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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VICTOR GUERRERO,
Petitioner,
v.
W.L. MUNIZ,
Respondent.

Case No. 1:16-cv-01433-LJO-JDP (HC)
FINDINGS AND RECOMMENDATIONS
THAT COURT DENY PETITION FOR WRIT
OF HABEAS CORPUS
ECF No. 1
OBJECTIONS DUE IN 14 DAYS

Petitioner Victor Guerrero, a state prisoner without counsel, seeks a writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 1. Petitioner challenges several parts of the jury instructions given at his trial. However, petitioner’s claims are incognizable under federal law, and the alleged errors were harmless. We therefore recommend that the court deny the petition.

I. Background

This case has its origins in a conspiracy to commit robbery that resulted in murder. According to the government, two women lured two men to an alley. Petitioner and another man, who were waiting in the alley, then attempted to rob the two victims. The robbery attempt went wrong when the victims resisted. Petitioner shot the resisting victim, and the other victim was stabbed by one of the four perpetrators. The victim shot by petitioner died. The government argued that the killing of one victim and injury of the other were natural and probable consequences of petitioner and the other perpetrators’ conspiracy to commit robbery. A jury

1 found petitioner guilty of conspiracy to commit robbery, first-degree felony murder, attempted
2 murder, second-degree robbery, and attempted second-degree robbery. CT 2:387-90, 406.¹ The
3 Fresno County Superior Court sentenced petitioner to life in prison without the possibility of
4 parole. CT 2:574-75, 579-82.

5 We set forth below the facts of the underlying offenses, as stated by the California Court
6 of Appeal, Fifth District (“Court of Appeal”). A presumption of correctness applies to these
7 facts. See 28 U.S.C. § 2254(e)(1); *Crittenden v. Chappell*, 804 F.3d 998, 1010-11 (9th Cir. 2015).

8 On the evening of June 5, 2010, Juan Gonzalez (Gonzalez), Jose
9 Jacobo (Jacobo), and Teofilo Mendoza (Mendoza) were leaving a
10 bar when they met 18-year-old Princess Hernandez (Hernandez)
11 and 20-year-old Sonia “Lil’ One” Miranda (Miranda). They drove
12 the two young women back to Gonzalez’s apartment, where they
13 drank beer and used drugs. In the early morning hours of June 6,
14 2010, the young women asked the men for a ride home. Gonzalez
15 drove Jacobo and the two young women to an alley in west Fresno
16 based on their directions about where to leave them. As the women
17 walked away from Gonzalez’s car, two suspects suddenly appeared
18 in the alley, accosted Gonzalez and Jacobo, and demanded their
19 wallets. Gonzalez and Jacobo resisted. Gonzalez was fatally shot in
20 the head and Jacobo was stabbed multiple times. The suspects fled
21 and Jacobo staggered into the street for help.

22 The investigation revealed the two suspects in the alley were Victor
23 “Mousie” Guerrero (Guerrero) and Juan “Pelon” Sanchez
24 (Sanchez); that Guerrero shot Gonzalez and Sanchez stabbed
25 Jacobo; and the alley was very near Francisco “Cisco” Gutierrez’s
26 (Gutierrez) apartment. Several hours before the robbery and
27 murder, Hernandez, Miranda, Guerrero and Sanchez had been at a
28 party at Gutierrez’s apartment, where they discussed a plan for the
two young women to go to a bar, meet some men at random, get
money and/or drugs from them, lure the victims outside, and
Guerrero and Sanchez would rob them.

Hernandez and Miranda later offered conflicting evidence whether
Gutierrez had participated in or knew about the plan. However,
they testified Amy “Clumsy” Cappel (Cappel) drove Guerrero,
Sanchez, and the two young women to a bar, and Cappel gave them
further instructions while they were in her car. Shortly after
Gonzalez’s body was found in the alley, his cell phone was used to
call the cell phone numbers for Cappel and her boyfriend.

...

¹ All “CT” citations refer to the clerk’s transcript. All “RT” citations refer to the reporter’s transcript.

1 The chief prosecution witnesses were Hernandez, Miranda, and
2 Gutierrez. Hernandez and Miranda were initially charged with the
3 same offenses as defendants, but they pleaded guilty to conspiracy
4 to commit robbery and voluntary manslaughter, pursuant to an
5 agreement to testify truthfully for the prosecution, after which they
6 would be sentenced to 11 years in prison. The plea agreement was
7 not contingent on the conviction of Guerrero or anyone else for the
8 crimes.

9 During the investigation, Gutierrez was detained while wearing
10 shoes that contained Gonzalez's blood, Gonzalez's vehicle
11 registration was found in Gutierrez's apartment, and Gutierrez
12 eventually admitted that he moved Gonzalez's car away from his
13 apartment building. Gutierrez was not charged with any offenses
14 arising from this case, and there is no evidence he received any
15 benefits for his testimony.

16 Sanchez was never found, and the police believed he escaped to
17 Mexico.

18 ...

19 ***Gutierrez's apartment***

20 Francisco "Cisco" Gutierrez lived in a first-floor apartment on East
21 Amador Street in west Fresno. Gutierrez testified he was a
22 "recreational" user of marijuana and methamphetamine. He used
23 the drugs every day so he could stay high.

24 Gutierrez testified that defendant Victor "Mousie" Guerrero lived
25 with him.

26 Hernandez and Miranda occasionally stayed at Gutierrez's
27 apartment. At the time of the murder, Hernandez was 18 years old
28 and Miranda was 20 years old. Hernandez and Miranda testified
they were addicted to methamphetamine, and Gutierrez supplied
them with drugs. Gutierrez allowed Hernandez and her two-year-
old child to stay with him since her family threw her out because of
her drug addiction.

Hernandez and Miranda testified they used to see Guerrero and
Julio "Pelon" Sanchez at Gutierrez's apartment.

Rosalinda Gonzalez, who lived in the same apartment complex as
Gutierrez, testified there were several people living or staying with
him, including Guerrero, Sanchez, and some young women.

Hernandez testified she did not know defendant Amy "Clumsy"
Cabel, but she had seen Cabel at Gutierrez's apartment on two
occasions close in time to the crimes. Guerrero, Sanchez, and
Miranda were present on the occasions when Cabel was there.
Hernandez testified Cabel's hair had blond-colored highlights.

Miranda testified she had known Cabel for about two weeks
before she was arrested in this case.

1 At trial, Gutierrez initially claimed he did not know Cabel but
2 admitted the name “Clumsy” sounded familiar. When asked to
3 look around the courtroom, Gutierrez admitted he recognized
4 Cabel, he “probably used to hang around with her back in the old
5 days,” and he had only seen her twice before the trial.

6 *The party*

7 On the evening of Saturday, June 5, 2010, Gutierrez had a barbeque
8 party at his apartment. Hernandez testified there were about 15
9 people there, including Guerrero, Sanchez, and Miranda. Everyone
10 was hanging around in the apartment, the back patio, and the
11 carport. They drank beer and used methamphetamine and
12 marijuana.

13 Miranda testified Cabel was at the party. Gutierrez testified he
14 could not remember if Cabel was there. Hernandez testified she
15 did not see Cabel inside Gutierrez’s apartment that night.

16 *The plan*

17 Hernandez testified that sometime after 11:00 p.m., everyone was
18 still at the party. Guerrero and Sanchez spoke to Hernandez and
19 Miranda inside Gutierrez’s living room. Hernandez testified
20 Guerrero told the young women they were going to go to a bar so
21 they could meet men and get money from them. Guerrero said they
22 would get a ride to the bar. Guerrero told Hernandez and Miranda
23 “we were going to go inside, just get some guys and . . . try to get
24 money” by “sweet talking to them.”

25 Hernandez testified Sanchez also said they were going to go into a
26 bar, find men with money, bring the men out of the bar, and
27 Sanchez and Guerrero would beat them up. Guerrero and Sanchez
28 said they would be watching Hernandez and Miranda to make sure
nothing bad happened. Sanchez said that he and Guerrero were
going to get money from the men once they were outside the bar.
Hernandez thought Sanchez said “they were gonna probably just
beat ‘em up.” No one talked about using a gun or a knife. They
would divide the money they got from he men.

29 *Testimony about Gutierrez’s knowledge of the plan*

30 Hernandez testified Gutierrez and other people were still at the
31 party when Guerrero and Sanchez spoke to the two young women
32 about the robbery plan, but no one else was talking or listening to
33 them. Hernandez testified she did not know exactly where
34 Gutierrez was during their discussion: “He might have been in the
35 room, I don’t know.” Hernandez testified Gutierrez did not take
36 part in the discussion, and he did not hear what they were talking
37 about.

