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5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA

7 DAVID JACINTO SALINAS,
8
9 Petitioner,

No. C 10-2084 SI (pr)

**ORDER DENYING HABEAS
PETITION AND DENYING
CERTIFICATE OF APPEALABILITY**

10 v.

11 KELLY HARRINGTON, Acting Warden,
12 Respondent.

13
14 **INTRODUCTION**

15 David Jacinto Salinas, a prisoner of the State of California, filed this habeas action under
16 28 U.S.C. § 2254 to challenge his 2007 conviction in the Santa Clara County Superior Court.
17 This matter is now before the court for consideration of the merits of the pro se habeas petition.
18 For the reasons discussed below, the petition is denied.

19
20 **BACKGROUND**

21 I. The Crimes

22 On February 10, 2006, Salinas and his co-defendant Manuel Louis Madril were charged
23 by information with one count of the murder of Myra Aguirre (California Penal Code § 187;¹
24 count 1) during the commission or attempted commission of a robbery, two counts of second
25 degree robbery of Andrew Satterwhite and Robert Conrad, respectively (§§ 211, 212.5; counts
26 2 and 3), and vehicle theft (Vehicle Code § 10851(a); count 4). As to the robberies and vehicle
27 theft, the information further alleged a criminal street gang enhancement (§§ 186.22(b)(1)(c)).

28

¹ Unless otherwise specified, further statutory references are to the California Penal Code.

1 As to Salinas, the information alleged that he used a deadly weapon -- a bottle -- during the
2 commission of one of the robberies in court 2 (§12022(b)(1)), and that, in connection with
3 counts 1, 2 and 3, he had a prior serious felony conviction that also constituted as a strike
4 (§§ 667(a), 1170.12, 1192.7(c)).

5 The California Court of Appeal set out the facts to be as follows:

6 *The Trial Evidence*

7 *The Current Offenses*

8 Andrew Satterwhite, who was 17 years old in October 2005, testified
9 under a grant of immunity² that on the evening of October 8, 2005, he and
10 Robert Conrad walked through Boggini Park on their way home from a friend's
11 house. It was dark, but they could see a group of 10 to 20 men by the picnic
12 tables in the park. One of the men asked them, "Why are you coming up on
13 us?" Satterwhite responded, "It's not like that." The man asked, "What do you
14 claim?" Satterwhite thought that the man was asking him if he was in a gang,
15 so he responded that he didn't claim anything. The group of men surrounded
16 Satterwhite and Conrad and one of the men shook Satterwhite's hand and said
17 "It's Norte." The man then told Satterwhite and Conrad to empty their pockets
18 and said "It's Capitol Park."

14 A man hit Satterwhite in the left eye and in the mouth and broke a
15 40-ounce beer bottle over his head. His head started bleeding and he fell to the
16 ground. While reaching towards his back waistband, the man said, "Don't make
17 me get the gun." The man took off the Larry Bird Celtics jersey, the white
18 T-shirt, and the white Nike shoes that Satterwhite was wearing. The group of
19 men started running away so Satterwhite and Conrad ran in the opposite
20 direction. Although Satterwhite saw a police car nearby, he did not run towards
21 it because he wanted to go home. His parents reported the incident to the police.

22 Satterwhite went to the Regional Medical Center where he received six
23 staples in his head and stitches on his right arm for cuts from the broken beer
24 bottle. While he was at the hospital, he told officers that a man who hit him had
25 "San Jo" tattooed on his neck. Officers brought Satterwhite's shoes and Conrad's
26 Raiders jersey to Satterwhite and he identified them. Officers also showed him
27 two men. Satterwhite thought that one of the men looked like the man who hit
28

2 Satterwhite denied participating in a burglary of Norwood Elementary School with
Conrad in October 2005. He admitted participating in a commercial burglary in January 2006
after taking his mother's car without her permission. He spent some time in juvenile hall for the
burglary, during which time he was threatened because of the incident at issue here. He was
later granted probation and one of the terms of his probation was that he remain in California.
However, he left the state, is residing in Nevada, and did not contact his probation officer upon
his return to the state while under subpoena. The grant of immunity allowed him to testify
without having to contact his probation officer or being arrested for violating his probation.

1 him with the beer bottle and then took his jersey.³ He was asked to, but could
2 not, identify a man who at the time was lying on a hospital stretcher.

3 Conrad,⁴ who was 17 years old at the time of trial, testified that on
4 October 8, 2005, while he and Satterwhite were walking through Boggini Park
5 around 9:30 p.m. on their way home from a friend's house, they were stopped by
6 a group of about 20 men. It was dark but at first the group seemed to be friendly
7 and somebody shook Satterwhite's hand. The men then said, "What's up," and
8 had Conrad and Satterwhite sit down at a picnic table because the men did not
9 know them. Conrad's black New York Yankees baseball cap was hit off his
10 head and the men told Conrad and Satterwhite to empty their pockets. Conrad
11 took a brush, a washcloth, and some papers and keys from his pockets.

12 The men told Satterwhite to take off his jersey. When Satterwhite did not
13 comply, he was hit in the head with a bottle, thrown to the ground, and his jersey
14 and shoes were taken off him. Somebody hit Conrad on the back of his head,
15 slamming it onto the picnic table. Because of all of this, Conrad decided to do
16 whatever the men asked him to do. He removed his Porter Raiders jersey.
17 Somebody pulled his T-shirt, chain and "R" pendant off him, so he removed his
18 earrings. When the group of men left them, Conrad and Satterwhite ran out of
19 the park. They went to a friend's house and discussed the incident before going
20 home. Conrad did not report the incident to the police.

21 San Jose Police officers Stanley Gaspar and Melinda O'Neil were
22 dispatched to Boggini Park around 9:23 p.m. on October 8, 2005, due to a 911
23 report that there were 20 to 30 people in the park, that there might be fight, and
24 that there were threats of a shooting. When the officers arrived around 9:26
25 p.m., Gaspar saw people running through the park and vehicles driving away in
26 all directions, some with their headlights off. Gaspar and other officers
27 contacted a group of six to eight people at the park and pat searched them for
28 weapons. While O'Neil was assisting Gaspar, she was notified around 9:35 p.m.
that there was a fatal accident involving a van at Quimby and Tully Roads.
O'Neill left for the accident scene, where she interviewed witnesses. After
Gaspar ensured himself that nobody in the park had a weapon and that nobody
was hurt, he also responded to the accident scene. Officer Catherine Foley, who
had been dispatched to Boggini Park at 9:27 p.m., left the park for the accident
scene around the same time as Officer Gaspar.

Officers Kendra Spath, James Gonzalez and Michael Clark were
dispatched to Boggini Park at 9:31 p.m. on October 8, 2005. While Officers
Spath and Gonzalez were eastbound on Quimby Road, a blue minivan sped
westbound past them with its headlights off. The dispatcher broadcast that a
vehicle matching the description of the minivan had just been stolen. Spath
reported that she had seen the minivan traveling westbound on Quimby Road,
but she and Gonzalez did not attempt to follow the minivan. Before they arrived

³ Satterwhite could not identify Salinas at trial as the man who he identified at the hospital. However, he testified that he was afraid to testify and was concerned that "people" would find out where he lived.

⁴ Conrad admitted participating in a burglary at Norwood Elementary School in 2005, and testified that he was on probation as a result of the burglary and that Satterwhite also participated in the burglary. The parties stipulated that the school incurred damages in excess of \$400, and that the conduct causing the damages qualifies as a felony.

1 at Boggini Park, Spath and Gonzalez were redirected to an injury accident at
2 Tully and Alvin,⁵ so they turned around and headed westbound on Quimby.
3 When they arrived at the intersection of Quimby and Tully,⁶ the blue minivan
they had seen earlier was wrapped around a signal pole on the west side of the
intersection. Spath reported the accident.

4 Officer Clark was eastbound on Tully Road on his way to Boggini Park
5 when he was dispatched to an injury accident at Tully and Alvin. He turned
6 around and headed westbound on Tully toward Alvin. However, when he
7 reached Quimby, he saw a blue minivan wrapped around a pole and on fire. He
8 had previously heard from dispatch that a blue minivan had been reported stolen.
He reported the accident, including the license plate of the minivan. He then
checked the minivan for any occupants and tried to put out the fire with his fire
extinguisher, but was not able to put it out.

9 On the evening of October 8, 2005, Rigoberto Cardenas drove his blue
10 Ford minivan to his sister-in-law's house on Castleton Drive near Quimby Road
11 in San Jose. He parked in the driveway and left his keys in the ignition and the
12 engine running when he went inside. The minivan was gone within a few
13 minutes and he had not given anyone permission to take it. The theft was
reported to 911. About 30 minutes later the police notified Cardenas that they
had found the minivan. They called again around 2:00 or 3:00 a.m. the next day,
at which time Cardenas went to the intersection of Tully and Quimby Roads
where he found the minivan "smashed." Inside the minivan were several items
that did not belong to Cardenas.

