

No. _____

In the Supreme Court of the United States

DESHAWN CAMPBELL, PETITIONER

vs.

GENA JONES, RESPONDENT

APPENDIX

- _____
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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 2 2026

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

DESHAWN LEE CAMPBELL,

Petitioner - Appellant,

v.

GENA JONES,

Appellee.

No. 23-1917

D.C. No.

5:12-cv-06089-BLF

Northern District of California,

San Jose

ORDER

Before: NGUYEN and BENNETT, Circuit Judges, and MATSUMOTO, District Judge.*

Appellant Deshawn Campbell filed a petition for rehearing en banc on March 9, 2026. Dkt. No. 47. Judge Nguyen and Judge Bennett voted to deny the petition for rehearing en banc, and Judge Matsumoto so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote to rehear the matter en banc. *See* Fed. R. App. P. 40.

The petition for rehearing en banc is **DENIED**.

* The Honorable Kiyo A. Matsumoto, United States District Judge for the Eastern District of New York, sitting by designation.

Appendix B

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 25 2026

FOR THE NINTH CIRCUIT

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

DESHAWN LEE CAMPBELL,

Petitioner - Appellant,

v.

GENA JONES,

Appellee.

No. 23-1917

D.C. No.

5:12-cv-06089-BLF

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Argued and Submitted January 9, 2026
San Francisco, California

Before: NGUYEN and BENNETT, Circuit Judges, and MATSUMOTO, District Judge.**

A California jury convicted Deshawn Campbell of the second-degree murder of Jeffrey Fontana, a San Jose police officer. Campbell unsuccessfully sought to set aside his conviction on direct appeal and in state post-conviction proceedings. He

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

** The Honorable Kiyo A. Matsumoto, United States District Judge for the Eastern District of New York, sitting by designation.

also sought federal habeas relief under 28 U.S.C. § 2254, which the district court denied.

Campbell raises three certified issues on appeal: (1) whether the prosecutor committed misconduct during closing argument by misstating the burden of proof and disparaging Campbell based on his race; (2) whether trial counsel was ineffective for failing to adequately object to the prosecutor's closing argument; and (3) whether the prosecutor allowed material false evidence concerning a witness's plea agreement to go uncorrected, in violation of *Napue v. Illinois*, 360 U.S. 264 (1959).

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), and we affirm.

1. On October 28, 2001, at 2:16 a.m., San Jose police officer Jeffrey Fontana responded to a disturbance call. Around two hours later, Officer Fontana's body was discovered lying in the street, face up, with a gunshot wound above his right eye and a pool of blood near his head. A .45-caliber shell casing was found at the scene, and a tan Hyundai was parked about fifteen feet from Officer Fontana's body. The Hyundai was registered to Campbell's father. Inside the vehicle, investigators identified Campbell's fingerprints and discovered an ATM card, bill, and receipt bearing his name. A search of Campbell's father's home revealed a .45 caliber bullet which bore distinctive ejection markings and a stamp identical to those on the casing found near Officer Fontana's body.

At the time of the shooting, Campbell had two outstanding arrest warrants and had told a friend that he was facing several years in prison. When the friend urged Campbell to turn himself in, Campbell said he “couldn’t handle that. He didn’t want to do that.”

The evidence the State presented at trial included this evidence, as well as evidence that while evading arrest, Campbell confessed to multiple people that he killed Officer Fontana.¹

At trial, Campbell testified, and admitted that he took a firearm and drove to the crime scene in his father’s Hyundai. But Campbell claimed that another man, Rodney McNary, shot Officer Fontana. In Campbell’s telling, he gave McNary the gun, and McNary shot the officer. Campbell testified that McNary then handed Campbell the gun, instructed him to get rid of it, and they both fled the scene. He also testified that before his arrest, he told several people that McNary had killed Officer Fontana.

¹ Campbell went to the home of Sebastian Cadena on the night of the shooting. Campbell asked Cadena if he had seen the news or heard anything about him. Cadena said no and invited him inside. Campbell had Cadena use a computer to look up information about the killing of a San Jose police officer. After reading an article, Campbell said, “it was me,” “it was me, who did it.” Campbell also spoke with Louella Kissoon several days after the shooting. She asked Campbell if he knew he had killed a police officer. He responded, “I know.” “I panicked and – you know, I have all these warrants and I just f***ed up.” Kissoon’s brother, Gerald, asked Campbell if he had done it. Campbell responded: “yeah, yeah.” The State played for the jury audio recordings of the police interviews of Sebastian Cadena, Louella Kissoon, and Gerald Kissoon.

The jury found Campbell guilty of: (1) the second-degree murder of Jeffrey Fontana, a peace officer engaged in the performance of his duties, with the personal use of a firearm; and (2) being a felon in possession of a firearm. The court sentenced Campbell to life without parole, consecutive to 25 years to life, consecutive to 40 months (consecutive to other sentences in unrelated felonies).

The California Court of Appeal affirmed the judgment and summarily denied Campbell's habeas and supplemental habeas petitions. The California Supreme Court denied review.

The district court denied habeas relief and declined to issue a certificate of appealability. We granted a certificate of appealability on three issues: (1) whether the prosecutor committed misconduct during closing argument by misstating the burden of proof and disparaging Campbell based on his race; (2) whether trial counsel was ineffective for failing to adequately object to the prosecutor's closing argument; and (3) whether the prosecutor allowed material false evidence concerning a witness's plea agreement to go uncorrected, in violation of *Napue v. Illinois*, 360 U.S. 264 (1959).

2. We review a district court's denial of habeas relief de novo. *See Lopez v. Thompson*, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc). Our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, a federal court may grant habeas relief on a claim that a state court resolved

on the merits only when the state court’s “decision” was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” 28 U.S.C. § 2254(d)(1), or “was based on an unreasonable determination of the facts in light of the evidence presented” in state court, *id.* § 2254(d)(2). A state court decision is contrary to Supreme Court precedent if “the state court arrives at a conclusion opposite to that reached by th[e] Court on a question of law or if the state court decides a case differently than th[e] Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from th[e] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413.

“These standards require federal courts to give the ‘benefit of the doubt’ to merits decisions issued by the courts of the sovereign States.” *Klein v. Martin*, No. 25-51, 2026 WL 189976, at *4 (U.S. Jan. 26, 2026) (per curiam) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). “So in order to obtain federal habeas relief,” the Supreme Court has emphasized, “a state prisoner must ‘show far more’ than ‘clear error.’” *Id.* (quoting *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (per curiam)). “The habeas claimant must instead establish that the state court ‘blunder[ed] so badly that every fairminded jurist would disagree’ with the

decision.” *Id.* (alteration in original) (quoting *Mays v. Hines*, 592 U.S. 385, 392 (2021) (per curiam)).

When the last state court to adjudicate a constitutional claim on the merits did not explain its denial, “the federal court should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale.” *Wilson v. Sellers*, 584 U.S. 122, 125 (2018). The federal court “should then presume that the unexplained decision adopted the same reasoning.” *Id.*

3. The state court did not unreasonably apply clearly established federal law in determining that the prosecutor committed no misconduct during closing summations at Campbell’s trial. A prosecutor’s misconduct is constitutional error only when it “so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); see also *Parker v. Matthews*, 567 U.S. 37, 45 (2012) (per curiam) (explaining that *Darden* constitutes the relevant Supreme Court precedent for a due process claim based on a prosecutor’s improper comments in closing argument).

In *Darden*, the prosecutor made “offensive comments” about the defendant during closing argument, saying that he was an “animal” that “shouldn’t be out of his cell unless he has a leash on him and a prison guard at the other end of that leash.” 477 U.S. at 180 & nn.11–12. The prosecutor also told the jury that he “wish[ed] [the

defendant] had used [a gun] on himself”; “wish[ed] someone had walked in the back door and blown [the defendant’s] head off”; and “wish[ed] that [he] could see [the defendant] sitting here with no face, blown away by a shotgun.” *Id.* at 180 n.12. The Supreme Court found that these comments “undoubtedly were improper.” *Id.* at 180. But the Court concluded that they did not deprive the defendant of a fair trial because the prosecutor “did not manipulate or misstate the evidence,” the trial court properly instructed the jury “that the arguments of counsel were not evidence,” and the “heavy” weight of the evidence against the defendant “reduced the likelihood that the jury’s decision was influenced by argument.” *Id.* at 181–82.

Campbell raised on direct appeal claims that the prosecutor violated his due process rights by misstating the burden of proof and disparaging him based on his race. The California Court of Appeal rejected both contentions. In doing so, the court correctly identified the appropriate standard.

We see no error related to the prosecutor’s recitation of the burden of proof. As the California Court of Appeal explained, “[t]he court instructed the jury that the [State] had the entire burden of establishing [Campbell]’s guilt and the prosecutor admitted that he had the burden to prove [Campbell] guilty beyond a reasonable doubt.” And the prosecutor acknowledged his burden at several points during closing argument.

Campbell focuses on the prosecutor's comments that Campbell had a "responsibility" to call certain witnesses and bring in evidence available to him. But *Darden* taught us to "place these remarks in context." *Id.* at 179. Here, the prosecutor was responding to Campbell's testimony that he told several people McNary had killed Officer Fontana. The prosecutor explained, "[t]here were many opportunities for [defense] Counsel to try and prove that [Campbell] was telling the truth. . . . He was the one who was privy and knew where these witnesses were. He was the one who knew what he told these witnesses."

These comments appropriately conveyed that, though the State had the burden of proof, the jury could nevertheless consider whether the defense had come forward with evidence to support the contentions Campbell made on the witness stand. Consequently, the prosecutor did not engage in misconduct by arguing that Campbell failed to call logical witnesses that would corroborate his claim that McNary was the shooter. *See United States v. Soulard*, 730 F.2d 1292, 1306 (9th Cir. 1984) ("A prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as it is not phrased to call attention to the defendant's own failure to testify.").

The California Court of Appeal reasonably determined that the prosecutor's comments did not misrepresent the burden of proof and thus were not improper.

Campbell also contends that the prosecutor disparaged him by appealing to

racial prejudice. During closing argument, the prosecutor asserted that Campbell's defense "consists of fear mongering. They put up a booking photograph of Rodney McNary, and they play him as the boogeyman. He's a mean-looking black man, and they're trying to intimidate you with that." "But when you look at these two men," the prosecutor continued, "[Campbell] and McNary, I suggest to you there's little difference between them." Then, discussing a letter that Campbell had written, the prosecutor described Campbell as "fairly illiterate." "[W]hen you go through the letter," the prosecutor told the jury, "you sit there and read it aloud, you laugh or you feel dismayed at . . . I don't know what they call it nowadays. Ebonics? I remember about ten years ago they were calling it that. And some of that stuff . . . is the type of stuff that people in the 'hood just write that way or speak that way." Defense counsel did not object to these remarks.

The prosecutor's race-based comments undoubtedly were improper. *See McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987) ("The Constitution prohibits racially biased prosecutorial arguments."). But to demonstrate a constitutional error, it "is not enough that the prosecutor[']s remarks were undesirable or even universally condemned." *Darden*, 477 U.S. at 181 (citation omitted). The extensive and outrageous misconduct that the Supreme Court held insufficient in *Darden* is worse than the prosecutor's comments here. *See id.* at 179–81 & nn.9–12. And we agree with the Court of Appeal that "[t]he evidence that [Campbell] was the person who

shot Officer Fontana was very strong, notwithstanding [Campbell's] testimony that he was not the shooter.” Given the strength of the evidence against Campbell and the trial court’s jury instructions,² we cannot say that the prosecutor’s remarks “so infected the trial with unfairness” as to deny Campbell due process. *Id.* at 181 (quoting *Donnelly*, 416 U.S. at 643).

We conclude that the state court’s rejection of Campbell’s claims was not contrary to, nor did it involve an unreasonable application of, Supreme Court precedent, including *Darden*.

4. The state court did not act unreasonably in denying Campbell’s ineffective assistance of counsel (“IAC”) claims. To evaluate an IAC claim, we apply the standard the Supreme Court announced in *Strickland v. Washington* and ask whether defense counsel’s performance was deficient and resulted in prejudice. *See* 466 U.S. 668, 687 (1984). The deficient performance prong requires that the defendant show that his counsel’s errors fell so far below the level of competent representation that it was as though he had no counsel at all. *See id.* On the prejudice prong, the defendant must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. When, as here, “a defendant challenges a conviction, the question is whether

² The jury was instructed that it must decide what happened based only on the evidence presented and that the attorneys’ remarks during closing arguments were not evidence.

there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Id.* at 695. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,” the Supreme Court has instructed, “that course should be followed.” *Id.* at 697.

Campbell alleges two separate errors. He contends that his trial counsel was ineffective for failing to request a curative admonition in connection with the prosecutor’s burden-shifting comments, to which he did object, and for failing to object to the prosecutor’s race-based comments. The California Court of Appeal addressed both substantive contentions on the merits of Campbell’s due process claims, finding that the prosecutor did not commit prejudicial misconduct. But the court did not directly discuss Campbell’s IAC claims or consider them under the *Strickland* framework.

Because the state court’s decision was “unaccompanied by an explanation” specifically resolving Campbell’s IAC claims, we must determine what theories “could have supported[] the state court’s decision” and then “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.” *Harrington v. Richter*, 562 U.S. 68, 98, 102 (2011). We agree with the district court that even assuming counsel’s performance was deficient, the state court could have reasonably determined that Campbell was not prejudiced by counsel’s failure to

object to the race-based comments or seek a curative instruction in connection with the burden-shifting comments.

The prosecutor's comments were not evidence, and, as noted, the jury was so instructed. *See Strickland*, 466 U.S. at 695–96 (distinguishing errors that “had a pervasive effect on the inferences to be drawn from the evidence” and “alter[ed] the entire evidentiary picture” from those that “had an isolated, trivial effect”). Here too we must also consider the weight of the evidence against Campbell. *See id.* at 696 (“[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.”). Campbell insists that this was a “close case” because of the evidence pointing to McNary's guilt. But he does not confront the substantial evidence of his own guilt. The state court had ample basis to think that any real possibility of Campbell being acquitted was eclipsed by the physical and forensic evidence, witness testimony, and his admission that he was present at the shooting and shot Officer Fontana. *See supra* n.1.

Against this backdrop, Campbell has fallen short of demonstrating that the “likelihood of a different result [was] substantial, not just conceivable.” *Harrington*, 562 U.S. at 112. Thus, it would not have been unreasonable for the state court to conclude that Campbell did not satisfy *Strickland*'s prejudice standard, especially given the California Court of Appeal's statement as to the strength of the evidence.

5. The state court could have reasonably concluded that the prosecutor did not allow materially false evidence to go uncorrected. “To establish a *Napue* violation, a defendant must show that the prosecution knowingly solicited false testimony or knowingly allowed it ‘to go uncorrected when it appear[ed].’” *Glossip v. Oklahoma*, 604 U.S. 226, 246 (2025) (alteration in original) (quoting *Napue*, 360 U.S. at 269). “If the defendant makes that showing, a new trial is warranted so long as the false testimony” was material—“that is, if it ‘in any reasonable likelihood [could] have affected the judgment of the jury.’” *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)). And “[e]vidence can be material,” the Supreme Court has explained, “even if it ‘goes only to the credibility of the witness.’” *Id.* at 248 (quoting *Napue*, 360 U.S. at 269).

Campbell’s *Napue* claim involves the testimony of Janielle Carter, McNary’s girlfriend. Carter faced criminal charges for second-degree robbery. She ultimately pleaded nolo contendere to the charge of being an accessory and, at the time she entered the plea, agreed that her sentencing would be delayed until the conclusion of Campbell’s case. The prosecutor in Campbell’s trial, Lane Liroff, also was the prosecutor assigned to Carter’s case.

At Campbell’s trial, Carter denied any knowledge that Liroff was the prosecutor on her criminal case or that her sentencing had been postponed until after

Campbell’s trial. She also denied that her cooperation as a witness could affect her sentence. Then, at the close of trial, defense counsel read the following stipulation to the jury: “Janielle Carter was convicted in 2003 to the charge of accessory, a felony. At the time she pled, it was agreed that her sentencing would be delayed until the conclusion of the prosecution against Deshawn Campbell for the murder of San Jose Officer Jeffrey Fontana. Lane Liroff is the prosecutor.”

The State concedes that the prosecutor knew Carter’s testimony was false, but it urges that the testimony was not material in light of the stipulation. No state court issued a reasoned decision addressing Campbell’s *Napue* claim. We presume the claim was adjudicated on the merits, *see Harrington*, 562 U.S. at 98–99, and find that the state court could have reasonably determined that the false testimony was immaterial.

Carter may have helped the State’s case, but her testimony was not “the only direct evidence of [Campbell]’s guilt.” *Cf. Glossip*, 604 U.S. at 248 (“Because Sneed’s testimony was the only direct evidence of Glossip’s guilt . . . , the jury’s assessment of Sneed’s credibility was necessarily determinative here.”). Nor was this a case where the jury could “convict [Campbell] only if it believed [Carter].” *See id.* Indeed, Carter did not provide any direct evidence that Campbell killed Officer Fontana. But other physical and testimonial evidence presented by the State, along with Campbell’s own admissions, tied him to the shooting. Given this other

evidence, Carter’s testimony was not so critical as to “undermine[] confidence in the verdict.” *See id.* at 250; *see also Catlin v. Broomfield*, 124 F.4th 702, 743 (9th Cir. 2024) (“[W]hen there is substantial evidence of guilt, false testimony bearing on the credibility of a single witness is less likely to be material.”). And the stipulation read to the jury appropriately and sufficiently mitigated any prejudice caused by the false testimony.

For these reasons, the state court could have reasonably concluded that there is no reasonable likelihood that Carter’s testimony affected the jury’s verdict. Thus, we conclude that the state court’s rejection of Campbell’s *Napue* claim was not contrary to, nor did it involve an unreasonable application of, Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1).

6. Campbell contends that the panel should expand the certificate of appealability. But contrary to our Circuit Rules, he did not brief any uncertified issues or otherwise justify expansion beyond directing us to his original motion. *See* Ninth Cir. R. 22-1(e). By failing to adequately develop his argument that we should expand the certificate of appealability, Campbell has forfeited it. *See Iraheta-Martinez v. Garland*, 12 F.4th 942, 959 (9th Cir. 2021) (concluding that a petitioner forfeits an argument not adequately developed in his opening brief).

Campbell’s motion to supplement the record, Dkt. No. 15, is granted.

AFFIRMED.

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DESHAWN LEE CAMPBELL,

Plaintiff,

v.

RANDY GROUNDS,

Defendant.

Case No. 12-cv-06089-BLF

**ORDER DENYING AMENDED
PETITION FOR WRIT OF HABEAS
CORPUS AND DENYING
CERTIFICATE OF APPEALABILITY**

Petitioner Deshawn Lee Campbell, a state prisoner represented by counsel, has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254, challenging his conviction and sentence imposed after a Santa Clara County jury found him guilty of second-degree murder of a peace officer, a firearms-use enhancement, and possession of a firearm as a felon. Petitioner's sentence for this conviction is life without parole, consecutive to 25 years to life, consecutive to 40 months.

Petitioner asserts a claim that his right to present his defense was violated, a claim that his Confrontation Clause rights were violated, two claims that his right to due process and a fair trial were violated, three claims of ineffective assistance of counsel, another claim that his due process rights were violated, a claim of cumulative error, and an actual innocence claim. The habeas petition has been fully briefed.

For the reasons discussed below, the amended petition for writ of habeas corpus, *see* ECF Nos. 1 ("Pet."), 163 ("Am'd Pet."), is DENIED.

I. FACTUAL BACKGROUND

The following factual summary is taken from the California Court of Appeal's opinion addressing Petitioner's direct appeal. *See People v. Campbell*, No. H034690, 2012 WL 1201647 (Cal. Ct. App. Apr. 10, 2012). The California Court of Appeal found as follows:

II. The Murder Case

II. A. The Writ Proceeding

Defendant was charged in count one of an information filed February 15, 2002, in case No. CC126494 with the first degree murder of Jeffrey Fontana (§ 187), with special circumstances making defendant eligible for the death penalty. On June 26, 2006, defendant filed a motion for a “mental retardation hearing” pursuant to *Atkins v. Virginia* (2002) 536 U.S. 304, and section 1376. The hearing was held over 55 days between February 2007 and July 2007. (*Campbell v. Superior Court* (2008) 159 Cal.App.4th 635, 640.) On August 17, 2007, the trial court issued an order finding that defendant is not mentally retarded. (*Id.* at p. 641.) Defendant filed a petition for writ of mandate and/or prohibition in this court contending that the trial court's order was an abuse of discretion. (*Id.* at p. 644.) On October 24, 2007, defendant filed a motion in the trial court to reopen the mental retardation hearing or, alternatively, for a new hearing based on newly discovered evidence. On November 1, 2007, the trial court denied the motion. Defendant filed a motion for leave to file a supplemental petition for writ of mandate and/or prohibition. (*Id.* at p. 645.) This court granted defendant leave to file the supplemental petition and issued a *Palma* notice. On January 30, 2008, this court issued a peremptory writ directing the trial court to vacate its August 17, 2007 order and its November 1, 2007 order, and to reopen the mental retardation hearing. (*Id.* at p. 653.) On December 19, 2008, following reopened proceedings, the trial court filed an order finding that defendant is mentally retarded, making defendant no longer eligible for the death penalty.

II. B. The Amended Information

On January 5, 2009, an amended information was filed charging defendant with the murder of Fontana (§ 187; count 1) and with possession of a firearm by a felon (§ 12021, subd. (a)(1); count 2). As to count 1, the information further alleged that Fontana was a peace officer engaged in the performance of his duties (§ 190.2, subd. (a)(7)), that defendant committed the offense for the purpose of avoiding a lawful arrest (§ 190.2, subd. (a)(5)), and that defendant personally and intentionally discharged a firearm during the commission of the offense (§§ 12022.53, subd. (d), 12022.5, subd. (a)). The information also alleged that defendant had a prior strike (§§ 667, subds.(b) –(i), 1170.12), and that his release on bail had been revoked at the time of the offenses (§ 12022.1). During jury voir dire, defendant stipulated that he had suffered a felony conviction prior to October 28, 2001.

II. C. In Limine Motions

II. C. 1. Expert Testimony on Mental Retardation

Prior to trial, defense counsel “concede[d]” to the People's “request to exclude ... the expert testimony involving mental retardation with the People's agreement that [they] will not be seeking ... jury instructions on a first-degree murder [theory].” Defense counsel

1 stated that “the concession, then, at this time is just we're not
2 presenting diminished actuality and, of course, that expert testimony
3 that would support that.” “This would only be really subject to an
4 issue that I could see coming up, hypothetically, if the defendant ...
5 chose to testify and if, based on that testimony, hypothetically, the
6 Court saw that there was enough evidence to instruct the jury on
7 voluntary manslaughter for some theory that would be presented
8 through his testimony. Then I could see us needing to revisit this
9 issue.”

10 II. C. 2. Uncharged Offense Evidence

11 Prior to trial, the prosecutor sought leave to introduce under Evidence
12 Code section 1101, evidence of three incidents involving prior
13 uncharged offenses by defendant, in addition to evidence that
14 defendant had outstanding bench warrants at the time of Officer
15 Fontana's shooting. The parties characterize the three uncharged
16 offense incidents at issue as the moped incident, the Kepler incident,
17 and the Good Guys incident. Defendant contended that the evidence
18 of the three incidents was inadmissible under Evidence Code sections
19 1101 and 352. The trial court ruled that all the proffered evidence was
20 admissible. The jury subsequently heard the following testimony.

21 Officer Vince Alvarez testified that on October 1, 2000, he stopped
22 defendant for riding a minibike without a helmet in violation
23 of Vehicle Code section 27803, subdivision (b). Defendant did not
24 stop right away and the officer had to force him to the side of the road.
25 During a subsequent pat-search of defendant for weapons, the officer
26 felt a large lump in defendant's left pants pocket. Defendant gave the
27 officer permission to reach inside the pocket. When the officer did so,
28 he felt a hard plastic card and some plastic bags. As the officer pulled
the items out of defendant's pocket, defendant pushed his body onto
the officer and attempted to grab the items out of the officer's hand.
When the officer pushed defendant away, defendant took off running.
The officer realized that he had defendant's ID, some cash, and five
baggies of what appeared to be marijuana. The officer chased
defendant for a short distance, but then reported the incident to
communications. He learned that defendant was on probation for
fraud and burglary. Defendant's father later phoned the police to say
that defendant would turn himself in. The officer went to defendant's
residence and arrested him for possession of marijuana for sale and
resisting arrest.

Gerald Kepler, a now-retired San Jose police officer, testified that late
on the night of September 9, 2001, when he was off-duty, his neighbor
woke him and informed him that some men were trying to get into a
pickup truck parked in Kepler's driveway. Kepler went outside in his
robe and approached two young men walking down the street who he
did not know, one of whom was defendant. The two men were already
in a confrontation with Kepler's neighbors. Kepler asked the men if
he could speak to them. Their conversation lasted “off and on” for
about three or four minutes, during which time defendant became
agitated and aggressive. He appeared to be under the influence and
Kepler could smell alcohol on his breath. Kepler decided to place
defendant under arrest for creating a disturbance, being drunk in
public, “and to avoid a fight between him and one of my neighbors.”

Kepler tried to take defendant's left arm and place him in a control hold. Defendant kicked Kepler's right leg out from under him. As Kepler fell to the ground, he grabbed defendant's jacket. Defendant spun away and struck Kepler on the back of the head with a flashlight. Defendant and the other man with him ran away. Kepler had to go to the emergency room and to have three stitches in the back of his head. His pickup truck had not been damaged. Over a month later, Kepler saw police flyers regarding Officer Fontana's shooting, and he realized for the first time that the person in the flyers, defendant, was the person who had hit him with the flashlight.

Sergeant Neal Wilson testified that around 9:00 p.m. on June 22, 2001, he responded to a Good Guys store following the report of somebody trying to use a stolen credit card. When he arrived, he saw defendant walking around inside the store. He waited for another officer, Sergeant Paul Spagnoli, to arrive, and then the two of them entered the store. People inside the store pointed to defendant, who started walking away from the officers. Wilson told defendant that he needed to talk to him. Defendant asked the officers why they were "hassling" him, and refused Wilson's request to pat search him for weapons. When Spagnoli reached towards defendant, defendant ran. Wilson ran to the store's open front door. Defendant stopped about five feet in front of Wilson, then bent over slightly and ran into him "[s]quare on." The force caused both of them to fall down outside the store. Defendant screamed, kicked, and swung his arms. Wilson was hit a few times, but he managed to hold on to defendant. Defendant got to his feet but Spagnoli could not gain control of him, so Wilson forced defendant back down on the ground. Spagnoli went down with defendant and hit his head on the pavement. A third officer was finally able to handcuff defendant and bring him to his feet, but defendant continued to struggle. Other officers arrived and put defendant in a patrol car with the help of a leg-wrap restraint. As a result of the incident, Wilson sustained injuries to both his knees and to his left elbow, his glasses broke, and he lost three days of work.

Lieutenant Paul Spagnoli testified that on the evening of June 22, 2001, Sergeant Wilson was already at the Good Guys store when he arrived there. They went inside the store together. Some employees pointed to defendant, so the officers approached him. Wilson told defendant that they wanted to talk to him and to do a pat search. Defendant ran, and Spagnoli chased him. Defendant ran right towards Wilson, who was blocking the store's front door. Wilson grabbed defendant, and they both went to the ground. Defendant violently struggled while the officers tried to take him into custody. When defendant stood up, Wilson forced him back down on the ground, which also caused Spagnoli to fall backwards and hit his head on the ground. Spagnoli felt tugging near his belt in the area of his gun holster at the same time that Wilson pulled defendant away. A third officer came to their assistance, and they were able to handcuff defendant. Defendant continued to kick, so a wrap restraint was placed around his legs when he was placed in the patrol car. Spagnoli was out of work the next day due to a slight headache as a result of the incident.

II. D. The Outstanding Bench Warrant Evidence

Evidence was also presented to the jury that, on July 9, 2001, defendant failed to appear in criminal court on forgery and theft charges, his bail was revoked, and a bench warrant issued. On July 26, 2001, the court issued a warrant for defendant's arrest in a separate burglary case. Defendant told a friend that he was facing three to five years in prison on his outstanding warrants. When the friend urged defendant to turn himself in, defendant said he "couldn't handle that. He didn't want to do that."

II. E. The Prosecution's Trial Evidence Regarding the Murder

On the night of October 27, 2001, defendant attended a large party at a house on Rotterdam Lane with several friends. Defendant and Rashaan Yarber were driven to the party by Rodney McNary in a black Mustang owned by McNary's girlfriend Janielle Carter. During the party, defendant and many others were involved in a fight in the backyard of the house. Ryan Palenske was in the street outside the house, leaning into Robert Cunningham's car and talking to Cunningham, when people from the party spilled out into the street. McNary, defendant, and Yarber got into the Mustang. McNary drove away, hitting Cunningham's car and Palenske with the Mustang as he was leaving. People threw rocks and bottles at the Mustang, and gunshots were fired. Cunningham followed the Mustang and Cunningham's passenger was able to write down its license plate number.

Cunningham saw the Mustang turn onto Porto Alegre before he ended his chase of it and headed home. The Mustang stopped near the Calle Almaden cul-de-sac off of Porto Alegre and defendant, McNary, and Yarber fled. Yarber and defendant ran to Tyree Washington's apartment on Coleman Road near Almaden Expressway. McNary ran in a different direction.

Yarber and defendant arrived at Washington's apartment out of breath. Defendant told people there that some people at the party had jumped him and hit him, so he ran. Defendant said that he was going to go back to the party with a gun and retaliate. Deon Watts drove defendant home around 3:30 or 4:00 a.m.

Carter, McNary's girlfriend, received calls from defendant, Washington, and Watts in the early morning hours of October 28, 2001. All of them were looking for McNary. Defendant told Carter that her Mustang had been damaged and that he was going to go back to the Mustang to "pop the ignition" so that it would appear to have been stolen.

Officers Mario Recinos and Jeffrey Fontana responded with other officers to a disturbance call on Rotterdam Lane around 2:16 a.m. on October 28, 2001. They cleared the call at 4:15 a.m. and went separate ways. Fontana sent a text message to Recinos stating that he was going to continue cruising the area. Several people who lived on Calle Almaden at the time testified that they heard a gunshot and the footsteps of one person run up the street. When they saw an officer lying in the street, they called 911. Recinos received the dispatch report that an officer was down on Calle Almaden and he was the first officer to arrive at the location at approximately 4:39 a.m. Fontana's

1 patrol car was parked at the end of the cul-de-sac with its door open,
2 its engine running, its front red and blue lights on, its rear amber light
3 flashing, and its spotlight on. Fontana was lying in the street, face up,
4 about 15 feet from a tan Hyundai that was parked in a driveway in
5 front of Fontana's patrol car. Fontana's feet were pointed towards the
6 Hyundai, there was a pool of blood near his head, and his duty weapon
7 holster was buttoned. His flashlight was in the gutter. He had a
8 gunshot wound above his right eye and gunpowder stippling on his
9 face indicating that he had been shot from close range. A .45-caliber
10 shell casing was found at the scene. The doors of the Hyundai were
11 closed, and the patrol car's spotlight was directed just to the left of the
12 Hyundai, as if it were directed on somebody standing outside the
13 driver's door. Recinos attempted to find Fontana's pulse, but there was
14 no pulse.

15 The keys to the Hyundai were in the ignition and the hood was warm
16 but the engine was off. All doors other than the driver's door were
17 locked, the driver's window was about halfway down, and there were
18 clothing items on the front and rear passenger seats. The car was
19 registered to defendant's father, Robert Campbell. An ATM card
20 bearing defendant's name was found under the driver's seat and a bill
21 and receipt in defendant's name were found in the glove box. One of
22 the residents of Calle Almaden told an officer that he had seen the
23 Hyundai about one month before, stopped at a light at the intersection
24 of Almaden Expressway and Blossom Hill Road. At that time, he had
25 seen "something happening" that caused him to write down the car's
26 license plate number and report it to the police. Defendant was sitting
27 in the right rear passenger seat of the Hyundai during this previous
28 incident.

Officers swabbed the steering wheel of the Hyundai with a gauze pad
and exposed the gauze pad to a trained bloodhound. The dog followed
the scent to a hillside pasture near Coleman Road and Almaden
Expressway where there was a herd of llamas, and then lost the scent.

A black Mustang was located parked on Via Almaden, which is a
short cul-de-sac opposite Calle Almaden. The parties stipulated that
the distance from the Hyundai to the Mustang was 175 yards. The
Mustang had side body damage, as if it had been involved in a
collision. The parties stipulated that "the Hyundai ... was analyzed,
and fingerprints were lifted from it. And those fingerprints came back
to Deshawn Campbell. There [were] no prints coming back to Rodney
McNary. [¶] As to the Mustang, there were fingerprints on there that
came back to Rodney McNary. Further, there was a DNA that was
associated with a cigarette or cigar, and the DNA came back to
Rodney McNary. There were no prints of Deshawn Campbell in the
Mustang." No gunshot residue was found inside the Hyundai,
indicating that a gun was not fired from inside the car. When the
Hyundai was inspected in December 2001, it had a small crack in its
windshield, one bulb in a rear taillight was burned out, and its two
front tires were worn down to their steel belts. In addition, the car
emitted grayish-white smoke from its exhaust pipe while being
driven. Each of these things constituted a Vehicle Code violation
which could cause an officer to stop the car.

Defendant went to Washington's apartment a second time on the

1 morning of October 28, 2001. This second time, he was out of breath,
2 and he asked to use the phone. Washington asked defendant what was
3 going on and defendant said, "it's nasty, it's real ugly." Washington
4 gave defendant a phone and defendant made three or four calls. In one
5 conversation, which Washington thought was with defendant's father,
6 defendant said something like, "clean up the house." A call was made
7 from Washington's phone to defendant's father at 4:36 a.m., and
8 another call was placed from Washington's phone to defendant's
9 brother's girlfriend at 4:38 a.m. Defendant also called Marcell Quincy
10 Gilbert at 4:46 a.m., and gave him directions to Washington's
11 apartment. When Gilbert arrived at Washington's apartment to give
12 defendant a ride, he asked defendant, "What's going on?" Defendant
13 replied, "It's all bad." Defendant climbed into the open bed of
14 Gilbert's pickup truck and lay down. Gilbert took defendant to
15 Gilbert's home, gave defendant his cell phone, and went to bed.
16 Defendant left later that day.

17 Around 4:45 a.m. on October 28, 2001, San Jose Police Officer John
18 Barg was assigned to aid in preventing all traffic from entering the
19 neighborhood where Officer Fontana had been shot. Barg was
20 stationed at the intersection of Almaden and McAbee, and all he knew
21 was that there was an officer "down." He did not know about the
22 Rotterdam Lane party. Around 5:30 a.m., a man who identified
23 himself as Rodney McNary approached Barg on a bicycle. McNary
24 was sweating and appeared nervous. Barg detained him and searched
25 him. McNary was released after Barg notified his supervisor, the
26 supervisor spoke to McNary, and Barg filled out a field identification
27 card.

28 Several officers went to defendant's father's home beginning around
5:55 a.m. on October 28, 2001. After contacting defendant's father
about one-half hour later, and asking him about his cars, defendant's
father said that he had recently sold his Hyundai to an individual
walking down the street. He could not give any other information
about the sale, however. The home was searched later that day. One
of the keys from the key ring in the Hyundai's ignition fit the lock to
a bedroom in which indicia of defendant's residency was found. A
forensic expert determined that a .45-caliber bullet found in
defendant's father's bedroom had been ejected but not fired from a
gun, and that distinctive ejection markings and a stamp on that bullet
were identical to markings on the .45-caliber casing found near
Officer Fontana's body. Defendant's father later admitted that he had
lied to the officers about selling the Hyundai.

Around 4:30 p.m. on October 28, 2001, officers found McNary at an
address on Gettysburg. McNary told Officer Rob Imobersteg that he
had gone to the Rotterdam Lane party with Campbell, that they fled
the party in a vehicle after a fight broke out, and that they later
abandoned the vehicle. He also said that he hid in a creek and that he
was later stopped by the officer on Almaden. He agreed to an
interview at the police station. During that interview, McNary denied
having been involved in the shooting of Officer Fontana. McNary was
interviewed by the police again a couple years later. During that
interview, McNary "emphatically denied" that he had shot Officer
Fontana.

When interviewed by officers on October 28, 2001, Carter initially lied about the location of her Mustang; she said that it had been stolen. When officers allowed McNary and Carter to talk with each other in an interview room at the police station, McNary told Carter that the police were “trying to put the shooting on him.” He told her to tell the officers the truth. Carter then told the police that McNary had borrowed her Mustang the night before.

At approximately 5:03 p.m. on October 28, 2001, an officer interviewed Rueben Martinez, a neighbor of the Campbell family. Martinez was sober and cooperative. He told the officer that he had seen defendant drive a tan Hyundai, but he had never seen defendant with a gun. He had heard defendant's father yelling at defendant about one month earlier, telling defendant that he wanted his gun back. Martinez had “negative things to say about activity involving the Campbells at the Campbell residence,” and he described defendant as a “hothead.”

Defendant went to the homes of several of his friends asking for help after Officer Fontana's death. Defendant seemed afraid or worried when he arrived at Kira McCuien's home with another man McCuien did not know on October 28, 2001. Defendant asked McCuien and Janee Gilmore for a ride somewhere. Gilmore could not give defendant a ride and McCuien declined to do so because she had seen defendant's picture “all over the news.” Gilmore testified that a month or two after Officer Fontana's death, McNary confessed to her that he did the shooting. However, she did not want to tell anybody about the confession, or testify about it, because McNary threatened her and people she cares about, and she was afraid of him and his “people.” She was testifying about the confession only because, if she did not do so, “you guys would put me in jail.”

Defendant was driven to Sebastian Cadena's home around 9:30 or 10:00 p.m. on October 28, 2001. Defendant asked Cadena if he had heard anything about him. Cadena said no, and invited defendant inside. Defendant asked Cadena if he could stay the night, but Cadena told him no. Defendant had Cadena look up on a computer information about the killing of a San Jose police officer. After reading the article, defendant said, “it was me,” “it was me, who did it.” Defendant started crying and asked Cadena to hide him. When Cadena said he could not do so, defendant gave him some phone numbers to call. Cadena called two of the numbers. Defendant soon left with the unknown person who had brought him.

Defendant went to Priscilla Smith's house on October 31, 2001, and stayed there a few days. Defendant told her that he had got into some trouble at a party, some guys were chasing him, and that is when he got pulled over. Although Smith knew that Campbell was wanted for questioning in the shooting of a police officer, she did not turn defendant in because she was afraid she would get into trouble. She asked defendant what he was going to do and he said, “I don't know.”

Smith argued with her boyfriend Clarence Sheppard about defendant being at her home, but she told Sheppard that defendant could stay. Sheppard talked to defendant, and defendant said, “I know, I know I messed up.” Sheppard asked defendant, “what the hell were you

1 thinking?" Defendant shook his head, "[l]ike he doesn't know."
2 Sheppard told defendant that he had to leave. Defendant gave
3 Sheppard a letter to give to his parents, but Sheppard did not give the
4 letter to them. He eventually gave the letter to the police.

5 Louella Kissoon and her brother Gerald Kissoon talked with
6 defendant at Smith's home a few days after Officer Fontana's death.
7 Defendant asked Louella if she had heard what happened. She asked
8 defendant if he knew he had made a mistake. Defendant responded,
9 "I know," "I fucked up." Louella asked defendant if he knew he had
10 killed a police officer. He responded, "I know." She asked defendant
11 why he shot the officer and he said, "I panicked and—you know, I
12 have all these warrants and I just fucked up." Louella told defendant
13 that he could not hide forever, and he responded, "I know, I know."
14 When Gerald first saw defendant at Smith's house, he got scared.
15 Gerald asked defendant, "did you do it?" Defendant responded,
16 "yeah, yeah." Defendant asked Gerald to help him. Defendant had a
17 .45-caliber gun that Gerald took and then dismantled and destroyed
18 at his parent's home. Smith and Luella drove defendant to another
19 person's house; defendant spent the drive in the trunk of the car.

20 Defendant was arrested on November 7, 2001. Defendant had a
21 telephone conversation from jail with one of his brothers on
22 November 15, 2001. In that conversation, defendant's brother told
23 defendant that he was with McNary, who was "hiding out," and that
24 he had asked McNary "why you hiding out ... trying to skip town? If
25 you didn't do nothing, if you had nothing to do with this?" Defendant
26 responded to his brother's statement by saying, "Because. He ran
27 someone over at that party, that, that [he] is scared of. And he hit a
28 car." Defendant's brother responded, "Still though ... I think he's
trying to keep hisself out of this and everybody else take their cases
and their charges and his rap, no. Fuck that."

II. F. The Defense Evidence Regarding the Murder

1 Lacey Orteza had known defendant and his family for about 16 years
2 by the time of defendant's trial. She had also known Carter for a
3 number of years, and knew McNary through Carter. A day or two
4 after an officer was killed in October 2001, McNary came to her
5 house. Orteza left the room, but she heard her now deceased husband
6 and McNary talking. McNary said, "9-1-1 was shot. 187. 9-1-1. I
7 didn't mean to do it." McNary sounded scared. He asked if he could
8 stay there until "everything blows over." Orteza's husband then left
9 with McNary. Within a week, Orteza and her husband moved because
10 she was afraid that McNary "was going to come and get us." She also
11 believed that she was in danger for testifying.

12 David Jackson, who admitted that he had two 2008 felony convictions
13 and who was in custody at the time of his testimony, testified that he
14 grew up with defendant. In late October or early November 2001,
15 Jackson was talking with McNary outside a restaurant while Carter
16 was sitting in a minivan nearby with two other men. McNary brought
17 up the subject of the shooting of a police officer. McNary twice said
18 that defendant did not do it. McNary then robbed Jackson; he pulled
19 out a gun, placed it next to Jackson's rib cage, and told Jackson to give
20 him everything he had. The two men in the minivan jumped out of it

1 and also pulled guns on Jackson. Jackson gave McNary a couple
2 hundred dollars, some gold jewelry, his driver's license, his red shirt,
3 and his red shoes. After McNary left, Jackson reported the robbery to
4 the police, but he did not say that the robber was McNary, because
5 McNary had his driver's license and therefore knew where he and his
6 family lived.

7 Defendant testified in his own defense. He testified that he was 30
8 years old and that he had one child, a daughter named Tavia. He
9 admitted having a 1999 conviction for residential burglary, and 2002
10 convictions for battery on a peace officer causing injury, three counts
11 of resisting a police officer, using and attempting to use a counterfeit
12 access card, possessing a forged license, second-degree robbery, and
13 petty theft with a prior. He further testified that it was McNary who
14 shot Officer Fontana, not he.

15 Defendant testified that when he told Carter over the phone on the
16 morning of the shooting that her car had been damaged, she became
17 upset. She asked defendant to meet McNary at the Mustang.
18 Defendant grabbed a gun from his father's closet for protection and
19 left in his father's car. When he found the Mustang, he drove down
20 the opposite street and parked in somebody's driveway. McNary ran
21 up to his car and they started talking. When another car approached
22 and parked behind defendant's car, McNary thought it was somebody
23 from the party, so he asked for defendant's gun. Defendant gave the
24 gun to McNary. The car's blue and red lights turned on, and an officer
25 got out of the car and approached them. The officer asked them their
26 names and what they were doing. McNary shot the officer. Defendant
27 panicked and got out of the car. McNary gave him back the gun and
28 told him to get rid of it, and then they both ran.

Defendant ran to Washington's apartment, where he called his father,
brothers, and Gilbert. Gilbert picked defendant up and took him to
Gilbert's house. Defendant did not tell anybody what had happened.
Defendant's cousin Sharon Baker picked him up later and took him to
his brother's home in East Palo Alto. Baker told defendant that she
saw the police at his house and she asked him why. He told her that
an officer had been shot and that somebody he knows did it.
Defendant told his brother that McNary had shot the officer. Baker
took defendant to a friend's house in San Jose. Another friend, "E.,"
took defendant to McCuien's house, and then to defendant's friend
Kamal's house. Kamal took defendant to Cadena's house. Defendant
did not tell any of these people who shot the officer.

Later, defendant went to and stayed at Priscilla Smith's home for a
number of days. There, he heard news reports stating that the police
were looking for him. He did not turn himself in because he did not
want to be labeled as a "snitch." He was also afraid that people
associated with McNary would hurt his family. He gave the gun to
Gerald Kissoon to destroy because he was afraid that if he had it on
him when he was arrested, and officers saw it, they might shoot him.
When he left Smith's home, he went to another friend's home. He told
his friend that he did not shoot the officer. He stayed in a shed there
until the police arrested him. After his arrest, when he talked to his
brother on the telephone, he did not say that McNary had killed the
officer because he knew that the conversation was being recorded and

he did not want to “put it out there.”