38 At trial, Miranda admitted that when she spoke to the police during
the investigation she said that Gutierrez had nothing to do with the
crime, and only Guerrero and Sanchez told her about the robbery
plan at the bar. However, Miranda testified she lied when she made

1 these statements because she looked up to Gutierrez and did not
2 want to implicate him, but Gutierrez was involved.

3 Miranda testified that during the party, Gutierrez was the man who
4 spoke to Hernandez and herself about the plan. He talked to them
5 outside his apartment, while Cabel and Sanchez were standing by
6 a car. Guerrero was not present. Gutierrez told Miranda and
7 Hernandez to leave with Guerrero, Sanchez, and Cabel.

8 According to Miranda, Gutierrez told the two young women that
9 "he needed us to rob . . . these guys." Gutierrez told her to "sweet
10 talk" men in the bar and "see . . . if they can give me money" and
11 drugs, and then they would share the drugs with everyone. Miranda
12 believed the plan was for the young women to flirt with men at the
13 bar to get money from them. Miranda thought they were going to
14 scare the men into giving them money. Miranda testified Gutierrez
15 told her that Guerrero and Sanchez were "going to . . . take care of
16 us and they were going to look out for us."

17 Miranda testified that she believed Gutierrez knew about the plan
18 because she saw him talking with Guerrero and Sanchez the day
19 before the party, and then he made her leave the party with
20 Guerrero and Sanchez and said "they were going to take care of me,
21 that they know what's up."

22 Hernandez and Miranda agreed to do it. Hernandez thought "it was
23 going to be easy." Hernandez testified she needed money for her
24 methamphetamine addiction. Miranda understood that she was
25 going to steal from some people at the bar. Hernandez and Miranda
26 decided to give fake names and conceal their identities to
27 whomever they met in the bar.

28 *Cabel's car*

Guerrero, Sanchez, Hernandez, and Miranda left Gutierrez's
apartment. Hernandez testified she told Gutierrez that she was
going somewhere and needed someone to watch her child.
Gutierrez and another friend stayed at the apartment with the child.

Hernandez testified Guerrero led them to a four-door car that was
already in the apartment building's carport. Hernandez testified
that Cabel was sitting in the driver's seat. Hernandez testified
Cabel had not been inside the apartment when they discussed what
they were going to do at the bar.

Hernandez testified Guerrero asked Cabel to give them a ride to
the bar. Hernandez, Miranda, and Sanchez got into the back seat.
Guerrero got into the front seat and Cabel drove.

Miranda testified that when she went to the parking lot, Cabel and
Sanchez were already standing by a car. Guerrero and Hernandez
joined them. Guerrero got into the front seat, Cabel was driving,
and Sanchez sat in the back with the two young women.

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Gutierrez’s testimony about Cabel’s car

Gutierrez testified that around 11:30 p.m., Guerrero left the party with Miranda, Hernandez, and Sanchez. Gutierrez and his girlfriend were cleaning the kitchen when they left, and he did not ask them any questions about what they were doing. Gutierrez did not remember if he had a conversation with them before they left, but testified they did not tell him where they were going.

Just after they left his apartment, Gutierrez testified he went outside and saw Guerrero, Sanchez, Hernandez, and Miranda standing by a car in the carport. Gutierrez went upstairs to his girlfriend’s apartment and smoked a marijuana joint on the balcony. The four people were standing around the car and talking. He could not see if anyone was sitting in the car. He stayed upstairs with his girlfriend.

Cabel drives to the El Prado Bar

Hernandez testified Cabel drove to a gas station and purchased gas, then drove to a bar but did not stop there. At that point, Guerrero talked to Cabel and told her where to go. Hernandez did not hear anyone tell Cabel about their plan.

However, Miranda testified that during the drive, Cabel instructed Miranda and Hernandez to go inside the bar and “take . . . whatever they give us, to take it.” Cabel told the young women to talk to men in the bar, and not refuse if the men offered to buy drinks or drugs. Miranda testified Cabel told the young women to “[j]ust talk to them. And don’t say no, to take whatever they were offering us.” Guerrero and Sanchez also told them to go to the bar and get some money. Guerrero and Cabel were talking during the drive, but Miranda could not hear their conversation because loud music was being played.

Hernandez testified Cabel stopped at the El Prado Bar. Hernandez testified she got out of the car with Miranda, and no one else got out or talked to them. Hernandez and Miranda walked toward the bar. Hernandez never saw Cabel again that night.

Miranda testified that when Cabel stopped at the bar, Sanchez got out of the back seat so Hernandez and Miranda could also get out. Guerrero stayed in the car. Miranda testified that Cabel told the young women “to go inside this bar,” “see what happens,” and “to take everything they were offering us.” Guerrero and Sanchez did not tell them anything. Miranda testified Cabel drove to another location and parked by the bar.

The victims arrive at the bar

Philip Flores (Flores) was one of the security guards at the El Prado Bar. He was stationed in the parking lot and charged patrons to park there. His girlfriend, Marie Gonzalez (Marie), was with him that night. Another security guard was stationed at the bar’s front entrance to check identifications.

1 Around 10:00 p.m., a green van pulled into the bar's parking lot,
2 and Flores collected the parking fee from one of the occupants. The
3 driver and two other Hispanic males got out of the van and walked
4 to the bar.

5 The men in the green van were later identified as Jose Jacobo and
6 Juan Gonzalez, the victims in this case, and their friend, Teofilo
7 Mendoza. Jacobo and his friends went into the bar and drank
8 several beers.

9 ***The suspects arrive at the bar***

10 Flores and Marie testified that around midnight, a white or light-
11 colored four-door vehicle stopped on the street in front of the bar's
12 parking lot. Flores believed there were two men and three women
13 in the car. Flores and Marie testified the driver was a light-skinned
14 woman with blond hair. Flores did not collect a parking fee from
15 this vehicle because it stayed on the street and did not turn into the
16 parking lot.

17 Flores testified two Hispanic men and two Hispanic young women
18 got out of the car; the female driver did not get out. Flores said one
19 man was bald and had tattoos with cursive writing on the right side
20 of his neck. Marie thought only one man got out of the car, and he
21 was bald. Marie testified the two women looked "really young."

22 Flores testified the two men stood face-to-face with the two young
23 women. Flores testified one man faced the young women and
24 talked to them. Both Flores and Marie heard one man tell the two
25 women to "go try," "go try it," or "go inside and try."

26 Flores and Marie testified the two young women walked toward the
27 bar's entrance. They lost sight of them and did not see if they went
28 inside. Flores testified the two men got into the car's back seat.
29 The car's driver made a U-turn, pulled into the adjoining
30 neighborhood, and then turned into the alley next to the parking lot.

31 ***The victims meet the young women***

32 There is no evidence that Jacobo and his friends previously knew
33 Hernandez and/or Miranda. Hernandez testified about how she and
34 Miranda met the victims, whom they apparently selected at random.
35 After the young women got out of Cappel's car, they walked to the
36 bar's entrance and were approached by three Hispanic men who
37 asked if they wanted to party. These men were later identified as
38 Gonzalez, Jacobo, and Mendoza, who had earlier arrived in the
39 green van.

40 Hernandez accepted their invitation. Hernandez and Miranda tried
41 to get into the bar, but the security guard stopped them because they
42 did not have identifications. The three men walked away and
43 headed to the parking lot.

44 Hernandez testified she returned to the parking lot with Miranda,
45 and they stayed there for about five minutes. Miranda had a cell

1 phone, but Hernandez could not remember if she was using it. One
2 of the three men again approached and asked if they wanted to
3 party. Hernandez again said yes. The other two men were waiting
4 at their van, and they walked over to the young women and invited
5 them to their house. Hernandez and Miranda agreed, and got into
6 their green van. They gave false names to the men.

7
8 Miranda testified that as they left the bar and walked to the parking
9 lot, she sent a text message to Cabel telling her that that they had
10 been kicked out of the bar. Cabel replied that she was “coming to
11 get us.” They waited in the parking lot and saw three Hispanic
12 men. Two men approached them and one man walked to a van.
13 The two men spoke to Miranda and Hernandez in Spanish. As they
14 spoke with the men, Miranda sent a text message to Cabel and told
15 her the men wanted the young women to go with them. Cabel
16 replied that she was looking at them, and it was okay for them to
17 go. Miranda also testified that she called Cabel and told her about
18 the three men, and Cabel “told me . . . not to trip, that they got our
19 backs” in case anything happened. Miranda and Hernandez got into
20 the van with the men.

