UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LOUIS SANDERS,

Petitioner,

v.

ERIC ARNOLD, Warden,[1]

Respondent.

Case No. 14-cv-03610-YGR (PR)

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

Petitioner Louis Sanders, a state prisoner currently incarcerated at California State Prison - Solano, brings the instant *pro se* habeas action under 28 U.S.C. § 2254 to challenge his 2011 conviction and sentence rendered in the Alameda County Superior Court in connection with two shooting deaths in September 2007. On February 7, 2011, Petitioner and his co-defendant, Marrin Hughes ("Hughes"), were each convicted of two counts of first degree murder as well as one count of possession of a firearm by a felon. 2CT 329-337, 340-343, 553-560. The jury also found true multiple-murder and firearm-use allegations. 2CT 553-560. According to the state appellate court, "[s]everal witnesses placed [Petitioner] at the scene and identified him as the shooter of the first victim, but only one witness, a 13-year-old boy, connected Hughes to the murders." *People v. Hughes, et al.*, No. A131963, 2013 WL 960130, *1 (Cal. Ct. App. Mar. 13, 2013) (brackets added). The court further added: "The boy, who was well-acquainted with the defendants and the victims, testified he saw Hughes emerge to gun down the second victim immediately after [Petitioner] shot the first victim." *Id.* The operative petition in this action is the amended petition, which raises thirteen claims. Dkts. 10 at 5; 10-1 at 15-41, 126-202, 209-210.[2] Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby DENIES all claims in the amended petition for the reasons set forth below.

[1] Eric Arnold, the current warden of the prison where Petitioner is incarcerated, has been substituted as Respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

[2] Page number citations refer to those assigned by the Court's electronic case management filing system and not those assigned by the parties.

I. BACKGROUND

A. Factual Background

The California Court of Appeal handled the direct appeals filed by Petitioner and Hughes, and in an unpublished opinion described the relevant facts as follows:

> The evidence presented at trial demonstrated that in 2007, victim Jabari Harris regularly sold drugs in the vicinity of 45th Avenue and Bancroft Avenue in Oakland, working with three associates. One was victim Luis Coria, the second was in jail at the time of the murders, and the third was a friend of Coria. Harris attempted to monopolize the sale of drugs in the area, regularly confronting other would-be sellers who were not a part of his team. One witness described Harris as "real aggressive" and "want[ing] to fight" when he confronted others attempting to sell drugs in the neighborhood without his approval.
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> Defendants are longtime acquaintances and, perhaps, cousins. At some time in 2007, each began selling drugs in the area claimed by Harris. During the month prior to the killings, Harris had found Hughes attempting to sell drugs in the area "two or three times." On those occasions, Harris and Hughes "exchanged words." Although Hughes was verbally defiant, when confronted he left the area rather than challenge Harris. In the same time period, Harris had similar confrontations with Sanders.
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> Three witnesses told police that, on September 11, 2007, they saw Sanders argue with and then kill Harris, shooting him once in the head.[FN 3]
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> [FN: 3] Two of these witnesses recanted their statements to police at trial, but the statements were admitted as evidence.
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> Only one witness tied Hughes to the killings. S.C. was 13 years old at the time and lived with his mother and sisters in a second-floor apartment on Bancroft Avenue. S.C. regarded Harris as a big brother, seeing him every day, spending time with him, and receiving small amounts of money from him. S.C. was familiar with defendants from seeing them in the neighborhood almost every day for "months" before the killings, and Hughes's brother was dating S.C.'s mother at the time. Both defendants had visited S.C.'s home and were free to come and go from the apartment. S.C. was aware of regular "conflict or friction" between Harris and Sanders. He also watched Harris confront Hughes a few days before the killings and tell Hughes he "couldn't be out there on the block no more."
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> On the day of the killings, S.C. arrived home from school between 4:30 and 5:00 p.m. S.C. stopped to talk to Sanders and two other[] person[s] on the corner across the street from his apartment. As they spoke, Sanders left, "went to the side of a building," and returned with a gun. When one of the others present asked Sanders if he would sell the gun, Sanders declined, saying he "needed it." After a few minutes, S.C. went home. Between 5:30 and 6:00 p.m., S.C., watching from the balcony of the apartment, saw Harris arrive in his

> car. S.C. went outside and they walked to the store together. They returned to the apartment building between 6:30 and 7:00 p.m. Harris told S.C. to go inside because it was getting late, and S.C. complied. Soon after, Sanders walked into S.C.'s mother's apartment, "told everybody to stay in the house and don't come outside," pulled the gun from his waistband, and left.
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> Two minutes later, S.C. went onto the balcony of the apartment. Looking down, he saw Sanders and Harris arguing in front of the apartment. Coria was nearby. As part of his testimony, S.C. marked the location of these persons on a photograph. The photograph, taken from the vantage point of the balcony, shows a fence alongside a sidewalk, with an open gate in the fence. Harris and Sanders were standing on the sidewalk, just outside the gate. Coria was a few feet away, also on the sidewalk.
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> After a few minutes of argument, Harris answered his cell phone and turned away from Sanders. At that instant, from six feet away, Sanders pulled out his gun and shot Harris. Sanders immediately walked to the fallen Harris and began rummaging through his pockets. Simultaneously, S.C. noticed Hughes appear from the side of the apartment building, inside the fence. He was moving toward the open gate, in the general direction of Coria, with gun in hand. Hughes shot Coria, who had begun running away, twice in the back. After Coria fell, Hughes moved closer to him, fired more shots, and ran off.[FN 4] When Coria collapsed, he was lying in the street, only a few feet from Harris's position on the sidewalk.
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> [FN 4:] In discussing the evidence against him, Hughes stresses that the forensic medical examiner concluded all of Coria's gunshot wounds were inflicted from the front or side, in conflict with S.C.'s testimony. S.C.'s testimony was bolstered, however, by the police discovery of several bullet casings inside the fence, in the location from which, S.C. testified, Hughes initially opened fire. There was no testimony suggesting Sanders was in this location that night.
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> The jury convicted both defendants on all counts and found true all allegations, including the special circumstance allegation. They were sentenced to life imprisonment without the possibility of parole.

Hughes, 2013 WL 960130, *1-3.

B. Procedural History

Petitioner and Hughes appealed the judgment to the California Court of Appeal. In an unpublished opinion, filed on March 13, 2013, the state appellate court affirmed the judgment. *Id.* at *19; Resp't Ex. 13. The state appellate court further ordered each defendant's terms of life imprisonment to run concurrently rather than consecutively, granted each custody credits, and affirmed the judgments of conviction in all other respects. *See id.* On June 12, 2013, the California Supreme Court denied Petitioner's and Hughes's petitions for review. Resp't Ex. 16.

On August 8, 2014, Petitioner filed a petition for a writ of habeas corpus in the instant matter, along with a motion to stay the petition while he exhausted his state court remedies as to some of his claims.[3] Dkts. 1, 2. On August 29, 2014, the Court granted Petitioner a stay pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). Dkt. 5.

On August 5, 2014, Petitioner filed a state habeas petition in Alameda County Superior Court, which was denied on October 3, 2014. *See* Resp't Ex. 18 (second to last attachment thereto).

On October 27, 2014, Petitioner filed a state habeas petition in the California Court of Appeal, which was denied on November 5, 2014. *See* Resp't Exs. 17, 18 (last attachment thereto).

On November 24, 2014, Petitioner filed a state habeas petition in the California Supreme Court, which was denied on February 11, 2015. *See* Resp't Exs. 18, 19.

On April 10, 2015, Petitioner filed his amended federal petition, which again is the operative petition in this matter. Dkt. 10. On April 17, 2015, this Court issued an order lifting the stay and directing Respondent to show cause why the writ should not be granted. Dkt. 11. Respondent has filed an Answer to the amended petition, and Petitioner has filed a Traverse. Dkts. 20, 21. The matter is fully briefed and ripe for adjudication.

II. LEGAL STANDARD

A federal court may entertain a habeas petition from a state prisoner "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). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed 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

[3] Meanwhile, Hughes filed a separate federal habeas action on January 6, 2015. *See* Case No. C 15-00040 BLF (PR). On January 29, 2016, the Honorable Beth Labson Freeman granted the motion to dismiss filed by Respondent in that matter upon finding that Hughes's petition was untimely under 28 U.S.C. § 2244(d). *See* Dkt. 11 in Case No. C 15-00040 BLF (PR).

the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *see Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong applies to decisions based on factual determinations, s*ee Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of section 2254(d)(1), only 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 Supreme] Court has on a set of materially indistinguishable facts." *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, falling under the second clause of section 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review 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." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *Id.* at 409.

Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *See Miller-El*, 537 U.S. at 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000). Moreover, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Even if constitutional error is established, habeas relief is warranted only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Penry v. Johnson*, 532 U.S. 782, 795-96 (2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)).

On federal habeas review, AEDPA "imposes a highly deferential standard for evaluating state-court rulings" and "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks omitted). In applying the

above standards on habeas review, this Court reviews the "last reasoned decision" by the state court. *See Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). Specifically, when there is no reasoned opinion from the highest state court to consider the petitioner's claims, the court looks to the last reasoned opinion. *Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). Thus, a federal court will "look through" the unexplained orders of the state courts rejecting a petitioner's claims and analyze whether the last reasoned opinion of the state court unreasonably applied Supreme Court precedent. *See Ylst*, 501 U.S. at 804-06; *LaJoie v. Thompson*, 217 F.3d 663, 669 n.7 (9th Cir. 2000). The last reasoned decision in this case is the state appellate court's unpublished disposition issued on March 13, 2013, in which that court considered the first eleven claims from the amended petition. *See* Resp't Ex. 13; *Hughes*, 2013 WL 960130, *1-19.

Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under section 2254(d). *Stanley v. Cullen*, 633 F.3d 852, 860 (9th Cir. 2011). Here, Petitioner presented the remaining two ineffective assistance of counsel ("IAC") claims (Claims Twelve to Thirteen) in his amended petition to the California Supreme Court in a state habeas petition, which the state supreme court summarily denied. *See* Resp't Exs. 18, 19. As such, these claims may be reviewed independently by this Court to determine whether that decision was an objectively unreasonable application of clearly established federal law. *Plascencia v. Alameida*, 467 F.3d 1190, 1197-98 (9th Cir. 2006) ("Because there is no reasoned state court decision denying this claim, we 'perform an independent review of the record to ascertain whether the state court decision was objectively unreasonable.'") (citation omitted); *see Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003) ("Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable."). "[W]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

III. DISCUSSION

A. Insufficiency of Evidence as to Conviction for Aiding and Abetting Murder of Coria (Claim One)

Petitioner contends that insufficient evidence supported his conviction for aiding and abetting the murder of Coria. Dkts. 10 at 5; 10-1 at 15, 126-138.

1. State Court Opinion

The state appellate court described the factual background on this claim and rejected it as follows:

> While neither defendant challenges the sufficiency of the evidence to support his conviction of the murder he was accused of committing personally, each contends the evidence was insufficient to convict him as an aider and abettor of the other defendant's killing.
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> "Principals include those who 'aid and abet' in the 'commission of a crime.' [Citation.] 'Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea.' [Citation.] We have defined the required mental states and acts for aiding and abetting as: '(a) the direct perpetrator's actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime.'" (*People v. Thompson* (2010) 49 Cal. 4th 79, 116-117.) "[A]n aider and abettor must act 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] In other words, an aider and abettor of a specific intent crime shares the perpetrator's specific intent when he or she knows of the perpetrator's criminal purpose and aids, promotes, encourages, or instigates the perpetrator with the intent of encouraging or facilitating the commission of the crime." (*People v. Houston* (2012) 54 Cal. 4th 1186, 1224.) To incur aider and abettor liability, the defendant's knowledge of the intent of the perpetrator and his or her own intent to assist must be formed before or during the commission of the crime. (*People v. Williams* (1997) 16 Cal. 4th 635, 675.)
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> "'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence . . . . "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding."

[Citation.] We do not reweigh evidence or reevaluate a witness's credibility.'" (*People v. Houston*, *supra*, 54 Cal. 4th at p. 1215.) "Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction. [Citations.] 'Whether the evidence presented at trial is direct or circumstantial, . . . the relevant inquiry on appeal remains whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.'" (*People v. Bloom* (1989) 48 Cal. 3d 1194, 1208.)

Both defendants argue there is no evidence to support a finding they were aware of each other's intent prior to the killings. While we agree there is no direct evidence of their knowledge, there was sufficient circumstantial evidence to allow the jury to conclude beyond a reasonable doubt that defendants were acting according to a preexisting plan to cooperate in the killing of Harris and Coria. The defendants were longtime acquaintances, and both had suffered harassment in their attempts to sell drugs in the neighborhood of 45th Avenue and Bancroft Avenue by Harris's aggressive defense of his claimed territory.[FN 6] There was direct evidence Sanders had formed the intent to shoot Harris well before he confronted him on the sidewalk. The conversation in which Sanders said he needed his gun occurred over an hour prior to the killing. Sanders's warning to the occupants of S.C.'s mother's apartment just prior to the shooting confirmed that intent. Sanders then shot Harris in plain view of Harris's colleague, Coria, and immediately bent over and searched Harris's pockets, apparently unconcerned about the prospect of retaliation from Coria. Instantly after Sanders shot Harris, Hughes came from a relatively hidden location, yet near an open gate, well-positioned to shoot Coria as he was running away. To allow such a prompt reaction, Hughes's gun must have been loaded and ready for firing as Sanders and Harris argued.

[FN 6:] We agree with defendants there was no evidence to suggest they were dealing drugs in concert. There was evidence, however, that both had been frustrated at times by Harris's attempts to monopolize the drug trade in the neighborhood.

If one accepts S.C.'s testimony, which was "reasonable, credible and of solid value," any interpretation of the evidence other than concerted action was implausible. To find defendants were acting independently, the jury would have had to conclude Hughes coincidentally happened to be standing behind the fence with a loaded gun in his hand when Sanders began to argue with Harris. Unless Hughes was anticipating trouble between Sanders and Harris, there was no reason for him to have his gun prepared for firing, let alone to be standing in a comparatively hidden location near the two arguing men. Given the speed with which he reacted to the Harris shooting, the conclusion is nearly inescapable that Hughes was anticipating it.

Hughes also argues there was no evidence to establish an act on his part to assist Sanders in killing Harris. As suggested above, however, the jury could have concluded Hughes placed himself behind the fence, gun loaded and ready, to make sure Coria did not interfere in the killing, retaliate against Sanders afterward, or serve

> as a witness to the killing. In turn, Sanders's killing of Harris allowed Hughes to act aggressively against Coria without concern for interference from Harris.
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> Sanders claims the evidence shows the shootings were spontaneous and unrelated, nothing more than "an outburst of shootings amidst a group of mostly armed and intoxicated friends and associates all involved with drugs, including an apparent bully engaged in another outburst." As discussed above, however, Sanders's conduct prior to the killing suggested his shooting of Harris was anything but spontaneous, and Hughes's positioning and his quick response to the Harris shooting also defeat the conclusion his shooting of Coria was unrelated to Sanders's crime.
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> In arguing for an absence of evidence of prior intent, Sanders relies heavily on *Juan H. v. Allen* (9th Cir.2005) 408 F.3d 1262 (*Juan H.*). As our Supreme Court has characterized *Juan H.*, "the defendant, a juvenile, was at home with his family when someone fired two shots into the trailer in which he lived. [Citation.] An hour and a half later, the defendant and his brother confronted two men with whom they had a history of conflict at the trailer park, and who were associated with a rival gang. [Citation.] The defendant's brother asked the two men whether they had fired the shots, and the men replied they knew nothing about the incident. [Citation.] The defendant's brother then pulled out a shotgun and fired at both men, killing one of them. [Citation.] [¶] The Ninth Circuit granted Juan H.'s federal petition for writ of habeas corpus, ruling that the record contained insufficient evidence to support the conclusions that Juan H. knew his brother planned to commit the first degree murders or that Juan H. acted in a way intended to encourage or facilitate the killings. [Citation.] The court further held that, even assuming the element of knowledge, the record contained no evidence that Juan H. did or said anything before, during or after the shooting from which a reasonable fact finder would infer a purpose to aid and abet in the murders. [Citation.] Specifically, the court held no reasonable fact finder could conclude that by standing, unarmed, behind his brother, Juan H. provided 'backup,' in the sense of adding deadly force or protecting his brother, in a deadly exchange." (*People v. Gonzales and Soliz* (2011) 52 Cal. 4th 254, 296-297.)
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> In contrast to *Juan H.*, there was ample circumstantial evidence here, as discussed above, from which the jury could conclude the defendants were aware of each other's intent prior to the shootings. Further, they could readily be found to have provided "backup," each eliminating a potentially deadly threat to the other.
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> Finally, Sanders argues the evidence was insufficient to demonstrate he harbored the specific intent to kill Coria necessary to support a finding of multiple murder special circumstances. For the reasons discussed above, the evidence was sufficient to demonstrate the necessary intent.

Hughes, 2013 WL 960130, *3-5 (footnotes 5 and 7 omitted; footnote 6 in original).

2. Applicable Federal Law

The Due Process Clause "protects the accused against conviction except upon proof 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 his state conviction cannot be characterized fairly as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt states a constitutional claim, which, if proven, entitles him to federal habeas relief. *Jackson v. Virginia*, 443 U.S. 307, 321, 324 (1979).

