(TEMP)(HC) Calderon-Silva v. Hollen

2015 | Cited 0 times | E.D. California | October 19, 2015

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MARCELINO CALDERON-SILVA,

Petitioner, v. K. HOLLEN, Warden,

Respondent.

No. 2: 14-cv-0052 GEB DAD P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding without counsel with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a judgment of conviction entered against him on November 18, 2011, in the Sacramento County Superior Court, on charges of assault with a deadly weapon by a life prisoner and possession of a sharp instrument by an inmate. Petitioner seeks federal habeas relief on the following grounds: (1) jury instruction error violated his right to due process; (2) the trial court abused its discretion in failing to strike one of his prior strike convictions in the furtherance of justice at the time of his sentencing; (3) the trial court violated his right to due process when it agreed to have him shackled during his trial; (4) his trial counsel rendered ineffective assistance; (5) the evidence introduced at his trial is insufficient to support his convictions; and (6) prosecutorial misconduct violated his right to due process. Upon careful consideration of the record and the applicable law, the undersigned denied. I. Background

conviction on appeal, the California Court of Appeal for the Third Appellate District provided the following factual summary:

Defendant Marcelino Silva, an inmate at Folsom State Prison serving a life term for murder, slashed a fellow inmate with a razor blade. A jury convicted defendant of assault with a deadly weapon with malice aforethought by a life prisoner (Pen. Code, 1

§ 4500) and possession of a sharp instrument by an inmate (§ 4502). The trial court found true allegations that defendant had suffered two prior strike convictions (§667, subds.(b)-(i); 1170.12) and sentenced him to 27 years to life in prison. He appealed. On appeal, defendant claims instructional error and that the trial court abused its discretion in failing to strike one of his strikes. Finding no

error, we shall affirm. FACTS Correctional Officer Randy Wahl was on duty in the yard at Folsom buildings. He called in an alarm over the radio. He ran toward the alley and ordered all inmates down. Defendant was running. Wahl stopped defendant, handcuffed him, and made a cursory search, but found no contraband. There appeared to be a blood stain on defendant s shirt and a cut on his right index finger. Officers responding to the alarm saw another inmate, Saustegui, on the ground bleeding from his face. Saustegui had open wound lacerations to the left side of his neck and his left cheek bone. His wounds required stitches. A razor blade from a disposable razor was found in the yard with wet blood on it. A security camera recorded the incident; the recording was played for the jury at trial. People v. Silva, No. C069793, 2012 WL 5077925 at *1 (Cal.App.3d Dist., Oct. 19, 2012). After the California Court of Appeal affirmed California

entitled after this court decides People v. Vargas /////

1 Further undesignated statutory references are to the Penal Code. Subsequently, petitioner filed a petition for writ of habeas corpus in the Sacramento County at court denied the petition on procedural

subsequently filed a petition for writ of habeas corpus in the California Court of Appeal for the Third Appellate District was denied with the court citing the decisions in In re Steele, 32 Cal.4th 682, 692 (2004) and In re Hillery, 202 Cal.App.2d 293 (1962), as well as Petitioner then filed a petition for writ of habeas corpus in the California Supreme Court.

defendant might be entitled after this court decides People v. Vargas Doc. 15.) Petitioner filed his federal habeas petition in this court on January 9, 2014. (ECF No. 1.) Respondent filed an answer on October 10, 2014, and petitioner filed a traverse on January 8, 2015. (ECF Nos. 17, 25.) II. Standards of Review Applicable to Habeas Corpus Claims An application for a writ of habeas corpus by a person in custody under a judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or application of state law. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010); Estelle v. McGuire, 502U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000). Title 28 U.S.C. § 2254(d) sets forth the following standards for granting federal habeas corpus relief:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or /////

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. For purposes of applying § 2254(d)(1), clearly established federal law consists of holdings of the United States Supreme Court at the time of the

last reasoned state court decision. Greene v. Fisher, ___ U.S. ___, ___, 132 S. Ct. 38, 44 (2011); Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011) (citing Williams v. Taylor, 529 U.S. 362, 405-06 (2000)). Circuit court precedent may be persuasive in determining what law is clearly established and whether a state court Stanley, 633 F.3d at 859 (quoting Maxwell v. Roe, 606 F.3d 561, 567 (9th Cir. 2010)). principle of Supreme Court jurisprudence into a specific legal rule that th[e] [Supreme] Court has Marshall v. Rodgers, ___ U.S. ___, ___, 133 S. Ct. 1446, 1450 (2013) (citing Parker v. Matthews, ___ U.S. ___, ___, 132 S. Ct. 2148, 2155 (2012)). Nor may it be used to

it would, if presented to th[e] [Supreme] Court, be accepted as correct. Id. Further, where courts Carey v. Musladin, 549 U.S. 70, 77 (2006).

contradicting a holding of the Supreme Court or reaches a result different from Supreme Court

Price v. Vincent, 538 U.S. 634, 640 (2003).

decisions, but unreasonably app 2

Lockyer v. Andrade, 538 U.S. 63, 75 (2003); Williams, 529 U.S. at 413; Chia v. Cambra, 360 F.3d 997, 1002 cause that court concludes in its independent judgment that the relevant state-court decision applied clearly 2 Under § 2254(d)(2), a state court decision based on a factual determination is not to be Stanley, 633 F.3d at 859 (quoting Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004)). established federal law erroneously or incorrectly. Rather, that application must also be Williams, 529 U.S. at 412. See also Schriro v. Landrigan, 550 U.S. 465, 473 (2007); Lockyer

Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).

lacking in justification that there was an error well understood and comprehended in existing law Richter, 562 U.S. at 103. Delgadillo v. Woodford,

527 F.3d 919, 925 (9th Cir. 2008); see also Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008)

2254(d)(1) error and that, if there is such error, we must decide the habeas petition by considering de novo the constitutional issues rais The court looks to the last reasoned state court decision as the basis for the state court judgment. Stanley, 633 F.3d at 859; Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). If the last reasoned state court decision adopts or substantially incorporates the reasoning from a previous state court decision, this court may consider both decisions to ascertain the reasoning of the last decision. Edwards v. Lamarque federal claim has been presented to a state court and the state court has denied relief, it may be

presumed that the state court adjudicated the claim on the merits in the absence of any indication or

state- Richter, 562 U.S. at 99. This presumption Id. at 785 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803

