UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOSE OLIVERA-BERITAN, Petitioner, v. DEBRA ASUNCION, Warden, Respondent.	Case No. 16cv2646-CAB (PCL) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE RE:** **(1) DENYING MOTION FOR AN EVIDENTIARY HEARING AND FOR APPOINTMENT OF COUNSEL, and** **(2) DENYING PETITION FOR A WRIT OF HABEAS CORPUS**

Jose Olivera-Beritan ("Petitioner") is a state prisoner proceeding pro se with a Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. (ECF No. 1.) He challenges his San Diego Superior Court convictions for three counts of first degree murder, two counts of kidnapping for ransom, one count of kidnapping, one count of attempted kidnapping, and one count of conspiracy to commit kidnapping for ransom. (Pet. at 1-3.)[1] The jury returned true findings on three murder special circumstances, as well as firearm use, bodily injury and gang enhancements, and Petitioner was sentenced to five

[1] Pleading citations are to page numbers as assigned by the Electronic Case Filing ("ECF") system.

consecutive terms of life without the possibility of parole, plus consecutive terms of 25 years to life and 19 years. (Id.) He claims his federal constitutional rights were violated because there is insufficient evidence apart from uncorroborated accomplice testimony to support all but two of his convictions (claim one); he is not guilty of two murders under the post-conviction decision in People v. Chiu, 59 Cal.4th 155, 167 (2014) (holding that "a defendant cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine" of aider and abettor liability) (claim two); the admission of hearsay testimony of a statement by his co-defendant violated his right to confrontation (claim three); there was purposeful racial discrimination in jury selection which appellate counsel failed to raise on appeal (claim four); his role in the murders is not sufficiently major to support a sentence of life without the possibility of parole (claim five); he was prejudiced by the denial of his motions for dual juries and severance of his trial from his co-defendant, and he received ineffective assistance of counsel by trial counsel's failure to seek severance of the counts against him and appellate counsel's failure to raise those claims on appeal (claim six); the trial court erred in its evidentiary rulings and discovery orders regarding the gang enhancement evidence (claim seven); the trial court imposed a restitution fine without a determination of his ability to pay, and he received ineffective assistance of trial and appellate counsel by their failure to challenge the fine (claim eight); and his state court habeas petitions were denied on the pretext that he failed to present a prima facie case for relief (claim nine). (Id. at 9-70.)

Respondent has filed an Answer and lodged portions of the state court record. (ECF Nos. 10-11.) Respondent argues that claims one, three, six, seven, eight and nine do not present federal issues, and the state court adjudication of the other claims is not contrary to, and does not involve an unreasonable application of, clearly established federal law. (Memorandum of Points and Authorities in Support of Answer ["Ans. Mem."] at 36-59.)

Petitioner has filed a Traverse. (ECF No. 20.) He argues that: (a) each of his claims presents federal issues, (b) Respondent has lodged and relied on jury voir dire transcripts regarding claim four which were not before the state court, and this Court should either

ignore them, hold an evidentiary hearing, or hold the Petition in abeyance while he returns to state court with those transcripts, and (c) new evidence that a cooperating accomplice witness admitted he committed perjury at trial, which was disclosed by the prosecution after completion of his appeal and state post-conviction review, should be considered in support of his claims, or the Court should hold the Petition in abeyance while he returns to state court with the new evidence. (Traverse at 7-26.) He has also filed a Motion for an evidentiary hearing and for the appointment of counsel. (ECF No. 16.)

For the following reasons, the Court finds that the appointment of counsel, an evidentiary hearing, or a stay and abeyance are neither necessary nor warranted. The Court also finds that federal habeas relief is unavailable because the state court adjudication of Petitioner's claims is neither contrary to, nor involves an unreasonable application of, clearly established federal law, and is not based on an unreasonable determination of the facts. The Court recommends denial of the Motion for an evidentiary hearing and appointment of counsel, and denial of the Petition.

I. PROCEDURAL BACKGROUND

On August 6, 2009, a 22-count Indictment was filed in the San Diego County Superior Court naming 17 defendants, including Petitioner who was charged in 9 counts. (Lodgment No. 3, Clerk's Transcript ["CT"] at 1-36.) Eight defendants appeared in the superior court, with the others remaining at large. (Lodgment No. 1, Reporter's Tr. ["RT"] at 1-4.) Of those eight defendants, two (Guillermo Moreno-Garcia and his younger half-brother Carlos Pena) entered into cooperation agreements and testified at trial, the District Attorney anticipated seeking the death penalty against four (Jorge Rojas Lopez, Jesus Lopez Becaerra, Edgar Frausto-Lopez and Jorge Salvador Moreno), leaving Petitioner and David Valencia to be the first to go to trial, and they were tried together. (RT 285-86.) The counts were renumbered and Petitioner was charged with attempted kidnapping of Arturo Martinez-Barrera in violation of California Penal Code §§ 207(a) and 664 (count 1); robbery of Ivan Lozano, Jr. in violation of Penal Code § 211 (count 2); murder of Ivan Lozano, Jr. in violation of Penal Code § 187(a) (count 3); kidnap for ransom of Cesar Uribe

in violation of Penal Code § 209(a) (count 4); murder of Cesar Uribe in violation of Penal Code § 187(a) (count 5); kidnap for ransom of Marc Anthony Leon in violation of Penal Code § 209(a) (count 6); murder of Marc Anthony Leon in violation of Penal Code § 187(a) (count 7); conspiracy to kidnap for ransom Eduardo Gonzalez-Tostado in violation of Penal Code §§ 182(a) and 209(a) (count 8); and kidnap for ransom of Eduardo Gonzalez-Tostado in violation of Penal Code § 209(a) (count 9). (CT 626-49.) David Valencia pled guilty to counts 8-9 and was only charged in counts 4-7. (CT 626-49, 832-34.) Special circumstance allegations as to the Lozano murder alleged it was committed during the commission or attempted commission of a robbery, and as to all murders that they: (1) were committed during the commission or attempted commission of kidnapping, (2) involved the infliction of torture, (3) were committed while the defendants were active participants in a criminal street gang, and (4) involved more than one murder. (Id.) As to all other counts the Indictment alleged they were committed for the benefit of a criminal street gang within the meaning of Penal Code § 186.22(b)(1), alleged with respect to counts 1, 8 and 9 that at least one principal was armed with a firearm within the meaning of Penal Code § 12022.52(d)&(e)(1), and alleged with respect to counts 4, 6 and 9 that the victim suffered bodily harm within the meaning of Penal Code § 209(a). (Id.)

On May 16, 2012, a jury found Petitioner and Valencia not guilty of robbery of Lozano and not guilty of the lesser included offense of grand theft (count 2), not guilty of kidnapping Leon for ransom but guilty of the lesser included offense of kidnap of Leon (count 6), and guilty on all remaining counts. (CT 1509-56.) The jury returned not true findings on the special circumstances of torture and robbery, but returned true findings on all remaining allegations, including the special circumstances that the murders were committed during the course of a kidnapping, were carried out to further the activities of a criminal street gang, and involved more than one murder. (Id.) On September 28, 2012, Petitioner was sentenced to five consecutive terms of life without the possibility of parole, plus consecutive terms of 25 years to life and 19 years, along with the imposition of $714 in court fees and $2,467.71 in restitution fines. (CT 1574-75.)

Petitioner appealed, raising claim one presented here. (Lodgment Nos. 4-8.) The appeal was consolidated with the appeal of his co-defendant Valencia, and on September 10, 2014, the appellate court affirmed in all respects, with the exception of directing the abstract of judgment be modified. (Lodgment No. 12.) Petitioner filed a petition for review in the state supreme court presenting claim one raised here. (Lodgment No. 13.) His petition was consolidated with Valencia's petition for review, and they were summarily denied on November 18, 2014. (Lodgment No. 15.)

On February 18, 2016, Petitioner filed a habeas petition in the superior court raising the remaining claims presented here. (Lodgment No. 16.) That petition was denied on March 25, 2016, on the basis that Petitioner had not stated a prima facie claim for relief, and, as to five of the claims, on the basis they were required to have been raised on direct appeal. (Lodgment No. 17.) His request for reconsideration, which was accompanied by additional documentary support, was denied. (Lodgment Nos. 18-19.) He presented the same claims with the additional documentary support to the appellate court in a habeas petition filed on May 27, 2016. (Lodgment No. 20.) The state appellate court addressed the merits of the claims and denied the petition on June 8, 2016. (Lodgment No. 21.) Petitioner filed a habeas petition in the state supreme court on August 1, 2016, presenting the same claims, which was summarily denied on October 12, 2016. (Lodgment Nos. 22-27.) He filed the instant federal Petition on October 24, 2016.[2]

II. TRIAL PROCEEDINGS

Motions to sever the trials of Petitioner and Valencia and for dual juries were denied. (RT 413-14, 475-76; CT 323-62.) Defense counsel made two Batson-Wheeler[3] motions during jury selection after the prosecutor excused four African-American jurors. (RT 639-

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[2] Petitioner's co-defendant David Valencia filed a habeas petition in this Court on January 14, 2016, which was denied on October 5, 2016, on the merits of the claims presented. See Order filed 10/5/16 [ECF No. 9] in So.Dist.Ca. Civil Case No. 16cv0101-DMS (WVG).

[3] The use of peremptory challenges to excuse prospective jurors solely on membership in a racial group violates both the state and federal Constitutions. See Batson v. Kentucky, 476 U.S. 79, 89 (1986) and People v. Wheeler, 22 Cal.3d 258, 276-77 (1978).

40.) The motions were denied after the trial judge found there was no prima facie showing of discriminatory animus. (RT 640.)

James Bird, a Federal Bureau of Investigation (FBI) Agent, testified as an expert witness. (RT 880-81.) He said that in 2006 he joined a task force assigned to address a serious problem with border-related kidnappings in the San Diego region. (Id.) Because crime in Tijuana, Mexico is controlled by a drug cartel, drug-related kidnappings in the cross-border area have always occurred, but Agent Bird said there was a dramatic change around 2005 when the cartels became heavily involved in kidnapping. (RT 896, 901-05.) When a kidnapping involves drug dealers, as opposed to ordinary citizens, it is much more likely the hostage will be killed for reasons related to the drug trade, such as retribution or to send a message to drug dealers, and such kidnappings are dramatically underreported due to the culture of fear of retaliation created by the cartels. (RT 897-904.)

Agent Bird said that since about 1980, the Arellano Felix Organization ("AFO") has been the drug cartel in control of the area of Mexico just south of San Diego, and although it was still the dominant power at the time he testified in 2012, it had been significantly weakened by recent arrests and attacks from the Sinaloa cartel. (RT 905.) The cartels are organized with a leader surrounded by family and close associates they have known for a very long time. (RT 906.) Immediately below that level are lieutenants who run different cells, and the cells are made up of crews of soldiers who are not treated or paid well, and who perform the undesirable jobs on the lowest level of the cartel. (RT 906-07.) The business of the cartels is making money, which they do by trafficking in drugs, accepting payments from people who want to be involved in criminal activity, laundering money, corrupting officials, and kidnapping for ransom, often organizing cells to specialize in one area. (RT 907-10.)

A typical kidnapping cell is composed of individuals with segregated roles who did not know each other, such as a spotter to identify a potential victim, people to grab the victim, people at different safe houses to watch the victim, people to rent the safe houses, and someone to pick up the ransom. (RT 910-13.) The ordinary FBI strategy of trying to

wait out the kidnappers in the hope they would tire of holding the hostage does not work with the cartels because they have unlimited resources, along with several rented safe houses staffed with poorly paid guards allowing them to move their victims. (RT 3923-24.) After a cell identifies a target and obtains permission from higher up in the cartel, they send people impersonating police dressed like a SWAT team into the person's home or place of business to abduct them, or pick a choke-off point on a route surveillance has shown the victim usually takes and perform a traffic stop while impersonating police. (RT 915-17.) The victim is blindfolded, restrained with duct tape or handcuffs, interrogated, and kept at one or more safe houses where they are fed poorly and sporadically, beaten, and left at the whims of low-level, uneducated, drug-using guards. (RT 917-21.) In almost every case the first call to the family involves a demand for a large amount of money, a warning not to call the police, and an assurance the kidnappers would call back. (RT 3915.) The kidnappers would call every few days and check on how much money the family was able to raise, until they were satisfied it was enough, and then arrange for delivery of the ransom. (RT 3916.) Upon release the victim would be forced to shower and be given new clothes to minimize forensic evidence. (RT 3924-25.) Agent Bird said it is not uncommon for cartel kidnappers to use Taser guns, or for the cartels to dispose of bodies by dissolving them in large barrels of acid and lye. (RT 3926-31.)

Lilia Leon testified that her son Marc Leon failed to come home from work on May 3, 2007, and did not answer his cell phone thereafter. (RT 960-71.) When he failed to call her on Mother's Day in Mexico, Thursday, May 10, she knew something was very wrong. (RT 972.) Marc Leon was friends with Cesar Uribe, and Uribe was friends with a man named Tony, so Lilia paid Tony a visit on May 11, and Tony told her Leon and Uribe had been kidnapped. (RT 972-75.) Lilia said that her family does not have much money and they were never contacted with a ransom demand. (RT 979-81.)

Veronica Gamez testified that she had a common law marriage to Cesar Uribe, and they were together for thirteen years before his disappearance on May 3, 2007. (RT 989-92.) She knew Uribe trafficked marijuana but they never discussed his business, and she

did not know if he was a member of a cartel. (RT 992-1000.) She and Uribe met and became friends with David Valencia (Petitioner's co-defendant) and his wife in 2000, and Uribe worked with Valencia trafficking marijuana for the next several years. (RT 1000-06.) The business relationship between Uribe and Valencia ended in 2004, although they remained friends, and Uribe continued selling marijuana without Valencia. (RT 1007-10.) Uribe then began working with Tony Sanchez, who she knew as Cap, and Uribe began making enough money to allow Veronica and Uribe to purchase expensive cars and a $980,000 home in an Eastlake community, where Valencia also lived with his family in a house rented from Adrian Gonzalez. (RT 1011-12, 1021-24.) She met Marc Leon in 2006, when he began helping Uribe and Cap. (RT 1019-21.) David Valencia and Uribe rented horse stables near the border that was owned or run by Adrian Gonzalez' brother Fabian Gonzalez, called "the ranch." (RT 1028.) Veronica met a man at the ranch by the name of Ernesto Ayon, also known to her as Chapo, who worked for Valencia, but not for Uribe and Cap. (RT 1029-30.) Veronica said it did not appear to her that Valencia was part of Uribe and Cap's marijuana trafficking organization. (RT 1030.)

Veronica testified that Uribe's relationship with Valencia became strained in March 2007, about two months before Uribe was kidnapped. (RT 1018.) Uribe was in the habit at that time of calling Marc Leon in the morning when he wanted to be picked up, and having Leon drop him off at the end of each day. (RT 1033-34.) Adrian Gonzalez, David Valencia's landlord, called their home on the morning of May 3 and asked Uribe when he was going to pay Valencia the money he owed Valencia, because Valencia needed to pay rent to Gonzalez. (RT 1035.) She overheard the conversation because Uribe used a radio phone, and said Uribe responded angrily that he did not owe Valencia anything, that he did not know what Gonzalez was talking about, and that Valencia was lying. (RT 1035-37.) Valencia called Uribe shortly thereafter speaking in a serious tone, and Uribe told Valencia that Leon was on the way to pick him up and Uribe would call Valencia back from the car in a few minutes. (RT 1037-40.) Uribe left with Leon, and Veronica never saw him again. (RT 1040.)

Roberto Palafax, also known as Antonio "Tony" Sanchez, testified that he was currently serving a six-year state prison sentence for possession of marijuana with intent to distribute, and that he had been arrested on June 18, 2007 in Cleveland, Ohio. (RT 8144-45.) Palafax said Cesar Uribe was his best friend and that he was good friends with Marc Leon, that they called him Cap, and that he and Uribe were partners in selling marijuana, with Uribe obtaining it and Palafax selling it in Cleveland. (RT 8149-74.) Palafax did not know or want to know where Uribe obtained the marijuana, denied having any ties to the AFO, and said that as far as he knew Uribe had no ties to the AFO. (RT 8304.) On May 3, 2007, someone called him using Uribe's phone and said they had kidnapped him and wanted a ridiculous amount of money, either a million or half a million dollars, and when Palafax told them they did not have that kind of money, they said they would give him two weeks to sell everything he owned. (RT 8175-85, 8208.) He said the kidnappers seemed to know everything about him, including who owed him money, information they could only have gotten from Uribe. (RT 8186.) They told him it was just business and if he did what they said Uribe would be released. (RT 8201.) Palafax and Uribe's family began gathering money, Palafax flew to San Diego from Cleveland, and the kidnappers called again one week later. (RT 8217-20.) Palafax testified that earlier in the day Uribe was kidnapped, Uribe told him he was going to meet Valencia. (RT 8312.)

Palafax said a second call gave instructions for the ransom drop, and a little over $50,000 was dropped at the Briarwood apartment complex in Chula Vista. (RT 8332-48.) The kidnappers called again after the drop and said they would do them a favor and take whatever they had, such as jewelry and whatever other money they could get. (RT 8349-50.) Palafax and Uribe's family made a second drop of about $40,000 plus watches and jewelry. (RT 8350-57.) When they had not heard from the kidnappers for three or four days and Uribe and Leon were not returned, they called the police. (RT 8360.)

Veronica Gamez was recalled and testified that David Valencia came to her home during the negotiations and denied knowing anything about the kidnapping. (RT 8580-8618.) Several members of Cesar Uribe's family testified that although they had never met

Petitioner, they occasionally saw Valencia at family celebrations, and that Valencia came to the Uribe house during the kidnapping very red and jittery, sweating profusely, pacing, looked very nervous, and was worried they might call the police. (RT 8803-33, 8910.) A family member testified that they gathered a total of $72,000 in ransom money for the first drop, and $33,000 and watches and jewelry for the second drop. (RT 8842-60.) A fraud investigator with the Bank of America testified that withdrawals from Cesar Uribe's account were made from an ATM on May 3, 5 and 7, 2007. (RT 12810-26.) The jury was shown a photograph taken from an ATM during the withdrawal on May 7, 2007, which the prosecutor argued depicted Petitioner. (RT 12816-20, 14344, 14374.)

Adrian Gonzalez testified that he rented a house to David Valencia three houses down from Cesar Uribe's house. (RT 10411-12.) Adrian said his brother Fabian had a horse ranch where Uribe and Valencia often hung out with Ernesto Ayon, also called Neto or Chapo, who lived there. (RT 10412-13.) In April or May of 2007, Valencia was $9,000 behind in his rent, and Valencia told Adrian he would pay as soon as Uribe paid $70,000 he owed him. (RT 10416-18.) Adrian called Uribe on May 3, 2007, the day he went missing, told him what Valencia had said, and said that Uribe got upset and denied owing Valencia anything. (RT 10419-21.) Valencia paid Adrian Gonzalez the $9,000 in June 2007. (RT 10427, 10449.)

Ramona Orozco testified that in 2007 she lived in Tijuana with her husband and their son Ivan Lozano Dias, Jr. (RT 1105.) Lozano was born in the United States and crossed the border to attend high school in Chula Vista, often accompanied by his friend Omar Sarabia, although he did not finish high school due to drug problems. (RT 1109-11.) The last day Ramona saw Lozano was Friday, March 22, 2007, when he left home to spend the weekend with their family friends Felix and Hazel Briseno in Chula Vista. (RT 1113-16, 1119.) When she was unable to contact Lozano, she and her husband called the police and hired a private investigator. (RT 1117-18.) They were eventually contacted by the Sarabia family and told that Lozano was last seen with Omar, and were later notified that Lozano's body was found on April 4, 2007 in San Diego County. (RT 1118, 1127.)

Hazel Briseno testified that Lozano often came from Tijuana and visited the Briseno house in Chula Vista in March 2007 when Mr. Briseno was dying of cancer. (RT 4103-04.) Hazel, her husband and Lozano spent the afternoon of March 23, 2007, at the Briseno house. (RT 4105.) Lozano received a call from Omar Sarabia, who was nicknamed Pecas, and said he was going out to meet Omar but would be back for dinner in fifteen minutes. (RT 4109-11.) Lozano was picked up ten minutes later, about 3:00 p.m., and left his jacket and car keys at the Briseno home. (RT 4112-14.) When Mr. Briseno called Lozano about an hour and a half later, Lozano sounded agitated and serious, and they never saw or heard from him again. (RT 4114-15.)

Brett Burkett, a San Diego Police Homicide Detective, testified that on April 4, 2007, he found the dead and decomposing body of Ivan Lozano, Jr. in the trunk of a 1999 Chrysler Concord abandoned in a Clairemont neighborhood, and there were large blisters and numerous toothpicks around the face and neck area. (RT 6915-18.) The owner of the car said it was stolen on March 24, 2007, about 1:00 or 2:00 a.m. (RT 4209-16.) Someone who lived near where the car was found said he first saw it parked there about 9:00 a.m. on March 24. (RT 4038-43.) Steven Charles Campman, a forensic pathologist with the San Diego County medical examiner, testified that Lozano had blunt force injuries, Taser injuries, duct tape residue around the ankles with indications the legs had been bound, and had been dead for an undeterminable number of days. (RT 8010-27.) Dr. Campman said the cause of death was homicidal violence including asphyxiation, and it would be consistent with his findings if he had died on March 23, 2007. (RT 8028, 8120, 8133.) Spare parts from the Chrysler Concord were later found in the garage of a house at 6549 Garber Avenue in Paradise Valley. (RT 9101-12.)

Emmanuel Nwagbo testified that he owned the house at 6549 Garber Avenue in Paradise Valley, and had lived there for five years before renting it in October 2006 to persons who identified themselves as Ignacio Peredo and Norma Berumen. (RT 1124-29.) The renters made the first payment in cash, and made the second payment with a Western Union transfer. (RT 1248-49.) At some point his neighbors, who Nwagbo knew well,

complained about his tenants, but the tenants refused to allow Nwagbo in the house. (RT 1253.) He went there on Mother's Day in the United States, Sunday, May 13, 2007, and was refused entrance by a young Hispanic male who claimed he did not speak English. (RT 1254-56.) Nwagbo was later contacted by the FBI and the San Diego Police, and identified that man from a photographic lineup as Carlos Pena. (RT 1257-58, 1324, 1580-84.) When Nwagbo entered the Garber Avenue house the first week of June 2007 it was abandoned, with the utilities shut off, and he noticed a bad smell and saw a lot of clothing, chemicals, white powder and damage to the house, so he called the police. (RT 1267-70.) The smell came from a black bag in the garage that had something seeping from it that looked like blood, with a box of muriatic acid next to it. (RT 1320-22.)

Nwagbo turned over a UPS envelope to the FBI with the name of Onel Jimenez, in which Nwagbo had received the January rent payment. (RT 1591.) Meredith Dent, a San Diego County District Attorney paralegal, testified that she subpoenaed UPS records which showed that envelopes were sent from Onel Jimenez to Emmanuel Nwagbo in April and May, 2007. (RT 1591, 13713-26.)

Onel Jimenez testified that he was born in Cuba, came to the United States on a raft when he was 19, spent a year at Guantanamo Bay, and then entered the United States legally in 1995. (RT 3402-03.) He met Petitioner, who is also Cuban and has the nickname Chino, in 2005, and they became friends and lived together in Kansas City. (RT 3407-09.) The last time he saw Petitioner was in early 2006 in Kansas City, and said he never gave him permission to use his name. (RT 3414.) Jimenez identified documents found on Petitioner when he was arrested as Jimenez' Missouri identification card, his contractor's license, and a Florida driver's license that Jimenez did not apply for which bore his information but Petitioner's photograph. (RT 3415-18.)

Richard Weiler, an FBI Agent stationed in Kansas City, Missouri, testified that he investigated Mexican and Cuba drug trafficking gangs active in that area in 2006-07. (RT 3528-33.) He said Petitioner was identified as a person of interest during the investigation of a Cuban gang, which did business with a Mexican gang with ties to San Diego, and that

Petitioner left the Kansas City area on September 6, 2006. (RT 3541, 3550-58.) Evidence was excluded that Petitioner left Kansas City immediately after a double murder and was involved in kidnapping and murdering drug dealers when he lived there. (RT 385-93.)