21
22 Jacobo and Mendoza also testified about how they met Hernandez
23 and Miranda. As they left the bar with Gonzalez, they encountered
24 two young women outside. One of the women approached and said
25 she wanted to go out and drink beer with them. They talked for
26 about five minutes, and then both women got into Jacobo’s van
27 with the three men. The young women sat in the back seat and
28 Jacobo drove away from the bar.

Flores and Marie, who were still working in the parking lot,
testified that about 10 to 15 minutes after the two young women
arrived, the same two women returned to the parking lot and one
woman was texting on a cell phone. A few minutes later, the three
men from the green van also returned to the parking lot. One man
approached and spoke with the woman who was not using the cell
phone, and the other two men went to the van.

Flores testified that after a few more minutes, the two men who
were waiting by the van spoke to their companion in Spanish and
said, “[C]ome on, let’s go.” Their companion and the two young
women walked to the green van, and everyone got inside and left.

Cabel’s car follows Jacobo’s van

Hernandez testified she saw Cabel’s car near the bar’s parking lot
as they left, but she did not know if Cabel followed the van from
the bar. However, Miranda testified that as they left the bar in the
van, she saw Cabel’s car following behind them. When the van
turned at the corner, Miranda saw Cabel’s car take off in another
direction. Miranda was upset and thought “[t]hey left us for dead.”

Flores and Marie testified that as the van drove out of the parking
lot, they saw the same light-colored vehicle that had earlier dropped
off the two young women. The vehicle emerged from a parking
spot on the street, the headlights were activated, and it drove

1 directly behind the green van and followed it. The woman with
2 blond hair was driving the vehicle. Flores could not see if anyone
else was in the car.

3 ***Jacobo drives to Mendoza's apartment***

4 Jacobo testified that as he drove from the bar, the two young
5 women asked the men to buy particular brands of beer. Jacobo
6 drove to a liquor store, but they did not buy anything. He drove to
7 a second liquor store and they bought beer. Jacobo drove to the
apartment where Mendoza and Gonzalez lived. Jacobo and
Mendoza did not know if the women were using a cell phone while
they were in the van's back seat.

8 Hernandez testified that when they got into the van, the men offered
9 to buy drugs and alcohol for them. Miranda asked for Corona beer
and Hernandez said she wanted Pacifico beer. The driver went to
10 more than one liquor store, and the men bought Pacifico and
Corona beers. Hernandez testified Miranda was texting on her cell
11 phone during the drive. Miranda testified no one responded to her
text messages.

12 Hernandez testified the driver parked at an apartment, and everyone
13 went inside and drank beer. Miranda and Hernandez testified one
man left the apartment, returned with drugs, and they smoked
14 methamphetamine. Hernandez testified everyone spoke in Spanish
because the men did not speak English. However, Hernandez and
15 Miranda spoke English to each other. Hernandez and Miranda
testified the men made sexual advances to them, and they felt
16 uncomfortable in their apartment.

17 Jacobo and Mendoza testified everyone was talking and drinking at
the apartment. Jacobo and Mendoza noticed one of the young
18 women was using a cell phone. The women said they wanted some
drugs. Gonzalez and the women left, and they returned with drugs.
19 Jacobo did not know what kind of drugs they were smoking.

20 ***Jacobo and Gonzalez drive to the alley***

21 Jacobo and Mendoza testified that as the evening continued, one
woman was on a cell phone, and then both women said they wanted
22 to leave and mentioned something about a baby. One woman was
crying. Jacobo and Gonzalez agreed to drive both women home.
23 Mendoza did not go with them because it was very late, and he had
too much to drink.

24 Jacobo testified he left the apartment with Gonzalez and both
25 women. They got into Gonzalez's two-door car. Gonzalez was
driving. Jacobo identified Hernandez as the woman who sat in the
26 front passenger seat, and Miranda sat in the backseat with him.
27 Jacobo testified the woman in the front seat (Hernandez) told
Gonzalez where they wanted to go. He did not recall if either
28 woman used a cell phone when they were in Gonzalez's car.

1 Hernandez testified that she asked to leave the men's apartment and
2 said she had to go back to her child. Hernandez and Miranda left
3 with two men; the third man did not go with them. They got into a
4 different car, and one of the men (Gonzalez) drove. Hernandez sat
5 in the front passenger seat, and Miranda and the other man (Jacobo)
6 sat in the back seat. Miranda testified the man in the back seat
7 made sexual advances toward her.

8 Hernandez testified Miranda used her cell phone while they were in
9 the car. Hernandez testified Miranda spoke to her in English and
10 gave her directions. Hernandez translated Miranda's directions into
11 Spanish, and told the driver to go to the west side of Fresno, toward
12 Food Maxx, and then directed him to turn into an alley near the
13 store, based on Miranda's directions.

14 Miranda testified that when she was in the man's car, she spoke to
15 Cabbel who told her to "go west" and "park by the Park." Miranda
16 told Hernandez to have the men "drop us off at the west" and "park
17 by the Park" because they were going back to Gutierrez's
18 apartment.

19 *The attack in the alley*

20 Hernandez and Miranda testified the driver parked in the alley.
21 Hernandez was familiar with the alley because it was very close to
22 Gutierrez's apartment. Hernandez did not see anyone else in the
23 alley.

24 Jacobo testified Gonzalez drove into an alley and both women said,
25 "[T]his is it." Gonzalez stopped the car, and the woman in the front
26 passenger seat got out. Jacobo testified that Gonzalez got out of the
27 driver's side door.

28 Hernandez testified the two men did not want them to leave.
Hernandez and Miranda turned away from the car and started to
walk toward Gutierrez's apartment.

Jacobo testified that as he got out of the back seat, a man was
"already there and [he] grabbed me by my hand" and pulled him
out of the car. The man spoke Spanish and told Jacobo that he
wanted his wallet. Jacobo told the man to wait for a little bit until
he took out his wallet. Jacobo testified he was very drunk and had
trouble reaching for his wallet. He tried to "loosen" himself from
the man.

Jacobo realized a second man was standing by Gonzalez. Both
suspects were Hispanic. Jacobo did not know where the men came
from, and he did not notice what happened to the young women.
The second suspect hit Gonzalez in the head. The first suspect
attacked Jacobo. Jacobo tried to kick him, but he was too drunk to
defend himself. The first suspect stabbed Jacobo with a knife.
Jacobo fainted, he never heard a gunshot, and he did not see what
the second suspect did to Gonzalez.

1 Hernandez testified she was walking away from the car when she
2 heard Sanchez say, "Give me the money" in Spanish. Hernandez
3 turned around and looked back at Gonzalez's car. She saw Sanchez
4 and Guerrero struggling with the two men. Hernandez testified
5 Guerrero had a gun. Hernandez heard the victims say "no," and
6 they refused to turn over their money.

7 Hernandez testified Guerrero and Sanchez told the young women to
8 run. Hernandez and Miranda started to run toward Gutierrez's
9 nearby apartment. Hernandez heard a gunshot. Hernandez turned
10 around and looked back at the car. She saw Guerrero hit one man
11 in the back of the neck, above the shoulders, and the man "just
12 dropped" down. This man was later identified as Gonzalez.
13 Guerrero pointed the gun at something, possibly the man he hit in
14 the back.

15 Miranda testified she got out of the car, told Hernandez they were
16 leaving, and started to walk out of the alley toward Gutierrez's
17 apartment. She saw Sanchez in the alley with the man who had
18 been sitting in the backseat with her, later identified as Jacobo. The
19 man was on his knees. Sanchez told the man to turn over his wallet
20 and everything he had. The man seemed to be reaching for his
21 wallet, and Sanchez kicked him more than once.

22 Miranda turned away from the car. She heard a gunshot, turned
23 around, and saw the driver (Gonzalez) on the ground. Miranda
24 initially testified she did not see the face of the second suspect, but
25 he was wearing the same sweater which Guerrero had been
26 wearing. However, Miranda eventually testified that Guerrero was
27 in the alley, he was standing by the driver, and he hit the driver with
28 something. Sanchez told her to run. She grabbed Hernandez's
hand, and they ran to Gutierrez's apartment. Hernandez fell down
and scraped her arm and knee, and then she got up and kept
running.

