

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

RICHARD MIGUEL GARCIA,

| Case No. 1:14-cv-00980-DAD-MJS (HC)

Petitioner,

## **FINDINGS AND RECOMMENDATION TO DENY FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS**

STUART SHERMAN, Warden

(ECF No. 22)

V.

## Respondent.

Petitioner is a state prisoner proceeding pro se with a first amended petition for writ of habeas corpus under 28 U.S.C. § 2254. Stuart Sherman, Warden of California Substance Abuse Treatment Facility, is hereby substituted as the proper named respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. Respondent is represented by Jeffrey White of the Office of the California Attorney General.

The petition raises the following claims: (1) the trial court erred in failing to instruct the jury on the lesser offenses of voluntary and involuntary manslaughter; (2) the trial court gave erroneous instructions on the gang enhancement; (3) the instruction on aiding and abetting was erroneous; (4) there was insufficient evidence to support a conviction for aiding and abetting murder; (5) the trial court erroneously failed to stay a

1 firearm enhancement; and (6) Petitioner was sentenced under the incorrect Penal Code  
2 provision for the gang enhancement. (ECF No. 22.)

3 As discussed below, the undersigned recommends the petition be denied.

4 **I. Procedural History**

5 Petitioner is currently in the custody of the California Department of Corrections  
6 and Rehabilitation pursuant to a judgment of the Superior Court of California, County of  
7 Tulare convicting him of second degree murder with gang and firearm enhancements.

8 Petitioner initially was convicted by a jury of conspiracy to commit murder and  
9 second degree murder, with gang and firearm enhancements. He received an aggregate  
10 sentence of fifty years to life. People v. Garcia, No. F062834, 2013 WL 3286207, at \*1  
11 (Cal. Ct. App. June 27, 2013) (Lodged Doc. 4.) Petitioner appealed. (Lodged Doc. 1.)

12 On June 27, 2013, the California Court of Appeal for the Fifth Appellate District  
13 reversed on the conspiracy count and remanded for a determination of whether  
14 Petitioner would be retried. (Lodged Doc. 4.) The court directed that, if Petitioner was not  
15 retried, the trial court would strike the conviction and sentence for the conspiracy count  
16 and amend the abstract of judgment to reflect that Petitioner was sentenced to 15 years  
17 to life for second degree murder, plus 25 years to life for the firearm enhancement, for an  
18 aggregate term of 40 years to life. (Lodged Doc. 4 at 52.) On October 16, 2013, the  
19 California Supreme Court denied Petitioner's petition for review. (Lodged Docs. 5-6.)

20 The state determined not to retry Petitioner on Count 1; he was resentenced on  
21 Count 2 to an indeterminate term of fifteen years to life, plus 25 years to life for the  
22 firearm enhancement, for an aggregate term of 40 years to life. (Lodged Doc. 11.)  
23 Following resentencing, Petitioner again appealed. (Lodged Doc. 7.)

24 On June 23, 2014, while his appeal was pending, Petitioner filed his first petition  
25 for writ of habeas corpus along with a request to stay the proceedings pending resolution  
26 of his second appeal. (ECF Nos. 1, 3.) His motion to stay and abey was granted. (ECF  
27 No. 9.)

1           On December 22, 2015, the Fifth District Court of Appeal modified the abstract of  
2 judgment to reflect the correct gang enhancement and to note that the enhancement  
3 was stayed. (Lodged Doc. 11.) In all other respects the judgment was affirmed. On  
4 February 24, 2016, the California Supreme Court denied review. (Lodged Docs. 12-13.)

5           Thereafter, the stay in this court was vacated. (ECF No. 21.) Petitioner filed the  
6 first amended petition presently before the Court. (ECF No. 22.) On May 3, 2017,  
7 Respondent filed an answer. (ECF No. 36.) On July 19, 2017, Petitioner filed a traverse.  
8 (ECF No. 39.) On December 7, 2017, Petitioner filed a document styled as a “Points and  
9 Authorities in Support of Traverse.” (ECF No. 42.) The matter is submitted.

10 **II. Factual Background**

11           The following facts regarding the underlying offense are taken from the Fifth  
12 District Court of Appeal’s June 27, 2013, opinion and are presumed correct. 28 U.S.C.  
13 § 2254(e)(1).

14           On the evening of August 28, 2009, two men wearing blue  
15 were walking along Avenue 416 in Orosi. There were three  
16 other people on the street who were not involved in the  
shooting, but witnessed the following events.

17           As the two men in blue walked on the street, a green Honda  
18 Accord appeared and pulled up to where the two men were  
19 walking. There were four men in the Honda. Someone in the  
car yelled the word “SuRat” at the two men in blue.

20           One witness [J.R.] testified that the Honda’s driver and the  
21 man who was sitting in the front passenger seat got out of the  
car. They threw cans at the two men in blue. [FN2]

22           [FN2: On cross-examination, this witness was  
23 impeached with his prior statement to the deputies that  
the man in the front passenger seat, later identified as  
24 defendant, did not get out of the car.]

25           This same witness testified that the man sitting in the  
Honda’s back seat, behind the driver, got out of the car and  
26 was holding a gun. The gunman initially aimed the gun at the  
27 witness, but then realized the witness was not with the two  
28 men in blue. The gunman then turned the weapon at the two  
men in blue, and fired five or six shots. One of the men fell

1 down. The other man appeared to be hit in the leg, but he  
2 was able to escape.

3 Another witness [G.C.] testified that the gunman got out of  
4 the Honda's back seat, and the other three men did not get  
5 out of the car or open their doors. The gunman fired five or  
6 six shots, one man fell down, and the second man ran away.  
7 After firing the shots, the gunman got back into the car, and  
8 the Honda left the area at a high rate of speed.

### 9 ***The initial investigation***

10 Around 7:50 p.m., deputies from the Tulare County Sheriff's  
11 Department received a dispatch about a gunshot victim on  
12 Avenue 416. The deputies found Arturo Bello lying on the  
13 road. Bello was dead, and his head was in a pool of blood.  
14 He had been wearing a blue tank top, a blue baseball cap,  
15 and white tennis shoes with a blue emblem. There were no  
16 weapons near him. There was a beer bottle found on the  
17 street in the victim's general vicinity.

### 18 ***Apprehension of suspects***

19 Shortly after the shooting, the deputies received the report  
20 that a dark colored Honda was involved. Just after finding the  
21 victim's body, the deputies saw a vehicle matching the  
22 Honda's description. It was traveling in excess of 75 miles per  
23 hour. The Honda passed two deputies traveling in an  
24 unmarked patrol unit. The deputies immediately activated the  
25 signal lights and siren to conduct a traffic stop. The Honda  
26 slowed down and finally stopped.

27 There were four people in the Honda. Josh Hernandez (Josh)  
28 was the driver. Defendant was sitting in the front passenger  
seat. Santos Hernandez (Santos), Josh's brother, and  
Rodney "Lance" Zayas were in the back seat. [FN3]

29 [FN3: We will refer to Santos and Josh by their first  
30 names for ease of reference; no disrespect is  
31 intended.]

32 Josh was wearing a black baseball cap with a red letter "C,"  
33 and had a red bandana hanging out of his back pocket. Josh  
34 had a tattoo on his arm in red ink which said "Hernandez de  
35 Catela."

36 Zayas had a .22-caliber live bullet in his pocket. Zayas also  
37 had "X4" and "TC" tattoos, which were gang-related. Santos

1 had a "C" tattoo on his arm, which stood for Catela.  
2 Defendant did not have any visible tattoos and was not  
3 wearing any red or gang-related attire when he was arrested.

4 At an in-field showup, one of the witnesses identified Zayas  
5 as the gunman, and said the three other suspects had been  
6 in the Honda.

7 ***Search of the car***

8 A Taurus nine-shot .22-caliber revolver was found on the  
9 floorboard of the Honda's backseat. It contained one .22-  
10 caliber live round but no expended shells. A plastic case was  
11 also in the backseat, and it contained a single .22-caliber live  
12 round and a cylinder lock. The live rounds which were found  
13 in Zayas's pocket, the revolver, and the plastic case were the  
14 same brand.

15 There were two CD cases in the car marked with the words  
16 "NorCal" and other northern gang-related words. There were  
17 beer bottles in the car.

18 ***Searches of the suspects' residences***

19 The deputies searched defendant's bedroom in his mother's  
20 house and found a Blackberry cell phone with gang  
21 photographs; a school group photo which depicted one  
22 person throwing a "four" sign and had derogatory phrases  
about the southern gang written on it; and other papers with  
gang letters on them. Defendant shared the bedroom with his  
brother, and the cell phone belonged to his brother.

23 When the deputies searched Josh's house in Bakersfield,  
24 they found a coffee mug with a drawing of the Huelga bird,  
25 the words "Catela, BPC," drawings of the "smile now, cry  
later" masks, and it said: "F\* \* \* those who oppose." There  
was a photograph of Josh "throwing up" a "four" sign with a  
red rag, signifying the Norteno gang.

26 Detective Crystal Derington testified that "Brown Pride  
27 Catela" was a northern gang in Cutler, and the words on the  
28 mug were "basically calling out their rival saying that they'll  
take care of business and do what it takes to stand their  
ground and take control of their territory...."

Zayas's house in Orosi was searched, and the deputies found a .12-gauge Mossberg semiautomatic shotgun under the dresser in Zayas's bedroom. It contained five shotgun

1 shells. There was red clothing in Zayas's bedroom closet.  
2 The deputies also found three letters from jail inmates and a  
page of gang-rap lyrics.

3 ***The fatal gunshot wound***

4 The victim suffered two gunshot wounds. The fatal wound  
5 entered his upper lip, just below his nose. The bullet traveled  
6 front to back, slightly downward, and slightly right to left. It  
7 fractured the victim's teeth [FN4] on his upper jaw, continued  
8 through the airway in the back of the mouth, severed the  
9 brain stem from the spinal cord, and went through the base of  
10 the skull. There was a fragment exit wound on the back of his  
11 scalp. A small caliber bullet fragment with rifling marks was  
12 recovered from his neck. This bullet wound was  
13 "immediately" fatal.

14 [FN4: Several teeth were found on the street near the  
15 victim's body.]

16 The victim had a second gunshot wound which entered the  
17 right side of his back. The bullet's trajectory was at an  
18 angle—slightly back to front, upward, and slightly left to right.  
19 The bullet hit the liver, entered the right chest cavity, and hit a  
20 rib. There was no exit wound. A deformed, small caliber bullet  
21 with rifling marks, and bullet fragments were recovered from  
22 the victim's body.

23 There were multiple abrasions on the victim's face and body.  
24 The victim's blood-alcohol level was 0.18 percent, and there  
25 was evidence that he had ingested marijuana.

26 ***Defendant's first statement***

27 At 7:32 a.m. on August 29, 2009, Detective Zaragoza  
28 conducted a videotaped interview with defendant. He advised  
defendant of the warnings pursuant to Miranda v. Arizona  
(1966) 384 U.S. 436 (Miranda), and defendant agreed to  
answer questions about the homicide. [FN5] Defendant, who  
was 23 years old, said Josh picked him up the previous day,  
and Zayas and Santos were in the car. Josh drove them to a  
cemetery, where they visited the grave of Josh's brother.  
They stayed there for about two hours and drank beer.  
Defendant said they left the cemetery in Josh's car. They  
were driving through Orosi when defendant fell asleep.  
Defendant said when he woke up, the deputies were behind  
Josh's car to conduct the traffic stop. Defendant said he did  
not know anything about a homicide, he did not do anything

1 wrong, and he fell asleep after they left the cemetery. At the  
2 end of the interview, Detective Zaragoza told defendant he  
3 was going to be booked into jail and asked if he claimed  
4 membership in a gang. Defendant said he was not involved in  
any gangs, and he could be housed in general population in  
the jail.

5 [FN5: The videotapes of defendant's two interviews  
6 were played for the jury and not transcribed by the  
7 court reporter. The prosecution apparently prepared  
8 transcripts for the jury to review during trial, but the  
transcripts were not introduced into evidence or  
included in the record. Our summary is based on our  
review of the videotapes themselves, introduced as  
exhibit Nos. 69 and 70.]

10 While not depicted on the videotape, Detective Zaragoza  
11 testified that defendant was "dry heaving" into a waste basket  
12 for about 10 to 15 minutes at the beginning of the interview,  
but he was coherent and did not appear under the influence.  
13 The videotape reflects that defendant was calm and polite  
during the interview.

14 ***Defendant's second statement***

15 Around 9:00 a.m. on the same day, defendant asked to  
16 speak to the detectives again, and said he had been too  
17 scared to tell the truth. Detective Zaragoza conducted  
18 another videotaped interview. Defendant was again advised  
19 of the Miranda warnings, and defendant said he wanted to  
talk to Zaragoza. Defendant was very calm and polite during  
the interview.

20 Defendant said he lied during the first interview to protect  
21 Zayas, and that Zayas fired the gun. Defendant said they left  
22 the cemetery in Josh's car. Josh was driving, defendant was  
in the front passenger seat, and Zayas and Santos were in  
the back seat.

23 Defendant said there were two men walking on the street,  
24 and they were wearing blue. Josh drove past them, then  
25 turned the car around and pulled up right next to them.  
Defendant said they did not yell at the men but "we all  
recognized them."

26 Detective Zaragoza asked defendant, "Who came up with the  
27 idea to go mobbing?" [FN6] Defendant replied: "Well, we all  
28 did but we never thought that that was going to happen."

1 Defendant said they had decided to have a barbecue, but  
2 first they were going to do a little mobbing. They were driving  
around and “one thing led to another.”

3 [FN6: As we will explain post, the prosecution's gang  
4 expert testified that “mobbing” meant “to get together”  
5 in a vehicle, look for a rival gang member, and take  
action against that person.]

6 On further questioning, defendant said that Zayas was the  
7 person who said they should go mobbing. Defendant said he  
8 never agreed to go mobbing but admitted that he remained in  
the car. Defendant said Zayas always had the gun, but  
9 defendant claimed he did not know about the gun before the  
shooting.

10 Detective Zaragoza asked defendant if going mobbing meant  
11 they were going to look for southerners. Defendant said, “Not  
12 necessarily,” and that it could mean that they were going to  
look for someone or just drive around and cruise. Defendant  
denied that the Surenos were their targets.

13 Defendant said Zayas started firing the gun. Defendant said  
14 no one else got out of the car. Defendant thought Zayas fired  
15 five or six shots. Defendant said everyone in the car was  
stunned that Zayas had a gun and fired the shots.

16 Defendant said that after Zayas finished shooting, Zayas got  
17 back in the car and said, “[L]et's get the f\* \* \* out of here,”  
18 and “I got ‘em, I got ‘em.” Josh took off for Orosi, but the  
deputies stopped them.

19 Detective Zaragoza asked defendant if he was a Norteno.  
20 Defendant said no. Defendant said he lived in Cutler, that  
there were a lot of northerners, and some were his friends.  
21 Defendant said some people were gangbangers, and he  
“kicked it” with them, but claimed he was not in a gang.