A federal court reviewing a state court conviction collaterally does not determine whether it is satisfied that the evidence established guilt beyond a reasonable doubt. *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992). Nor does a federal habeas court in general question a jury's credibility determinations, which are entitled to near-total deference. *Jackson*, 443 U.S. at 326. If confronted with a record that supports conflicting inferences, a federal habeas court "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* 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.'" *Payne*, 982 F.2d at 338 (quoting *Jackson*, 443 U.S. at 319). Only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt, may the writ be granted. *Jackson*, 443 U.S. at 324.

The Supreme Court has emphasized that "*Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (per curiam). In reviewing habeas petitions, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Id.* (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010)). Thus, after AEDPA, a federal habeas court applies the standards of *Jackson* with an additional layer of deference. *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). To grant relief, a federal habeas court must conclude that "the state court's determination that a rational jury

could have found that there was sufficient evidence of guilt, i.e., that each required element was proven beyond a reasonable doubt, was objectively unreasonable." *Boyer v. Belleque*, 659 F.3d 957, 965 (9th Cir. 2011).

Sufficiency of the evidence claims are reviewed with reference to the substantive elements of the criminal offense as defined by the state law. *Jackson*, 443 U.S. at 324 n.16.

3. Analysis

Petitioner has failed to demonstrate that the state appellate court's determination was an unreasonable application of Supreme Court authority. The state appellate court correctly noted that an abundance of evidence existed supporting Petitioner's conviction as an aider and abettor to Coria's murder.

As mentioned above, the state appellate court noted that the intent element for aiding and abetting liability under California law requires "knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends . . . ." *Hughes*, 2013 WL 960130, *3. The court found "sufficient circumstantial evidence" in the record that Petitioner had such knowledge and intent. *Id.* at *4. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that Petitioner foresaw Hughes's deliberate and premeditated shooting of Coria. Thus, the state appellate court reasonably found that Petitioner and Hughes were "acting according to a preexisting plan to cooperate in the killing of Harris and Coria." *Id.* The evidence displayed that Harris and Coria were in a turf war over illegal drug sales with Petitioner and Hughes, who were "longtime acquaintances." *Id.* The evidence also demonstrated that Petitioner and Hughes planned the shootings beforehand and acted in concert to eliminate their competition. Both men armed themselves and went to an area where Harris and Coria were located, with Hughes waiting in a "relatively hidden location" nearby. *Id.* Before the shooting, Petitioner warned his friends to stay inside their apartment, which overlooked the murder scene. After Petitioner shot Harris in Coria's presence, he began rifling through Harris's pockets, apparently unconcerned that Coria—Harris's associate—had just witnessed the murder and might try to attack him or escape. Within seconds of Petitioner shooting Harris, Hughes came out of his hiding spot and shot Coria as he tried to flee.

Petitioner's conduct demonstrates he had prior knowledge that Hughes would shoot Coria after Petitioner shot Harris, and that Petitioner intended to assist Hughes in killing Coria by killing Harris first. Based on this evidence, a rational juror could have found the requisite intent to support the finding that Petitioner was guilty as an aider and abettor of Coria's murder.

The state appellate court further found unavailing Petitioner's argument relating to the insufficiency of the evidence as to the multiple-murder special circumstance allegation. *Id.* at *5. For the same reasons outlined above, the state appellate court determined that the evidence was sufficient to demonstrate Petitioner harbored the specific intent to kill Coria necessary to support a finding of a multiple murder special circumstance. *Id.*

In sum, viewing the evidence in the light most favorable to the prosecution, Petitioner has failed to show that no rational trier of fact could have found proof supporting Petitioner's conviction as an aider and abettor to Coria's murder. *Jackson*, 443 U.S. at 324.

The Court finds objectively reasonable the state appellate court's rejection of Petitioner's due process claim alleging insufficient evidence supporting his conviction for aiding and abetting in the murder of Coria. 28 U.S.C. § 2254(d)(1). Accordingly, Petitioner is not entitled to habeas relief on this claim, and Claim One is DENIED.

B. Right to Confrontation - *Bruton*[4] and *Crawford*[5] Error (Claim Two)

Petitioner contends that his Sixth Amendment right to confront a witness against him—or in this case, not a witness but his co-defendant Hughes—was violated when the trial court admitted a statement by Hughes and refused to redact Petitioner's name. Dkt. 10-1 at 16-17. In support of this proposition, he cites *Bruton v. United States*, 391 U.S. 123, 126, 135-36 (1968) and *People v. Aranda*, 63 Cal. 2d 518, 530 (1965). Petitioner claims the unredacted statement by Hughes implicated Petitioner as a perpetrator and the limiting instruction given was "presumptively insufficient *Aranda/Bruton* to limit their substantive inculpatory use under the circumstances . . . ." Dkt. 10-1 at 16. Petitioner also contends that the unredacted statement was

[4] *Bruton v. United States*, 391 U.S. 123 (1968).

[5] *Crawford v. Washington*, 541 U.S. 36 (2004)

testimonial hearsay barred by *Crawford*. *Id.*

1. State Court Opinion

The state appellate court gave the following background and rejected this claim as follows:

> ***1. Evidence of Hughes's Jailhouse Call***
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> The prosecution questioned S.C. about a telephone call he received around the time of the preliminary hearing in this matter. S.C. testified that he was called at home, prior to finishing his preliminary hearing testimony. Although the caller identified himself as "Lou," Sanders's nickname, S.C. recognized Hughes's voice. As S.C. characterized it, Hughes told him "to tell everybody that he had nothing to do with it." Prior to S.C.'s testimony about the substance of this call, the court had instructed the jury that the evidence could be considered only in connection with Hughes, not Sanders. The court had earlier denied a motion by Sanders's counsel alternatively for severance or to redact the reference to "Lou" under Evidence Code section 352.
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> Sanders argues the trial court, in refusing to sever or redact the reference to "Lou," erred and denied him due process and the right of confrontation under *People v. Aranda* (1965) 63 Cal. 2d 518 (*Aranda*), partially abrogated by constitutional amendment as stated in *People v. Fletcher* (1996) 13 Cal. 4th 451, 465, *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*), and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).
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> *Aranda* and *Bruton* effectively prohibit the introduction in a joint criminal trial of a statement by one codefendant that "inculpates" (*Bruton*, *supra*, 391 U.S. at p. 137) or "implicates" (*Aranda*, *supra*, 63 Cal. 2d at p. 530) the other defendant. In both cases, one defendant confessed to a law enforcement officer that he and the other defendant committed the crimes of which they were jointly accused. (*Bruton*, at p. 124; *Aranda*, at p. 522.)
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> We find *Bruton* and *Aranda* inapplicable here because Hughes's identification of himself as Sanders did not in any way inculpate or implicate Sanders in the killings. Hughes did not say or even suggest that Sanders had committed the crimes. He merely falsely identified himself as Sanders in a telephone call relating to the crimes. The misidentification did not even, as Sanders contends, confirm Hughes's prior acquaintance with Sanders, since by the time of the telephone call the two had been named in the same information. In any event, when the statement does not directly implicate a codefendant, a limiting instruction may be sufficient to prevent undue prejudice. (*People v. Fletcher* (1996) 13 Cal. 4th 451, 468.) Here, it was.
>
> Nor, for two reasons, is *Crawford* applicable. *Crawford* precludes the admission of an out-of-court "testimonial" statement when the declarant is unavailable for cross-examination. (See *People v. Lopez* (2012) 55 Cal. 4th 569, 576 (*Lopez*).) Although *Crawford* did not attempt to define a "testimonial" statement, it suggested the rule

> applies when the statement was "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Crawford*, *supra*, 541 U.S. at p. 52.) While the court's subsequent attempts to define this concept have lacked unanimity (see *Lopez*, at pp. 576-582), the court appears to agree that "to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity," normally because it is made in the course of a criminal investigation or prosecution (*id.* at p. 581). While it is possible, as Sanders contends, Hughes was aware his telephone call was being recorded and would be available for trial, his statement to S.C. was not made "with some degree of formality or solemnity" and is therefore not covered by the rule of Crawford. In addition, Crawford does not restrict the use of statements for a nonhearsay purpose. (*People v. Livingston* (2012) 53 Cal. 4th 1145, 1163-1164 (*Livingston*).) Here, the only hearsay use of the statement would have been to prove that Sanders was the caller, contrary to the prosecution's theory. Accordingly, its nonhearsay use here was not prohibited by *Crawford*.
>
> Further, we find no error in the trial court's decision not to redact the reference to "Lou" from Hughes's statement. Evidence can be excluded under Evidence Code section 352 if its probative value is "'substantially outweighed'" by the potential for undue prejudice or confusion. (*People v. Riccardi* (2012) 54 Cal. 4th 758, 808-809.) We review a trial court's decision not to exclude evidence under section 352 for abuse of discretion. (*Riccardi*, at p. 809.) We find no abuse. Hughes's use of the name "Lou" was probative because it connected the call to the pending preliminary hearing and demonstrated Hughes's attempt to deceive, perhaps because he was aware the call could be recorded. The potential for undue prejudice was minimal because the misidentification did not tie Sanders to the crimes in any overt way, S.C. testified unequivocally the caller was Hughes, and the trial court gave a limiting instruction.
>
> Even if we did not reach the foregoing conclusions, we would find no basis for reversing the judgment on the basis of the trial court's admission of Hughes's reference to "Lou" because it was harmless. As discussed above, Hughes's use of the name did little or nothing to implicate Sanders in the killings. At most, the reference suggested a prior relationship between Hughes, Sanders, and S.C., but there was other uncontested evidence that these three knew each other prior to the shootings. As a result, admission of the evidence was harmless under the standards of both *Chapman* and *Watson*.

Hughes, 2013 WL 960130, *9-10 (footnote omitted).

2. Applicable Federal Law

The Confrontation Clause of the Sixth Amendment provides that in criminal cases the accused has the right to "be confronted with the witnesses against him." U.S. Const. amend. VI. The ultimate goal of the Confrontation Clause is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. *Crawford*, 541 U.S. at 61. It commands, not for

evidence to be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Id.* The Clause thus reflects a judgment, not only about the desirability of reliable evidence, but about how reliability can best be determined. *Crawford*, 541 U.S. at 61.

The Confrontation Clause applies to all "testimonial" statements. *See Crawford*, 541 U.S. at 50-51. "Testimony . . . is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51 (internal quotation, brackets, and citation omitted); *see id.* ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). The Confrontation Clause applies not only to in-court testimony but also to out-of-court statements introduced at trial, regardless of the admissibility of the statements under state laws of evidence. *Id.* at 50-51.

Furthermore, the use of the out-of-court confession (or inculpatory statements) of a co-defendant who did not testify at trial violates the non-confessing defendant's right of cross-examination secured by the Confrontation Clause. *Bruton*, 391 U.S. at 134-37 (1968). Such a violation is not cured by a jury instruction that the confession should be disregarded in determining the non-confessing defendant's guilt or innocence. *Bruton*, 391 U.S. at 134-37 (1968). *Bruton* error, however, does not require reversal "'if the other evidence of guilt was overwhelming and the prejudice to the defendant from his co-defendant's admission slight by comparison.'" *Id.* (quoting *United States v. Guerrero*, 756 F.2d 1342, 1348 (9th Cir.)); *see United States v. Gillam*, 167 F.3d 1273, 1277 (9th Cir. 1998) (finding *Bruton* error where co-defendant's redacted admission clearly implicated defendant, but finding error harmless because of strength of government's case against defendant).

3. Analysis

As explained above, the state appellate court denied Petitioner's claims of *Bruton* and *Crawford* errors on the grounds that admission of Hughes's unredacted statement was harmless beyond a reasonable doubt. *Hughes*, 2013 WL 960130, *9-10. Such a ruling was not "contrary to" clearly established federal law. *See* 28 U.S.C. § 2254(d)(1)(a). Claims under *Bruton* and *Crawford* are subject to harmless error analysis. *See United States v. Rashid*, 383 F.3d 769, 775-

77 (8th Cir. 2004) (applying harmless error analysis to claim of *Bruton* error after *Crawford*), *sentence vacated on Booker grounds sub nom. Abu Nahia v. United States*, 546 U.S. 803 (2005); *United States v. Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004) (applying harmless error analysis to *Crawford* claim). The proper standard for harmless error on direct review is whether the error was harmless beyond a reasonable doubt. *Id.*

The record shows that S.C. testified at trial that when he was preparing to return for the preliminary hearing, he received a telephone call from Hughes. 5RT 650, 653; Resp't Exs. 3A, 3F. S.C. recognized Hughes's voice. 5RT 651, 653. They had a brief conversation. 5RT 652. Hughes identified himself as "Lou" and advised S.C. to tell the court that he had nothing to do with the murders. 5RT 654. S.C. notified the District Attorney's office about the telephone call. 5RT 652.

Hughes did not discuss the details of the murders with S.C., nor did he confess or implicate either himself or Petitioner during the conversation. Rather, he tried to persuade S.C. to tell the court that he had nothing to do with the murders. He did not attempt to shift blame to Petitioner during the call. While he may have identified himself as "Lou" during the call, S.C. testified that it was Hughes, not Petitioner on the phone. Further, the evidence of the call was admitted only against Hughes, and the trial court gave the jury a limiting instruction to ensure that it did not improperly consider the evidence against Petitioner. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (observing that the "rule that juries are presumed to follow their instructions" applies in cases that do not involve a "facially incriminating confession" as in *Bruton*).

The state appellate court found that Hughes's identification of himself as "Lou" during the phone call to S.C. did not directly implicate Petitioner in the murders of Harris and Coria. *Hughes*, 2013 WL 960130, *9. Further, the state appellate court found no *Crawford* error based on two reasons: (1) Hughes's use of Petitioner's name was not submitted for the truth of the matter asserted but rather for a non-hearsay purpose, and, (2) Hughes's false identification of himself did not constitute a testimonial statement. *Id.* at *10. The state appellate court additionally found that, even assuming federal constitutional error occurred, it was harmless. *Id.* at *9-10. Such conclusions were not objectively unreasonable.

In light of the relatively minor nature of the reference, any potential harm that it caused was cured by the trial court's limiting instruction that statements made by Hughes could only be considered against him and not against Petitioner. *See Fields v. Brown*, 503 F.3d 755, 787 (9th Cir. 2007) (jurors are presumed to follow the trial court's instructions). Finally, given the overwhelming evidence of Petitioner's guilt, Hughes's use of Petitioner's name during his phone call to S.C. was not prejudicial to Petitioner's case. On this record, this Court finds that any error was harmless because it did not have a "substantial and injurious effect or influence in determining the jury's verdict." *See Brecht*, 507 U.S. at 638. Accordingly, Petitioner is not entitled to habeas relief on this claim, and Claim Two is DENIED.

C. Claim Related to Photograph Inscriptions (Claim Three)

Petitioner contends that the trial court violated his constitutional rights by admitting into evidence notations on the backs of photographs identifying S.C. as a witness who had "seen it all" and Petitioner as a "suspect." Dkts. 10 at 5; 10-1 at 18-19, 154-160.

1. State Court Opinion

The state appellate court gave the factual background on this claim and rejected it on appeal as follows:

> On the day following S.C.'s testimony, the prosecution called Oakland Police Sergeant George Phillips to testify about the investigation. In the days immediately after the killings, the police had not located any eyewitnesses and had not identified any suspects. A week after the killings, Phillips received a telephone call from a San Francisco police officer about a potential witness. Over a defense objection and subject to a limiting instruction that the testimony could not be considered for the truth of the matter asserted, Phillips testified the officer gave him the names of S.C. and his mother. Phillips then described his investigation over the next few days, interviewing S.C.'s mother and tracking down additional witnesses. Because S.C.'s mother told him S.C. was in the closet when the shooting occurred, Phillips did not focus on S.C. Two weeks after the killings, Phillips found on his desk an envelope from the same San Francisco police officer. In the envelope were four pictures. Two were of S.C.'s mother, and one was of S.C. Again over a defense objection and subject to the same limiting instruction, Phillips testified that, on the back of the photograph of S.C., was written, "The little boy that seen it all." The back of the fourth photograph, which turned out to be of Sanders, was inscribed, "suspect." Phillips testified he used these photographs to develop further witnesses and information. When, two months later, S.C.'s mother was arrested, Phillips used the leverage resulting from the

arrest to persuade her to admit S.C. witnessed the shootings.

Sanders contends admission of the text of the notations on the backs of the two photographs, identifying S.C. as a witness and himself as a suspect, violated *Crawford*, denied him due process, and constituted legal error.

As noted above, *Crawford* precludes the admission of an out-of-court "testimonial" statement when the declarant is unavailable for cross-examination. To qualify as a testimonial, the statement must have been made with some degree of formality or solemnity. (*Lopez, supra*, 55 Cal. 4th at p. 581.) Because there was no information provided about the anonymous, handwritten notations, other than that they found their way into the hands of a San Francisco police officer not otherwise involved in the investigation, we have no basis for finding they were made with the necessary formality or solemnity to qualify as "testimonial" under *Crawford*. In any event, "'there are no confrontation clause restrictions on the introduction of out-of-court statements for nonhearsay purposes.'" (*Livingston, supra*, 53 Cal. 4th at pp. 1163-1164.) As discussed below, these inscriptions were admitted only for nonhearsay purposes. Nor, as also discussed below, do we agree with Sanders's contention that the notations were "pivotal" evidence, making their admission a violation of due process. (*Id*. at p. 1163.)

