

NO. 40057-0

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ANDREW HECHT,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

A jury convicted appellant Michael Andrew Hecht of patronizing a prostitute and felony harassment for threatening to kill another prostitute. At trial, photos of Hecht and the two prostitutes were admitted as exhibits without objection.

During closing argument, the prosecutor incorporated the photographic exhibits into PowerPoint slides. The photographic exhibits were used to connect faces to testimony, to emphasize who the relevant individuals were for each charge, and to assist in presenting argument that the evidence proved that Hecht was guilty of both counts.

The slides displayed appropriate argument in the context of the prosecutor's simultaneous verbal remarks. No slide displayed prejudicial content calculated to inflame the jury or expressed the prosecutor's personal opinions, distinguishing Hecht's case from the recent Washington Supreme Court opinion in *In re Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012).

Hecht's remaining arguments also fail because the information and the jury instructions properly set forth the essential elements of the crime of felony harassment; and the trial court properly admitted evidence of Hecht's past prostitution activities under ER 404(b). Hecht received a fair trial and his convictions should be affirmed.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Should Hecht's convictions be affirmed where Hecht never objected to the prosecutor's closing argument and the prosecutor's closing argument was neither improper, "flagrant and ill-intentioned," nor prejudicial?

B. Should Hecht's conviction for harassment be affirmed where the information and jury instructions properly set forth the essential elements of the crime?

C. Should Hecht's conviction for harassment be affirmed where the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the victim was placed in reasonable fear by Hecht's death threat and Hecht should have reasonably foreseen that the death threat would be taken seriously?

D. Should Hecht's conviction for patronizing a prostitute be affirmed where the trial court properly admitted evidence of Hecht's past prostitution activities as proof of a common scheme or plan to solicit prostitutes in downtown Tacoma?

III. STATEMENT OF THE CASE

A. Facts

For years, appellant Michael Andrew Hecht was a practicing lawyer who patronized prostitutes in the downtown area of Tacoma. RP 478-81, 525-27, 670-71, 878-892. Residents, shopkeepers, downtown employees, street prostitutes, security officers and others observed Hecht circle the Antique Row area of downtown Tacoma in his car, pick up prostitutes, drive them away, and later return to drop them off.¹

In 2008, Hecht ran for Pierce County Superior Court Judge. RP 995. Hecht won the election that was held on August 19, 2008. RP 1304.

At the time of Hecht's election, Joseph Pfeiffer was a homeless drug addict who worked as a prostitute in downtown Tacoma. RP 878. Hecht met Pfeiffer regularly and paid him for sex acts that occurred at Hecht's law office. RP 882, 889-893, 903-05.

A person Hecht had paid for sex in years past was Joey Hesketh. RP 669-671, 706. Around the time that Hecht was elected judge in August 2008, Hesketh disclosed his past prostitution activities with Hecht to several individuals. RP 687-88, 732, 735, 754-56.

¹ RP 380-384, 398-401, 409-410, 413-416, 438, 443-446, 455-56, 478-489, 521-531, 670-76, 749-752, 790-794, 828-829, 847-852, 861-862.

On August 30, 2008, a downtown shopkeeper named Albert Milliken questioned Pfeiffer about Hecht. RP 833, 909. Pfeiffer text-messaged Hecht and informed him of the inquiry. RP 910.

Hecht immediately drove to Pfeiffer's location and asked Pfeiffer if Pfeiffer was "talking shit about him." RP 911. Pfeiffer responded "no," but told Hecht that Joey Hesketh was talking openly about Hecht's past prostitution activities. RP 910-11. Hecht knew that if such information became public it could jeopardize his judgeship. RP 1305.

Hecht confronted Milliken outside of Milliken's antique shop. RP 833. Hecht was agitated and yelled, "You don't know who you're dealing with. You keep your [expletives] shut." RP 833-34, 1306-07.

Hecht asked Pfeiffer to help him locate Hesketh. RP 911. Hecht and Pfeiffer drove around in Hecht's vehicle in search of Hesketh. RP 911. Hecht was "pissed off." RP 912. Hecht found Hesketh walking through an alley with his friend, Michael Mundorff. RP 911, 913.

Hecht accelerated through the alley at a high rate of speed. RP 615, 691. Hecht "slammed on his brakes" and stopped abruptly in front of Hesketh, missing him by inches. RP 616, 620, 692, 913. Hecht was "very upset and angry and aggressive." RP 693. Hecht yelled at Hesketh; "Have you been talking shit about me?" RP 620, 644, 693, 913. Hesketh feigned ignorance and denied that he talked to anyone about

Hecht. RP 620-21-645, 693-94, 913. Hecht yelled angrily in response; “You better not be talking about me. If I find out you are talking about me, I am going to kill you.” RP 620, 644, 693. Hecht drove away. RP 622.

Hesketh was “rattled” by the death threat and took it seriously. RP 622, 648, 696. Hesketh feared that Hecht would have him killed. RP 696. After Hecht’s threat, Hesketh avoided areas where he might encounter Hecht. RP 624, 698, 739-42. Hesketh was so worried that Hecht would have him killed that he told his father about the threat so his father would know that Hecht was responsible if anything happened to Hesketh. RP 698, 781.

On September 4, 2008, Hesketh’s father talked to Hecht on the phone and confronted him about the death threat to his son. RP 748, 780-82. Hecht initially denied knowing Hesketh, but eventually admitted confronting Hesketh because Hesketh “was talking about me.” RP 785.

B. Procedure

On February 27, 2009, the State charged Hecht with felony harassment (Count I) and patronizing a prostitute (Count II). CP 1-2. Count II was later amended to include Pfeiffer’s name, but Hecht never objected to charging language for either count. CP 341-42; RP 201-04.

The State moved pretrial for a ruling on the admissibility of evidence that Hecht had a common scheme or plan to solicit prostitutes in downtown Tacoma. CP 88-0110. The trial court allowed some of the evidence offered by the State, but excluded other evidence. CP 389-396. The court gave limiting instructions restricting the jury's consideration of evidence of Hecht's past prostitution activities. RP 478, 481, 491, 524.

The case was tried to a Pierce County jury in October 2009. RP 39-1470. During the State's case the trial court admitted paper photographic exhibits of Hesketh (Ex. 4), Pfeiffer (Ex. 5) and Hecht (Ex. 6) without objection. RP 479, 532, 617. Exhibits 4-6 were viewed and identified before the jury by numerous witnesses throughout trial.²

Hecht testified in his own defense. RP 1207. Hecht admitted that he confronted Hesketh on August 30, 2008, while in the company of Pfeiffer. RP 1250. Hecht admitted that he "didn't want anybody talking stuff about me." RP 1315-16. Hecht admitted that he was angry, yelled, and used profanity. RP 1312-13. Hecht admitted that he asked Hesketh if he was "talking shit" about Hecht. RP 1250. Hecht denied that he threatened to kill Hesketh. RP 1250-51.

² RP 420 (Gorsuch); 444, 449, 450 (Grigsby); 478, 492 (Marx); 532 (Smith); 586 (Shepard); 617 (Mundorff); 755 (Kirkman); 792, 793 (Pino); 826, 840 (Milliken); 852, 854 (Garthe); 864, 865 (Perry); 1079 (Mingee); 1145 (Golden); 1202 (Grady).

Hecht admitted that he had spent considerable time with Pfeiffer and brought him to his law office after hours on numerous occasions. RP 1236-39, 1279. Hecht admitted that he knew Pfeiffer was a prostitute. RP 1290, 1299, 1309. Hecht admitted that he gave money to Pfeiffer, but he denied that it was in exchange for sex. RP 1309. Hecht testified that he brought Pfeiffer to his law office after hours for mentoring, but the money he gave to Pfeiffer on those occasions was a gift because he was “like a helpful grandpa type” or “daddy figure” to Pfeiffer. RP 1236, 1309, 1390.

The trial court provided the jury with a “to convict” instruction that set forth all essential elements of the crime of harassment. CP 361 (Instruction No. 11). Hecht did not object to the court’s instructions.

The trial court instructed the jury prior to closing arguments that the lawyers’ closing arguments were “not evidence;” to “disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions;” and that the witnesses’ testimony and admitted exhibits were the only “evidence” to be considered. RP 1349; CP 350-51.

The prosecutor’s verbal remarks during closing argument were accompanied by visual slides. CP 437-527. The slides were created using Microsoft PowerPoint and displayed to the jury with a projector and screen. CP 437-527. Some slides included digital images of the admitted

photographs of Hesketh, Pfeiffer, and Hecht. Slides³ 15, 65, 67, 81-82, 85-86. These slides also included text of excerpts of trial testimony and/or the prosecutor's arguments from the evidence. *Id.* Hecht did not object to either the slides or the verbal argument.⁴ RP 1350-1400.

Following closing arguments, the paper photos of Hesketh, Pfeiffer, and Hecht went to the jury room for the jury to consider and inspect during deliberations. Exhibits 4-6; CP 529-548 (Clerk's Minute Entry for October 27, 2009). The prosecutor's PowerPoint presentation was not submitted to the jury. CP 343-346; CP 437-527.

The jury returned verdicts of guilty. CP 370-372. Hecht was sentenced in November 2009. CP 397-411. Hecht appeals. CP 413-430.

IV. ARGUMENT

A. **The Prosecutor's Closing Argument Was Not Flagrant And Ill-Intentioned Misconduct That Created A substantial Likelihood That The Jury's Verdict Was Affected**

A defendant claiming prosecutorial misconduct must demonstrate that the prosecutor's conduct was both improper and prejudicial. *State v. Sakellis*, 164 Wn. App. 170, 183, 269 P.3d 1029 (2011). If the defendant did not object at trial, prejudice is established only if (1) misconduct occurred that was "flagrant and ill-intentioned," (2) there is a substantial

³ The 86 PowerPoint slides are CP 437-527. For ease of reference, the State will hereafter cite to the specific Slide number (1-86) when citing CP 437-527.

⁴ Hecht's lone objection during closing argument was not related to this appeal. RP 1389.

likelihood the misconduct affected the jury verdict, and (3) no curative instruction would have obviated the prejudicial effect on the jury. *Id.*

The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed.2d 78 (1982). The aim of due process is not punishment of society for the misdeeds of the prosecutor, but avoidance of an unfair trial to the accused. *Id.*

Here, Hecht did not object to any of the conduct he now complains about on appeal. Hecht fails to establish flagrant and ill-intentioned misconduct, prejudice that had a substantial likelihood of affecting the jury verdict, or prejudice that could not have been cured by an instruction. Thus, his convictions should be affirmed.

1. The Prosecutor Did Not Commit Flagrant And Ill-Intentioned Misconduct Because All Argument And Visual Aids Were Proper And Supported By The Evidence

Prosecutors may strike “hard blows” in closing argument. *United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 84 L. Ed.2d 1 (1985). Prosecutors have wide latitude to draw reasonable inferences from the evidence and to express those inferences to the jury. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). The prosecutor’s closing argument must be evaluated in the context of the total argument, the

evidence, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Closing argument “is that moment in the trial when a prosecutor is compelled to reveal her own understanding of the case as part of her effort to guide the jury’s comprehension.” *Gault v. Lewis*, 489 F.3d 993, (9th Cir. 2007). It is the very purpose of closing argument for the prosecutor to comment on the evidence and argue why it proves guilt.

Visual aids may accompany verbal argument, including visual aids that display images of exhibits, excerpts of testimony, the jury instructions, and the prosecutor’s arguments from the evidence. *See generally State v. Asaeli*, 150 Wn. App. 543, 588-597, 208 P.3d 1136 (2009), (affirming conviction where prosecutor used PowerPoint in closing to highlight evidence and argue evidence and application of law). This includes the use of computer software like PowerPoint. *Id.*

A review of the verbatim transcript of the prosecutor’s closing argument in Hecht’s case, standing alone, reveals no misconduct. Hecht’s claim of prosecutorial misconduct is based on the prosecutor’s use of slides to assist the prosecutor in delivering his closing remarks. Hecht specifically alleges that display of Slides 15, 65, 67, 81-82, and 84 constituted “misconduct” because the slides combined images of evidence with text of testimony and the prosecutor’s arguments about the evidence.

Hecht relies almost exclusively on *In re Glasmann* as support for his claims of error and argues that his case is “nearly identical” to *Glasmann*. Review of *Glasmann* reveals that *Glasmann* is materially different from this case and that Hecht interprets *Glasmann* too broadly.

The defendant in *Glasmann* was tried for numerous violent crimes, including kidnapping, assault, and robbery. *In re Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). *Glasmann* fought with police during the incident and suffered injuries to his face that were evident in his booking photo. *Id.* at 700. The State rested without using or offering the booking photo. *Id.* *Glasmann* wanted the jury to see his booking photo, which was admitted as a defense exhibit during the defense case. *Id.* *Glasmann* was convicted and the conviction affirmed on appeal. *Id.* at 703.

Glasmann asserted in a personal restraint petition filed years later that during closing argument the prosecutor used PowerPoint to display images of his “battered” face accompanied by captions attacking his credibility. *Id.* at 701 n.2. *Glasmann* further asserted that the prosecutor superimposed the word GUILTY across his face multiple times in the shape of a large “X.” *Id.* The Court accepted *Glasmann*’s factual assertions. *Id.* at 704-714.⁵

⁵ The PowerPoint slides in *Glasmann* were not part of the trial record. The State and *Glasmann* provided differing versions of the slides that were actually displayed to the jury at trial, a fact in dispute. *Glasmann* at 701, n.2.

Glasmann held that the analysis to employ when such claims of prosecutorial misconduct are raised is “whether the comments deliberately appealed to the jury’s passion and prejudice and encouraged the jury to base the verdict on the improper argument rather than properly admitted evidence.” *Id.* at 711 (internal quotations omitted). The Court further held that alleged misconduct must be viewed in context of “the entire record and circumstances of the case.” *Id.* at 714.

The Court concluded that the slides in *Glasmann* went “well beyond” arguing the evidence and the law; images of Glasmann’s “unkempt and bloodied” face accompanied by inflammatory captions about his guilt and veracity were calculated to appeal to the passion of the jury; and in conjunction with verbal argument expressed personal opinions on Glasmann’s guilt and veracity. *Id.* at 705-07. Under these circumstances, the Court held that the slides were “the equivalent of unadmitted evidence.” *Id.* at 706. The Court also held that the prosecutor improperly shifted the burden of proof by arguing that “in order to reach a verdict” the jury must disbelieve Glasmann’s testimony. *Id.* at 713-14.

In conclusion, the Court held that the “highly inflammatory images” and the “overlaid message that emphatically and repeatedly conveyed the prosecutor’s belief to the jury that Glasmann is ‘absolutely

guilty!” were “an appeal to passion and prejudice” that could not be cured by a cautionary instruction. *Id.* at 709.

Hecht’s case is distinguished from the “record and circumstances” reported in *Glasmann*. Unlike *Glasmann*, the slides in Hecht’s case were used appropriately to properly argue the evidence.

a. Display Of Slides 15, 65, 67, 81, 82, And 85 Was Not “Flagrant And Ill-Intentioned” Misconduct Because The Slides Displayed Proper Argument

The prosecutor’s conduct was not “flagrant and ill-intentioned.” The trial was straightforward and proceeded without any complaints about the prosecutor’s conduct. The only misconduct alleged on appeal is display of several slides from a lengthy closing argument at the end of a long trial. The slides Hecht identifies as “flagrant and ill-intentioned” displayed innocuous photographs of the three main witnesses accompanied by text of either trial testimony or the prosecutor’s permissible argument from the evidence.

Hecht specifically claims that it was misconduct for the prosecutor to display Slides 15, 65, 67, 81, 82, and 85 because these slides showed digital images of Exhibits 4-6 accompanied by written text that was not on the actual paper exhibits. Hecht argues that these slides were the equivalent of “altered” or “unadmitted” evidence that were “nearly identical” to those reported in *Glasmann*.

Unlike *Glasmann*, the prosecutor's slides in this case conveyed nothing more than what the prosecutor could properly argue verbally. Images of Hecht, Hesketh, and Pfeiffer were appropriately displayed to connect faces to testimony, to identify the relevant individuals for each count, and to assist in presenting proper argument based on the evidence. The slides are addressed in turn.

Slide 15 was captioned "AUGUST 30, 2008," followed by a side-by-side display of photos of Hecht (Ex.6) and Hesketh (Ex.4) above text of Hesketh's trial testimony, including that Hecht told Hesketh, "I'll kill you." Slide 15 (emphasis in the original). The prosecutor summarized Hesketh's trial testimony while this slide was displayed.⁶ RP 1361.

Slide 65 was captioned "COUNT I—HARASSMENT" followed by a side-by-side display of photos of Hesketh (Ex.4) and Hecht (Ex.6). The text "guilty" was overlaid on Hecht's photo. Slide 65. This slide was displayed simultaneously with the prosecutor's concluding statement that "the evidence" proved Hecht guilty (RP 1387) and followed a lengthy summary of evidence that proved Hecht "guilty" of Count I. RP 1377-87.

Slide 67 was captioned "COUNT II—PATRONIZING A PROSTITUTE" followed by a side-by-side display of admitted photos of

⁶ Due to Hecht's failure to object to any slides, there is no record of how long a particular slide was displayed (if at all). Review of the transcript in conjunction with the slides suggests that Slide 15 was briefly displayed. Slide 15; RP 1361.

Hecht (Ex. 6) and Pfeiffer (Ex. 5), with the text “customer” under Hecht’s photo and the text “prostitute” under Pfeiffer’s photo. Slide 67. While this slide was briefly displayed, the prosecutor verbally told the jury:

That brings us to Count II, which is patronizing a prostitute. These are the two people involved.

RP 1387. The prosecutor then argued evidence supporting the conclusion that Pfeiffer was a prostitute and Hecht was his customer. RP 1387-99.

Slides 81 and 82 were captioned “Compare to Defendant” and “Credibility,” respectively. Both slides displayed the photo of Hecht (Ex.6) followed by excerpts of Hecht’s trial testimony. Slides 81-82. During the display of these slides, the prosecutor verbally recounted Hecht’s trial testimony and argued that the evidence supported the conclusion that Hecht was not a credible witness. RP 1397-99.

Slide 85 was captioned “PATRONIZING A PROSTITUTE” followed by side-by-side photos of Pfeiffer (Ex.5) and Hecht (Ex.6) with the text “guilty” overlaid on Hecht’s photo. Slide 85. The prosecutor simultaneously argued verbally that “the evidence” proved Hecht guilty of Count II (RP 1399), which followed a lengthy summary of evidence that proved Hecht guilty of Count II. RP 1387-99.

All of these slides conveyed argument that was proper if delivered verbally. For example, in lieu of displaying Slide 15, the prosecutor could

have held up the Pfeiffer photo (Ex. 5) in one hand, the Hecht photo (Ex. 6) in the other, and simultaneously argued to the jury the evidence that proved Pfeiffer was a prostitute and Hecht was his customer. This time-honored practice is proper argument.

Similarly, in lieu of Slides 65 and 85, the prosecutor could have held up Hecht's photo (Ex. 6) in one hand, Pfeiffer or Hesketh's in the other, and recounted all of the evidence and testimony that proved that Hecht was guilty of a crime involving Hesketh or Pfeiffer. The prosecutor could have (and probably did) put verbal emphasis on "I'll kill you" when recounting Hesketh's testimony. The prosecutor could have repeatedly argued that Hecht was "guilty" while holding Hecht's photo (Ex. 6) in his hand and verbally recounting for the jury all of the evidence supporting a verdict of "guilty." This could not be objectionable.

In lieu of Slides 81-82, the prosecutor could have held Hecht's photo in his hand and displayed it to the jury while recounting testimony that cast doubt on Hecht's credibility. This could not be objectionable.

Nevertheless, Hecht asserts that these same arguments became "flagrant and ill-intentioned misconduct" when displayed in digital slides conveying the identical arguments. Hecht argues that the slides were "altered evidence" equal to those reported in *Glasmann*. Hecht's

argument ignores the record, the wide latitude prosecutors have in closing argument, and the presumption that jurors follow their jury instructions.

First, the prosecutor did not “alter” evidence. The “evidence” was Exhibits 4, 5, and 6, not the prosecutor’s closing argument. Exhibits 4-6 were tangible pieces of paper that were not “altered” in any way by the prosecutor. *See* Ex. 4-6. Exhibits 4-6 were displayed to witnesses and the jury throughout the trial.⁷ The photos of Hesketh (Ex. 4) and Pfeiffer (Ex. 5) were specifically published to the jury during trial, if not Hecht’s photo (Ex. 6) as well. RP 532, 1079. The photographic exhibits sat on the bar before the jury while the prosecutor delivered his closing argument, and were physically received by the jury *immediately* after closing arguments. CP 529-548 (Clerk’s Minute Entry for 10-27-08). The jury was specifically instructed that the prosecutor’s closing argument, which included the PowerPoint presentation, was not evidence and it never went to the jury room. CP 350-51 (Inst. No. 1). Exhibits 4-6 were inside the jury room throughout deliberations and the jury could plainly see that the exhibits had no text or captions on them. It could not have been more obvious to the jury that the prosecutor used digital copies of the exhibits for demonstrative purposes during closing argument.

⁷ RP 420, 444, 449, 450, 478, 532, 586, 617, 755, 792, 793, 826, 840, 852, 854, 864, 865, 1079, 1145, 1202.

This is especially so when the jury instructions are considered. The jury was repeatedly and explicitly instructed that the prosecutor's arguments in closing were "not evidence;" to ignore anything in the prosecutor's argument that was not supported by "the evidence;" and that the only "evidence" to consider was the testimony and the admitted exhibits. CP 349-51 (Instruction No. 1); RP 335-36, 1349. These instructions were given prior to testimony (RP 335-36), immediately prior to closing argument (RP 1349) and went with the jury in writing for deliberations (CP 349-51). The jury is presumed to have followed these instructions. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

The *Glasmann* opinion contains no discussion of jury instructions. Here, the record is clear that the jury was repeatedly instructed on the difference between evidence and argument. The record is clear that there could have been no confusion. The court must presume that the jurors followed their instructions in the absence of "highly inflammatory" photos and captions like those reported in *Glasmann*. CP 351; RP 335-36, 1349.

Glasmann concluded in part that slides combining Glasmann's booking photo with argument amounted to "unadmitted evidence" because of the inherently prejudicial nature of the photo and the appeals to the jury's prejudices. Here, unlike *Glasmann*, there were no slides that "deliberately appealed to the jury's passion and prejudice" or "encouraged

the jury to base its verdict on improper argument rather than properly admitted evidence.” Unlike *Glasmann*, there was no patently prejudicial slide of the defendant’s “unkempt and bloodied face” with an “X” across it and accompanied by inflammatory captions. The jury in Hecht’s case saw only his unassuming driver’s license photo and mundane captions. Driver’s license photos do not carry the inherent prejudice that a booking photo can. *Flemming v. Salinas Valley State Prison*, No. 00383, 2012 WL 3693859 (E.D. Cal. Aug. 24, 2012) at 36 (attached **Appendix A**).⁸

Hecht essentially argues that it is fundamentally unfair to use technology in criminal courts to express an argument even if the content of the argument is otherwise appropriate. This is not the holding from *Glasmann*. *Glasmann* held that combining exhibits with captions and/or text in a manner calculated to appeal to the passions and prejudices of the jury is improper. That did not occur in Hecht’s case. Rather, the content of the slides was supported by the evidence, did not appeal to the emotions of the jury, and did not express personal opinions. There was no misconduct in this case.

⁸ GR 14.1 provides that parties may cite unpublished opinions from other jurisdictions if it is permissible in that jurisdiction to cite to unpublished opinions. GR 14.1(b). The Federal Rules of Appellate Procedure (FRAP) allow citation to unpublished opinions in the federal courts. FRAP 32.1(a) (“A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been (i) designated as ‘unpublished,’ ‘not for publication,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007”).

Numerous cases from other jurisdictions are helpful to put *Glasmann* into context and highlight the unique circumstances in *Glasmann* that led to findings of both misconduct and prejudice. In each of these cases, the prosecutor appropriately displayed slides combining images of exhibits in conjunction with text of testimony or argument.

In *Flemming v. Salinas Valley State Prison*, the defendant was tried for murder in California. *Flemming v. Salinas Valley State Prison*, No. 00383, 2012 WL 3693859, (E.D. Cal. Aug. 24, 2012), (**Appendix A**). The prosecutor utilized a “lengthy PowerPoint presentation” in closing. One slide displayed the text “COURTNEY FLEMING MURDERED FIDEL JIMENEZ!” beside an autopsy photo, a photo of a revolver, a photo of a bullet hole, and the defendant’s driver’s license photo.⁹ *Id.* at 29. Another slide displayed the gun and the text, “Courtney Flemming and Luciano Lopez Guilty of the senseless MURDER of FIDEL JIMENEZ.” *Id.* In denying a motion for new trial based upon these slides and many similar slides, the trial court noted that the slides did not “represent anything more than what could have been said orally.” *Id.* at 30. California appellate courts and a federal court all affirmed:

We see no improper appeal to passion or prejudice here. The prosecutors’ juxtaposition of the four photos was simply a dramatic, visual means by which to illustrate his

⁹ The driver’s license photo was not an admitted exhibit.

argument that the evidence established Flemming shot and killed Jimenez.

Id. at 31.

In *Smith v. Hawai'i*, No. 06-00618, 2007 WL 1853982 (D. Haw. June 25, 2007), the defendant was accused of murdering his infant son. *Smith v. Hawai'i*, No. 06-00618, 2007 WL 1853982 (D. Haw. June 25, 2007), *aff'd* 304 Fed.Appx. 535 (9th Cir. 2008), *cert. denied*, 130 S. Ct. 54, 175 L. Ed.2d 44 (2009) (**Appendix B**). Included in the prosecutor's closing PowerPoint presentation was a slide displaying an admitted in-life photograph of the infant with the overlaid text, "My father killed me." *Id.* at 9. Another was an admitted autopsy photo of the infant with the overlaid text, "No accident." *Id.* Defendant's claims of prosecutorial misconduct were rejected by the trial court, the Hawai'i Supreme Court, and two federal courts. The federal court held that the photos were admitted exhibits and "the text simply supports the DPA's argument that the injuries were not accidental, but intentional. Neither did the DPA misstate or manipulate the evidence by presenting these photos and their text." *Id.* at 10.

In *Santos v. Clark*, No. 09-3617, 2011 WL 3806953 (C.D. Cal. June 28, 2011), the defendant was tried for murder in California. *Santos v. Clark*, No. 09-3617, 2011 WL 3806953 (C.D. Cal. June 28, 2011), *review*

denied (WL 3811463 9th Cir. 2011) (**Appendix C**). The prosecutor's PowerPoint presentation included a slide of numerous juxtaposed images of admitted evidence beside the text, "Patrick Santos is guilty." *Id.* at 6. California and federal courts rejected a claim of prosecutorial misconduct. *Id.* The courts noted the wide latitude afforded counsel during closing argument and concluded that slides "linking the evidence to a finding of guilt and stating that [Santos] was guilty, were well within the bounds of fair play and did not constitute misconduct." *Id.* at 6-7.

