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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

KEVIS LAVELL MANUEL,	)	NO. CV 17-6333-AB(E)
	)	
Petitioner,	)	
	)	
v.	)	REPORT AND RECOMMENDATION OF
	)	
WARDEN J. SUTTON,	)	UNITED STATES MAGISTRATE JUDGE
	)	
Respondent.	)	
	)	

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This Report and Recommendation is submitted to the Honorable André Birotte, Jr., United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

**PROCEEDINGS**

Petitioner filed a "Petition for Habeas Corpus By a Person in State Custody" on August 28, 2017. Respondent filed an Answer on October 9, 2017. Petitioner did not file a Reply within the allotted time.

**BACKGROUND**

1  
2  
3 A jury found Petitioner guilty of: (1) two counts of kidnapping  
4 Brenita Doe and Dominique Doe in violation of California Penal Code  
5 section 207(a); (2) two counts of making criminal threats in violation  
6 of California Penal Code section 422(a); and (3) injuring a former  
7 cohabitant, girlfriend or child's parent after a prior conviction in  
8 violation of California Penal Code section 273.5(f)(2) (Reporter's  
9 Transcript ["R.T."] 1203-07; Clerk's Transcript ["C.T."] 192-93). The  
10 jury acquitted Petitioner of human trafficking of Dominique Doe and  
11 found not true the allegations that Petitioner personally used a  
12 firearm in the commission of the offenses (R.T. 1204-06; C.T. 192-93).  
13 The jury deadlocked on a count of human trafficking of Brenita Doe,  
14 and the court declared a mistrial as to that count (R.T. 1209; C.T.  
15 193-94).

16  
17 Petitioner admitted suffering prior convictions qualifying for  
18 sentence enhancements under California Penal Code sections 667(a) and  
19 667.5(b) (R.T. 702-03, 1502-03; C.T. 234-35). Petitioner also  
20 admitted suffering a prior conviction qualifying as a strike under  
21 California's Three Strikes Law, California Penal Code sections 667(b)

22 ///  
23 ///  
24 ///  
25 ///  
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27 ///  
28 ///

1 - (i) and 1170.12(a) - (d) (R.T. 1502-03; C.T. 234).<sup>1</sup> Petitioner  
2 received a prison sentence of nineteen years and four months (R.T.  
3 1509-11; C.T. 235-38).

4  
5 The California Court of Appeal affirmed (Respondent's Lodgment 6;  
6 see People v. Manuel, 2016 WL 3773400 (Cal. App. July 12, 2016). The  
7 California Supreme Court denied Petitioner's petition for review  
8 summarily (Respondent's Lodgment 9).

9  
10 **SUMMARY OF TRIAL EVIDENCE**

11  
12 The Court has conducted an independent review of the Reporter's  
13 Transcript and has confirmed that the following summary of the  
14 evidence in People v. Manuel, 2016 WL 3773400 (Cal. App. July 12,  
15 2016) is accurate. See Nasby v. McDaniel, 853 F.3d 1049, 1052-53 (9th  
16 Cir. 2017); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009)  
17 (taking factual summary from state court decision). The Court  
18 observes that, in Petitioner's petition for review to the California  
19 Supreme Court, Petitioner incorporated the Court of Appeal's factual  
20 summary (see Respondent's Lodgment 10, p. 6).

21 ///

22 ///

23  
24 <sup>1</sup> The Three Strikes Law consists of two nearly identical  
25 statutory schemes. The earlier provision, enacted by the  
26 Legislature, was passed as an urgency measure, and is codified as  
27 California Penal Code §§ 667(b) - (I) (eff. March 7, 1994). The  
28 later provision, an initiative statute, is embodied in California  
Penal Code § 1170.12 (eff. Nov. 9, 1994). See generally People  
v. Superior Court (Romero), 13 Cal. 4th 497, 504-05, 53 Cal.  
Rptr. 2d 789, 917 P.2d 628 (1996). The state charged Petitioner  
under both versions (C.T. 97).