We review the trial court's decision to admit the potential hearsay evidence under a limiting instruction for abuse of discretion. (*People v. Waidla* (2000) 22 Cal. 4th 690, 722-723.) The texts were, of course, inadmissible hearsay only to the extent they were admitted for the purpose of proving the truth of the inscriptions. They could properly be admitted for a nonhearsay purpose, such as, in this case, explaining conduct. (*See Livingston, supra*, 53 Cal. 4th at p. 1162 [""""The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement""""].) The facts sought to be proved, the course and explanation for the officer's investigation, were relevant, and the trial court sought to mitigate any undue prejudice by giving the instruction limiting their use to nonhearsay purposes.

Further, the potential for undue prejudice was minimal. Although Sanders characterizes this evidence as "key" and "[going] to the heart of the defense," it was anything but. The inscriptions provided no information about the crimes themselves. They merely suggested one person was a witness to the crime and characterized a defendant was a "suspect." Further, the inscriptions were anonymous, and there was no testimony about their author or authors or the circumstances of their genesis. Even in the absence of the limiting instruction, the jury had no reason to believe the inscriptions were reliable or to give them any evidentiary weight, and no claim was made that the jury should do so. They were simply presented to explain the course of the investigation. Under these circumstances, we find no abuse of discretion.

In any event, admission of the texts from the photographs was harmless under both the *Chapman and Watson* tests. As to the

> reference to S.C. having "seen it all," any bolstering of S.C.'s testimony would have been minimal. The inscription was anonymous, and there was no explanation of why the author believed S.C. to have been a witness. On that ground alone, it would have been given little weight. More important, the jury was able to evaluate the credibility of S.C.'s testimony for itself in viewing his testimony. As to the description of Sanders as a "suspect," it would have had a similarly minimal impact, since the jury was presented with ample evidence relating directly to Sanders's commission of the crimes.

Hughes, 2013 WL 960130, *10-11.

2. Applicable Federal Law

As mentioned above, the Sixth Amendment right to confront witnesses applies to any "testimonial" statements, whether sworn or unsworn, and to both in-court testimony and out-of-court statements introduced at trial. *Crawford*, 541 U.S. at 51-52. However, not all interrogations by law enforcement officers are subject to the Confrontation Clause. *See Michigan v. Bryant*, 562 U.S. 344, 354 (2011). "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

Evidence admitted for a non-hearsay purpose does not implicate the Confrontation Clause. *Crawford*, 541 U.S. at 59 n.9; *Tennessee v. Street*, 471 U.S. at 414 (no Confrontation Clause concerns were raised by the admission of co-defendant's confession for the non-hearsay purpose of rebutting defendant's assertion that his own confession was a "coerced imitation" of co-defendant's confession); *Moses v. Payne*, 555 F.3d at 755-56 (no Confrontation Clause issue where social worker reported spousal abuse under mandatory reporting law, and statements were introduced for non-hearsay purpose of explaining why she contacted Child Protective Services); *United States v. Mitchell*, 502 F.3d at 966 ("Testimony by a patrol officer about information [] eyewitnesses gave her about the car parked at the Trading Post was offered as a basis for action, not for its truth.").

On federal habeas review of a due process claim, the question is whether the admission of the challenged evidence was so prejudicial in the context of the trial as to render the conviction unfair. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). "A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." *Boyde v. Brown*, 404 F.3d 1159, 1172 (9th Cir. 2005). "Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991) (emphasis in original).

3. Analysis

As explained above, the state appellate court concluded that there was no evidence to show that the notations on the backs of the photographs qualified as testimonial under *Crawford*. *Hughes*, 2013 WL 960130, *11. Such a conclusion was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. *See, e.g.*, *Bryant*, 562 U.S. at 370 ("when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the 'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs."). Furthermore, such a conclusion did not preclude the state appellate court's determination that no *Crawford* error occurred. *See id.*

The state appellate court found that the notations were offered for a nonhearsay purpose rather than for the truth of the matter asserted, and concluded that their admission therefore did not violate *Crawford*. *See id.* Such a finding by the state appellate court was objectively reasonable, based on clearly established Supreme Court law, *see Crawford*, 541 U.S. at 59 n.9; *Tennessee v. Street*, 471 U.S. at 414, and the record before it. Here, the record shows that the prosecutor questioned the primary investigator, Sergeant Phillips, about the progress of the murder investigation. 6RT 790. Sergeant Phillips testified that he was contacted by San Francisco Police Officer McMillan about a potential suspect and a potential witness. 6RT 790. The prosecutor asked the investigator about the identity of the witness provided by the other officer, as a means of explaining the investigator's subsequent conduct, and the defense objected. 6RT 790. The trial court overruled a defense objection, instructing the jury that the testimony was admitted for a

limited purpose:

> I'm going to permit it but not for the truth of the matter stated. This is evidence that's offered for a limited purpose. The purpose of this information is so that you can understand why the witness did what he did in his investigation related to this.
>
> It's not to be considered for the truth of whether that person is a witness or not, just simply to explain the officer's actions. I'm directing you to consider this particular piece of evidence for that limited purpose.

6RT 791. Sergeant Phillips explained that he then decided to speak with S.C.'s mother based on the aforementioned information, as well as to conduct a review of the police interviews from the day of the murder and a conversation with Harris's father. 6RT 791-793, 795-796. Sergeant Phillips further testified that he received photographs in the mail from Officer McMillan, and that there was writing on the back of the photographs. 6RT 800-802. There were two photos of S.C.'s mother, a photograph of S.C., and a photograph labeled "suspect." 6RT 801-804. The defense objected to the described writings. 6RT 802-803. The trial court sustained the hearsay objection but permitted testimony to explain the subsequent conduct of the investigator, and instructed the jury that the information was only relevant to why the investigator proceeded as he did:

> THE COURT: Okay, this evidence can be considered by you for a limited purpose. Not the truth of what might be written on the back of the photo, not whether it's true or not, but whether it caused the officer to focus his investigation in a certain way, whether it explains that. You can't consider it for the truth because whoever wrote this thing on there we don't have that witness, but you can consider it for its effect on Sergeant Phillips and what he might have done next. For that limited purpose you may consider it, but not for the truth of the matter written on the back.

6RT 803. Given the purpose for which the testimony was offered—i.e., as an explanation for Sergeant Phillips's conduct during his investigation, as well as the inclusion of limiting instructions making such purpose explicit to the jury—the state appellate court did not unreasonably conclude that the writings on the back of the photographs were admitted for a nonhearsay purpose.

The state appellate court also was objectively reasonable in concluding that the admission of the evidence did not violate due process. *Hughes*, 2013 WL 960130, *11. The jury could draw a permissible inference from the evidence: it outlined the course of Sergeant Phillips's

investigation and explained why it progressed the way that it did. Accordingly, this was not an instance in which no permissible inference could be drawn from the evidence. *See Jammal v. Van de Kamp*, 926 F.2d at 920.

Finally, the state appellate court's conclusion that any error was harmless was not objectively unreasonable, nor was there any prejudice under *Brecht*. *See Hughes*, 2013 WL 960130, *11. Sergeant Phillips determined that S.C. and his mother were witnesses based on his own interaction with them, not based on the preliminary means by which he located them. Further, both witnesses testified at trial, permitting the jury to evaluate their veracity. Thus, Petitioner was not prejudiced by the limited admission of testimony relating to these witnesses. Accordingly, Petitioner is not entitled to habeas relief on this claim, and Claim Two is DENIED.

D. Jury Instruction Claims (Claims Four to Eight, Eleven)

Petitioner raises the following claims of instructional error due to the trial court's: (1) failure to instruct the jury that in order for the multiple murder special circumstance to apply to him he had to kill or intend to kill both victims in fact (Claim Four); (2) erroneous instructions on accomplice liability, which failed to explain to the jury how to determine the degree of murder with respect to an accomplice and instead indicated automatic liability for first degree murder (Claim Five); (3) failure to instruct *sua sponte* on voluntary manslaughter based on unreasonable self-defense (Claim Six); (4) erroneous instruction that flight could be considered as evidence of a consciousness of guilt (Claim Seven); and (5) erroneous reasonable doubt instruction (along with the prosecutor's argument on reasonable doubt) violated Petitioner's right to due process (Claim Eight). Dkt. 10-1 at 20-34. Lastly, Petitioner joined codefendant Hughes's argument on direct appeal that the trial court violated due process by giving a one-sided post-crime conduct instruction (Claim Eleven). *Id.* at 42-44, 203.

1. Applicable Federal Law

A determination that a reasonable likelihood exists that the jury has applied the challenged instruction in a way that violates the Constitution establishes only that an error has occurred. *Calderon v. Coleman*, 525 U.S. 141, 146 (1998). The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record.

Estelle v. McGuire, 502 U.S. 62, 72 (1991); *Duckett v. Godinez*, 67 F.3d 734, 745 (9th Cir. 1995).

Due process requires that "'criminal defendants be afforded a meaningful opportunity to present a complete defense.'" *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir. 2006) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Therefore, a criminal defendant is entitled to adequate instructions on the defense theory of the case. *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 2000). However, due process does not require that an instruction be given unless the evidence supports it. *Hopper v. Evans*, 456 U.S. 605, 611 (1982); *Menendez v. Terhune*, 422 F.3d 1012, 1029 (9th Cir. 2005). The defendant is not entitled to have jury instructions raised in his or her precise terms where the given instructions adequately embody the defense theory. *United States v. Del Muro*, 87 F.3d 1078, 1081 (9th Cir. 1996).

"Even if there is some 'ambiguity, inconsistency, or deficiency' in [a jury] instruction, such an error does not necessarily constitute a due process violation." *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting *Middleton v. McNeil*, 541 U.S. 433, 437 (1977)). "Rather, the defendant must show both that the instruction was ambiguous and that there was "'a reasonable likelihood'" that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington*, 555 U.S. at 190-91 (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (internal quotation marks and citation omitted); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) ("'[I]t must be established not merely that the instruction is undesirable, erroneous or even "universally condemned," but that it violated some [constitutional right].'").

The omission of an instruction is less likely to be prejudicial than a misstatement of the law. *Walker v. Endell*, 850 F.2d 470, 475-76 (9th Cir. 1987) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)). Thus, a habeas petitioner whose claim involves a failure to give a particular instruction bears an "'especially heavy burden.'" *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th Cir. 1997) (quoting *Henderson*, 431 U.S. at 155).

If an error is found, the court also must determine that the error had a substantial and injurious effect or influence in determining the jury's verdict, *see Brecht*, 507 U.S. at 637, before granting relief in habeas proceedings. *Calderon*, 525 U.S. at 146-47. Under AEDPA, a federal

habeas court need not determine whether the state court's harmlessness determination on direct review, which is governed by the "harmless beyond a reasonable doubt" test set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967), was contrary to or an unreasonable application of clearly established federal law. *Fry v. Pliler*, 551 U.S. 112, 119-20 (2007); *Brecht*, 507 U.S. at 637 (on collateral review, the *Chapman* "harmless beyond a reasonable doubt" standard of prejudice must give way to the less onerous standard of whether the error had a substantial and injurious effect or influence in determining the jury's verdict). However, no case forbids use of the *Chapman* test, and a number of Ninth Circuit cases have used it. *See, e.g.*, *Ponce v. Felker*, 606 F.3d 596, 606 (9th Cir. 2010) (finding no prejudice under *Chapman* and *Brecht*); *Medina v. Hornung*, 386 F.3d 872, 878 (9th Cir. 2004) (in applying the "unreasonable application" clause of § 2254(d)(1), habeas court may determine whether state court's harmless error analysis under *Chapman* was objectively unreasonable).

2. Instructional Error on Multiple-Murder Special Circumstance Allegation (Claim Four)

Petitioner argues that the multiple-murder special circumstance jury instruction violated his right to due process because it failed to specify that the jury had to find that he harbored the intent to kill with respect to the Coria murder. Dkts. 10 at 5; 10-1 at 20, 161-164.

a. State Court Opinion

The California Court of Appeal rejected Petitioner's claim as follows:

> The trial court used CALCRIM Nos. 700, 702, 705, and 721 to instruct the jurors on the requirements for determining the special circumstances allegation. CALCRIM No. 700 explains generally the burden of proof for a special circumstance allegation; CALCRIM No. 705 instructs the jury on the consideration of circumstantial evidence of a defendant's mental state; and CALCRIM No. 721 states that, when a defendant is charged with the special circumstance of having been convicted of more than one murder, the jury must find the defendant has been convicted of at least one charge of first degree murder and a second charge of either first and second degree murder.
>
> The relevant part of CALCRIM No. 702, the focus of Sanders's argument, states, as delivered by the court: "If you decide that a defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance of having been convicted of more than one murder in this case in violation of Penal Code section 190.2[, subdivision] (a)(3), you must also decide

whether the defendant acted with the intent to kill. [¶] In order to prove this special circumstance for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor, the People must prove that the defendant acted with the intent to kill."[FN 15]

[FN 15:] The remainder of the instruction read: "The People do not have to prove that the actual killer acted with the intent to kill in order for this special circumstances to be true. If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find this special circumstances true, you must find that the defendant acted with the intent to kill. [¶] If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that he acted with the intent to kill for the special circumstances [of] having been convicted of more than one murder in this case in violation of Penal Code section 190.2 [, subdivision] (a)(3) to be true. If the People have not met this burden, you must find this special circumstances has not been proved true for that defendant."

Sanders argues CALCRIM No. 702 is inadequate in this context because the jury could have construed the instruction as being satisfied if it found he acted with the intent to kill Harris, without determining his intent with respect to Coria.

Reversal on the basis of an ambiguous jury instruction is required only if "there is [a] reasonable likelihood that the jury misconstrued or misapplied the instruction at issue." (*People v. Romero* (2008) 44 Cal. 4th 386, 416.) We find no reasonable likelihood, considering the instructions as a whole, the jury would have believed Sanders's intent in killing Harris would have satisfied this instruction. As customized for the allegations of this prosecution, the first paragraph of CALCRIM No. 702 anticipates that at least two murders have been presented to the jury. That paragraph states that the instruction applies only if the jury has concluded the "defendant is guilty of first degree murder but was not the actual killer." This immediately takes from consideration a murder as to which the jury found the defendant to be the "actual killer." Only after this narrowing clarification does the instruction state, "In order to prove this special circumstance for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor, the People must prove that the defendant acted with the intent to kill." The instruction's unmistakable reference is to the defendant's intent with respect to the murder in which he or she was not the actual killer. Further, as Sanders concedes, the prosecution argued intent to kill was required for both murders. There was no suggestion the jury could find the special circumstance true without finding Sanders had an intent to kill with respect to both shootings.

The jury was also unlikely to adopt Sanders's suggested construction because it would have rendered CALCRIM No. 702 surplusage in these circumstances. The prosecution's theory of the case was that each defendant personally committed one premeditated murder and was an accomplice with respect to the other murder. On the evidence presented, the jury could not have

> found that each defendant personally committed a murder without also finding he possessed the intent to kill with respect to that murder. Accordingly, if the defendant's intent with respect to that murder was sufficient to permit the jury to find the special circumstance as to the murder for which he acted as an accomplice, there would have been no reason to give CALCRIM No. 702. The requisite intent for the special circumstance allegation would have been satisfied already, without regard to the defendant's intent with respect to the murder for which he acted as an accomplice. The instruction makes sense only if the jury was required to evaluate the defendant's intent with respect to the accomplice murder, separate and apart from his intent regarding the murder he personally committed. This would have been obvious to the jury, precluding their acceptance of Sanders's reading of the instruction. Accordingly, we find no basis for reversal on this ground.[FN 16]
>
> [FN 16:] We also note Sanders failed to object to or seek clarification of the instructions as given. In the absence of a showing the alleged error affected his "substantial rights," the argument is forfeited. (*People v. Valdez*, *supra*, 55 Cal. 4th at p. 151; § 1259.) We have addressed the argument on its merits to preclude any later claim the failure to object constituted ineffective assistance of counsel.

Hughes, 2013 WL 960130, *12-13.

b. Analysis

As an initial matter, the Court notes that this federal claim of instructional error is procedurally barred. A federal court, as a matter of comity and federalism, will not review questions of federal law decided by a state court if the decision also rests on a state law ground that is independent of the federal question and adequate to support the judgment. *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). In cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* at 750. The Ninth Circuit has recognized and applied the California contemporaneous objection rule in affirming denial of a federal petition for procedural default where there was a complete failure to object at trial. *See e.g.*, *Paulino v. Castro*, 371 F.3d 1083, 1092-93 (9th Cir. 2004) (barring review of jury instruction error claim because no contemporaneous objection). Here, the state appellate court pointed out that Petitioner failed to object to or seek clarification of the challenged special

circumstances instructions as given. *Hughes*, 2013 WL 960130, *13, fn. 16. Petitioner's failure to object at trial to the use of CALCRIM Nos. 700, 702, 705, and 721 (to instruct the jurors on the requirements for determining the special circumstances allegation) bars his claim that their use violated his right to due process. However, even if the Court overlooks the procedural default, this claim fails on the merits as discussed next.

The state appellate court was objectively reasonable in finding no merit to Petitioner's argument that CALCRIM No. 702 was inadequate because the jury could have construed the instruction as being satisfied if it found he acted with the intent to kill *Harris*, without determining his intent with respect to *Coria*. *Hughes*, 2013 WL 960130, *12.

