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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

GENE SANCHEZ,
Plaintiff,
v.
ERIC ARNOLD,
Defendant.

Case No. [17-cv-01155-BLF](#)

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS;
DENYING CERTIFICATE OF
APPEALABILITY**

[Re: ECF 1]

Petitioner Gene Sanchez (“Petitioner”), a state prisoner represented by counsel, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his state criminal conviction of California Penal Code §§ 182(a)(1) (conspiracy to commit murder) and asserting two claims that his constitutional rights were violated.¹ Petition (“Pet.”), ECF 1. After a Court Order to Show Cause (ECF 4), Respondent Eric Arnold (“Respondent”) filed an answer, addressing the merits of Petitioner’s claims, and exhibits in support thereof. Answer (“Ans.”), ECF 11-1; Exhibits A–H, ECF 11-3–16-9. Petitioner filed a traverse in response. Traverse (“Trav.”), ECF 17. Having reviewed the briefs and the underlying record, the Court concludes that Petitioner is not entitled to relief and DENIES the petition for writ of habeas corpus.

I. BACKGROUND

In 2011, Petitioner was tried (in a joint trial with three co-defendants) and convicted in Santa Clara County Superior Court. A jury found Petitioner guilty of the one count charged, conspiracy to commit murder (§ 182(a)(1))². 16 Clerk’s Transcript on Appeal (“CT”) 4020, Ex. A

¹ This matter was reassigned to this Court on January 12, 2018.

² Statutory references throughout this opinion are to the California Penal Code unless otherwise noted.

1 to Ans., ECF 12-6. The charge also included an enhancement for street gang association (§
2 186.22(b)). *Id.* at 4019. On August 19, 2011, the trial court sentenced Petitioner to a prison term
3 of 50 years-to-life consecutive to five years. *Id.* at 4154–55.

4 Petitioner appealed and, on December 11, 2014, the California Court of Appeal issued a
5 written opinion denying relief and affirming the judgment. *See* Opinion (“Op.”), ECF 16-9, Ex. F.
6 On March 11, 2015, the California Supreme Court granted Petitioner’s petition for review,
7 deferring further action in the matter pending consideration and disposition of a related issue
8 before it in a separate case. *See* ECF 16-9, Ex. G. On September 21, 2016, the California
9 Supreme Court dismissed the petition. *See id.*

10 On March 6, 2017, Petitioner filed the instant federal petition for writ of habeas corpus in
11 this Court, asserting two claims that his Sixth Amendment Confrontation Clause and Fourteenth
12 Amendment Due Process rights were violated during his trial. ECF 1.

13 **II. SUMMARY OF EVIDENCE**

14 In its written opinion, the California Court of Appeal fairly and accurately summarized the
15 factual background of Petitioner’s case at trial as follows:

16 **A. El Hoyo Palmas and Affiliated Gangs**

17 Over defendants’ objections, John Mendoza testified as an expert in the area of
18 Nuestra Familia, Nuestra Raza, and Norteño criminal street gangs. Mendoza, a
19 former member of the Nuestra Raza and Nuestra Familia gangs, testified in
20 exchange for a reduction in his sentence. According to Mendoza, Norteños (or
21 Northerners) are members of street gangs that identify with Northern California.
22 Nuestra Familia began as a prison gang and is at the top of the Norteño gang
23 hierarchy. Nuestra Raza, also a prison gang, is subordinate to Nuestra Familia.
24 Norteño street gangs, including El Hoyo Palmas (Palmas), fall under the Nuestra
25 Familia umbrella. In prison, all Northerners report to Nuestra Familia. Mendoza
26 testified that gang members gain respect by committing acts of violence, which
27 they may brag about in custody. Sureños, or Southerners, and Norteños are rivals.
28 Norteños refer to Sureños as “scraps,” and “scrap hunting” refers to going out to
attack or kill Sureños.

Evidence was presented that defendants were Palmas members. For example,
witnesses identified photographs in which defendants could be seen in front of
Palmas graffiti, wearing clothing associated with the gang, or making gang signs.
Police searches also found clothing associated with Palmas in defendants’
possession. As discussed further below, San Jose Police Department Detective

1 Anthony Kilmer testified over defendants’ objection as an expert on Norteño
2 street gangs and Palmas in particular. He opined that all of the defendants were
3 members of Palmas based on their tattoos, items found at their homes and on their
computers, and/or police reports documenting their prior contact with law
enforcement. Defendants did not dispute their gang membership at trial.

4 In addition to Mendoza, three other former gang members testified as part of plea
5 bargains. Vince Tirri, a former Nuestra Raza member, testified as part of a plea
6 deal that reduced his exposure from life to a range of seven to 19 years. As
7 discussed in detail below, Tirri testified to several incriminating statements
8 Espana made about the charged offenses while he and Tirri were in custody
together. Tirri also testified to his impression that Sanchez, whom he met while
neither was incarcerated, was a leader and influential member of Palmas who felt
responsible for younger gang members.

9 Hector Delreal, a member of Palmas who was involved in some of the charged
10 offenses, also testified as part of a plea deal. His testimony implicating the
11 defendants is discussed below.

12 Joseph Abeyta, a former member of both Nuestra Raza and Palmas, testified to
13 incriminating statements Espana made about the charged offenses while in
14 custody. Specifically, he testified that Espana was being teased for being a virgin
15 and another inmate and Norteño joked, “Yeah, ... he’s a virgin with hot ones
16 under his belt,” which Abeyta interpreted to mean Espana had committed
17 murders. According to Abeyta, Espana did not deny the suggestion that he was a
18 murderer. On cross-examination, Abeyta acknowledged that Espana could not
have contradicted the inmate who made the “hot ones” comment due to their
relative rank in the Norteño hierarchy. Espana objected to the admission of
Abeyta’s description of the conversation on hearsay grounds. The court ruled the
testimony was admissible as an adoptive admission.

19 **B. Firearms Evidence**

20 Police recovered three firearms, each of which was used in one or more of the
charged offenses, which are described in detail below.

21 On March 1, 2007, police seized a .25–caliber pistol during a probation search of
22 a residence. Delreal testified that another Palmas member left the gun in his car
23 on February 28, 2007. As discussed below, that firearm was used in the shootings
24 on Richmond Avenue (count 2), Hamilton Avenue (counts 3 & 4), and Waverly
Avenue (counts 7 & 8).

25 On March 17, 2007, an officer investigating a loud party saw Castro, Espana, and
26 a third man standing near a minivan. The officer seized a .357 revolver that he
27 saw underneath the front tire of the minivan. The gun did not belong to the owner
of the residence and minivan. That firearm was used in the Hamilton Avenue
shooting (counts 3 & 4).

28 Castro, Espana, and Rojas were arrested on March 30, 2007. After Rojas, who

1 fled from police, was apprehended, an officer located a nine-millimeter Smith &
2 Wesson pistol along the path Rojas had taken when he fled. That firearm was
3 used in the shootings on Waverly Avenue (counts 7 & 8), San Tomas Aquino
4 Parkway (counts 9 & 10), Poco Way (counts 11, 12, & 13), Virginia Avenue
5 (count 14), and Giusti Drive (count 15).

6 **C. Murder of Palmas Member Cesar Gonzalez**

7 Early on the morning of December 3, 2006, Cesar Gonzalez was shot and killed
8 by, police suspect, a Sureño gang member. According to Detective Kilmer,
9 Gonzalez was a member of Palmas. Delreal testified that there was an emergency
10 meeting of Palmas members at defendant Sanchez's house on the evening of
11 December 3, 2006. That meeting was attended by defendants Castro and Rojas,
12 Pete Washington, possibly defendant Espana, and others. According to Delreal,
13 Sanchez asked who was willing to "go do stuff," which Delreal interpreted to
14 mean shoot Sureños in retaliation. Delreal testified that he, Castro, Rojas, and
15 others volunteered. Following the meeting, Castro and Delreal met at a gas station
16 where Castro told Delreal to go to the east side of San Jose and said he would go
17 to the west side.

18 **D. December 3, 2006 Shootings**

19 *1. McCreery Avenue Shooting*

20 Delreal testified that on the evening of December 3, 2006, following the meeting
21 at Sanchez's house and his discussion with Castro, he and two other Palmas
22 members went to McCreery Avenue on the east side of San Jose looking for
23 Sureños. They shot at a group of men, hitting Jesus Ayala, a Sureño gang
24 member.