Dr. Stephen Greenspan, a psychologist, testified as an expert in the field of mental retardation. In the United States, the criteria for mental retardation are significant deficits in intellectual functioning, associated deficits in adaptive functioning or adaptive behavior, and onset before the age of 18. After reviewing the reports of other experts, various records made available to him, and his own interview and evaluation of defendant, Dr. Greenspan concluded that defendant qualifies for a diagnosis of mild mental retardation. He estimates that defendant has a mental age of between 10 and 12 years old, and an academic level of between the fifth and the seventh grade. Poor social judgment is one of the defining characteristics of people with mild mental retardation as is gullibility, or the lack of awareness of when they are being swindled or taken advantage of. A person with mental retardation can also have an antisocial personality disorder, but it is more likely that defendant has an anxiety disorder rather than an antisocial personality disorder.

Mark Harrison, a licensed private investigator, testified as an expert on African–American criminal street gangs. In Harrison's opinion, based on photographs, contents of a notebook seized from Carter's residence, McNary's tattoos, and his “central file,” McNary is an active member of the Seven Trees Crip criminal street gang. The primary activities of the Seven Trees Crip gang are street-level distribution of controlled substances, shootings, robberies, homicides, and witness intimidation. Given the nature of the gang, it would be dangerous for a person to tell police information about the involvement of a member of the gang in a serious crime, and there would be “severe consequences” if a person testified in court about a gang member's involvement in the killing of a police officer.

II. G. Verdict and Sentencing

On May 27, 2009, the jury found defendant guilty of the second-degree murder of Jeffrey Fontana, a peace officer engaged in the performance of his duties, with the personal use of a firearm (§§ 187, 12022.5, 12022.53; count 1), and of being a felon in possession of a firearm (§ 12021, subd. (a)(1); count 2). The jury further found true allegations that at the time of the offenses, defendant's release on bail had been revoked (§ 12022.1), and that he had a prior strike (§§ 667, subds.(b) – (i), 1170.12).

On August 7, 2009, the court sentenced defendant to life without parole on count 1, consecutive to 25 years to life for the section 12022.53 enhancement, consecutive to three years four months (one year four months on count 2 and two years for the on-bail enhancement), consecutive to the five-year-four-month term imposed in unrelated case No. CC114103 and the 16–month term imposed in the burglary case, case No. CC946256. No custody credits were awarded.

People v. Campbell, 2012 WL 1201647, at *2-9 (footnotes omitted).

II. PROCEDURAL BACKGROUND

A. Direct Review

The California Court of Appeal affirmed the judgment on appeal in an unpublished decision issued on April 10, 2012. *See People v. Campbell*, 2012 WL 1201647; Ans., Ex. M.

The California Supreme Court denied review on July 11, 2012. *See Ans., Ex. N.*

B. State Habeas Proceedings

In October 2011, Petitioner filed a state habeas petition in the Sixth Appellate District of the California Court of Appeal. *See Pet., Ex. 4* (petition); Ans., Ex. O (habeas docket sheet). In January 2012, Petitioner filed a supplemental habeas petition. *See Pet., Ex. 7* (supplemental petition); Ans., Ex. O (habeas docket sheet). On April 10, 2022, the Court of Appeal denied the petition and supplemental petition. *See Ans., Ex. O.* Petitioner filed a petition for review with the California Supreme Court. *See Pet., Ex. 9.* The petition was summarily denied. *See Ans., Exs. O, P.*

C. Federal Habeas Proceedings

Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California on November 30, 2012. *See Pet.* District Judge William Alsup appointed counsel. ECF No. 6. Respondent filed an Answer on July 15, 2013. ECF No. 11 (“Ans.”). Petitioner filed a Traverse on September 30, 2013. ECF No. 14 (“Trav.”). Petitioner filed a request for an evidentiary hearing and a request for an oral argument, *see* ECF Nos. 15, 16, which were denied, *see* ECF No. 24. On April 17, 2014, the case was reassigned to the undersigned. On June 5, 2015, the Court granted Petitioner’s motion for leave to conduct discovery. ECF Nos. 32, 48. The parties then litigated the scope of discovery before the Court.

On June 19, 2017, the Court issued an Order approving the parties’ stipulation to grant Petitioner “leave to amend his pending § 2254 petition to add a supplemental claim alleging his actual innocence.” ECF No. 161. On July 7, 2017, Petitioner filed an Amended Petition. *See* ECF Nos. 162, 163 (“Am’d Pet.”). The Court administratively closed the case. ECF No. 164.

D. Further State Habeas Proceedings

Petitioner filed an “actual-innocence habeas petition” in Santa Clara County Superior

1 Court. ECF No. 204-4 (“New Cl. Exs.”), Ex. 6. The Superior Court denied Petitioner’s writ of
 2 habeas corpus in a reasoned decision on August 31, 2020. *Id.*, Ex. 7. Petitioner then filed a
 3 petition for writ of habeas corpus in the California Supreme Court. *Id.*, Ex. 8. The California
 4 Supreme Court summarily denied the petition on May 11, 2022. *Id.*, Ex. 9.

5 **E. Further Federal Habeas Proceedings**

6 On May 20, 2022, Petitioner filed an unopposed motion to lift the stay, *see* ECF No. 199,
 7 which the Court granted the same day, *see* ECF No. 201. On July 22, 2022, Petitioner filed a
 8 supplemental brief with supplemental authorities relating to the nine claims in his initial Petition.
 9 ECF No. 203 (“Pet. Supp. Br.”). He also filed a brief and exhibits in support of his new actual
 10 innocence claim (“Claim No. 10”). ECF Nos. 204-3, 204-5 (“New Cl. Br.”). On August 26,
 11 2022, Respondent filed a supplemental brief with supplemental authorities in opposition to the
 12 Petition. ECF No. 205 (“Resp. Supp. Br.”). Respondent also filed a brief in opposition of
 13 Petitioner’s new Claim No. 10. ECF Nos. 206-3, 206-4 (“New Cl. Opp.”). On September 9,
 14 2022, Petitioner filed a reply addressing supplemental authorities. ECF No. 209 (“Supp. Br.
 15 Reply”). Petitioner also filed a reply brief in support of his new Claim No. 10. ECF No. 208
 16 (“New Cl. Reply”).

17 **III. LEGAL STANDARD**

18 Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a federal
 19 court cannot grant relief on any habeas claim that was “adjudicated on the merits” by a state court
 20 unless that adjudication: “(1) resulted in a decision that was contrary to, or involved an
 21 unreasonable application of, clearly established Federal law, as determined by the Supreme Court
 22 of the United States; or (2) resulted in a decision that was based on an unreasonable determination
 23 of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).
 24 In determining whether the requirements of § 2254(d) are met, a district court is limited to the
 25 state court record. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (“[R]eview under § 2254(d)(1)
 26 is limited to the record that was before the state court that adjudicated the claim on the merits.”);
 27 *Gulbrandson v. Ryan*, 738 F.3d 976, 993 & n.6 (9th Cir. 2013) (clarifying that *Pinholster*’s
 28 “evidentiary limitation is applicable to § 2254(d)(2) claims as well”).

The “contrary to” and “unreasonable application” clauses of § 2254(d)(1) have separate and distinct meanings. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000). A state court decision is “contrary to” Supreme Court authority and thus falls under the first clause of § 2254(d)(1), only “if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Id.* at 412-13. A state court decision is an “unreasonable application of” Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court’s decisions but “unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. While circuit law may be “persuasive authority” for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, only the Supreme Court’s holdings are binding on the state courts and only those holdings need be reasonably applied. *See Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003), *overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003).

When the last state court to adjudicate a federal constitutional claim on the merits did not provide an explanation for the denial, “the federal court should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale.” *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). “It should then presume that the unexplained decision adopted the same reasoning.” *Id.* However, that presumption may be rebutted upon a “showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court’s decision.” *Id.*

If there is no lower court decision to look to, it is presumed that an unexplained denial is on the merits absent any indication to the contrary. *See Harrington v. Richter*, 562 U.S. 86, 98 (2011). In that case, the federal court must determine “what arguments or theories supported or . . . could have supported” the challenged state court decision, and “whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of [the Supreme] Court.” *Id.* at 102. “Accordingly, when the state court does not supply reasoning for its decision, [federal courts] are instructed to engage in an independent review of the

record and ascertain whether the state court’s decision was objectively unreasonable.” *Murray v. Schriro*, 882 F.3d 778, 802 (9th Cir. 2018) (internal quotation marks and citation omitted). “Crucially, this is not a de novo review of the constitutional question.” *Id.* (internal quotation marks and citation omitted). “[E]ven a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.* (internal quotation marks and citation omitted).

When a habeas claim was not adjudicated on the merits, the district court must review the claim de novo. *See Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

Even if a petitioner establishes a constitutional violation under the relevant standard, the habeas inquiry is not at an end. *See Davis v. Ayala*, 576 U.S. 257, 267 (2015). “[H]abeas petitioners ‘are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice.’” *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). “Under this test, relief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury’s verdict.” *Id.* at 267-68 (internal quotation marks and citation omitted).

IV. ANALYSIS

As set forth above, the amended petition contains ten claims including a claim that his right to present his defense was violated (Claim 1), a claim that his Confrontation Clause rights were violated (Claim 2), a claim that his right to due process and a fair trial were violated through the admission of irrelevant and prejudicial bad character evidence (Claim 3), a claim that his right to due process and a fair trial were violated through prosecutorial misconduct (Claim 4), a claim that his due process rights were violated by the prosecution’s failure to correct false witness testimony (Claim 6), three claims of ineffective assistance of counsel (Claims 5, 7, 8), a claim that the cumulative effect of the errors alleged deprived Petitioner of a fair trial (Claim 9), and a claim of actual innocence (Claim 10). *See Am’d Pet.*

A. Claim 1: Right to Present a Defense

In Claim 1, Petitioner alleges that the trial court violated his right to present a defense, guaranteed by the Sixth and Fourteenth Amendments, through multiple rulings. *Am’d Pet.* at 6.

1 These rulings involved evidence of Campbell’s mental retardation¹ and evidence of McNary’s
 2 guilt, as well as rulings about the content of closing argument and a pinpoint jury instruction.
 3 Trav. at 17-39.

4 **1. Procedural Background and Standard of Review**

5 Claim 1 was raised in Petitioner’s petition for review on appeal filed in the California
 6 Supreme Court. See Pet., Ex. 3. The petition for review was denied summarily. See Ans., Ex. N.
 7 As stated above, when the last state court to adjudicate a federal constitutional claim on the merits
 8 does not provide an explanation for the denial, “the federal court should ‘look through’ the
 9 unexplained decision to the last related state-court decision that does provide a relevant
 10 rationale.” *Wilson*, 138 S.Ct. at 1192. “It should then presume that the unexplained decision
 11 adopted the same reasoning.” *Id.* Here, the California Supreme Court did not provide an
 12 explanation for its denial of the petition for review. See Ans., Ex. N. Accordingly, this Court will
 13 “look through” the California Supreme Court’s decision to the state appellate court’s decision on
 14 direct review, which denied the claim on the merits. See *People v. Campbell*, 2012 WL 1201647,
 15 at *9-17.

16 Petitioner argues that the Court should not grant AEDPA deference to the state appellate
 17 court’s decision. Trav. at 22-28. In his opening brief on appeal, Petitioner argued that these
 18 rulings abridged his right to present a defense. Pet., Ex. 1 at 61-92. The state appellate court
 19 decided the claims based on state evidentiary law. See *People v. Campbell*, 2012 WL 1201647, at
 20 *9-17. It did not address the federal constitutional claims. See *id.* Petitioner argues that, for this
 21 reason, the decision is not entitled to AEDPA deference. Trav. at 22-28.

22 Petitioner cites *Johnson v. Williams*, 568 U.S. 289 (2013), in which the Supreme Court
 23 decided what level of AEDPA deference applies “when a defendant convicted in state court
 24 attempts to raise a federal claim, either on direct appeal or in a collateral state proceeding, and a
 25

26 ¹ The Court uses the term “mental retardation” as that is the term used by the California Court of
 27 Appeal and the parties in their briefing. But the Court recognizes that “the term ‘mental
 28 retardation’ has negative connotations, has become offensive to many people, and often results in
 misunderstandings about the nature of the disorder and those who have it.” See Change in
 Terminology: “Mental Retardation” to “Intellectual Disability,” 78 Fed. Reg. 46,499, 46,499
 (Aug. 1, 2013).

1 state court rules against the defendant and issues an opinion that addresses some issues but does
 2 not expressly address the federal claim in question.” *Id.* at 292. Williams was convicted in state
 3 court in California, and on appeal to the California Court of Appeal, she argued that the discharge
 4 of a certain juror violated both the Sixth Amendment and the California Penal Code. *Id.* at 295.
 5 The California Court of Appeal “devoted several pages to discussing the propriety of the trial
 6 judge’s decision to dismiss the juror,” but it “never expressly acknowledged that it was deciding a
 7 Sixth Amendment issue.” *Id.* at 295-96. Williams petitioned the California Supreme Court for
 8 review, and it granted her petition in light of intervening authority. *Id.* at 295-96. On remand, the
 9 California Court of Appeal issued a revised opinion, in which it decided that the trial court had not
 10 abused its discretion by dismissing the juror. *Id.* at 296. Williams petitioned for review in the
 11 California Supreme Court, but it was denied in a one-sentence order. *Id.* Williams filed a federal
 12 habeas petition, and the district court applied AEDPA’s deferential standard of review for claims
 13 previously adjudicated on the merits. *Id.* at 297. The Ninth Circuit reversed, stating that de novo
 14 review was required because the state appellate court had not addressed the Sixth Amendment
 15 claim and deciding that the dismissal of the juror did violate the Sixth Amendment. *Id.*

16 The Supreme Court held that “[w]hen a state court rejects a federal claim without expressly
 17 addressing that claim, a federal habeas court must presume that the federal claim was adjudicated
 18 on the merits—but that presumption can in some limited circumstances be rebutted.” *Johnson*,
 19 568 U.S. at 301. The Supreme Court then elaborated on how the presumption can be rebutted:

20 To be sure, if the state-law rule subsumes the federal standard—that
 21 is, if it is at least as protective as the federal standard—then the federal
 22 claim may be regarded as having been adjudicated on the merits.
 23 See *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263
 24 (2002) (*per curiam*). But what if, for example, in at least some
 25 circumstances the state standard is *less* protective? Or what if the state
 26 standard is quite different from the federal standard, and the
 27 defendant’s papers made no effort to develop the basis for the federal
 28 claim? What if a provision of the Federal Constitution or a federal
 precedent was simply mentioned in passing in a footnote or was
 buried in a string cite? In such circumstances, the presumption that
 the federal claim was adjudicated on the merits may be rebutted—
 either by the habeas petitioner (for the purpose of showing that the
 claim should be considered by the federal court *de novo*) or by the
 State (for the purpose of showing that the federal claim should be
 regarded as procedurally defaulted). See *Coleman, supra*, at 739, 111
 S.Ct. 2546 (rebuttable presumption of no independent and adequate

state ground applies so long as “it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law”). Thus, while the *Richter* presumption is a strong one that may be rebutted only in unusual circumstances, it is not irrebuttable. “*Per se* rules should not be applied ... in situations where the generalization is incorrect as an empirical matter,” *Coleman*, 501 U.S., at 737, 111 S.Ct. 2546, and an irrebuttable presumption that state courts never overlook federal claims would occasionally miss the mark.

The language of 28 U.S.C. § 2254(d) makes it clear that this provision applies only when a federal claim was “adjudicated *on the merits* in State court.” A judgment is normally said to have been rendered “on the merits” only if it was “delivered after the court ... heard and *evaluated* the evidence and the parties’ substantive arguments.” Black’s Law Dictionary 1199 (9th ed. 2009) (emphasis added). And as used in this context, the word “merits” is defined as “[t]he *intrinsic rights and wrongs of a case* as determined by *matters of substance*, in distinction from matters of form.” Webster’s New International Dictionary 1540 (2d ed. 1954) (emphasis added); see also, *e.g.*, 9 Oxford English Dictionary 634 (2d ed. 1989) (“the *intrinsic ‘rights and wrongs’ of the matter*, in contradistinction to extraneous points such as the competence of the tribunal or the like” (emphasis added)); Random House Dictionary of the English Language 897 (1967) (“the *intrinsic right and wrong of a matter*, as a law case, unobscured by procedural details, technicalities, personal feelings, etc.” (emphasis added)). If a federal claim is rejected as a result of sheer inadvertence, it has not been evaluated based on the intrinsic right and wrong of the matter. Justice SCALIA is surely correct that such claims have been adjudicated and present federal questions we may review, *post*, at 1100 – 1101, but it does not follow that they have been adjudicated “on the merits.” By having us nevertheless apply AEDPA’s deferential standard of review in such cases, petitioner’s argument would improperly excise § 2254(d)’s on-the-merits requirement.

Id. at 301-03 (footnote omitted). “When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, § 2294(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge.” *Id.* at 303.

The Supreme Court applied this rule in holding “that the Ninth Circuit erred by finding the California Court of Appeal overlooked Williams’ Sixth Amendment claim.” *Johnson*, 568 U.S. at 304. It noted that the state court had discussed a California Supreme Court case called *People v. Cleveland*, 25 Cal. 4th 466 (2001), that itself “included a lengthy discussion of three Federal Court of Appeals cases.” *Id.* The Court recognized that “*Cleveland* did not expressly purport to decide a federal constitutional question, but its discussion of [three Federal Court of Appeals cases] shows that the California Supreme Court understood itself to be deciding a question with federal

1 constitutional dimensions.” *Id.* at 305. The Supreme Court noted that the Ninth Circuit’s decision
 2 rested on the fact that *Cleveland* did not follow the Federal Court of Appeals cases, but it
 3 explained that the California Supreme Court was not bound by those decision and that
 4 “disagreeing with the lower federal courts is not the same as ignoring federal law.” *Id.* The
 5 Supreme Court went on to elaborate that “[r]egardless of whether a California court would
 6 consider Williams’ [state law] and Sixth Amendment claims to be perfectly coextensive, the fact
 7 that these claims are so similar makes it unlikely that the California Court of Appeal decided one
 8 while overlooking the other.” *Id.* The Supreme Court recognized that Williams had “treated her
 9 state and federal claims as interchangeable” throughout the state court proceedings and did not
 10 petition the appellate court for rehearing nor argued in subsequent state and federal proceedings
 11 that the state court had not adjudicated her Sixth Amendment claim on the merits. *Id.* at 306.

12 The Court now must decide whether the California Court of Appeal’s decision adjudicated
 13 Petitioner’s Sixth Amendment claim that his right to present a defense was violated on the merits.
 14 Under *Johnson*, there is a rebuttable presumption that it did. *See Johnson*, 568 U.S. at 301. But
 15 Petitioner argues that he has rebutted that presumption. *Trav.* at 23. On appeal to the California
 16 Court of Appeal, Petitioner challenged these rulings under state evidence rules and his federal
 17 constitutional rights. *See Pet.*, Ex. 1 at 62-91. The Court notes that Petitioner briefed the Sixth
 18 Amendment issue before the California Court of Appeal. *See id.* Under *Johnson*, this weighs in
 19 favor of finding a decision on the merits. Petitioner did not petition for rehearing with the
 20 California Court of Appeal but, unlike in *Johnson*, Petitioner here did note in his petition for
 21 review to the California Supreme Court that the California Court of Appeal had not addressed the
 22 merits of his federal constitutional claim. *See Pet.*, Ex. 3 at 7.

23 In its decision, the California Court of Appeal relied on state evidence law, including
 24 largely Evidence Code § 352. In its section discussing evidence of mental retardation, the
 25 California Court of Appeal did state that “[a]s a general matter, the ordinary rules of evidence do
 26 not impermissibly infringe on the accused’s right to present a defense. Courts retain, moreover, a
 27 traditional and intrinsic power to exercise discretion to control the admission of evidence in the
 28 interests of orderly procedure and the avoidance of prejudice.” *People v. Campbell*, 2012 WL

1201647, at *11 (quoting *People v. Hall*, 41 Cal. 3d 826, 834 (1986); *People v. Cudjo*, 6 Cal. 4th 585, 611 (1993)). In turn, the California Supreme Court in *Hall* discussed the relationship of the constitutional right to present a defense and the rules of evidence—specifically, Evidence Code § 352—and cited one Supreme Court case and a federal evidence rule. *Hall*, 41 Cal. 3d at 834-35; see *Johnson*, 568 U.S. at 304 (considering that state court cited *Cleveland*, which in turn discussed federal law). And in *Cudjo*, the California Supreme Court conducted an extensive discussion of the defendant’s claim that he was unconstitutionally deprived of the right to present a defense. *Cudjo*, 6 Cal. 4th at 610-12; see *Johnson*, 568 U.S. at 304. And in discussing the closing argument, the California Court of Appeal quoted a California state court case that provided: “A defendant’s rights to due process and to present a defense does not include a right to present to the jury a speculative, factually unfounded inference.” *People v. Campbell*, 2012 WL 1201647, at *16-17 (quoting (*People v. Mincey*, 2 Cal. 4th 408, 441 (1992))). Petitioner has not rebutted the presumption. The Court cannot say that “the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court.” *Johnson*, 568 U.S. at 303.

Petitioner points the Court to several Supreme Court decisions, including *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Holmes v. South Carolina*, 547 U.S. 319 (2006); *Washington v. Texas*, 388 U.S. 14 (1967); *Crane v. Kentucky*, 476 U.S. 683 (1986); and *Olden v. Kentucky*, 488 U.S. 227 (1988). See Trav. at 18. Accordingly, this Court’s task is to determine whether the California Court of Appeal’s denial of Claim 1 was contrary to *Chambers* and the other Supreme Court authority identified by Petitioner. See *Williams v. Johnson*, 840 F.3d 1006, 1009-1011 (9th Cir. 2016) (applying standard in § 2254(d)(1)-(2) on remand).

2. California Court of Appeal Decision

The California Court of Appeal addressed Petitioner’s Claim 1 as follows:

I.A. Expert Testimony on Defendant’s Developmental Disabilities

As we discussed above, prior to trial, defense counsel stated that defendant would not be presenting a “diminished actuality” defense or expert testimony that would support that defense. However, in the middle of trial, defense counsel advised the court that he wanted to present testimony on mental retardation by Dr. Greenspan prior to defendant’s testimony. The prosecutor objected, arguing that prior to trial defense counsel had “conceded” the motion to exclude such

testimony, and that defense counsel's proffer was "so generic that we have no idea what it's actually about and how it even relates to the defendant." Defense counsel stated that "Dr. Greenspan is going to offer a diagnosis in this case. He's going to offer the foundation for that diagnosis, and he's going to rebut traditional assumptions about mental retardation.... [¶] Now, if, for any reason, [defendant] were not to testify, then the Court could merely strike the testimony of Dr. Greenspan, and the jury would be instructed to completely disregard it. And that would be I think more than fair, if that's what it came down to." Counsel anticipated that "the direct examination of Dr. Greenspan would take no more than probably four hours, in that range." "I believe we have a constitutional due-process right to present this evidence."

The court ruled that Dr. Greenspan would not be allowed to testify "until after the defendant testifies.... [¶] Also, Dr. Greenspan's testimony is ... going to be very abbreviated and limited. It's not going to talk about statistics other than those that relate to the defendant. The criteria from the diagnosis, age, IQ, deficits in adaptive behavior. I don't want to hear anything about talking to anecdotal people. I just want to hear about the ... scores on the tests that he took and how that qualifies him as ... someone with mental retardation and how mental retardation manifests itself in communication, memory, and demeanor, such as flat [affect] and stoicism." "I'm basing my decision in this ... regard on [Evidence Code section] 352 grounds, because ... I think it's an undue consumption of our time to go beyond the areas that I discussed, because I think they relate to how the defendant, if he does, in fact, testify, will appear on the stand." "The only thing this evidence goes to is credibility."

Defendant testified that he did not shoot Officer Fontana, that McNary shot the officer. Defendant testified that he only provided the gun to McNary, and that he took back the gun, ran, and destroyed the gun after the shooting.

Dr. Greenspan testified that defendant is mildly mentally retarded and has a mental age of between 10 and 12 years old, and an academic level of between the fifth and the seventh grade. Dr. Greenspan further testified that poor social judgment is one of the defining characteristics of people with mild mental retardation as is gullibility, or the lack of awareness of when they are being swindled or taken advantage of. A person with mental retardation can also have an antisocial personality disorder, but it is more likely that defendant has an anxiety disorder rather than an antisocial personality disorder.

The court instructed the jury pursuant to CALCRIM No. 226 that it must judge the credibility and believability of witnesses, and could consider various things when doing so. The court also instructed the jury pursuant to section 1127g and CALCRIM No. 331 as follows: "In evaluating the testimony of a person with a developmental disability or a cognitive impairment, consider all the factors surrounding that person's testimony, including his or her level of cognitive development. [¶] Even though a person with a developmental disability or cognitive impairment may perform differently as a witness because of his or her level of cognitive impairment, that does not mean that he or she is more or less credible

than any other witness. [¶] You should not discount or distrust the testimony of a person with a developmental disability or cognitive impairment solely because he or she has such disability or impairment.” Pursuant to a request by the prosecutor, the court also instructed the jury that, “[t]he testimony of Dr. Stephen Greenspan ... may be considered by you solely to aid in your assessment of the defendant’s credibility and not for any other purpose. [¶] You are advised that the defendant is presumed to have been sane at the time of the commission of the offense charged. This means that he was able to know the nature of his act and appreciate the difference between right and wrong. [¶] There is no presumption that the defendant did, in fact, have any specific state of mind. The prosecution must prove beyond a reasonable doubt the existence of any specific state of mind necessary for a conviction.”

On appeal, defendant contends that the court erred “[b]y refusing to allow evidence of [his] retardation to be used for the purpose of explaining his conduct during and after the shooting of Officer Fontana.” “The excluded evidence of the social and cognitive effects of [his] retardation was not only clearly relevant, but *essential* to explaining his behavior both at the scene of the crime and in its aftermath.” Defendant’s “retardation and its effects on his judgment and social skills were necessary to explain his behavior at the time of the crime and his statements and behavior in its aftermath, and [he] had an absolute right to have Dr. Greenspan tell the jury about it.”

The Attorney General contends that the court properly limited the scope of Dr. Greenspan’s testimony. Defendant “expressly agreed at the outset of trial not to present any expert testimony on retardation in exchange for the prosecutor’s dismissal of the ... first degree murder and the related special circumstances [charges].” “More substantively, Dr. Greenspan’s testimony would not have assisted the jury in its evaluation of the case.” “[Defendant] described the shooting of Officer Fontana as a sudden, unexpected event.” “[I]f [defendant’s] description of the shooting had in fact been true, the jurors would not have found it remarkable—or explainable only through expert testimony on retardation—that [defendant] took the gun from McNary and fled from the scene.” The Attorney General further contends that any error by the court in restricting Dr. Greenspan’s testimony was harmless.

Trial courts have the discretion to exclude otherwise admissible evidence pursuant to Evidence Code section 352 “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid.Code, § 352.) “As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]” (*People v. Hall* (1986) 41 Cal.3d 826, 834; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.) “We review a trial court’s evidentiary rulings under [Evidence Code section 352] for abuse of discretion.” (*People v. Doolin* (2009) 45 Cal.4th 390, 437.) A ruling excluding evidence under Evidence Code section 352 will

1 be overturned on appeal only if the trial court “exercised its discretion
2 in an arbitrary, capricious or patently absurd manner that resulted in
3 a manifest miscarriage of justice. [Citations.]” (*People v.*
4 *Jordan* (1986) 42 Cal.3d 308, 316; *People v. Rodriguez* (1999) 20
5 Cal.4th 1, 9–10.)

6 “ ‘ “[A] trial court has wide discretion to admit or exclude expert
7 testimony.... An appellate court may not interfere with the exercise of
8 that discretion unless it is clearly abused.” ’ [Citation.]” (*People v.*
9 *Manriquez* (1999) 72 Cal.App.4th 1486, 1492.) The trial court’s
10 exercise of its discretion is governed by Evidence Code section 801,
11 which limits expert testimony to that “[r]elated to a subject that is
12 sufficiently beyond common experience that the opinion of an expert
13 would assist the trier of fact.” (Evid.Code, § 801, subd. (a).) “Expert
14 opinion is not admissible if it consists of inferences and conclusions
15 which can be drawn as easily and intelligently by the trier of fact as
16 by the witness. [Citation.]” (*People v. Torres* (1995) 33 Cal.App.4th
17 37, 45.) Therefore, the question before us is whether the trial court
18 abused its discretion in determining that the probative value of the
19 additional proffered testimony by Dr. Greenspan was substantially
20 outweighed by the probability that its admission would “necessitate
21 undue consumption of time....” (Evid.Code, § 352.)

22 Evidence of a criminal defendant’s mental retardation “is not
23 admissible ‘to show or negate the *capacity* to form any mental state,’
24 but is admissible solely on the issue whether the accused
25 ‘*actually* formed a required specific intent ... when a specific intent
26 crime is charged.’ ” (*People v. Smithey* (1999) 20 Cal.4th 936,
27 958 (*Smithey*); § 28, subd. (a); see also *People v. Cortes* (2011) 192
28 Cal.App.4th 873, 902.) “In the guilt phase of a criminal action, any
expert testifying about a defendant’s mental [retardation] shall not
testify as to whether defendant had or did not have the required mental
states, which include, but are not limited to, purpose, intent,
knowledge, or malice aforethought, for the crimes charged. The
question as to whether the defendant had or did not have the required
mental states shall be decided by the trier of fact.” (§ 29; *Smithey*,
supra, at p. 958.)

The mental state required for second degree murder is malice
aforethought, and malice aforethought can be either express or
implied. A defendant acts with express malice aforethought if he
unlawfully intends to kill. A defendant acts with implied malice if he
intentionally commits an act; the natural consequences of the act are
dangerous to human life; at the time he acts, he knows his act is
dangerous to human life; and he deliberately acts with conscious
disregard for human life. (See CALCRIM No. 520.) “To support a
defense of ‘diminished actuality,’ a defendant presents evidence of
voluntary intoxication or mental condition to show he ‘actually’
lacked the mental states required for the crime. [Citation.]” (*People v.*
Clark (2011) 52 Cal.4th 856, 880, fn. 3.) “[T]he jury may generally
consider evidence of voluntary intoxication or mental condition in
deciding whether defendant actually had the required mental states
for the crime.” (*People v. Steele* (2002) 27 Cal.4th 1230, 1253.)

In this case, as defendant’s counsel stated before trial, defendant did
not present a “diminished actuality” defense. Nor did counsel attempt

1 to elicit testimony from Dr. Greenspan about defendant's mild mental
2 retardation in order to support a "diminished actuality" defense.
3 Rather, defense counsel offered the expert's testimony for the sole
4 purpose of explaining defendant's conduct during and after the
5 shooting of Officer Fontana.

6 Defendant testified that he did not shoot Officer Fontana, that he
7 handed his gun to McNary, that McNary shot the officer, that
8 defendant took back the gun and ran away, and that defendant gave
9 the gun to Gerald Kissoon to destroy. Dr. Greenspan testified that
10 poor social judgment is one of the defining characteristics of people
11 with mild mental retardation as is gullibility, or the lack of awareness
12 of when they are being swindled or taken advantage of. Dr. Greenspan
13 also testified that a person with mental retardation can also have
14 an antisocial personality disorder, but it is more likely that defendant
15 has an anxiety disorder rather than an antisocial personality disorder.
16 Defendant points to testimony about people with mild mental
17 retardation that Dr. Greenspan gave at defendant's mental
18 retardation hearing but that the jury did not hear at his trial. Defendant
19 contends that the additional testimony was necessary in order to
20 further explain defendant's actions before and after Officer Fontana's
21 shooting. The court determined that it would be "an undue
22 consumption of our time" to permit additional testimony regarding
23 how people with mild mental retardation act.

24 Here, defendant did not present a diminished actuality defense and his
25 defense was that he was not the shooter; his defense was not that he
26 did not actually have malice aforethought. Defendant testified, so the
27 jury saw him and heard his testimony regarding his defense. The jury
28 also heard Dr. Greenspan's diagnosis of mild mental retardation for
defendant, with a possible anxiety disorder, and it heard Dr.
Greenspan's testimony that people with mild mental retardation have
poor social judgment and are gullible. Dr. Greenspan testified that
defendant had a mental age of between 10 and 12 years old, and an
academic level of between the fifth and seventh grade, and the jury
could use their own common sense and experience to evaluate how
such a person acts. (See CALCRIM No. 226.) Dr. Greenspan also
testified about how people with mild mental retardation can appear
when testifying. The court correctly instructed the jury pursuant
to CALCRIM No. 226 on how to judge the credibility of a witness
generally and, pursuant to section 1127g and CALCRIM No. 331, on
how to evaluate defendant's credibility given Dr. Greenspan's
diagnosis of defendant as having mild mental retardation. The court
further instructed the jury that the testimony of Dr. Greenspan was to
be considered solely on the issue of defendant's credibility. Therefore,
the court could properly conclude that the relevance of additional
testimony regarding how people with mild retardation act in order to
explain defendant's actions before and after Officer Fontana's
shooting, was outweighed by the probability that its admission would
necessitate undue consumption of time. (Evid.Code, § 352.) No error
or abuse of discretion has been shown.

Even if we were to determine that the court erred in refusing to admit
the additional testimony, we would not find any error prejudicial. The
evidence that defendant was the person who shot Officer Fontana was
very strong, notwithstanding defendant's testimony that he was not

the shooter. The jury saw, heard, and evaluated the testimony of defendant and Dr. Greenspan. The court correctly instructed the jury pursuant to section 1127g and CALCRIM No. 331 on how to evaluate defendant's testimony given Dr. Greenspan's diagnosis of mild mental retardation. The court also instructed the jury that Dr. Greenspan's testimony was to be considered solely on the issue of defendant's credibility. On this record, we cannot say that any error by the trial court in excluding the testimony defendant points to on appeal resulted in a miscarriage of justice. (Evid.Code, § 354.)

I.B. Third-Party Culpability Evidence

Defendant contends that, “[a]lthough the trial court allowed the defense to present *some* of the evidence pointing to McNary's culpability, the court prejudicially restricted the admission of that evidence on repeated occasions.... [E]ach of these rulings constituted an abuse of the discretion vested in the trial court.” Defendant specifically contends that the court should have admitted: (1) testimony by Janielle Carter, McNary's girlfriend, that McNary called his lawyer shortly after Fontana's murder; (2) testimony by Eric McLaurin that McNary told him that McNary had shot the police officer; (3) testimony by David Jackson that McNary “smirked” after saying that defendant did not shoot the officer; (4) testimony by Lacey Orteza and Janee Gilmore that they were afraid of McNary in part because of their personal knowledge of his prior bad acts; and (5) testimony regarding Steven Eddie's contact with police in the vicinity of the shooting of Officer Fontana within hours of the shooting.

The Attorney General contends that the trial court reasonably prohibited defendant from introducing the testimony he claims was erroneously excluded. The Attorney General contends that the court reasonably excluded testimony regarding McNary's alleged call to his attorney on a number of grounds, the court properly found that McLaurin's and Jackson's proposed testimony would be too untrustworthy to be admissible, the proposed testimony by Orteza and Gilmore was cumulative, and the proposed testimony regarding Eddie was irrelevant.

“ ‘A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. This rule does “not require that any evidence, however remote, must be admitted to show a third party's possible culpability.... [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.” [Citation.]’ [Citations.]” (*People v. Panah* (2005) 35 Cal.4th 395, 481 (*Panah*); see also *People v. Geier* (2007) 41 Cal.4th 555, 581 (*Geier*)). “ ‘[T]he evidence [has] to be relevant under Evidence Code section 350, and its probative value [can]not be “substantially outweighed by the risk of undue delay, prejudice, or confusion” under Evidence Code section 352.’ [Citation.]” (*Geier, supra*, at p. 581.) On appeal, “we review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm.” (*Id.* at p. 582.)

In *Geier*, the defendant sought to admit testimony by a witness,

Green, that Green saw a third party, Sloan, with the victim on the night of the victim's murder, and that Sloan later told Green that Sloan had dropped off the victim at her apartment. Our Supreme Court found that Green's testimony was properly excluded. "Such evidence does not rise even to the status of motive evidence. While it could be generously construed as possible evidence that Sloan had the opportunity to commit the crimes, as noted, evidence of mere opportunity without further evidence linking the third party to the actual perpetration of the offense is inadmissible as third party culpability evidence." (*Geier, supra*, 41 Cal.4th at p. 582.) The defendant also sought to admit testimony by another witness, Harrison, that Sloan made comments that could be construed as an admission that he killed the victim. Our Supreme Court found that this evidence was properly excluded under Evidence Code section 352. "In light of the confused and contradictory tenor of Harrison's testimony—asserting at one point that Sloan said someone was framing him for the murder, and at another, that he confessed to it—her testimony possessed, as the prosecutor noted, 'minimal probative value.' Balanced against this minimal probative value was the 'probability' that the admission of Harrison's testimony would have 'necessitate[d] undue consumption of time or ... confus[ed] the issues, or misle[d] the jury.' (Evid.Code, § 352.)" (*Geier, supra*, 41 Cal.4th at p. 582.)

I.B. 1. Testimony by Carter that McNary Called his Lawyer

Evidence was introduced that McNary had been driving Carter's car when he hit a parked car and an individual standing in the street as he was driving away from the Rotterdam Lane party. Accordingly, even if the proffered testimony by Carter that McNary called his attorney shortly after Officer Fontana was shot would suggest that McNary had a "guilty mental state" as defendant contends, it does not necessarily follow that McNary must have felt guilty about having shot Officer Fontana; he could have felt guilty about fleeing the scene where he hit a parked car and an individual. As the proffered testimony does not link McNary to the actual perpetration of the shooting of Officer Fontana, the court was not required to admit the proffered testimony as third-party culpability evidence. (*Panah, supra*, 35 Cal.4th at p. 481.)

I.B. 2. Testimony by McLaurin regarding McNary's Confession

The proffered evidence regarding Eric McLaurin was that defendant's family members claimed that McLaurin told them that McNary told him that he, McNary, killed the police officer. However, McLaurin told the police that he did not remember ever saying that, and that defendant's family was trying to intimidate him. McLaurin testified, and a recording of his police interview was played for the court, at an Evidence Code section 405 hearing prior to defendant's 2007 mental retardation hearing. When defense counsel told the court in January 2009 that he intended to call McLaurin to testify, the prosecutor told the court that McLaurin was not providing consistent statements, that the prosecution would need to bring in additional witnesses to impeach McLaurin, and that the prosecution had "a previous statement by McNary to the police officers, and a taped statement, in which he convincingly says he didn't do it." The court

1 ruled that, “[a]fter having actually observed Mr. McLaurin and
2 reading ... the *Geier* case, I think that Mr. McLaurin's various
3 versions of the information really fall within the paradigm of
4 the *Geier* case. And so I'm going to be excluding those under
5 [Evidence Code section] 352.”

6 Given the contradictory nature of the proffered evidence regarding
7 McLaurin, and the fact that it involved double hearsay, it had minimal
8 probative value. In addition, there was the probability that the
9 presentation of the evidence would have necessitated undue
10 consumption of time, or confused the issues, or misled the jury.
11 (Evid.Code, § 352.) Therefore, the testimony by McLaurin was
12 similar to the testimony the *Geier* court found was properly excluded,
13 and the court in this case did not err or abuse its discretion in
14 excluding this evidence. (*Geier, supra*, 41 Cal.4th at p. 582.)

15 **I.B. 3. Testimony by Jackson that McNary Smirked**

16 The court admitted testimony from David Jackson that McNary told
17 him that defendant did not shoot the officer, and then McNary pulled
18 out a gun and robbed Jackson. Defense counsel sought admission of
19 additional testimony from Jackson that, immediately after McNary
20 said that defendant did not shoot the officer, Jackson asked McNary
21 who did shoot the officer. McNary then had “a look on his face ‘like
22 a smirk,’ ” before he pulled out a gun and robbed Jackson. Defense
23 counsel argued that the “smirk” or “smile” was an adoptive
24 admission, a statement against penal interest by an unavailable
25 witness, and evidence of McNary's state of mind. However, McNary's
26 smirk does not qualify as an admissible adoptive admission
27 under Evidence Code section 1221 because McNary was not a
28 “party” in this case. (Evid.Code, § 1221.)

For the same reason, McNary's smirk does not qualify as an
admissible “statement” or “nonverbal conduct” under Evidence Code
sections 225 and 1220. (See *People v. Hawkins* (2002) 98
Cal.App.4th 1428, 1449.) In addition, Jackson's opinion of what
McNary meant by the smirk was speculative; although McNary could
have meant by the smirk to convey to Jackson that he knew who the
actual shooter of Officer Fontana was, that does not mean that
McNary necessarily meant to convey to Jackson that the shooter was
McNary himself. Therefore, it cannot be said that when McNary made
the smirk it “was so far contrary to [his] pecuniary or proprietary
interest, or so far subjected him to the risk of ... criminal liability, ...
that a reasonable man in his position would not have made the
statement [or nonverbal conduct] unless he believed it to be
true.” (Evid.Code, 1230.) Given the speculative nature of this
proposed testimony, it had little to no probative value on the issue of
McNary's culpability, and the court did not err or abuse its discretion
in excluding it under Evidence Code section 352.

I.B. 4. Testimony by Ortiz and Gilmore

The court admitted testimony from Lacey Ortiz and Janee Gilmore
about their fear of McNary. Ortiz testified that she and her husband
moved because she was afraid that McNary “was going to come and
get us” shortly after McNary told her husband that he was involved in

the shooting of a police officer. She also believed that she was in danger for testifying. Gilmore testified that McNary confessed to her that he did the shooting. However, she did not want to tell anybody about the confession, or testify about it, because McNary threatened her and she feared McNary and his “people.” She was testifying about it only because, if she did not do so, she would be put in jail. The court further admitted testimony that McNary was a member of the Seven Trees Crip criminal street gang, that the primary activities of the gang included homicides and witness intimidation, and that there would be “severe consequences” if a person testified about a gang member’s involvement in the killing of a police officer.

Defense counsel sought admission of additional testimony by Ortey and Gilmore that their fear of McNary was based on their knowledge of his involvement in the Seven Trees Crip gang. As the jury heard testimony that Ortey and Gilmore did not want to testify because of threats by McNary and their fear of him, and testimony that McNary was a member of the Seven Trees Crip gang, any error in not admitting additional testimony that Ortey and Gilmore knew that McNary was a member of the Seven Trees Crip gang did not result in a miscarriage of justice. (Evid.Code, § 354.)

I.B. 5. Testimony about Steven Eddie

Defense counsel sought to introduce evidence that Steven Eddie was stopped by Officer Jacob Ferguson between 6:30 and 7:00 a.m., on the morning of the shooting of Officer Fontana. Because Eddie was on parole, he was detained, taken to the police department, and subjected to a gunshot residue test that morning. Defense counsel argued that this showed that Officer Barg could have followed the same procedure when he stopped McNary around 5:30 a.m., and that Barg and his sergeant were negligent in releasing McNary without giving McNary a gunshot residue test. As the trial court found, evidence that a different officer subjected a different parolee to a gunshot residue test on the morning of the shooting of Officer Fontana (which could suggest that Officer Barg could have subjected McNary to a gunshot residue test that morning) was not relevant evidence in this case, as the evidence would not have had a tendency in reason to prove or disprove defendant’s theory of defense that McNary was the person who shot Officer Fontana. (Evid.Code, § 210.) Accordingly, the court did not err or abuse its discretion in excluding the evidence under Evidence Code section 352.

I.C. Pinpoint instruction on Third–Party Culpability Evidence

Defendant contends that the court erred in refusing to give his proposed pinpoint instruction on third-party culpability evidence. The Attorney General contends that the court properly denied defendant’s request for a pinpoint instruction.