Kameron Korte, a Drug Enforcement Administration Agent, testified that she was a member of the San Diego Integrated Narcotics Task Force which participated in the June 2007 investigation into a kidnapping at 1539 Point Dume Court. (RT 1376-77.) Korte said she interviewed the persons arrested following a SWAT raid at that address on June 16, 2007, which resulted in the rescue of the kidnap victim, Eduardo Gonzalez-Tostado. (RT 1379-81.) Jorge Rojas Lopez falsely identified himself as Ruben Flores, and was in possession of three forms of identification under the name of Jose Meraz Carrasco. (RT 1381-94.) Juan Estrada-Gonzalez provided his true name, and was in possession of several forms of identification in the name of Miguel Escamilla. (RT 1396-97.) Carlos Pena identified himself as Jose Carlos Pena-Garcia, and was in possession of two padlock keys, a handcuff key, and a cell phone. (RT 1414-15.) Petitioner gave his true name, said he was born in Havana, Cuba, and was in possession of a Florida driver's license under the name of Onel Jimenez. (RT 1406.) He was also in possession of handcuffs, a gold chain with a gold medallion similar to what a police officer might wear in a SWAT raid, a receipt for a cell phone, and two credit cards issued to the kidnap victim. (RT 1407-13.)

Tony Botterill, a property manager in Chula Vista, testified that the house at 1539 Point Dume Court in Chula Vista was rented on May 26, 2007, by Luis Armando Gonzalez Perez. (RT 1351-54.) He said David Valencia rented a property in Eastlake, about seven miles from the Point Dume Court house. (RT 1358-59.) The owner of the Point Dume property called Botterill on June 16, 2007, when he saw his house on the news surrounded by a SWAT team. (RT 1359-60, 1363.) Botterill went there the next day and found food debris and discarded fast food wrappers, a missing stair carpet, and two dirty mattresses. (RT 1362-63.) A Taser gun was later found hidden in a couch. (RT 1369-73.)

Joel Mendoza, a San Diego Police Officer, testified that on June 13, 2007, he and his partner were on patrol in farmland area with horse stables near the border when they

saw a Toyota Camry with a brake light out, and initiated a traffic stop. (RT 1132-37.) The driver was David Valencia and the passenger was Ernesto Ayon. (RT 1142-48.) The officers found an unloaded .40-caliber Ruger semiautomatic handgun under the driver's seat, a loaded .40-caliber Glock semiautomatic handgun under the front passenger seat, as well as several cell phones and a bindle containing a usable amount of cocaine, and both men were arrested. (RT 1158-60, 1199-1210.)

FBI Agent Dean Giboney testified, both as an expert witness and an investigator, that he has been the lead agent for the FBI investigation of the Las Palillos kidnapping and murder crew since 2007, and has previously testified as an expert witness regarding Mexican cartels. (RT 1426-27.) He said that Victor Rojas Lopez, also known as El Palillo, was a well-known cell leader for the AFO in the early 2000s, with 20 to 40 people working under him, until he was murdered by the AFO in November 2002. (RT 1507-11, 1525.) His crew stole drugs from other organizations, including the Sinaloa cartel, a heated a rival of the AFO, committed kidnappings for ransom, and trafficked in drugs. (RT 1510-12, 2309.) His nickname, El Palillo, came from the way he wore his hair, in a spiked fashion, and from Palillo, a Spanish word for toothpick. (RT 1517.)

Agent Giboney testified that Jorge Rojas Lopez, who was arrested in the Point Dume raid, is Victor Rojas Lopez' younger brother, and had been a member of Victor's AFO cell. (RT 1528.) After Victor and other members of the cell were murdered by the AFO, Jorge fled to the United States and continued to operate the cell, but separate from the AFO. (RT 1529.) He said that the May 2007 disappearances of Cesar Uribe and Marc Leon, the March 2007 murder of Ivan Lozano, Jr., and the uncharged April 2007 murder of a man named Mario Baylon, among others, appeared to be traced to the new Los Palillos crew led by Jorge Rojas Lopez. (RT 1529-45.) Agent Giboney identified the members of the new Los Palillos crew over a defense objection regarding whether the testimony was expert opinion or based on investigation, and the jury was instructed regarding those dual roles. (RT 1596-98.) The Los Palillos crew consisted of Jorge Rojas Lopez (with nicknames El Palillo and Jorgillo) and an alias Ruben Flores Rosales, Juan Francisco Estrada-Gonzalez

(Pepe), Jesus Lopez-Becerra (Topo), his brother Gerardo Gabriel Lopez-Becerra (Tito) who is deceased, Edgar Frausto-Lopez (Tita), his brother Ponciano Frausto-Lopez (Pelon) who is deceased, Jorge Moreno, Juan Laureano-Arvizu (Flaco or Chaquetin), Juan Omar Sarabia (Pecas), Jesus Gonzalez Trujillo (Compadre), Guillermo Ignacio Moreno-Garcia (Memo), his half-brother Carlos Pena (Morro), Petitioner (Chino or Asere), David Valencia (Guero), Ernesto Ayon (Neto or Chapo), Pedro Corrales (Perico) who is deceased, Eduardo Monroy (the Architect), and Nancy Mendoza Moreno. (RT 1596-1616.)

Agent Giboney testified that after Eduardo Gonzalez-Tostado was kidnapped on June 10, 2007, a wiretap revealed that Jorge Rojas Lopez was involved. (RT 1545-53.) Agent Giboney determined that Gonzalez-Tostado was being held at 1539 Point Dume Court in Chula Vista, organized a SWAT team entry, rescued the victim, and arrested several men. (RT 1557-59.) Four vehicles were seized from the residence, including a gray Ford Ranger owned by Carlos Pena and a silver Chevrolet Equinox owned by Petitioner. (RT 1568, 5342-47.) Also recovered was a Taser gun, an H&K USP model 40-caliber semiautomatic handgun, several AK-47 style rifles, ammunition, a Sig Sauer P220 semiautomatic handgun, ballistic police vests and other clothing with "police" emblazoned on them, police ball caps and t-shirts, counterfeit police badges designed to be worn around the neck, a ski mask, chains, four padlocks, and a blue and red strobe light ordinarily used by police vehicles designed to plug into a car cigarette lighter. (RT 1624-38.) Agent Giboney opined that dressing up as police and using police lights to kidnap victims and hold them at rented houses is consistent with cartel-style kidnappings. (RT 1823-30.)

Agent Giboney spoke with the owner of the Garber Avenue residence about a young Hispanic male who answered the door and refused him entry on Mother's Day 2007. (RT 1576-79.) The owner identified that man from a photographic lineup as Carlos Pena, and identified Pena's gray Ford Ranger pickup truck as having been at the house. (RT 1580-84.) The muriatic acid found in the garage of the Garber Avenue house is the type used to dissolve corpses. (RT 2409-10.) A Florida driver's license in the name of William Smith bearing Petitioner's photograph was found at the Point Dume Court house. (RT 2425-27.)

Agent Giboney opined that the toothpicks scattered on Lozano's body was a calling card of the Los Palillos crew, as would, hypothetically, if the bodies of Cesar Uribe and Marc Leon had been dissolved in acid, poured into a ditch, and buried. (RT 2611-14.)

Jennifer Atwood, a San Diego Police Sergeant, was working as a patrol officer in the downtown division when she received a radio dispatch on January 3, 2007, at 11:37 p.m. about a shooting at 1642 Columbia Street in Little Italy. (RT 2631-32.) She entered an apartment and saw a large amount of blood and a man named Arturo Martinez-Barrera bleeding from what appeared to be three close-range large-caliber gunshot wounds. (RT 2634-39, 2705, 3655.) His black Toyota Sequoia was outside the apartment with a broken window and a blood trail leading to the building, and he told her that a white minivan had parked in front of him at the Briarwood apartments in Chula Vista and five or six men exited the minivan dressed in black with "police" written on their caps and brandishing handguns. (RT 2702-04, 3656-57.) Officer Atwood went to the Briarwood apartments and found shattered glass and shell casings from a .45-caliber automatic. (RT 2640-46.)

Residents of the Briarwood apartment complex testified that they heard gunshots about 11:00 p.m. on January 3, 2007. (RT 2726-29, 2744-47.) One resident saw two cars drive away at very high speed, a white minivan with its side door open and a silver four-door pickup truck. (RT 2729-40.) Another saw a white minivan with strobe lights with two men in the front, the two rear sliding doors on each side open with the seats removed, and a man wearing all black and a ski mask sitting in the back. (RT 2747-53.) A resident said that although the men were dressed like police she could tell they were not police. (RT 2753-61.)

Arturo Martinez-Barrera testified, in handcuffs, that he has been in custody since March 6, 2007, serving a 151-month federal prison sentence for conspiracy to distribute more than a dozen kilograms of marijuana. (RT 2820.) He said he started out as a small-time independent marijuana dealer in the mid-1990s, moving ten or twenty pounds at a time while avoiding involvement with the cartels due to the violence, and avoiding dealing in other drugs due to the long prison sentences, and built his business up to where he was

dealing thousands of pounds at a time, at which point he was caught. (RT 2821-31.) In December 2006, Martinez-Barrera was told by Juan Laureano-Arvizu, who he knew as Flaco, that Laureano-Arvizu had heard that Martinez-Barrera owed a drug debt to a man named Jorgillo, an alias for Jorge Rojas Lopez. (RT 2849-54.) He knew he did not owe a debt, but tried to meet with Lopez to clear things up and avoid any trouble. (RT 2854.)

On January 3, 2007, Laureano-Arvizu asked Martinez-Barrera to go for a drink, and Martinez-Barrera, driving his black Toyota Sequoia, followed Laureano-Arvizu, who was driving a four-door gray pickup truck. (RT 2906-17.) He said Laureano-Arvizu drove abnormally slow while speaking on the phone, and led them to the Briarwood apartment complex. (RT 2924.) When Laureano-Arvizu parked his pickup truck in the apartment complex and apparently went to knock on a door, Martinez-Barrera parked his Sequoia behind Laureano-Arvizu's pickup truck and stayed in his vehicle. (RT 2929-32.) About five minutes later Martinez-Barrera made a U-turn because he thought something might be wrong and wanted to be able to leave quickly, at which point he saw lights coming from the top of a hill and was suddenly boxed in by a car in front and a van on the passenger side of his Sequoia. (RT 2933-38.) Two men who came from the car wore all black and looked like police, pointed handguns at him, banged on his windows, and screamed for him to get out. (RT 2939.) He knew they were not police, so he put the Sequoia in reverse as shots were fired from both sides, which broke a window and hit him in three places. (RT 2944-47, 3003.) When the van started following him it created a gap, and he drove though the gap and out of the apartment complex. (RT 2953-54.) He drove to 1642 Columbia Street in Little Italy to the apartment of his friend Valeria, where the paramedics took him to the hospital, and called his friend Cynthia Mendoza along the way and told her that Laureano-Arvizu had set him up. (RT 2955-57.)

Martinez-Barrera said he had never met Petitioner, but David Valencia, who also went by the name Guero, was a friend of his from the early 1980s when they lived in Tijuana. (RT 3019-20.) Valencia sold marijuana to Martinez-Barrera on three occasions, about one hundred pounds each time, but Martinez-Barrera did not know if Valencia was

affiliated with any cartel. (RT 3021-22.) Martinez-Barrera said he had a falling out with Valencia in 2004 when he was fronted marijuana from Valencia that was stolen before it was sold, and he had to pay Valencia back out of his own pocket, and after that they never saw each other again. (RT 3025-26.)

Cynthia Mendoza testified that she knew Arturo Martinez-Barrera as Manzanas, that she has known him most of her life, and that he is a family friend. (RT 3150.) She said there were two brothers who went by the name of El Palillo whom she and everyone else knew of from going out to clubs in Tijuana, and said the older brother died and the younger brother was named Jorgito or Jorgillo, both meaning "little Jorge." (RT 3155-57, 3202.) In 2006 and early 2007, Mendoza often saw Jorgillo in clubs in downtown San Diego and Little Italy in the company of Laureano-Arvizu, who she knew as Juan Flaco or Chaquetin, who was also a family friend. (RT 3158-61.) Juan Omar Sarabia, who she knew as Omar Pecas, and his sister Griselda Sarabia, were part of that group which Mendoza often saw in clubs wearing expensive clothes and drinking expensive alcohol. (RT 3162-64.) Mendoza knew that Los Palillos was an illegal cartel to be feared, and said that Laureano-Arvizu bragged that he was part of that cartel. (RT 3201-04.) She said Laureano-Arvizu drove a gray four-door pickup truck, and he came to live with her for several weeks in December 2006, but she kicked him out for what he did to Martinez-Barrera. (RT 3204-08.) Mendoza testified that when Martinez-Barrera dropped her off at her home on January 3, 2007, Laureano-Arvizu was there, and Martinez-Barrera said he and Laureano-Arvizu were going out for a drink. (RT 2311-19.) She went to bed and was awoke by a panicked phone call from Martinez-Barrera who told her he had been shot, that Laureano-Arvizu had set him up, and that she should get her daughter and leave. (RT 3222-23.) Laureano-Arvizu then called asking where Martinez-Barrera was, and Mendoza and her daughter fled to her cousin Valeria's apartment on Columbia Street in Little Italy. (RT 3223-28.)

Valeria Aguayo testified that Cynthia Mendoza is her cousin, that she met Arturo Martinez-Barrera, also called Manzanas, through her family when she was a teenager, and had known Juan Laureano-Arvizu Flaco, who she also knew as Chaquetin, since she was

a teenager. (RT 3301-04.) Laureano-Arvizu introduced her to Jorge Rojas Lopez, the younger of two brothers nicknamed El Palillo, in 2006, at a nightclub in Tijuana, although she was already aware of who he was because she was close friends with Edgar Frausto-Lopez, a drug dealer who worked with the elder El Palillo (Victor Rojas Lopez) in the early 2000s. (RT 3305-14.) She also knew Juan Omar Sarabia and his sister Griselda Sarabia, and said Omar and Laureano-Arvizu worked together and were good friends. (RT 3335-37.) On January 3, 2007, Martinez-Barrera arrived at her apartment on Columbia Street, shot and bleeding, and was taken to the hospital. (RT 3324-27.)

Valeria testified that a few days after Martinez-Barrera was shot, she and her friend Ulysses entered a nightclub in the Gaslamp District in San Diego and saw the younger El Palillo, called Jorge, with a woman named Patty, and they immediately turned around and left the club and waited for a taxi outside to go home. (RT 3346.) A short time later, Jorge and Patty pulled up to where they were waiting for a taxi and gave her a ride home in Jorge's Cadillac Escalade, dropping Ulysses off at his car. (RT 3346-47.) Jorge asked her over and over if there had been any gossip about Martinez-Barrera. (RT 3348-51.) They were sitting in the Escalade talking when the police arrived due to a complaint regarding loud music coming from the Escalade, and arrested Jorge for possession of a handgun that he had been fingering while questioning Valeria. (RT 3352-54, 3357.)

San Diego Police Officer Joel Schmid testified that he was passing 1642 Columbia Street on January 7, 2007, about 3:30 a.m., and saw a new Cadillac Escalade, registered to Juan Lopez, parked in the driveway with its passenger door open. (RT 3953-56, 3958.) Ruben Flores Rosales, an alias for Jorge Rojas Lopez, was in the driver's seat with Patricia Soto sitting on his lap, Valeria Aguayo was in the passenger seat, and they were drinking and talking. (RT 3954-57.) A search of the vehicle revealed a radio phone, six cell phones, and a loaded Colt Mustang .380 caliber semiautomatic handgun. (RT 3958-64, 4007.) A search of the driver revealed a small amount of methamphetamine, $3200 in cash, and a U.S. Visa, Mexican Passport, birth certificate and Mexican Driver's license all in the name of Ruben Albel Flores Rosales. (RT 4000-07, 4016.)

Lourdes Hernandez testified that she met Juan Laureano-Arvizu, also known as Flaco and Chaquetin, in March 2006 when she was 18 years old working as a waitress, and he was 33 years old and came to her restaurant well-dressed with well-dressed friends. (RT 3562-63, 3568.) She began dating him two weeks later, they started to live together seven or eight months later, and broke up in November 2006. (RT 3654-67, 3570.) She said that one of Laureano-Arvizu's best friends was Omar Sarabia, who she knew as Pecas, another was Guillermo Ignacio Moreno-Garcia, who she knew as Memo, and that Laureano-Arvizu drove a four-door silver pickup truck. (RT 3569-74.) Hernandez testified that on January 3, 2007, Laureano-Arvizu drove them to go for drinks while Martinez-Barrera followed in his black Toyota Sequoia. (RT 3575-78.) Laureano-Arvizu stopped his pickup truck in the Briarwood apartment complex, with Martinez-Barrera stopped directly behind him, got out, and told Hernandez "if you see anything weird, leave." (RT 3578-82.) She moved to the driver's seat as he walked out of sight as if to enter an apartment. (RT 3583-84.) Martinez-Barrera moved his Sequoia next to Laureano-Arvizu's pickup truck just as a white minivan pulled up between their vehicles, attempting to block the Sequoia from leaving. (RT 3585-88.) Five or six men with handguns wearing police gear got out of both sides of the sliding doors of the van, surrounded the Sequoia, and shouted at Martinez-Barrera that they were the FBI and he was under arrest. (RT 3588-90.) They wore hats with "FBI" on them, bulletproof vests, and police badges hanging from their necks, but they looked fake. (RT 3590-92.) When a shot was fired she began to drive away in Laureano-Arvizu's pickup truck. (RT 3595.) She saw Laureano-Arvizu, who was standing on a sidewalk, shrug his shoulders as if he did not know what was going on, but his expression also looked fake. (RT 3595-96.) Martinez-Barrera drove off after crashing into the minivan, and she drove off with Laureano-Arvizu. (RT 3598.) Laureano-Arvizu told her to slow down, and four or five of the men from the minivan, one of whom was Moreno-Garcia, ran up and got into the pickup truck. (RT 3599-3601, 3609.) She drove to the Garber Avenue house at Laureano-Arvizu's direction. (RT 3602, 5543.) She went back to the Briarwood apartments later that night with Laureano-Arvizu, Moreno-Garcia and

Moreno-Garcia's girlfriend to pick up Laureano-Arvizu's gun which he had thrown in a bush. (RT 3616-18.)

The owner of a white Dodge Caravan minivan testified it was stolen between 6:30 p.m. and 11:00 p.m. on October 19, 2006. (RT 4220-22.) When it was recovered, the middle bench seat had been removed and there was damage as if it had collided with a black vehicle. (RT 4224.) It was found abandoned near the border, with the middle seat removed and black paint on the right side next to collision damage. (RT 4233-42.)

Ron Newquest, a San Diego Police Homicide Detective, testified that on March 13, 2007, he was called to investigate a body decomposing in a vehicle near Palm Avenue and Interstate 805, which was the beginning of his involvement in the investigation of a string of kidnapping and murders involving Los Palillos. (RT 3817-20.) The victim was named Mario Baylon, and his body was bloated and had Taser injuries. (RT 3823.) The body of Ivan Lozano, Jr. was found on April 4, 2007, which led Detective Newquest to become involved in the kidnappings of Cesar Uribe, Marc Leon and Eduardo Gonzalez-Tostado, as well as the SWAT team action at the Point Dume house. (RT 3825-29.) He said he saw Taser marks on the back of Gonzalez-Tostado when he was rescued, and found a barrel in the backyard of the Garber Avenue house used as a barbeque. (RT 3834-3908.)

Jose Garcia Vazquez, also known as Kilino, testified that he was kidnapped on January 31, 2007, when eight or ten men dressed like police came from a white van and took him out of the Chevrolet Equinox being driven by a woman named Nancy who had befriended him at his gym and had insisted he go with her in her vehicle to run an errand. (RT 4315-26, 4406.) They shot him with a Taser gun, causing him to lose consciousness, and he was handcuffed and taken to the house on Garber Avenue. (RT 4328-36, 13845.) He was kept blindfolded in a closet on the second story for twenty-two days, and was fed fast food twice a day. (RT 4338-39.) He thought one of his captors was Mexican and the other, named El Cubano, was Cuban or Venezuelan. (RT 4403.) He was taken in a white Cadillac Escalade and released at a shopping center. (RT 4420.) He testified that he did not know Petitioner, but he saw David Valencia at his gym a few times. (RT 4423-24.)

Guillermo Ignacio Moreno-Garcia testified pursuant to a cooperation agreement, and said he expected to be sentenced to at least 25 years and at most 33 years and eight months in prison provided he testified truthfully. (RT 5012-13.) He said he goes by the name of Memo, and that Carlos Pena, who goes by the name of Morro, is his younger half-brother. (RT 4520-21.) Moreno-Garcia said that while he was in high school he started hanging out with a man named Juan Carlos Lopez, dropped out in order to sell drugs, and eventually joined the AFO when he was 18 or 19 years old. (RT 4520-22.) At that time he worked for Lopez and Lopez' four older brothers, who in turn worked for El Mayel, a high-ranking member of the AFO. (RT 4537-4602.) After two of the Lopez brothers were killed and El Mayel arrested, Victor Rojas Lopez, known as the elder El Palillo, a close friend of Moreno-Garcia, took over for the Lopez brothers and became the leader of a cell of the AFO which called itself Los Palillos. (RT 4606-07, 4635-36.) Moreno-Garcia was a soldier in that cell, along with Jorge Gonzalez-Trujillo, known as Compadre, who was married to Victor Rojas Lopez's sister. (RT 4607-08.) Also working for the cell was Edgar Frausto-Lopez (Tito), Armando Rodriguez (Chipo), and Hector Altamirano-Lopez (Teran). (RT 4607-08.) Moreno-Garcia said he worked for the AFO from 2001 to 2003, and that his association ended when Victor Rojas Lopez was killed. (RT 4628.)

Moreno-Garcia testified that when Ramon Arellano was killed and his brother Benjamin Arellano arrested, their younger brother Francisco Arellano, known as Tigrillo, took over the AFO. (RT 4640-41.) The elder El Pallio's brother-in-law, Cholo, ran a crew in the AFO, and around 2003 Moreno-Garcia saw Cholo and Frausto-Lopez argue over a woman in a club. (RT 4641-44, 5229.) Moreno-Garcia called the elder El Palillo, who ordered them to leave the club, but Frausto-Lopez waited outside and pointed a gun at Cholo. (RT 4647-49.) Cholo and his crew were arrested but Moreno-Garcia and Frausto-Lopez were not, and Cholo demanded that Frausto-Lopez be killed for the embarrassment. (RT 4649-53.) When the elder El Palillo refused, he was killed by the AFO along with three members of the Los Palillos crew, because Cholo was Francisco Arellano's right-hand man, and the original Los Palillos crew then disbanded. (RT 4651-55, 4732-33.)

Moreno-Garcia was also close friends with the elder El Palillo's younger brother Jorge Rojas Lopez, who he called Jorgillo, who was a member of the AFO. (RT 4717-20.) Sometime after the elder El Palillo was killed and the original Los Palillos crew disbanded, Moreno-Garcia met Jorge Rojas Lopez in San Diego and, with other members of the disbanded crew, began importing drugs from Mexico and shipping them to Kansas City, but with no connection to the AFO. (RT 4739-44, 4802.) Jorge Rojas Lopez, who was living in San Diego illegally with a false passport in the name of Ruben Flores, wanted revenge on the AFO. (RT 4744-45.) All the former members of the Los Palillos crew wanted revenge on the AFO, so Moreno-Garcia said they began kidnapping AFO members, and that most of the drugs they shipped to Kansas City were obtained as ransom from those kidnappings. (RT 4740-50, 4825-26.)

Moreno-Garcia identified Petitioner, who he knew as Chino, as one of the people who worked for the group to which they shipped drugs in Kansas City, and said he and Petitioner became good friends when Petitioner moved to San Diego. (RT 4829-47.) Petitioner was part of the Kansas City crew run by Jhanmay Molina which eventually joined forces with the new Los Palillos. (RT 4826-32.) Moreno-Garcia lived at the Briarwood apartments when Petitioner moved to San Diego, and Petitioner lived in the house on Garber Avenue that Moreno-Garcia rented in October 2006. (RT 4849-50.) It was at that time they started calling themselves Los Palillos again, and began kidnapping AFO members in San Diego for ransom. (RT 4851-56.) Moreno-Garcia said he participated in 10 to 15 kidnappings with Los Palillos, and said Jorge Rojas Lopez became known as El Pallilo and was the leader of the crew that included Juan Laureano-Arvizu, also known as Flaco and Chaquetin. (RT 4902.) Moreno-Garcia knew David Valencia, and said Valencia was good friends with Ernesto Ayon, also known as Neto or Chapo, and that Valencia and Ayon had a ranch five minutes from the border. (RT 4912-14.)