22 Defendant said he “kicked it” with Santos, Josh, his brothers  
23 and cousins. Defendant knew Santos and Josh were  
northerners. Defendant was asked: “Do you kick it with  
24 northerners?” Defendant nodded his head, “[Y]es” Defendant  
25 was asked, “[W]hich clique?” Defendant said: “I was never in  
a clique. I just hung around with them.”

26 Defendant said he hung around with Santos, Josh, and with  
27 “BPC.” Defendant was asked, “[H]ow long you been kicking it

1 with them?" Defendant replied: "A long time ... seven or eight  
2 years."

3 "Q. So you kick it with the BPC, the northerners?

4 "A. Yeah."

5 Defendant was repeatedly asked if he knew Zayas had a gun  
6 before the shooting. Defendant eventually admitted that "we  
7 knew" Zayas had a gun before the shooting, because Zayas  
8 picked up the gun at his house. Defendant explained they left  
9 the cemetery and drove to Zayas's house. Zayas went into  
10 the house and then returned to Josh's car. Defendant said  
11 when Zayas got into the car, he showed them that he had a  
12 gun, and it was a chrome .22- or .25-caliber revolver.  
13 Defendant admitted he had seen Zayas with a gun on other  
14 occasions. Defendant said they carried guns to feel safe from  
15 the southerners.

16 Defendant repeatedly denied that he touched the gun. When  
17 asked if his fingerprints could be on the gun, defendant said  
18 they might be. Defendant then added there was a "big  
19 possibility" that he touched the gun, but he could not  
20 remember since he was drunk that night.

21 Defendant admitted that southerners had once shot at him.  
22 He knew that southerners had shot Josh a couple of times.  
23 Defendant also knew that Zayas's brother had been  
24 murdered by a southerner in a gang-related shooting.

25 As the interview continued, defendant was asked if anyone in  
26 the car said they should look for southerners. Defendant said  
27 that Zayas said, "[H]ey, f\* \* \*, let's go look for some scraps."  
28 Defendant said they "ran into those guys," and Zayas said  
they were "scraps." Defendant admitted that he said, "[F]\* \* \*  
'em" when he saw the two men on the street.

Defendant said Zayas got out of the car, fired the shots, got  
back into the car, and said, "I got 'em, I got 'em." Defendant  
said Zayas meant he got the southerner he had shot. Josh  
and Santos said, "[L]et's jam." Defendant said, "Let's get the  
f\* \* \* out of here."

Defendant was asked what they talked about in the car  
before the traffic stop. Defendant said they were all "tripping  
out." Zayas was scared, and he wanted defendant to run  
away with the gun. Defendant said no because he didn't  
shoot the gun.

1                   “Q. You've been a northerner for what, eight years ... ?

2                   “A. Not anymore since today. F\* \* \* that. I don't need this shit,  
3                   man.”

4                   Defendant said he wanted “witness protection” and did not  
5                   want to be involved with gangs.

6                   **PROCEDURAL HISTORY**

7                   Defendant, Josh, Santos, and Zayas were jointly charged  
8                   with count I, conspiracy to commit murder (§§ 182, subd.  
9                   (a)(1) & 187); count II, first degree murder of Bello (§ 187,  
10                   subd. (a)), with a special circumstance that the offense was  
                         committed by active participants in a criminal street gang (§  
                         190.2, subd. (a)(22)); and count III, attempted murder of the  
                         second man (§§ 664/187, subd. (a)). [FN7]

11                   [FN7: While defendant was charged with murder with a  
12                   special circumstance, the prosecutor announced that  
                         she would not seek the death penalty.]

13                   As to all counts, it was alleged that a principal personally and  
14                   intentionally discharged a firearm which proximately caused  
15                   death (§ 12022.53, subds.(d), (e)(1)); and the offenses were  
16                   committed for the benefit of a criminal street gang (§ 186.22,  
17                   subd. (b)(1)(C)). As to count II, murder, it was separately  
                         alleged that codefendant Zayas personally used a firearm (§  
                         12022.5, subd. (a)(1)).

18                   Defendant pleaded not guilty. The court granted the  
19                   prosecutor's motions to sever defendant's trial from the three  
                         codefendants, and to dismiss count III, attempted murder,  
20                   against defendant.

21                   After a separate jury trial, Zayas was found not guilty of first  
22                   degree murder, and guilty of the lesser included offense of  
23                   second degree murder with a firearm and gang  
                         enhancements. He was found not guilty of attempted murder.  
24                   Zayas was sentenced to 40 years to life. (People v. Zayas  
                         (F062556) filed 6/21/2012)

25                   Santos pleaded no contest to voluntary manslaughter and the  
26                   gang enhancement, with an indicated sentence of 16 to 21  
                         years in prison. The record is silent as to the disposition of  
                         the charges against Josh.

27                   Defendant was tried separately for count I, conspiracy to  
28                   commit murder, and count II, first degree murder with a

1 special circumstance, and the special allegations. Santos  
2 testified for the prosecution at defendant's jury trial. Santos  
3 stated that he was concerned for his safety and considered a  
4 "rat" by the Nortenos because he was testifying against  
5 defendant.

6 **SANTOS'S TRIAL TESTIMONY**

7 Santos testified that he had been a member of the North Side  
8 Cutler Norteno gang, but he was no longer in a gang. The  
9 Nortenos lived in Cutler while the Surenos, their rivals, lived  
10 in Orosi. Santos had an "X-4" tattoo on his arm which meant  
11 14, the number claimed by the Nortenos.

12 Santos testified he did not know if his brother, Josh, had also  
13 been a member of the Nortenos, but admitted that Josh hung  
14 out with him, and he was involved with the Nortenos. Santos  
15 and Josh had been shot at on previous occasions by  
16 members of the Sureno gang. Santos testified that Zayas  
17 was also a member of the Nortenos.

18 Santos had known defendant for 10 years. They worked  
19 together and frequently drank and went to parties together.  
20 Santos did not know if defendant was involved with a gang.  
21 Santos did not talk about his own gang status with defendant,  
22 but "everybody knew that I was" in the gang.

23 ***The cemetery***

24 Santos testified that on the morning of August 28, 2009, he  
25 and his wife went to the cemetery in Sultana to visit the grave  
26 of his younger brother, who had died in a car accident. Josh  
27 arrived separately in his Honda. Santos's wife left, and  
28 Santos and Josh remained at the cemetery. Santos and Josh  
drank beer and cried about their brother.

While Santos was at the cemetery, he received a call from Zayas. Santos told Zayas where they were. Around 1:00 p.m., Zayas arrived at the cemetery. Zayas's older brother was also buried there. Santos knew that Zayas's brother had been shot and killed by South Siders.

Santos testified they called defendant while they were still at the cemetery, because they wanted to arrange a barbecue. They left the cemetery, drove to defendant's house, and picked him up. They bought more beer, and then returned to the cemetery.

1 Santos testified the four men stayed at the cemetery and  
2 drank beer. Zayas was angry and upset as he thought about  
his brother.

3 **Zayas retrieves the gun**

4 Santos testified that around 6:00 p.m., they left the cemetery  
5 in Josh's Honda. Josh was driving, defendant was in the front  
seat, and Santos and Zayas were in the back seat.

6 Josh drove the group to Zayas's house in Orosi so Zayas  
7 could get some money for food. Zayas went into the house  
8 while the other men stayed in the car and continued to drink.

9 Santos testified that when Zayas returned to the car, he had  
10 a revolver in his waistband. Santos was surprised to see the  
11 gun. Josh briefly took the gun from Zayas to make sure it was  
12 not loaded. Santos and defendant did not hold the gun.

13 Santos testified that Zayas said, "Let's go for a ride," and  
14 used the term "mobbing." Santos believed that Zayas was  
15 "mad, looking for trouble" with South Siders. Santos knew the  
16 term "Scrap hunting" meant mobbing with a gun. Santos  
17 testified that everyone in the car knew Zayas had a gun.  
18 Santos thought Zayas was just looking for a fight. Santos  
19 testified none of them tried to get out of the car. Josh  
20 continued driving, and they all agreed to drive to Orosi to go  
21 mobbing.

22 **The shooting**

23 Santos testified they drove around Orosi looking for Scraps.  
24 Zayas saw "two guys" wearing blue hats who were walking  
25 on Avenue 416. Josh drove past the two men and Zayas  
26 yelled something at them. Defendant swore at the two men.  
27 The two men yelled something back, and they threw  
something at Zayas.

28 Santos testified Josh turned the car around and drove up to  
the two men. Zayas got out of the car and fired shots at them.  
Santos testified it happened very quickly. Santos, Josh, and  
defendant stayed in the car. Zayas fired five or six rounds.  
Santos could not tell if he hit anyone.

Zayas got back into the car and said, "I think I got one."  
Santos testified that he had no idea that Zayas was going to  
shoot anyone. Josh and defendant were shocked about what

1 Zayas did. Santos testified that Zayas shot a Sureno because  
2 he was mad that a Sureno killed his brother.

3 Josh immediately drove away from Orosi. No one in the car  
4 said anything. The deputies pursued them. When the  
5 deputies appeared behind their car, Zayas looked scared and  
6 told defendant to take the gun and run away. Defendant  
7 refused and Josh stopped the car.

8 Santos testified that after he was arrested, he was placed in a  
9 patrol car with defendant. Santos told defendant that he was  
10 going to claim he was drunk. Defendant did not say anything.  
11 Santos testified that when he was initially interviewed, he  
12 claimed he was drunk and passed out. However, he later told  
13 the detectives what happened in the car.

#### 14 **GANG EXPERT'S TESTIMONY**

15 Tulare County Sheriff's Detective Steven Sanchez was  
16 assigned the North County Gang Violence Special Unit. He  
17 testified the Norteno gang claimed the color red and the  
18 number 14. The letters "TC" were a local Norteno tattoo  
19 which meant Tulare County. Other Norteno tattoos included  
"X4" for 14, and the Huelga bird.

20 The Norteno subset gangs in Tulare County included the  
21 Brown Pride Catela (BPC), North Side Catela, and East Side  
22 Orosi. [FN8] There were over 150 Norteno gang members in  
23 the Cutler–Orosi area. The primary activities of the Norteno  
24 gang included homicide, attempted homicide, robbery,  
25 carjacking, and felony graffiti. One of the goals of the gang  
26 was to instill fear of retaliation.

27 [FN8: Another officer testified that Brown Pride Catela  
28 was the predominant Norteno gang in the area.]

The Surenos were the rivals of the Nortenos and claimed the  
color blue and the number 13. A derogatory name for the  
Surenos was Scraps.

Detective Sanchez testified that gang members gain respect  
by being feared in the community. When they are  
disrespected, they will be seen as weak unless they respond.  
They could be disrespected by rival gang members yelling  
their names or tagging graffiti in their turf. Gang members will  
typically commit offenses in front of fellow gang members.  
They will achieve greater status within their gang if they

1 commit violent crimes. It is a sign of betrayal for a gang  
2 member to testify against another gang member.

3 ***“Mobbing”***

4 Detective Sanchez testified there was a Norteno turf war in  
5 the Cutler–Orosi area. Surenos claimed Orosi while Nortenos  
6 claimed Cutler, and the two towns were separated by one  
7 street. The violence between the two gangs had escalated  
within the past five years because each gang was trying to  
claim the other city as their turf.

8 Sanchez explained that “mobbing” meant “to get together” in  
9 a vehicle, look for a rival gang member, and take action  
10 against that person. It was common for gang members to go  
11 mobbing and look for their rivals. Detective Sanchez did not  
know if it was common for gang members to have a weapon  
while they were mobbing. “Scrap hunting” meant that a  
Norteno was looking for a rival Sureno.

12 ***Predicate offenses***

13 Detective Sanchez testified about two predicate offenses  
14 involving members of the Norteno gang in Tulare County.  
15 Robert Clevenger and Enrique Gonzalez, members of BPC,  
16 were convicted of committing an assault with a deadly  
17 weapon in May 2007. They were driving around in the Orosi  
18 area, confronted two Surenos, and Gonzalez opened fire on  
19 the Surenos. The participants in the other predicate offense  
were Javier Sahagun, Humberto Melchor, and George Lua,  
also members of BPC, who were convicted of committing an  
assault with a deadly weapon in October 2008. They had  
been in a car which opened fire on a Sureno in Cutler.

20 ***Gang status***

21 Detective Sanchez testified that in order to validate a person  
22 as a gang member, law enforcement officers rely on certain  
23 criteria. Based on such criteria, Zayas was a validated  
24 member of the Norteno gang: he had previously associated  
25 himself with the Nortenos when he was booked into jail, he  
26 had gang-related tattoos, and gang-related items were found  
27 at his house. Josh was also a validated Norteno and member  
28 of BPC. Josh often associated with Zayas. Josh was wearing  
Norteno clothing and colors when he was stopped after the  
shooting, he had gang-related tattoos, and gang indicia was  
found at his house. Santos was a validated gang member  
and admitted being a member of North Side Catela.

1 Detective Sanchez testified that defendant did not possess  
2 any gang indicia when he was arrested in this case. The  
3 officers did not find any weapons or gang-related attire when  
4 they searched defendant's house. Defendant has a tattoo of  
5 his last name on his leg. It was common for gang subjects to  
6 have such tattoos, but Sanchez conceded it was not a gang-  
7 related tattoo.

8 Detective Sanchez conceded that as of the day before the  
9 homicide in this case, defendant did not meet any of the  
10 criteria used to validate a person as a gang member. He was  
11 unable to locate any field interview or crime reports about  
12 defendant.

13 However, Sanchez testified that someone could be validated  
14 as a gang member by meeting the gang criteria based on one  
15 actual crime committed by that person. Sanchez believed  
16 defendant was a validated Norteno and part of BPC as of the  
17 date of the shooting because he admitted gang membership  
18 during his interview with Detective Zaragoza; he associated  
19 with gang members; he was involved in a gang-related crime;  
20 and he possessed gang indicia, gang writings, and gang  
21 photographs at his house.

22 When defendant was booked in this case, defendant said he  
23 did not have any known enemies. However, the intake officer  
24 who interviewed defendant reported that defendant said he  
25 was a Norteno dropout, and had known enemies in custody  
from both southern and northern sides.

26 Detective Sanchez testified that when defendant was  
27 interviewed by the officers about the homicide, he admitted  
28 that he had been associated with BPC for approximately  
eight years. He never claimed to be a dropout. Defendant  
also admitted that he "kicked it" with "these guys," identified  
as Santos, Josh, and their cousins. Defendant told the  
detectives that Zayas picked up the gun from his house, that  
it was Zayas's idea to go mobbing, and defendant knew they  
were going to go out and "look for some Scraps." Defendant  
said that he saw the two men walking down the street, and he  
thought they were Surenos. Defendant admitted that he said,  
"[F]\* \* \* 'em." Detective Sanchez testified such a phrase  
meant to assault the rivals.