In *State v. Strong*, 142 S.W.3d 702 (Mo. 2004), the defendant was tried for capital murder in Missouri. During the penalty phase of the trial, the prosecutor utilized a "computerized slide show." *Id.* at 720. Numerous images of admitted photographs were combined into single slides, including photos of the victims, the murder weapon, and the crime scene. *Id.* Defendant argued that he was prejudiced because the prosecutor "bombarded [the jury] with a host of graphic, color images." *Id.* at 721. The Supreme Court of Missouri rejected the claim, holding that the defendant "fails to establish that the slide presentation during the penalty phase prompted the jury to act other than on the basis of reason." *Id.*

In *State v. Francione*, 46 A.3d 219, 136 App. Conn. 302 (2012), the defendant was tried for arson in Connecticut. The prosecutor

presented PowerPoint slides in closing argument that combined images of exhibits accompanied by text of the prosecutor's comments on the exhibits. *Id.* at 238. On appeal, the court rejected the argument that use of such slides in closing argument was somehow improper:

In this instance there would have been *no meaningful distinction between presenting the information contained on the slides orally and displaying it on an overheard projector*. The slides were not improper because all of the information adequately was supported by the evidence, the prosecutor was not appealing solely to the emotions of the jury, the prosecutor did not improperly express his opinion as to the guilt of the defendant or the credibility of the witnesses, and there was no reasonable likelihood that the presentation would confuse the jury or prejudice the defendant.

Id. (emphasis added).

Like the cases cited above, the State's slides in this case simply conveyed arguments that the prosecutor was entitled to make verbally. There was "no meaningful distinction between presenting the information contained on the slides orally and displaying it on an overhead projector." *Id.* Unlike *Glasmann*, the prosecutor did not go "well beyond" arguing the facts and law by combining inflammatory photos and captions "calculated" to appeal to the passion and prejudice of the jury. Rather, the prosecutor used non-inflammatory images and captions to make proper argument. There was no misconduct.

b. It Is Not “Clear And Unmistakable” That Slides 65 & 85 Were Expressions Of The Prosecutor’s Personal Opinion That Hecht Was Guilty

Prosecutors may not express personal opinions about the defendant’s guilt. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). However, “there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.” *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006), (*quoting State v. Armstrong*, 37 Wn. 51, 54-55, 79 P. 490 (1905)). Comments must be viewed in context and in light of the wide latitude counsel has in closing argument:

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument . . . it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence.

McKenzie, 157 Wn.2d at 53-54. For that reason, “[p]rejudicial error does not occur until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*” *Id.* (emphasis in original).

In *State v. Armstrong*, 37 Wn. 51, 54-55, 79 P. 490 (1905), the prosecutor’s statement, “I think you will agree with me that this is the worst homicide that ever occurred in the county” was not an improper

expression of personal opinion; it was allowable argument in light of the evidence and the total argument. Similarly, in *State v. Trout*, 125 Wn. App. 403, 418, 105 P.3d 69 (2005), the prosecutor's argument that a verdict of guilty was the only "just and reasonable outcome" was not a clear and unmistakable expression of personal opinion when considered in the context of the total argument.

Hecht argues that the prosecutor expressed his personal opinion that Hecht was guilty by displaying Slides 65 and 85. These two slides showed the Hecht photo (Ex. 6) beside the Hesketh photo (Ex. 4, Slide 65) or Pfeiffer photo (Ex. 5, Slide 85). The word "guilty" was overlaid on the image of the Hecht photo exhibit. Slides 65, 85. Notably absent was a statement by the prosecutor, verbal or otherwise, that "it is my opinion that the defendant is guilty." Nor can such an opinion be implied from Slides 65 or 85 when viewed in context.

The prosecutor began closing argument by telling the jury that it must "determine whether the evidence proves beyond a reasonable doubt that the defendant is guilty of the crime of harassment and the crime of patronizing a prostitute." RP 1350. The prosecutor told the jury, "You will be deciding this case based on the testimony of the witnesses that you heard from the witness stand and those exhibits that the court has admitted

into evidence.” RP 1352. The court gave the jury the same admonitions in its instructions. CP 348-369.

The prosecutor began his arguments by stating, “I want to take this opportunity to go over with you *the evidence* that proves that the defendant is guilty.” RP 1378-79. The prosecutor’s entire argument leading up to Slide 65 was an explanation of why *the evidence* proved Hecht “guilty” of Count I. RP 1378-87. The prosecutor’s argument as he switched from Slide 64 to Slide 65 was, “And you know *from the evidence* that even judges can commit crimes.” RP 1387 (emphasis added). The prosecutor verbally argued that “*the evidence* proves that he is guilty of Count I” at the very same time he displayed Slide 65. RP 1387 (emphasis added). Slide 65 was displayed for mere seconds as the only verbal argument between the content of Slides 64 and 66 was two sentences: “And that’s what the defendant did when he threatened Joey Hesketh on August 30, 2008. And *the evidence* proves he is guilty of Count I.” RP 1387 (emphasis added). The record could not be clearer that Slide 65 and the verbal argument that both preceded and accompanied it were the prosecutor’s argument for a verdict of guilty based upon *the evidence*.

Similarly, the prosecutor’s argument preceding Slide 85 was a lengthy discussion of all of *the evidence* that proved Hecht guilty of Count

II. RP 1387-1399. The prosecutor switched¹⁰ from Slide 84 to Slide 85 and immediately argued the following while Slide 85 was displayed:

Because you heard a mountain of *evidence* from people who have actually been with the defendant and have been paid for sex by the defendant and all the people who frequent the downtown area who know exactly what the defendant has been doing down there for years.

The evidence proves beyond a reasonable doubt, that the defendant is guilty of patronizing a prostitute.

RP 1399 (emphasis added). The next slide, the last slide in the presentation, was captioned “THE EVIDENCE” and stated in text that “*the evidence . . .* proves beyond a reasonable doubt that Defendant is guilty of Count I with special verdict of threat to kill [and] guilty of Count II.” Slide 86 (emphasis added). No personal opinions were expressed or implied by any of these slides when considered in context.

Hecht examines the slides in a vacuum and divorces them from the prosecutor’s simultaneous verbal argument, contradicting the rule that a prosecutor’s closing argument is reviewed in context of the entire closing argument and not parsed for examination in isolation. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). In *Armstrong* and *Trout* the prosecutors made arguments about guilt far stronger than what the prosecutor argued here, yet the arguments in those cases fell short of

¹⁰ The last words of Slide 84 were “You shouldn’t,” at which time the prosecutor would have clicked forward to Slide 85. Slides 84-85; RP 1399.

“clear and unmistakable” expressions of personal opinion. It is not “clear and unmistakable” that the prosecutor in this case expressed personal opinions in Slides 65 and 85.

c. It Is Not “Clear And Unmistakable” That Slides 79, 80, 81, 82 And 84 Were Expressions Of The Prosecutor’s Personal Opinions On Credibility

The prosecutor is permitted to strike “hard blows” at witness credibility during closing argument, but may not express personal opinion about a witness’s credibility. *State v. Martin*, 41 Wn. App. 133, 703 P.2d 309 (1985). The State is allowed to draw inferences from the evidence “as to why the jury would want to believe one witness over another.” *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed.2d 858 (1996). A prosecutor does not improperly vouch for the credibility of a witness unless it is “clear and unmistakable” that he or she expressed a personal opinion about credibility rather than arguing inferences from the evidence. *Brett*, 126 Wn.2d at 175. Where a prosecutor shows that the defendant’s testimony was untruthful, it is not improper for the prosecutor to argue that the defendant was untruthful, or even to call the defendant a liar. *State v. McKenzie*, 157 Wn.2d 44, 59, 134 P.3d 221 (2006).

In *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003), the prosecutor’s statement “the State believes, this prosecutor believes,

that he got up there and lied” was a clear and unmistakable expression of personal opinion. Conversely, in *State v. Swan*, 114 Wn.2d 613, 661-62, 709 P.2d 610 (1990), the prosecutor’s argument in support of two child victims, “These were little girls who could talk, you could trust, they told the truth,” was not a personal expression on credibility when viewed in context.

Hecht argues that display of five PowerPoint slides, 79-82 and 84, (1) impermissibly vouched for State’s witnesses, and (2) expressed the prosecutor’s personal opinion that Hecht was not credible. Hecht did not object to any of these slides or the accompanying verbal argument.

Slide 79 was captioned “Credibility,” followed by reference to witnesses Hesketh, Marx, and Smith and text that each “gets nothing out of this.” Slide 79. No photos were included. Simultaneous with display of the slide, the prosecutor verbally argued that the evidence supported the inference that the three witnesses gave credible testimony. RP 1396.

Slide 80 was entitled, “Joseph Pfeiffer: Why would he make this up?” followed by text referencing evidence that supported the conclusion that Pfeiffer gave credible testimony. Slide 80. No photos were displayed. Simultaneous with the display of the slide, the prosecutor verbally recounted evidence that supported the inference that Pfeiffer was a credible witness. RP 1396-97.

Slide 81 was entitled, “Compare to Defendant” followed by text of excerpts of Hecht’s trial testimony. Slide 81. A digital copy of Hecht’s photo (Ex. 6) was included to connect the face of the witness who gave the testimony outlined in the slide. Slide 81. Simultaneously, the prosecutor verbally recited Hecht’s trial testimony and asked the jury to question whether it was credible when examined on its own and after comparison to other evidence. RP 1397-98.

Slide 82 was entitled “Credibility” followed by a digital copy of the Hecht exhibit (Ex. 6) and excerpts of Hecht’s trial testimony. Slide 82. At the same time this slide was displayed, the prosecutor continued with verbal argument asking the jury to assess Hecht’s credibility given the evidence presented. RP 1398-99.

Slide 84 was captioned “Defendant’s Credibility” followed by text posing the question to the jury, “If he’s not truthful about the little things . . . why should you believe him when he denies the big things?” Slide 84. The slide did not display a photo. The text was followed by the inference that the prosecutor argued should follow from the evidence: “You shouldn’t.” Slide 84. The prosecutor made this same argument verbally at the same time this slide was (presumably) displayed. RP 1399.

The content of these slides and the accompanying verbal argument were wholly proper in light of the issues at trial, the evidence presented,

and the total argument. Hecht argued through cross-examination and in closing that the State's witnesses had motive to lie when they testified. Slide 79 merely argued from the evidence that these witnesses were credible because they "got nothing" from testifying against Hecht.

Slide 80 did nothing more than display a brief written summary of testimony that supported the inference that Pfeiffer gave credible testimony. At the same time Slide 80 was displayed, the prosecutor verbally recited the same testimony displayed in the slide. RP 1396-97.

Similarly, Slides 81 and 82 recounted testimony that supported the inference that Hecht's testimony was not credible. Slide 81 appropriately asked the jury to compare Pfeiffer's testimony to Hecht's testimony, and then listed evidence that called into question the credibility of Hecht's testimony. Slide 82 continued with excerpts of questionable testimony from Hecht. While Slides 81 and 82 were (presumably) displayed, the prosecutor verbally recounted the same testimony and asked the jury to consider whether it was credible. RP 1397-98.

Slide 84 asked the jury to infer from Hecht's testimony that it was not credible after consideration of its content and comparing it to Pfeiffer's testimony. Slide 84. It was not improper for the prosecutor to ask the jury to compare the testimony of witnesses in order to resolve critical facts. *State v. Brett*, 126 Wn.2d at 175. The phrase "you

shouldn't" was preceded by the prosecutor's argument that *the evidence* undermined Hecht's credibility. RP 1391-99. Immediately after displaying the text "You shouldn't," the prosecutor explained that "a mountain of evidence" contradicted Hecht's testimony. RP 1399.

The prosecutor's argument and accompanying slides on credibility were entirely appropriate. The State properly asked the jury to examine the testimony of Pfeiffer and Hecht and compare the two for credibility purposes. *State v. Brett*, 126 Wn.2d at 175. It was appropriate for the prosecutor to argue to the jury all inferences from the evidence that supported the conclusion that the testimony of the State's witnesses was credible and Hecht's was not. *Id.* The prosecutor could have held up the paper photograph of Hecht in his hands and simultaneously made the same arguments about Hecht's credibility that he did in the slides. The slides did nothing more than visually express arguments the prosecutor was entitled to make verbally.

Unlike what was reported in *Glasmann*, the slides displayed non-inflammatory images of admitted exhibits accompanied by non-inflammatory captions, appropriate recitation of trial testimony, and appropriate argument on evidence relevant to credibility. Unlike *Glasmann*, there was no inflammatory booking photo of the defendant's "battered" face with an "X" across it. There were no inflammatory

captions that, when combined with an inflammatory photo, worked to inflame the jury against Hecht's credibility. Hecht's DOL photo (Ex.6) was an unassuming photo of Hecht in civilian clothes that did not bear negatively on his credibility. Hecht's photo was used minimally to connect Hecht to his testimony and highlight the credibility issues surrounding his testimony. Simultaneously, the prosecutor verbally argued that Hecht was not a credible witness based "upon the evidence."

The record is not "clear and unmistakable" that the prosecutor expressed personal opinions about witness credibility as opposed to arguing inferences from the evidence. To the contrary, the record is clear and unmistakable that the prosecutor argued *the evidence*. Unlike *Horton*, there was no slide or argument with comments like "it's my opinion that Hecht lied," or "I believe Pfeiffer was truthful." No personal opinions were expressed and there was no misconduct.

d. The Prosecutor's Reference To "Truth" During Rebuttal Argument Was Not Misconduct

The "search for the truth [is] the ultimate objective of a criminal trial." *State v. Curtiss*, 161 Wn. App. 673, 702, 250 P.3d 496 (2011) (quoting *State v. Gakin*, 24 Wn. App. 681, 686, 603 P.2d 380 (1979)). A prosecutor's request that the jury return a verdict that "speaks the truth" is not misconduct. *Curtiss*, 161 Wn. App. at 702.

Here, the jury was instructed that in order to find the defendant guilty, it must be satisfied that the State proved each element of the crime beyond a reasonable doubt. CP 352 (Inst. No. 2). The jury was further instructed that it was satisfied beyond a reasonable doubt if it had “an abiding belief in *the truth* of the charge.” CP 352 (Inst. No. 2) (emphasis added). The prosecutor ended his rebuttal argument by stating:

. . . That’s what the evidence proves in this case. State’s not asking you to do anything in this case other than return a verdict that represents the truth about what happened.

RP 1453.

Hecht claims that the prosecutor impermissibly argued that the jury could find him guilty by finding “the truth,” as opposed to finding that each element of the crime was proved beyond a reasonable doubt. Hecht argues he was so prejudiced by this isolated comment that he was deprived of a fair trial. Hecht cites *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009) as support. App. Br. at 21 (citing *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009)).

In *Anderson*, the prosecutor gave a lengthy explanation of “reasonable doubt” and repeatedly implored the jury to “declare the truth.” *State v. Anderson*, 153 Wn. App. 417, 423-25, 220 P.3d 1273 (2009). The court found improper the prosecutor’s “repeated requests that the jury ‘declare the truth’.” *Id.* at 429. However, the court did not

find these “repeated requests” prejudicial in light of jury instructions that imparted the correct standard of proof. *Id.*

Unlike *Anderson*, the prosecutor here did not make “repeated requests” to the jury to “declare the truth.” Rather, the prosecutor made one comment at the end of closing argument that the jury returns a verdict that “represents the truth.” This comment was preceded by the prosecutor’s lengthy argument that “the evidence” proved the defendant guilty beyond a reasonable doubt. Like *Anderson*, the jury was properly instructed on the burden of proof. The prosecutor’s use of the word “truth” was not misconduct, much less prejudicial conduct.

2. Hecht Was Not Prejudiced By Any Perceived Misconduct Because There Is No Substantial Likelihood That Any Resulting Prejudice Affected The Jury’s Verdict

A criminal conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone, unless the prosecutor’s conduct when reviewed in context affected the fairness of the trial. *United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 84 L. Ed.2d 1 (1985). Argument is considered prejudicial only if there is a substantial likelihood that the argument affected the jury’s verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

The prejudicial effect of a prosecutor's improper comments is not reviewed in isolation, but by placing the remarks in the context of the total arguments, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2011). Defense counsel's decision not to object to closing argument "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 709 P.2d 610 (1990); *State v. Curtiss*, 161 Wn. App. 673, 698-99, 250 P.3d 496 (2011).

In *McKenzie*, the defendant was accused of child rape. *McKenzie* 157 Wn.2d at 46. The prosecutor repeatedly referred to the "lost innocence" of the child victim during closing argument. *Id.* at 52-60. The Court found the "lost innocence" argument improper, but in the absence of an objection and in light of the case as a whole, it did not find that the comment was so prejudicial that the defendant was deprived of a fair trial. *Id.* at 60.

Here, like *McKenzie*, a rational reading of the record does not establish prejudice even if the court could find error. Hecht places undue emphasis on a handful of PowerPoint slides from a lengthy closing argument at the end of a long trial. Hecht argues that the allegedly

offending slides were “highly prejudicial images,”¹¹ but he does not explain how or why they were “highly prejudicial.” There was nothing patently prejudicial about Hecht’s photo, especially when compared to the inflammatory booking photo that was prominent in *Glasmann*. Unlike *Glasmann*, there was no booking photo of Hecht’s “unkempt and bloodied” face with an “X” over it, there were no captions or slides that appealed solely to the passions and prejudices of the jury, there was no expression of personal opinion by the prosecutor as to the defendant’s guilt or credibility, and there was no “burden shifting” argument.

Rather, the prosecutor displayed three nondescript photographs of Hesketh, Pfeiffer, and Hecht. Ex. 4-6. Hecht’s DOL photo depicted an unassuming Hecht in civilian clothes that did not portray him in a negative light. Ex. 6. The photos were not “calculated” to appeal to the passions and prejudices of the jury. The slides that incorporated the photos had innocuous captions such as “Count I,” “Count II”, “Patronizing a Prostitute,” “Compare to Defendant,” “Credibility,” and “The Evidence.” These were not captions “calculated” to “appeal to the passions of the jury.” Text within the slides appropriately recounted trial testimony or set forth proper argument from the evidence. Unlike *Glasmann*, there was no “overlaid message that emphatically and repeatedly conveyed the

¹¹ App. Br. at 22.

prosecutor's belief to the jury that Glasmann is 'absolutely guilty!'" *Glasmann*, 175 Wn.2d at 712.

The slides at issue were small moments in a greater trial. The State called 22 witnesses and admitted numerous exhibits over the course of several weeks for the sole purpose of establishing that Hecht was guilty. CP 529-548. The singular purpose of the prosecutor's closing argument was to persuade the jury that the evidence proved that Hecht was "guilty." The jury was acutely aware of the verdict the State was asking the jury to return based upon the evidence. Slides 65 and 85 conveyed nothing more. The last slide of the presentation was captioned "THE EVIDENCE" and was followed by both a verbal and written request to return verdicts of guilty based upon "the evidence." Slide 86. A briefly-displayed slide of Hecht with the word "guilty" on it conveyed the same argument. The prosecutor did not go "well beyond" arguing the evidence as was reported in *Glasmann*. Display of any of the slides could not have changed the outcome of the trial in light of the record as a whole.

Unlike *Glasmann*, Hecht was not accused of violent crimes, did not fight with the police, and had no injuries to his face such that display of his photo was likely to inflame the passions of the jury against him. Hecht was accused of low-level crimes and the most "prejudicial" thing the prosecutor did was show Hecht's unassuming DOL photo with the

word “guilty” on it while appropriately arguing at the same time that *the evidence* proved Hecht was guilty. The word “guilty” on Hecht’s photo was reflective of the verdict the prosecutor asked the jury to return based upon *the evidence*, not a verdict based on an inflammatory photo or personal opinion.

Hecht was ably represented at trial and contested all of the State’s evidence. The defense closing argument responded to all of the prosecutor’s arguments, including the credibility of Hecht, Hesketh, and Pfeiffer. RP 1400-1432. Hecht’s able representation detracts from a finding of prejudice.

Finally, Exhibits 4, 5, and 6 were admitted evidence, were displayed throughout the trial, were with the jury throughout deliberations, and had no writing on them. The jury was acutely aware of the content of Exhibits 4-6, and knew from instruction and common sense that copies of those exhibits were displayed demonstratively by the prosecutor during closing argument. The jury is presumed to have followed its instruction that closing argument was “not evidence.” *State v. Warren*, 165 Wn.2d at 29.

There is no “substantial likelihood” that the slides Hecht challenges, even if error, changed the outcome of the trial when considered in context of the case as a whole. *McKenzie* found no

prejudice on facts with far more potential for prejudice than those present here. Unlike *Glasmann*, the record “when viewed as a whole” does not establish that the verdict was based on anything other than the evidence.

3. Any Prejudice Could Have Been Cured With An Objection And An Instruction From The Court

The trial court can mitigate potential prejudice by providing curative instructions to the jury that the prosecutor’s statements are not evidence and should not be so considered. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). The failure to request a curative instruction or to object to allegedly improper conduct waives the error unless the prosecutor’s conduct was so flagrant and ill-intentioned that the resulting prejudice could not have been neutralized by admonition to the jury. *State v. Dunaway*, 109 Wn.2d 207, 221, 743 P.2d 1237 (1987).

In *McKenzie*, the Court held that the prosecutor’s improper reference to the “lost innocence” of the child victim could have been obviated with a curative instruction. *McKenzie*, 157 Wn.2d at 60. Similarly, if Hecht had objected to any of the slides he challenges for the first time on appeal, the court could have considered his objection, made a record of what actually transpired in court, and ruled accordingly. The trial court, if persuaded by Hecht’s objection, could have instructed the jury to disregard any improper slide that was shown. Unlike *Glasmann*,

there was nothing so prejudicial about the slides in this case that they could not have been cured by an instruction.

B. Hecht's Conviction For Harassment Should Be Affirmed Because The Information And Jury Instructions Properly Set Forth All Essential Elements Of The Crime

Hecht's second claim of error, that proving a "true threat" is an essential element of the crime of harassment, was recently addressed by the Washington Supreme Court in *State v. Allen*, No. 86119-6, 2013 WL 259383 (Wash. Jan. 24, 2013) held that "true threat" is *not* an essential element of the crime of harassment that must be pled in the information and included in the court's "to convict" instruction. *Id.* at 8. *Allen*, decided subsequent to Hecht's appellate brief, squarely resolves the issue.

C. The Evidence Was Sufficient To Establish Each Element Of The Crime Of Harassment Beyond A Reasonable Doubt

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The evidence is reviewed in the light most favorable to the State to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

The crime of felony harassment requires evidence sufficient to convince a rational trier of fact beyond a reasonable doubt that the defendant uttered a threat to kill, the defendant should have foreseen that his or her words would be construed as a threat to kill, and the victim was placed in reasonable fear that the threat to kill would be carried out.

RCW 9A.46.020(1)(a).¹²

Hecht argues insufficient evidence that (1) Hesketh was placed in reasonable fear of the threat to kill, and (2) Hecht should have foreseen that the threat to kill would be taken seriously. Both arguments fail.

1. There Was Sufficient Evidence That Hesketh Was Placed In Reasonable Fear Of Hecht's Threat To Kill Him

The jury was presented with sufficient evidence that Joey Hesketh was placed in reasonable fear of Hecht's death threat. Moments before issuing the threat, Hecht drove his car to within inches of Hesketh and "slammed on his brakes." RP 692. Hecht "yell[ed]" at Hesketh. RP 693. Hecht was "very upset, angry, and aggressive." RP 693. Hecht yelled at Hesketh "Are you talking about me?" and then said, "You better not be

¹² "A person is guilty of harassment if: (a) Without lawful authority, the person knowingly threatens: (i) to cause bodily injury immediately or in the future to the person threatened or to any other person; . . . and (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(a). Harassment is elevated to a felony if the threat is a threat to kill. RCW 9A.46.020(2)(b).

talking about me. If I find out you are talking about me, I am going to kill you.” RP 693.

Hesketh testified that he took Hecht’s threat seriously. RP 696. Hesketh knew he *had* been talking about Hecht and it was obvious that Hecht knew Hesketh had talked about him. RP 696. The pre-condition to the death threat (“if I find out you’ve been talking about me”) had already been satisfied and Hesketh knew it. RP 696. Hesketh was asked during trial if he was “afraid” after hearing Hecht’s threat and he answered “yes.” RP 696. Hesketh further testified that he was “uncomfortable, nervous, worried, stressed” about Hecht’s threat to kill him; and he was concerned that Hecht could hire someone to kill him because Hecht “knows criminals.” RP 695-96, 740, 1194.

Hesketh testified that following Hecht’s death threat, he took steps to avoid encountering Hecht. RP 698. Hesketh “didn’t show [his] face around town” after the death threat. RP 698. Hesketh further testified that because of Hecht’s position as lawyer and judge-elect, he believed that Hecht could “do anything he wants, jeopardize my safety.” RP 740.

Hesketh testified that he was so worried that Hecht would cause him to die that he confided in his father that Hecht threatened him so that his father would know Hecht was responsible “if anything happens to me.”

RP 697-98. Hesketh's father testified that Hesketh was "very fearful, very upset" when he disclosed that Hecht had threatened his life. RP 781.

Michael Mundorff was an eyewitness to the threat to kill. RP 615-22. Mundorff corroborated Hesketh's description of the event, including that Hecht was "extremely agitated" and "very angry" when he uttered the threat. RP 620. Mundorff testified that Hesketh was "rattled" and "very scared" after the threat. RP 623, 648. Mundorff testified that after the threat Hesketh was constantly fearful of encountering Hecht in downtown Tacoma and purposefully avoided that area for fear of Hecht. RP 624-25.

Finally, the jury was presented with evidence that Hecht had motive to silence Hesketh. Hecht's death threat was made at a time when Hecht was a judge-elect and he could not afford to have his past indiscretions come to light if he wanted to keep his judgeship. Hecht needed to impress upon Hesketh the seriousness of the threat in order to keep Hesketh silent. Hecht's motive to impress upon Hesketh the seriousness of the threat allowed the jury to infer that Hesketh *did* take the threat seriously, just as Hecht intended.

