No. _____

IN THE

Supreme Court of the United States

AURELIO SALDIVAR,

Petitioner,

v.

G.D. LEWIS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NOT FOR PUBLICATION

FILED

JUN 25 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AURELIO FIDENCIO SALDIVAR, Petitioner-Appellant, v. G. D. LEWIS, Warden, Respondent-Appellee.	No. 15-55829 D.C. No. 2:13-cv-07757-JLS-AS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Argued and Submitted June 6, 2018
Pasadena, California

Before: LIPEZ,** NGUYEN, and OWENS, Circuit Judges.

Petitioner-Appellant Aurelio Fidencio Saldivar appeals from the denial of his petition for a writ of habeas corpus. As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Kermit V. Lipez, United States Circuit Judge for the First Circuit, sitting by designation.

1. *Ineffective-Assistance Claim.* Contrary to petitioner's argument, the Supreme Court has never clearly resolved whether, in assessing the competence of counsel's representation under the Sixth Amendment, an appellate court may consider hypothetical strategic rationales for counsel's conduct and, if so, whether a defendant must negate every such rationale to demonstrate *Strickland* deficiency. There being no such precedent, petitioner's argument that the court of appeal's application of the standard from *People v. Lucas*, 907 P.2d 373, 389 (Cal. 1995), was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), necessarily fails. *See, e.g.*, *Marshall v. Rodgers*, 569 U.S. 58, 61–64 (2013) (per curiam); *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

As to the court of appeal's determination that most of the purported errors by petitioner's trial counsel did not amount to constitutional deficiencies, petitioner has failed to demonstrate "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). And as to those errors the court held to be constitutional deficiencies, petitioner has failed to show that the court of appeal was "necessarily unreasonable" in concluding that the evidence against him was overwhelming and that counsel's deficiencies therefore neither independently nor cumulatively

prejudiced him. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011).[1]

2. *Due-Process Claim.* Even assuming that the state trial court's erroneous use of CALCRIM 1603 and its failure to provide a theft instruction violated petitioner's due-process rights, the errors did not have a "substantial and injurious effect" on the jury's verdict, either individually or cumulatively. *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993) (citation omitted); *see also Dixon v. Williams*, 750 F.3d 1027, 1034–35 (9th Cir. 2014) (per curiam). Nor did these purported instructional errors, considered cumulatively with the deficiencies the California court of appeal identified in petitioner's trial counsel's performance, prejudice petitioner's case. *See Brecht*, 507 U.S. at 637–38.

3. Petitioner's Request for Judicial Notice (Dkt. No. 22) is granted.

AFFIRMED.

[1] Contrary to petitioner's suggestions that we analyze the court of appeal's *Strickland* holdings under both § 2254(d)(1)'s "unreasonable application" prong *and* § 2254(d)(2), federal habeas review of a state court's *Strickland* analysis is properly situated under the former. *See, e.g.*, *Richter*, 562 U.S. at 101; *Cullen*, 563 U.S. at 190–203.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AURELIO FIDENCIO SALDIVAR, Petitioner - Appellant, v. G. D. LEWIS, Warden, Respondent - Appellee.	No. 15-55829 D.C. No. 2:13-cv-07757-JLS-AS Central District of California, Los Angeles ORDER

Before: W. FLETCHER and PAEZ, Circuit Judges.

The request for a certificate of appealability is granted with respect to the following issues: (1) whether trial counsel was ineffective, and (2) whether cumulative error rendered appellant's trial fundamentally unfair. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

A review of this court's docket reflects that the filing and docketing fees for this appeal are due. Within 21 days of the filing date of this order, appellant shall either (1) pay to the district court the $505.00 filing and docketing fees for this appeal and file in this court proof of such payment, or (2) file in this court a motion to proceed in forma pauperis, accompanied by a completed Form CJA 23. Failure to pay the fees or file a motion to proceed in forma pauperis shall result in the

automatic dismissal of the appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

If appellant moves to proceed in forma pauperis, appellant may simultaneously file a motion for appointment of counsel.

The Clerk shall serve a copy of Form CJA 23 on appellant.

If appellant pays the fees, the following briefing schedule shall apply: the opening brief is due August 9, 2016; the answering brief is due September 8, 2016; the optional reply brief is due within 14 days after service of the answering brief. If appellant files a motion to proceed in forma pauperis, the briefing schedule will be set upon disposition of the motion.

The Clerk shall serve on appellant a copy of the "After Opening a Case – Pro Se Appellants" document.