Defense counsel requested that the court give the following instruction to the jury: “You have heard evidence that [a person other than the defendant] [Rodney McNary] committed the offense with which the defendant is charged. The defendant is not required to prove [Rodney McNary’s] guilt beyond a reasonable doubt. It is the prosecution that has the burden of proving the defendant guilty

beyond a reasonable doubt. Therefore, the defendant is entitled to an acquittal if you have a reasonable doubt as to the defendant's guilt. Evidence that [Rodney McNary] committed the charged offense may by itself leave you with a reasonable doubt. [¶] If after considering all of the evidence, including any evidence that another person committed the offense, you have a reasonable doubt that the defendant committed the offense, you must find the defendant not guilty." The court denied defendant's request, finding the requested instruction "redundant for [CALCRIM No.] 220." The court also noted that the instruction was refused in *People v. Earp* (1999) 20 Cal.4th 826 (*Earp*). However, the court did give defendant's requested pinpoint instructions regarding evidence of McNary's motive and flight.

"A criminal defendant is entitled, on request, to an instruction 'pinpointing' the theory of his defense. [Citations.] ... [H]owever, instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories 'is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.' [Citation.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 570 (*Wharton*); see also *People v. Wright* (1988) 45 Cal.3d 1126, 1137, 1143 (*Wright*).)

In *Wright*, our Supreme Court reaffirmed its disapproval of " 'the common practice [of] select[ing] certain material facts, or those which are deemed to be material, and endeavoring to force the court to indicate an opinion favorable to the defendant as to the effect of such facts, by incorporating them into instructions containing a correct principle of law'" (*Wright, supra*, 45 Cal.3d at p. 1135.) Thus, the court disapproved as "argumentative" an instruction requested by the defendant that would have instructed the jury to "consider" various pieces of evidence, such as the fact that all the robbers wore ski masks, in assessing the defendant's guilt. (*Id.* at pp. 1138, 1135.) A pinpoint instruction is also "argumentative" when it "invite[s] the jury to draw inferences favorable to only one party from the evidence presented at trial." (*People v. Carter* (2003) 30 Cal.4th 1166, 1225; see also *Earp, supra*, 20 Cal.4th at pp. 886–887 [requested instruction was "plainly argumentative" as it emphasized specific evidence defendant claimed raised reasonable doubt].)

"Further, '[i]t is not erroneous to refuse' even a legally correct instruction if it is duplicative. [Citation.]" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1079, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 (*Hill*).) A trial court is not required to give requested instructions which are duplicative of the legal concepts in other given instructions. (*People v. Farmer* (1989) 47 Cal.3d 888, 913–914, overruled on another point in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6; *Wright, supra*, 45 Cal.3d at p. 1134.) Any error in refusing a requested pinpoint instruction is reviewed under the standard enunciated in *People v. Watson* (1956) 46 C.2d 818, 836: is it reasonably probable that a result more favorable to defendant would have been reached in the absence of the error? (*Wharton, supra*, 53 Cal.3d at p. 571.)

Defendant's proposed pinpoint instruction that the court refused to give was both duplicative and argumentative. The proposed instruction was duplicative of the instruction the court gave on reasonable doubt (CALCRIM No. 220). That instruction informed the jury that the People have the burden of proving the defendant guilty beyond a reasonable doubt and that, in deciding whether the People have proved the case beyond a reasonable doubt, the jury must impartially consider all the evidence that was received throughout the entire trial. The proposed instruction was also argumentative in that it invited the jury to find defendant not guilty upon finding that there was some evidence supporting defendant's claim that McNary committed the charged offense: "Evidence that [Rodney McNary] committed the charged offense may by itself leave you with reasonable doubt." (See *Earp*, *supra*, 20 Cal.4th at pp. 886–887.)

The jury knew from the evidence presented and defense counsel's argument that the defense theory was that McNary, not defendant, was the shooter. The court also gave defendant's pinpoint instructions regarding evidence of McNary's motive and flight. Under the circumstances, even assuming that the court erred in refusing to give defendant's other proposed pinpoint instruction, it is not reasonably probable that had the jury been given the instruction, a result more favorable to defendant would have been reached. (*Earp*, *supra*, 20 Cal.4th at pp. 886–887; *People v. Watson*, *supra*, 46 Cal.2d at pp. 836–837.)

I.D. Restriction of Defense Argument

Defendant acknowledges that McNary did not testify at trial because (1) he had invoked his Fifth Amendment right not to do so at a pretrial hearing and the prosecutor refused to offer him immunity, and (2) at the time of trial, he had absconded from parole. Nevertheless, defendant contends that the court improperly prohibited his counsel from commenting during closing argument on the prosecutor's failure to call McNary as a logical witness. "Because the prosecution's refusal to grant McNary immunity was discretionary, there was no valid legal reason not to allow the defense to comment on [the prosecution's] failure to exercise that discretion and call McNary, a logical witness, to permit the jury to assess the credibility of his story."

The Attorney General contends that "the defense attorney could not have honestly argued that McNary's failure to testify somehow reflected badly on the prosecution's case. A trial court is not[] required to allow a lawyer to argue false inferences to the jury."

"If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, ... neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding." (Evid.Code, § 913, subd. (a).) "A person may invoke the constitutional privilege against self-incrimination for a reason other than guilt." (*People v. Mincey* (1992) 2 Cal.4th 408, 441.) Accordingly, a court does not err by refusing a party's request to compel a witness to invoke before the

jury the witness's privilege against self-incrimination. (*Id.* at p. 442.) In addition, the prosecution is not obligated to grant immunity to a potential defense witness in order to assist a defendant, or to make reasonable efforts to persuade a potential witness to testify. (§ 1324; *People v. Williams* (2008) 43 Cal.4th 584, 622–623.) As defendant has not shown that McNary was available to testify at the time of defendant's trial, and that McNary would have testified had he been called to testify, the court did not err in refusing defendant's request to allow his counsel to comment on the prosecutor's failure to call McNary as a logical witness. (*Mincey, supra*, 2 Cal.4th at p. 442 [“A defendant's rights to due process and to present a defense does not include a right to present to the jury a speculative, factually unfounded inference”].)

People v. Campbell, 2012 WL 1201647, at *9-17.

3. Claims

Petitioner has four categories of arguments as to the abridgement of his right to present a defense. *See* Trav. at 17-39. The Court will address each in turn.

a. Exclusion of Evidence of Mental Retardation

First, Petitioner argues that his right to present a defense was abridged by the trial court's excluding certain testimony of Petitioner's mental retardation expert. Trav. at 17-30.

1. Legal Standard

The Ninth Circuit has made clear that state law issues of admissibility and foundation are not cognizable on federal habeas review. *See Johnson v. Sublett*, 63 F.3d 926, 931 (9th Cir. 1995) (denying habeas relief because claim merely “present[ed] state-law foundation and admissibility questions that raise no federal habeas issues”). Thus, even accepting Petitioner's argument that the trial court erred, those purported errors would not entitle Petitioner to habeas relief. In any event, the state appellate court held that the trial court did not err under state law and that any alleged error was harmless. This Court is bound by the state appellate court's interpretation of state law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam) (stating that “a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus”).

Furthermore, the fact that petitioner has invoked his rights under the Fifth and Sixth Amendments does not render his otherwise state evidentiary claim a cognizable federal claim. A federal habeas petitioner may not transform a state-law issue into a federal one merely by making

1 a general appeal to a constitutional guarantee, such as the right to due process. *See Gray v.*
 2 *Netherland*, 518 U.S. 152, 163 (1996). For this reason, the Ninth Circuit repeatedly has held that a
 3 habeas petitioner's mere reference to the Due Process Clause is insufficient to render his claims
 4 viable under the Fourteenth Amendment. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th
 5 Cir. 1994); *Miller v. Stagner*, 757 F.2d 988, 993-94 (9th Cir. 1985).

6 Regardless, even if Petitioner had asserted a cognizable challenge to the trial court's
 7 decisions, that challenge would not entitle Petitioner to habeas relief. “Whether rooted directly in
 8 the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or
 9 Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a
 10 meaningful opportunity to present a complete defense.’” *Crane*, 476 U.S. at 690 (1986) (quoting
 11 *California v. Trombetta*, 467 U.S. 479, 485 (1984)) (citations omitted); *Chambers*, 410 U.S. at
 12 294. But the right to present relevant evidence is subject to reasonable restrictions, such as state
 13 evidentiary rules. *Moses v. Payne*, 555 F.3d 742, 757 (9th Cir. 2009); *see also LaJoie v.*
 14 *Thompson*, 217 F.3d 663, 668 (9th Cir. 2000) (observing that right to present evidence in criminal
 15 case “may, in appropriate circumstances, bow to accommodate other legitimate interests in the
 16 criminal trial process” (quoting *Michigan v. Lucas*, 500 U.S. 145, 149 (1991))). Indeed, “state and
 17 federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence
 18 from criminal trials. Such rules do not abridge an accused's right to present a defense so long as
 19 they are not ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Greene*
 20 *v. Lambert*, 288 F.3d 1081, 1090 (9th Cir. 2002) (emphasis in original) (quoting *United States v.*
 21 *Scheffer*, 523 U.S. 303, 308 (1998)). The Supreme Court, moreover, has “indicated its approval of
 22 ‘well-established rules of evidence [that] permit trial judges to exclude evidence if its probative
 23 value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or
 24 potential to mislead the jury.’” *Moses*, 555 F.3d at 757 (alteration in original) (quoting *Holmes*,
 25 547 U.S. at 326).

26 The Ninth Circuit has observed that “[t]he Supreme Court has found a violation of the right
 27 to present a complete defense in cases where a state evidentiary rule, on its face, ‘significantly
 28 undermined fundamental elements of the defendant's defense,’ but did little or nothing to promote

a legitimate state interest.” *United States v. Pineda-Doval*, 614 F.3d 1019, 1033 n.7 (9th Cir. 2010) (quoting *Scheffer*, 523 U.S. at 315). Specifically, the Supreme Court has struck down rules that “preclude[] a defendant from testifying, exclude[] testimony from key percipient witnesses, or exclude[] the introduction of all evidence relating to a crucial defense.” *Moses*, 555 F.3d at 758.

2. Analysis

The trial court's challenged rulings do not meet the requirements established by the Supreme Court. Petitioner argues that the trial court erred both by limiting the testimony itself *and* by limiting the purpose for which the evidence could be considered. Trav. at 17. The trial court only allowed the jury to consider the evidence of Petitioner's mental retardation “in assessing Petitioner's testimonial demeanor,” and Petitioner argues that the jury should have been allowed to also consider the evidence of his mental retardation in evaluating his “behavior at the crime scene and in its aftermath.” *Id.*

Petitioner argues that the California Court of Appeal only considered part of this argument. *Id.* at 24. Before the California Court of Appeal, “Petitioner complained . . . not *only* that the jury needed to hear additional testimony, but that it *also* needed to be permitted to apply what it *did* hear to explain petitioner's actions and statements.” *Id.* (emphases in original). Petitioner argues that the California Court of Appeal did not address the latter part of his argument—that the trial court improperly limited the purpose for which the admitted evidence could be considered. *Id.* The Court disagrees. The California Court of Appeal explicitly recognized this argument, stating that “defendant contends that the court erred by refusing to allow evidence of his retardation to be used for the purpose of explaining his conduct during and after the shooting of Officer Fontana.” *People v. Campbell*, 2012 WL 1201647, at *11 (internal quotation marks omitted). The California Court of Appeal decided that it was not an abuse of discretion to exclude additional evidence of mental retardation as an undue consumption of time given that the trial court “instructed the jury that the testimony of Dr. Greenspan was to be considered solely on the issue of defendant's credibility.” *Id.* at *11-13. This ruling implies that the California Court of Appeal decided that the instruction limiting the consideration of the evidence for purposes of considering Petitioner's

1 testimony was proper.

2 Petitioner’s challenge to the exclusion of additional evidence is a challenge to the way the
3 trial court exercised its discretion. And under AEDPA, such a claim must fail because the
4 Supreme Court has not squarely addressed whether a trial court’s exclusion of evidence under a
5 rule requiring it to “balance factors and exercise its discretion” may violate due process, nor has it
6 established a “controlling legal standard” for evaluating such discretionary decisions. *Moses*, 555
7 F.3d at 758-60; *see Brown v. Horell*, 644 F.3d 969, 983 (9th Cir. 2011) (noting that, since the
8 Ninth Circuit issued its opinion in *Moses*, “the Supreme Court has not decided any case either
9 ‘squarely address[ing]’ the discretionary exclusion of evidence and the right to present a complete
10 defense or ‘establish[ing] a controlling legal standard’ for evaluating such exclusions” (alterations
11 in original)). In the absence of any such Supreme Court precedent, the state appellate court’s
12 decision upholding the trial court’s exercise of its discretion cannot be contrary to, or an
13 unreasonable application of, clearly established federal law as determined by the Supreme
14 Court. *Moses*, 555 F.3d at 760; *see Carey v. Musladin*, 549 U.S. 70, 77 (2006) (holding where
15 Supreme Court precedent gives no clear answer to question presented, “it cannot be said that the
16 state court ‘unreasonabl[y] appli[ed] clearly established Federal law’” (alterations in original)
17 (quoting § 2254(d)(1))).

18 The Court determines that the California Court of Appeal’s decision as to evidence of
19 mental retardation was not contrary to Supreme Court precedent.

20 b. Exclusion of Evidence of McNary’s Guilt

21 1. Legal Standard

22 The same legal standard discussed above applies here.

23 2. Analysis

24 Petitioner next argues that his right to present a defense was abridged by the trial court’s
25 exclusion of various pieces of evidence that allegedly supported Petitioner’s theory that McNary
26 was the murderer. *Trav.* at 30-36. Petitioner points to (1) McNary’s alleged telephone call to his
27 lawyer, (2) McNary’s alleged confession to Eric McLaurin, (3) McNary’s alleged guilty smirk, (4)
28 the basis for Gilmore’s and Ortez’s fear of McNary, and (5) the disparate treatment of Steven

1 Eddie by the police. *Id.*

2 Petitioner is again challenging the trial court's exercise of discretion to exclude evidence.
3 Under AEDPA, the claim fails because the Supreme Court has not squarely addressed whether a
4 trial court's exclusion of evidence under a rule requiring it to "balance factors and exercise its
5 discretion" may violate due process, nor has it established a "controlling legal standard" for
6 evaluating such discretionary decisions. *Moses*, 555 F.3d at 758-60; *see Brown*, 644 F.3d at 983.
7 In the absence of any such Supreme Court precedent, the state appellate court's decision upholding
8 the trial court's exercise of its discretion cannot be contrary to, or an unreasonable application of,
9 clearly established federal law as determined by the Supreme Court. *Moses*, 555 F.3d at 760; *see*
10 *Carey*, 549 U.S. at 77.

11 Petitioner also argues that the California Court of Appeal made an unreasonable finding of
12 fact in justifying the trial court's action on the basis that the evidence regarding McLaurin
13 involved double hearsay. *Trav.* at 33. Petitioner argues that the California Court of Appeal
14 "apparently . . . believed that the proffered evidence was that 'defendant's family members
15 claimed that McLaurin told them that McNary told him that he, McNary, killed the police
16 officer.'" *Id.* (citation omitted). He argues that this "was not the proffer at all, which was simply
17 that McLaurin would testify regarding McNary's hearsay statement against penal interest." *Id.*
18 (citation omitted). The Court disagrees that this is a finding of fact and, regardless, it was in no
19 way dispositive to the appellate court's decision.

20 The Court determines that the California Court of Appeal's decision as to evidence of
21 McNary's guilt was not contrary to Supreme Court precedent, nor did it involve an unreasonable
22 determination of the facts.

23 c. Closing Argument

24 1. Legal Standard

25 Although complete denial of an opportunity to make a closing argument violates a
26 defendant's constitutional rights, *Herring v. New York*, 422 U.S. 853, 858-65 (1975), the Supreme
27 Court has held that *Herring* "did not clearly establish that the *restriction* of summation also
28 amounts to structural error," *Glebe v. Frost*, 574 U.S. 21, 24 (2014) (emphasis in original). "In the

1 absence of ‘the rare type of error’ that requires automatic reversal, relief is appropriate only if the
 2 prosecution cannot demonstrate harmlessness.” *Davis*, 576 U.S. at 267 (quoting *Glebe*, 574 U.S.
 3 at 23. The harmlessness analysis on a petition for writ of habeas corpus mandates that a petitioner
 4 is not entitled to relief “unless they can establish that [the alleged error] resulted in ‘actual
 5 prejudice.’” *Id.*; see also *Brecht*, 507 U.S. at 637. “Under this test, relief is proper only if the
 6 federal court has ‘grave doubt about whether a trial error of federal law had substantial and
 7 injurious effect or influence in determining the jury’s verdict.’ There must be more than a
 8 ‘reasonable possibility’ that the error was harmful.” *Davis*, 576 U.S. at 267 (citations omitted).

9 2. Analysis

10 Petitioner argues that the trial court infringed his right to present a defense when it refused
 11 to let defense counsel comment, in closing argument, on the prosecution’s failure to call McNary
 12 as a witness. Trav. at 38-39. The California Court of Appeal noted that “Defendant acknowledges
 13 that McNary did not testify at trial because (1) he had invoked his Fifth Amendment right not to
 14 do so at a pretrial hearing and the prosecutor refused to offer him immunity, and (2) at the time of
 15 trial, he had absconded from parole.” *People v. Campbell*, 2012 WL 1201647, at *17. The
 16 California Court of Appeal further explained that “a court does not err by refusing a party’s request
 17 to compel a witness to invoke before the jury the witness’s privilege against self-incrimination.”
 18 *Id.* And it noted that “the prosecution is not obligated to grant immunity to a potential defense
 19 witness in order to assist a defendant, or to make reasonable efforts to persuade a potential witness
 20 to testify.” *Id.* In conclusion, the California Court of Appeal stated: “As defendant has not shown
 21 that McNary was available to testify at the time of defendant’s trial, and that McNary would have
 22 testified had he been called to testify, the court did not err in refusing defendant’s request to allow
 23 his counsel to comment on the prosecutor’s failure to call McNary as a logical witness.” *Id.* It
 24 also quoted a California state court case that provided: “A defendant’s rights to due process and to
 25 present a defense does not include a right to present to the jury a speculative, factually unfounded
 26 inference.” *Id.* (quoting *Mincey*, 2 Cal. 4th at 442).

27 Petitioner “supplemented his claim in his state habeas petition with a declaration indicating
 28 that McNary had been arrested by state authorities in the midst of Petitioner’s trial and was

accessible to the prosecution as a witness had it wished to grant him immunity and call him.” Trav. at 38 (citing Pet., Ex. 4 at 54-55, Ex. 5 at 18-19, Ex. 6 at Ex. U). But this fact does not change the analysis, as the fact remains that McNary had invoked his Fifth Amendment right. And the prosecution was not required to immunize him.

As Petitioner states, the question is “whether the defense may appropriately comment in closing argument on the prosecutions’ failure to exercise its discretion to immunize the witness.” Trav. at 38. In answering this question in the negative, the California Court of Appeal did not act contrary to Supreme Court precedent. As the California Court of Appeal recognized, “[a] defendant’s rights to due process and to present a defense does not include a right to present to the jury a speculative, factually unfounded inference.” *People v. Campbell*, 2012 WL 1201647, at *17 (quoting *Mincey*, 2 Cal. 4th at 442). Petitioner’s proposed closing argument would have presented a speculative, factually unfounded inference because McNary invoked his Fifth Amendment right. Further, the Court cannot say that the restriction on the closing argument resulted in any actual prejudice.

The Court determines that the California Court of Appeal’s decision as to closing argument was not contrary to Supreme Court precedent.

d. Instruction

1. Legal Standard

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (“[I]t must be established not merely that the instruction is undesirable, erroneous, or even ‘universally condemned,’ but that it violated some [constitutional right].” (quoting *Cupp*, 414 U.S. at 146)). The instruction may not be judged in artificial isolation but must be considered in the context of the instructions as a whole and the trial record. *See Estelle*, 502 U.S. at 72. In other words, the court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152, 169 (1982) (citing *Henderson v. Kibbe*, 431 U.S.

145, 154 (1977)); *see, e.g., Middleton v. McNeil*, 541 U.S. 433, 434-38 (2004) (per curiam) (no reasonable likelihood that jury misled by single contrary instruction on imperfect self-defense defining “imminent peril” where three other instructions correctly stated the law); *Chambers v. McDaniel*, 549 F.3d 1191, 1199-1200 (9th Cir. 2008) (finding constitutional error where, in addition to erroneous instruction on premeditation, murder instructions as a whole and state's emphasis on erroneous instruction in closing argument allowed jury to convict petitioner of first-degree murder without finding separately all elements of the crime); *United States v. Rodriguez*, 971 F.3d 1005, 1012-13 (9th Cir. 2020) (holding in federal criminal appeal that even if the district court erred in some discussion of the jury instructions, it “used [defendant's] preferred formulation where it mattered, i.e., in laying out the elements of the offense,” and so there was “no reversible error when the jury instructions are considered ‘as a whole, and in context’” (citation omitted)); *Ross v. Davis*, 29 F.4th 1028, 1045 (9th Cir. 2022) (holding in capital case that state court's determination that erroneous aider or abettor instruction was harmless was not unreasonable because, as state court found, the specific intent culpability requirement was encompassed under alternative instruction).

2. Analysis

Petitioner argues that his right to present a defense was abridged by the trial court's refusal to give a pinpoint instruction on third-party culpability evidence. Trav. at 36-38. The California Court of Appeal determined that the instruction was properly excluded as argumentative and duplicative, and that in any event the trial court's refusal to give the instruction was harmless. *People v. Campbell*, 2012 WL 1201647, at *16-17. Petitioner argues that the California Court of Appeal made two unreasonable determinations of fact, as the instruction was neither argumentative nor duplicative. Trav. at 37. AEDPA requires the Court to determine whether a state court's decision is “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)(2). But the Court disagrees with Petitioner's contention that the California Court of Appeal's determinations that the instruction was duplicative and argumentative are properly characterized as determinations of fact. Instead, these are legal conclusions. Further, the Court determines that that the California Court of

1 Appeal's decision was not contrary to Supreme Court precedent. At a minimum, Petitioner has
 2 not shown actual prejudice resulting from the failure to give the instruction, especially in light of
 3 the instructions on reasonable doubt and the other pinpoint instructions related to McNary.

4 The Court determines that the California Court of Appeal's decision as to the pinpoint
 5 instruction was not contrary to Supreme Court precedent, nor did it involve an unreasonable
 6 determination of the facts.

7 **4. Conclusion**

8 Based on the foregoing, the California Court of Appeal's rejection of this claim did not
 9 result in a decision that was contrary to or involved an unreasonable application of Supreme Court
 10 precedent and nor was it based on an unreasonable determination of the facts in light of the
 11 evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, Claim 1
 12 is DENIED.

13 **B. Claim 2: Confrontation Clause**

14 In Claim 2, Petitioner alleges that the trial court violated his Confrontation Clause right
 15 and right to Due Process, guaranteed by the Sixth and Fourteenth Amendments, by admitting
 16 testimonial hearsay for pretextual purposes. Am'd Pet. at 6.

17 **1. Procedural Background and Standard of Review**

18 Claim 2 was raised in Petitioner's petition for review on appeal filed in the California
 19 Supreme Court. *See* Pet., Ex. 3. The petition for review was denied summarily. *See* Ans., Ex. N.
 20 As discussed above, this Court may "look through" that decision to the California Court of
 21 Appeal's underlying decision on direct review, which denied the claim on the merits. *See People*
 22 *v. Campbell*, 2012 WL 1201647, at *17-20. Petitioner points the Court to the Supreme Court's
 23 decision in *Crawford v. Washington*, 541 U.S. 36 (2004), as well as in *Tennessee v. Street*, 417
 24 U.S. 409 (1985); *Bruton v. United States*, 391 U.S. 123 (1986); and *Douglas v. Alabama*, 380 U.S.
 25 415 (1965). *See* Trav. at 40. Accordingly, this Court's task is to determine whether the California
 26 Court of Appeal's denial of Claim 2 involved an unreasonable application of or was contrary to
 27 *Crawford* and the other Supreme Court authority identified by Petitioner.
 28

2. California Court of Appeal Decision

The California Court of Appeal addressed Petitioner's Confrontation Clause claim as follows:

II. Admission of McNary's Out-of-Court Statements

Prior to trial, the court granted defense counsel's request, over the prosecutor's objection, to allow Janee Gilmore to testify that she heard McNary confess to shooting Officer Fontana. The prosecutor told the jury in his opening statement that McNary has said that he did not shoot Officer Fontana. Defense counsel told the jury in his opening statement that Gilmore would confirm the defense theory that McNary had shot Officer Fontana by testifying that McNary had confessed the killing to her. The prosecution then moved to call Gilmore during its case-in-chief and to impeach McNary's statements to Gilmore by offering other statements by McNary that were inconsistent with the declaration against penal interest he made to Gilmore. The prosecutor argued that Evidence Code section 1202 and *People v. Osorio* (2008) 165 Cal.App.4th 603 (*Osorio*) permitted this procedure. Defendant objected, arguing that what the prosecutor wanted to do was "back door in McNary's denial of shooting Fontana" under Evidence Code section 1202. "[H]e wants to impeach Janee Gilmore. He does not want to impeach Rodney McNary." Defendant also objected to admission of evidence of McNary's denials on the basis of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), and Evidence Code section 352. The court granted the prosecutor's motion, finding that the prosecutor had established, "under the *Osorio* case, that this is not testimonial and therefore doesn't implicate *Crawford* and that it comes within [Evidence Code section] 1202 and is proper."

During the prosecutor's case-in-chief, after the jury heard Gilmore's testimony regarding McNary's confession to her, Officer Imobersteg's testimony about McNary's unrecorded police interview on the day of the shooting, McNary's recorded police interview, and Officer Pete Ramirez's testimony about McNary's unrecorded interview several years later, the court instructed the jury that "the recorded statement of Mr. McNary does not come into evidence for the truth of the matter, but for the purpose and only the purpose of impeaching the statements he made to Janee Gilmore, which she testified about. [¶] And the same is true with his statement to Officer Imobersteg." The jury then heard testimony from David Lucio, an investigator associated with the public defender's office, that McNary said "basically" the same thing to him that he had said in his police interviews. The jury later heard testimony from Sally Graver, a private investigator working with defense counsel, that she interviewed McNary twice, the first time in September 2004, and the second time in January 2005. Graver testified that during both interviews, McNary's statements to her about what he did on the night of Officer Fontana's shooting were generally consistent with his statements to the police. At the close of the trial, the court instructed the jury as follows: "Rodney McNary did not testify in this trial, but statements he made at an earlier time were introduced through the testimony of Janee Gilmore and Lacey Orteiz. In addition to this testimony, you have heard evidence that Rodney McNary made statements to David Lucio and Sally Graver

and also to Detectives Edwards and Ramirez, which were recorded. [¶] If you decide that Rodney McNary made those statements to David Lucio, Sally Graver, and the tape recording of Rodney McNary's interviews with Detectives Edwards and Ramirez, you may only consider them in a limited way. You may use them only in deciding whether you believe the statements made by McNary to Janee Gilmore and Lacey Orteza. You may not use these statements as proof that the information contained in them is true, nor may you use them for any other purpose."

Defendant now contends that the court erred in admitting McNary's out-of-court exculpatory statements. "McNary's statements to police and defense investigators could impeach his confession to Gilmore only if the jurors determined that the former statements were true. Moreover, McNary's out-of-court statements to the effect that he did not shoot the officer went directly to the heart of the central issue in the case. Under these circumstances, despite the general presumption that jurors follow the instructions given them, and notwithstanding the trial court's limiting instructions, the admission of McNary's repeated denials of guilt bore an undue risk of confusing the jurors and causing them to consider McNary's statements for the underlying truth.... As against this strong risk of confusing the jury, the prosecution had no need at all, nor a foundation, for introducing the evidence." Defendant also contends that admission of McNary's out-of-court exculpatory statements violated defendant's Sixth Amendment right to confront witnesses.

The Attorney General contends that the court properly allowed the prosecutor to call Gilmore and to present other testimony in his case-in-chief in order to address defendant's theory of defense. The Attorney General argues that the prosecutor was entitled to use hearsay to impeach Gilmore's and Ortiz's testimony regarding what McNary said to them. "Because McNary had invoked the Fifth Amendment and subsequently absconded from parole, the only possible way for the prosecutor to rebut the defense evidence was through McNary's prior denials of guilt. Evidence Code section 1202 expressly allows a party to present hearsay for such a purpose, i.e., to impeach hearsay offered on behalf of the same declarant." The Attorney General further contends that admission of McNary's out-of-court exculpatory statements did not violate defendant's right to confront witnesses.

A trial court has discretion, within the limits of Evidence Code section 352, to permit the prosecution to introduce during its case-in-chief evidence on a witness's credibility when the prosecution reasonably anticipates the defense will place the witness's credibility at issue. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1085 [defense signaled a strategy of challenging the witness's credibility as early as the preliminary hearing].) "'As a general matter, an appellate court reviews a trial court's ruling as to the order of proof for abuse of discretion. That is because, as a general matter, the trial court has authority to 'regulate the order of proof' in the exercise of 'its discretion.'" (Evid.Code, § 320.)' [Citations.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 175.)

Evidence Code section 1202 "governs the impeachment of hearsay

statements by a declarant who does not testify at trial.” (*People v. Blacksher* (2011) 52 Cal.4th 769, 806 (*Blacksher*)). Evidence Code section 1202 states, in relevant part: “Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct.” “[Evidence Code s]ection 1202 deals with the impeachment of a declarant whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. It clarifies two points. *First*, evidence to impeach a hearsay declarant is not to be excluded on the ground that it is collateral. *Second*, the rule applying to the impeachment of a witness—that a witness may be impeached by an inconsistent statement only if he [or she] is provided with an opportunity to explain or deny it—does not apply to a hearsay declarant.” [Citation.]” (*Blacksher, supra*, at p. 806, fn. 22.)

Evidence Code section 785, which was added as part of the same bill that added Evidence Code section 1202, allows the credibility of a witness to be attacked by any party. (*Osorio, supra*, 165 Cal.App.4th at pp. 616–617; *Blacksher, supra*, 52 Cal.4th at p. 807.) “Because the Legislature did not expressly make Evidence Code sections 785 and 1202 mutually exclusive, *Osorio* concluded that both sections should be read together and ‘as a single statute, these two sections allow a prosecutor to use a prior inconsistent statement to partially impeach a hearsay statement the prosecutor had previously introduced.’ [Citation.]” (*Blacksher, supra*, at pp. 807–808.) “[T]he result in *Osorio* was ... correct. The inconsistent statements at issue in *Osorio* were not hearsay because they were not admitted for their truth. Accordingly, the defendant’s inability to cross-examine the declarant about those statements raised no confrontation clause concerns [under the *Crawford* rule].” (*Blacksher, supra*, at p. 808; see also *id.* at fn. 23.)

In this case, the court properly allowed the prosecutor to present McNary’s out-of-court exculpatory statements. The court had previously ruled that defendant could present evidence that McNary had confessed to shooting Officer Fontana, and defense counsel informed the jury during opening statements that Gilmore would testify to that effect. Accordingly, the defense put McNary’s credibility at issue, and the prosecutor could properly attack McNary’s credibility during its case-in-chief. (*People v. Mendoza, supra*, 52 Cal.4th at p. 1085.) In addition, Evidence Code sections 785 and 1202 allowed the prosecutor to attack McNary’s credibility using his prior inconsistent statements. (*Osorio, supra*, 165 Cal.App.4th at pp. 616–617; *Blacksher, supra*, 52 Cal.4th at p. 807.) And, admission of the prior inconsistent statements did not violate *Crawford*, as the statements were not admitted for their truth. (*Blacksher, supra*, at p. 808.) The court instructed the jury that the statements were not admitted for their truth, and that the jury could use them only to assess McNary’s credibility, and we must presume that the jury understood and followed the court’s instruction. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 (*Mickey*)). No confrontation or due process violation has been shown.

People v. Campbell, 2009 WL 2766801, at *17-20 (footnote omitted).

3. Legal Standard

“The Sixth Amendment’s Confrontation Clause provides that, ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’” *Crawford*, 541 U.S. at 42 (alterations in original) (quoting U.S. Const., amend. VI). The Supreme Court explained that pursuant to the Confrontation Clause, “[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” *Id.* at 59. “The Clause [] does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” *Id.* at 59 n.9 (citing *Street*, 471 U.S. at 414). In *Tennessee v. Street*, the Supreme Court summarized its holding as follows:

The State introduced Peele’s confession for the legitimate, nonhearsay purpose of rebutting respondent’s testimony that his own confession was a coerced “copy” of Peele’s statement. The jury’s attention was directed to this distinctive and limited purpose by the prosecutor’s questions and closing argument. In this context, we hold that the trial judge’s instructions were the appropriate way to limit the jury’s use of that evidence in a manner consistent with the Confrontation Clause.

471 U.S. at 417.

4. Analysis

Petitioner contends that there was a risk that the out-of-court statements would be considered for their truth, and therefore the admission of these statements violated his right to confront witnesses under the Sixth Amendment. *Trav.* at 39-49. Petitioner argues that “the limiting instructions could not ameliorate the prejudice of the unfronted testimonial out-of-court statements” and that “the jury would necessarily consider the statements for their truth despite the limiting instructions.” *Id.* at 40. Petitioner asserts that the prosecution purported to admit McNary’s out-of-court statements to attack his credibility but actually was using “pretext and manipulation of the evidence rules to counter the third party culpability defense” put on by Petitioner. *Id.* at 41-42. Petitioner argues that “the Confrontation Clause was violated by the prosecutor’s using the subterfuge of a putative purpose other than proving the truth of the matter to gain the admission of testimonial hearsay, through his clear intent, and the purpose to which he

1 actually put it, was to have the trier of fact consider it for its truth.” *Id.* at 42. Petitioner argues
 2 that “[t]he fact that petitioner did not have a prior opportunity to cross-examine McNary bars the
 3 admission of his testimonial hearsay for the purpose of proving the truth of the matters stated
 4 therein, which is the very purpose to which the prosecutor put it.” *Id.* Petitioner argues that the
 5 presumption that jurors follow instructions is rebuttable and that presumption has been rebutted
 6 here. *Id.* at 42-43.

7 Petitioner points the Court to *Williams v. Illinois*, 567 U.S. 50 (2012), in support of his
 8 argument. *Trav.* at 43-46. Petitioner does recognize that this case was decided after the California
 9 Court of Appeal’s decision, so he is not arguing that the denial of his Confrontation Clause claim
 10 involved an unreasonable application of this case. *Id.* at 46. In *Williams*, the Supreme Court
 11 explained that “it is settled that the Confrontation Clause does not bar the admission of”
 12 statements that are “not admitted for the truth of the matter asserted.” 567 U.S. at 57. The
 13 Supreme Court further stated that *Crawford* “took pains to reaffirm the proposition that the
 14 Confrontation Clause ‘does not bar the use of testimonial statements for purposes other than
 15 establishing the truth of the matter asserted.’” *Id.* at 70 (quoting *Crawford*, 541 U.S. at 59-60 n.9).

16 Petitioner relies on a concurring opinion written by Justice Thomas in *Williams*. *Williams*,
 17 567 U.S. 102-18 (Thomas, J., concurring). He recognized that “[r]ules of limited admissibility are
 18 commonplace in evidence law” and that the Court will “often presume that courts and juries
 19 follow limiting instructions.” *Id.* at 105 (citations omitted). But, he explained, the Supreme Court
 20 has also “recognized that concepts central to the application of the Confrontation Clause are
 21 ultimately matters of federal constitutional law that are not dictated by state or federal evidentiary
 22 rules.” *Id.* “Likewise, [the Supreme Court] ha[s] held that limiting instructions may be
 23 insufficient in some circumstances to protect against violations of the Confrontation Clause.” *Id.*
 24 (citing *Bruton*, 391 U.S. 123). Justice Thomas explained that the Supreme Court has “made sure
 25 that an out-of-court statement was introduced for a ‘legitimate, nonhearsay purpose’ before relying
 26 on the not-for-its-truth rationale to dismiss the application of the Confrontation Clause.” *Id.*
 27 (citing *Street*, 471 U.S. at 417). Justice Thomas reached the conclusion that in *Williams*, the
 28 statements at issue had not been “introduced for a plausible nonhearsay purpose” and had instead

1 been introduced for their truth. *Id.* at 106-110. He concurred with the judgment on a different
2 basis. *Id.* at 110-18.

3 Petitioner also points to Justice Kagan’s dissent in *Williams*, in which she also concluded
4 that the statements at issue in the case were admitted for the truth of the matter asserted and
5 therefore were not exempt from the requirements of the Confrontation Clause. *Williams*, 567 U.S.
6 at 125-33 (Kagan, J., dissenting). She explained that this case was different from *Street*, in which
7 the statement was actually not admitted for the truth of the matter asserted. *Id.* at 126. Justice
8 Kagan explained *Crawford* and *Street* as follows:

9 In acknowledging the not-for-the-truth carveout from the Clause, the
10 Court [in *Crawford*] cited *Tennessee v. Street* as exemplary. *See*
11 *Crawford*, 541 U.S., at 59-60, n.9, 124 S. Ct. 1354. There, Street
12 claimed that his stationhouse confession of murder was a sham: A
13 police officer, he charged, had read aloud his alleged accomplice’s
14 confession and forced him to repeat it. To help rebut that defense, the
15 State introduced the other confession into the record, so the jury could
16 see how it differed from Street’s. This Court rejected Street’s
17 Confrontation Clause claim because the State had offered the out-of-
18 court statement not to prove “the truth of [the accomplice’s]
19 assertions” about the murder, but only to disprove of Street’s claim of
20 how the police elicited his confession. *Street*, 471 U.S., at 413, 105
21 S. Ct. 2078. Otherwise said, the truth of the admitted statement was
22 utterly immaterial; the only thing that mattered was that the statement
23 (whether true or false) varied from Street’s.

24 *Williams*, 567 U.S. at 126 (Kagan, J., dissenting).

25 In summary, Petitioner argues “that the mere admission of the McNary statements for a
26 purported nonhearsay purpose does not, *ipso facto*, mean that the Confrontation Clause is not
27 violated, and that a reviewing court must examine the relevant questions, including whether the
28 out-of-court statements were introduced as a subterfuge or for a *legitimate* nonhearsay purpose
and whether the statements ‘remained bound up with [their] truth’ in order to make that
determination.” Trav. at 46 (emphases in original). He asserts that the California Court of Appeal
“never answered the predicate questions because it never asked them, and it unreasonably applied
clearly established federal law, and/or acted contrary to it, in failing to do so.” *Id.* Respondent
counters that “the prosecutor’s sole purpose in introducing McNary’s pretrial assertions of his
innocence was to impeach the defense evidence that McNary had confessed the killing of Officer
Fontana.” Ans. at 85. He explains that “[t]he trial court repeatedly instructed the jurors that they

1 were not to consider McNary's out-of-court statements for the truth of the matter asserted, but
 2 rather 'to show the conflict of these statements with the other testimony we've had.'" *Id.* at 85-86
 3 (citation omitted). Respondent cites to a Supreme Court case in arguing that "[t]he jury is
 4 presumed to have followed that instruction." *Id.* at 86 (citing *Francis v. Franklin*, 471 U.S. 307,
 5 324 n.9 (1985)).

6 The Court determines that the California Court of Appeal did not unreasonably apply
 7 clearly established federal law. The California Court of Appeal accurately stated that "[t]he court
 8 instructed the jury that the statements were not admitted for their truth, and that the jury could use
 9 them only to assess McNary's credibility, and we must presume that the jury understood and
 10 followed the court's instruction." *People v. Campbell*, 2012 WL 1201647, at *20. The California
 11 Court of Appeal did not unreasonably apply or act contrary to Supreme Court precedent in stating
 12 that it presumed the jury understood and followed the court's instruction. *See Tan v. Runnels*, 413
 13 F.3d 1101, 1115 (9th Cir. 2005) (citing *Francis*, 471 U.S. at 324 n.9) (stating courts "presume
 14 jurors follow the court's instructions absent extraordinary situations"); *see also Greer v. Miller*,
 15 483 U.S. 756, 766 n.8 (1987) ("We normally presume that a jury will follow an instruction to
 16 disregard inadmissible evidence inadvertently presented to it, unless there is an "overwhelming
 17 probability" that the jury will be unable to follow the court's instructions . . . and a strong
 18 likelihood that the effect of the evidence would be "devastating" to the defendant." (citations
 19 omitted)). And while *Williams* was not decided before the California Court of Appeal decision,
 20 and therefore was not clearly established federal law, the Court determines that in this case, the
 21 California Court of Appeal did not act contrary to Supreme Court precedent in deciding that the
 22 evidence was properly admitted for a reason other than the truth of the matter asserted. As the
 23 California Court of Appeal recognized, the evidence was admitted for impeachment purposes;
 24 these impeachment purposes were not "pretextual" as Petitioner argues. And with this
 25 determination made, the California Court of Appeal did not unreasonably apply *Crawford* or
 26 *Street* in determining that the statements did not violate the Confrontation Clause given that they
 27 were not admitted for their truth.

28 Based on the foregoing, the California Court of Appeal's rejection of this claim did not

1 result in a decision that was contrary to or involved an unreasonable application of Supreme Court
 2 precedent and nor was it based on an unreasonable determination of the facts in light of the
 3 evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). Accordingly, Claim 2 is
 4 DENIED.

5 **C. Claim 3: Due Process and Fair Trial Re: Bad Character Evidence**

6 In Claim 3, Petitioner alleges that the trial court violated his rights to Due Process and a
 7 Fair Trial, guaranteed by the Fifth and Fourteenth Amendments, by admitting irrelevant and
 8 prejudicial bad character evidence. Am'd Pet. at 6. He specifically argues that the trial court
 9 admitted "irrelevant and prejudicial uncharged-offenses and other bad-character evidence." Trav.
 10 at 49.

11 **1. Procedural Background and Standard of Review**

12 Claim 3 was raised in Petitioner's petition for review on appeal filed in the California
 13 Supreme Court. See Pet., Ex. 3. The petition for review was denied summarily. See Ans., Ex. N.
 14 As discussed above, this Court may "look through" that decision to the California Court of
 15 Appeal's underlying decision on direct review, which denied the claim on the merits. See *People*
 16 *v. Campbell*, 2012 WL 1201647, at *20-24.

17 Petitioner briefly argues that the California Court of Appeal did not address Petitioner's
 18 federal claim, and therefore the Court should not grant AEDPA deference. Trav. at 51. The Court
 19 applies the rebuttable presumption from *Johnson v. Williams*, discussed above. Petitioner has
 20 provided no argument as to why the presumption is rebutted. See Trav. at 49-51. Further, the
 21 California Court of Appeal explicitly recognized that defendant argues that "the admission of the
 22 testimony [about the uncharged offenses] denied him a fair trial." *People v. Campbell*, 2012 WL
 23 1201647, at *21. Accordingly, this Court's task is to determine whether the California Court of
 24 Appeal's denial of Claim 3 was contrary to Supreme Court authority identified by Petitioner. See
 25 *Williams*, 840 F.3d at 1009-1011 (applying standard in § 2254(d)(1)-(2) on remand).

26 Petitioner seems to acknowledge that the denial of Claim 3 did not violate any clearly
 27 established federal law. Trav. at 49-51. Again, this Court's task is to determine whether the
 28 California Court of Appeal's denial of Claim 3 involved an unreasonable application of or is

contrary to Supreme Court precedent.

2. California Court of Appeal Decision

The California Court of Appeal addressed Petitioner's Confrontation Clause claim as follows:

III. A. Evidence of Defendant's Uncharged Offenses

As stated above, the jury heard evidence of the facts underlying three incidents involving defendant's uncharged offenses. The first incident occurred in October 2000, when defendant was stopped by an officer for riding a minibike without a helmet. The officer needed to force defendant to the side of the road because defendant did not stop right away. When the officer reached inside defendant's pocket, with defendant's permission, and then pulled out items from the pocket, defendant pushed his body onto the officer and attempted to grab the items out of the officer's hand. When the officer pushed defendant away, defendant took off running. The officer discovered he had defendant's ID, some cash, and five baggies of marijuana.

The second incident occurred in June 2001, when officers approached defendant inside a Good Guys store because store employees reported that defendant had tried to use a stolen credit card. Defendant ran from the officers and, when one officer stood in front of the open store door, defendant ran into the officer, pushing him to the ground. Defendant then violently struggled in an attempt to get away from both officers, causing injuries to both officers. Even though defendant was handcuffed, other officers needed a leg-wrap restraint in order to put defendant into a patrol car.

The third incident occurred in September 2001, when an off-duty police officer approached defendant and another man who were confronting the officer's neighbors on the street outside their homes late at night. Defendant appeared to be under the influence and became agitated and aggressive. When the officer attempted to arrest defendant, defendant kicked the officer's right leg out from under him, struck him on the back of the head with a flashlight, and ran away. The officer needed stitches in his head as a result of his injuries.