1           On May 28, 2014, Manuel questioned Brenita Doe  
2           (Brenita),<sup>2</sup> his intermittent girlfriend, about another man.  
3           In the living room of their house, he cursed and yelled at  
4           her, accused her of lying, and then hit her in the face and  
5           shoulders. Brenita's four children—Marcquis, Dominique,  
6           Gabriel and Kjohny — were in the house but in different  
7           rooms.<sup>3</sup>

8  
9           Brenita ran out of the house and down the street to get  
10          help. Manuel "dragged" her back and threw her on the ground  
11          in front of the house. After that, he picked her up and  
12          took her inside where he repeatedly slapped and punched her.  
13          Eventually, he instructed Brenita to put on a short dress  
14          and Dominique, who was 12 years old, to put on short shorts.  
15          He announced that he was going to prostitute their bodies.

16  
17          After Brenita and Dominique changed, Manuel forced them  
18          into the family's car. He drove them to a Rite Aid and told  
19          Brenita to get out and make some money. She got out, went  
20          to a bus stop and took a seat. Manuel offered her for sale  
21          to passersby. He told them he had Brenita's 12-year-old  
22          daughter in his car.

23        ///  
24        ///  
25        \_\_\_\_\_

26                <sup>2</sup>     The trial court concealed Brenita's full name by  
27                referring to her as Brenita Doe.

28                <sup>3</sup>     Manuel is Kjohny's father but not the father of  
              Marcquis, Dominique and Gabriel.

1           No one accepted Manuel's solicitations. Eventually, he  
2           drove Dominique to a 7-Eleven across the street from the  
3           Rite Aid and parked while Brenita remained at the bus stop.  
4           Manuel got out of the car and told Dominique that if she  
5           moved, he would kill her. While making the threat, Manuel  
6           pulled a gun part way out of his waistband so it was visible  
7           to Dominique. Then he pointed the gun at her head.  
8           Subsequently, he tucked the gun back into his waistband and  
9           threatened Dominique by saying, "If you scream or if you  
10          yell or get out, I'll kill you."

11  
12          Manuel made Brenita return to the car and told her to  
13          get inside. After she complied, he drove back to the house.

14  
15          Shortly thereafter, Manuel drove Brenita and Dominique  
16          to some train tracks. He turned off the car and told them  
17          to get out. When they refused, he tried to forcibly remove  
18          them, but they fought back. He said he was going to kill  
19          them. When he could not pull them out, he got back in the  
20          car. Eventually, Manuel drove them to a trailer park, after  
21          which he drove them home.

22  
23          At home, Manuel told Brenita to cook food. Later, he  
24          told her to get back in the car so they could take another  
25          ride. Because she was afraid he would hit her, she  
26          complied. He drove to a park.

27        ///  
28        ///  
29

1 Dominique told Marcquis to call the police. He spoke  
2 to some neighbors and asked them to make the call. One of  
3 the neighbors called 911. When Manuel returned home with  
4 Brenita, the police were present. He parked in a neighbor's  
5 driveway and got out. The police saw Manuel trying to hide.  
6 Soon after, they arrested him.

7  
8 (Respondent's Lodgment 7, pp. 3-4; see People v. Manuel, 2016 WL  
9 3773400, at \*1-2).

10  
11 **PETITIONER'S CONTENTIONS**

12  
13 Petitioner asserts two related claims of alleged instructional  
14 error:

15  
16 1. The trial court allegedly erred by failing to instruct the  
17 jury on the "contextual factors" contained in CALCRIM 1215 with  
18 respect to the asportation requirement of simple kidnapping (Ground  
19 One); and

20  
21 2. The trial court allegedly erred by failing to instruct the  
22 jury to consider whether the movement of the victims was incidental to  
23 the other alleged "associated crimes" (Ground Two).

24  
25 **STANDARD OF REVIEW**

26  
27 Under the "Antiterrorism and Effective Death Penalty Act of 1996"  
28 ("AEDPA"), a federal court may not grant an application for writ of

1 habeas corpus on behalf of a person in state custody with respect to  
2 any claim that was adjudicated on the merits in state court  
3 proceedings unless the adjudication of the claim: (1) "resulted in a  
4 decision that was contrary to, or involved an unreasonable application  
5 of, clearly established Federal law, as determined by the Supreme  
6 Court of the United States"; or (2) "resulted in a decision that was  
7 based on an unreasonable determination of the facts in light of the  
8 evidence presented in the State court proceeding." 28 U.S.C. §  
9 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v.  
10 Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09  
11 (2000).