If G. D. Lewis is no longer the appropriate appellee in this case, counsel for appellee shall notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AURELIO FIDENCIO SALDIVAR, Petitioner, v. G.D. LEWIS, Warden, Respondent.	NO. ED CV13-7757-JLS (AS) **ORDER DENYING CERTIFICATE OF APPEALABILITY**

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts requires a district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed

further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotations omitted).

Here, after duly considering Petitioner's contentions regarding instructional error, ineffective assistance of trial and appellate counsel, California's Felony-murder special circumstances statute as unconstitutionally vague, and cumulative error, as alleged in the Petition, the Court concludes that Petitioner has not made the requisite showing for the issuance of a certificate of appealability.

Accordingly, a Certificate of Appealability is denied in this case.

DATED: May 8, 2015

JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AURELIO FIDENCIO SALDIVAR, Petitioner, v. G. D. LEWIS, Warden, Respondent.	No. ED CV13-7757-JLS (AS) **JUDGMENT**

Pursuant to the Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: May 8, 2015

JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AURELIO FIDENCIO SALDIVAR, Petitioner, v. G.D. LEWIS, Warden, Respondent.	No. ED CV13-7757-JLS (AS) **ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. After having made a de novo determination of the portions of the Report and Recommendation to which Objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

///

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein on counsel for Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 8, 2015

JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AURELIO FIDENCIO SALDIVAR, Petitioner, v. G.D. LEWIS, Warden, Respondent.	No. CV13-7757-JLS (AS) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Josephine L. Staton, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the Petition be DENIED and that this action be DISMISSED with prejudice.

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I.

INTRODUCTION

On October 21, 2013, Aurelio Fidencio Saldivar ("Petitioner" or "Saldivar"), a California state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"), pursuant to 28 U.S.C. § 2254. (Docket Entry No. 1.) The Petition raises five grounds for habeas relief. (See Pet. 7–49.)[1] On December 12, 2013, Respondent filed an Answer to the Petition ("Answer") (Docket Entry No. 5-1), along with an accompanying Memorandum of Points and Authorities ("Mem. P. & A."). (Docket Entry No. 5-2.) On January 14, 2014, Petitioner filed a Reply to the Answer ("Reply"). (Docket Entry No. 8.)

II.

BACKGROUND

On June 17, 2010, an Orange County Superior Court jury convicted Petitioner of first degree murder (Count One), a violation of California Penal Code ("P.C.") § 187, and participation in a criminal street gang (Count Two), a violation of P.C. § 186.22(a). (Lodgment 6, at 2.) The jury found true the special circumstance allegations that when he committed the murder: (1) Petitioner was engaged in the commission of a robbery within the meaning of P.C. § 190.2(a)(17)(A); and (2) Petitioner was an active participant in a criminal street

[1] All citations to filings in this case refer to the pagination provided by the Court's docket.

gang within the meaning of P.C. § 190.2(a)(22). (Id.) The jury also found true the allegations that: (1) Petitioner committed the murder for the benefit of a criminal street gang, within the meaning of P.C. § 186.22(b)(1); and (2) Petitioner personally and intentionally discharged a firearm during the crime causing great bodily injury, within the meaning of P.C. §§ 12022.54(d) and 12022.54(e)(1). (Id. at 2–3.) On June 25, 2010, the trial court sentenced Petitioner to life without the possibility of parole for the first degree murder conviction (Count One) and imposed, but stayed, a 10-year enhancement for criminal street gang activity and a 25-year-to-life enhancement for gang weapon use. (Id.) For the conviction of participation in a criminal street gang (Count Two), the trial court imposed, but stayed, a three year sentence. (Id.)

On April 7, 2011, Petitioner appealed his convictions to the California Court of Appeal, raising the same claims asserted in the instant Petition. (See Lodgment 3, 4.) On April 30, 2012, the Court of Appeal affirmed Petitioner's convictions in a reasoned decision. (Lodgment 6.) On June 4, 2012, Petitioner filed a Petition for Review in the California Supreme Court, (Lodgment 7), which was summarily denied on August 8, 2012. (Lodgment 8.)

On October 21, 2013, Petitioner filed the instant Petition. (Lodgment 1.)

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III.

FACTUAL BACKGROUND

The following facts, taken from the California Court of Appeal's decision on direct review, have not been rebutted with clear and convincing evidence, and must be presumed correct. 28 U.S.C. § 2254(e)(1); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009).

I. Background

Yessayan, a member of the Family Mob gang, emigrated as a child from Russia with his parents. Although Family Mob is a "traditional Hispanic street gang," it accepted Yessayan "based on his level of participation." Yessayan had been albino and legally blind since birth and received Social Security disability income.