Moreno-Garcia testified that the Garber Avenue and Point Dume houses were safe houses for Los Palillos, that the Garber Avenue house was rented under the name of an ex-wife of a Los Palillos associate named Primo, and that Moreno-Garcia participated in

renting that house. (RT 5026-28.) He said that the high ranking members of the Los Palillos crew each lived in their own homes where no criminal activity was allowed to take place in order to avoid being raided, and that Laureano-Arvizu at times lived with his girlfriend Lourdes Hernandez in downtown San Diego. (RT 5020-23.)

Moreno-Garcia testified that he began his association with the new Los Palillos when, in August 2004, he was approached by Hector Pelon, a member of the original Los Palillos who had worked under Victor Rojas Lopez (the elder El Palillo), and asked if he was up to doing something with Victor's younger brother Jorge Rojas Lopez and Edgar Frausto-Lopez (Tito). (RT 5035-39.) Moreno-Garcia was brought to a house in Chula Vista where Altamirano-Lopez lived, and where Jorge Rojas Lopez (now called El Palillo) and Frausto-Lopez told him that that several men were coming to drop off money from drug proceeds from up north, and that the men would need to sleep for a few hours before continuing on to Mexico with the money hidden in secret compartments in their truck. (RT 5039-41.) Moreno-Garcia was told that instead of helping the men as usual, this time Frausto-Lopez, Jorge Rojas Lopez, and himself would hide upstairs, allow the men to think that only Altamirano-Lopez was home, wait for them to fall asleep, and then tie them up and rob them. (RT 5041-42.)

After the three men arrived and fell asleep, Moreno-Garcia searched their truck while the men were murdered. (RT 5042-55.) Moreno-Garcia purchased a minivan with cash at a nearby junk yard, and the three dead men were put in the back. (RT 5056-60.) Jorge Rojas Lopez threw some money on top of the bodies, and Moreno-Garcia drove the van to Chula Vista where he parked it and left the keys under the mat, having been told that someone would pick it up and drive it to Tijuana. (RT 5062-63.) They abandoned the house, and Frausto-Lopez gave Moreno-Garcia $21,000 and said it was from Jorge Rojas Lopez. (RT 5101-05.) Several people from the Kansas City crew, which included Jesus Lopez-Becarra (Topo) and Juan Francisco Estrada-Gonzalez (Pepe), moved to San Diego from Kansas City, and, along with others, the new Los Palillos crew was formed. (RT 5110-11.) Jorge Rojas Lopez was their leader, and Frausto-Lopez was his right hand man

until he was arrested, when Estrada-Gonzalez took over as Jorge Rojas Lopez's right hand man. (RT 5111.)

The next murder Moreno-Garcia participated in for Los Palillos occurred in August 2005, where a man was lured into a safe house on Elder Street under the guise of selling marijuana. (RT 5120-22.) Moreno-Garcia said that he and other members of the Los Palillos crew, which did not yet include Petitioner, planned to shoot the victim with a Taser gun and take his marijuana. (RT 5121-24.) The victim was handcuffed, shot with a Taser gun, beaten, questioned about his sources of marijuana within the AFO, and after five or six hours murdered. (RT 5127-30.) While that was happening, Moreno-Garcia packaged the marijuana, about 80 or 90 pounds, and mailed it to Kansas City. (RT 5131.) The dead man was put in his own van which was dumped near the border with "Del Chapo" written on it, a reference to the boss of the Sinaloa cartel. (RT 5138-42.)

Moreno-Garcia testified that at some point the Los Palillos crew found out that the AFO intended to send people from Mexico to the United States to kill them, and they agreed to go after the AFO instead. (RT 5201-02.) El Palillo found out from Chaquetin where Camaron, a high level member of the AFO, lived, and the Los Palillos crew began surveillance in preparation for his kidnapping. (RT 5202-03.) The Los Palillos crew dressed as police, armed themselves, cornered Camaron when he tried to leave his house, and abducted him without a fight. (RT 5204-14.) They put Camaron in the back of a van, shot him with a Taser, and drove him to the Elder Street safe house where he was held and tortured for one or two weeks before he was murdered by Lopez-Bacerra. (RT 5214-23.) Moreno-Garcia was paid $34,000 out of the $300,000 ransom, Camaron's body was wrapped in a tarp and dumped behind a hotel, and the Elder Street house was abandoned. (RT 5220-21, 5226, 5231.)

Moreno-Garcia said that Laureano-Arvizu, who he knew at Chaquetin, then told them about another AFO member named Parra who sold marijuana, and the Los Palillos crew began surveillance of Parra. (RT 5232-33.) The crew dressed like police again, armed themselves, drove into Parra's driveway with a dashboard flashing light plugged

into the vehicle's cigarette lighter, shot at Parra when he ran, and left without abducting him. (RT 5235-40.) As Moreno-Garcia drove away with Frausto-Lopez and Jorge Rojas Lopez in the car, a real police officer gave chase in his patrol car. (RT 5240-43.) When Moreno-Garcia was unable to evade the police car, he stopped and everyone but him got out and shot at the police car. (RT 5243-44.) The men got back in the car and Moreno-Garcia drove away, eventually stopping again where everyone but him jumped out and run away, and he drove across the border into Mexico. (RT 5244-48.) A couple of months later the Los Palillos crew kidnapped a man named Abelino in the same manner, with Jorge Rojas Lopez, Juan Estrada-Gonzalez, Lopez-Bacerra and Frausto-Lopez dressed as police, with Moreno-Garcia driving. (RT 5252-54.) Moreno-Garcia received $14,000 from the ransom in that incident, and testified that the five of them thereafter participated in several other similar kidnappings. (RT 5255-58.)

Moreno-Garcia testified that when Petitioner moved to San Diego from Kansas City he stayed with Moreno-Garcia in his apartment at the Briarwood apartment complex for a month or so, and then moved into the Garber Avenue house. (RT 5300-02.) The first two kidnapping victims brought to the Garber Avenue house while Petitioner was living there were named Balitas (Eddie Nunez) and Kilino (Jorge Garcia-Vasquez). (RT 5314.) Balitas' father worked for the AFO and Kilino's wife was related to a financial advisor for the AFO. (RT 5415.) Moreno-Garcia and Petitioner took turns guarding Balitas. (RT 5325.) Kilino was targeted through his gym and abducted with the help of a woman named Nancy, who was close to the Los Palillos crew, and was kept blindfolded the entire time and held in an upstairs closet. (RT 5335-38, 5430-31.) Moreno-Garcia acted as lookout as Estrada-Gonzalez, Lopez-Bacerra and Frausto-Lopez dressed as police and jumped out of a stolen van in that kidnapping, while Petitioner stayed at the Garber Avenue house. (RT 5340-42.) Petitioner, the only Cuban there, took shifts guarding Kilino in the three to five days he was held hostage, and Moreno-Garcia said that Petitioner usually carried a Taser gun. (RT 5425-28.) After the Kilino kidnapping, Petitioner, who was living at the Garber Avenue house, asked to join the Los Palillos crew. (RT 5303-06, 5313.)

Moreno-Garcia was summoned to the Garber house by Jorge Rojas Lopez on one occasion where he met Petitioner, Estrada-Gonzalez and Frausto-Lopez, and they waited for a call from Laureano-Arvizu (Chaquetin) who was going to set up a drug dealer named Manzanas (Arturo Martinez-Barerra) for the Los Palillos crew to kidnap and rob. (RT 5520-24.) Petitioner was present when they devised a plan where Jorge Rojas Lopez would be driving a stolen van with Frausto-Lopez in the front passenger seat, Moreno-Garcia and Estrada-Gonzalez in the back, and Petitioner on top of a hill in the Briarwood apartment complex in a Toyota Camry as a lookout. (RT 5525-26, 5530.) Jorge Rojas Lopez and Frausto-Lopez dressed as police, and the plan was to act like they were arresting Laureano-Arvizu so that Martinez-Barerra would not panic when they abducted him. (RT 5526.) After they pulled Martinez-Barerra over, Moreno-Garcia's gun accidentally fired when he used it to knock on the window of the Toyota Sequoia Martinez-Barerra was driving, who then put the Sequoia in reverse and almost ran over Moreno-Garcia. (RT 5533-39.) As Jorge Rojas Lopez put the van in reverse, Petitioner drove down from the top of the hill in an attempt to block the Sequoia, but the Sequoia collided with the van and with the Camry Petitioner was driving while Frausto-Lopez fired at the Sequoia, and Martinez-Barerra escaped. (RT 5533-34, 5546.) They all returned to the Garber Avenue house, including Laureano-Arvizu's girlfriend Lourdes. (RT 5543-55.) Moreno-Garcia later returned and picked up Jorge Rojas Lopez's rifle which he had left at the apartment complex, went back to the Garber Avenue house, and then returned again to the apartment complex with Laureano-Arvizu to pick up his gun. (RT 5548-49, 5607-14.)

After the shootout at the Briarwood apartments, Moreno-Garcia said the crew used the Garber Avenue house to kidnap and murder Ivan Lozano, Jr., who Moreno-Garcia knew from high school. (RT 5618-19.) Several months earlier, Laureano-Arvizu and Moreno-Garcia ran into Lozano at a club in San Diego where they had an altercation during which Moreno-Garcia threatened Lozano because Laureano-Arvizu thought Lozano was affiliated with the AFO. (RT 5622-28.) A couple of months later Laureano-Arvizu said that Juan Omar Sarabia, who Garcia knew as Pecas, said he knew Lozano and knew he was

working for the AFO, and Laureano-Arvizu devised a plan to abduct Lozano. (RT 5628-29.) Moreno-Garcia was at the Garber Avenue house along with most of the El Palillo crew, including Carlos Pena (Morro), Petitioner (Asere or Chino), Jorge Rojas Lopez (El Palillo), Juan Estrada-Gonzalez (Pepe), Jesus Lopez-Bacerra (Topo), Edgar Frausto-Lopez (Tito), Jorge Gonzalez-Trujillo (Compadre), and a man known only as Niengo, when Lozano was brought to the house, handcuffed and blindfolded, and interrogated. (RT 5632-39.) After phone calls were made and it was determined no ransom would be paid, Moreno-Garcia witnessed Gonzalez-Trujillo put a belt around Lozano's neck and choke him to death while Moreno-Garcia, Petitioner, Niengo and Laureano-Arvizu kicked Lozano. (RT 5640-42.) Petitioner and Laureano-Arvizu stole a Gold Chrysler Concord and put Lozano's body in the trunk, Jorge Rojas Lopez threw toothpicks over the body, and they abandoned it in Clairemont. (RT 5643-5705.) Moreno-Garcia said he found out later that Omar Sarabia, who he knew as Pecas, had picked Lozano up at the border, and that Lozano had been lured to the Garber Avenue house with 80 to 100 pounds of marijuana he expected to sell, which the Los Palillos crew eventually mailed to Kansas City. (RT 5706-13.)

After the Lozano murder, Moreno-Garcia was called to the Garber Avenue house by Gonzalez-Trujillo around Mother's Day 2007. (RT 5908-12.) Everyone dressed up like police and armed themselves with guns and a Taser, expecting the arrival of two victims. (RT 5913-14.) Valencia, who was setting up the victims, came in the house through the garage, followed closely by Cesar Uribe, who was tackled. (RT 5918-19.) Moreno-Garcia, Estrada-Gonzalez and Frausto-Lopez stormed into the garage and grabbed the other guy, Marc Anthony Leon, and threw him to the floor and handcuffed him. (RT 5919-20.) Uribe and Leon were brought into the living room bound and blindfolded with duct tape. (RT 5922.) Everyone pretended Valencia was also a victim, and Uribe was taken into the back room while Petitioner and Niengo, one armed with a gun and the other with a Taser, guarded Leon. (RT 5922-28.)

Uribe told them that he had marijuana in a house close by, and Moreno-Garcia went there with several others and took 80 to 100 pounds of marijuana they eventually shipped

to Kansas City, ransacked the house, and returned to the Garber Avenue house where Petitioner was upstairs guarding Uribe and Leon while everyone else was downstairs drinking. (RT 5924-36.) Uribe and Leon were held there for one or two weeks and were both murdered the same day, three or four days after Mother's Day. (RT 5937-38.) Moreno-Garcia said Uribe could not be released because he knew Valencia had set him up, and although everyone felt bad that Leon had just been in the wrong place at the wrong time, he could not be released because he also knew Valencia had set them up. (RT 5941-44.) Uribe and Leon were handcuffed and had duct tape on their eyes and legs the entire time they were held at the Garber Avenue safe house, with Petitioner guarding them at night and Moreno-Garcia guarding them during the day. (RT 5952, 6007-09.)

Moreno-Garcia said that a decision was made to murder Uribe and Leon and dissolve their bodies in acid so the kidnapping would not come back to Valencia. (RT 6016.) Two 55-gallon barrels were brought to the house, set on top of propane heaters, and filled about a quarter of the way with muriatic acid. (RT 6029-37, 6106.) Petitioner and Valencia were in the house when Leon was brought down and choked to death by Gonzalez-Trujillo with an extension cord, and then stripped and placed in a barrel. (RT 6040-46.) Uribe was then brought downstairs still handcuffed, had the duct tape taken off his eyes, and began talking to Valencia. (RT 6107-10.) Petitioner was in the house at the time, as he lived there and rarely left, but Moreno-Garcia could not remember if he was present in the room when Uribe or Leon were killed. (RT 6109.) Everyone present started kicking Uribe as he was being killed, and he was then stripped and placed in a barrel. (RT 6111-17.) He said it took a couple of days for the bodies to dissolve, that the smell was terrible, and four or five days after the murders the barrels were taken to Valencia's ranch and dumped. (RT 6121-32.) The Garber Avenue house was then abandoned, and Moreno-Garcia's association with Los Palillos ended because he had a falling out over his accidental shooting during the botched Martinez-Barerra kidnap and his refusal to set up a friend. (RT 6139-42.)

Moreno-Garcia's attorney testified that when she was appointed to represent him he faced life without parole based on the only crime with which he was charged, kidnap for

ransom with gang allegations. (RT 7704-09.) In response to defense counsel's opening statement that the only evidence against Petitioner was the testimony of two men (Moreno-Garcia and his half-brother Carlos Pena) trying to avoid the death penalty, Petitioner's attorney testified that after reviewing police reports and other discovery, she determined that Moreno-Garcia was guilty at most as an accessory with respect to the murders, and that he never faced the death penalty. (RT 7716-17.) Moreno-Garcia made a statement to the police and drove around San Diego County with the prosecution team. (RT 7717-24.) His cooperation agreement provided he plead guilty to kidnapping with great bodily injury, firearm use, and gang involvement enhancements, conspiracy to commit robbery, and accessory to murder, and that his exposure would be between 25 years and 33 years and eight months in prison, of which he must serve at least 85 percent. (RT 7726-36.)

Detective Newquist was recalled and testified that he was present when Moreno-Garcia was interviewed for the first time on January 16, 2008, and when he was driven to two locations in San Diego County afterwards. (RT 7819-22.) Moreno-Garcia told them he knew Petitioner and Valencia, said he was only involved in the ransom collection in the Abelino kidnapping for which he had been arrested, admitted he was the driver in the shootout with a Chula Vista police officer following a botched kidnap attempt, denied involvement in the Lozano, Uribe and Leon murders, denied and then admitted involvement in the murder and body dump of Ricardo Escobar-Luna, and told them that he was just an errand boy for El Palillo. (RT 7828-51, 7904-05.)

Fabian Gonzalez, the brother of Valencia's landlord Adrian Gonzalez, testified that he knew Valencia and Cesar Uribe from the ranch they rented from him in Imperial Beach, where they kept horses for about two years up until Uribe was kidnapped and Valencia arrested. (RT 8914-20.) He said that Chapo (Ernesto Ayon) lived at the ranch, but he had never met Petitioner. (RT 8926, 8938.) Gilberto Corral testified that he owned the ranch that he rented to Fabian Gonzalez where David Valencia was renting a horse stable, and said that Gonzalez had violated the terms of his lease by building a gated fence and allowing Ernesto Ayon to live there in a horse stall. (RT 9302-21.)

Eduardo Gonzalez-Tostado testified that he came from a wealthy and well known family in Mexico. (RT 9335-40.) He lived in a gated community in Chula Vista and came home one day in May 2007 and found a note on his door from "Roberto" asking to call immediately because it was urgent. (RT 9343-45.) He called "Roberto," who said a dangerous group of people were planning to kidnap Gonzalez-Tostado, and this group owed Roberto $35,000, but he would tell Gonzalez-Tostado who they were for $50,000. (RT 9400-04.) From his home security video and private investigators, he learned that "Roberto" was named Chaquetin, also known as Flaco, whose true name is Juan Laureano-Arvizu. (RT 9406.) Gonzalez-Tostado called Laureano-Arvizu again the next day, called him Chaquetin, told him he knew who he was and that if he came to Gonzalez-Tostado's restaurant in Tijuana he would give him $5,000 for the information. (RT 9409.) Laureano-Arvizu was surprised that Gonzalez-Tostado knew his name, and Laureano-Arvizu told him that Eduardo Monroy, the architect of a remodel on Gonzalez-Tostado's house, was involved in the kidnapping plan and had given them the code to the security gate at his house. (RT 9410-11.)

Gonzalez-Tostado said he met David Valencia in 2003-04 at a gym near his house in Chula Vista and they became friends, their families became friendly, and he met Cesar Uribe though Valencia. (RT 9420-25.) Gonzalez-Tostado had a falling out with Valencia in late 2003 or early 2004 when, at a club, Valencia got drunk and hit his girlfriend, and when Gonzalez-Tostado intervened Valencia hit him over the head with a bottle, sending him to the hospital. (RT 9426-29.) Around the same time he found the note on his door, he received a message that Valencia wanted to speak to him. (RT 9431-33.)

Valencia and Gonzalez-Tostado met at a coffee shop the next day, where Valencia introduced him to a very attractive young woman named Nancy, who Valencia said would be willing to party with him and not tell his wife. (RT 9510-14.) Nancy told Gonzalez-Tostado she would like to go out for drinks sometime, and he agreed. (RT 9516-17.) He called Nancy the next day, June 8, 2007, and met her at a coffee shop about 5:00 or 6:00 p.m., but Nancy was driving her own car and wanted him to follow her to drop off her car

at her aunt's house a few blocks away and then take her to a cantina in Tijuana, where she could legally drink because she was under 21 years of age. (RT 9519-23.) She drove to a house where she waived him inside, and when he stepped in three armed men came running at him from the hallway dressed in black clothing with police lettering and wearing masks. (RT 9527-36.) He was grabbed from behind, hit with a rifle butt, shot with a Taser gun in the back many times, and fell down and kicked repeatedly. (RT 9536-40.) He briefly lost consciousness, and when he awoke his hands were handcuffed behind his back, his legs were wrapped tightly, he was blindfolded, and the men were laughing. (RT 9540-43.)

The men took his car keys and told Nancy to take the car, he was chained with padlocks, and they placed him in a closet where he ate and slept the entire time he was a captive. (RT 9605-13.) They told him they had done the same thing to the son of an AFO member named Balitas, to a police officer affiliated with the AFO, to men named Junior and Gordo, and to Kilino, someone Gonzalez-Tostado knew from his gym, who they said was also lured by Nancy. (RT 9619-24.) They called his wife with his phone and explained it was a kidnapping and she agreed to get money together. (RT 9628-33.)

Gonzalez-Tostado said there were three people who stayed in the house with him the entire time, who called each other Morro, Asere and Tio, and three bosses who were not called by names and would come and go. (RT 9639-41.) He said Asere had a Cuban accent, spent most nights using a laptop computer, and told him he had a wife in Cuba. (RT 9648-51, 9708.) He was told by the number one boss that they were pissed off with the Arellano cartel from Tijuana because they had killed his brother, who was named El Palillo, and accused Gonzalez-Tostado of being friends with the AFO, which he denied. (RT 9709-14.) The number one boss later told Gonzalez-Tostado he did some checking and believed that he was not affiliated with the AFO. (RT 9714.)

At some point Gonzalez-Tostado was forced to shower, given new clothes, and Morro replaced his blindfold. (RT 9658-9702.) He was brought down to the living room, where Asere, Morro and Tio were gathered with two of the bosses, and was told they had received $200,000 but wanted more money and the six Rolex watches he owned. (RT

9715-17.) The bosses left and only Asere and Morro remained, and he was allowed to sit on a couch downstairs, blindfolded, where he talked to Asere and listened to a soccer game on the television. (RT 9720-23.) Morro started yelling as the FBI raided the house. (RT 9724.) Asere took the blindfold and handcuffs off Gonzalez-Tostado, and he saw Asere's face, who he identified in court as Petitioner. (RT 9724-27.) He identified Carlos Pena as Morro, and Raul Rojas-Gamez as Tio. (RT 9728-31, 11023-24.) He identified the voice of Jorge Rojas Lopez (El Palillo) at boss number one, the voice of Juan Estrada-Gonzalez (Pepe) as boss number two, and was unable to identify the third boss. (RT 11027-28.)

Sergio Tostado Valdez, Gonzalez-Tostado's cousin, testified that he socialized with David Valencia on several occasions, and that he never liked Eduardo Monroy, an architect who worked for Gonzalez-Tostado, because Monroy gave Sergio the nickname Brennan which he felt was an insult. (RT 10101-08.) Sergio recognized Juan Laureano-Arvizu, who he knew as Chaquetin, from a surveillance video at Gonzalez-Tostado's house as the person who left a note on the door because Laureano-Arvizu was dating Lourdes Hernandez, the sister of Sergio's girlfriend. (RT 10111-18.) When Sergio received a phone call from Gonzalez-Tostado asking for help putting together some money because he had been kidnapped, he immediately reported the kidnapping to the FBI, recorded the conversations with the kidnappers, who called him Brennan, and helped the family gather the ransom money. (RT 10120-38.) Sergio made a ransom drop of $200,000 in marked bills and Rolex watches in an FBI briefcase with a tracking device. (RT 10204-28.)

FBI Agent Giboney was recalled to testify about the events which led to the rescue of Gonzalez-Tostado from the Point Dume house. (RT 10454-620.) Agent Giboney said that in his expert opinion Petitioner and Valencia were members of the Los Palillos crew, and that it constituted a criminal street gang. (RT 10638, 10712-19.)

Lauren Wood, a special agent with the FBI, testified regarding the events which led to the rescue of Gonzalez-Tostado. (RT 10845-11012.) After the rescue, as she was questioning Gonzalez-Tostado outside the house where he had been held, another agent came forward with Petitioner, who was wearing handcuffs, had an ace bandage on his head

and Gonzalez-Tostado's credit card in his pocket, and was pretending to be a victim. (RT 11013-19.) She said Gonzalez-Tostado identified Petitioner as Asere and said he had a Cuban accent, identified Carlos Pena as Morro, identified Raul Rojas-Gamez as Tio, identified the voice of Jorge Rojas Lopez (El Palillo) as boss number one, and the voice of Juan Estrada-Gonzalez (Pepe) as boss number two. (RT 11023-28.) When Jorge Rojas Lopez and Rojas-Gamez were later arrested, they were in possession of cash with recorded serial numbers from the Gonzalez-Tostado ransom. (RT 11031-32.)

Carlos Pena, also known as Morro, testified that Guillermo Moreno-Garcia, who is called Memo, is his half-brother. (RT 11610-11, 11638.) Pena said he joined Los Palillos in 2006, that he became very close to Edgar Frausto-Lopez (Tito) and Jesus Lopez-Bacerra (Topo), and treated Jorge Rojas Lopez (El Palillo) with respect. (RT 11616-20.) He met Petitioner, who was Cuban and who he called Asere or Chino, when Petitioner moved to San Diego from Kansas City. (RT 11622-23.) Pena moved into the Garber Avenue house in October 2006, along with Petitioner, and they both lived there until it was abandoned, with Petitioner rarely leaving. (RT 11641-42, 11701-04.) Pena moved to the Point Dume house on June 1, 2007, at the same time Petitioner moved into an apartment with his girlfriend Erika. (RT 11705-07.)