(1991)). Similarly, when a state court decision on does not expressly address a federal claim, a federal habeas court must presume, subject to rebuttal, that the federal claim was adjudicated on the merits. Johnson v. Williams, ___ U.S. ___, ___, 133 S. Ct. 1088, 1091 (2013). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under § 2254(d). Stanley, 633 F.3d at 860; Himes v. Thompson review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court deci Himes, 336 F.3d at 853. Where no

Richter, 562 U.S. at 98. A s Stancle v. Clay, 692 F.3d 948, 957 & n. 3 (9th Cir. 2012). While the federal court cannot analyze

just what the state court did when it issued a summary denial, the federal court must review the Richter, 562 U.S. at 98

have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior Id. at 102 nstrate Walker v. Martel, 709 F.3d 925, 939 (9th Cir. 2013) (quoting Richter, 562 U.S. at 98). When it is clear, however, that a state court has not reached the merits of a petit claim, the deferential standard set forth in 28 U.S.C. § 2254(d) does not apply and a federal habeas court must review the claim de novo. Stanley, 633 F.3d at 860; Reynoso v. Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006); Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003). ///// ///// ///// A. Jury Instruction Error In his first claim for federal habeas relief, petitioner argues that jury instruction error at his trial violated his federal constitutional rights. (ECF No. 1 at 4.) 3

Although petitioner does not elaborate on this claim in his habeas petition, he has clarified in his traverse that he is raising the same jury instruction claim that he raised on direct appeal. (ECF No. 25 at 10-13.) On appeal, petitioner argued that the trial court erred in instructing the jury at his trial on implied malice. (-11.) The California Court of Appeal rejected that argument on state law grounds, reasoning as follows:

Defendant contends it was error for the trial court to instruct the jury on implied malice. He argues the specific intent requirement of section 4500 cannot be satisfied by implied malice. He asserts He contends a violation of section 4500 where the victim does not die, like attempted murder, requires a specific intent to kill, a mental state inconsistent with implied malice. We are not persuaded by defendant attempt to analogize his assault charge to murder and attempted murder charges. Section 4500 is an assault statute, not a murder statute. (See People v. McNabb (1935) 3 Cal.2d 441, 458 [explaining that the predecessor protection to prisoners themselves against the assaults of the

vicious, and also to protect the officers who are required to mingle person of another with a deadly weapon or instrument, or by any means of force likely to p committed by a life-term inmate with malice aforethought. It does not require intent to kill. The subsequent death of the victim (within a year and a day) is relevant only in determining the penalty. If the victim dies, the punishment is death or life imprisonment without the possibility of parole; if the victim does not die, the punishment is life without the possibility of parole for nine years. (§ 4500.) The assault offense defined in section 4500 requires the specific intent of malice aforethought. (People v. Jeter (2005) 125 Cal.App.4th 1212, 1217 (Jeter).) in section 4500 have the same meaning as in sections 187 and 188. [Citations.] Thus the rules that have evolved regarding malice aforethought as an element in a charge of murder apply to section (People v. Chacon (1968) 69 Cal.2d 765, 781 (Chacon), 3 CM/ECF system and not to page numbers assigned by the parties.

disapproved on another ground in People v. Doolin (2009) 45 Cal.4th 390, 421, fn.22.) (People v. Nieto Benitez (1992) 4 Cal.4th 91, 102.) Under section 188, which defines malice aforethought for purposes there is manifested a deliberate intention unlawfully to take away the life of provocation appears, or when the circumstances attending the (§ 188.) statutory definition of implied malice has never proved of much (People v. Dellinger (1989) 49 Cal.3d 1212, 1217.) Our high court has nd a mental component. The physical component is satisfied by the [Citation.] The mental component is the the life of another and . . . (People v. Chun (2009) 45 Cal.4th 1172,

1181 (Chun).) as it has for murder convictions, requiring either an intent to kill or (Jeter, supra, 125 Cal.App.4th at p. 1216.) Here, the trial court instructed the jury in a manner consistent with this meaning - that a violation of section 4500 required a specific intent and the specific intent required would be explained in the instruction for that crime. The jury was then instructed in the language of CALCRIM No. 2720, that defendant ssault with a deadly weapon with malice aforethought, while serving a life sentence in violation of Penal The instruction set out the elements of the It then defined malice aforethought:

implied malice. Proof of either is sufficient to establish the state of mind required for this crime. [¶] The defendant acted with express malice if he unlawfully intended to kill the person assaulted. [¶] The defendant acted with implied malice if, one, he intentionally committed an act; two, the natural consequences of the act were dangerous to human life; three, at the time he acted, he knew his acts were dangerous to human life; and four, he deliberately acted

This definition of malice aforethought is the same as that required for murder. (See Chun, supra, 45 Cal.4th at p. 1181; CALCRIM No. 520.) Thus, in accordance with Chacon, supra, the trial court defined malice aforethought for purposes of section 4500 using the same definition applicable in murder cases. The inclusion of a definition of implied malice was proper; the trial court correctly instructed the jury. Silva, 2012 WL 5077925 at **1-3. In general, a challenge to jury instructions does not state a cognizable federal constitutional claim. McGuire, 502 U.S. at 72; Engle v. Isaac, 456 U.S. 107, 119 (1982); Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). In order to warrant federal

habeas

amendment. Cupp v. Naughten, 414 U.S. 141, 146 (1973). The appropriate inquiry when such a challenge is made in a federal habeas proceeding . . so infected Dixon v. Williams, 750 F.3d 1027, 1032 (9th Cir. 2014) (citations omitted). In making its determination, this court must Id. (quoting Boyde v. California, 494 U.S. 370, 378 (1990)). [N]ot every ambiguity, inconsistency, or Middleton v. McNeil, 541 U.S. 433, 437 (2004). Petitioner has failed to demonstrate that the decision of the California Court of Appeal rejecting his jury instruction claim was contrary to or an unreasonable application of federal law under the authorities cited above. This court is bound by the conclusion of the Court of Appeal that the jury instructions on the specific intent requirement of California Penal Code § 4500 were sufficient to satisfy the requirements of California law. Bradshaw v. Richey, 546 U.S. 74, 76 (2005) We have repeatedly held that a state court s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus. ; see also Matthews v, Holland, No.1:13-cv-0427 LJO MJS (HC), 2014 WL 5485712, at *19 (E.D. Cal. Oct. 29, 2014) (Concluding, in denying federal habeas relief, that California Penal Code § 4500 is a general intent crime and that its element of malice aforethought can be proven by either express or implied malice.)