First, as part of its evaluation of Petitioner's instructional error claim, the state appellate court listed and implicitly determined that the challenged instructions—including, CALCRIM No. 702—were correct as a matter of state law. *See id.* at *12-13. A state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Hicks v. Feiock*, 485 U.S. 624, 629 (1988). Therefore, the state appellate court's implicit determination—that the challenged instructions were correct as a matter of state law—is binding on this Court. *See id.*

The state appellate court also concluded that there was no "reasonable likelihood" that the jury interpreted CALCRIM No. 702 as Petitioner suggests. *Hughes*, 2013 WL 960130, *12. The first part of CALCRIM No. 702 states that for the jury to find true the multiple-murder special circumstance, the jury would have to determine that Petitioner had in this proceeding been "convicted of *more than one* offense of murder." *Id.* at *12 (emphasis added). Moreover, the jury was further instructed that "[i]n order to prove this special circumstance for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor, the People must prove that the defendant acted with the intent to kill." *Id.* Thus, the instruction's unmistakable reference is to Petitioner's intent with respect to the murder in which he was not the "actual killer." As the state court reasonably found, the instruction was unambiguous on its face, and made it clear that to find Petitioner guilty of the multiple-murder special circumstance, the jury had to find that he harbored the intent to kill with respect to the *Coria* murder, i.e., where he was

not the "actual killer." Indeed, the instruction plainly states that if the jury found the defendant guilty of first degree murder under an aiding and abetting theory, then to find the special circumstance true, it had to find that the defendant harbored the requisite intent to kill with respect to the murder he aided and abetted. Contrary to Petitioner's claim, the language of CALCRIM No. 702 did not suggest that the jury could avoid the determination of intent as to any victim for which the defendant was an aider or abettor.

Additionally, the state appellate court reasonably concluded that the prosecutor's argument reinforced this plain reading of the instruction. In his argument to the jury, the prosecutor emphasized that in order to return a true finding on the special circumstance allegation, the jury had to find that Petitioner acted with the intent to kill with respect to the Coria murder. 8RT 955-957.

Moreover, given the evidence at trial, the prosecution's theory of the case, and the instructions as a whole, the state appellate court reasonably found no reasonable likelihood the jury would have accepted Petitioner's interpretation of the instruction. This was a case in which each defendant personally committed one murder and aided and abetted a second, and other instructions made it clear that the jury had to find an intent to kill with respect to the murders personally committed by each defendant in order to find them guilty of those murders. Thus, as the state appellate court correctly noted, there would have been no need to give CALCRIM No. 702 if Petitioner's interpretation of the instruction were accepted as true, i.e., that the jury had to find intent to kill only with respect to the killing personally committed by the defendant in order to find the special circumstance true. Under these circumstances, there was no reasonable likelihood the jury would have interpreted the instruction in such a way as to make it superfluous, and the state appellate court's conclusion in this regard was not objectively unreasonable.

Finally, given the evidence at trial and the prosecution's theory of the case, which showed that Petitioner and Hughes together planned, prepared for, and executed the murders of Harris and Coria, any instructional error did not have a substantial or injurious effect or influence in determining the jury's verdict with regard to the special circumstance under *Brecht*. Accordingly, Petitioner is not entitled to habeas relief on this claim, and Claim Four is DENIED.

3. Instructional Error on Accomplice Liability (Claim Five)

Petitioner contends that the trial court gave "incomplete" and "ambiguous" accomplice liability instructions, which "said nothing whatsoever about personal premeditation; how to determine the degree of murder for a nonkiller; or whether an accomplice may be guilty of a lesser (or greater) offense than the perpetrator." Dkts. 10 at 5; 10-1 22. Petitioner's arguments turn on the contention that he was not involved in the killing of Coria, only the killing of Harris. Dkts. 10 at 5; 10-1 at 21-23, 165-170.

a. State Court Opinion

The California Court of Appeal ruled on Petitioner's claim as follows:

> With respect to accomplice liability, the trial court gave CALCRIM Nos. 400 and 401. The latter states the four general requirements of aiding and abetting liability, including the defendant's prior knowledge of the perpetrator's intent to commit the crime and the defendant's own intent to aid and abet the commission of the crime. The instruction effectively repeats the intent requirement in a sentence stating that a person aids and abets a crime "if he or she knows of the perpetrator's unlawful purpose" and "specifically intends to" aid the perpetrator's commission of "that crime." Immediately thereafter, the trial court delivered CALCRIM Nos. 500, 520, and 521, regarding homicide and the elements of first and second degree murder.
>
> Sanders contends the trial court's instructions on accomplice liability were inadequate because they "indicate[d] automatic guilt of whatever (premeditated) crime the perpetrator commits without regard to whether the accomplice acted with something less than the perpetrator's premeditation." Sanders relies on recent decisions that criticize the standard jury instructions on aiding and abetting for failing to make clear that an aider and abettor's criminal liability must be judged by the aider and abettor's own mental state, not the mental state of the perpetrator. (*See People v. Nero* (2010) 181 Cal. App. 4th 504, 513-517 (*Nero*); *People v. Samaniego* (2009) 172 Cal. App. 4th 1148, 1164-1165 (*Samaniego*).) As these cases point out, in some circumstances an accomplice may be guilty of a lesser or greater crime than the perpetrator because of differences in their respective mental states. While the CALCRIM instructions no longer preclude such a result, they do not expressly address the possibility, either.[FN 8]
>
> [FN 8:] The specific problem identified in *Nero* and *Samaniego* was a phrase in CALCRIM No. 400 stating that a defendant is "equally" guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator who committed it. (*Nero, supra*, 181 Cal. App. 4th at p. 517; *Samaniego, supra*, 172 Cal. App. 4th at p. 1163.) At some point the word "equally" was deleted from CALCRIM No. 400, and the trial court used the updated version of the instruction. (*See* 1 Judicial Council of Cal., Jury Instns. (2012)

CALCRIM No. 400, p. 167.) The specific issue from those cases was therefore not present here.

Hughes makes a similar argument, contending the court's accomplice liability instructions permitted the jury to find him guilty of the killing of Harris without a finding he acted with the intent to kill Harris.[FN9]

[FN 9:] Sanders and Hughes failed to object or seek clarification of the instructions as given. In the absence of a showing the alleged error affected their "substantial rights," their arguments are forfeited. (*People v. Valdez* (2012) 55 Cal. 4th 82, 151; § 1259.) We address the argument on its merits to preclude any claim the failure to object constituted ineffective assistance of counsel.

We decline to weigh in on the controversy over the CALCRIM instructions because, in this case, any deficiency in the standard instructions was harmless under both *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) (harmless beyond a reasonable doubt) and *People v. Watson* (1956) 46 Cal. 2d 818, 836 (*Watson*) (reasonable probability of a more favorable outcome), for the same reasons it was found harmless in *Samaniego*. As in *Samaniego*, the jury was instructed with the murder and special circumstances multiple-murder instructions. As *Samaniego* noted, "The error here is harmless beyond a reasonable doubt because the jury necessarily resolved these issues against appellants under other instructions. [Citation.] [¶] The jury necessarily found that appellants acted willfully with intent to kill. It was instructed regarding the multiple-murder special circumstance in accordance with CALCRIM No. 702 [requiring the jury to find intent to kill for a multiple-murder special circumstance]. The jury found the special circumstance to be true, thereby necessarily finding that each appellant had the specific intent to kill. The jury was also instructed that appellants acted willfully if they intended to kill. (CALCRIM No. 521.) Hence, the jury also found that appellants acted willfully. [¶] The jury also necessarily found that appellants acted deliberately and with premeditation [under CALCRIM No. 401, which requires an accomplice to be aware of the intent of the perpetrator] . . . . [¶] It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required." (*Samaniego*, *supra*, 172 Cal. App. 4th at pp. 1165-1166.)

The same logic applies here. The jury could not have found the defendants were aware of each other's intent to kill Sanders and Coria and chose to aid each other without also finding the necessary premeditation. Any error in the standard instructions was harmless. While recognizing the jury necessarily found he acted with intent to kill under the special circumstances instruction, Hughes argues this was insufficient because the jury was not required by that instruction to find he formed the intent to kill before the fatal wounds were inflicted. While the argument is plausible in theory, it is untenable on the evidence at trial. Harris was killed before Coria. Hughes could not have formed the intent to kill Harris only after seeing him shot in the head. In order to conclude Hughes acted with awareness

> of Sanders's intent and with the intent to kill, the jury necessarily found Hughes formed that intent prior to the killing of Harris.[FN 10]
>
> [FN 10:] Notably, the cases cited by Hughes in support of his argument address crimes other than murder. (*People v. Montoya* (1994) 7 Cal. 4th 1027, 1039 [burglary]; *People v. Cooper* (1991) 53 Cal. 3d 1158, 1160-1161 [robbery].) The third case cited by Hughes, *People v. Rutkowsky* (1975) 53 Cal. App. 3d 1069, while it does address a murder conviction, says nothing about the timing of intent to kill. It merely states that two witnesses could not have been accomplices because there was no evidence they knew the crime was going to be committed or that they encouraged it. (*Id*. at p. 1072.)

Hughes, 2013 WL 960130, *5-6.

b. Analysis

Petitioner contends that his due process rights were violated by the trial court's failure to instruct the jury that an aider and abettor can be convicted of a lesser offense than the perpetrator, stating as follows: "The language indicates automatic guilt of whatever (premeditated) crime the perpetrator commits without regard to whether the accomplice acted with something less than the perpetrator's premeditation." Dkt. 10-1 at 22.

The Court notes that the state appellate court found the issue waived due to the lack of objection or request for modification at trial. *Id.* at *5, fn. 9. Thus, it seems that this claim of instructional error is procedurally defaulted. *See Paulino*, 371 F.3d at 1092-93. Even if the Court overlooks the procedural default, the claim fails because the state appellate court was objectively reasonable in finding that "any deficiency in the standard instructions was harmless" under both *Chapman* and *People v. Watson*, 46 Cal. 2d 818, 836 (1956). Specifically, as explained below, the state appellate court's aforementioned ruling does not amount to an objectively unreasonable application of clearly established Supreme Court law.[6] Any instructional error was plainly harmless under either *Chapman* or *Brecht*. As the state appellate court noted, the jury necessarily found that Petitioner acted with the requisite premeditation and deliberation with respect to Hughes's killing of Coria. *Hughes*, 2013 WL 960130, *6. The evidence showed that Petitioner

[6] The *Watson* standard for harmless error applied by the state appellate court is equivalent to the *Brecht* standard applied on federal habeas review. *Bains v. Cambra*, 204 F.3d 964, 971 n.2 (9th Cir. 2000).

and Hughes worked together to plan and to execute the murders of Harris and Coria. To find Petitioner guilty of aiding and abetting Hughes in the Coria murder, the jury had to find that Petitioner had knowledge of Hughes's unlawful purpose. *See* 1CT 283 (CALCRIM No. 401, "Aiding and Abetting; Intended Crimes"). Additionally, as noted above, to return a true finding on the multiple-murder special circumstance against Petitioner, the jury had to find that Petitioner had the intent to kill Coria. *See supra* Discussion III.D.2. Given the evidence at trial, such knowledge and intent existed before the murders took place. Accordingly, the jury necessarily found that Petitioner premeditated and deliberated Coria's murder alongside Hughes. Therefore, the Court finds that any such instructional error did not have a substantial and injurious effect on the jury's verdict. Claim Five is DENIED.

4. Failure to Instruct on Voluntary Manslaughter (Claim Six)

Petitioner claims that the trial court erred in failing to instruct *sua sponte* on voluntary manslaughter based on unreasonable self-defense with respect to his shooting of Harris. Dkts. 10 at 5; 10-1 at 24-26, 170-178.

a. State Court Opinion

The California Court of Appeal rejected Petitioner's claim as follows:

> "'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' [Citations.] 'That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.'" (*People v. Rogers* (2006) 39 Cal. 4th 826, 866.) In other words, the duty to instruct on lesser included offenses exists only if there is substantial evidence supporting a jury determination that the defendant "was in fact guilty only of the lesser offense." (*People v. Parson* (2008) 44 Cal. 4th 332, 348-349.) "'As our prior decisions explain, the existence of "any evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.] "Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]'" that the lesser offense, but not the greater, was committed." (*People v. Moye* (2009) 47 Cal. 4th 537, 553.)
>
> Unreasonable self-defense is "not a true defense but 'a shorthand description of one form of voluntary manslaughter,' obligating the

> trial court to instruct on it, *sua sponte*, as a lesser offense of murder 'whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense.'" (*People v. Murtishaw* (2011) 51 Cal. 4th 574, 594.)
>
> Although two persons besides S.C. identified Sanders to police as Harris's killer, only S.C. claimed to be looking at Sanders when the fatal shot was fired. The other two witnesses claimed to have turned toward Sanders and Harris only after hearing the shot. S.C. testified that before the shooting Harris and Sanders argued for "a few minutes." Apparently in the midst of the argument, Harris answered his cell phone. In doing so, he "[t]ook his phone out of his pocket and turned away," placing his back to Sanders. Sanders then took a gun from his waist and shot Harris. The forensic pathologist who conducted Harris's autopsy testified he was killed by a single gunshot that entered above and behind his left ear, suggesting that he was killed either as he was turning away or after he had turned away.[FN 17]
>
> [FN 17:] At the preliminary hearing, S.C. had testified both that Sanders was facing Harris when the shot was fired and that Harris "was just turning around when [Sanders] pulled the gun." The pathologist's testimony appears to preclude the former.
>
> Noting S.C.'s testimony that Harris was shot after having answered his cell phone, Sanders argues the jury could have concluded, "If Harris did pivot to pull a phone in the midst of arguing, [Sanders] could interpret this as a furtive or deceptive act posing a risk to him" and shot Harris, perhaps thinking Harris was pulling a gun. Such an interpretation of the evidence, however, would have required the jury to disregard S.C.'s testimony that the shooting occurred only after Harris had pulled out his cell phone and, at a minimum, begun to turn away. Because the shooting was not an instantaneous reaction to Harris's initial movements, Sanders would have recognized the cell phone by the time he had removed the gun from his waistband. The argument also ignores the vibration or ring tone that would have caused Harris to respond to his cell phone, which presumably would have been perceptible to Sanders as well. There is simply no evidence, direct or circumstantial, to suggest the shooting occurred in response to a perceived threat.
>
> It is, of course, always possible to speculate that the crime occurred differently from the manner suggested by the testimony presented at trial, but the potential for such speculation does not constitute substantial evidence to trigger the duty to instruct on a lesser included offense. (*People v. DePriest* (2007) 42 Cal. 4th 1, 50-51.) Because there was no substantial evidence to support a finding of unreasonable self-defense, Sanders was not denied his constitutional right to have the jury determine factual issues by the trial court's failure to instruct on the theory. (*People v. Moore* (2011) 51 Cal. 4th 386, 408-409.)

Hughes, 2013 WL 960130, *13-14.

b. Analysis

In California, the crime of voluntary manslaughter is a lesser included offense of the crime of murder. *People v. Beltran*, 56 Cal. 4th 935, 942 (2013). Petitioner's claim fails because the failure of a state trial court to instruct on lesser included offenses in a non-capital case, such as this, does not present a federal constitutional question. *See Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000); *Windham v. Merkle*, 163 F.3d 1092, 1105-06 (9th Cir. 1998). Therefore, this claim is not cognizable on federal habeas review.

In addition, the state appellate court's factual finding—that the evidence did not support an instruction on voluntary manslaughter based on unreasonable self-defense—is presumed correct and has not been rebutted. *See Menendez v. Terhune*, 422 F.3d 1012, 1029-30 (9th Cir. 2005). Petitioner therefore is not entitled to federal habeas relief on his claim, and Claim Six is DENIED.

5. Instructional Error on Flight (Claim Seven)

Petitioner contends that the trial court violated his right to due process by instructing the jury that flight could be considered as evidence of a consciousness of guilt. Dkts. 10 at 5; 10-1 at 27-29, 179-185.

a. State Court Opinion

The state appellate court ruled on Petitioner's claim as follows:

> Sanders contends the trial court erred in instructing that flight could be considered evidence of awareness of guilt because there was insufficient evidence his leaving the scene constituted "flight."
>
> "A flight instruction is proper where the evidence shows a defendant departed the crime scene under circumstances suggesting his movement was motivated by a consciousness of guilt." (*People v. McWhorter* (2009) 47 Cal. 4th 318, 376.) "Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest 'a purpose to avoid being observed or arrested.' [Citations.] To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury could find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*People v. Bonilla* (2007) 41 Cal. 4th 313, 328.)
>
> One witness, Luis Villasenor, testified that as he was driving up 46th Avenue toward Bancroft Avenue the evening of the shooting, he heard about six shots in quick succession. About 30 seconds later, a person wearing distinctive gold-tipped dreadlocks, such as worn by Sanders, ran from the scene down 46th Avenue. There is no question Sanders, whom several witnesses placed at the scene at the

> time of the shooting, had left before police arrived. Villasenor's testimony is sufficiently suggestive of legal flight to support the instruction. Although Sanders is certainly correct there are other possible explanations for his movements, the evidentiary basis for the flight instruction requires sufficient, not uncontradicted, evidence. (*People v. Richardson* (2008) 43 Cal. 4th 959, 1020.)
>
> In any event, the flight instruction was harmless. Flight was a minor issue in the case, and under either the *Chapman* or *Watson* standards, it made no prejudicial difference to the outcome, given the nature of the remaining evidence.