Hecht's attempted analogy to *State v. C.G.*, 150 Wn.2d 604, 607, 80 P.3d 594 (2003), is unpersuasive. In *C.G.*, a high school student threatened to kill the vice principal. The vice principal testified that the girl's threat "caused him concern" that "she might try to harm him or

someone else.” *Id.* The vice principal never testified that he reasonably feared that C.G. would kill him; nor was there any other evidence to establish this necessary fact. *Id.* at 610. The Court reversed on grounds of insufficient evidence that the victim was placed in reasonable fear that a threat to *kill* would be carried out, as opposed to reasonable fear that bodily harm might be caused. *Id.*

Unlike *C.G.*, the evidence in the present case was not limited to the victim’s “concern” that the defendant “might harm him or someone else.” Unlike *C.G.*, Hesketh was the only subject of the threat and the only evidence of a threat was Hecht’s threat to “kill.” Hesketh testified that he took the threat to kill seriously. RP 696. Hesketh further told his father about the threat because he was worried that Hecht would kill him and his father would not know who killed him. RP 698. Hesketh’s testimony was supplemented by both Mundorff’s testimony about Hesketh’s displays of fear and Hecht’s obvious motive to purposefully cause fear.

Viewing the evidence in a light most favorable to the State, and drawing all reasonable inferences in favor of the State, there was ample evidence presented to conclude beyond a reasonable doubt that the threat to kill placed Hesketh in reasonable fear that he would be killed.

2. There Was Sufficient Evidence That Hecht Should Have Foreseen That His Threat To Kill Would Be Taken Seriously

Hecht also argues insufficient evidence that he would reasonably foresee that his words “would be interpreted as a serious expression of intent to carry out the threat,” as opposed to idle talk or jest. App. Br. at 36. Hecht argues that the only rational interpretation of the evidence was that Hecht’s words were “hyperbole intended simply to convince Hesketh to refrain from spreading rumors about him.” *Id.*

The reasonable inference from the circumstances surrounding the death threat was that Hecht would foresee that the threat would be taken seriously. Hecht accelerated his car towards Hesketh and stopped within “inches” of striking Hesketh. RP 616, 629, 692. Hecht was extremely angry. RP 693. Hecht told Hesketh that he would kill him if Hesketh talked about him. RP 620, 64, 693. Hecht told Hesketh in so many words that he was aware that Hesketh had already “talked” about him. RP 696.

Hesketh’s disclosures about Hecht put Hecht’s judgeship in jeopardy. Hecht had serious motive to silence Hesketh by impressing upon him the seriousness of his threat. The jury was entitled to infer that Hecht would not only foresee that his threat would be taken seriously, but that he actually intended Hesketh to take the threat seriously.

Finally, Hecht was a lawyer and judge-elect; Hesketh was a homeless drug addict. The gross disparity in social status gave Hecht the appearance of power over Hesketh. The jury could rationally conclude that Hecht had the full weight of his social status behind the threat and reasonably foresaw and intended Hesketh to take the threat seriously.

D. The Trial Court Properly Admitted Evidence Of Hecht's Past Prostitution Activities As Proof Of A "Common Scheme Or Plan" To Solicit Prostitutes In Downtown Tacoma

A trial court's ruling under ER 404(b)¹³ is reviewed solely for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). A trial court abuses its discretion when ruling on evidence offered under ER 404(b) only where the decision was manifestly unreasonable or based upon untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Crimes or misconduct other than the acts charged may be admitted under ER 404(b) to prove a scheme or plan of which the offense charged is a recent manifestation. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). "When the very doing of the act charged is still to be proved,

¹³ "*Other Crimes, Wrongs, or Acts*. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident."

one of the facts which may be introduced into evidence is the person's design or plan to do it." *Id.*

A common scheme or plan exists when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. *Lough*, 125 Wn.2d at 855. A common scheme or plan is established by evidence reflecting that the defendant committed "markedly similar acts of misconduct against similar victims under similar circumstances." *Id.* at 855-56. The similarity may be proved circumstantially by evidence that the defendant committed acts having "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations." *Id.*

Evidence of Hecht's past prostitution activities must be considered in context of the issues at trial. Pfeiffer testified that Hecht paid him for sex. RP 882, 889-93. Hecht testified that he knew Pfeiffer, he brought Pfeiffer to his law office after hours, he gave money to Pfeiffer, but the money was not in exchange for sex. RP 1297. If Hecht had a common scheme and plan to solicit prostitutes in the downtown Tacoma area, this fact was highly relevant to the central issue of whether Hecht's exchanges of money with Pfeiffer were for prostitution purposes or innocuous "grandpa-type" gifts to Pfeiffer. The testimony of John M. and Ed S. was evidence that Hecht's conduct with Pfeiffer was a manifestation of a

common scheme or plan to solicit prostitutes in downtown Tacoma. *Lough*, 125 Wn.2d at 855-56.

Hecht's interactions with John M. and Ed S. were "markedly similar" to his interactions with Joseph Pfeiffer. Pfeiffer was a drug-addicted homeless man living on the streets of downtown Tacoma. RP 878, 893. Pfeiffer worked as a prostitute to earn money. RP 878. Hecht cruised downtown Tacoma looking for prostitutes. RP 905-06. Hecht picked up Pfeiffer in downtown Tacoma on numerous occasions, took him back to his law office, paid him for sex, and then returned him to the streets of downtown Tacoma. RP 882-895.

Similarly, John M. and Ed S. testified that they were once drug-addicted homeless men living on the streets of downtown Tacoma. RP 476-77, 487, 520-21. Both testified that Hecht cruised downtown Tacoma looking for prostitutes, picked them up, drove them to his law office, paid them for sex, and then returned them to the streets of downtown Tacoma. RP 478-489, 521-31.

The trial court carefully considered and balanced the probative value versus the danger of unfair prejudice in determining what evidence should be admitted, and what should be excluded. CP 389-396. The trial court minimized the danger of unfair prejudice by excluding other evidence of Hecht's past prostitution activities; and repeatedly cautioned

the jury that it's consideration of the testimony of John M. and Ed S. was limited to common scheme or plan. CP 389-396; RP 478, 481, 491, 524. Jurors are presumed to follow the court's limiting instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

The trial court's ruling was reasonable and based upon tenable grounds. The trial court carefully considered the evidence and minimized its prejudice with repeated limiting instructions. There was no abuse of discretion by admitting the evidence.

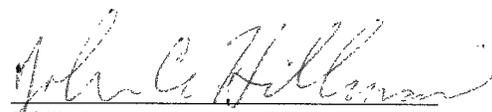
V. CONCLUSION

The prosecutor did not commit misconduct in closing argument. The trial court properly admitted limited evidence of Hecht's past prostitution activities. Hecht received a fair trial at which sufficient evidence of guilt was presented. Hecht's convictions should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of March, 2013.

ROBERT W. FERGUSON
Attorney General

By:


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Assistant Attorney General

Appendix A



Slip Copy, 2012 WL 3693859 (E.D.Cal.)
(Cite as: 2012 WL 3693859 (E.D.Cal.))

Page 1

Only the Westlaw citation is currently available.

United States District Court,
E.D. California.
Cortney Dejohn FLEMMING, Petitioner,
v.
WARDEN, SALINAS VALLEY STATE PRISON,
Respondent.

No. 1:12-CV-00383 AWI GSA HC.
Aug. 24, 2012.

Cortney Dejohn Fleming, Soledad, CA, pro se.

Clara Morgan Levers, Attorney General's Office for
the State of California, Sacramento, CA, for Re-
spondent.

FINDINGS AND RECOMMENDATION RE-
GARDING PETITION FOR WRIT OF HABEAS
CORPUS

GARY S. AUSTIN, United States Magistrate Judge.

*1 Petitioner is a state prisoner proceeding pro
se with a petition for writ of habeas corpus pursuant
to 28 U.S.C. § 2254.

BACKGROUND

Petitioner is currently in the custody of the
California Department of Corrections and Rehabil-
itation pursuant to a judgment of the Superior Court
of California, County of Fresno, following his con-
viction by jury trial on January 11, 2009, of second
degree murder (Cal.Penal Code § 187(a)), and at-
tempted murder (Cal.Penal Code §§ 187(a), 664). (*See*
Resp't's Answer, Ex. A.) The jury further found
that Petitioner had personally and intentionally dis-
charged a firearm, proximately causing death, and
that he personally and intentionally discharged a
firearm during commission of the attempted murder
(Cal.Penal Code § 12022.53(d)). (*Id.*) Petitioner
was sentenced to serve an indeterminate term of
forty years to life plus a consecutive term of

twenty-seven years. (*Id.*)

Petitioner timely filed a notice of appeal. On
October 14, 2011, the California Court of Appeal,
Fifth Appellate District ("Fifth DCA"), affirmed
Petitioner's judgment in a reasoned decision. (*Id.*)
Petitioner then filed a petition for review in the
California Supreme Court. On January 11, 2012,
the petition was summarily denied. (*See* Lodged
Doc. No. 6.)

On March 14, 2012, Petitioner filed the instant
federal habeas petition in this Court. The petition
presents the following grounds for relief: 1) The tri-
al court committed reversible constitutional error
by denying Petitioner's motion to discharge a juror;
2) The trial court erred by erroneously admitting in-
to evidence photographs and a video from security
cameras; and 3) The prosecutor committed inten-
tional misconduct during closing argument, and de-
fense counsel was ineffective in failing to object to
the misconduct. On July 3, 2012, Respondent filed
an answer to the petition. Petitioner did not file a
traverse.

STATEMENT OF FACTS^{FN1}

FN1. The Fifth DCA's summary of the
facts in its October 14, 2011, opinion is
presumed correct. 28 U.S.C. §§ 2254(d)(2)
, (e)(1). Petitioner does not present clear
and convincing evidence to the contrary;
thus, the Court adopts the factual recita-
tions set forth by the Fifth DCA.

PROSECUTION EVIDENCE

The Initial Investigation and Fidel Jimenez's Death
[n.2]

[n.2] The record occasionally gives the name as
"Jiminez." Because the information says
"Jimenez," we use that spelling except where
quoting.

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At around 11:45 p.m. on March 23, 2008, which was Easter Sunday, Fresno Police Officers Garcia and Lujan were dispatched to a report of a shooting at the Liquor King at Herndon and Blackstone. It was a day on which cruising was allowed, so traffic on Blackstone was heavy. The large parking lot, which served Liquor King and several other businesses, contained numerous cars and people. When the officers arrived, cars were leaving the lot and people were running in every direction.

Garcia observed a gray or silver truck that appeared to have collided with a building. The truck's driver, Fidel Jimenez, was slumped over on the truck's seat. He was bleeding from the face or head and had a slight pulse. Someone in the crowd that had gathered advised he had been shot. There was broken glass on the truck's seat and two tall beer cans on the floorboard.

*2 Lujan began crowd control, while Garcia and Sergeant Alvarez, who was now at the scene, tried to extricate Jimenez. Jimenez lost his pulse, but the officers were able to get it back. Emergency personnel then arrived and took over. Alvarez ordered the entire parking lot locked down, and put out a preliminary radio broadcast containing information he had received concerning a white Mustang that may have been involved. The car, which contained an African-American male and possibly a Hispanic, had left at a high rate of speed.

There was what appeared to be bullet impact damage to the door frame of a business just south of the one into which the pickup had crashed. There was a bullet entry hole on the passenger side pillar of the pickup, and a deformed bullet fragment was found in the corresponding wall panel. Although a number of latent prints were lifted from vehicles, cans, bottles, and other trash in the parking lot, none could be identified as belonging to Lopez or Flemming. No firearms were found in the pickup nor was an antitheft device called the Club. However, an open flip-style cell

phone was found on the passenger side floorboard of the vehicle.

The entire strip mall/parking lot area was searched for evidence. No Club security devices, bars, or anything else that might be used as a weapon were located. No shell casings were found.

Fidel Jimenez suffered a gunshot wound to the head, behind the right ear, with injuries to the left back of the brain and the cervical spine. He was alive but paralyzed from the neck down when brought to the hospital, and he remained that way until April 1, 2008. On April 1, his neurological status began to change, and it was determined he had developed an aneurysm in the area of several bullet fragments. A corrective procedure was unsuccessful, and Jimenez's family made the decision to withdraw life support. He died on April 4. The cause of death was related to injuries to the brain and spinal cord, with those injuries having been caused by the gunshot wound to the head that he sustained on March 23. The wound course was inconsistent with him looking at the shooter at the time the bullet struck him, but was consistent with him looking straight ahead.

Witness Accounts [n.3]

[n.3] In Akira Kurosawa's film *Rashomon*, four individuals witness a crime. Each then recounts the story honestly, but in mutually contradictory ways. Because of the *Rashomon*-like testimony of the various eyewitnesses—even those who were not acquainted with the victims or defendants—we summarize each individually, rather than attempting to compile a unified account. We also include their statements to police.

Adam Mirelez

On the evening of March 23, 2008, Adam Mirelez and Jimenez, his longtime friend, went cruising on Blackstone. Jimenez was driving his 1986 primer-gray Silverado pickup. Mirelez was sipping from a can of beer. He never saw Jimenez

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drinking that night, although there was a second beer can in the truck.

*3 Blackstone was fairly crowded, and at some point they pulled into the parking lot on the southwest corner of Herndon and Blackstone, where the Liquor King was located. There was a speed bump as they first came in, and a crowd of people and cars. Mirelez estimated they were going five miles per hour or less. Jimenez was on his cell phone.

The car stopped by a median before it reached the crowd of people. Jimenez and Mirelez were trying to get through, but there were people everywhere. As they waited for people to move, Mirelez saw Lopez on the sidewalk on the driver's side of the truck, almost 10 feet away. Lopez came up to Jimenez's window, which was open, and angrily yelled a couple of times, "What's up, homey?" Jimenez nodded his head at Lopez as if to say, "What's up," but he was not really paying attention because he was on the phone.

Lopez then came to Mirelez's side and said the same thing numerous times. Mirelez, who had a can of beer in his hand, put the beer in his lap and pulled the door handle, but the door did not open any distance. Lopez then punched him in the nose through the window, causing Mirelez's nose to bleed profusely. Mirelez leaned down toward Jimenez and grabbed the beer can, which was between his legs. He then raised back up. He never attempted to strike Lopez; as far as he knew, there was nothing in the truck he could have used to do so. Jimenez did not have a Club.

Lopez stepped back and yelled at his friend, "Pull the pistol. Pull the pistol." The friend, a tall African-American who was wearing a white sweater and possibly a hood, seemed to come out of nowhere. He pulled a gun from his pocket or belt area and pointed it at Mirelez from a little over six feet away. Mirelez ducked down, heard a shot, and then felt the truck go forward. It hit

something, then went over the curb and into a store. He heard two shots together. Because he had ducked down, he did not see what happened to Lopez or the African-American male after the shooting. Mirelez believed that if he had not ducked down, he possibly would have been shot. The bullet came through the window where he had been sitting. He had been sitting between the gun and Jimenez.

Once the truck hit the building, Mirelez got out and looked at Jimenez. Mirelez did not see any blood, but he could not get Jimenez to wake up. Mirelez then ran. He had just been shot at; there were people everywhere and he did not know if his assailants were still around or what was going on. He returned within a minute, and the police soon arrived.

When subsequently interviewed by Detective Byrd, Mirelez described the shooter as wearing a fitted baseball cap and a white, zip-up, hooded sweater. Shown a photographic lineup, Mirelez selected Lopez's picture and said it looked most like the person who hit him and said to pull out the pistol. Byrd also showed Mirelez a photographic array containing Flemming's picture, but Mirelez could not identify anyone. Mirelez did not recognize Flemming at trial. When shown a surveillance camera photograph, however, he found the individual's white sweater, and the way he stood and had his hands in his pocket, familiar. Mirelez believed he had previously seen the white sweater on the shooter.

Martin Alvarez

*4 On March 23, 2008, Martin Alvarez was cruising on Blackstone with his friend, Gabriel Lopez, in Gabriel's truck. [n.4] Seeing a lot of cars in the parking lot at Blackstone and Herndon, they decided to stop. They had parked and gotten out of their vehicle, when Alvarez saw an older gray truck drive in. It was proceeding slowly at five miles per hour or less.

[n.4] To avoid confusion with Defendant

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Lopez, we refer to Gabriel Lopez by his first name. No disrespect is intended.

Lopez—whom Alvarez had seen on a prior occasion—was walking across the parking lot, and the truck stopped to let him cross. In Alvarez's opinion, the truck did not stop "in any aggressive way." Lopez, who was about the width of one parking space away and still on the sidewalk, nevertheless threw up his arms, approached the truck, and loudly asked, "What's up dog?" He also said, "Do you have a problem?" and things of that sort. His comments were directed at the driver.

Lopez kept saying the same stuff over and over, and the male in the passenger seat of the truck started to open the door. The passenger said something like he was not going to let somebody start arguing over something stupid. By that time, Lopez had already gone around the truck and was asking if the passenger was going to do something. Lopez then pushed the door closed. The passenger window was open; Alvarez saw Lopez swing at the passenger, but could not see whether contact was made. The passenger reached toward the seat as if to grab something with which to hit Lopez back, although Alvarez never saw anything in his hand. Lopez then called his friend, shouting, "Hey, dog. Pull that gun out. Pull that gun out." Alvarez was not sure where Lopez's friend came from, but when Lopez shouted, the friend, who was African-American, ran toward the truck. Alvarez saw him kind of reach and hold his belt area as he moved toward the truck's passenger, shouting, "What's up dog?"

Gabriel told Alvarez to get in the truck, and the two tried to watch what was going on while also going toward their vehicle. Lopez's friend was arguing and at the same time pointing the gun, which was small and black. Alvarez saw the truck's driver step on the gas, and Lopez's friend shot toward the truck. Two shots were fired. The first hit the pillar of the truck. The second hit the driver. His foot apparently got stuck on the gas,

and the truck hit an SUV and then the building.

Although Alvarez did not see what Lopez did after the shots were fired, he saw the shooter jump into the back seat of an older, two-door white car. The shooter was wearing a white sweatshirt with green lines on it and maybe some jeans. He was not wearing a hat. Alvarez did not see where the car went.

Detective Tacadena interviewed Alvarez within hours of the shooting. Alvarez reported that he saw the Hispanic male and the African-American male getting into a white, older-model car he thought was a Monte Carlo. Alvarez also related that prior to the shooting, he saw the pickup's passenger reach across his body with his hand and swing at the suspect standing outside the vehicle with an object that appeared red in color. At some point, the passenger had a beer in his hand. Alvarez reported hearing the passenger say, "F* * * this. I ain't gonna, I ain't gonna take this from this guy[.]" Alvarez said the African-American was wearing a white sweatshirt with a green shirt underneath. When shown a photographic lineup containing Lopez's picture, Alvarez identified Lopez and said he was 100 percent sure he was the person who punched the passenger and said to pull out the pistol.

Gabriel Lopez

*5 Gabriel also saw the pickup traveling in the parking lot. He did not believe it was going that fast, because it stopped and waited for him to back into a parking stall. He saw the truck stop at a second point and heard arguments. They seemed to come from the front and side of the truck.

Gabriel saw an African-American male with a white shirt in front of the truck. This man raised his hands. The next thing Gabriel saw was a person with a black shirt reaching into the truck like he was trying to punch the passenger. He heard the person in the white shirt say something like, "Get it out." The person with the black shirt then

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took a few steps away from the truck and started shooting. The truck, which had accelerated just prior to the shots being fired, turned to the left and hit other cars.

The two individuals involved in the altercation started walking slowly toward where Gabriel's truck was parked. A mid-1980's Monte Carlo SS and a black-and-white Mustang were in that direction. The pair appeared to be walking toward the Monte Carlo, but Gabriel did not see what car they entered.

Detective Byrd interviewed Gabriel a few hours after the shooting. Gabriel said the African-American was possibly wearing a white shirt. Gabriel related that he heard glass break and then shots. He saw the African-American male's hand extend prior to the shooting, but did not see the gun. Gabriel later recontacted Byrd to relate that he had seen the Mustang driving up and down Blackstone, with a passenger who was an African-American male with cornrows and a white shirt.

Terry Reyes

Terry Reyes was in the Liquor King parking lot a bit after 10:00 p.m. on Easter Sunday, 2008. She saw an older-model, primed truck pull in. It was barely moving because the place was so packed with cars, and then it stopped. Reyes then saw two men run around the front of the truck to the passenger side. She could hear arguing, and saw the Hispanic male start to hit the passenger of the truck through the window. The passenger ducked down or blocked himself from getting hit. Reyes thought she saw a little piece of something, possibly a stick, that he was using to deflect the blows, but he could have been using his arms. She never saw anything come out of the truck, and did not believe the people outside the truck were in danger.

Reyes saw the other man, an African-American, pull a gun from the belt area of his jeans and point it at the truck. It looked like he

tried to pull the trigger and nothing happened, but then he pulled again and Reyes saw two shots and heard gunshots. The gun was shot directly at the truck from the passenger side. The African-American and Hispanic males then ran off and the truck crashed into a building. The suspects ran to what Reyes believed was an older white car that could have been a Mustang.

Reyes told Officer Taliaferro at the scene that the shooter, an African-American male, had stepped out of a Ford Mustang and shot into the victim's vehicle. When interviewed by Tacadena, she said the African-American's hairstyle was a short fade, and he was wearing a white T-shirt and light blue jeans. She also said both suspects left the scene in an older-model white Mustang.

Jose Vargas

*6 Jose Vargas saw Jimenez's truck pull into the parking lot. He estimated it was travelling five miles per hour or possibly slower, "like a walking pace." Vargas heard an argument between an African-American male and the passenger in the truck, but no reference to a firearm. The African-American male approached the passenger side of the pickup and punched the passenger. The passenger swung backward, moving his hand at an arc up by his ear. There was nothing in his hand. The African-American male then stepped back, pulled a gun from his front pocket or belt, and shot what Vargas believed to be three rounds into the vehicle. The shooter was wearing a white sweatshirt or sweatshirt jacket and dark jeans or black pants. He did not have anything on his head. He was the only person Vargas saw who appeared to be associated with this event.

Fresno Police Officer Rose took a statement from Vargas at the scene. In part, Vargas reported that he saw an African-American male approach the passenger side of the truck, and that at some point he heard a voice yell, "Pull out the piece[.]"

Juan Padilla

Juan Padilla, who was with Vargas, also saw

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Jimenez's truck pull into the parking lot. It was going slow, perhaps five miles per hour. He subsequently heard some arguing, then saw a punch thrown on the passenger side of the truck. Because he was not wearing his glasses, he could not see well enough to see who threw the punch. It appeared that the passenger either swung back or attempted to block a blow, whereupon an African-American individual outside the truck took a step back and made a motion like he was reaching for a weapon. [n.5] Padilla turned around and told his friends to duck. He then heard two or three gunshots. The African-American male ran.

[n.5] Padilla did not see anything in the passenger's hand. He believed he would have noticed if there was something large, but probably would not have seen anything small.

Byrd interviewed Padilla a few days after the shooting. Padilla said he saw the African-American male go up to the passenger side of the truck and strike the passenger. He said the African-American male was wearing a white jacket or sweater.

Yvette Uribe

Yvette Uribe grew up with Flemming and was also acquainted with Lopez. She saw them at Liquor King on Easter Sunday of 2008, although she did not know at what time. She estimated it was an hour or so before the shooting.

Janell Mayberry

Janell "Nellie" Mayberry was acquainted with both Flemming and Lopez, whom he knew as Chano. [n.6] On Easter Sunday, 2008, Mayberry drove his green four-door Infiniti to Flemming's house so they could go cruising. With Mayberry was Albert "Papa" Hood. Eventually, Mayberry drove to the Liquor King, accompanied by Hood, Flemming, and Flemming's girlfriend, Claudia. Mayberry was following a white Monte Carlo that contained Kevin Tatum (an African-American), Lopez, and Luis Perez. On the

way, they stopped at several stores. At no time that evening did Mayberry hear Lopez ask if they wanted to take a gun with them.

*7 [n.6] Mayberry's testimony might best be described as evolving over the course of his time on the witness stand. We have attempted to synthesize the versions into one that imparts the most information.

At some point while Mayberry was in the Liquor King parking lot, he heard, but did not see, a shooting. He ran back to his car, arriving about the same time as Flemming, Claudia, and Hood. Everyone was talking about the shooting, although nobody was talking as if they had seen it. Mayberry immediately left the parking lot. He did not know who did the shooting or if Flemming had a gun. He did not see who got into Tatum's car.

At some point after the shooting, Lopez called Mayberry, wanting his gun back. Mayberry and Hood drove to Lopez's house about an hour after the shooting. Lopez grabbed the gun from Mayberry's car, but Mayberry could not remember where in the car. This was the first time Mayberry saw the gun.

Mayberry and Hood remained at Lopez's house for about an hour. At some point, Flemming called Mayberry. Flemming may have mentioned cameras at the Liquor King, as they were all wondering whether the store had cameras.

Byrd and Tacadena interviewed Mayberry two weeks after the investigation started. They tape-recorded the interview, which took place at Mayberry's home. By the time of the interview, Byrd had spoken to about 30 people, and so already knew what he should be hearing from Mayberry. [n.7]

[n.7] At trial, Mayberry testified that he could not remember what he told Byrd, but believed he "[h]alfway" told him the truth.

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Mayberry initially was very evasive and inconsistent. Ultimately, however, he talked about a person named Chano, and identified a photograph of Lopez. He said there was a plan to go cruising on Easter, and that he had gone to Lopez's house early that evening to go cruising. Originally, he was in Kevin Tatum's white Monte Carlo SS, but eventually he left in his own green Infinity. While at Lopez's house, Lopez asked the group if they wanted him to bring his gun. Flemming told him to bring it. Lopez then brought it out of his house and took it with them when they went cruising.

Mayberry related that they went to the Liquor King parking lot, then left to go to another liquor store and returned. With Mayberry in the car he was driving were Albert Hood in the passenger seat, and Flemming and Flemming's girlfriend, Claudia Seamster, in the back seat. Kevin Tatum's white Monte Carlo SS was traveling with them; in that car were Tatum, Lopez, and Luis Perez.

Mayberry told Byrd that he heard a shooting, whereupon he ran back to his vehicle. At the vehicle when he arrived were Hood, Flemming, and Seamster. As they were leaving the scene, Flemming and Hood both said, " 'That n* * * * got busted on.' " Flemming also said, "I told him to stop f* * *ing around." Seamster was upset and crying, and Flemming was trying to calm her down. Mayberry related that from the scene, he went south on Blackstone. He dropped Flemming and Seamster off at an apartment complex, then had a conversation with Hood about "laying down" after something like this, meaning they should not be out and about. Lopez subsequently called, requesting his gun, so Mayberry drove to Lopez's house. There, Hood retrieved the gun—a .38 Special—from the back seat area where Flemming had been and gave it to Lopez. Upon receiving the gun, Lopez said something to the effect of, "Thanks, fool. I need it," and then took it into the house. Flemming called Mayberry

while Mayberry was at Lopez's house. Flemming asked if he thought there were videos at the Liquor King. Mayberry then passed the phone to Lopez, and Flemming spoke with Lopez.

Luis Perez

*8 Luis Perez had been friends with defendants since childhood. He "[s]omewhat" recalled Easter Sunday of 2008, as he was "kind of drunk" that day. Around 9:00 or 10:00 that night, Perez and Kevin Tatum drove over to Lopez's house in Tatum's white Monte Carlo to pick Lopez up to go cruising. Perez did not see Flemming there.