Pena said he was involved in three kidnappings at the Garber Avenue house, Balitas was the first, Santos the second, and Kilino the third, and was involved in the botched attempt to kidnap Martinez-Barrera. (RT 11707-08.) He said he was also involved in three murders which took place at the Garber Avenue house, Ivan Lozano, Marc Leon, and Cesar Uribe, in that order, and that he participated in the kidnapping of Eduardo Gonzalez-Tostado at the Point Dume house. (RT 11709.) Pena described the various roles he and the other members of Los Palillos had in those kidnappings and murders. (RT 11710-12215.) With respect to Petitioner, Pena said Petitioner participated in the abduction of Balitas, and that because Pena and Petitioner lived at the Garber Avenue house, they took the night shifts guarding him. (RT 11715-18.) He said Petitioner took shifts guarding Santos, Kilino, Uribe and Leon during those kidnappings, that Petitioner was out of the

house during the botched kidnapping and shooting of Martinez-Barrera, and was in the house when Lozano was killed. (RT 11723, 11731, 11739, 11806-10, 11831.) Petitioner and Pena picked up Cesar Uribe's car after he was abducted, searched it and took what they wanted, and Pena abandoned it in Tijuana. (RT 11825-28.) Pena purchased a Taser gun, and along with Petitioner purchased masks and fans used when they dissolved the bodies of Uribe and Leon, and charcoal for the backyard barbeque barrel they used to cover the smell and burn the victims' clothing. (RT 11918-41, 12021-23.) Pena said that when Pepe told him to go to Tijuana and buy acid, he knew a decision had been made to kill Uribe and Leon rather than release them. (RT 11944-45.) Valencia told him what kind of acid to buy, and Petitioner, who knew how to use the acid because he said he used it to clean milk tanks in Cuba, showed Pena how to mix it properly, and demonstrated by dissolving a pull tab from a soda can, which took about two minutes. (RT 11945-55.)

When Pena returned to the Garber Avenue house from Tijuana with the acid, Petitioner, Moreno-Garcia, Frausto-Lopez, Lopez-Bacerra, Gonzalez-Trujillo, Jorge Rojas Lopez, Estrada-Gonzalez, Niengo, Ernesto Ayon, and Valencia were at the house, and they all remained there until Uribe and Leon had been murdered and placed in the barrels about seven or eight hours later. (RT 11953, 11957-58.) When Leon was taken downstairs and murdered, Petitioner remained upstairs guarding Uribe, who was praying, but Pena said that everyone in the house, including Petitioner, was present in the room downstairs when Uribe was murdered. (RT 12000-09, 12014.) Pena said that Uribe was taunted before he was killed, that Estrada-Gonzalez gave Pena a plastic bag to put over Uribe's head and said to Pena "it's time you start learning," but that Estrada-Gonzalez then took the bag back and put it over Uribe's head as Gonzalez-Trujillo strangled him with a rope.[4] (RT 12010.)

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[4] The District Attorney forwarded Petitioner a note Pena wrote in jail on August 31, 2016, four years after trial, in which he said he wanted to clear his conscience, admitted he placed the bag over Uribe's head while Estrada-Gonzalez and Gonzalez-Trujillo strangled Uribe, and had lied about that at trial. (Traverse Attach. A.) The District Attorney also informed Petitioner that Moreno-Garcia, Pena's half-brother, was interviewed and confronted with Pena's statement. Moreno-Garcia said he still did not remember who placed the bag over Uribe's head, although he was in the room when it happened, and said he was shocked to hear Pena admitted doing it, saying he would have remembered something like that. (Id. Attach. B.)

Three or four days after the murders Pena took the barrels, which had been sealed with duct tape and plastic bags he and Petitioner had purchased, to the ranch and dropped them off with Ernesto Ayon near a five to seven foot-deep hole. (RT 12040-48.) Pena burned both victims' clothes in the backyard of the Garber Avenue house, disposed of their wallets, and after he cleaned the house with Petitioner, including disinfecting the floor where Uribe and Leon were killed, the house was abandoned. (RT 12021-23, 12105-08.)

Pena testified that Los Palillos then moved their "office" from the Garber Avenue house to the Point Dume house, and that Petitioner did not live at the Point Dume house but came there to work, occasionally spending the night. (RT 12115-18.) When the FBI raided the Point Dume house on June 16, 2007, Petitioner was driving a Chevrolet Equinox that he bought from Topo, which Nancy had driven when Kilino was abducted. (RT 12117-18.) Pena said that he and Petitioner were both patrolling the area in their cars acting as lookouts when Gonzalez-Tostado was abducted. (RT 12320-23.) Pena said that when Gonzalez-Tostado was brought to the Point Dume house, he, Petitioner, Jorge Rojas Lopez, Estrada-Gonzalez, Rojas-Gamez, and Lopez-Bacerra were there, and that he, Petitioner, and Rojas-Gamez guarded Gonzalez-Tostado that first night. (RT 12132-38.) Valencia came over with chains and padlocks the next day, said he would feel better if Gonzalez-Tostado was chained, and whispered so Gonzalez-Tostado would not hear his voice. (RT 12140-41.) Pena said that he, Petitioner and Rojas-Gamez guarded and fed Gonzalez-Tostado the entire time he was there. (RT 12141-43.) Petitioner spent every night there on guard duty but went home during the day. (RT 12144-45.)

After the ransom was paid, Lopez-Bacerra gave Pena $15,000 and told him $5,000 was for him and to give $10,000 to Petitioner as payment for them guarding Gonzalez-Tostado. (RT 12204.) Pena returned to the Point Dume house, gave Petitioner the money, and was alone there with Petitioner and Gonzalez-Tostado, who had already showered and changed clothes, when the FBI raided the house. (RT 12209-11.) Pena said he and Petitioner panicked and asked Gonzalez-Tostado to give them an alibi, and Petitioner took the handcuffs and blindfold off Gonzalez-Tostado and put them on himself. (RT 12213,

12330.) Pena ran out the back door into a canyon, where he was arrested by a member of the SWAT team. (RT 12213-15.) Pena said that he was arrested along with Petitioner, Estrada-Gonzalez, Jorge Rojas Lopez, Rojas-Gamaz, and Valencia, but that Frausto-Lopez, Gonzalez-Trujillo and Moreno-Garcia remained fugitives for several months. (RT 12228.) Two years after he was arrested, Pena entered into a cooperation agreement with the District Attorney, showed them where the remains of Uribe and Leon were buried, agreed to cooperate in exchange for a plea to kidnapping for ransom and manslaughter with a gang enhancement, with a prison sentence of at least 26 years and 8 months, and no more than 39 years, and said he never faced the death penalty. (RT 12232-310, 12404.)

Detective Newquist was recalled and testified that Moreno-Garcia said the remains of Uribe and Leon were buried at the ranch but did not know where, and a search of the property with cadaver dogs failed to find anything. (RT 12831-38.) Based on information from Carlos Pena, however, human remains were found at the ranch. (RT 12837-927.)

Tamira Ballard, a criminalist in the DNA section of the San Diego Police crime lab, testified that Petitioner's DNA was found on the handcuffs and Taser gun found at the Point Dume house. (RT 13007-36.) A professor of anthropology testified that the human remains found at the ranch were consistent with the bodies of Uribe and Leon having been dissolved in acid. (RT 13126-69.) Firing logs for the Taser with Petitioner's DNA showed it was fired 34 times on March 8, 2007, the day Mario Baylon was abducted, 5 times on March 23, 2007, the day Lozano was abducted, twice on March 28, 2007, 8 times on May 3, 2007, the day Uribe and Leon went missing, once each on May 4, 5, 8, 9 and 18, and 12 times on June 8, 2007, the day Gonzalez-Tostado was abducted. (RT 9208-20.)

Forensic computer examiners testified that the laptop computer seized from the Point Dume house had chat logs in Petitioner's name and about 2,600 photographs. (RT 13179-99.) The photographs depicted Petitioner with the laptop, with Moreno-Garcia, with his girlfriend Erika Donegan in Las Vegas, next to his Chevrolet Equinox in the driveway of the Garber Avenue house, in the backyard of that house, and inside that house, including sitting on the couch using his laptop computer. (RT 13214-19, 13281-85, 13908-19.)

Erika Donegan testified that she met Guillermo Moreno-Garcia in 2006 and started dating him, said that she called him Memo, and met his brother Carlos Pena. (RT 13241-45.) She met Petitioner, one of Moreno-Garcia's friends she knew as Chino, in late 2006, and began living with Petitioner in April or May 2007, when Petitioner was driving a Chevrolet Equinox. (RT 13246-49.) After Petitioner was arrested, he asked her to get the Equinox from the FBI in order to remove something from it, but when the FBI released the car to her it was empty. (RT 13260-70.) A woman named Alicia, the wife of one of the leaders of the Los Palillos crew, came over to her house and removed a bundle of cash from inside the door and took it with her. (RT 13270-75.) Donegan said Petitioner often used a laptop computer when they were together. (RT 13276-77.) Telephone records indicated that calls were made from the land line at the Garber Avenue house to Petitioner's cell phone on October 25, 2006 at 3:59, 5:02 and 7:15 p.m., on October 27, 2006 at 1:56 and 3:06 p.m., and on November 2, 2006 at 4:20 p.m. (RT 13504-05.)

Marco Mercado, an investigator with the San Diego County District Attorney, testified that Lopez-Becerra, also known as Topo, is dead, that Ernest Ayon, also known as Chapo or Neto, was released to the INS and deported before Guillermo Moreno-Garcia implicated him and is a fugitive, and that he arranged for the extradition from Mexico to the United States of Jorge Gonzalez-Trujillo (Compadre) and Nancy Michelle Mendoza-Moreno, who he opined was the same Nancy used to lure Gonzalez-Tostado and Kilino. (RT 13828-42.) He interviewed the kidnap victim called Kilino (Jorge Garcia-Vasquez), who said that Nancy was in the car when he was abducted and that he was held at the Garber Avenue house. (RT 13842-48.) The People rested. (RT 13932.)

The defense called a crime scene specialist who testified that she processed the Chrysler Concorde with Lozano's body and lifted 15 fingerprints. (RT 13935-42.) The parties stipulated that none of the fingerprints recovered from the Concorde matched Petitioner. (RT 13948.) Both defenses rested and there was no rebuttal. (RT 13950.)

After deliberating four and one-half days (CT 1497-1508), the jury found Petitioner not guilty of kidnap for ransom of Marc Leon, not guilty of robbery of Ivan Lozano, Jr.

and not guilty of the lesser included offense of grand theft of Lozano, but guilty on all other counts, including the attempted kidnapping of Martinez-Barrera, the first degree murders of Lozano, Cesar Uribe and Marc Leon, kidnap for ransom of Cesar Uribe and Eduardo Gonzalez-Tostado, kidnap of Marc Leon, and conspiracy to kidnap Gonzalez-Tostado for ransom. (RT 15303-14.) The jury returned not true findings on the murder special circumstances of torture and robbery, but returned true findings on the murder special circumstances of murder in the course of kidnapping, multiple murders, and murder for the benefit of a criminal street gang, and returned true findings on the remaining enhancement allegations that Petitioner committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang, that he was a principal in the attempted kidnapping of Martinez-Barrera and in the conspiracy count during which at least one principle used a firearm, and that Cesar Uribe and Gonzalez-Tostado suffered bodily harm. (Id.) Valencia was found guilty of kidnapping for ransom and first degree murder of Uribe, and guilty of kidnapping and first degree murder of Leon, with true findings on the same special circumstances on the murders as Petitioner. (CT 1510-23.) Petitioner was sentenced to a term of 25 years to life for the attempted kidnapping of Martinez-Barrera, five consecutive terms of life without the possibility of parole for the murders of Lozano, Uribe and Leon, and for the kidnapping for ransom of Uribe and Gonzalez-Tostado, a consecutive term 5 years for kidnapping Leon, plus 14 years to life on the conspiracy to kidnap for ransom Gonzalez-Tostado, along with imposition of a $1,000 restitution fine, $714 in court fees, and $2,467.71 reimbursement for Lozano's funeral expenses. (RT 15374-77.)

III. DISCUSSION

Petitioner claims that his federal constitutional rights were violated because there is insufficient evidence apart from the accomplice testimony of Carlos Pena and Guillermo Moreno-Garcia to support the convictions for attempted kidnapping of Martinez-Barrera, the first degree murders of Lozano, Uribe and Leon, and the Uribe and Leon kidnappings (claim one); his convictions for murdering Lozano and Leon under the natural and probable

consequences theory of aider and abettor liability are invalid under the post-conviction opinion in People v. Chiu, 59 Cal.4th 155 (2014) (claim two); the hearsay testimony of Adrian Gonzalez that Valencia said Uribe owed Valencia money violated his right to confront Valencia (claim three); there was purposeful racial discrimination in jury selection which appellate counsel failed to challenge (claim four); he was not a major participant in the murders as required to support a sentence of life without the possibility of parole (claim five); he was prejudiced by the denial of his motion for severance of his trial from the trial of Valencia and his motion for dual juries, and he received ineffective assistance of counsel by trial counsel's failure to seek severance of the counts against him and appellate counsel's failure to raise those claims on appeal (claim six); the trial court erred in its evidentiary and discovery rulings with respect to the gang enhancement evidence (claim seven); the trial court erred in imposing a restitution fine without making a finding regarding his ability to pay (claim eight); and his state habeas petitions were denied on the pretext he did not present a prima facie case for relief (claim nine). (Pet. at 9-70.)

Respondent answers that habeas relief is unavailable because claims one, three, and six through nine do not present federal issues. (Ans. Mem. at 36-59.) Respondent argues that the state court adjudication of the remaining claims is neither contrary to, nor involves an unreasonable application of, clearly established federal law, because: (a) Petitioner was convicted of murder during the course of a kidnapping and Chiu does not apply to felony-murder convictions, (b) the voir dire transcripts reveal there was no prima facie showing of discrimination, and (c) there is sufficient evidence that Petitioner was a major participant in the murders to support a sentence of life without parole. (Id.)

Petitioner replies that: (a) all of his claims present federal issues, (b) Respondent should not be allowed to rely on the jury voir dire transcripts because they were not part of the state court record in his post-conviction proceedings, and if the Court does rely on those transcripts it should either hold an evidentiary hearing or hold the Petition in abeyance while he returns to state court to present the transcripts, (c) Carlos Pena's admission he committed perjury at trial, from which a logical deduction can be made that Moreno-Garcia

also committed perjury, should be considered in support of the claims, or he should be allowed to return to state court with that evidence, and (d) the complexity of these issues warrants appointment of counsel. (Traverse at 7-26.) Petitioner has also filed a Motion for appointment of counsel and for an evidentiary hearing. (ECF No. 16.)

For the following reasons, the Court finds that neither an evidentiary hearing, appointment of counsel, or a stay and abeyance are necessary or warranted, and that habeas relief is unavailable because the state court adjudication of Petitioner's claims is neither contrary to, nor involves an unreasonable application of, clearly established federal law, and is not based on an unreasonable determination of the facts. The Court recommends denial of the Petition and the Motion for counsel and an evidentiary hearing.

A. Standard of Review

In order to obtain federal habeas relief with respect to a claim that was adjudicated on the merits in state court, a federal habeas petitioner must demonstrate that the state court adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254(d) (West 2006). Even if § 2254(d) is satisfied, a petitioner must show a federal constitutional violation occurred in order to obtain habeas relief. Fry v. Pliler, 551 U.S. 112, 119-22 (2007); Frantz v. Hazey, 533 F.3d 724, 735-36 (9th Cir. 2008) (en banc). A petitioner must also show that any constitutional error is not harmless, unless it is of the type included on the Supreme Court's "short, purposely limited roster of structural errors." Gautt v. Lewis, 489 F.3d 993, 1015 (9th Cir. 2007), citing Arizona v. Fulminante, 499 U.S. 279, 306 (1991) (recognizing "most constitutional errors can be harmless.")

A state court's decision may be "contrary to" clearly established Supreme Court precedent (1) "if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases" or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different

from [the Court's] precedent." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). A state court decision may involve an "unreasonable application" of clearly established federal law, "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." Id. at 407. Relief under the "unreasonable application" clause of § 2254(d) is available "if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." White v. Woodall, 572 U.S. ___, 134 S.Ct. 1697, 1706-07 (2014), quoting Harrington v. Richter, 562 U.S. 86, 103 (2011). In order to satisfy § 2254(d)(2), the petitioner must show that the factual findings upon which the state court's adjudication of his claims rest are objectively unreasonable. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

B. Claim One

Petitioner alleges in claim one that his federal constitutional rights were violated because there is insufficient evidence apart from the uncorroborated accomplice testimony of Guillermo Moreno-Garcia and Carlos Pena to support the convictions for the attempted kidnapping of Martinez-Barrera, the first degree murders of Lozano, Uribe and Leon, and the kidnappings of Uribe and Leon. (Pet. at 9-18.) He argues there were no witnesses apart from Moreno-Garcia and Pena who identified him or testified to his role in those crimes, and he was convicted merely on the evidence of his participation in the Gonzalez-Tostado kidnapping coupled with character evidence of the modus operandi of Los Palillos. (Id.)

Respondent answers that this claim does not present a federal question because the rule requiring corroboration arises from state law, and in any case federal due process permits convictions based on uncorroborated accomplice testimony. (Ans. Mem. at 36.) Petitioner replies that the state rule requiring corroboration of accomplice testimony creates a liberty interest protected by federal due process as recognized by Hicks v. Oklahoma, 447 U.S. 343 (1980). (Traverse at 8-9.) He argues that in any case federal due process entitles him to a sufficiency of the evidence determination under In re Winship, 397 U.S. 358 (1970) and Jackson v. Virginia, 443 U.S. 307 (1979). (Id.)

Petitioner presented this claim to the state supreme court in his petition for review. (Lodgment No. 13.) It was consolidated with Valencia's petition for review and denied by an order that stated: "The petitions for review are denied." (Lodgment No. 15.) The same claim was also presented to the state appellate court on direct appeal and denied on the merits in a written opinion. (Lodgment Nos. 4, 9.) There is a presumption that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803-06 (1991). The Court will presume the silent denial rested on the same grounds as the last reasoned opinion addressing the claim, the appellate court opinion on direct appeal, which stated:

> When assessing a challenge to the sufficiency of the evidence, we apply the substantial evidence standard of review, under which we view the evidence "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, 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." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)
>
> Generally, the uncorroborated testimony of a single witness is sufficient to sustain a conviction or true finding on an enhancement allegation "unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)
>
> However, [California Penal Code] section 1111 prohibits a conviction based "upon the testimony of an accomplice unless it be corroborated by such other evidence as shall *tend to connect the defendant with the commission of the offense*." (§ 1111, italics added; see *People v. McDermott* (2002) 28 Cal.4th 946, 985–986 ("A conviction can be based on an accomplice's testimony only if other evidence tending to connect the defendant with the commission of the offense corroborates that testimony.").)

"The corroboration required of accomplice testimony . . . need only connect the defendant to the crime sufficiently that we may conclude the jury reasonably could have been satisfied that the accomplice was telling the truth." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 185–186.) "(T)he corroborating evidence may be circumstantial, of little weight by itself, and related merely to *one part* of the accomplice's testimony." (*Id.* at p. 186, italics added; see also *People v. Abilez* (2007) 41 Cal.4th 472, 505 (such corroborative evidence may be slight or entirely circumstantial and entitled to little consideration when standing alone, and need not by itself establish every element of the crime); *People v. Trujillo* (1948) 32 Cal.2d 105, 111 ("If (the accomplice's) testimony could be completely proven by other evidence, there would be no occasion to offer him as a witness.").)

The trier of fact's finding on the issue of corroboration may not be disturbed on appeal unless the corroborative evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. Szeto* (1981) 29 Cal.3d 20, 25).

As noted, Beritan seeks reversal of six of his eight convictions in this case - counts 1 (attempted kidnapping of Martinez), 3 (murder of Lozano), and 4 through 7 (kidnappings and murders of Uribe and Leon) - based on his claim there is insufficient independent evidence to corroborate the accomplice testimony of Moreno and Pena as it pertains to him. As discussed in the factual background, *ante*, the prosecution's case was based in part on the accomplice testimony of both Moreno and Pena.

Beritan first asserts "there was no witness, apart from Moreno and Pena, who identified (him) at all" or who testified he "ha(d) any specific role in the commission of the crimes" committed against Martinez, Lozano, Uribe and Leon. As Beritan appears to acknowledge, corroborative evidence need not consist of direct eyewitness testimony; it may be entirely circumstantial. (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 186.) Specifically, Beritan asserts, and we agree, that to be sufficient for purposes of section 1111 the corroborative evidence need only provide a "thin circumstantial nexus" that tends to connect him with the commission of the crimes with which he was charged.

Beritan contends, however, that "(t)here is nothing even circumstantially suggestive from any of the witnesses" to show he had a role in the commission of any of those crimes. Conceding there is "ample, independent evidence of (his) participation in the Tostado kidnapping," Beritan contends that "one cannot take the independent Tostado evidence as

connecting (him)" to the crimes committed against Martinez, Lozano, Uribe and Leon. Acknowledging that Uribe and Leon were murdered at the Garber Avenue residence after they were held captive there, Beritan further contends there is no independent evidence to show he was living at the Garber Avenue residence during the commission of those crimes and, even if he was living there, "corroboration based only on presence at the scene and opportunity to commit a crime does not satisfy the requirements of section 1111."

These contentions are unavailing. As already discussed, corroborative evidence may be circumstantial, of little weight by itself, and related merely to *one part* of an accomplice's testimony. (*People v. Letner and Tobin, supra,* 50 Cal.4th at p. 186.)

Here, in his accomplice testimony, Moreno indicated that Los Palillos rented "safe houses" in the San Diego area to facilitate the kidnappings and other crimes they planned to commit. He testified that the Garber Avenue residence was one of those safe houses. Moreno further testified that he spoke to Beritan and a few other members of Los Palillos about making money by kidnapping AFO members for ransom and that Beritan moved into the Garber Avenue safe house, as did Moreno's brother, Carlos Pena. In his own accomplice testimony, Pena similarly testified that Los Palillos rented the Garber Avenue safe house in October 2006, and Pena lived there with Asere (Beritan) from that time until Los Palillos abandoned that safe house.

Independent circumstantial evidence, which Beritan disregards, corroborates Moreno's and Pena's testimony that he was living at the Garber Avenue safe house during the commission of the crimes. Nwagbo, the owner of the Garber Avenue residence, testified that in mid-October 2006 a man he knew as Ignacio Peredo signed a one-year agreement to rent the property. When the rent payments stopped, Nwagbo called Peredo, who sent a money order by overnight mail. Agent Giboney testified that Nwagbo showed him the UPS next-day airshipping envelope that was used to send the money order, and the return address was in the name of a person named Onel Jimenez. A paralegal working for the district attorney's office testified she subpoenaed the UPS records, and the receipt for the envelope shipped to Nwagbo showed it was sent by Onel Jimenez. Agent Giboney testified that Beritan was a member of Los Palillos, and both Agent Giboney and Agent Kameron Korte testified that Onel Jimenez was an alias that Beritan used.

The foregoing circumstantial evidence, which corroborates Moreno's and Pena's accomplice testimony, tends to connect Beritan to the commission of the crimes by establishing that he used his alias, Onel Jimenez, to rent the

Garber Avenue safe house, and that he resided there during the commission of the crimes.

Independent circumstantial evidence also corroborates Moreno's and Pena's testimony that Beritan guarded Uribe, Leon, and other victims at Los Palillos's safe houses. Moreno testified that he and Beritan guarded Vasquez ("Kilino") at the Garber Avenue safe house while he was held captive there, that he (Moreno) and other members of Los Palillos openly communicated to one another during that time and referred to Beritan by his nicknames "Asere," "Chino," "Cubano," and "Cuba," and that Beritan was the only one there who was Cuban. Moreno also testified that he and Beritan guarded another victim, Balitas, while he was held captive at the Garber Avenue safe house; Beritan was still living there when Uribe and Leon were later kidnapped and held captive there, and Beritan helped to guard them before they were strangled. Pena similarly testified that Beritan helped to guard Balitas, Vasquez, Uribe, and Leon while they were held captive at the Garber Avenue safe house.

Independent circumstantial evidence corroborates the foregoing accomplice testimony that Beritan guarded Uribe and Leon. As noted, Moreno testified that when he and Beritan guarded Vasquez at the Garber Avenue safe house, he (Moreno) and other members of Los Palillos openly referred to Beritan by his various nicknames, including "Asere" and "Cubano." Vasquez corroborated this testimony by testifying that one of the men who guarded him one was a foreigner with a Cuban or Venezuelan accent, and Vasquez knew him as "El Cubano." Tostado also gave corroborative testimony. He testified that he learned the nicknames of three of the kidnappers who held him captive at the Point Dume Court safe house, and one of them was nicknamed "Asere" (Beritan). Agent Giboney independently testified that Beritan's nicknames were "Chino" and "Asere." At trial, Tostado identified Beritan as "Asere."