At the close of the case, the court instructed the jury in relevant part: "During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." "The People have presented evidence that the defendant committed other offenses of resisting arrest, evading a peace officer, simple battery on a peace officer, trying to prevent or deter an executive officer from performing that officer's duty, and assault with a deadly weapon which are not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses.... [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may but are not required to consider that evidence for the limited purpose of deciding

whether or not the defendant had a motive to commit the offense charged in Count 1; namely, murder. [¶] Do not consider this evidence for any other purpose.... [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.”

In his closing argument, the prosecutor relied on the uncharged offense evidence to show that, although there was no evidence that McNary had ever violently resisted arrest, the evidence showed that defendant had “a documented history of absolute uncontrolled frenzy to resist an arrest,” “a pathological aversion to arrest.” “So I think it’s wrong to say that [defendant] killed because he had two warrants out for his arrest, because I don’t think ... that exactly described what’s happening.” “What I think was happening is that he has some type of flaw, a dangerous flaw: that he will not submit to an arrest and respond with force and violence to avoid apprehension.” “That’s his flaw. And that explains the motive. Because he is a flawed person, because he is pathologically averse to submitting to arrest, you can see how this would happen.” “What I’m saying is this guy was a time bomb. And, unfortunately, Jeff Fontana didn’t know that he was stopping a time bomb.” Defendant did not object to this argument by the prosecutor.

On appeal, defendant contends that none of the testimony regarding the uncharged offenses was admissible, and that the admission of the testimony denied him a fair trial. He argues that evidence of uncharged offenses is not admissible on the issue of motive unless the other offenses were so substantially similar to the charged crime “as to evidence the perpetrator’s ‘signature,’ ” and that the evidence of the incidents at issue was “far from ‘like a signature.’ ” He further argues that the evidence was far more prejudicial than probative, and that the prosecutor “blatantly” improperly used the evidence to prove defendant’s “*propensity of character* to commit violence against police officers.” “[T]he prosecution’s use of the other-crimes evidence to make a propensity argument is probative of the harm that resulted from the erroneous admission of that evidence.”

The Attorney General contends that the evidence of defendant’s prior offenses was properly admitted. The Attorney General argues that the offenses were “extremely” probative of defendant’s mental state at the time of the charged offense, they were not the types of offenses that would have inflamed the passions of the jury unfairly against defendant, and the court’s limiting instructions further minimized any possibility of prejudice. The Attorney General further argues that defendant forfeited any claim of error based on the prosecutor’s closing argument by failing to raise an objection below, and that “[e]ven if the prosecutor’s rhetoric became overheated in a few passages of a very lengthy argument, the strength of the evidence as a whole rendered any error harmless.”

Evidence Code section 1101, subdivision (a) states in relevant part: “Except as provided in this section ..., evidence of a person’s character or a trait of his or her character ... is inadmissible when offered to prove his or her conduct on a specified occasion.” Subdivision (b) of this section provides: “Nothing in this section prohibits the admission of evidence that a person committed a crime, ... when relevant to prove some fact (such as motive ...) other than his or her disposition

to commit such an act.”

“ ‘As Wigmore notes, admission of this evidence produces an “over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.” [Citation.] It breeds a “tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offen[s]es....” [Citation.] Moreover, “the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor.” [Citation.]’ [Citation.]” (*People v. Foster* (2010) 50 Cal.4th 1301, 1331 (*Foster*); *People v. Fuiava* (2012) 53 Cal.4th 622, 667 (*Fuiava*)). Since substantial prejudice is inherent in admitting evidence of uncharged offenses, evidence of such offenses is admissible only if it has “ ‘substantial probative value.’ ” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *Foster, supra*, at p. 1331.) Moreover, the probative value of the evidence of any uncharged offense must be weighed against the danger “of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid.Code, § 352.) The “undue prejudice” referred to in Evidence Code section 352 “is not synonymous with ‘damaging,’ but refers instead to evidence that “ ‘uniquely tends to evoke an emotional bias against defendant’ ” without regard to its relevance on material issues.” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

“ ‘ “[W]hen the commission of a criminal act [(the crime for which defendant is on trial)] is a disputed issue, evidence of *motive* may become relevant to that issue. Motive is itself a state-of-mind or state-of-emotion fact. Motive is an idea, belief, or emotion that impels or incites one to act in accordance with his state of mind or emotion. Thus, evidence, offered to prove motive, that defendant committed an uncharged offense meets the test of relevancy by virtue of the circumstantial-evidence-reasoning process that accepts as valid the principle that one tends to act in accordance with his state of mind or emotion.” [Citation.]’ [Citations.]” (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1382–1383 (*Spector*)).

“Although motive is not an element of any of defendant's crimes, ‘the absence of apparent motive may make proof of the essential elements less persuasive....’ [Citation.]” (*People v. Davis* (2009) 46 Cal.4th 539, 604.) “Because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.” (*People v. Lopez* (1969) 1 Cal.App.3d 78, 85.)

“Other crimes evidence is admissible to establish two different types or categories of motive evidence. In the first category, ‘the uncharged act supplies the motive for the charged crime; the uncharged act is cause, and the charged crime is effect.’ [Citation.] ‘In the second category, the uncharged act evidences the existence of a motive, but the act does not supply the motive.... [T]he motive is the cause, and both the charged and uncharged acts are effects. *Both crimes are explainable as a result of the same motive.*’ [Citation.] [¶] California case law allows the admission of other crimes evidence to prove this second kind of motive. (See *People v. Davis* [, *supra*,] 46 Cal.4th 539, 604 [evidence of two prior sexual assaults on children involving bondage tended to show defendant had motive for sexually assaulting

murder victim]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 15 [evidence of prior assault and robbery of different victim tended to show defendant had motive to rob victim killed in current case]; *People v. Walker* (2006) 139 Cal.App.4th 782, 803 [in trial for murdering prostitute, evidence of prior sexual assaults tended to show defendant's "common motive of animus against prostitutes resulting in violent batteries interrupting completion of the sex act"']; *People v. Pertsoni* (1985) 172 Cal.App.3d 369, 375 [in trial for murdering man affiliated with Yugoslav government, evidence defendant had previously shot at person he thought was Yugoslavian ambassador tended to show that defendant's hatred of Yugoslav government impelled him to kill current victim].) (*Spector, supra*, 194 Cal.App.4th at pp. 1381–1382, fn. omitted.) "Both *People v. Walker, supra*, 139 Cal.App.4th 782, and *People v. Scheer* (1998) 68 Cal.App.4th 1009, acknowledged the legitimacy of category two motive evidence although they characterized it as 'common plan' evidence. (See *People v. Walker, supra*, at p. 804.)" (*Spector, supra*, at p. 1382, fn. 17.)

"[T]he probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus. [Citations.]" (*People v. Demetrulias, supra*, 39 Cal.4th at p. 15.)

" 'Rulings made under [Evidence Code sections 1101 and 352] are reviewed for an abuse of discretion. [Citation.]' [Citation.] 'Under the abuse of discretion standard, "a trial court's ruling will not be disturbed, and reversal ... is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citation.]" (*Foster, supra*, 50 Cal.4th at pp. 1328–1329; see also *Fuiava, supra*, 53 Cal.4th at pp. 667–668.)

In this case, the evidence of the facts underlying the uncharged offenses was admitted to show that defendant had a motive for shooting Officer Fontana. Evidence of defendant's motives for assaulting other officers or people attempting to apprehend him tended to show that defendant had the same motive when he assaulted and killed Officer Fontana. The challenged evidence showed that prior to the shooting, when defendant was approached, stopped, or arrested by a police officer or someone else who attempted to apprehend him, he acted aggressively and violently, often physically harming the apprehending person. In October 2000, when an officer made a traffic stop and then pulled five bags of marijuana out of defendant's pocket, defendant pushed his body against the officer, attempted to grab the items out of the officer's hand, and then took off running. In June 2001, defendant ran from two officers who approached him inside a store; he took one officer to the ground and violently struggled with both officers, injuring both officers; and other officers needed a leg-wrap restraint in order to place defendant in a patrol car. In September 2001, when an off-duty police officer attempted to arrest defendant for being drunk in public and creating a disturbance, defendant kicked the person's leg out from under him, hit the person in the head with a flashlight, and ran away. In October 2001, Officer Fontana was shot after he parked behind defendant's car near where defendant and McNary had earlier abandoned McNary's

car. McNary's car had earlier hit a car and a person while McNary and defendant were fleeing from a fight at a party. Thus, both the uncharged offenses and the charged crimes were explainable as a result of the same motive. (*Spector, supra*, 194 Cal.App.4th at p. 1381.) That is, "the other crimes evidence in this case was admissible because it tended to show [defendant] had acted with the same state of mind or 'state of emotion' in both the charged and the uncharged offenses." (*Id.* at p. 1383; see also *Fuiava, supra*, 53 Cal.4th at p. 668.)

The challenged evidence was highly relevant to the disputed facts, and it was no more inflammatory than the evidence concerning the charged offense of murder of a police officer during the performance of his duties. In addition, the jury was instructed that the evidence of the uncharged offenses could not be considered as proof that defendant is a person of bad character or that he has a disposition to commit crimes. The jury was instructed that the evidence could be considered for the limited purpose of determining if it tends to show the existence of a motive for the commission of the charged crime, and for no other purpose; that the People are not required to prove that defendant had a motive but, in reaching its verdict, it may consider whether defendant did have a motive; and that "[h]aving a motive may be a factor tending to show that the defendant is guilty [whereas n]ot having a motive may be a factor tending to show the defendant is not guilty." The jury was also instructed that it must decide what happened based only on the evidence presented, that the attorneys' remarks during closing arguments are not evidence, and that it must follow the court's instructions even if it believes that the attorneys' comments conflict with the instructions. These instructions ameliorated any potential misapplication of the challenged evidence due to the prosecutor's closing remarks, and we must presume that the jury understood and followed the instructions. (See *People v. Osband* (1996) 13 Cal.4th 622, 717.) The jury also heard evidence that defendant knew that he had outstanding bench warrants and that he did not want to go back to jail, which was relevant to the special allegation that defendant's bail had been revoked at the time of Officer Fontana's shooting but which also showed that defendant had a motive to shoot the officer. Defendant has not shown that the trial court abused its discretion in admitting the testimony regarding the facts underlying the uncharged offenses.

Even if we were to find that the court erred in admitting evidence of the facts underlying some or all of the uncharged offenses on the issue of motive, we would find any error not prejudicial. The evidence showed that defendant was with McNary when McNary hit a car and an individual in the street as he was speeding away from a party earlier in the same evening that Officer Fontana was shot and killed. Defendant testified that he had his father's gun when Officer Fontana approached him and McNary near where he and McNary abandoned the car McNary had been driving. Defendant also testified that it was McNary and not defendant who shot and killed the officer. The court instructed the jury that having a motive may be a factor tending to show that defendant is guilty of the charged murder while not having a motive may be a factor tending to show that defendant is not guilty. The court similarly instructed the jury at defendant's request regarding the presence or absence of motive in Rodney McNary. Evidence that

defendant had prior convictions was admitted as impeachment evidence, the facts underlying the uncharged prior offenses were not admitted to show defendant's disposition to commit the charged murder, and the jury was instructed not to consider the uncharged offense evidence to prove that defendant has a bad character or is disposed to commit crime. The evidence regarding the uncharged offenses was no more prejudicial or inflammatory than the properly admitted evidence that defendant failed to appear in criminal court on forgery and theft charges, that his bail was revoked, that he had two outstanding arrest warrants, and that he told a friend he did not want to turn himself in because he knew he was facing three to five years in prison. Under the facts of this case, it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the evidence of his prior uncharged offenses. Therefore, defendant cannot show that admission of the evidence of his prior uncharged offenses “ ‘resulted in a manifest miscarriage of justice.’ ” (*Foster, supra*, 50 Cal.4th at p. 1329.)

III. B. Other Bad Acts Evidence

Defendant contends that the court also abused its discretion by admitting other irrelevant and prejudicial bad character evidence. Specifically, he challenges the admission of evidence that (1) a .357–caliber gun and .357–caliber ammunition were found during the search of defendant's residence; (2) a resident of Calle Almaden reported on the morning of Officer Fontana's shooting that he had seen defendant in the back seat of the Hyundai in the area a month earlier, and that something caused the resident to report it to the police at that time; and (3) Rueben Martinez, a neighbor of defendant's family, had negative things to say about activity at the Campbell residence. Defendant argues that this evidence “had no conceivable relevance to proof of the murder of Officer Fontana other than through the impermissible means of proving [defendant's] bad character (Evid.Code, § 1101, subd. (a)), and which also was far more prejudicial than probative (Evid.Code, § 352).”

The Attorney General contends that any error in admitting this challenged evidence was harmless.

The defense theory of the case was that McNary was the person who shot Officer Fontana, but the police did not do everything they could have done during their investigation of the shooting. The evidence that a .357–caliber gun and .357–caliber ammunition unrelated to Officer Fontana's shooting (Officer Fontana was shot with a .45) were found during a search of defendant's residence tended to show that the officers' search of defendant's residence was thorough, and the evidence was not unduly prejudicial to defendant because the .357 gun and ammunition were found in areas of the residence that defendant did not have exclusive control over. The evidence that a resident of Calle Almaden saw defendant in the Hyundai a month before the shooting tended to show that defendant regularly used the Hyundai and that the police were aware that the Hyundai had been seen in the area prior to the shooting, and the evidence was not unduly prejudicial to defendant because there was no evidence that the actions of defendant were the reason the witness reported the prior sighting to the police at the time of the sighting, so any error in

admitting the evidence was harmless. The evidence that Martinez was sober, cooperative, and had negative things to say to the police about activity at the Campbell residence was relevant to Martinez's credibility, because Martinez testified that he was uncooperative with the police because the police wanted him to falsely say bad things about defendant, that he did not remember making any statements about Campbell to the police, and that this was because he had a long-standing history of heavy drug and alcohol use. On this record, we cannot say that the trial court's decision to admit the challenged evidence was " 'arbitrary, capricious, or patently absurd' " and " 'resulted in a manifest miscarriage of justice.' " (*Foster, supra*, 50 Cal.4th at p. 1329.)

People v. Campbell, 2012 WL 1201647, at *20-24.

3. Analysis

Petitioner recognizes that "the Supreme Court has left open the question of whether the admission of propensity evidence can violate due process and the Ninth Circuit has relied on this absence of clearly established federal law within the meaning of § 2254(d)(1) to reject claims such as the instant one." Trav. at 49. The Supreme Court has stated: "[W]e express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Estelle*, 502 U.S. at 75 n.5. And the Ninth Circuit has relied on the absence of clearly established federal law in foreclosing a habeas petitioner's argument that impermissible propensity evidence violates clearly established due process rights. See *Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008) (citing *Alberni v. McDaniel*, 458 F.3d 860, 862-67 (9th Cir. 2006), cert. denied, 549 U.S. 1287 (2007)). The Ninth Circuit referred to the footnote in *Estelle* in determining "that admission of the propensity evidence was not contrary to clearly established law." *Id.* at 1046 (citing *Alberni*, 458 F.3d at 863-67). Here, Petitioner can point to no Supreme Court precedent establishing that admission of the identified evidence is unconstitutional, so the Court cannot say that the California Court of Appeal decision was contrary to clearly established Supreme Court precedent. See *id.*

Petitioner contends that the precedent that Respondent points to was wrongly decided, but also recognizes that "given this Court's necessary deference to controlling Ninth Circuit authority, it may well be that [P]etitioner's propensity claim will be rejected based on the absence of clearly established federal law." Trav. at 50. Petitioner does argue that the Court can consider this error in its cumulative error analysis. *Id.* at 50-51. Petitioner also asserts that part of the claim does not

include propensity evidence, but instead “the admission of other irrelevant, prejudicial evidence,” namely, “a gun found at the Campbell residence unrelated to the shooting of Officer Fontana, a prior police call made by a resident on the street where the murder occurred reporting that he had seen the Campbell car about a month earlier and Campbell had been riding in it as a passenger, and a neighbor’s offering negative opinions about the Campbell family.” *Id.* at 51. Petitioner argues that the resolution of this portion of the claim “does not depend on any footnote in a Supreme Court case expressly reserving any issue.” *Id.* But Petitioner does not point the Court to any clearly established Supreme Court decision that the California Court of Appeal unreasonably applied in reaching this conclusion. *See id.* at 51. The Court concludes that the California Court of Appeal did not unreasonably apply or act contrary to Supreme Court precedent in denying Claim 3.

Based on the foregoing, the California Court of Appeal’s rejection of this claim did not result in a decision that was contrary to or involved an unreasonable application of Supreme Court precedent and nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, Claim 3 is DENIED.

D. Claim 4: Due Process and Fair Trial Re: Prosecutorial Misconduct

In Claim 4, Petitioner alleges that the trial court violated his rights to Due Process and a Fair Trial, guaranteed by the Fifth and Fourteenth Amendments, by numerous instances of prosecutorial misconduct. Am’d Pet. at 8.

1. Procedural Background and Standard of Review

Claim 4 was raised in Petitioner’s petition for review on appeal filed in the California Supreme Court. *See* Pet., Ex. 3. The petition for review was denied summarily. *See* Ans., Ex. N. As discussed above, this Court may “look through” that decision to the California Court of Appeal’s underlying decision on direct review, which denied the claim on the merits. *See People v. Campbell*, 2012 WL 1201647, at *24-33.

The Court’s task is to determine whether the California Court of Appeal’s denial of Claim 4 involved an unreasonable application of or was contrary to *Darden v. Wainwright*, 477 U.S. 168,

181 (1986).

2. California Court of Appeal Decision

The California Court of Appeal addressed Petitioner's claims of prosecutorial misconduct as follows:

IV. Prosecutorial Misconduct

Defendant contends that the prosecutor committed "a plethora of other acts of misconduct" in addition to the claims he raised above. Specifically, defendant argues that the prosecutor (a) appealed to the jury's sympathy for the victim, (b) misstated the law during closing argument, (c) disparaged defendant based on his race, (d) engaged in contemptuous behavior, (e) intentionally elicited inadmissible testimony during his cross-examination of defendant, (f) engaged in rude and intemperate behavior, and (g) disparaged defense counsel. "[T]he prosecutor's pervasive misconduct 'so infected the trial with unfairness as to make the resulting conviction a violation of due process.' " Defendant further contends that, in those instances where his counsel failed to object to the misconduct, counsel rendered ineffective assistance.

The Attorney General contends that defendant forfeited many of his claims of misconduct and that, regardless, none of the claimed instances of misconduct were prejudicial.

Recently, in *Fuiava, supra*, 53 Cal.4th 622, a case also involving the murder of a peace officer, the California Supreme Court addressed the issue of prosecutorial misconduct. That case provides guidance to us as we address defendant's claims.

" 'Under California law, a prosecutor commits reversible misconduct if he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " [Citation.] [Citation.]' " (*Fuiava, supra*, 53 Cal.4th at p. 679; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*); *People v. Friend* (2009) 47 Cal.4th 1, 29 (*Friend*).) Misconduct need not be intentional before it constitutes reversible error. (*Hill, supra*, 17 Cal.4th at p. 822.)

"A defendant generally "may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' " [Citation.] [Citation.] A defendant's failure to object

and to request an admonition is excused only when ‘an objection would have been futile or an admonition ineffective.’ [Citation.] Defendant therefore forfeited appellate claims of misconduct related to many of the prosecutor’s actions listed in his briefs. [Citation.]” (*Fuiava*, *supra*, 53 Cal.4th at pp. 679–680; see also *Hill*, *supra*, 17 Cal.4th at p. 820; *Samayoa*, *supra*, 15 Cal.4th at p. 841.)

“To determine whether an admonishment would have been effective, we consider the statements in context. [Citation.] If the defendant objected or if an objection would not have cured the harm, we look to see whether the improper conduct was prejudicial, i.e., whether it is reasonably probable that a jury would have reached a more favorable result absent the objectionable comments. [Citation.]” (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074 (*Herring*).)

“ ‘To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]’ [Citation.]” (*People v. Brown* (2003) 31 Cal.4th 518, 553–554 (*Brown*); see also *Samayoa*, *supra*, 15 Cal.4th at p. 841.)

“To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel’s performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” (*People v. Benavides* (2005) 35 Cal.4th 69, 92–93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 693–694 (*Strickland*).) “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” (*Strickland*, *supra*, 466 U.S. at p. 697.)

IV. A. Appeal to Jurors’ Sympathy

During closing argument, the prosecutor stated that defendant was charged with the “monstrous crime” of “the killing of a police officer.” The prosecutor argued that our society is “dependent upon law enforcement officers who value doing the right thing, who are brave and ... demonstrate valor daily.” He further argued that he had received a note the night before from a police officer friend which said that Officer Fontana “never had a chance ... to grow old, ... to have a life, ... to have the career that he worked for and hoped for. And he didn’t have a chance that night on the street.” Defendant contends that the prosecutor’s arguments “had no bearing on the question of [defendant’s] guilt or innocence, but were highly emotive and bore a strong likelihood of inflaming the jury’s passions.”

“[A]n appeal for sympathy for the victim is out of place during an objective determination of guilt.” (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, reversed on another ground in *Stansbury v.*

1 *California* (1994) 511 U.S. 318.) “ ‘It is, of course, improper to make
 2 arguments to the jury that give it the impression that “emotion may
 3 reign over reason,” and to present “irrelevant information or
 4 inflammatory rhetoric that diverts the jury’s attention from its proper
 5 role, or invites an irrational, purely subjective response.” [Citation.]’
 6 [Citation.]” (*People v. Redd* (2010) 48 Cal.4th 691,
 7 742 (*Redd*); *Fuiava, supra*, 53 Cal.4th at p. 693.) However,
 8 defendant did not object to this argument by the prosecutor.
 9 Therefore, defendant has forfeited the issue on appeal. (*People v.*
 10 *Stansbury, supra*, at p. 1056; *Redd, supra* at p. 743.) Regardless, the
 11 prosecutor’s first comments merely referred to the special allegation
 12 that the victim was a peace officer engaged in the performance of his
 13 duties, and the court instructed the jury that it must “not let bias,
 14 sympathy, prejudice, or public opinion influence your decision.”
 15 Even if we assume that the prosecutor’s latter comments constituted
 16 misconduct, on the record before us we find that an admonition would
 17 have cured any harm and that there is no reasonable probability that a
 18 result more favorable to defendant would have been reached in the
 19 absence of the assumed misconduct. (*People v. Stansbury, supra*, at
 20 p. 1057; *Redd, supra*, at p. 743; *Herring, supra*, 20 Cal.App.4th at p.
 21 1074.)

22 **IV. B. Misstatement of the Law**

23 Defendant contends that the prosecutor misstated the law during
 24 closing argument by suggesting that defendant had a responsibility to
 25 prove his innocence. “ ‘[I]t is improper for the prosecutor to misstate
 26 the law generally [citation], and particularly to attempt to absolve the
 27 prosecution from its prima facie obligation to overcome reasonable
 28 doubt on all elements. [Citation.]’ ” (*Hill, supra*, 17 Cal.4th at p. 829.)

“In *Griffin v. California* (1965) 380 U.S.609, the United States
 Supreme Court held that the prosecution may not comment upon a
 defendant’s failure to testify in his or her own behalf. Its holding does
 not, however, extend to bar prosecution comments based upon the
 state of the evidence or upon the failure of the defense to introduce
 material evidence or to call anticipated witnesses. [Citations.]”
 (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339 (*Bradford*); see
 also *People v. Ratliff* (1986) 41 Cal.3d 675, 691–692 (*Ratliff*).) “A
 prosecutor may fairly comment on and argue any reasonable
 inferences from the evidence. [Citation.] Comments on the state of
 the evidence or on the defense’s failure to call logical witnesses,
 introduce material evidence, or rebut the People’s case are generally
 permissible. [Citation.] However, a prosecutor may not suggest that
 ‘a defendant has a duty or burden to produce evidence, or a duty or
 burden to prove his or her innocence.’ [Citations.]” (*People v.*
Woods (2006) 146 Cal.App.4th 106, 112 (*Woods*).)

The prosecutor argued: “[Defense counsel] has made a point trying to
 claim that he has no responsibility to provide any evidence or to prove
 anything. He keeps talking about burden shifting. But that’s not the
 instruction that you’ve actually gotten from the court. [¶] The
 defendant’s presumed to be innocent. That’s the law. It’s been ...
 always the law in this country. It goes back to England. And that’s
 satisfactory, and no one’s challenging that. [¶] I bear the burden of
 proof to prove him [guilty] beyond a reasonable doubt. That’s all we’re

1 talking about. What that does not mean is if there's evidence that's
2 available to the defendant ... that would help prove that he's telling the
3 truth or there's evidence available to the defendant that would help
4 prove that the witnesses he called or that he's relying upon are telling
5 the truth, then he should bring them in. [¶] He has subpoena power....
6 There is no reason that he could not do that.... He can't shirk that
7 responsibility, as he tried to do here. And he truly tried to do it. [¶] He
8 says [defendant] is telling the truth. After all, look at all the people he
9 told but failed to bring in those people to prove that that's, in fact,
10 what occurred. [¶] That's not what he claims, that burden shifting, and
11 the law protects him from that accusation. That's not the truth. [¶]
12 Indeed, there were many opportunities – many opportunities –” When
13 the court overruled defense counsel's objection at this point that this
14 argument was “prosecutorial misconduct,” the prosecutor continued:
15 “There were many opportunities for Counsel to try and prove that
16 [defendant] was telling the truth. Many. He was the one who was on
17 the run. He was the one who was privy and knew where these
18 witnesses were. He was the one who knew what he told these
19 witnesses.” The prosecutor then named several people that could have
20 corroborated defendant's and his witnesses' testimony.

21 To the extent that the prosecutor's argument could be reasonably
22 understood to suggest that defendant had a “responsibility” to present
23 evidence to prove his innocence, the argument constituted
24 misconduct. However, to the extent that the argument could be
25 reasonably understood to be only a comment on the failure of
26 defendant to present evidence corroborating his and his witnesses'
27 testimony, the argument did not constitute misconduct. (*Bradford*,
28 *supra*, 15 Cal.4th at pp. 1339–1340; *Woods*, *supra*, 146 Cal.App.4th
at p. 113.) We “do not lightly infer” that the jury drew the most
damaging rather than the least damaging meaning from the
prosecutor's statements. (*Brown*, *supra*, 31 Cal.4th at pp. 553–554.)
Further, the court overruled defense counsel's objection that the
prosecutor's argument constituted misconduct. The prosecutor argued
that he had the burden to prove defendant guilty beyond a reasonable
doubt, and that defendant failed to call logical witnesses that would
corroborate his claim that McNary was the shooter. The court had
previously instructed the jury that the People had the entire burden of
establishing defendant's guilt. (CALCRIM No. 220; see *Ratliff*,
supra, 41 Cal.3d at p. 691; *Redd*, *supra*, 48 Cal.4th at p. 740.)
Although the question is close, we conclude on this record that it is
reasonably likely that the prosecutor's comments, taken in context and
together with the trial court's instructions, were not understood by the
jury to mean that defendant had the burden of producing evidence to
demonstrate his innocence. (*Bradford*, *supra*, 15 Cal.4th at p. 1339–
1340; *Hill*, *supra*, 17 Cal.4th at pp. 831–832; *Redd*, *supra*, at p. 740.)
Accordingly, we conclude that the prosecutor did not commit
misconduct by misstating the law.

Even assuming we were to find that the prosecutor's comments did
constitute misconduct, we would not find them prejudicial. The court
instructed the jury that the People had the entire burden of
establishing defendant's guilt and the prosecutor admitted that he had
the burden to prove defendant guilty beyond a reasonable doubt.
Although a criminal defendant is entitled to the presumption of
innocence and a prosecutor may not suggest that a defendant has the

burden to prove his innocence, a prosecutor may still comment on a defendant's failure to call logical witnesses and failure to introduce material evidence. Here the prosecutor pointed out several witnesses that defendant did not call. Had defendant requested that the court admonish the jury that he did not have a "responsibility" to present evidence to prove his innocence, such an admonition would have cured any harm caused by the alleged misconduct. Accordingly, it is not reasonably probable that a jury would have reached a more favorable result absent the prosecutor's comments. (*Herring, supra*, 20 Cal.App.4th at p. 1074.)

IV. C. Appeal to Racial Prejudice

Defendant contends that the prosecutor "disparaged [him] by not-so-subtly appealing to race prejudice." "A prosecutor may argue vigorously and include opprobrious epithets and forceful language when warranted by the evidence" (*Herring, supra*, 20 Cal.App.4th at p. 1074), but may not make comments that have nothing to do with the crimes alleged and that attack the defendant's character or "invite[] the jury to decide the case based on its own value judgment and not on the law." (*Id.* at p. 1075.)

The prosecutor argued that defendant's defense "consists of fear mongering. They put up a booking photograph of Rodney McNary, and they play him as the boogeyman. He's a mean-looking black man, and they're trying to intimidate you with that. And whenever a defense witness is cornered, they resort to the company line again: They're afraid of the boogeyman. [¶] But when you look at these two men, [defendant] and McNary, I suggest to you there's little difference between them. Both of them are violent criminals. Both of them are convicted of multiple felonies. And, according to this evidence, both of them are validated members of Seven Trees Crips."

The prosecutor also argued that defendant had made admissions to various people, and "[t]hen there was also admissions that took different forms. There was the letter. And in the letter he said things.... [¶] It's hard to read, and he seems fairly illiterate. But he doesn't seem inarticulate. And that's what ... I think you should ... ask yourself when you read the letter, because there's a difference between good grammar and ability to express your thoughts. And there's no question he's not handicapped in the latter. [¶] And when you go through the letter, you sit there and read it aloud, you laugh or you feel dismayed at – at the – I don't know what they call it nowadays. Ebonics? I remember about ten years ago they were calling it that. And some of that stuff ... is the type of stuff that people in the 'hood just write that way or speak that way. [¶] But, also, look to see [defendant's] ability to express his thoughts."

Defendant did not object to these arguments by the prosecutor and, absent timely and specific objection, these arguments would not be cause for reversal since a timely admonition likely would have cured any harm. (*Herring, supra*, 20 Cal.App.4th at p. 1075.) Moreover, we do not believe that these arguments demonstrate that the prosecutor was inviting the jury to decide the case based on its own value judgment and not on the facts and the law. (*Ibid.*) Accordingly, no prejudicial misconduct has been shown.

IV. D. Contemptuous Conduct

Defendant contends that the prosecutor committed “contemptuous behavior” during April and May 2006, almost three years before defendant’s 2009 trial. The parties agree that: on May 30, 2006, defendant’s counsel filed a petition alleging the prosecutor’s conduct at issue constituted grounds for recusal as well as contempt of court; on June 8, 2006, the court found no basis for recusal, but the court did not rule on the contempt petition; on June 12, 2006, the court informed the parties that it would address the contempt petition at the end of trial; on August 23, 2007, as the trial had not yet begun, the prosecutor brought the outstanding contempt petition to the court’s attention, but argued that the statute of limitations had run; during the prosecutor’s argument, the court stated, “I’ll have to look,” “I’ll look at it,” “Well, I’ll take a look at that”; thereafter, it does not appear that any party brought the issue of the outstanding contempt petition to the court’s attention again, and the court never addressed the merits of the defense petition.

As the trial court found that the complained-of pretrial conduct by the prosecutor was not grounds for recusal of the prosecutor, which ruling defendant does not contest here, and defendant did not thereafter request the court to find that the prosecutor’s conduct constituted a contempt of court, we find that there is nothing for this court to review on appeal from the judgment. (See Code Civ. Proc., § 1222; *Moffat v. Moffat* (1980) 27 Cal.3d 645, 656 [orders in contempt proceedings are final and conclusive; review may only be had by writ of certiorari or, where appropriate, habeas corpus].)

IV. E. Improper Questioning of Defendant

Defendant contends that the prosecutor twice intentionally elicited inadmissible testimony during his cross-examination of defendant. “‘It is, of course, misconduct for a prosecutor to “intentionally elicit inadmissible testimony.” [Citations.]’ [Citations.] Such misconduct is exacerbated if the prosecutor continues to attempt to elicit such evidence after defense counsel has objected. [Citation.]” (*Smithey, supra*, 20 Cal.4th at p. 960.)

During a recorded telephone conversation that the prosecutor played for the jury, and during defendant’s own testimony on cross-examination, defendant said that he did not surrender to the police sooner than he did because he was afraid of the police; because he did not want to have to tell on McNary; and because he was trying to stay out of custody until his daughter’s second birthday on November 15, 2001, as he was not present for her first birthday. The prosecutor asked defendant why he was not present for his daughter’s first birthday. The court sustained defense counsel’s relevance objection. Then the prosecutor asked defendant if he was someplace where he could not visit his daughter on her first birthday. The court again sustained defense counsel’s relevance objection. The prosecutor then asked defendant if he was in jail on his daughter’s first birthday. After the court sustained the objection defense counsel raised on unspecified grounds, the prosecutor asked defendant if he had promised his daughter that he would be present for her second

birthday, and whether he had hoped to visit her then. When defendant answered affirmatively to both questions, the prosecutor then asked defendant whether that was the real reason he did not turn himself in rather than because he was afraid of the police and McNary.

Defense counsel's objections to the prosecutor's questions of defendant were on the ground of relevancy. He did not claim the questions constituted misconduct, and he did not request an admonition. An admonition would have cured any harm. Accordingly, defendant has forfeited any claim of misconduct on appeal. (*Hill, supra*, 17 Cal.4th at p. 820; *Fuiava, supra*, 53 Cal.4th at p. 683.) "Moreover, we observe that it is not necessarily improper for an attorney to attempt to overcome prior sustained objections by asking a witness similar questions that have been reframed in an effort to meet the trial court's ruling." (*Fuiava, supra*, at p. 683.) In addition, the jury was instructed at the end of the case that the attorneys' questions are not evidence, and that the jury was not to assume that "something is true just because one of the attorneys asked a question that suggested it was true." Therefore, on this record, we cannot say that the prosecutor's questions constituted prejudicial misconduct.

Later during the prosecutor's cross-examination of defendant, he played a recording of a jail-house telephone conversation defendant had had with a friend and defendant's mother. The prosecutor then asked defendant whether in that conversation, by repeating a story his lawyer told him, defendant was saying "that it's good for your case if Jeffrey Fontana is a jerk?" When defendant answered "Yes," the prosecutor asked defendant if he had told his friend and his mother about McNary. Defendant responded, "I didn't say anything." "I just telling her what was told to me." The prosecutor then asked defendant, "Is that because you hadn't come up with the story about [McNary] being the shooter?" Defendant responded "No," and the prosecutor then asked, "Had you told your lawyer at that point about [McNary] being the shooter?" Defense counsel objected, stating that the question called for privileged information. The court overruled the objection, but the prosecutor withdrew the question.

As the prosecutor withdrew the question as soon as defense counsel objected to it, defense counsel did not request an admonition, which would have cured any harm caused by the question, and the jury was instructed that the attorneys' questions are not evidence, we cannot say that the prosecutor's question constituted prejudicial misconduct.

IV. F. Intemperate Behavior

Defendant contends that on eight specified occasions, not all of which were before the jury, the prosecutor engaged in "rude and intemperate behavior" "which cumulatively created an 'acrimonious atmosphere in the courtroom and threaten[ed] the ability of defendant to receive a fair trial.'" " 'It is the duty of every member of the bar to "maintain the respect due to the courts" and to "abstain from all offensive personality." [Citations.] A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state.' " (*Hill, supra*, 17 Cal.4th at pp. 819–820.) " 'Prosecutors who engage in rude or intemperate behavior,

even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve. [Citations.]’ [Citations.]” (*Id.* at p. 820.)

The incidents of “rude and intemperate behavior” by the prosecutor that defendant challenges are as follows:

(1) Twice before the jury the prosecutor asked Sally Graver, the defense investigator, “argumentative” questions during cross-examination, defense counsel objected to both questions, and the court sustained the objection as to the first question. The first “argumentative” question was, “You are a real investigator, aren’t you?” After the court sustained defense counsel’s objection, the prosecutor asked Graver, “You are a licensed investigator, aren’t you?” The second “argumentative” question occurred after Graver admitted that she was guessing in answer to the prosecutor’s question. The prosecutor asked her, “Would reference to the Lucio report refresh your recollection ... so you wouldn’t have to guess?” Graver responded, “We can give it a try.” The prosecutor stated, “Well, you know better than I do. Do you think you’re capable of remembering what you read?” Graver responded, “If it’s written in there, yes.” Defense counsel objected, but the objection was overruled.

(2) Twice before the jury the prosecutor asked Mark Harrison, the defense expert on African–American criminal street gangs, “argumentative” questions during cross-examination, defense counsel objected to both questions, and the court sustained the objection as to the first question. The first “argumentative” question occurred when the prosecutor asked Harrison whether Santa Clara County was largely Crip street gang territory in 2000. Harrison responded that he did not know. The prosecutor then asked Harrison where Blood street gangs existed at that time. Harrison responded that “they have not had just one stronghold.” The prosecutor then asked, “Sir, you don’t know what you’re talking about; isn’t that true?” After the court sustained defense counsel’s objection, the prosecutor asked Harrison, “Isn’t it true that Santa Clara County Bloods only existed in one geographic area, and the rest of the county was Crip territory?” Harrison responded that he did not know. The second “argumentative” question occurred when the prosecutor asked Harrison if the Seven Trees Crip gang was “largely defunct and has been for years.” Harrison responded, “I don’t know that.” When the prosecutor stated, “No, you don’t, do you?” defense counsel objected. In overruling the objection, the court stated: “Right now the question I hear is: You don’t know whether they’re ongoing, do you? [¶] I don’t see anything objectionable to that question. [¶] The witness needs to answer.”

(3) The prosecutor said “Are you kidding?” when defendant testified during cross-examination before the jury that his lawyer had told him that the “head of the San Jose chapter” of the NAACP “was saying ... that he had gotten phone calls and people would make complaints that the police was riding around and saying that when they catch me, they was going to kill me.” Defense counsel objected that there was no question pending, and that it “[s]ounds like an editorial.” The prosecutor said, “Let me rephrase it,” and the court overruled the objection.

(4) Defense counsel objected during a pretrial hearing that the prosecutor was “badgering” a witness when he repeatedly asked the witness if she recalled the question he had asked her but that she had not answered. The court overruled the objection. Defense counsel later stated on the record that the prosecutor had reduced the witness to tears.

(5) During the prosecutor's cross-examination of Lacey Ortiz before the jury, when Ortiz attempted to answer a question before the prosecutor finished asking it, the prosecutor said, “I'm not done.” The court immediately stated: “Counsel – counsel gets to – [¶] Let's try and keep our tone civil. This happens in court all the time. There's no reason to get vehement. So finish your question.” After the prosecutor finished asking his question, and Ortiz answered it, the prosecutor noted that Ortiz was crying.

(6) During a January 2006 pretrial hearing, more than three years before trial, the prosecutor interrupted the court on multiple occasions. “He once cut the court off in mid-sentence with the words ‘I am not done’ ... and three times ordered it to ‘Let me finish.’ ”

(7) During a January 2007 pretrial hearing, more than two years before trial, defense counsel stated that “ ‘it was reported to me that [the prosecutor] had a rude, impolite, discourteous encounter with Ms. Graver [the defense investigator], and she was very upset by his treatment of her,’ [but][t]he prosecutor defended his behavior.”

(8) During trial, but outside the presence of the jury, defendant's father invoked his Fifth Amendment right to not testify. Defense counsel objected that the prosecutor's questioning of defendant's father on the invocation of his right was “argumentative” and “pejorative.” The court sustained the objection on the ground that the prosecutor's question was “argumentative.”

Much of the conduct by the prosecutor that defendant challenges here occurred outside the presence of the jury and some of the conduct occurred years before trial. The questioning of defendant's father and the alleged “discourteous encounter” with the defense investigator occurred outside the presence of the jury, and the alleged “badgering” of a witness and the repeated interrupting of the court occurred during pretrial hearings. Defendant does not explain how any of the conduct that occurred outside the presence of the jury could have infected the trial with such unfairness as to make the resulting conviction a denial of due process. (*Friend, supra*, 47 Cal.4th at p. 29.)

Most of the conduct by the prosecutor that occurred in the presence of the jury amounted to allegedly asking “argumentative” or “editorial” questions. Some objections to the questions were overruled by the court. The court overruled one of two allegedly “argumentative” questions asked of the defense investigator, the court overruled one of two allegedly “argumentative” questions asked of the defense expert witness on African–American criminal street gangs, and the court overruled the “editorial” question asked of defendant when the prosecutor stated that he would re phrase the question. As the Supreme Court observed in *Fuiava*: “Even to the

1 extent we might characterize the prosecutor as having overreacted to
2 the difficulties he faced in effectively questioning [certain witnesses],
3 however, it is clear that the trial court monitored the situation and
4 intervened when it felt it necessary to do so.” (*Fuiava, supra*, 53
5 Cal.4th at p. 686.)

6 Counsel must always be respectful and courteous to the court, to other
7 counsel, and to witnesses. Here, the record reflects that the court once
8 had to tell the prosecutor that there was no need for him to use a
9 “vehement” tone of voice with a witness in front of the jury and that
10 the prosecutor rudely and discourteously interrupted the court
11 numerous times at a pretrial hearing. However, the record also reflects
12 that the court intervened when it felt it necessary to do so. Therefore,
13 we cannot say that, on the record before us, the conduct by the
14 prosecutor before the jury that defendant challenges here infected the
15 trial with such unfairness as to make the resulting conviction a denial
16 of due process. (*Friend, supra*, 47 Cal.4th at p. 29; *Brown, supra*, 31
17 Cal.4th at pp. 553–554; *Fuiava, supra*, 53 Cal.4th at p. 686.)

18 **IV. G. Disparagement of Defense Counsel**

19 Defendant contends that on three occasions, only two of which were
20 in the presence of the jury, the prosecutor disparaged defense counsel,
21 which “gratuitously added to the acrimonious nature of the
22 proceedings.” “A prosecutor commits misconduct if he or she attacks
23 the integrity of defense counsel, or casts aspersions on defense
24 counsel. [Citations.] ‘An attack on the defendant’s attorney can be
25 seriously prejudicial as an attack on the defendant himself, and, in
26 view of the accepted doctrines of legal ethics and decorum [citation],
27 it is never excusable.’ [Citation.]” (*Hill, supra*, 17 Cal.4th at p.
28 832; *Redd, supra*, 48 Cal.4th at p. 734.) However, the prosecutor “
‘has wide latitude in describing the deficiencies in opposing counsel’s
tactics and factual account. [Citations.]’ [Citation.]” (*Redd, supra*, at
p. 735.)

The conduct by the prosecutor that defendant challenges here is as
follows:

(1) During closing argument, the prosecutor, while talking about his
dog Lydia, stated that “the way she would deal with her world was
through looking away and ignoring what she thought was going to be
uncomfortable.... [¶] ... If there was something unpleasant, she would
just look away. And as far as she was concerned, it didn’t really exist.
And it worked well, because she ... lived to be a ripe old age
eventually. [¶] And this is the part that I’m – I – I don’t mean to
disparage Counsel. I don’t mean to disparage you, but you remind me
of Lydia. Because what you’ve done is you take instances, you ignore
things, and you suggest to the jury, then, that this creates a reasonable
doubt. And it doesn’t. It doesn’t.” Defense counsel did not object to
this argument.

(2) During the trial, defense counsel wanted to distribute to the jury
copies of the transcript of a CD they were about to hear when the
courtroom clerk was out of the courtroom. The prosecutor complained
that defense counsel was not following proper procedure, so the court
told defense counsel that he could ask the court “to mark it and admit

1 it, and then the actual marking and admitting will happen when the
2 clerk gets back.” The prosecutor complained that, “Now you’re telling
3 him how to do it.” “He needs to learn to walk by himself.” The court
4 responded: “Well, we can worry about parenting skills another time.
5 For right now, go ahead. You can proceed.” Defense counsel then
6 asked that the CD and transcripts be marked and that the CD be
7 admitted into evidence.

8 (3) During a pretrial hearing, several years before trial, when defense
9 counsel requested that the prosecutor be admonished for disparaging
10 defense counsel, the prosecutor admitted that he had disparaged
11 defense counsel during the hearing. Defendant acknowledges on
12 appeal that the court then issued a “mild admonition directed at both
13 parties, without making any explicit finding of disparagement or
14 prosecutorial misconduct.”