Saldivar is an active participant in the Middleside Los Chicos gang and has the monikers "Fat Boy" and "Bouncer." Middleside Los Chicos and Family Mob were not rival gangs but associated with each other through several women—Amy Belyea, Amie Hofstad, Seriah Martinez, and Sujey Toscano.

Though ineligible for a driver's license, Yessayan used some of his Social Security disability income to buy a black Nissan Altima with custom rims. Due to his vision impairment and lack of a driver's license, he drove the car only short distances. More often, he would let others, including Saldivar, Toscano, and Hofstad, drive the car while he sat in the front passenger seat or in the backseat, where his eyes were protected from bright light by dark tinted windows. Toscano and Hofstad did not particularly like Yessayan, but they were willing to get together with him when he had methamphetamine to share.

II. "If [Yessayan] Doesn't Stop Disrespecting . . . , He [Is] Going to Get Attacked."

About one month before his murder, Yessayan drove his car to pick up Toscano, her daughter, and Heriberto Tejeda, an

associate of the Family Mob gang and Yessayan's friend. Toscano took over driving the car, and, while she drove, Yessayan made unwanted sexual overtures to her. She rebuffed him and they argued.

Toscano decided she wanted Saldivar to join them and drove to his house to get him. When Saldivar got into the car, he was carrying two large handguns in holsters hanging on either side of his body. During the week before Yessayan's murder, Hofstad saw Saldivar armed with a silver colored revolver. On many occasions, Alex Preciado, a Middleside Los Chicos associate, saw Saldivar carrying a chrome revolver.

Tejeda was scared when he saw Saldivar enter the car. Tejeda and Yessayan sat in the backseat, where Tejeda could hear Saldivar and Toscano whisper to each other. When Toscano and Saldivar insisted Tejeda be taken home, he refused because he did not want to leave his friend, Yessayan, alone with them. Instead, they drove back to Saldivar's home. Saldivar and Tejeda got out of the car, and Saldivar, still carrying the two handguns, took Tejeda aside and told him that if Yessayan did not stop "disrespecting in front of [Toscano's] little daughter, he [is] going to get attacked."

During the week before his murder, Yessayan made another sexual overture to Toscano while she drove his car. Toscano was upset.

III. Robbery and Execution

Between 5:00 and 6:00 p.m. on June 6, 2006, Alex Preciado and his wife, Renee Preciado, drove to Saldivar's home to buy heroin. Alex Preciado and his wife noticed a black Nissan parked in front of Saldivar's house. Inside the car were Saldivar, Yessayan, a woman (possibly Seriah Martinez), and Marcos Antonio Charcas Fernandez (Fernandez), a Middleside Los Chicos gang member with the moniker of "Youngster." Yessayan was in the backseat, and Saldivar was in the driver's seat.

Anthony Chargualaf lived down the street from Saldivar and sometimes used methamphetamine with Middleside Los Chicos gang members. At about 8:24 p.m. on June 6, Chargualaf

spoke by cell phone with Saldivar, who was using Fernandez's cell phone, to see if Saldivar wanted to get together later that evening. Saldivar said he was going to Los Angeles. Chargualaf could hear a female voice and a male voice in the background. Another call was made between Fernandez's cell phone and Chargualaf's cell phone at 8:31 p.m. Cell phone records were obtained and used to track calls made from and received by Fernandez's cell phone. When the 8:24 p.m. call was made, Saldivar and Fernandez were in the area of the intersection of the 91 and 605 Freeways and, when the 8:31 p.m. call was made, they were in Bellflower, further west.

At 8:41 p.m., two calls were made from Fernandez's cell phone to Michelle Asai. By this time, Yessayan's black Nissan had turned around and was travelling eastbound in the area of the 91 Freeway and Brookhurst Street in Anaheim/Fullerton. Another cell phone call to Asai at 9:15 p.m. established Yessayan's black Nissan was in the area of the intersection of the 91 and 57 Freeways. No more calls were made from or to Fernandez's cell phone until 9:59 p.m., when the cell phone was in Santa Ana.

At about 9:15 p.m. on June 6, a security guard at an asphalt company on East Lincoln Avenue in the City of Orange heard two loud gunshots fired eight to 10 seconds apart. The asphalt company was near a nursery that abutted a trail running along a concrete river channel. A couple watching television in their home near the nursery also heard loud gunshots sometime between 9:00 and 10:00 p.m.

On the morning of June 7, 2006, a jogger running along the path behind the nursery found Yessayan's body lying face down. The body was about 300 yards from the cell tower that had transmitted the 9:15 p.m. call from Fernandez's cell phone. A forensic analyst examined the murder scene and found a spent bullet about four inches deep in the soil under the spot where Yessayan's head had lain.