Further, after a review of the record and the instructions as a whole, the undersigned also concludes that the giving of a jury instruction on implied malice did not render petitioner clause. Accordingly, petitioner is not entitled to federal habeas relief with respect to this claim of instructional error. B. Romero Motion In his second claim for federal habeas relief, petitioner argues that at the time of his sentencing the trial court abused its discretion in denying his motion to strike one of his prior pursuant to the decision in People v. Superior Court (Romero), 13 Cal.4th 497. (ECF No. 1 at 4; ECF No. 25 at 13-21.) Petitioner contends that the sentencing judge decision in this regard was based on regarding his previous convictions. (Id.) Petitioner raised this claim on direct appeal. The California Court of Appeal rejected

Defendant contends the trial court abused its discretion in refusing to strike one of defendant s prior strikes. While conceding a the spirit of the three strikes law. Defendant notes his two strikes - for murder and attempted murder - arose from a single incident, where he fired multiple times into a car containing boisterous men, killing one. He also argues a two-strike sentence of 18 years to life would be ample punishment for his crime. In the furtherance of justice, a trial court may strike or dismiss a prior conviction allegation. (§ 1385, subd. (a); People v. Superior Court (Romero strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously (People v. Williams (1998) 17 Cal.4th 148, 161.)

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A trial court s refusal to strike a prior conviction allegation is reviewed under the deferential abuse of discretion standard. (People v. Carmony (2004) 33 Cal.4th 367, 375 (Carmony).) carefully circumscribes the trial court s power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational Carmony, supra, 33 Cal.4th at p. 378.) Here, we find no abuse of discretion. That defendant s two strikes arose from the same brief crime spree does not require striking one of them. In People v. Benson (1998) 18 Cal.4th 24, 36, at footnote 8, our Supreme Court suggested there so closely connected - for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct - that a trial court would abuse its discretion under section 1385 if it failed to s two strikes did not arise from a single act; he fired a gun at least eight times, stopping to firing until one victim was dead and the other had escaped by crawling out of the other side of the car he was sitting in. Defendant s conduct constituted multiple acts of violence, properly resulting in multiple counts of conviction, properly resulting in two strikes. 4 As defendant acknowledges, the trial s Romero motion. The court considered that defendant s prior convictions all involved violence. In 1991, he repeatedly fired his gun into a car, committing murder. He had suffered two misdemeanor convictions for spousal abuse and battery. While in prison, he had several serious rule violations. His potential for violence was such as to require shackling at trial. His current conviction was for assault with malice, slashing his victim s throat, and the trial court believed from reviewing the recording that defendant intended to kill his victim. The purpose of sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony (§667, subd. (b); see People v. Strong (2001) 87 Cal.App.4th 328, 338.) Defendant s pattern of violent behavior, spanning over two decades and continuing while defendant was incarcerated, amply supports the trial court s well-reasoned conclusion that defendant was not outside the spirit of the three strikes law. Silva, 2012 WL 5077925 at *3-4. 5 4 Further, even if the same act were involved, the trial court would not be required to strike a striking a strike. (People v. Scott (2009) 179 Cal.App.4th 920, 931.) We decline to follow People v. Burgos

5 Petitioner also raised this claim in his petition for review filed in the California Supreme Court. denied that petition without prejudice to any relief to which petitioner might be entitled after this court decides People v. Vargas at court subsequently held in Vargas that California trial courts are at sentencing if those convictions were based on the same single act against a single victim. Vargas, 59 Cal.4th 635 (2014). As noted above, the California Court of Appeal found here any of s in furtherance of justice essentially involves an interpretation of state sentencing law. As Wilson, 562 U.S. at 5 (quoting Estelle, 502 U.S. at 67-68). This federal habeas co retation of state law. Bradshaw, 546 U.S. at 76; Aponte v. Gomez, 993 F.2d 705, 707 (9th Cir. 1993). So

as being cruel and unusual, racially or ethnically motivated, or enhanced by indigency, the Makal v. State of Arizona,

Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994).

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As explained by the California Court of Appeal, the sentencing judge in this case declined to strike either of s only after carefully considering all of the relevant circumstances and applying the applicable state law. Under the circumstances of this case, t Three Strikes Law was not an unreasonable one. As noted by the state appellate court, petitioner has a lengthy history of violent offenses and his current offense involved violence as well. If

actually permitted under state law, a federal due process violation would be presented. See Marzano v. Kincheloe, 915 F.2d 549, 552 (9th Cir. 1990) (due process violation found where the constitutionally imposed under the state statute upon which his conviction was based). However,

petitioner has not made a showing that such is the case here. Nor has petitioner demonstrated that one of his prior convictions was fundamentally unfair. Accordingly, he is not entitled to federal habeas relief on his second claim.

convictions involved two victims and also 7-8.) Petitioner did not seek further review in state court after Vargas was decided. C. Shackling In his next claim for relief, petitioner contends that the trial court violated his rights under by permitting his shackling during his trial. (ECF No. 1 at 5, 7-28.) For the following reasons, the undersigned also recommends that relief be denied with respect to this claim. The state court record reflects that on the day jury selection began at petitioner trial, Correctional Officer Bento from the California Department of Corrections and Rehabilitation

Transcript on Appeal (RT) at 3-4.) Officer Bento t waist, the leg irons, and tethered to the ch (Id. at 4.) Officer Bento noted that: (1) petitioner was convicted of second degree murder in

1992 and was currently serving a life sentence; (2) petitioner xican -caller or a leader for that (3) petitioner by prison officials as a Mexican mafia member. (Id.) Officer Bento also informed the trial court that while imprisoned in 2000 petitioner possessed and distributed heroin; in 2004 he committed ; he threatened staff; -manufactured weapon; committed ith great bodily injury (the current case); Id. - in

petitioner stated to the reporting officer that: (1) y and living area that this actions [sic] could lead to generate violence between us (prison guards) and myself; (2) he ; (3) he (Id. at 5.) Officer Bento took the position , therefore necessary for him to remain is trial. (Id.) any restraints on petitioner during trial. Counsel argued that predicate, , danger to the courtroom, or intended to disrupt the proceedings. (Id. at 5-6.) Trial counsel stated that he had never seen petitioner behave in a disruptive manner in a courtroom, even without the use of full restraints. (Id. at 6-7.) Counsel argued th Id. at 7.)