In this regard, the Attorney General correctly argues that "evidence establishing that a defendant committed crimes similar to the one at issue can corroborate an accomplice's testimony." (*People v. Hannie* (1962) 202 Cal.App.2d 462, 466 ("(T)he accomplice in this case was corroborated by evidence establishing a prior burglary committed under circumstances similar to the burglary here in question.").) Here, the independent testimony of Vasquez and Tostado establishing that Beritan had assisted Los Palillos in holding them and Balitas captive corroborates Moreno's and Pena's accomplice testimony that he also assisted in holding Uribe and Leon captive before they were murdered. (*Ibid*.)

Pena testified that Beritan helped to guard Tostado at the Point Dume Court safe house. Beritan does not dispute that Tostado corroborated this testimony by testifying that he learned the nicknames of three of the kidnappers.

For the foregoing reasons, we conclude that sufficient evidence independent of Moreno's and Pena's accomplice testimony tends to connect Beritan to the Uribe/Leon crimes (counts 4 through 7) such that we may conclude the jury reasonably could have been satisfied that their accomplice testimony about Beritan's participation in those crimes was truthful.

We also conclude sufficient independent evidence tends to connect Beritan to the attempted kidnapping of Martinez (count 1) and the murder of Lozano (count 3) such that we may conclude the jury reasonably could have been satisfied that Moreno's accomplice testimony about Beritan's participation in those crimes was truthful. Regarding the attempted kidnapping of Martinez, Moreno and Pena testified that they, Beritan, and other Los Palillos members met at the Garber Avenue safe house to plan the kidnapping for ransom of Martinez. Moreno testified that the Garber Avenue safe house was still leased by Los Palillos at that time, Beritan was living there, and Martinez was going to be held captive there following his abduction. Moreno also testified that the plan was to have Arvizu lure Martinez, who was an independent drug-trafficker, to the Briarwood apartment complex on the pretext that a buyer of drugs would be there for a drug sale transaction, and some of the members of Los Palillos dressed as police officers would then "arrest" Martinez and take him to the Garber Avenue safe house. Moreno further testified Beritan would be nearby in a car acting as a lookout.

Moreno's testimony that Martinez was going to be held captive at the Garber Avenue safe house after being lured to, and "arrested" at, the Briarwood apartment complex following his abduction is corroborated by the independent testimony of Lourdes Hernandez, who testified that Arvizu drove her to the Briarwood apartment complex in his Ridgeline truck after telling her they were going to pick up cocaine and that Martinez followed them there in his Sequoia. This testimony corroborates Moreno's accomplice testimony that, as part of the kidnapping plan devised at the Garber Avenue safe house, Arvizu would lure Martinez to the Briarwood apartment complex.

Lourdes also testified that, after Martinez escaped from the attempted "arrest" and drove away, she and Arvizu picked up the men wearing police vests who had assaulted Martinez and drove them to a home in the Chula Vista

> area. At trial, Lourdes identified the Garber Avenue safe house as the home to which they drove after the incident.
>
> In addition, as already discussed, substantial evidence apart from Moreno's and Pena's accomplice testimony shows that Beritan had rented the Garber Avenue safe house on behalf of Los Palillos, he lived there, and he guarded other victims there.
>
> Although the foregoing independent evidence only provides what Beritan refers to as a "thin circumstantial nexus," it tends to connect Beritan to the commission of the attempted kidnapping of Martinez such that we may conclude the jury reasonably could have been satisfied that Moreno's accomplice testimony about Beritan's participation in that crime was truthful. (*People v. Letner and Tobin, supra,* 50 Cal.4th at p. 186 ("(T)he corroborating evidence may be circumstantial, of little weight by itself, and related merely to one part of the accomplice's testimony.").)
>
> Last, the same independent evidence showing that Beritan rented the Garber Avenue safe house on behalf of Los Palillos, lived there, and guarded other victims there, also tends to connect him to the murder of Lozano, who Moreno testified was strangled to death at the Garber Avenue safe house while Beritan and other Los Palillos members were kicking him.
>
> For all of the foregoing reasons, we affirm Beritan's convictions of counts 1, 3, and 4 through 7.

(Lodgment No. 9, People v. Valencia, et al, No. D062774, slip op. at 39-48 (Cal. Ct. App. Sept. 10, 2014).)

"[T]he 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. at 364. The Fourteenth Amendment's Due Process Clause is violated, and an applicant is entitled to federal habeas corpus relief, "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson, 443 U.S. at 324. When AEDPA applies, the Court must apply an additional layer of deference in applying the Jackson standard. Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). Federal habeas relief functions as a "guard against extreme malfunctions in the state criminal justice systems,"

and not simply as a means of error correction. Richter, 562 U.S. at 103, quoting Jackson, 443 U.S. at 332 n.5.

It is clear that sufficient evidence was presented at trial in the form of eyewitness testimony of Carlos Pena and Guillermo Moreno-Garcia to support the jury's guilty verdicts as to Petitioner's convictions for the attempted kidnapping of Martinez-Barrera, the murder of Lozano, and the kidnappings and murders of Uribe and Leon. Moreno-Garcia testified that he was good friends with Petitioner, that Petitioner lived at the Garber Avenue house, a Los Palillos safe house, and that Petitioner asked to join the Los Palillos crew after he participated the Kilino kidnapping. (RT 4849-50.) He said that Petitioner was the only Cuban at the house when Kilino was held there, and that Petitioner usually carried a Taser and helped guard Kilino and Balitas. (RT 5325, 5427.) Kilino testified that he was shot with a Taser, was held at the Garber Avenue house, and that one of his captors was a Cuban or Venezuelan named El Cubano. (RT 4328-36, 4403, 13845.) Moreno-Garcia testified that Petitioner was present when they planned the kidnapping of Martinez-Barrera, and was to be driving a Toyota Camry and acting as a lookout. (RT 5525-30.) He testified that when Martinez-Barrera tried to evade abduction, Petitioner drove the Camry in an attempt to block Martinez-Barrera's Sequoia. (RT 5533.) Moreno-Garcia testified that Petitioner kicked Lozano along with several other men as he was being murdered, helped steal the Chrysler Concord in which Lozano's body was found, and helped put the body in the Concord after they removed the spare tire and other parts which were found at the Garber Avenue house where Petitioner lived. (RT 5640-48.) He testified that Petitioner helped guard Uribe and Leon as they were being bound and blindfolded, and that Petitioner was armed with a gun or a Taser while he guarded them while the others went to ransack Uribe's house. (RT 5922-28.) He said Petitioner guarded Uribe and Leon during the two weeks they were held at the Garber Avenue house, and that Petitioner was in the house when Uribe and Leon were killed and placed in the barrels of acid to dissolve. (RT 5937, 5952, 6007-09, 6040-46, 6109.)

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Carlos Pena testified that he lived with Petitioner at the Garber Avenue house where Lozano, Uribe and Leon were murdered, and that Petitioner rarely left the house. (RT 11701-04.) Pena testified that he and Petitioner took turns guarding Lozano, Uribe and Leon, that Petitioner was present when Lozano was murdered, and was out of the house with the rest of the Los Palillos crew during the botched kidnap attempt on Martinez-Barrera. (RT 11739, 11806-10, 11831.) Pena testified that Petitioner drove him to pick up and dispose of Uribe's car, and purchased materials used in dissolving and disposing of the corpses of Uribe and Leon and cleaning up afterwards. (RT 11825-28, 11939-41, 12105-06.) He said that before Uribe and Leon were killed and after the decision had been made to kill rather than release them, Petitioner instructed him on the proper mixture of the acid, and was at the house when Uribe and Leon were murdered and placed in the barrels to dissolve. (RT 11947-58.) Pena said Petitioner guarded Uribe while Leon was killed, and Petitioner was in the room while Uribe was taunted and killed, when Moreno-Garcia said everyone present kicked Uribe as he was being strangled. (RT 12006-09, 12014.)

Thus, evidence was presented at trial that Petitioner directly participated in the attempted kidnapping of Martinez-Barrera by planning his abduction, acting as a lookout, and then interceding in the attempt to prevent Martinez-Barrera from escaping. Evidence was presented that he directly participated in the kidnappings of Lozano, Uribe and Leon by guarding them while they were held hostage. He directly participated in the murders of Lozano and Uribe by kicking them while they were being strangled, and by helping to prepare the barrels in which Uribe's body was dissolved. The evidence showed Petitioner was upstairs guarding Uribe when Leon was killed downstairs, which not only allowed Leon to be killed without interference by Uribe, but was done after Petitioner had taught Pena how to properly mix the acid to dissolve the bodies, after Petitioner and Pena purchased supplies for that job, after the barrels were set up and ready to go, and after Pena said the decision had been made to kill rather than release them. The evidence therefore showed that Petitioner knew Leon was going to be killed, and that he facilitated Leon's murder by guarding Uribe during the killing.

In light of the additional layer of deference this Court must give in applying the Jackson standard, see Juan H., 408 F.3d at 1274, and the Supreme Court's admonition that federal habeas relief functions as a "guard against extreme malfunctions in the state criminal justice systems," and not simply as a means of error correction, Richter, 562 U.S. at 103, quoting Jackson, 443 U.S. at 332 n.5, it is clear that sufficient evidence was presented at trial in the form of eyewitness accomplice testimony to support Petitioner's convictions. See Coleman v. Johnson, 566 U.S. 650, ___, 132 S.Ct. 2060, 2065 (2012) ("The jury in this case was convinced, and the only question under Jackson is whether that finding was so insupportable as to fall below the threshold of bare rationality.")

Petitioner does not dispute that the testimony of Pena and Moreno-Garcia support those convictions. He contends, rather, that the state law which provides that accomplice testimony is insufficient to convict unless it is corroborated, creates a liberty interest protected by federal due process from an arbitrary deprivation. (Pet. at 17, citing Hicks v. Oklahoma, 447 U.S. at 346 (holding that when a state statute vests sentencing discretion in a jury, "[t]he defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State."); Traverse at 8-9.) Respondent is correct that there is no clearly established federal law requiring accomplice testimony to be corroborated. See Laboa v. Calderon, 224 F.3d 972, 979 (9th Cir. 2000) (holding that California Evidence Code section 1111, which prevents "convictions based only on uncorroborated accomplice testimony. . . . that . . . is not 'incredible or insubstantial on its face,' . . . is not required by the Constitution or federal law."), quoting Cal. Evid. Code § 1111 and citing United States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) ("The uncorroborated testimony of an accomplice is enough to sustain a conviction unless it is incredible or insubstantial on its face.")

However, even assuming clearly established federal law requires corroboration, or assuming Petitioner has a state-created liberty interest in corroboration of accomplice

testimony protected by federal due process from arbitrary deprivation, the state appellate court reasonably found that the testimony of Moreno-Garcia and Pena was corroborated. Evidence which corroborated the testimony that Petitioner lived at the Garber Avenue safe house and participated in the Los Palillos activities which went on in that house, included evidence that he paid the rent on the Garber Avenue house using one of his aliases, Onel Jimenez (RT 1591, 13713-26), and that spare parts from the Chrysler Concord Moreno-Garcia said Petitioner stole and in which Lozano's body was dumped were found in the garage of the Garber Avenue house. (RT 9101-12.) Telephone calls were made from the Garber Avenue house landline to Petitioner's cell phone. (RT 13505-05.) A photograph taken from an ATM during a withdrawal from Uribe's account while he was being held at the Garber Avenue house showed a person who looked like Petitioner, and when Petitioner was arrested he had Gonzalez-Tostado's bank card in his pocket. (RT 1410-11, 12816-20, 14344, 14374.) Petitioner was the only Cuban in Los Palillos at that time, and Kilino, one of the Garber Avenue kidnap victims, testified that one of his captors was Cuban. (RT 4849-50, 5303-06, 5026-28, 5313.) Gonzalez-Tostado identified Petitioner as a Cuban guard who often used a laptop computer, and the seized laptop had photographs showing Petitioner at the Garber Avenue house using the laptop, and next to his Chevrolet Equinox in front of that house which Kilino testified was used in his kidnapping, which was at the Point Dume house when Petitioner was arrested, and in which Petitioner's girlfriend testified a bundle of cash was found by the wife of a high-ranking member of Los Palillos. (RT 4315-22, 9724-27, 13214-19, 13270-75, 13281-85, 13908-19.) Pena's testimony was also corroborated by evidence that Jorge Rojas Lopez and Rojas-Gamez were in possession of marked bills from the ransom money when they were arrested. (RT 11031-32.)

There was also evidence which corroborated the accomplice testimony about the murders of Lozano, Uribe and Leon. Human remains were found at the ranch exactly where Pena said he brought the barrels with the remains of Uribe and Leon to dump, even though previous attempts to find them with cadaver dogs based on Moreno-Garcia's representation they were buried at the ranch were unsuccessful. (RT 12831-38, 12837-

927.) Moreno-Garcia testified that Petitioner usually carried a Taser gun. (RT 5425-28.) Lozano's body had Taser injuries, and Petitioner's DNA was on the Taser gun found in the couch of the Point Dume house where Pena and Gonzalez-Tostado said Petitioner was sitting when the FBI raided the house. (RT 13007-36.) That Taser gun had been discharged 5 times on the day Lozano was abducted, 8 times on the day Uribe and Leon were abducted, and several times while Uribe and Leon were held at the Garber Avenue house. (RT 9208-20.) In addition, the jury was instructed:

> You may use the testimony of an accomplice to convict the defendant only if: The accomplice's testimony is supported by other evidence that you believe; and, two, that supporting evidence is independent of the accomplice's testimony; and, three, that supporting evidence tends to connect the defendant to the commission of the crimes.

(RT 14051.)

As the appellate court noted, "[t]he corroboration required of accomplice testimony . . . need only connect the defendant to the crime sufficiently that we may conclude the jury reasonably could have been satisfied that the accomplice was telling the truth." Letner and Tobin, 50 Cal.4th at 185-86. It is clear that the evidence presented at Petitioner's trial satisfied that standard. Thus, even assuming Petitioner has a federal due process right to corroboration of accomplice testimony, or to be free from an arbitrary determination that accomplice testimony was corroborated, it was objectively reasonable for the state court to find that sufficient evidence was presented at trial to corroborate the accomplice testimony of Carlos Pean and Guillermo Garcia-Moreno that Petitioner was involved in the attempted kidnap of Martinez-Barrera, the murders of Lozano, Uribe and Leon, and the kidnapping of Uribe and Leon.

The Court finds that the state court adjudication of claim one is neither contrary to, nor involves an unreasonable application of, clearly established federal law. Richter, 562 U.S. at 102; Jackson, 443 U.S. at 324; In re Winship, 397 U.S. at 364; Juan H., 408 F.3d at 1274; Laboa, 224 F.3d at 979. Neither is the state court adjudication of claim one is based on an unreasonable determination of the facts. Miller-El, 537 U.S. at 340.

C. Claim Two

Petitioner contends in claim two that if he was convicted of murdering Lozano and Leon under the natural and probable consequences theory of aider and abettor liability, those convictions now violate due process based on the post-conviction opinion in People v. Chiu, 59 Cal.4th 155, 167 (2014) (holding that an aider and abettor "cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine.") (Pet. at 20-28.) Respondent answers that Petitioner was convicted of murder during the course of a kidnapping, and Chiu does not apply to the felony murder doctrine. (Ans. Mem. at 37, citing Chiu, 59 Cal.4th at 166 (stating that the holding of the case "does not affect or limit an aider and abettor's liability for first degree felony murder under [Penal Code] section 189.")).

Petitioner replies that the jury was instructed on deliberate and premeditated murder, felony murder, and the natural and probable consequences theory of aider and abettor murder, and the prosecutor argued to the jury that they could convict Petitioner under any of those theories. (Traverse at 10.) Unlike Chiu, he argues, the record is unclear which theory the jury chose, and it is likely they convicted him on a natural and probable consequences theory, rather than murder during the course of a felony, in light of their findings that he was not guilty of robbing Lozano, not guilty of kidnapping Leon for ransom, and their not true finding on the robbery special circumstance. (Id.)

Petitioner presented this claim to the state supreme court in a habeas petition (Lodgment Nos. 22-26), which was denied by an order that stated: "Petition for writ of habeas corpus denied." (Lodgment No. 27, In re Beritan, No. S236290, order at 1 (Oct. 12, 2016).) He presented the same claim to the state appellate court in a habeas petition. (Lodgment No. 20 [ECF No. 11-102 at 4-12].) The Court will look through the silent denial by the state supreme court to the last reasoned state court decision as to this claim, Ylst, 501 U.S. at 803-06, the state appellate court order denying habeas relief:

> Beritan's first contention is that he was convicted of first degree murder under the natural and probable consequences theory of aider and abettor liability and is entitled to relief pursuant to a Supreme Court decision made

> after his conviction, *People v. Chiu* (2014) 59 Cal.4th 155. Beritan, however, provides no basis for this claim. Other than a self-serving conclusory statement in his petition, Beritan provides no evidence suggesting that the jury was instructed on the natural and probable consequences theory. Regardless, as to each murder count, the jury also found that the murders were committed in the perpetration of kidnapping. Beritan admits in his petition that he was convicted of first degree murder under the felony murder theory. The rule announced in *People v. Chiu* "does not affect or limit an aider and abettor's liability for first degree felony murder under (Penal Code) section 189." (*People v. Chiu* (2014) 59 Cal.4th 155, 166.)

(Lodgment No. 21, In re Beritan, No. D070384, order at 2-3 (Cal. Ct. App. June 8, 2016).)

Clearly established federal law provides that federal constitutional error occurs when a general verdict is returned by a jury instructed on both a valid and invalid theory of guilt, but only when it is impossible to determine which theory the jury relied upon. Hedgpeth v. Pulido, 555 U.S. 57, 58 (2008). With respect to such an error, a federal habeas court must determine if it is harmless by examining whether "the flaw in the instructions 'had a substantial and injurious effect or influence in determining the jury's verdict.'" Id., quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993). "Under this standard, an error is harmless unless the "record review leaves the conscientious judge in grave doubt about the likely effect of an error . . . (i.e.,) that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.'" Padilla v. Terhune, 309 F.3d 614, 621-22 (9th Cir. 2002), quoting O'Neal v. McAninch, 513 U.S. 432, 435 (1995) and citing Kotteakos v. United States, 328 U.S. 750, 765 (1946) ("[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.")

Petitioner's jury was instructed:

> The defendants are being prosecuted for first-degree murder under two theories: One, the murder was willful, deliberate, and premeditated and, two, felony murder. . . . You may not find the defendant guilty of first-degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.

The defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. . . .

The People have the burden of proving beyond a reasonable doubt that the killing was first-degree murder rather than a lesser crime.

A defendant may also be guilty of murder under a theory of felony murder, even if another person or persons did the act that resulted in the death. To prove that the defendant is guilty of first-degree murder under this theory, the People must prove that:

[O]ne: a defendant committed or aided and abetted or was a member of a conspiracy to: A, commit robbery or kidnapping as it relates to the Ivan Lozano-Valdez murder [which] applies to [Petitioner] only. B, commit kidnap for ransom or robbery as it relates to the Cesar Uribe and Marc Leon murders. Applies to both [Petitioner] and Valencia.

Two, a defendant intended to commit or intended to aid and abet the perpetrator in committing or intended that one or more of the members of the conspiracy commit: A, a robbery as it relates to – to the Ivan Lozano murder. Applies to [Petitioner] only. B, kidnap for ransom as it relates to the Cesar Uribe and Marc Leon murders. Applies to both [Petitioner] and Valencia.

Three, if the defendant did not personally commit the underlying felony, for example, robbery or kidnap for ransom, then a perpetrator whom the defendant was aiding and abetting or with whom the defendant conspired, personally committed: A, robbery as it relates to the Ivan Lozano murder. Applies to [Petitioner] only. B, and kidnap for ransom as it relates to the Cesar Uribe and Marc Leon murders. Applies to both [Petitioner] and Valencia.

And, four, while committing robbery as it relates to the Ivan Lozano murder, applies to [Petitioner] only, and/or kidnap for ransom as it relates to the Cesar Uribe and Marc Leon murders, applies to both [Petitioner] and Valencia, the perpetrator caused the death of another person.

And, five, there was a logical connection between the cause of death and the underlying felony. The connection between the cause of death and the underlying felony must involve more than just their occurrence at the same time and place.

To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I have given you on aiding and abetting. To

> decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I have given you on conspiracy. You must apply those instructions when you decide whether the People have proved first-degree murder under a theory of felony murder.

(RT 14080-84.)

With respect to the required mental state, the jury was instructed:

> The crimes, allegations, and special circumstances charged in this trial require a specific intent or mental state. [¶] For you to find a person guilty of these crimes or to find the allegations true, that person must not only intentionally commit the prohibited act but must do so with a specific intent or mental state. The act and the specific intent or mental state required are explained in the instructions for the crimes listed above, the allegations listed above, and the special circumstances as charged in this trial. You are also directed to the aiding and abetting instructions and the conspiracy instructions as it relates to the required intent to be found guilty or not guilty of the crimes and to find the allegations or special circumstances to be true and/or not true.

(RT 14046-47.)

Finally, the jury was instructed on the natural and probable consequences doctrine of conspiracy in the murders of Lozano (count 3), Uribe (count 5), and Leon (count 7):

> To prove that a defendant is guilty of the crimes charged in Count 3, 5, and 7 [under a conspiracy theory] the People must prove that: One, the defendant conspired to commit one of the following crimes: Robbery in count 3 as applied to [Petitioner]; and kidnapping for ransom in counts 5 and 7 as applied to both defendants; two, a member of the conspiracy committed murder to further the conspiracy; and, three, murder was a natural and probable consequence of the common plan or design of the crime that the defendant conspired to commit.

(RT 14046-47, 14066; CT 989-90.)

Although the prosecutor did not mention the natural and probable consequences doctrine during closing, he argued that the murders were committed during the commission of a felony, were willful, deliberate and premeditated, that Petitioner was both an aider and abettor and a conspirator, and that the jury was not required to be unanimous as to which theory they used to find him guilty. (RT 14146-48.) He argued in passing that Petitioner could be convicted of any crime under a conspiracy theory (RT 14148), but concluded that

Petitioner "should be held responsible for first degree murder because of the fact that it was committed willfully in a premeditated and deliberate way and that it was committed during the commission of a felony." (RT 14425.) Unlike the aiding and abetting instructions, which require knowledge of the perpetrator's purpose, the conspiracy instructions allowed the jury to convict Petitioner of first degree murder without a finding that he knew that the purpose of the person he was aiding or abetting was to commit first degree murder, merely that first degree murder was a natural and probable consequence of the conspiracy he entered into, which is similar, but not identical to, the instructional error in Chiu.[5] See Chiu, 59 Cal.4th at 166 (holding that because first degree murder "has the additional elements of willfulness, premeditation, and deliberation . . . which are uniquely subjective and personal," the connection between aider and abettor culpability and premeditation "is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved.")

The state appellate court correctly found that Petitioner had not shown that his jury was instructed on a natural and probable consequences theory of aiding and abetting liability, as opposed to the natural and probable consequences theory of conspiracy liability, although that court did not discuss the distinction between those theories. The appellate court did, however, correctly find that a conviction for aiding and abetting murder during the commission of a kidnapping was sufficient to preclude relief under Chiu. See Chiu, 59 Cal.4th at 166 (stating that the holding "does not affect or limit an aider and abettor's liability for first degree felony murder under [Penal Code] section 189.") Petitioner has cited no authority for the proposition that Chiu has been extended to the situation here, where the jury was instructed on the natural and probable consequences theory of conspiracy but, unlike Chiu, was also instructed that the murder must be willful, deliberate and premeditated.

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[5] The state supreme court decided Chiu on June 2, 2014, before Petitioner filed his petition for review on October 20, 2014 (although a Chiu claim was not raised on direct appeal), and before Petitioner began his round of post-conviction review in February 2016.

The state superior court, in denying habeas relief as to this claim, stated:

> Unlike *Chiu*, the jury in petitioner's case was not given a jury instruction on the natural and probable consequence theory of liability pursuant to CALCRIM 403 or its equivalent of CALJIC 3.02. The jury was also not given jury instruction CALCRIM 402, which is the instruction on the natural and probable consequences doctrine as it applies to target and non-target offenses charged. Rather, the court properly gave jury instruction CALCRIM 401, that petitioner had the shared intent to commit the murders. Petitioner fails to cite any authority expanding the applicability of *Chiu* to the jury instructions that were provided to the jury in his case. Furthermore, petitioner alleges that the prosecutor argued the natural and probable consequence theory in closing argument. However, petitioner does not attach a single portion of the transcript supporting this claim. There is no evidence suggesting that the jury somehow theorized the natural and probable consequence doctrine on its own, absent such an instruction, and found petitioner liable on this improper basis. For these reasons, petitioner's instructional error claim based on *Chiu* is denied.