14 Around 9:30 p.m. on October 8, 2005, Quyen Tiet witnessed a collision
15 at the intersection of Tully and Quimby Roads. Tiet was on Tully Road about
16 one-half block from the intersection when a minivan sped past him. The
17 minivan accelerated towards the intersection as the stoplight was turning red,
entered the intersection on the red light, and hit the driver's side of a car. Tiet
thought he saw four people get out of the minivan. He called 911.

18 Antonio Gomez and Liliana Baez were on Tully Road slowing down for
19 the stoplight at Quimby Road when they witnessed the collision. When the light
20 turned green for Quimby Road, a red Honda Civic started into the intersection.
21 A minivan with its headlights off sped past Gomez and Baez, entered the
22 intersection on the red light, hit the driver's side of the Honda, and then hit a
23 pole. The Honda spun and came to rest between 80 and 110 feet away. Gomez
24 and Baez saw two men get out of the driver's side of the minivan and run
towards a shopping center. Gomez pulled over, got out of his car, and yelled at
the men to stop. The two men stopped for a moment then continued on. Gomez
and Baez saw a third man get out of the passenger side of the minivan. Gomez
was able to stop the third man, who collapsed, and Gomez dragged the man over
to the sidewalk. Gomez then checked on the two occupants of the Honda. He
got no response from the woman driver; the male passenger drifted in and out
of consciousness. Baez identified photos of Salinas and Joseph Vargas as two

25 _____
26 ⁵ Alvin is the last intersection on Tully Road before the eastside entrances to Highway
27 101.

28 ⁶ At the intersection of Quimby and Tully Roads, Tully runs from the northeast to the
southwest towards Highway 101, and Quimby runs from the southeast to the northwest through
Tully.

1 of the men who got out of the minivan after the collision. Gomez identified a
2 photo of Vargas as the man he stopped after he got out of the passenger side of
3 the minivan, and a photo of Salinas as one of the two men who got out of the
4 driver's side of the minivan and ran away.

5 Sandra Ramirez was with her son in a car on Quimby Road at the Tully
6 Road stoplight when the collision occurred. She did not see the minivan hit the
7 red Honda, she just heard the noise and saw the aftermath of the collision. The
8 minivan came to rest against a traffic signal post. She saw two men jump out of
9 the minivan but she did not see where they went. Her son got out of their car,
10 ran to the Honda, and quickly ran back. He said that it looked like a woman was
11 dead. Ramirez called 911.

12 Officer Foley prepared the accident report for the collision. Myra
13 Aguirre was identified as the deceased driver of the Honda and Hugo Garcia was
14 identified as the injured passenger. Aguirre died instantly as a result of blunt
15 impact to her head and torso which caused both her brain stem and her aorta to
16 sever. Aguirre also sustained fractures of her ribs, left arm bone, both leg bones,
17 and skull, and abrasions throughout her body. Garcia was taken from the scene
18 of the collision in an ambulance. He had lacerations above both eyes and on his
19 right leg.

20 Two bags of items were taken from the minivan to the Regional Medical
21 Center and shown to Satterwhite. Satterwhite identified his shoes and Conrad's
22 jersey. He was not able to identify the black Nike shoes, a black T-shirt with
23 "408" written in red, or a black hat. Five white T-shirts and a New York
24 Yankees hat were found on the front passenger floorboard of the minivan on
25 October 11, 2005, after the minivan was taken to the police storage lot.

26 Officer Kevin Cassidy testified as a collision reconstruction expert that
27 the minivan was approximately 392 feet from the intersection when the signal
28 turned red, and that he did not find any evidence that the driver of the minivan
applied the brakes prior to entering the intersection. The minivan struck the
Honda before the Honda was halfway through the intersection. At the time of
collision, the Honda was traveling about 18 miles per hour and the minivan was
traveling about 58 miles per hour.

After arriving at the scene of the accident, Officer Joseph Freitas was
directed to go to school grounds north of the accident scene in order to look for
the men who had fled from the minivan. He was then directed by a witness to
a pickup truck parked in a bakery parking lot. Officer Freitas found Salinas
lying face down underneath the pickup truck and several officers ordered Salinas
out from underneath the truck. Salinas complied with the orders and was taken
into custody. Salinas, an admitted Norteño gang member, had a tattoo of an "X"
and a "4" behind his left ear, "EHP" tattooed on his left leg just above the knee,
four dots along the knuckles of one hand and a single dot along one of the
knuckles of his other hand. His nose was bleeding and he had abrasions on his
chest, face, and hands, lacerations on his forearms, and glass fragments in his
hair and face. An officer transported Salinas to the police department where a
blood sample and pictures of Salinas's injuries were taken. The officer then
transported Salinas to Regional Medical Center for viewing by an assault victim.

Around 1:30 a.m. on October 9, 2005, officers were dispatched to the
crime scene at Boggini Park. On or around a picnic table in the middle of the
park they found a broken glass beer bottle, some blood, a pair of white Nike

1 shoes, a pair of red knit gloves, a key with a blue coil, a lighter, a white wash
2 cloth, a \$5 bill, and some jewelry. The jewelry consisted of two earrings, a
chain necklace, and an "R" pendant.

3 Madril's family took him to Valley Medical Center on the night of
4 October 8, 2005. Lisa Delatorre,⁷ Madril's sister, heard from family members
5 that Madril might have been in a car accident that night and saw that Madril had
6 bruises on his leg and head, and that his tongue was cut and swollen. Lisa told
7 her husband Ricardo that Madril might have been in a car accident. When
8 Ricardo later learned that the woman who was killed in a car accident that night
9 was one of his niece's friends, he called the police. Ricardo told the police that
10 Madril had been in the hospital due to injuries he received on the night of
October 8, 2005, and that the injuries might have been caused by the car
11 accident that occurred on Tully Road. Lisa told the police that Madril told her
12 that he had been in a car accident on Tully Road and that he had fled from the
13 accident because he had been in a stolen car. Lisa also said that Madril was
14 flashing what she believed were gang signs while he was in the hospital waiting
15 area, and that it upset her.

16 Madril and Rachel Acosta, his mother, stayed overnight at her nephew's
17 house after Madril was released from the hospital. Although Acosta asked
18 Madril how he was injured, Madril did not respond. The next day, Madril wrote
19 Acosta a note asking her to take him to the home of his girlfriend Christina
20 Balandra in Tracy. Acosta took him there. Madril was arrested at Balandra's
21 home on October 13, 2005. At the time, Madril was wearing a red T-shirt. An
admitted Norteño gang member, Madril has "X4" tattooed in red on one of his
22 fingers. He also has "ESSJ," standing for East Side San Jose, "Norte," and "408"
23 within a Huelga Bird tattooed on his left forearm.

24 On the night of October 8, 2005, Kristopher Bal heard about the incident
25 in which Satterwhite's jersey was stolen. About an hour after learning about the
26 incident, Bal called the phone number of his friend Jorge Trejo's cell phone.
27 Trejo was a Norteño gang member.⁸ Somebody Bal did not recognize answered
28 the phone. A few minutes after their conversation, a Black man named Timothy
brought Bal a bloody white Larry Bird Celtic's jersey, Trejo's cell phone, and the
jacket Bal had loaned to Trejo earlier that night. The man said that he had found
the items in the park, and Trejo later told Bal that he had been in Boggini Park.
Bal identified the black Nike shoes taken from the minivan on October 8, 2005,
as belonging to his friend Artie, and the black hat with the red Huelga bird as the
hat that he had loaned to Trejo along with his jacket.

On October 13, 2005, Conrad was shown a photographic lineup. He
identified Salinas as the man who smashed the beer bottle over Satterwhite's
head. He could not identify the black hat, the black T-shirt with the red number
"408," or the black shoes that were found in the minivan.

Vargas, who was 17 years old in October 2005 and "claimed" Norteño,

⁷ We will hereafter refer to Lisa and Ricardo Delatorre by their first names for ease of
reference, and do not intend any disrespect.

⁸ Trejo died three days after the incident at issue here after he was hit by a car at an
intersection.

1 testified pursuant to a plea agreement⁹ that he was at Boggini Park with 15 to 20
2 other people on the night of October 8, 2005. It was dark, and he drank malt
3 liquor, smoked marijuana, and talked with others in the group. Salinas and
4 Madril were part of the group. After about 15 or 20 minutes, around six
5 teenagers came up to the group and asked for cigarettes. Members of Vargas's
6 group asked the teenagers where they were from and if they "claimed." The
7 teenagers said that they do not claim and then everybody shook hands. They
8 were leaving when Salinas, while putting his right hand behind his back as
9 though he was going to pull out a gun, told the teenagers to sit down on a picnic
10 bench or they would get shot. Salinas also yelled, "Capitol Park." The
11 teenagers sat down.