15 As defendant did not object below to the prosecutor’s argument and
16 comments before the jury that he challenges here, and an
17 admonishment would have cured any harm, we find that defendant
18 has forfeited his claims. (*Hill, supra*, 17 Cal.4th at p. 820.) Even if we
19 were to find no forfeiture, we are satisfied there was no denial of due
20 process. The court admonished both counsel after the prosecutor’s
21 remarks at the pretrial hearing without making an explicit finding of
22 disparagement or misconduct. Defense counsel did not object to the
23 prosecutor’s comments before the jury, which on occasion were rude
24 and intemperate, and they did not comprise a pattern of egregious
25 behavior making the trial fundamentally unfair because they related
26 to the tactics and argument of counsel rather than to defendant’s
27 culpability. (*Samayoa, supra*, 15 Cal.4th at p. 841; *People v.*
28 *Espinoza* (1992) 3 Cal.4th 806, 820.)

We also agree with our Supreme Court’s assessment of a similar claim
of cumulative prejudice in *Fuiava*. “To the extent we have concluded
(or have assumed for the sake of argument) that defendant has
preserved some of his claims of misconduct, and have concluded (or
assumed) that, with regard to the preserved claims, misconduct
occurred, we also have concluded that the misconduct could not have
been prejudicial. Defendant’s arguments concerning the relative
strengths and weaknesses of the prosecution and defense cases do not
convince us that the preserved instances of misconduct or assumed
misconduct, when considered individually or cumulatively, deprived
defendant of a fair trial.” (*Fuiava, supra*, 53 Cal.4th at p. 692.)

People v. Campbell, 2012 WL 1201647, at *24-33.

3. Legal Standard

Prosecutorial misconduct is cognizable in federal habeas corpus. The appropriate standard
of review is the narrow one of due process and not the broad exercise of supervisory power.
Darden, 477 U.S. at 181. A defendant’s due process rights are violated when a prosecutor’s
misconduct renders a trial “fundamentally unfair.” *Id.* at 183; *Smith v. Phillips*, 455 U.S. 209, 219
(1982) (“[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is

the fairness of the trial, not the culpability of the prosecutor”). Under *Darden*, the first issue is whether the prosecutor's remarks were improper; if so, the next question is whether such conduct infected the trial with unfairness. *Tan*, 413 F.3d at 1112; *see also Deck v. Jenkins*, 814 F.3d 954, 978 (9th Cir. 2016) (recognizing *Darden* as the clearly established federal law regarding a prosecutor's improper comments for AEDPA review purposes). A prosecutorial misconduct claim is decided “on the merits, examining the entire proceedings to determine whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995) (quoting *Hall v. Whitley*, 935 F.2d 164, 165 (9th Cir. 1991)); *see Trillo v. Biter*, 769 F.3d 995, 1001 (9th Cir. 2014) (“Our aim is not to punish society for the misdeeds of the prosecutor; rather, our goal is to ensure that the petitioner received a fair trial.”).

The key factor in determining whether misconduct amounted to a violation of due process is whether the trial court issued a curative instruction. When a curative instruction is issued, a court presumes that the jury has disregarded inadmissible evidence and that no due process violation occurred. *See Greer*, 483 U.S. at 766 & n.8; *Darden*, 477 U.S. at 179-82 (condemning prosecutor's comments but holding the trial was fair, partially in light of curative actions taken by trial judge); *Trillo*, 769 F.3d at 1000 (“We presume that juries listen to and follow curative instructions from judges.”). This presumption may be overcome if there is an “overwhelming probability” that the jury would be unable to disregard evidence and a strong likelihood that the effect of the misconduct would be “devastating” to the defendant. *See Greer*, 483 U.S. at 766 n.8; *Tan*, 413 F.3d at 1115-16 (finding trial fair where jury received instructions several times to consider only the evidence presented, and not its sympathy for the victim's life story).

Other factors which a court may take into account in determining whether misconduct rises to a level of due process violation include: (1) the weight of evidence of guilt, *compare United States v. Young*, 470 U.S. 1, 19 (1985) (finding “overwhelming” evidence of guilt) *with United States v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987) (in light of prior hung jury and lack of curative instruction, new trial required after prosecutor's reference to defendant's courtroom demeanor); (2) whether the misconduct was isolated or part of an ongoing pattern, *see Lincoln v.*

Sunn, 807 F.2d 805, 809 (9th Cir. 1987); (3) whether the misconduct relates to a critical part of the case, *see Giglio v. United States*, 405 U.S. 150, 154 (1972) (failure to disclose information showing potential bias of witness especially significant because government’s case rested on credibility of that witness); and (4) whether a prosecutor’s comment misstates or manipulates the evidence, *see Darden*, 477 U.S. at 182.

4. Analysis

Petitioner challenges seven different aspects of alleged prosecutorial misconduct; the Court will address each in turn.

a. Appeal to Jurors’ Sympathy

Petitioner first argues that the prosecutor improperly appealed to the jury’s passion and prejudice. Trav. at 55-59. The California Court of Appeal determined that Petitioner had waived the argument on appeal because he did not object to the argument. *People v. Campbell*, 2012 WL 1201647, at *26. The California Court of Appeal went on to state that, regardless, it found that the trial court’s admonition “would have cured any harm and that there is no reasonable probability that a result more favorable to defendant would have been reached in the absence of the assumed misconduct.” *Id.* (citations omitted).

Petitioner argues that “[i]t was objectively unreasonable of the [California Court of Appeal] not to acknowledge the evil identified in *Nobari* and appropriately assess its impact herein.” Trav. at 58 (citing *United States v. Nobari*, 574 F.3d 1065, 1076 (9th Cir. 2009)). In *Nobari*, the Ninth Circuit stated: “[P]rosecutors ‘may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence.’” 574 F.3d at 1076 (quoting *United States v. Koon*, 34 F.3d 1416, 1443 (9th Cir. 1994)). Respondent argues that the argument was forfeited because the trial attorney did not object. Ans. at 101. Respondent also argues that Petitioner’s claim fails on the merits. *Id.* at 101-102.

Respondent is correct that a petitioner who fails to observe a state’s contemporaneous objection rules may not challenge the constitutionality of the conviction in federal court. *See*

1 *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *United States v. Frady*, 456 U.S. 152, 162-169 (1982)
 2 (while plain error applies in determining whether a defendant may raise a claim for the first time
 3 on direct appeal, cause and actual prejudice standard applies in determining whether that same
 4 claim may be raised on habeas). However, a petitioner is not barred and therefore does not have to
 5 show cause and prejudice when a reviewing state court overlooks the procedural default and
 6 considers the claim on the merits. *See Thomas v. Hubbard*, 273 F.3d 1164, 1176 (9th Cir.
 7 2002) (holding that alleged procedural default was no bar to claim where state court addressed
 8 procedural default issue but left resolution of the issue uncertain, failing to make a clear and
 9 express statement that its decision was based on a procedural default); *Walker v. Endell*, 850 F.2d
 10 470, 474 (9th Cir. 1987) (relying on *Engle* to find that review on the merits for plain error by a
 11 state appellate court negates the defendant's procedural default), *cert. denied*, 488 U.S. 926, 981
 12 (1988). Accordingly, because the state appellate court went ahead and addressed the merits of this
 13 claim, Petitioner is not barred from having this Court consider it on the merits. *See also Ylst v.*
 14 *Nunnemaker*, 501 U.S. 797, 801 (1991).

15 The Court determines that the California Court of Appeal's decision was not an
 16 unreasonable application of or contrary to *Darden*. Contrary to Petitioner's argument, the
 17 California Court of Appeal did acknowledge and assess the impact of the prosecutor's closing
 18 argument. *People v. Campbell*, 2012 WL 1201647, at *26. The Court presumes that the jury
 19 followed the admonition. *See Greer*, 483 U.S. at 766 & n.8. The comments did not render the
 20 trial fundamentally unfair. *See Darden*, 477 U.S. at 183.

21 Based on the foregoing, the California Court of Appeal's rejection of this claim did not
 22 result in a decision that was contrary to or involved an unreasonable application of Supreme Court
 23 precedent and nor was it based on an unreasonable determination of the facts in light of the
 24 evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, this
 25 subclaim is DENIED.

26 b. Misstatement of Law

27 Petitioner next argues that the prosecutor misstated the law in closing argument by
 28 informing the jury that Petitioner bore the responsibility of producing evidence of his innocence.

1 Trav. at 59-61.

2 In closing argument, the prosecutor stated as follows:

3 The prosecutor argued: “[Defense counsel] has made a point trying to
4 claim that he has no responsibility to provide any evidence or to prove
5 anything. He keeps talking about burden shifting. But that's not the
6 instruction that you've actually gotten from the court. [¶] The
7 defendant's presumed to be innocent. That's the law. It's been ...
8 always the law in this country. It goes back to England. And that's
9 satisfactory, and no one's challenging that. [¶] I bear the burden of
10 proof to prove him [guilty] beyond a reasonable doubt. That's all we're
11 talking about. What that does not mean is if there's evidence that's
12 available to the defendant ... that would help prove that he's telling the
13 truth or there's evidence available to the defendant that would help
14 prove that the witnesses he called or that he's relying upon are telling
15 the truth, then he should bring them in. [¶] He has subpoena power....
16 There is no reason that he could not do that.... He can't shirk that
17 responsibility, as he tried to do here. And he truly tried to do it. [¶] He
18 says [defendant] is telling the truth. After all, look at all the people he
19 told but failed to bring in those people to prove that that's, in fact,
20 what occurred. [¶] That's not what he claims, that burden shifting, and
21 the law protects him from that accusation. That's not the truth. [¶]
22 Indeed, there were many opportunities – many opportunities –” When
23 the court overruled defense counsel's objection at this point that this
24 argument was “prosecutorial misconduct,” the prosecutor continued:
25 “There were many opportunities for Counsel to try and prove that
26 [defendant] was telling the truth. Many. He was the one who was on
27 the run. He was the one who was privy and knew where these
28 witnesses were. He was the one who knew what he told these
witnesses.” The prosecutor then named several people that could have
corroborated defendant's and his witnesses' testimony.

18 *People v. Campbell*, 2012 WL 1201647, at *27.

19 The California Court of Appeal stated that the argument constituted misconduct to the
20 extent it “could be reasonably understood to suggest that defendant had a ‘responsibility’ to
21 present evidence to prove his innocence,” but “to the extent that the argument could be reasonably
22 understood to be only a comment on the failure of defendant to present evidence corroborating his
23 and his witnesses' testimony, the argument did not constitute misconduct.” *People v. Campbell*,
24 2012 WL 1201647, at *27. The California Court of Appeal explained that the trial court overruled
25 defense counsel’s objection that the argument constituted misconduct, and it further noted that the
26 trial court has instructed the jury as to the burden of proof. *Id.* The California Court of Appeal
27 concluded: “Although the question is close, we conclude on this record that it is reasonably likely
28 that the prosecutor's comments, taken in context and together with the trial court’s instructions,

were not understood by the jury to mean that defendant had the burden of producing evidence to demonstrate his innocence.” *Id.* The California Court of Appeal thus determined there was no misconduct. *Id.* But it went on to explain that even if there was misconduct, it was not prejudicial. *Id.* Noting that the trial court instructed the jury as to the burden of proof, the prosecutor admitted he had the burden of proof, and a prosecutor may comment on a defendant’s failure to call certain witnesses or introduce certain evidence, the California Court of Appeal stated “it is not reasonably probable that a jury would have reached a more favorable result absent the prosecutor’s comments.” *Id.*

The Court determines that the California Court of Appeal’s rejection of this claim was not unreasonable or contrary to Supreme Court precedent, including *Darden*. The trial court and prosecutor both accurately stated the burden of proof. And “[p]rosecutors may comment on the failure of the defense to produce evidence to support an affirmative defense so long as it does not directly comment on the defendant’s failure to testify.” *Cook v. Schriro*, 538 F.3d 1000, 1020 (9th Cir. 2008) (citing *Lockett v. Ohio*, 538 U.S. 586, 595 (1978)). These comments did not render the trial fundamentally unfair. *See Darden*, 477 U.S. at 183.

Based on the foregoing, the California Court of Appeal’s rejection of this claim did not result in a decision that was contrary to or involved an unreasonable application of Supreme Court precedent and nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, this subclaim is DENIED.

c. Racial Disparagement

Third, Petitioner argues that the prosecutor made “racially charged, offensive comments.” *Trav.* at 61-64. Respondent argues that the claims were forfeited by defense counsel’s failure to object at trial and that there was no misconduct. *Ans.* at 104-06. Because the state appellate court went ahead and addressed the merits of this claim, Petitioner is not barred from having this Court consider it on the merits. *See Ylst*, 501 U.S. at 801.

The California Court of Appeal stated that it did not believe that the prosecutor’s argument “demonstrate that the prosecutor was inviting the jury to decide the case based on its own value

1 judgment and not on the facts and the law.” *People v. Campbell*, 2012 WL 1201647, at *28. The
 2 California Court of Appeal therefore concluded there was no prejudicial misconduct.” *Id.* The
 3 Court determines that that denial of this claim was not an unreasonable application of or contrary
 4 to federal law, including *Darden*. The Court is not convinced that these comments rendered the
 5 trial fundamentally unfair. *See Darden*, 477 U.S. at 183.

6 Based on the foregoing, the California Court of Appeal’s rejection of this claim did not
 7 result in a decision that was contrary to or involved an unreasonable application of Supreme Court
 8 precedent and nor was it based on an unreasonable determination of the facts in light of the
 9 evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, this
 10 subclaim is DENIED.

11 d. Contemptuous Conduct

12 Fourth, Petitioner points to “the prosecutor’s publicly filing prejudicial information – a
 13 psychologist’s belief that Campbell was not mentally retarded – that was contained in a
 14 declaration that the trial court had ordered sealed, and then his promptly disclosing it to the media,
 15 which the prosecutor justified with the excuse that ‘[t]he Court didn’t rule the contents of the
 16 declaration sealed. She ruled the declaration sealed’” *Trav.* at 64-65 (alterations in original)
 17 (citation omitted). The California Court of Appeal determined that there was nothing for it to
 18 review, as “defendant did not thereafter request the court to find that the prosecutor’s conduct
 19 constituted a contempt of court.” *People v. Campbell*, 2012 WL 1201647, at *28.

20 Petitioner does not point the Court to any Supreme Court precedent. *See Trav.* at 64-65.
 21 “Petitioner concedes that this and the following three subclaims are not likely, each standing on its
 22 own, to warrant habeas relief, but they are indeed part of the cumulative prosecutorial misconduct
 23 that denied petitioner a fair trial.” *Id.* Respondent argues that the prosecutor did not engage in
 24 contemptuous conduct, and there was neither misconduct nor prejudice. *Ans.* at 106-110.

25 The Court determines that the California Court of Appeal did not unreasonably apply
 26 Supreme Court precedent in reaching its determination. There was no contempt finding to be
 27 reviewed. And, as Petitioner acknowledges, this claim standing alone does not warrant habeas
 28 relief.

Based on the foregoing, the California Court of Appeal's rejection of this claim did not result in a decision that was contrary to or involved an unreasonable application of Supreme Court precedent and nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, this subclaim is DENIED.

e. Improper Questioning

Fifth, Petitioner points to two instances of questioning by the prosecutor. Trav. at 65. First, Petitioner argues that "the prosecutor ignored the trial court's repeated sustaining of defense objections to inform the jury in the form of his question that Campbell had been in jail a year earlier on his daughter's first birthday." *Id.* As to the second, Petitioner asserts that the prosecutor "sought to elicit attorney-client privileged information to suggest that the third party culpability defense was only contrived at some late date." *Id.*

As to the first line of questioning, the California Court of Appeal noted that defense counsel objected to the questions as irrelevant but did not claim the questions constituted misconduct and did not request an admonition, which would have cured any harm, and therefore defendant forfeited a claim of misconduct on appeal. *People v. Campbell*, 2012 WL 1201647, at *29. The California Court of Appeal went on to state that "it is not necessarily improper for an attorney to attempt to overcome prior sustained objections by asking a witness similar questions that have been reframed in an effort to meet the trial court's ruling." *Id.* (citation omitted). The California Court of Appeal also noted that the jury received an instruction that the attorneys' questions were not evidence. *Id.* The California Court of Appeal stated that "on this record, we cannot say that the prosecutor's questions constituted prejudicial misconduct." *Id.* As to the second line of questioning, noting that "the prosecutor withdrew the question as soon as defense counsel objected to it, defense counsel did not request an admonition, which would have cured any harm caused by the question, and the jury was instructed that the attorneys' questions are not evidence," the California Court of Appeal concluded that it could not "say that the prosecutor's question constituted prejudicial misconduct." *Id.*

The state appellate court's decision was not an unreasonable application of Supreme Court

precedent. The questions did not render the trial “fundamentally unfair.” As Petitioner concedes, this claim is not sufficient to obtain habeas relief.

Based on the foregoing, the California Court of Appeal’s rejection of this claim did not result in a decision that was contrary to or involved an unreasonable application of Supreme Court precedent and nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, this subclaim is DENIED.

f. Rude and Intemperate Behavior

Sixth, Petitioner points to “multiple instances of rude and intemperate behavior by the prosecutor that cumulatively created an acrimonious atmosphere in the courtroom.” *Trav.* at 66. The California Court of Appeal noted that much of the conduct occurred outside the presence of the jury, and Petitioner had not explained “how any of the conduct that occurred outside the presence of the jury could have infected the trial with such unfairness as to make the resulting conviction a denial of due process.” *People v. Campbell*, 2012 WL 1201647, at *31. The California Court of Appeal elaborated that most of the conduct in the presence of the jury “amounted to allegedly asking ‘argumentative’ or ‘editorial’ questions,” and some objections to these questions were overruled by the trial court. *Id.* The California Court of Appeal found that the trial court was monitoring the situation and intervened when it felt necessary, and it concluded that it could not “say that, on the record before [it], the conduct by the prosecutor before the jury that defendant challenges here infected the trial with such unfairness as to make the resulting conviction a denial of due process.” *Id.*

The California Court of Appeal decision was not an unreasonable application of or contrary to Supreme Court precedent. The actions did not render the trial fundamentally unfair. As Petitioner concedes, this claim is not sufficient to obtain habeas relief.

Based on the foregoing, the California Court of Appeal’s rejection of this claim did not result in a decision that was contrary to or involved an unreasonable application of Supreme Court precedent and nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, this

1 subclaim is DENIED.

2 g. Disparagement of Defense Counsel

3 Seventh, Petitioner “cites instances of the prosecutor’s disparaging defense counsel.”
 4 Trav. at 66. The California Court of Appeal noted that defense counsel did not object before the
 5 jury and an admonishment would have cured any harm, so defendant forfeited the claims, but even
 6 if there was no forfeiture, there was no denial of due process. *People v. Campbell*, 2012 WL
 7 1201647, at *33. It explained that the trial court admonished the attorneys after certain remarks at
 8 the pretrial hearing, and it stated that the prosecutor’s comments “did not comprise a pattern of
 9 egregious behavior making the trial fundamentally unfair because they related to the tactics and
 10 argument of counsel rather than to defendant’s culpability.” *Id.*

11 The California Court of Appeal decision was not an unreasonable application of or
 12 contrary to Supreme Court precedent. The actions did not render the trial fundamentally unfair.
 13 As Petitioner concedes, this claim is not sufficient to obtain habeas relief.

14 Based on the foregoing, the California Court of Appeal’s rejection of this claim did not
 15 result in a decision that was contrary to or involved an unreasonable application of Supreme Court
 16 precedent and nor was it based on an unreasonable determination of the facts in light of the
 17 evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, this
 18 subclaim is DENIED.

19 h. Cumulative

20 Petitioner also suggests that the Court should evaluate the alleged prosecutorial conduct
 21 cumulatively, as the cumulative misconduct deprived him of a fair trial. The California Court of
 22 Appeal addressed cumulative prejudice as follows:

23 “To the extent we have concluded (or have assumed for the sake of
 24 argument) that defendant has preserved some of his claims of
 25 misconduct, and have concluded (or assumed) that, with regard to the
 26 preserved claims, misconduct occurred, we also have concluded that
 27 the misconduct could not have been prejudicial. Defendant’s
 28 arguments concerning the relative strengths and weaknesses of the
 prosecution and defense cases do not convince us that the preserved
 instances of misconduct or assumed misconduct, when considered
 individually or cumulatively, deprived defendant of a fair trial.”
 (*Fuiava, supra*, 53 Cal.4th at p. 692.)

People v. Campbell, 2012 WL 1201647, at *33.

Again, the Court does not find that the California Court of Appeal unreasonably applied Supreme Court precedent or acted contrary to Supreme Court precedent. In light of the totality of the circumstances, the California Court of Appeal was not unreasonable in determining that the trial as a whole was not unfair. *See Darden*, 477 U.S. at 183 (stating “Darden’s trial was not perfect—few are—but neither was it fundamentally unfair” (citation omitted)).

5. Conclusion

Based on the foregoing, the California Court of Appeal’s rejection of Claim 4 did not result in a decision that was contrary to or involved an unreasonable application of Supreme Court precedent and nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, Claim 5 is DENIED.

E. Claim 6²: Due Process Re: Prosecution’s Failure to Correct False Testimony of a Witness

Claim 6 alleges violation of Petitioner’s right to Due Process, guaranteed by the Fourteenth Amendment, based on the prosecution’s failure to correct false testimony. Am’d Pet. at 8.

1. Procedural Background and Standard of Review

Claim 6 was raised in Petitioner’s petition for direct review of his habeas petition filed in the California Supreme Court. *See* Pet., Ex. 9. The petition for review was denied summarily. *See* Ans., Exs. O, P. No lower court issued a reasoned decision addressing this claim.

Because there is no lower court decision to look to, and in the absence of any indication to the contrary, this Court presumes that the California Supreme Court denied Claim 6 on the merits. *See Richter*, 562 U.S. at 98. Petitioner asserts that the denial of Claim 6 was in violation of the due process principle articulated in *Napue v. Illinois*, 360 U.S. 264, 269 (1959), and its progeny. *Trav.* at 67. Accordingly, this Court’s task is to determine, based on the state court record, what arguments or theories could have supported the denial of Claim 6 and whether fairminded jurists

² The Court discusses Claim 5 along with Claims 7-8 because they are all based on claims on ineffective assistance of counsel.

could disagree as to whether those arguments or theories constitute an unreasonable application of *Napue*. See *Richter*, 562 U.S. at 102.

2. Legal Standard

There are three situations in which a violation of the prosecutor's duty to disclose information may occur: (1) where the prosecutor uses testimony which he knows or should know is perjured or false; (2) where defendant requests specific evidence which is not provided; and (3) where the defense makes a general request or no request at all and prosecutor fails to provide information which might create a reasonable doubt. See *United States v. Agurs*, 427 U.S. 97, 103-07 (1976).

When a prosecutor obtains a conviction using testimony or evidence that he knows or should know is perjured or false, it has been consistently held that such conviction must be set aside if there is any reasonable likelihood that the testimony or evidence could have affected the judgment of the jury. See *id.* at 103; see, e.g., *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (prejudice to right to fair trial more palpable when prosecutor not only withheld exculpatory evidence but knowingly introduced and argued false evidence); *United States v. Polizzi*, 801 F.2d 1543, 1550 (9th Cir. 1986) (prosecutor's presentation of tainted evidence viewed seriously and effects exceedingly carefully scrutinized; new trial required if any reasonable likelihood false evidence could have affected judgment of the jury). In fact, “[a] conviction obtained using knowingly perjured testimony violates due process, even if the witness's perjured testimony goes only to his credibility as a witness and not to the defendant's guilt.” *United States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011) (citing *Mooney v. Holohan*, 294 U.S. 103, 211 (1935); *Napue*, 360 U.S. at 269).

“The same result obtains when the [prosecutor], although not soliciting false evidence, allows it to go uncorrected when it appears.” *Napue*, 360 U.S. at 269; cf. *United States v. Alli*, 344 F.3d 1002, 1006-08 (9th Cir. 2003) (reversal not required under plain error standard where government breached its duty to correct known misstatements of its witnesses regarding possible benefits in exchange for testimony favorable to the government when defense counsel had the plea agreements, used them in cross-examining the witnesses, and could have introduced them; the

witnesses' false testimony were corrected; and the prosecutor never sought to capitalize on the false testimony).

A conviction based in part on perjured testimony or false evidence, even perjured testimony or false evidence presented in good faith by the witness, does not comport with fundamental fairness. *See Phillips v. Ornoski*, 673 F.3d 1168, 1182-1186 (9th Cir. 2012) (prosecutor's attempt to "insulate" primary witness from perjury by agreeing with her counsel to keep immunity agreement secret from the witness, and then calling defense counsel's accusation that witness was receiving a benefit "sheer fabrication" was a blatant violation of *Napue*); *Hayes v. Brown*, 399 F.3d 972, 978-82 (9th Cir. 2005) (en banc) (prosecutor's action in presenting false evidence to the jury and by failing to correct the record (that no agreement had been reached to favorably dispose of main witness' pending felony cases) violated petitioner's rights, even where testifying witness did not commit perjury because he had not been informed of prosecutor's agreement with his defense counsel).

If the prosecutor knows that his witness has lied, he has a constitutional duty to correct the false impression of the facts. *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000). This duty is not discharged merely because defense counsel knows, and the jury might figure out, that the testimony is false. *Id.* "No lawyer, whether prosecutor or defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial." *Id.* (reversing conviction where prosecutor failed to correct false testimony during trial, despite fact that prosecutor conceded during closing argument that witness had lied); *Belmontes v. Brown*, 414 F.3d 1094, 1115 (9th Cir. 2005), *rev'd on other grounds*, 549 U.S. 7 (2007) (prosecutor had duty to correct witness's testimony that incident was the first time he was "busted," even though defense counsel knew of witness's prior arrests, but defense was not prejudiced); *Commonwealth of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1122-23 (9th Cir. 2001) (defendant cannot waive prosecutor's failure to meet his constitutional obligation to present truthful evidence).

Prosecutors will not be held accountable for discrepancies in testimony where there is no evidence from which to infer prosecutorial misconduct and the fairness of the trial was not

1 materially affected. *See United States v. Zuno-Arce*, 44 F.3d 1420, 1423 (9th Cir. 1995) (no
 2 evidence of prosecutorial misconduct where discrepancies in testimony could as easily flow from
 3 errors in recollection as from lies) *overruled in part on other grounds by Valerio v. Crawford*, 306
 4 F.3d 742, 764 (9th Cir. 2002) (en banc); *see, e.g., Hayes v. Ayers*, 632 F.3d 500, 520-21 (9th Cir.
 5 2011) (defendant failed to show that witness’s “mostly equivocal” statements about when she
 6 received immunity or whether she actively sought immunity were actually false or that the
 7 prosecutor knew as much). Petitioner must establish factual basis for attributing knowledge that
 8 the testimony was perjured to the government. *See Morales v. Woodford*, 388 F.3d 1159, 1179
 9 (9th Cir. 2004).

10 In sum, to prevail on a claim based on *Napue*, the petitioner “must show that (1) the
 11 testimony (or evidence) [presented by the prosecution] was actually false, (2) the prosecution
 12 knew or should have known that the testimony was actually false, and (3) that the false testimony
 13 was material.” *Hayes*, 632 F.3d at 520 (quoting *Zuno-Arce*, 339 F.3d at 889); *see Soto v. Ryan*,
 14 760 F.3d 947, 970-71 (9th Cir. 2014) (while co-defendants’ convictions were overturned due to
 15 prosecutor’s use of detective’s false testimony, finding no prosecutorial misconduct in petitioner’s
 16 separate trial involving same prosecutor where record showed that detective’s testimony and
 17 prosecutor’s arguments had morphed from accurate information in petitioner’s trial to affirmative
 18 misrepresentations during co-defendants’ trials). “Material” means that “there is a reasonable
 19 likelihood that the false evidence or testimony could have affected the judgment of the jury.”
 20 *Morris v. Ylst*, 447 F.3d 735, 743 (9th Cir. 2006); *see Jones v. Ryan*, 691 F.3d 1093, 1106 (9th Cir.
 21 2012) (false impression allegedly created by sketches not material because there was
 22 overwhelming evidence of guilt unrelated to sketches). If the claim meets the materiality standard
 23 under *Agurs/Napue*, then no separate analysis of harmlessness under *Brecht* is required. *Hayes*,
 24 399 F.3d at 984.

25 3. Analysis

26 Petitioner asserts that the prosecutor “failed to correct the false testimony of Janielle Carter
 27 in which she denied knowledge that he had agreed to make a sentencing recommendation in her
 28 outstanding criminal cases, but that recommendation was contingent on her cooperation at

Campbell’s trial.” Trav. at 67. In testifying, Janielle Carter denied any knowledge that Lane Liroff was the prosecutor on her cases or that her sentencing had been postponed until after Petitioner’s trial, and she denied any understanding that her cooperation as a witness could affect her sentences. *See* Ans. at 129. Respondent notes that at the close of Petitioner’s trial, defense counsel read the following stipulation to the jury: “Janielle Carter was convicted in 2003 to the charge of accessory, a felony. At the time she pled, it was agreed that her sentencing would be delayed until the conclusion of the prosecution against Deshawn Campbell for the murder of San Jose Officer Jeffrey Fontana. Lane Liroff is the prosecutor.” Ans. at 129-30 (citation omitted). In opposing the state habeas petition, Respondent submitted a declaration from Lane Liroff, who prosecuted Campbell in the murder case and also prosecuted Janielle Carter for the robbery. Ans. at 130-31; *see* Ans., Ex. L (Resp. Informal Response to State Habeas Petition), Ex. 1 (“Liroff Decl.”). In the Declaration, Liroff states that he disclosed to the defense the details of the plea agreement. *See* Liroff Decl.

The Court determines that the first two elements of a *Napue* violation are met: the testimony was actually false and the prosecutor knew it was false. *See Napue*, 360 U.S. at 271-72. But the California Supreme Court could have reasonably determined that the third element—that the false testimony was material—was not met, even under the “less demanding materiality standard [applicable] to *Napue* errors.” *Dow v. Virga*, 729 F.3d 1041, 1048 (9th Cir. 2013). Again, under the third element, “the court must determine whether the error is material, that is, whether ‘there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.’” *Id.* (quoting *Agurs*, 427 U.S. at 103). The California Supreme Court could have reasonably determined that there was no reasonable likelihood that the false testimony could have affected the judgment of the jury given that the jury heard the stipulation stating that Ms. Carter’s sentencing would be delayed until the conclusion of Petitioner’s trial. This stipulation suggested to the jury that Ms. Carter’s sentencing would be affected by her participation as a witness at Petitioner’s trial. Because the jury was aware of this information through the stipulation, the California Supreme Court could have reasonably determined that there was not a reasonable likelihood that Ms. Carter’s false testimony could have affected the judgment of the

1 jury. Further, the California Supreme Court could have noted the fact that the defense counsel was
2 aware of this information and chose not to disclose it to the jury in any fashion other than the
3 stipulation in reasonably determining that the false testimony was not material.

4 The Court recognizes that “the government’s duty to correct perjury by its witnesses is not
5 discharged merely because defense counsel knows, and the jury may figure out, that the testimony
6 is false.” *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000). And the Court further
7 recognizes that the stipulation here was read by defense counsel, *see* Ans. at 129-30, and “[t]he
8 jury understands defense counsel’s duty of advocacy and frequently listens to defense counsel
9 with skepticism,” meaning “[a] prosecutor has a special duty commensurate with a prosecutor’s
10 unique power, to assure that defendants receive fair trials.” *Id.* But the Ninth Circuit in *LaPage*
11 also concluded that there was “a ‘reasonable likelihood’ that the false testimony affected the
12 outcome of the case.” *Id.* at 491. Here, the California Supreme Court rejected Petitioner’s claim,
13 meaning it concluded that there was no reasonable likelihood that the false testimony affected the
14 outcome. The Court’s role is to determine what arguments or theories could have supported the
15 denial of this claim and whether fairminded jurists could disagree as to whether those arguments
16 or theories constitute an unreasonable application of *Napue*. The Court has identified the
17 appropriate arguments or theories, and it determines that fairminded jurists could disagree that
18 these arguments or theories are inconsistent with a Supreme Court decision.

19 Based on the foregoing, the California Supreme Court’s rejection of this claim did not
20 result in a decision that was contrary to or involved an unreasonable application of Supreme Court
21 precedent and nor was it based on an unreasonable determination of the facts in light of the
22 evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, Claim 6
23 is DENIED.

24 **F. Claims 5, 7-8: Ineffective Assistance of Counsel**

25 Claims 5, 7, and 8 allege ineffective assistance of trial counsel. Am’d Pet. at 8.

26 **1. Legal Standard**

27 A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth
28 Amendment right to counsel, which guarantees not only assistance, but effective assistance of

counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). “The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Id.*

To prevail on a Sixth Amendment ineffective assistance of counsel claim, a petitioner must satisfy a two-prong test. First, he must establish that counsel's performance was deficient, i.e., that it fell below an “objective standard of reasonableness” under prevailing professional norms. *Id.* at 687-88. To prove deficient performance, a petitioner must demonstrate that counsel’s representation “fell below an objective standard of reasonableness” as measured by “prevailing professional norms.” *Strickland v. Washington*, 466 U.S. at 688. “[T]he relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable.” *Siripongs v. Calderon*, 133 F.3d 732, 736 (9th Cir. 1998). “‘Judicial scrutiny of counsel’s performance must be highly deferential,’ and courts ‘must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *West v. Ryan*, 608 F.3d 477, 486 (9th Cir. 2010) (quoting *Strickland*, 466 U.S. at 689).

Second, a petitioner must establish that he was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 694. To prove prejudice, a petitioner must demonstrate a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Hinton v. Alabama*, 571 U.S. 263, 275 (2014) (quoting *Strickland*, 466 U.S. at 695).

A “doubly” deferential judicial review is appropriate in analyzing ineffective assistance of counsel claims under § 2254. *See Pinholster*, 563 U.S. at 202. The “question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Richter*, 562 U.S. at 105.

A court need not determine whether counsel's performance was deficient before examining

the prejudice suffered by the defendant as the result of the alleged deficiencies. *See Strickland*, 466 U.S. at 697.

A difference of opinion as to trial tactics does not constitute denial of effective assistance, *see United States v. Mayo*, 646 F.2d 369, 375 (9th Cir. 1981), and tactical decisions are not ineffective assistance simply because in retrospect better tactics are known to have been available, *see Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir. 1984), *cert. denied*, 469 U.S. 838 (1984).

The petitioner bears the burden of rebutting the strong presumption that strategic decisions by counsel are reasonable, and the absence of evidence cannot overcome the presumption. *Dunn v. Reeves*, --- U.S. ---, 141 S. Ct. 2405, 2410 (2021) (per curiam).

2. Claim 5: Ineffective Assistance in Failing to Object to Several Instances of Prosecutorial Misconduct

In Claim 5, Petitioner asserts that trial counsel failed to object to several instances of prosecutorial misconduct. Am'd Pet. at 8.

a. Procedural Background and Standard of Review

The claim was raised in Petitioner's petition for review on appeal to the California Supreme Court. *See* Pet., Ex. 3. The petition was denied summarily. *See* Ans., Ex. N. As discussed above, this Court may "look through" that decision to the California Court of Appeal's underlying decision on direct review, which denied the claim on the merits. *See People v. Campbell*, 2012 WL 1201647, at *24-33. The California Court of Appeal addressed this claim in the same section discussing the prosecutorial misconduct itself, quoted above.

The Court's task is to determine whether the California Court of Appeal's denial of Claim 5 involved an unreasonable application of or was contrary to *Strickland*.

b. Analysis

The Court determines that the California Court of Appeal's denial of Claim 5 was not an unreasonable application of or contrary to *Strickland*. For the reasons discussed above in the section on prosecutorial misconduct, even if Petitioner could show that his counsel was deficient, he has not established that he was prejudiced by this performance. *Strickland*, 466 U.S. at 694.

The Court is not convinced that there is a “reasonable probability that, but for counsel’s [alleged] unprofessional errors, the result of the proceeding would have been different.” *Id.*

Based on the foregoing, the California Court of Appeal’s rejection of this claim did not result in a decision that was contrary to or involved an unreasonable application of Supreme Court precedent and nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, Claim 5 is DENIED.

3. Claim 7: Ineffective Assistance in Failing to Correct False Testimony of a Prosecution Witness

In Claim 7, Petitioner alleges that trial counsel failed to correct the false testimony of a prosecution witness. Am’d Pet. at 8.

a. Procedural Background and Standard of Review

The claim was raised in Petitioner’s petition for direct review of his habeas petition to the California Supreme Court. *See* Pet., Ex. 9. The petition was denied summarily. *See* Ans., Exs. O, P. No lower court issued a reasoned decision addressing this claim.

Because there is no lower court decision to look to, and in the absence of any indication to the contrary, this Court presumes that the California Supreme Court denied Claim 7 on the merits. *See Richter*, 562 U.S. at 98. This Court’s task is to determine, based on the state court record, what arguments or theories could have supported the denial of Claim 7 and whether fairminded jurists could disagree as to whether those arguments or theories constitute an unreasonable application of Supreme Court precedent. *See Richter*, 562 U.S. at 102.

b. Analysis

The California Supreme Court reasonably could have found that trial counsel’s performance was not deficient. The parties read a stipulation to the jury at the end of the trial that stated as follows: “Janielle Carter was convicted in 2003 to the charge of accessory, a felony. At the time she pled, it was agreed that her sentencing would be delayed until the conclusion of the prosecution against Deshawn Campbell for the murder of San Jose Officer Jeffrey Fontana. Lane Liroff is the prosecutor.” Ans. at 129-30 (citation omitted). Defense counsel may have thought

1 this stipulation was sufficient to make clear to the jury that Ms. Carter would possibly receive a
2 reduced sentence based on her role as a witness. The California Supreme Court reasonably could
3 have found that defense counsel's performance was not deficient on this basis.

4 The California Supreme Court also reasonably could have found that no prejudice was
5 caused by defense counsel's failure to object. As stated above, because the jury was aware of this
6 information through the stipulation, the California Supreme Court could have reasonably
7 determined that defense counsel's failure to correct Ms. Carter's testimony was not prejudicial.

8 Based on the foregoing, the California Supreme Court's rejection of this claim did not
9 result in a decision that was contrary to or involved an unreasonable application of Supreme Court
10 precedent and nor was it based on an unreasonable determination of the facts in light of the
11 evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Accordingly, Claim 7
12 is DENIED.

13 **4. Claim 8: Ineffective Assistance in Failing to Object to Evidence of a Third-** 14 **Party Conspiracy**

15 In Claim 8, Petitioner alleges that trial counsel failed to object to evidence of a third-party
16 conspiracy. Am'd Pet. at 8.

17 **a. Procedural Background and Standard of Review**

18 The claim was raised in Petitioner's petition for direct review of his habeas petition to the
19 California Supreme Court. *See* Pet., Ex. 9. The petition was denied summarily. *See* Ans., Exs. O,
20 P. The state-court decision to which 2254(d) applies is the "last reasoned decision" of the state
21 court, if there is a reasoned decision. *See Ylst*, 501 U.S. at 803-04. As stated above, when the last
22 state court to adjudicate a federal constitutional claim on the merits does not provide an
23 explanation for the denial, "the federal court should 'look through' the unexplained decision to the
24 last related state-court decision that does provide a relevant rationale." *Wilson*, 138 S.Ct. at 1192.
25 "It should then presume that the unexplained decision adopted the same reasoning." *Id.* Here, the
26 California Supreme Court did not provide an explanation for its denial of the petition for
27 review. *See* Ans., Exs. O, P. Accordingly, this Court will "look through" the California Supreme
28 Court's decision to the state appellate court's decision on direct appeal, which did address this

claim. *See People v. Campbell*, 2012 WL 1201647, at *33-34. Here, the claim was raised in Petitioner's direct appeal to the California Court of Appeal. *See Pet.*, Ex. 1 at 161-72. The California Court of Appeal's decision is the last related state-court decision that provides a relevant rationale. The Court will therefore look through to that decision, which denied the claim on the merits. *See People v. Campbell*, 2012 WL 1201647, at *33-34. As Petitioner recognizes, this Court's task is to determine whether the California Court of Appeal's denial of Claim 8 involved an unreasonable application of *Strickland*. *See Trav.* at 75.

b. California Court of Appeal Decision

The California Court of Appeal provided:

V.A. Evidence and Argument Regarding the Conduct of Defendant's Father

Defendant contends that evidence that defendant's father lied to police regarding the ownership status of his Hyundai on the morning of Officer Fontana's shooting, and that he was otherwise uncooperative, was improperly admitted as irrelevant and prejudicial, because there was no evidence that defendant asked his father to lie. He further contends that the prosecutor improperly argued to the jury that defendant's father lied to the police about the ownership status of the Hyundai in order to protect defendant, that the lie was part of a larger conspiracy to falsely exculpate defendant, and that the jury could consider the evidence as establishing defendant's consciousness of guilt. Defendant acknowledges that defense counsel did not object to the admission of the evidence or the prosecutor's argument, but he argues that his contentions are cognizable on appeal because counsel rendered ineffective assistance by failing to object. He further argues that this court should find the admission of the evidence and the prosecutor's argument prejudicial error.

The Attorney General contends that the evidence was properly admitted, so there was neither prejudicial error nor ineffective assistance of counsel.

"California law prohibits proving consciousness of guilt by establishing attempts to suppress evidence unless those attempts can be connected to a defendant. (*People v. Hannon* (1977) 19 Cal.3d 588, 596-600; *People v. Weiss* (1958) 50 Cal.2d 535, 551-554.)" (*People v. Olquin* (1994) 31 Cal.App.4th 1355, 1368.) "Consciousness of guilt may be shown by (1) a defendant's own efforts to create false evidence or obtain false testimony, or (2) the efforts of someone else to do so, 'but only if the defendant was present and knew about the conduct, or, if not present, authorized the other person's actions.' (CALCRIM No. 371.)" (*People v. Nelson* (2011) 51 Cal.4th 198, 214, fn. 9.) "Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a

defendant is a question of law.” (*People v. Hannon, supra*, 19 Cal.3d at p. 597.)

In this case, there was evidence in the record which, if believed by the jury, sufficiently supported the prosecutor's argument that defendant authorized his father's actions. Defendant went to Tyree Washington's apartment a second time on the morning of Officer Fontana's shooting. Defendant was out of breath, and he asked to use the phone. Washington asked defendant what was going on and defendant said, “it's nasty, it's real ugly.” Washington gave defendant a phone and defendant made three or four calls. In one conversation, which Washington thought was with defendant's father, defendant said something like, “clean up the house.” A call was made from Washington's phone to defendant's father at 4:36 a.m., and another call was placed from Washington's phone to defendant's brother's girlfriend at 4:38 a.m. Defendant also called Marcell Quincy Gilbert at 4:46 a.m., and gave him directions to Washington's apartment. When Gilbert arrived at Washington's apartment to give defendant a ride, he asked defendant, “What's going on?” Defendant replied, “It's all bad.” Defendant climbed into the open bed of Gilbert's pickup truck and lay down. Gilbert took defendant to Gilbert's home, gave defendant his cell phone, and went to bed. Defendant's father talked to the police around 6:00 a.m. The jury could reasonably infer from this evidence that, during telephone conversations with his father and his brother's girlfriend prior to his father's police interview, defendant could have asked that his father help him suppress evidence tending to show defendant's guilt. Accordingly, the court properly admitted testimony showing that defendant's father lied to the police and properly permitted the prosecutor to argue that defendant's father's action could support a finding of defendant's consciousness of guilt, and defendant cannot show that he was prejudiced by counsel's failure to raise objections to the evidence and argument because there was strong evidence tending to show that defendant asked his father to help him suppress evidence. (*Strickland, supra*, 466 U.S. at p. 697.)

V.B. Janee Gilmore's Testimony

The prosecutor called Janee Gilmore to testify during its case-in-chief over defense counsel's objection. The prosecutor argued that defendant's father was the person who brought Gilmore to defense counsel's attention, and that the prosecution should be able to connect Gilmore with defendant's attempts to blame somebody else for Officer Fontana's shooting. Gilmore testified during the prosecution's case-in-chief that a month or two after Officer Fontana's death, McNary confessed to her that he did the shooting. However, she did not want to tell anybody about the confession, or testify about it, because McNary threatened her and people she cares about, and she was afraid of him and his “people.” She was testifying about the confession only because, if she did not do so, “you guys would put me in jail.” Gilmore further testified that she and her brother grew up together with defendant, that defendant and her brother were best friends, and that she considered defendant to be like a big brother to her.

Defendant contends that “Gilmore's testimony had no relevance to the prosecution's case-in-chief, and the defense was prejudiced by its

admission.” He argues that the evidence that defendant spoke to his father after Officer Fontana's shooting, and that defendant's father brought Gilmore to defense counsel's attention, was not sufficient evidence from which the jury could infer that Gilmore was part of a conspiracy to fabricate testimony on defendant's behalf. He further argues that the issue is cognizable on appeal despite defense counsel's failure to object to Gilmore's testimony on this ground, as counsel rendered ineffective assistance by failing to do so.