The trio drove up and down Blackstone. Perez believed he saw Flemming on Blackstone late that night, but did not really remember because he was drunk. Perez's group stopped at the Liquor King parking lot, then went somewhere else to get more liquor, then returned to the Liquor King lot. They probably cruised Blackstone for an hour or two before going to the Liquor King parking lot for the final time.

While Perez was standing outside one of the stores, he heard gunshots. He did not see what happened. He ran to the car; Lopez and Tatum were already there. They got into the car and joined a line of vehicles trying to leave. Tatum was driving. It took them three or four minutes to get out of the line, then Tatum dropped Perez and Lopez off at Lopez's house and left. Perez did not recall any conversation in the car about what had taken place.

Byrd interviewed Perez on April 4, 2008, and tape-recorded their conversation. [n.8] Perez said he had consumed some hard liquor before going out cruising on Blackstone, and also drank a little once out there. Perez related that on the date of the shooting, he was with Kevin Tatum and Lopez. He went to Lopez's house, but did not see Flemming there. He thought he might have seen him driving on Blackstone in a green four-door sedan with tinted windows. [n.9] Eventually, he admitted seeing Flemming in the Liquor King.

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[n.8] According to Perez, he had consumed 9 or 10 beers prior to the interview.

[n.9] The windows of Mayberry's car were tinted.

Perez told Byrd that at some point, he heard gunshots at the Liquor King. When he got to the car, Tatum and Lopez were there. Perez eventually related that Lopez said he had almost gotten run over, he was in a fight with the passenger of a truck, and one of his friends shot. Lopez never said which one.

Perez said that after the shooting, they went to Lopez's house, where Perez stayed until he was picked up by somebody else. The white Monte Carlo left. Perez first said Tatum did not want to give him a ride home because the tags on the car were not current. Eventually, he agreed with Byrd that the real reason Tatum did not want to give him a ride home was because they knew the vehicle had been seen at the location of the shooting and that involved parties had gotten into it, and he did not want to be driving it around.

Perez related that a green car showed up at Lopez's house. It looked like the same car Flemming had been in. The car was present at the Liquor King. When it arrived at Lopez's house, its occupants gave Lopez a gun.

Perez said he himself was wearing a red hat and red shirt that night. Lopez was wearing a black jacket, and Flemming was wearing a white sweater with a black shirt underneath. Perez said Tatum might have been wearing a white jersey, then later mentioned a team jersey. [n.10]

*9 [n.10] The final descriptions Perez gave Byrd were consistent with what Byrd saw on a surveillance videotape taken inside the Liquor King.

Kevin Tatum

Kevin Tatum had known Flemming since high school. He first met Lopez on Easter night, 2008,

when he went cruising with Lopez and Luis Perez, each of whom he picked up in his white 1987 Monte Carlo SS. While picking Lopez up at Lopez's house, there was no mention of a handgun. Tatum did not remember if he saw Flemming at Lopez's house. At some point, he saw a green car owned by Janell Mayberry, but he did not remember when.

The trio went cruising down Blackstone somewhere in the timeframe of 8:00 or 9:00 p.m. They ended up in the Liquor King parking lot, then left to go to another liquor store down the block. At some point, they returned to the Liquor King parking lot. When the shooting occurred, Tatum was in a different area of the parking lot. Mayberry's car was next to his.

Tatum did not see the shooting, but heard the shots. People then scattered. Tatum ran to his car. When he left the parking lot, Perez and Lopez were with him. The green car left at the same time. It contained Mayberry, Hood, Flemming, and Claudia. Tatum did not remember anybody in his car being excited or what Lopez might have been saying.

Tatum dropped Lopez off at home. He believed he also dropped Perez off, then went home himself. He made no comment, and was not concerned, about anybody possibly looking for his car, which he accidentally wrecked soon after the shooting.

On April 15, Byrd interviewed Tatum, who admitted being in the Liquor King on Easter. Byrd showed Tatum some digital photographs that were created from the video surveillance system inside the store. Tatum identified himself on one of the photographs. He recognized himself by his clothing, mainly his blue hat. Tatum was able to say who else was in the photograph, and that those people were in the store at the time he was. Tatum identified Flemming in one of the photographs and mentioned he was wearing a white jacket. He was also able to identify Perez, who

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was wearing a red hat and red shirt, and Lopez.

Claudia Seamster [n.11]

[n.11] Seamster and Flemming married in January 2009. Although she used Flemming as her last name at the time of trial, we refer to her as Seamster for clarity.

On Easter Sunday, 2008, Flemming was at Claudia Seamster's house for most of the day. At some point around nightfall, Mayberry picked up the couple. Hood was in the car with him. They went riding around. Seamster believed they went to a liquor store, although Flemming was not drinking at all that day. No other car was with them. Seamster was unacquainted with Lopez, except for seeing him in court. Although she saw a lot of people on Easter Sunday night, she did not see him or go to his house. She did not see a handgun or see him provide a handgun to Flemming.

At some point, there was a shooting at their location. Seamster had gotten out of the car to go to the restroom when she heard loud noises, then everybody panicked. There were people and cars everywhere, and at first she could not find Mayberry's vehicle. When she finally located it, it was not in the same place it had been. Mayberry, Flemming, and Hood were already inside. One of them said they heard gunshots. They were scared. No one said who had done the shooting, and she did not see a gun.

*10 Byrd obtained information that Seamster might be an important person in the case three or four days after the shooting. He made numerous unsuccessful attempts to contact her over the course of three or four months. In October 2008, he saw her in the audience at one of the hearings in this case, and asked her to accompany him to the police department so he could obtain a statement. She agreed to do so. She was not under arrest, and he interviewed her in his office rather than in an interview room. [n.12]

[n.12] A recording of the interview was played for the jury.

In the interview, Seamster related that she had never met Lopez before the night of the shooting. He was a friend of Flemming, Mayberry, and Hood. They were driving around, went somewhere, and Lopez was there.

Seamster admitted seeing the gun at one of the stops she, Mayberry, Flemming, and Hood had made. Lopez had it. She did not see it in Flemming's possession or in the car. She eventually admitted the people with her in the car were saying that they were arguing or something and the guy in the truck reached for something. When Byrd asked whether Flemming told Seamster that he shot the victim, Seamster responded that he said it was because they were arguing and he reached for something and Flemming got scared, she guessed. It was being said that he thought the guy was going to get a weapon or something. Seamster believed Flemming was the one saying this, but she did not know. Seamster did not know if Flemming shot the victim. If he did, it would be out of character for him and would be because somebody provoked him or he felt he was in danger.

Additional Evidence

On April 3, 2008, Lopez was taken into custody and a search warrant was executed at his residence. A Rossi .38 Special revolver containing two expended cartridges and no live rounds was found on the floor of his bedroom closet, wrapped in a black Tshirt. [n.13] A black knit cap containing live ammunition was found on a dresser in the same room. The gun and expended cartridges were subsequently processed for fingerprints. None were located. The gun's grip and trigger were swabbed for DNA, and DNA samples were obtained from defendants. Although a DNA profile consistent with a single individual was obtained from the trigger, Flemming was eliminated as the source. A mixture of DNA from at least three individuals, one of whom was

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female, was obtained from the grip; again, Flemming was eliminated as a source. [n.14] Lopez, however, could not be excluded as a contributor to the DNA obtained from either location. The DNA profile obtained from the trigger was indistinguishable from the profile obtained from Lopez's reference sample, making it very likely Lopez was the source of that DNA. It could not be determined how long the DNA had been there. It could not be determined if the bullet fragment found in Jimenez's truck was fired by this gun, but neither could the gun be eliminated.

*11 [n.13] Because the gun was a revolver, it did not eject shell casings when fired. Shown this gun at trial, Alvarez testified it was consistent with the one used to shoot Jimenez, although he could not say it was the same gun. Shown a photograph of this gun by Byrd, Mayberry said it looked like the one he had seen on the night of the shooting.

[n.14] According to Scott D. Lewis, senior criminalist for the State of California, if someone used a handgun and then wiped it down to remove fingerprints, the handgun was left in a car and then picked up by a second individual and handed to a fifth individual, and the handgun was then stored in a cloth covered in bodily excretions, the chances of detecting the original handler of the gun would be almost zero. If the gun were wrapped in something that had semen and vaginal fluid on it, this could account for finding a profile with at least three contributors including a female.

On April 4, 2008, Byrd interviewed Flemming, who was in custody. Flemming related that he was at his mother's house all day on Easter, and that he did not leave until about midnight. When he left, he was with his friend Nellie, whose last name he did not know. They were in Nellie's vehicle, a light blue Ford Explorer, and they went driving around on the west side. Flemming first denied knowing the Liquor King's location, but later said he had probably gone there, but was not

sure because he had been drinking and passed out at one point. Flemming denied being at the Liquor King parking lot at approximately 11:45 p.m. on Easter or shooting anyone that night. He admitted knowing Lopez, but denied seeing him that day and said he had not seen him in about four months.

Byrd and Tacadena showed a photographic lineup containing Flemming's picture to several people. No one identified him.

DEFENSE EVIDENCE

Lopez

Crystal Torres was not a friend of either defendant. On March 23, 2008, she was not drinking. She heard an argument and saw an African-American male in a white T-shirt, arguing with a person in the victim's truck. The man in the white shirt was in front of the truck. He came around from the driver's side to the passenger side. Another male, a Hispanic who was wearing a sweater, seemed to be with him and came from the same spot as the African-American. The African-American male swung at the passenger in the truck, but Torres did not know if the blow connected. The passenger flinched back, and the driver yelled something. The passenger reached down and pulled out a red Club, which he swung halfway out the window. The African-American male moved back, and the passenger put the Club back in the truck. Someone yelled, "Pull it out." The African-American male stepped back and pulled out a gun. He fired, and the driver pulled the passenger down. The truck reversed and tried to get out, but there were too many cars, and the African-American male fired again. The truck then went forward and hit another truck and then struck a building.

Flemming

*12 Christopher DeLecce was cruising on the night of Easter Sunday, 2008. At about 10:00 p.m., he arrived in the area of Blackstone and

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Bullard to Herndon. Because his car was overheating, DeLecce pulled over by the Mexican restaurant in the same parking lot as the liquor store. There was a party atmosphere in the area, with numerous cars and people.

At some point, DeLecce heard a couple pops. He first thought it was firecrackers, but then saw a 1972 to 1974 white Chevrolet pickup "peeling out." It hit two parked cars and went into a building. DeLecce saw a person standing next to where the pickup would have been right before it peeled out. He had his arm extended and was shooting at the

back of the pickup. The person, an African-American male, had cornrows, a white T-shirt, and blue jeans. DeLecce could not tell if he was with anyone. The gun was small and chrome, and DeLecce believed about five shots were fired.

Nestor Cerna was cruising on Easter Sunday, 2008, and was in the parking lot at about 10:30 or 10:45 p.m., when he heard gunshots. Before the shots were fired, Cerna's attention was drawn to a 1969 or 1970 white Oldsmobile 442. An African-American male was associated with that car. He was wearing a white shirt and had beaded cornrows. [n.15] Cerna had seen him earlier in the evening when cruising on Kings Canyon; the person's partner, who was also African-American, was right behind him in a car that was the same year and body style. When the shooting happened, the vehicle was in the area of the shots, but no one was inside. The African-American male was around the crowd that was near the shooting. Seconds before the shooting, Cerna saw a white, lowered, older Chevrolet pickup that later crashed into a building, doing a burnout in the parking lot. [n.16] As this truck was pulling away, Cerna saw the smoke from its tires. He then heard shots and the truck crashed. The passenger jumped out and ran down the sidewalk by the Liquor King. He was not carrying anything and was waving his arms.

[n.15] When interviewed by detectives, Cerna

said this individual was possibly wearing a yellow shirt.

[n.16] Crystal Torres observed a white pickup smoking its tires. She was acquainted with the passenger. This was not the same truck as the victim's truck. It was the only vehicle she saw smoking its tires in the 25 to 30 minutes she was in the parking lot.

(See Resp't's Answer, Ex. A.)

DISCUSSION

I. Jurisdiction

Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); *Williams v. Taylor*, 529 U.S. 362, 375, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the U.S. Constitution. The challenged conviction arises out of Fresno County Superior Court, which is located within the jurisdiction of this Court. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(d).

*13 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its enactment. *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir.1997), cert. denied, 522 U.S. 1008, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997), quoting *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir.1996), cert. denied, 520 U.S. 1107, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997), overruled on other grounds by *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (holding AEDPA only applicable to cases filed after statute's enactment). The instant petition was filed after the enactment of the AEDPA and is therefore governed by its provisions.

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II. Standard of Review

Under the AEDPA, relitigation of any claim adjudicated on the merits in state court is barred unless a petitioner can show that the state court's adjudication of his claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *Harrington v. Richter*, — U.S. —, —, 131 S.Ct. 770, 784, 178 L.Ed.2d 624 (2011); *Lockyer*, 538 U.S. at 70–71; *Williams*, 529 U.S. at 413.

As a threshold matter, this Court must “first decide what constitutes ‘clearly established Federal law, as determined by the Supreme Court of the United States.’ ” *Lockyer*, 538 U.S. at 71, quoting 28 U.S.C. § 2254(d)(1). In ascertaining what is “clearly established Federal law,” this Court must look to the “holdings, as opposed to the dicta, of [the Supreme Court’s] decisions as of the time of the relevant state-court decision.” *Williams*, 529 U.S. at 412. “In other words, ‘clearly established Federal law’ under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.” *Id.* In addition, the Supreme Court decision must “‘squarely address [] the issue in th[e] case’ or establish a legal principle that ‘clearly extend[s]’ to a new context to the extent required by the Supreme Court in ... recent decisions”; otherwise, there is no clearly established Federal law for purposes of review under AEDPA. *Moses v. Payne*, 555 F.3d 742, 754 (9th Cir.2009), quoting *Wright v. Van Patten*, 552 U.S. 120, 125, 128 S.Ct. 743, 169 L.Ed.2d 583 (2008); see *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007); *Carey v. Musladin*, 549 U.S.

70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006). If no clearly established Federal law exists, the inquiry is at an end and the Court must defer to the state court's decision. *Carey*, 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482; *Wright*, 552 U.S. at 126; *Moses*, 555 F.3d at 760.

If the Court determines there is governing clearly established Federal law, the Court must then consider whether the state court's decision was “contrary to, or involved an unreasonable application of,” [the] clearly established Federal law.” *Lockyer*, 538 U.S. at 72, quoting 28 U.S.C. § 2254(d)(1). “Under the ‘contrary to’ clause, a federal habeas court may grant the writ 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] Court has on a set of materially indistinguishable facts.” *Williams*, 529 U.S. at 412–13; see also *Lockyer*, 538 U.S. at 72. “The word ‘contrary’ is commonly understood to mean ‘diametrically different,’ ‘opposite in character or nature,’ or ‘mutually opposed.’ ” *Williams*, 529 U.S. at 405, quoting Webster's Third New International Dictionary 495 (1976). “A state-court decision will certainly be contrary to [Supreme Court] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases.” *Id.* If the state court decision is “contrary to” clearly established Supreme Court precedent, the state decision is reviewed under the pre-AEDPA de novo standard. *Frantz v. Haze*, 533 F.3d 724, 735 (9th Cir.2008) (en banc).

*14 “Under the ‘reasonable application clause,’ a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.” *Williams*, 529 U.S. at 413. “[A] federal court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly.

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Rather, that application must also be unreasonable.” *Id.* at 411; *see also Lockyer*, 538 U.S. at 75–76. The writ may issue only “where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme Court’s] precedents.” *Harrington*, 131 S.Ct. at 784. In other words, so long as fairminded jurists could disagree on the correctness of the state courts decision, the decision cannot be considered unreasonable. *Id.* If the Court determines that the state court decision is objectively unreasonable, and the error is not structural, habeas relief is nonetheless unavailable unless the error had a substantial and injurious effect on the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

Petitioner has the burden of establishing that the decision of the state court is contrary to or involved an unreasonable application of United States Supreme Court precedent. *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir.1996). Although only Supreme Court law is binding on the states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a state court decision is objectively unreasonable. *See LaJoie v. Thompson*, 217 F.3d 663, 669 (9th Cir.2000); *Duhaim v. Ducharme*, 200 F.3d 597, 600–01 (9th Cir.1999).

AEDPA requires considerable deference to the state courts. “[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits,” and “evidence introduced in federal court has no bearing on 2254(d) (1) review.” *Cullen v. Pinholster*. —U.S. —, —, 131 S.Ct. 1388, 1398–99, 179 L.Ed.2d 557 (2011). “Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary.” *Miller–El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), *citing* 28 U.S.C. § 2254(e)(1). However, a state court factual finding is not entitled to deference if the relevant state court record is unavailable for the federal court to review. *Townsend v. Sain*, 372 U.S. 293, 319, 83 S.Ct. 745, 9 L.Ed.2d

770 (1963), *overruled by, Keeney v. Tamayo–Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992).

II. Review of Claims

A. Failure to Dismiss Juror

Petitioner first alleges the trial court erred in violation of his constitutional rights by failing to discharge Juror # 3 in light of the juror’s purported bias and misconduct.

This claim was first presented on direct appeal to the Fifth DCA. The Fifth DCA denied the claim in a reasoned decision. (*See* Resp’t’s Answer, Ex. A.) Petitioner then raised the claim to the California Supreme Court in a petition for review. The California Supreme Court denied the claim without comment or citation of authority. (*See* Lodged Doc. No. 6.) When the California Supreme Court’s opinion is summary in nature, the Court must “look through” that decision to a court below that has issued a reasoned opinion. *Ylst v. Nunnemaker*, 501 U.S. 797, 804–05 & n. 3, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). In this case, the appellate court analyzed and rejected the claim as follows:

JUROR MISCONDUCT

*15 Defendants contend the trial court committed reversible error by refusing to discharge Juror No. 3 in light of the juror’s purported bias and misconduct. We conclude the court did not err. [n.21]

[n.21] We reject the Attorney General’s argument that defendant’s claim was forfeited by their failure to renew the motion to discharge Juror No. 3 after the trial court denied it without prejudice. Although, as a general proposition, a matter is not preserved for appellate review when a trial court denies a motion without prejudice and the motion is not renewed (*People v. Mitts* (2010) 48 Cal.4th 158, 170, 106 Cal.Rptr.3d 153, 226 P.3d 276), here, as will be apparent, the trial court’s comments

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made clear that the motion was denied unless something further arose. Since nothing did, it would have been futile for defendants to renew the motion at trial, and in any event, they renewed their challenge to Juror No. 3 in their motion for a new trial. (See, e.g., *People v. Carasi* (2008) 44 Cal.4th 1263, 1296, 82 Cal.Rptr.3d 265, 190 P.3d 616; *People v. Bell* (2007) 40 Cal.4th 582, 595, 54 Cal.Rptr.3d 453, 151 P.3d 292.) Accordingly, they did all that was necessary to preserve the issue for our review.

A. Background

July selection began on August 6, 2009. [n.22] Juror No. 3 was in the panel of prospective jurors sent to the courtroom on this date. [n.23] Because the only inquiry undertaken at the time was to be with respect to hardship, the prosecutor, with the court's approval, did not display his witness list. It is unclear whether Detective Byrd was seated at counsel table; if so, he was not introduced to the prospective jurors. Prospective jurors not excused for hardship were ordered to return on August 11.

[n.22] All dates in this section are to dates in 2009 unless otherwise stated.

[n.23] We are able to determine this by matching names on the confidential juror case information sheet dated August 6, 2009, to unredacted juror information that was initially contained in the record on appeal. The record on appeal sometimes refers to Juror No. 3 as “ * * * *20” and “ * * * *51.” To avoid confusion, we will consistently refer to the juror as Juror No. 3.

On August 11, Juror No. 3 was seated in the box. At some point, the parties' witness lists were displayed, and the court asked whether any of the prospective jurors in the box knew, were acquainted with, or had heard about, any of the potential witnesses. No one responded. Byrd was not present at this time. [n.24] At the conclusion of

its voir dire, the court asked if there were any reasons not mentioned that would cause any prospective juror to doubt that he or she could be completely fair and impartial to both sides. There was no response.

[n.24] It appears Byrd was on vacation from approximately August 10–14.

On the afternoon of August 12, the jury was empanelled and sworn. Among its preliminary instructions, the court admonished the jurors not to talk about the case with anyone; not to speak to any of the defendants, witnesses, or lawyers involved in the trial; and, if they received information about the case from a source outside the trial, even unintentionally, to not share the information with other jurors, but to let the court or bailiff know.

*16 On the morning of August 19, the prosecutor informed the court that Byrd reported having contact with someone he knew from a sister church, and that the person was one of the trial jurors. The court inquired of Byrd, who related: “His name is [redacted]. We don't know each other's names. We have one church and he goes to a sister church. At men's retreats any time there's a function where the churches get together, I mean, that's how I know him just from that and he recognized me right away. Again, we don't know each other's names. And he came [and] gave me a hug. Bless you. That type of thing. [¶] And I saw he had a juror tag and I said, Are you on a jury? And I said, What department? And he said, 72.” The court decided to address the matter at a more convenient time.

When the court excused the jury for lunch the next day, it asked Juror No. 3 to remain. This ensued:

“[THE COURT:] And Juror Number Three, I understand that you are familiar with Detective Byrd?”

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“JUROR SEAT NUMBER THREE: Slightly.

“THE COURT: And Detective Byrd had said ... that you belong to different branches of, is it the same church?

“JUROR SEAT NUMBER THREE: Yes.

“THE COURT: And that you have either seen him or talked to him or something along that line at a retreat?

“JUROR SEAT NUMBER THREE: Right. But that's as far as it goes.

“THE COURT: All right. And then apparently Detective Byrd is very diligent. He told us that you perhaps saw each other in the hallway [and] said, Hello. Hug. Said something like, Bless you, brother, and went on. He found out that you were a juror and ended the information [sic].

“JUROR SEAT NUMBER THREE: That was after the Bless you, brother. We were coming up the hallway, or actually the elevator, saw each other, said, Hello. What have you. Saw my badge. Said I was in Department 72. He said that's the case he's working. And I said, By the way, I know your name is Richard. What's your last name? And he said, Byrd. That's it.

“THE COURT: No. There's no fault here. We have to ask these questions. No, you shouldn't take offense at the questions or anything....

“JUROR SEAT NUMBER THREE: Well, I don't want anything taken out of context.

“THE COURT: No. There's not going to be anything taken out of context.

“All right.... Do you feel that there's anything about your relationship with Detective Byrd, who would be the chief investigating officer for the prosecution, do you think there's anything about your relationship ... that would get

in the way of you being fair to both sides?

“JUROR SEAT NUMBER THREE: None.

“THE COURT: All right.... [S]ometimes the chief investigating officer doesn't testify and sometimes they testify to very important things and I don't know what's going on [sic] happen here.

“JUROR SEAT NUMBER THREE: If I may intervene. At that moment when you were, I remember you saying that, you know, before jury selection. Well, see, at that time I didn't even know who he was other than just then when I see him visually then I knew who he was after the fact.

*17 “THE COURT: ... So the question is: Just assume that Detective Byrd becomes a witness in this matter, and let's assume he presents some pretty important testimony, is there anything about your relationship or your knowledge, or I should say acquaintance-ship with Detective Byrd that would cause you to give his testimony a leg up on any other witness?

“JUROR SEAT NUMBER THREE: None.

“THE COURT: Is there anything about your relationship that would cause you to have a notion that he's credible or would you be able to wait and hear and judge him by the standards, the same standards you would any other witness?

“JUROR SEAT NUMBER THREE: Same standards as anybody else. It's all what they put on here.” The court briefly met with the attorneys, then the following took place:

“THE COURT: [¶] ... [¶] After it was determined that you were a juror in this matter was there anything else said between you and Detective Byrd?

“JUROR SEAT NUMBER THREE: No, other

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than just yesterday morning just running into each other up here.

“THE COURT: All right. Any ... conversation about the case or anything?”

“JUROR SEAT NUMBER THREE: No. I was surprised to see him down in the elevator.”

After the juror was excused, Byrd was asked his recollection of what took place. This ensued:

“DETECTIVE BYRD: Basically Adam Mirelez was late for court. I went down to the first floor in order to look for him and I ran into, I didn't know his name at the time, but [Juror No. 3]. I saw him. He saw me. We instantly recognized each other and he gave me like a half hug. I noticed he was wearing a juror badge and I inquired asking him, Are you a juror? Or, You're a juror, where at? And he said, Department 72. I immediately recognized it was this courtroom and I told him at that time, That's my case that I'm on, and that he needed to immediately let the judge know that we know each other.

“And then I told him why I would also do the same and then he started just saying, Well, I didn't know. And I said, That's okay. You just need to let the judge know. And he said, then he told me, My name is [Juror No. 3] for when you talk to them, and that was it.

“THE COURT: All right. And the one thing I had sort of outlined ... was that the relationship was for some type of sister or brother church.

“DETECTIVE BYRD: It's exactly that. I attend Lighthouse Christian Fellowship in Madera and he attends in Fresno and now and then along with a couple others we have men's retreats or some type of revival occasionally where groups come together and that's where I recognized him from, and that's the extent of it. It would just be, How are you doing? How are you doing? That type of thing. We're there for a

church event and listen to pastors. That's the extent of it.

“THE COURT: Any questions?”

“MR. SCHWAB [counsel for co-defendant Lopez]: Did he express any opinions about the case?”

*18 “DETECTIVE BYRD: No, not at all.

“MS. MARTINEZ [counsel for Petitioner]: I just have a question for the court, which is: Did [Juror No. 3] let the court know about this encounter? Because I think we only heard it from Detective Byrd.

“THE COURT: I don't know. Nobody spoke to me so I'm unable to answer your question. I'll make inquiries and I don't know if we can. [¶] ... [¶] Because I have to figure out who the bailiff or clerk was. All right. So we'll make that determination with all things considered.”

The court asked counsel to reserve any arguments for a later time. On August 26, after Mayberry, Perez, and Seamster had testified concerning their interviews with Byrd and the court had determined that the recording of Seamster's interview would be played for the jury so they could judge when [sic] Byrd essentially put words in her mouth, the court allowed counsel to make any requests or argument with respect to Juror No. 3. This followed:

“MR. SCHWAB: Very briefly. We would just object to the juror continued [sic] to be seated.

“THE COURT: You're making a motion to have him removed for cause? I want to be clear. [¶] ... [¶]

“MR. SCHWAB: That is correct because of the nature of how he knows Mr. Byrd on a spiritual nature, on the spiritual retreats. He may hold somebody in higher esteem that he meets in that manner than he would just a police officer

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that's testifying on the stand. And we'll submit.