12 The men in Vargas's group told the teenagers to empty their pockets and
13 to put the items on the picnic table. Salinas looked through the items and
14 slapped each of the teenagers on the head. He hit one of the teenagers on the
15 head with a 40-ounce beer bottle, grabbed him, threw him on the ground, and
16 took his jersey. Madril went through the wallets on the table, then hit and
17 kicked a different teenager and took off his shirt. Vargas watched but did not
18 intervene. Salinas told Vargas to pick up "the pile" and then the group ran off.
19 Vargas picked up the shirts and jerseys that were on the ground and followed
20 Salinas, Madril, and a teenaged member of his group. About one block from the
21 park, the four of them stopped and Salinas told Vargas to call his friend to come
22 pick them up. Vargas tried calling his friend while they continued walking.
23 When they saw an empty van parked with its engine running, Salinas told them
24 to wait and then ran to the van, jumped in, and drove it back to them. Vargas
25 jumped into the front passenger seat of the van with the items he had grabbed at
26 the park and Madril and the teenager jumped into the back.

27 Salinas sped off and turned onto Quimby Road without stopping at stop
28 signs. Vargas told Salinas to slow down but Salinas told him to shut up. Salinas
sped through a red light at White Road. Vargas saw two patrol cars heading in
the opposite direction, and Madril said that "cop cars" were there. Salinas said,
"I got it," drove faster, and turned onto Capitol Expressway. He continued
speeding and turned onto Tully Road, running another red light. He continued
speeding on Tully Road so Vargas put his seat belt on because he thought they
were going to run into something. Vargas saw a red light at an intersection
ahead of them but did not feel Salinas step on the brakes or swerve. The van hit
a red car and then hit a pole. Vargas heard doors open but he did not see where
Salinas, Madril, or the teenager went. Vargas climbed out a window because his
door was jammed, and then he collapsed and crawled to the sidewalk. The
police and paramedics came and he was taken to the hospital by ambulance.

29 An officer took Vargas into custody at the Regional Medical Center and
30 transported him to Juvenile Hall. The officer also collected Vargas's clothes and
31 booked them into evidence. Blood samples taken from Vargas around 11:15
32 p.m. on the night of the incident tested negative for alcohol, but the samples
33 were not tested for marijuana. Madril's blood was found on the passenger-side
34 airbag and the passenger seat armrest in the minivan. Madril and Salinas were
35 possible contributors of DNA found on the driver's side airbag and Salinas and

36
37 ⁹ Vargas was originally charged with murder, two counts of robbery, and vehicle theft.
38 In exchange for testifying truthfully at trial, he admitted the two counts of robbery and the
remaining charges were dismissed. In addition, Vargas admitted having a 2004 conviction for
possessing marijuana for sale.

1 Vargas were possible contributors of DNA found on the steering wheel.

2 ***The Gang Evidence***

3 San Jose Police Detective Christopher Dominguez testified as an expert
4 in the operation, activities, and membership of Hispanic criminal street gangs
5 that, in San Jose, gang members predominately align with Norteño gangs.
6 Currently, there are around 40 different Norteño street gangs in San Jose,
7 organized around the various geographic areas of the city. Members of the
8 different Norteño gangs will often associate or "hang out" with each other.
9 Norteños identify with the color red and the number 14. They act out against
10 Sureño gang members, who identify with the color blue and the number 13, as
11 well as against people who are not gang-affiliated. Norteños will steal
12 somebody's clothing, such as a shirt or cap, as an act of intimidation or
13 humiliation. When an individual Norteño gang member commits an assault or
14 robbery, other gang members present are expected to support or assist in
15 whatever way necessary, including helping the individual get away afterwards.
16 San Jose Police Sergeant Shawny Williams testified as an expert in the
17 operation, membership, and criminal activities of Hispanic street gangs that El
18 Hoya Palmas is a San Jose Norteño gang. Norteño gang members identify with
19 the color red and the number 14. The black T-shirt with the number "408" in red
20 and the black hat with a red Huelga Bird found in the minivan are consistent
21 with the types of clothing that Norteño gang members wear. The Huelga Bird
22 is associated with Norteño gangs as well as with the United Farm Workers.
23 Norteño gang members view people wearing clothing consistent with Norteño
24 gangs but denying Norteño gang membership as disrespectful and would take
25 action against them. If a gang member took the clothing off such a person it
26 would enhance the gang member's reputation within the gang.

27 Detective Dominguez testified that the El Hoya Palmas gang had
28 approximately 45 members on the east side of San Jose in 2005. One of the
primary activities of the gang was the commission of crimes listed in section
186.22, subdivision (e). In Detective Dominguez's opinion, based on Salinas's
tattoos and his police contacts, Salinas is a member of El Hoya Palmas. East
Side San Jose is an ongoing Norteño criminal street gang with approximately
300 members. One of its primary activities has been the commission of crimes
identified in section 186.22, subdivision (e). In Detective Dominguez's opinion,
based on Madril's tattoos and admissions, Madril is associated with East Side
San Jose. Also in Detective Dominguez's opinion, the theft of Satterwhite's and
Conrad's clothing and property and the physical force used against them was
done in association with other gang members and was for the benefit of a gang.

29 ***The Verdicts and Findings on the Prior, the Romero Motion, and***
30 ***Sentencing***

31 On January 29, 2007, the jury found both defendants guilty of first degree
32 murder during the commission or attempted commission of a robbery (§ 187;
33 count 1), two counts of second degree robbery (§§ 211, 212.5, subd. (c); counts
34 2 & 3), and vehicle theft (Veh. Code, § 10851, subd. (a); count 4). The jury
35 found true the allegations that Salinas personally used a deadly and dangerous
36 weapon, a bottle, during the commission of count 2 (§ 12022, subd. (b)(1)), and
37 as to both defendants that counts 2 through 4 were committed for the benefit of
38 or in association with a criminal street gang (§ 186.22, subd. (b)(1)), but found
not true the gang allegations as to count 1. On January 30, 2007, Salinas waived
his right to a jury trial on his alleged priors and, after a court trial, the court

1 found true the allegations that Salinas had a prior serious felony conviction that
2 also qualified as a strike (§§ 667, 1170.12). On March 23, 2007, the court
3 sentenced Madril to state prison for the indeterminate term of 25 years to life
4 consecutive to the determinate term of 13 years. The determinate term consists
5 of the midterm of three years on count 2, plus 10 years for the gang
6 enhancement, with a concurrent total term of five years on count 4. The court
7 stayed the total term of 13 years on count 3 pursuant to section 654.

8 On April 16, 2007, Salinas filed a request that the court strike his strike
9 under section 1385 and [People v. Superior Court (Romero) (1996)] . . . 13 Cal.
10 4th 497. On April 23, 2007, after hearing argument from both parties, the court
11 denied Salinas's request and sentenced him to the indeterminate term of 55 years
12 to life consecutive to the determinate term of 22 years. The indeterminate term
13 consists of double the term of 25 years to life for count 1 plus five years for the
14 prior serious felony enhancement. The determinate term consists of six years,
15 or double the midterm, for count 2, plus 10 years for the gang enhancement, one
16 year for the weapon enhancement, and five years for the prior serious felony
17 enhancement, and a concurrent total term of seven years for count 4. The court
18 stayed a total term of 16 years on count 3.

19 Cal. Ct. App. Opinion, ¶. 3-15 (footnotes in original).

20
21 II. Procedural History

22 Salinas was sentenced under California's Three Strikes Law¹⁰ and, as mentioned above,
23 received a longer sentence consisting of 55-years-to-life in prison (on count 1), consecutive to
24 a determinate term of 22 years (for counts 2 and 4). He was found to have suffered one prior
25 conviction that counted as a strike under the Three Strikes Law.

26 Salinas' conviction was affirmed by the California Court of Appeal. The appellate court
27 modified Salinas' judgment by ordering the sentence imposed on the vehicle theft count stayed
28 pursuant to section 654.

Salinas also filed a habeas corpus petition in the appellate court, which that court ordered
considered with the appeal. In that petition, Salinas sought a resentencing hearing. The
appellate court denied his petition in a separate order.

Salinas filed a petition for review in the California Supreme Court, which was summarily
denied.

¹⁰ California's Three Strikes Law consists of two almost identical statutory schemes -- one adopted by initiative and the other passed by the legislature -- that allow harsher sentences for defendants who are convicted of felonies and have previously been convicted of one or more serious or violent felonies. See Cal. Penal Code §§ 667, 1170.12.

1 Salinas then filed this federal habeas corpus action on May 17, 2010. In his petition,
2 Salinas alleges the following due process claims: (1) the trial court failed to instruct on theft as
3 a lesser-included offense of robbery; (2) the trial court failed to instruct on gross vehicular
4 manslaughter while intoxicated and/or on vehicular manslaughter; (3) the trial court erred in
5 convicting him of first degree felony murder, "because the homicide was too attenuated from the
6 felony," petition, p. 6j; (4) the trial court erred in the use of the pattern jury instruction, CALJIC
7 No. 2.11.5, regarding unjoined perpetrators of the same crime, which also violated his rights to
8 confront witnesses; and (5) there was insufficient foundation and/or insufficient evidence of the
9 "primary activities" element of the street gang enhancement, *id.* at 6p. The court determined that
10 Salinas' claims appeared to be cognizable in a federal habeas action and issued an order to show
11 cause on June 14, 2010.

12 Respondent filed an answer to the petition.

13 Salinas' traverse was due on October 10, 2010; however, to date, he has not filed his
14 traverse. The case is now ready for review on the merits.

