NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDUARDO ALVAREZ, Petitioner-Appellant, v. FRED FOULK, Warden, Respondent-Appellee.	No. 15-17394 D.C. No. 2:14-cv-00029-JKS MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
James K. Singleton, Senior District Judge, Presiding

Submitted July 13, 2017**
San Francisco, California

Before: GRABER and FRIEDLAND, Circuit Judges, and FOGEL,*** District Judge.

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

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

*** The Honorable Jeremy D. Fogel, Senior United States District Judge for the Northern District of California, sitting by designation.

Eduardo Alvarez appeals the dismissal of his petition for habeas relief under 28 U.S.C. § 2254. We review de novo, *Lopez v. Thompson*, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc), and affirm.

Alvarez was granted a certificate of appealability on two questions: (1) whether the prosecutor's questions and argument at his trial unconstitutionally drew attention to Alvarez's decision to invoke his right to remain silent under *Doyle v. Ohio*, 426 U.S. 610 (1976); and (2) whether he is entitled to relief under a related claim for ineffective assistance of counsel.

1. The prosecutor's questions and closing argument were improper under *Doyle*. Even so, the district court correctly denied relief because the state court could reasonably have held that the prosecutor's conduct did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). To the extent that the prosecutor's questions called the jury's attention to Alvarez's post-arrest silence, they did so in the context of a broader, permissible argument based on Alvarez's delay in turning himself in and his failure to make any mitigating or exculpatory statements prior to his arrest. Taken as a whole, the evidence against Alvarez was also strong. *See id.* at 639 (addressing a similar factual scenario); *see also Jenkins v. Anderson*, 447 U.S. 231, 240 (1980).

2. We "need not determine whether counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). Even if it was, Alvarez cannot prevail because the California courts could reasonably have concluded that there was no prejudice; the likelihood of a different result at trial was not substantial. *See Harrington v. Richter*, 562 U.S. 86, 105, 111-12 (2011).

AFFIRMED.