We find defendant cannot show that he was prejudiced by the admission of Gilmore's testimony during the prosecution's case-in-chief. Gilmore's testimony supported defendant's claim that McNary was the person who shot Officer Fontana, and defense counsel told the jury during his opening statement that Gilmore would so testify. As we stated above, in section II, the court properly allowed the prosecutor to call Gilmore during its case-in-chief. Accordingly, defendant cannot show that, had counsel raised an additional objection to the prosecutor's calling of Gilmore during its case-in-chief, it is reasonably probable a result more favorable to defendant would have occurred. (*Strickland, supra*, 466 U.S. at p. 697.)

People v. Campbell, 2012 WL 1201647, at *33-34.

c. Analysis

Petitioner argues that he was denied the effective assistance of trial counsel “by their failure to object to the admission of evidence, and to related prosecutorial argument and jury instruction, suggesting that his father lied to police and tried to procure false testimony from Janee Gilmore in an effort to exculpate his son because such evidence, though highly prejudicial, was inadmissible under state law, which precluded such evidence absent proof that the defendant authorized such efforts or they occurred in his presence.” Trav. at 73-74.

California law provides as follows: A party’s “[e]fforts to suppress testimony against himself indicate a consciousness of guilt on the part of a defendant, and evidence thereof is admissible against him. Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant.” *People v. Weiss*, 50 Cal. 2d 535, 554 (1958) (citations omitted) (headnotes omitted) (quoting *People v. Kendall*, 111 Cal. App. 2d 204, 213 (1952)), *overruled on other grounds as recognized by* 35 Cal. 3d 772 (1984). The California Court of Appeal found that there was sufficient evidence that defendant authorized such efforts or that they occurred in his presence to admit the evidence about his father. It was therefore not

unreasonable for the California Court of Appeal to find that there was no prejudice, as any objections by defense counsel would have been overruled. The Court determines that the state appellate court's decision was not an unreasonable application of or contrary to *Strickland*.

Based on the foregoing, the California Court of Appeal's rejection of this claim did not result in a decision that was contrary to or involved an unreasonable application of Supreme Court precedent and nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. See 28 U.S.C. § 2254(d). Accordingly, Claim 8 is DENIED.

G. Claim 9: Cumulative Error

In Claim 9, Petitioner asserts that all of the trial errors alleged in Claims 1-8 deprived him of a fair trial in violation of the Due Process Clause. Am'd Pet. at 8.

1. Procedural Background and Standard of Review

Claim 9 was raised in Petitioner's petition for review on appeal filed in the California Supreme Court. See Pet., Ex. 3. The petition for review was denied summarily. See Ans., Ex. N. But this Court may look through that decision to the California Court of Appeal's underlying decision on direct review, which denied the claim on the merits. See *People v. Campbell*, 2012 WL 1201647, at *36. This Court's task is to determine whether the California Court of Appeal's denial of Claim 9 involved an unreasonable application of or was contrary to Supreme Court authority identified by Petitioner.

2. California Court of Appeal Decision

Defendant contends that "a confluence of trial errors 'created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors.' " The California Supreme Court has recognized that the cumulative impact of errors at trial may result in the deprivation of a fair trial, even though the errors individually or even added together may not. (See e.g., *Hill*, *supra*, 17 Cal.4th at p. 847.) For the most part, we have rejected defendant's claims of error. However, even assuming that the court erred in excluding some additional defense evidence and further assuming that there was some prosecutorial misconduct during argument, upon careful consideration, we conclude that there was no miscarriage of justice under the state Constitution (Cal. Const., art. VI, § 13) and that defendant was not denied due process or a fair trial under the federal Constitution. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1056; *Fuiava*,

supra, 53 Cal.4th at p. 733.) “Defendant was entitled to a fair trial but not a perfect one. [Citations.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

People v. Campbell, 2012 WL 1201647, at *36.

3. Legal Standard

“The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair.” *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers*, 410 U.S. at 298). “The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal.” *Id.* However, “cumulative error warrants habeas relief only where the errors have ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Id.* (quoting *Donnelly*, 416 U.S. at 643).

4. Analysis

The California Court of Appeal did not unreasonably apply or act contrary to Supreme Court precedent, namely *Chambers*, in making its determination. The Court recognizes it is “clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal.” *Parle*, 505 F.3d at 928. That being said, for the reasons discussed above, Petitioner has failed to demonstrate an accumulation of errors that infected the trial with unfairness such that the Court would determine that the California Court of Appeal’s decision was contrary to clearly established federal law.

Accordingly, Claim 9 is DENIED.

H. Claim 10: Actual Innocence

In Claim 10, Petitioner asserts a claim of actual innocence. *See* Am’d Pet.

1. Procedural Background and Standard of Review

The claim was raised in Petitioner’s petition for direct review of his 2017 habeas petition to the California Supreme Court. *See* New Cl. Exs., Ex. 8. The petition for review was denied summarily. *See id.*, Ex. 9. But this Court may look through that decision to the Superior Court’s

underlying decision on the habeas petition, which denied the claim on the merits. *See id.*, Ex. 7. This Court's task is to determine whether the Superior Court's denial of Claim 10 involved an unreasonable application of or was contrary to Supreme Court authority.

2. California Superior Court Decision

The California Superior Court addressed Petitioner's actual innocence claim as follows:

Petitioner Deshawn Lee Campbell (Petitioner or Campbell) was convicted of the murder of San Jose Police Officer Jeffrey Fontana. The murder occurred in the early morning hours of October 28, 2001. At trial, Campbell's defense, almost exclusively, was that Rodney McNary (McNary,) and not Campbell, killed Officer Fontana. Multiple witnesses were called who allegedly heard McNary confess to the crime; Campbell himself waived his fifth amendment privilege and testified that McNary was the true killer. The jury did not believe Campbell's testimony, nor the alleged confessions of McNary and rejected McNary as the killer. How do we know? Because the jury reached a guilty verdict on May 27, 2009. Campbell was later sentenced in accordance with that verdict and is currently serving that sentence.

Campbell now brings this writ claiming that an alleged confession/admission by McNary made to [REDACTED] (hereinafter "CI") years after the crime constitutes "new evidence" sufficient to grant the writ pursuant to California Penal Code section 1473. The Court granted an evidentiary hearing to hear the CI testify as well as learn the circumstances surrounding the alleged confession. After considerable effort, the hearing was completed. Following post-hearing briefing, the Court now denies the motion.

The reason for denying the motion is simple: The CI was a non-credible witness. His testimony was inconsistent, incomplete, avoidant, impeached, self-serving, proven to be materially inaccurate and, accordingly, wholly unbelievable. Counsel for Petitioner argued thoroughly to the contrary, but the Court personally witnessed the CI's testimony. One cannot make a silk purse out of a sow's ear; no reasonable person, or juror, would conclude the CI to be a credible witness.

A second, independent, reason for denying the writ is that the alleged confession itself is not credible. Let us assume the CI's testimony to be accurate. Let us even take the CI out of the picture; instead assuming McNary's alleged confession was tape recorded and thus did not have to pass through the highly suspect medium of the CI. Simply put, the "confession" is not a credible one. McNary's alleged confession has multiple material errors and omissions that make it unbelievable as an accurate confession. A few examples:

- McNary stated he fired the gun more than once. Overwhelming evidence established by multiple witnesses, the forensic evidence, and even Petitioner's own testimony, prove only one shot was fired;

- McNary stated he fired the shot from inside the car. This claim is contradicted by uncontroverted evidence including lack of McNary's fingerprints or DNA in the car, lack of gunshot residue in the car. Also, stippling on Officer Fontana's face show the shot was made at close range and therefore *outside* the car -- because his body was 15 feet from the car. Again, even Petitioner testified Officer Fontana was shot from outside the car;
- McNary claims he and others were in the car. All the doors except the driver's door were locked and items were on the front passenger seat making it unlikely anyone sat there. Petitioner testified that he was the only one in the car.

There are multiple other examples.

These are not small details one might expect to be misremembered over time. How many times did you shoot the police officer? Were you in the car or outside? Who was there? These are things McNary would be expected to remember clearly, and recite accurately to the CI, if he were confessing to a crime he truly committed.

Also, the circumstances of the alleged confession suggest unreliability. This was not a private admission to a close friend or relative. Instead, the alleged confession was made to [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

In his briefing, Campbell emphasizes certain trial evidence and argues that the case was a "close" one and therefore in the "sliding scale" of Penal Code section 1473, his "new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner." *In re Sagin* (2019) 39 Cal.App.5th 570, 579-580. The People, in turn, argue to rebut Petitioner and instead invite the court to focus on the substantial incriminating evidence presented at trial. The People argue the evidence of guilt was "overwhelming" and therefore "only the most compelling new evidence will provide a basis for habeas relief." *Id.* Although the Court does find the evidence presented against Campbell overwhelming, it does not matter here. Under either standard, the "new" evidence of McNary's alleged confession presented through the CI would not tip the scales in favor of Petitioner. In fact, presenting a materially inaccurate "confession" through a non-credible witness, in the Court's view, might harm the Petitioner's defense. A reasonable juror could easily conclude that even if McNary's alleged confession was accurately conveyed by the CI (a doubtful proposition,) the "confession" is so materially different than other facts in the case (including Petitioner's own testimony) that it shows McNary *didn't* know how the crime was *actually* committed and therefore implies he *didn't* commit the crime. Far more reasonable is that even if McNary made the statement claimed by the CI, it was inaccurate bragging [REDACTED]. Speculating whether the evidence would harm Petitioner's case aside, what is clear to the Court is that the evidence, if presented, would not help. A non-credible "confession" presented through a non-

credible witness on a topic that was covered at length in the trial, is not “new” evidence sufficient to grant the writ pursuant to Section 1473. The writ is DENIED.

New Cl. Exs., Ex. 7.

3. Legal Standard and Analysis

Of relevance here, the U.S. Supreme Court has expressly left “open” the question of whether “an asserted federal constitutional right to be released upon proof of ‘actual innocence’” exists. *Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71 (2009); *see also Herrera v. Collins*, 506 U.S. 390, 400 (1993) (“[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.”). Thus, the U.S. Supreme Court has never clearly established that a defendant’s federal constitutional rights are violated by a failure to vacate his conviction upon a showing of actual innocence—regardless of whether that showing is made under a “probable innocence” standard, *see Herrera*, 506 U.S. at 402-03, or the lesser showing required by § 1473(b)(3). For that reason, the Superior Court’s rejection of Petitioner’s claim based on newly discovered evidence cannot be contrary to, or an unreasonable application of, clearly established federal law. *Accord Valerio v. Frauenheim*, No. 2:17-CV-07706-MAA, 2019 WL 6310267, at *36 (C.D. Cal. Nov. 25, 2019); *see Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (“Because our cases give no clear answer to the question presented, let alone one in Van Patten’s favor, it cannot be said that the state court unreasonably applied clearly established Federal law.”(internal quotations and alterations omitted)); *see also* New Cl. Br. at 36 (recognizing “virtual impossibility” of prevailing on this claim).

Therefore, Claim 10 is DENIED.

V. CERTIFICATE OF APPEALABILITY

A certificate of appealability is DENIED. *See* Rule 11(a) of the Rules Governing Section 2254 Cases. Petitioner has not made “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Nor has Petitioner demonstrated that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may not appeal the denial of a certificate of appealability in this Court, but he may seek a certificate from the Court of Appeals under Rule 22

of the Federal Rules of Appellate Procedure. See Rule 11(a) of the Rules Governing Section 2254 Cases.

VI. ORDER

- (1) Petitioner's amended petition for a writ of habeas corpus is DENIED; and
- (2) A certificate of appealability is DENIED.

IT IS SO ORDERED.

Dated: August 8, 2023



BETH LABSON FREEMAN
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DESHAWN LEE CAMPBELL,

Plaintiff,

v.

RANDY GROUNDS,

Defendant.

Case No. 12-cv-06089-BLF

JUDGMENT

For the reasons stated in the order denying the amended petition for a writ of habeas corpus, judgment is entered in favor of Respondent and against Petitioner.

IT IS SO ORDERED.

Dated: August 8, 2023


BETH LABSON FREEMAN
United States District Judge

Court of Appeal, Sixth Appellate District - No. H034690

S202650

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DESHA WN LEE CAMPBELL, Defendant and Appellant.

The petition for review is denied.

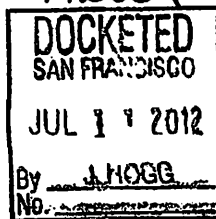
Cantil-Sakauye, C.J., was absent and did not participate.

**SUPREME COURT
FILED**

JUL 11 2012

Frank A. McGuire Clerk

Deputy



SF 2009 405686

CHIN

Acting Chief Justice

B

Appendix E

COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FILED

APR 10 2012

THE PEOPLE,

Plaintiff and Respondent,

v.

DESHAWN LEE CAMPBELL,

Defendant and Appellant.

H034690

MICHAEL J. YERLY, Clerk

By

DEPUTY

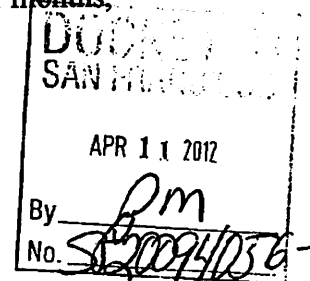
(Santa Clara County

Super. Ct. Nos. CC126494, C9946256)

INTRODUCTION

In case No. CC126494, defendant Deshawn Lee Campbell was convicted after jury trial of the 2001 murder of Jeffrey Fontana, a peace officer engaged in the performance of his duties, with the personal use of a firearm (Pen. Code, §§ 187, 12022.5, 12022.53),¹ and of being a felon in possession of a firearm (§ 12021, subd. (a)(1)). The jury further found true allegations that at the time of the offenses, defendant's release on bail had been revoked (§ 12022.1), and that he had a prior strike (§§ 667, subds. (b) – (i), 1170.12). The trial court sentenced defendant to prison for life without parole, consecutive to 25 years to life, consecutive to three years four months.

¹ All further unspecified statutory references are to the Penal Code.



consecutive to the five-year-four-month term imposed in unrelated case No. CC114103 and the 16-month term imposed in unrelated case No. C9946256 (the burglary case).

In case No. C9946256, defendant was convicted in 1999 by guilty plea of first degree burglary (§§ 459, 460, subd. (a)). He was originally granted probation, but was resentenced to prison following his conviction in the murder case for 16 months (one-third the middle term) with no presentence custody credit, consecutive to the terms imposed as stated above in unrelated case Nos. CC126494 (the murder case) and CC114103.

Defendant appeals from the judgment in the murder case and the resentencing in the burglary case. On appeal in the burglary case, defendant contends that he is entitled to 483 days of presentence custody credit.

On appeal in the murder case, defendant contends: (1) the court erred and violated his right to present a defense by (a) limiting evidence and argument about the behavioral implications of his developmental disabilities, (b) limiting evidence of his defense of third-party culpability, that is, his claim that Rodney McNary was the actual shooter, (c) refusing his requested pinpoint instruction on third-party culpability, (d) refusing to allow his counsel to comment on the prosecution's failure to call McNary to testify, and (e) cumulative error; (2) the court abused its discretion and violated his right to confrontation by admitting evidence of McNary's out-of-court self-exculpatory statements; (3) the court denied him a fair trial by admitting evidence of (a) uncharged offenses, and (b) other bad acts; (4) the prosecutor committed prejudicial misconduct by (a) appealing to the jury's sympathy for the victim, (b) misstating the law during closing argument, (c) disparaging defendant, (d) conduct that amounted to contempt of court, (e) improper questioning of defendant, (f) rude and intemperate behavior, and (g) disparaging defense counsel; (5) the court prejudicially erred by admitting irrelevant evidence of conduct by (a) his father and (b) a family friend; (6) the court prejudicially

erred by admitting multiple hearsay in a witness's police interview; and (7) cumulative error resulted in an unfair trial.

We will affirm the judgment in the murder case. However, in the burglary case we will order the abstract of judgment amended to include the grant of 483 days of presentence custody credit.

Defendant has also filed a petition for writ of habeas corpus and a supplemental petition, which we have ordered considered with the appeal. In the petitions defendant contends that the prosecutor allowed a witness's false testimony to go uncorrected and that trial counsel rendered ineffective assistance. We have disposed of the petitions by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

BACKGROUND

I. The Burglary Case

In case No. C9946256, defendant pleaded guilty on December 13, 1999, to first degree burglary (§§ 459, 460, subd. (a)), and on April 25, 2000, he was placed on five years formal probation. His probation was revoked in 2001 and in January 2002, he was sentenced to serve a five-year term. In October 2002, he was resentenced to serve a 16-month term (one-third the middle term) consecutive to the term imposed in unrelated case No. CC114103, and was granted 483 days custody credit. He was resentenced in August 2009, following his conviction in the murder case, case No. CC126494, to serve a 16-month consecutive term (one-third the middle term) with no presentence custody credit.

II. The Murder Case

II. A. The Writ Proceeding

Defendant was charged in count one of an information filed February 15, 2002, in case No. CC126494 with the first degree murder of Jeffrey Fontana (§ 187), with special circumstances making defendant eligible for the death penalty. On June 26, 2006, defendant filed a motion for a "mental retardation hearing" pursuant to *Atkins v. Virginia* (2002) 536 U.S. 304, and section 1376. The hearing was held over 55 days between

February 2007 and July 2007. (*Campbell v. Superior Court* (2008) 159 Cal.App.4th 635, 640.) On August 17, 2007, the trial court issued an order finding that defendant is not mentally retarded. (*Id.* at p. 641.) Defendant filed a petition for writ of mandate and/or prohibition in this court contending that the trial court's order was an abuse of discretion. (*Id.* at p. 644.) On October 24, 2007, defendant filed a motion in the trial court to reopen the mental retardation hearing or, alternatively, for a new hearing based on newly discovered evidence. On November 1, 2007, the trial court denied the motion. Defendant filed a motion for leave to file a supplemental petition for writ of mandate and/or prohibition. (*Id.* at p. 645.) This court granted defendant leave to file the supplemental petition and issued a *Palma* notice.² On January 30, 2008, this court issued a peremptory writ directing the trial court to vacate its August 17, 2007 order and its November 1, 2007 order, and to reopen the mental retardation hearing. (*Id.* at p. 653.) On December 19, 2008, following reopened proceedings, the trial court filed an order finding that defendant is mentally retarded, making defendant no longer eligible for the death penalty.

II. B. The Amended Information

On January 5, 2009, an amended information was filed charging defendant with the murder of Fontana (§ 187; count 1) and with possession of a firearm by a felon (§ 12021, subd. (a)(1); count 2). As to count 1, the information further alleged that Fontana was a peace officer engaged in the performance of his duties (§ 190.2, subd. (a)(7)), that defendant committed the offense for the purpose of avoiding a lawful arrest (§ 190.2, subd. (a)(5)), and that defendant personally and intentionally discharged a firearm during the commission of the offense (§§ 12022.53, subd. (d), 12022.5, subd. (a)). The information also alleged that defendant had a prior strike (§§ 667, subds. (b) –

² *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.

(i), 1170.12), and that his release on bail had been revoked at the time of the offenses (§ 12022.1). During jury voir dire, defendant stipulated that he had suffered a felony conviction prior to October 28, 2001.

II. C. In Limine Motions

II. C. 1. Expert Testimony on Mental Retardation

Prior to trial, defense counsel “concede[d]” to the People’s “request to exclude . . . the expert testimony involving mental retardation with the People’s agreement that [they] will not be seeking . . . jury instructions on a first-degree murder [theory].” Defense counsel stated that “the concession, then, at this time is just we’re not presenting diminished actuality and, of course, that expert testimony that would support that.” “This would only be really subject to an issue that I could see coming up, hypothetically, if the defendant . . . chose to testify and if, based on that testimony, hypothetically, the Court saw that there was enough evidence to instruct the jury on voluntary manslaughter for some theory that would be presented through his testimony. Then I could see us needing to revisit this issue.”

II. C. 2. Uncharged Offense Evidence

Prior to trial, the prosecutor sought leave to introduce under Evidence Code section 1101, evidence of three incidents involving prior uncharged offenses by defendant, in addition to evidence that defendant had outstanding bench warrants at the time of Officer Fontana’s shooting. The parties characterize the three uncharged offense incidents at issue as the moped incident, the Kepler incident, and the Good Guys incident. Defendant contended that the evidence of the three incidents was inadmissible under Evidence Code sections 1101 and 352. The trial court ruled that all the proffered evidence was admissible. The jury subsequently heard the following testimony.

Officer Vince Alvarez testified that on October 1, 2000, he stopped defendant for riding a minibike without a helmet in violation of Vehicle Code section 27803, subdivision (b). Defendant did not stop right away and the officer had to force him to the

side of the road. During a subsequent pat-search of defendant for weapons, the officer felt a large lump in defendant's left pants pocket. Defendant gave the officer permission to reach inside the pocket. When the officer did so, he felt a hard plastic card and some plastic bags. As the officer pulled the items out of defendant's pocket, defendant pushed his body onto the officer and attempted to grab the items out of the officer's hand. When the officer pushed defendant away, defendant took off running. The officer realized that he had defendant's ID, some cash, and five baggies of what appeared to be marijuana. The officer chased defendant for a short distance, but then reported the incident to communications. He learned that defendant was on probation for fraud and burglary. Defendant's father later phoned the police to say that defendant would turn himself in. The officer went to defendant's residence and arrested him for possession of marijuana for sale and resisting arrest.

Gerald Kepler, a now-retired San Jose police officer, testified that late on the night of September 9, 2001, when he was off-duty, his neighbor woke him and informed him that some men were trying to get into a pickup truck parked in Kepler's driveway. Kepler went outside in his robe and approached two young men walking down the street who he did not know, one of whom was defendant. The two men were already in a confrontation with Kepler's neighbors. Kepler asked the men if he could speak to them. Their conversation lasted "off and on" for about three or four minutes, during which time defendant became agitated and aggressive. He appeared to be under the influence and Kepler could smell alcohol on his breath. Kepler decided to place defendant under arrest for creating a disturbance, being drunk in public, "and to avoid a fight between him and one of my neighbors." Kepler tried to take defendant's left arm and place him in a control hold. Defendant kicked Kepler's right leg out from under him. As Kepler fell to the ground, he grabbed defendant's jacket. Defendant spun away and struck Kepler on the back of the head with a flashlight. Defendant and the other man with him ran away. Kepler had to go to the emergency room and to have three stitches in the back of his

head. His pickup truck had not been damaged. Over a month later, Kepler saw police flyers regarding Officer Fontana's shooting, and he realized for the first time that the person in the flyers, defendant, was the person who had hit him with the flashlight.

Sergeant Neal Wilson testified that around 9:00 p.m. on June 22, 2001, he responded to a Good Guys store following the report of somebody trying to use a stolen credit card. When he arrived, he saw defendant walking around inside the store. He waited for another officer, Sergeant Paul Spagnoli, to arrive, and then the two of them entered the store. People inside the store pointed to defendant, who started walking away from the officers. Wilson told defendant that he needed to talk to him. Defendant asked the officers why they were "hassling" him, and refused Wilson's request to pat search him for weapons. When Spagnoli reached towards defendant, defendant ran. Wilson ran to the store's open front door. Defendant stopped about five feet in front of Wilson, then bent over slightly and ran into him "[s]quare on." The force caused both of them to fall down outside the store. Defendant screamed, kicked, and swung his arms. Wilson was hit a few times, but he managed to hold on to defendant. Defendant got to his feet but Spagnoli could not gain control of him, so Wilson forced defendant back down on the ground. Spagnoli went down with defendant and hit his head on the pavement. A third officer was finally able to handcuff defendant and bring him to his feet, but defendant continued to struggle. Other officers arrived and put defendant in a patrol car with the help of a leg-wrap restraint. As a result of the incident, Wilson sustained injuries to both his knees and to his left elbow, his glasses broke, and he lost three days of work.

Lieutenant Paul Spagnoli testified that on the evening of June 22, 2001, Sergeant Wilson was already at the Good Guys store when he arrived there. They went inside the store together. Some employees pointed to defendant, so the officers approached him. Wilson told defendant that they wanted to talk to him and to do a pat search. Defendant ran, and Spagnoli chased him. Defendant ran right towards Wilson, who was blocking the store's front door. Wilson grabbed defendant, and they both went to the ground.

Defendant violently struggled while the officers tried to take him into custody. When defendant stood up, Wilson forced him back down on the ground, which also caused Spagnoli to fall backwards and hit his head on the ground. Spagnoli felt tugging near his belt in the area of his gun holster at the same time that Wilson pulled defendant away. A third officer came to their assistance, and they were able to handcuff defendant. Defendant continued to kick, so a wrap restraint was placed around his legs when he was placed in the patrol car. Spagnoli was out of work the next day due to a slight headache as a result of the incident.

II. D. The Outstanding Bench Warrant Evidence

Evidence was also presented to the jury that, on July 9, 2001, defendant failed to appear in criminal court on forgery and theft charges, his bail was revoked, and a bench warrant issued. On July 26, 2001, the court issued a warrant for defendant's arrest in a separate burglary case. Defendant told a friend that he was facing three to five years in prison on his outstanding warrants. When the friend urged defendant to turn himself in, defendant said he "couldn't handle that. He didn't want to do that."

II. E. The Prosecution's Trial Evidence Regarding the Murder

On the night of October 27, 2001, defendant attended a large party at a house on Rotterdam Lane with several friends. Defendant and Rashaan Yarber were driven to the party by Rodney McNary in a black Mustang owned by McNary's girlfriend Janielle Carter. During the party, defendant and many others were involved in a fight in the backyard of the house. Ryan Palenske was in the street outside the house, leaning into Robert Cunningham's car and talking to Cunningham, when people from the party spilled out into the street. McNary, defendant, and Yarber got into the Mustang. McNary drove away, hitting Cunningham's car and Palenske with the Mustang as he was leaving. People threw rocks and bottles at the Mustang, and gunshots were fired. Cunningham followed the Mustang and Cunningham's passenger was able to write down its license plate number.

Cunningham saw the Mustang turn onto Porto Alegre before he ended his chase of it and headed home. The Mustang stopped near the Calle Almaden cul-de-sac off of Porto Alegre and defendant, McNary, and Yarber fled. Yarber and defendant ran to Tyree Washington's apartment on Coleman Road near Almaden Expressway. McNary ran in a different direction.

Yarber and defendant arrived at Washington's apartment out of breath. Defendant told people there that some people at the party had jumped him and hit him, so he ran. Defendant said that he was going to go back to the party with a gun and retaliate. Deon Watts drove defendant home around 3:30 or 4:00 a.m.

Carter, McNary's girlfriend, received calls from defendant, Washington, and Watts in the early morning hours of October 28, 2001. All of them were looking for McNary. Defendant told Carter that her Mustang had been damaged and that he was going to go back to the Mustang to "pop the ignition" so that it would appear to have been stolen.³

Officers Mario Recinos and Jeffrey Fontana responded with other officers to a disturbance call on Rotterdam Lane around 2:16 a.m. on October 28, 2001. They cleared the call at 4:15 a.m. and went separate ways. Fontana sent a text message to Recinos stating that he was going to continue cruising the area. Several people who lived on Calle Almaden at the time testified that they heard a gunshot and the footsteps of one person run up the street. When they saw an officer lying in the street, they called 911. Recinos received the dispatch report that an officer was down on Calle Almaden and he was the first officer to arrive at the location at approximately 4:39 a.m. Fontana's patrol car was parked at the end of the cul-de-sac with its door open, its engine running, its front

³ Carter was convicted by plea in 2003 of being an accessory, a felony, and at the time she entered her plea it was agreed that her sentencing would be delayed until the conclusion of this case.

red and blue lights on, its rear amber light flashing, and its spotlight on. Fontana was lying in the street, face up, about 15 feet from a tan Hyundai that was parked in a driveway in front of Fontana's patrol car. Fontana's feet were pointed towards the Hyundai, there was a pool of blood near his head, and his duty weapon holster was buttoned. His flashlight was in the gutter. He had a gunshot wound above his right eye and gunpowder stippling on his face indicating that he had been shot from close range. A .45-caliber shell casing was found at the scene. The doors of the Hyundai were closed, and the patrol car's spotlight was directed just to the left of the Hyundai, as if it were directed on somebody standing outside the driver's door. Recinos attempted to find Fontana's pulse, but there was no pulse.

The keys to the Hyundai were in the ignition and the hood was warm but the engine was off. All doors other than the driver's door were locked, the driver's window was about halfway down, and there were clothing items on the front and rear passenger seats. The car was registered to defendant's father, Robert Campbell. An ATM card bearing defendant's name was found under the driver's seat and a bill and receipt in defendant's name were found in the glove box. One of the residents of Calle Almaden told an officer that he had seen the Hyundai about one month before, stopped at a light at the intersection of Almaden Expressway and Blossom Hill Road. At that time, he had seen "something happening" that caused him to write down the car's license plate number and report it to the police. Defendant was sitting in the right rear passenger seat of the Hyundai during this previous incident.

Officers swabbed the steering wheel of the Hyundai with a gauze pad and exposed the gauze pad to a trained bloodhound. The dog followed the scent to a hillside pasture near Coleman Road and Almaden Expressway where there was a herd of llamas, and then lost the scent.

A black Mustang was located parked on Via Almaden, which is a short cul-de-sac opposite Calle Almaden. The parties stipulated that the distance from the Hyundai to the

Mustang was 175 yards. The Mustang had side body damage, as if it had been involved in a collision. The parties stipulated that "the Hyundai . . . was analyzed, and fingerprints were lifted from it. And those fingerprints came back to Deshawn Campbell. There [were] no prints coming back to Rodney McNary. [¶] As to the Mustang, there were fingerprints on there that came back to Rodney McNary. Further, there was a DNA that was associated with a cigarette or cigar, and the DNA came back to Rodney McNary. There were no prints of Deshawn Campbell in the Mustang." No gunshot residue was found inside the Hyundai, indicating that a gun was not fired from inside the car. When the Hyundai was inspected in December 2001, it had a small crack in its windshield, one bulb in a rear taillight was burned out, and its two front tires were worn down to their steel belts. In addition, the car emitted grayish-white smoke from its exhaust pipe while being driven. Each of these things constituted a Vehicle Code violation which could cause an officer to stop the car.

Defendant went to Washington's apartment a second time on the morning of October 28, 2001. This second time, he was out of breath, and he asked to use the phone. Washington asked defendant what was going on and defendant said, "it's nasty, it's real ugly." Washington gave defendant a phone and defendant made three or four calls.⁴ In one conversation, which Washington thought was with defendant's father, defendant said something like, "clean up the house." A call was made from Washington's phone to defendant's father at 4:36 a.m., and another call was placed from Washington's phone to defendant's brother's girlfriend at 4:38 a.m. Defendant also called Marcell Quincy Gilbert at 4:46 a.m., and gave him directions to Washington's apartment. When Gilbert arrived at Washington's apartment to give defendant a ride, he asked defendant, "What's

⁴ Washington testified that he pleaded guilty to being an accessory to a felony in violation of section 32, and that the court reduced the charge to a misdemeanor at the time of sentencing.

going on?" Defendant replied, "It's all bad." Defendant climbed into the open bed of Gilbert's pickup truck and lay down. Gilbert took defendant to Gilbert's home, gave defendant his cell phone, and went to bed. Defendant left later that day.

Around 4:45 a.m. on October 28, 2001, San Jose Police Officer John Barg was assigned to aid in preventing all traffic from entering the neighborhood where Officer Fontana had been shot. Barg was stationed at the intersection of Almaden and McAbee, and all he knew was that there was an officer "down." He did not know about the Rotterdam Lane party. Around 5:30 a.m., a man who identified himself as Rodney McNary approached Barg on a bicycle. McNary was sweating and appeared nervous. Barg detained him and searched him. McNary was released after Barg notified his supervisor, the supervisor spoke to McNary, and Barg filled out a field identification card.

Several officers went to defendant's father's home beginning around 5:55 a.m. on October 28, 2001. After contacting defendant's father about one-half hour later, and asking him about his cars, defendant's father said that he had recently sold his Hyundai to an individual walking down the street. He could not give any other information about the sale, however. The home was searched later that day. One of the keys from the key ring in the Hyundai's ignition fit the lock to a bedroom in which indicia of defendant's residency was found. A forensic expert determined that a .45-caliber bullet found in defendant's father's bedroom had been ejected but not fired from a gun, and that distinctive ejection markings and a stamp on that bullet were identical to markings on the .45-caliber casing found near Officer Fontana's body. Defendant's father later admitted that he had lied to the officers about selling the Hyundai.

Around 4:30 p.m. on October 28, 2001, officers found McNary at an address on Gettysburg. McNary told Officer Rob Imobersteg that he had gone to the Rotterdam Lane party with Campbell, that they fled the party in a vehicle after a fight broke out, and that they later abandoned the vehicle. He also said that he hid in a creek and that he was

later stopped by the officer on Almaden. He agreed to an interview at the police station. During that interview, McNary denied having been involved in the shooting of Officer Fontana.⁵ McNary was interviewed by the police again a couple years later. During that interview, McNary “emphatically denied” that he had shot Officer Fontana.

When interviewed by officers on October 28, 2001, Carter initially lied about the location of her Mustang; she said that it had been stolen. When officers allowed McNary and Carter to talk with each other in an interview room at the police station, McNary told Carter that the police were “trying to put the shooting on him.” He told her to tell the officers the truth. Carter then told the police that McNary had borrowed her Mustang the night before.

At approximately 5:03 p.m. on October 28, 2001, an officer interviewed Rueben Martinez, a neighbor of the Campbell family. Martinez was sober and cooperative. He told the officer that he had seen defendant drive a tan Hyundai, but he had never seen defendant with a gun. He had heard defendant’s father yelling at defendant about one month earlier, telling defendant that he wanted his gun back. Martinez had “negative things to say about activity involving the Campbells at the Campbell residence,” and he described defendant as a “hothead.”

Defendant went to the homes of several of his friends asking for help after Officer Fontana’s death. Defendant seemed afraid or worried when he arrived at Kira McCuien’s home with another man McCuien did not know on October 28, 2001. Defendant asked McCuien and Janee Gilmore for a ride somewhere. Gilmore could not give defendant a ride and McCuien declined to do so because she had seen defendant’s picture “all over the news.” Gilmore testified that a month or two after Officer Fontana’s death, McNary confessed to her that he did the shooting. However, she did not want to tell anybody

⁵ An audio recording of the interview was played for the jury.

about the confession, or testify about it, because McNary threatened her and people she cares about, and she was afraid of him and his "people." She was testifying about the confession only because, if she did not do so, "you guys would put me in jail."

Defendant was driven to Sebastian Cadena's home around 9:30 or 10:00 p.m. on October 28, 2001. Defendant asked Cadena if he had heard anything about him. Cadena said no, and invited defendant inside. Defendant asked Cadena if he could stay the night, but Cadena told him no. Defendant had Cadena look up on a computer information about the killing of a San Jose police officer. After reading the article, defendant said, "it was me," "it was me, who did it." Defendant started crying and asked Cadena to hide him. When Cadena said he could not do so, defendant gave him some phone numbers to call. Cadena called two of the numbers. Defendant soon left with the unknown person who had brought him.

Defendant went to Priscilla Smith's house on October 31, 2001, and stayed there a few days. Defendant told her that he had got into some trouble at a party, some guys were chasing him, and that is when he got pulled over. Although Smith knew that Campbell was wanted for questioning in the shooting of a police officer, she did not turn defendant in because she was afraid she would get into trouble. She asked defendant what he was going to do and he said, "I don't know."

Smith argued with her boyfriend Clarence Sheppard about defendant being at her home, but she told Sheppard that defendant could stay. Sheppard talked to defendant, and defendant said, "I know, I know I messed up." Sheppard asked defendant, "what the hell were you thinking?" Defendant shook his head, "[I]ike he doesn't know." Sheppard told defendant that he had to leave. Defendant gave Sheppard a letter to give to his parents, but Sheppard did not give the letter to them. He eventually gave the letter to the police.⁶

⁶ The letter is not in the record on appeal.

Louella Kissoon and her brother Gerald Kissoon talked with defendant at Smith's home a few days after Officer Fontana's death. Defendant asked Louella if she had heard what happened. She asked defendant if he knew he had made a mistake. Defendant responded, "I know," "I fucked up." Louella asked defendant if he knew he had killed a police officer. He responded, "I know." She asked defendant why he shot the officer and he said, "I panicked and—you know, I have all these warrants and I just fucked up." Louella told defendant that he could not hide forever, and he responded, "I know, I know." When Gerald first saw defendant at Smith's house, he got scared. Gerald asked defendant, "did you do it?" Defendant responded, "yeah, yeah." Defendant asked Gerald to help him. Defendant had a .45-caliber gun that Gerald took and then dismantled and destroyed at his parent's home. Smith and Luella drove defendant to another person's house; defendant spent the drive in the trunk of the car.

Defendant was arrested on November 7, 2001. Defendant had a telephone conversation from jail with one of his brothers on November 15, 2001. In that conversation, defendant's brother told defendant that he was with McNary, who was "hiding out," and that he had asked McNary "why you hiding out . . . trying to skip town? If you didn't do nothing, if you had nothing to do with this?" Defendant responded to his brother's statement by saying, "Because. He ran someone over at that party, that, that [he] is scared of. And he hit a car." Defendant's brother responded, "Still though . . . I think he's trying to keep hisself out of this and everybody else take their cases and their charges and his rap, no. Fuck that."

II. F. The Defense Evidence Regarding the Murder

Lacey Ortiz had known defendant and his family for about 16 years by the time of defendant's trial. She had also known Carter for a number of years, and knew McNary through Carter. A day or two after an officer was killed in October 2001, McNary came to her house. Ortiz left the room, but she heard her now deceased husband and McNary talking. McNary said, "9-1-1 was shot. 187. 9-1-1. I didn't mean to do it." McNary

sounded scared. He asked if he could stay there until “everything blows over.” Ortiz’s husband then left with McNary. Within a week, Ortiz and her husband moved because she was afraid that McNary “was going to come and get us.” She also believed that she was in danger for testifying.⁷

David Jackson, who admitted that he had two 2008 felony convictions and who was in custody at the time of his testimony, testified that he grew up with defendant. In late October or early November 2001, Jackson was talking with McNary outside a restaurant while Carter was sitting in a minivan nearby with two other men. McNary brought up the subject of the shooting of a police officer. McNary twice said that defendant did not do it. McNary then robbed Jackson; he pulled out a gun, placed it next to Jackson’s rib cage, and told Jackson to give him everything he had. The two men in the minivan jumped out of it and also pulled guns on Jackson. Jackson gave McNary a couple hundred dollars, some gold jewelry, his driver’s license, his red shirt, and his red shoes. After McNary left, Jackson reported the robbery to the police, but he did not say that the robber was McNary, because McNary had his driver’s license and therefore knew where he and his family lived.

Defendant testified in his own defense. He testified that he was 30 years old and that he had one child, a daughter named Tavia. He admitted having a 1999 conviction for residential burglary, and 2002 convictions for battery on a peace officer causing injury, three counts of resisting a police officer, using and attempting to use a counterfeit access card, possessing a forged license, second-degree robbery, and petty theft with a prior. He further testified that it was McNary who shot Officer Fontana, not he.

⁷ The parties later stipulated that between 1989 and 2005, McNary suffered various felony and misdemeanor convictions, including for assault with a deadly weapon, assault by means likely to produce great bodily injury, infliction of corporal injury on a cohabitant, and possession of a firearm by a felon.

Defendant testified that when he told Carter over the phone on the morning of the shooting that her car had been damaged, she became upset. She asked defendant to meet McNary at the Mustang. Defendant grabbed a gun from his father's closet for protection and left in his father's car. When he found the Mustang, he drove down the opposite street and parked in somebody's driveway. McNary ran up to his car and they started talking. When another car approached and parked behind defendant's car, McNary thought it was somebody from the party, so he asked for defendant's gun. Defendant gave the gun to McNary. The car's blue and red lights turned on, and an officer got out of the car and approached them. The officer asked them their names and what they were doing. McNary shot the officer. Defendant panicked and got out of the car. McNary gave him back the gun and told him to get rid of it, and then they both ran.

Defendant ran to Washington's apartment, where he called his father, brothers, and Gilbert. Gilbert picked defendant up and took him to Gilbert's house. Defendant did not tell anybody what had happened. Defendant's cousin Sharon Baker picked him up later and took him to his brother's home in East Palo Alto. Baker told defendant that she saw the police at his house and she asked him why. He told her that an officer had been shot and that somebody he knows did it. Defendant told his brother that McNary had shot the officer. Baker took defendant to a friend's house in San Jose. Another friend, "E.," took defendant to McCuinen's house, and then to defendant's friend Kamal's house. Kamal took defendant to Cadena's house. Defendant did not tell any of these people who shot the officer.

Later, defendant went to and stayed at Priscilla Smith's home for a number of days. There, he heard news reports stating that the police were looking for him. He did not turn himself in because he did not want to be labeled as a "snitch." He was also afraid that people associated with McNary would hurt his family. He gave the gun to Gerald Kissoon to destroy because he was afraid that if he had it on him when he was arrested, and officers saw it, they might shoot him. When he left Smith's home, he went

to another friend's home. He told his friend that he did not shoot the officer. He stayed in a shed there until the police arrested him. After his arrest, when he talked to his brother on the telephone, he did not say that McNary had killed the officer because he knew that the conversation was being recorded and he did not want to "put it out there."

Dr. Stephen Greenspan, a psychologist, testified as an expert in the field of mental retardation. In the United States, the criteria for mental retardation are significant deficits in intellectual functioning, associated deficits in adaptive functioning or adaptive behavior, and onset before the age of 18. After reviewing the reports of other experts, various records made available to him, and his own interview and evaluation of defendant, Dr. Greenspan concluded that defendant qualifies for a diagnosis of mild mental retardation. He estimates that defendant has a mental age of between 10 and 12 years old, and an academic level of between the fifth and the seventh grade. Poor social judgment is one of the defining characteristics of people with mild mental retardation as is gullibility, or the lack of awareness of when they are being swindled or taken advantage of. A person with mental retardation can also have an antisocial personality disorder, but it is more likely that defendant has an anxiety disorder rather than an antisocial personality disorder.

Mark Harrison, a licensed private investigator, testified as an expert on African-American criminal street gangs. In Harrison's opinion, based on photographs, contents of a notebook seized from Carter's residence, McNary's tattoos, and his "central file," McNary is an active member of the Seven Trees Crip criminal street gang. The primary activities of the Seven Trees Crip gang are street-level distribution of controlled substances, shootings, robberies, homicides, and witness intimidation. Given the nature of the gang, it would be dangerous for a person to tell police information about the involvement of a member of the gang in a serious crime, and there would be "severe consequences" if a person testified in court about a gang member's involvement in the killing of a police officer.

II. G. Verdict and Sentencing

On May 27, 2009, the jury found defendant guilty of the second-degree murder of Jeffrey Fontana, a peace officer engaged in the performance of his duties, with the personal use of a firearm (§§ 187, 12022.5, 12022.53; count 1), and of being a felon in possession of a firearm (§ 12021, subd. (a)(1); count 2). The jury further found true allegations that at the time of the offenses, defendant's release on bail had been revoked (§ 12022.1), and that he had a prior strike (§§ 667, subds. (b) – (i), 1170.12).

On August 7, 2009, the court sentenced defendant to life without parole on count 1, consecutive to 25 years to life for the section 12022.53 enhancement, consecutive to three years four months (one year four months on count 2 and two years for the on-bail enhancement), consecutive to the five-year-four-month term imposed in unrelated case No. CC114103 and the 16-month term imposed in the burglary case, case No. CC946256. No custody credits were awarded.

DISCUSSION

I.A. Expert Testimony on Defendant's Developmental Disabilities

As we discussed above, prior to trial, defense counsel stated that defendant would not be presenting a “diminished actuality” defense or expert testimony that would support that defense. However, in the middle of trial, defense counsel advised the court that he wanted to present testimony on mental retardation by Dr. Greenspan prior to defendant's testimony. The prosecutor objected, arguing that prior to trial defense counsel had “conceded” the motion to exclude such testimony, and that defense counsel's proffer was “so generic that we have no idea what it's actually about and how it even relates to the defendant.” Defense counsel stated that “Dr. Greenspan is going to offer a diagnosis in this case. He's going to offer the foundation for that diagnosis, and he's going to rebut traditional assumptions about mental retardation. . . . [¶] Now, if, for any reason, [defendant] were not to testify, then the Court could merely strike the testimony of Dr. Greenspan, and the jury would be instructed to completely disregard it. And that would

be I think more than fair, if that's what it came down to." Counsel anticipated that "the direct examination of Dr. Greenspan would take no more than probably four hours, in that range." "I believe we have a constitutional due-process right to present this evidence."