16 JURISDICTION AND VENUE

17 This court has subject matter jurisdiction over this habeas action for relief under 28
18 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged
19 action concerns a conviction obtained in Santa Clara County, which is in this district. See 28
20 U.S.C. §§ 84, 2241(d).

22 EXHAUSTION

23 Prisoners in state custody who wish to challenge collaterally in federal habeas
24 proceedings either the fact or length of their confinement are required first to exhaust state
25 judicial remedies, either on direct appeal or through collateral proceedings, by presenting the
26 highest state court available with a fair opportunity to rule on the merits of each and every claim
27 they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). The parties do not dispute that
28 state court remedies were exhausted for the claims asserted in the petition.

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STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless 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).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams (Terry) v. Taylor, 529 U.S. 362, 412-13 (2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decision but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." Id. at 409.

DISCUSSION

I. Failure to Instruct on Lesser Offense

A. Theft

Salinas contends the state court erred in failing to instruct the jury on theft as a lesser included offense of robbery.

1 The California Court of Appeal described the factual background of this claim as
2 follows:

3 Salinas requested that the court instruct the jury on petty theft as a lesser
4 included offense of the robberies charged in counts 2 and 3. He contended that
5 the jury could find that Satterwhite and Conrad's property was still in the park
6 when they left the park, and that it was then taken by people who had knowledge
7 that they had no right to the property: "We have recently possessed stolen
8 property, or property that one person claims is his, some of which is found in the
9 possession of the defendants later on, there has to be some explanation for that;
10 and if that is the case, the jury could infer that there was a theft that occurred.
11 But if the exertion of force doesn't occur in order to effectuate taking of the
12 property, it's not a robbery; it's a theft."

13 The prosecutor argued that there was no evidence to support a finding of
14 after-acquired intent to take the property: "There was no witness to say that after
15 they left the park, the defendants remained behind and then somebody decided
16 let's take the property. [¶] The evidence that we did have was the victims'
17 testimony that it was taken from them; that the defendants left, that they were
18 then able to leave and they left Vargas testified that he was told as items
19 were being taken, before the defendants scrambled away and before the victims
20 ran away, he was told, get the stuff; get the property." Madril submitted the
21 matter without argument.

22 The court ruled, based on its "recollection of the evidence, based on the
23 arguments and comments I heard this afternoon," that the evidence did not
24 support giving a lesser included offense instruction as to theft on counts 2 or 3.

25 Cal. Ct. App. Opinion, p. 15.

26 Salinas claims that there was evidence which suggested that "this was only an assault,
27 with the intent to steal formed after the assault terminated." Petition, p. 6a. He adds that "there
28 was more than enough evidence for the jury to conclude that this was not a real robbery,"
including the following: "Too much stuff was left behind. The Boston Celtics Larry Bird jersey
was returned. The value of the items found in the van after the accident was de minimis
Vargas said there were six purported victims, but Satterwaite and Conrad said there were only
two." Id. at 6f. Salinas adds, "Money was left behind, including a \$5 bill . . . [and] jewelry."
Id. at 6e.

The California Court of Appeal rejected Salinas' argument that the trial court erred in
failing to instruct on theft, stating:

It is well settled that theft is a lesser included offense of robbery, which
includes the additional element of force or fear. (People v. Ortega (1998) 19
Cal.4th 686, 694; People v. Melton (1988) 44 Cal.3d 713, 746.) ""[A]
defendant has a constitutional right to have the jury determine every material

1 issue presented by the evidence" [Citations.] [Citation.] "To protect this
2 right and the broader interest of safeguarding the jury's function of ascertaining
3 the truth, a trial court must instruct on lesser included offenses, even in the
4 absence of a request, whenever there is substantial evidence raising a question
5 as to whether all of the elements of the charged offense are present." [Citation.]
6 Conversely, even on request, a trial judge has no duty to instruct on any lesser
7 offense unless there is substantial evidence to support such instruction.
8 [Citation.] "'Substantial evidence is evidence sufficient to 'deserve consideration
9 by the jury,' that is, evidence that a reasonable jury could find persuasive."
10 [Citation.] [Citation.]" (People v. Cunningham (2001) 25 Cal.4th 926,
11 1007-1008.)

12 It is not error to refuse a defendant's requested instruction on a lesser
13 included offense when there is no substantial evidence that would have
14 supported a conviction of the lesser offense. (See People v. Neely (1993) 6
15 Cal.4th 877, 897; People v. Marshall (1996) 13 Cal.4th 799, 848-849.)
16 "Speculation is insufficient to require the giving of an instruction on a lesser
17 included offense. [Citations.] In addition, a lesser included instruction need not
18 be given when there is no evidence that the offense is less than that charged.
19 [Citation.]" (People v. Mendoza (2000) 24 Cal.4th 130, 174.)

20 The record in this case shows that Satterwhite and Conrad testified that
21 they were assaulted and threatened after they failed to obey a demand that they
22 empty their pockets. Satterwhite testified that his jersey was taken from him
23 after he was hit over the head with a beer bottle and thrown to the ground.
24 Conrad testified that he took off his own jersey after seeing what happened to
25 Satterwhite. Vargas testified that Satterwhite and Conrad were told to empty
26 their pockets after defendants threatened them, and that Satterwhite was told to
27 take off his jersey after being hit over the head with a beer bottle and being
28 thrown to the ground. Satterwhite and Conrad testified that the group of men
from the park left the park before they did. Vargas testified that Salinas told him
to grab "the pile" before the group fled from the park, and that he just grabbed
the items that were on the ground and he left the items that were on the table.

Defendants argue that the record supports a finding that Satterwhite and
Conrad were acting like gang "wannabees," thus the encounter in the park was
between gang members and gang "wannabees," and that Satterwhite and Conrad
testified at trial that they were robbery victims in an effort to hide the fact that
they were gang "wannabees." Defendants further argue that because Vargas did
not take all of the items from the park and Satterwhite's jersey was voluntarily
returned, the jury could have found that whoever took the items had no intent to
permanently deprive the victims of them. However, this is mere speculation and
is insufficient to require the giving of an instruction on the lesser offense of
theft. (People v. Mendoza, supra, 24 Cal.4th at p. 174.) The record is clear that
the items were taken from the victims by use of force or fear. There was no
evidence that the offenses were less than that charged, that is, that they were
theft rather than robbery. No error or due process violation has been shown.

Cal. Ct. App. Opinion, ¶. 16-17.

Salinas' federal due process claim based on the failure to instruct has no merit because
there is no clearly established federal rule that a trial court must instruct on all lesser included
offenses. Although instructions on lesser included offenses must be given in capital cases, Beck

1 v. Alabama, 447 U.S. 625 (1980), "[t]here is no settled rule of law on whether Beck applies to
2 noncapital cases such as the present one. In fact, this circuit, without specifically addressing the
3 issue of extending Beck, has declined to find constitutional error arising from the failure to
4 instruct on a lesser included offense in a noncapital case." Turner v. Marshall, 63 F.3d 807, 819
5 (9th Cir. 1995), overruled on other grounds by Tolbert v. Page, 182 F.3d 677, 685 (9th Cir.
6 1999) (en banc). The failure of a state trial court to instruct on lesser-included offenses in a non-
7 capital case does not present a federal constitutional claim. See Solis v. Garcia, 219 F.3d 922,
8 929 (9th Cir. 2000), cert. denied, 534 U.S. 839 (2001); Windham v. Merkle, 163 F.3d 1092,
9 1105-06 (9th Cir. 1998).

10 Even though there is not a constitutional right to lesser included instructions, "the
11 defendant's right to adequate jury instructions on his or her theory of the case might, in some
12 cases, constitute an exception to the general rule." Solis, 219 F.3d at 929 (citing Bashor v.
13 Risley, 730 F.2d at 1240). Solis suggests that there must be substantial evidence to warrant the
14 instruction on the lesser included offense. See Solis, 219 F.3d 929-30 (no duty to instruct on
15 involuntary manslaughter because evidence presented at trial implied malice); see also Cooper
16 v. Calderon, 255 F.3d 1104, 1110-11 (9th Cir. 2001) (no duty in death penalty case to instruct
17 on second degree murder as a lesser included offense because the evidence established that the
18 killer had acted with premeditation, so if the jury found that the defendant was the killer, it
19 necessarily would have found that he committed first degree murder). This exception is
20 inapplicable because Salinas has not rebutted the state court's finding that there was no
21 substantial evidence of theft instead of robbery. As stated above, there was substantial evidence
22 to support a finding of robbery because the record shows that Salinas and his cohorts attacked
23 Satterwhite and Conrad and demanded their property. Accordingly, Salinas' constitutional rights
24 were not violated by the state court's failure to instruct on theft as a lesser included offense, and
25 he is not entitled to habeas relief based on this claim.

26
27 B. Gross Vehicular Manslaughter While Intoxicated and/or Vehicular Manslaughter

28 Salinas also contends the state court erred in failing to instruct the jury on the lesser-

1 related offenses of gross-vehicular manslaughter while intoxicated and/or vehicular
2 manslaughter.