29 Sanchez testified the items found in defendant's bedroom  
30 were also indicative of Norteno gang membership, including  
31 the photograph with "BPC" written on it, along with the words,  
32 "gang that all his Scraps belong 6 feet under." Some of the

1 people in the photograph were “X-ed” out in blue ink.  
2 Sanchez testified it was common to find yearbooks which  
3 belonged to gang members, where they had crossed out the  
4 pictures of rival gang members. Sanchez admitted that he did  
5 not know if defendant wrote the gang language on the  
6 photograph. The Blackberry cell phone, which belonged to  
7 defendant's brother, contained a photograph that depicted  
8 defendant with six individuals, posing with a marijuana plant.  
9 Some of the subjects were flashing Norteno gang signs.  
10 However, defendant was not flashing a gang sign.

11 ***Hypothetical question***

12 The prosecutor asked Detective Sanchez a hypothetical  
13 question about four Nortenos who visit the cemetery and talk  
14 about a relative who was killed by a Surenos. They decide to  
15 go mobbing, and the surviving relative picks up his gun. They  
16 drive around and see two guys wearing Sureno blue. The  
17 Nortenos shout out gang slurs, the two guys in blue yell  
18 something in return. The driver makes a U-turn and pulls up  
19 to where the two guys are walking. The gunman shoots at  
20 both men in blue, and he kills one of them.

21 In response, Detective Sanchez testified that such a high-  
22 profile assault would be committed for the gang's benefit, and  
23 boost the gang members' status within the gang. “Also, it  
24 continues the war on the streets between the North and  
25 South, especially in the Cutler–Orosi area[,]” and this one  
26 incident would “fuel ten other incidents that happen in the  
27 future because of this. It's going to continue the gang war. It  
28 also sends a message to the rivals that one gang is  
particularly responsible for doing the shooting.”

***DEFENSE EVIDENCE***

21 Scott LaFleur had been defendant's high school English  
22 teacher in the late 1990s. LaFleur described defendant as a  
23 great kid, and he was shocked to hear about the charges  
24 against him.

25 Manuel Lopez lived next to defendant in Cutler and had  
26 known him for 15 years. Lopez described defendant as a  
27 quiet person who was not violent. Lopez was also surprised  
28 when he heard about this case. Lopez never knew defendant  
to be involved with gangs.

## ***Defendant's trial testimony***

Defendant testified that he hung around with Josh and Santos. He knew they were Nortenos, but testified that they had a social relationship. On the day of the shooting, they picked him up and drove to the cemetery where they drank beer and smoked marijuana. Defendant said he did not know Zayas's brother, but knew he had been shot by rival gang members.

Defendant testified that they drove to Zayas's house to pick up money for a barbecue. Zayas returned to the car and showed them a gun. Josh took the gun away from Zayas to make sure it was not loaded. Defendant became concerned and asked Josh to take him home. However, defendant did not try to leave.

Defendant testified that "mobbing" meant drinking, smoking weed, and driving slowly. He admitted that mobbing could lead to trouble. Defendant saw the two men in blue walking down the street. Defendant pretended not to see them, but Zayas started yelling and exchanging words with them. Defendant told Josh to keep driving, but he did not tell Josh to pull over and let him out.

Defendant testified Josh turned around and drove up to the two men. Zayas got out of the car and started shooting. Defendant never thought Zayas would shoot anyone, and he was shocked when Zayas opened fire. After the shooting, defendant said, “Let’s get the f\* \* \* out of here[,]” because he had nothing to do with it. Defendant did not want to wait for the police to arrive, because he was afraid that Zayas might believe he was a “rat” and kill him too.

Defendant testified that he was not completely honest when he was initially interviewed in this case. He was shocked, sick, and afraid, and he was trying to protect Zayas. Defendant felt scared and pressured by the gang investigators. Defendant decided to ask for the second interview to clear things up.

Defendant admitted that he lied during his interviews with the officers. During one of the interviews, he said that he might have touched the gun in the car. He only said that because he felt pressured by the officers. Defendant testified that he never touched the gun. Defendant admitted that he also told the officers that he said, “[F]I\* \* \* em.” when he saw the two

1 men walking on the street. However, defendant testified he  
2 never actually said that when he was in the car.

3 Defendant knew Josh, Santos, and Zayas were Nortenos,  
4 and he got into the car that day with three known Nortenos.  
5 Defendant admitted that he said he “kicked it” with Josh and  
6 Santos, but he never said he was a Norteno or in BPC, and  
7 he had never been in a gang.

8 Defendant testified the school photograph found in his  
9 bedroom belonged to a friend, and someone else wrote on  
10 the picture. Defendant claimed that the officers “labeled” him  
11 as a Norteno dropout.

12 **Verdicts and sentence**

13 Defendant was convicted of count I, conspiracy to commit  
14 murder. In count II, he was found not guilty of first degree  
15 murder, but guilty of second degree murder as a lesser  
16 included offense. The jury found the firearm and gang  
17 enhancements true. He was sentenced to 50 years to life.

18 People v. Garcia, No. F062834, 2013 WL 3286207, at \*1–10 (Cal. Ct. App. June 27,  
19 2013)

20 **III. Jurisdiction and Venue**

21 Relief by way of a writ of habeas corpus extends to a prisoner under a judgment  
22 of a state court if the custody violates the Constitution, laws, or treaties of the United  
23 States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362,  
24 375 n.7 (2000). Petitioner asserts that he suffered a violation of his rights as guaranteed  
25 by the U.S. Constitution. Petitioner was convicted and sentenced in this district. 28  
26 U.S.C. § 2241(d); 2254(a). The Court concludes that it has jurisdiction over the action  
27 and that venue is proper.

28 **IV. Applicable Law**

29 The petition was filed after April 24, 1996 and is governed by the Antiterrorism  
30 and Effective Death Penalty Act of 1996 (“AEDPA”). Lindh v. Murphy, 521 U.S. 320, 326  
31 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997). Under AEDPA, federal  
32

habeas corpus relief is available for any claim decided on the merits in state court proceedings if the state court's adjudication of the claim:

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

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

28 U.S.C. § 2254(d).

## A. Standard of Review

A state court decision is “contrary to” federal law if it “applies a rule that contradicts governing law set forth in [Supreme Court] cases” or “confronts a set of facts that are materially indistinguishable from” a Supreme Court case, yet reaches a different result.” Brown v. Payton, 544 U.S. 133, 141 (2005) (citing Williams, 529 U.S. at 405-06). “AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. . . . The statue recognizes . . . that even a general standard may be applied in an unreasonable manner” Panetti v. Quarterman, 551 U.S. 930, 953 (2007) (citations and quotation marks omitted). The “clearly established Federal law” requirement “does not demand more than a ‘principle’ or ‘general standard.’” Musladin v. Lamarque, 555 F.3d 830, 839 (2009). For a state decision to be an unreasonable application of clearly established federal law under § 2254(d)(1), the Supreme Court’s prior decisions must provide a governing legal principle (or principles) to the issue before the state court. Lockyer v. Andrade, 538 U.S. 63, 70-71 (2003).

A state court decision will involve an “unreasonable application of” federal law only if it is “objectively unreasonable.” Id. at 75-76 (quoting Williams, 529 U.S. at 409-10); Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002). “[A]n unreasonable application of federal law is different from an incorrect application of federal law.” Harrington v. Richter 562 U.S. 86, 101 (2011) (citing Williams, 529 U.S. at 410) (emphasis in original). “A state

1 court's determination that a claim lacks merit precludes federal habeas relief so long as  
2 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.*  
3 (citing Yarborough v. Alvarado, 541 U.S. 653, 664 (2004)). Further, "[t]he more general  
4 the rule, the more leeway courts have in reading outcomes in case-by-case  
5 determinations." *Id.*; Renico v. Lett, 130 S. Ct. 1855, 1864 (2010). "It is not an  
6 unreasonable application of clearly established Federal law for a state court to decline to  
7 apply a specific legal rule that has not been squarely established by [the Supreme  
8 Court]." Knowles v. Mirzayance, 556 U.S. 111, 122 (2009).

9                   **B. Requirement of Prejudicial Error**

10               In general, habeas relief may only be granted if the constitutional error  
11 complained of was prejudicial. That is, it must have had "a substantial and injurious  
12 effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S.  
13 619, 623 (1993); see also Fry v. Pliler, 551 U.S. 112, 121-22 (2007) (holding that the  
14 Brecht standard applies whether or not the state court recognized the error and reviewed  
15 it for harmlessness). Some constitutional errors, however, do not require a showing of  
16 prejudice. See Arizona v. Fulminante, 499 U.S. 279, 310 (1991); United States v. Cronic,  
17 466 U.S. 648, 659 (1984). Furthermore, claims alleging ineffective assistance of counsel  
18 are analyzed under the Strickland prejudice standard; courts do not engage in a  
19 separate analysis applying the Brecht standard. Strickland v. Washington, 466 U.S. 668  
20 (1984); Avila v. Galaza, 297 F.3d 911, 918, n.7 (2002); Musalin v. Lamarque, 555 F.3d  
21 830, 834 (9th Cir. 2009).

22                   **C. Deference to State Court Decisions**

23               "[S]tate courts are the principal forum for asserting constitutional challenges to  
24 state convictions," not merely a "preliminary step for a later federal habeas proceeding."  
25 Richter, 562 U.S. at 103. Whether the state court decision is reasoned and explained, or  
26 merely a summary denial, the approach to evaluating unreasonableness under  
27 § 2254(d) is the same: "Under § 2254(d), a habeas court must determine what  
28

1 arguments or theories supported or . . . could have supported, the state court's decision;  
2 then it must ask whether it is possible fairminded jurists could disagree that those  
3 arguments or theories are inconsistent with the holding in a prior decision of [the  
4 Supreme Court].” Id. at 102. In other words:

5 As a condition for obtaining habeas corpus relief from a  
6 federal court, a state prisoner must show that the state  
7 court's ruling on the claim being presented in federal court  
8 was so lacking in justification that there was an error well  
understood and comprehended in existing law beyond any  
possibility for fairminded disagreement.

9 Id. at 103. Thus, the Court may issue the writ only “in cases where there is no possibility  
10 fairminded jurists could disagree that the state court's decision conflicts with [the  
11 Supreme Court's] precedents.” Id. at 102.

12 “Where there has been one reasoned state judgment rejecting a federal claim,  
13 later unexplained orders upholding that judgment or rejecting the claim rest on the same  
14 grounds.” See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). Thus, the court will “look  
15 through” a summary denial to the last reasoned decision of the state court. Id. at 804;  
16 Plascencia v. Alameida, 467 F.3d 1190, 1198 (9th Cir. 2006). Furthermore, the district  
17 court may review a habeas claim, even where the state court's reasoning is entirely  
18 unexplained. Richter, 562 U.S. at 98. “Where a state court's decision is unaccompanied  
19 by an explanation, the habeas petitioner's burden still must be met by showing there was  
20 no reasonable basis for the state court to deny relief.” Id. (“This Court now holds and  
21 reconfirms that § 2254(d) does not require a state court to give reasons before its  
22 decision can be deemed to have been ‘adjudicated on the merits.’”).

23 **V. Review of Petition**

24 **A. Claim One: Lesser Included Offense Instructions**

25 Petitioner argues that the trial court's failure to give instructions on the included  
26 offenses of voluntary and involuntary manslaughter violated his right to trial by jury and  
27 his right to due process as guaranteed by the United States Constitution.

## 1. Voluntary Manslaughter Instruction

Petitioner contends that the trial court erred in failing to instruct the jury sua sponte on voluntary manslaughter based on the nonstatutory theory that a killing committed without malice during the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter, rather than murder.

**a. State Court Decision**

The California Supreme Court summarily denied this claim. Accordingly, the Court “looks through” the Supreme Court’s decision to the reasoned decision of the Fifth District Court of Appeal. See Ylst, 501 U.S. at 804. The Court of Appeal rejected Petitioner’s claim as follows:

#### **IV. Voluntary manslaughter instructions**

Defendant was charged with first degree murder, and the jury received instructions on second degree murder as the only lesser included offense. Defendant now contends the court had a *sua sponte* duty to instruct the jury about both voluntary and involuntary manslaughter as lesser included offenses of second degree murder. In this section, we will address defendant's contentions about voluntary manslaughter.

#### **A. *Sua sponte* duty to instruct**

"It is, of course, axiomatic that 'in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] ... That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citations], but not when there is no evidence that the offense was less than that charged.' [Citation.] Thus, it has long been settled that the trial court need not, even if requested, instruct the jury on the existence and definition of a lesser and included offense if the evidence was such that the defendant, if guilty at all, was guilty of the greater offense. [Citations.]" (People v. Kelly (1990) 51 Cal.3d 931, 958–959; People v. Breverman (1998) 19 Cal.4th 142, 154–155.)

1        “The failure to instruct on a lesser included offense in a  
2        noncapital case does not require reversal ‘unless an  
3        examination of the entire record establishes a reasonable  
4        probability that the error affected the outcome.’ [Citation.]  
5        ‘Such posttrial review focuses not on what a reasonable jury  
6        could do, but what such a jury is likely to have done in the  
7        absence of the error under consideration. In making that  
8        evaluation, an appellate court may consider, among other  
9        things, whether the evidence supporting the existing  
10       judgment is so relatively strong, and the evidence supporting  
11       a different outcome is so comparatively weak, that there is no  
12       reasonable probability the error of which the defendant  
13       complains affected the result.’ [Citation.]” (People v. Thomas  
14       (2012) 53 Cal.4th 771, 814, fn. omitted, italics in original.)  
15       [FN10]

16       [FN10: This is a noncapital case for purposes of  
17       appellate review: defendant was charged with first  
18       degree murder with a special circumstance, but the  
19       prosecutor announced that she would not seek the  
20       death penalty, and defendant was ultimately convicted  
21       of second degree murder. (See, e.g., People v.  
22       Thomas, supra, 54 Cal.4th at p. 814, fn. 11.)]

23       **B. Murder and manslaughter**

24       As explained above, murder is an unlawful killing with malice  
25       aforethought. (§ 187, subd. (a).) Malice is express when the  
26       defendant manifests a deliberate intention to take away the  
27       life of another. (People v. Blakeley (2000) 23 Cal.4th 82, 87,  
28       96.) A defendant acts with implied malice when he acts with  
29       an awareness of endangering human life. (People v. Knoller  
30       (2007) 41 Cal.4th 139, 143, 153.)

31       Both voluntary and involuntary manslaughter are lesser  
32       included offenses of murder. (People v. Thomas, supra, 53  
33       Cal.4th at p. 813; People v. Rios (2000) 23 Cal.4th 450, 460.)  
34       “The lesser included offense of manslaughter does not  
35       include the element of malice, which distinguishes it from the  
36       greater offense of murder. [Citation.]” (People v. Cook (2006)  
37       39 Cal.4th 566, 596.)