"MS. MARTINEZ: I would join [T]his wasn't, as often times happens, the juror will see a witness and maybe waive [sic] or something. I mean, he actually—I don't know which one came up to which one first, I think it was the juror hugged him and he said, God bless you. [¶] And so to me it was much more than that.... [¶] And then when we called the juror in he seemed very defensive.... The feeling I got is that he felt we were accusing him of something improper....

"And again, because I think it's much more than just knowing a witness and the fact that he actually touched him, hugged him, bothers me. That's much more than a simple hello. And I would ask that he be removed for those reasons. I don't know that he could be fair and objective.

"And given that Detective Byrd is the lead detective, he's been sitting here through the trial, I mean, it's not a come-in-and-out witness, it's someone I'm sure they can see each other from where they both sit. And that's a concern to me. [¶] ... [¶]

"MR. JENKINS [prosecutor]: [Juror No. 3] was pretty clear that he did not know Detective Byrd other than by sight, and he corroborated that with what the detective said, that they belonged to different branches of the same church. He did not know him and he was very clear that he would not give the detective's testimony any greater weight than any other witness. That's the same standard we use for every witness we put on the stand. And he seemed to be very forceful in his assertions that he would be fair.

*19 "THE COURT: Well, what we have here is, I think we have very clear evidence. Detective Byrd's testimony to me was much clearer as to the level of relationship.... [¶] But it's clear

... that there's a lack of relationship, ... it would be difficult to even call it an acquaintanceship.

"And ... Mr. Schwab's statements ... don't cause me to doubt the juror, but ... I had sort of the same concerns, but I don't know that it's the same speculations, ... but if it's premised on the conclusion that one religious man would be more inclined to believe another religious man, and I don't know that without some affirmative commentary or statements by someone involved in that particular relationship or acquaintance, ... it would be improper for me to ... draw that conclusion. I think I would be treading on thin ice were I to do that.

"I'm simply going to ... deny the motion at this point in time. I am cautious enough to continue to watch and to continue to be vigilant about any signs that I might see now or even in jury deliberations. I just don't feel that there's any motion.

"I simply think there's nothing there that I can use. But should there be something there or something added I would be inclined to go otherwise."

The trial court's refusal to discharge Juror No. 3 was subsequently presented as one of the grounds for the defense motion for a new trial. The court rejected the claim of error, observing: "[W]hat we heard from the juror in question left no possible grounds to excuse him short of us thinking to ourselves without any basis. Well, he must ... be a liar. And if his words ... were to be given any credence at all there were no legal grounds to excuse him and there was nothing to suggest otherwise that he wasn't telling the truth when he said those words. There was just nothing inherent in the statement that made it seem unbelievable."

B. Analysis

"An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial

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jury is one in which no member has been improperly influenced [citations] and every member is “ ‘capable and willing to decide the case solely on the evidence before it’ ” [citations].” (*In re Hamilton* (1999) 20 Cal.4th 273, 293–294, 84 Cal.Rptr.2d 403, 975 P.2d 600; see, e.g., *Tanner v. United States* (1987) 483 U.S. 107, 126, 107 S.Ct. 2739, 97 L.Ed.2d 90; *Ristaino v. Ross* (1976) 424 U.S. 589, 595, fn. 6, 96 S.Ct. 1017, 47 L.Ed.2d 258.) “ ‘ “Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.” [Citations.]’ [Citations.]” (*People v. Harris* (2008) 43 Cal.4th 1269, 1303, 78 Cal.Rptr.3d 295, 185 P.3d 727.) “Section 1089 authorizes the trial court to discharge a juror at any time before or after the final submission of the case to the jury if, upon good cause, the juror is ‘found to be unable to perform his or her duty.’ A trial court ‘has broad discretion to investigate and remove a juror in the midst of trial where it finds that, for any reason, the juror is no longer able or qualified to serve.’ [Citation.]” (*People v. Bennett* (2009) 45 Cal.4th 577, 621, 88 Cal.Rptr.3d 131, 199 P.3d 535.)

*20 While broad, however, the trial court’s discretion is not unlimited. (*People v. Roberts* (1992) 2 Cal.4th 271, 325, 6 Cal.Rptr.2d 276, 826 P.2d 274.) “ ‘Before an appellate court will find error in failing to excuse a seated juror, the juror’s inability to perform a juror’s functions must be shown by the record to be a ‘demonstrable reality.’ The court will not presume bias, and will uphold the trial court’s exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence.’ ” [Citations.]” (*People v. Martinez* (2010) 47 Cal.4th 911, 943, 105 Cal.Rptr.3d 131, 224 P.3d 877; see also *People v. Maury* (2003) 30 Cal.4th 342, 434, 133 Cal.Rptr.2d 561, 68 P.3d 1.) [n.25] These standards apply even where the asserted ground for

discharge is juror misconduct. (*People v. Ledesma* (2006) 39 Cal.4th 641, 743, 47 Cal.Rptr.3d 326, 140 P.3d 657; *People v. Miranda* (1987) 44 Cal.3d 57, 117, 241 Cal.Rptr. 594, 744 P.2d 1127, disapproved on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4, 269 Cal.Rptr. 269, 790 P.2d 676.)

[n.25] The California Supreme Court has clarified that “a somewhat stronger showing than what is ordinarily implied by [the abuse-of-discretion] standard of review is required” where the appellate court is examining a trial court’s decision to remove a juror. (*People v. Wilson* (2008) 44 Cal.4th 758, 821, 80 Cal.Rptr.3d 211, 187 P.3d 1041; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052, 63 Cal.Rptr.3d 82, 162 P.3d 596.) “Thus, a juror’s inability to perform as a juror must be shown as a ‘demonstrable reality’ [citation], which requires a ‘stronger evidentiary showing than mere substantial evidence’ [citation].” (*Wilson*, at p. 821, 80 Cal.Rptr.3d 211, 187 P.3d 1041.) Even so, the demonstrable reality standard does not involve the reweighing of evidence; rather, “[t]he inquiry is whether ‘the trial court’s conclusion is manifestly supported by evidence on which the court actually relied.’ [Citation.]” (*People v. Lomax* (2010) 49 Cal.4th 530, 589–590, 112 Cal.Rptr.3d 96, 234 P.3d 377, fn. omitted.) We need not decide whether this more stringent standard of review also applies where, as here, the trial court has denied a defendant’s challenge to a juror for bias. On the facts of this case, our analysis and conclusion are the same under either standard.

“[W]here a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance, ‘open to [corroboration by] sight, hearing, and the other senses’ [citation], which suggests a likelihood that one or more members of the jury were influenced by improper bias. [¶] When the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual

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or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors, the event is called juror misconduct. [Citations.] A sitting juror's involuntary exposure to events outside the trial evidence, even if not 'misconduct' in the pejorative sense, may require similar examination for probable prejudice. Such situations may include attempts by nonjurors to tamper with the jury, as by bribery or intimidation. [Citations.]” (*In re Hamilton*, *supra*, 20 Cal.4th at pp. 294–295, 84 Cal.Rptr.2d 403, 975 P.2d 600, fn. omitted.) Misconduct can be good cause for discharge of a juror under section 1089 (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 743, 47 Cal.Rptr.3d 326, 140 P.3d 657), even if it is “neutral” in the sense that it does not suggest bias toward either side (*People v. Daniels* (1991) 52 Cal.3d 815, 863–864, 277 Cal.Rptr. 122, 802 P.2d 906), but removal is not necessarily the remedy required in every case (see *People v. Guzman* (1977) 66 Cal.App.3d 549, 559, 136 Cal.Rptr. 163). In order for misconduct to constitute grounds to believe a juror will be unable to fulfill his or her functions as a juror, “such misconduct must be ‘serious and willful.’ [Citation.]” (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729, 104 Cal.Rptr.2d 726, quoting *People v. Daniels*, *supra*, at p. 864, 277 Cal.Rptr. 122, 802 P.2d 906.)

*21 “Misconduct by a juror raises a rebuttable presumption of prejudice. [Citation.] However, we will set aside a verdict only where there is a substantial likelihood of juror bias. [Citation.] We will find such bias if the misconduct is inherently and substantially likely to have influenced the jury. Alternatively, even if the misconduct is not inherently prejudicial, we will nonetheless find such bias if, after a review of the totality of the circumstances, a substantial likelihood of bias arose. [Citation.]” (*People v. Bennett*, *supra*, 45 Cal.4th at pp. 626–627, 88 Cal.Rptr.3d 131, 199 P.3d 535.) Stated conversely, “[a]ny presump-

tion of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant.” [Citation.]” (*In re Lucas* (2004) 33 Cal.4th 682, 696, 16 Cal.Rptr.3d 331, 94 P.3d 477.) “The presumption may be rebutted by proof that prejudice did not actually result. [Citation.]” (*People v. Mendoza* (2000) 24 Cal.4th 130, 195, 99 Cal.Rptr.2d 485, 6 P.3d 150.)

The existence of prejudice is a mixed question of law and fact that is subject to our independent determination. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 627, 88 Cal.Rptr.3d 131, 199 P.3d 535.) Nevertheless, we accept the trial court's factual findings and credibility determinations where they are supported by substantial evidence. (*Ibid.*) Here, it is apparent the trial court found Byrd and Juror No. 3 credible. Although a trial court's assessment of a juror's state of mind or a juror's declaration of impartiality are not necessarily dispositive (see, e.g., *Holbrook v. Flynn* (1986) 475 U.S. 560, 570, 106 S.Ct. 1340, 89 L.Ed.2d 525; *Irvin v. Dowd* (1961) 366 U.S. 717, 728, 81 S.Ct. 1639, 6 L.Ed.2d 751; *People v. San Nicolas* (2004) 34 Cal.4th 614, 646, 21 Cal.Rptr.3d 612, 101 P.3d 509; *People v. Williams* (1989) 48 Cal.3d 1112, 1129, 259 Cal.Rptr. 473, 774 P.2d 146, neither are they irrelevant (see, e.g., *Smith v. Phillips* (1982) 455 U.S. 209, 217, fn. 7, 102 S.Ct. 940, 71 L.Ed.2d 78).

We turn first to the issue of inherent bias. This requires us to ask whether the event was so inherently prejudicial that by its very nature it was likely to have influenced the vote of any juror. (See *People v. Nesler* (1997) 16 Cal.4th 561, 580, 66 Cal.Rptr.2d 454, 941 P.2d 87 (lead opn. of George, C.J.); cf. *People v. Danks* (2004) 32 Cal.4th 269, 305, 8 Cal.Rptr.3d 767, 82 P.3d 1249 [finding of inherently likely bias required

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only when extraneous information so prejudicial that erroneous introduction in trial would have warranted reversal.) The answer is no. Accordingly, “we now consider ‘the nature of the misconduct and the surrounding circumstances’ to determine whether it is substantially likely [any juror] was nevertheless actually biased as a result” of what occurred. (*Danks*, at p. 306, 8 Cal.Rptr.3d 767, 82 P.3d 1249.)

Bias in favor of or against a particular witness that renders a juror unable to fairly weigh that witness's testimony is grounds for that juror's discharge and replacement. (See *People v. Barnwell*, *supra*, 41 Cal.4th at p. 1051, 63 Cal.Rptr.3d 82, 162 P.3d 596.) Here, however, it would be speculative to assume Juror No. 3 was biased in favor of Byrd, or against defendants, when the record establishes merely that he and Byrd attended different branches of the same church and occasionally crossed paths at church retreats. (See *People v. Bennett*, *supra*, 45 Cal.4th at p. 621, 88 Cal.Rptr.3d 131, 199 P.3d 535 [trial court did not abuse its discretion in declining to excuse juror where record did not support defendant's speculation juror was biased].) It is apparent neither knew the other's name, and that they had very little interaction at those events. It is also apparent neither recognized the other in the courtroom before they ran into each other in the elevator.

*22 Lopez suggests the juror's testimony in this regard was disingenuous and that he “must have noticed” Byrd, “the designated investigating officer, seated next to the trial prosecutor,” but this is speculation. We do not know the seating arrangements in the courtroom or whether Byrd's face was clearly visible from Juror No. 3's position; Byrd apparently did not notice Juror No. 3, and we would hope jurors were more focused on the witnesses testifying than on other trial participants. Byrd himself did not take the witness stand for the first time until August 20, the day after he and Juror No. 3 came into contact. Fleming insists the two “obviously” had a “close re-

ligious relationship” as shown by the fact Juror No. 3 hugged Byrd and said, “ ‘Bless you, brother.’ ” However, we cannot consider the manner of greeting in isolation. In light of the testimony by Byrd and the juror that they barely knew each other, and the juror's emphatic insistence that he would judge Byrd's testimony by the same standards as any other witness and could be fair to both sides—testimony that was reasonably credited by the trial court (see *People v. Harris*, *supra*, 43 Cal.4th at pp. 1304–1305, 78 Cal.Rptr.3d 295, 185 P.3d 727; *People v. Beeler* (1995) 9 Cal.4th 953, 975, 39 Cal.Rptr.2d 607, 891 P.2d 153) —the record establishes nothing more than a standard greeting between members of the same religious denomination. The record does not suggest it was anything out of the ordinary or that it meant Juror No. 3 was likely to give Byrd's testimony more credence or weight than that of other witnesses.

Defendants argue that Juror No. 3's bias is apparent from his failure to report his contact with Byrd to the court, even though Byrd told him to do so. We believe defendants read too much into the record. Although it shows the court itself was not informed of the contact, it does not establish, with any certainty, that the juror never said anything to the bailiff or clerk. [n.26] In any event, Byrd was not in a position of authority over the juror. The court's preliminary instructions told jurors to inform the court or bailiff if they received information about the case from a source outside the trial. The record clearly shows Juror No. 3 and Byrd did not discuss the case itself. Moreover, it is apparent Juror No. 3 knew Byrd was going to report the incident and even gave Byrd his name for the purpose of doing so. It is also clear that the juror's defensiveness resulted from his awareness that he had violated the court's admonition not to speak to any of the witnesses, albeit inadvertently. Thus, we reject the notion that the juror demonstrated bias by intentionally concealing either his acquaintance with Byrd or the fact of their contact. (See *People v.*

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San Nicolas, *supra*, 34 Cal.4th at p. 644, 21 Cal.Rptr.3d 612, 101 P.3d 509; cf. *In re Hitchings* (1993) 6 Cal.4th 97, 119–120, 24 Cal.Rptr.2d 74, 860 P.2d 466; cf. *People v. Cochran* (1998) 62 Cal.App.4th 826, 830–831, 73 Cal.Rptr.2d 257 [presumption of prejudice rebutted, and defendant not deprived of fair trial, where two jurors disclosed after trial began that they knew relatives of victim; acquaintances were minimal, and each juror stated she could be fair and impartial].)

*23 [n.26] Even Byrd did not inform the court directly, but rather reported the contact to the prosecutor.

It is true that Juror No. 3 unintentionally violated the trial court's admonition not to speak to any of the witnesses involved in the trial. Discussing the case in violation of the court's admonition, or repeatedly and willfully violating the court's instructions, is serious misconduct that may constitute good cause for discharge. (*People v. Wilson*, *supra*, 44 Cal.4th at pp. 834–835, 80 Cal.Rptr.3d 211, 187 P.3d 1041; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 743, 47 Cal.Rptr.3d 326, 140 P.3d 657; *People v. Daniels*, *supra*, 52 Cal.3d at pp. 863–864, 277 Cal.Rptr. 122, 802 P.2d 906; *People v. Pierce* (1979) 24 Cal.3d 199, 205–207, 155 Cal.Rptr. 657, 595 P.2d 91.) That is not what happened here, however. “[W]hen the alleged misconduct involves an unauthorized communication with or by a juror, the presumption [of prejudice] does not arise unless there is a showing that the content of the communication was about the matter pending before the jury, i.e., the guilt or innocence of the defendant. [Citations.]” (*In re Hamilton*, *supra*, 20 Cal.4th at pp. 305–306, 84 Cal.Rptr.2d 403, 975 P.2d 600; *People v. Federico* (1981) 127 Cal.App.3d 20, 38, 179 Cal.Rptr. 315.)

The record before us establishes that Juror No. 3's acquaintance with Byrd, together with the circumstances surrounding their contact and the rev-

elation of that acquaintance to the court, “is not, judged objectively, ‘inherently and substantially likely to have influenced the juror.’ [Citation.] Nor does it objectively demonstrate a substantial likelihood, or even a reasonable possibility, of actual bias. [Citations.]” (*People v. Loker* (2008) 44 Cal.4th 691, 754–755, 80 Cal.Rptr.3d 630, 188 P.3d 580; see *People v. Danks*, *supra*, 32 Cal.4th at p. 305, 8 Cal.Rptr.3d 767, 82 P.3d 1249 [reviewing court will not reverse unanimous verdict merely because there is some possibility juror was improperly influenced].) Accordingly, any presumption of prejudice stands rebutted, and the trial court did not abuse its discretion in refusing to discharge Juror No. 3. (See *People v. Holloway* (2004) 33 Cal.4th 96, 126, 14 Cal.Rptr.3d 212, 91 P.3d 164; *In re Hamilton*, *supra*, 20 Cal.4th at p. 296, 84 Cal.Rptr.2d 403, 975 P.2d 600; *People v. Zapien* (1993) 4 Cal.4th 929, 997, 17 Cal.Rptr.2d 122, 846 P.2d 704.)

(See Resp't's Answer, Ex. A.)

“In all criminal prosecutions,” state and federal, “the accused shall enjoy the right to ... trial ... by an impartial jury,” U.S. Const., Amends. 6 and 14; see *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The Court recognizes the “wide discretion owed to trial courts when it comes to jury-related issues.” *Mu'Min v. Virginia*, 500 U.S. 415, 427–428, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991). A state trial court's finding of impartiality is “presumptively correct under 28 U.S.C. § 2254[(e)(1)].” *Smith v. Phillips*, 455 U.S. 209, 218, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). In this case, the trial judge, after questioning and observing both the officer and the juror, determined there was no evidence of any bias or misconduct. The court noted that the officer and the juror were very candid and sincere in their accounts of their chance meeting outside the courtroom. The court noted that the two individuals scarcely knew each other, and it would be difficult to even call their relationship an acquaintanceship. The juror stated he would be completely impartial, and the court found

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no reason to doubt him. The court was in the best position to judge the sincerity of the juror's claim of impartiality. Under AEDPA, a habeas petitioner bears the heavy burden of "rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Here, Petitioner has not presented any evidence to meet this burden. *See United States v. Quintero-Barraza*, 78 F.3d 1344, 1350 (9th Cir.1996). The claim should be rejected.

B. Admission of Surveillance Video and Photographs

*24 Petitioner next claims the trial court erred in admitting evidence in the form of a surveillance video and photographs acquired from that video.

This claim was also presented on direct appeal to the Fifth DCA where it was denied in a reasoned decision. (*See Resp't's Answer, Ex. A.*) Petitioner then raised the claim to the California Supreme Court where it was summarily denied. (*See Lodged Doc. No. 6.*) Therefore, the Court must "look through" the decision of the California Supreme Court to the reasoned decision of the appellate court. *Ylst*, 501 U.S. at 804-05 & n. 3. In rejecting the claim, the Fifth DCA stated:

ADMISSION OF SURVEILLANCE VIDEO AND PHOTOGRAPHS

Flemming contends the trial court erred by admitting into evidence a surveillance video from the Liquor King, and still photographs made from that video, because they were not adequately authenticated. Lopez joins in the argument. We conclude any error was harmless.

A. Background

Detective Miramontes testified that at some point, he contacted Liquor King to determine if there was a videotape of the events of Easter Sunday 2008. The clerk who was working at the store at the time said he did not know how to access the system to make a copy, but he would call someone who knew how. Miramontes then asked the person for a copy of the videotape of the surveillance inside the store or whatever he had.

This individual indicated at some point that he was the person who knew how to access the system. Miramontes recalled that he was either the store's owner or its manager, but did not document the person's name. Miramontes told the person what he needed, the person was given access to the store, and about 30 minutes later the person told Miramontes it was ready and gave him the videotape. Miramontes did not know if the person made a copy of the tape or handed over the original, and did not do anything to make sure it had not been altered in any way. He turned the tape over to Byrd.

Byrd testified that the videotape was represented to him as showing the interior of the Liquor King on the night of the shooting. Byrd had been inside the store. With respect to the date and time depicted on the tape, Byrd explained that whenever a purchase was rung up on the register, the register tape of the transaction, showing what was purchased and the date and time, was recorded on the video itself. The videotape, which he viewed, corresponded to the date of the shooting. With respect to the time, he somewhat confusingly stated, "And as far as the time, specifically when I saw what matched, what was being told of me it had the time of 23:24, which is 11:24 p.m."

Byrd explained that the police department's robbery unit had a machine for creating still photographs from videos. Byrd identified People's exhibits 85 and 86 as photographs he obtained from the surveillance video, and People's exhibits 87 and 88 as close-ups from the photographs.

At trial, no one directly identified Flemming as the shooter. Shown People's exhibit 87, which depicted an African-American male in a white sweater or similar garment, Mirelez testified that the white sweater was familiar to him, and that the person who pulled the gun had a sweater like that. When Janell Mayberry was shown the photograph, he said the person in it looked like Flemming, although he could not remember if Flemming was wearing that sweater on the night of the

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shooting. Shown People's exhibit 85 by the prosecutor, Kevin Tatum identified himself and Perez, although he could not identify the individual in white. He testified that the photograph showed the interior of the Liquor King, and that what it showed him wearing was consistent with what he wore on Easter Sunday. Shown People's exhibit 87, Tatum testified he recognized the same individual in white. It was Flemming, wearing a white sweater. Asked if that was how Flemming appeared on Easter Sunday 2008, Tatum stated he did not remember. Under cross-examination by Flemming's attorney, Tatum confirmed that he definitely recognized Flemming in the photograph, but not what he was wearing.

*25 Flemming subsequently objected to the playing of the surveillance videotape on the ground that a proper foundation had not been laid. Lopez joined in the objection. The court clarified that defendants were concerned with the mode of preparation, the circumstances by which it came into being, and the like. The prosecutor argued that the tape was self-authenticating; it showed the interior of the Liquor King and the individuals present, and one of the witnesses identified himself and said he was there. In addition, the tape showed the date and time the events were occurring. Further, Miramontes went to an employee and said he wanted the video surveillance, the employee said he would have to contact the right person, that person came and gave Miramontes the tape, and the tape corresponded to what it was supposed to be. Counsel for Flemming pointed out that dates could be changed. Counsel for Lopez argued that Miramontes did not do anything to find out if the tape was authentic or had been altered; hence, the tape was not sufficiently authenticated.

The court ruled that the tape did not self-authenticate, as there was nothing to show the time and date stamps were accurate or set correctly on the date in question. It then stated:

“On the other hand, there is ... slight authentic-

ation through the testimony of Miramontes[,] through the circumstances that he testified to[,] through the testimony of the several witnesses that identified that as being a photograph, People's 85, I believe, of the night in question. And ... at this point in time it is not admissible.

“Once the testimony of Detective Byrd comes out that the pictures came from the tape and ... the tape accurately represents the store and whatnot. I'm going to find that there is ... the minimum basis for this type of evidence, the standard for admissibility is very low. And ... the lack of proof goes to the weight rather than the admissibility of the evidence.” [n.17]

[n.17] Although the finality of the court's ruling is unclear in light of the testimony Byrd had already given, the court subsequently stated it had reserved ruling on the tape until after Byrd testified further concerning foundation. It granted defendants a continuing objection to the evidence.

Byrd subsequently testified that he received the videocassette from Miramontes at the scene. Byrd had asked Miramontes about surveillance videos from the Liquor King and other surveillance that might be around, which was how the tape came to be obtained. Byrd did not observe the tape being made or copied, so did not know if any alterations were made. He did not personally speak with anyone at Liquor King about the tape. He further testified, however, that he personally had been inside the Liquor King, and the cameras could be spotted inside the store. He had viewed the videotape on more than one occasion, and recognized it as depicting the Liquor King's interior. Byrd explained that Liquor King had four cameras in various areas around the store (one over the door, one behind the register, one in the corner facing the door on the opposite end wall, and one facing north and covering the office door at the far end of the store), and the system flashed from one camera to another. The tape ran at a high rate of speed, and so he had to pause it in or-

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der to advance one frame or camera at a time. Byrd further explained that the camera behind the register showed the receipt of any purchase being made, including the items being bought, the cost, and the date and time. Byrd's notes said the time stamped on the video was one hour ahead. He believed Miramontes was the source of that information, based on which Byrd believed the time shown on the video was not correct.

*26 Byrd testified that he spoke to Susanna Bosquez, who was the mother of Jimenez's child. After interviewing her on the night of events and then viewing the video, he recognized her in the video. This gave him a good way of knowing he was at the appropriate time aside from what appeared on the receipts. Insofar as Byrd knew, nobody gave specific times when they were in the store, but the date and time depicted on the video referred to the evening of the shooting. Based on the 911 call, the shooting occurred at 11:41 p.m., which was 23:41 in military time. The time at which Tatum identified himself and the others as being present was 23:24, roughly 19 minutes before the shooting was reported, if based on the time stamp on the video.

Asked if he felt with certainty that he knew the videotape accurately depicted the time of the incident, Byrd responded, "Based on the statements I received from people telling me when they were interviewed, when they were in the store, and that they entered the store I believe it to be fairly accurate." However, he did nothing to verify the authenticity of the tape or time shown with anyone responsible for the tape.

Byrd explained that he created the still photographs using a special VCR system possessed by the police department's robbery unit. The system allows detectives to freeze a surveillance video at the desired location and then copy a photograph of that spot. When Byrd interviewed Kevin Tatum on April 15, Tatum admitted being in the Liquor King on Easter Sunday 2008. Shown People's exhibit 85, Tatum identified himself in

the photograph. Tatum also identified others in the photograph, including Lopez and Perez, and said they were in the store at the same time he was. He also identified Flemming, although from a different photograph. (People's exhibit 87). Tatum mentioned that Flemming was wearing a white jacket.

The prosecutor subsequently moved the videotape and the photographs into evidence. Flemming objected to the tape, particularly because the time and date stamps were known to be inaccurate. Lopez joined, and also argued that there had not been a proper foundation laid not so much as to the video's authenticity, but as to its reliability. The prosecutor responded that the foundation had been laid for the tape being what it purported to be: The individuals who were asked for the surveillance tape had the apparent ability to provide it in response to the request; Byrd had viewed the tape and it corresponded to what he viewed at the scene and what witnesses told him; and Tatum identified individuals, including himself, on the tape.

The court ruled the video was admissible. [n.18] Leaving aside the time and date stamps, it found that the testimonies of Miramontes, Byrd, and the other witnesses combined to establish that the tape depicted the Liquor King at a point in time during the events on the evening at issue. With respect to the accuracy of the timing of the tape, the court found that the witnesses' testimony provided a rough but inaccurate timeline, and that no evidence had been presented to the jury to establish that the time and date stamps were what they purported to be. The court was not persuaded the time and date stamps were accurate; no testimony had been offered on that point, and counsel were free to argue the matter to the jury. In the court's view, however, there was sufficient foundation to admit the tape, as the witnesses adequately established that the pictures on the tape "were a result of their adventures on that night and the late evening hours sometime before the

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shooting.” Because the photographs were, according to Byrd’s testimony, accurate copies that he made from the tape, and the tape was admitted, the photographs were also admitted.

