6, 2011

6
7 

8
9 Marc L. Goldman
United States Magistrate Judge

**Additional material
from this filing is
available in the
Clerk's Office.**