The court ruled that Dr. Greenspan would not be allowed to testify "until after the defendant testifies. . . . [¶] Also, Dr. Greenspan's testimony is . . . going to be very abbreviated and limited. It's not going to talk about statistics other than those that relate to the defendant. The criteria from the diagnosis, age, IQ, deficits in adaptive behavior. I don't want to hear anything about talking to anecdotal people. I just want to hear about the . . . scores on the tests that he took and how that qualifies him as . . . someone with mental retardation and how mental retardation manifests itself in communication, memory, and demeanor, such as flat [affect] and stoicism." "I'm basing my decision in this . . . regard on [Evidence Code section] 352 grounds, because . . . I think it's an undue consumption of our time to go beyond the areas that I discussed, because I think they relate to how the defendant, if he does, in fact, testify, will appear on the stand." "The only thing this evidence goes to is credibility."

Defendant testified that he did not shoot Officer Fontana, that McNary shot the officer. Defendant testified that he only provided the gun to McNary, and that he took back the gun, ran, and destroyed the gun after the shooting.

Dr. Greenspan testified that defendant is mildly mentally retarded and has a mental age of between 10 and 12 years old, and an academic level of between the fifth and the seventh grade. Dr. Greenspan further testified that poor social judgment is one of the defining characteristics of people with mild mental retardation as is gullibility, or the lack of awareness of when they are being swindled or taken advantage of. A person with mental retardation can also have an antisocial personality disorder, but it is more likely that defendant has an anxiety disorder rather than an antisocial personality disorder.

The court instructed the jury pursuant to CALCRIM No. 226 that it must judge the credibility and believability of witnesses, and could consider various things when doing so.⁸ The court also instructed the jury pursuant to section 1127g and CALCRIM No. 331 as follows: “In evaluating the testimony of a person with a developmental disability or a cognitive impairment, consider all the factors surrounding that person’s testimony, including his or her level of cognitive development. [¶] Even though a person with a

⁸ The court instructed: “You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. [¶] You may believe all, part, or none of any witness’s testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness’s testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are: [¶] How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness’s behavior while testifying? [¶] Did the witness understand the questions and . . . answer them directly? [¶] Was the witness’s testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? [¶] What was the witness’s attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] How reasonable is the testimony when you consider all the other evidence in the case? [¶] Did other evidence prove or disprove any fact about which the witness testified? [¶] Did the witness admit to being untruthful? [¶] Has the witness been convicted of a felony? [¶] Has the witness engaged in other conduct that reflects on his or her believability? [¶] Was the witness promised immunity or leniency in exchange for his or her testimony? [¶] Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. [¶] If you do not believe a witness’s testimony that he or she no longer remembers something, that testimony is inconsistent with the witness’s earlier statement on the subject. [¶] If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that the witness said. Or, if you think the witness lied about some things but told the truth about others, you may simply accept the part that you think is true and ignore the rest.”

developmental disability or cognitive impairment may perform differently as a witness because of his or her level of cognitive impairment, that does not mean that he or she is more or less credible than any other witness. [¶] You should not discount or distrust the testimony of a person with a developmental disability or cognitive impairment solely because he or she has such disability or impairment.” Pursuant to a request by the prosecutor, the court also instructed the jury that, “[t]he testimony of Dr. Stephen Greenspan . . . may be considered by you solely to aid in your assessment of the defendant’s credibility and not for any other purpose. [¶] You are advised that the defendant is presumed to have been sane at the time of the commission of the offense charged. This means that he was able to know the nature of his act and appreciate the difference between right and wrong. [¶] There is no presumption that the defendant did, in fact, have any specific state of mind. The prosecution must prove beyond a reasonable doubt the existence of any specific state of mind necessary for a conviction.”

On appeal, defendant contends that the court erred “[b]y refusing to allow evidence of [his] retardation to be used for the purpose of explaining his conduct during and after the shooting of Officer Fontana.” “The excluded evidence of the social and cognitive effects of [his] retardation was not only clearly relevant, but *essential* to explaining his behavior both at the scene of the crime and in its aftermath.” Defendant’s “retardation and its effects on his judgment and social skills were necessary to explain his behavior at the time of the crime and his statements and behavior in its aftermath, and [he] had an absolute right to have Dr. Greenspan tell the jury about it.”

The Attorney General contends that the court properly limited the scope of Dr. Greenspan’s testimony. Defendant “expressly agreed at the outset of trial not to present any expert testimony on retardation in exchange for the prosecutor’s dismissal of the . . . first degree murder and the related special circumstances [charges].” “More substantively, Dr. Greenspan’s testimony would not have assisted the jury in its evaluation of the case.” “[Defendant] described the shooting of Officer Fontana as a

sudden, unexpected event.” “[I]f [defendant’s] description of the shooting had in fact been true, the jurors would not have found it remarkable—or explainable only through expert testimony on retardation—that [defendant] took the gun from McNary and fled from the scene.” The Attorney General further contends that any error by the court in restricting Dr. Greenspan’s testimony was harmless.

Trial courts have the discretion to exclude otherwise admissible evidence pursuant to Evidence Code section 352 “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) “As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]” (*People v. Hall* (1986) 41 Cal.3d 826, 834; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.) “We review a trial court’s evidentiary rulings under [Evidence Code section 352] for abuse of discretion.” (*People v. Doolin* (2009) 45 Cal.4th 390, 437.) A ruling excluding evidence under Evidence Code section 352 will be overturned on appeal only if the trial court “exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]” (*People v. Jordan* (1986) 42 Cal.3d 308, 316; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

“ “[A] trial court has wide discretion to admit or exclude expert testimony. . . . An appellate court may not interfere with the exercise of that discretion unless it is clearly abused.” ’ [Citation.]” (*People v. Manriquez* (1999) 72 Cal.App.4th 1486, 1492.) The trial court’s exercise of its discretion is governed by Evidence Code section 801, which limits expert testimony to that “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a).) “Expert opinion is not admissible if it consists of inferences and

conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness. [Citation.]” (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.) Therefore, the question before us is whether the trial court abused its discretion in determining that the probative value of the additional proffered testimony by Dr. Greenspan was substantially outweighed by the probability that its admission would “necessitate undue consumption of time” (Evid. Code, § 352.)

Evidence of a criminal defendant’s mental retardation “is not admissible ‘to show or negate the *capacity* to form any mental state,’ but is admissible solely on the issue whether the accused ‘*actually* formed a required specific intent . . . when a specific intent crime is charged.’ ” (*People v. Smithey* (1999) 20 Cal.4th 936, 958 (*Smithey*); § 28, subd. (a); see also *People v. Cortes* (2011) 192 Cal.App.4th 873, 902.) “In the guilt phase of a criminal action, any expert testifying about a defendant’s mental [retardation] shall not testify as to whether defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.” (§ 29; *Smithey, supra*, at p. 958.)

The mental state required for second degree murder is malice aforethought, and malice aforethought can be either express or implied. A defendant acts with express malice aforethought if he unlawfully intends to kill. A defendant acts with implied malice if he intentionally commits an act; the natural consequences of the act are dangerous to human life; at the time he acts, he knows his act is dangerous to human life; and he deliberately acts with conscious disregard for human life. (See CALCRIM No. 520.) “To support a defense of ‘diminished actuality,’ a defendant presents evidence of voluntary intoxication or mental condition to show he ‘actually’ lacked the mental states required for the crime. [Citation.]” (*People v. Clark* (2011) 52 Cal.4th 856, 880, fn. 3.) “[T]he jury may generally consider evidence of voluntary intoxication or mental

condition in deciding whether defendant actually had the required mental states for the crime.” (*People v. Steele* (2002) 27 Cal.4th 1230, 1253.)

In this case, as defendant’s counsel stated before trial, defendant did not present a “diminished actuality” defense. Nor did counsel attempt to elicit testimony from Dr. Greenspan about defendant’s mild mental retardation in order to support a “diminished actuality” defense. Rather, defense counsel offered the expert’s testimony for the sole purpose of explaining defendant’s conduct during and after the shooting of Officer Fontana.

Defendant testified that he did not shoot Officer Fontana, that he handed his gun to McNary, that McNary shot the officer, that defendant took back the gun and ran away, and that defendant gave the gun to Gerald Kissoon to destroy. Dr. Greenspan testified that poor social judgment is one of the defining characteristics of people with mild mental retardation as is gullibility, or the lack of awareness of when they are being swindled or taken advantage of. Dr. Greenspan also testified that a person with mental retardation can also have an antisocial personality disorder, but it is more likely that defendant has an anxiety disorder rather than an antisocial personality disorder. Defendant points to testimony about people with mild mental retardation that Dr. Greenspan gave at defendant’s mental retardation hearing but that the jury did not hear at his trial. Defendant contends that the additional testimony was necessary in order to further explain defendant’s actions before and after Officer Fontana’s shooting. The court determined that it would be “an undue consumption of our time” to permit additional testimony regarding how people with mild mental retardation act.

Here, defendant did not present a diminished actuality defense and his defense was that he was not the shooter; his defense was not that he did not actually have malice aforethought. Defendant testified, so the jury saw him and heard his testimony regarding his defense. The jury also heard Dr. Greenspan’s diagnosis of mild mental retardation for defendant, with a possible anxiety disorder, and it heard Dr. Greenspan’s testimony that

people with mild mental retardation have poor social judgment and are gullible. Dr. Greenspan testified that defendant had a mental age of between 10 and 12 years old, and an academic level of between the fifth and seventh grade, and the jury could use their own common sense and experience to evaluate how such a person acts. (See CALCRIM No. 226.) Dr. Greenspan also testified about how people with mild mental retardation can appear when testifying. The court correctly instructed the jury pursuant to CALCRIM No. 226 on how to judge the credibility of a witness generally and, pursuant to section 1127g and CALCRIM No. 331, on how to evaluate defendant's credibility given Dr. Greenspan's diagnosis of defendant as having mild mental retardation. The court further instructed the jury that the testimony of Dr. Greenspan was to be considered solely on the issue of defendant's credibility. Therefore, the court could properly conclude that the relevance of additional testimony regarding how people with mild retardation act in order to explain defendant's actions before and after Officer Fontana's shooting, was outweighed by the probability that its admission would necessitate undue consumption of time. (Evid. Code, § 352.) No error or abuse of discretion has been shown.

Even if we were to determine that the court erred in refusing to admit the additional testimony, we would not find any error prejudicial. The evidence that defendant was the person who shot Officer Fontana was very strong, notwithstanding defendant's testimony that he was not the shooter. The jury saw, heard, and evaluated the testimony of defendant and Dr. Greenspan. The court correctly instructed the jury pursuant to section 1127g and CALCRIM No. 331 on how to evaluate defendant's testimony given Dr. Greenspan's diagnosis of mild mental retardation. The court also instructed the jury that Dr. Greenspan's testimony was to be considered solely on the issue of defendant's credibility. On this record, we cannot say that any error by the trial court in excluding the testimony defendant points to on appeal resulted in a miscarriage of justice. (Evid. Code, § 354.)

I.B. Third-Party Culpability Evidence

Defendant contends that, “[a]lthough the trial court allowed the defense to present *some* of the evidence pointing to McNary’s culpability, the court prejudicially restricted the admission of that evidence on repeated occasions. . . . [E]ach of these rulings constituted an abuse of the discretion vested in the trial court.” Defendant specifically contends that the court should have admitted: (1) testimony by Janielle Carter, McNary’s girlfriend, that McNary called his lawyer shortly after Fontana’s murder; (2) testimony by Eric McLaurin that McNary told him that McNary had shot the police officer; (3) testimony by David Jackson that McNary “smirked” after saying that defendant did not shoot the officer; (4) testimony by Lacey Orteza and Janee Gilmore that they were afraid of McNary in part because of their personal knowledge of his prior bad acts; and (5) testimony regarding Steven Eddie’s contact with police in the vicinity of the shooting of Officer Fontana within hours of the shooting.

The Attorney General contends that the trial court reasonably prohibited defendant from introducing the testimony he claims was erroneously excluded. The Attorney General contends that the court reasonably excluded testimony regarding McNary’s alleged call to his attorney on a number of grounds, the court properly found that McLaurin’s and Jackson’s proposed testimony would be too untrustworthy to be admissible, the proposed testimony by Orteza and Gilmore was cumulative, and the proposed testimony regarding Eddie was irrelevant.

“ ‘A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. This rule does “not require that any evidence, however remote, must be admitted to show a third party’s possible culpability [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant’s guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.” [Citation.]’ [Citations.]” (*People v. Panah*

(2005) 35 Cal.4th 395, 481 (*Panah*); see also *People v. Geier* (2007) 41 Cal.4th 555, 581 (*Geier*).) “ ‘[T]he evidence [has] to be relevant under Evidence Code section 350, and its probative value [can]not be “substantially outweighed by the risk of undue delay, prejudice, or confusion” under Evidence Code section 352.’ [Citation.]” (*Geier, supra*, at p. 581.) On appeal, “we review the ruling, not the court’s reasoning and, if the ruling was correct on any ground, we affirm.” (*Id.* at p. 582.)

In *Geier*, the defendant sought to admit testimony by a witness, Green, that Green saw a third party, Sloan, with the victim on the night of the victim’s murder, and that Sloan later told Green that Sloan had dropped off the victim at her apartment. Our Supreme Court found that Green’s testimony was properly excluded. “Such evidence does not rise even to the status of motive evidence. While it could be generously construed as possible evidence that Sloan had the opportunity to commit the crimes, as noted, evidence of mere opportunity without further evidence linking the third party to the actual perpetration of the offense is inadmissible as third party culpability evidence.” (*Geier, supra*, 41 Cal.4th at p. 582.) The defendant also sought to admit testimony by another witness, Harrison, that Sloan made comments that could be construed as an admission that he killed the victim. Our Supreme Court found that this evidence was properly excluded under Evidence Code section 352. “In light of the confused and contradictory tenor of Harrison’s testimony—asserting at one point that Sloan said someone was framing him for the murder, and at another, that he confessed to it—her testimony possessed, as the prosecutor noted, ‘minimal probative value.’ Balanced against this minimal probative value was the ‘probability’ that the admission of Harrison’s testimony would have ‘necessitate[d] undue consumption of time or . . . confus[ed] the issues, or misle[d] the jury.’ (Evid. Code, § 352.)” (*Geier, supra*, 41 Cal.4th at p. 582.)

I. B. 1. Testimony by Carter that McNary Called his Lawyer

Evidence was introduced that McNary had been driving Carter's car when he hit a parked car and an individual standing in the street as he was driving away from the Rotterdam Lane party. Accordingly, even if the proffered testimony by Carter that McNary called his attorney shortly after Officer Fontana was shot would suggest that McNary had a "guilty mental state" as defendant contends, it does not necessarily follow that McNary must have felt guilty about having shot Officer Fontana; he could have felt guilty about fleeing the scene where he hit a parked car and an individual. As the proffered testimony does not link McNary to the actual perpetration of the shooting of Officer Fontana, the court was not required to admit the proffered testimony as third-party culpability evidence. (*Panah, supra*, 35 Cal.4th at p. 481.)

I. B. 2. Testimony by McLaurin regarding McNary's Confession

The proffered evidence regarding Eric McLaurin was that defendant's family members claimed that McLaurin told them that McNary told him that he, McNary, killed the police officer. However, McLaurin told the police that he did not remember ever saying that, and that defendant's family was trying to intimidate him. McLaurin testified, and a recording of his police interview was played for the court, at an Evidence Code section 405 hearing prior to defendant's 2007 mental retardation hearing. When defense counsel told the court in January 2009 that he intended to call McLaurin to testify, the prosecutor told the court that McLaurin was not providing consistent statements, that the prosecution would need to bring in additional witnesses to impeach McLaurin, and that the prosecution had "a previous statement by McNary to the police officers, and a taped statement, in which he convincingly says he didn't do it." The court ruled that, "[a]fter having actually observed Mr. McLaurin and reading . . . the *Geier* case, I think that Mr. McLaurin's various versions of the information really fall within the paradigm of the *Geier* case. And so I'm going to be excluding those under [Evidence Code section] 352."

Given the contradictory nature of the proffered evidence regarding McLaurin, and the fact that it involved double hearsay, it had minimal probative value. In addition, there was the probability that the presentation of the evidence would have necessitated undue consumption of time, or confused the issues, or misled the jury. (Evid. Code, §352.) Therefore, the testimony by McLaurin was similar to the testimony the *Geier* court found was properly excluded, and the court in this case did not err or abuse its discretion in excluding this evidence. (*Geier, supra*, 41 Cal.4th at p. 582.)

I. B. 3. Testimony by Jackson that McNary Smirked

The court admitted testimony from David Jackson that McNary told him that defendant did not shoot the officer, and then McNary pulled out a gun and robbed Jackson. Defense counsel sought admission of additional testimony from Jackson that, immediately after McNary said that defendant did not shoot the officer, Jackson asked McNary who did shoot the officer. McNary then had “a look on his face ‘like a smirk,’ ” before he pulled out a gun and robbed Jackson. Defense counsel argued that the “smirk” or “smile” was an adoptive admission, a statement against penal interest by an unavailable witness, and evidence of McNary’s state of mind. However, McNary’s smirk does not qualify as an admissible adoptive admission under Evidence Code section 1221 because McNary was not a “party” in this case. (Evid. Code, § 1221.)⁹

For the same reason, McNary’s smirk does not qualify as an admissible “statement” or “nonverbal conduct” under Evidence Code sections 225 and 1220.¹⁰ (See

⁹ “Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which *the party*, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.” (Evid. Code, § 1221, italics added.)

¹⁰ “ ‘Statement’ means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.” (Evid. Code, § 225.) “Evidence of a statement is not made inadmissible by the hearsay

People v. Hawkins (2002) 98 Cal.App.4th 1428, 1449.) In addition, Jackson's opinion of what McNary meant by the smirk was speculative; although McNary could have meant by the smirk to convey to Jackson that he knew who the actual shooter of Officer Fontana was, that does not mean that McNary necessarily meant to convey to Jackson that the shooter was McNary himself. Therefore, it cannot be said that when McNary made the smirk it "was so far contrary to [his] pecuniary or proprietary interest, or so far subjected him to the risk of . . . criminal liability, . . . that a reasonable man in his position would not have made the statement [or nonverbal conduct] unless he believed it to be true." (Evid. Code, 1230.) Given the speculative nature of this proposed testimony, it had little to no probative value on the issue of McNary's culpability, and the court did not err or abuse its discretion in excluding it under Evidence Code section 352.

I. B. 4. Testimony by Ortiz and Gilmore

The court admitted testimony from Lacey Ortiz and Janee Gilmore about their fear of McNary. Ortiz testified that she and her husband moved because she was afraid that McNary "was going to come and get us" shortly after McNary told her husband that he was involved in the shooting of a police officer. She also believed that she was in danger for testifying. Gilmore testified that McNary confessed to her that he did the shooting. However, she did not want to tell anybody about the confession, or testify about it, because McNary threatened her and she feared McNary and his "people." She was testifying about it only because, if she did not do so, she would be put in jail. The court further admitted testimony that McNary was a member of the Seven Trees Crip criminal street gang, that the primary activities of the gang included homicides and witness intimidation, and that there would be "severe consequences" if a person testified about a gang member's involvement in the killing of a police officer.

rule when offered against the declarant in an action to which he is *a party . . .*" (Evid. Code, § 1220, italics added.)

Defense counsel sought admission of additional testimony by Ortiz and Gilmore that their fear of McNary was based on their knowledge of his involvement in the Seven Trees Crip gang. As the jury heard testimony that Ortiz and Gilmore did not want to testify because of threats by McNary and their fear of him, and testimony that McNary was a member of the Seven Trees Crip gang, any error in not admitting additional testimony that Ortiz and Gilmore knew that McNary was a member of the Seven Trees Crip gang did not result in a miscarriage of justice. (Evid. Code, § 354.)

I. B. 5. Testimony about Steven Eddie

Defense counsel sought to introduce evidence that Steven Eddie was stopped by Officer Jacob Ferguson between 6:30 and 7:00 a.m., on the morning of the shooting of Officer Fontana. Because Eddie was on parole, he was detained, taken to the police department, and subjected to a gunshot residue test that morning. Defense counsel argued that this showed that Officer Barg could have followed the same procedure when he stopped McNary around 5:30 a.m., and that Barg and his sergeant were negligent in releasing McNary without giving McNary a gunshot residue test. As the trial court found, evidence that a different officer subjected a different parolee to a gunshot residue test on the morning of the shooting of Officer Fontana (which could suggest that Officer Barg could have subjected McNary to a gunshot residue test that morning) was not relevant evidence in this case, as the evidence would not have had a tendency in reason to prove or disprove defendant's theory of defense that McNary was the person who shot Officer Fontana. (Evid. Code, § 210.) Accordingly, the court did not err or abuse its discretion in excluding the evidence under Evidence Code section 352.

I. C. Pinpoint instruction on Third-Party Culpability Evidence

Defendant contends that the court erred in refusing to give his proposed pinpoint instruction on third-party culpability evidence. The Attorney General contends that the court properly denied defendant's request for a pinpoint instruction.

Defense counsel requested that the court give the following instruction to the jury: “You have heard evidence that [a person other than the defendant] [Rodney McNary] committed the offense with which the defendant is charged. The defendant is not required to prove [Rodney McNary’s] guilt beyond a reasonable doubt. It is the prosecution that has the burden of proving the defendant guilty beyond a reasonable doubt. Therefore, the defendant is entitled to an acquittal if you have a reasonable doubt as to the defendant’s guilt. Evidence that [Rodney McNary] committed the charged offense may by itself leave you with a reasonable doubt. [¶] If after considering all of the evidence, including any evidence that another person committed the offense, you have a reasonable doubt that the defendant committed the offense, you must find the defendant not guilty.” The court denied defendant’s request, finding the requested instruction “redundant for [CALCRIM No.] 220.” The court also noted that the instruction was refused in *People v. Earp* (1999) 20 Cal.4th 826 (*Earp*). However, the court did give defendant’s requested pinpoint instructions regarding evidence of McNary’s motive and flight.¹¹

“A criminal defendant is entitled, on request, to an instruction ‘pinpointing’ the theory of his defense. [Citations.] . . . [H]owever, instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories ‘is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.’

¹¹ The court instructed the jury: “Presence of motive in Rodney McNary may be a factor tending to show that he shot and killed Officer Fontana. Not having a motive may be a factor tending to show that he did not shoot and kill Officer Fontana. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.” “If Rodney McNary fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that Rodney McNary fled, it is up to you to decide the meaning and importance of that conduct.”

[Citation.]” (*People v. Wharton* (1991) 53 Cal.3d 522, 570 (*Wharton*); see also *People v. Wright* (1988) 45 Cal.3d 1126, 1137, 1143 (*Wright*).)

In *Wright*, our Supreme Court reaffirmed its disapproval of “ ‘the common practice [of] select[ing] certain material facts, or those which are deemed to be material, and endeavoring to force the court to indicate an opinion favorable to the defendant as to the effect of such facts, by incorporating them into instructions containing a correct principle of law’” (*Wright, supra*, 45 Cal.3d at p. 1135.) Thus, the court disapproved as “argumentative” an instruction requested by the defendant that would have instructed the jury to “consider” various pieces of evidence, such as the fact that all the robbers wore ski masks, in assessing the defendant’s guilt. (*Id.* at pp. 1138, 1135.) A pinpoint instruction is also “argumentative” when it “invite[s] the jury to draw inferences favorable to only one party from the evidence presented at trial.” (*People v. Carter* (2003) 30 Cal.4th 1166, 1225; see also *Earp, supra*, 20 Cal.4th at pp. 886-887 [requested instruction was “plainly argumentative” as it emphasized specific evidence defendant claimed raised reasonable doubt].)

“Further, ‘[i]t is not erroneous to refuse’ even a legally correct instruction if it is duplicative. [Citation.]” (*People v. Berryman* (1993) 6 Cal.4th 1048, 1079, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 (*Hill*).) A trial court is not required to give requested instructions which are duplicative of the legal concepts in other given instructions. (*People v. Farmer* (1989) 47 Cal.3d 888, 913-914, overruled on another point in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6; *Wright, supra*, 45 Cal.3d at p. 1134.) Any error in refusing a requested pinpoint instruction is reviewed under the standard enunciated in *People v. Watson* (1956) 46 C.2d 818, 836: is it reasonably probable that a result more favorable to defendant would have been reached in the absence of the error? (*Wharton, supra*, 53 Cal.3d at p. 571.)

Defendant’s proposed pinpoint instruction that the court refused to give was both duplicative and argumentative. The proposed instruction was duplicative of the

instruction the court gave on reasonable doubt (CALCRIM No. 220). That instruction informed the jury that the People have the burden of proving the defendant guilty beyond a reasonable doubt and that, in deciding whether the People have proved the case beyond a reasonable doubt, the jury must impartially consider all the evidence that was received throughout the entire trial. The proposed instruction was also argumentative in that it invited the jury to find defendant not guilty upon finding that there was some evidence supporting defendant's claim that McNary committed the charged offense: "Evidence that [Rodney McNary] committed the charged offense may by itself leave you with reasonable doubt." (See *Earp*, *supra*, 20 Cal.4th at pp. 886-887.)

The jury knew from the evidence presented and defense counsel's argument that the defense theory was that McNary, not defendant, was the shooter. The court also gave defendant's pinpoint instructions regarding evidence of McNary's motive and flight. Under the circumstances, even assuming that the court erred in refusing to give defendant's other proposed pinpoint instruction, it is not reasonably probable that had the jury been given the instruction, a result more favorable to defendant would have been reached. (*Earp*, *supra*, 20 Cal.4th at pp. 886-887; *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.)

I. D. Restriction of Defense Argument

Defendant acknowledges that McNary did not testify at trial because (1) he had invoked his Fifth Amendment right not to do so at a pretrial hearing and the prosecutor refused to offer him immunity, and (2) at the time of trial, he had absconded from parole. Nevertheless, defendant contends that the court improperly prohibited his counsel from commenting during closing argument on the prosecutor's failure to call McNary as a logical witness. "Because the prosecution's refusal to grant McNary immunity was discretionary, there was no valid legal reason not to allow the defense to comment on [the prosecution's] failure to exercise that discretion and call McNary, a logical witness, to permit the jury to assess the credibility of his story."

The Attorney General contends that “the defense attorney could not have honestly argued that McNary’s failure to testify somehow reflected badly on the prosecution’s case. A trial court is not[] required to allow a lawyer to argue false inferences to the jury.”

“If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, . . . neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.” (Evid. Code, § 913, subd. (a).) “A person may invoke the constitutional privilege against self-incrimination for a reason other than guilt.” (*People v. Mincey* (1992) 2 Cal.4th 408, 441.) Accordingly, a court does not err by refusing a party’s request to compel a witness to invoke before the jury the witness’s privilege against self-incrimination. (*Id.* at p. 442.) In addition, the prosecution is not obligated to grant immunity to a potential defense witness in order to assist a defendant, or to make reasonable efforts to persuade a potential witness to testify. (§ 1324; *People v. Williams* (2008) 43 Cal.4th 584, 622-623.) As defendant has not shown that McNary was available to testify at the time of defendant’s trial, and that McNary would have testified had he been called to testify, the court did not err in refusing defendant’s request to allow his counsel to comment on the prosecutor’s failure to call McNary as a logical witness. (*Mincey, supra*, 2 Cal.4th at p. 442 [“A defendant’s rights to due process and to present a defense does not include a right to present to the jury a speculative, factually unfounded inference”].)

II. Admission of McNary’s Out-of-Court Statements

Prior to trial, the court granted defense counsel’s request, over the prosecutor’s objection, to allow Janee Gilmore to testify that she heard McNary confess to shooting Officer Fontana. The prosecutor told the jury in his opening statement that McNary has said that he did not shoot Officer Fontana. Defense counsel told the jury in his opening

statement that Gilmore would confirm the defense theory that McNary had shot Officer Fontana by testifying that McNary had confessed the killing to her. The prosecution then moved to call Gilmore during its case-in-chief and to impeach McNary's statements to Gilmore by offering other statements by McNary that were inconsistent with the declaration against penal interest he made to Gilmore. The prosecutor argued that Evidence Code section 1202 and *People v. Osorio* (2008) 165 Cal.App.4th 603 (*Osorio*) permitted this procedure. Defendant objected, arguing that what the prosecutor wanted to do was "back door in McNary's denial of shooting Fontana" under Evidence Code section 1202. "[H]e wants to impeach Janee Gilmore. He does not want to impeach Rodney McNary." Defendant also objected to admission of evidence of McNary's denials on the basis of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), and Evidence Code section 352. The court granted the prosecutor's motion, finding that the prosecutor had established, "under the *Osorio* case, that this is not testimonial and therefore doesn't implicate *Crawford* and that it comes within [Evidence Code section] 1202 and is proper."

During the prosecutor's case-in-chief, after the jury heard Gilmore's testimony regarding McNary's confession to her, Officer Imobersteg's testimony about McNary's unrecorded police interview on the day of the shooting, McNary's recorded police interview, and Officer Pete Ramirez's testimony about McNary's unrecorded interview several years later, the court instructed the jury that "the recorded statement of Mr. McNary does not come into evidence for the truth of the matter, but for the purpose and only the purpose of impeaching the statements he made to Janee Gilmore, which she testified about. [¶] And the same is true with his statement to Officer Imobersteg." The jury then heard testimony from David Lucio, an investigator associated with the public defender's office, that McNary said "basically" the same thing to him that he had said in his police interviews. The jury later heard testimony from Sally Graver, a private investigator working with defense counsel, that she interviewed McNary twice, the first

time in September 2004, and the second time in January 2005. Graver testified that during both interviews, McNary's statements to her about what he did on the night of Officer Fontana's shooting were generally consistent with his statements to the police. At the close of the trial, the court instructed the jury as follows: "Rodney McNary did not testify in this trial, but statements he made at an earlier time were introduced through the testimony of Janee Gilmore and Lacey Ortez. In addition to this testimony, you have heard evidence that Rodney McNary made statements to David Lucio and Sally Graver and also to Detectives Edwards and Ramirez, which were recorded. [¶] If you decide that Rodney McNary made those statements to David Lucio, Sally Graver, and the tape recording of Rodney McNary's interviews with Detectives Edwards and Ramirez, you may only consider them in a limited way. You may use them only in deciding whether you believe the statements made by McNary to Janee Gilmore and Lacey Ortez. You may not use these statements as proof that the information contained in them is true, nor may you use them for any other purpose."

Defendant now contends that the court erred in admitting McNary's out-of-court exculpatory statements. "McNary's statements to police and defense investigators could impeach his confession to Gilmore only if the jurors determined that the former statements were true. Moreover, McNary's out-of-court statements to the effect that he did not shoot the officer went directly to the heart of the central issue in the case. Under these circumstances, despite the general presumption that jurors follow the instructions given them, and notwithstanding the trial court's limiting instructions, the admission of McNary's repeated denials of guilt bore an undue risk of confusing the jurors and causing them to consider McNary's statements for the underlying truth. . . . As against this strong risk of confusing the jury, the prosecution had no need at all, nor a foundation, for introducing the evidence." Defendant also contends that admission of McNary's out-of-court exculpatory statements violated defendant's Sixth Amendment right to confront witnesses.

The Attorney General contends that the court properly allowed the prosecutor to call Gilmore and to present other testimony in his case-in-chief in order to address defendant's theory of defense. The Attorney General argues that the prosecutor was entitled to use hearsay to impeach Gilmore's and Ortiz's testimony regarding what McNary said to them. "Because McNary had invoked the Fifth Amendment and subsequently absconded from parole, the only possible way for the prosecutor to rebut the defense evidence was through McNary's prior denials of guilt. Evidence Code section 1202 expressly allows a party to present hearsay for such a purpose, i.e., to impeach hearsay offered on behalf of the same declarant." The Attorney General further contends that admission of McNary's out-of-court exculpatory statements did not violate defendant's right to confront witnesses.

A trial court has discretion, within the limits of Evidence Code section 352, to permit the prosecution to introduce during its case-in-chief evidence on a witness's credibility when the prosecution reasonably anticipates the defense will place the witness's credibility at issue. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1085 [defense signaled a strategy of challenging the witness's credibility as early as the preliminary hearing].) "As a general matter, an appellate court reviews a trial court's ruling as to the order of proof for abuse of discretion. That is because, as a general matter, the trial court has authority to 'regulate the order of proof' in the exercise of 'its discretion.' (Evid. Code, § 320.)" [Citations.] (*People v. Tafoya* (2007) 42 Cal.4th 147, 175.)

Evidence Code section 1202 "governs the impeachment of hearsay statements by a declarant who does not testify at trial." (*People v. Blacksher* (2011) 52 Cal.4th 769, 806 (*Blacksher*).) Evidence Code section 1202 states, in relevant part: "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct."

“ ‘[Evidence Code s]ection 1202 deals with the impeachment of a declarant whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. It clarifies two points. *First*, evidence to impeach a hearsay declarant is not to be excluded on the ground that it is collateral. *Second*, the rule applying to the impeachment of a witness—that a witness may be impeached by an inconsistent statement only if he [or she] is provided with an opportunity to explain or deny it—does not apply to a hearsay declarant.’ [Citation.]” (*Blacksher, supra*, at p. 806, fn. 22.)

Evidence Code section 785,¹² which was added as part of the same bill that added Evidence Code section 1202, allows the credibility of a witness to be attacked by any party. (*Osorio, supra*, 165 Cal.App.4th at pp. 616-617; *Blacksher, supra*, 52 Cal.4th at p. 807.) “Because the Legislature did not expressly make Evidence Code sections 785 and 1202 mutually exclusive, *Osorio* concluded that both sections should be read together and ‘as a single statute, these two sections allow a prosecutor to use a prior inconsistent statement to partially impeach a hearsay statement the prosecutor had previously introduced.’ [Citation.]” (*Blacksher, supra*, at pp. 807-808.) “[T]he result in *Osorio* was . . . correct. The inconsistent statements at issue in *Osorio* were not hearsay because they were not admitted for their truth. Accordingly, the defendant’s inability to cross-examine the declarant about those statements raised no confrontation clause concerns [under the *Crawford* rule].” (*Blacksher, supra*, at p. 808; see also *id.* at fn. 23.)

In this case, the court properly allowed the prosecutor to present McNary’s out-of-court exculpatory statements. The court had previously ruled that defendant could present evidence that McNary had confessed to shooting Officer Fontana, and defense counsel informed the jury during opening statements that Gilmore would testify to that effect. Accordingly, the defense put McNary’s credibility at issue, and the prosecutor

¹² Evidence Code section 785 states: “The credibility of a witness may be attacked or supported by any party, including the party calling him.”

could properly attack McNary's credibility during its case-in-chief. (*People v. Mendoza, supra*, 52 Cal.4th at p. 1085.) In addition, Evidence Code sections 785 and 1202 allowed the prosecutor to attack McNary's credibility using his prior inconsistent statements. (*Osorio, supra*, 165 Cal.App.4th at pp. 616-617; *Blacksher, supra*, 52 Cal.4th at p. 807.) And, admission of the prior inconsistent statements did not violate *Crawford*, as the statements were not admitted for their truth. (*Blacksher, supra*, at p. 808.) The court instructed the jury that the statements were not admitted for their truth, and that the jury could use them only to assess McNary's credibility, and we must presume that the jury understood and followed the court's instruction. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 (*Mickey*).) No confrontation or due process violation has been shown.

III. A. Evidence of Defendant's Uncharged Offenses

As stated above, the jury heard evidence of the facts underlying three incidents involving defendant's uncharged offenses. The first incident occurred in October 2000, when defendant was stopped by an officer for riding a minibike without a helmet. The officer needed to force defendant to the side of the road because defendant did not stop right away. When the officer reached inside defendant's pocket, with defendant's permission, and then pulled out items from the pocket, defendant pushed his body onto the officer and attempted to grab the items out of the officer's hand. When the officer pushed defendant away, defendant took off running. The officer discovered he had defendant's ID, some cash, and five baggies of marijuana.

The second incident occurred in June 2001, when officers approached defendant inside a Good Guys store because store employees reported that defendant had tried to use a stolen credit card. Defendant ran from the officers and, when one officer stood in front of the open store door, defendant ran into the officer, pushing him to the ground. Defendant then violently struggled in an attempt to get away from both officers, causing injuries to both officers. Even though defendant was handcuffed, other officers needed a leg-wrap restraint in order to put defendant into a patrol car.

The third incident occurred in September 2001, when an off-duty police officer approached defendant and another man who were confronting the officer's neighbors on the street outside their homes late at night. Defendant appeared to be under the influence and became agitated and aggressive. When the officer attempted to arrest defendant, defendant kicked the officer's right leg out from under him, struck him on the back of the head with a flashlight, and ran away. The officer needed stitches in his head as a result of his injuries.

At the close of the case, the court instructed the jury in relevant part: "During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." "The People have presented evidence that the defendant committed other offenses of resisting arrest, evading a peace officer, simple battery on a peace officer, trying to prevent or deter an executive officer from performing that officer's duty, and assault with a deadly weapon which are not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses. . . . [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant had a motive to commit the offense charged in Count 1; namely, murder. [¶] Do not consider this evidence for any other purpose [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime."

In his closing argument, the prosecutor relied on the uncharged offense evidence to show that, although there was no evidence that McNary had ever violently resisted arrest, the evidence showed that defendant had "a documented history of absolute uncontrolled frenzy to resist an arrest," "a pathological aversion to arrest." "So I think it's wrong to say that [defendant] killed because he had two warrants out for his arrest,

because I don't think . . . that exactly described what's happening." "What I think was happening is that he has some type of flaw, a dangerous flaw: that he will not submit to an arrest and respond with force and violence to avoid apprehension." "That's his flaw. And that explains the motive. Because he is a flawed person, because he is pathologically averse to submitting to arrest, you can see how this would happen." "What I'm saying is this guy was a time bomb. And, unfortunately, Jeff Fontana didn't know that he was stopping a time bomb." Defendant did not object to this argument by the prosecutor.

On appeal, defendant contends that none of the testimony regarding the uncharged offenses was admissible, and that the admission of the testimony denied him a fair trial. He argues that evidence of uncharged offenses is not admissible on the issue of motive unless the other offenses were so substantially similar to the charged crime "as to evidence the perpetrator's 'signature,' " and that the evidence of the incidents at issue was "far from 'like a signature.' " He further argues that the evidence was far more prejudicial than probative, and that the prosecutor "blatantly" improperly used the evidence to prove defendant's "*propensity of character* to commit violence against police officers." "[T]he prosecution's use of the other-crimes evidence to make a propensity argument is probative of the harm that resulted from the erroneous admission of that evidence."

The Attorney General contends that the evidence of defendant's prior offenses was properly admitted. The Attorney General argues that the offenses were "extremely" probative of defendant's mental state at the time of the charged offense, they were not the types of offenses that would have inflamed the passions of the jury unfairly against defendant, and the court's limiting instructions further minimized any possibility of prejudice. The Attorney General further argues that defendant forfeited any claim of error based on the prosecutor's closing argument by failing to raise an objection below, and that "[e]ven if the prosecutor's rhetoric became overheated in a few passages of a

very lengthy argument, the strength of the evidence as a whole rendered any error harmless.”

Evidence Code section 1101, subdivision (a) states in relevant part: “Except as provided in this section . . . , evidence of a person’s character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion.” Subdivision (b) of this section provides: “Nothing in this section prohibits the admission of evidence that a person committed a crime, . . . when relevant to prove some fact (such as motive . . .) other than his or her disposition to commit such an act.”

“ ‘As Wigmore notes, admission of this evidence produces an “over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.” [Citation.] It breeds a “tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offen[s]es” [Citation.] Moreover, “the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor.” [Citation.]’ [Citation.]” (*People v. Foster* (2010) 50 Cal.4th 1301, 1331 (*Foster*); *People v. Fuiava* (2012) 53 Cal.4th 622, 667 (*Fuiava*).) Since substantial prejudice is inherent in admitting evidence of uncharged offenses, evidence of such offenses is admissible only if it has “ ‘substantial probative value.’ ” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *Foster, supra*, at p. 1331.) Moreover, the probative value of the evidence of any uncharged offense must be weighed against the danger “of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) The “undue prejudice” referred to in Evidence Code section 352 “is not synonymous with ‘damaging,’ but refers instead to evidence that “ ‘uniquely tends to evoke an emotional bias against defendant’ ” without regard to its relevance on material issues.” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

“ ‘ “[W]hen the commission of a criminal act [(the crime for which defendant is on trial)] is a disputed issue, evidence of *motive* may become relevant to that issue.

Motive is itself a state-of-mind or state-of-emotion fact. Motive is an idea, belief, or emotion that impels or incites one to act in accordance with his state of mind or emotion. Thus, evidence, offered to prove motive, that defendant committed an uncharged offense meets the test of relevancy by virtue of the circumstantial-evidence-reasoning process that accepts as valid the principle that one tends to act in accordance with his state of mind or emotion.” [Citation.]’ [Citations.]” (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1382-1383 (*Spector*).)

“Although motive is not an element of any of defendant’s crimes, ‘the absence of apparent motive may make proof of the essential elements less persuasive’ [Citation.]” (*People v. Davis* (2009) 46 Cal.4th 539, 604.) “Because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.” (*People v. Lopez* (1969) 1 Cal.App.3d 78, 85.)

“Other crimes evidence is admissible to establish two different types or categories of motive evidence. In the first category, ‘the uncharged act supplies the motive for the charged crime; the uncharged act is cause, and the charged crime is effect.’ [Citation.] ‘In the second category, the uncharged act evidences the existence of a motive, but the act does not supply the motive. . . . [T]he motive is the cause, and both the charged and uncharged acts are effects. *Both crimes are explainable as a result of the same motive.*’ [Citation.] [¶] California case law allows the admission of other crimes evidence to prove this second kind of motive. (See *People v. Davis*[, *supra*,] 46 Cal.4th 539, 604 [evidence of two prior sexual assaults on children involving bondage tended to show defendant had motive for sexually assaulting murder victim]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 15 [evidence of prior assault and robbery of different victim tended to show defendant had motive to rob victim killed in current case]; *People v. Walker* (2006) 139 Cal.App.4th 782, 803 [in trial for murdering prostitute, evidence of prior sexual assaults tended to show defendant’s ‘ “common motive of animus against

prostitutes resulting in violent batteries interrupting completion of the sex act” ’]; *People v. Pertsoni* (1985) 172 Cal.App.3d 369, 375 [in trial for murdering man affiliated with Yugoslav government, evidence defendant had previously shot at person he thought was Yugoslavian ambassador tended to show that defendant’s hatred of Yugoslav government impelled him to kill current victim].)” (*Spector, supra*, 194 Cal.App.4th at pp. 1381-1382, fn. omitted.) “Both *People v. Walker, supra*, 139 Cal.App.4th 782, and *People v. Scheer* (1998) 68 Cal.App.4th 1009, acknowledged the legitimacy of category two motive evidence although they characterized it as ‘common plan’ evidence. (See *People v. Walker, supra*, at p. 804.)” (*Spector, supra*, at p. 1382, fn. 17.)

“[T]he probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus. [Citations.]” (*People v. Demetrulias, supra*, 39 Cal.4th at p. 15.)

“ ‘Rulings made under [Evidence Code sections 1101 and 352] are reviewed for an abuse of discretion. [Citation.]’ [Citation.] ‘Under the abuse of discretion standard, “a trial court’s ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” [Citation.]’ [Citation.]” (*Foster, supra*, 50 Cal.4th at pp. 1328-1329; see also *Fuiava, supra*, 53 Cal.4th at pp. 667-668.)