IV. "There Were Problems and There Had to Be a 187."

Later on June 7, 2006, Chargualaf was driving by Saldivar's house and, seeing Saldivar in his driveway, stopped to ask him if he wanted to get together with some girls. Saldivar made a hand gesture in the shape of a gun and said, "there

were problems and there had to be a 187." The Penal Code section for murder is 187.

Also on June 7, Saldivar told Alex Preciado, "remember that car you saw yesterday, you didn't see nothing."

Sometime after 8:00 p.m. on June 7, Saldivar asked Chargualaf for a ride. Chargualaf drove, Saldivar was in the front passenger seat, and Belyea and another girl were in the backseat. As they drove on an overpass across the Santa Ana River, somewhere near Harbor Boulevard and Warner Avenue, Saldivar rolled down the window and threw "a bunch of shiny stuff," possibly bullets, out the window and into the riverbed below.

Also on the night of June 7, Saldivar and Ruben Oliveros, another Middleside Los Chicos gang member, appeared at the home of Jose Muniz with Yessayan's black Nissan Altima. Muniz operated the local "chop shop" where he would get rid of stolen cars by disassembling them. Oliveros asked if he could park the car in front of Muniz's home. When Saldivar and Oliveros returned the next day, Oliveros told Muniz that he and his girlfriend no longer could afford the car payments for the black Nissan. Muniz offered to take over the car payments, but Oliveros insisted that Muniz chop up the car.

Saldivar, Oliveros, and Muniz all participated in chopping up Yessayan's black Nissan. Oliveros paid Muniz $200 for his help. Oliveros took the engine, wheels, doors, hood, and trunk lid; Muniz took the interior black leather seats and whatever scrap was left.

V. Arrest, Investigation, and Autopsy

Police officers arrested Saldivar on June 12, 2006. The officers searched his car and found Yessayan's car keys inside a "fanny pack" on the passenger seat. When police officers searched Saldivar's house, they found gang graffiti on the inside of the garage door.

Police investigators used a metal detector to search the Santa Ana River riverbed under and around the Harbor Boulevard overpass, near the spot where Chargualaf saw Saldivar throw "shiny stuff" out the car window. The

investigators found three .357 Magnum bullet casings. Two casings were Winchester, and one was Fiocchi; all the cases were corroded. The bullet found in the dirt at the murder site appeared to be a Fiocchi .357 Magnum revolver bullet.

Police officers recovered a .41 caliber Smith & Wesson handgun from the home of Victor Enciso, an active participant in the Middleside Los Chicos gang. Forensic testing established that gun could not have fired the bullet found at the murder site.

Dr. Joseph Halka, who conducted Yessayan's autopsy, testified Yessayan had been shot twice in the head and died from the second gunshot. A contact wound behind Yessayan's right ear showed that the barrel of the gun had been placed against Yessayan's head when it was first fired. The bullet entered behind Yessayan's right ear and exited above the top of his right ear without penetrating the skull. The bullet fractured Yessayan's skull and probably caused a concussion, but was not fatal. The second gunshot was aimed from behind Yessayan's left ear from a distance of six to 18 inches. The second bullet was fatal; it entered Yessayan through the back of his head, passed through his brain, and exited from his right cheek. Bleeding from the second wound indicated that Yessayan was still alive when the second gunshot was fired.

VI. Gang Expert Testimony

Police Detective Craig Brown, the lead investigator in the case, testified at trial as a gang expert. He testified that Yessayan was a member of the Family Mob, a Costa Mesa gang, and that Saldivar, Oliveros, and Fernandez were members of Middleside Los Chicos, a Santa Ana gang. In December 2003, Saldivar told a police officer he had been "jumped"[2] into Middleside Los Chicos gang 10 years earlier.

After recounting the history of the Middleside Los Chicos gang, Brown testified that in June 2006 and at the time of trial, that gang had about 50 active members. Brown explained gang structure as a series of concentric rings.

[2] "Jumping in" is a means by which someone becomes a gang member by physically confronting two or more gang members and by getting beaten up.

At the hardcore center are the "O.G.'s," who call the shots and who are feared and respected because they have proven to be extremely violent. Around the O.G.'s is a ring of gang members who perform the work for the gang. The people in this ring are trusted to be violent, back up other gang members, and sell drugs. Next is a ring of persons who participate in gang activities but have not formally become gang members. Finally, at the periphery, there is a ring of semiactive gang participants who might show up at gang parties but who do no work for the gang. Muniz and Chargualaf, for example, were part of this peripheral ring of semiactive gang members.