38       Malice is presumptively absent, and the crime constitutes  
39       voluntary manslaughter, when a defendant, acting with intent  
40       to kill or conscious disregard for life, “kills ‘upon a sudden  
41       quarrel or heat of passion’ (§ 192, subd. (a)), provided that  
42       provocation is sufficient to cause an ordinarily reasonable  
43       person to act rashly and without deliberation, and from  
44       an sudden quarrel or heat of passion.” (§ 192, subd. (a).)

1 passion rather than judgment. [Citation.] Additionally, when a  
2 defendant kills in the actual but unreasonable belief that he or  
3 she is in imminent danger of death or great bodily injury, the  
4 doctrine of 'imperfect self-defense' applies to reduce the  
5 killing from murder to voluntary manslaughter. [Citations.]"  
6 (People v. Koontz (2002) 27 Cal.4th 1041, 1086.)

7 **C. Garcia and Bryant**

8 As to voluntary manslaughter, defendant does not contend  
9 that lesser included offense instructions should have been  
10 given based on either heat of passion or unreasonable self  
11 defense. Instead, defendant asserts the trial court had a sua  
12 sponte duty to instruct the jury on a new, nonstatutory theory  
13 of voluntary manslaughter—a killing committed without  
14 malice during the course of an inherently dangerous  
15 assaultive felony—because the jury could have found that he  
16 did not know of or share Zayas's "murderous intent."  
17 Defendant contends that "California courts have recognized a  
18 non-statutory form of voluntary manslaughter: an  
19 unintentional killing in the course of an aggravated assault."

20 Defendant's voluntary manslaughter argument is based on  
21 People v. Garcia (2008) 162 Cal.App.4th 18 (Garcia). In that  
22 case, the defendant assaulted the victim with the butt of a  
23 gun, causing the victim to strike his head on the pavement  
24 and suffer fatal head injuries. Defendant argued he had only  
25 meant to hurt the victim and not to kill him. The jury was  
26 instructed on murder, and the lesser included offense of  
27 voluntary manslaughter based on provocation or imperfect  
28 self-defense. The defendant was convicted of voluntary  
manslaughter. On appeal, the defendant argued the trial  
court had a sua sponte duty to instruct the jury on involuntary  
manslaughter because there was substantial evidence the  
victim was killed without malice, i.e., without an intent to kill or  
conscious disregard for human life. (Id. at p. 26.)

Garcia rejected defendant's involuntary manslaughter  
argument. In doing so, however, Garcia stated that "an  
unlawful killing during the commission of an inherently  
dangerous felony, even if unintentional, is at least voluntary  
manslaughter." (Garcia, *supra*, 162 Cal.App.4th at p. 31.)

In People v. Bryant (June 3, 2013, S196365) -- Cal.4th --  
[2013 WL 2372310] (Bryant), the Fourth District relied on this  
language in Garcia and held the trial court erred in failing to  
instruct the jury, sua sponte, that an unintentional killing  
without malice during the course of an inherently dangerous

1 assaultive felony constituted voluntary manslaughter. (Bryant,  
2 supra, at pp. 2–3.)

3 When defendant filed his brief in his appeal, he relied on the  
4 Fourth District's opinion in Bryant. Defendant argued the trial  
5 court in this case also had a sua sponte duty to give the  
6 same voluntary manslaughter instruction, based on Bryant's  
7 interpretation of Garcia. At the time that defendant filed his  
8 brief, however, the California Supreme Court had granted  
9 review in Bryant and the case was not citable. (People v.  
Bryant, review granted Nov. 16, 2011, S196365.) Nevertheless,  
10 defendant insisted the trial court had a duty to  
11 give the same type of sua sponte instruction on voluntary  
12 manslaughter as the Fourth District formulated in Bryant, and  
13 suggested in dicta in Garcia. [FN11]

14 [FN11: We note that defendant was tried and  
15 convicted in this case in June 2011. The Fourth District  
16 filed its appellate opinion in Bryant in August 2011,  
17 and the California Supreme Court granted review in  
18 November 2011. The trial court in this case could  
19 hardly have acquired a sua sponte duty to instruct on a  
20 theory that was dicta in Garcia, had not been raised by  
21 defendant, and had not been addressed by an  
22 appellate court at the time of defendant's jury trial. As  
23 the California Supreme Court has explained, "the sua  
24 sponte 'rule seems undoubtedly designed to promote  
25 the ends of justice by providing some judicial  
26 safeguards for defendants from the possible vagaries  
27 of ineptness of counsel under the adversary system.  
28 Yet the trial court cannot be required to anticipate  
every possible theory that may fit the facts of the case  
before it and instruct the jury accordingly. The judge  
need not fill in every time a litigant or his counsel fails  
to discover an abstruse but possible theory of the  
facts." (People v. Flannel (1979) 25 Cal.3d 668, 683.)]

29 In any event, the California Supreme Court has now issued  
30 its opinion in Bryant, and rejected the Fourth District's  
31 interpretation of voluntary manslaughter and Garcia. Bryant  
32 explained: "A defendant commits voluntary manslaughter  
33 when a homicide that is committed either with intent to kill or  
34 with conscious disregard for life—and therefore would  
35 normally constitute murder—is nevertheless reduced or  
36 mitigated to manslaughter. [Citation.]" (Bryant, supra, --  
37 Cal.4th -- at p. 8.) "Although we have on occasion employed  
38 somewhat different formulations to define the offense of  
voluntary manslaughter, we have never suggested that it

1 could be committed without either an intent to kill or a  
2 conscious disregard for life." (Id. at pp. 9–10.)

3 Bryant clarified that the court had never held "that a  
4 defendant may be found guilty of voluntary manslaughter  
5 when he kills unintentionally and without conscious disregard  
6 for life." (Bryant, *supra*, -- Cal.4th -- at p. 11.)

7 "A defendant who has killed without malice in the  
8 commission of an inherently dangerous assaultive  
9 felony must have killed without either an intent to kill or  
10 a conscious disregard for life. Such a killing cannot be  
11 voluntary manslaughter because voluntary  
12 manslaughter requires either an intent to kill or a  
13 conscious disregard for life. To the extent that ...  
14 Garcia ... suggested otherwise, it is now disapproved.  
15 [¶] Because a killing without malice in the commission  
16 of an inherently dangerous assaultive felony is not  
17 voluntary manslaughter, the trial court could not have  
18 erred in failing to instruct the jury that it was." (Id. at  
19 pp. 12.)

#### 13           **D. Analysis**

14 Defendant contends the trial court had a *sua sponte* duty to  
15 instruct the jury with Garcia's "nonstatutory" theory of  
16 voluntary manslaughter, based on an unintentional killing in  
17 the course of an aggravated assault. Defendant argues the  
18 jury could have found that defendant did not know or share  
19 Zayas's intent to kill even if he knew Zayas was armed, and  
the jury could have found that defendant only intended to aid  
and abet an aggravated assault and did not appreciate the  
danger to life.

20 Defendant's argument is meritless given the California  
21 Supreme Court's complete rejection of the Fourth District's  
22 interpretation of Garcia, and the possibility that such a theory  
23 of voluntary manslaughter exists. We thus conclude the trial  
24 court in this case did not have a *sua sponte* duty to instruct  
the jury on any nonstatutory version of voluntary  
manslaughter.

25 Garcia, 2013 WL 3286207, at \*19–22.

#### 26           **b. Applicable Law on Lesser Included Offense Instructions**

27           [T]he failure . . . to instruct on lesser included offenses in a non-capital case does  
28 not present a federal constitutional question." Windham v. Merkle, 163 F.3d 1092, 1105-

1 06 (9th Cir. 1998). There is no Supreme Court authority holding that the Constitution  
2 entitles a defendant in a non-capital case to jury instructions on lesser included offenses.  
3 Beck v. Alabama, 447 U.S. 625, 638 n.14 (1980); Howell v. Mississippi, 543 U.S. 440,  
4 445 (2005) (suggesting Beck does not apply in non-capital cases). Thus, a state court  
5 could not have applied Supreme Court authority unreasonably in denying a claim based  
6 on the failure to give a lesser included offense instruction in a non-capital case. 28  
7 U.S.C. § 2254(d); Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) (“[T]his Court has  
8 held on numerous occasions that it is not an unreasonable application of clearly  
9 established Federal law for a state court to decline to apply a specific legal rule that has  
10 not been squarely established by this Court.”) (internal quotation omitted); see also  
11 United States v. Rivera-Alonzo, 584 F.3d 829, 834 n.3 (9th Cir. 2009) (“In the context of  
12 a habeas corpus review of a state court conviction, we have stated that there is no  
13 clearly established federal constitutional right to lesser included instructions in non-  
14 capital cases.”). Nonetheless, despite these holdings, the Ninth Circuit has stated,  
15 without deciding, that a defendant in a non-capital case may be entitled to lesser  
16 included offense instructions if those instructions encompass the defendant’s theory of  
17 defense and are supported by substantial evidence. Solis v. Garcia, 219 F.3d 922, 929-  
18 30 (9th Cir. 2000).<sup>1</sup>

19 Errors in instructing the jury can only support federal habeas relief if they “so  
20 infected the entire trial that the resulting conviction violates due process.” Estelle v.  
21 McGuire, 502 U.S. 62, 72 (1991)). Allegedly erroneous instructions “must be considered  
22 in the context of the instructions as a whole and the trial record.” Id. at 72. Additionally, a  
23 state court’s reasoned interpretation that a petitioner was not entitled to an instruction  
24 under state law binds this court. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per

25 \_\_\_\_\_  
26 <sup>1</sup> However, subsequent Ninth Circuit cases have cited Solis for the absolute proposition that there is no  
27 clearly established federal constitutional right to instructions on lesser-included offenses in non-capital  
28 cases. Rivera-Alonzo, 584 F.3d at 834 n.3; Cervantez v. Pliler, 360 Fed. Appx. 737, 738 (9th Cir. 2009).  
District Courts have likewise questioned whether this statement in Solis is based on clearly established  
Supreme Court precedent. E.g. Chaidez v. Knowles, 258 F. Supp. 2d 1069, 1096 n.15 (N.D. Cal. 2003)  
(suggesting there is not clearly established Supreme Court authority for Solis proposition).

1 curiam) (“[A] state court's interpretation of state law, including one announced on direct  
2 appeal of the challenged conviction, binds a federal court sitting in habeas corpus.”); see  
3 also Mullaney v. Wilbur, 421 U.S. 684, 691 & n.11 (1975) (holding that “state courts are  
4 the ultimate expositors of state law” and federal courts are bound by their interpretations  
5 of state law unless the holding “appears to be an obvious subterfuge to evade  
6 consideration of a federal issue”) (citation and internal quotation omitted); see also Solis,  
7 219 F.3d at 927 (“We accept, as we must, the California Supreme Court's identification  
8 of the elements of the offense.”); Stanton v. Benzler, 146 F.3d 726, 728 (9th Cir. 1998)  
9 (holding that state court's determination on what constitutes “an element of the offense  
10 . . . is not open to challenge on habeas review”); Melugin v. Hames, 38 F.3d 1478, 1487  
11 (9th Cir. 1994) (“[The Ninth Circuit] must accept a state court ruling on questions of state  
12 law.”). A state court's determination that the evidence does not support a requested  
13 instruction is entitled to a presumption of correctness from a federal habeas court. See  
14 Menendez v. Terhune, 422 F.3d 1012, 1029 (9th Cir. 2005); see also Hartman v.  
15 Summers, 120 F.3d 157, 161 (9th Cir. 1997)

16 Finally, a habeas petitioner is not entitled to relief unless the instructional error  
17 “had substantial and injurious effect or influence in determining the jury's verdict.”  
18 Brecht v. Abrahamson, 507 U.S. 619 at 637, 113 S.Ct. 1710, 123 L.Ed.2d 353. In other  
19 words, the error must have resulted in “actual prejudice.” Id.

20 **c. Analysis**

21 As stated, there is no clearly established Supreme Court authority requiring that  
22 lesser included offense instructions be given in non-capital cases. Thus, the state court's  
23 rejection of this claim was not unreasonable.

24 In any event, Petitioner contends that he was entitled to a voluntary manslaughter  
25 instruction based on the Courts of Appeals' reasoning in Garcia and Bryant. However,  
26 the elements of the offense of manslaughter are a question of state substantive law. The  
27 California Supreme Court is the final arbiter of state law, and has rejected the existence  
28

1 of a non-statutory form of voluntary manslaughter predicated on a killing without malice  
2 in the course of an inherently dangerous assaultive felony. People v. Bryant, 56 Cal. 4th  
3 959, 970, 301 P.3d 1136, 1142 (2013). That decision is binding on this court. To the  
4 extent Petitioner contends this ruling is in error, a challenge to a jury instruction based  
5 solely on an error of state law is not cognizable. Estelle v. McGuire, 502 U.S. 62, 71-72  
6 (1991). The Court’s habeas jurisdiction extends only to a claim that the conviction  
7 violates the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a); 28  
8 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 n.7 (2000). Here,

9 Finally, the failure to give the instruction did not violate due process. The  
10 instruction was inapplicable under state law, and there was therefore no substantial  
11 evidence to support giving it. Nor was Petitioner prejudiced, given that the jury could not  
12 have found him guilty of voluntary manslaughter in light of Bryant.

13 Petitioner is not entitled to relief on this claim.

14 **2. Involuntary Manslaughter Instruction**

15 Petitioner argues that the state court erred in failing to sua sponte give an  
16 involuntary manslaughter instruction on the ground that the jury could have concluded  
17 he had only the intent to aid and abet assault and battery, rather than murder.

18 **a. State Court Decision**

19 The Fifth District Court of Appeal rejected this claim as follows:

20 **V. *Involuntary manslaughter instructions***

21 Defendant separately contends the court had a sua sponte  
22 duty to instruct on involuntary manslaughter as another lesser  
23 included offense of murder. “Involuntary manslaughter is  
24 manslaughter during ‘the commission of an unlawful act, not  
25 amounting to a felony,’ or during ‘the commission of a lawful  
26 act which might produce death, in an unlawful manner, or  
27 without due caution and circumspection.’ (§ 192, subd. (b).)  
28 ‘The offense of involuntary manslaughter requires proof that a  
human being was killed and that the killing was unlawful.  
[Citation.] A killing is “unlawful” if it occurs (1) during the  
commission of a misdemeanor inherently dangerous to  
human life, or (2) in the commission of an act ordinarily lawful

1 but which involves a high risk of death or bodily harm, and  
2 which is done “without due caution or circumspection.”  
3 [Citation.]” (People v. Murray (2008) 167 Cal.App.4th 1133,  
4 1140.) There also exists a nonstatutory form of the offense,  
5 which is based on the predicate act of a noninherently  
6 dangerous felony committed without due caution and  
7 circumspection. (People v. Butler (2010) 187 Cal.App.4th  
8 998, 1007 .)

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“[C]riminal negligence is the governing mens rea standard for  
all three forms of committing the offense. [Citations.]” (People  
v. Butler, *supra*, 187 Cal.App.4th at p. 1007.) Criminal  
negligence consists of “aggravated, culpable, gross, or  
reckless’ conduct that creates a high risk of death or great  
bodily injury and that evidences a disregard for human life or  
indifference to the consequences of the conduct. [Citations.]”  
(Garcia, *supra*, 162 Cal.App.4th at pp. 27–28.)