Relying on the decision in People v. Duran, 16 Cal.3d 282 (1976), the trial court ruled that shackling had been demonstrated. (Id. at 8.) While noting that the trial judge ecord and, to a lesser extent, his history of prison rules violations, some was justified in this case. (Id. at 9.) The trial judge then sought suggestions from the parties on Id.)

communicate with counsel and take notes during his trial. (Id. at 10.) Trial counsel also suggested that the shackles used should yed black or in some other manner blackened, an opportunity to put those inside his clothing to the Id. at 10-11.) Trial counsel asked th leg shackles that might be utilized to restrain petitioner. (Id. at 11.) He argued,

Id.) The trial court ultimately as we have been discussing, are the least restrictive reasonable restraints Id. at 12.) The trial judge also directed that the restraints used should not be visible to t Id. at 12.) To this end, p restraints were wrapped in black tape to hide them from the jury and to muffle their sound, and the waist chain was placed Id. at 13- 14.) The trial judge noted that the chains would not be visible to the jury with these precautions taken. (Id. at 14.) The trial judge also ruled that if petitioner testified in his own defense, the jury would be excused while petitioner was situated in the witness stand, and again when he returned to his seat at counsel table: /////

And for the record, I am including a similar but separate analysis Hernandez, 51 Cal.4th 733, on having an escort officer at the witness stand. It would be done outside the presence of the jury, meaning the defendant would take the stand and then leave the stand outside the presence of the jury so they would not see any restraints. While on the stand, the waist restraints and leg restraints would not be visible to the jury. The escort officer in this courtroom sits off to the side of the witness stand more or less at the end of the jury box, visible to their far right.

And for all the reasons that the Court found a manifest need under the Duran analysis, the Court would find the same analysis under the Hernandez analysis for an escort officer to accompany Mr. Silva to the stand should he testify. (Id. at 15.) Petitioner, however, did not testify at trial. In his claim before this court, petitioner argues that the trial court erred in finding a the use of shackles pursuant to the decision in Duran. (ECF No. 1 at 11.) He argues that the record does not demonstrate that shackling was required in this case and that the at his trial all inmate/defendants accused of violent crimes. (Id. at 11-12.) Petitioner also argues that

Officer Be in support of his request for the use of shackles were not supported by any evidence. Petitioner contends that his prison disciplinary convictions were based on false evidence and were the result of retaliation against him by prison officials for his filing of inmate grievances on his own behalf and on behalf of other prisoners. (Id. at 13-19.)

Id. at 20.) He alleges that his

made it obvious to the jury that he was shackled. (Id. at 20-21.) He argues, in essence, that the

trial c his shackles were not successful. (Id. at 20-21, 25-26.) Petitioner also asserts regarding the additional security precautions that would be taken if he elected to testify in his own defense caused him not to testify because he believed those precautions would allow the jury to see his shackles. (Id. at 24- 25, 27.) Petitioner informs this court that his own defense, but ling regarding his shackling (Id.

at 24, 25.) Petitioner argues that if he had been

able to testify, his testimony would have demonstrated that the charges against him were false. (Id. at 27.) Petitioner raised his shackling claim for the first time in a habeas petition filed in the Sacramento County Superior Court. That court opined the claim could not be considered in a habeas corpus action because it had not been raised on The Superior Court also rejected measures, including shackles and the stationing of an officer near petitioner if he testified,

satisfied the requirements in People v. Hill, (1998) 17 Cal.4th 800, 841 and People v. Duran Id.) Respondent argues that the Sacramento County shackling claim was not cognizable on habeas because it was not raised on appeal constitutes a state procedural bar which precludes this court from addressing the claim on the merits. (ECF No. 17 at 24.) tate

Walker v. Martin, 562 U.S. 307, 315 (2011) (quoting Beard v. Kindler, 558 U.S. 53, 55 (2009). See also Maples v. Thomas, ___U.S.___, ___, 132 S. Ct. 912, 922 (2012); Greenway v. Schriro, 653 F.3d 790, 797 (9th Cir. 2011); Calderon v. United States District Court (Bean), 96 F.3d 1126, 1129 (9th Cir. 1996) (quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991)). However, a reviewing court need not invariably resolve the question of procedural default prior to ruling on the merits of a claim. Lambrix v. Singletary, 520 U.S. 518, 524-25 (1997); see also Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Ci issues presented by the appeal, so it may well make sense in some instances to proceed to the Busby v. Dretke, 359 F.3d 708, 720 (5th Cir. 2004) (noting that although the question of procedural default should ordinarily be considered first, a reviewing court need not do so invariably, especially when the issue turns on difficult questions of state law). Thus, where deciding the merits of a claim proves to be less complicated and less time- consuming than adjudicating the issue of procedural default, a court may exercise discretion in its management of the case to reject the claims on their merits and forgo the procedural default analysis. See Boyd v. Thompson, 147 F.3d 1124, 1127 (9th Cir. 1998); Batchelor v. Cupp, 693 F.2d 859, 864 (9th Cir.1982); see also Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) (citing Lambrix, 520 U.S. at 525.) Under the circumstances presented here, the undersigned finds that can be resolved more easily by addressing it on the merits. Accordingly, the court will assume that claim in this regard is not defaulted. The Sixth and Fourteenth Amendments to the United States Constitution assure a criminal defendant the right to a fair trial. See Estelle v. Williams, 425 U.S. 501, 503 (1976). Visible

related fairn Deck v. Missouri, 544 U.S. 622, 630-31 (2005) (quoting Illinois v. Allen, 397 U.S. 337, 344 (1970)). See also Larson v. Palmateer, 515 F.3d

Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to Deck Id. at 624, 628. Accordingly, criminal

defendants have Ghent v. Woodford, 279 F.3d 1121, 1132 (9th Cir. 2002). Shackling is not

unconstitutionally prejudicial per se. Allen, 397 U.S. at 343-44; Duckett v. Godinez unless the defendant makes a showing that he suffered prejudice as a result. Ghent, 279 F.3d at 1132 (citing United States v. Olano, 62 F.3d 1180, 1190 (9th Cir 1995) and United States v. Halliburton, 870 F.2d 557, 561-62 (9th Cir. 1989)); see also Larson, 515 F.3d at 1064 (state trial during his

shackling and the ch Spain v. Rushen such as a waist chain, leg irons or handcuffs may create a more prejudicial appearance than more Larson, 515 F.3d at 1064. In a federal habeas corpus proceeding such as this one, the court must determine whether Brecht v. Abrahamson , 507 U.S. 619, 623 (1993); Larson, 515 F.3d at 1064. See also Fry v. Pliler, 551 U.S. 112, 121-22 (2007) (Brecht harmless error review applies whether or not the state court recognized the error and reviewed it for harmlessness). In the context of a claim based on shackling at trial, a federal

Holbrook v. Flynn, 475 U.S. 560, 572 (1 Castillo v. Stainer, 983 F.2d 145, 148 (9th Cir. 1991). See also Pember v.