In the culture of Hispanic street gangs, respect is gained through violence and intimidation. Disrespecting a gang member can lead to violent "payback," which must be equal to or greater than the disrespect. Minor acts and social indiscretions, such as staring, failing to nod, or whistling at a gang member's girlfriend, are viewed by gang members as disrespect deserving of payback. Brown explained that an unwanted romantic advance made by a gang member toward a female friend of a member of a nonrival gang is a form of disrespect. Women, Brown explained, are considered gang property and are "the most common catalyst for gang crimes."

Guns, as well as women, are considered gang property. Higher ranking gang members generally carry and brandish the guns. All gang members of ranking status have access to the gang gun, which might be stored at a gang member's house or passed around. Carrying a gun and killing people bolsters a gang member's status and reputation.

Brown explained that anybody—whether or not a gang member—who cooperates with law enforcement is considered a "rat." Within gang culture, a rat is violating the unwritten rules and could be beaten up or even killed. The rules of gang culture go so far as to prohibit a gang member from providing information to law enforcement about a crime committed by a rival gang member. During trial, Jesus Garcilazo refused to testify despite a grant of transactional immunity and was held in civil contempt. Brown identified Garcilazo as a Family Mob gang member and explained he refused to testify because doing so would have

> violated the rules of gang culture, even though he and Yessayan were members of the same gang.
>
> Brown testified Middleside Los Chicos gang members Joseph Preciado and Joseph John Mason each committed a prior crime. Preciado was convicted of vehicle theft committed in February 2004. Mason was convicted of assault with a deadly weapon and street terrorism under section 186.22, subdivision (a). A true finding was made on the gang enhancement allegation (§ 186.22, subd. (b)(1)) against Mason.
>
> When presented with a hypothetical mirroring the facts of this case, Brown testified the crime was committed at the direction of and for the benefit of the gang. The murder would enhance the status and reputation for violence of the gang members and the gang itself.

(Lodgment 6, 4—10.)

IV.

PETITIONER'S CONTENTIONS

The Petition raises the following grounds for federal habeas relief:

Ground One: The trial court erred when it failed to instruct the jury on theft as a lesser-included offense of robbery.

Ground Two: The trial court erred when it issued the CALCRIM No. 1603 jury instruction on aiding and abetting a robbery.

Ground Three: Petitioner received ineffective assistance of counsel when his appointed trial counsel:

(a) Failed to object to the expert witness's reliance on hearsay statements

(b) Failed to object to admission of an unrelated .41-caliber handgun;

(c) Failed to object to the prosecutor's use of Muniz's testimony beyond the limited purpose the jury was permitted to use;

(d) Failed to object to inflammatory gang evidence;

(e) Mistakenly introduced bad character evidence and elicited speculation about Petitioner's drug dealing;

(f) Failed to object to gruesome crime scene photographs and a photograph of Yessayan in his graduation robes;

(g) Failed to object to expert testimony interpreting Petitioner's tattoos;

(h) Failed to object to the Prosecutor's closing argument definition of "natural and probable";

(i) Emphasized an unrelated gang crime during closing argument;

(j) Conceded that Middleside Los Chicos is a Criminal Street Gang during closing argument;

(k) Failed to request CALCRIM No. 1403 jury instruction (a limiting instruction on gang evidence);

(l) Failed to object to testimony regarding, and the prosecutor's references to, the Mexican Mafia.

Moreover, Petitioner alleges that his retained, post-trial counsel was ineffective because he failed to specify every ground of trial counsel's ineffectiveness as alleged in the instant Petition, in making a motion for a new trial.

Ground Four: California's felony-murder special circumstance statute for murders committed while the defendant was engaged in a robbery, P.C. § 190.2(a)(17)(A), is unconstitutionally vague.

Ground Five: Cumulative error denied Petitioner his right to due process of law.

(See Pet. 8—43.)

V.

AEDPA STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant an application for a writ of

habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings, unless the adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2); Woodford v. Visciotti, 537 U.S. 19, 21 (2002).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 132 S. Ct. 38, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. Early v. Packer, 537 U.S. 3, 8 (2002) (quoting Williams v. Taylor, 529 U.S. 362, 405-06 (2000)) (internal quotation marks omitted). A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407.[3]

[3] After Williams was decided, "[the U.S. Supreme Court] limit[ed] federal courts' ability to extend Supreme Court rulings to

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003). Rather, "[t]he state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (quoting Williams, 529 U.S. at 409). "Under § 2254(d), a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible [that] fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." Harrington v. Richter, 131 S. Ct. 770, 786 (2011). This is "the only question that matters under § 2254(d)(1)." Id. (quoting Andrade, 538 U.S. at 71) (internal quotation marks omitted).