12  
13 "Clearly established Federal law" refers to the governing legal  
14 principle or principles set forth by the Supreme Court at the time the  
15 state court renders its decision on the merits. Greene v. Fisher, 565  
16 U.S. 34, 38 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A  
17 state court's decision is "contrary to" clearly established Federal  
18 law if: (1) it applies a rule that contradicts governing Supreme  
19 Court law; or (2) it "confronts a set of facts . . . materially  
20 indistinguishable" from a decision of the Supreme Court but reaches a  
21 different result. See Early v. Packer, 537 U.S. at 8 (citation  
22 omitted); Williams v. Taylor, 529 U.S. at 405-06.

23  
24 Under the "unreasonable application" prong of section 2254(d)(1),  
25 a federal court may grant habeas relief "based on the application of a  
26 governing legal principle to a set of facts different from those of  
27 the case in which the principle was announced." Lockyer v. Andrade,  
28 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537

1 U.S. at 24-26 (state court decision "involves an unreasonable  
2 application" of clearly established federal law if it identifies the  
3 correct governing Supreme Court law but unreasonably applies the law  
4 to the facts).

5  
6 "In order for a federal court to find a state court's application  
7 of [Supreme Court] precedent 'unreasonable,' the state court's  
8 decision must have been more than incorrect or erroneous." Wiggins v.  
9 Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state  
10 court's application must have been 'objectively unreasonable.'" Id.  
11 at 520-21 (citation omitted); see also Waddington v. Sarausad, 555  
12 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th  
13 Cir. 2004), cert. dismiss'd, 545 U.S. 1165 (2005). "Under § 2254(d), a  
14 habeas court must determine what arguments or theories supported,  
15 . . . or could have supported, the state court's decision; and then it  
16 must ask whether it is possible fairminded jurists could disagree that  
17 those arguments or theories are inconsistent with the holding in a  
18 prior decision of this Court." Harrington v. Richter, 562 U.S. 86,  
19 101 (2011). This is "the only question that matters under §  
20 2254(d)(1)." Id. at 102 (citation and internal quotations omitted).  
21 Habeas relief may not issue unless "there is no possibility fairminded  
22 jurists could disagree that the state court's decision conflicts with  
23 [the United States Supreme Court's] precedents." Id. "As a condition  
24 for obtaining habeas corpus from a federal court, a state prisoner  
25 must show that the state court's ruling on the claim being presented  
26 in federal court was so lacking in justification that there was an  
27 error well understood and comprehended in existing law beyond any  
28 possibility for fairminded disagreement." Id. at 103.



1 In applying these standards, the Court usually looks to the last  
2 reasoned state court decision, here the decision of the California  
3 Court of Appeal. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th  
4 Cir. 2008).

5 **DISCUSSION<sup>4</sup>**

6  
7 **A. Background**

8  
9 The trial court instructed the jury using CALCRIM 1215 as  
10 follows:

11  
12 The defendant is charged in Count 1 and Count 2 with  
13 kidnapping in violation of Penal Code section 207(a).

14  
15 To prove the defendant is guilty of this crime, the  
16 People must prove that:

17  
18 1. The defendant took, held, or detained another  
19 person by using force or by instilling reasonable  
20 fear;

21  
22 2. . . . Using that force or fear, the defendant  
23 moved the other person or made the other person

---

24  
25 <sup>4</sup> The Court assumes arguendo Petitioner has not  
26 procedurally defaulted any of his claims. See Lambrix v.  
27 Singletary, 520 U.S. 518, 523-25 (1997); Ayala v. Chappell, 829  
28 F.3d 1081, 1095-96 (9th Cir. 2016), cert. denied, 136 S. Ct. 244  
(2017); Franklin v. Johnson, 290 F.3d 1223, 1229, 1232-33 (9th  
Cir. 2002).

1           move a substantial distance; and

2  
3           3. The other person did not consent to the movement.

4  
5           In order to consent, a person must act freely and  
6 voluntarily and know the nature of the act.