Ryan, No. CV-11-1600-PHX-SMM (LOA), 2012 WL 4747175, at *15 (D. Az. June 19, 2012) (denying habeas relief on a claim based on shackling at trial because petitioner did not establish the shackles were visible to the jury and the evidence of his guilt was substantial); Wagener v. Kenan, No. 07-CV-1584-JLS (BLM), 2008 WL 3925721, at *39 (S.D. Cal. Aug. 22, 2008) (denying habeas relief even though the trial judge provided no explanation for the use of shackles at trial because there was no evidence that any juror had viewed the shackles). The Ninth Circuit has also held t Cox. v. Ayers, 613 F.3d 883, 891 (9th Cir. 2010)

(shackling not prejudicial where the See also Dyas v. Poole, 317 F.3d 934, 937 (9th Cir. 2003) (finding prejudice where defendant was charged shackles during the trial). Here, the trial court provided the individualized determination of necessity required by the Supreme Court in Deck and concluded that convictions and prison violence, the use of a waist chain and leg irons were justified by the . The trial court also attempted to and there is no evidence before this court that those efforts were unsuccessful. Given this record, the decision regarding the shackling of petitioner during his trial does not violate the federal legal principles set forth above. Even assuming arguendo that the trial court erred in allowing petitioner to be shackled during his trial, petitioner has failed to show that any error resulted in him suffering any prejudice. I restraint than other, more unobtrusive restraints. However, there is no evidence, aside from the shackles were ever seen by any member of his jury or that they prevented or restricted the defense from fully presenting its case. P unsupported and self-serving after-the-fact statements that the use of the restraints and a security officer effectively prevented him from testifying in his own defense are also insufficient to establish prejudice. Notably, neither petitioner nor his trial counsel complained that petitioner deci In any event, the evidence against petitioner in this case was substantial, if not overwhelming. By the very nature of the charges against him the jury was well aware that petitioner was a prisoner. This would have mitigated any concern about prejudice stemming from the use of shackles. See Cox, 613 F.3d at 891 e hold that the evidence against Petitioner was so overwhelming that the marginal bias created by the shackles had

no prejudicial effect on the guilty verdict. ; Larson, 515 F.3d at 1064 Although we are troubled by the trial court s imposition of a visible security restraint without making a finding of necessity on the record, we conclude that Larson ///// has not shown that wearing the leg brace for the first two days of his six-day trial had a substantial and injurious effect or influence in determining the jury s verdict.). There is nothing in the record before this court that the shackling of petitioner at trial had a substantial and injurious effect on the verdict. Accordingly, petitioner is not entitled to federal habeas relief with respect to his shackling claim. D. Ineffective Assistance of Counsel In his next claim for relief, petitioner alleges that his trial counsel rendered ineffective assistance at the preliminary hearing in state court . After setting forth the applicable legal principles, the court will address this claim in turn below. The clearly established federal law governing ineffective assistance of counsel claims is that set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To succeed on a Strickland performance was Id. at 687. Counsel is ange of competence demanded of attorneys in

Id. at 687 Richter, 562 at 104 (quoting Strickland

Strickland, 466 U.S. at 669. See also Richter, 562 U.S. at 107 (same).

Strickland, 466 U.S. at 689. There is in

Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing Strickland, 466 U.S. at 689). This presumption of

Cullen v. Pinholster, 563 U.S. 170, ___, 131 S. Ct. 1388, 1407 (2011) (internal quotation marks and alterations omitted). Reasonable tactical decisions, including decisions with regard to the presentation of the Strickland, 466 U.S. at 687-90. However, defense counsel

Strickland minimum, conduct a reasonable investigation enabling him to make informed decisions about Hendricks v. Calderon, 70 F.3d 1032, 1035 (9th Cir. 1995) (quoting Sanders, 21 F.3d at 1456 (internal citation and quotations omitted). Strickland and § 2254(d Richter, 562 U.S. at 105 (citations

counsel, . . . AEDPA review must b Woods v. Daniel, ___U.S.___, ___, 135

S. Ct. 1372, 1376 (2015) (quoting Burt v. Titlow, 571 U.S. ___, ___, 134 S. Ct. 10, 13 (2013)). As the Ninth Circuit has recently acknowledged, is whether there is any reasonable argument that counsel satisfied Strickland Bemore v. Chappell, 788 F.3d 1151, 1162 (9th Cir. 2015) (quoting Richter, 562 U.S. at 105). See also Griffin v. Harrington, 727 F.3d 940, 945 (9th Cir. 2013) (s application of the Strickland standard was unreasonable. This is different from asking whether defense counsel s performance fell below Strickland) (quoting Richter, 562 U.S. at 101). Petitioner raises several instances which he claims constituted ineffective assistance of counsel. First, he argues that his trial counsel improperly failed to object to the admission into evidence at his preliminary hearing of a videotape of the prison

assault on the grounds that the videotape had been edited by the prosecution. (ECF No. 1 at 29-30.) Petitioner claims that his counsel should have insisted on reviewing the entire videotape himself and should have requested that the entire videotape, and not just the edited version, be admitted. (Id. at 30.) Petitioner ///// contends that the (Id. at 30-31.)

Petitioner also claims that his counsel failed to object at his preliminary hearing to the admission of: (1) what he characterizes as the razor blade found at the scene of the assault; (2) the actual razor blade found at the scene; (3) a ; and (4) a closeup photograph cut on his finger. (Id. at 32.) Petitioner denies that he suffered an injury to his finger as a result of the altercation in question. (Id.) In support of this assertion, petitioner attaches a prison states, . . . no injuries as a Id. at 127.) Petitioner also asserts that his counsel failed to ensure that the photographs introduced at his preliminary hearing were properly authenticated. (Id. at 34.) Petitioner or tested for fingerprints. (Id.)