(Lodgment No. 17, In re Beritan, HC 22392, order at 6-7 (Cal. Super. Ct. Mar. 25, 2016).)

Thus, Petitioner has not demonstrated that his jury was instructed on an invalid theory of liability, and has therefore failed to demonstrate the existence of a federal constitutional error. Pulido, 555 U.S. at 58. However, even assuming the jury was instructed on an invalid theory of murder of Lozano and Leon along with other valid theories, this Court must determine if such an error is harmless. Id. Under California law, a person who aids and abets a crime is a principal in the crime, sharing the same guilt as the perpetrator. People v. Prettyman, 14 Cal.4th 248, 259 (1996). "An aider and abettor is a person who, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." Id.

Petitioner was seen kicking Lozano as he was being strangled to death after it had been determined that no ransom would be paid, and he helped dispose of Lozano's body by stealing the car in which it was found sprinkled with toothpicks, a calling sign of the Los Palillos crew. Spare parts from that car were found at the Garber Avenue house, where

Petitioner lived. Evidence showed that Lozano's body had Taser injuries, that Petitioner usually carried a Taser, and that a Taser recovered from the couch he was last seen sitting on contained his DNA and had been fired five times on the day Lozano was abducted. Thus, the evidence supports a finding that Petitioner aided and abetted the willful, deliberate and premeditated murder of Lozano, because he acted with "knowledge of the unlawful purpose of the perpetrator," and with "the intent or purpose of committing, encouraging, or facilitating the commission of the offense" he "aid[ed], promote[d], encourage[d] or instigate[d], the commission of the crime." Prettyman, 14 Cal.4th at 259.

The same is true with respect to Leon. The evidence showed that Petitioner helped prepare the acid solution to dissolve Leon's body before he was killed, which indicated his participation in, and knowledge of, the plan to kill Leon, which Pena and Moreno-Garcia both testified the group had made earlier the day of the killings, and which Pena said was obvious once he was told to purchase the acid. Petitioner instructed Pena on how to properly mix the acid prior to the killing, and guarded Uribe while Leon was taken downstairs and murdered in the same room where the barrels of acid were set up and ready to be used to dissolve his corpse. Petitioner participated in dissolving Leon's body, which included the purchase of supplies, and a barbeque to mask the smoke and odor. He also cleaned the house afterwards, disinfecting the floor where Leon was killed, and the Taser with his DNA was discharged eight times on the day Leon was abducted. Thus, the evidence supports a finding that he aided and abetted the willful, deliberate and premeditated murder of Leon because he had "knowledge of the unlawful purpose of the" person(s) who killed Leon, acted with "the intent or purpose of committing, encouraging, or facilitating" that killing, and "aid[ed], promote[d], encourage[d] or instigate[d]" the killing. Prettyman, 14 Cal.4th at 259.

"[A]n error is harmless unless the "record review leaves the conscientious judge in grave doubt about the likely effect of an error . . . (i.e.,) that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.'" Padilla, 309 F.3d at 621-22, quoting O'Neal, 513 U.S. at 435. The Court is not in

grave doubt that instructing the jury on the theory of conspiracy to kidnap or rob Lozano and Leon, the natural and probable consequences of which was murder, affected their verdict. In light of the evidence of Petitioner's direct participation in the planned and premeditated murders of Lozano and Leon, and in light of the instruction that the People were required to prove the murders were willful, deliberate and premeditated, it is implausible that the jury rejected a finding that he aided and abetted the premeditated killings during the course of a kidnapping, but instead rested their verdicts on a finding that Petitioner was part of a conspiracy to kidnap or rob Lozano and Leon, the natural and probable consequences of which was murder. Further support for that conclusion is provided by the evidence that prior to those killings Petitioner was aware the Los Palillos crew participated in kidnappings where the victims were not murdered. In fact, the first two Los Palillos kidnappings Petitioner participated in, the Kilino and Balitas kidnappings, which immediately preceded the Lozano kidnapping and murder, resulted in Kilino and Balitas being released. Unlike the other kidnappings, Lozano was murdered because no ransom was paid, and Leon was murdered because he could implicate Valencia. Thus, it is extremely unlikely the jury would have convicted Petitioner on the basis that murder is a natural and probable consequence of a Los Palillos kidnapping, as opposed to finding that Petitioner directly aided and abetted the premeditated murders Lozano and Leon.

Accordingly, the record supports the finding by the state appellate court that because the jury convicted Petitioner of felony murder of Lozano and Leon during the course of a kidnapping there was no Chiu instructional error. See Chiu, 59 Cal.4th at 166 (stating that the holding "does not affect or limit an aider and abettor's liability for first degree felony murder under [Penal Code] section 189."); Pulido, 555 U.S. at 58 (federal constitutional error occurs only when it is impossible to determine that the jury relied on an invalid theory of guilt). Even assuming the jury was instructed on an invalid theory along with other valid theories, and assuming the instruction amounted to a federal error, the Court finds any such error harmless because it did not have "a substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623.

In sum, the Court finds that the state court adjudication of claim two is neither contrary to, nor involves an unreasonable application of, clearly established federal law. Richter, 562 U.S. at 102; Pulido, 555 U.S. at 58. Even assuming a federal error occurred, the Court finds it is harmless. Pulido, 555 U.S. at 58; Brecht, 507 U.S. at 623. Nor is there any basis to find that the state court adjudication of claim two is based on an unreasonable determination of the facts. Miller-El, 537 U.S. at 340.

E. Claim Three

Petitioner contends in claim three that his federal constitutional right to confront the witnesses against him was violated by the admission of the hearsay testimony of Adrian Gonzalez, who testified that Valencia said Uribe owed Valencia $70,000, and that as soon as Uribe paid Valencia, Valencia would pay Gonzalez the $9,000 in back rent he owed, which he did not long after the Uribe's ransom was paid. (Pet. at 30-34.) Petitioner contends he was not able to cross-examine the declarant, Valencia. (Id.)

Respondent answers that a claim challenging the admissibility of evidence at a state trial generally does not raise a federal issue, and that the Ninth Circuit has held that there is no clearly established federal law permiting federal habeas relief based on the admission of prejudicial evidence. (Ans. Mem. at 38, citing Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (observing that even though the petitioner received a fundamentally unfair trial as a result of the introduction of prejudicially irrelevant evidence, a federal habeas court applying AEDPA could not grant the writ on that basis because the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ.").) Petitioner replies that this claim presents a federal issue because at trial he objected on the same basis he does here, that admission of the statement violated his rights under Crawford v. Washington, 541 U.S. 36, 68 (2004) (holding that the Sixth Amendment's Confrontation Clause provides that the introduction of prior testimonial statements violates a defendant's confrontation rights unless the person who made the statements is unavailable to testify and there was a prior opportunity for cross-examination). (Traverse at 11.)

Petitioner presented this claim to the state supreme court in a habeas petition that was summarily denied. (Lodgment Nos. 22-27.) He presented the same claim in his state appellate court habeas petition. (Lodgment No. 20 [ECF No. 11-102 at 13-17].) The Court will look through the silent denial by the state supreme court to the last reasoned state court decision as to this claim, Ylst, 501 U.S. at 803-06, the state appellate court order:

> Habeas corpus is not an available remedy to review the rulings of the trial court with respect to the admission or exclusion of evidence. (*In re Lindley* (1947) 29 Cal.2d 709, 723.) To the extent that he argues that his right to confront witnesses was violated by the admission of hearsay, he does not demonstrate that any of those statements were testimonial in nature. (See, e.g. *People v. Arceo* (2011) 195 Cal.App.4th 556, 571 (if challenged statements are not testimonial, the confrontation clause has no application).

(Lodgment No. 21, In re Beritan, No. D070384, order at 1-2.)

The Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy v. Iowa, 487 U.S. 1012, 1016 (1988). The physical confrontation "enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person." Maryland v. Craig, 497 U.S. 836, 846 (1990). Nevertheless, the clause "permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial." Id. at 847-48. The introduction of prior testimonial statements of a witness violates a defendant's confrontation rights unless the person who made the statements is unavailable to testify and there was a prior opportunity for cross-examination. Crawford, 541 U.S. at 68. The Confrontation Clause does not apply to non-testimonial evidence. Davis v. Washington, 547 U.S. 813, 821 (2006).

The state appellate court's determination that Petitioner failed to show the statement is testimonial is objectively reasonable. The Crawford Court identified a "core class" of testimonial statements as the functional equivalent of court testimony, such as affidavits, depositions or confessions, and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available to use at a later trial." Crawford, 541 U.S. at 51-52. Valencia's statement to his landlord

about paying his past due rent does not constitute testimonial evidence under Crawford, and the adjudication of this claim by the appellate court is therefore objectively reasonable. As to Petitioner's general due process objection to the admission of the statement, the state court adjudication of the claim does not involve an unreasonable application of clearly established federal law. See Holley, 568 F.3d at 1101 (recognizing that the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ.")

Even if there is error arising from the admission of the statement, a confrontation clause violation is subject to harmless error review. United States v. Nielsen, 371 F.3d 574, 581 (9th Cir. 2004). Evidence that Valencia said Uribe owed him money tended to support the theory that Valencia set Uribe up and lured him to the Garber Avenue house. That evidence was insignificant in light of the direct evidence of Valencia's role in setting up and luring victims to be kidnapped by Los Palillos, including the testimony of Gonzalez-Tostado that Valencia set him up, testimony by Moreno-Garcia that Valencia brought Uribe and Leon to the Garber Avenue house, testimony by Palafax that Uribe said he was going to meet Valencia just before he was kidnapped, and testimony by Uribe's spouse that Uribe spoke to Valencia just before he disappeared. In addition, Valencia's statement did very little if anything to incriminate Petitioner, as Valencia's role in luring victims into the hands of Los Palillos is separate from Petitioner's role in the crimes, which involved maintaining the safe house, guarding and murdering the victims, and disposing of their bodies.

Furthermore, the jury was instructed: "You must separately consider the evidence as it applies to each defendant. You must decide each charge for each defendant separately." (RT 14038, 14087.) They were also instructed: "I instructed you during the trial that certain evidence was admitted only against certain defendants. You must not consider that evidence against any other defendant." (RT 14047-48.)

"The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, makes sense of, and follow the instructions given them." Francis v. Franklin,

471 U.S. 307, 324 n.9 (1985). However, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton v. United States, 391 U.S. 123, 135 (1968) (finding such a situation where jury was instructed to ignore powerfully incriminating extrajudicial statements of a co-defendant which were devastating to the defense, and where the inherently unreliable nature of that evidence was intolerably compounded by the failure of the co-defendant to be subject to cross-examination). Because the challenged statement is insignificant in light of the other evidence of the various roles Valencia and Petitioner played in the crimes, it does not rebut the presumption the jury followed their instructions. Thus, any error in the admission of Valencia's statement could not have "had a substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623.

The Court finds that the state court adjudication of claim three is neither contrary to, nor involves an unreasonable application of, clearly established federal law. Richter, 562 U.S. at 102; Crawford, 541 U.S. at 68; Davis, 547 U.S. at 821. Even assuming a federal error occurred, the Court finds it is harmless. Brecht, 507 U.S. at 623; Nielsen, 371 F.3d at 581. Nor is there any basis to find that the state court adjudication of claim three is based on an unreasonable determination of the facts. Miller-El, 537 U.S. at 340.

E. Claim Four

In claim four Petitioner alleges purposeful racial discrimination in jury selection, and ineffective assistance of appellate counsel for failing to raise the claim on appeal. (Pet. at 36-37.) He claims defense counsel made a prima facie showing of racial discrimination after the prosecutor dismissed four African-American jurors, and that the trial judge erred in finding that no prima facie showing had been made. (Id.)

Respondent answers that there were no racial overtones in the dismissal of the jurors because Petitioner is Cuban, the victims are all Hispanic, and the challenged jurors are all African-American. (Ans. Mem. at 42.) Respondent argues that Petitioner has failed to provide any statistical information regarding the number of African-Americans on the

venire and the number challenged, and the jury voir dire transcripts reveal there were race-neutral reasons for excusing at least two of the challenged jurors. (Id.) With respect to the ineffective assistance aspect of the claim, Respondent argues appellate counsel was not deficient in failing to raise a claim with no likelihood of success. (Id. at 43.)

Petitioner replies that Respondent is incorrect to argue that the race of the challenged jurors, relative to the ethnicity of Petitioner and the victims, is material to the analysis, and in any case he identifies his ethnicity as "African-American Cuban Hispanic." (Traverse at 12.) He argues that his requests for the jury voir dire transcripts in each of his pro se state habeas petitions was denied, and he attributes the failure to have to voir dire proceedings transcribed and available to the state courts to his appointed appellate counsel's failure to raise the issue on appeal. (Id. at 12-13.) He argues that because the voir dire transcripts relied on by Respondent were not before the state court, they should be stricken from the record here and ignored, or, alternately, that this Court should either conduct an evidentiary hearing or hold the Petition in abeyance while he returns to state court to re-submit the claim with the complete transcript. (Id. at 13-14.)

In his first state habeas petition, Petitioner requested copies of the voir dire transcript. (Lodgment No. 16 [ECF No. 11-96 at 18, 197-99].) The superior court denied that request, and denied his Batson claim because it could have been but was not raised on appeal. (Lodgment No. at 17, In re Beritan, HC 22392, order at 4-5, 11 [ECF No. 11-97 at 5, 11].) The superior court, in finding that Petitioner had not met his burden of demonstrating a prima facie case for relief, noted that he had an obligation to support his claim with reasonably available documentary evidence such as relevant portions of the trial transcript. (Id.) Petitioner filed a motion for reconsideration to which he attached the portions of the trial transcript which contained the Batson motions, which he had omitted from his original habeas petition. (Lodgment No. 18 [ECF No. 11-98 at 128-29].) The superior court denied the motion for reconsideration, without reassessing the claim in light of the Batson motion hearing transcripts, which it noted Petitioner was in possession of when he filed his original habeas petition but omitted from that petition, on the basis that Petitioner had not shown a

change in existing facts or law as required to support a motion for reconsideration. (Lodgment No. 19, In re Beritan, HC 22392, order at 5 [ECF No. 11-101 at 5].)

Petitioner thereafter presented the same claim to the appellate court, with the trial transcript of the Batson motion hearing, and with the same complaint that his appellate counsel did not order the voir dire proceedings transcribed and his objection to the superior court's determination that he was required to present the voir dire transcript in order to state a prima facie case for relief. (Lodgment No. 26 [ECF No. 11-110 at 3].) That court denied the habeas petition, stating:

> Beritan's third ground contends that the court erred in denying a challenge to the prosecution's use of peremptory challenges to strike African-American jurors. The record he provides reveals only that the prosecution used at least one peremptory challenge to strike an African-American man. Although that fact may be probative, it is not enough standing alone to establish a prima facie case of discrimination. (See, e.g., *People v. Scott* (2015) 61 Cal.4th 363, 384-385.) Without an additional record, this court is entirely unable to consider the totality of the circumstances to determine whether an inference of discrimination exists. (*Ibid*.)

(Lodgment No. 21, In re Beritan, No. D070384, order at 2 [ECF No. 11-105 at 2].)

Petitioner presented the same claims and arguments, supported by the same trial transcripts, to the state supreme court in a habeas petition. (Lodgment No. 26.) That court denied the petition in an order that stated: "Petition for writ of habeas corpus denied." (Lodgment No. 27, In re Beritan, No. S236290, order at 1.)

"Before we can apply [the] standards [of 28 U.S.C. § 2254(d)], we must identify the state court decision that is appropriate for our review. When more than one state court has adjudicated a claim, we analyze the last reasoned decision." Barker v. Fleming, 423 F.3d 1085, 1091-92 (9th Cir. 2005). With respect to the claim of ineffective assistance of appellate counsel in failing to raise a Batson issue on appeal, which would have presumably generated the voir dire transcripts, avoided a default of the underlying Batson claim in the superior court, and avoided the denial in the appellate court on the basis of a lack of the relevant transcripts, the appellate court did not address that claim. The Court will therefore

look through the silent denial of the claim by the state supreme court to the only state court to expressly address it, the superior court order denying habeas relief, which is quoted below in the discussion of that claim.

As to the Batson claim, there is a presumption the state supreme court's silent denial is based on the appellate court's rejection of the claim. Ylst, 501 U.S. at 803-06. As set forth above, the appellate court found that the trial transcript of the Batson motion presented by Petitioner is insufficient to state a prima facie case of discrimination, and "[w]ithout an additional record, this court is entirely unable to consider the totality of the circumstances to determine whether an inference of discrimination exists." (Lodgment No. 21, In re Beritan, No. D070384, order at 2.)

1. Batson Claim

The full transcript of the voir dire questioning of the jurors which Respondent has lodged here (Lodgment No. 2, vol. 3-4), was apparently not included in the record on appeal in the state court. However, the trial transcripts which were part of the state court record included the Batson motion hearing, and Petitioner attached them to his pro se habeas petitions in support of his claim to the state supreme court (Lodgment No. 26 part 1 [ECF No. 11-110 at 221-22]), the state appellate court (Lodgment No. 20, part 2 [ECF No. 11-103 at 104-05]), and the state superior court in his motion for reconsideration (Lodgment No. 18, part 1 [ECF No. 11-98 at 128-29]), but not to the superior court in his original habeas petition (see Lodgment No. 16).

The trial transcript that was before the state court reveals that during jury selection defense counsel stated: "We want to bring a Batson/Wheeler motion. That's the third African-American that they kicked off. Juror No. 49, 96, and 118." (RT 639.) The trial judge deferred the motion until the next break. (Id.) When the prosecutor excused Juror No. 127 immediately after the defense excused Juror No. 123, the defense renewed the motion and the following exchange occurred:

> The Court: A Batson-Wheeler motion was made after – or at Juror No. 123. If you could please set forth a prima facie case at this time, please, the defense.

> Defense Counsel: Your honor, I believe a prima facie case has been made. The three first ones that we made the [first] motion were all African-American males. And then Juror No. [127] was an African-American female. They're all part of a recognizable group, and we believe that that's the reason we made the challenge at that time.
>
> The Court: How many were left on the panel when you made your first – how many African-American jurors were left of the panel when you made your first [motion]?
>
> Defense Counsel: I don't believe there were any.
>
> The Court: There were two. Denied. How many were on the panel when you made your second [motion]?
>
> Defense Counsel: I believe there were two, your Honor.
>
> The Court: There was one.
>
> Defense Counsel: We are wrong.
>
> The Court: It's denied. There's no prima facie case made as to either Batson-Wheeler [motion].

(RT 639-40.)

Respondent has lodged the complete voir dire transcript (Lodgment No. 2, vol. 3-4), and argues that it shows there are legitimate race-neutral reasons for dismissing Juror Nos. 49 and 96, that defense counsel did not give any reasons to support a discriminatory animus by the prosecutor other than the mere fact that four African-American jurors were excused, and there were no racial overtones because Petitioner is not the same race as the excused jurors. (Ans. Mem. at 40-41.) Petitioner replies that this Court is not entitled to consider those transcripts because they were not before the state court, and should strike that part of the Answer. (Traverse at 13, citing Cullen v. Pinholster, 563 U.S. 170, 181-82 (2011) (holding that for claims which were adjudicated on the merits in state court, a federal habeas court must make its § 2254(d) determination based solely on the evidence presented to the state court).) He argues that if this Court is going to rely on matters outside the state

court record, it should either conduct an evidentiary hearing or hold the Petition in abeyance while he returns to state court with the complete transcript. (Id. at 13-14.)

Clearly established federal law provides that a single strike of an African-American juror for a racial reason violates the Equal Protection Clause. Batson, 476 U.S. at 95-96. The Batson inquiry consists of three steps:

> First, the defendant must make out a prima facie case by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. Third, if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination.

Johnson v. California, 545 U.S. 162, 168 (2005) (internal citations, quotation marks and footnote omitted).

"[A] defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." Id. at 170. As set forth above, the trial record before the state court showed that after the first Batson motion the trial judge pointed out that there were two African-American jurors remaining on the panel, and after the second motion the trial judge pointed out there was one remaining. There is Ninth Circuit authority suggesting that reliance solely on the fact that members of the challenged racial group remained on the jury is insufficient or nominally sufficient to find the lack of a discriminatory animus at Batson step one. See Shirley v. Yates, 807 F.3d 1090, 1102 (9th Cir. 2015) (collecting cases). And although the record might seem to suggest the trial judge did just that, the Supreme Court has cautioned against relying on the cold record of voir dire transcripts in the Batson context. See Hernandez v. New York, 500 U.S. 352, 369 (1991) (holding that a trial court's ruling on the issue of discriminatory intent must be sustained unless clearly erroneous); Miller-El, 537 U.S. at 339-40 (holding that trial court Batson findings "are presumed correct absent clear and convicting evidence to the contrary," and that "[d]eference is

necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court to make credibility determinations.")

From the transcript of the Batson motion hearing, which was before the state appellate and supreme courts, it is clear that defense counsel did not satisfy Batson's first step because counsel merely pointed out that the prosecutor had removed several African-American jurors, but without any showing or allegation that it was done for a discriminatory purpose, or even that it had a discriminatory impact, as there is no indication in the record regarding the total number of African-American jurors in the venire or on the final panel. See Johnson, 545 U.S. at 168 (holding that a "defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'"), quoting Batson, 476 U.S. at 93-94, and citing Washington v. Davis, 426 U.S. 229, 29-42 (1976) (recognizing that an act challenged solely because it has a racially disproportionate impact, "without regard to whether it reflects a racially discriminatory purpose," is not unconstitutional); see also Cooperwood v. Cambra, 245 F.3d 1042, 1048 (9th Cir. 2001) (finding that the fact that African-Americans remained on the panel when the challenges were made generally weighs against an inference of discrimination).

Thus, the record that was before the state court shows that defense counsel did not provide any support for his Batson motions other than pointing out that African-American jurors had been excused while other African-American jurors remained. Because defense counsel was in a position to make a disparate impact argument during the Batson motions but did not do so, the Court must presume there was no such argument available. See Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (recognizing a strong presumption that counsel took actions "for tactical reasons rather than through sheer neglect."), citing Strickland v. Washington, 466 U.S. 668, 690 (1984) (holding that counsel is "strongly presumed" to make decisions in the exercise of professional judgment); and Massaro v. United States, 538 U.S. 500, 505 (2003) (noting that the presumption of competence has particular force where a claim is based solely on the trial record). Even ignoring that presumption,

Petitioner has still come forward with nothing to rebut the presumption of correctness of the trial judge's finding that defense counsel failed to satisfy Batson's first step, other than his speculative and conclusory allegations that had the voir dire proceedings been transcribed during his post-conviction process he might have been able to make such a showing. Speculative and conclusory allegations are insufficient to support habeas relief. James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994).

Accordingly, to the extent this Court is required to apply the provisions of 28 U.S.C. § 2254(d) to the state appellate court adjudication of Petitioner's Batson claim, the Court finds, based on the record before the state court as set forth above, that the appellate court's rejection of the claim (on the basis that Petitioner had failed to overcome the presumption that no prima facie case of racial discrimination was made at trial sufficient to satisfy Batson's first step), is not an objectively unreasonable application of clearly established federal law, and is not based on an unreasonable determination of the facts. See Rice v. Collins, 546 U.S. 333, 338-39 (2006) (recognizing that state court factual findings in the Batson context are presumed correct, and a federal habeas "petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'"), quoting 28 U.S.C. § 1154(e)(1); Tolbert v. Page, 182 F.3d 677, 682 (9th Cir. 1999) (en banc) ("At the *Batson* prima facie showing step, the concerns of judicial administration tip in favor of the trial court and, therefore, a deferential standard of review prevails.")

Notwithstanding that the record before the state court precludes a finding of a Batson violation, Petitioner challenges the failure of the state appellate court to obtain the complete voir dire transcripts in order to properly adjudicate his Batson claim. The Supreme Court has acknowledged that the failure of a state court to consider key aspects of the trial record is a defect in the fact-finding process. Miller-El, 537 U.S. at 346. "How serious the defect, or course, depends on what bearing the omitted evidence has on the record as a whole." Taylor v. Maddox, 366 F.3d 992, 1008 (9th Cir. 2004). The Court in Taylor found that the failure of the state court "to consider, or even acknowledge, highly probative testimony cast[] serious doubt on the state-court fact-finding process," which required the federal

habeas court "to set those findings aside and . . . make new findings." Id. at 1005-08. An evidentiary hearing or further development of the record would be appropriate in this Court if Petitioner: (1) did not receive a full and fair hearing in state court, (2) did not fail to develop the facts supporting this claim in the state court, and (3) alleges facts that, if proven true, would entitled him to relief. Baja v. Ducharme, 187 F.3d 1075, 1078-79.