7  
8           Substantial distance means more than slight or trivial  
9 distance. In deciding whether the distance was substantial,  
10 you must consider all the circumstances relating to the  
11 movement.

12  
13 (R.T. 940-41; see C.T. 140).

14  
15           The court did not include the following language, which is  
16 contained in brackets within CALCRIM 1215:

17  
18           [Thus, in addition to considering the actual distance moved,  
19 you may also consider other factors such as [whether the  
20 distance the other person was moved was beyond that merely  
21 incidental to the commission of \_\_\_\_\_ <insert  
22 associated crime>], whether the movement increased the risk  
23 of [physical or psychological] harm, increased the danger of  
24 a foreseeable escape attempt, or gave the attacker a greater  
25 opportunity to commit additional crimes, or decreased the  
26 likelihood of detection.]

27 ///

28 ///

1           Petitioner contends that, if the court had included in the  
2 kidnapping instruction the "contextual factors" contained in the  
3 bracketed language set forth above, the jury purportedly could have  
4 found that the movement of Brenita and Dominique was incidental to the  
5 assault, the making of criminal threats and the alleged human  
6 trafficking (Petition, attachment, pp. 17-22). Therefore, Petitioner  
7 argues, the jury could have found that the movement of the victims was  
8 not "substantial," as required for a simple kidnapping conviction  
9 (Petition, attachment, pp. 17-22). The Court of Appeal rejected  
10 Petitioner's claims, ruling that any error in failing to instruct on  
11 "contextual factors" was harmless and that an "associated crime"  
12 instruction was not warranted by the evidence (Respondent's Lodgment  
13 9, pp. 10-12; see People v. Manuel, 2016 WL 3773400, at \*5-7).

14  
15           **B. Governing Legal Standards**

16  
17           "[I]nstructions that contain errors of state law may not form the  
18 basis for federal habeas relief." Gilmore v. Taylor, 508 U.S. 333,  
19 342 (1993); see also Estelle v. McGuire, 502 U.S. 62, 71-72 (1991)  
20 ("the fact that the instruction was allegedly incorrect under state  
21 law is not a basis for habeas relief"); Dunckhurst v. Deeds, 859 F.2d  
22 110, 114 (9th Cir. 1988) (instructional error "does not alone raise a  
23 ground cognizable in a federal habeas corpus proceeding"). When a  
24 federal habeas petitioner challenges the validity of a state jury  
25 instruction, the issue is "whether the ailing instruction by itself so  
26 infected the entire trial that the resulting conviction violates due  
27 process." Estelle v. McGuire, 502 U.S. at 72; Clark v. Brown, 450  
28 F.3d 898, 904 (9th Cir.), cert. denied, 549 U.S. 1027 (2006). The

1 court must evaluate the alleged instructional error in light of the  
2 overall charge to the jury. Middleton v. McNeil, 541 U.S. 433, 437  
3 (2004); Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Villafuerte v.  
4 Stewart, 111 F.3d 616, 624 (9th Cir. 1997), cert. denied, 522 U.S.  
5 1079 (1998). In challenging a failure to give an instruction, a  
6 habeas petitioner faces an "especially heavy" burden. Henderson v.  
7 Kibbe, 431 U.S. at 155.

8  
9 **C. The Omission of the "Contextual Factors" from the Kidnapping**  
10 **Instruction Does Not Merit Federal Habeas Relief.**

11  
12 California Penal Code section 207(a) provides:

13  
14 Every person who forcibly, or by any other means of  
15 instilling fear, steals or takes, or holds, detains, or  
16 arrests any person in this state, and carries the person  
17 into another country, state, or county, or into another part  
18 of the same county, is guilty of kidnapping.