As explained in section IV, ante, Garcia addressed whether  
the trial court in that case had a *sua sponte* duty to instruct on  
involuntary manslaughter as a lesser included offense of  
murder, where the defendant hit the victim in the face with the  
butt of a shotgun. (Garcia, *supra*, 162 Cal.App.4th at p. 22.)  
Garcia clarified that an unlawful killing during the commission  
of an inherently dangerous felony was not involuntary  
manslaughter. (*Id.* at p. 31.) Garcia concluded the court did  
not have a *sua sponte* duty to give involuntary manslaughter  
instructions because the defendant’s conduct constituted  
either assault with a deadly weapon or assault with a firearm,  
and both offenses were inherently dangerous felonies. (*Id.* at  
pp. 22, 31–32.)

Defendant argues that the court should have instructed on  
involuntary manslaughter in this case because the jurors  
could have had a reasonable doubt whether defendant knew  
Zayas was armed with a loaded gun. Defendant asserts that  
if he “only intended to aid and abet a simple assault or battery  
and acted with criminal negligence, he would be guilty of  
involuntary manslaughter at most.”

While Bryant rejected the Fourth District’s discussion of  
Garcia and voluntary manslaughter, the majority opinion  
declined to address Garcia’s analysis of involuntary  
manslaughter. (People v. Bryant, *supra*, -- Cal.4th -- at p. 12.)  
We note that Justice Kennard filed a concurring opinion and  
found an assault with a deadly weapon can constitute the  
unlawful act that makes a killing which occurs during the  
assault an involuntary manslaughter. (*Id.* at pp. 4–5 [Conc.

1 Opn., Kennard J.].) Justice Kennard believed “a killing  
2 committed during an unlawful act amounting to a felony is  
3 involuntary manslaughter, notwithstanding the appearance of  
4 the phrase ‘not amounting to felony’ in section 192’s  
5 subdivision (b)....” (Id. at p. 6.) In reaching this conclusion,  
6 however, Justice Kennard further found the trial court in  
7 Bryant did not have a sua sponte duty to instruct on this  
8 theory of involuntary manslaughter, because it was based “on  
9 a legal principle that has been so ‘obfuscated by infrequent  
10 reference and inadequate elucidation’ that it cannot be  
11 considered a general principal of law. [Citation.]” (Id. at pp.  
12 6–7.)

13 In any event, while a homicide may constitute involuntary  
14 manslaughter if it occurs during the commission of a  
15 misdemeanor inherently dangerous to human life, that  
16 definition would not apply in this case. Both assault with a  
17 deadly weapon and assault with a firearm are inherently  
18 dangerous felonies. (Garcia, *supra*, 162 Cal.App.4th at p. 28,  
19 fn. 4.) Defendant admitted that he knew Zayas had retrieved  
20 a gun, Zayas was angry and upset about his brother’s death  
21 at the hands of southerners, and defendant agreed with  
22 Zayas and the others to drive around and look for  
23 southerners. Defendant also admitted that he and his  
24 associates carried weapons to feel safe from southerners  
25 because of past shooting incidents.

26 An involuntary manslaughter instruction was not warranted  
27 under the facts of this case. An instruction on a lesser  
28 included offense is not required if the evidence was such that  
the defendant, if guilty at all, was guilty of the greater offense.  
(People v. Kelly, *supra*, 51 Cal.3d at p. 959.) A manslaughter  
theory requires the killing be committed *without malice*  
(People v. Cook, *supra*, 39 Cal.4th at p. 596), whereas the  
evidence in this case showed implied malice. As explained  
*ante*, malice is implied “ ‘when the killing results from an  
intentional act, the natural consequences of which are  
dangerous to life, which act was deliberately performed by a  
person who knows that his conduct endangers the life of  
another and who acts with conscious disregard for life’  
[citation]....” (People v. Lasko, *supra*, 23 Cal.4th at p. 107;  
Swain, *supra*, 12 Cal.4th at p. 602.) A defendant acts with  
implied malice when he acts with an awareness of  
endangering human life. (People v. Knoller, *supra*, 41 Cal.4th  
at pp. 143 & 153.)

29 Defendant’s own statements established implied malice in  
30 this case. During his second interview with Detective

1 Zaragoza, defendant admitted he knew Zayas was upset  
2 about his brother's death, and that Zayas retrieved the gun  
3 from his house and returned to the car with it. Defendant had  
4 seen Zayas with a gun on previous occasions, defendant had  
been shot at by southerners before, and they carried guns to  
feel safe from the southerners.

5 When asked who came up with the idea to go mobbing,  
6 defendant replied: "Well, we all did but we never thought that  
7 that was going to happen." Defendant also said that "mobbing  
8 meant they were going to look for someone or just drive  
around and cruise, and denied that they were looking for  
Surenos.

9 On further questioning, however, defendant said that Zayas  
10 said they should go mobbing and "look for some scraps."  
11 Defendant said they "ran into those guys" who were wearing  
12 blue, and Zayas said they were "scraps." Defendant admitted  
that he said, "[F]\* \* \* 'em" when he saw the two men on the  
street, and Zayas got out of the car and fired the gunshots.

13 The prosecution's gang expert testified that "mobbing" meant  
14 "to get together" in a vehicle, look for a rival gang member,  
15 and take action against that person. It was common for gang  
members to go mobbing and look for their rivals. Detective  
16 Sanchez did not know if it was common for gang members to  
have a weapon while they were mobbing. "Scrap hunting"  
17 meant that a Norteno was looking for a rival Sureno. The  
18 expert further testified that when defendant saw the two men  
on the street and said, "[F]\* \* \* 'em," such a phrase meant to  
assault their rivals.

19 The court did not have a *sua sponte* duty to instruct on  
20 involuntary manslaughter as a lesser included offense of  
21 murder. To be culpable as an aider and abettor, the  
22 defendant must have acted with knowledge of the criminal  
23 purpose of the perpetrator, and with an intent or purpose  
either of committing, or of encouraging or facilitating  
24 commission of, the offense. (McCoy, *supra*, 25 Cal.4th at p.  
25 1118.) Defendant's admission that he made such statements  
when he knew that Zayas had a gun, Zayas was upset about  
26 his brother's gang-related death, and Zayas was looking for  
"scraps," showed his intent to encourage or facilitate Zayas's  
intent to kill, and that he acted with an awareness of  
endangering human life. (People v. Knoller, *supra*, 41 Cal.4th  
27 at pp. 143 & 153.)

28 Garcia, 2013 WL 3286207, at \*22-25.

## b. Analysis

Again, because there is no clearly established Supreme Court authority requiring that lesser included offense instructions be given in non-capital cases, the state court's rejection of this claim was not unreasonable. Additionally, there was no substantial evidence to support giving the instruction.

Involuntary manslaughter is the killing without malice in the commission of an unlawful act not amounting to a felony. Cal. Penal Code § 192(b). Here, the Court of Appeal concluded that the evidence implied malice, making an involuntary manslaughter instruction unavailable. This conclusion was not unreasonable. Petitioner knew Zayas was upset about his brother's death at the hands of Surenos, knew that Zayas retrieved a gun, and knew that Zayas wanted to "look for some scraps," i.e., Surenos. When Petitioner saw the men on the street, he stated, "[F]\* \* \* 'em." The Court of Appeal was not unreasonable in determining that these facts were sufficient to demonstrate that Petitioner acted with implied malice, i.e., with an awareness of endangering human life.

15 Because the evidence implied malice, an involuntary manslaughter instruction  
16 was precluded. See Solis, 219 F.3d at 930. There was not substantial evidence to  
17 support giving the instruction, and therefore no possible constitutional error occurred.  
18 Petitioner is not entitled to relief on this claim.

**B. Claim Two: CALCRIM No.1401**

20 Petitioner contends that the jury was not properly instructed on the gang  
21 enhancement in CALCRIM No. 1401.

## 1. State Court Decision

The Fifth District Court of Appeal rejected this claims as follows:

Defendant was convicted of second degree murder and the jury found the gang enhancement true. Defendant contends the jury's true finding on the gang enhancement must be stricken because CALCRIM No. 1401, which defined the gang enhancement, omitted elements of the enhancement and "confusingly" referred the jury to other instructions.

1 As with his other instructional challenges, defendant failed to  
2 object to CALCRIM No. 1401, but we will address and reject  
his contentions.

3 **A. CALCRIM No. 736**

4 As explained above, defendant was charged with conspiracy  
5 to commit murder, and first degree murder with the gang  
6 special circumstance (§ 190.2, subd. (a)(22)). The gang  
7 enhancement was alleged as to both counts. (§ 186.22, subd.  
(b)(1)(C).)

8 As to the gang allegations, the jury first received CALCRIM  
9 No. 736, which defined the gang special circumstance.

10 “The defendant is charged with a special circumstance of  
11 committing murder while an active participant in a criminal  
12 street gang. To prove that this special circumstance is true,  
the People must prove that, one, did defendant intend to kill  
Arturo Bello.

13 “Two, at the time of the killing, the defendant was an active  
14 participant in a criminal street gang.

15 “Three, the defendant knew that members of the gang  
16 engaged in or have engaged in a pattern of criminal gang  
activity.

17 “And four, the [murder] was carried out to further the activities  
18 of the criminal street gang.

19 “Active participation means involvement with a criminal street  
gang in a way that is more than passive or in name only.

20 “The People do not have to prove that the defendant devoted  
21 all or a substantial part of his time or efforts to the gang or  
that he was an actual member of the gang.

22 “A *criminal street gang* is any ongoing organization,  
23 association, or group of three or more persons whether  
24 formal or [informal], one, that has a common name or  
common identifying sign or symbol.

25 “Two, that has as one or more of its *primary activities* the  
26 commission of murder, attempted murder, vandalism, terrorist  
27 threats, witness intimidation [,] carjacking, assault with [a]  
deadly weapon, or entering an inhabited dwelling.

1 "Three, whose members when acting alone or together  
2 engage in or have engaged in a *pattern of criminal gang*  
activity.

3 "In order to qualify as a *primary activity*, the crime must be  
4 one of the group's chief or principal activities rather than an  
5 occasional act committed by one or more persons who  
happen to be members of the group.

6 "A *pattern of criminal gang activity* is [sic] used here means,  
7 one, the commission of, the attempted commission of, or  
conviction of any combination of two or more of the following  
8 crimes or two or more of the occurrence of one or more of the  
following crimes: Murder, attempted murder, or assault with a  
9 deadly weapon.

10 "Two, at least one of those crimes was committed after  
11 September 26, 1988.

12 "Three, the most recent crime occurred within three years of  
one of the earlier crimes.

13 "Four, the crimes were committed on separate occasions or  
14 by two or more persons. The crimes, if any, that established a  
pattern of criminal gang activity need not be established.

15 "If you find the defendant guilty of a crime in this case, you  
16 may consider that crime in deciding whether *one of the*  
group[']s *primary activities* was commiss[ion] of that crime  
17 and whether a pattern of criminal gang activity has been  
proved. You may not find that there was a *pattern of criminal*  
18 *gang activity* unless all of you agree that two or more crimes  
19 that satisfy these requirements were committed, but you do  
not have to all agree on which crimes were committed.

20 "Other instructions explain what is necessary for the People  
21 to prove that a member of the gang or defendant committed  
murder, attempted murder, or assault with a deadly weapon."  
(Italics added.)

22

23 **B. CALCRIM No. 1401**

24 Immediately after receiving CALCRIM No. 736, the jury  
25 received CALCRIM No. 1401, to define the elements of the  
26 gang enhancement. This instruction advised the jury that if it  
27 found defendant guilty of the charged offenses, or the lesser  
included offense of second degree murder, it had to decide  
whether, for each crime, "the People have proved the

1 additional allegation" that the crime was committed for the  
2 benefit of, at the direction of, or in association with a criminal  
3 street gang, and "decide whether the People have proved this  
4 allegation for each crime and return a separate finding for  
5 each crime."

6 "To prove this allegation, the People must prove that, one,  
7 the defendant committed the crime for the benefit of, at the  
8 direction of, or in association with a criminal street gang.

9 "And, two, the defendant intended to assist, further, or  
10 promote criminal conduct by gang members. *A criminal street*  
11 *gang is defined in another instruction to which you should*  
12 *refer.*

13 "The crimes, if any, that establish a *pattern of criminal gang*  
14 *activity* need not be gang-related. The People need not prove  
15 the defendant is an active or current member of the alleged  
16 criminal street gang.

17 "If you find the defendant guilty of a crime in this case, you  
18 may consider that crime in deciding whether one of the  
19 group's *primary activities* was commission of that crime, and  
20 whether a *pattern of criminal gang activity* has been proved.

21 "The People have the burden of proving each allegation  
22 beyond a reasonable doubt. If the People have not met this  
23 burden, you must find the allegation has not been proved."  
24 (Italics added.)

25 The italicized phrase is consistent with one of the options  
26 provided by the pattern instruction, if the elements of a  
27 criminal street gang are given to the jury in another  
28 instruction.

### 29 **C. Analysis**

30 Defendant contends the jury was not correctly instructed on  
31 the elements of the gang enhancement because CALCRIM  
32 No. 1401 omitted the definitions of a gang's "primary activity"  
33 and "pattern of criminal gang activity."

34 We must view the instructions as a whole and determine their  
35 correctness from the entire charge to the jury, not from a  
36 consideration of one instruction alone. (People v. Wilson,  
37 *supra*, 3 Cal.4th at p. 943.) CALCRIM No. 1401 specifically  
38 instructed the jury that a "criminal street gang" was defined in  
39 "another instruction to which you should refer." The identity of  
40

1 that other instruction could not have been a mystery, since  
2 the court had just read CALCRIM No. 736 to the jury  
3 immediately before it read CALCRIM No. 1401. While  
4 CALCRIM No. 736 began with the definition of the elements  
5 for the gang special circumstance, that instruction also  
6 contained separate and correct definitions of a “criminal  
7 street gang,” a gang’s “primary activities,” and the “pattern of  
8 criminal gang activity.” The entirety of the instructions thus  
9 reflects that the jury was correctly instructed on the elements  
10 of the gang enhancement.

11 Defendant concedes that CALCRIM No. 1401 referred the  
12 jury to “other instructions,” but asserts that the jury would not  
13 have understood that it needed to “look at” CALCRIM No.  
14 736 for the definitions of “primary activities” and “pattern of  
15 criminal gang activity,” and the jury would have been  
16 confused by CALCRIM No. 736’s discussion of the gang  
17 special circumstance and the active participation requirement  
18 for that special circumstance. The references between the  
19 two instructions are clear. Moreover, defendant did not  
20 request clarification of the otherwise adequate instructions,  
21 and he may not complain here. (People v. Alvarez (1996) 14  
22 Cal.4th 155, 223.)