3 The California Court of Appeal described the factual background of this claim as
4 follows:

5 In addition to giving the jury general instructions on homicide and murder
6 (CALJIC Nos. 8.00, 8.10, 8.11) the court instructed the jury on felony-murder
7 during the commission of a robbery (CALJIC Nos. 8.21 and 8.21.1), second
8 degree murder (CALJIC Nos. 8.30 and 8.31), and both voluntary and
9 involuntary manslaughter (CALJIC Nos. 8.37, 8.40, 8.45, 8.46, 8.50, 8.51,
10 8.55). Salinas requested that the court also instruct the jury on vehicular
11 manslaughter not involving drugs or alcohol (CALJIC No. 8.90) and gross
12 vehicular manslaughter while intoxicated (CALJIC No. 8.93). The court denied
13 the request, finding that vehicular manslaughter is a lesser related offense, not
14 a lesser included offense, to the charged count of murder.

15 Cal. Ct. App. Opinion, p. 18.

16 Salinas claims that the "rules barring instruction on lesser related offenses do not impede"
17 his claim that the state court erred and denied him due process by failing to give the requested
18 aforementioned instructions. Petition, p. 6i.

19 The California Court of Appeal rejected Salinas' argument that the trial court erred in
20 failing to give the requested instructions on lesser related offenses, stating:

21 Gross vehicular manslaughter while intoxicated may be a lesser related
22 offense of murder, but it is not a lesser included offense. (People v. Sanchez
23 (2001) 24 Cal.4th 983, 992-993 (Sanchez).) "Although it generally is true that
24 manslaughter is a lesser included offense of murder, because generally
25 manslaughter simply involves an unlawful killing of a human being without
26 malice, gross vehicular manslaughter while intoxicated-like assault with a
27 deadly weapon-requires proof of additional elements that are not included in the
28 offense of murder or in other forms of nonvehicular manslaughter." (Id. at p.
29 992.) The same must be said about ordinary vehicular manslaughter.

30 A criminal defendant has no right to requested instructions on lesser
31 related offenses. (People v. Birks (1998) 19 Cal.4th 108, 112-113.) A contrary
32 rule "can be unfair to the prosecution, and actually promotes inaccurate
33 factfinding, because it gives the defendant a superior trial right to seek and
34 obtain conviction for a lesser uncharged offense whose elements the prosecution
35 has neither pled nor sought to prove." (Ibid.) "Under Birks, supra, 19 Cal.4th
36 108, trial courts can no longer instruct juries on such related, but not included,
37 offenses without the prosecutor's permission." (People v. Martinez (2002) 95
38 Cal.App.4th 581, 586.) Here, the record reveals that the prosecutor objected to
39 the giving of CALJIC Nos. 8.90 and 8.93, citing Sanchez. Accordingly, the
40 court did not err in refusing Salinas's request to instruct the jury with CALJIC
41 Nos. 8.90 and/or 8.93.

42 Cal. Ct. App. Opinion, ¶. 18-19.

1 The California Court of Appeal's holding was not contrary to, or an unreasonable
2 application of, clearly established federal law. There is no clearly established federal law that
3 a trial court must instruct on lesser related offenses. As mentioned above, the Supreme Court
4 held in Beck, that an instruction on a lesser included offense must be given in a capital case;
5 however, the law is unsettled as to whether such an instruction must be given in noncapital cases.
6 Turner, 63 F.3d 807, 819. The Ninth Circuit has declined to find constitutional error arising
7 from the failure to instruct on a lesser included offense in a noncapital case. Id. (citing Bashor
8 v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984)).

9 Salinas' claim here concerns the duty to give an instruction on lesser related offenses.
10 The law on such duty is even more unsettled. Federal law does not support Salinas' claim that
11 under this set of facts, a court must instruct on lesser related offenses. To grant Salinas' claim,
12 therefore, this court would have to create a new rule. In Teague v. Lane, 489 U.S. 288 (1989),
13 the United States Supreme Court held that, with a few exceptions not relevant here, a federal
14 court may not grant habeas corpus relief to a state prisoner based on a rule announced after his
15 conviction and sentence became final. Here, Salinas' conviction and sentence have become final
16 and this court may not create a new rule requiring that an instruction on lesser related offenses
17 must be given.

18 Notwithstanding the lack of a specific rule requiring the court to instruct on lesser related
19 offenses, there is authority that habeas relief is available when the failure to instruct results in
20 a failure to instruct on the defendant's theory of the case or so infects the entire trial that the
21 resulting conviction violates due process. See Conde v. Henry, 198 F.3d 734, 739 (9th Cir.
22 2000) (error to deny defendant's request for instruction on simple kidnaping where such
23 instruction was supported by the evidence). This principle stems from the general rule from the
24 Supreme Court that habeas relief is available when an erroneous jury instruction so infects the
25 entire trial that the resulting conviction violates due process. See Estelle v. McGuire, 502 U.S.
26 62, 72 (1991); Hendricks v. Vasquez, 974 F.2d 1099, 1106 (9th Cir. 1992) (citing Cupp v.
27 Naughton, 414 U.S. 141, 147 (1973)). Even assuming that the Supreme Court source of this rule
28 would make it clearly established federal law within the meaning of 28 U.S.C. § 2254(d)(1), it

1 would not support relief in this case. A defendant does not have a right to have the jury hear his
2 specific proposed instruction on his theory of the case if other instructions, in their entirety,
3 adequately cover the defense theory. Cf. Duckett v. Godinez, 67 F.3d 734, 743 (9th Cir. 1995).

4 Here, Salinas was able to and did argue that he was not guilty of the charged crime of
5 murder. During Salinas' attorney's closing statements to the jury, she asked the jury to "come
6 back with a guilty of manslaughter as a felony, and guilty of auto theft as a felony." RT 1849.

7 Salinas was able to discuss the instructions given relating to felony murder, CALJIC Nos.
8 8.10 and 8.11, 8.21, 8.21.1, which did require the finding the "unlawful killing of a human being
9 whether intentional, unintentional or accidental, which occurs during the commission or
10 attempted commission of the crime of [Robbery] is murder of the first degree when the
11 perpetrator had the specific intent to commit that crime," CT 880, and the instruction relating to
12 when a robbery is complete, which states: "A robbery is complete when the perpetrator has
13 eluded any pursuers, has reached a place of temporary safety, and is in unchallenged possession
14 of the stolen property after having effected an escape with the property," CT 881. Thus, Salinas
15 was able to and did argue that the elements had not been proven -- specifically, that acquitting
16 Salinas of the counts of robbery "means there is no felony murder because the underlying felony
17 is not connected to the terrible accident." RT 1888. While "not conceding that a robbery
18 occurred," Salinas' attorney also argued that Salinas was entitled to a verdict of not guilty on the
19 felony- murder because "temporary safety had been reached" when "Andrew and Robert went
20 in one direction, Mr. Salinas and his group actually went off in the direction of Z's house, off to
21 the north end and to the west" RT 1888-1891.

22 Salinas' attorney was also able to discuss the instructions on "malice murder versus
23 manslaughter." RT 1894. The jury instruction on "malice murder" or non-felony murder,
24 CALJIC No. 8.10, identified that following elements: (1) a human being was killed; (2) the
25 killing was unlawful; and (3) the killing was done with malice aforethought. CT 879. The jury
26 instruction on manslaughter, CALJIC Nos. 8.37, 8.40 and 8.45, identified elements that did not
27 include "malice aforethought," i.e., "[t]he crime of manslaughter is the unlawful killing of a
28 human being without malice aforethought" CT 886. Finally, there was also a jury instruction

1 differentiating the two, CALJIC No. 8.50, which states: "The distinction between murder [other
2 than felony-murder] and manslaughter is that murder [other than felony-murder] requires malice
3 while manslaughter does not."

4 Salinas' attorney also discussed the definition of "malice," CALJIC No. 8.11:

5 "Malice" may be either express or implied. Malice is implied when (1) The
6 killing resulted from an intentional act; (2) The natural consequences of the act
7 are dangerous to human life; and (3) The act was deliberately performed with
8 knowledge of the danger to, and with conscious disregard for human life. When
it is shown that a killing resulted from the intentional doing of an act with
implied malice, no other mental state need be shown to establish the mental state
of malice aforethought.

9 CT 883; RT 1895-1896. She also directed the jury to CALJIC No. 8.72, which states: "[i]f you
10 are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful,
11 but you unanimously agree that you have a reasonable doubt whether the crime is murder or
12 manslaughter, you must give the defendant the benefit of that doubt and find it to be
13 manslaughter rather than murder." CT 898; RT 1895. She added that:

14 in both the murder instruction and manslaughter instruction, there has to be a
15 conscious disregard for human life. The difference between manslaughter and
16 murder is that for it to be malice murder, the prosecution must prove beyond a
reasonable doubt that this deliberate act was performed with knowledge of the
facts in question.

17 RT1895. In applying the aforementioned instructions to the facts in Salinas' case, she argued
18 as follows:

19 If you run through a red light, you should know that a car could be there. You
20 ought to know someone could get hurt, and you are disregarding the human
21 safety that common sense tells you, you should slow down; but there is no
22 knowledge of the fact in question, that is the difference. It hasn't been proven
that that extra element of knowledge that's necessary for malice murder was
present in this case.