25 *2. Richmond Avenue Shooting*

26 Meanwhile, according to Delreal, Castro went to the west side of San Jose in his
27 Toyota Tacoma truck. Castro drove a green Toyota extra cab pickup that,
28 according to an officer who conducted surveillance on Castro, looked darker and
more blue in color in certain light.

Ivan Sandoval, a Sureño gang member, was shot outside an apartment complex on
Richmond Avenue on the evening of December 3, 2006. Sandoval testified that
the shooter was in a black or grayish truck. One of the individuals in the truck,
who Sandoval identified as Washington, asked Sandoval if he was a Sureño by
saying, "Sureño rifa; right?" Sandoval responded that he was and Washington
began shooting. Sandoval testified that he knew Washington from juvenile hall.

Witness Shareen Nassarllah testified that the shooter was in the passenger seat of
a passing truck. The shooter asked Sandoval, "Sur trece, que no?" Sandoval
answered, "Yeah," indicating he was a Sureño, and was shot. Venancio Escobar,
who also was shot in the incident, testified that the shots came from a dark green
pickup truck. Another witness, Tony Guillen, testified that the shooter was in a

1 greenish four-door truck. The officer who responded to the shooting testified that,
2 on his way to the scene, he passed a dark green Toyota pickup truck.

3 A criminalist from the Santa Clara County Crime Laboratory testified that he
4 analyzed casings found at the scene of the Richmond shooting and determined
5 that they were fired by the .25-caliber pistol recovered by police on March 1,
6 2007. Delreal testified that he had seen Castro with that gun a couple of months
7 before it was left in his vehicle in February 2007.

8 Castro was charged with attempted murder (Pen.Code, §§ 187, 664, subd. (a),
9 count 2) [FN omitted] of Sandoval.

10 **E. December 14, 2006 Hamilton Avenue Shooting**

11 Juan Perez testified that he and several other men were outside his Hamilton
12 Avenue home at about 9:30 p.m. on December 14, 2006, when two people with
13 hoods over their heads approached and asked if the men were Sureños. Perez
14 answered that they were not and the hooded men then shot, killing Luis Medina
15 and injuring Juan Payan. On April 12, 2007, Perez picked Washington out of a
16 photo lineup as one of the shooters.

17 Fernando Reyes, who lived near the scene of the shooting, testified that after
18 hearing gunshots he saw three men run away from Hamilton and get in a light
19 blue pickup truck, which he believed to be a Nissan king cab. Reyes testified that
20 a picture of Castro's truck looked "more or less similar to the one" he saw, but he
21 noted differences in the wheel rims and windows.

22 Delreal testified that while he and Castro were cellmates in jail, Castro admitted
23 that he was present at the Hamilton Avenue shooting and "just ... drove." Delreal
24 testified that Rojas also discussed a shooting on Hamilton while in custody.
25 According to Delreal, Rojas said that he approached a group of Sureños and shot
26 at them with a nine-millimeter pistol and that two people were shot, one of whom
27 died.

28 Jeremy Rosario, Washington's roommate and close friend, testified that
Washington—who died on February 27, 2007—was a member of Palmas. Rosario
testified that Washington said he was involved in a shooting near Hamilton and
that Castro was there as well.

A criminalist from the Santa Clara County Crime Laboratory testified that he
analyzed casings found at the scene of the Hamilton Avenue shooting and
determined that they were fired by the .25-caliber pistol recovered by police on
March 1, 2007 and the .357-revolver recovered by police on March 17, 2007.

Castro was charged with the murder of Medina (§ 187, count 3) and attempted
murder of Payan (§§ 187, 664, subd. (a), count 4).[FN2]

[FN2] Espana also was charged in counts 3 and 4, but the People
dismissed those counts as to him during trial.

1 **F. January 20, 2007 Waverly Avenue Party Shooting**

2 There was a party on Waverly Avenue, which is in a Norteño neighborhood, on
3 January 20, 2007. Both Sureños and Norteños attended the party. A fight ensued.
4 Shots were fired from the front of the house and Jose Romero and Marcos
Lomeli, a Sureño gang member, were wounded.

5 Manuel Amaya, a Sureño, testified that he arrived at the party with other Sureños.
6 Because he was dressed like a Sureño, a number of Norteños standing in the front
7 yard called him a scrap. Some individuals said “Norte Palmas” and told Amaya
8 and his friends to leave, but they did not. Later, someone asked Amaya if he was a
9 scrap. He answered he was a Sureño and the man hit him in the face with a beer
bottle. Amaya identified a member of Palmas as the man who hit him. Shortly
thereafter, the lights went out and there was shooting. Amaya did not recognize
any of the defendants as having attended the party.

10 Jose Cervantes, another Sureño who attended the Waverly party, testified that he
11 heard people at the party yelling “Norte” and “Palmas.”

12 Partygoer Janet Ayala was interviewed by police in April 2007. At that time,
13 Ayala picked Sanchez, Espana, and Castro out of photo lineups and indicated they
14 were at the Waverly Avenue party. She also told the officer that she thought
15 Castro had said “Why is there a scrap party being thrown in my hood?” On cross-
16 examination, Ayala said she never personally heard anyone say “Why is there a
17 scrap party being thrown in my hood,” but heard from others that someone said
that. She also indicated that she was never positive that the men she identified
were at the party, but only thought they looked a little bit like people she saw
there.

18 In April 2007, another partygoer, Sergio Crisostomo, identified Castro in a
19 photographic lineup as having been at the party.

20 Yesenia Ramirez, who also attended the Waverly party, testified that the gunshots
21 came from a vehicle, but said she could not describe it. On the night of the
22 shooting, however, she told police that the shots were coming from two vehicles,
one of which she described as a dark blue or dark green pickup truck.

23 Delreal testified that Rojas told him that he, Espana, and Castro were at the party
24 on Waverly Avenue. Rojas told Delreal that, upon seeing Sureños, they left to get
25 their guns and came back and shot into the party. Rojas admitted to Delreal that
26 he was one of the shooters. Delreal further testified that he lived just down the
27 street from the location of the Waverly shooting. On the night of the shooting,
28 Castro called Delreal and said “some stuff happened by your house.” Shortly
thereafter, Castro, Espana, Rojas, and another Palmas member arrived at Delreal’s
house and dropped off some hats with the letter “P” on them, which are associated
with the Palmas gang.

A criminalist from the Santa Clara County Crime Laboratory testified that he

1 analyzed casings found at the scene of the Waverly shooting and determined that
2 they had been fired by the nine-millimeter Smith & Wesson pistol recovered by
3 police on March 30, 2007 and the .25–caliber pistol recovered by police on March
4 1, 2007.

5 Castro was charged with the attempted murder of Lomeli and Romero (§§ 187,
6 664, subd. (a), counts 7 & 8).

7 **G. January 27, 2007 San Tomas Aquino Parkway Shooting**

8 Josafat Hernandez testified that on the night of January 27, 2007, he met two
9 friends outside his apartment on San Tomas Aquino Parkway. One of the friends,
10 Rigoberto Gonzalez (Rigoberto), got out of the car so that Hernandez could get
11 into the backseat. Two men approached Rigoberto while he was standing outside
12 the car and asked in Spanish what neighborhood he belonged to. Rigoberto
13 answered: “I do not belong to a neighborhood” and was shot to death. Hernandez
14 was shot in the leg. Hernandez testified that he recognized Espana “a little bit.”

15 Alfonso Flores, who lived on San Tomas Aquino Parkway at the time of the
16 shooting, testified that on January 27, 2007, he heard what sounded like
17 firecrackers and screeching tires. He looked out the window and saw a dark-
18 colored, extended-cab truck with its lights off backing up. When shown a picture
19 of Castro’s truck at trial, Flores said it looked like the truck he saw the night of
20 the shooting.

21 Delreal testified that Rojas told him that he, Espana, and Washington were
22 involved in a shooting near San Tomas Aquino Parkway. Rojas told Delreal that
23 Washington approached an individual who was getting out of a car, asked if he
24 was a Sureño, and then shot the individual. Rojas shot the man after he was on the
25 ground and Espana drove them away in Castro’s truck. Castro was not there
26 because he was with his girlfriend.

27 Jeremy Rosario testified that Washington said he shot someone at San Tomas
28 Aquino Parkway and that Espana was present.

The first 911 phone call regarding a shooting occurred at 11:11 p.m. Cell phone records indicated that, around that time, Rojas’s cell phone connected to a cell tower within a mile of the shooting, and then moved to the east side of San Jose. Rojas lived on the south side of the city, which is not in the vicinity of the shooting. Cell phone records further showed that, at about 10 minutes prior to the shooting, Espana’s cell phone connected to a cell tower within two miles of the crime. At 11:18 p.m.—seven minutes after the first 911 call—Espana’s phone connected to a cell tower nine miles from the crime scene towards east San Jose.