23 Defendant further argues the jury would have been confused  
24 by the inclusion of assault with a deadly weapon and  
25 conspiracy to commit murder in CALCRIM No. 736’s list of  
26 predicate offenses, because the gang expert did not testify  
27 those offenses were a primary activities, and jury was not  
28 otherwise instructed on the elements of assault with a deadly  
29 weapon.

30 The prosecution’s gang expert testified the primary activities  
31 of the Norteno gang included homicide, attempted homicide,  
32 robbery, carjacking, and felony graffiti. The expert testified  
33 about two predicate offenses, based on convictions of  
34 Norteno gang members for committing the offense of assault  
35 with a deadly weapon on members of the Sureno gang in the  
36 Orosi area. As noted above, defendant did not request  
37 clarification of the otherwise adequate instructions, and he  
38 may not complain here. (People v. Alvarez, *supra*, 14 Cal.4th  
39 at p. 223.) Moreover, any error is necessarily harmless since  
40 the parties never disputed the existence of the Nortenos as a  
41 criminal street gang, or challenged the evidence about the  
42 predicate offenses. (Chapman v. California, *supra*, 386 U.S.  
43 at pp. 23–24; People v. Wilson (2008) 44 Cal.4th 758, 804.)  
44 [FN12]

1 [FN12: For similar reasons, we also reject defendant's  
2 separate contention that the jury's true finding on the  
3 section 12022.53, subdivision (e) firearm  
4 enhancement must be stricken since that  
enhancement was based on the true finding on the  
gang enhancement.]

5 Garcia, 2013 WL 3286207, at \*25–28.

6 **2. Procedural Default**

7 The state court determined that the gang enhancement instruction was adequate  
8 under state law. Moreover, as to Petitioner's claim that the instruction was confusing or  
9 unclear, the state court noted that Petitioner did not object to the instruction in the trial  
10 court and therefore "may not complain here." Garcia, 2013 WL 3286207, at \*27-28.  
11 Respondent contends that the state court's imposition of a procedural bar forecloses  
12 federal review of the claim. The Court agrees.

13 State courts may decline to review a claim based on a procedural default.  
14 Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977). In turn, federal courts "will not review a  
15 question of federal law decided by a state court if the decision of that court rests on a  
16 state law ground that is independent of the federal question and adequate to support the  
17 judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991); LaCrosse v. Kernan, 244  
18 F.3d 702, 704 (9th Cir. 2001); see Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991); Park  
19 v. California, 202 F.3d 1146, 1150 (2000) ("A district court properly refuses to reach the  
20 merits of a habeas petition if the petitioner has defaulted on the particular state's  
21 procedural requirements. . . ."). This concept has been commonly referred to as the  
22 procedural default doctrine. This doctrine of procedural default is based on concerns of  
23 comity and federalism. Coleman, 501 U.S. at 730-32. If the court finds an independent  
24 and adequate state procedural ground, "federal habeas review is barred unless the  
25 prisoner can demonstrate cause for the procedural default and actual prejudice, or  
26 demonstrate that the failure to consider the claims will result in a fundamental

1 miscarriage of justice." Noltie v. Peterson, 9 F.3d 802, 804-805 (9th Cir. 1993); Coleman,  
2 501 U.S. at 750; Park, 202 F.3d at 1150.

3 The procedural default doctrine will apply only if the application of the state  
4 procedural rule provides "an adequate and independent state law basis" on which the  
5 state court can deny relief. Park, 202 F.3d at 1151 (quoting Coleman, 501 U.S. at 729–  
6 30). "For a state procedural rule to be 'independent,' the state law basis for the decision  
7 must not be interwoven with federal law." LaCrosse, 244 F.3d at 704 (citing Michigan v.  
8 Long, 463 U.S. 1032, 1040-41 (1983)); Morales v. Calderon, 85 F.3d 1387, 1393 (9th  
9 Cir. 1996) ("Federal habeas review is not barred if the state decision 'fairly appears to  
10 rest primarily on federal law, or to be interwoven with federal law.' " (quoting Coleman,  
11 501 U.S. at 735). "A state law is so interwoven if 'the state has made application of the  
12 procedural bar depend on an antecedent ruling on federal law [such as] the  
13 determination of whether federal constitutional error has been committed.'" Park, 202  
14 F.3d at 1152 (quoting Ake v. Oklahoma, 470 U.S. 68, 75 (1985)).

15 To be deemed adequate, the state law ground for decision must be well-  
16 established and consistently applied. Poland v. Stewart, 169 F.3d 573, 577 (9th Cir.  
17 1999) ("A state procedural rule constitutes an adequate bar to federal court review if it  
18 was 'firmly established and regularly followed' at the time it was applied by the state  
19 court.") (quoting Ford v. Georgia, 498 U.S. 411, 424 (1991)). Although a state court's  
20 exercise of judicial discretion will not necessarily render a rule inadequate, the discretion  
21 must entail "the exercise of judgment according to standards that, at least over time, can  
22 become known and understood within reasonable operating limits." Id. at 377 (quoting  
23 Morales, 85 F.3d at 1392).

24 To overcome a procedural default a prisoner must 'demonstrate cause for the  
25 default and actual prejudice as a result of the alleged violation of federal law, or  
26 demonstrate that failure to consider the claims will result in a fundamental miscarriage of  
27 justice.' Coleman, 501 U.S. at 750. "[C]ause" under the cause and prejudice test must  
28

1 be something external to the petitioner, something that cannot fairly be attributed to him:  
2 '[W]e think that the existence of cause for a procedural default must ordinarily turn on  
3 whether the prisoner can show that some objective factor external to the defense  
4 impeded counsel's efforts to comply with the State's procedural rule.'" *Id.* at 753 (citing  
5 Murray v. Carrier, 477 U.S. 478, 488 (1986)).

6 The Ninth Circuit has recognized and applied the California contemporaneous  
7 objection rule in affirming denial of a federal petition for procedural default where there  
8 was a complete failure to object at trial. See e.g., Paulino v. Castro, 371 F.3d 1083,  
9 1092-93 (9th Cir. 2004) (barring review of jury instruction error claim because no  
10 contemporaneous objection). Here, the state appellate court pointed out that Petitioner  
11 failed to object to or seek clarification of the challenged instructions as given. Garcia,  
12 2013 WL 3286207, at \*27-28. Petitioner's failure to object at trial to the use of CALCRIM  
13 Nos. 736 and 1401 bars his claim that their use violated his right to due process.  
14 However, even if the Court overlooks the procedural default, this claim fails on the merits  
15 as discussed next.

### 16 3. Merits Analysis

17 Instructional error warrants federal habeas relief only if the "ailing instruction by  
18 itself so infected the entire trial that the resulting conviction violates due process[.]"  
19 Waddington v. Saruasad, 555 U.S. 179, 191 (2009) (quoting Estelle v. McGuire, 502  
20 U.S. 62, 72 (1991)). "[N]ot every ambiguity, inconsistency, or deficiency in a jury  
21 instruction rises to the level of a due process violation." Dixon v. Williams, 750 F.3d  
22 1027, 1032 (9th Cir. 2014) (citation omitted). To warrant relief, the erroneous instruction  
23 must have had a substantial and injurious effect or influence in determining the jury's  
24 verdict. Hedgpeth v. Pulido, 555 U.S. 57, 61-62 (2008) (per curiam) (citing Brecht, 507  
25 U.S. at 623). The instruction "may not be judged in artificial isolation," but instead must  
26 be considered "in the context of the instructions as a whole and the trial record."  
27 McGuire, 502 U.S. at 72.

1       First here, the state court determined that the instruction as given was correct  
2 under state law. A state court's interpretation of state law, including one announced on  
3 direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.  
4 See Bradshaw v. Richey, 546 U.S. 74, 76 (2005); Hicks v. Feiock, 485 U.S. 624, 629  
5 (1988). Therefore, the state appellate court's determination—that the challenged  
6 instruction was correct as a matter of state law—is binding on this Court. See id.

7       Next, Petitioner contends that the instruction was deficient and violated due  
8 process because CALCRIM No. 1401 did not define “primary activity” and “pattern of  
9 criminal gang activity.” However, it is undisputed that these terms were defined in  
10 CALCRIM No. 736, which was given immediately before CALCRIM No. 1401. When  
11 viewed “in the context of the instructions as a whole and the trial record,” McGuire, 502  
12 U.S. at 72, the instructions cannot be said to have violated due process in this regard.  
13 The state court was not unreasonable in rejecting this claim.

14       Petitioner also contends that the instructions were confusing because CALCRIM  
15 No. 736 states that the prosecution was required to prove “the defendant was an active  
16 participant in a criminal street gang,” while CALCRIM No. 1401 states that the  
17 prosecution “need not prove the defendant is an active or current member of the alleged  
18 criminal street gang.” This contention was not addressed by the state court. Regardless,  
19 the instructions accurately defined the gang special circumstance and gang  
20 enhancement, respectively. Compare Cal Penal Code § 190.2(a)(22) (gang special  
21 circumstance applicable to “an active participant in a criminal street gang”), with Cal.  
22 Penal Code § 186.22(b)(1) (active participation not required for gang sentencing  
23 enhancement). The instructions do not raise due process concerns in this regard. See  
24 Estelle, 502 U.S. at 72; Dixon, 750 F.3d at 1032.

25       Petitioner next contends that the instructions were flawed because CALCRIM No.  
26 736 did not track precisely the prosecution's gang expert's testimony. Specifically, the  
27 instruction identified assault with a deadly weapon as a primary activity of the gang, but  
28

1 the gang expert did not testify that assault with a deadly weapon was a primary activity.  
2 Petitioner also complains that assault with a deadly weapon was not defined. The  
3 instruction identified the following primary activities of a gang: “the commission of  
4 murder, attempted murder, vandalism, terrorist threats, witness intimidation[,] carjacking,  
5 assault with [a] deadly weapon, or entering an inhabited dwelling.” Garcia, 2013 WL  
6 3286207, at \*26. The gang expert testified that the primary activities of the Norteno gang  
7 included homicide, attempted homicide, robbery, carjacking, and felony graffiti. He also  
8 identified assault with a deadly weapon and conspiracy to commit murder as predicate  
9 offenses, based on prior convictions of Norteno gang members. The Court fails to see  
10 how the instructions were deficient in this regard such that they violated due process.

11 Furthermore, the state court determined that any error in this regard was  
12 harmless under Chapman v. California, 386 U.S. 18 (1967). Under Chapman, “the test  
13 for determining whether a constitutional error is harmless . . . is whether it appears  
14 ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict  
15 obtained.’” Neder v. United States, 527 U.S. 1, 15 (1999) (quoting Chapman, 386 U.S. at  
16 24). However, when a state court’s Chapman decision is reviewed under AEDPA, a  
17 habeas Petitioner must establish that the trial court’s error resulted in “actual prejudice.”  
18 Davis v. Ayala, 135 S. Ct. 2187, 2197 (2015) (quoting Brecht v. Abrahamson, 507 U.S.  
19 619, 637 (1993)). This requires more than a “reasonable possibility” that the error was  
20 harmful. Brecht, 507 U.S. at 637. Instead, the petitioner must show that the state court’s  
21 harmless error determination “was so lacking in justification that there was an error well  
22 understood and comprehended in existing law beyond any possibility of fairminded  
23 disagreement.” Davis, 135 S.Ct. at 2199 (quoting Harrington v. Richter, 562 U.S. 86, 103  
24 (2011)). In other words, “a federal court may not award habeas relief under § 2254  
25 unless the harmlessness determination itself was unreasonable.” Id. (quoting Fry v.  
26 Pliler, 551 U.S. 112, 119 (2007)). Here, the state court’s harmlessness determination  
27 was not unreasonable. The state court noted that “the parties never disputed the  
28

1 existence of the Nortenos as a criminal street gang, or challenged the evidence about  
2 the predicate offenses.” Garcia, No. 2013 WL 3286207, at \*28. Thus, the potential for  
3 confusion complained of by Petitioner is unlikely to have had any effect on the jury’s  
4 verdict.

5 Finally, Petitioner complains that the instructions would have permitted the jury to  
6 improperly consider conspiracy to commit murder as a primary activity or predicate  
7 offense. However, as the Court of Appeal acknowledged separately, the conspiracy to  
8 commit murder instruction was flawed and the conviction on that ground could not be  
9 sustained. Garcia, 2013 WL 3286207, at \*15. Accordingly, Petitioner argues, the gang  
10 enhancement also must be reversed because the instructions advised the jury: “If you  
11 find the defendant guilty of a crime in this case, you may consider that crime in deciding  
12 whether one of the group[’]s primary activities was commiss[ion] of that crime and  
13 whether a pattern of criminal gang activity has been proved.” However, conspiracy to  
14 commit murder was not listed as a qualifying primary activity under CALCRIM No. 736.  
15 Furthermore, as stated, there was no dispute at trial that the Nortenos constituted a  
16 criminal street gang.

17 Accordingly, Petitioner is not entitled to relief on this claim.

18 **C. Claim Three: CALCRIM No. 400**

19 Petitioner contends that the use of the phrase “equally guilty” in CALCRIM No.  
20 400 was erroneous.

21 **1. State Court Decision**

22 The Fifth District Court of Appeal rejected Petitioner’s claim as follows:

23 At trial, the parties did not dispute that Zayas was the  
24 gunman. Defendant was charged with first degree murder as  
25 an aider and abettor, and convicted of second degree murder  
as a lesser included offense.

26 The jury received the following version of CALCRIM No. 400,  
27 on aiding and abetting:

1           “A person may be guilty of a crime in two ways: One,  
2           he may have directly committed the crime. I will call  
3           that person the perpetrator. Two, he may have aided  
4           and abetted a perpetrator, who directly committed the  
5           crime.

6           “A person is *equally guilty* of the crime whether he  
7           committed it personally or aided and abetted the  
8           perpetrator who committed it.” (Italics added.)

9           Defendant argues his conviction for second degree murder  
10          must be reversed because of the inclusion of the italicized  
11          phrase “equally guilty” in CALCRIM No. 400. Defendant  
12          argues this phrase has been repeatedly criticized as  
13          confusing, and it has been removed from subsequent  
14          versions of CALCRIM No. 400. Defendant further argues the  
15          inclusion of the phrase in this case was prejudicial because  
16          defendant did not share the same intent as the gunman,  
17          since defendant allegedly did not know that Zayas's gun was  
18          loaded or he intended to shoot someone.

19          The People contend that defendant has forfeited review of  
20          this issue since he did not object to CALCRIM No. 400.  
21          However, defendant's claim that the instruction misstated the  
22          law or violated his right to due process “is not of the type that  
23          must be preserved by objection. [Citations.]” (People v.  
24          Smithey, supra, 20 Cal.4th at p. 976, fn. 7; see also § 1259;  
25          People v. Flood (1998) 18 Cal.4th 470, 482, fn. 7.) We thus  
26          turn to the merits of defendant's argument.

#### 18          A. ***Aiding and Abetting***

19          As explained above, murder is an unlawful killing committed  
20          with malice aforethought. (People v. Cravens (2012) 53  
21          Cal.4th 500, 507.) Malice may be either express or implied.  
22          (Ibid.)