Hughes, 2013 WL 960130, *14.

b. Analysis

The state appellate court reasonably concluded that, based on the evidence of Petitioner's flight from the scene, the jury reasonably could infer a consciousness of guilt. *See id.* Given that the evidence supported such an inference, the trial court was not foreclosed from giving the flight instruction simply because there also may have been an innocent explanation for Petitioner's flight. It was up to the jury to decide what conclusions to draw from the evidence of Petitioner's flight, and the state appellate court reasonably concluded that based on that evidence, there was no reasonable likelihood the jury misapplied the instruction on flight. *See Estelle*, 502 U.S. at 72.

Alternatively, the state appellate court determined that any instructional error was harmless under *Chapman*. Such a finding was not objectively unreasonable, nor was any error prejudicial under *Brecht*. Because any error in giving the flight instruction was plainly harmless, Petitioner is not entitled to federal habeas relief on his claim. *See Davis v. Ayala*, ___ U.S. ___, 135 S. Ct. 2187, 2198-99 (2015). As the state appellate court noted, Petitioner's flight from the scene was a minor issue in the case, and in light of the other overwhelming evidence of his guilt, the instruction did not have a substantial or injurious effect on the verdict. *See Calderon*, 525 U.S. at 146. Accordingly, Petitioner is not entitled to federal habeas relief on this claim, and Claim Seven is DENIED.

6. Instructional Error on Reasonable Doubt and Related Prosecutorial Misconduct Claim (Claim Eight)

Petitioner contends that the trial court's reasonable doubt instruction, along with the prosecutor's argument on reasonable doubt, violated his right to due process. Dkts. 10 at 5; 10-1 at 30-34, 186-192.

a. State Court Opinion

The state appellate court summarized and rejected this claim, as follows:

> On the topic of reasonable doubt, the trial court gave CALCRIM No. 220, which states: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." The language of CALCRIM No. 220 is taken directly from Penal Code section 1096, which states, in part, reasonable doubt "'is that state of the case, which . . . leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.'" CALCRIM No. 220 simply rephrases the statutory language in positive terms.
>
> During closing argument, the prosecutor quoted the charge and offered commentary on the concept of "abiding conviction," telling the jury, "When we get to this concept of abiding conviction beyond a reasonable doubt, recall that the definition of abiding, enduring, lasting, continuing. Definition of conviction to be convinced or to have a strong belief in. When you put them together what it comes out with is the concept if you have a strong belief and your state of being convinced, enduring, is lasting, it is proof beyond a reasonable doubt."
>
> Sanders contends the trial court's instruction and the prosecutor's subsequent commentary on reasonable doubt understated the degree of certainty required to support a belief beyond a reasonable doubt, thereby depriving him of a fair trial.
>
> Sanders's claim that the statute and instruction allow a finding of guilt with a lesser degree of proof than that required by the due process clause was rejected in *People v. Davis* (1995) 10 Cal. 4th 463 (*Davis*) with respect to the equivalent CALJIC instruction. (*Davis*, at p. 520.) While it is possible, as Sanders does, to find language in United States Supreme Court cases that can be interpreted to set a higher standard, our Supreme Court has held that the precise language is not critical. As the court held recently in this connection, "Regarding the presumption of innocence, the United States Supreme Court has declared that the federal due process clause does not require a trial court to use any particular phrase or form of words when instructing on this principle. (*Taylor v. Kentucky* [(1978) 436 U.S. 478,] 485.) We followed *Taylor* in *People v. Hawthorne* [(1992)] 4 Cal. 4th 43 (*Hawthorne*), to conclude that so long as the court's instructions to the jury express the substance of the presumption of innocence, it will satisfy the dictates of due process." (*People v. Aranda* (2012) 55 Cal. 4th 342, 355.)
>
> As to the prosecutor's commentary on the meaning of "abiding conviction," no objection was raised in the trial court. A defendant's claim of prosecutorial misconduct—in this case, misleading the jury on the law—"'is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury.'" (*People v. Tully*

> (2012) 54 Cal. 4th 952, 1010.) Sanders makes no persuasive case for disregarding this requirement.
>
> Even if the issue of the prosecutor's statements has been preserved for appellate review, we would find no basis for reversal, since we find no reasonable likelihood the jury misunderstood the concept of "reasonable doubt" as a result of those comments. (*See People v. Samayoa* (1997) 15 Cal. 4th 795, 841 [when a claim of prosecutorial misconduct "focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion"].) Sanders does not suggest how the true meaning of "abiding conviction" departs in any material way from the meaning ascribed by the prosecutor—a "strong belief" that is "enduring [or] lasting." Sanders's true dispute is with the language of section 1096 itself, but we are bound by *Davis* to find the statute adequately states the constitutional standard.

Hughes, 2013 WL 960130, *14-15.

b. Analysis

i. Claim of Instructional Error

Petitioner claimed on appeal and in the instant amended petition that the "archaic and incomplete abiding conviction language" set forth in the reasonable doubt instruction, CALCRIM No. 220, "constitutes error by conveying an insufficient standard of proof akin to clear and convincing evidence and going only to jurors' duration of belief in guilt, not their degree of certainty." Dkt. 10-1 at 32. In essence, Petitioner argues that CALCRIM No. 220 allowed a finding of guilt with a lesser degree of proof than that required by the Due Process Clause. *See id.* at 30-34. The California courts have rejected such a claim with respect to the equivalent CALJIC instruction. *Hughes*, 2013 WL 960130, *15 (citing *Davis*, 10 Cal. 4th at 520). Further, the Supreme Court has expressly upheld the "abiding conviction" language of CALCRIM No. 220. Dkt. 20-1 at 48 (citing *Victor v. Nebraska*, 511 U.S. 1, 5 (1994)).

The "beyond a reasonable doubt" standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. *Victor*, 511 U.S. at 6. So long as the trial court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. *Id.* Rather, taken as a whole, the instructions must correctly convey the concept of

reasonable doubt to the jury. *Id.* (citing *Holland v. United States*, 348 U.S. 121, 140 (1954)). The proper inquiry is "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard [that the jurors are able to say that the evidence before them is sufficient to show the existence of evidence of every fact necessary to constitute the crime charged.]" *Victor*, 511 U.S. at 6.

Here, the challenged instruction does not suggest an impermissible definition of reasonable doubt. CALCRIM No. 220 defines proof beyond a reasonable doubt as "proof that leaves [one] with an abiding conviction that the charge is true." Thus, CALCRIM No. 220 instructs jurors that reasonable doubt is the "absence of an abiding conviction in the truth of the charges" and to acquit in the absence of proof. *See People v. Guerrero*, 155 Cal. App. 4th 1264, 1268 (2007). In *Victor v. Nebraska*, the Supreme Court upheld the "abiding conviction" language and explained that "[a]n instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof." 511 U.S. at 14-15; *accord Lisenbee v. Henry*, 166 F.3d 997, 999-1000 (9th Cir. 1999) (use of term "abiding conviction" in defining reasonable doubt is constitutionally sound). Under these circumstances, the trial court's giving of CALCRIM No. 220 could not possibly so infect the entire trial that the resulting conviction violated due process. *See Estelle*, 502 U.S. at 72 (standard).

Because the state appellate court's decision to reject this claim was neither contrary to nor an unreasonable application of federal law, Claim Eight (relating to any instructional error on reasonable doubt) is DENIED.

ii. Claim of Prosecutorial Misconduct

Petitioner next claims that the prosecutor's related statements at closing argument misstated the burden of proof and thereby violated Petitioner's right to due process. Dkt. 10-1 at 30-34.

Prosecutorial misconduct is cognizable in federal habeas corpus: "the appropriate standard of review for such a claim . . . is the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation marks omitted). A defendant's due process rights are violated when a prosecutor's misconduct renders a

trial fundamentally unfair. *Id.*; *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (noting, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"). Under *Darden*, the first issue is whether the prosecutor's remarks were improper; if so, the next question is whether such conduct "infected the trial with unfairness." *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005). A prosecutorial misconduct claim is decided by "examining the entire proceedings to determine whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995) (internal quotation marks omitted).

If constitutional error occurred, habeas relief is unavailable unless the error had a substantial and injurious effect or influence on the jury's verdict. *Trillo v. Biter*, 769 F.3d 995, 1001-02 (9th Cir. 2014) (although prosecutor's statement in argument was improper, it was harmless under *Brecht* because it was a single statement and there was strong evidence of guilt).

A federal court will not review questions of federal law decided by a state court if the decision also rests on a state law ground that is independent of the federal question and adequate to support the judgment. *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). In cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred. *See id.* at 750.

In the instant matter, the rule cited by the state appellate court, specifically, that a defendant must make a contemporaneous objection at trial in order to preserve an issue on appeal, has been found to be a sufficiently independent and adequate procedural rule to support the denial of a federal petition on grounds of procedural default. *See Paulino v. Castro*, 371 F.3d 1083, 1092-93 (9th Cir. 2004) (finding claim procedurally defaulted based on California's contemporaneous objection rules). Specifically, the Ninth Circuit has recognized that California's contemporaneous objection rule—i.e., relating to defense counsel's failure to object to prosecutorial misconduct in closing argument—constitutes a valid procedural default. *Rich v. Calderon*, 187 F.3d 1064, 1070 (9th Cir. 1999) (failure to object to prosecutorial misconduct in closing argument); *Featherstone v. Estelle*, 948 F.2d 1497, 1506 (9th Cir. 1991) (same). This

prosecutorial misconduct claim is therefore procedurally defaulted.

Although the state appellate court had made a note that the prosecutorial misconduct claim was procedurally waived, it also found that the claim failed on the merits. *Hughes*, 2013 WL 960130, *15. Specifically, the state appellate court found that there was "no reasonable likelihood the jury misunderstood the concept of 'reasonable doubt' as a result of [the prosecutor's] comments." *Id.* Petitioner failed to "suggest how the true meaning of 'abiding conviction' depart[ed] in any material way from the meaning ascribed by the prosecutor—a 'strong belief' that is 'enduring [or] lasting.'" *Id.* Rather, Petitioner's "true dispute was with the language of section 1096 itself," from which the language of CALCRIM No. 220 was taken, and that—for the same reasons outlined above—the court is "bound by *Davis* to find the statute adequately states the constitutional standard." *Id.* (citing *Davis*, 10 Cal. 4th at 520).

Based on a review of the record, and applying the legal principles on prosecutorial misconduct as outlined above, the Court finds that the state appellate court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent and was not based on an unreasonable determination of the facts in light of the entire trial record.

Finally, even assuming error, the evidence of Petitioner's guilt was so compelling and overwhelming that any due process violation did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. The prosecutor made only a few, brief comments regarding the concept of an "abiding conviction," and the jury was instructed properly on the concept by the trial court. Therefore, any comments made by the prosecutor relating to "abiding conviction" were not prejudicial, and the state appellate court was objectively reasonable in concluding that the such an argument did not rise to the level of a constitutional violation. *See Darden*, 477 U.S. at 181 (court must find that the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process.")

Accordingly, Petitioner is not entitled to habeas relief on this claim, and Claim Eight (relating to prosecutorial misconduct) is DENIED.

7. One-Sided Post-Crime Conduct Instruction (Claim Eleven)

a. State Court Opinion

The state appellate court gave the following background on the claim that the trial court violated due process by giving a one-sided post-crime conduct instruction, which was initially raised by co-defendant Hughes[7] on direct appeal:

> This argument requires a further explanation of the content and circumstances of the telephone call from Hughes to S.C. at the time of the preliminary hearing. S.C. and his mother had been relocated for their protection and were living in another state, and Hughes was in custody. During his initial appearance at the preliminary hearing, S.C. did not complete his testimony, and he returned to his new home with the understanding he would come back to California to complete his testimony at a later date. It was while he was at the new home, "shortly before" he was to return to complete his testimony, that he received the call from Hughes, who identified himself as "Lou."
>
> As S.C. characterized the call, Hughes told him "to tell everybody that he [presumably Hughes] had nothing to do with it." In fact, Hughes did not literally tell S.C. to say he had nothing to do with the crime. Rather, after asking S.C. whether he would be returning to California to testify in the upcoming hearing and receiving a noncommittal answer, Hughes said, "[W]hen they doing the . . . questions, man, just . . . let the people know . . . that, um, them people . . . up there, man, uh, they told you everything, uh, to talk about." This is the only portion of the brief call in which Hughes overtly attempted to influence S.C.'s testimony.
>
> During an investigation conducted after S.C. reported the call to a deputy district attorney, jail officials discovered the call to S.C. occurred in the course of a telephone call between Hughes and his girlfriend, Kristen Ford. A police officer described the call as a "three-way phone call," used by inmates to prevent the recipient of the call from determining the originating number. A recording of the entire call was played to the jury, and a transcript was placed in the record.
>
> At the beginning of the call, Hughes suggested to Ford that he had a telephone number for S.C. and remarked, "Man, I need to get through to him."[FN 21] After further conversation, during which Ford sought to discourage Hughes from making the call, he asked Ford to "[t]ransfer the phone and then do that for me? If—if you don't, just . . . click over when he—if he picks up just click over. If he don't, just hang it up." Eventually, Ford phoned S.C.'s home, and the conversation described above between S.C. and Hughes occurred, with Ford remaining silently on the line. After S.C. ended the call, the conversation between Hughes and Ford continued. Ford

[7] Petitioner joined in co-defendant Hughes's arguments relating to Claim Eleven in the state courts.

> asked, "Feel better now?" Hughes responded, apparently mocking S.C., "Yeah, man. Who this? I don't know. Man, shit," and commented S.C. was "[c]aught off guard," later saying, "caught a motherfucker by surprise."
>
> [FN 21:] A search of Hughes's jail cell uncovered a piece of paper with S.C.'s out-of-state telephone number written on it.
>
> In his closing, the prosecutor discussed the telephone call at length, arguing the conversation between Hughes and Ford before S.C. was joined suggested Ford had already attempted to influence S.C.'s testimony through his mother. Turning to the conversation between Hughes and S.C., the prosecutor quoted Hughes's request to S.C., arguing, "He's trying to unduly influence [S.C.] to have [S.C.] not identify him in his role in these murders." In turn, the defense argued Hughes had not attempted to intimidate S.C. and characterized the likely meaning of his request as, "They must have put you up to this. They must have told you what to say. When you come just tell them that."
>
> Over defense objection, the trial court delivered CALCRIM No. 371, which states, in part: "If a defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that a defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."[FN 22]
>
> [FN 22:] As delivered by the court, the full instruction read: "If a defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that a defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If a defendant tried to create false evidence or obtain false testimony, that conduct may show that he was aware of his guilt. If you conclude that a defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If someone other than a defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show that this defendant was aware of his guilt, but only if that defendant was present and knew about that conduct, or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself. [¶] If you conclude that a defendant tried to hide evidence, discouraged someone from testifying, or authorized another person to hide evidence or discourage a witness, you may consider that conduct only against that defendant. You may not consider that conduct in deciding whether the other defendant is guilty or not guilty."

Hughes, 2013 WL 960130, *16-17.

The state appellate court rejected Hughes's instructional error claim, which Petitioner had

joined in on, as follows:

> Hughes contends the instruction was one-sided because it did not mention the defense's theory of the meaning of the telephone call—that it was a plea for S.C. to tell the truth, reflecting Hughes's awareness of his innocence.
>
> Although the instruction did not mention the possibility of attempted intervention as evidence of innocence, we do not find it to have been impermissibly one-sided. Rather, under Hughes's theory of the telephone call the instruction was simply inapplicable. CALCRIM No. 371 does not suggest the jury may find an awareness of guilt merely on the basis of a defendant's contact with a witness. Rather, the instruction applies only if the jury concludes the defendant attempted to "hide evidence or discourage someone from testifying against him" or "create false evidence or obtain false testimony." In other words, CALCRIM No. 371 instructs that an awareness of guilt is potentially manifest only if the defendant wrongfully attempts to influence a witness's testimony. Whether such conduct occurred is left entirely to the jury's judgment.
>
> Hughes's counsel argued he was urging S.C. to tell the truth in the telephone call. In that case, the predicate for the instruction—an attempt to obtain false testimony or suppress truthful testimony—would not have been present. If the jury accepted Hughes's interpretation, it would have had no reason to apply CALCRIM No. 371 at all. A CALJIC instruction conveying the same meaning has been upheld repeatedly.[FN 23] (*See People v. Famalaro* (2011) 52 Cal. 4th 1, 35-36, italics added [the instruction "merely allows the jury to decide, if evidence of concealment exists, what weight and significance it may have in the case"].)
>
> [FN 23:] CALJIC No. 2.06, approved by the court, states: "If you find that a defendant attempted to suppress evidence against [himself] [herself] in any manner, such as [by the intimidation of a witness] [by an offer to compensate a witness] [by destroying evidence] [by concealing evidence] [by _____], this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide." We have found no published decision addressing the validity of CALCRIM No. 371
>
> Hughes relies primarily on *Cool v. United States* (1972) 409 U.S. 100 (*Cool*), which he claims "controls this case." In *Cool*, a per curiam decision, the appellant was convicted of counterfeiting after her companion was arrested for passing counterfeit bills. After that arrest, the appellant was told to follow the police car carrying her companion to the station. At trial, a witness testified he saw a bag, which was later found to be filled with counterfeit bills, thrown from the appellant's car window in the course of this drive. The companion admitted his guilt and provided an account fully exonerating the appellant. (*Id*. at pp. 100-101.) The Supreme Court reversed the conviction on the basis of a long instruction on accomplice testimony that, the court held, effectively required the

> jury to disregard the companion's testimony unless it was convinced beyond a reasonable doubt his story was true. (*Id*. at p. 103.)
>
> In a footnote, the court noted another error that it also characterized as reversible. Immediately after the instruction mentioned above, the trial court informed the jury it could convict the appellant on accomplice testimony alone. The Supreme Court noted the instruction was confusing, since the only accomplice testimony was exculpatory, and it held the instruction to be "fundamentally unfair" because, "even if it is assumed [the companion's] testimony was to some extent inculpatory," the instruction "told the jury that it could convict solely on the basis of accomplice testimony without telling it that it could acquit on that basis." (*Cool*, *supra,* 409 U.S. at p. 103, fn. 4.)
>
> We find *Cool* distinguishable. While the Supreme Court did not explain its reasoning in detail, we assume the instruction in *Cool* was found unfair precisely because the appellant was relying for her acquittal on the companion's testimony. By informing the jury it could convict on the basis of that testimony but not, as the appellant urged, acquit, the instruction created the possibility of a misimpression regarding the use of the accomplice testimony. CALCRIM No. 371, in contrast, creates no risk of a misimpression. As discussed above, the instruction does not suggest the jury may infer an awareness of guilt merely from a defendant's attempt to contact a witness; some type of wrongful conduct must be present. Further, the instruction in *Cool* mentioned using accomplice testimony only as evidence of guilt, without informing the jury it could use the evidence in any other manner. (*Cool*, *supra*, 409 U.S. at p. 103, fn. 4.) In contrast, CALCRIM No. 371 expressly tells the jury it is the ultimate arbiter of the "meaning and importance" of any evidence of an attempt to influence testimony. There could have been no misimpression that Hughes's attempted intervention could be viewed only as evidence of an awareness of guilt, rather than innocence.