A criminalist from the Santa Clara County Crime Laboratory testified that he analyzed nine-millimeter casings found at the scene of the San Tomas Aquino Parkway shooting and determined that they were fired by the nine-millimeter Smith & Wesson pistol police recovered on March 30, 2007.

1 Rigoberto's mother testified that Rigoberto and his half brother Gustavo were
2 fighting over property before Rigoberto was killed. She testified that she believed
3 Gustavo had killed Rigoberto. Gustavo testified that he was not involved in
4 Rigoberto's death, but acknowledged the two had been fighting.

5 Castro, Espana, and Rojas were charged with the murder of Rigoberto (§ 187,
6 count 9) and attempted murder of Hernandez (§§ 187, 664, subd. (a), count 10).

7 **H. February 5, 2007 Poco Way Shooting**

8 On the afternoon of February 5, 2007, Alberto Jose Avalos, Arturo Amezcuita,
9 and Victor Castaneda were fired on by two men while parked in a white Jetta on
10 Poco Way. At trial, Amezcuita identified Rojas as one of the shooters and
11 testified that he recognized Rojas because the two sat next to each other during a
12 school placement exam prior to the shooting. An adult education placement
13 program registrar testified that both Amezcuita and Rojas were registered for a
14 placement test that was conducted on January 9, 2007. Avalos and Amezcuita
15 testified that they had seen the shooters earlier that day while they were driving
16 around. Avalos said the men had thrown Norteño gang signs at that time and that
17 he had thrown a Sureño gang sign.

18 Delreal testified that he was involved in the Poco Way shooting. He was driving
19 with Rojas and another Palmas member when Rojas saw some Sureños he had
20 "gotten into it with" in a white Jetta. When the Jetta turned onto Poco Way,
21 Delreal dropped Rojas and the other Palmas member off. He saw them shoot into
22 the Jetta.

23 A criminalist from the Santa Clara County Crime Laboratory testified that he
24 analyzed four casings found at the scene and determined that two were fired by
25 the nine-millimeter Smith & Wesson pistol police recovered on March 30, 2007.

26 Rojas was charged with attempted murder of Alberto Jose Avalos, Arturo
27 Amezcuita, and Victor Castaneda (§§ 187, 664, subd. (a), counts 11, 12 & 13).

28 **I. Pete Washington's February 27, 2007 Death**

On February 27, 2007, Pete Washington was found dead from a gunshot wound to
his right temple in the room he shared in a transitional home with Jeremy Rosario.

Another resident of the transitional home, Johnathan Ashley, testified that Rosario
arrived home on the evening of February 27, 2007 and he went into the room he
shared with Washington. Rosario became upset when he realized something was
wrong with Washington. Ashley went into the room and saw Washington lying on
his bed with a gun near him and blood on his pillow. Ashley said he told Rosario
to move the gun.

The officer who interviewed Rosario the night of Washington's death testified
that Rosario was upset and crying. Rosario told the officer he had taken the gun
out of Washington's left hand and put in on top of the refrigerator. Rosario

1 testified that he used a jacket to move the gun to avoid getting his prints on it. The
2 gun was found in the pocket of a jacket on top of the refrigerator. Three latent
3 fingerprints were found on the gun, all of which matched Rosario and none of
4 which matched Washington.

5 Detective Sean Pritchard, who was investigating the Hamilton Avenue and San
6 Tomas Aquino Parkway shootings, interviewed Rosario on March 20, 2007.
7 Based in part on Rosario's statements, Detective Pritchard began surveillance of
8 Sanchez and Castro.

9 **J. March 28, 2007 Virginia Avenue Shooting**

10 A San Jose police officer testified that he responded to the scene of a shooting on
11 Virginia Avenue at 7:52 p.m. on March 28, 2007. The officer found 15-year-old
12 Edgar Martinez lying in the gutter with at least six gunshot wounds. Martinez, a
13 Sureño, died. Officers found 10 shell casings at the scene.

14 Virginia Avenue resident Tom Quiroz testified that he heard gunshots on March
15 28, 2007. He looked out the front door and saw four men running. Three of the
16 men jumped into a silver Dodge Stratus and sped away.

17 Castro's brother, Gilbert, drove a silver Dodge Stratus.

18 On March 31, 2007, Castro spoke with his other brother, Juan, at the police
19 station and—in a conversation recorded by police—said he had driven the Stratus
20 “the night the Virginia thing happened.”

21 Delreal testified that, while he and Rojas were cellmates, Rojas discussed his
22 involvement in the Virginia Avenue shooting. Rojas told Delreal that he, Castro,
23 Espana, and another individual were out in Castro's brother's car. Rojas
24 approached an individual and said he was from Palmas. The individual ran away
25 and Rojas chased him and “unloaded the clip on him.”

26 Tirri testified that, while in custody, Espana discussed being involved in a
27 shooting outside an apartment building or house shortly before he was arrested on
28 March 30, 2007. According to Tirri, Espana said that Castro was driving his
brother's car, which Tirri said was “a Stratus, or some type of car like that.”

San Jose Police Officer Jaime Jimenez was conducting surveillance on Castro at
the time of the Virginia Avenue shooting. He testified that at the time of that
shooting Castro's truck was parked at his residence but that the Dodge Stratus
associated with that residence was not there.

A criminalist from the Santa Clara County Crime Laboratory testified that he
analyzed casings found at the scene and determined that they were fired by the
nine-millimeter Smith & Wesson pistol police recovered on March 30, 2007.

Castro, Espana, and Rojas were charged with the murder of Edgar Martinez (§
187, count 14).

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K. March 30, 2007 Giusti Drive Shooting

San Jose Police Officer James Hussey testified that he was surveilling Castro on the evening of March 30, 2007. According to Officer Hussey's testimony, shortly after 7:00 p.m. that evening, Castro and Rojas left Castro's home in the Toyota pickup truck and drove to pick up Espana. Two hours later, the truck parked in a parking lot near Snow and Giusti Drive and two individuals with hoods pulled up on their heads and exited the vehicle. They approached a man in blue mechanic's pants and an orange shirt who was working on a car. Officer Hussey testified that the three men appeared to be having a conversation and he thought he might be witnessing a drug deal. After about 30 seconds, he saw one of the hooded men point something at the mechanic and heard eight to 10 gunshots. The two men then ran to Castro's truck.

Multiple patrol cars surrounded the vehicle shortly after it pulled away. Castro remained in the vehicle and was arrested. Rojas and Espana got out of the vehicle and ran, but were apprehended a short distance away. A nine-millimeter Smith & Wesson pistol was found along the path Rojas took when he fled police. A criminalist from the Santa Clara County Crime Laboratory testified that he analyzed casings found at the scene and determined that they were all fired from that gun.

Espana was handcuffed, searched, and made to sit on the pavement. After Espana had been moved to another location, an officer found the victim's wallet on the ground where Espana had been seated.

The victim, locksmith Hernan Koba, died of his wounds. A cell phone was found hanging around his neck. An expert in the area of forensic toxicology testified that there was methamphetamine in Koba's body at the time of his death in an amount suggesting he had been using the drug chronically.

Delreal testified that Rojas discussed the Giusti Drive shooting with him while they were cellmates. Rojas said that he, Castro, and Espana were out and that he and Espana approached Koba with the intent to rob him. According to Delreal, Rojas said Koba gave them his wallet but refused to give them the cell phone that was hanging around his neck, so Rojas shot him. Rojas admitted to Delreal that he ran from police and threw his gun while he was running.

Tirri testified that Espana said he shot Koba and that he approached him on the mistaken belief that he was a Sureño. Tirri informed Espana that he would not get "credit" for the killing because Koba was not a Sureño. Espana responded that he and his boys had already "dropped some bodies."

Castro's brother, Juan, testified that Castro told him he thought they were going to a party the night of the Giusti Drive shooting. Castro said he was parking when Rojas and Espana came running back to the car. They told him Rojas shot the victim because he refused to give them his wallet.

1 Rojas testified that the Giusti Drive shooting was the result of a drug deal gone
2 bad. According to Rojas, Castro recognized Koba and wanted to buy drugs from
3 him, so Rojas and Espana approached Koba to make a transaction. A fight over
4 money ensued and Espana shot Koba, who looked like he was about to hit
5 Espana. Back in Castro's truck, Rojas learned Espana had taken Koba's wallet
6 and agreed to take the gun and clip from Espana to hide.