23 RT 1899.

24 Salinas had no constitutional right to have the jury instructed in a way that was more
25 likely to be helpful to him when the instructions given did allow him to argue his defense theory.
26 The instructions allowed him to argue that he was not guilty of felony-murder or "malice
27 murder" and, instead, guilty only of manslaughter. Furthermore, the record does not indicate that
28 the absence of the instruction had a "substantial and injurious effect or influence in determining

1 the jury's verdict.'" Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v.
2 United States, 328 U.S. 750, 776 (1946)). Accordingly, Salinas is not entitled to habeas relief
3 based on this claim.

4
5 II. Murder Was Too Attenuated From Felony

6 Salinas claims that the trial court "violated due process" by allowing the jury "to convict
7 [him] of first degree felony murder, because the homicide was too attenuated from the felony."
8 Petition, p. 6j. Specifically, he argues that "[t]he combination of the prosecution's theory of
9 robbery and its theory of felony-murder improperly stretched the felony-murder doctrine beyond
10 reasonable boundaries." Id. Though not entirely clear, Salinas also appears to argue the trial
11 court erred in allowing the jury to "convict [him] of first degree murder based upon improper
12 felony-murder instructions." Id. at 6L.

13 In his opening brief filed in the state appellate court, Salinas raised this argument in
14 connection with his claim relating to failure to instruct on the lesser-related offenses of gross-
15 vehicular manslaughter while intoxicated and/or vehicular manslaughter. Salinas argued:

16 There was substantial evidence that Appellant was not guilty of the charged
17 crime of (felony) murder. A reasonable jury could have concluded that the fatal
18 vehicle crash was so attenuated from the robbery that the felony murder rule
19 should not apply. A reasonable jury could have concluded that the robbery was
no longer in progress at the time of the vehicle accident, because the defendants
had already escaped and reached a place of "temporary safety" within the
meaning of CALJIC [No.] 8.21.1.

20 Salinas' Opening Br. Filed Cal. Ct. App., p. 24. Because Salinas did not raise this claim
21 separately, the appellate court did not separately respond to this argument; instead, it resolved
22 his previous claim on the fact that there is no right to lesser related offenses.

23 In his petition for review filed in the state supreme court and in the instant petition,
24 Salinas renews this argument under a separate heading, claiming that the application of the
25 felony murder rule to these facts denies him due process because the murder was so attenuated
26 from the felony. As explained below, this court finds that this argument lacks merit.

27 California Penal Code § 189, which establishes the limits of felony murder, provides that
28 a murder that is committed in the course of a robbery is felony murder in the first degree. Cal.

1 Penal Code. § 189. A robbery is not considered complete if the "robbers had not won their way
2 to a 'place of temporary safety'" People v. Salas, 7 Cal.3d 812, 822 (1972) (quoting People
3 v. Boss, 210 Cal. 245, 250 (1930); CALJIC No. 8.21.1. "Whether a defendant has reached a
4 place of temporary safety is a question of fact for the jury." People v. Johnson, 5 Cal.App.4th
5 552, 559 (1992). Here, the jury was instructed on this issue pursuant to CALJIC No. 8.21.1,
6 which states:

7 [For the purposes of determining whether an unlawful killing has
8 occurred during the commission of a robbery, the] commission of the crime of
robbery is not confined to a fixed place or a limited period of time.

9 A robbery is still in progress after the original taking of physical
10 possession of the stolen property while the perpetrator is in possession of the
11 stolen property and fleeing in an attempt to escape. Likewise it is still in
progress so long as immediate pursuers are attempting to capture the perpetrator
or to regain the stolen property.

12 A robbery is complete when the perpetrator has eluded any pursuers, has
13 reached a place of temporary safety, and is in unchallenged possession of the
stolen property after having effected an escape with such property.

14 CT 881. In Salas, the California Supreme Court made clear that "a fleeing robber's failure to
15 reach a place of temporary safety is alone sufficient to establish the continuity of the robbery
16 within the felony-murder rule." 7 Cal.3d at 823. A state court's interpretation of state law binds
17 a federal court sitting in habeas corpus. Bradshaw v. Richey, 546 U.S. 74, 76 (2005). Under this
18 rule, this court is bound by the state supreme court's interpretation of the felony murder rule. See
19 id.

20 In this case, Salinas argues that no robbery took place and instead, "the defendants beat
21 the victims and harassed them to show gang power." Petition, at p. 6j. He adds that "most of
22 the property taken from the victims was left behind in the park, including [sic] shoes, jewelry,
23 and money" Id. He also points out that "[t]he most valuable and notable piece of clothing
24 taken from the victims, the Boston Celtics Larry Bird jersey, was returned to the victim's friend
25 that same night" Id. at 6j-6k. Thus, Salinas argues that "[t]hese facts tend to disprove the
26 taking of any other property with the intent to permanently deprive." Id. at 6k. Furthermore,
27 he argues that when "the defendants walked away from the scene . . . several blocks away . . .
28 [t]hey arguably reached a point of temporary safety, within the meaning of CALJIC [No.]

1 8.21.1." Id. He adds, "When the defendants were on the sidewalk several blocks from the park,
2 they arguably were in unchallenged possession of the stolen property, so as to cause the robbery
3 to be deemed terminated, within the meaning of CALJIC [No.] 8.21.1." Id. He claims the "theft
4 of the car occurred after the robbery had terminated," and "in any event, vehicle theft, [under]
5 Vehicle Code § 10851, does not trigger the felony-murder rule." Id. In sum, he argues that "the
6 felony and homicide were so attenuated from each other that this application of the felony-
7 murder rule violated due process" Id. at 61.

8 Contrary to Salinas' claims above, there is substantial evidence supporting the jury's
9 finding that he was guilty of felony murder on the theory that robbery was still in progress
10 because he had not reached a place of temporary safety at the time of the murder. The state
11 appellate court reached this same conclusion in its analysis of Salinas' sentencing claim, stating:

12 In this case, it is evident from the record that Salinas stole and drove the minivan
13 in an effort to escape from the scene of the robberies. The record does not show
14 that defendants had reached a location of temporary safety when Salinas took the
15 minivan. Instead, the record shows that Salinas and Madril assaulted and robbed
16 the teenagers in the park and stole the minivan outside the park while attempting
17 to get away, as several police vehicles and officers were arriving at the park in
18 response to reports of threats of violence there at the time the vehicle theft
19 occurred.

20 Cal. Ct. App. Opinion, p. 26. Furthermore, the evidence establishes Salinas drove at high speeds
21 and ignored traffic signals before the crash. His cohorts, Vargas and Madril, saw two police cars
22 coming from the opposite direction. Madril informed Salinas that "cop cars" were there, and
23 Salinas replied, "I got it." RT 975-976. Salinas then drove even faster and ran red lights until
24 he crashed into the victim's car and, ultimately, into a pole. Everyone in the minivan continued
25 to flee after the crash. Vargas attempted to run from the scene, but he collapsed and was
26 arrested. Salinas was eventually captured. At that time, only Madril escaped.

27 Just as the state supreme court has made clear in Salas, here, Salinas' failure to reach a
28 place of temporary safety "is alone sufficient to establish the continuity of the robbery within
the felony-murder rule." Salas, 7 Cal.3d at 823. A reasonable jury could have concluded, from
the facts above, that at the time of the killing, Salinas was fleeing from the crime scene at a high
speed in a stolen vehicle used to effectuate his escape. At no point in time did he relax or find

1 a private location away from the scrutiny of the public or the police. Accordingly, this court
2 finds reasonable the state court's rejection of Salinas' due process claim relating to his argument
3 that the murder was "too attenuated" from the felony. Therefore, Salinas is not entitled to habeas
4 relief based on this claim.

5
6 III. Error in Instructing the Jury with CALJIC No. 2.11.5

7 Salinas claims that his rights to confront witnesses and to due process were violated by
8 the use of the pattern jury instruction, CALJIC No. 2.11.5, regarding unjoined perpetrators of
9 the same crime. Petition, p. 6p.

10 The California Court of Appeal described the factual background of this claim, stating
11 the following relating to the challenged instruction, CALJIC No. 2.11.5, and to Vargas, who
12 testified as a prosecution witness under a grant of immunity, RT 943:

13 Vargas testified that he was charged with murder, two counts of robbery,
14 and vehicle theft in connection with the incidents at issue here and that, pursuant
15 to a plea agreement involving his testimony at defendants' trial, he admitted the
16 two counts of robbery and the remaining charges were dismissed. Vargas
17 further testified that he and a teenager who had been in the park during
18 defendants' robberies were also in the minivan with defendants at the time
19 Salinas drove through the red light and hit the Honda. Other witnesses testified
20 that they saw between two and four people get out of the minivan after it hit the
21 Honda.