19  
20 To prove simple kidnapping under section 207(a), the prosecution  
21 must show that the asportation of the victim was "substantial in  
22 character." People v. Martinez, 20 Cal. 4th 225, 235, 83 Cal. Rptr.  
23 2d 533, 973 P.2d 512 (1999) (citation and internal quotations omitted)  
24 ("Martinez"). The trier of fact may consider more than "actual  
25 distance," however. Id. at 235-37 (overruling prior case law holding  
26 that asportation for simple kidnapping was to be determined solely by  
27 the distance moved). In Martinez, the California Supreme Court held  
28 that, in a simple kidnapping case, it would be "proper for the court

1 to instruct that, in determining whether the movement is 'substantial  
2 in character' [citation], the jury should consider the totality of the  
3 circumstances." Id. at 237. "Thus, in a case where the evidence  
4 permitted, the jury might properly consider not only the actual  
5 distance the victim is moved, but also such factors as whether that  
6 movement increased the risk of harm above that which existed prior to  
7 the asportation, decreased the likelihood of detection, and increased  
8 both the danger inherent in a victim's foreseeable attempts to escape  
9 and the attacker's enhanced opportunity to commit additional crimes."  
10 Id. (footnote omitted).

11  
12 Here, the trial court instructed the jury to consider the  
13 "totality of the circumstances" in determining whether the movement of  
14 the victims was substantial, but did not instruct on the specific  
15 "contextual factors" the jury might consider under Martinez. Martinez  
16 indicated that a jury "may convict of simple kidnapping without  
17 finding an increase in harm, or any other contextual factors." Id.  
18 "Instead, . . . the jury need only find that the victim was moved a  
19 distance that was "'substantial in character.'" Id. (citations  
20 omitted). "To permit consideration of 'the totality of the  
21 circumstances' is intended simply to direct attention to the evidence  
22 presented in the case, rather than to abstract concepts of distance."  
23 Id.

24  
25 Acknowledging that Martinez did not expressly mandate a jury  
26 instruction on the contextual factors, the Court of Appeal in  
27 Petitioner's case nevertheless stated that it would be reasonable to  
28 read Martinez as requiring such an instruction (Respondent's Lodgment

1 7, pp. 10-11; see People v. Martinez, 2016 WL 3773400, at \*6). The  
2 Court of Appeal stated that simply instructing the jury to consider  
3 the "totality of the circumstances" "arguably [is] too vague to  
4 provide guidance" (id.).<sup>5</sup> However, the Court of Appeal ruled that any  
5 "hypothetical error" was not prejudicial in light of the evidence that  
6 Petitioner: (1) moved the victims in sequence to a Rite Aid, a 7-  
7 Eleven, the victims' home, a set of train tracks, a trailer park, and  
8 then back to the victims' home; and (2) moved Brenita to a park and  
9 then back home again (Respondent's Lodgment 7, p. 11; see People v.  
10 Martinez, 2016 WL 3773400, at \*6). The Court of Appeal reasoned that  
11 the movement of Brenita and Dominique necessarily increased the risk  
12 of harm to them because it gave Petitioner "an increased opportunity  
13 to commit additional crimes and avoid detection because he could have  
14 made good on his threats to kill Brenita and Dominique at the train  
15 tracks without leaving evidence of such crimes at their house, and  
16 without neighbors hearing any cries for help or any gunshots"  
17 (Respondent's Lodgment 7, p. 11; see People v. Manuel, 2016 WL  
18 3773400, at \*6). The Court of Appeal also reasoned that the use of a  
19 car to transport Brenita and Dominique increased the risk of danger to  
20 the victims "if they tried to escape while in transit from one place

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21  
22 <sup>5</sup> But see People v. Brooks, 3 Cal. 5th 1, 219 Cal. Rptr.  
23 3d 331, 396 P.3d 480 (2017), cert. denied, \_\_\_ U.S. \_\_\_, 2017 WL  
24 4409978 (Dec. 4, 2017) (because Martinez indicated that a jury  
25 could determine the asportation element of simple kidnapping  
26 "solely on the basis of the actual distance the victim was moved"  
27 without finding an increase in harm or other contextual factors,  
28 an instruction which included the contextual factors "concerned,  
not the entirety of the definition of asportation, but rather one  
of the theories under which the jury was told the element of  
asportation could be established, a theory that was not itself  
necessary for the verdict") (citation and internal quotations  
omitted).