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Castro, Espana, and Rojas were charged with the murder of Koba (§ 187, count
15).

L. Detective Kilmer's Expert Testimony

As noted above, Detective Kilmer testified as an expert on Norteños and Palmas. Detective Kilmer opined that all of the following were carried out for the benefit of, at the direction of, and/or in association with the Palmas criminal street gang: (1) the December 3, 2006 Richmond Avenue shooting; (2) the December 14, 2006 Hamilton Avenue shooting; (3) the January 20, 2007 Waverly Avenue shootings; (4) the January 27, 2007 San Tomas Aquino Parkway shooting; (5) the February 5, 2007 Poco Way shooting; (6) the March 28, 2007 Virginia Avenue shooting; and (7) the March 30, 2007 Giusti Drive shooting and robbery. Detective Kilmer based that opinion on evidence that some of the victims were Sureños, that certain of the shootings occurred in known Sureño neighborhoods, and that such shootings generally convey a message that the gang is strong. Detective Kilmer's opinions were based, in part, on his review of police reports as well as conversations with other officers, gang intervention counselors, witnesses, and gang members.

Before trial, defendants moved in limine to exclude Detective Kilmer's testimony on the grounds that (1) the defense did not know the basis of some of his testimony and (2) portions of his testimony were based on out-of-court testimonial statements by witnesses (e.g., other police officers and gang members) who were neither present at trial, nor subject to cross-examination, in violation of their Sixth Amendment confrontation clause rights under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). The court rejected those arguments and denied defendants' motions in limine to exclude Detective Kilmer's testimony.

M. Rosario's Additional Testimony and Cross-examination

In addition to his accounts of the Hamilton Avenue and San Tomas Aquino Parkway shootings, Jeremy Rosario testified more generally that Washington was a member of Palmas and was friends with all of the defendants, who also belonged to the gang. While Rosario was not a member of the gang, he considered Washington to be his best friend and he spent time with Washington and the defendants. Rosario testified that he had seen all of the defendants with guns and had overheard them discuss "scrap hunting." According to Rosario, Sanchez seemed to be the one encouraging or suggesting scrap hunting. Washington told Rosario that he sold cocaine and gave the money he earned doing so to Sanchez for gang expenses. Rosario testified about a specific incident in which he saw Sanchez ask a 15- or 16-year-old boy whether he was "down with their hood,"

1 and then gave the boy a gun and tell him to “blast” some Sureño gang members in
2 a nearby park.

3 Near the beginning of his cross-examination, Espana’s counsel asked Rosario if
4 he had been truthful with the police during their investigation of Washington’s
5 death. Rosario responded with “What does this have to do with me finding my
6 best friend dead and these fuckin’ murderers?” Rosario further told Espana’s
7 attorney “You fuckin’ disgust me. You are going to go home and sleep beautifully
8 ... and I have to remember.” The jury was excused from the courtroom and the
9 trial court ordered the comments stricken on its own motion. Counsel for
10 defendants objected to that ruling, arguing that Rosario's outburst was relevant to
11 his credibility, bias, and attitude. The court nevertheless ordered the comments
12 stricken as nonresponsive.

13 When cross-examination continued, Rosario provided some substantive responses
14 but frequently answered questions “I don’t remember,” refusing to review any
15 documents in an effort to refresh his memory. He also answered “sure” to many
16 of the questions posed by the defense attorneys. Eventually, he explained that
17 “sure” “sometimes” meant yes and “sometimes” meant no; it also meant “if that’s
18 what you wanna think.” The defense attorneys were permitted to impeach Rosario
19 with his prior statements to police and his grand jury testimony. Among other
20 things, defense counsel questioned Rosario about statements he made to police
21 about associating with a Sureño-affiliated gang in Santa Maria in 2008.

22 Outside the presence of the jury, counsel for defendants requested that Rosario's
23 direct examination testimony be stricken of two grounds. First, they argued
24 Rosario was an incompetent witness under Evidence Code section 701,
25 subdivision (a)(1) because he lacked the ability to communicate in a meaningful
26 manner. Second, they urged his conduct denied defendants the right to a fair trial
27 and to confront a witness against them. The court refused to strike Rosario’s
28 testimony, reasoning that while Rosario was not “giving meaningful answers,” he
“did answer the questions” and he “was subjected to ... unlimited cross-
examination.”

N. Indictment

21 On May 13, 2008, the grand jury returned a 17–count indictment against the four
22 appellants and seven other codefendants. The charges against the seven other
23 codefendants were dismissed or severed.[FN3] The indictment charged Sanchez,
24 Castro, Espana, and Rojas with conspiracy to commit murder (count 1; § 182,
25 subd. (a)(1)). It further charged Rojas of three counts of murder (counts 9, 14, 15),
26 and four counts of attempted murder (counts 10–13); it charged Espana with four
27 counts of murder (counts 3, 9, 14, 15) and two counts of attempted murder
28 (counts 4, 10); and it charged Castro with four counts of murder (§ 187; counts 3,
4, 7, 8, 10).[FN4] Each count included the gang enhancement allegation that
defendants committed the charged crime for the benefit of, at the direction of, and
in association with a criminal street gang, with the specific intent to promote,
further and assist in criminal conduct by gang members, within the meaning of

1 section 186.22, subdivision (b)(1)(C). Multiple murder and gang special
2 circumstance allegations were also charged in connection with the murder charges
3 (§ 190.2, subd. (a)(3), (a)(22)), and many of the charges included firearm
4 allegations (§ 12022.53, subds. (b), (c), (d), (e)(1)). In connection with the murder
5 of Hernan Koba charged in count 15, the indictment included a robbery special
6 circumstance allegation (§ 190.2, subd. (a)(17)).

7 [FN3] These included counts 5, 6, 16, and 17, which accordingly are not at
8 issue here.

9 [FN4] Counts 3 and 4 later were dismissed as to Espana.

10 **O. Guilty Verdicts and Sentencing**

11 The jury deliberated for more than seven days before returning verdicts of guilty
12 on all counts and finding all allegations and enhancements to be true.

13 The trial court sentenced Sanchez to 50 years to life consecutive to five years.
14 Rojas was sentenced to life without the possibility of parole, consecutive to life
15 with the possibility of parole, consecutive to 175 years to life. Espana received a
16 sentence of life without the possibility of parole, consecutive to life with the
17 possibility of parole, consecutive to 100 years to life. The court sentenced Castro
18 to life without the possibility of parole, consecutive to life with the possibility of
19 parole, consecutive to 225 years to life.

20 Op. at 2–17.

21 **III. LEGAL STANDARD**

22 This Court may entertain a petition for a writ of habeas corpus “in behalf of a person in
23 custody pursuant to the judgment of a State court only on the ground that he is in custody in
24 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); *Rose v.*
25 *Hodges*, 423 U.S. 19, 21 (1975). Under the Antiterrorism and Effective Death Penalty Act of
26 1996 (“AEDPA”), a district court may not grant the writ with respect to any claim that was
27 adjudicated on the merits in state court unless the state court’s adjudication of the claim: “(1)
28 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). The first prong applies both to
questions of law and to mixed questions of law and fact, *Williams v. Taylor*, 529 U.S. 362, 384–86
(2000), while the second prong applies to decisions based on factual determinations, *Miller–El v.*

1 *Cockrell*, 537 U.S. 322, 340 (2003).

2 As to the first prong, “[u]nder the ‘contrary to’ clause, a federal habeas court may grant the
3 writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a
4 question of law or if the state court decides a case differently than [the] Court has on a set of
5 materially indistinguishable facts.” *Williams*, 529 U.S. at 412–13. The only definitive source of
6 clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings (as opposed to the
7 dicta) of the Supreme Court as of the time of the state court decision. *Id.* at 412; *Brewer v. Hall*,
8 378 F.3d 952, 955 (9th Cir. 2004). While circuit law may be “persuasive authority” for purposes
9 of determining whether a state court decision is an unreasonable application of Supreme Court
10 precedent, only the Supreme Court’s holdings are binding on the state courts and only those
11 holdings need be “reasonably” applied. *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003),
12 *overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003).

13 “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if
14 the state court identifies the correct governing legal principle from [the Supreme Court’s]
15 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Williams*,
16 529 U.S. at 413. “Under § 2254(d)(1)’s ‘unreasonable application’ clause, . . . a federal habeas
17 court may not issue the writ simply because that court concludes in its independent judgment that
18 the relevant state-court decision applied clearly established federal law erroneously or
19 incorrectly.” *Id.* at 411. A federal habeas court making the “unreasonable application” inquiry
20 should ask whether the state court’s application of clearly established federal law was “objectively
21 unreasonable.” *Id.* at 409.