Miranda and Hernandez return to Gutierrez's apartment

19 Hernandez testified that when they got back to Gutierrez's
20 apartment, she did not see anyone, and the party guests were gone.
21 Hernandez went into the bedroom and checked on her child.
22 Miranda stayed outside the apartment. Hernandez changed her
23 clothes because she got dirty when she fell down.

24 Miranda testified she saw Cappel outside Gutierrez's apartment.
25 Miranda went inside, and Gutierrez and Guerrero were there.
26 Sanchez was in the kitchen and washing blood off his hands.
27 Miranda cursed Sanchez and Guerrero, and told them they were
28 stupid. She was mad because "everything happened so fast and . . .
they never told us they were going to use a gun or stuff like that."
Gutierrez later told her to be quiet about everything and keep him
out of it.

29 Miranda went outside and saw the victim's car in the carport.
30 About an hour later, Miranda saw Gutierrez drive away in the
31 victim's car.

1 *Gutierrez's testimony about after the shooting*

2 Gutierrez testified that he was in his girlfriend's upstairs apartment
3 when he heard "a big commotion outside, like arguing." He ran
4 outside and it was still dark. Gutierrez testified Miranda and
5 Sanchez were in the carport. Miranda was arguing and cursing
6 Sanchez, and kept asking him in Spanish, "Why? Why?" Guerrero
7 and Hernandez were running from the alley to Gutierrez's
8 apartment.

9 Gutierrez testified there was a small car in the carport, near where
10 Miranda and Sanchez were arguing. Gutierrez testified he did not
11 recognize the car, and it had not been there during his party. The
12 driver's door was open, and he could not see anyone inside it.
13 Gutierrez thought it was probably a stolen car. This car was later
14 identified as Gonzalez's vehicle, which had been parked in the alley
15 during the robbery and murder.

16 Gutierrez returned to his apartment and there were still two or three
17 people there from his party. Hernandez and Miranda ran inside and
18 were "just going all hysterical and crazy." He tried to ask what
19 happened, but they did not respond. Everyone was "just like
20 tripping out." Sanchez ran into the bathroom, Guerrero went into a
21 bedroom, and the young women were crying in the living room.
22 Gutierrez again asked the young women what happened, but things
23 were "all crazy" and they didn't explain.

24 Gutierrez testified Sanchez emerged from the bathroom and said
25 "something had happened," and he was going to leave. Gutierrez
26 kept asking Sanchez what happened. Sanchez said he would tell
27 him later.

28 Gutierrez testified the young women went into their bedroom, and
he heard "banging" and things being thrown around. When they
walked out of the bedroom, they had changed their clothes.
Gutierrez thought that he had seen a dark red stain on one young
woman's skirt before they changed.

Gutierrez went to the bedroom to speak to Guerrero, who was
taking off his shirt and black sweater. Guerrero looked "very
pissed," and Gutierrez decided to leave him alone.

Gutierrez went back to Sanchez and asked what happened. Sanchez
was changing his clothes. He said in Spanish, "that they had did
this hit and that they had hit this—he said—he said 'pisa' at the
time, so he said that—that it was an accident." Gutierrez testified
the word "pisa" meant "Mexican." Gutierrez again asked Sanchez
what happened. Sanchez "wasn't really telling me like a lot of
things." Sanchez was putting clothes in a bag and said he was
leaving.

Gutierrez went upstairs to his girlfriend's apartment and talked to
her about the situation. His girlfriend said he had to find out
whether the car was stolen and get rid of it.

1 Gutierrez returned to his apartment. A few party guests were still
2 there, but Guerrero, Sanchez, and one of the young women were
3 gone.

3 ***Gutierrez moves the victim's car***

4 Gutierrez testified that around sunrise, he went to the carport and
5 moved the car that he believed was stolen. The driver's door was
6 still open and the interior light was on. The ashtrays were pulled
7 out, the glove compartment was open, and the center console was
8 flipped open. The stereo had been pulled out and wires were
9 dangling. There were insurance documents and other papers spread
10 inside and outside the car. Gutierrez picked up some of the papers
11 and threw them into his nearby trash can. Gutierrez thought the
12 keys were in the car because he tried to start it, but the battery was
13 dead. Gutierrez shifted the car into neutral, pushed it to Modoc
14 Street, and left it there. He spent the rest of the night at his
15 girlfriend's apartment.

11 ***THE INVESTIGATION***

12 Jacobo testified that he woke up in the alley, and realized he had
13 been stabbed and he was bleeding. Gonzalez was lying on the
14 ground next to him. Jacobo tried to talk to him, but Gonzalez was
15 not responsive. Jacobo walked out of the alley and onto the street
16 to find help.

17 At 3:33 a.m. on June 6, 2010, Sergeant Richard Brown received a
18 dispatch about a suspicious person in the area of Stanislaus and B
19 Streets. At 3:36 a.m., Sergeant Brown arrived in the area and found
20 Jacobo walking in the street. Jacobo had several stab wounds, and
21 his clothes were soaked in blood. Jacobo told Sergeant Brown that
22 he and his friend had been assaulted in the area. Jacobo's wallet,
23 and the money and papers inside it, were not taken from him during
24 the assault in the alley.

25 Sergeant Brown looked in the vicinity for Jacobo's friend. The
26 police received information about a subject lying in a nearby alley,
27 about four blocks from the location where Jacobo had been found.
28 Brown responded to the alley and found Juan Gonzalez lying face
up on the ground. He was dead from a gunshot wound to the head.
The police did not see a vehicle in the alley.

Jacobo suffered multiple stab wounds to the left side of his chest,
waist, left arm and hand. He was in the hospital for one week and
survived his injuries. He returned to the hospital several times for
additional operations. He had nerve damage to his left arm and
permanent injury to his left hand.

The pathologist determined Gonzalez had been shot in the back of
his head, and he died within several minutes. There were no signs
of stippling or gunpowder around the entrance wound, which
indicated the gun barrel was not directly on his skin. There was no
evidence the fatal wound was inflicted by a shotgun. Gonzalez also
had abrasions on his left cheek below the eye and on the left

1 forehead, which showed a particular pattern from whatever was
2 used to inflict the injuries. The facial injuries were inflicted around
3 the same time as the fatal head wound. There were no defensive
4 wounds. Gonzalez's blood and urine tested positive for alcohol,
5 methamphetamine, and amphetamine.

6 *The crime scene*

7 At 6:00 a.m., Detective Jennifer Federico arrived in the dirt alley
8 where Gonzalez's body was found. Both entrances to the alley
9 were blocked with crime scene tape. A wallet was lying on the
10 ground, about a foot and a half away from Gonzalez's body. There
11 was no money in the wallet.

12 There was a nine-millimeter Lugar expended cartridge case on the
13 ground, about a foot from Gonzalez's body. There were fresh shoe
14 tracks and bloody shoe prints in the dirt. A Corona beer bottle and
15 a broken bottle of Pacifico beer were in the vicinity of the body.

16 There was a trail of blood drops that led from the alley, into the
17 street, and along the fence at the park which was adjacent to the
18 alley. The blood trail ended on the street where Jacobo was found.

19 *The victim's apartment*

20 The investigating officers went to Gonzalez's apartment and found
21 empty beer cans and bottles throughout the interior, including those
22 for Pacifico, Corona, and Tecate. A homemade device used to
23 smoke methamphetamine was on the couch. Jacobo's green van
24 was parked near Gonzalez's apartment complex. There were empty
25 Tecate beer cans and Corona beer bottle caps inside in the van.

26 *Gutierrez and the Nike shoes*

27 Around 9:00 a.m., as the officers investigated the alley where
28 Gonzalez's body was found, Gutierrez testified he left his
29 girlfriend's apartment and went downstairs to his own apartment.
30 He grabbed his wallet because he was going to the store. He looked
31 inside one of the bedrooms and one of the young women was
32 asleep. No one else was there.

33 Gutierrez testified he had been wearing some "nice dress shoes" at
34 the party. He also testified that when he returned to his apartment
35 around 9:00 a.m., he was wearing "some brown Lugz" shoes.

36 Gutierrez testified he owned three or four pairs of shoes, including
37 a pair of white Nike Air Jordans, which did not have laces. He had
38 last worn the Nike shoes two days before the party. Gutierrez
39 testified that when Guerrero moved into his apartment, he allowed
40 Guerrero to borrow his shirts, socks, and shoes because Guerrero
41 did not have any money or clothes to wear.