Petitioner received a fair and full hearing in the trial court regarding his Batson motions, as the trial judge considered and ruled upon both motions which were brought by his counsel. Petitioner has not made a showing that he did not receive a full and fair hearing in the appellate court simply because the voir dire transcripts were not in the record. Petitioner attended the trial as well as the voir dire proceedings, and was in a position to allege facts which, if true, would challenge the trial court's finding that Batson was not satisfied at the first step even without the full transcript. He failed to allege in state court, as he has here, how the voir dire transcripts support his claim. In other words, he has never alleged what in particular about the prosecution's peremptory challenge of four African-American jurors, other than that fact standing alone, which as set forth above is insufficient, raised an inference of racial discrimination in jury selection.

As set forth above, the state court adjudicated the Batson claim by stating "[w]ithout an additional record, this court is entirely unable to consider the totality of the circumstances to determine whether an inference of discrimination exists," and that "[t]he record he provides reveals only that the prosecution used at least one peremptory challenge to strike an African-American man." Even assuming that was not an adjudication on the merits of the claim, or that it involves an unreasonable determination of the facts since the record presented to that court reveals that several African-American jurors were struck, or that Petitioner could otherwise satisfy the provisions of 28 U.S.C. § 2254(d) and avoid the deference it requires and its attendant restrictions on evidentiary hearings, it is clear that federal habeas relief is unavailable because the Batson claim fails under a de novo review. See Berghuis v. Thompkins, 560 U.S. 370, 390 (2010) (holding that when it is unclear whether AEDPA deference applies, a federal habeas court may conduct a de novo review

to deny a petition but not to grant one); Johnson v. Finn, 665 F.3d 1063, 1069 n.1 (9th Cir. 2011) (noting that the bar to evidentiary development under Pinholster is inapplicable when § 2254(d)(1) deference does not apply).

Under a de novo review, the totality of the circumstances does not raise an inference that the prosecutor challenged any juror on account of their race. Respondent contends that Petitioner, a Cuban, is not the same ethnicity as the Hispanic victims or the challenged African-American jurors. Petitioner correctly replies that he need not be the same race as any improperly excused juror, and that such a distinction does not prevent him from presenting a Batson challenge. Powers v. Ohio, 499 U.S. 400, 415 (1991). It is a factor to be considered both in determining whether a prima facie case has been made and whether the prosecutor ultimately engaged in wrongful discrimination. Id. at 416. However, even discounting or ignoring that factor based on Petitioner's contention that he is or should be considered an "African-American Cuban Hispanic" (see Traverse at 12), the remaining circumstances support the presumption of correctness of the trial judge's finding. See Tolbert, 182 F.3d 685 (recognizing that under pre-AEDPA law a trial court's finding of no prima facie case of discrimination under Batson's first step is entitled "to a presumption of correctness."); Hayes v. Brown, 399 F.3d 972, 978 (9th Cir. 2005) (en banc) (holding that under pre-AEDPA habeas review, "state court judgments of conviction and sentence carry a presumption of finality and legality and may be set aside only when a state prisoner carries his burden of proving that [his] detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution.")

The prosecutor used 25 peremptory challenges, passing five times, and the defense used 27 peremptory challenges, passing twice. (Lodgment No. 2, vol. 4 at 245-62.) Of the four excused jurors which Petitioner contends were African-American (Juror Nos. 49, 96, 118 and 127), the prosecutor excused Juror No. 49 on his sixth challenge, excused Juror No. 96 on his 12th challenge after passing four times, excused Juror No. 118 on his 17th challenge, and excused Juror No. 127 on his 19th challenge. (Id.) Thus, out of 25 peremptory challenges, the prosecutor excused four African-American jurors, thereby

using 16% of his challenges to excuse African-Americans, leaving at least one African-American on the jury. The fact that one African-American juror remained weighs "against an inference of discrimination, but 'only nominally' so." Shirley, 807 F.3d 1102, quoting Montiel v. City of Los Angeles, 2 F.3d 335, 340 (9th Cir. 1993).

Although the Ninth Circuit has found that an inference of racial discrimination arises when the prosecutor has peremptorily struck 56%, 57% and 66% of the minority venire members, see Shirley, 807 F.3d at 1101 (collecting cases), the record in this case does not provide for such a statistical analysis because there is no indication of the ethnicity of the venire members, other than the representation regarding the four challenged jurors and the one remaining juror. Defense counsel was in a position to make such a statistical disparity argument during the Batson motions, but did not do so, presumably because no such disparity existed. Gentry, 540 U.S. at 5 (recognizing a strong presumption that counsel took actions "for tactical reasons rather than through sheer neglect."), citing Strickland, 466 U.S. at 690 (holding that counsel is "strongly presumed" to make decisions in the exercise of professional judgment); and Massaro, 538 U.S. at 505 (noting that the presumption of competence has particular force where a claim is based solely on the trial record). Although the prosecutor immediately excused each of the four challenged jurors as soon as they were seated after a defense challenge seated them in the jury box (Lodgment No. 2, vol. 4 at 248, 252, 255-56), it is clear that by using only 16% of his peremptory challenges to excuse African-American jurors, the prosecutor did not disproportionately use his peremptory challenges to dismiss minority jurors. See Shirley, 807 F.3d at 1101 n.7 (recognizing that the disproportionate use of peremptory challenges to excuse minority jurors is a factor to consider at Batson step one.) Thus, all of the circumstances support the trial judge's finding that no prima facie case of discrimination was presented. Although Petitioner is in a position to allege facts demonstrating that the dismissal of the African-American jurors satisfied Batson's first step, he has not done so, either here or in the state courts. The Court will not consider Respondent's contention that the record reveals race-neutral reasons for excusing two of the jurors. See Paulino v. Harrison, 542 F.3d 692, 699

(9th Cir. 2008) (recognizing that it is "the prosecutor's *actual* reasons for exercising her peremptory challenges" that matters, not speculation), citing Johnson, 545 U.S. at 172.

The Court finds, based on the totality of the circumstances under a de novo review, that Petitioner has not overcome the presumption of correctness of the finding by the trial judge that the defense did not make a prima facie case of racial discrimination sufficient to satisfy Batson's first step. Because the claim can be denied based on the state court record, and because Petitioner's allegations, even if true, do not support habeas relief, he is not entitled to an evidentiary hearing. Campbell v. Wood, 18 F.3d 662, 679 (9th Cir. 1994); Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir. 1992).

2. Ineffective Assistance of Appellate Counsel

Petitioner also claims he received ineffective assistance of appellate counsel in failing to raise a Batson claim on appeal. As set forth above, the Court will look though the silent denial of this claim by the state supreme court to the last reasoned state court decision, the superior court order denying habeas relief, which states:

> While the peremptory challenge claim and other issues were not raised on appeal, petitioner has not made a prima facie showing that had they been raised and addressed on appeal, the outcome would have been different. Petitioner also fails to present any evidence that he was not consulted prior to the filing of the appeal and/or that an omission of this type would have altered the outcome of his convictions. Further, petitioner does not establish how his appellate attorney's failure to order the record of voir dire and jury selection constitutes ineffective assistance of counsel. As stated above, petitioner does not cite any authority, nor clearly articulates his claim based on the alleged improper peremptory challenge to the jury composition.
>
> While petitioner presented evidence that he complained to the California State Bar regarding the lack of communication from his appellate counsel after the denials from the Court of Appeal and California Supreme Court, that evidence in and of itself does not establish ineffective assistance of counsel. Also, the letter dated November 12, 2015, which does not appear to have a designated recipient, suggests that petitioner is in possession of his trial transcripts except for volumes 30 and 37. Despite petitioner's retention of the trial transcripts, he fails to provide the court with any excerpt from same even though he cites to the trial transcripts throughout the Petition. Moreover, to the extent that petitioner claims volumes 30 and 37 "cover the direct and

> cross examination of one of the two alleged direct participants in this crimes charged and prosecution," as stated *supra*, this court will not review petitioner's sufficiency of the evidence claim on this Petition. Therefore, petitioner's claim of ineffective assistance of appellate counsel is denied.

(Lodgment No. 17, In re Beritan, HC 22392, order at 8-9 [ECF No. 11-97 at 8-9].)

The clearly established United States Supreme Court law governing ineffective assistance of counsel claims is set forth in Strickland. See Baylor v. Estelle, 94 F.3d 1321, 1323 (9th Cir. 1996) (stating that Strickland "has long been clearly established federal law determined by the Supreme Court of the United States"); Turner v. Calderon, 281 F.3d 851, 872 (9th Cir. 2002) (explaining that the Strickland standard applies to claims of ineffective assistance of appellate counsel). For ineffective assistance of counsel to provide for relief, Petitioner must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Petitioner must also show that counsel's deficient performance prejudiced the defense, which requires showing that "counsel's errors were so serious as to deprive [Petitioner] of a fair trial, a trial whose result is reliable." Id. To show prejudice, Petitioner need only demonstrate a reasonable probability that the result of the proceeding would have been different absent the error. Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. Petitioner must establish both deficient performance and prejudice in order to establish ineffective assistance of counsel. Id. at 687. "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). "The standards created by Strickland and section 2254(d) are both highly deferential and when the two apply in tandem, review is 'doubly' so." Richter, 562 U.S. at 105 (citations omitted). These standards are "difficult to meet" and "demands that state court decisions be given the benefit of the doubt." Pinholster, 563 U.S. at 181.

The adjudication by the state superior court (on the basis that Petitioner had not alleged that he was excluded from the decision by his appellate counsel not to include a Batson claim or how the inclusion of the claim would have altered the outcome of the

proceedings), is objectively reasonable because appellate counsel was entitled to make a tactical decision not to raise such weak and unsupported claim. Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (holding that appellate counsel has no constitutional obligation to raise every nonfrivolous issue on appeal because "[i]n many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy."); Gustave v. United States, 627 F.2d 901, 906 (9th Cir. 1980) ("There is no requirement that an attorney appeal issues that are clearly untenable.") Petitioner contends that if appellate counsel had raised the claim the voir dire transcripts would have been in the state court record. It is clear from the de novo review above that it was objectively reasonable for the state superior court to find that Petitioner did not support his conclusory allegation that access to the transcripts would have altered the outcome or shown that the trial court erred in finding the first Batson step was not satisfied. See Burt v. Titlow, 571 U.S. ___, 134 S.Ct. 10, 17 (2013) ("[T]he absence of evidence cannot overcome the strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.") (internal quotations and citations omitted); see also Blackledge v. Allison, 431 U.S. 63, 74 (1977) (holding that vague and conclusory allegations are insufficient to prove that counsel provided ineffective assistance); Richter, 562 U.S. at 110 ("Representation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial."), quoting Strickland, 466 U.S. at 686. "The standards created by Strickland and section 2254(d) are both highly deferential and when the two apply in tandem, review is 'doubly' so." Richter, 562 U.S. at 105 (citations omitted).

3. Conclusion

In sum, the Court finds that the state court adjudication of both the Batson and the ineffective assistance of appellate counsel aspects of claim four are neither contrary to, nor involve an unreasonable application of, clearly established federal law, and are not based on an unreasonable determination of the facts in light of the evidence presented in the state

court proceedings. Richter, 562 U.S. at 102; Rice, 546 U.S. at 338-39; Miller-El, 537 U.S. at 346; Strickland, 466 U.S. at 687; Tolbert, 182 F.3d at 682. The Court alternately finds that even assuming Petitioner could satisfy those standards, his Batson claim fails under a de novo review. The Court finds that an evidentiary hearing or further development of the record is neither necessary nor warranted because Petitioner has not alleged facts which, if true, would entitle him to relief in this Court. Maddox, 366 F.3d at 1005-08; Baja, 187 F.3d at 1078-79; Campbell, 18 F.3d at 679; Hendricks, 974 F.2d at 1103. The Court also finds that a stay of this case while Petitioner returns to state court to present the full jury voir dire transcript in support of claim four is not appropriate because his claim is insufficiently meritorious. Rhines v. Weber, 544 U.S. 269, 277-78 (2005).

E. Claim Five

Petitioner contends in claim five that his level of participation in the murders was insufficient to sentence him to life without the possibility of parole because there is no evidence he was the actual killer or that he shared the intent of the killer. (Pet. at 38.) Respondent answers that this claim is conclusory and unsupported by any evidence, and in any case is without merit because Petitioner was clearly a major participant in the murders. (Ans. Mem. at 44-55.) Petitioner replies that under People v. Banks, 61 Cal.4th 788 (2015), he could be sentenced to life without parole only if he was a major participant in the murders and acted with reckless indifference to human life, both of which the trial testimony failed to establish. (Traverse at 14-19.)

Petitioner presented this claim to the state supreme court in a habeas petition (Lodgment Nos. 22-27), as well as to the state appellate court. (Lodgment No. 20 [ECF No. 11-102 at 20].) The Court will look through the silent denial by the state supreme court to the last reasoned state court decision as to this claim, Ylst, 501 U.S. at 803-06, the state appellate court order denying habeas relief, which states in relevant part:

> Beritan's fourth ground for relief relies on another relatively recent Supreme Court decision, *People v. Banks* (2015) 61 Cal.4th 788. Beritan contends that pursuant to *People v. Banks*, the evidence is insufficient to establish that he was a "major participant" in the murders to be eligible for

> sentences of life without parole as to each murder conviction pursuant to Penal Code section 190.2. The petition, however, simply asserts that the evidence was insufficient without any evidentiary support. A petitioner seeking habeas corpus relief bears a heavy burden to plead and prove sufficient grounds for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) "At the pleading stage, the petitioner must state a prima facie case for relief. To that end, the petitioner 'should both (i) state fully and with particularity the facts on which relief is sought (citations), as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations.'" (*In re Martinez* (2009) 46 Cal.4th 945, 955-956.) Conclusory allegations made without any explanation of their factual bases are insufficient to state a prima facie case or warrant an evidentiary hearing. (*People v. Duvall, supra*, at p. 474.)

(Lodgment No. 21, In re Beritan, No. D070384, order at 3.)

Petitioner presented the claim to the state supreme court in exactly the same manner he presented it to the appellate court, which is exactly the same manner as he has presented it here. (Compare Lodgment No. 102 [ECF No. 11-102 at 20] with Lodgment No. 22 [ECF No. 11-106 at 19] and Pet. at 38.) Because Petitioner did not cure the defect of pleading identified by the state appellate court's citation to Duvall when he filed his habeas petition in the state supreme court, that petition did not satisfy the exhaustion requirement. See Picard v. Connor, 404 U.S. 270, 275-76 (1971) (in order to exhaust state judicial remedies, claims must be "fairly presented" to the highest state court, that is, in a manner which allows that court to have "the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding."); Castille v. Peoples, 489 U.S. 346, 351 (1989) (the "fair presentation" requirement is not satisfied where a claim is presented in a manner that precludes consideration by the state court); Pombrio v. Hense, 631 F.Supp.2d 1247, 1251-52 (C.D. Cal. 2009) (noting that a Duvall citation points to a correctable defect and therefore does not support exhaustion).

Nevertheless, the exhaustion requirement is satisfied "if it is clear that (the habeas petitioner's) claims are now procedurally barred under (state) law." Gray v. Netherland, 518 U.S. 152, 161 (1996); Phillips v. Woodford, 267 F.3d 966, 974 (9th Cir. 2001) ("the district court correctly concluded that [the] claims were nonetheless exhausted because a

return to state court for exhaustion would be futile.") Petitioner has already filed habeas petitions at every level of the state court and has received citations to procedural bars. His direct appeal has been final since the deadline to file a petition for a writ of certiorari in the United States Supreme Court expired in February 2015. Because it has been over two years since his conviction became final, because the state court has already issued procedural bars in his first round of state habeas, and because he has not identified any new evidence he has not already presented to the state court with respect to this claim, it is clear that any attempt by Petitioner to return to state court at this time in order to seek further post-conviction relief with respect to claim five would meet with the imposition of a procedural bar. See In re Clark, 5 Cal.4th 750, 797-98 (1993) ("the general rule is still that, absent justification for the failure to present all known claims in a single, timely petition for writ of habeas corpus, successive and/or untimely petitions will be summarily denied," and describing the "fundamental miscarriage of justice" exception to that rule). Accordingly, the claim is considered to be exhausted. Cassett v. Stewart, 406 F.3d 614, 621 n.5 (9th Cir. 2005) ("A habeas petitioner who has defaulted his federal claims in state court meets the *technical* requirements for exhaustion; there are no state remedies any longer 'available' to him."), quoting Coleman v. Thompson, 501 U.S. 722, 732 (1991).

A de novo review of the record is appropriate for such a claim. Pirtle v. Morgan, 313 F.3d 1160, 1167-68 (9th Cir. 2002). Under such a review, the state court adjudication is entitled to deference. See Hayes, 399 F.3d at 978 (9th Cir. 2005) (en banc) (noting that pre-AEDPA habeas review provides that "state court judgments of conviction and sentence carry a presumption of finality and legality and may be set aside only when a state prisoner carries his burden of proving that [his] detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution.")

Petitioner claims that he is statutorily ineligible for a sentence of life without the possibility of parole because the evidence is insufficient to support the sentence. (Pet. at 38.) He again relies on Hicks v. Oklahoma, which held that when a state statute vests sentencing discretion in a jury, "[t]he defendant in such a case has a substantial and

legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." Hicks, 447 U.S. at 346. The state appellate court's determination that this claim lacked evidentiary support is objectively reasonable, as speculative and conclusory allegations are insufficient to show an entitlement to habeas relief. Borg, 24 F.3d at 26.

Petitioner's reliance on People v. Banks is unavailing as well. In Banks, the California Supreme Court listed factors to consider in determining whether participation is sufficiently significant to be considered "major" in order to support a sentence of life without parole, with no single factor being necessary or necessarily significant. Banks, 61 Cal.4th at 803. These include: (1) what role did defendant have in planning the criminal enterprise which led to death, (2) what role did he have in supplying or using weapons, (3) what awareness did he have of particular dangers posed by the nature of the crime, weapons or past experience or conduct of the other participants, (4) was he present at the scene of the killing, in a position to facilitate or prevent the killing, and what role did he play in the killing, and (5) what did he do after lethal force was used. Id.

Each and every one of the Banks factors support Petitioner's sentence with respect to the murders of Lozano, Uribe and Leon. As set forth above, evidence was presented that Petitioner asked to be part of the Los Palillos crew after he had already participated in at least one Los Palillos kidnapping, and that he lived at the house where all three murders were planned and executed and rarely left. He was identified by eyewitnesses as guarding all three victims as they awaited being murdered, and kicking Lozano and Uribe while they were being strangled to death. He demonstrated how to mix the acid used to dissolve the bodies of Leon and Uribe while they were still alive, and prepared the containers eventually used for the disposal of their remains, including helping to purchase the necessary supplies. He participated in a backyard barbeque to mask the smoke and odor of their dissolving corpses, and cleaned the house afterwards, including disinfecting the floor where they had been murdered. He stole the car in which Lozano's body was found, and helped put

Lozano's body, which had Taser injuries, in the car. There was testimony that Petitioner usually carried a Taser gun, and his DNA was found on the Taser gun found in the couch of the Point Dume house where he was sitting when the FBI raided the house and arrested him. That Taser gun had been discharged five times on the day Lozano was abducted, eight times on the day Uribe and Leon were abducted, several times while Uribe and Leon were held captive, and twelve times the day Gonzalez-Tostado was abducted. Both Garcia-Vasquez (Kilino) and Gonzalez-Tostado testified that they were shot with a Taser. In addition, Petitioner participated in the Uribe and Leon kidnappings and murders after he became aware that Los Palillos were capable of murdering their kidnap victims, having already participated in the Lozano kidnapping and murder.

Petitioner has identified nothing arbitrary about his sentence within the meaning of Banks, and the Court finds that claim five does not even present a colorable claim for relief. Thus, the Court recommends denying relief as to this claim irrespective of Petitioner's failure to properly present it to the state courts. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); see also Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005) (holding "that a federal court may deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise even a colorable federal claim.")

In sum, the Court finds that, to the extent the appellate court denial of claim five is an adjudication on the merits, the denial is neither contrary to, nor involves an unreasonable application of, clearly established federal law, and is not based on an unreasonable determination of the facts. To the extent the state court did not adjudicate this claim on the merits, the Court finds that habeas relief is unavailable under a de novo review.

E. Claim Six

Petitioner contends in claim six that the trial court erroneously denied his motions for severance and dual juries, that his trial counsel provided ineffective assistance in failing to seek severance of the counts, and his appellate counsel provided ineffective assistance

in failing to present these claims on appeal. (Pet. at 39-45.) Respondent answers that there is no clearly established United States Supreme Court authority holding that the denial of a severance motion violates federal due process. (Ans. Mem. at 56.) Respondent also contends the jury was instructed to consider the evidence against each defendant separately, and this Court must presume they followed that instruction. (Id. at 56-57.)

Petitioner replies that even if clearly established federal law does not provide specifically for challenges to the denial of a severance motion, the failure to sever in this case resulted in the denial of clearly established federal rights, such as his right to confront Valencia, his state-created and federally-protected right to be free from arbitrary rulings, and his general federal due process right to a fair trial. (Traverse at 19-20.)

Petitioner presented this claim to the state supreme court in a habeas petition which was summarily denied (Lodgment Nos. 22-27), and to the state appellate court in a habeas petition. (Lodgment No. 20 [ECF No. 11-102 at 21-27].) The Court will look through the silent denial by the state supreme court to the state appellate court order:

> [Beritan] contends the court erred in failing to sever the trial of his codefendant and to bifurcate his trial among the various counts. Beritan's conclusion that he was prejudiced by the evidence introduced at trial is insufficient. Beritan makes no showing rising to the level of "'gross unfairness' amounting to a denial of due process." (*People v. Montes* (2014) 58 Cal.4th 809, 834-835.)

(Lodgment No. 21, In re Beritan, No. D070384, order at 2.)

The Supreme Court has recognized that a fundamentally unfair state criminal trial can rise to the level of a federal due process violation. See e.g. California v. Trombetta, 467 U.S. 479, 485 (1984) ("Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness.") The Ninth Circuit has held in pre-AEDPA cases that a state prisoner can show a federal due process violation where the denial of a severance motion rendered a trial fundamentally unfair. See Bean v. Calderon, 163 F.3d 1073, 1084 (9th Cir. 1998) ("[T]he propriety of a consolidation rests within the sound discretion of the state trial judge. The simultaneous

trial of more than one offense must actually render petitioner's state trial fundamentally unfair and hence, violative of due process before relief pursuant to 28 U.S.C. § 2254 would be appropriate."), quoting Featherstone v. Estelle, 948 F.2d 1497, 1503 (9th Cir. 1991).

Where AEDPA applies, as it does to this claim, a federal habeas court must apply federal law as established by United States Supreme Court holdings. Woodall, 134 S.Ct. at 1702 n.2, citing Parker v. Matthews, 567 U.S. 37, __, 132 S.Ct. 2148, 2155 (2012) ("[C]ircuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court,' . . . [and] cannot form the basis for habeas relief under AEDPA."), quoting 28 U.S.C. § 2254(d)(1). The Supreme Court has acknowledged that § 2254(d)(1) does not require an "identical factual pattern before a legal rule must be applied." Woodall, 134 S.Ct. at 1706, quoting Panetti v. Quarterman, 551 U.S. 930, 953 (2007). Rather, "relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." Woodall, 134 S.Ct. at 1706-07, quoting Richter, 562 U.S. at 103.

Respondent cites Collins v. Runnels, 603 F.3d 1127 (9th Cir. 2010), for the proposition that the Ninth Circuit has determined there is no clearly established federal law within the meaning of 28 U.S.C. § 2254(d) with respect to severance. (Ans. Mem. at 56.) In Collins, which involved a joint trial of defendants with antagonistic defenses, the Ninth Circuit noted the language in United States v. Lane, 474 U.S. 438 (1986) that states: "Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." Lane, 474 U.S. at 446 n.8. The court in Collins found that statement in Lane to be dicta because Lane addressed standards of joinder under Federal Rules of Criminal Procedure 8 and 12, and did not involve a federal constitutional issue. Collins, 603 F.3d at 1132. The Ninth Circuit in Collins found that because the Supreme Court had not yet addressed under what conditions a failure to sever defendants is a state court trial could rise to the level of a federal due process

violation, there is no clearly established federal law within the meaning of 28 U.S.C. § 2254(d) as to that issue. Id.