22 As to the second prong, under the “unreasonable determination” clause, a federal habeas
23 court must “presume the [state] court’s factual findings to be sound unless [the petitioner] rebuts
24 ‘the presumption of correctness by clear and convincing evidence.’” *Miller-El v. Dretke*, 545 U.S.
25 231, 240 (2005) (quoting 28 U.S.C. § 2254(e)(1)). “To show such an error occurred, the petitioner
26 must establish that the state court’s decision rested on a finding of fact that is ‘objectively
27 unreasonable.’” *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (quoting *Lambert v.*
28 *Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004)). This standard is a “demanding” one, but it is “not

1 insatiable.” *Dretke*, 545 U.S. at 240.

2 The state court decision to which Section 2254(d) applies is the “last reasoned decision” of
3 the state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991); *Barker v. Fleming*, 423 F.3d
4 1085, 1091–92 (9th Cir. 2005). When there is no reasoned opinion from the highest state court
5 considering a petitioner’s claims, the court “looks through” to the last reasoned opinion. *Ylst*, 501
6 U.S. at 804.

7 The Supreme Court has vigorously and repeatedly affirmed that under AEDPA, there is a
8 heightened level of deference a federal habeas court must give to state court decisions. *See Hardy*
9 *v. Cross*, 565 U.S. 65, 66 (2011) (per curiam); *Harrington v. Richter*, 562 U.S. 86, 96–101 (2011);
10 *Felkner v. Jackson*, 562 U.S. 594 (2011) (per curiam). As the Court explained: “[o]n federal
11 habeas review, AEDPA imposes a highly deferential standard for evaluating state-court rulings
12 and demands that state-court decisions be given the benefit of the doubt.” *Felkner*, 562 U.S. at
13 598 (internal quotation marks and citation omitted). With these principles in mind regarding the
14 standard and limited scope of review in which this Court may engage in federal habeas
15 proceedings, the Court addresses Petitioner’s claims.

16 **IV. DISCUSSION**

17 Petitioner asserts two claims in his petition: (1) his Sixth and Fourteenth Amendment
18 rights to confrontation and due process were violated based on the trial court’s admission of
19 prosecution witness Jeremy Rosario’s testimony though Rosario refused to submit to cross-
20 examination; and (2) his Sixth and Fourteenth Amendment rights to confrontation and due process
21 were violated based on the trial court’s admission of hearsay statements as conveyed by expert
22 witness Detective Anthony Kilmer as a basis for his gang-related expert testimony. Because the
23 California Supreme Court summarily dismissed Petitioner’s petition for review, ECF 16-9, Ex. G,
24 this Court reviews the Court of Appeals decision for the respective claims. *See Ylst*, 501 U.S. at
25 803–04. The Court discusses each claim in turn.

26 **A. Trial Court’s Admission of Prosecution Witness Jeremy Rosario’s Testimony**
27 **Despite His Refusal to Submit to Cross-Examination**

28 Petitioner argues that the state court’s decision was contrary to or an unreasonable

1 application of clearly established Confrontation Clause law because the state court upheld the trial
2 court's refusal to strike the testimony of prosecution witness Jeremy Rosario even though Rosario
3 "largely refused to testify on cross-examination" by "feign[ing] memory loss," refusing to allow
4 defense counsel to refresh his recollection (despite allowing government's counsel to do so), and
5 "answering 'sure' to scores of questions and [telling] counsel to interpret those answers any way
6 counsel wanted to." Pet. at 26.

7 On appeal, the state appellate court rejected Petitioner's claim that the admission of
8 Rosario's testimony violated his rights:

9 The state and federal Constitutions guarantee a criminal defendant the
10 right to confront the witnesses against him. (U.S. Const., 6th and 14th Amends.;
11 Cal. Const., art. I, § 15.) The primary purpose of confrontation is to secure the
12 opportunity for cross-examination. (*Alvarado v. Superior Court* (2000) 23 Cal.4th
13 1121, 1137; *United States v. Owens* (1988) 484 U.S. 554, 557 (*Owens*)).
14 Defendants maintain Rosario's refrain of "I don't remember" and "sure" denied
15 them their constitutionally guaranteed opportunity to cross-examine him. They
16 maintain the trial court erred by failing to strike Rosario's direct testimony in its
17 entirety. The People respond that Rosario's presence on the witness stand
18 afforded defendants an adequate opportunity for cross-examination.

19 A witness who "refuses to answer any question on direct or cross-
20 examination denies a defendant the right to confrontation which contemplates a
21 meaningful opportunity to cross-examine the witness." (*People v. Rios* (1985) 163
22 Cal.App.3d 852, 864; *see also Douglas v. Alabama* (1965) 380 U.S. 415, 422
[confrontation clause violation where witness refuses to testify at all on privilege
23 grounds].) By contrast, a witness who suffers from memory loss—real or
24 feigned—is considered "subject to cross-examination" because his presence and
25 responses provide the "jury with the opportunity to see [his] demeanor and assess
26 [his] credibility." (*People v. Gunder* (2007) 151 Cal.App.4th 412, 420 (*Gunder*)
27 ["The circumstance of feigned memory loss is not parallel to an entire refusal to
28 testify."]; *see also Owens, supra*, 484 U.S. at p. 559, 108 S.Ct. 838 [opportunity
to cross-examine not denied where witness suffers from memory loss].)

At issue here is whether Rosario is more akin to a witness who refuses to
answer questions or one who feigns memory loss. We conclude that, despite
Rosario's selective memory and evasiveness, the confrontation clause was
satisfied because "[his] presence at trial as a testifying witness gave the jury the
opportunity to assess [his] demeanor and whether any credibility should be given
to [his] testimony." (*People v. Homick* (2012) 55 Cal.4th 816, 861 (*Homick*),
quoting *People v. Perez* (2000) 82 Cal.App.4th 760, 766.) We are not persuaded
by defendants' contention that *Homick*, *Perez*, and *Gunder*, where the witnesses
were equally forgetful on direct and cross-examination, do not apply because
Rosario's memory loss did not manifest itself until cross-examination.[FN5] The

1 extent of a witness’s memory loss does not impact the rationale underlying those
2 decisions—namely, that the confrontation clause is not violated where the jury
3 has the opportunity to observe the witness’s demeanor and to assess his
4 credibility. Indeed, if anything, the selective nature of Rosario’s claimed memory
5 loss reflected poorly on his credibility, thus benefiting defendants.[FN6]

6 [FN5] In fairness, Rosario was a reluctant and forgetful witness
7 throughout his testimony. However, he permitted the prosecutor to refresh
8 his recollection, while denying defense counsel that opportunity.

9 [FN6] *People v. Murillo* (2014) 231 Cal.App.4th 448 is not contrary.
10 There, “[t]he trial court allow[ed] the prosecutor to ask [a prosecution]
11 witness more than 100 leading questions concerning the witness’s out-of-
12 court statements to prove defendant guilty of several criminal offenses.”
13 (*Id.* at pp. 449–450.) For example, the prosecutor asked the witness:
14 “‘Isn’t it true ... that you were shown six photographs [in January] and
15 asked whether you could identify anybody in those photographs?; [D]o
16 you recall telling the detectives that it looks like, but you’re not sure, [it is]
17 number four [(Murillo)]?; [D]o you recall circling number four [(Murillo)]
18 and putting your initials, the date, and the time on that document?; [D]o
19 you recall writing a statement that says, ‘Number four [(Murillo)] looks
20 like him, but not completely sure. Kind of the same face structure’?; [O]n
21 page one of this exhibit, do you recall signing it under signature of witness
22 in front of the detectives?’” (*Id.* at p. 451.) The witness refused to answer
23 or said he had nothing to say. Our colleagues in the Second District
24 concluded that the prosecutor’s “questions create[d] the illusion of
25 testimony[, which] deprived defendant of a fair trial because he could not
26 exercise his constitutional right of cross-examination.” (*Id.* at p. 450.) The
27 court reversed, citing *Crawford*. (*Id.* at p. 455.) As noted, case law
28 distinguishes between witnesses who feign memory loss and those who
refuse to answer questions. Rosario fell into the former category, while the
witness in *Murillo* fell into the later. And in *Murillo* the prosecutor
essentially testified for the witness. That did not occur here; Rosario
provided substantive responses and testimony.