22 The court stated on the record during the discussions regarding jury
23 instructions that "[CALJIC No.] 2.11.5 will be given as modified." At the close
24 of trial, the court instructed the jury pursuant to CALJIC No. 2.11.5 as follows:
25 "There has been evidence in this case indicating that a person other than a
26 defendant was or may have been involved in the crime for which that defendant
27 is on trial. [¶] There may be many reasons why that person is not here on trial.
28 Therefore, do not speculate or guess as to why the other person is not being
prosecuted in this trial or whether he has been or will be prosecuted. Your duty
is to decide whether the People have proved the guilt of each defendant on trial."
Neither an objection to the instruction as given nor a request by defense counsel
for a limiting instruction appears in the record.

Cal. Ct. App. Opinion, p. 19.

Salinas contends that the trial court erred in giving CALJIC No. 2.11.5 without a limiting
instruction that it did not apply to Vargas. Salinas specifically states, "The Use Note for
CALJIC [No.] 2.11.5, explicitly prohibits this instruction from being given if it pertains to a
prosecution witness. ('Do no use this instruction if the other person is a witness for either the

1 prosecution or the defense.') ('Citations omitted')." Petition, p. 6m. Salinas argues that CALJIC
2 No. 2.11.5 "effectively told the jury to ignore the question of whether Vargas fingered Salinas
3 for the robberies to save his own skin on those charges." Id. at 6o.

4 The California Court of Appeal rejected Salinas' argument that the trial court erred in
5 failing to give CALJIC No. 2.11.5 without the limiting instructions, stating:

6 The purpose of CALJIC No. 2.11.5 is to "discourage the jury from
7 irrelevant speculation about the prosecution's reasons for not jointly prosecuting
8 all those shown by the evidence to have participated in the perpetration of the
9 charged offenses, and also to discourage speculation about the eventual fates of
10 [unjoined] perpetrators." (People v. Price (1991) 1 Cal. 4th 324, 446.)
11 Generally, the instruction should not be given if the "other person" who may
12 have been involved testifies at trial because there is the possibility that CALJIC
13 No. 2.11.5 could prevent a jury from considering the coparticipant's incentive
14 to lie. (People v. Hardy (1992) 2 Cal.4th 86, 189-190; People v. Cox (1991) 53
15 Cal.3d 618, 667.) Accordingly, where a coparticipant testifies and another does
16 not, CALJIC No. 2.11.5 either should not be given or should be limited to
17 preclude its application to the testifying coparticipant. (People v. Cain (1995)
18 10 Cal.4th 1, 34-35, fn. 9; People v. Sully (1991) 53 Cal.3d 1195, 1218.)

19 The California Supreme Court considered in People v. Jones (2003) 30
20 Cal.4th 1084 (Jones) a version of CALJIC No. 2.11.5 that is similar to the
21 version given by the trial court in the present case. In Jones, the court stated,
22 "[W]e have often said that trial courts should not give CALJIC No. 2.11.5 in an
23 unmodified form when, as here, a person who might have been prosecuted for
24 the crime has testified at trial. [Citations.]" (Jones, supra, at p. 1113.)
25 However, the court also stated that although it is a "mistake" to give CALJIC
26 No. 2.11.5 where an unjoined coparticipant has testified, the "mistake" is not
27 "error when, as here, 'the instruction is given with the full panoply of witness
28 credibility and accomplice instructions.'" (Jones, supra, at p. 1114, quoting
People v. Lawley (2002) 27 Cal.4th 102, 162.)

19 The trial court in this case instructed the jury with CALJIC Nos. 2.20
20 [believability of a witness], 2.23.1 [believability of a witness-past criminal
21 conduct], 2.27 [sufficiency of testimony of one witness], 3.11 [testimony of
22 accomplice must be corroborated], 3.12 [sufficiency of evidence to corroborate
23 an accomplice], 3.13 [one accomplice may not corroborate another], 3.14
24 [criminal intent necessary to make one an accomplice], 3.16 [witness accomplice
25 as matter of law], and 3.18 [testimony of accomplice to be viewed with care and
26 caution]. The court also instructed the jury to consider the instructions as a
27 whole and to not single out one instruction to the exclusion of another.
28 (CALJIC No. 1.01; see, e.g., People v. Sully, supra, 53 Cal.3d at ¶. 1218-1219;
People v. Cox, supra, 53 Cal.3d at p. 667.) As the instructions as a whole
correctly instructed the jurors regarding Vargas's credibility, the jury was aware
that Vargas had entered into a plea agreement regarding the same charges that
were brought against defendant, and there was testimony that a fourth person
was with Vargas and defendants during the robberies, vehicle theft, and fatal
accident, we cannot say that the court erred in giving CALJIC No. 2.11.5
without a limiting instruction. (Jones, supra, 30 Cal.4th at p. 1114.)

Cal. Ct. App. Opinion, p. 19.

1 Salinas' claim is without merit. First, as explained above, the appellate court disposed of
2 this claim on state law grounds. Thus, Salinas has not shown that this is a federal constitutional
3 claim, Estelle, 502 U.S. at 67-68, or that he has a clearly established right to preclude the trial
4 court from issuing such an instruction. Second, even if Salinas has presented a federal claim,
5 CALJIC No. 2.11.5 merely restricts the jury from considering why a coparticipant is not on trial.
6 It does not forbid the jury from considering whether Vargas avoided trial by pleading out as part
7 of its credibility consideration. Furthermore, the jury need not have considered why Vargas was
8 not on trial, because the jury was told that he had avoided trial by entering into a plea
9 agreement regarding the same charges that were brought against Salinas. Also, as the appellate
10 court pointed out, the trial court gave other instructions reminding the jury that it was duty-
11 bound to determine the credibility of all witnesses, and, as part of that consideration, should
12 consider the possibility of bias or interest. CT 845, 849-850, 864-869. Courts must presume that
13 jurors followed their instructions. See Richardson v. Marsh, 481 U.S. 200, 206 (1987).
14 Accordingly, Salinas is not entitled to habeas relief based on this claim.

15
16 **IV. Insufficient Evidence to Support Gang Enhancement**

17 Salinas contends that his right to due process was violated because there was insufficient
18 evidence to support the sentence enhancement he received for committing a crime for the benefit
19 of a criminal street gang. Specifically, Salinas contends that there was insufficient evidence that
20 the commission of one or more enumerated crimes was one of the primary activities of the "El
21 Hoyo Palmas,"¹¹ the criminal street gang which he claims was his "supposed" gang. Petition,
22 p. 6t. He argues that "there [are] two separate failures of proof as to the 'primary activities'
23 elements of the gang enhancement, (1) that there was insufficient foundation for the [] gang
24 expert's opinion as to this element, and (2) that, absent the expert's opinion, there was
25 insufficient evidence of this element." Id. at 6r.

26 California law provides for a sentence enhancement for crimes committed "for the benefit
27

28 ¹¹ The state appellate court misspelled the gang's name as "El Hoya Palmas" in their unpublished opinion. The correct spelling is "El Hoyo Palmas."

1 of, at the direction of, or in association with any criminal street gang." Cal. Penal Code
2 § 186.22(b)(1). The appellate court explained how to establish that a group is a criminal street
3 gang within the meaning of the statute:

4 the People must prove: (1) the group is an ongoing association of three or more
5 persons sharing a common name, identifying sign, or symbol; (2) one of the
6 group's primary activities is the commission of one or more statutorily
7 enumerated offenses; and (3) the group's members must engage in, or have
8 engaged in, a pattern of criminal gang activity. [Citations.]" (People v. Duran
9 (2002) 97 Cal.App.4th 1448, 1457.) Accordingly, "[t]o trigger the gang statute's
10 sentence-enhancement provision (§ 186.22, subd. (b)), the trier of fact must find
11 that one of the alleged criminal street gang's primary activities is the commission
12 of one or more of certain crimes listed in the gang statute." (People v.
13 Sengpadychith (2001) 26 Cal.4th 316, 322 (Sengpadychith)).

14 Cal. Ct. App. Opinion, p. 21.

15 Salinas contends that there was insufficient evidence of the primary activity element
16 required for the gang enhancement because the expert opinion by prosecution's gang expert,
17 Detective Christopher Dominguez, on the issue lacked an adequate factual foundation. In the
18 instant petition, Salinas points to the testimony Detective Dominguez, when he was recalled by
19 the prosecution, relating to "primary activities" of the El Hoyo Palmas gang:

20 Q. [Prosecutor David Pandori]: Are -- how long have those -- how long has the
21 umbrella group, El Hoyo Palmas, been in operation?

22 A. [Detective Dominguez]: Approximately 15 years.

23 Q.: And they are composed of three or more persons; correct?

24 A.: Correct.

25 Q.: You indicated some of the common signs and symbols. My next question
26 is, are you familiar with the list of crimes that are in Penal Code § 186.22(e)?

27 A.: Correct; approximately 33 of those crimes.

28 Q.: All right. Is one of the primary activities of that gang commission of the
crimes listed in that code section?

A.: That's correct.

Q.: Is the commission of those crimes one of the gang's chief or principal
occupations?

A.: That's correct.

RT 1608-1609. Salinas argues:

1 Although officer Dominguez gave this opinion, he did not identify any specific
2 crime listed in in § 186.22(e) which he believed was a "primary activity" of the
3 El Hoyo Palmas. Nor did he identify any specific El Hoyo Palmas gang member
committed any specific crime enumerated in that section, except for the two
charged robberies.