1 to the other" (Respondent's Lodgment 7, p. 11; see People v. Manuel,  
2 2016 WL 3773400, at \*6). Applying the harmless error standard for  
3 federal constitutional error set forth in Chapman v. California, 386  
4 U.S. 18, 24 (1967) ("Chapman") to Petitioner's federal claim, the  
5 Court of Appeal concluded that, "[b]eyond a reasonable doubt, the jury  
6 would have concluded that Manuel moved Brenita and Dominique a  
7 substantial distance even if the jury had been instructed on the  
8 contextual factors regarding asportation (Respondent's Lodgment 7, pp.  
9 10-11; see People v. Manuel, 2016 WL 3773400, at \*6).

10  
11 Assuming arguendo that federal constitutional error occurred,  
12 federal habeas relief would still be unavailable unless the Court of  
13 Appeal unreasonably applied Chapman. See Rademaker v. Paramo, 835  
14 F.3d 1018, 1023 (9th Cir. 2016), cert. denied, 137 S. Ct. 1119 (2017).  
15 The evidence showed that: (1) at the house on the day of the incident,  
16 Petitioner yelled at Brenita and hit, slapped and punched her in the  
17 face, arms, leg, head and ankle: (2) after Petitioner forced Brenita  
18 and Dominique to change into provocative clothing, he told the victims  
19 to get in the car so he could go sell their bodies; (3) Dominique  
20 obeyed Petitioner's order to get in the car because she was scared;  
21 (4) Petitioner drove several blocks to a Rite Aid; (5) at the Rite  
22 Aid, Petitioner yelled at Brenita to get out of the car and go to the  
23 bus stop to sell her body; (6) Petitioner walked behind Brenita to the  
24 bus stop, where he attempted to solicit passersby to engage in  
25 prostitution with Brenita and Dominique; (7) Petitioner reentered the  
26 car and drove with Dominique to a nearby 7-Eleven; (8) Petitioner  
27 parked at the 7-Eleven and told Dominique "if you move, I will kill  
28 you"; (9) Petitioner left Dominique in the car and walked across two

1 streets to Brenita's location at the bus stop; (10) Brenita followed  
2 Petitioner's order to get in the car; (11) Petitioner drove past the  
3 Rite Aid and the 7-Eleven to an alley by the train tracks; (12)  
4 Petitioner stopped the car and told the victims to exit the car,  
5 saying that he was going to kill them and put their bodies by the  
6 train tracks; (13) Petitioner tried to drag the victims out of the car  
7 but they resisted; (14) Petitioner drove the victims home and told  
8 Brenita to cook and Dominique to clean; (15) Petitioner told Brenita  
9 to get back in the car and drove to a park; and (16) Petitioner drove  
10 to someone's house, leaving Brenita in the car, then drove back to the  
11 house with Brenita and parked in the driveway next door (R.T. 340-41,  
12 343-50; 357-59, 360-62, 364-67, 371-72, 374, 382-85, 387-89, 391-92,  
13 395-97, 409-13, 417, 421-22, 616-17, 621-26, 628-38, 643-48, 659-60,  
14 662-66, 669-74, 680-81). The evidence plainly showed that the  
15 movement of the victims was "substantial" in character. Moreover, as  
16 the Court of Appeal reasonably concluded, this evidence proved that  
17 the movement of the victims "increased the risk of harm above that  
18 which existed prior to the asportation, decreased the likelihood of  
19 detection, and increased both the danger inherent in a victim's  
20 foreseeable attempts to escape and the attacker's enhanced opportunity  
21 to commit additional crimes." See Martinez, 20 Cal. 3d at 237. In  
22 light of this evidence, the Court of Appeal's harmless error  
23 determination cannot be deemed unreasonable. See Rademaker v. Paramo,  
24 835 F.3d at 1023-24 (where trial court applied a post-Martinez  
25 instruction on contextual factors to a pre-Martinez charge, the Court  
26 of Appeal found the error harmless, and the federal habeas court  
27 deemed the Court of Appeal's finding not unreasonable; the jury  
28 properly would have convicted the petitioner of kidnapping under