*27 [n.18] Because the videotape (People’s exhibit 97) was damaged during trial, a DVD copy was substituted (People’s exhibit 100).

Portions of the video were subsequently shown to the jury, with Byrd identifying various persons, including the individual Tatum said was Flemming. At one point, counsel for Flemming asked what time the portion started. Byrd responded that the video was stamped 23:23, which was 11:23 p.m., but that it was either 10:23 p.m. or 11:23 p.m. On another portion of the video, a receipt was shown. It bore the date March 23, 2008, and the time of 23:23. When counsel for Flemming asked Byrd, “And you don’t know, sitting there, that that’s accurate?” the court interjected, “Correct. We’ve now established that.”

During her summation, counsel for Flemming stated she did not contest the fact that Flemming was at the Liquor King sometime on the night of the shooting, but she argued there were several African-American men there, Flemming was not the only one in a white shirt, and the prosecutor failed to prove he was the shooter. Flemming’s attorney also pointed out the problems with the tape, including that the police did not have the name of the person who made it and did not know if it was altered, and the fact the time stamp was an hour off. The prosecutor responded by listing the various witnesses who placed Flemming at the Liquor King. He also argued that assuming the tape was an hour off, nothing changed: Flemming and his friends were still in the parking lot, and Flemming was still wearing a white sweater.

Defendants subsequently moved for a new trial, in part based on the admission of the videotape and photographs. The motion was denied.

B. Analysis

Only relevant evidence is admissible. (Evid.Code, § 350; *People v. Lucas* (1995) 12 Cal.4th 415, 466, 48 Cal.Rptr.2d 525, 907 P.2d 373.) A writing is relevant only if it is shown to be authentic, since, without proof of authenticity, it has no tendency in reason to prove or disprove a fact at issue in the case. (*People v. Beckley* (2010) 185 Cal.App.4th 509, 518, 110 Cal.Rptr.3d 362; *Poland v. Department of Motor Vehicles* (1995) 34 Cal.App.4th 1128, 1135, 40 Cal.Rptr.2d 693; see Evid.Code, § 210.) [n.19] “[I]n some legal systems it is assumed that documents are what they purport to be, unless shown to be otherwise. With us it is the other way around.” (*McAllister v. George* (1977) 73 Cal.App.3d 258, 262, 140 Cal.Rptr. 702.) Accordingly, authentication of a writing is required before either the writing or secondary evidence of its content may be received into evidence. (Evid.Code, § 1401.) “Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.” (*Id.*, § 1400.) “A video recording is authenticated by testimony or other evidence ‘that it accurately depicts what it purports to show.’ [Citation.]” (*People v. Mayfield* (1997) 14 Cal.4th 668, 747, 60 Cal.Rptr.2d 1, 928 P.2d 485.) “Circumstantial evidence, content and location are all valid means of authentication [citations.]” (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383, 108 Cal.Rptr.2d 809.)

*28 [n.19] The video recording and photographs at issue here each constitute a “writing” under the Evidence Code. (Evid.Code, § 250; *People v. Rich* (1988) 45 Cal.3d 1036, 1086, fn. 12, 248 Cal.Rptr. 510, 755 P.2d 960; *People v. Beckley*, *supra*, 185 Cal.App.4th at p. 514, 110 Cal.Rptr.3d 362.)

The authenticity of a writing is a preliminary fact that must be proven before the proffered

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evidence is admissible. (Evid.Code, § 403, subd. (a)(3); *People v. Phillips* (1985) 41 Cal.3d 29, 76, 222 Cal.Rptr. 127, 711 P.2d 423 (plur. opn. of Reynoso, J.)) “When, as here, the relevance of proffered evidence depends upon the existence of a foundational fact, the proffered evidence is inadmissible unless the trial court determines it ‘is sufficient to permit the jury to find the preliminary fact true by a preponderance of the evidence.’ [Citations.]” (*People v. Tafoya* (2007) 42 Cal.4th 147, 165, 64 Cal.Rptr.3d 163, 164 P.3d 590; Evid.Code, § 403, subd. (a)(1).) “In other words ... there [must] be sufficient evidence to enable a reasonable jury to conclude that it is more probable that the fact exists than that it does not. [Citations.]” (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61, 98 Cal.Rptr.2d 911.) “The court should exclude the proffered evidence only if the ‘showing of preliminary facts is too weak to support a favorable determination by the jury.’ [Citations.]” (*People v. Lucas, supra*, 12 Cal.4th at p. 466, 48 Cal.Rptr.2d 525, 907 P.2d 373.) “As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the [writing’s] weight as evidence, not its admissibility. [Citations.]” (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321, 94 Cal.Rptr.3d 198 & cases cited.) A trial court’s ruling on the sufficiency of the foundational evidence is reviewed for abuse of discretion (*People v. Tafoya, supra*, 42 Cal.4th at p. 165, 64 Cal.Rptr.3d 163, 164 P.3d 590; *People v. Lucas, supra*, 12 Cal.4th at p. 466, 48 Cal.Rptr.2d 525, 907 P.2d 373), keeping in mind, of course, that the court has no discretion to admit irrelevant evidence (Evid.Code, § 350; *People v. Poggi* (1988) 45 Cal.3d 306, 323, 246 Cal.Rptr. 886, 753 P.2d 1082).

“The general rule is that photographs are admissible when it is shown that they are correct reproductions of what they purport to show. This is usually shown by the testimony of the one who took the picture. However, this is not necessary

and it is well settled that the showing may be made by the testimony of anyone who knows that the picture correctly depicts what it purports to represent.” (*People v. Doggett* (1948) 83 Cal.App.2d 405, 409, 188 P.2d 792; see also *People v. Bowley* (1963) 59 Cal.2d 855, 859, 31 Cal.Rptr. 471, 382 P.2d 591 [testimony of person present when film made that film accurately depicts what it purports to show is legally sufficient foundation for admission].) Indeed, videotapes or photographs from surveillance cameras at commercial establishments are typically admitted into evidence despite the fact the photographer or videographer does not testify. Commonly, “[i]n those situations, a person testifies to being in the building and recounts the events depicted in the photographs. Courts have consistently held that such testimony establishes a sufficient foundation if the videotape is a “ ‘reasonable representation of that which it is alleged to portray.’ ” [Citations.]” (*People v. Khaled* (2010) 113 Cal.Rptr.3d 796, 186 Cal.App.4th Supp. 1, 5.)

*29 Here, Byrd’s testimony concerning the Liquor King’s interior and camera placement, combined with the statements made to him by, and/or testimony of, Bosquez, Tatum, and Perez concerning their presence in the store and who else was there, established a sufficient foundation that the videotape accurately depicted what it purported to show, namely the interior of the Liquor King on the night of the shooting. This is so despite the fact police should take care to ensure the authenticity of any photographic or video evidence they collect can be established, something that can be critical to prevent the admission of manipulated images, especially in light of the relative ease with which digital images today can be altered. (See *People v. Beckley, supra*, 185 Cal.App.4th at pp. 515–516, 110 Cal.Rptr.3d 362.) Since Byrd himself made the photographs from the videotape, they were also sufficiently authenticated.

How close to the time of the shooting the

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videotape was made and the accuracy of the identifications of defendants were questions for the jury to decide. As the California Supreme Court has explained, “The trial court has the preliminary, but not the final, authority to determine the question of the existence of the preliminary fact. Unlike in other situations (see, e.g., *People v. Alcalá* (1992) 4 Cal.4th 742, 787, 15 Cal.Rptr.2d 432, 842 P.2d 1192 [preliminary fact of competence of witness is question for court under Evidence Code sections 402 and 405]), under Evidence Code section 403, ‘[t]he preliminary fact questions listed in subdivision (a) [of Evidence Code section 403] ... are not finally decided by the judge because they have been traditionally regarded as jury questions. The questions involve the credibility of testimony or the probative value of evidence that is admitted on the ultimate issues. It is the jury’s function to determine the effect and value of the evidence addressed to it... [T]he judge’s function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question. The “question of admissibility ... merges imperceptibly into the weight of the evidence, if admitted.’ ” [Citation.]” (*People v. Lucas, supra*, 12 Cal.4th at pp. 466–467, 48 Cal.Rptr.2d 525, 907 P.2d 373; see also *People v. Avery* (1950) 35 Cal.2d 487, 492, 218 P.2d 527 [uncertainty of witness’s recollection or lack of positiveness about identity of persons involved went to weight, not competency, of evidence].) The possible problems with the time shown on the video were fully placed before jurors, who could also assess the quality of the video and photographs and decide whether they were clear enough to permit accurate identifications.

Finally, even assuming error, it is not reasonably probable defendants would have obtained a more favorable result had the video and photographs not been admitted into evidence. (See *People v. Lucas, supra*, 12 Cal.4th at p. 468, 48 Cal.Rptr.2d 525, 907 P.2d 373 [applying test of *People v. Watson* (1956) 46 Cal.2d 818, 836];

People v. Beckley, supra, 185 Cal.App.4th at p. 517, 110 Cal.Rptr.3d 362 [same].) [n.20] Byrd’s testimony concerning what the witnesses (particularly Tatum and Perez) told him about who was present on the night of the shooting and what Flemming was wearing, was admissible independent of the video and photographs. Given the poor quality of the video and photographs (which we have viewed), jurors’ actually seeing those items added little or nothing, and certainly did not render the trial fundamentally unfair. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1142, 63 Cal.Rptr.3d 297, 163 P.3d 4, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, 87 Cal.Rptr.3d 209, 198 P.3d 11; *People v. Chatman* (2006) 38 Cal.4th 344, 371, 42 Cal.Rptr.3d 621, 133 P.3d 534; cf. *People v. Jimenez, supra*, 165 Cal.App.4th at pp. 81–82, 80 Cal.Rptr.3d 579.)

*30 [n.20] Defendants claim that prejudice from the evidence’s admission “must be assessed by the standard for federal constitutional error, namely whether the error was harmless beyond a reasonable doubt. [Citation.] We reject [defendants’] attempt ‘to inflate garden-variety evidentiary questions into constitutional ones.’ [Citation.] The proper standard for review of the assumed evidentiary error here is that for state law error under [*Watson*] (whether ‘it is reasonably probable that a result more favorable to [defendants] would have been reached in the absence of the error’).” (*People v. Bacon* (2010) 50 Cal.4th 1082, 1104, fn. 4, 116 Cal.Rptr.3d 723, 240 P.3d 204.)

In *People v. Jimenez* (2008) 165 Cal.App.4th 75, 81–82, 80 Cal.Rptr.3d 579, we applied the harmless-beyond-a-reasonable-doubt test, finding the erroneous admission of DNA evidence with an inadequate chain of custody to be so prejudicial as to have rendered the defendant’s trial fundamentally unfair and, thus, a violation of due process. The nature of the erroneously admitted evidence is much different in the present case,

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however; hence, *Jimenez* is distinguishable.

(See Resp't's Answer, Ex. A.)

Generally, the admissibility of evidence is a matter of state law, and is not reviewable in a federal habeas corpus proceeding. *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir.), *cert. denied*, 478 U.S. 1021, 106 S.Ct. 3336, 92 L.Ed.2d 741 (1985); *Henry v. Kernan*, 177 F.3d 1152, 1159 (9th Cir.1999) (admission of evidence in a state trial is not subject to federal habeas review unless it violates a specific constitutional right). However, there can be habeas relief for the admission of prejudicial evidence if the admission was fundamentally unfair and resulted in a denial of due process. *Estelle*, 502 U.S. at 72–73; *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); *Walters v. Maas*, 45 F.3d 1355, 1357 (9th Cir.1995); *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir.1993), *cert. denied*, 510 U.S. 1191, 114 S.Ct. 1294, 127 L.Ed.2d 647 (1994); *Gordon v. Duran*, 895 F.2d 610, 613 (9th Cir.1990). The failure to comply with state rules of evidence alone is neither a necessary nor a sufficient basis for granting federal habeas relief on due process grounds. *Jammal v. Van de Kamp*, 926 F.2d 918, 919–920 (9th Cir.1991).

Nevertheless, with respect to the admission of irrelevant or overtly prejudicial evidence, the Supreme Court has not squarely decided when the Constitution would overrule a discretionary ruling by a state court. *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir.2009) (Supreme Court “has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ”). Absent such “clearly established Federal law,” this Court cannot conclude that the state court's ruling was an “unreasonable application.” *Musladin*, 549 U.S. at 77. The claim should be denied.

C. Prosecutorial Misconduct and Ineffective Assist-

ance of Counsel

*31 In his final claim for relief, Petitioner alleges the prosecutor committed misconduct during opening statement when he used certain slides and photographs during a presentation. Petitioner contends these slides and photographs were unduly prejudicial and constituted a reprehensible method of inciting and persuading the jury. He further claims defense counsel was ineffective in failing to timely object.

Petitioner also presented this claim on direct appeal to the Fifth DCA, and it was rejected in a reasoned decision. (See Resp't's Answer, Ex. A.) Petitioner then raised the claim to the California Supreme Court where it was summarily denied. (See Lodged Doc. No. 6.) The Court must “look through” the decision of the California Supreme Court to the reasoned decision of the appellate court. *Ylst*, 501 U.S. at 804–05 & n. 3. The Fifth DCA denied the claim as follows:

PROSECUTORIAL MISCONDUCT

A. Background

During his opening summation, the prosecutor displayed a lengthy PowerPoint presentation to the jury.[n.39] In addition to slides displaying applicable legal principles and portions of the evidence adduced at trial, the presentation included a slide reading, “A BLACK MALE MURDERED FIDEL JIMINEZ!” and “WHO IS THIS BLACK MALE? HOW DO WE FIND OUT?” Between the two statements were a large question mark, a close-up photograph of a bullet hole in Jimenez's vehicle, and a close-up photograph taken at autopsy of the right side of Jimenez's head and neck, in which the healing gunshot wound was visible. Amid further slides displaying witness statements and other evidence, the prosecutor included the same slide, but now with the statements, “A BLACK MALE MURDERED FIDEL JIMINEZ!” and “WHO IS THIS BLACK MALE?” and with the question mark turned into a jigsaw puzzle with pieces beginning to be filled

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in so that a photograph of a person gradually emerged. In slide 65, the puzzle was completed; it was a photograph of Flemming. The slide stated, "A BLACK MALE MURDERED FIDEL JIMINEZ!" and "HIS NAME IS COURTNEY FLEMMING." Flemming's photograph, the bullet hole, and the autopsy photograph were displayed again on slide 67, along with, "COURTNEY FLEMMING MURDERED FIDEL JIMINEZ!" and "We know this based on the Statements 'and lies' of his own friends." After further slides containing evidence and legal principles, the prosecutor presented a slide containing photographs of Flemming, the wound to Jimenez's head, and the gun found at Lopez's residence, with statements of what the prosecutor needed to prove, Flemming's alleged actions, and the purported proof. Slide 74 bore the statement, "COURTNEY FLEMMING MURDERED FIDEL JIMINEZ!" and juxtaposed a photograph of Flemming, a Liquor King surveillance photograph of an individual that purportedly was Flemming, a photograph of the gun found in Lopez's room and the shirt in which it was wrapped, and a close-up color autopsy photograph of the healing wound to Jimenez's head. Slide 78 substituted a photograph of Lopez for the surveillance photograph and stated, "COURTNEY FLEMMING MURDERED FIDEL JIMINEZ!" and "LUCIANO LOPEZ IS EQUALLY GUILTY." Additional slides set out further law and evidence, and the presentation concluded with a close-up photograph of the gun under the statement, "Courtney Flemming and Luciano Lopez Guilty of the senseless MURDER of FIDEL JIMENZ [sic]."

*32 [n.39] A copy of the presentation has been placed on CD and made part of the record on appeal. We have viewed the exhibit. In the descriptions that follow, we quote verbatim from the various slides. We recognize that some of the names are not spelled the same as in the trial transcript.

Court recessed for the day at the conclusion of

the prosecutor's opening argument. The next morning, Flemming's attorney objected to the PowerPoint presentation under Evidence Code section 352. Counsel stated: "I'm objecting to the scenes up there. My client, it was really reminiscent to me of the whole OJ thing. My client is on the screen next to a black revolver. The only Black guy. And then the autopsy photo of Fidel Jiminez, it's intended to insight [sic], inflame the jury and I'm objecting under 352." Lopez's attorney also objected, under Evidence Code section 352, to use of the photographs, arguing, "What they do is use booking paragraphs [sic] or nefarious photographs used to inflame the passions of the jury." When the court asked whose booking photographs were used, counsel for Lopez responded that Lopez's booking photograph was used and he believed also Flemming's, and that the manner in which they were used was inflammatory.

After the prosecutor stated that the photographs used of the various witnesses were from the Department of Motor Vehicles, the court expressed some concern that they were not in evidence, but understood the point was to allow the jury to associate testimony with a face, and so found their use not prejudicial. The court rejected any notion that a photograph of a defendant placed against a weapon was any more prejudicial than the typical closing argument of a prosecutor. It concluded: "So the only slight concerns I have are using matters that are not in evidence. And at this point in time it's too late to object and if at some appropriate time you want to make a motion for new trial, I'll tell you now my inclination is to deny it."

Flemming raised the issue again in his new trial motion, in which Lopez joined. Flemming pointed specifically to slide 74 (the juxtaposed photographs of Flemming, the video surveillance, the gun, and Jimenez's head), and asserted that use of the slide, the purpose of which was to inflame the jury, constituted a reprehensible method of per-

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suading the jury. At the hearing on the motion, Flemming's attorney argued:

"I thought the use, especially on Power Point and it's on, I don't know, a ten foot wall and it's amplified and it ... reminded me of the O.J. Simpson cases where I thought it was used to inflame the jury. I thought it was somewhat racist. Actually, I thought it was racist putting my client's face in a photo that was never admitted before the jury. It just looked very sinister.

"Next to a revolver. A revolver that ... it was never established that the bullet in Mr. Jimenez came from that revolver yet the revolver is there. "My client's black face in front of a jury. It was very menacing and the fact that [the prosecutor] propped [sic] the photo of Mr. Jimenez, just the ear with ... the bullet wound entry, I think all was designed to prejudice the jury, to inflame the jury. I found it highly offensive. I hope that everybody else did too.

*33 "And that was my objection. I just thought that it was reprehensible how he used the Power Point presentation for that purpose."

The prosecutor responded that nothing about Flemming's photograph suggested it was a booking photograph, and Flemming looked very similar to the way he looked in court. The prosecutor asserted that using the photograph was no different than using Flemming's name, and noted the jury had seen Flemming throughout the trial. The prosecutor reasoned that for purposes of argument, the photograph did not need to be in evidence because it was just pointing out the individual about whom the prosecutor was talking. As for the slide in its entirety, the prosecutor argued that it summarized the case against Flemming, did not contain any overly gruesome images, and was not designed to be racist or inflame the jury, but rather to argue that Flemming was the person who killed Jimenez.

In denying the motion, the court found it improper to show the jury a photograph that had not been received into evidence, but concluded the use of "this rather toned-down piece of unadmitted evidence" was insufficient to warrant a new trial. The court further found it "inconceivable ... to think that a picture of a Black man without more is in any way racist." The court found the slide as a whole did not "represent anything more than what could have been said orally," and that the photographs were put together in an attempt to be persuasive.

B. Analysis

Flemming now says the prosecutor committed intentional, prejudicial misconduct by using slide 74 in his closing argument. This is so, Flemming asserts, because use of the juxtaposed photographs was an improper appeal to the passions and prejudices of the jury. Lopez joins in the claim.

The applicable standards are settled. "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 when 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.' " [Citations.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 157, 74 Cal.Rptr.3d 454, 180 P.3d 224, disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22, 87 Cal.Rptr.3d 209, 198 P.3d 11.) Prosecutorial misconduct does not require a showing of bad faith or wrongful intent. (

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People v. Hoyos (2007) 41 Cal.4th 872, 924, fn. 36, 63 Cal.Rptr.3d 1, 162 P.3d 528, overruled on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 624–625, 130 Cal.Rptr.3d 590, 259 P.3d 1186; *People v. Hill* (1998) 17 Cal.4th 800, 822, 72 Cal.Rptr.2d 656, 952 P.2d 673.) Rather, “ ‘when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ [Citation.]” (*People v. Prieto* (2003) 30 Cal.4th 226, 260, 133 Cal.Rptr.2d 18, 66 P.3d 1123.)

*34 To preserve a claim of prosecutorial misconduct for appellate review, “a defendant must contemporaneously object and seek a jury admonition. [Citations.]” (*People v. Bonilla* (2007) 41 Cal.4th 313, 336, 60 Cal.Rptr.3d 209, 160 P.3d 84.) Arguments made in the context of a motion for new trial, or at a time when it is too late for the trial court, through admonition of the jury, to correct any error or mitigate any prejudice, do not constitute a timely objection. (*People v. Williams* (1997) 16 Cal.4th 153, 254, 66 Cal.Rptr.2d 123, 940 P.2d 710.)

Defendants recognize their trial attorneys failed to object in a timely manner to the asserted misconduct they now attempt to raise. Anticipating we will therefore find their claims forfeited, they assert their attorneys' inaction violated their constitutional right to the effective assistance of counsel. Although they are entitled to make such a claim (*People v. Lopez* (2008) 42 Cal.4th 960, 966, 71 Cal.Rptr.3d 253, 175 P.3d 4), the California Supreme Court has cautioned “that a defendant cannot automatically transform a forfeited claim into a cognizable one merely by asserting ineffective assistance of counsel. [Citation.]” (*People v. Thompson* (2010) 49 Cal.4th 79, 121, fn. 14, 109 Cal.Rptr.3d 549, 231 P.3d 289.) In any event, since either the prosecutor did not commit misconduct or any misconduct was harmless even absent an admonition to the jury, de-

fendants' claim fails, whether addressed as ineffectiveness of counsel or on the merits. (See *ibid.*; *People v. Young* (2005) 34 Cal.4th 1149, 1188, 24 Cal.Rptr.3d 112, 105 P.3d 487.)

“ [T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper.’ [Citation.]” (*People v. Panah* (2005) 35 Cal.4th 395, 463, 25 Cal.Rptr.3d 672, 107 P.3d 790.) It is for the jury to decide whether the inferences the prosecutor draws from the evidence are reasonable. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1146, 124 Cal.Rptr.2d 373, 52 P.3d 572.) A prosecutor may not, however, appeal to the sympathy or passions of the jury at the guilt phase of a trial. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250, 278 Cal.Rptr. 640, 805 P.2d 899.) “ ‘It is ... 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.]’ [Citations.]” (*People v. Redd* (2010) 48 Cal.4th 691, 742–743, 108 Cal.Rptr.3d 192, 229 P.3d 101 .)

We see no improper appeal to passion or prejudice here. The prosecutor's juxtaposition of the four photos was simply a dramatic, visual means by which to illustrate his argument that the evidence established Flemming shot and killed Jimenez. Contrary to defendants' oft-repeated assertion, the photographs themselves were not prejudicial, either considered alone or in combination. Three of the four photographs were in evidence, and the autopsy photo—the only one with any potential to generate an emotional reaction—did not depict Jimenez's body cut open, but simply showed a healing wound that was not the least bit gory-looking. [n.40] As the photographs were in evidence, “[t]he prosecutor cannot be faulted for

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misconduct because he referred to them, nor was he required to discuss his view of the case in clinical or detached detail. [Citations.]” (*People v. Panah*, *supra*, 35 Cal.4th at p. 463, 25 Cal.Rptr.3d 672, 107 P.3d 790.)

*35 [n.40] To the extent there was something on Jimenez’s neck that might have been mistaken for blood, Dr. Chambliss, who performed the autopsy, explained it was iodine or betadine and was related to the medical therapy Jimenez received while in the hospital.

The photographs of Flemming (and of Lopez in one of the other slides) were not in evidence. Assuming the prosecutor should not have used them in his argument (cf. *People v. Collins* (2010) 49 Cal.4th 175, 209, 110 Cal.Rptr.3d 384, 232 P.3d 32 [prosecutor may not assume or state facts not in evidence]), any misconduct was manifestly harmless under any standard. Nothing in either photograph suggested they were taken at the time defendants were booked and, insofar as the record shows, defendants looked virtually the same in the photographs as they did in court, with the exception, obviously, that their clothing was different. In addition, counsel for Flemming responded forcefully and effectively to the prosecutor’s use of the images in her closing argument. Moreover, the trial court instructed jurors not to let “bias, sympathy, prejudice or public opinion” influence their decision, that they were to decide the facts based only on the evidence, and that the attorneys’ remarks during closing arguments were not evidence. We presume the jury followed these instructions. (*People v. Martinez*, *supra*, 47 Cal.4th at p. 957, 105 Cal.Rptr.3d 131, 224 P.3d 877.) [n.41]

[n.41] In conjunction with several issues briefed by Lopez, defendants contend the trial errors cumulatively denied them their rights to due process and a fundamentally fair trial. Lopez’s briefing in this regard violates California Rules of Court, rule 8.204(a)(1)(B), which requires that each brief state each point under a

separate heading or subheading, by simply adding a paragraph asserting cumulative prejudice where purportedly applicable. Defendants also assert, again by way of Lopez’s brief, that several alleged errors violated the federal constitutional guarantee of substantive due process. The briefing on this issue, which again is not set out under a separate heading or subheading, simply consists of Lopez’s bald assertion, followed by the citations of several cases. There is no discussion of why substantive due process has allegedly been violated, or how the cases cited are applicable to defendant’s case. Simply stating a claim does not make it so.

In light of the foregoing, we decline to reach either claim. (See *People v. Wharton* (1991) 53 Cal.3d 522, 563, 280 Cal.Rptr. 631, 809 P.2d 290.) Were we to do so, however, we would reject both. (See, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 468, 127 Cal.Rptr.2d 544, 58 P.3d 391.)

(See Resp’t’s Answer, Ex. A.)

A petitioner is entitled to habeas corpus relief if the prosecutor’s misconduct “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). To constitute a due process violation, the prosecutorial misconduct must be “of sufficient significance to result in the denial of the defendant’s right to a fair trial.” *Greer v. Miller*, 485 U.S. 756, 765 (1987), quoting *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Any claim of prosecutorial misconduct must be reviewed within the context of the entire trial. *Id.* at 765–66; *United States v. Weitzenhoff*, 35 F.3d 1275, 1291 (9th Cir.1994). The court must keep in mind that “[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” and “the aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the ac-

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cused.” *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). “Improper argument does not, per se, violate a defendant’s constitutional rights.” *Thompson v. Borg*, 74 F.3d 1571, 1576 (9th Cir.1996), quoting *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir.1993). If prosecutorial misconduct is established, and it was constitutional error, the error must be evaluated pursuant to the harmless error test set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). See *Thompson*, 74 F.3d at 1577 (“Only if the argument were constitutional error would we have to decide whether the constitutional error was harmless.”)