Hughes, 2013 WL 960130, *18-19.

b. Analysis

The state appellate court reasonably concluded that there was no reasonable likelihood the jury misapplied the instruction in the manner asserted. *See Estelle*, 502 U.S. at 72. As the state appellate court correctly noted, before the jury could even find that the post-crime conduct instruction (CALCRIM No. 371) applied, it had to first find that the defendant tried to influence wrongfully the testimony of the witness. In other words, if Hughes was merely trying to encourage S.C. to tell the truth, then the jury would have necessarily found that CALCRIM No. 371 did not apply. Therefore, CALCRIM No. 371 was not constitutionally infirm, and the state appellate court's conclusion in this regard was not objectively unreasonable. Finally, given the

overwhelming evidence of Petitioner's guilt in this case, the trial court's giving of CALCRIM No. 371 could not have had a substantial or injurious effect on the jury's verdict. *See Calderon*, 525 U.S. at 146.

Accordingly, Petitioner is not entitled to habeas relief on this claim that the trial court violated due process by giving a one-sided post-crime conduct instruction, and Claim Eleven claim is DENIED in regards to the instructional error claim.

E. Failure of Trial Court to Conduct *Marsden*[8] Hearing (Claim Nine)

Petitioner claims that at sentencing the trial court violated his right to due process by failing to conduct an inquiry pursuant to *People v. Marsden*, 2 Cal. 3d 118 (1970), and by failing to rule on his motion for a new trial.[9] Dkts. 10 at 5; 10-1 at 35-40, 193-200.

1. State Court Opinion

The California Court of Appeal gave the following background as to this claim, which was raised as a joint argument by Hughes and Petitioner:

> At sentencing, Hughes's counsel made an oral motion for a continuance, noting Hughes's family was in the process of retaining private counsel to file a motion for a new trial. Counsel explained he had not requested the continuance earlier because he had not been told of the family's intent. Addressed by the court directly, Hughes explained his family was in the process of refinancing the family home to raise a retainer fee for a private attorney, although the prospective attorneys had not yet been hired. He believed the new trial motion would be ready within four to six weeks. . . . .
>
> Sanders joined the request for a continuance, explaining, "I'm

[8] *People v. Marsden*, 2 Cal. 3d 118 (1970), requires the trial court to permit a criminal defendant requesting substitution of counsel to specify the reasons for his request and generally to hold a hearing. This California rule substantially parallels the one prescribed by the Ninth Circuit in *Hudson v. Rushen*, 686 F.2d 826 (9th Cir. 1982). *See Chavez v. Pulley*, 623 F. Supp. 672, 687 n.8 (E.D. Cal. 1985).

[9] In his traverse, Petitioner states that ". . . in a pretrial proceeding, [he] requested a *Marsden* hearing, so that the court would order that defense counsel be excused . . . ." Dkt. 21 at 8 (citing RT 404). However, Petitioner's present claim involves an alleged failure to conduct a *Marsden* inquiry during sentencing (as opposed to during a pretrial proceeding). Compare Dkt. 10-1 at 35-40 *with* Dkt. 21 at 8. To the extent that Petitioner is attempting to raise a new claim relating to the trial court's alleged failure to conduct a *Marsden* inquiry during this pretrial proceeding, such a claim will not be considered as Petitioner may not raise new grounds for relief in a traverse. *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994). Moreover, such a claim has not been exhausted as it was not included in either the petition for review or the habeas petition filed in the California Supreme Court. *See* Resp't Exs. 14, 18.

> asking for a retrial based on the ineffective assistance of counsel."[FN 12] Counsel for Sanders told the court he had not made a formal motion for a new trial because "I just received notice" of Sanders's intent and opined, "what my client says is a fruit of writ of habeas corpus [sic], not a motion for a new trial."
>
> [FN 12:] In a postconviction interview with the probation officer, recounted in the probation report, Sanders had expressed dissatisfaction with the criminal justice system, contended he was not given a fair trial, and declared his intention to "file a motion for ineffective assistance of counsel."
>
> Sanders asked the court for permission to "read into the record why I want to file ineffective assistance of counsel, why I'm asking for a retrial." Given leave, Sanders said his attorney had prejudiced him by failing to call a witness, Janae Morgan, who could have "had a positive effect that could have changed the outcome of the jury's verdict in favor of [the] defense case." Despite noting his attorney's purported ineffective assistance, Sanders did not ask to have a new attorney appointed. The court noted the failure to procure favorable testimony was a strategic decision better suited to a writ of habeas corpus than a motion for a new trial, since the latter is "limited to things that occurred on the record."
>
> The court denied the joint requests for a continuance as untimely. In explaining the denial, the court noted the large number of community members assembled, which the court estimated at 85 persons, the substantial preparation by the court and counsel, and the failure to request the continuance earlier. The court also found Hughes's proposal to be "very speculative," since he had yet to retain an attorney.

Hughes, 2013 WL 960130, *7.

The state appellate court then rejected this claim as follows:

> Sanders contends the trial court erred in failing to conduct an adequate inquiry into his claim of ineffective assistance under *People v. Marsden* (1970) 2 Cal. 3d 118 (*Marsden*).
>
> The need for a hearing under *Marsden* arises "[w]hen a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation." (*People v. Richardson* (2009) 171 Cal. App. 4th 479, 484.) A request for substitution of appointed counsel can be made both before and after trial. "[T]he standard expressed in *Marsden* and its progeny applies equally preconviction and postconviction." (*People v. Smith* (1993) 6 Cal. 4th 684, 694.) When an appropriate request is made, "the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] '"Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.'" (*People v. Richardson*, at p. 484; *see also People v. Lucky* (1988) 45 Cal. 3d 259, 281, fn. omitted ["a trial court's duty to permit a defendant to

> state his reasons for dissatisfaction with his attorney arises when the defendant in some manner moves to discharge his current counsel"].)
>
> In *People v. Sanchez* (2011) 53 Cal. 4th 80, the Supreme Court addressed the common practice of appointing "conflict" counsel when a *Marsden* request is made. In the course of its decision, the court reiterated that a *Marsden* hearing is required only when "there is 'at least some clear indication by defendant,' either personally or through his current counsel, that defendant 'wants a substitute attorney.'" (*Id*. at pp. 89-90.) In a footnote, the court expressly disapproved a series of cases decided by the appellate court to the extent they "incorrectly implied that a *Marsden* motion can be triggered with something less than a clear indication by a defendant" or his counsel that the defendant "'wants a substitute attorney.'" (*Id*. at p. 90, fn. 3.) In these disapproved cases, the court had implicitly, if not explicitly, held that a defendant's expressed desire to make a new trial motion or motion to withdraw a plea on the basis of claimed ineffective assistance of counsel, without more, should be treated as triggering *Marsden* hearing requirements. (E.g., *People v. Mejía* (2008) 159 Cal. App. 4th 1081, 1086 [although defendant made no request for substitute or even "conflict" counsel, court nevertheless concluded he made a *Marsden* motion because he "instructed his counsel to move for a new trial largely on the basis of his counsel's performance at trial and that his counsel so informed the trial court"].)
>
> No duty under *Marsden* to inquire into Sanders's claim of ineffective assistance of counsel arose here because Sanders never gave a "clear indication" that he wanted to replace his appointed counsel. On the contrary, there was no suggestion Sanders wanted a new attorney. Instead, he twice stated that the relief he sought in connection with his claim of ineffective assistance was a "retrial." Sanders may have refrained from seeking new counsel because, the motion having been made at a sentencing hearing, counsel's representation was nearly at an end. Whatever the reason, however, Sanders's failure to request substitute counsel, or even to suggest he desired a new attorney, rendered *Marsden* inapposite.

Id. at *7-8.

2. Analysis

The denial of a motion to substitute counsel implicates a defendant's Sixth Amendment right to counsel and is properly considered in federal habeas. *Bland v. California Dep't of Corrections*, 20 F.3d 1469, 1475 (9th Cir. 1994), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000). The Ninth Circuit has held that when a defendant voices a seemingly substantial complaint about counsel, the trial judge should make a thorough inquiry into the reasons for the defendant's dissatisfaction. *Id.* at 1475-76; *United States v. Robinson*, 913 F.2d 712, 716 (9th Cir. 1990); *Hudson*, 686 F.2d at 829. The inquiry, however, need only be as

comprehensive as the circumstances reasonably would permit. *King v. Rowland*, 977 F.2d 1354, 1357 (9th Cir. 1992) (record may demonstrate that extensive inquiry was not necessary); *see also Stenson v. Lambert*, 504 F.3d 873, 886 (9th Cir. 2007) (trial court should conduct "such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern," and one that will provide a "sufficient basis for reaching an informed decision" on whether to appoint new counsel, citations omitted*); United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1986) (trial court "might have made a more thorough inquiry" into conflict, but defendant's statements and judge's observations provided sufficient basis for informed decision).

If the state court fails to rule on a *Marsden* motion, the defendant's failure to reassert the *Marsden* motion is not a waiver of the Sixth Amendment claim if the defendant does not know that the trial court has failed erroneously to rule on the motion. *Schell*, 218 F.3d at 1023 (defendant did not waive Sixth Amendment claim because trial counsel misled him to believe the motion to substitute counsel had been denied rather than forgotten).

Regardless of whether the state court failed to rule on the motion to substitute counsel or denied the motion, the ultimate inquiry in a federal habeas proceeding is whether the petitioner's Sixth Amendment right to counsel was violated. *Cf. id.* at 1024-25 (overruling earlier circuit precedent that had stated that habeas court's inquiry was whether the state court's denial of the motion was an abuse of discretion). That is, the habeas court considers whether the trial court's denial of or failure to rule on the motion "actually violated [petitioner's] constitutional rights in that the conflict between [petitioner] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." *Id.* at 1026.

Here, the state appellate court rejected Petitioner's claim upon reasonably concluding that no *Marsden* inquiry was necessary under the circumstances before it. The state appellate court determined that Petitioner "never gave a 'clear indication' that he wanted to replace his appointed counsel." *Hughes*, 2013 WL 960130, *8. There was "no suggestion [Petitioner] wanted a new attorney." *Id.* Instead, Petitioner expressed his disagreement with certain decisions made by his counsel during trial and notified the trial court that the "relief he sought in connection with his

claim of ineffective assistance was a 'retrial.'" *Id.* The state appellate court further noted that trial counsel "'received notice' of [Petitioner's] intent" to seek a retrial but advised him that the issue was one that had to be raised in a petition for a writ of habeas corpus rather than in a new trial motion. *Id.* at *7. The trial court agreed with counsel and denied Petitioner's request for a continuance to prepare a new trial motion based on such a ground. *Id.*

Given Petitioner's and his trial counsel's statements, as well as the trial court's stated understanding of the issue being raised by Petitioner, the trial court had no duty to conduct a *Marsden* inquiry. No clearly established Supreme Court precedent holds that a trial court has a *sua sponte* duty to conduct a *Marsden* inquiry in the absence of a defendant's clear request to substitute counsel, or that a trial court is required to deduce a defendant's desire for substitute counsel at sentencing based on an expression of dissatisfaction with certain decisions made by counsel during trial. *See United States v. Robinson*, 913 F.2d 712, 716 (9th Cir. 1990) (holding that a trial court must inquire into the sources of a defendant's dissatisfaction with counsel "once a defendant has made a motion or request for substitute counsel"); *United States v. Padilla*, 819 F.2d 952, 956 n.1 (10th Cir. 1987) (in general, "the district court should make formal inquiry into the defendant's reasons for dissatisfaction with present counsel when substitution of counsel is requested"). Petitioner fails to show that the state appellate court unreasonably denied relief on his claim that the trial court had a *sua sponte* duty to conduct a *Marsden* hearing in conjunction with the request for a continuance to bring a new trial motion. Furthermore, Petitioner provides no facts suggesting that the trial court "actually violated [Petitioner's] constitutional rights in that the conflict between [him] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." *Schell*, 218 F.3d at 1026. Indeed, Petitioner failed to identify any such impediment between him and his trial counsel.

As for Petitioner's claim that the trial court violated his right to due process by failing to *rule* on his new trial motion, the record shows that no such motion was ever submitted by Petitioner. Instead, the record shows that Petitioner requested a *continuance* so that he might file such a motion and that the trial court denied that request. *Hughes*, 2013 WL 960130, *7.

Accordingly, the trial court had no duty to rule on a new trial motion that was not before it, and thus no violation of due process exists.

Accordingly, Petitioner is not entitled to habeas relief on these grounds, and Claim Nine is DENIED.

F. Cumulative Error (Claim Ten)

Petitioner argues that even if the errors alleged in Claims One through Nine were not prejudicial as singular errors, the combined effect of the errors created cumulative prejudice that requires a grant of habeas relief. Dkts. 10 at 5; 10-1 at 41, 202. The state appellate court ruled on Petitioner's claim of cumulative error as follows: "Because we find no actual error in Sanders's trial, we find no prejudice due to the cumulative effect of error." *Hughes*, 2013 WL 960130, *15.

In some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the cumulative effect of several errors may still prejudice a defendant so much that his conviction must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893-95 (9th Cir. 2003) (reversing conviction where multiple constitutional errors hindered defendant's efforts to challenge every important element of proof offered by prosecution). However, where, as here, there is no single constitutional error as to Claims One through Nine, nothing can amount to the level of a constitutional violation. *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011).

Accordingly, Petitioner is not entitled to relief on his claim for cumulative error, and Claim Ten is DENIED.

G. Ineffective Assistance of Counsel ("IAC") (Claims Eleven to Thirteen)

Petitioner raises three IAC claims as to his trial counsel, Spencer W. Strellis, Esq., and appellate counsel, Joseph Shipp, Esq. Dkts. 10 at 5; 10-1 at 42-44, 214-229. The clearly established federal law governing IAC claims is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must show that (1) his counsel's performance was deficient and that (2) the "deficient performance prejudiced the defense." *Id.* at 687. Counsel is constitutionally deficient if his or her representation "fell below an objective standard of reasonableness" such that it was outside "the range of competence demanded of attorneys in criminal cases." *Id.* at 687-88 (internal quotation marks omitted). Reviewing courts must

"indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Where deficient performance is established, "[the] errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington*, 562 U.S. at 101 (quoting *Strickland*, 466 U.S. at 687). The *Strickland* standard applies to trial and appellate counsel. *Smith v. Murray*, 477 U.S. 527, 535-36 (1986); *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989).

Under AEDPA, a federal court's review of state court's decision on an IAC claim is "doubly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). The question is not whether counsel's actions were reasonable; rather, the question is whether "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105; *Bemore v. Chappell*, 788 F.3d 1151, 1162 (9th Cir. 2015) (same). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Griffin v. Harrington*, 727 F.3d 940, 945 (9th Cir. 2013)) (quoting *Harrington*, 562 U.S. at 101).