1 either standard, given evidence that petitioner moved the victim a  
2 "substantial distance" of approximately a mile and a half); People v.  
3 Brooks, 3 Cal. 5th 1, 219 Cal. Rptr. 3d 331, 396 P.3d 480 (2017),  
4 cert. denied, \_\_\_ U.S. \_\_\_, 2017 WL 4409978 (Dec. 4, 2017) (erroneous  
5 use of post-Martinez asportation instruction to pre-Martinez  
6 aggravated kidnapping harmless beyond a reasonable doubt, where  
7 evidence showed defendant drove victim once for 15-20 minutes and a  
8 second time for 5-10 minutes, and suggested even longer drives).  
9 Under the AEDPA standard of review, Petitioner is not entitled to  
10 federal habeas relief on Ground One of the Petition. See 28 U.S.C. §  
11 2254(d); Harrington v. Richter, 562 U.S. 86, 101 (2011).

12  
13 **D. The Failure to Give an "Associated Crime" Instruction Does**  
14 **Not Merit Federal Habeas Relief.**

15  
16 In Martinez, the California Supreme Court also indicated that,  
17 "in a case involving an associated crime, the jury should be  
18 instructed to consider whether the distance a victim was moved was  
19 incidental to the commission of that crime in determining the  
20 movement's substantiality." Martinez, 20 Cal. 4th at 237. For  
21 purposes of simple kidnapping, an "associated crime" is "any criminal  
22 act the defendant intends to commit where, in the course of its  
23 commission, the defendant also moves a victim by force or fear against  
24 his or her will." People v. Bell, 179 Cal. App. 4th 428, 438-39, 102  
25 Cal. Rptr. 3d 300 (2009) (original emphasis). "When an 'associated  
26 crime' is involved, there can be no violation of section 207 unless  
27 the asportation is more than incidental to the commission of that  
28 crime." Id. at 437 (citation and internal quotations omitted).

1           Petitioner contends that the movement of Brenita and Dominique  
2 was incidental to the other charged crimes, i.e., the alleged assault  
3 on Brenita, the threats and the human trafficking (Petition,  
4 attachment, pp. 17-18). The Court of Appeal rejected this claim,  
5 holding that the evidence did not support an associated crime  
6 instruction. The Court of Appeal reasoned that the non-kidnapping  
7 crimes did not occur at the same time Petitioner was moving Brenita  
8 and Dominique by force or fear, and, in any event, the continued  
9 movement of Brenita and Dominique after the completion of the non-  
10 kidnapping crimes was not incidental to those crimes (Respondent's  
11 Lodgment 7, p. 12; see People v. Manuel, 2016 WL 3773400, at \*7).

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13           The Court of Appeal's decision was not unreasonable. The  
14 evidence, described above, proved that: (1) Petitioner assaulted  
15 Brenita before the kidnapping began; and (2) Petitioner continued to  
16 move the victims after he made the threats and allegedly engaged in  
17 human trafficking. See People v. Delacerda, 236 Cal. App. 4th 282,  
18 291-94, 186 Cal. Rptr. 3d 475 (2015) (where defendant engaged in  
19 multiple acts of harmful or offensive touching of victim before,  
20 during and after the dragging movement that comprised the kidnapping,  
21 domestic violence battery was an associated crime of kidnapping only  
22 to the extent the acts of touching involved defendant's dragging of  
23 victim and stuffing her in a closet; failure to give "associated  
24 crimes" instruction prejudicial only to that extent; however, assault  
25 with a firearm was not an associated crime of kidnapping where assault  
26 "involved no movement at all, and was complete before the movement  
27 which comprised the kidnapping began"). The Court of Appeal  
28 reasonably determined that the evidence did not support an associated



1 **NOTICE**

2 Reports and Recommendations are not appealable to the Court of  
3 Appeals, but may be subject to the right of any party to file  
4 objections as provided in the Local Rules Governing the Duties of  
5 Magistrate Judges and review by the District Judge whose initials  
6 appear in the docket number. No notice of appeal pursuant to the  
7 Federal Rules of Appellate Procedure should be filed until entry of  
8 the judgment of the District Court.

9 If the District Judge enters judgment adverse to Petitioner, the  
10 District Judge will, at the same time, issue or deny a certificate of  
11 appealability. Within twenty (20) days of the filing of this Report  
12 and Recommendation, the parties may file written arguments regarding  
13 whether a certificate of appealability should issue.

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