*36 In this case, the prosecutor utilized six photographs which are the subject of this claim. Four of the six photographs were in evidence; thus, there can be no misconduct as to these photographs. As to the remaining two photographs (one of Petitioner and the other of codefendant Lopez), Petitioner fails to demonstrate misconduct by the prosecutor. As noted by Respondent, the photographs could not have been prejudicial. They depicted Petitioner and his co-defendant in virtually the same manner as they appeared in court, with the exception of their clothing. There was nothing inherently prejudicial about the photographs, such as might occur from a booking photograph. Also, Petitioner does not point to any Supreme Court authority which would forbid such evidence. As previously noted with respect to the admission of irrelevant or overtly prejudicial evidence, the Supreme Court has not squarely decided when the Constitution would overrule a discretionary ruling by a state court. *Holley*, 568 F.3d at 1101. Therefore, Petitioner fails to demonstrate that the state court rejection was contrary to, or an unreasonable application of, clearly established Supreme Court precedent.

Likewise, Petitioner’s claim of ineffective assistance of counsel must fail. It follows that if the prosecutor committed no misconduct, then any objection by defense counsel likely would have been denied. Counsel cannot be faulted for failing to

make a frivolous motion. See *Rupe v. Wood*, 93 F.3d 1434, 1444–45 (9th Cir.1996) (“[T]he failure to take a futile action can never be deficient performance.”), cert. denied, 519 U.S. 1142, 117 S.Ct. 1017, 136 L.Ed.2d 894 (1997); *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir.) (counsel is not obligated to raise frivolous motions, and failure to do so cannot constitute ineffective assistance of counsel), cert. denied, 513 U.S. 1001, 115 S.Ct. 513, 130 L.Ed.2d 420 (1994). Certainly, in light of the above, the state court’s conclusion that a rational attorney could have declined to raise an objection was not unreasonable. Therefore, the claim should be rejected.

RECOMMENDATION

Accordingly, the Court HEREBY RECOMMENDS that this action be DENIED WITH PREJUDICE.

This Findings and Recommendation is submitted to the Honorable Lawrence J. O’Neill, United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after service of the Findings and Recommendation, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served and filed within fourteen (14) days after service of the objections. The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.1991).

*37 IT IS SO ORDERED.

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Appendix B

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H

Only the Westlaw citation is currently available.

United States District Court, D. Hawai'i.
 Derrick SMITH, Plaintiff,
 v.
 State of HAWAII, et al., Defendants.

No. CV 06-00618 SOM-KSC.
 June 25, 2007.

*ORDER ADOPTING MAGISTRATE'S FINDINGS
 AND RECOMMENDATION*

SUSAN OKI MOLLWAY, United States District
 Judge.

*1 Findings and Recommendation having been
 filed and served on all parties on May 15, 2007, and
 no objections having been filed by any party,

IT IS HEREBY ORDERED AND ADJUDGED
 that, pursuant to Title 28, United States Code, Sec-
 tion 636(b)(1)(C) and Local Rule 74.2, the Findings
 and Recommendation are adopted as the opinion and
 order of this Court.

IT IS SO ORDERED.

*FINDINGS AND RECOMMENDATION TO
 DENY THE AMENDED PETITION*

KEVIN S.C. CHANG, United States Magistrate
 Judge.

Before the court is *pro se* Petitioner Derrick
 Smith's amended petition for a writ of habeas cor-
 pus brought pursuant to 28 U.S.C. § 2254. (Doc.
 No. 8.) The Amended Petition was referred to this
 court pursuant to 28 U.S.C. § 636(a). For the fol-
 lowing reasons, this court FINDS that Grounds One
 and Three are without merit and that Ground Two
 is procedurally barred from federal review. The
 court therefore RECOMMENDS that the Amended
 Petition be DENIED in its entirety.

BACKGROUND

Smith is challenging his August 23, 2004, con-
 viction in the Circuit Court of the First Circuit,
 State of Hawaii (circuit court), for second degree
 murder, in violation of Hawaii Revised Statutes §
 707-701.5 (1993). Smith was convicted of the
 murder of his infant son, Kelbey Bridenstine.

Smith directly appealed, raising three points of
 error: the circuit court erred by (1) admitting
 Smith's statement, uttered seven weeks before the
 baby died, "Do you want me to drop that baby over
 the balcony;" (2) admitting a full-length photograph
 of Smith into evidence; and (3) permitting the
 deputy prosecuting attorney ("DPA") to use a
 PowerPoint ^{FN1} slide presentation, amounting to
 prosecutorial misconduct, during opening and closing
 arguments, with (a) a photograph of the baby
 imprinted with the words, "My father killed me;"
 (b) autopsy photographs of the baby with allegedly
 inappropriate text; and © photographs of Smith
 with allegedly inappropriate text. (Resps.' Ex. R,
 "Opening Brief of Defendant-Appellant," 12-21.)

FN1. "PowerPoint" is a registered trade-
 mark of the Microsoft Corporation for its
 graphics presentation software.

On March 28, 2006, the Hawaii Supreme Court
 affirmed Smith's conviction by summary disposi-
 tion order. (Resps.' Ex. U.) Notice and Judgment on
 appeal was filed on April 12, 2006. (Resps.' Ex. V
 .) The record does not disclose whether Smith
 sought certiorari with the United States Supreme
 Court.

Smith commenced this action on November 20,
 2006, and filed the Amended Petition and Memor-
 andum in Support on December 19, 2006. (Doc.
 Nos. 1, 7 & 8.) Smith alleges that the circuit court
 violated his "due process rights to a fair trial," rais-
 ing three grounds for relief: the circuit court erred
 by (1) admitting his "misconst[r]ued [and] misinter-
 preted statement," uttered seven weeks before the
 baby's death, "Do you want me to drop that baby

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over the balcony?" (Ground One); (2) allowing a full-length photograph of Smith to be introduced and used at trial (Ground Two); and (3) permitting the DPA to use PowerPoint slides during opening statement and closing argument, some containing allegedly inappropriate text, of the newborn wrapped in a blanket, autopsy photographs of the baby, and the full-length photograph of Smith (Ground Three). (Pet.6-9.)

LEGAL STANDARD

*2 Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), habeas corpus relief may not be granted on any claim that was adjudicated on the merits in state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States" or the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)(2); *Williams v. Taylor*, 529 U.S. 362, 402-04 (2000).

"A decision is 'contrary to' federal law when a state court applies a rule of law different from that set forth" in Supreme Court holdings or when it makes a contrary determination based on " 'materially indistinguishable facts.' " *Earp v. Ornoski*, 431 F.3d 1158, 1182 (9th Cir.2005) (quoting *Williams*, 529 U.S. at 405-06). An "unreasonable application" occurs when the state court applies Supreme Court holdings to the facts of the petitioner's case in a manner that is "objectively unreasonable." *Alberni v. McDaniel*, 458 F.3d 860, 863 (9th Cir.2006). "Clearly established federal law 'as determined by the Supreme Court, refers to the holdings, as opposed to the dicta of [the Supreme Court's] decisions as of the time of the relevant state-court decision.' " *Earp*, 431 F.3d at 1182 (quoting *Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir.2004)) (internal citation omitted).

DISCUSSION

I. Trial Error as Opposed to Structural Error.

The court first addresses, and rejects, Smith's argument in his Reply Brief, that his claims regarding the admission and presentation of evidence to the jury must be reviewed as structural errors, requiring immediate reversal, rather than as trial errors subject to the harmless error standard. (*See* Reply 6-7.)

Constitutional violations are categorized as either trial error or structural error. *Arizona v. Fulminante*, 499 U.S. 279, 306-10 (1991). Trial errors "occur during the presentation of the case to the jury," and are amenable to harmless-error analysis because they can "be quantitatively assessed in the context of other evidence presented" to determine the effect on the trial. *Fulminante*, 499 U.S. at 307-308. The admission of an involuntary confession, or in fact, of any evidence at trial, is the quintessential definition of trial error, i.e., any submission that can easily be reviewed against the remainder of the evidence presented, to determine whether it had a harmless or prejudicial effect on the outcome of trial. *See id.* at 310.

In contrast, structural errors are "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," *id.* at 309, and require "automatic reversal of the conviction because they infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993). Examples of structural errors are: the complete denial of counsel at trial or sentencing^{FN2}; a biased trier-of-fact^{FN3}; the unlawful exclusion of members of the defendant's race from a jury^{FN4}; the denial of the right to self-representation at trial^{FN5}; and the denial of a public trial.^{FN6} These deprivations are "structural" because they affect the framework within which the trial proceeds, rather than simply an error in the trial process itself. *Fulminante*, 499 U.S. at 309-10.

FN2. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

FN3. *See Tumey v. Ohio*, 273 U.S. 510

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(1927).

FN4. See *Vasquez v. Hillery*, 474 U.S. 254 (1986).

FN5. See *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8 (1984).

FN6. See *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984).

*3 Smith's claims are clearly trial errors, challenging the admission or presentation of evidence during trial, and will be reviewed under *Brecht's* harmless error standard. See *Brecht*, 507 U.S. at 623 (holding that the limited scope of federal habeas review does not warrant relief unless trial errors had a "substantial and injurious effect or influence in determining the jury's verdict" and deprived the petitioner of a fair trial in violation of due process).

II. Ground One: Admission of Smith's Statement.

Smith argues that the circuit court erred by allowing testimony from the baby's mother, Erica Bridenstine, recounting a statement Smith made seven weeks before the baby died. Bridenstine testified that, during an argument a week after the baby was born, Smith said, "do you want me to drop that baby over the balcony?" (Resps.' Ex. I, 23.) Smith denied that he said this, alleging that he actually said that he would take the baby and drop him off in Brooklyn, where his mother resides. (Amd. Pet. 6; Resps.' Ex. L, 39-40.) He further argues that this admission "was irrelevant and unduly prejudicial and denied him of his due process right to a fair trial." (*Id.* 2.)

On direct appeal, Smith alleged that the admission of this testimony violated Hawaii Rules of Evidence 402^{FN7}, 403^{FN8}, and 404(b)^{FN9}, as well as his federal and state constitutional rights to due process and a fair and impartial trial. The Hawaii Supreme Court held that Smith failed to meet his burden of demonstrating that the circuit court abused its discretion by permitting the state-

ment. (Resps.' Ex. U, 2). The supreme court noted that the circuit court held a hearing on whether the statement should be allowed, expressly balanced the probative value of the statement against its prejudicial effect, and provided limiting instructions to the jury several times concerning the statement. (*Id.*)

FN7. Rule 402 provides:

Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible [.] All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

FN8. Rule 403 provides:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time[.] Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FN9. Rule 404(b) provides:

Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes[.]

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible where such evidence is probative of any other fact that is of consequence to the determination of the ac-

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tion, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

A state court's evidentiary ruling is not subject to federal habeas review unless the ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process. *See Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Drayden v. White*, 232 F.3d 704, 710 (9th Cir.2000) (stating that “[t]he improper admission of evidence does not violate the Due Process Clause unless it is clearly prejudicial and rendered the trial fundamentally unfair”) (internal quotation and citation omitted); *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir.1991). Even when evidence is erroneously admitted, a federal court cannot interfere absent some apparent violation of fundamental due process and the right to a fair trial. *See Hill v. United States*, 368 U.S. 424, 428 (1962); *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir.1993).

The due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991); *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir.1995). Generally, only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. *See Jammal*, 926 F.2d at 920.

*4 In order to obtain habeas relief on the basis of evidentiary error, petitioner must show that the error was one of constitutional dimension and that it was not harmless under *Brecht*, 507 U.S. at 629-30. Thus, the court must find that the error had “‘a substantial and injurious effect’ on the verdict.” *Dillard v. Roe*, 244 F.3d 758, 767 n. 7 (9th Cir.2001) (quoting *Brecht*, 507 U.S. at 623) (further quotations omitted).

At the hearing on the Motion in Limine # 5, the

DPA sought introduction of the statement to rebut Smith's defense that he accidentally dropped the baby, and to prove intent and knowledge. (*See Resps.' Ex. G.*, 22-23.) Smith objected, arguing the statement was too attenuated in time, having occurred seven weeks prior to the baby's death, to be probative of Smith's state of mind.

The circuit court carefully considered Bridenstine's testimony regarding Smith's statement and determined that Smith made the statement as testified to by Bridenstine, and that it was not too attenuated in time. The court concluded that it was reasonable to infer that Smith “asked the question because he was unhappy about the sacrifices” he was being required to make since the baby's birth, and was still unhappy during the seven weeks between the statement and the baby's death. (*Resps.' Ex. H* 10-11.)

The court next considered the need for the statement, finding that there was not “a plethora of evidence going to state of mind,” and that there was no sufficient alternative evidence available to support the DPA's theory, thus, finding substantial need for the statement. (*Resps.' Ex. H* 12.) The circuit court then examined the risks of unfair prejudice, confusion, or waste of time if the statement was introduced. The court concluded that, because the evidence was a statement, rather than an act, the likelihood of its being improperly used as proof of Smith's propensity to act in a certain way was minor. The court also found that, because a limiting instruction would be given to the jury, both orally and in the jury instructions, any danger of the statement inducing “overmastering hostility” in the jury was negligible. (*Id.*) The court therefore found that the possibility of unfair prejudice by introducing the statement was outweighed by its probative value.

As noted above, a federal habeas court has no authority to review challenges to state-court determinations of state-law questions. *Estelle*, 502 U.S. at 68. Habeas review is limited to determining whether a conviction violated the Constitution,

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laws, or treaties of the United States. 28 U.S.C. § 2241; *Rose v. Hodges*, 423 U.S. 19, 21 (1975). A federal habeas court “cannot review questions of state evidence law” and may only consider “whether the petitioner's conviction violated constitutional norms.” *Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir.1999). The circuit court's carefully considered admission of this statement was clearly not so arbitrary or prejudicial that it violated such constitutional norms.

*5 Although Smith insists that admitting the statement violated his constitutional rights, the record does not support the conclusion that the introduction of Smith's statement fatally infected the trial's fundamental fairness. Although the statement may have been damaging to Smith's defense, that fact alone does not render its admission unfair. Smith's statement was neither “macabre” nor “particularly inflammatory.” *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 898 (9th Cir.1996). Nor is there evidence in the record or other reason to believe that it rendered the jury incapable of rational thought. See *United States v. Johnson*, 820 F.2d 1065, 1069 (9th Cir.1987) (evidence is unfairly prejudicial if it “makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged”) (emphasis added) (citation omitted).

Defense counsel had the opportunity to cross-examine Bridenstine concerning the statement. In doing so, counsel adduced evidence that Smith had never harmed the baby, that Bridenstine was comfortable with Smith watching the baby, that when the statement was made it was Bridenstine who was angry, not Smith, and that even after the statement was made, Bridenstine was not alarmed or afraid to let Smith watch the baby. (Resps.' Ex. I, 32-33.) Smith also had the opportunity to personally rebut the statement during his own testimony, leaving it to the jury to decide which testimony was more credible. (Resps.' Ex. L, 39-40.)

Moreover, the circuit court gave several limiting instructions on this evidence to the jury. See *Walters*, 45 F.3d at 1357-58 (stating that the danger of unfair prejudice is reduced by court's limiting instruction that the evidence could be used only to show, *inter alia*, the absence of mistake or accident and not to show defendant's bad character.) Immediately following Bridenstine's testimony, the court instructed the jurors that the statement could not be used as character evidence against Smith, or as evidence that he later acted in conformity with the statement, and that it was admitted only to show “proof or lack of proof of a possible motive, intent, knowledge, or absence of mistake or accident.” (Resps.' Ex. H, 23-24.) The court repeated this admonition during final jury instructions. (Resps.' Ex. M, 28-29.)

Under these circumstances, the circuit court's decision to allow the jury to decide what weight to attach to Smith's statement was not inconsistent with the court's duty to protect the trial's fundamental fairness. The circuit court's decision, and the supreme court's affirmance, was neither contrary to nor an unreasonable application of federal law as set forth by the United States Supreme Court. Accordingly, Smith is not entitled to habeas relief on this basis.

III. Ground Two: Admission of Smith's Photograph.

*6 Smith claims that the circuit court erred by admitting his full-length photograph into evidence. Smith alleges that the photograph, admitted as State's Exhibit 25 at trial, was irrelevant and prejudicial and violated his rights to due process and a fair trial. Although Smith raised this claim on direct appeal, the supreme court rejected it as procedurally defaulted. The supreme court found that Smith's attorney did not object to the introduction of this particular photograph into evidence at trial, and had therefore waived any objection to it on appeal. (See Resps.' Ex. U, 2-3.)

A federal court is precluded from reviewing the merits of a claim when the state court has denied relief on the basis of an independent and adequate

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state procedural default such as a contemporaneous objection rule. *See Lee v. Kemna*, 534 U.S. 362, 375 (2001); *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). For the procedural default doctrine to apply, however, the state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default. *Hanson v. Mahoney*, 433 F.3d 1107, 1113 (9th Cir.2006) (citations omitted).

Generally, there is no procedural default unless "the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Coleman*, 501 U.S. at 735-36 (citation and quotation marks omitted). Nonetheless, an implied procedural default can occur when a petitioner fails to raise a claim at the state level and would be procedurally barred from presenting it if he returned to state court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999).

Procedural default can be excused when the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. If the petitioner can establish one of these exceptions, the federal court may consider the procedurally defaulted claim. *See id.*

To demonstrate cause, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (examples include government interference or reasonable unavailability of factual basis for claim). If the petitioner has not demonstrated cause for procedural default, the federal court need not consider the issue of prejudice. *Thomas v. Lewis*, 945 F.2d 1119, 1123 n. 10 (9th Cir.1991).

The Hawaii Supreme Court expressly barred Smith's claim regarding the full-length photograph, stating that "[i]t is axiomatic that a party must make

a specific objection in order to preserve a point of error on appeal." (Resps.' Ex. U, 3.) The supreme court relied on long-standing Hawaii evidentiary rules and case law to do so. *See Haw. R. Evid.* 103(a)(1) (1993); *State v. Long*, 48 P.3d 595, 600 (Haw.2002); *State v. Fox*, 760 P.2d 670, 675 (Haw.1988). This court finds that this procedural rule was clear, consistently applied, and well-established in Hawaii at the time of Smith's trial and appeal. (*See id.*)

*7 Smith was represented by counsel at trial and he makes no claim here, nor did he on appeal, that his counsel was ineffective to the extent of establishing cause for the error. Because Smith has never raised an ineffective assistance of counsel claim, he cannot use this as an excuse to establish cause for a procedural default in a federal habeas proceeding. *Carrier*, 477 U.S. at 488-89; *Eisermann v. Penarosa*, 33 F.Supp.2d 1269, 1275 (D.Haw.1999). Nor does Smith allege any other reason excusing his default. Because Smith has not established cause, this court need not examine whether he has demonstrated actual prejudice. *See Thomas*, 945 F.2d at 1123 n. 10.

Smith also fails to establish that he is actually innocent such that a failure to consider this claim will result in the fundamental miscarriage of justice. This exception "applies only when a constitutional violation probably has resulted in the conviction of one actually innocent of a crime and petitioner supplements his constitutional claim with a colorable showing of factual innocence[.]" *Casey v. Moore*, 386 F.3d 896, 921 n. 27 (9th Cir.2004). To establish actual innocence a petitioner must establish that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt in light of new evidence. *Schlup v. Delo*, 513 U.S. 298, 327 (1995); 28 U.S.C. § 2254(c)(2)(B); *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) ("[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence.... Given the rarity of [reliable] evidence [of actual innocence], in virtually every

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case, the allegation of actual innocence has been summarily rejected.”) (internal quotation marks and citations omitted). Smith has presented no new evidence whatsoever demonstrating his actual innocence. Nor can this court say that, but for the admission of this evidence, no reasonable juror would have convicted him. *Schlup*, 513 U.S. at 327. Accordingly, this claim is procedurally barred from federal review and should be denied.

IV. Ground Three: The PowerPoint Presentations.

Smith claims that his rights to due process and to a fair trial were violated by the DPA's PowerPoint presentation of photographs of the newborn baby wrapped in a blanket, autopsy photographs of the baby, and the full-length photograph of Smith discussed above, some with allegedly inappropriate text, during his opening statement and closing argument.

In reviewing this claim, the Hawaii Supreme Court noted that Smith had failed to object to most of these slides at trial, having only “specifically objected to the prosecution's use of the baby's photograph in its opening PowerPoint presentation.” (Resps.' Ex. U, 3 n. 6.) Despite Smith's failure to object to all of the slides, the supreme court determined that it could review Smith's allegations of prosecutorial misconduct under a plain error standard. (*Id.* (citing *State v. Wakisaka*, 78 P.3d 317, 326 (Haw.2003); *see also* Haw. R. Evid. 103(2)(d).)

*8 Clearly established federal law establishes that, for allegations of prosecutorial misconduct to succeed on a writ of habeas corpus, “it ‘is not enough that the prosecutors' remarks were undesirable or even universally condemned[,]’ [t]he relevant question is whether the prosecutors' comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’ “ *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citations omitted); *Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir.2005) (stating, “under *Darden*, the first issue is whether the prosecutor's remarks were improper and, if so, whether they infected the trial with unfairness.”). Thus, federal

habeas review for a claim of prosecutorial misconduct is “the narrow one of due process, and not the broad exercise of supervisory power.” *Darden*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. De-Christoforo*, 416 U.S. 637, 642 (1974)).

To determine if a petitioner's due process rights were violated, the court “must consider the probable effect of the prosecutor's [comments] on the jury's ability to judge the evidence fairly.” *United States v. Young*, 470 U.S. 1, 12 (1985). To do so, the prosecutor's remarks must be viewed in context. *See Boyde v. California*, 494 U.S. 370, 385 (1990); *United States v. Robinson*, 485 U.S. 25, 33-34 (1988); *Williams v. Borg*, 139 F.3d 737, 745 (9th Cir.1998). Although not limited to the following, factors to consider in this analysis are whether the prosecutor's comments manipulated or misstated the evidence; whether the trial court gave a curative instruction; and the weight of the evidence against the accused. *Darden*, 477 U.S. at 181-82.

A. Opening Statement

Prior to opening statements, the DPA provided the court with a hard copy of the PowerPoint slides he intended to use. (Resps.' Ex. AA.) The three pictures at issue here are: (1) State's Exhibit 25, the full-length photograph of Smith discussed above in § II; ^{FN10} (2) State's Exhibit 28, an autopsy photograph of the infant showing injuries to his nose and face; ^{FN11} and (3) State's Exhibit 40, a photograph of the infant as a newborn, wrapped in a blanket. ^{FN12} (*See* Resps.' Exs. W, Y, Z, & AA.)

FN10. Exhibit 25 was used in slides 9, 14, 25, 26, 28, and 30 in the DPA's opening presentation. (*See* Resps.' Ex. AA.)

FN11. Exhibit 28 was used in slides 32 and 36 in the DPA's opening presentation. (*See* Resps.' Ex. AA.)

FN12. Exhibit 40 was used in slides 2, 4, 5, 7, 13, and 20 in the DPA's opening presentation. (*See* Resps.' Ex. AA.)

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After viewing the copies of these slides and reading the DPA's opening statement, this court cannot find that the introduction of these photographs, whether by PowerPoint presentation or otherwise, was so improper as to render the trial fundamentally unfair.

The purpose of opening statement is "to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of evidence and testimony to the whole, it is not an occasion for argument." *United States v. Dinitz*, 424 U.S. 600, 612 (1976). The DPA's opening PowerPoint presentation clearly complied with those prescriptions. First, the photograph of Kelbey wrapped in a blanket, Exhibit 40, was accompanied by text communicating basic information about the child, his date of birth, his weight and length, and his general health. While, as the supreme court noted, the use of these slides may have engendered sympathy for the infant and his mother, it was not so overarching as to prejudice Smith's right to a fair trial. (See Resps.' Ex. U, 8-9.) The DPA's use of these slides did not misstate the expected evidence or constitute improper argument.

*9 Second, as noted above, Smith failed to raise an objection at trial to the introduction of his full-length photograph, thereby waiving any objection to it on appeal, or in this federal habeas action. Even if the objection had been preserved was now properly before the court, the introduction of the photograph did not constitute improper or inflammatory argument during the opening statement. The photograph simply shows Smith standing against a wall of the apartment where the baby was killed. The photo does not portray Smith in a demeaning or frightening manner. Moreover, the photo is useful in that it illustrates for the jury the distance between Smith's arm and the tile floor, which was an issue due to Smith's argument that he accidentally dropped the baby to the tile floor while holding the child on his forearm, perpendicular to the floor.

Nor does the accompanying text necessarily render the photograph improper or inflammatory.

Most of the text is a summary of the evidence that the DPA reasonably expected to be adduced at trial, including Smith's three dissimilar statements about what had happened. The only possibly questionable text was the photograph with "I should drop the baby off the balcony" imposed upon it. This statement somewhat mischaracterizes the testimony expected from Bridenstine, that Smith said "do you want me to drop the baby off the balcony." It is not, however, so different as to render the resulting conviction a denial of due process. See *Greer v. Miller*, 483 U.S. 756, 765 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Turner v. Calderon*, 281 F.3d 851, 868 (9th Cir.2002).

Finally, the two slides of the autopsy photograph of Kelbey, with text listing the extent of the injuries suffered, were not so inflammatory as to infect the whole trial and violate due process. See *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1466 (finding no denial of due process from admission of videotape of autopsy procedure). Neither the photograph itself, nor the written information conveyed on the slide, was so disturbing or gruesome as to warrant excluding the PowerPoint slides.^{FN13}

FN13. The court notes that in the majority of cases involving gruesome photographs or other demonstrative evidence, most courts have refused to overturn verdicts because of the introduction of such photographs. See, e.g., *Jones v. Butler*, 864 F.2d 348, 368 (5th Cir.1988) (photographs showed buttocks areas with blood trickling down from the genital area and of victim's legs spread apart showing genital area); *Schneider v. Delo*, 890 F.Supp. 791, 841 (E.D.Mo.1995), *aff'd.*, 85 F.3d 335 (8th Cir.1996) (gruesomeness of photos is directly attributable to the crime itself, and counsel's desire to stipulate to facts of death was irrelevant); *Odle v. Calderon*, 884 F.Supp. 1404, 1425 (N.D.Cal.1995); *Murray v. Delo*, 767 F.Supp. 975, 987 (E.D.Mo.1991) (photographs aided the jury

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in analyzing the oral testimony); *Williams v. Chrans*, 742 F.Supp. 472, 491 (N.D.Ill.1990), *aff'd*, 945 F.2d 926 (7th Cir.1991) (use of photos justified, in part, for demonstrating nature of force used on victim).