There does not appear to be a valid basis to distinguish Collins from the present case. In addition to the failure to sever defendants, it likewise does not appear that the Supreme Court has ever specifically addressed whether and to what extent a failure to sever charges can rise to the level of a federal due process violation. Rather, as shown by Collins, federal criminal procedural rules control severance in federal trials (including severance of charges), and the Supreme Court has not been called upon to address whether a federal constitutional right to severance exists in federal or state criminal proceedings. Because there can be no fairminded disagreement as to whether a federal due process right to severance of trials or severance of counts in a state criminal trial has been "clearly established," the Court is prohibited from finding that the state court adjudication of those aspects of claim six were contrary to, or involved an unreasonable application of, clearly established federal law within the meaning of 28 U.S.C. § 2254(d)(1), even if Petitioner could demonstrate that the failure to sever the trials or the counts resulted in a fundamentally unfair trial. Woodall, 134 S.Ct. at 1706-07; Collins, 603 F.3d at 1132.

The Court also finds that, assuming clearly established federal law provides that a failure to sever trials or charges can rise to the level of a federal due process violation if joinder implicates federally protected rights, Petitioner has not demonstrated that the appellate court's adjudication of his claim resulted in an objectively unreasonable application of that principle. The majority of the evidence against Valencia indicated that his primary role in the criminal activities of Los Palillos was luring victims into the hands of the Los Palillos crew, and he generally avoided spending time with the victims after they were kidnapped in case they recognized him. Petitioner's primary role was guarding and interacting with the victims, assisting in murdering them, disposing of their bodies, and cleaning up afterwards. Petitioner has made no showing that the evidence against Valencia tainted him, and if anything the opposite appears more likely.

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Furthermore, the jury was instructed: "You must separately consider the evidence as it applies to each defendant. You must decide each charge for each defendant separately." (RT 14038.) The jury received the same instruction regarding the special circumstance allegations. (RT 14087.) They were also instructed: "I instructed you during the trial that certain evidence was admitted only against certain defendants. You must not consider that evidence against any other defendant." (RT 14047-48.) Petitioner contends it was unfair that the jury heard evidence of Valencia's role in the Gonzalez-Tostado kidnapping (counts eight and nine) even though Valencia was not charged in those counts because he had pled guilty to them prior to trial, which allowed the jury to speculate as to why he was not charged along with Petitioner in those counts, and the jury may have held Valencia's actions against him. (Pet. at 41.) However, the jury was instructed: "Do not speculate as to why David Valencia is not charged in Counts 8 and 9." (RT 14038.)

"The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, makes sense of, and follow the instructions given them." Francis, 471 U.S. at 324 n.9. However, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton, 391 U.S. at 135 (finding such a situation where jury was instructed to ignore powerfully incriminating extrajudicial statements of a co-defendant which were devastating to the defense, and where the inherently unreliable nature of that evidence was intolerably compounded by the failure of the co-defendant to be subject to cross-examination). Petitioner has not identified any such powerfully devastating incriminating evidence presented which the jury was not able to compartmentalize. In light of the separate roles Petitioner and Valencia had in the crimes charged against them, Petitioner has not rebutted the presumption the jury followed their instructions to separately consider the evidence introduced against one but not the other.

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With respect to the ineffective assistance of trial and appellate counsel aspects of this claim, the Court will look through the silent denial by the state supreme court to the last reasoned state court decision as to this claim, Ylst, 501 U.S. at 803-06, the superior court order denying habeas relief, which states:

> Petitioner claims he suffered ineffective assistance of trial counsel because of his attorney's failure to seek a severance of trial from co-defendant Valencia. This contention is false. Contrary to petitioner's assertion, his trial counsel filed a motion for severance of the jury trial from co-defendant Valencia prior to trial. The trial court denied the motion. Trial counsel also sought bifurcation of trial on the gang enhancement allegations prior to trial, which was also denied. Thus, petitioner's claim of ineffective assistance of trial counsel is unsupported and denied.
>
> Petitioner's assertion of ineffective assistance of counsel as to his appellate attorney is also denied. Petitioner argues his appellate counsel only asserted one issue on appeal, failed to raise the peremptory challenge issue and other claims on appeal, and did not consult with him prior to filing the appeal. . . . Petitioner fails to present evidence supporting these claims.

(Lodgment No. 17, In re Beritan, HC 22392, order at 7-8 [ECF No. 11-97 at 7-8].)

The state court adjudication of Petitioner's claim of ineffective assistance of appellate counsel is objectively reasonable. Petitioner did not allege facts which, if true, establish prejudice arising from the failure of appellate counsel to raise a claim on appeal challenging the denial of his motions for severance and dual juries, or a claim challenging the failure of trial counsel to seek severance of the counts. Petitioner must show he was prejudiced by counsel's alleged deficient performance, which requires showing "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. As set forth above, there is no indication of unfairness in Petitioner's trial arising from the failure to sever his trial or sever the counts against him, and it was objectively reasonable for the state superior court to deny these claims on the basis that Petitioner had not alleged facts supporting those claims. Id.; see Padilla, 559 U.S. at 371 ("Surmounting Strickland's high bar is never an easy task."); Pinholster, 563 U.S. at 181 (these standards are "difficult to meet" and "demands that state court decisions be given the benefit of the

doubt."); Richter, 562 U.S. at 105 ("The standards created by Strickland and section 2254(d) are both highly deferential and when the two apply in tandem, review is 'doubly' so.") (citations omitted). Petitioner has not alleged that his appellate counsel made errors with respect to severance which were prejudicial, and the denial by the state court is neither contrary to, nor involves an unreasonable application of, clearly established federal law. Richter, 562 U.S. at 110 ("Representation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial."), quoting Strickland, 466 U.S. at 686.

With respect to Petitioner's claim of ineffective assistance of trial counsel for failing to seek to sever the counts against him, no state court expressly addressed that claim. Accordingly, this Court must presume the silent denial by the state supreme court was a decision on the merits of the ineffective assistance of appellate counsel claim. Richter, 562 U.S. at 102; Johnson v. Williams, 568 U.S. 289, ___, 133 S.Ct. 1088, 1096 (2012) (holding that when a state court issues a reasoned decision but appear to ignore a federal claim, there is a rebuttable presumption the claim was denied on the merits). The Court "must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of" the Supreme Court. Richter, 562 U.S. at 102.

The state supreme court could have reasonably denied the ineffective assistance of trial aspect of claim six on the basis that Petitioner did not demonstrate prejudice arising from the failure of trial counsel to seek severance of the counts. Petitioner must show he was prejudiced by counsel's alleged deficient performance, which requires showing "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. As set forth above, there is no indication of unfairness in Petitioner's trial from the failure to sever the counts against him, and it would have been objectively reasonable for the state supreme court to deny these claims on the basis that the failure to bifurcate the counts undermined confidence in the outcome of the trial. Id.; see also Padilla, 559 U.S.

at 371 ("Surmounting Strickland's high bar is never an easy task."); Pinholster, 563 U.S. at 181 (these standards are "difficult to meet" and "demands that state court decisions be given the benefit of the doubt."); Richter, 562 U.S. at 105 ("The standards created by Strickland and section 2254(d) are both highly deferential and when the two apply in tandem, review is 'doubly' so.") (citations omitted). Because Petitioner has not demonstrated that his trial or appellate counsel made errors with respect to severance which were prejudicial, the silent denial by the state supreme court is neither contrary to, nor involves an unreasonable application of, clearly established federal law. Richter, 562 U.S. at 110 ("Representation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial."), quoting Strickland, 466 U.S. at 686.

The Court finds that the state court adjudication of claim six is neither contrary to, nor involves an unreasonable application of, clearly established federal law, and is not based on an unreasonable determination of the facts.

E. Claim Seven

Petitioner contends in claim seven that the trial court's evidentiary rulings allowed the admission of unreliable and pseudo-scientific "expert" opinion evidence regarding his guilt on the gang allegations, including evidence of other crimes involving people with whom he had no relationship, which, when coupled with discovery orders which withheld evidence from the defense but not the prosecution, resulted in a denial of his rights to confront witnesses, present a defense, and to the effective assistance of counsel. (Pet. at 46-59.) With respect to the evidentiary rulings, he contends the trial court erred in failing to exclude: (a) FBI Agent Bird's testimony regarding the patterns and practices of drug cartels, (b) FBI Agent Giboney's hearsay and opinion testimony regarding the membership of Los Palillos and the predicate crimes they committed necessary to support his opinion that the gang enhancement and special circumstance allegations were satisfied, which was particularly problematic since he switched back and forth between expert and investigator, (c) evidence of Cuban gang activity in Kansas City, (d) evidence of Valencia's guilty plea

to the Gonzalez-Tostado kidnapping and his admission to the gang enhancement allegation as to that crime, and (e) evidence of the uncharged kidnappings of Balitas and Kilino. (Id. at 46-55.) With respect to the discovery orders, he contends that: (a) the trial judge issued protective orders at the beginning of the case which prevented the defense from acquiring the grand jury transcripts, police reports and witness statements, resulting in the defense constantly playing catch-up when those materials were released at the last moment during trial, and (b) the cooperating witnesses, Moreno-Garcia and Pena, were allowed grand jury transcripts in their cells, whereas Petitioner and Valencia were not, and Petitioner had his own trial notes confiscated from his cell and reviewed by the prosecutor. (Id. at 55-59.)

Respondent answers that the gang evidence was properly admitted to support the charges that the crimes were committed for the benefit of a criminal street gang, that an expert can rely on out-of-court statements in forming an opinion without violating a defendant's confrontation rights, and that there is no clearly established federal law precluding the introduction of uncharged crimes to show propensity. (Ans. Mem. at 57-58.) Respondent also contends there is no prejudice because the jury was provided with a limiting instruction regarding the uncharged offenses and gang evidence, and the narrow purposes for which they could be used. (Id. at 58.)

Petitioner replies that he is not presenting a claim that state evidentiary rules were violated, but is claiming that the evidence admitted pursuant to evidentiary rulings violated various rights protected by the federal Constitution. (Traverse at 20-21.) He also contends that because the gang expert was allowed to testify both as an expert and an investigator, the jury was unable to discern when and whether the testimony relating to out-of-court statements were opinion or offered for the truth of the matters asserted. (Id. at 21.)

Petitioner presented this claim to the state supreme court in a habeas petition. (Lodgment Nos. 22-26.) That petition was denied by an order that stated: "Petition for writ of habeas corpus denied." (Lodgment No. 27, In re Beritan, No. S236290, order at 1 [ECF No. 11-112 at 1].) He presented the same claim to the state appellate court in a habeas petition. (Lodgment No. 20, part 1 [ECF No. 11-102 at 28-41].) The Court will look

through the silent denial by the state supreme court to the last reasoned state court decision as to this claim, Ylst, 501 U.S. at 803-06, the state appellate court order denying habeas relief, which states:

> In his second and sixth grounds for relief, Beritan argues that certain evidence was erroneously admitted at trial, including certain expert testimony. Habeas corpus is not an available remedy to review the rulings of the trial court with respect to the admission or exclusion of evidence. (*In re Lindley* (1947) 29 Cal.2d 709, 723.) To the extent that he argues that his right to confront witnesses was violated by the admission of hearsay, he does not demonstrate that any of those statements were testimonial in nature. (See, e.g. *People v. Arceo* (2011) 195 Cal.App.4th 556, 571 (if challenged statements are not testimonial, the confrontation clause has no application).

(Lodgment No. 21, In re Beritan, No. D070384, order at 2-3 [ECF No. 11-105 at 2-3].)

Claims based on state evidentiary rulings are not cognizable on federal habeas unless the admission or exclusion of the evidence was so prejudicial it rendered a trial fundamentally unfair. Estelle v. McGuire, 502 U.S. 62, 70-73 (1991); Ortiz-Sandoval v. Gomez, 81 F.3d 891, 897 (9th Cir. 1996). The determination by the trial judge that the proffered testimony was relevant is entitled to deference in this Court. Bradshaw v. Richey, 546 U.S. 74, 76 (2005). "The issue for us, always, is whether the state proceedings satisfied due process; the presence or absence of a state law violation is largely beside the point." Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991) ("While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated; conversely, state procedural and evidentiary rules may countenance processes that do not comport with fundamental fairness.")

To the extent Petitioner contends the evidence of uncharged crimes, gang activity in Kansas City, and the testimony regarding drug cartels in general constituted improper evidence of his propensity to commit crimes, the Ninth Circuit has held that because the United States Supreme Court in Estelle v. McGuire specifically reserved ruling on the issue regarding whether introduction of propensity evidence in a state trial could violate federal

due process, and has denied certiorari at least four times on the issue since, there is no "clearly established federal law" recognizing such a claim, precluding habeas relief where 28 U.S.C. § 2254(d) applies. Alberni v. McDaniel, 458 F.3d 860, 866 (9th Cir. 2006). As to the admission of evidence other than propensity evidence to which Petitioner contends rendered his trial unfair, he has failed to show that the state court adjudication of the claim involves an unreasonable application of clearly established federal law. See Holley, 568 F.3d at 1101 (recognizing that the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ.")

With respect to his contention that the jury might have been confused by testimony from an expert witness who is also involved in investigating the charged crimes, the jury was instructed regarding Agent Giboney's separate roles as expert and investigator. (RT 2300-02.) The jury was instructed that an expert cannot testify as to guilt or innocence or whether a special circumstance allegation is true or false, and that the jury was to treat their veracity the same as any other witness. (RT 870-71, 2300-02.) The jury was also instructed on the limited purpose for which the gang evidence was admitted. (RT 14045.) When Jorge Garcia Vazquez (Kilino) testified regarding his uncharged kidnapping, the jury was told they would be receiving a limiting instruction (RT 4302), which they were given prior to closing statements. (RT 14054-55.) Petitioner has not rebutted the presumption that the jury followed those instructions.

To the extent Petitioner contends the expert opinions violated his right to confront the witnesses upon which the experts relied to form their opinion, the state court correctly found that he had failed to identify any testimonial statements relied upon by the experts in forming their opinions. Davis, 547 U.S. at 821 (holding that the Confrontation Clause does not apply to non-testimonial evidence). Even if he could, the Supreme Court has held that when, as here, an expert is subject to cross-examination regarding their opinion, statements relied upon for that opinion fall outside the reach of the Confrontation Clause. Williams v. Illinois, 567 U.S. 50, __, 132 S.Ct. 2221, 2228 (2012).

The Court finds that the state court adjudication of claim seven is neither contrary to, nor involves an unreasonable application of, clearly established federal law, and is not based on an unreasonable determination of the facts.

E. Claim Eight

Petitioner contends in claim eight that the trial court erred in imposing a restitution fine without determining his ability to pay, his trial counsel rendered ineffective assistance in failing to object, and his appellate counsel provided ineffective assistance in failing to pursue this claim on appeal. (Pet. at 60-65.) He claims the $1,000 restitution fine and the $2,407.71 compensation for Lozano's burial expenses amounts to an excessive fine in violation of the Eighth Amendment because there is little or no chance he will earn that much while serving the rest of his life in prison. (Id.)

Respondent answers that this is not a claim cognizable on federal habeas because it does not challenge the legality or duration of Petitioner's confinement. (Ans. Mem. at 59.) Petitioner replies that aside from the Eighth Amendment excessive fine claim, any type of arbitrary state action raises a federal due process issue. (Traverse at 22-23.)

The Court will look through the silent denial of this claim by the state supreme court to the last reasoned state court decision, Ylst, 501 U.S. at 803-06, the state appellate court order denying habeas relief, which states:

> In his seventh ground for relief, Beritan claims that the court imposed restitution fines despite Beritan's inability to pay the fines and that his counsel rendered ineffective assistance by failing to provide evidence of his inability to pay or otherwise object to the fines. Regardless of the nature of the claim, Beritan has not submitted any declarations or other evidence establishing his alleged inability to pay the fines. His "'(c)onclusory allegations made without any explanation of the basis for the allegations do not warrant relief . . . .'" (*In re Duvall* (1995) 9 Cal.4th 464, 474.)

(Lodgment No. 21, In re Beritan, No. D070384, order at 2.)

This Court lacks jurisdiction to consider Petitioner's Eighth Amendment excessive fine restitution claim. Bailey v. Hill, 599 F.3d 976, 979-80 (9th Cir. 2010) ("§ 2254 does not confer jurisdiction over a state prisoner's in-custody challenge to a restitution order

imposed as part of a criminal sentence.") To the extent the Court has jurisdiction to consider the ineffective assistance of counsel aspect of the claim, the state appellate court rejection of the claim (on the basis that his allegation of inability to pay is conclusory) is objectively reasonable. In light of the fact that Petitioner was convicted of crimes involving extortion of hundreds of thousands of dollars, the theft and damage of several vehicles, the shooting of a man in a botched kidnapping attempt, and the unnecessary, and unnecessarily brutal, murder of three men, along with the ghastly treatment of their remains, his claim that trial and appellate counsel were deficient in failing to challenge the relatively modest restitution order does not constitute a colorable claim for relief.[6] Miller, 882 F.2d at 1434 (holding that appellate counsel has no constitutional obligation to raise every nonfrivolous issue on appeal); Gustave, 627 F.2d at 906 ("There is no requirement that an attorney appeal issues that are clearly untenable."); see also Blackledge, 431 U.S. at 74 (holding that vague and conclusory allegations are insufficient to prove that trial counsel provided ineffective assistance); Richter, 562 U.S. at 110 ("Representation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial."), quoting Strickland, 466 U.S. at 686.

Accordingly, the Court finds, to the extent the Court has jurisdiction to address claim eight, the state court adjudication is neither contrary to, nor involves an unreasonable application of, clearly established federal law, and is not based on an unreasonable determination of the facts.

E. Claim Nine

Petitioner contends in his final claim that the California superior, appellate and supreme courts arbitrarily denied his habeas petitions on the pretext that he did not present

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[6] As with claim five, to the extent the appellate court's citation to Duvall indicates a failure to properly present the claim to the state court, the Court recommends denying relief as to this claim irrespective of that failure. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); Cassett, 406 F.3d at 623-24 (holding "that a federal court may deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise even a colorable federal claim.")

a prima facie case for relief. (Pet. at 66-70.) Respondent answers that there is no federal constitutional basis for the claim. (Ans. Mem. at 59.) Petitioner replies that this claim relies on his arguments set forth throughout this action that his federal constitutional rights were violated in the state court proceedings. (Traverse at 25.)

The Court will look through the silent denial by the state supreme court to the last reasoned state court decision as to this claim, Ylst, 501 U.S. at 803-06, the state appellate court order denying habeas relief:

> Beritan's eighth and final claim challenges the superior court's denial of his petition for writ of habeas corpus filed in that court. This court does not consider Beritan's criticisms of the superior court's order denying habeas corpus relief. Such an order is not appealable or otherwise reviewable by this court. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7; *Jackson v. Superior Court* (2010) 189 Cal.App.4th 1051, 1064.)

(Lodgment No. 21, In re Beritan, No. D070384, order at 3.)

Petitioner states that this claim relies on his arguments set forth throughout this action that his federal constitutional rights were violated in the state court proceedings, and adds that the requirement that this Court defer to the state court adjudication of his claims places an unfair burden on him as a pro se litigant to vindicate his federal constitutional rights. (Traverse at 25.) To the extent he contends 28 U.S.C. § 2254(d) is unconstitutional, that claim has been rejected. Crater v. Galaza, 491 F.3d 1119, 1126-30 (9th Cir. 2007). To the extent Petitioner claims that the state courts did not properly adjudicate his claims, as set forth throughout this Report, there is no basis for granting federal habeas relief based on the state court adjudication of his claims.

The Court finds that the state court adjudication of claim nine is neither contrary to, nor involves an unreasonable application of, clearly established federal law, and is not based on an unreasonable determination of the facts.

F. Evidentiary Hearing

Petitioner has filed a Motion for an evidentiary hearing asserting that once the Court has reviewed his claims and the record it should be apparent that an evidentiary hearing is

necessary. (ECF No. 16.) He also requests an evidentiary hearing in his Traverse. (Traverse at 9-10, 26.) The only evidence he identifies that has not been presented to the state courts are the voir dire transcripts and Carlos Pena's admission that he perjured himself at trial when he said he did not put the bag on Uribe's head while Uribe was strangled to death. (See Traverse Ex. A-B [ECF No. 20 at 31-70].)

In light of the evidence presented against Petitioner, which is summarized in Part II of this Report and discussed throughout Part III, Carlos Pena's admission that his testimony was false when he said immediately after Estrada-Gonzalez gave him a bag to put over Uribe's head and told him it was time to start learning, Estrada-Gonzalez took the bag back from him and put it on Uribe's head himself, when in fact Pena had put the bag on Uribe's head, is not sufficiently significant to change the outcome of any claim. An evidentiary hearing is not required because even assuming Pena is now telling the truth, and assuming the Court could consider his statement, Petitioner's claims still fail for the reasons discussed throughout this Report. In addition, the complete voir dire transcripts are not necessary to address the Batson claim nor helpful to Petitioner.

The Court recommends denying Petitioner's Motion for an evidentiary hearing on the basis that, even assuming the allegations in the Petition are true, the state court record provides an adequate basis to adjudicate his claims. See Campbell, 18 F.3d at 679 (holding that an evidentiary hearing is not necessary where the federal claim can be denied on the basis of the state court record, and where the allegations, even if true, do not provide a basis for relief).

G. Appointment of Counsel

Petitioner has also filed a Motion for appointment of counsel, arguing that after the Court has reviewed and evaluated his claims, it should be clear that the assistance of counsel is necessary to the proper adjudication of his claims, and in conducting an evidentiary hearing. (ECF No. 16 at 1-2; see also Traverse at 9-10, 26.) The Sixth Amendment right to counsel does not extend to federal habeas corpus actions by state prisoners. McCleskey v. Zant, 499 U.S. 467, 495 (1991); Chaney v. Lewis, 801 F.2d 1191,

1196 (9th Cir. 1986); Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th Cir. 1986). Financially eligible habeas petitioners seeking relief pursuant to 28 U.S.C. § 2254 may obtain representation whenever the court "determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B); Terrovona v. Kincheloe, 912 F.2d 1176, 1181 (9th Cir. 1990); Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984). The interests of justice require appointment of counsel when the court conducts an evidentiary hearing on the petition or utilizes the discovery process. Terrovona, 912 F.2d at 1177; Knaubert, 791 F.2d at 728; Rule 8(c), 28 U.S.C. foll. § 2254; Rule 6(a), 28 U.S.C. foll. § 2254. The appointment of counsel is discretionary where no evidentiary hearing or discovery is necessary. Terrovona, 912 F.2d at 1177; Knaubert, 791 F.2d at 728.

"Indigent state prisoners applying for habeas relief are not entitled to appointed counsel unless the circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations." Chaney, 801 F.2d at 1196; Knaubert, 791 F.2d at 728-29. A due process violation may occur in the absence of counsel if the issues involved are too complex for the petitioner. However, it appears that Petitioner has a good grasp of this case and the legal issues involved. Under such circumstances, there is no abuse of discretion in denying a state prisoner's request for appointment of counsel, as it is simply not warranted by the interests of justice. See LaMere v. Risley, 827 F.2d 622, 626 (9th Cir. 1987); Hoggard v. Purkett, 29 F.3d 469, 471 (8th Cir. 1994) ("[where] the issues involved can be properly resolved on the basis of the state court record, a district court does not abuse its discretion in denying a request for court-appointed counsel.")

The Court finds that the "interests of justice" do not warrant the appointment of counsel as to any claim presented in this case, and recommends denying Petitioner's Motion for appointment of counsel.

IV. CONCLUSION

For all of the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the assigned District Court Judge issue an Order: (1) approving and adopting this Report and Recommendation, (2) denying Petitioner's Motion for an Evidentiary Hearing and for the

Appointment of Counsel [ECF No. 16], and (3) directing that Judgment be entered denying the Petition.

IT IS ORDERED that no later than **August 18, 2017**, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **September 1, 2017.** The parties are advised that failure to file objections with the specified time may waive the right to raise those objections on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir. 1991).

DATE: July 24, 2017

Peter C. Lewis
United States Magistrate Judge