Petitioner raised Grounds One through Five in his Petition for Review to the California Supreme Court, which was summarily denied. (Lodgment 8.) This Court looks through the California Supreme Court's summary denial to the last reasoned state court decision, here the decision of the California Court of Appeal in case number G043935. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim [are presumed to] rest upon the same ground."); see also

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new sets of facts on habeas review. [Now], courts may so extend Supreme Court rulings only if it is 'beyond doubt' that the rulings apply to the new situation or set of facts." See Moore v. Helling, 763 F.3d 1011, 1016 (9th Cir. 2014) (quoting White v. Woodall, 134 S. Ct. 1697, 1706 (2014)).

Cannedy v. Adams, 706 F.3d 1148, 1159 (9th Cir. 2013) (footnote omitted) ("[Courts] 'look[] through' summary denials to the last reasoned decision—whether those denials are on the merits or denials of discretionary review."), as amended, 733 F.3d 794 (9th Cir. 2013), cert. denied, 2014 WL 210777 (U.S. Jan. 21, 2014). Thus, in addressing Grounds One through Five, the Court will consider the reasoned opinion of the California Court of Appeal, which denied these claims on the merits. See Berghuis v. Thompkins, 560 U.S. 370, 380 (2010).

VI.

DISCUSSION

A. Grounds One and Two: Jury Instructions

In Ground One, Petitioner contends the trial court violated his constitutional rights when it failed to instruct the jury on theft as a lesser-included offense of robbery. In Ground Two, Petitioner contends the trial court violated his constitutional rights when it erroneously issued the CALCRIM No. 1603 instruction on aiding and abetting a robbery.

Instructional error warrants federal habeas relief only if the "'ailing instruction . . . so infected the entire trial that the resulting conviction violates due process[.]'" Dixon v. Williams, 750 F.3d 1027, 1033 (9th Cir. 2014) (quoting Middleton v. McNeil, 541 U.S. 433, 437 (2004)) (citation omitted). The instruction must be more than merely erroneous; rather, Petitioner must show there was a

"reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." McNeil, 541 U.S. at 437 (citations and internal quotation marks omitted); Waddington v. Sarausad, 555 U.S. 179, 190-91 (2009); see also Cupp v. Naughten, 414 U.S. 141, 146 (1973) ("Before a federal court may overturn a conviction resulting from a state trial in which [an allegedly faulty] instruction was used, it must be established not merely that the instruction is undesirable, erroneous or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."). Further, "[i]t is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (citation omitted); Sarausad, 555 U.S. at 191.

Where, as here, the alleged error is the failure to give an instruction, the burden on the Petitioner is "'especially heavy.'" Sarausad, 555 U.S. at 191 (quoting Henderson v. Kibbe, 431 U.S. 145, 155 (1977)). Moreover, even if a constitutional error occurred, federal habeas relief remains unwarranted unless the error caused prejudice, ***i.e.***, unless it had a substantial and injurious effect or influence in determining the jury's verdict. Dixon, 750 F.3d at 1034 (citing Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)). As set forth below, Petitioner does not satisfy these standards for habeas relief.

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a. Ground One: Theft As A Lesser-Included Offense Instruction

Petitioner contends that his constitutional right to due process was violated when the trial court failed to instruct the jury on theft as a lesser included offense of robbery. (Pet. 8—9.) Petitioner claims that his robbery conviction cannot be sustained absent evidence that he "conceived his intent to steal either before committing the act of force against the victim, or during the commission of that act." (Pet. 9; Reply 5.) Petitioner argues that the circumstantial evidence demonstrates that he formed the intent to take the car after the killing to get away from the crime scene, not before or during Yessayan's murder. (See id.) Thus, Petitioner claims "the evidence at best dictated theft of the victim's car and not robbery." (Reply 5.)

Respondent cites to Ninth Circuit authority for the proposition that failure of the state trial court to instruct on lesser-included offenses in a non-capital case does not present a federal constitutional question. (Mem. P. & A. 10 (citing Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998); Turner v. Marshall, 63 F.3d 807, 819 (9th Cir. 1995); Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984).) Although claims of error in state jury instructions are generally a matter of state law and do not usually invoke a constitutional question, Gilmore v. Taylor, 508 U.S. 333, 342—43 (1993), federal habeas relief is warranted if the jury instruction violates some due process right guaranteed by the Fourteenth Amendment. Cupp, 414 U.S. at 146.