In addition to claiming memory loss, Rosario frequently responded with
an equivocal “sure.” Rosario’s behavior was, in this regard, similar to that of the
witness in *Homick* who “refused to answer questions ... and generally behaved in
an uncooperative and childish manner.” (*Homick, supra*, 55 Cal.4th at p. 855.) We
see no practical difference between a witness who feigns lack of memory to avoid
answering a question and one who provides a meaningless response like Rosario’s
admittedly hollow “sure.” In both cases, while the witness’s response “‘narrow[s]
the practical scope of cross-examination,’” there is no confrontation right
violation because the jury has “‘the opportunity to assess [his] demeanor and
whether any credibility should be given to [his] testimony.’” (*Id.* at p. 861.)

Op. at 18–20 (citations altered).

The state appellate court’s decision was not contrary to and did not involve an

1 unreasonable application of clearly established federal law.

2 The Confrontation Clause of the Sixth Amendment provides that in criminal cases the
3 accused has the right to “be confronted with the witnesses against him.” U.S. Const. amend. VI.
4 The federal confrontation right applies to the states through the Fourteenth Amendment. *Pointer*
5 *v. Texas*, 380 U.S. 400, 403 (1965). The ultimate goal of the Confrontation Clause is to ensure
6 reliability of evidence, though it is a procedural rather than a substantive guarantee. *See Crawford*
7 *v. Washington*, 541 U.S. 36, 61 (2004). It commands not that evidence be reliable, but that
8 reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Id.*;
9 *see Davis v. Alaska*, 415 U.S. 308, 315–16 (1974) (noting a primary interest secured by the
10 Confrontation Clause is the right of cross-examination). The Clause thus reflects a judgment, not
11 only about the desirability of reliable evidence, but about how reliability can best be determined.
12 *Crawford*, 541 U.S. at 61; *see, e.g., United States v. Medjuck*, 156 F.3d 916, 919 n.1 (9th Cir.
13 1998) (noting that the Confrontation Clause serves to ensure that witnesses will testify under oath,
14 to force witnesses to undergo cross-examination, and to permit the jury to observe the demeanor of
15 witnesses). Confrontation Clause claims are subject to harmless error analysis. *United States v.*
16 *Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004); *see also United States v. Allen*, 425 F.3d 1231, 1235
17 (9th Cir. 2005). For purposes of federal habeas corpus review, the standard applicable to
18 violations of the Confrontation Clause is whether the inadmissible evidence had an actual and
19 prejudicial effect upon the jury. *See Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002)
20 (citing *Brecht*, 507 U.S. 619, 637 (1993)).

21 Petitioner fails to identify any clearly established federal law to which the state court
22 decision is contrary or which it unreasonably applied. Petitioner argues, at bottom, that admission
23 of Rosario’s testimony violated his right under the Confrontation Clause to have “an opportunity
24 for effective cross-examination.” Pet. at 30 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739
25 (1987)). He alleges he was denied this opportunity by Rosario’s feigned memory loss and
26 recalcitrance. *Id.* at 30–31. In his Petition, he cites numerous Supreme Court cases that broadly
27 define the right to effective cross-examination; however, he fails to point specifically to a single
28 case with analogous, or even similar, facts. In his Traverse, Petitioner more explicitly argues that

1 he “relies on” *Douglas v. Alabama*, 380 U.S. 415 (1965). See Trav. at 2. According to Petitioner,
 2 the state court’s decision was contrary to the holding in *Douglas*, which, in Petitioner’s words,
 3 “held that admission of a prior statement by a witness who at trial claimed his Fifth Amendment
 4 right to not respond to questioning violated the defendant’s right to Confrontation under the Sixth
 5 Amendment.” *Id.*

6 But the state court considered *Douglas* and reasonably determined that Rosario’s testimony
 7 (or lack thereof) was more akin to the testimony at issue in *United States v. Owens*, 484 U.S. 554,
 8 555, 559–60 (1988), in which the Supreme Court held that the defendant’s Confrontation rights
 9 had not been violated where the witness testified to an out-of-court identification but could not
 10 explain the basis for that identification due to memory loss. See Op. at 18–19. The state court
 11 noted that in *Douglas*, the “witness refuse[d] to testify at all” by claiming privilege for each
 12 question, whereas in cases like *Owens* involving memory loss, the witness is “considered ‘subject
 13 to cross-examination’ because his presence and responses provide the ‘jury with the opportunity to
 14 see [his] demeanor and assess [his] credibility.’” *Id.* (alterations in original) (quoting *California v.*
 15 *Gunder*, 151 Cal. App. 4th 412, 420 (2007)) (citing *Owens*, 484 U.S. at 559). It then held that in
 16 this case, Rosario, “despite his selective memory and evasiveness,” was more similar to the
 17 witnesses with memory loss than those who elect not to testify at all because the jury had “the
 18 opportunity to observe [his] demeanor and to assess his credibility.” Op. at 20. It also held that
 19 Rosario’s equivocal answer of “sure” was the same as feigning memory loss, in that it provided a
 20 “meaningless response” that still allowed the jury to evaluate Rosario’s credibility and demeanor.
 21 *Id.* at 20.

22 Nothing about the state court’s assessment of the facts and analogizing to *Owens* is an
 23 unreasonable application of the rule set forth in *Douglas*. The state court found that throughout
 24 his testimony Rosario “provided some substantive responses” and that “defense attorneys were
 25 permitted to impeach Rosario with his prior statements. Op. at 16. See, e.g., 43 State Court
 26 Reporter’s Transcript (“RT”) at 2180–81, 2195–96; 44 RT 2219–21, 2225–26. And though
 27 Rosario frequently answered “sure” and “I don’t remember” and refused to review documents to
 28 refresh his memory, the state court reasonably determined that these responses allowed the jury to

1 weigh Rosario’s credibility and demeanor. Indeed, the state court noted that “if anything, the
2 selective nature of Rosario’s claimed memory loss reflected poorly on his credibility.” Op. at 18.

3 The Court is not convinced by Petitioner’s argument that *Douglas* controls here because
4 “*Owens* involved a witness who has genuine memory loss, not feigned memory loss.” Trav. at 6.
5 Even if this were a meaningful distinction, Petitioner points to no Supreme Court case holding that
6 feigned memory loss is somehow distinguishable from genuine memory loss for the purposes of
7 the Confrontation Clause analysis. This failure alone necessarily means that the state court’s
8 application of *Owens* and *Douglas* was reasonable. But also, this distinction makes little sense
9 under the reasoning of *Owens*, where the Court emphasized that “the traditional protections of the
10 oath, cross-examination, and opportunity for the jury to observe the witness’ demeanor” satisfy the
11 constitutional requirements of the Confrontation Clause. *Owens*, 484 U.S. at 560; see *Felix v.*
12 *Mayle*, 379 F.3d 612, 617–18 (9th Cir. 2004), *rev’d and remanded on other grounds*, 545 U.S. 644
13 (2005) (holding state court decision was not contrary to clearly established law where the state
14 court held that feigned memory loss was more similar to *Owens* than *Douglas*). The state court
15 reasonably determined that those same protections are available whether the memory loss at issue
16 is feigned or genuine. See Op. at 19.

17 Likewise, the Court is unconvinced by Petitioner’s attempt to distinguish a witness’s “total
18 uncooperativeness” (*i.e.*, unwillingness or inability to answer questions from both government and
19 defense counsel) from a “selective uncooperativeness” (*i.e.*, unwillingness to answer questions
20 only from defense counsel), as is at issue here. Trav. at 3. The state court reasonably held that
21 “[t]he extent of a witness’s memory loss does not impact the rationale underlying th[e relevant]
22 decisions.” Op. at 19.³ Moreover, the state court found that “Rosario was a reluctant and
23 forgetful witness throughout his testimony,” *id.* at 19 n.5, not just to defense counsel—a factual
24 determination which this Court presumes to be correct under 28 U.S.C. § 2254(e)(1), absent clear
25 and convincing evidence to the contrary.

26
27 ³ To the extent Petitioner also argues that the Supreme Court’s decision in *Crawford*, 541 U.S. 36,
28 overruled *Owens* as to the issue of memory loss and the Confrontation Clause, see Pet. at 28–29,
Trav. at 6–7, Petitioner cites no clearly established Supreme Court law supporting that position.

1 For the foregoing reasons, the Court holds that the state court’s affirmance of the
2 admission of prosecution witness Jeremy Rosario’s testimony was not an unreasonable application
3 of or contrary to clearly established Supreme Court law.