42 Gutierrez testified that as he left for the store, he took off his
43 "slippers" and put on the Nike shoes, which he had left outside the
44 front door next to the doorstep. He had left the shoes at the door

1 because he used them “for yard clean up, like yard shoes.” He did
2 not notice anything unusual about the Nikes or see any blood on the
3 shoes. However, Gutierrez subsequently admitted that he noticed
4 stains on the shoes and tried to wash them off with a hose.

5 After he put on the Nike shoes, Gutierrez and his girlfriend walked
6 to the store. He bought “a Smirnoff” and some chips and candy.

7 ***Discovery of the victim’s car***

8 At 1:00 p.m., the investigating officers found Gonzalez’s silver
9 two-door Mercury Cougar on Modoc Street near East Amador. The
10 car was about two blocks from the alley where Gonzalez’s body
11 was found, and where he had parked the car to drop off the young
12 women. The stereo was missing and the wires were hanging from
13 the dashboard. However, the car’s interior was unusually clean, as
14 if it had just been cleaned out.

15 It was later determined that Miranda’s right palm print was on the
16 car’s exterior, on the rear roof of the driver’s side.

17 ***Initial contact with Gutierrez***

18 After they found the victim’s car, Detective Federico and other
19 officers walked around the neighborhood, looked through trash
20 containers, and hoped to find something connected to the vehicle.
21 They ended up at Gutierrez’s apartment complex on East Amador,
22 which was less than 100 yards away from the location of the
23 victim’s car.

24 Detective Federico looked around the outside of the apartment and
25 carport area. There were beer bottles, chairs, and a barbeque grill in
26 the carport, as if there had been a party. Federico looked in the grill
27 and did not see anything unusual. Federico noticed the beer bottles
28 were the same brand as those in the alley where the victim’s body
was found.

As the officers looked around the outside of the apartment complex,
Gutierrez and his girlfriend returned from the store. Gutierrez was
carrying an open container of vodka. He was wearing a black T-
shirt, white shorts, and black and white shoes without laces.

Detective Federico questioned Gutierrez about the open container.
Gutierrez also had a small amount of marijuana. Federico asked if
he had a party the previous night. Gutierrez acted nervous. He was
vague and hesitated to give any information. He said he had a
gathering and spent the night at his girlfriend’s apartment.
Gutierrez said he lived by himself in his apartment.

Detective Federico asked Gutierrez to sit down, and she noticed the
chevrons on the soles of his Nike shoes were similar to the shoe
prints in the dirt alley near the victim’s body. Another detective
noticed possible blood stains on top of the shoes.

1 Detective Federico determined Gutierrez had outstanding
2 misdemeanor warrants. He was taken downtown because of the
3 warrants and for an interview. During the interview, Gutierrez
4 admitted he had a party but gave false names for his friends.
5 Gutierrez again said he lived alone. Gutierrez was asked if he saw
6 anything unusual in the middle of the night. He said there were two
7 guys driving in the alley around 3:00 a.m.

8 Detective Federico testified that at the time of this interview, she
9 did not know if there was blood on Gutierrez's shoes or who it
10 matched. However, she went by her "gut instinct" and told
11 Gutierrez that the victim's blood was on his shoes. Gutierrez said
12 he had cleaned off the shoes that morning.

13 After the interview, Gutierrez was taken to jail, and then cited and
14 released. The police seized the white Nike shoes.

15 ***Guerrero and Sanchez leave Gutierrez's apartment***

16 Gutierrez testified that that after he was cited and released, he
17 returned to his apartment and no one was there. Later that
18 afternoon, however, Guerrero reappeared at the apartment.
19 Gutierrez asked him what happened. "[Guerrero] told me that he
20 was sorry" and "he didn't meant to do it," and then "got to telling
21 what went on."

22 Gutierrez testified he "blew up," cursed Guerrero, and asked "why
23 you guys do that for . . . I live right here, you know, I—I helped
24 you guys, you know, and for you guys to do this shit to me, you
25 know, and I thought you guys were my homeboys . . ." Guerrero
26 said he was sorry and "he didn't mean to—it wasn't supposed to
27 happen," and "he started fighting."

28 Gutierrez testified that he saw Guerrero using his barbeque grill,
which had been moved to the back patio. Guerrero was burning a
sweater on the grill. Guerrero did not explain what he was doing
and Gutierrez did not ask, but he "kind of figured" why he was
doing it. Gutierrez testified Guerrero later left the apartment.
Gutierrez looked in Guerrero's bedroom and all of the clothes were
gone, including those that Gutierrez had loaned to him.

Rosalina Gonzalez, Gutierrez's neighbor, testified that on Saturday
night, June 5, 2010, she heard gunshots. On Sunday afternoon,
June 6, 2010, she saw the police walk around Gutierrez's
apartment, take photographs, and collect bottles and cans. After the
police left, she saw Sanchez walk out of the apartment complex's
front gate. He was carrying a bag of clothes. Shortly afterwards,
Guerrero walked out of the same gate and also had a bag of clothes.
She asked Guerrero if he was going to do the laundry. Guerrero
replied, "No, I'm leaving." He got into a car and left with some
young women.

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Search of Gutierrez’s apartment

On or about June 7, 2010, the officers executed a search warrant at Gutierrez’s apartment. They found men’s and women’s clothes, baby items, photographs of Hernandez and another young woman, and paperwork in the names of Hernandez, Miranda, Guerrero, and Gutierrez. They also found clothes that appeared to have blood on it.

The registration paperwork for Gonzalez’s car was found in a hallway closet. The officers also found a sawed-off shotgun in the patio area, and .22–caliber shells in the apartment. There were several knives in the kitchen and one knife in a bedroom. There was no evidence of blood on the knives.

The officers examined the barbeque grill on the back patio. They found ashes from burnt clothing in the grill. The ashes were not present when they initially saw the grill in the carport area the previous day.

Gutierrez’s subsequent statements

After the search, Gutierrez was arrested for possession of an illegal weapon. Gutierrez was again interviewed and confronted with the discovery of the shotgun, clothes that appeared bloody, and the victim’s vehicle registration. Gutierrez was told the evidence pointed to him. Gutierrez said he got into a fight in the alley with someone and cleaned up in the bathroom.

Gutierrez later said something happened that night, he was upset about it, and he pushed a car away because the keys were missing. Gutierrez also said someone moved the car to East Modoc in the middle of the night. Gutierrez said two people named “Mousie” and “Pelon” had been staying at his apartment, they were gone in the morning, and he had not seen them since. Gutierrez said the Nike shoes did not belong to him, they had been “left” at his apartment, and he found them outside the front door.

Gutierrez eventually told the officers that “Mousie” Guerrero, “Pelon” Sanchez, Hernandez, and Miranda were at his apartment that night, they left together, and they later returned. Gutierrez also said the Nike shoes belonged to him. He noticed there was blood on the shoes, and he cleaned the blood off the shoes with a water hose because he did not want people to see him walking around with bloody shoes. He did not know they were involved in that kind of serious offense, and he did not want anyone else to get in trouble. Gutierrez said he initially did not want to identify anyone because of his lifestyle, and he did not want to be a snitch. Gutierrez said he was not involved in killing anyone, and he was upset that everything got put on him.

Miranda’s pretrial statements

On June 11, 2010, Miranda was interviewed at the police department. Detective Federico asked Miranda what “you guys

1 decided to do.” Miranda replied that “they told us . . . to go and
2 ‘hila’—that means a job in Spanish—‘some guys.’” Miranda said
3 they were supposed to “[g]o dance with some guys . . . like go kick
4 it with them, and whatever, you know, and hit ‘em up . . . when
5 they were right there.” Miranda was asked if they “were going to
6 jack ‘em?” Miranda replied, “I guess.” Miranda also said, “[T]hey
7 just want us to talk to some guys and, you know, to bring ‘em right
8 out there and whatever . . .” and “like to steal.” Miranda thought
9 they were just going to “beat up the guys for money.”

10 Miranda said that when they got into the green van, she was texting
11 with Cabel and “they said, ‘yeh, we’re following you, you know,
12 we’re behind you.’” Miranda lost sight of Cabel’s car and again
13 texted her, but did not receive a response.