23          A defendant may be culpable for a crime as a direct  
24          perpetrator or as an aider and abettor. To be culpable as an  
25          aider and abettor, the defendant must have acted with  
26          knowledge of the criminal purpose of the perpetrator, and  
27          with an intent or purpose either of committing, or of  
28          encouraging or facilitating commission of, the offense.  
29          (People v. McCoy (2001) 25 Cal.4th 1111, 1118 (McCoy)).

30          With respect to the target offense intended by the aider and  
31          abettor, the aider and abettor's mens rea is the intent  
32          associated with the target offense. (McCoy, supra, 25 Cal.4th  
33          29          25 Cal.4th 1111, 1118 (McCoy)).

1 at p. 1118 & fn. 1.) “Generally, a person who is found to have  
2 aided another person to commit a crime *is* ‘equally guilty’ of  
3 that crime. [Citations.]” (People v. Lopez (2011) 198  
4 Cal.App.4th 1106, 1118 (Lopez), italics in original.) In some  
5 circumstances, however, the aider and abettor may be found  
6 guilty of a target offense that is greater or lesser than the  
7 offense attributed to the perpetrator, depending on the  
8 particular states of mind of the aider and abettor and the  
9 perpetrator and the availability of defenses to a particular  
10 crime. (McCoy, *supra*, 25 Cal.4th at pp. 1114, 1118–1120;  
11 People v. Nero (2010) 181 Cal.App.4th 504, 507, 513–517  
12 (Nero); People v. Samaniego (2009) 172 Cal.App.4th 1148,  
13 1164 (Samaniego); Lopez, *supra*, 198 Cal.App.4th at p.  
14 1118.) In the context of a target offense, aider and abettor  
15 liability is premised on the combined acts of all the  
16 participants, and “on the aider and abettor’s *own mens rea*.  
17” (McCoy, *supra*, 25 Cal.4th at p. 1120, italics added.)

18 An aider and abettor may be guilty of a target offense that is  
19 lesser than the perpetrator’s offense, depending on the aider  
20 and abettor’s state of mind and the availability of defenses.  
21 (See Nero, *supra*, 181 Cal.App.4th at pp. 513–517;  
22 Samaniego, *supra*, 172 Cal.App.4th at pp. 1163–1164.) As a  
23 result, it has been recognized that the “equally guilty”  
24 language in CALCRIM No. 400 can be confusing or  
25 misleading. (People v. Loza (2012) 207 Cal.App.4th 332,  
26 348, fn. 8 (Loza); Lopez, *supra*, 198 Cal.App.4th at pp. 1118–  
27 1119 & fn. 5; Samaniego, *supra*, 172 Cal.App.4th at pp.  
28 1163–1165; Nero, *supra*, 181 Cal.App.4th at pp. 510 & 518.)  
The “equally guilty” language creates the risk that the jury  
might think that if it finds the defendant in some way aided  
the perpetrator with the criminal conduct, it necessarily must  
find the defendant guilty of *the same offense* as the  
perpetrator, without determining the aider and abettor’s  
particular state of mind. (See Loza, *supra*, 207 Cal.App.4th at  
p. 356; Nero, *supra*, 181 Cal.App.4th at p. 518; Samaniego,  
*supra*, 172 Cal.App.4th at p. 1165.)

## 23 B. Analysis

24 As defendant correctly points out, the word “equally” has  
25 been removed from the “equally guilty” phrase in the pattern  
26 instruction on aiding and abetting. (Loza, *supra*, 207  
27 Cal.App.4th 332, 348, fn. 8.) Defendant argues the court  
28 erroneously included the phrase in the version of CALCRIM  
No. 400 given to the jury, and that error requires reversal of  
his murder conviction. However, even assuming the inclusion  
of the phrase was erroneous, the record demonstrates that

1 any error was harmless beyond a reasonable doubt pursuant  
2 to Chapman v. California, supra, 386 U.S. 18. (Samaniego,  
3 supra, 172 Cal.App.4th at p. 1165 [applying Chapman test to  
erroneous inclusion of “equally guilty” in CALCRIM No. 400];  
4 Lopez, supra, 172 Cal.App.4th at pp. 1119–1120.)

5 In this case, the jury received both the general aiding and  
6 abetting instruction containing the “equally guilty” language  
7 (CALCRIM No. 400), and the more specific instruction  
8 (CALCRIM No. 401) that explained in detail the mental state  
9 necessary to impose culpability on the basis of aiding and  
10 abetting rather than direct perpetration of a crime. CALCRIM  
11 No. 401 stated that for defendant to be culpable as an aider  
12 and abettor, the prosecution had to prove that the defendant  
13 knew “the perpetrator intended to commit the crime,” the  
14 defendant intended to aid and abet the perpetrator in  
committing the crime, and the “defendant’s words or conduct  
did, in fact, aid and abet the perpetrator’s commission of the  
crime.” CALCRIM No. 401 correctly explained that  
“[s]omeone aids and abets a crime if he knows of the  
perpetrator’s unlawful purpose, and he specifically intends to  
and does, in fact, aid, facili[tate], promote, encourage, or  
instigate the perpetrator’s commission of that crime.”

15 More importantly, the verdict in this case indicates that the  
16 jury was not confused by the “equally guilty” language.  
17 Defendant was charged with first degree premeditated  
murder with a special circumstance, based on the  
18 prosecution’s theory that defendant shared Zayas’s alleged  
premeditated, deliberate, and willful intent to kill southerner  
19 gang members. The jury found defendant not guilty of the  
20 charged offense, and guilty of second degree murder as a  
lesser included offense, thus rejecting the prosecution’s  
theory that defendant and Zayas shared the same intent.

21 In addition, this case is dissimilar from Nero and Loza, which  
22 deemed the “equally guilty” language confusing and  
prejudicial. Nero and Loza found the inclusion of the phrase  
23 was prejudicial because the juries in both cases asked  
questions during the deliberations which reflected confusion  
24 about whether an aider and abettor could have a less  
culpable state of mind, and the trial courts failed to clarify the  
25 confusion. (Nero, supra, 181 Cal.App.4th at pp. 507, 510–520  
[jurors asked if aider and abettor could be less culpable; court  
26 re-read instruction containing “equally guilty” language]; Loza,  
27 supra, 207 Cal.App.4th at pp. 349, 352, 355–357 [jurors  
asked if they should consider the aider and abettor’s state of  
28 mind; court referred jury back to the instructions].)

1 In contrast, the instructions in this case directed the jury to  
2 examine defendant's own particular mental state, and the jury  
3 did not ask any questions suggesting it did not fully  
4 understand this requirement. The jury was also correctly  
5 instructed as to the definitions of willful, premeditated, and  
6 deliberate attempted murder, and the mental state of malice.  
7 The entirety of the instructions properly informed the jury as  
8 to the intent required for aider and abettor culpability. We  
9 thus conclude that the inclusion in this case of the phrase  
10 "equally guilty" in CALCRIM No. 400 was harmless beyond a  
11 reasonable doubt. (Samaniego, supra, 172 Cal.App.4th at p.  
12 1165.)

13 People v. Garcia, No. F062834, 2013 WL 3286207, at \*17–19 (Cal. Ct. App. June 27,  
14 2013)

15 **2. Analysis**

16 The California Court of Appeal noted that the inclusion of the "equally guilty"  
17 language in CALCRIM No. 400 can be confusing and misleading, but stopped short of  
18 determining that the instruction was erroneous. Instead, the state court concluded that  
19 any error was harmless under Chapman. This determination was not unreasonable.  
20 Davis, 135 S.Ct. at 2199.

21 The state court considered the challenged portion of CALCRIM No. 400 in the  
22 context of the jury instructions as a whole. The state court noted that the jury was given  
23 other instructions on how to evaluate Petitioner's potential liability. Immediately following  
24 CALCRIM No. 400, the jury was instructed with CALCRIM No. 401 which provided a  
25 more detailed explanation of the mens rea required for aiding and abetting liability,  
26 specifically that the aider and abettor must have intended to aid and abet the perpetrator  
27 in the commission of the crime, and that mere presence at the crime scene or knowledge  
28 of the perpetrator's intent, standing alone, is insufficient to support liability. (RT vol. 4 at  
484.) Based on the instructions as a whole, the state court determined that the "equally  
guilty" language was harmless. This decision is not "so lacking in justification that there  
was an error well understood and comprehended in existing law beyond any possibility  
of fairminded disagreement." Richter, 562 U.S. at 103.

1 Accordingly, Petitioner is not entitled to relief on this claim.

2 **D. Claim Four: Sufficiency of the Evidence**

3 Petitioner argues that there is insufficient evidence to support his conviction for  
4 aiding and abetting murder.

5 **1. State Court Decision**

6 The Fifth District Court of Appeal rejected Petitioner's claim as follows:

7 Defendant contends there is insufficient evidence to support  
8 his conviction for second degree murder as an aider and  
9 abettor because there is no evidence that he had the  
10 requisite malice, he did not take "any concrete action" to  
11 assist Zayas (the gunman) as he fired the fatal shots, and  
12 defendant's mere presence at the scene does not constitute  
13 aiding and abetting.

14 In section II, *ante*, we set forth the standard of review to  
15 determine whether a conviction is supported by substantial  
16 evidence. In section III, *ante*, we explained that to be culpable  
17 as an aider and abettor, the defendant must have acted with  
18 knowledge of the criminal purpose of the perpetrator, and  
19 with an intent or purpose either of committing, or of  
20 encouraging or facilitating commission of, the offense.  
(McCoy, *supra*, 25 Cal.4th at p. 1118.)

21 We have also explained that the trial court did not have a sua  
22 sponte duty to instruct on voluntary and involuntary  
23 manslaughter as lesser included offenses of murder because  
24 defendant, if guilty at all, was guilty of the greater offense of  
25 implied malice second degree murder. (People v. Kelly,  
supra, 51 Cal.3d at p. 959.) Malice is implied "when the  
killing results from an intentional act, the natural  
consequences of which are dangerous to life, which act was  
deliberately performed by a person who knows that his  
conduct endangers the life of another and who acts with  
conscious disregard for life' [citation]...." (People v. Lasko,  
supra, 23 Cal.4th at p. 107; Swain, *supra*, 12 Cal.4th at p.  
602.) A defendant acts with implied malice when he acts with  
an awareness of endangering human life. (People v. Knoller,  
supra, 41 Cal.4th at pp. 143 & 153.)

26 As explained in sections III(D) and IV, *ante*, there is  
27 overwhelming evidence to support defendant's conviction as  
28 an aider and abettor for second degree murder under an  
implied malice theory. We need not restate this analysis and

1 find that defendant's conviction for second degree murder is  
2 supported by overwhelming evidence.

3 In reaching this conclusion, we note that during his interviews  
4 with law enforcement officers, defendant sought to present an  
5 image of a bystander—one who, by happenstance of  
6 residence was left little choice but to be in the company of  
7 gang members without actual affiliation with their enterprise,  
8 and who just happened to be in the wrong place (Josh's car),  
9 with the wrong people (Josh, Santos, and Zayas) at the  
10 wrong time (when Zayas murdered the victim). Indeed, there  
11 may be slight ring of truth to the defendant's contention about  
12 the unfortunate circumstances that led to the tragic events on  
13 one fateful day. Yet, while the social conditions that  
14 contributed to defendant's decisions may provide some  
15 explanation, they do not constitute excuse. Moreover, as the  
16 second interview continued, defendant admitted that he knew  
17 much more about the events which led up to the murder than  
18 he had previously indicated. Indeed, defendant essentially  
19 conceded he was not an idle bystander that day. Among  
20 other things, we learned from the defendant's police  
interview, that he was aware of Zayas's purposeful retrieval  
and possession of a gun that day. Defendant explained that  
he and his friends had previously been shot at, the shots  
were fired by Southerners, and that was why he felt they  
needed to carry weapons. Defendant knew that Zayas was  
very upset about his brother's murder at the hands of  
southerners, and that they all agreed to go mobbing. When  
defendant saw the two men dressed in blue, he yelled out,  
"F\* \* \* 'em," and Zayas started shooting. The consequences  
of the activities of defendant and his compatriots on the day  
in question were not fortuitous, and the law imposes  
accountability on the defendant notwithstanding that he did  
not pull the trigger.

21 Garcia, 2013 WL 3286207, at \*24–25.

22 **2. Legal Standard**

23 The Due Process Clause "protects the accused against conviction except upon  
24 proof beyond a reasonable doubt of every fact necessary to constitute the crime with  
25 which he is charged." In re Winship, 397 U.S. 358, 364 (1970). There is sufficient  
26 evidence to support a conviction if, "after viewing the evidence in the light most favorable  
27 to the prosecution, any rational trier of fact could have found the essential elements of

1 the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).  
2 "[T]he dispositive question under Jackson is 'whether the record evidence could  
3 reasonably support a finding of guilt beyond a reasonable doubt.'" Chein v. Shumsky,  
4 373 F.3d 978, 982 (9th Cir. 2004) (quoting Jackson, 443 U.S. at 318). Put another way,  
5 "a reviewing court may set aside the jury's verdict on the ground of insufficient evidence  
6 only if no rational trier of fact could have agreed with the jury." Cavazos v. Smith, 565  
7 U.S. 1, 132 S.Ct. 2, \*4, 181 L.Ed. 2d 311 (2011).

8 In conducting federal habeas review of a claim of insufficient evidence, "all  
9 evidence must be considered in the light most favorable to the prosecution." Ngo v.  
10 Giurbino, 651 F.3d 1112, 1115 (9th Cir. 2011). "Jackson leaves juries broad discretion in  
11 deciding what inferences to draw from the evidence presented at trial," and it requires  
12 only that they draw "reasonable inferences from basic facts to ultimate facts." Coleman  
13 v. Johnson, 132 S.Ct. 2060, 2064 (2012) (citation omitted). "Circumstantial evidence  
14 and inferences drawn from it may be sufficient to sustain a conviction." Walters v.  
15 Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted).

16 "A petitioner for a federal writ of habeas corpus faces a heavy burden when  
17 challenging the sufficiency of the evidence used to obtain a state conviction on federal  
18 due process grounds." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In order to  
19 grant relief, the federal habeas court must find that the decision of the state court  
20 rejecting an insufficiency of the evidence claim reflected an objectively unreasonable  
21 application of Jackson and Winship to the facts of the case. Ngo, 651 F.3d at 1115; Juan  
22 H., 408 F.3d at 1275 & n.13. Thus, when a federal habeas court assesses a sufficiency  
23 of the evidence challenge to a state court conviction under AEDPA, "there is a double  
24 dose of deference that can rarely be surmounted." Boyer v. Belleque, 659 F.3d 957, 964  
25 (9th Cir. 2011). The federal habeas court determines sufficiency of the evidence in  
26 reference to the substantive elements of the criminal offense as defined by state law.  
27 Jackson, 443 U.S. at 324 n.16; Chein, 373 F.3d at 983.