4 **B. Trial Court’s Admission of Hearsay Statements as Conveyed by Expert Witness**
5 **Detective Anthony Kilmer**

6 Petitioner also argues that the state court unreasonably upheld the admission of expert
7 testimony on gangs by Detective Anthony Kilmer because, to support his opinion, Kilmer
8 introduced out-of-court, testimonial, case-specific statements for the truth of the matters asserted,
9 in violation of Petitioner’s Confrontation Clause rights. *See* Pet. at 43.

10 On appeal, the state appellate court rejected Petitioner’s claim that the admission of
11 Kilmer’s testimony violated his rights:

12 In *Crawford*, the Supreme Court announced a new rule: the confrontation
13 clause prohibits the “admission of testimonial statements of a witness who did not
14 appear at trial unless he was unavailable to testify, and the defendant had a prior
15 opportunity for cross-examination.” (*Crawford*, supra, 541 U.S. at pp. 53–54, 124
16 S.Ct. 1354.) At trial, Detective Kilmer testified that his expert opinions were
17 based, in part, on out-of-court statements, including police reports and
18 conversations with gang members and other officers. Defendants argue those out-
19 of-court statements—so-called “basis evidence”—were both testimonial and were
20 offered for their truth, such that Detective Kilmer’s testimony ran afoul of
21 *Crawford*.

22 Expert basis evidence implicates the confrontation clause only where the
23 expert discloses or otherwise conveys to the jury the substance of testimonial out-
24 of-court statements. (*U.S. v. Johnson* (4th Cir.2009) 587 F.3d 625, 635 (*Johnson*)
25 [“An expert witness’s reliance on evidence that *Crawford* would bar if offered
26 directly only becomes a problem where the witness is used as little more than a
27 conduit or transmitter for testimonial hearsay, rather than as a true expert whose
28 considered opinion sheds light on some specialized factual situation.”]; *U.S. v.*
Lombardozzi (2d Cir.2007) 491 F.3d 61, 72 [same]; *U.S. v. Gomez* (9th Cir.2013)
725 F.3d 1121, 1129 [same].) In the Supreme Court’s fractured decision in
Williams v. Illinois (2012) — U.S. —, 132 S.Ct. 2221 all nine justices agreed
that it is the admission of the *contents* of out-of-court statements that raises
potential confrontation clause concerns. (*Id.* at p. —, 132 S.Ct. at p. 2228 (plur.
opn. of Alito, J.) [“[o]ut-of-court statements that are *related* by the expert solely
for the purpose of explaining the assumptions on which that opinion rests”],
italics added; *id.* at p. —, 132 S.Ct. at p. 2255 (conc. opn. of Thomas, J.) [“the
disclosure of Cellmark’s out-of-court statements through the expert testimony”],
italics added; *id.* at p. —, 132 S.Ct. at p. 2267 (dis. opn. of Kagan, J.)
[considering whether “the *substance* of the report could come into evidence”],

1 italics added.) Our own high court’s recent decisions involving the intersection of
2 the confrontation clause and expert basis evidence likewise demonstrate that Sixth
3 Amendment concerns arise only where an expert witness communicates the
4 substance of an out-of-court statement. (*People v. Dungo* (2012) 55 Cal.4th 608,
5 622 (conc. opn. of Werdegar, J.) [considering whether an expert’s “repetition to
6 the jury of anatomical and physiological observations [a pathologist] recorded in
7 his [autopsy] report,” on which the expert based his opinions, violated the
8 confrontation clause]; *People v. Lopez* (2012) 55 Cal.4th 569, 576 [considering
9 whether criminalist’s testimony about the “contents” of a nontestifying analyst’s
10 laboratory report “violated defendant’s right to confront [the analyst] at trial”].)

7 Thus, as a threshold matter, defendants must establish that Detective
8 Kilmer conveyed the contents of out-of-court statements to the jury. (*Ballard v.*
9 *Uribe* (1986) 41 Cal.3d 564, 574–575 [party challenging judgment has burden to
10 show reversible error].) This they fail to do. Defendants point to Detective
11 Kilmer’s testimony that his opinions were based, in part, on (1) in-custody and
12 on-the-street conversations with gang members in which they voluntarily told him
13 about gang rivalries as well as their lifestyle, customs, and motivations; (2)
14 discussions with probation and parole officers about gang members who are on
15 probation or parole; and (3) conversations with officers in other agencies in Santa
16 Clara County about gang problems and gang members. But defendants cite no
17 testimony in which Detective Kilmer disclosed “the content of those
18 [conversations] or even stated with any particularity what [he] learned from those
19 [conversations].” (*Johnson*, supra, 587 F.3d at p. 636 [finding no confrontation
20 clause violation where expert relied on interviews with witnesses and cooperating
21 defendants without referencing the substance of those interviews].) Defendants
22 also complain that Detective Kilmer based his opinion that predicate offenses
23 were committed by Palmas members on police reports and conversations with
24 other officers. Again, however, our review of the record indicates Detective
25 Kilmer never revealed the substance of those reports or conversations.

19 Because Detective Kilmer did not relate statements by out-of-court
20 declarants to the jury, the admission of his testimony did not violate defendants’
21 confrontation rights. We need not reach the questions of whether any of the out-
22 of-court statements on which Detective Kilmer relied were testimonial or offered
23 for their truth.[FN7]

22 [FN7] Incidentally, even if we attempted to address those issues,
23 defendants’ failure to point to specific out-of-court statements Detective
24 Kilmer relayed to the jury would derail our analysis. Whether a particular
25 out-of-court statement is testimonial is highly fact-specific. (*Michigan v.*
26 *Bryant* (2011) 131 S.Ct. 1143 [“In determining whether a declarant’s
27 statements are testimonial, courts should look to all of the relevant
28 circumstances.”].) Given the record’s silence as to the circumstances
surrounding the various conversations on which Detective Kilmer relied,
we would be required to resolve the issue against defendants. (*See*
Denham v. Superior Court (1970) 2 Cal.3d 557, 564 [“All intendments
and presumptions are indulged to support [the judgment] on matters as to
which the record is silent, and error must be affirmatively shown.”].)

1 Op. at 26–28 (citations altered).

2 Petitioner challenges the state court’s holding on three bases. First, Petitioner challenges
 3 the state court’s primary holding: that Kilmer did not introduce the contents of out-of-court
 4 statements to the jury. *See* Pet. at 43. Petitioner does not argue that this holding is contrary to or
 5 an unreasonable application of clearly established law. Instead, he argues that this was an
 6 unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) because Kilmer did reveal
 7 the contents of certain statements. He then argues that these statements were introduced for the
 8 truth of the matters asserted as clearly established under *Williams v. Illinois*, 567 U.S. 50 (2012).
 9 Second, Petitioner challenges the state court’s secondary holding: that Petitioner failed to raise
 10 sufficient evidence to demonstrate that any purportedly introduced statements were “testimonial”
 11 so as to violate his Confrontation Clause rights. *See* Pet. at 56–57. Relying on *Davis v.*
 12 *Washington*, 547 U.S. 813 (2006), *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011), and
 13 *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308 (2009), he argues that the state court
 14 unreasonably determined that the statements on which Kilmer relied were not testimonial. Finally,
 15 Petitioner argues that these errors were not harmless, but instead had a substantial and injurious
 16 effect on the verdict under *Brecht*, 507 U.S. 619.

17 Petitioner’s first argument—that the state court unreasonably determined that Kilmer did
 18 not reveal the content of certain statements—has some merit. The state court did not explicitly
 19 conduct a statement-by-statement review of Kilmer’s testimony, but it appears from the record that
 20 Kilmer may indeed have introduced the contents of certain statements to the jury, either by
 21 recounting portions of those statements himself or by affirming the statements as recounted in
 22 questions by the prosecutor. However, this Court need not decide whether the state court’s factual
 23 determination was unreasonable, because to succeed here Petitioner must also win on his second
 24 argument—that the state court unreasonably held that Petitioner failed to demonstrate that
 25 Kilmer’s introduced statements were testimonial. This he cannot do. This holding by the state
 26 court was neither an unreasonable determination of the facts nor contrary to or an unreasonable
 27 application of clearly established law. Because this holding is dispositive, this Court need not
 28 reach Petitioner’s other arguments.