14 Miranda was asked about whether she was texting when the men
15 drove them from the apartment to the alley. Miranda said she
16 received a text for the men to drive to the west side by the park:
17 “Clumsy [Cabel] told her Mousie [Guerrero] told her that we’re
18 going back to the West.” Miranda also said that Sanchez sent her a
19 text with driving instructions.

20 Miranda said when they arrived in the alley, she got out of the car
21 and saw Guerrero and Sanchez. Guerrero went directly to the
22 driver (Gonzalez) and Sanchez walked up to the passenger
23 (Jacob). Either one or both men told Miranda and Hernandez to
24 run. Guerrero hit the driver with a gun in the back of the neck. She
25 said the weapon was a faded black color, and it was possibly a .40-
26 caliber gun. Miranda heard a gunshot and the driver went down.

27 On June 14, 2010, Miranda was again interviewed. She said that
28 she was in the bar’s parking lot with Hernandez, and they were
picked up by three Hispanic men. They got into the van, and she
sent a text message to Cabel to let her know they were in the van.
Miranda said Cabel sent her a text message that she knew where
they were, and “they were watching them.” Miranda said she did
not see where Cabel was parked. Miranda was asked how she
knew Cabel was texting her. Miranda said she was not sure who
was texting her, but she knew the source was either Cabel,
Guerrero, or Sanchez. However, Miranda thought Sanchez was the
only person who had a cell phone. Miranda said that around 2:30
a.m., she received a text message from Sanchez that directed her to
bring the victims west to the park.

29 *Hernandez’s pretrial statement*

30 On June 13, 2010, Hernandez was arrested. The police noticed she
31 had scabs on her arm and knee. Hernandez said she went to a bar
32 with another woman to “sweet talk” some men. They gave false
33 names to some of the men they met. She said the men took her to
34 an alley and the suspects were there. Hernandez said she did not
35 know who the suspects were, and she did not implicate anyone.

36 Hernandez asked Detective Federico what kind of charges she
37 faced. Federico replied that she could face the death penalty.

1 Hernandez was surprised that it was serious. Federico gave
2 Hernandez her business card and encouraged her to call her with
any information. Hernandez was booked into jail after the
interview.

3
4 On June 14, 2010, Hernandez called Detective Federico from jail
and agreed to another interview. Hernandez was shown
5 photographs and identified Cabel, Guerrero, Sanchez, and
6 Gutierrez as people who may have been involved. However, she
did not say that Gutierrez was involved in any way in the homicide.
7 She gave a false name for Miranda. Hernandez said she did not see
the faces of the suspects in the alley, but she thought the men were
Guerrero and Sanchez.

8 *The other suspects*

9 On June 18, 2010, Cabel was arrested. She had brown hair with
10 blond streaks. Cabel disclosed the cell phone numbers for herself
and her boyfriend, and what she thought was his home telephone
number.

11 On June 19, 2010, Guerrero was arrested in Washington state. His
12 head was shaved and he had tattoos in cursive writing on both sides
of his neck, which were clearly visible.

13 Sanchez was never found.

14 *Forensic evidence*

15 As noted above, it was stipulated that, based on DNA testing, the
16 police later learned that Gonzalez's blood was found on the outside
of one of the Nike shoes that Gutierrez was wearing that morning,
17 and Gutierrez's DNA was on the inner tongue of both shoes.

18 *The cell phone records*

19 As explained above, Sergeant Brown received a dispatch at 3:33
20 a.m. on June 6, 2010, about a suspicious person in the area of
Stanislaus and B Streets. At 3:36 a.m., Sergeant Brown arrived in
the area and found Jacobo, who was critically wounded and
21 reported the attack. A short time later, Brown found Gonzalez's
body in the alley.

22 The prosecution introduced the records from Gonzalez's cell phone,
23 which showed that numerous calls were place to and from his cell
phone starting at 3:11 a.m. on June 6, 2010, and continuing to June
24 7, 2010. There were calls from Gonzalez's cell phone to Cabel's
cell phone at 3:11 a.m., 3:26 a.m., 3:31 a.m. and 3:32 a.m. There
25 were calls from Gonzalez's cell phone to the cell phone of Cabel's
boyfriend at 3:36 a.m., 3:38 a.m., and 4:16 a.m. There were six
26 calls from the cell phone of Cabel's boyfriend to Gonzalez's cell
phone between 4:04 a.m. and 5:32 a.m., and another at 8:20 a.m.
27 At 9:11 a.m., there was a call from Gonzalez's cell phone to a
number that was similar to the number which Cabel thought was
28 her boyfriend's home number.

1 **GUERRERO'S DEFENSE EVIDENCE**

2 Neither Guerrero nor Cabel testified at trial.

3 Guerrero presented evidence from Gary Harmor, a forensic
4 serilogist, who examined the Nike shoes which Gutierrez was
5 wearing. There was DNA on the inner tongue portion of both shoes
6 from two or more people. He determined Gutierrez was the major
7 contributor to the DNA profile. Guerrero was absolutely excluded
8 as a source. Harmor testified a person's DNA will remain in shoes
9 which that person wore until the shoes are thoroughly washed. If
10 the outside of the shoes had been washed with a hose, the DNA
11 would slightly degrade but still remain.

12 There were at least two and maybe more DNA profiles on the
13 inside of the right shoe's tongue; and at least three and maybe more
14 DNA profiles on the inside of the left shoe's inner tongue.

15 If a person wore clean socks and then put on the shoes, that
16 person's DNA would not have transferred to the shoes as long as
17 the socks were not soaked with perspiration. Harmor believed that
18 a person would leave DNA even if that person wore socks and
19 shoes in the summer since perspiration would happen fairly
20 quickly.

21 There was mold on the shoes when they were delivered to Harmor's
22 laboratory. The mold was consistent with moisture, and DNA will
23 degrade as a result of prolonged contact with moisture.

24 *People v. Guerrero*, No. F066730, 2015 WL 4555562, at *1-16 (Cal. Ct. App. July 28, 2015).

25 **II. Discussion**

26 A federal court may grant habeas relief when a petitioner shows that his custody violates
27 federal law. *See* 28 U.S.C. §§ 2241(a), (c)(3), 2254(a); *Williams v. Taylor*, 529 U.S. 362, 374-75
28 (2000). Section 2254 of Title 28, as amended by the Antiterrorism and Effective Death Penalty
Act of 1996 ("AEDPA"), governs a state prisoner's habeas petition. *See* § 2254; *Harrington v.*
Richter, 562 U.S. 86, 97 (2011); *Woodford v. Garceau*, 538 U.S. 202, 206-08 (2003). To decide a
Section 2254 petition, a federal court examines the decision of the last state court that issued a
reasoned opinion on petitioner's habeas claims. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192
(2018).

When a state court has adjudicated a petitioner's claims on the merits, a federal court
reviews the state court's decision under the deferential standard of Section 2254(d).
Section 2254(d) precludes a federal court from granting habeas relief unless a state court's

1 decision is (1) contrary to clearly established federal law, (2) a result of an unreasonable
2 application of such law, or (3) based on an unreasonable determination of facts. *See* § 2254(d);
3 *Murray v. Schriro*, 882 F.3d 778, 801 (9th Cir. 2018). A state court’s decision is contrary to
4 clearly established federal law if it reaches a conclusion “opposite to” a holding of the United
5 States Supreme Court or a conclusion that differs from the Supreme Court’s precedent on
6 “materially indistinguishable facts.” *Soto v. Ryan*, 760 F.3d 947, 957 (9th Cir. 2014) (citation
7 omitted). The state court’s decision unreasonably applies clearly established federal law when
8 the decision has “no reasonable basis.” *Cullen v. Pinholster*, 563 U.S. 170, 188 (2011). An
9 unreasonable determination of facts occurs when a federal court is “convinced that an appellate
10 panel, applying the normal standards of appellate review, could not reasonably conclude that the
11 finding is supported by the record.” *Loher v. Thomas*, 825 F.3d 1103, 1112 (9th Cir. 2016). A
12 federal habeas court has an obligation to consider arguments or theories that “could have
13 supported a state court’s decision.” *See Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2557 (2018)
14 (quoting *Richter*, 562 U.S. at 102). On all issues decided on the merits, the petitioner must show
15 that the state court’s decision is “so lacking in justification that there was an error well understood
16 and comprehended in existing law beyond any possibility for fairminded disagreement.” *Richter*,
17 562 U.S. at 103.