In this case, the evidence of the facts underlying the uncharged offenses was admitted to show that defendant had a motive for shooting Officer Fontana. Evidence of defendant’s motives for assaulting other officers or people attempting to apprehend him tended to show that defendant had the same motive when he assaulted and killed Officer Fontana. The challenged evidence showed that prior to the shooting, when defendant was approached, stopped, or arrested by a police officer or someone else who attempted to apprehend him, he acted aggressively and violently, often physically harming the apprehending person. In October 2000, when an officer made a traffic stop and then

pulled five bags of marijuana out of defendant's pocket, defendant pushed his body against the officer, attempted to grab the items out of the officer's hand, and then took off running. In June 2001, defendant ran from two officers who approached him inside a store; he took one officer to the ground and violently struggled with both officers, injuring both officers; and other officers needed a leg-wrap restraint in order to place defendant in a patrol car. In September 2001, when an off-duty police officer attempted to arrest defendant for being drunk in public and creating a disturbance, defendant kicked the person's leg out from under him, hit the person in the head with a flashlight, and ran away. In October 2001, Officer Fontana was shot after he parked behind defendant's car near where defendant and McNary had earlier abandoned McNary's car. McNary's car had earlier hit a car and a person while McNary and defendant were fleeing from a fight at a party. Thus, both the uncharged offenses and the charged crimes were explainable as a result of the same motive. (*Spector, supra*, 194 Cal.App.4th at p. 1381.) That is, "the other crimes evidence in this case was admissible because it tended to show [defendant] had acted with the same state of mind or 'state of emotion' in both the charged and the uncharged offenses." (*Id.* at p. 1383; see also *Fuiava, supra*, 53 Cal.4th at p. 668.)

The challenged evidence was highly relevant to the disputed facts, and it was no more inflammatory than the evidence concerning the charged offense of murder of a police officer during the performance of his duties. In addition, the jury was instructed that the evidence of the uncharged offenses could not be considered as proof that defendant is a person of bad character or that he has a disposition to commit crimes. The jury was instructed that the evidence could be considered for the limited purpose of determining if it tends to show the existence of a motive for the commission of the charged crime, and for no other purpose; that the People are not required to prove that defendant had a motive but, in reaching its verdict, it may consider whether defendant did have a motive; and that "[h]aving a motive may be a factor tending to show that the defendant is guilty [whereas n]ot having a motive may be a factor tending to show the

defendant is not guilty.” The jury was also instructed that it must decide what happened based only on the evidence presented, that the attorneys’ remarks during closing arguments are not evidence, and that it must follow the court’s instructions even if it believes that the attorneys’ comments conflict with the instructions. These instructions ameliorated any potential misapplication of the challenged evidence due to the prosecutor’s closing remarks, and we must presume that the jury understood and followed the instructions. (See *People v. Osband* (1996) 13 Cal.4th 622, 717.) The jury also heard evidence that defendant knew that he had outstanding bench warrants and that he did not want to go back to jail, which was relevant to the special allegation that defendant’s bail had been revoked at the time of Officer Fontana’s shooting but which also showed that defendant had a motive to shoot the officer. Defendant has not shown that the trial court abused its discretion in admitting the testimony regarding the facts underlying the uncharged offenses.

Even if we were to find that the court erred in admitting evidence of the facts underlying some or all of the uncharged offenses on the issue of motive, we would find any error not prejudicial. The evidence showed that defendant was with McNary when McNary hit a car and an individual in the street as he was speeding away from a party earlier in the same evening that Officer Fontana was shot and killed. Defendant testified that he had his father’s gun when Officer Fontana approached him and McNary near where he and McNary abandoned the car McNary had been driving. Defendant also testified that it was McNary and not defendant who shot and killed the officer. The court instructed the jury that having a motive may be a factor tending to show that defendant is guilty of the charged murder while not having a motive may be a factor tending to show that defendant is not guilty. The court similarly instructed the jury at defendant’s request regarding the presence or absence of motive in Rodney McNary. Evidence that defendant had prior convictions was admitted as impeachment evidence, the facts underlying the uncharged prior offenses were not admitted to show defendant’s

disposition to commit the charged murder, and the jury was instructed not to consider the uncharged offense evidence to prove that defendant has a bad character or is disposed to commit crime. The evidence regarding the uncharged offenses was no more prejudicial or inflammatory than the properly admitted evidence that defendant failed to appear in criminal court on forgery and theft charges, that his bail was revoked, that he had two outstanding arrest warrants, and that he told a friend he did not want to turn himself in because he knew he was facing three to five years in prison. Under the facts of this case, it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the evidence of his prior uncharged offenses. Therefore, defendant cannot show that admission of the evidence of his prior uncharged offenses “ ‘resulted in a manifest miscarriage of justice.’ ” (*Foster, supra*, 50 Cal.4th at p. 1329.)

III. B. Other Bad Acts Evidence

Defendant contends that the court also abused its discretion by admitting other irrelevant and prejudicial bad character evidence. Specifically, he challenges the admission of evidence that (1) a .357-caliber gun and .357-caliber ammunition were found during the search of defendant’s residence; (2) a resident of Calle Almaden reported on the morning of Officer Fontana’s shooting that he had seen defendant in the back seat of the Hyundai in the area a month earlier, and that something caused the resident to report it to the police at that time; and (3) Rueben Martinez, a neighbor of defendant’s family, had negative things to say about activity at the Campbell residence. Defendant argues that this evidence “had no conceivable relevance to proof of the murder of Officer Fontana other than through the impermissible means of proving [defendant’s] bad character (Evid. Code, § 1101, subd. (a)), and which also was far more prejudicial than probative (Evid. Code, § 352).”

The Attorney General contends that any error in admitting this challenged evidence was harmless.

The defense theory of the case was that McNary was the person who shot Officer Fontana, but the police did not do everything they could have done during their investigation of the shooting. The evidence that a .357-caliber gun and .357-caliber ammunition unrelated to Officer Fontana's shooting (Officer Fontana was shot with a .45) were found during a search of defendant's residence tended to show that the officers' search of defendant's residence was thorough, and the evidence was not unduly prejudicial to defendant because the .357 gun and ammunition were found in areas of the residence that defendant did not have exclusive control over. The evidence that a resident of Calle Almaden saw defendant in the Hyundai a month before the shooting tended to show that defendant regularly used the Hyundai and that the police were aware that the Hyundai had been seen in the area prior to the shooting, and the evidence was not unduly prejudicial to defendant because there was no evidence that the actions of defendant were the reason the witness reported the prior sighting to the police at the time of the sighting, so any error in admitting the evidence was harmless. The evidence that Martinez was sober, cooperative, and had negative things to say to the police about activity at the Campbell residence was relevant to Martinez's credibility, because Martinez testified that he was uncooperative with the police because the police wanted him to falsely say bad things about defendant, that he did not remember making any statements about Campbell to the police, and that this was because he had a long-standing history of heavy drug and alcohol use. On this record, we cannot say that the trial court's decision to admit the challenged evidence was " 'arbitrary, capricious, or patently absurd' " and " 'resulted in a manifest miscarriage of justice.' " (*Foster, supra*, 50 Cal.4th at p. 1329.)

IV. Prosecutorial Misconduct

Defendant contends that the prosecutor committed "a plethora of other acts of misconduct" in addition to the claims he raised above. Specifically, defendant argues that the prosecutor (a) appealed to the jury's sympathy for the victim, (b) misstated the

law during closing argument, (c) disparaged defendant based on his race, (d) engaged in contemptuous behavior, (e) intentionally elicited inadmissible testimony during his cross-examination of defendant, (f) engaged in rude and intemperate behavior, and (g) disparaged defense counsel. “[T]he prosecutor’s pervasive misconduct ‘so infected the trial with unfairness as to make the resulting conviction a violation of due process.’ ” Defendant further contends that, in those instances where his counsel failed to object to the misconduct, counsel rendered ineffective assistance.

The Attorney General contends that defendant forfeited many of his claims of misconduct and that, regardless, none of the claimed instances of misconduct were prejudicial.

Recently, in *Fuiava*, *supra*, 53 Cal.4th 622, a case also involving the murder of a peace officer, the California Supreme Court addressed the issue of prosecutorial misconduct. That case provides guidance to us as we address defendant’s claims.

“ ‘Under California law, a prosecutor commits reversible misconduct if he or she makes use of “deceptive or reprehensible methods” when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant’s specific constitutional rights—such as a comment upon the defendant’s invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action “ ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’ ” [Citation.]’ [Citation.]” (*Fuiava*, *supra*, 53 Cal.4th at p. 679; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*); *People v. Friend* (2009) 47 Cal.4th 1, 29 (*Friend*).) Misconduct need not be intentional before it constitutes reversible error. (*Hill*, *supra*, 17 Cal.4th at p. 822.)

“A defendant generally ‘ ‘ ‘may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]’ ” [Citation.]’ [Citation.] A defendant’s failure to object and to request an admonition is excused only when ‘an objection would have been futile or an admonition ineffective.’ [Citation.] Defendant therefore forfeited appellate claims of misconduct related to many of the prosecutor’s actions listed in his briefs. [Citation.]” (*Fuiava, supra*, 53 Cal.4th at pp. 679-680; see also *Hill, supra*, 17 Cal.4th at p. 820; *Samayoa, supra*, 15 Cal.4th at p. 841.)

“To determine whether an admonishment would have been effective, we consider the statements in context. [Citation.] If the defendant objected or if an objection would not have cured the harm, we look to see whether the improper conduct was prejudicial, i.e., whether it is reasonably probable that a jury would have reached a more favorable result absent the objectionable comments. [Citation.]” (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074 (*Herring*).)

“ ‘To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]’ [Citation.]” (*People v. Brown* (2003) 31 Cal.4th 518, 553-554 (*Brown*); see also *Samayoa, supra*, 15 Cal.4th at p. 841.)

“To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel’s performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability

that, but for counsel's errors, the result of the proceeding would have been different." (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 (*Strickland*).) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland, supra*, 466 U.S. at p. 697.)

IV. A. Appeal to Jurors' Sympathy

During closing argument, the prosecutor stated that defendant was charged with the "monstrous crime" of "the killing of a police officer." The prosecutor argued that our society is "dependent upon law enforcement officers who value doing the right thing, who are brave and . . . demonstrate valor daily." He further argued that he had received a note the night before from a police officer friend which said that Officer Fontana "never had a chance . . . to grow old, . . . to have a life, . . . to have the career that he worked for and hoped for. And he didn't have a chance that night on the street." Defendant contends that the prosecutor's arguments "had no bearing on the question of [defendant's] guilt or innocence, but were highly emotive and bore a strong likelihood of inflaming the jury's passions."

"[A]n appeal for sympathy for the victim is out of place during an objective determination of guilt." (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, reversed on another ground in *Stansbury v. California* (1994) 511 U.S. 318.) "It is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." [Citation.]' [Citation.]" (*People v. Redd* (2010) 48 Cal.4th 691, 742 (*Redd*); *Fuiava, supra*, 53 Cal.4th at p. 693.) However, defendant did not object to this argument by the prosecutor. Therefore, defendant has forfeited the issue on appeal. (*People v. Stansbury, supra*, at p. 1056; *Redd, supra* at p. 743.) Regardless, the prosecutor's first comments merely referred to the special allegation that the victim was a peace officer

engaged in the performance of his duties, and the court instructed the jury that it must “not let bias, sympathy, prejudice, or public opinion influence your decision.” Even if we assume that the prosecutor’s latter comments constituted misconduct, on the record before us we find that an admonition would have cured any harm and that there is no reasonable probability that a result more favorable to defendant would have been reached in the absence of the assumed misconduct. (*People v. Stansbury, supra*, at p. 1057; *Redd, supra*, at p. 743; *Herring, supra*, 20 Cal.App.4th at p. 1074.)

IV. B. Misstatement of the Law

Defendant contends that the prosecutor misstated the law during closing argument by suggesting that defendant had a responsibility to prove his innocence. “[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]’ ” (*Hill, supra*, 17 Cal.4th at p. 829.)

“In *Griffin v. California* (1965) 380 U.S.609, the United States Supreme Court held that the prosecution may not comment upon a defendant’s failure to testify in his or her own behalf. Its holding does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. [Citations.]” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339 (*Bradford*); see also *People v. Ratliff* (1986) 41 Cal.3d 675, 691-692 (*Ratliff*).) “A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. [Citation.] Comments on the state of the evidence or on the defense’s failure to call logical witnesses, introduce material evidence, or rebut the People’s case are generally permissible. [Citation.] However, a prosecutor may not suggest that ‘a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.’ [Citations.]” (*People v. Woods* (2006) 146 Cal.App.4th 106, 112 (*Woods*).)

The prosecutor argued: “[Defense counsel] has made a point trying to claim that he has no responsibility to provide any evidence or to prove anything. He keeps talking about burden shifting. But that’s not the instruction that you’ve actually gotten from the court. [¶] The defendant’s presumed to be innocent. That’s the law. It’s been . . . always the law in this country. It goes back to England. And that’s satisfactory, and no one’s challenging that. [¶] I bear the burden of proof to prove him [guilty] beyond a reasonable doubt. That’s all we’re talking about. What that does not mean is if there’s evidence that’s available to the defendant . . . that would help prove that he’s telling the truth or there’s evidence available to the defendant that would help prove that the witnesses he called or that he’s relying upon are telling the truth, then he should bring them in. [¶] He has subpoena power. . . . There is no reason that he could not do that He can’t shirk that responsibility, as he tried to do here. And he truly tried to do it. [¶] He says [defendant] is telling the truth. After all, look at all the people he told but failed to bring in those people to prove that that’s, in fact, what occurred. [¶] That’s not what he claims, that burden shifting, and the law protects him from that accusation. That’s not the truth. [¶] Indeed, there were many opportunities – many opportunities –”

When the court overruled defense counsel’s objection at this point that this argument was “prosecutorial misconduct,” the prosecutor continued: “There were many opportunities for Counsel to try and prove that [defendant] was telling the truth. Many. He was the one who was on the run. He was the one who was privy and knew where these witnesses were. He was the one who knew what he told these witnesses.” The prosecutor then named several people that could have corroborated defendant’s and his witnesses’ testimony.

To the extent that the prosecutor’s argument could be reasonably understood to suggest that defendant had a “responsibility” to present evidence to prove his innocence, the argument constituted misconduct. However, to the extent that the argument could be reasonably understood to be only a comment on the failure of defendant to present

evidence corroborating his and his witnesses' testimony, the argument did not constitute misconduct. (*Bradford, supra*, 15 Cal.4th at pp. 1339-1340; *Woods, supra*, 146 Cal.App.4th at p. 113.) We "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. (*Brown, supra*, 31 Cal.4th at pp. 553-554.) Further, the court overruled defense counsel's objection that the prosecutor's argument constituted misconduct. The prosecutor argued that he had the burden to prove defendant guilty beyond a reasonable doubt, and that defendant failed to call logical witnesses that would corroborate his claim that McNary was the shooter. The court had previously instructed the jury that the People had the entire burden of establishing defendant's guilt. (CALCRIM No. 220; see *Ratliff, supra*, 41 Cal.3d at p. 691; *Redd, supra*, 48 Cal.4th at p. 740.) Although the question is close, we conclude on this record that it is reasonably likely that the prosecutor's comments, taken in context and together with the trial court's instructions, were not understood by the jury to mean that defendant had the burden of producing evidence to demonstrate his innocence. (*Bradford, supra*, 15 Cal.4th at p. 1339-1340; *Hill, supra*, 17 Cal.4th at pp. 831-832; *Redd, supra*, at p. 740.) Accordingly, we conclude that the prosecutor did not commit misconduct by misstating the law.

Even assuming we were to find that the prosecutor's comments did constitute misconduct, we would not find them prejudicial. The court instructed the jury that the People had the entire burden of establishing defendant's guilt and the prosecutor admitted that he had the burden to prove defendant guilty beyond a reasonable doubt. Although a criminal defendant is entitled to the presumption of innocence and a prosecutor may not suggest that a defendant has the burden to prove his innocence, a prosecutor may still comment on a defendant's failure to call logical witnesses and failure to introduce material evidence. Here the prosecutor pointed out several witnesses that defendant did not call. Had defendant requested that the court admonish the jury that he did not have a "responsibility" to present evidence to prove his innocence, such an admonition would

have cured any harm caused by the alleged misconduct. Accordingly, it is not reasonably probable that a jury would have reached a more favorable result absent the prosecutor's comments. (*Herring, supra*, 20 Cal.App.4th at p. 1074.)

IV. C. Appeal to Racial Prejudice

Defendant contends that the prosecutor "disparaged [him] by not-so-subtly appealing to race prejudice." "A prosecutor may argue vigorously and include opprobrious epithets and forceful language when warranted by the evidence" (*Herring, supra*, 20 Cal.App.4th at p. 1074), but may not make comments that have nothing to do with the crimes alleged and that attack the defendant's character or "invite[] the jury to decide the case based on its own value judgment and not on the law." (*Id.* at p. 1075.)

The prosecutor argued that defendant's defense "consists of fear mongering. They put up a booking photograph of Rodney McNary, and they play him as the boogeyman. He's a mean-looking black man, and they're trying to intimidate you with that. And whenever a defense witness is cornered, they resort to the company line again: They're afraid of the boogeyman. [¶] But when you look at these two men, [defendant] and McNary, I suggest to you there's little difference between them. Both of them are violent criminals. Both of them are convicted of multiple felonies. And, according to this evidence, both of them are validated members of Seven Trees Crips."

The prosecutor also argued that defendant had made admissions to various people, and "[t]hen there was also admissions that took different forms. There was the letter. And in the letter he said things. . . . [¶] It's hard to read, and he seems fairly illiterate. But he doesn't seem inarticulate. And that's what . . . I think you should . . . ask yourself when you read the letter, because there's a difference between good grammar and ability to express your thoughts. And there's no question he's not handicapped in the latter. [¶] And when you go through the letter, you sit there and read it aloud, you laugh or you feel dismayed at – at the – I don't know what they call it nowadays. Ebónics? I remember about ten years ago they were calling it that. And some of that stuff . . . is the type of

stuff that people in the 'hood just write that way or speak that way. [¶] But, also, look to see [defendant's] ability to express his thoughts."

Defendant did not object to these arguments by the prosecutor and, absent timely and specific objection, these arguments would not be cause for reversal since a timely admonition likely would have cured any harm. (*Herring, supra*, 20 Cal.App.4th at p. 1075.) Moreover, we do not believe that these arguments demonstrate that the prosecutor was inviting the jury to decide the case based on its own value judgment and not on the facts and the law. (*Ibid.*) Accordingly, no prejudicial misconduct has been shown.

IV. D. Contemptuous Conduct

Defendant contends that the prosecutor committed "contemptuous behavior" during April and May 2006, almost three years before defendant's 2009 trial. The parties agree that: on May 30, 2006, defendant's counsel filed a petition alleging the prosecutor's conduct at issue constituted grounds for recusal as well as contempt of court; on June 8, 2006, the court found no basis for recusal, but the court did not rule on the contempt petition; on June 12, 2006, the court informed the parties that it would address the contempt petition at the end of trial; on August 23, 2007, as the trial had not yet begun, the prosecutor brought the outstanding contempt petition to the court's attention, but argued that the statute of limitations had run; during the prosecutor's argument, the court stated, "I'll have to look," "I'll look at it," "Well, I'll take a look at that"; thereafter, it does not appear that any party brought the issue of the outstanding contempt petition to the court's attention again, and the court never addressed the merits of the defense petition.

As the trial court found that the complained-of pretrial conduct by the prosecutor was not grounds for recusal of the prosecutor; which ruling defendant does not contest here, and defendant did not thereafter request the court to find that the prosecutor's conduct constituted a contempt of court, we find that there is nothing for this court to review on appeal from the judgment. (See Code Civ. Proc., § 1222; *Moffat v. Moffat*

(1980) 27 Cal.3d 645, 656 [orders in contempt proceedings are final and conclusive; review may only be had by writ of certiorari or, where appropriate, habeas corpus].)

IV. E. Improper Questioning of Defendant

Defendant contends that the prosecutor twice intentionally elicited inadmissible testimony during his cross-examination of defendant. “ ‘It is, of course, misconduct for a prosecutor to “intentionally elicit inadmissible testimony.” [Citations.]’ [Citations.] Such misconduct is exacerbated if the prosecutor continues to attempt to elicit such evidence after defense counsel has objected. [Citation.]” (*Smithey, supra*, 20 Cal.4th at p. 960.)

During a recorded telephone conversation that the prosecutor played for the jury, and during defendant’s own testimony on cross-examination, defendant said that he did not surrender to the police sooner than he did because he was afraid of the police; because he did not want to have to tell on McNary; and because he was trying to stay out of custody until his daughter’s second birthday on November 15, 2001, as he was not present for her first birthday. The prosecutor asked defendant why he was not present for his daughter’s first birthday. The court sustained defense counsel’s relevance objection. Then the prosecutor asked defendant if he was someplace where he could not visit his daughter on her first birthday. The court again sustained defense counsel’s relevance objection. The prosecutor then asked defendant if he was in jail on his daughter’s first birthday. After the court sustained the objection defense counsel raised on unspecified grounds, the prosecutor asked defendant if he had promised his daughter that he would be present for her second birthday, and whether he had hoped to visit her then. When defendant answered affirmatively to both questions, the prosecutor then asked defendant whether that was the real reason he did not turn himself in rather than because he was afraid of the police and McNary.

Defense counsel’s objections to the prosecutor’s questions of defendant were on the ground of relevancy. He did not claim the questions constituted misconduct, and he

did not request an admonition. An admonition would have cured any harm. Accordingly, defendant has forfeited any claim of misconduct on appeal. (*Hill, supra*, 17 Cal.4th at p. 820; *Fuiava, supra*, 53 Cal.4th at p. 683.) “Moreover, we observe that it is not necessarily improper for an attorney to attempt to overcome prior sustained objections by asking a witness similar questions that have been reframed in an effort to meet the trial court’s ruling.” (*Fuiava, supra*, at p. 683.) In addition, the jury was instructed at the end of the case that the attorneys’ questions are not evidence, and that the jury was not to assume that “something is true just because one of the attorneys asked a question that suggested it was true.” Therefore, on this record, we cannot say that the prosecutor’s questions constituted prejudicial misconduct.

Later during the prosecutor’s cross-examination of defendant, he played a recording of a jail-house telephone conversation defendant had had with a friend and defendant’s mother. The prosecutor then asked defendant whether in that conversation, by repeating a story his lawyer told him, defendant was saying “that it’s good for your case if Jeffrey Fontana is a jerk?” When defendant answered “Yes,” the prosecutor asked defendant if he had told his friend and his mother about McNary. Defendant responded, “I didn’t say anything.” “I just telling her what was told to me.” The prosecutor then asked defendant, “Is that because you hadn’t come up with the story about [McNary] being the shooter?” Defendant responded “No,” and the prosecutor then asked, “Had you told your lawyer at that point about [McNary] being the shooter?” Defense counsel objected, stating that the question called for privileged information. The court overruled the objection, but the prosecutor withdrew the question.

As the prosecutor withdrew the question as soon as defense counsel objected to it, defense counsel did not request an admonition, which would have cured any harm caused by the question, and the jury was instructed that the attorneys’ questions are not evidence, we cannot say that the prosecutor’s question constituted prejudicial misconduct.

IV. F. Intemperate Behavior

Defendant contends that on eight specified occasions, not all of which were before the jury, the prosecutor engaged in “rude and intemperate behavior” “which cumulatively created an ‘acrimonious atmosphere in the courtroom and threaten[ed] the ability of defendant to receive a fair trial.’ ” “ ‘It is the duty of every member of the bar to “maintain the respect due to the courts” and to “abstain from all offensive personality.” [Citations.] A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state.’ ” (*Hill, supra*, 17 Cal.4th at pp. 819-820.) “ ‘Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve. [Citations.]’ [Citations.]” (*Id.* at p. 820.)

The incidents of “rude and intemperate behavior” by the prosecutor that defendant challenges are as follows:

(1) Twice before the jury the prosecutor asked Sally Graver, the defense investigator, “argumentative” questions during cross-examination, defense counsel objected to both questions, and the court sustained the objection as to the first question. The first “argumentative” question was, “You are a real investigator, aren’t you?” After the court sustained defense counsel’s objection, the prosecutor asked Graver, “You are a licensed investigator, aren’t you?” The second “argumentative” question occurred after Graver admitted that she was guessing in answer to the prosecutor’s question. The prosecutor asked her, “Would reference to the Lucio report refresh your recollection . . . so you wouldn’t have to guess?” Graver responded, “We can give it a try.” The prosecutor stated, “Well, you know better than I do. Do you think you’re capable of remembering what you read?” Graver responded, “If it’s written in there, yes.” Defense counsel objected, but the objection was overruled.

(2) Twice before the jury the prosecutor asked Mark Harrison, the defense expert on African-American criminal street gangs, “argumentative” questions during cross-examination, defense counsel objected to both questions, and the court sustained the objection as to the first question. The first “argumentative” question occurred when the prosecutor asked Harrison whether Santa Clara County was largely Crip street gang territory in 2000. Harrison responded that he did not know. The prosecutor then asked Harrison where Blood street gangs existed at that time. Harrison responded that “they have not had just one stronghold.” The prosecutor then asked, “Sir, you don’t know what you’re talking about; isn’t that true?” After the court sustained defense counsel’s objection, the prosecutor asked Harrison, “Isn’t it true that Santa Clara County Bloods only existed in one geographic area, and the rest of the county was Crip territory?” Harrison responded that he did not know. The second “argumentative” question occurred when the prosecutor asked Harrison if the Seven Trees Crip gang was “largely defunct and has been for years.” Harrison responded, “I don’t know that.” When the prosecutor stated, “No, you don’t, do you?” defense counsel objected. In overruling the objection, the court stated: “Right now the question I hear is: You don’t know whether they’re ongoing, do you? [¶] I don’t see anything objectionable to that question. [¶] The witness needs to answer.”

(3) The prosecutor said “Are you kidding?” when defendant testified during cross-examination before the jury that his lawyer had told him that the “head of the San Jose chapter” of the NAACP “was saying . . . that he had gotten phone calls and people would make complaints that the police was riding around and saying that when they catch me, they was going to kill me.” Defense counsel objected that there was no question pending, and that it “[s]ounds like an editorial.” The prosecutor said, “Let me rephrase it,” and the court overruled the objection.

(4) Defense counsel objected during a pretrial hearing that the prosecutor was “badgering” a witness when he repeatedly asked the witness if she recalled the question

he had asked her but that she had not answered. The court overruled the objection. Defense counsel later stated on the record that the prosecutor had reduced the witness to tears.

(5) During the prosecutor's cross-examination of Lacey Orteiz before the jury, when Orteiz attempted to answer a question before the prosecutor finished asking it, the prosecutor said, "I'm not done." The court immediately stated: "Counsel – counsel gets to – [¶] Let's try and keep our tone civil. This happens in court all the time. There's no reason to get vehement. So finish your question." After the prosecutor finished asking his question, and Orteiz answered it, the prosecutor noted that Orteiz was crying.

(6) During a January 2006 pretrial hearing, more than three years before trial, the prosecutor interrupted the court on multiple occasions. "He once cut the court off in mid-sentence with the words 'I am not done' . . . and three times ordered it to 'Let me finish.' "

(7) During a January 2007 pretrial hearing, more than two years before trial, defense counsel stated that " 'it was reported to me that [the prosecutor] had a rude, impolite, discourteous encounter with Ms. Graver [the defense investigator], and she was very upset by his treatment of her,' [but] [t]he prosecutor defended his behavior."

(8) During trial, but outside the presence of the jury, defendant's father invoked his Fifth Amendment right to not testify. Defense counsel objected that the prosecutor's questioning of defendant's father on the invocation of his right was "argumentative" and "pejorative." The court sustained the objection on the ground that the prosecutor's question was "argumentative."

Much of the conduct by the prosecutor that defendant challenges here occurred outside the presence of the jury and some of the conduct occurred years before trial. The questioning of defendant's father and the alleged "discourteous encounter" with the defense investigator occurred outside the presence of the jury, and the alleged "badgering" of a witness and the repeated interrupting of the court occurred during

pretrial hearings. Defendant does not explain how any of the conduct that occurred outside the presence of the jury could have infected the trial with such unfairness as to make the resulting conviction a denial of due process. (*Friend, supra*, 47 Cal.4th at p. 29.)

Most of the conduct by the prosecutor that occurred in the presence of the jury amounted to allegedly asking “argumentative” or “editorial” questions. Some objections to the questions were overruled by the court. The court overruled one of two allegedly “argumentative” questions asked of the defense investigator, the court overruled one of two allegedly “argumentative” questions asked of the defense expert witness on African-American criminal street gangs, and the court overruled the “editorial” question asked of defendant when the prosecutor stated that he would re phrase the question. As the Supreme Court observed in *Fuiava*: “Even to the extent we might characterize the prosecutor as having overreacted to the difficulties he faced in effectively questioning [certain witnesses], however, it is clear that the trial court monitored the situation and intervened when it felt it necessary to do so.” (*Fuiava, supra*, 53 Cal.4th at p. 686.)

Counsel must always be respectful and courteous to the court, to other counsel, and to witnesses. Here, the record reflects that the court once had to tell the prosecutor that there was no need for him to use a “vehement” tone of voice with a witness in front of the jury and that the prosecutor rudely and discourteously interrupted the court numerous times at a pretrial hearing. However, the record also reflects that the court intervened when it felt it necessary to do so. Therefore, we cannot say that, on the record before us, the conduct by the prosecutor before the jury that defendant challenges here infected the trial with such unfairness as to make the resulting conviction a denial of due process. (*Friend, supra*, 47 Cal.4th at p. 29; *Brown, supra*, 31 Cal.4th at pp. 553-554; *Fuiava, supra*, 53 Cal.4th at p. 686.)

IV. G. Disparagement of Defense Counsel

Defendant contends that on three occasions, only two of which were in the presence of the jury, the prosecutor disparaged defense counsel, which “gratuitously added to the acrimonious nature of the proceedings.” “A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. [Citations.] ‘An attack on the defendant’s attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.’ [Citation.]” (*Hill, supra*, 17 Cal.4th at p. 832; *Redd, supra*, 48 Cal.4th at p. 734.) However, the prosecutor “‘has wide latitude in describing the deficiencies in opposing counsel’s tactics and factual account. [Citations.]’ [Citation.]” (*Redd, supra*, at p. 735.)

The conduct by the prosecutor that defendant challenges here is as follows:

(1) During closing argument, the prosecutor, while talking about his dog Lydia, stated that “the way she would deal with her world was through looking away and ignoring what she thought was going to be uncomfortable. . . . [¶] . . . If there was something unpleasant, she would just look away. And as far as she was concerned, it didn’t really exist. And it worked well, because she . . . lived to be a ripe old age eventually. [¶] And this is the part that I’m – I – I don’t mean to disparage Counsel. I don’t mean to disparage you, but you remind me of Lydia. Because what you’ve done is you take instances, you ignore things, and you suggest to the jury, then, that this creates a reasonable doubt. And it doesn’t. It doesn’t.” Defense counsel did not object to this argument.

(2) During the trial, defense counsel wanted to distribute to the jury copies of the transcript of a CD they were about to hear when the courtroom clerk was out of the courtroom. The prosecutor complained that defense counsel was not following proper procedure, so the court told defense counsel that he could ask the court “to mark it and admit it, and then the actual marking and admitting will happen when the clerk gets

back.” The prosecutor complained that, “Now you’re telling him how to do it.” “He needs to learn to walk by himself.” The court responded: “Well, we can worry about parenting skills another time. For right now, go ahead. You can proceed.” Defense counsel then asked that the CD and transcripts be marked and that the CD be admitted into evidence.

(3) During a pretrial hearing, several years before trial, when defense counsel requested that the prosecutor be admonished for disparaging defense counsel, the prosecutor admitted that he had disparaged defense counsel during the hearing. Defendant acknowledges on appeal that the court then issued a “mild admonition directed at both parties, without making any explicit finding of disparagement or prosecutorial misconduct.”

As defendant did not object below to the prosecutor’s argument and comments before the jury that he challenges here, and an admonishment would have cured any harm, we find that defendant has forfeited his claims. (*Hill, supra*, 17 Cal.4th at p. 820.) Even if we were to find no forfeiture, we are satisfied there was no denial of due process. The court admonished both counsel after the prosecutor’s remarks at the pretrial hearing without making an explicit finding of disparagement or misconduct. Defense counsel did not object to the prosecutor’s comments before the jury, which on occasion were rude and intemperate, and they did not comprise a pattern of egregious behavior making the trial fundamentally unfair because they related to the tactics and argument of counsel rather than to defendant’s culpability. (*Samayoa, supra*, 15 Cal.4th at p. 841; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

We also agree with our Supreme Court’s assessment of a similar claim of cumulative prejudice in *Fuiava*. “To the extent we have concluded (or have assumed for the sake of argument) that defendant has preserved some of his claims of misconduct, and have concluded (or assumed) that, with regard to the preserved claims, misconduct occurred, we also have concluded that the misconduct could not have been prejudicial.

Defendant's arguments concerning the relative strengths and weaknesses of the prosecution and defense cases do not convince us that the preserved instances of misconduct or assumed misconduct, when considered individually or cumulatively, deprived defendant of a fair trial." (*Fuiava, supra*, 53 Cal.4th at p. 692.)

V. A. Evidence and Argument Regarding the Conduct of Defendant's Father

Defendant contends that evidence that defendant's father lied to police regarding the ownership status of his Hyundai on the morning of Officer Fontana's shooting, and that he was otherwise uncooperative, was improperly admitted as irrelevant and prejudicial, because there was no evidence that defendant asked his father to lie. He further contends that the prosecutor improperly argued to the jury that defendant's father lied to the police about the ownership status of the Hyundai in order to protect defendant, that the lie was part of a larger conspiracy to falsely exculpate defendant, and that the jury could consider the evidence as establishing defendant's consciousness of guilt. Defendant acknowledges that defense counsel did not object to the admission of the evidence or the prosecutor's argument, but he argues that his contentions are cognizable on appeal because counsel rendered ineffective assistance by failing to object. He further argues that this court should find the admission of the evidence and the prosecutor's argument prejudicial error.

The Attorney General contends that the evidence was properly admitted, so there was neither prejudicial error nor ineffective assistance of counsel.

"California law prohibits proving consciousness of guilt by establishing attempts to suppress evidence unless those attempts can be connected to a defendant. (*People v. Hannon* (1977) 19 Cal.3d 588, 596-600; *People v. Weiss* (1958) 50 Cal.2d 535, 551-554.)" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.) "Consciousness of guilt may be shown by (1) a defendant's own efforts to create false evidence or obtain false testimony, or (2) the efforts of someone else to do so, 'but only if the defendant was present and knew about the conduct, or, if not present, authorized the other person's

actions.’ (CALCRIM No. 371.)” (*People v. Nelson* (2011) 51 Cal.4th 198, 214, fn. 9.) “Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law.” (*People v. Hannon, supra*, 19 Cal.3d at p. 597.)

In this case, there was evidence in the record which, if believed by the jury, sufficiently supported the prosecutor’s argument that defendant authorized his father’s actions. Defendant went to Tyree Washington’s apartment a second time on the morning of Officer Fontana’s shooting. Defendant was out of breath, and he asked to use the phone. Washington asked defendant what was going on and defendant said, “it’s nasty, it’s real ugly.” Washington gave defendant a phone and defendant made three or four calls. In one conversation, which Washington thought was with defendant’s father, defendant said something like, “clean up the house.” A call was made from Washington’s phone to defendant’s father at 4:36 a.m., and another call was placed from Washington’s phone to defendant’s brother’s girlfriend at 4:38 a.m. Defendant also called Marcell Quincy Gilbert at 4:46 a.m., and gave him directions to Washington’s apartment. When Gilbert arrived at Washington’s apartment to give defendant a ride, he asked defendant, “What’s going on?” Defendant replied, “It’s all bad.” Defendant climbed into the open bed of Gilbert’s pickup truck and lay down. Gilbert took defendant to Gilbert’s home, gave defendant his cell phone, and went to bed. Defendant’s father talked to the police around 6:00 a.m. The jury could reasonably infer from this evidence that, during telephone conversations with his father and his brother’s girlfriend prior to his father’s police interview, defendant could have asked that his father help him suppress evidence tending to show defendant’s guilt. Accordingly, the court properly admitted testimony showing that defendant’s father lied to the police and properly permitted the prosecutor to argue that defendant’s father’s action could support a finding of defendant’s consciousness of guilt, and defendant cannot show that he was prejudiced by counsel’s

failure to raise objections to the evidence and argument because there was strong evidence tending to show that defendant asked his father to help him suppress evidence. (*Strickland, supra*, 466 U.S. at p. 697.)

V.B. Janee Gilmore's Testimony

The prosecutor called Janee Gilmore to testify during its case-in-chief over defense counsel's objection. The prosecutor argued that defendant's father was the person who brought Gilmore to defense counsel's attention, and that the prosecution should be able to connect Gilmore with defendant's attempts to blame somebody else for Officer Fontana's shooting. Gilmore testified during the prosecution's case-in-chief that a month or two after Officer Fontana's death, McNary confessed to her that he did the shooting. However, she did not want to tell anybody about the confession, or testify about it, because McNary threatened her and people she cares about, and she was afraid of him and his "people." She was testifying about the confession only because, if she did not do so, "you guys would put me in jail." Gilmore further testified that she and her brother grew up together with defendant, that defendant and her brother were best friends, and that she considered defendant to be like a big brother to her.

Defendant contends that "Gilmore's testimony had no relevance to the prosecution's case-in-chief, and the defense was prejudiced by its admission." He argues that the evidence that defendant spoke to his father after Officer Fontana's shooting, and that defendant's father brought Gilmore to defense counsel's attention, was not sufficient evidence from which the jury could infer that Gilmore was part of a conspiracy to fabricate testimony on defendant's behalf. He further argues that the issue is cognizable on appeal despite defense counsel's failure to object to Gilmore's testimony on this ground, as counsel rendered ineffective assistance by failing to do so.

We find defendant cannot show that he was prejudiced by the admission of Gilmore's testimony during the prosecution's case-in-chief. Gilmore's testimony supported defendant's claim that McNary was the person who shot Officer Fontana, and

defense counsel told the jury during his opening statement that Gilmore would so testify. As we stated above, in section II, the court properly allowed the prosecutor to call Gilmore during its case-in-chief. Accordingly, defendant cannot show that, had counsel raised an additional objection to the prosecutor's calling of Gilmore during its case-in-chief, it is reasonably probable a result more favorable to defendant would have occurred. (*Strickland, supra*, 466 U.S. at p. 697.)

V. C. CALCRIM No. 371

The court instructed the jury with a modified version of CALCRIM No. 371, in part, as follows: "If someone other than the defendant tried to provide false testimony or destroy evidence, that conduct may show that the defendant was aware of his guilt but only if the defendant was present and knew about the conduct or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself." Defendant did not object below to the giving of this instruction. Defendant contends on appeal that the giving of the instruction was reversible error because, "[w]hile there was admittedly evidence that [he] authorized Gerald Kissoon's destruction of the gun used to shoot Officer Fontana, there was zero evidence that [he] authorized or knew about any attempt to *provide false testimony*."

We have found that there was evidence from which the jury could infer that defendant asked that his father help him suppress evidence tending to show defendant's guilt. We also find that there was evidence from which the jury could also reasonably infer that defendant asked his father's help in providing false testimony. In addition, even if we were to find that such an inference was not reasonable based on the evidence, we would find that defendant was not prejudiced by the court's instruction with the modified version of CALCRIM No. 371. The court also instructed the jury that "[s]ome of these instructions may not apply depending on your findings about the facts of the case. Do not assume, just because I give a particular instruction, that I am suggesting

anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.” As we must presume that the jury understood and followed this instruction (*Mickey, supra*, 54 Cal.3d at p. 689, fn. 17), we must presume that the jury disregarded the part of CALCRIM No. 371 that defendant objects to here if it found that defendant did not authorize any attempt to provide false testimony. No prejudicial error has been shown.

VI. Admission of Multiple Hearsay

Louella Kissoon testified that she spoke with defendant at Priscilla Smith’s house a few days after Officer Fontana’s shooting. During Louella’s testimony, the prosecutor played a recording of her police interview for the jury. During the interview, Louella stated that Smith called her on November 3, 2001, and said “[t]hat Deshawn Campbell had, you know, did the situation that happened, and- [¶] . . . [¶] . . . you know, shot the officer. And whatever, and he was like on the run or something. And I was like, oh!” Prior to the playing of the recording, defense counsel objected that this statement by Louella was “hearsay, blatant hearsay.” “It’s not used for any purpose of what this witness did next. It should be excluded.” The prosecutor argued that “it comes in for her knowledge” because later in the same interview she said that when she saw defendant she told him that she had heard what had happened, that he had killed a police officer, and that she said, “you know you made a mistake, right?” Defendant responded to her, “I know—I fucked up!” The court ruled: “If this were standing alone, I wouldn’t allow it. As it relates to the subsequent statement of the witness, I am going to allow it. But I will give a limiting instruction as to that portion.”

During the playing of the recording, defense counsel stopped the recording and asked for the limiting instruction as to the statement “You know, shot the officer.” The court instructed the jury: “With respect to the last statement that you heard, it’s not being offered for the truth of what was asserted in that statement, but for the knowledge that it imparted or attributed – that could be attributed to the maker of the statement, the

witness, or the declarant.” Defense counsel thanked the court, and the remainder of the recording was then played.

Defendant now contends that the court erred in playing that portion of Louella’s police interview that includes Smith’s hearsay statement for three reasons. First, “it was not the accusation itself that was evidence, but rather [defendant’s] purported response. The basis in rumor or fact of [Louella’s] accusation, assuming she made any such accusation, was accordingly irrelevant.” Second, “Smith’s statement to [Louella] itself lacked a knowledge foundation.” And third, “the trial court’s limiting instruction was confusing and erroneous.” Defendant argues that the error in admitting the hearsay statement “may not suffice, standing alone, to demonstrate a miscarriage of justice such that a new trial must be ordered, but it hurt [defendant]. . . . [It] could *only* have been prejudicial.”

The Attorney General contends that the tape of Louella’s entire interview was properly played for the jury. “Louella’s reference to Smith’s hearsay comments were brief and general, and the jury was instructed that the comments served only to give context to Louella’s later interaction with [defendant]. In any event, the evidence as a whole rendered any error harmless.”

“ ‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200.) “An out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute. [Citations.]” (*People v. Turner* (1994) 8 Cal.4th 137, 189; see also *People v. Fields* (1998) 61 Cal.App.4th 1063, 1068.) “ ‘[O]ne important category of nonhearsay evidence . . . [is] evidence of a declarant’s statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer’s reaction to the statement that is the

relevant fact sought to be proved, not the truth of the matter asserted in the statement.’ [Citation.]” (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907; see also *People v. Hill* (1992) 3 Cal.4th 959, 987-988; *People v. Mendoza* (2007) 42 Cal.4th 686, 697 (*Mendoza*).)

Here, Louella told the police that, after Smith told her that defendant had killed a police officer, Louella had a conversation with defendant during which she told him that she had heard that he had killed a police officer and did he understand that he had made a mistake. There is no dispute that defendant was aware that there were accusations that he had killed a police officer before he talked to Louella. On this record, the evidence that Smith told Louella that defendant had killed a police officer did not constitute hearsay, as it was not offered to prove the fact of the matter asserted but was offered to show why Louella told defendant that she had heard what had happened (*Mendoza, supra*, 42 Cal.4th at p. 697), and it was not prejudicial to defendant because defendant was aware that others had also made accusations that defendant had killed a police officer at the time Louella spoke to defendant. Accordingly, we cannot say that the court erred in playing the entire recording of Louella’s police interview for the jury.

VII. Cumulative Prejudice

Defendant contends that “a confluence of trial errors ‘created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors.’ ” The California Supreme Court has recognized that the cumulative impact of errors at trial may result in the deprivation of a fair trial, even though the errors individually or even added together may not. (See e.g., *Hill, supra*, 17 Cal.4th at p. 847.) For the most part, we have rejected defendant’s claims of error. However, even assuming that the court erred in excluding some additional defense evidence and further assuming that there was some prosecutorial misconduct during argument, upon careful consideration, we conclude that there was no miscarriage of justice under the state Constitution (Cal. Const., art. VI, § 13) and that defendant was

not denied due process or a fair trial under the federal Constitution. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1056; *Fuiava, supra*, 53 Cal.4th at p. 733.) “Defendant was entitled to a fair trial but not a perfect one. [Citations.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

VIII. Custody Credits

Defendant contends that the 483 days of presentence custody credits he earned in the burglary case (case No. C9946256) prior to the resentencing in that case on August 7, 2009, should have been carried forward to the current abstract of judgment. Therefore, he requests that this court order the abstract of judgment modified to include those credits. After reviewing defendant’s claim, the Attorney General “see[s] no basis to oppose it.” Accordingly, we will order the abstract of judgment modified by adding 483 days of presentence custody credits in case No. CC9946256.

DISPOSITION

The judgment is affirmed. The clerk of the superior court is directed to amend the abstract of judgment to include 483 days of presentence custody credits in case No. CC9946256, and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

MIHARA, J.

WALSH, J.*

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*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.