With respect to claims of ineffective assistance of appellate counsel, the *Strickland* standard also applies. *Evitts v. Lucey*, 469 U.S. 387 (1985). A petitioner must satisfy both prongs of the *Strickland* test in order to prevail on his claim of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 289 (2000). "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes—and when page limits on briefs are widely imposed." *Jones v. Barnes*, 463 U.S. 745, 752-53 (1983). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id*. at 751-52; *id*. at 752 ("Multiplicity hints at lack of confidence in any one [claim]."); *Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997) ("A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court."); *Miller v. Keeney*,

882 F.2d 1428, 1433-34 (9th Cir. 1989) ("the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy"). Thus, "it is still possible to bring a *Strickland* claim based on [appellate] counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

1. Failure to Transcribe Jury Instructions (Claim Eleven)

Petitioner alleges that his trial counsel was ineffective for stipulating that the jury instructions did not have to be transcribed. Dkts. 10 at 5; 10-1 at 42-44, 203.

a. State Court Opinion

The state appellate court gave the following background on this IAC claim, which was initially raised by co-defendant Hughes[10] on direct appeal:

> Counsel for both defendants stipulated that the reporter need not transcribe the trial court's reading of the jury instructions and that a written copy of the instructions would suffice for purposes of the appellate record. Prior to reading the instructions, the court provided the jurors with a written copy of them.[FN19] Following the reading of the instructions, none of the attorneys objected or otherwise suggested the court's reading deviated from the written copy provided to the jury and placed in the appellate record. It was later noted that during the reading of the instructions the trial court avoided reading an error in the written instructions. The parties stipulated to a correction of the written instructions, consistent with the court's reading.
>
> [FN 19:] The copy of the jury instructions in the clerk's transcript contains a cover page stating, "READ AND SENT TO THE JURY ON FEBRUARY 1, 2011."

Hughes, 2013 WL 960130, *16. As mentioned, Petitioner joined in Hughes's arguments on direct appeal, and the state appellate court rejected them, as follows:

> Hughes contends his attorney's stipulation constituted ineffective assistance of counsel because it failed to provide an adequate record for appeal, citing California Rules of Court, rule 8.320(c)(4), which states that a reporter's transcript must contain "[a]ll instructions given orally." We decline to address the merits of the argument because Hughes fails to show any prejudice from the stipulation. (*People v. Hernandez* (2011) 53 Cal. 4th 1095, 1105 ["a defendant claiming the ineffective assistance of counsel is required to show both that counsel's performance was deficient and that counsel's errors prejudiced the defense"].) Despite his claim the appellate

[10] Petitioner joined in co-defendant Hughes's arguments relating to Claim Eleven in the state courts.

> record is inadequate, Hughes has not identified any argument, meritorious or not, that he was prevented from making on appeal as a result of the stipulation. There is no reason to believe the court's reading deviated materially from the written copy of the instructions, and we have accepted that copy as an accurate record of the court's instructions, per the parties' stipulation.[FN 20] (*See People v. DeFrance* (2008) 167 Cal. App. 4th 486, 495-496.)
>
> [FN 20:] Hughes suggests there could have been a material discrepancy between the oral and written instructions that slipped by the court and all three attorneys. The suggestion is highly improbable and, more to the point, simple speculation. As such, it cannot support a finding of prejudice.
>
> Hughes argues the stipulation was prejudicial per se because it "deprive[d him] of counsel during a critical stage of the proceedings" by producing an inadequate appellate record. (E.g., *United States v. Cronic* (1984) 466 U.S. 648, 658.) Hughes was, of course, not deprived of counsel; his attorney was present and able to note for the record if the oral instructions departed in any way from the written instructions. Further, notwithstanding California Rules of Court, rule 8.320(c)(4), the appellate record was not inadequate in any meaningful way. We would have been required to accept the written version of the instructions as authoritative for purposes of the appeal, even if there was evidence the court's oral instructions deviated from the written copy. (*People v. Rodriguez* (2000) 77 Cal. App. 4th 1101, 1112-1113 ["'It is generally presumed that the jury was guided by the written instructions.' [Citations.] The written version of jury instructions governs any conflict with oral instructions"].)

Hughes, 2013 WL 960130, *16.

b. Analysis

The state appellate court reasonably concluded that Petitioner and Hughes failed to show affirmatively any prejudice arising from their trial counsels' stipulation that the jury instructions did not need to be transcribed, let alone a substantial likelihood of a different result. As the state appellate court noted, no evidence existed in the record showing that the oral instructions differed from the written instructions, and neither Petitioner nor Hughes made a showing that they differed in any material respects such that they prejudicially affected the claims on appeal. *Id.* Accordingly, Petitioner is not entitled to federal habeas relief on this claim, and Claim Eleven is DENIED in regards to the IAC claim.

2. Failing to Challenge Witnesses' Coerced Statements to Police (Claim Twelve)

Petitioner alleges that both trial and appellate counsel were ineffective for failing to

challenge the admissibility of "unreliable" pretrial statements of certain "third party witnesses." Dkts. 10 at 5; 10-1 at 209, 214-227. Specifically, Petitioner's IAC claim relates to trial counsel's failure to file a motion to exclude the pretrial statements of the following prosecution witnesses on the grounds that they were coerced by police: S.C.; S.C.'s mother; and two other witnesses, Nikita Ragan ("Ragan") and Michael Short ("Short"), who were all allegedly present near the scene on the night of the shooting.[11] *See id.* Petitioner claims that "Lead Detective for the Oakland Police Department, George Phillips, provided details about the crimes to [the aforementioned] witnesses during their investigation." *Id.* at 215. Petitioner adds that Sergeant Phillips "then threatened those witnesses with time in jail, while simultaneously promising leniency or no time if they gave his version of the crime in their witness statements . . . they were coerced to make false unreliable statements." *Id.* As explained below, the record shows that Ragan and Short recanted their statements to police at trial, but their pretrial statements were admitted as evidence. *Hughes*, 2013 WL 960130, *3, fn. 3; 6RT 851 (Ragan), 865-866 (Short). Petitioner claims that without the testimonies of S.C., S.C.'s mother, Ragan, and Short, "no one else could have identified Petitioner as the shooter." Dkt. 10-1 at 227. Petitioner further argues that appellate counsel was "ineffective when he failed to raise or identify this mitigating, non-frivolous issue on appeal." *Id.* at 227, 214-227. Finally, Petitioner claims that the "state courts failed to grant [his] request that an evidentiary hearing be conducted so that [he] could present evidence to prove his claim." Dkt. 21 at 7, 11. Thus, he requests an evidentiary hearing in order that "he may be given the opportunity to develop

[11] In his traverse, Petitioner focuses solely on Claim Twelve. *See* Dkt. 21 6-12. Though not entirely clear, it appears that Petitioner attempts to raise more new claims in his traverse. *See id.* First, Petitioner claims that trial counsel never ascertained whether either S.C.'s mother or Ragan was "given leniency in their criminal cases, for their continued cooperation at trial." *Id.* at 10. In addition, Petitioner claims that Harris's father, Charles Harris, was "fueled by vengeance to find anyone who may have been involved in his son's death, handed [S.C.'s mother and Ragan] a get out of jail free card." *Id.* 10-11. Petitioner claims that "[i]t was never ascertained at trial what information concerning the crime was given to [S.C.'s mother], S.C. or Nikita Ragan by Charles Harris . . . ." *Id.* at 11. In essence, Petitioner claims that Sergeant Phillips "illegally allowed Charles Harris to circumvent the integrity of the investigation, a fact unexplored by the jury." *Id.* Finally, Petitioner also claims that Sergeant Phillips "failed to audiotape significant portions of his interrogation of witnesses." *Id.* None of the aforementioned claims will be considered at this time. As stated above, Petitioner may not raise new grounds for relief in a traverse. *Cacoperdo*, 37 F.3d at 507. Moreover, none of these new claims have been exhausted in state court as they were not included in either the petition for review or the habeas petition filed in the California Supreme Court. *See* Resp't Exs. 14, 18.

his claim, as no hearing was provided by the trial court." Dkt. 10-1 at 218.

There is no reasoned state decision addressing this IAC claim. Thus, the Court will conduct "an independent review of the record" to determine whether the California Supreme Court's summary denial of this claim was contrary to or an unreasonable application of clearly established federal law. *Plascencia*, 467 F.3d at 1197-98; *Himes*, 336 F.3d at 853.

a. Request for Evidentiary Hearing

As mentioned above, Petitioner requests an evidentiary hearing to develop this IAC claim. Dkt. 10-1 at 218. In his traverse, Petitioner claims that "[t]he state court has not given Petitioner a full and/or fair hearing to determined that facts alleged" and that his allegations supporting this IAC claim "in substantial part are supported by the record, therefore are not conclusory." Dkt. 21 at 11. The Court finds that no additional factual supplementation is necessary, and that an evidentiary hearing is unwarranted with respect to the instant IAC claim. For the reasons described below, the facts alleged in support of this IAC claim, even if established at an evidentiary hearing, would not entitle Petitioner to federal habeas relief. Further, Petitioner has not identified any concrete and material factual conflict in need of resolution that would require the Court to hold an evidentiary hearing. *See Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011) (holding that federal habeas review under 28 U.S.C. § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits" and "that evidence introduced in federal court has no bearing on" such review).[12] Therefore, Petitioner's request for an evidentiary hearing is DENIED.

b. IAC Claim

In order to establish prejudice from counsel's failure to file a motion, a petitioner must show that (1) had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious, and (2) had the motion been granted, it is reasonable that there would have been an outcome more favorable to him. *Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999).

[12] The Ninth Circuit has also recognized that *Pinholster* "effectively precludes federal evidentiary hearings" on claims adjudicated on the merits in state court. *Gulbrandson v. Ryan*, 738 F.3d 976, 993 (9th Cir. 2013); *see also Sully v. Ayers*, 725 F.3d 1057, 1075 (9th Cir. 2013).

Failure of counsel to bring a motion is not ineffectiveness if the motion is based on a meritless argument. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005); *Wilson*, 185 F.3d at 990; *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir.1996); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985). "Counsel [is] under no obligation to bring a plainly unavailing motion . . . ." *United States v. Quintero-Barraza*, 78 F.3d 1344, 1349 (9th Cir. 1996) (citing *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994)).

The following summaries relate to the pretrial statements made to the police as well as the relevant trial testimonies provided by each of the aforementioned witnesses. It bears repeating that Harris and Coria were shot and killed on September 11, 2007 on Bancroft Avenue in Oakland, California. *Hughes*, 2013 WL 960130, *1-2. At that time, the 4500-block of Bancroft Avenue was "high in drug trafficking." 6RT 819.

i. S.C.'s Mother

On November 16, 2007, S.C.'s mother was arrested and taken to the police department on a "drug related offense" based on a search warrant executed by Oakland Police Officer Sean Festag. 6RT 821-822, 827. On that same date, at 4:50 p.m., Sergeant Phillips, along with Sergeant James Morris, went over the *Miranda* admonition and waiver form before interviewing S.C.'s mother regarding the September 11, 2007 incident. 6RT 823-827. S.C.'s mother indicated a willingness to speak with the officers. 6RT 826. Sergeant Phillips had interviewed S.C.'s mother on two prior occasions, during which she told him that S.C. was in the closet at the time of the shooting. 6RT 827. During the November 16, 2007 interview, however, Sergeant Phillips confronted S.C.'s mother that he had some "solid information" that "her son was not in the closet at the time of the shooting." 6RT 827. S.C.'s mother then informed Sergeant Phillips that her son had witnessed the shootings on September 11, 2007, and she admitted to misleading them because she was "afraid that something was going to happen to [S.C.]." 6RT 828-829. Sergeant Phillips decided to interview S.C. based on the new information that S.C.'s mother had relayed to him. 6RT 831. S.C.'s mother informed Sergeant Phillips that S.C. would be coming home from school, and she did not object to having an officer pick up S.C. on his way home from school and drive him to the Oakland Police Department. 6RT 831.

At trial, S.C.'s mother testified that she was at home with her children at 4527 Bancroft Avenue in Oakland (which overlooked the murder scene) when she heard the shots on the evening of September 11. 5RT 693, 703. She testified that she checked on her children after hearing the shots, and that her son, S.C., who had come in from the balcony, told her he was "all right." 5RT 703-705. She noticed that S.C. "was just kind of in shock," but they did not discuss what had happened at that time. 5RT 705. S.C.'s mother testified that S.C. later confided in her that he had witnessed the shooting, but she did not remember the exact date of that conversation. 5RT 712-713. S.C.'s mother testified that S.C. told her that he was on the balcony the night of September 11, and that he had witnessed Sanders and Hughes shoot Harris and Coria, respectively. 5RT 713-715. Hughes's attorney cross-examined S.C.'s mother about the three times she was arrested and questioned by police about this incident. 5RT 728-731. S.C.'s mother testified that on the third occasion, she admitted that she "wasn't being honest and they knew what was going on and that [her] son was a material witness." 5RT 729-730. She was questioned about her interaction with S.C. during the November 16, 2007 interview with Sergeant Phillips. 5RT 730. S.C.'s mother testified that Sergeant Phillips spoke with S.C. alone, and that S.C. came out saying: "mom, he said he was going to give you 20 years, lock you up for 20 years if I didn't tell him everything I knew." 5RT 730. (Sergeant Philipps denied telling either S.C. or his mother that S.C. better cooperate or his mother would be sent to prison for 20 years and he would go to the Department of Human Services ("DHS"). 6RT 902-905.) S.C.'s mother testified that she did not tell S.C. "you better talk, otherwise they're gonna put me away." 5RT 730-731.

ii. S.C.

At 6:40 p.m. on November 16, 2007, Sergeants Phillips and Morris interviewed S.C. about the September 11, 2007 incident. 6RT 832-833. S.C. was initially "very reluctant to speak" and he "was afraid." 6RT 833. Sergeant Phillips told S.C. that they "were aware that he saw some things," that there was "no need to be afraid," and that his mother "spoke with [them] and told [them] some things you know that we knew." 6RT 833. Sergeant Phillips explained to S.C. that they knew that "he was on the balcony at the time of the shooting and [they] felt he actually saw the shooting." 6RT 833. S.C. was "still reluctant" to speak with Sergeant Phillips. 6RT 834. At

that point, Sergeant Phillips allowed S.C.'s mother to speak with S.C. privately for a "few minutes" without any officers present and without recording their discussion. 6RT 834-835. After S.C. spoke with his mother, he was "more open" and "willing to tell [the officers] exactly what happened." 6RT 835. The officers did not record any statements when they first spoke with S.C. regarding Petitioner's involvement in the murder of Harris, and Hughes's involvement in the murder of Coria. 6RT 835-837. After speaking with S.C., the officers recorded his statements regarding Petitioner's and Hughes's involvement in the September 11, 2007 incident. 6RT 836-837. In that recording, S.C. implicated Petitioner and Hughes in the murder of Harris and Coria, respectively. 6RT 836-837. S.C. also identified photographs of both Petitioner and Hughes. 6RT 837-838. After the officers had completed S.C.'s taped statement, they kept S.C. in the police department for "a period of time" that was "not that long." 6RT 840-841. The officers also released S.C.'s mother from custody. 6RT 841. Thereafter, S.C., his mother, and their family were "relocated to another state as a result of [Sergeant Phillips's] efforts and the efforts of the Alameda County District Attorney's office." 6RT 841.

At trial, S.C. testified that when he spoke to his mother prior to giving his recorded statement, she told him to "tell [the officers] what happened or they [are] going to take [her] to jail for 20 years" and "put him in DHS custody." 5RT 647. (S.C.'s mother testified that she did not tell S.C. "you better talk, otherwise they're gonna put me away." 5RT 730-731.) S.C. then testified that after reflecting back on his recorded statement, he agreed that he gave a "truthful statement" to Sergeant Phillips. 5RT 648. S.C. testified in the same manner about witnessing the shootings by Petitioner and Hughes as he had in his recorded statement. 5RT 600-643. S.C. agreed that he "told the truth to the best of his recollection" during his testimony at trial. 5 RT 648. The trial court admitted S.C.'s November 16, 2007 tape-recorded interview into evidence. 6RT 838-840; Resp't Ex. 3B.

iii. Ragan

At 1:02 p.m. on November 26, 2007, Sergeants Phillips, along with Sergeant Todd Crutchfield, interviewed Ragan, who was in custody based on an unrelated warrant, because Sergeant Phillips had "some background information on her as to her actions at the scene" at issue.

6RT 843, 845. On that same date, Sergeant Phillips read Ragan the *Miranda* admonition before interviewing her, and she indicated a willingness to speak with the officers. 6RT 845. Ragan initially denied being at the scene. 6RT 847. Sergeant Phillips admitted to "us[ing] investigative tactics with [Ragan] that suggested that she could potentially be charged with a crime" because he "heard she did some things at the scene at the time of the shooting that led [him] to believe that she may have been involved with the shooting itself . . . ." 6RT 848. Ragan then spoke to the officers without being recorded and admitted being at the scene of the shooting, hearing the shot, looking towards the area where the shot was fired, and witnessing Petitioner "standing there with a gun in his hand and [Harris] shot." 6RT 849-850. Ragan later agreed to have officers record her statements implicating Petitioner in the murder of Harris. 6RT 850-851. The taped interview concluded at 10:53 p.m. 6RT 854. Ragan was eventually released, and the officers decided not to take her into custody based on the $20,000 warrant and instructed her to "take care of it." 6RT 855.