The record does not show that the trial judge abused his discretion in admitting these photos. This is made more clear when these photographs are taken in context. Just prior to the DPA's opening statement, the circuit court instructed the jurors that the opening statements of the parties were simply an introduction of what to expect at trial and were not to be confused with evidence. (Resps.' Ex. H, 20-21.) This court "must presume that jurors follow the court's instructions, absent extraordinary situations." *Tak Sun Tan*, 413 F.3d at 1115 (citing *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985)). Smith's arguments notwithstanding, this is not such an "extraordinary situation[]" where [the court] can lay aside the 'crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.' " *Id.* Smith has failed to show that the admission of these photos at opening statement rendered his trial fundamentally unfair.

B. Closing Argument

*10 Smith also alleges that the presentation of these photos on closing argument, including text imposed over Kelby's newborn photo, Exhibit 40, stating "My father killed me," the autopsy photograph, Exhibit 28, with text stating "No accident," and repeated use of Smith's full-length photo, Exhibit 25, violated his rights to due process and a fair trial.^{FN14}

FN14. During closing argument, State's Exhibit 25 was used in slides 6, 7, 8, 9, 26, 29, 30, and 31; State's Exhibit 28 was used in slides 3, 10, and 34; and State's Exhibit 40 was used in slide 2. (See Resps.' Ex. BB.)

At trial, Smith placed great weight on the pos-

sibility that the text "My father killed me," on Kelbey's photo would make it appear that Kelbey was attesting to that fact. In response, the DPA removed the quotation marks from the photograph, and made clear in his accompanying argument that, in fact, the baby was unable to testify or to tell the jury what had happened. (See Resps.' Ex. M, 43-45.) On appeal, Smith argued that *all* of these slides, with their accompanying text, "crossed the line between permissible and impermissible argument, as the photographs served no useful or explanatory purpose but rather only served to inflame the jury's emotions." (Resps.' Ex. R, 33.) The Hawaii Supreme Court disagreed, holding that the PowerPoint presentation did not amount to prosecutorial misconduct.

First, attorneys have great latitude in the presentation of their closing arguments. *Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir.1996). Second, evidence which is probative of an element of the crime may be introduced whether or not that element is specifically contested by the defense. *Estelle v. McGuire*, 502 U.S. 62, 69-70 (1991). These photos were all relevant to elements of the crime, such as intent, motive, absence of mistake, cause of death, etc., which the DPA was obligated to prove.

Third, the autopsy photograph with the imposed text "No Accident," seen three times in the closing presentation, were not so improper and inflammatory as to deny Smith fundamental due process. As noted above, the photo itself is not particularly gruesome, and the text simply supports the DPA's argument that the injuries were not accidental, but intentional. *See supra*, n. 13. (noting that evidence decidedly more disturbing than this one were not excluded from evidence in other cases).

As for the other two photos, of newborn Kelbey wrapped in a blanket with the statement "My father killed me," and Smith standing against a wall, this court is convinced that they only supported the reasonable inferences that the DPA had put forth during trial, and were not unduly prejudicial.

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As noted above, the photo of Kelbey might have engendered sympathy for the baby and his mother, but not to such an extent as to infect the trial with overarching hostility toward Smith. And the photos of Smith have no such impact, and are probative of the issue of cause of death and lack of mistake or accident.

Nor did the DPA use these photographs or their text improperly, either to vouch for the credibility of a government witness or to offer the DPA's personal opinion on Smith's culpability. *See United States v. Young*, 470 U.S. 1, 19 (1985). Neither did the DPA misstate or manipulate the evidence by presenting these photos and their text.

*11 Moreover, the circuit court instructed the jurors that their decision was to be based only on the evidence produced in court, defining that evidence as witness testimony and exhibits. (Resps.' Ex. M, 24-31.) The jurors were specifically admonished that the lawyers' statements, and the visual evidence (i.e. the PowerPoint presentations) during opening and closing argument were not evidence. (*Id.* 24, 39.) Furthermore, they were instructed not to be "influenced by sympathy or prejudice." (*Id.* 25.) These admonishments and instructions significantly limited any possible prejudice caused by the photograph's or their text. *See, e.g., Furman v. Wood*, 190 F.3d 1002, 1006 (9th Cir.1999) (upholding the state court's ruling that the prosecutor's improper statements did not render trial fundamentally unfair because the prosecutor also told the jury that his arguments were not evidence, and because the government presented a strong case against the defendant); *Hall v. Whitley*, 935 F.2d 164, 165-66 (9th Cir.1991) (holding that the prosecutor's improper comments were isolated moments in a three day trial, and their effect was mitigated by the judge's instructions that closing arguments were not evidence, and the strong proof of the defendant's guilt).

Additionally, the great weight of the other evidence presented against Smith, including his conflicting statements, the unlikelihood that the baby's serious and multiple injuries resulted from a

single accidental fall, as Smith posited, and the fact that Smith was the only person with the baby at the time of death, militates in favor of a finding of no prosecutorial misconduct here.

In summary, the photographs and text presented on the DPA's opening and closing arguments neither misstated the evidence nor inflamed the passions of the jury. The circuit court carefully instructed the jury several times on the weight to be accorded the DPA's PowerPoint presentations. The evidence presented against Smith was substantial. Analyzed in this context, the introduction of these photos did not amount to prosecutorial misconduct. *See Darden*, 477 U.S. at 181-82. Accordingly, this claim should be denied.

CONCLUSION

The court FINDS that Smith is not entitled to habeas relief because he has failed to demonstrate that the Hawaii Supreme Court's conclusion on the merits of his direct appeal was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent, or was based on an unreasonable determination of the facts. Accordingly, the court RECOMMENDS that the Amended Petition be DENIED.

IT IS SO FOUND AND RECOMMENDED.

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Appendix C

Westlaw

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Only the Westlaw citation is currently available.

United States District Court,
C.D. California.
Patrick James SANTOS, Jr., Petitioner,
v.
Ken CLARK, Respondent.

No. CV 09–3617–JSL (PJW).
June 28, 2011.

Patrick James Santos, Jr., Calipatria, CA, pro se.

Stephanie A. Miyoshi, CAAG—Office of Attorney
General of California, Los Angeles, CA, for Re-
spondent.

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE
PATRICK J. WALSH, United States Magistrate
Judge.

*1 This Report and Recommendation is sub-
mitted to the Hon. J. Spencer Letts, United States
District Judge, pursuant to 28 U.S.C. § 636 and
General Order 05–07 of the United States District
Court for the Central District of California. For the
reasons discussed below, it is recommended that
the Petition be denied and the action be dismissed
with prejudice.

I.

SUMMARY OF PROCEEDINGS

A. *State Court Proceedings*

In 2005, Petitioner was found guilty by a jury
in Los Angeles County Superior Court of first de-
gree murder. (Clerk's Transcript (“CT”) 250.) The
jury also found true gun and gang enhancements.
(CT 250–51.) The court sentenced him to 50 years
to life in prison. (CT 266–67.)

Petitioner appealed to the California Court of
Appeal, which affirmed the judgment. (Lodged
Document Nos. 1–3.) He then filed a petition for re-

view in the California Supreme Court, which was
summarily denied. (Lodged Document Nos. 4–5.)
Thereafter, he filed habeas corpus petitions in the
Los Angeles County Superior Court, the California
Court of Appeal, and the California Supreme Court,
all of which were denied. (Lodged Document Nos.
6–10.)

B. *Federal Court Proceedings*

On May 1, 2009, Petitioner, proceeding pro se,
filed a Petition for Writ of Habeas Corpus
(“Petition”) in this court, pursuant to 28 U.S.C. §
2254, raising the following claims:

1. The trial court violated Petitioner's right to be present at all critical stages of the proceeding when the jury was allowed to secretly exit the courthouse.
2. The trial court violated Petitioner's due process right to investigate juror misconduct by allowing the jury to secretly exit the courthouse.
3. Petitioner's appellate counsel failed to give Petitioner a copy of all relevant transcripts and court documents.
4. The prosecution willfully lost or destroyed exculpatory evidence.
5. Petitioner's trial counsel was ineffective.
6. The prosecutor committed misconduct by misstating the law, using improper exhibits, and secreting a material witness.
7. The prosecutor's use of gang evidence violated Petitioner's right to a fair trial.
8. The trial court imposed an excessive restitution fee without a proper hearing.

(Petition at 5–6i.^{FN1})

FN1. The Court has numbered the un-
numbered pages following page five as

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pages 6a through 6i.

II.

STATEMENT OF FACTS

The following statement of facts was taken verbatim from the California Court of Appeal's opinion affirming Petitioner's conviction:

[Enrique Ruiz] Olvera, working as a security guard at the El Dorado Swap Meet, died from a gunshot received during a robbery of a jewelry store. The robbery was planned and committed by members of "66," a subset of East Coast Crips. [Petitioner], a "66" member, confessed to his role in the robbery and identified the other participating gang members. Expert testimony was presented to establish that the robbery and murder were committed for the benefit of a criminal street gang.

(Lodged Document No. 3 at 3.)

III.

STANDARD OF REVIEW

*2 The standard of review in this case is set forth in 28 U.S.C. § 2254:

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

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly

established federal law if it applies a rule that contradicts Supreme Court case law or if it reaches a conclusion different from the Supreme Court's in a case that involves facts that are materially indistinguishable. *Premo v. Moore*, — U.S. —, —, 131 S.Ct. 733, 743, 178 L.Ed.2d 649 (2011) (citing *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002)). To establish that the state court unreasonably applied federal law, a petitioner must show that the state court's application of Supreme Court precedent to the facts of his case was not only incorrect but objectively unreasonable. *Renico v. Lett*, — U.S. —, —, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010). Where no decision of the Supreme Court has squarely decided an issue, a state court's adjudication of that issue cannot result in a decision that is contrary to, or an unreasonable application of, Supreme Court precedent. See *Harrington v. Richter*, — U.S. —, —, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011).

Petitioner raised Grounds One and Two in his petition for review in the California Supreme Court, but that court did not explain its reasons for denying them. (Lodged Document No. 5.) The appellate court, however, did. (Lodged Document No. 3.) This Court presumes that the state supreme court rejected Petitioner's claims for the same reasons the state appellate court did. In this situation, the Court looks to the appellate court's reasoning and will not disturb it unless it concludes that "fairminded jurists" would all agree that the decision was wrong. *Richter*, 131 S.Ct. at 786.

Petitioner raised Grounds Three through Eight in a habeas corpus petition in the California Supreme Court, but the court did not explain its reasons for denying them. (Lodged Document Nos. 9–10.) The Los Angeles County Superior Court and California Court of Appeal, however, did (Lodged Document Nos. 6, 8), which this Court presumes is the basis for the state supreme court's subsequent decision denying the claims. Because the superior court and the appellate court rejected Grounds Three, Four, Five, and Seven on the merits, this

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Court will uphold the findings unless the Court concludes that “fairminded jurists” would all agree that they were wrong. *See Richter*, 131 S.Ct. at 786. The superior court and the appellate court denied the remaining claims on procedural grounds, which, generally, bars Petitioner from challenging the state court's decision on these claims.

IV. DISCUSSION

A. *Jurors Exiting From Courthouse*

*3 In Grounds One and Two, Petitioner claims that his constitutional rights were violated when, following the return of the verdict, the trial court allowed the jurors to exit the courthouse through a back door without telling Petitioner and his counsel that the jurors were leaving. There is no merit to this claim.

After reaching the verdict, the jurors informed the clerk that they wished to leave the building without talking to anyone, i.e., the lawyers. (Reporter's Transcript (“RT”) 1209–12.) The verdict was then read in open court and the jury was polled. (RT 902–07.) The court instructed the jurors that they could now discuss the case with others if they desired, but were not required to. (RT 908.) Thereafter, the jurors were allowed to leave the courthouse through a private exit without Petitioner's or his attorney's knowledge. (RT 1202–03.) Because he had not been able to talk with the jurors after the verdict, Petitioner's counsel made a motion to have the court release the jurors' contact information so that he could contact them and ask about any juror misconduct. (RT 1202–05.) The court denied the motion, finding that the jurors collectively decided not to talk to anyone about the case and that the law supported honoring their request. (RT 1206–12.)

Petitioner first argues that the court's unilateral decision to allow the jurors to leave the courthouse through a non-public exit violated his right to be present at all critical stages of the proceedings. (Petition at 6a.) This claim, however, has been procedurally defaulted because, as explained by the

California Court of Appeal, Petitioner's counsel failed to object on that ground in the trial court. (Lodgment No. 3 at 5.) The rule cited by the appellate court is a part of California's contemporaneous objection rule, California Evidence Code § 353, which requires a defendant to make a specific and timely objection and secure a ruling from the trial court in order to preserve the issue for appeal. The Ninth Circuit has repeatedly upheld this rule in similar contexts. *See Paulino v. Castro*, 371 F.3d 1083, 1092–93 (9th Cir.2004); *Vansickel v. White*, 166 F.3d 953, 957–58 (9th Cir.1999).

Here, there is no dispute that Petitioner's counsel never objected to the court's decision to allow the jurors to leave the courthouse through a back door on the ground that it was a critical stage of the proceedings and, therefore, Petitioner and counsel had a right to be there. As such, Petitioner's claim is procedurally defaulted. Furthermore, Petitioner makes no credible argument, nor is any apparent, that cause and prejudice or a miscarriage of justice excuses the procedural default in this case. *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Noltie v. Peterson*, 9 F.3d 802, 804–05 (9th Cir.1993). For this reason, the claim is denied.

Petitioner also claims that the trial court's decision to allow the jury to secretly exit the building violated his due process right to investigate juror misconduct. (Petition at 6b.) As noted by the California Court of Appeal, however, there is no “deeply rooted right in this nation's history to question the jury about its deliberative process after the verdict.” (Lodged Document No. 3 at 13.) And, though the Constitution requires an impartial jury, *see Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), Petitioner has put forth nothing to suggest that the jury in this case committed misconduct. Petitioner's contention that the Constitution requires that he be permitted to confront and question jurors regarding their verdict under all circumstances is not only not supported by the law the weight of authority supports the con-

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trary position. *See, e.g., United States v. Chavis*, 772 F.2d 100, 110 (5th Cir.1985) (“In order to justify the extraordinary step of examining the jury concerning its verdict, a defendant must make a preliminary showing of misconduct on the part of the jury, or that the jury based its verdict on matters outside the record.”); *United States v. Moten*, 582 F.2d 654, 664 (2d Cir.1978) (“[T]he proper functioning of the jury system requires that the courts protect jurors from being ‘harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict.’ ” (quoting *McDonald v. Pless*, 238 U.S. 264, 267, 35 S.Ct. 783, 59 L.Ed. 1300 (1915))). Finally, and importantly, because the Supreme Court has never extended the right to an impartial jury to include the right to question jurors after they return a verdict, the California Court’s adjudication of this issue could not have been contrary to, or an unreasonable application of, Supreme Court precedent. *See Wright v. Van Patten*, 552 U.S. 120, 125–26, 128 S.Ct. 743, 169 L.Ed.2d 583 (2008); *Carey v. Musladin*, 549 U.S. 70, 77, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006). For these reasons, Petitioner’s claims fail.

B. Failure to Receive Transcripts

*4 In Ground Three, Petitioner claims that appellate counsel failed to give him copies of the trial transcripts and other court documents so that he could prepare a habeas corpus petition. (Petition at 6c.) This claim is not cognizable on federal habeas review, however, because indigent prisoners do not have a constitutional right to trial transcripts for collateral proceedings. *See United States v. MacCollom*, 426 U.S. 317, 329–30, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976) (Blackmun, J., concurring); *see also United States v. Losing*, 601 F.2d 351, 353 (8th Cir.1979) (“[A] prisoner has no absolute right to a transcript to assist him in the preparation of a collateral attack on his conviction, and that constitutional requirements are met by providing such materials only after judicial certification that they are required to decide the issues presented by a non-frivolous pending case.”); *United States v. Van*

Poyck, 980 F.Supp. 1108, 1111 n. 2 (C.D.Cal.1997) (“[I]t has been held that a prisoner does not have an absolute right to a trial transcript to assist him in preparation of a collateral attack on his conviction”). Nor has Petitioner explained what constitutional obligation mandated his attorney to provide these documents to him. Finally, even if his claim were cognizable, he has not suggested any prejudice from the lack of the transcripts and court documents. In fact, the Court has the transcripts and the court documents and has reviewed them in connection with this decision. Nothing in them suggests that Petitioner is not guilty or that he was denied a fair trial. As such, this claim does not warrant habeas relief.

C. Destruction of Evidence

In Ground Four, Petitioner claims that the prosecution willfully lost or destroyed exculpatory evidence. (Petition at 6d.) There is no merit to this claim.

The government’s duty to preserve evidence is limited to material evidence, the value of which is apparent at the time of its destruction, that is of such a nature that the defendant cannot obtain comparable evidence from other sources if that evidence is destroyed. *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). However, “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

Here, Petitioner complains that police failed to collect the pants the victim was wearing at the time he was shot to death and videotapes of the robbery-murder. (Petition at 6d.) Petitioner argues that this evidence would have supported his theory that the security guard shot himself with his own gun during the course of the robbery. (Petition at 6d.) This claim fails for several reasons. First, Petitioner presents no evidence that the police failed to preserve the victim’s pants or that videotapes of the

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robbery even existed. Assuming that such evidence existed and was not collected by the police, Petitioner has not demonstrated any bad faith on the part of the officers. Finally, Petitioner's argument that this evidence was exculpatory is completely speculative and rebutted by the evidence at trial.

*5 The gun found under the security guard's body was a .22-caliber, which the medical examiner testified could not have fired the shot that killed the victim because it was not powerful enough to have caused the victim's wounds. (RT 334-35, 645-47, 654-57; see also Lodged Document No. 7, Exh. C.) Moreover, Petitioner admitted to being at the scene of the crime and that his fellow gang members fired at the security guard several times during the robbery. (See CT 186-97.) Thus, there was no apparent exculpatory value in any videotapes or the victim's pants. For these reasons, too, this claim must fail.

Petitioner also contends that the police failed to check the victim's gun for fingerprints and to test it to see if it had been recently fired. There was no dispute, however, that the gun belonged to the security guard and, even assuming that it had been recently fired, it would not have proven that Petitioner and his accomplices did not shoot and kill the guard. The security guard's gun was too small to have caused the wound that killed the guard. Thus, Petitioner has not presented a plausible theory to explain how further investigation into these issues would have affected the outcome of this case. Accordingly, this claim does not merit relief.

D. Ineffective Assistance of Counsel

In Ground Five, Petitioner claims that he received ineffective assistance of counsel at trial. (Petition at 6d-6e.) There is no merit to this claim.

The Sixth Amendment right to counsel guarantees not only assistance, but effective assistance, of counsel. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on a claim of ineffective assistance of counsel, Petitioner must establish two things: (1)

counsel's performance fell below an "objective standard of reasonableness" under prevailing professional norms; and (2) the deficient performance prejudiced the defense, *i.e.*, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687-88, 694. A claim of ineffective assistance must be rejected upon finding *either* that counsel's performance was reasonable *or* that the alleged error was not prejudicial. *Id.* at 697.

Petitioner contends that counsel was ineffective for failing to object when the prosecutor argued in closing: "It doesn't matter which one of the participants, whether it is [Petitioner] or one of his fellow robbers. Doesn't matter who did the killing, nor does it matter whether or not the killing was intentional, unintentional, or accidental." (RT 728-29.) Petitioner argues that this was an incorrect statement of the law because it conflicted with his theory that the security guard accidentally shot himself to death. (Petition at 6e.)

Petitioner is wrong. It is clear from the context of the argument that the prosecutor was correctly explaining the felony-murder rule and how it would apply to Petitioner under the facts of this case. (See RT 727-29.) Moreover, defense counsel explained Petitioner's theory of the case and the jury was instructed that it should find Petitioner not guilty of murder if it believed that the victim's wound was self-inflicted. (RT 765-71; CT 243.) Thus, it was not a misstatement of the law and it did not improperly prejudice Petitioner's case. Accordingly, counsel was not ineffective for failing to object.

*6 Petitioner provides a laundry-list of other claims of ineffective assistance of counsel, which are vague, conclusory, and without explanation as to how they affected the outcome of his case. For example, he claims that counsel had not tried a case "in a long time," asked only a few questions of several witnesses, and failed to object to the prosecutor's gang references. He also complains that counsel failed to acquire "crucial evidence," advised Petitioner not to testify at trial, and failed to

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hire a ballistics expert. He does not explain, however, how other counsel, other evidence, or experts would have overcome the substantial evidence of Petitioner's guilt, which included his confession. Nor has Petitioner put forth any evidence supporting his theory that the victim shot himself, which was rejected by the jury. For these reasons, these claims are rejected. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir.1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.").

E. Prosecutorial Misconduct

In Ground Six, Petitioner claims that, in three instances, the prosecutor committed misconduct that prejudiced his case. (Petition at 6f–6g.) There is no merit to these claims.^{FN2}

FN2. Respondent argues that this claim is procedurally defaulted because it was not raised on appeal, as required under state law. Petitioner raised this claim for the first time on state habeas review and both the Los Angeles County Superior Court and the California Court of Appeal denied the claim because it could have been raised on appeal but was not, citing *In re Harris*, 5 Cal.4th 813, 21 Cal.Rptr.2d 373, 855 P.2d 391 (1993); *In re Dixon*, 41 Cal.2d 756, 264 P.2d 513 (1953); *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729 (1993); and *In re Waltreus*, 62 Cal.2d 218, 42 Cal.Rptr. 9, 397 P.2d 1001 (1965). (Lodged Document Nos. 6, 8.) The Court finds that the claim can be resolved more easily by addressing it on the merits than by examining the intricacies of the procedural bar and will, therefore, look past the procedural issues. *See Lambrix v. Singletary*, 520 U.S. 518, 525, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (explaining district court may address merits of habeas petition without reaching procedural issues where the interests of judicial economy are best served by doing so); *Franklin v. John-*

son, 290 F.3d 1223, 1232 (9th Cir.2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the [habeas petition], so it may well make sense in some instances to proceed to the merits if the result will be the same.").

A defendant's due process rights are violated if prosecutorial misconduct renders a trial fundamentally unfair. *Darden v. Wainwright*, 477 U.S. 168, 181–83, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In order to obtain habeas relief, however, a petitioner must also show that the prosecutorial misconduct he complains of had a substantial and injurious effect or influence in determining the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637–38, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *see also Shaw v. Terhune*, 380 F.3d 473, 478 (9th Cir.2004) (applying Brecht harmless error test to claim of prosecutorial misconduct).

Petitioner claims that the prosecutor committed misconduct when he argued to the jury that Petitioner was guilty of murder whether he pulled the trigger or one of his fellow gang members did and regardless of whether the killing was intentional or not. (*See* RT 727–29.) As discussed previously, however, the prosecutor was correctly stating the law under California's felony-murder rule and, thus, did not commit misconduct in his argument.

Petitioner contends that the prosecutor committed misconduct during closing argument by showing the jury images of the evidence that also included the words, "Patrick Santos is guilty." This was not improper. Prosecutors are afforded wide latitude in closing argument and may argue reasonable inferences from the evidence. *See Menendez v. Terhune*, 422 F.3d 1012, 1037 (9th Cir.2005); *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir.1997). The prosecutor's slides during closing, linking the evidence to a finding of guilt and stating that Petitioner was guilty, were well within the bounds of fair play and did not constitute misconduct. *See Berger v. United States*, 295 U.S. 78,

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88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) (allowing prosecutors to “strike hard blows” against a defendant).

*7 Finally, Petitioner claims that the prosecutor intentionally made a witness, police detective Kelle Baitts, unavailable to testify by placing him on administrative leave during the trial. Petitioner does not explain, however, how the prosecutor had control over the detective's leave status or why, after the prosecutor procured the detective's absence, Petitioner did not subpoena the detective to testify even if he was on leave. Thus, he has fallen far short of demonstrating misconduct on the prosecutor's behalf. Accordingly, this claim fails.

F. Evidentiary Error

In Ground Seven, Petitioner claims that the introduction of gang evidence violated his right to a fair trial. (Petition at 6h.) There is no merit to this claim.

The evidence of Petitioner's and the other robbers' gang membership was directly relevant to prove that the crimes were committed for the benefit of a criminal street gang pursuant to California Penal Code § 186.22(b). The admission of relevant evidence does not violate due process. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 67–70, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir.1993). Moreover, the jury was specifically instructed that the gang evidence could only be considered for determining whether the murder was committed for the benefit of the gang and could not be used to prove Petitioner's bad character or disposition to commit crimes. (CT 223.) “A jury is presumed to follow its instructions.” *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000); *see also Aguilar v. Alexander*, 125 F.3d 815, 820 (9th Cir.1997) (holding that juries are presumed to follow a court's limiting instructions). Thus, the Court presumes that the jury did not consider the gang evidence in deciding whether Petitioner had committed the murder and, therefore, Petitioner's right to a fair trial was not violated. Accordingly, Petitioner's claim fails.

tioner's claim fails.

G. Imposition of Restitution

In Ground Eight, Petitioner claims that the trial court imposed excessive restitution without a proper hearing. (Petition at 6i.) A petitioner cannot challenge a restitution order in a federal habeas corpus proceeding, however, because the order does not go to the validity or duration of his confinement. *See Bailey v. Hill*, 599 F.3d 976, 981–82 (9th Cir.2010); *United States v. Thiele*, 314 F.3d 399, 401 (9th Cir.2002). Accordingly, this claim is not cognizable and does not merit relief.

V.

RECOMMENDATION

For these reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation, and (2) directing that Judgment be entered denying the Petition and dismissing this case with prejudice.^{FN3}

FN3. The Court is not inclined to issue a Certificate of Appealability (“COA”) in this case. *See* Federal Rules Governing Section 2254 Cases, Rule 11 (“The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.”). If Petitioner believes that a COA should issue, he should explain why in his Objections to this Report and Recommendation.

C.D.Cal.,2011.

Santos v. Clark

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ANDREW HECHT,

Appellant.

DECLARATION OF
SERVICE

DAISY LOGO declares as follows:

On Thursday, March 14, 2013, I deposited into the United States

Mail, first-class postage prepaid and addressed as follows:

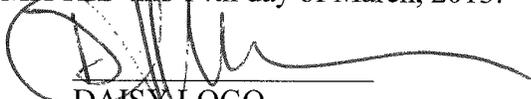
STEPHANIE CUNNINGHAM
ATTORNEY AT LAW
4616 25TH AVE NE, NO. 552
SEATTLE, WA 98105

Copies of the following documents:

- 1) Brief of Respondent
- 2) Declaration of Service

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

RESPECTFULLY SUBMITTED this 14th day of March, 2013.



DAISY LOGO
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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