18 Even when a state court does not explicitly address a petitioner’s claims on the merits, a
19 Section 2254 petitioner must satisfy a demanding standard to obtain habeas relief. When a state
20 court gives no reason for denying a petitioner’s habeas claim, a rebuttable presumption arises that
21 the state court adjudicated the claim on the merits under Section 2254(d). *See Richter*, 562 U.S.
22 at 99. And a federal habeas court’s obligation to consider arguments or theories that could
23 support a state court’s decision extends to state-court decisions that offer no reasoning at all. *See*
24 *Sexton*, 138 S. Ct. at 2557.

25 If a state court denies a petitioner’s habeas claim solely on a procedural ground, then
26 Section 2254(d)’s deferential standard does not apply, *see Visciotti v. Martel*, 862 F.3d 749, 760
27 (9th Cir. 2016), but the petitioner faces another hurdle: if the state court’s decision relies on a
28 state procedural rule that is “firmly established and regularly followed,” the petitioner has

1 procedurally defaulted on his claim and cannot pursue habeas relief in federal court unless he
2 shows that the federal court should excuse his procedural default. *See Johnson v. Lee*, 136 S. Ct.
3 1802, 1804 (2016); *accord Runnigeagle v. Ryan*, 825 F.3d 970, 978-79 (9th Cir. 2016). If the
4 petitioner has not pursued his habeas claim in state court at all, the claim is subject to dismissal
5 for failure to exhaust state-court remedies. *See Murray v. Schriro*, 882 F.3d 778, 807 (9th Cir.
6 2018).

7 If obtaining habeas relief under Section 2254 is difficult, “that is because it was meant to
8 be.” *Richter*, 562 U.S. at 102. As the Supreme Court has put it, federal habeas review “disturbs
9 the State’s significant interest in repose for concluded litigation, denies society the right to punish
10 some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises
11 of federal judicial authority.” *Id.* at 103 (citation omitted). Our habeas review authority serves as a
12 “guard against *extreme* malfunctions in the state criminal justice systems, not a substitute for
13 ordinary error correction through appeal.” *Id.* at 102-03 (emphasis added).

14 Here, petitioner raises four habeas claims: (1) the trial court failed to include the word
15 “accomplice” in certain jury instructions, thereby precluding the jury’s finding that Gutierrez was
16 an accomplice whose testimony required corroboration under California law; (2) Article VI
17 Section 3 of the California Constitution governed whether the error in failing to give proper the
18 jury instructions resulted in prejudice for petitioner; (3) the trial court’s error in failing to provide
19 the proper jury instructions violated petitioner’s rights under the Fifth, Sixth, and Fourteenth
20 Amendments of the U.S. Constitution; and (4) petitioner received ineffective assistance from his
21 trial counsel because his attorney failed to object to the trial court’s failure to provide proper jury
22 instructions. *See* ECF No. 1 at 5-10. On direct appeal, the Court of Appeal rejected all these
23 claims on the merits. The California Supreme Court summarily denied review.

24 All four habeas claims depend on one issue: whether the trial court erred by omitting the
25 word “accomplice” in various parts of the jury instructions—as petitioner argues in Ground One.
26 Grounds Two and Three concern what law should apply to Ground One. Ground Four matters
27 only if the trial court erred by omitting the word “accomplice” in the jury instructions challenged
28 by petitioner. Petitioner’s central premise—that he is entitled to federal habeas relief based on

1 the state trial court’s errors in the jury instructions—is flawed for two simple reasons: federal law
2 does not require corroboration of accomplice testimony, and even if it did, any error would have
3 been harmless in this case.²

4 **a. Accomplice Testimony under Federal Law**

5 At trial, the government presented three key witnesses: Princess Hernandez, Sonia
6 Miranda, and Francisco Gutierrez. The trial court instructed the jury that Hernandez and Miranda
7 were accomplices as a matter of law and that, to support petitioner’s conviction, the testimony
8 from these individuals required independent corroboration. As for Gutierrez, the trial court
9 instructed the jury that whether he was an accomplice was a question of fact for the jury to
10 decide. On direct appeal, the Court of Appeal concluded that the trial court gave a “sufficient”
11 jury instruction that allowed the jury to decide whether Gutierrez was an accomplice. *Guerrero*,
12 2015 WL 4555562, at *28. In this habeas proceeding, petitioner argues that some of the jury
13 instructions erroneously omitted the word “accomplice”; that, but for this error, the jury would
14 have found that Gutierrez was an accomplice whose testimony required corroboration; and that
15 without the requisite corroboration for Gutierrez’s testimony, the guilty verdict cannot stand.

16 Under California state law, uncorroborated accomplice testimony cannot support a
17 conviction, but this state law rule does not implicate any federal right. *See Barco v. Tilton*, 694 F.
18 Supp. 2d 1122, 1136 (C.D. Cal. 2010). Indeed, uncorroborated accomplice testimony can support
19 a conviction under federal law. *See id.* (collecting cases); *United States v. Ramirez-Robles*, 386
20 F.3d 1234, 1245 (9th Cir. 2004) (“[U]ncorroborated testimony of a co-conspirator is sufficient to
21 uphold a conviction.”); *Cornwell v. Warden, San Quentin State Prison*, No. 06-cv-705, 2018 WL
22 934542, at *136 (E.D. Cal. Feb. 15, 2018) (“As the Ninth Circuit has explained, California’s
23 statutory law prohibiting convictions based solely on uncorroborated accomplice testimony is
24 only a state law rule: it is not required by Constitution or federal law.”); *cf. United States v.*
25 *Augenblick*, 393 U.S. 348, 352 (1969) (“When we look at the requirements of procedural due
26

27 ² It appears that this case should not have survived preliminary screening, given petitioner’s
28 failure to identify any violation of federal law—despite his general, vague references to the
United States Constitution.

1 process, the use of accomplice testimony is not catalogued with constitutional restrictions.”).
2 Because a federal district court does not review errors of state law, a challenge to jury instructions
3 based on the rule of California law that requires corroborated accomplice testimony does not state
4 a cognizable federal habeas claim. *See Barco*, 694 F. Supp. 2d at 1136.

5 Here, petitioner states no cognizable habeas claim under federal law. Although petitioner
6 states in passing that the trial court’s errors in its jury instructions violated his rights under the
7 Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, ECF No. 1 at 47, his
8 appeals to those broad constitutional principles do not raise federal claims. *See Gray v.*
9 *Netherland*, 518 U.S. 152, 163 (1996); *Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004). Only
10 a holding from the United States Supreme Court can establish a clearly established federal law,
11 *see Atwood v. Ryan*, 870 F.3d 1033, 1046 (9th Cir. 2017), and petitioner has identified none.

12 **b. Effect of Alleged Error on Trial’s Outcome**

13 Even if petitioner had stated a cognizable habeas claim under federal law, any error here
14 would be harmless. The standard from *Brecht v. Abrahamson*, 507 U.S. 619 (1993), governs our
15 harmless-error inquiry. *See Dixon v. Williams*, 750 F.3d 1027, 1034 (9th Cir. 2014) (per curiam).
16 Under *Brecht*, a petitioner can obtain federal habeas relief only if “the error had substantial and
17 injurious effect or influence in determining the jury’s verdict.” 507 U.S. at 637. To satisfy this
18 standard, the court must have “grave doubt” as to the outcome, meaning that “in the judge’s mind,
19 the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of
20 the error.” *See O’Neal v. McAninch*, 513 U.S. 432, 435 (1995).

21 Here, we do not see any basis for grave doubt that the trial’s outcome would have been
22 different. Petitioner does not argue that the following jury instructions contain any error:

23 Before you may consider the statement or testimony of Francisco
24 Gutierrez as evidence against the defendants regarding the crime of
25 conspiracy to commit robbery, robbery, or attempted robbery, *you*
26 *must decide whether Francisco Gutierrez was an accomplice* to that
crime. A person is an accomplice if he or she is subject to
prosecution for the identical crime charged against the defendant.
Someone is subject to prosecution if:

- 27 1. He or she personally committed the crime;

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Or 2. He or she knew of the criminal purpose of the person who committed the crime;

And 3. He or she intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime or participate in a criminal conspiracy to commit the crime.

The burden is on the defendant to prove that it is more likely than not that Francisco Gutierrez was an accomplice.

A person may be an accomplice even if he or she is not actually prosecuted for the crime.

If you decide that a declarant or witness was not an accomplice, then supporting evidence is not required and you should evaluate his or her statement or testimony as you would that of any other witness.