Petitioner further argues that his counsel failed to conduct sufficient investigation or to prior to his preliminary hearing. (Id. at 32.) In particular, petitioner argues that the razor blade found near the assault scene was not considered contraband on the general population yard. Petitioner suggests that the razor blade may have been on the yard for an innocent reason, such as for an inmate to Id. at 33.) Petitioner also faults his counsel for agreeing to stipulate at his preliminary hearing to the time of dayon the video of the assault that was introduced. (Id. at 35.) He argues [sic] objected to the admission of the unauthenticated evidence and other inadmissible evidence at issue, and also had numerous grounds on which he could move the court for its exclusion, but he failed to act with reasonable Id.) Petitioner further complains that his counsel failed eviden is preliminary hearing and failed to move to dismiss the charges against petitioner on the grounds of the insufficiency of the evidence. (Id.) In his traverse petitioner presents several additional arguments regarding the claimed ineffective assistance rendered by his counsel. He points to evidence that another inmate also had blood stains on his clothing after the incident. Petitioner notes that the victim was hiding his face He suggests that the blood on his hand could have come from hitting the ground after he was ordered to do so by correctional officers and that it was not possible a razor blade found on the ground would have blood on it because it was raining. (Id.) Petitioner concludes by arguing that his trial counsel should have presented all of this evidence at his preliminary hearing. Petitioner raised these claims of ineffective assistance of counsel for the first time in his petition for writ of habeas corpus filed in the Sacramento County Superior Court. That court rejected all of the arguments, reasoning as follows:

Petitioner claims that his counsel should have objected to the admission of a videotape and photos because they lacked documented the handling of all of the evidence in the case. Petitioner also claims that his counsel should have challenged the videotape as being distorted, but petitioner has failed to explain how it was distorted. Accordingly, Petitioner has failed to show that there were valid grounds upon which to object and cannot support his claim of deficient performance. (See People v. Price unmeritorious motion, objection, argument, or request is not ineffective assistance].) Petitioner also claims that had counsel conducted a proper investigation he would have learned that razors are

permitted in most parts of the prison. However, in a case like this where a victim has been slashed with a razor blade this information would regard.

should be noted that the purpose of a preliminary hearing is to determine that a crime occurred and that the accused committed it. (Penal Code section 866(b). Although the defense has the right to call witnesses and present a defense, it is unusual for the defense to follow this approach because it provides the prosecutor with Procedure (2013 Ed.) section 8.13.) Thus, his counsel was following the preferred practice by failing to present any evidence at the preliminary hearing. Petitioner has failed to demonstrate either deficient performance or prejudice with respect to these claims that he received ineffective assistance of counsel. Specifically, petitioner has failed to show that he suffered prejudice videotape of the assault be admitted at the preliminary hearing, failure to object to the

admission of pictures of the razor blade and finger, or counse to stipulate to the time of day set forth on the videotape of the assault at the preliminary hearing. There is no evidence before this federal habeas court suggesting that the full, unedited videotape would have been more favorable to petitioner, that the pictures in question were not authentic, or that the time of day reflected on the video was inaccurate. On the contrary, the record of both his trial reflects that the photographs and videotape admitted were properly authenticated. (See, e.g. -63, 72-83, 114- Transcript on Appeal (CT) at 27-34). Of course, defense c make a meritless objection does not constitute ineffective assistance. See Jones v. Smith, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000) (citing Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985)) assistance of counsel)); Rupe v. Wood futile action can never be de Petitioner has failed to demonstrate that any

of the arguments he now suggests counsel should have made would have led to the dismissal of the charges or resulted in a different verdict at his trial. W of sufficient investigation by counsel, he has failed to make any showing that further defense investigation would have resulted in the discovery of evidence favorable to the defense or led to a different outcome either at his preliminary hearing or his trial. In the absence of such a showing, petitioner has failed to demonstrate prejudice with respect to this claim. See Villafuerte v. Stewart, 111 F.3d 616, 632 concerning what counsel would have found had he investigated further, or what lengthier

preparation would have accomplished). Moreover, as suggested by the Sacramento County well have deferred at the preliminary hearing, electing to wait until trial to present any defense evidence in order to avoid alerting the prosecution to his defense strategy. Any decision to follow that course would have in keeping with typical defense strategy and certainly have been well within the range of competence demanded of attorneys in criminal cases. The decision of the Sacramento County Superior Court rejecting petitioner s claims of ineffective assistance of counsel is not contrary to or an unreasonable application of the decision in Strickland, nor wa Richter, 562

U.S. at 103. Accordingly, petitioner is not entitled to federal habeas relief on his ineffective assistance of counsel claims. E. Insufficient Evidence In his next claim for relief, petitioner argues

that the evidence admitted at his trial was No. 1 at 36.) Specifically, petitioner argues there was insufficient evidence that he harbored

malice, that he possessed a weapon, that he committed an aggravated assault, or that he is a recidivist for purposes of California sentencing statutes. (Id. at 39-67.) In support of this claim petitioner provides his own version of the events and an analysis of those events as reported by correctional officers, and argues that he was not guilty but was simply a Id. at 36-67.) Petitioner also provides his own analysis of the evidence introduced at his trial, including the videotape of the altercation, and explains why it fails to support his convictions. (Id. at 43-45.) In doing so, petitioner concedes that he hit the victim in the face on the morning in question, but denies that he slashed him with a razor blade. (Id. at 41.) Petitioner Id. at

54.) Petitioner informs this court that another unidentified inmate attempted to stab him and that just as he attempted to run away from that inmate Id. at 41.) ///// Petitioner also argues that possession of a razor blade does not constitute a violation of California Penal Code § 4502(a) if the blade was carried, but not used as a weapon on the general population yard. (Id. at 46.) He contends there is no evidence he possessed the razor blade found on the yard. (Id.) Petitioner raised these claims of insufficiency of the evidence for the first time in his habeas petition filed in the Sacramento County Superior Court. That court rejected the claims on procedural grounds and also on the merits, reasoning as follows:

As to the sufficiency of the evidence, it appears that the videotape Petitioner focuses on could have been authenticated, if necessary. Each incident report that petitioner supplied as an exhibit recounts the handling of evidence from the incident. Petitioner does not specify what relevant information he thinks was omitted from the video. In any case, petitioner admitted that he struck the victim across the face and hit the victim in the head. A jury could reasonably conclude that petitioner was the person slashing the victim. s Lod. Doc. 11 at 2.) Assuming arguendo that of insufficiency of the evidence are not subject to a procedural default, petitioner is not entitled to federal habeas relief. The Due Process upon proof beyond a reasonable doubt of In re Winship, 397 U.S.

evidence in the light most favorable to the prosecution, any rational trier of fact could have found Jackson v. Virginia, 443 U.S. vidence could Chein v. Shumsky, 373 F.3d 978, 982 (9th Cir. 2004) (quoting Jackson insufficient evidence only if no rational trier of Cavazos v. Smith, ___ U.S. ___, ___, 132 S. Ct. 2, 4 (2011). evidence must be Ngo v. Giurbino, Jackson leaves juries broad discretion in deciding what t they draw Coleman v. Johnson,___ U.S. ___,

drawn from it may be sufficient to sustain a convict Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted). 6 the sufficiency of the evidence used to obtain a state conviction on federal due pro Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In order to grant relief, the federal habeas

court must find that the decision of the state court rejecting an insufficiency of the evidence claim

reflected an objectively unreasonable application of Jackson and Winship to the facts of the case. Ngo, 651 F.3d at 1115; Juan H., 408 F.3d at 1275 & n.13. Thus, when a federal habeas court

is a Boyer v. Belleque, 659 F.3d 957, 964 (9th Cir. 2011). The United States Supreme Court has labeled the relevant standard under - Parker v. Matthews, ___ U.S. ___, 132 S. Ct. 2148, 2152 (2012). See also Creech v. Frauenheim, ___ F.3d ___, ___, 2015 WL 5090775 at *4 (9th Cir. Aug. 31, 2015); Kyzar v. Ryan, 780 F.3d 940, 948 (9th Cir. 2015) (citing Coleman, 132 S. Ct. at

Court of Appeal, it was not unreasonable for the state court to determine that a rational trier of fact could have found beyond a reasonable doubt that petitioner committed the crimes he was charged with committing. The correctional officers who observed the relevant events testified at petitioner s trial and a videotape of the incident was played for the jury. Petitioner concedes that

6 The federal habeas court determines sufficiency of the evidence in reference to the substantive elements of the criminal offense as defined by state law. Jackson, 443 U.S. at 324 n.16; Chein, 373 F.3d at 983. the videotape introduced into evidence at his trial shows him Petitioner was identified as one of two possible suspects in the commission of the crime and he was the only inmate who ran from the altercation instead of heeding the order of correctional officers to get down on the ground. (RT at 60-63, 77-78, 134-38.) A razor blade with blood on it was found at the scene and petition thumb had a cut on it which was bleeding. (Id. to close. (Id. verdict that petitioner was guilty of the charged crimes. The fact that the videotape evidence was arguably consistent with another interpretation of the events, or that there was evidence tending to support he did not slash the victim with a razor blade but only struck him, insufficiency of the evidence claim. What is dispositive is that the evidence of record, considered in the light most favorable to the prosecution, reasonably supports the jury s finding that petitioner was guilty of the charged crimes beyond a reasonable doubt. Chein, 373 F.3d at 982. The decision of the California courts introduced at his trial was insufficient to support his conviction on the charges brought against

him was not contrary to or an unreasonable application of the decisions in Jackson and In re Winship Smith, 132 S. Ct. at 4. See also Coleman, 132 S. Ct. at 2062 (quoting Cavazos, 132 S. Ct. at 4). Accordingly, petitioner is not entitled to federal habeas relief with respect to his insufficiency of the evidence claims. Petitioner also challenges the sentence imposed against him, arguing that he is not a relevant California statutes. (ECF No. 1 at 63-67.) Petitioner makes the following specific arguments: (1) because he did not suffer any felony convictions before his 1992 conviction , he is not a habitual offender; (2) because his 1992 convictions for attempted murder and murder single

Law; and (3) his 1992 conviction is invalid because he was not appointed counsel, as required by Gideon v. Wainwright, 372 U.S. 335 (1963), and because the prosecutor committed error under Brady v. Maryland, 373 U.S. 83 (1963); and (4) his current offense of conviction does not (Id.) s challenge to his state sentence involves solely an interpretation and/or application of state sentencing law. As explained above, so long as a sentence imposed by ual, racially or ethnically motivated, or enhanced

by indigency, the penalties for violation of state Makal, 544 F.2d at 1035. Thus, absent a showing of fundamental unfairness, petitioner is not entitled to federal habeas relief on his claims of sentencing error under state law. prior criminal history, he has failed to demonstrate that his sentence for assault with a deadly weapon by a life prisoner and possession of a sharp instrument by an inmate, imposed pursuant to California s Three Strikes law, was fundamentally unfair or unusually harsh. Accordingly, petitioner is not entitled to federal habeas relief on these sentencing claims. 7 F. Prosecutorial Misconduct In his last claim for federal habeas relief, petitioner argues that prosecutorial misconduct in his case violated his right to due process. (ECF No. 1 at 68-70.) Specifically, petitioner argues that the prosecutor improperly destroyed a portion of the surveillance videotape of the slashing incident. According to petitioner, the missing portion of the video sho Id. at 68.) Petitioner contends the prosecutor deliberately destroyed

this portion of the videotape [to] the fact petitioner was not moving his right hand at the time he was walking towards the incident site, he (petitioner) was /////

7 Throughout his petition and traverse, petitioner refers in passing to other possible claims for relief, including violations of the cruel and unusual punishment clause of the Eighth Amendment and the double jeopardy clause of the Fifth Amendment. (See e.g., ECF No. 1 at 66-67.) Petitioner has failed to demonstrate entitlement to federal habeas relief with respect to any of these potential, yet unexhausted, claims. carry[ing] a weapon when, in fact, petitioner was carrying his gray baseball cap with his personal Id. at 69.) Petitioner claims that the prosecutor took advantage of this situation during his closing argument to the jury, when he emphasized that the videotape of the incident showed that m was not moving as he approached the victim, as if he were carrying the razor blade in his right hand. Specifically, the prosecutor argued to the jury:

Some of the direct and circumstantial evidence: Walking towards the group with a very deliberate purpose. Right arm is not moving. Approaches the victim from behind. Does that reaching over where face is cut. (RT at 297-98.) Petitioner argues that this argument by the prosecutor unfairly capitalized on the absence of the portion of the videotape showing petitioner holding a baseball cap in his right arm. Petitioner raised these claims of prosecutorial misconduct for the first time in his habeas petition filed in the Sacramento County Supreme Court. Relief as to the claims was summarily denied by that court. 8 A criminal defendant s due process rights are violated when a prosecutor s misconduct renders a trial fundamentally unfair. Darden v. Wainwright, 477 U.S. 168, 181 (1986). Claims of prosecutorial misconduct are reviewed on the merits, examining the entire proceedings to determine whether the prosecutor s [actions] so infected the trial with unfairness as to make the Johnson v. Sublett, 63 F.3d 926, 929 (9th Cir. 8 In his habeas petition filed in the Sacramento County Superior Court, petitioner argued that his trial counsel rendered ineffective assistance in failing to object to remarks made by the prosecutor during his closing argument. That court rejected those claims, reasoning as follows:

Finally, petitioner has alleged that counsel should have objected to certain remarks of the prosecutor

in opening or closing argument. improper. Even if there were [sic], the trial court later instructed not the comments or statements by the attorneys in this regard. Petitioner cannot show, therefore, that he was prejudiced by his 1995) (citation omitted). See also Greer v. Miller, 483 U.S. 756, 765 (1987); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Towery v. Schriro, 641 F.3d 300, 306 (9th Cir. 2010). Relief on such claims is limited to cases in which the petitioner can establish that prosecutorial misconduct resulted in actual prejudice to the petitioner. Darden, 477 U.S. at 181-83; see also Towery beyond a reasonable doubt, a federal court may not grant habeas relief unless the state court s it has a See Ortiz-

Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996). Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993). In considering claims of prosecutorial misconduct involving allegations of improper argument, the court must examine the likely effect of the statements in the context in which they were made and determine whether the comments so infected the trial with unfairness as to render the resulting conviction a denial of due process. Darden, 477 U.S. at 181-83; Donnelly, 416 U.S. at 643; Turner v. Calderon, 281 F.3d 851, 868 United States v. Birges, 723 F.2d 666, 671-72 (9th Cir. 1984), and are free to argue

United States v. Gray, 876 F.2d 1411, 1417 (9th Cir. 1989). See also Duckett, 67 F.3d at testimony and its inferences, although they may not, of course, employ argument which could be United States v. Gorostiza, 468 F.2d 915, 916 (9th Cir. Darden, 477 U.S. at 181 (citatio

Donnelly, 416 U.S. at 639. See also United States v. Robinson, 485 U.S. 25, 33 (1988) destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable California v. Trombetta, 467 U.S. 479, 489 (1984). To obtain relief based on the alleged destruction of evidence, however, a petitioner must also demonstrate that the police acted in bad faith in failing to preserve potentially useful evidence. Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Phillips v. Woodford, 267 F.3d 966 apparent exculpatory value of the evidence at the time it was lost or destroyed. Youngblood, 488

U.S. at 56-57 n.*; see also United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993). For instance, the mere failure to preserve evidence which could have been subjected to tests which might have exonerated the defendant does not constitute a due process violation. Youngblood, 488 U.S. at 57; Miller v. Vasquez, 868 F.2d 1116, 1120 (9th Cir. 1989). Here, petitioner has failed to demonstrate that the prosecutor committed misconduct under these applicable standards. First, petitioner has failed to show that the prosecutor destroyed any part of the videotape, or that such destruction was conducted with knowledge that any portion of the tape had exculpatory value. legations in this regard are insufficient to establish either prosecutorial misconduct or prejudice.

he challenged portion of that argument is a reasonable inference from the evidence presented at petitiotrial. Petitioner himself concedes that the videotape showed him making a backhand motion toward the victim with something in his hand. In any event, as noted by the Sacramento County Superior Court, their opening statements and their closing arguments, the attorneys will discuss the

case, but their

CT at 94.) These jury instructions would have mitigated any possible prejudice flowing , even if they could be characterized in some way as evidencing prosecutorial misconduct. See Kansas v. Marsh, 548 U.S. 163 (2006); Richardson v. Marsh the law that jurors follow Fields v. Brown, 503 F.3d 755, 782 (9th Cir. 2007).

///// Petitioner also objects to the following statements by the prosecutor during his closing argument:

So go through that video. Look at the photographs. Recall the testimony of the officers. And it leads to the only reasonable and Count Three.

(RT at 298-99.) Petitioner argues that with these comments the prosecutor offered an improper opinion that petitioner was guilty and vouched for the credibility of the government witnesses. (ECF No. 1 at 69.) 9 The undersigned does not find that the prose s, quoted above, improperly an improper expression of personal opinion that petitioner was guilty by the prosecutor. These brief remarks did not place the prestige of the government behind testimony nor did they suggest that information not presented to the jury supported the testimony of any trial witness. Rather, the presented at trial established that p constituted a reasonable inference from the evidence presented.

Under the circumstances of this case, and for the reasons set forth above, the decision of the prosecutor committed misconduct was not contrary to or an unreasonable application of clearly established federal law. Accordingly, petitioner is also not entitled to federal habeas relief with respect to his prosecutorial misconduct claim. ///// ///// 9 United States v. Necoechea, 986 F.2d 1273, 1276 (9th United States v. Nobari, 574 F.3d 1065, 1078 (9th Cir. 2009. It is improper for a prosecutor to vouch, in the sense described above, for the credibility of a government witness. United States v. Hermanek, 289 F.3d 1076, 1098 (9th Cir. 2002); see also United States v. Young, 470 U.S. 1, 7 n.3 (1985). It is also improper for a prosecutor to express his personal opinion of the def United States v. Potter, 616 F.2d 384, 392 (9th Cir. 1979). IV. Conclusion For all of the reasons set forth above application for a writ of habeas corpus be denied. These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned

shall be served and filed within fourteen days after service of the objections. Failure to file

Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In his objections petitioner may address whether a certificate of appealability should issue in the event he files an appeal of the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a certificate of appealability when it enters a final order

adverse to the applicant). Dated: October 16, 2015

DAD:8: Calderon-silva52.hc