At trial, Ragan testified that after she heard the first shot, she ran and did not recall whether she saw a gun in Petitioner's hand. 3RT 287-288. The prosecutor then attempted to impeach Ragan with her prior statements to the officers from her November 26, 2007 tape-recorded interview, but Ragan claimed she did not remember seeing Petitioner holding a gun because she ran from the scene. 3RT 288-291. Ragan also claimed that she could not remember that she told Sergeant Phillips that she saw Petitioner shoot Harris. 3RT 295-296. Ragan also testified that she could not remember identifying a photograph of Petitioner as the person who shot Harris. 3RT 295. On cross-examination, Petitioner's attorney questioned Ragan about the circumstances in which she was questioned by Sergeant Phillips, and Ragan stated that she felt "pressured" to tell the officers what they wanted to hear. 3RT 335-338. Ragan also claimed she insisted that she ran from the scene after hearing the first shot, but the officers threatened that she was going to be "charged with accessory." 3RT 337. Therefore, Ragan agreed that it was fair to say she "wanted to say anything that the police wanted to hear so that [she] could get out of the police station." 3RT 337. The trial court admitted Ragan's November 26, 2007 tape-recorded interview into evidence. 6RT 851; Resp't Ex. 3C.

iv. Short

On February 29, 2008, Short unexpectedly arrived at the police department "to meet with [Sergeant Phillips] to find out why [Sergeant Phillips] was looking for [Short]." 6RT 857, 861. At 7:30 p.m. Sergeant Phillips, along with Sergeant Tim Nolan, interviewed Short about the September 11, 2007 incident. 6RT 861. They advised him of his *Miranda* rights because "it was still unknown if [he] was involved" in the shooting. 6RT 863. Apparently, Short's name surfaced while Sergeant Phillips was interviewing other witnesses. 6RT 863. Short initially did not admit to being present at the scene. 6RT 864. Sergeant Phillips used some "investigative tactics" on Short, and told him that they had "good information that [Short] was there at the scene . . . ." 6RT 864. Short then agreed to give a statement and allowed officers to record it. 6RT 864-865. Short stated that he was present at the scene of the September 11, 2007 incident, but he did not see who shot the victims. 4RT 540. Short told officers that he "ran around the corner when [he] heard the shooting." 4RT 540. The first interview ended at 1:25 a.m. the following morning, March 1, 2008. 6RT 867-868.

On March 25, 2008, Sergeant Phillips conducted a second interview with Short. 6RT 870. Sergeant Phillips claimed that he felt Short "was still leaving out some facts" because other witnesses "never mentioned [Short] walking away when the shooting began." 6RT 870. Sergeant Phillips picked up Short at his work and transported him to the police department. 6RT 870. Sergeants Phillips and Crutchfield entered the interview room to speak with Short at 9:14 p.m. 6RT 872. Sergeant Phillips advised Short of his *Miranda* rights. 6RT 870. At trial, Short testified that in the interview room the officers presented him with "[his] name on a piece of paper trying to charge [him] with a double homicide." 4RT 538. Sergeant Phillips denies this happened and denies that either he or Sergeant Crutchfield "threatened [Short] with any sort of criminal charges if he did not more fully and accurately provide [the officers] the truth about what happened back on September 11th of 2007." 6RT 872. Short agreed to have the officers record his second statement, and the interview began at 10:07 p.m. 6RT 872. In the taped statement, Short stated that he heard the first shot, saw Harris falling backwards, and saw Petitioner standing next to Harris with a pistol in his hand. 4RT 542. Short added that he heard more gunshots, saw

"muzzle flash" coming from Petitioner's gun, and saw Petitioner pointing the gun in the directed of a "Hispanic young man" and firing "at least more than four" shots. 4RT 543. At trial, Short denied making the aforementioned statements in the second tape-recorded interview and testified that the officers "were trying to charge [him] with a double homicide" so he "told them what [he] thought they wanted to hear." 4RT 538. Short testified that he was present at the scene of the September 11, 2007 incident and that he heard the shots that night, but he "didn't see who pulled that trigger." 4RT 537-538. The prosecutor then attempted to impeach Short with his prior statements to the officers from his March 25, 2008 tape-recorded interview, but Short admitted to lying to the officers because they threatened to charge him with a double homicide. 4RT 541-545. The trial court admitted Short's March 1 and 25, 2008 tape-recorded interviews into evidence. 6RT 865-866, 873-874; Resp't Exs. 3D, 3E.

v. Summary of Witnesses' Pretrial Statements and Trial Testimony

In sum, the record shows that S.C., S.C.'s mother, Ragan, and Short were all initially reluctant witnesses to the shooting on September 11, 2007. These witnesses' pretrial statements were used to place each witness near the scene of the shooting. The pretrial statements of S.C., Ragan, and Short identified Petitioner as the person who shot Harris. However, at trial, Ragan and Short either denied their pretrial statements or claimed to have difficulty recalling events and remembering their exact statements to police. Thus, at times, their previous statements were admitted for impeachment purposes. On cross-examination, defense counsel questioned each witness about the conduct of the police while taking their statements. Defense counsel also cross-examined Sergeant Phillips about his conduct during the police interviews.

vi. Analysis of IAC Claim

When a declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his or her prior testimonial statements. *California v. Green*, 399 U.S. 149, 157 (1970); *see Crawford v. Washington*, 541 U.S. 36 (2004). Here, as outlined above, each of the aforementioned witnesses testified at trial and was subject to cross-examination, and some of them were questioned about their previous inability or unwillingness to testify. Thus, the

admission of their prior statements to Sergeant Phillips did not violate Petitioner's rights under the Confrontation Clause. *See Green*, 399 U.S. at 162 ("where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem"); *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985) ("the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose . . . infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony"). Furthermore, the admission of impeachment evidence is a well-established legal principle. *See California v. Green*, 399 U.S. 149, 162 (1970); Cal. Evidence Code § 1235. Because there is no violation of the right to confrontation when the declarant is available for cross-examination, trial counsel was not ineffective in failing to file a motion to exclude the pretrial statements. *See Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (finding that counsel is not ineffective for failing to file frivolous motions).

Petitioner's remaining claims to exclude the aforementioned pretrial statements lack merit. As explained above, Sergeant Phillips testified that S.C.'s mother, Ragan and Short were all read their *Miranda* rights prior to their interviews. Additionally, while Sergeant Phillips testified that he used certain "investigative tactics" on Ragan and Short, there is nothing in the record indicating that Sergeant Phillips admitted to giving S.C., S.C.'s mother, Ragan, or Short information about the case. *See* 6RT 824-831 (S.C.'s mother); 832-841 (S.C.); 842-855 (Ragan); 857-875 (Short). Moreover, certain inconsistencies between the aforementioned witnesses' pretrial statements and their trial testimony further aided the defense in creating confusion regarding the credibility of the witnesses. Defense counsel was able to question the reliability of the statements on cross-examination, by asking each of the witnesses as well as Sergeant Phillips about the conduct of the police during the interviews. Therefore, defense counsel also had a reasonable tactical basis for not attempting to exclude the statements altogether. Lastly, Petitioner offers no solid or credible evidence that the statements actually were coerced or fabricated. Absent coercion or a *Miranda* violation, any objection to these pretrial statements would have been futile. *Strickland* does not obligate counsel to make a meritless argument. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir.

1996); *Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir.), *cert. denied*, 493 U.S. 869 (1989). Put simply, trial counsel cannot have been ineffective for failing to raise a meritless motion. *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005). Finally, the Court need not discuss prejudice where Petitioner has not established incompetence under the first *Strickland* prong. *See Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998).

For these same reasons, Petitioner cannot show appellate counsel's failure to raise the issue on appeal. *Moormann v. Ryan*, 628 F.3d 1102, 1106 (9th Cir. 2010) (the reviewing court must assess whether the claims that were omitted on direct appeal had merit). "[A]ppellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal." *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001). As noted above, Petitioner's argument that any of the aforementioned witnesses were coerced amounts to nothing more than speculation.

Because the California Supreme Court reasonably could have determined that neither trial nor appellate counsel was ineffective on the record presented, federal habeas relief is not warranted on the claim. Accordingly, Claim Twelve is DENIED.

3. Failure to Call Alibi Witness (Claim Thirteen)

Petitioner contends that trial counsel was ineffective for failing to call his sister, Tiana Sanders, as an alibi witness at trial, and that appellate counsel was ineffective for failing to raise this claim on appeal. Dkts. 10 at 5; 10-1 at 210, 228-230.

Again, give a lack of a reasoned state decision, the Court will conduct "an independent review of the record" to determine whether the California Supreme Court's summary denial of this claim was contrary to or an unreasonable application of clearly established federal law. *Plascencia*, 467 F.3d at 1197-98; *Himes*, 336 F.3d at 853.

Petitioner claims that "[o]ne of the reasons that Petitioner requested that trial counsel be replaced [was] because [counsel] would not interview, his sister who would testify that Petitioner

was in her presence at another location during the time of the shooting, in which he was charged.[13] *Id.* (citing "attached declaration exhibit C"). Neither the amended petition nor Petitioner's state habeas petition include a declaration by Tiana Sanders. *See* Dkts. 10, 10-1 at 207-229; *see also* Resp't Ex. 18. Instead, Petitioner has attached to his state habeas petition a document labeled, "Supporting Facts Continuance," in which he describes the alleged alibi evidence. *See* Dkt. 10-1 at 229. Petitioner contends that his sister would have testified at trial that he was home with her babysitting at the time of the murders, stating:

> Prejudice is shown by the fact that the only believable witness was Petitioner[']s sister Tiana Sanders, who would have testified that every Wednesday Petitioner baby sat his children while Petitioner[']s wife worked. And on September 11, 2007 she directly sat in the presence of Petitioner from 3:00 pm until 10:00 pm because they were both in the same house and Petitioner never left the house.

Id. Petitioner claims that "if [such testimony by Tiana Sanders was] believed, the jury would have acquitted Petitioner of the charged crime." *Id.* Petitioner argues that "[b]ecause counsel prior to trial did not interview Tiana Sanders, not did her call her to the witness stand at trial, he is ineffective in his assistance." *Id.* In addition, Petitioner argues that his appellate counsel was "ineffective in his assistance for failing to raise or identify the nonfrivolous issue on appeal." *Id.* Again, Petitioner requests an evidentiary hearing in order to "fully develop a record as to material facts central to his claim . . . ." *Id.*

[13] Petitioner claims that he "requested that the court allow him a *Marsden* hearing . . . so that he could express reasons on the record why his counsel should be replaced." Dkt. 10-1 at 228 (citing "RT 67, 266, 404"). The Court notes the record was sealed for one of the pages cited by Petitioner relating to the alleged *Marsden* hearing. 4RT 404. Mid-way through the trial on January 24, 2011, after the prosecution had presented testimony of nine witnesses, Petitioner's attorney indicated that Petitioner wanted to "make a *Marsden* motion." 4RT 403. The trial court apparently conducted a *Marsden* hearing *in camera* with only Petitioner and his counsel, and the transcript of this proceeding was sealed. 4RT 403. Thus, the Court was unable to review the reasons for such a hearing. The two other pages cited by Petitioner are not sealed. 1RT 67, 3RT 266. However, it is unclear how these two pages relate to any *Marsden* hearing because Petitioner does not elaborate on why he cited to these pages. The Court notes that nowhere on these two pages does Petitioner or his trial counsel mention anything about the alleged alibi witness. *See* 1RT 67 (conversation before the court relating to discovery issue between prosecutor and Hughes's trial counsel), 3RT 266 (direct testimony of Ragan during which trial court asks defense counsel if he could hear answers).

a. Request for Evidentiary Hearing

As mentioned above, Petitioner requests an evidentiary hearing to develop his IAC claim relating to the failure to call an alibi witness. Dkt. 10-1 at 229. However, the Court finds that no additional factual supplementation is necessary. Thus, an evidentiary hearing is unwarranted. For the reasons described below, the facts alleged in support of this IAC claim, even if established at an evidentiary hearing, would not entitle Petitioner to federal habeas relief. Further, Petitioner has not identified any concrete and material factual conflict in need of resolving that would require the Court to hold an evidentiary hearing. See *Pinholster*, 563 U.S. at 181-82. Therefore, Petitioner's request is DENIED.

b. Analysis of IAC Claim

The duty to investigate and prepare a defense does not require that every conceivable witness be interviewed. *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995). A claim of failure to interview a witness cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel. *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986). When the record shows that the lawyer was well-informed and the defendant fails to state what additional information would be gained by the discovery he now claims was necessary, an ineffective assistance claim fails. *Id.* A defendant's mere speculation that a witness might have given helpful information if interviewed is not enough to establish ineffective assistance of counsel. *See Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.), *amended*, 253 F.3d 1150 (9th Cir. 2001).

To establish prejudice caused by the failure to call a witness, a petitioner must show that the witness was likely to have been available to testify, that the witness would have given the proffered testimony, and that the witnesses' testimony would have created a reasonable probability that the jury would have reached a verdict more favorable to the petitioner. *Alcala v. Woodford*, 334 F.3d 862, 872-73 (9th Cir. 2003).

Here, trial counsel's strategy at trial was to challenge the strength of the prosecution's evidence that Petitioner committed the first degree murder of Harris, or that he aided and abetted Hughes's murder of Coria. *Lord v. Wood*, 184 F.3d 1083, 1095 (9th Cir. 1999) ("Few decisions a

lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial."). As such, trial counsel's tactical decision—to choose this strategy over one that hinged on the jury believing a sole alibi witness (related by blood to Petitioner) over the multiple third-party eyewitnesses who testified that they saw Petitioner at the time of the murders—does not demonstrate ineffectiveness. *See Allen v. Woodford*, 395 F.3d 979, 1002 (9th Cir. 2004) (trial counsel chose not to call defendant's granddaughter "because the jury 'would expect a grandchild to have nothing but good things to say about a grandparent'"); *Bergmann v. McCaughtry*, 65 F.3d 1372, 1380 (7th Cir. 1995) ("As a matter of trial strategy, counsel could well decide not to call family members as witnesses because family members can be easily impeached for bias."); *Romero v. Tansy*, 46 F.3d 1024, 1030 (10th Cir. 1995) ("alibi testimony by a defendant's family members is of significantly less exculpatory value than the testimony of an objective witness"). Nor can Petitioner show prejudice, in light of the overwhelming number of eyewitnesses who placed him at the scene before, during, or after the murders. For these same reasons, appellate counsel also was not ineffective for failing to bring a plainly meritless claim on appeal.

Furthermore, the Court notes that Petitioner did not submit a declaration from his sister in support of his claim. *See* Dkts. 10, 10-1; Resp't Ex. 18. In the absence of a declaration by such a witness demonstrating what that witness would have said at trial, Petitioner cannot meet his burden to show prejudice affirmatively from the failure to call the witness. *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000) (petitioner presented no evidence that alleged alibi witness "actually exists, other than from Dows' self-serving affidavit," and could not show that witness would have presented helpful testimony because he failed to present affidavit from witness). Instead, Petitioner submitted a document entitled, "Supporting Facts Continuance," in which he claims that his sister would have placed him at "home" on September 11, 2007 from 3:00 p.m. until 10:00 p.m. because his sister would have testified that "every Wednesday [he] baby sat his children while Petitioner[']s wife worked." Dkt. 10-1 at 229. Even if the Court could have considered such a document, this alleged testimony by his sister lacks persuasion. Based on the testimony of S.C., an eyewitness to the shooting (who did not recant his statements at trial), it was after 7:00 p.m. on September 11, 2007 when he witnessed Petitioner shoot Harris. *Hughes*, 2013 WL

960130, *2. The Court notes that September 11, 2007 fell on a *Tuesday*, and not on a Wednesday. Petitioner claims that his sister would have testified that he "baby sat" his children "every *Wednesday*" while his wife worked. Dkt. 10-1 at 229 (emphasis added). Because the shooting took place on *Tuesday*, September 11, 2007, it would seem that his sister's alleged testimony that Petitioner baby sat his children every *Wednesday* would not have been helpful to the defense. Without such an explanation, his sister's alleged testimony—placing Petitioner at "home" on September 11, 2007 from 3:00 p.m. until 10:00 p.m.—would be less reliable. Thus, even if the alleged testimony of his sister had been presented to the jury, it would not have been a reliable account for Petitioner's precise whereabouts when the crime was alleged to have been committed. Petitioner has failed to show that trial counsel's failure to investigate or have this alibi witness testify prejudiced his case. Therefore, the state supreme court reasonably rejected Petitioner's claim of ineffectiveness. Furthermore, Petitioner does not identify any controlling Supreme Court authority to establish that the state supreme court's rejection of this IAC claim was unreasonable.

Accordingly, the state supreme court's summary rejection of this IAC claim on collateral review was not an objectively unreasonable application of the *Strickland* standard. Petitioner is not entitled to relief on this claim, and Claim Thirteen is DENIED.

IV. CERTIFICATE OF APPEALABILITY

No certificate of appealability is warranted in this case. For the reasons set out above, jurists of reason would not find this Court's denial of Petitioner's claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may not appeal the denial of a Certificate of Appealability in this Court but may seek a certificate from the Ninth Circuit under Rule 22 of the Federal Rules of Appellate Procedure. *See* Rule 11(a) of the Rules Governing Section 2254 Cases.

V. CONCLUSION

For the reasons outlined above, the Court orders as follows:

1. All claims from the amended petition are DENIED, and a certificate of appealability will not issue. Petitioner's requests for an evidentiary hearing relating to Claims Twelve and Thirteen are DENIED. *See* Dkt. 10-1 at 218, 229. Petitioner may seek a certificate of

appealability from the Ninth Circuit Court of Appeals.

2. The Clerk of the Court shall terminate any pending motions and close the file.

IT IS SO ORDERED.

Dated: July 26, 2017

YVONNE GONZALEZ ROGERS
United States District Judge

United States District Court
Northern District of California