If you decide that a declarant or witness was an accomplice, then you may not convict a defendant of conspiracy to commit robbery, robbery, or attempted robbery, based on his or her statement or testimony alone. You may use the statement or testimony of an accomplice to convict the defendant only if:

1. *The accomplice's statement or testimony is supported by other evidence that you believe;*
2. *That supporting evidence is independent of the accomplice's statement or testimony;*
- And 3. *That supporting evidence tends to connect the defendant to the commission of the crime.*

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact mentioned by the accomplice in the statement or about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

The evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice.

Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

*Guerrero, 2015 WL 4555562, at *28-30 (emphasis added). The Court of Appeal explained that*

1 these unchallenged jury instructions were “sufficient” for the jury to decide whether Gutierrez
2 was an accomplice. *Id.* at *28. The jury instructions explicitly asked the jury to decide whether
3 Gutierrez was an accomplice, explained what makes a person an accomplice, and explained the
4 kinds of evidence that could corroborate an accomplice’s testimony. Petitioner does not argue
5 that the jury instructions above misstated any rule of California law, and we see no error. *See*
6 *generally People v. Coffman & Marlow*, 34 Cal. 4th 1, 103 (2004) (discussing the correct law on
7 accomplice testimony under California law and what courts should instruct the jury). We
8 conclude that the jury instructions sufficed to prompt the jury to decide whether Gutierrez was an
9 accomplice.

10 We ordinarily do not address the issues of state law in habeas proceedings, but even if we
11 were to do so, petitioner’s arguments would warrant prompt rejection. According to petitioner,
12 the following instructions should have included the term “accomplice” along with the term
13 “defendant”:

14 To prove that a defendant is guilty of murder, the People must
15 prove that:

- 16 1. The defendant is guilty of conspiracy to commit robbery,
robbery, or attempted robbery;
- 17 2. During the commission of the conspiracy to commit robbery,
18 robbery, or attempted robbery, a co-participant in that robbery
or attempted robbery, committed the crime of murder;

19 And 3. Under all of the circumstances, a reasonable person in
20 the defendant's position would have known that the commission
of murder was a natural and probable consequence of the
21 commission of conspiracy to commit robbery, robbery, or
attempted robbery.

22 To prove that a defendant is guilty of the crimes charged in Counts
23 2 and 3 -- that would be the murder, attempt murder charges -- the
People must prove that:

- 24 1. The defendant conspired to commit robbery;
- 25 2. A member of the conspiracy committed murder or attempted
26 murder to further the conspiracy;

27 And 3. Murder or attempted murder was a natural and probable
consequence of the common plan or design of the crime that the
28 defendant conspired to commit.

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The defendants may also be guilty of murder under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the perpetrator.

To prove that a defendant is guilty of first degree murder under this theory, the People must prove that:

- 1. The defendant committed, or attempted to commit, or aided and abetted or was a member of a conspiracy to commit robbery;
- 2. The defendant intended to commit, or intended to aid and abet the perpetrator in committing, or intended that one or more members of the conspiracy commit robbery;
- 3. If the defendant did not personally commit or attempt to commit robbery, then a perpetrator, whom the defendant was aiding and abetting or with whom the defendant conspired, personally committed or attempted to commit robbery;

And 4. While committing or attempting to commit robbery, the perpetrator caused the death of another person;

And 5. There was a logical connection between the cause of death and the robbery or attempted robbery. The connection between the cause of death and the robbery, or attempted robbery, must involve more than just their occurrence at the same time and place.

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To prove that a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

- 1. The perpetrator committed the crime;
- 2. The defendant knew that the perpetrator intended to commit the crime;
- 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

And 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

ECF No. 1 at 179-82. These jury instructions are not the kinds of instructions that would ordinarily include any discussion on the corroboration of accomplice testimony, and the jury instructions would have been confusing if the trial court had adopted petitioner’s approach and added the term “accomplice” next to each occurrence of the term “defendant.” Petitioner cites no

1 authority supporting his claim of error in the jury instructions. Indeed, the trial court followed the
2 model jury instructions routinely used in California state courts. *See* Cal. Jury Instr. Crim. 401,
3 417, 540B. The Court of Appeal rejected petitioner’s argument, *Guerrero*, 2015 WL 4555562, at
4 *28-30, and we see no basis to grant habeas relief.

5 **c. Other Matters**

6 Petitioner identifies the jury instructions as the only errors in this case, so we need not go
7 further. However, we briefly discuss two other fundamental reasons why petitioner cannot
8 prevail.

9 First, petitioner mistakenly states that, had the trial court given his version of the jury
10 instructions, the jury would necessarily have found that Gutierrez was an accomplice whose
11 testimony required corroboration. *See* ECF No. 1 at 169-70. Such a finding would not have been
12 guaranteed, even if the court had used the instructions now favored by petitioner. The jury had
13 enough evidence to find that Gutierrez was not an accomplice, as the Court of Appeal explained.
14 *Guerrero*, 2015 WL 4555562, at *27. Gutierrez testified that he did not know about the
15 conspiracy to commit robbery or the murder that resulted from the conspiracy. RT 3:593-94,
16 618-23. We recognize that some evidence could support a finding that Gutierrez was an
17 accomplice: for example, the police found some blood stains on Gutierrez’s shoes, and
18 petitioner’s expert testified that the shoes had Gutierrez’s DNA but not petitioner’s DNA.
19 RT 4:694-98. However, the DNA evidence was inconclusive. Petitioner’s own expert testified
20 that, if a person wore clean socks and then put on his shoes, that person’s DNA ordinarily would
21 not transfer to his shoes absent other factors such as the socks being soaked with perspiration.
22 RT 4:700, 709-10. The parties do not dispute that Gutierrez often allowed petitioner to borrow
23 his clothing and shoes. RT 3:593-94. Given the evidence presented at trial, the jury could have
24 found that Gutierrez was not an accomplice, so petitioner’s arguments—all of which assume that
25 Gutierrez was an accomplice—do not entitle him to habeas relief.

26 Second, the Court of Appeal concluded that even if Gutierrez was an accomplice, the jury
27 had enough evidence corroborating Gutierrez’s testimony. A witness testified at trial that, when
28 he was at a parking lot, a man whose description matched petitioner’s gave directions to two

1 women, saying, “go and try” or “go try it.” RT 2:228, 260-61. That testimony, the Court of
2 Appeal explained, sufficed to corroborate Gutierrez’s testimony under California law, which
3 required only slight corroboration of accomplice testimony. *Guerrero*, 2015 WL 4555562, at
4 *33-34. We must defer to the state court on an issue of state law. *Woods v. Sinclair*, 764 F.3d
5 1109, 1138 (9th Cir. 2014). For all these reasons, petitioner cannot prevail, and we thus
6 recommend that the court deny his petition.

7 **III. Certificate of Appealability**

8 A petitioner seeking a writ of habeas corpus has no absolute right to appeal a district
9 court’s denial of a petition; he may appeal only in limited circumstances. *See* 28 U.S.C. § 2253;
10 *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Rule 11 Governing Section 2254 Cases
11 requires that a district court issue or deny a certificate of appealability when entering a final order
12 adverse to a petitioner. *See also* Ninth Circuit Rule 22-1(a); *United States v. Asrar*, 116 F.3d
13 1268, 1270 (9th Cir. 1997). A certificate of appealability will not issue unless a petitioner makes
14 “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This
15 standard requires the petitioner to show that “jurists of reason could disagree with the district
16 court’s resolution of his constitutional claims or that jurists could conclude the issues presented
17 are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327; *accord*
18 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

19 Here, petitioner has not made a substantial showing of the denial of a constitutional right.
20 Thus, we recommend that the court decline to issue a certificate of appealability.

21 **IV. Findings and recommendations**

22 As noted above, we recommend that the court deny the petition and decline to issue a
23 certificate of appealability. Under 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of
24 Practice for the United States District Court, Eastern District of California, these findings and
25 recommendations are submitted to the United States District Court Judge presiding over this case.
26 Within fourteen days of the service of the findings and recommendations, any party may file
27 written objections to the findings and recommendations with the court and serve a copy on all
28 parties. That document must be captioned “Objections to Magistrate Judge’s Findings and

1 Recommendations.” The presiding District Judge will then review the findings and
2 recommendations under 28 U.S.C. § 636(b)(1)(C).

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4 IT IS SO ORDERED.

5 Dated: April 16, 2019


UNITED STATES MAGISTRATE JUDGE

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