1 Petitioner's claim is whether there was sufficient evidence to satisfy the elements  
2 of second degree murder under California law. Under California law, murder is an  
3 unlawful killing with malice aforethought. Cal. Penal Code § 187(a). Malice is express  
4 when the defendant manifests a deliberate intention to take away the life of another.  
5 People v. Blakeley, 23 Cal. 4th 82, 87, 96 (2000). A defendant acts with implied malice  
6 when he acts with an awareness of endangering human life. People v. Knoller 41 Cal.  
7 4th 139, 143, 153 (2007). More specifically, malice is implied "when the killing results  
8 from an intentional act, the natural consequences of which are dangerous to life, which  
9 act was deliberately performed by a person who knows that his conduct endangers the  
10 life of another and who acts with conscious disregard for life" To be culpable as an aider  
11 and abettor, the defendant must have acted with knowledge of the criminal purpose of  
12 the perpetrator, and with an intent or purpose either of committing, or of encouraging or  
13 facilitating commission of, the offense. People v. McCoy, 25 Cal. 4th 1111, 1118 (2001).

14 **3. Analysis**

15 The state court was not unreasonable in determining that substantial evidence  
16 supports Petitioner's conviction as an aider and abettor to second degree murder. As the  
17 state court noted, there is a "slight ring of truth" to Petitioner's contention that he was in  
18 the wrong place, with the wrong people, at the wrong time. Garcia, 2013 WL 3286207, at  
19 \*25. Nevertheless, the evidence showed that Petitioner knew Zayas was upset about his  
20 brother's death at the hands of Surenos, knew that Zayas retrieved a gun, and knew that  
21 Zayas wanted to "look for some scraps," i.e., Surenos. When Petitioner saw the men on  
22 the street, he stated, "[F]\* \* \* 'em." As concluded above, the Court of Appeal was not  
23 unreasonable in determining that these facts were sufficient to demonstrate that  
24 Petitioner acted with implied malice, i.e., with an awareness of endangering human life.  
25 In light of these facts, the Court cannot say that "no rational trier of fact could have  
26 agreed with the jury." Cavazos, 565 U.S. 1 (2011). Petitioner is not entitled to relief on  
27 this claim.

## **E. Claim Five: Failure to Stay Firearm Enhancement**

Petitioner challenges his firearm enhancement on several grounds. First, he contends that his constitutional rights were violated when the trial court failed to stay the firearm enhancement under California Penal Code section 654. Second, he claims that the firearm enhancement was unproven. Lastly, he contends that the sentence on the firearm enhancement constitutes cruel and unusual punishment in violation of the Eighth Amendment.

## 1. State Court Decision

The Fifth District Court of Appeal rejected this claim as follows:

Defendant contends the court improperly sentenced him to 15 years to life for second degree murder plus a consecutive term of 25 years to life for the firearm enhancement. Defendant argues the court should have stayed the term for the section 12022.53 firearm enhancement pursuant to section 654 because the firearm was used to commit the murder, he was not the gunman, and he was only convicted as an aider and abettor.

## A. Section 12022.53 and Aiders and Abettors

Section 12022.53 establishes mandatory sentence enhancements for persons convicted of specified felonies, including murder, who discharge a firearm in the commission of the offense. (§ 12022.53, subds. (b)(e).) Subdivision (d) of section 12022.53 mandates a consecutive enhancement of 25 years to life for any person who personally and intentionally discharges a firearm causing death in the commission of one of the specified felonies. Subdivision (e)(1) imposes vicarious liability on an aider or abettor who committed the specified offense for the benefit of, at the direction of, or in association with a criminal street gang. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171.)

Section 12022.53, subdivisions (d) and (e)(1), read together, require the imposition of a consecutive sentence enhancement of 25 years to life when a defendant is convicted of a murder committed for the benefit of a criminal street gang, and any principal in the offense “personally and intentionally discharges a firearm” that causes death to any person other than an accomplice. (*People v. Hernandez* (2005) 134 Cal.App.4th 474, 480.)

1 In order to find an aider and abettor subject to the sentence  
2 enhancements of section 12022.53, the aider and abettor  
3 must be convicted of the underlying offense (i.e., murder),  
4 and the gang enhancement found true. There is no  
5 requirement that the principal who intentionally and  
6 personally discharged the firearm must be convicted of the  
7 offense. (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1174.)

8

9 **B. Section 654**

10 In *People v. Hutchins* (2001) 90 Cal.App.4th 1308 (*Hutchins*),  
11 the court rejected the application of section 654 to a section  
12 12022.53, subdivision (d) enhancement, in a case where the  
13 defendant committed a murder using a gun. The defendant  
14 argued that the trial court punished him twice for firing the  
15 shots that killed the victim by sentencing him to 15 years to  
16 life for second degree murder plus 25 years to life for the  
17 section 12022.53, subdivision (d) firearm enhancement.  
18 *Hutchins* rejected the defendant's argument that imposition of  
19 the firearm enhancement violated section 654. "Clearly, in  
20 enacting this provision the Legislature intended to mandate  
21 the imposition of substantially increased penalties where one  
22 of a number of crimes, including homicide, was committed by  
23 the use of a firearm. In so doing, the express language of the  
24 statute indicates the Legislature's intent that section 654 *not*  
25 apply to suspend or stay execution or imposition of such  
26 enhanced penalties...." (*Hutchins, supra*, at p. 1313, italics in  
27 original.) Thus, "where imposition of a firearms use  
28 enhancement is made *mandatory* notwithstanding other  
sentencing laws and statutes, it is *error* to apply section 654  
to stay imposition of such an enhancement. [Citations.]" (*Id.*  
at p. 1314, italics in original; see also *People v. Sanders*  
(2003) 111 Cal.App.4th 1371, 1375.)

20 In *People v. Palacios* (2007) 41 Cal.4th 720, the court cited  
21 *Hutchins* with approval, noted that the Legislature mandated  
22 that section 12022.53 enhancements "shall be imposed  
23 '[n]otwithstanding any other provision of law,'" and held that  
24 "in enacting section 12022.53, the Legislature made clear  
25 that it intended to create a sentencing scheme unfettered by  
26 section 654." (*Palacios, supra*, at pp. 728, 733, italics added.)  
27 "Nothing in the statute suggests the Legislature intended to  
28 override section 654 as to some applications of section  
12022.53, but not others." (*Id.* at p. 733.)

## C. Analysis

Defendant argues section 654 may be applied to his case, and the reasoning in *Palacios* and *Hutchins* is inapplicable to these facts, because he was not the gunman, he did not personally use or discharge the firearm, and the enhancement was imposed based on his liability as an aider and abettor pursuant to section 12022.53, subdivision (e)(1). This is a distinction without a difference. As explained above, the firearm enhancement was pleaded and proved pursuant to section 12022.53, subdivisions (d) and (e)(1). Section 12022.53, subdivision (d) mandates a consecutive term of 25 years to life if a person convicted of an enumerated felony "intentionally and personally discharged a firearm and proximately caused great bodily injury ... or death ...." "Section 12022.53, subdivision (e)(1), imposes vicarious liability under this section *on aiders and abettors who commit crimes in participation of a criminal street gang*. [Citation.]" (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1171, italics added.)

“Under this sentencing regime an aider and abettor who is found guilty of murder is subject to the 25 years to life enhancement even though he or she did not personally and intentionally discharge a firearm causing death if the murder was committed for the benefit of a criminal street gang and ‘any principal’ in the offense personally and intentionally discharged a firearm causing death.” (*People v. Hernandez, supra*, 134 Cal.App.4th at p. 480, fn. omitted.)

The imposition of the indeterminate enhancement on a defendant convicted as an aider and abettor to a murder committed for the benefit of a criminal street gang, pursuant to section 12022.53, subdivision (e), does not violate the defendant's equal protection or due process rights, or constitute cruel and/or unusual punishment. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 12-18; *People v. Hernandez*, *supra*, 134 Cal.App.4th at pp. 480-483.)

We conclude the court properly imposed the consecutive term of 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1), and section 654 was not applicable.

(Lodged Doc. 11 at 5-8 (record citations omitted).)

## 2. Analysis

**a. Applicability of Section 654**

3 The state court determined that section 654 was inapplicable in Petitioner's case.  
4 Petitioner contends this ruling was erroneous. However, the Court is bound by the  
5 California Court of Appeal's interpretation of the state penal code. See Bradshaw v.  
6 Richey, 546 U.S. 74, 76 (2005) (per curiam) ("[A] state court's interpretation of state law,  
7 including one announced on direct appeal of the challenged conviction, binds a federal  
8 court sitting in habeas corpus."); see also Christian v. Rhode, 41 F.3d 461, 469 (1994)  
9 ("Absent a showing of fundamental unfairness, a state court's misapplication of its own  
10 sentencing laws does not justify federal habeas relief."). More specifically, a claim in  
11 federal court that multiple punishment violates section 654 fails to state a federal  
12 question. See Watts v. Bonneville, 879 F.2d 685, 687 (9th Cir.1989) (holding petitioner's  
13 claim that the state court violated Penal Code section 654 was not cognizable under  
14 AEDPA). The state court's application of state sentencing law is not cognizable on  
15 habeas review unless the error is so arbitrary or capricious as to constitute an  
16 independent due process or Eighth Amendment violation. Lewis v. Jeffers, 497 U.S. 764,  
17 780 (1990).

**b. Eighth Amendment**

19 Petitioner makes a cursory claim that his firearm enhancement violates the Eighth  
20 Amendment. This claim was not presented to the California Supreme Court and it is  
21 therefore unexhausted. (Lodged Doc. 12.) 28 U.S.C. § 2254(b)(1). Regardless, the claim  
22 may be denied on the merits because it is not colorable. 28 U.S.C. § 2254(b)(2); Cassett  
23 v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005).

24 The United States Supreme Court has held that the Eighth Amendment includes a  
25 "narrow proportionality principle" that applies to terms of imprisonment. See Harmelin v.  
26 Michigan, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring). However, outside the  
27 context of capital punishment, successful challenges to the proportionality of particular

1 sentences are “exceedingly rare.” Solem v. Helm, 463 U.S. 277, 289–90 (1983). “The  
2 Eighth Amendment forbids only extreme sentences that are ‘grossly disproportionate’ to  
3 the crime.” Harmelin, 501 U.S. at 1001 (Kennedy, J., concurring) (citing Solem, 463 U.S.  
4 at 288, 303). Thus, in Lockyer v. Andrade, 538 U.S. 63, 75 (2003), the United States  
5 Supreme Court held that it was not an unreasonable application of clearly established  
6 federal law for the California Court of Appeal to affirm a “Three Strikes” sentence of two  
7 consecutive 25 year-to-life imprisonment terms for a petty theft with a prior conviction  
8 involving theft of \$150.00 worth of videotapes. In Ewing v. California, 538 U.S. 11, 29  
9 (2003), the Supreme Court held that a “Three Strikes” sentence of 25 years-to-life in  
10 prison imposed on a grand theft conviction involving the theft of three golf clubs from a  
11 pro shop was not grossly disproportionate and did not violate the Eighth Amendment.  
12 More recently, in Crosby v. Schwartz, 678 F.3d 784, 791–92 (9th Cir.2012), the Ninth  
13 Circuit held that a “Three Strikes” sentence of 26 years to life for failure to annually  
14 update sex offender registration and failure to timely register a change of address did not  
15 violate the Eighth Amendment.

16 Here, Petitioner was sentenced to an aggregate term of forty years to life for his  
17 participation as an aider and abettor in a murder involving the use of a firearm. This  
18 sentence does not lead to an inference of gross disproportionality and therefore does not  
19 amount to cruel and unusual punishment under the Eighth Amendment.

20 **c. Insufficient Evidence**

21 Finally, Petitioner argues that the firearm enhancement is not supported by the  
22 evidence. This claim likewise was not presented to the California Supreme Court and is  
23 unexhausted. (Lodged Doc. 12.) 28 U.S.C. § 254(b)(1). Regardless, it is not colorable.  
24 28 U.S.C. § 2254(b)(2); Cassett, 406 F.3d at 623-24. The argument is premised on  
25 Petitioner’s contention that he is not subject to the enhancement as an aider and abettor.  
26 The Fifth District Court of Appeal’s analysis forecloses such a determination on state law  
27 grounds.

1 Accordingly, Petitioner is not entitled to relief on this claim.

2 **F. Claim Six: Failure to Stay Sentence on Gang Enhancement**

3 Petitioner argues that his constitutional rights were violated at resentencing when  
4 the trial court stayed the sentence on the gang enhancement pursuant to California  
5 Penal Code § 186.22(b)(1)(C) rather than § 186.22(b)(5). (ECF No. 26 at 18.) Petitioner  
6 raised this claim in his second appeal to the Fifth District Court of Appeal (Lodged Doc. 7  
7 at 13-14), and the Court of Appeal granted Petitioner relief. (Lodged Doc. 11 at 8-9.)  
8 Specifically, the Court of Appeal directed that the abstract of judgment be modified to  
9 delete the reference to § 186.22(b)(1)(C) and to indicate Petitioner was sentenced  
10 pursuant to § 186.22(b)(5) and that the enhancement under that section was stayed.  
11 (*Id.*)

12 Because Petitioner has been granted relief on this claim, it is moot. Bailey v. Del  
13 Papa, 237 F. App'x 280, 281 (9th Cir. 2007) (finding adjudication of habeas claim  
14 unnecessary where state court had already granted relief). Thus, even assuming the  
15 claim is cognizable in a federal habeas proceeding, he is not entitled to relief on this  
16 claim.

17 **VI. Points and Authorities in Support of Traverse**

18 Almost five months after filing his traverse, Petitioner filed a document styled,  
19 "Points and Authorities in Support of Traverse." (ECF No. 42.) However, the document  
20 does not address arguments raised in the petition or traverse, and instead asserts that  
21 Petitioner is entitled to resentencing due to recent changes in California law.

22 This claim is not contained in the petition. Furthermore, it appears to be  
23 unexhausted and raises only questions of state law. It is not cognizable on federal  
24 habeas review. Petitioner is not entitled to relief on this claim and instead must seek any  
25 available remedy in state court.

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1      **VII. Conclusion and Recommendation**

2      Based on the foregoing, it is HEREBY RECOMMENDED that the petition for writ of  
3      habeas corpus be DENIED.

4      The findings and recommendation are submitted to the United States District  
5      Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
6      **thirty** (30) days after being served with the findings and recommendation, any party may  
7      file written objections with the Court and serve a copy on all parties. Such a document  
8      should be captioned "Objections to Magistrate Judge's Findings and Recommendation."  
9      Any reply to the objections shall be served and filed within fourteen (14) days after  
10     service of the objections. The parties are advised that failure to file objections within the  
11     specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772  
12     F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir.  
13     1991)).

14  
15     IT IS SO ORDERED.

16     Dated: January 10, 2018

17     /s/ Michael J. Seng  
18     UNITED STATES MAGISTRATE JUDGE

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