1 As discussed above, the Confrontation Clause of the Sixth Amendment gives a criminal
2 defendant the right to “be confronted with the witnesses against him.” U.S. Const. amend. VI. In
3 *Crawford*, 541 U.S. at 51, the Supreme Court made clear that a witness is anyone who bears
4 testimony against the defendant. As such, statements that are “testimonial,” even when made
5 outside the courtroom, are subject to the Confrontation Clause’s mandates. Such statements
6 include, but are not limited to, those made as “prior testimony at a preliminary hearing, before a
7 grand jury, or at a former trial” and those made during certain “police interrogations.” *Id.* at 68.
8 Since *Crawford*, the Supreme Court has continued to develop guidelines for determining when a
9 statement is testimonial. In *Michigan v. Bryant*, 562 U.S. 344, 358 (2011), the Court made clear
10 that statements are testimonial when they are “procured with a primary purpose of creating an out-
11 of-court substitute for trial testimony.” This test is an objective one. *Id.* As to police
12 interrogations (including street encounters), the *Bryant* Court held that courts must “objectively
13 evaluat[e] the statements and actions of the parties to the encounter, in light of the circumstances
14 in which the interrogation occurs” to determine the primary purpose for soliciting the statement.
15 *Id.* at 370. Likewise, one additional factor to consider is the formality of the situation and the
16 interrogation. A “formal station-house interrogation . . . is more likely to provoke testimonial
17 statements, while less formal questioning is less likely to reflect a primary purpose aimed at
18 obtaining testimonial evidence against the accused.” *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015)
19 (internal quotation marks omitted). In any scenario, the question of whether a statement is
20 testimonial is fact-specific. *See Bryant*, 562 U.S. at 370.

21 Petitioner points to several categories of statements introduced by Kilmer that he believes
22 were testimonial. *See Pet.* at 48–52. First, Petitioner notes that Kilmer relied on police reports
23 and field investigation cards that detail various “police contacts” with Petitioner and others. *See,*
24 *e.g.*, 125 RT 7639–40, 7655–59, 7661–65, 7667. Second, Kilmer had conversations with other
25 officers and witnesses in the case (including Jeremy Rosario and Hector Delreal) about various
26 facts, including the gang affiliations in the area where the January 20, 2007 meeting took place,
27 the fact that some gang members often frequented Pete Washington’s house, and the affiliations of
28 the perpetrators of the predicate crimes in this case. *See* 125 RT 7633, 7646; 126 RT 7700–02,

1 7716–19, 7732. Kilmer also relied on police reports to discern information about the predicate
2 acts. 126 RT 7716–19. And he relied on police reports, field investigation cards, and information
3 from a police department database in forming his opinions. *See* 125 RT 7637; 126 RT 7745–46.
4 Finally, he relied on certain physical evidence, including Petitioner’s tattoos and items found as a
5 result of a search of Petitioner’s house during the time of the string of shootings in 2007. 125 RT
6 7624–25, 7663–66.

7 As an initial matter, there is no indication that the state court made an unreasonable
8 determination of the facts to the extent it held that these statements were not solicited during
9 police investigations seeking to establish a substitute for in-court testimony. In his brief before the
10 state court, Petitioner cited only the transcript of Kilmer’s testimony. *See* Appellant’s Opening
11 Brief, ECF 16-9, Ex. C (relying on Defendant Rojas’s brief, ECF 16-9, Ex C1 at 58–66). Based
12 on that testimony, the state court could have reasonably determined that the statements Kilmer
13 relied upon from police contacts, police reports, field investigation cards, and his own
14 conversations with officers and witnesses were all solicited in circumstances not constituting
15 formal investigations.

16 For example, Petitioner notes that each of the interactions between officers and Petitioner
17 are described as “contacts,” whereby it is reasonable to determine that they were not solicited
18 pursuant to formal investigative matters. *See* Pet. at 48–52; 125 RT 7625, 7631–32, 7639–40,
19 7655–59, 7661–65, 7667. Indeed, Kilmer testified that at least one of those contacts, in 2008, was
20 during the department’s “unofficial” Cinco de Mayo activities. 125 RT 7655. Though Petitioner
21 was “detained,” 126 RT 7764, there is no evidence that the statements were solicited as part of an
22 ongoing investigation. Similarly, though Kilmer relied on police reports, there is no firm
23 indication that these reports were drafted as part of an ongoing investigation into criminal activity,
24 as opposed to serving as a log of interactions with known and potential gang affiliates for other
25 legitimate police purposes.⁴ 125 RT 7637; 126 RT 7745–46. Kilmer even described the police

26 _____
27 ⁴ Petitioner’s strongest argument as to reports and conversations being testimonial relates to
28 Kilmer’s testimony on the predicate acts. Kilmer testified that he relied on conversations he had
with other officers “in helping form [his] opinion on this case” and on the “the predicate report[s]”
of the crimes. 126 RT 7716–19. This information alone does not present clear and convincing

1 database on which he relied as including informal contacts such as street stops of individuals and
2 identifications of vehicles registered to gang members. *See* 125 RT 7637. Petitioner has provided
3 no evidence, much less clear and convincing evidence, that such information was collected during
4 ongoing investigations. As such, the state court’s determination of the facts was reasonable.

5 In arguing that the state court’s decision was contrary to or an unreasonable application of
6 clearly established law, Petitioner relies on *Davis v. Washington*, 547 U.S. 813 (2006), *Bullcoming*
7 *v. New Mexico*, 564 U.S. 647, 652 (2011), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305,
8 308 (2009).⁵ *See* Pet. at 57. He claims that these cases clearly establish that when a police
9 department maintains police-contact records, it is a “strong indicator that the records were
10 prepared and retained for use in court”—that is, that the records are testimonial. Pet. at 57. And
11 in this case, he says, some of the contacts were made during the string of shootings at issue and
12 when the police department was “very, very busy,” further indicating that the contacts were
13 “undertaken to investigate the very crimes charged,” *id.*, and that the contacts were “methodically
14 catalogued precisely for future reference in future gang prosecution,” Trav. at 12.

15 None of the cases Petitioner cites support these propositions. Both *Bullcoming* and
16 *Melendez-Diaz* are wholly inapposite, dealing not with police contacts or investigations, but rather
17 with the reports and conclusions produced as a result of expert forensic analyses. *Davis*, by
18 contrast, did deal with police investigations, distinguishing statements made to police about events
19 during an ongoing emergency, 547 U.S. at 826–27, from statements detailing past events,
20 specifically those given in response to an investigation “into possible criminal past conduct,” *id.* at

21
22 evidence that the conversations and reports were procured with the primary purpose of obtaining
23 testimony. But even if they were testimonial, as noted, Petitioner does not challenge the state
24 court’s determination that Kilmer must have introduced the *contents* of the testimonial statements
25 in order for there to be a Confrontation Clause issue. *See* Op. at 26–28. At least as to these
26 statements, the record is clear that Kilmer never introduced the contents of any statements from
27 the police reports or conversations concerning the predicate acts. On direct examination, the
28 prosecutor asked Kilmer whether he had an opinion on whether each predicate act was committed
by an El Hoyo Palmas gang member, to which he answered “yes” without revealing the statements
upon which he relied in forming that opinion. *See* 126 RT 7716–19. As such, the state court
reasonably held that the predicate act testimony was admissible.

⁵ Petitioner also relies heavily on the California Supreme Court decision in *People v. Sanchez*, 63 Cal. 4th 665 (2016) to support his arguments. But Petitioner must demonstrate why the state court decision here was an unreasonable application of “Federal law[] as determined by the Supreme Court of the *United States*.” *See* 28 U.S.C. 2254(d)(1) (emphasis added).

1 829 (citing *Crawford*). But *Davis* does not speak to the scenario at issue here, involving
2 seemingly informal police contacts, not explicitly tied to an ongoing criminal investigation, the
3 records of which are then maintained by the police department. Indeed, Petitioner points only to
4 cases in which the investigation was clearly targeted at “possible criminal past conduct”—which is
5 not the case here, where the records were allegedly catalogued for use in *future* investigations.
6 And even as to the contacts made during the “busy” period during the string of shootings at issue,
7 there is no evidence that these contacts were made to investigate those shootings. As such, the
8 state court’s decision was not an unreasonable application of or contrary to clearly established law.

9 The state court thus reasonably concluded that the trial court’s admission of Detective
10 Kilmer’s expert testimony relying on out-of-court statements did not violate Petitioner’s
11 Confrontation Clause rights under the Sixth and Fourteenth Amendments.

12 **V. CONCLUSION**

13 After a careful review of the record and pertinent law, the Court concludes that the Petition
14 for a Writ of Habeas Corpus must be DENIED.

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

23 The Clerk shall terminate any pending motions, enter judgment in favor of Respondent,
24 and close the file.

25 **IT IS SO ORDERED.**

26 Dated: August 31, 2018

27 

28 BETH LABSON FREEMAN
United States District Judge