4 Petition, p. 6s.

5 The state appellate court rejected Salinas' claim, stating:

6 "The phrase 'primary activities,' as used in the gang statute implies that
7 the commission of one or more of the statutorily enumerated crimes is one of the
8 group's 'chief or 'principal' occupations. [Citation.]" (Sengpadychith, supra, 26
9 Cal.4th at p. 323.) "Evidence of past or present conduct by gang members
10 involving the commission of one or more of the statutorily enumerated crimes
11 is relevant in determining the group's primary activities. Both past and present
12 offenses have some tendency in reason to show the group's primary
13 activity" (Ibid.) However, such evidence alone is not necessarily sufficient
14 to establish the gang's primary activities. (Ibid.) "Sufficient proof of the gang's
15 primary activities might consist of evidence that the group's members
16 consistently and repeatedly have committed criminal activity listed in the gang
17 statute. Also sufficient might be expert testimony, as occurred in [People v.
18 Gardeley] [(1996)] 14 Cal.4th 605 [(Gardeley)]." (Sengpadychith, supra, at p.
19 324.)

20 Defendants contend that Detective Dominguez's opinion testimony varied
21 dramatically from that presented in Gardeley. They argue that the expert in
22 Gardeley gave his opinion that the primary activity of the relevant gang was the
23 sale of narcotics, but that the gang also engaged in witness intimidation, both of
24 which are offenses listed in section 186.22, subdivision (e). They further argue
25 that the expert in Gardeley testified that he based his opinion on conversations
26 with the defendant and with other members of the gang, his personal
27 investigations of hundreds of crimes committed by gang members, and
28 information from his colleagues and various law enforcement agencies. "In
Gardeley, unlike here, the court knew both what information the expert was
relying upon, and where that information originated [¶] Here, there was
none of the foundation for the expert's opinion called for in Gardeley."

We are not persuaded by defendants' arguments. Detective Dominguez testified as a gang expert that both El Hoya Palmas and East Side San Jose were Norteño gangs in San Jose and that members of the gangs often associate with or "hang out" together. Detective Dominguez further testified that Norteño gang members "act out" against non-gang members by intimidating them and by taking their property in order to show that they control the neighborhood; that when a gang member commits a crime such as assault or robbery the other gang members present are expected to support or assist them in whatever way necessary; that he has "countless times" spoken to people in the hospital, including both Norteño and Sureño gang members, who have been very badly beaten by a Norteño gang member; and that "[t]aking anything that you want from someone, part of the gang lifestyle, you see someone walking by, you want something, you take it. It might be a shirt. It might be shoes. It might be a belt. We've investigated, I think three cases where all they took was a baseball cap."

A gang expert's opinion can be based on hearsay evidence, including the expert's conversations with gang members, the expert's investigation of gang

1 crimes, and the expert's conversations with other officers. (Gardeley, supra, 14
2 Cal.4th at ¶. 617-620.) The statute does not require proof of convictions, only
3 proof that enumerated offenses were committed. (In re Leland D. (1990) 223
4 Cal.App.3d 251, 258.) Here, Detective Dominguez testified that, in his opinion,
5 one of the primary activities of both the El Hoya Palmas Norteño gang and the
6 East Side San Jose Norteño gang was the commission of crimes enumerated in
7 section 186.22, subdivision (e). He testified that he investigated both assaults
8 and robberies involving Norteño gang members, and both assault and robbery
9 are offenses enumerated in section 186.22, subdivision (e). Thus, contrary to
10 defendants' arguments, Detective Dominguez testified regarding what offenses
11 the relevant gang members consistently and repeatedly commit, what
12 information he was relying on, and where he got that information.

13 "[E]ither prior conduct or acts committed at the time of the charged
14 offenses can be used to establish the "primary activities" element of the gang
15 enhancement." (Sengpadychith, supra, 26 Cal.4th at p. 323, quoting People v.
16 Galvan (1998) 68 Cal.App.4th 1135, 1140.) Here, in addition to hearing
17 testimony about prior acts committed by relevant gang members, the jury heard
18 testimony that defendants, admitted gang members, robbed two teenagers in a
19 park and then stole a vehicle in an attempt to get away, all in association with
20 and for the benefit of their respective gangs. Both robbery and vehicle theft are
21 offenses enumerated in section 186.22, subdivision (e). Accordingly, we
22 conclude on this record that there was sufficient evidence to support the jury's
23 finding that one of the primary activities of defendants' respective gangs was the
24 commission of statutorily enumerated offenses. (Sengpadychith, supra, 26
25 Cal.4th at ¶. 323-324.)

26 Cal. Ct. App. Opinion, pp. 22-24.

27 The Due Process Clause "protects the accused against conviction except upon proof
28 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
charged." In re Winship, 397 U.S. 358, 364 (1970). A state prisoner who alleges that the
evidence in support of the state conviction cannot be fairly characterized as sufficient to have
led a rational trier of fact to find guilt beyond a reasonable doubt therefore states a constitutional
claim, Jackson v. Virginia, 443 U.S. 307, 321 (1979), which, if proven, entitles the petitioner to
federal habeas relief, id. at 324. The federal court determines only whether, "after viewing the
evidence in the light most favorable to the prosecution, any rational trier of fact could have
found the essential elements of the crime beyond a reasonable doubt." Id. at 319. Only if no
rational trier of fact could have found proof of guilt beyond a reasonable doubt, has there been
a due process violation. Id. at 324. And after the AEDPA, a federal habeas court applies the
standards of Jackson with an additional layer of deference, asking whether the state court's
application of Jackson was objectively unreasonable. Juan H. v. Allen, 408 F.3d 1262, 1275,

1 1278-79 (9th Cir. 2005).

2 It is decisive here that a federal "sufficiency of the evidence" inquiry is channeled by state
3 law -- although federal law requires sufficient evidence, it is state law that sets out the elements
4 as to which there must be sufficient evidence. Sarausad v. Porter, 479 F.3d 671, 678 (9th Cir.
5 2007) (Jackson standard must be applied with explicit reference to the substantive elements of
6 the criminal offense as defined by state law), reversed on other grounds by Waddington v.
7 Sarausad, 555 U.S. 179 (2009). As discussed above, the state court observed, "[t]he phrase
8 'primary activities,' as used in the [California] gang statute, implies that the commission of one
9 or more of the statutorily enumerated crimes is one of the groups's 'chief' or 'principal'
10 occupations." People v. Sengpadychith, 26 Cal. 4th 316, 322 (2001). Proof that a "group's
11 members consistently and repeatedly have committed criminal activity listed in the gang statute"
12 is sufficient to establish the gang's primary activity. Id. at 324. In order to determine whether
13 the primary activity element is satisfied, the trier of fact may consider past offenses and the
14 charged offenses. Id. at 320, 323; People v. Duran, 97 Cal. App. 4th 1448, 1465 (2002). Expert
15 testimony, such as the testimony at issue here, may be used to establish that one of the group's
16 primary activities is the commission of statutorily enumerated offenses. Sengpadychith, 26 Cal.
17 4th at 324; People v. Gardeley, 14 Cal. 4th 605, 617-20 (1996).

18 In the present case, the California Court of Appeal's rejection of Salinas' claim was
19 reasonable. The evidence at trial showed that on the evening of October 8, 2005, Andrew
20 Satterwhite and Robert Conrad were assaulted and robbed by Norteño gang members while they
21 walked through Boggini Park on their way home from a friend's house. Detective Dominguez
22 was initially called as the prosecution's gang expert in "the operation, activities, and membership
23 in Hispanic street gang[s]" prior to his redirect. RT 117. He testified that both the El Hoyo
24 Palmas and East Side San Jose were Norteño gangs in San Jose. RT 122. He further testified
25 that Norteño gang members intimidate non-gang members by taking their property and
26 sometimes using force to do so. RT 124. He has spoken to victims of such robberies and
27 assaults at hospitals, who have been beaten badly by a Norteño gang member. RT 127. Both
28 robbery and assault are included in the enumerated offenses. See Cal. Penal Code § 186.22(e).

1 The evidence that Detective Dominguez testified about on direct -- before he was recalled by the
2 prosecution -- included what offenses the El Hoyo Palmas consistently and repeatedly commit,
3 what information he was relying on, and where he got the information he used to establish the
4 primary activities element of the gang enhancement. There thus was constitutionally sufficient
5 evidence to support the jury's findings as to the sentence enhancement. Accordingly, Salinas is
6 not entitled to habeas relief based on this claim.

7
8 **CONCLUSION**

9 For the foregoing reasons, the petition for writ of habeas corpus is DENIED. A certificate
10 of appealability will not issue. Reasonable jurists would not "find the district court's assessment
11 of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).
12 Salinas may seek a certificate of appealability from the Ninth Circuit Court of Appeals. The
13 clerk shall enter judgment in favor of respondent, and close the file.

14 IT IS SO ORDERED.

15 DATED: October 4, 2011

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17 _____
18 SUSAN ILLSTON
19 United States District Judge
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