The California Court of Appeal rejected Petitioner's claim, stating that the trial court was not required to give a jury instruction on theft because Petitioner was not charged with robbery. (Lodgment 6, at 15.) "'[W]hen robbery is not a charged offense but merely forms the basis for a felony-murder charge and a special circumstance allegation, a trial court does not have a sua sponte duty to instruct the jury on theft.'" (Lodgment 6, at 15 (quoting People v. Valdez, 32 Cal. 4th 73, 110—11 (2004).) Furthermore, the California Court of Appeal held that: "Instruction on theft neither would have been relevant to issues raised by the evidence nor necessary for the jury's understanding of the case. To decide whether Saldivar murdered Yessayan in the course of committing a robbery, the jury did not have to understand the elements of theft." (Lodgment 6, at 15—16.)

"'[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" Dixon, 750 F.3d at 1033 (quoting Boyde v. California, 494 U.S. 370, 378 (1990)). Here, Petitioner was charged with first degree murder under two theories: (1) that the murder was willful, deliberate, and premeditated, and (2) the murder was committed during the course of a robbery (*i.e.*, felony-murder theory). (5 R.T. 957.) The jury was instructed it could not convict Petitioner of first degree murder unless all jurors agreed the prosecutor had proved he committed murder, "but all of [the jurors] [did] not need to agree on the same theory." (Id.)

The trial court's jury instruction for felony-murder directed jurors to a separate instruction for robbery, which specified: "[T]he defendant's intent to take the property must have been formed ***before or during the time he used force or fear***. If the defendant did not form this required intent until after using the force of fear, then he did not commit robbery." (5 R.T. 959, 962–66 (emphasis added); see also 5 C.T. 1336, 1339–40.) Likewise, the jury received an instruction on the special circumstance of murder during the commission of a robbery, which specified that Petitioner had to "intend[] to commit or aid and abet the felony of robbery ***before or at the time of the act causing death.***" (5 R.T. 977–78 (emphasis added); 5 C.T. 1355–56.)

The jury instructions made it clear that in order to find Petitioner guilty of felony-murder and the special circumstance allegation, the jury had to find that Petitioner committed a robbery ***before or during the commission of a murder***. Because the jury found that Petitioner committed first-degree murder, and found true the special circumstance allegation, it necessarily found that Petitioner formed the intent to steal Yessayan's car before or during the murder. Thus, when considering the context of the charges as a whole, Petitioner has not met his heavy burden to show that a jury instruction of theft was necessary or a "reasonable likelihood" that the jury applied the instructions in a way that violated the Constitution. Boyde, 494 U.S. at 380.

Therefore, the California Court of Appeal's denial of Petitioner's instructional error claim was reasonable and consistent

with clearly established federal law. See 28 U.S.C. § 2254(d). Accordingly, Petitioner is not entitled to habeas relief on Ground One.

b. Ground Two: CALCRIM No. 1603 Instruction

Petitioner alleges that the trial court violated his due process rights when it provided the CALCRIM No. 1603 jury instruction, which states the following: "To be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid and abet the commission of the robbery before or while a perpetrator carried away the property to a place of temporary safety." (Pet. 10.) Petitioner contends that CALCRIM No. 1603 permits a jury to convict a defendant who formed the intent to aid and abet the robbery after the act causing death, whereas the felony-murder instruction requires the defendant to form the intent to aid and abet before or at the time of the act causing death. (Pet. 10.) Moreover, Petitioner cites to a bench note for CALCRIM No. 1603 that states: "Do not give this instruction if the defendant is charged with felony murder." (Pet. 10 (citing Bench Notes to CALCRIM No. 1603).)

The California Court of Appeal agreed with Petitioner, holding that CALCRIM No. 1603 "could well suggest to a jury that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule." (Lodgment 6, at 17 (citing to People v. Pulido, 15 Cal. 4th 713, 728 (1997).) However, applying the harmless error doctrine under Chapman v. California, 386 U.S. 18

(1967), the Court of Appeal held that the error was not prejudicial. (Lodgment 6, at 18.) The California Court of Appeal reasoned:

> In addition to giving CALCRIM No. 1603, the trial court instructed the jury with a modified CALCRIM No. 540A, as follows: "The defendant is also charged in count 1 with murder under a theory of felony murder. [¶] To prove that the defendant is guilty of first degree murder under this theory, the People must prove that: number one, the defendant committed robbery; number two, the defendant intended to commit robbery; and, number three, while committing robbery, the defendant did an act that caused the death of another person. [¶] . . . [¶] . . . ***The defendant must have intended to commit the felony of robbery before or at the time of the act causing the death.***" (Italics added.) The trial court also gave a modified CALCRIM No. 540B, which instructed the jury on felony murder when the defendant did not commit the act causing death but aided and abetted the perpetrator. That instruction concluded by stating: "***The defendant must have intended to commit or aid and abet the felony of robbery before or at the time of the act causing the death.***" (Italics added.)
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> While CALCRIM No. 1603 generally deals with aiding and abetting a robbery, CALCRIM Nos. 540A and 540B specifically deal with robbery as the predicate crime for felony murder. In addition, the jury was given CALCRIM No. 730, which is specifically directed to the robbery-murder special-circumstance allegation, modified and read to the jury as follows: "The defendant is charged with the special circumstance of murder committed while engaged in the commission of robbery in violation of Penal Code section 190.2(a)(17). [¶] To prove that this special circumstance is true, the People must prove that: Number one, the defendant committed or aided and abetted a robbery; number two, the defendant intended to commit or intended to aid and abet the perpetrator in committing a robbery; number three, if the defendant did not personally commit or attempt to commit the robbery, then a perpetrator whom the defendant was aiding and abetting before or during the killing personally committed robbery; number four, the defendant did an act that caused the death of another

> person; and, number five, the act causing the death and the robbery were part of one continuous transaction. [¶] . . . [¶] *The defendant must have intended to commit or aided and abetted the felony of robbery before or at the time of the act causing death.*" (Italics added.)
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> The italicized passage told the jury that to find the robbery-murder special-circumstance allegation to be true, the jury had to find that Saldivar must have formed the intent to commit or aid and abet the robbery before or at the time of the act causing Yessayan's death. We presume the jury followed the trial court's instructions, and the jury returned a verdict finding the robbery-murder special-circumstance allegation to be true. Thus, the jury must have found that Saldivar formed the requisite intent before or at the time Yessayan was shot and killed. The error in giving CALCRIM No. 1603 did not, beyond any reasonable doubt, contribute to the verdict.

(Lodgment 6, at 18–19 (alterations in original) (citations omitted) (citing People v. Boyette, 29 Cal. 4th 381, 436 (2002)).)

Reading the contested instruction in the context of Petitioner's charges and jury instructions as a whole, see Boyde v. California, 494 U.S. at 378, the Court finds that it was not objectively unreasonable for the California Court of Appeal to conclude that, even if it was error to instruct the jury with CALCRIM No. 1603, the error did not have a "substantial and injurious effect" on the verdict. Brecht v. Abrahamson, 507 U.S. at 623. The Court of Appeal, as the law allows, presumed that the jurors followed the instructions given and applied the proper legal standard. Doe v. Busby, 661 F.3d 1001, 1017–18 (9th Cir. 2011) ("A habeas court must presume that jurors follow the jury instructions."); see also Richardson v. Marsh, 481 U.S. 200, 206 (1987). The instructions for the charges Petitioner was convicted of – felony-murder and the special circumstance allegation – properly required the jury to find

that Petitioner formed the requisite intent before or at the time Yessayan was shot and killed. (5 C.T. 1336—38, 1355—1356.)

Furthermore, the evidence at trial suggested that Petitioner formed the intent to take the car before Yessayan was murdered. Shortly before the murder took place, Alex Preciado and his wife saw Petitioner sitting outside of his home in the driver's seat of Yessayan's car. (1 R.T. 206, 236—38, 244, 263.) Yessayan was in the back seat along with other members of the Middleside Los Chicos gang, including Fernandez. (Id.) Alex Preciado saw Petitioner the day after the murder, and Petitioner told him "remember that car you saw yesterday, you didn't see nothing." (1 R.T. 209.) When police officers arrested Petitioner on June 12, 2006, they found Yessayan's car keys inside a "fanny pack" on the passenger seat of his car. (2 R.T. 398, 447—448.) Given the entirety of the jury instructions and the evidence, it is reasonable to assume that the jury applied the law correctly and found that Petitioner formed the intent to commit, or aid and abet the commission of, the robbery before Yessayan was killed.

Therefore, the California Court of Appeal's rejection of Petitioner's instructional error claim was reasonable and consistent with clearly established federal law. See 28 U.S.C. § 2254(d). Accordingly, Petitioner is not entitled to habeas relief on Ground Two.

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B. Ground Three: Ineffective Assistance of Counsel

In Ground Three, Petitioner asserts twelve instances of ineffective assistance by his appointed trial counsel. (See Pet. 12–40.) Petitioner also contends that his post-trial counsel rendered constitutionally defective assistance of counsel by failing to raise every ground of ineffective assistance, that was asserted on direct appeal and in the instant Petition, in a motion for a new trial. (Pet. 34.)

A habeas petitioner asserting ineffective assistance of counsel must demonstrate both deficient performance on the part of counsel and prejudice therefrom. Strickland v. Washington, 466 U.S. 668, 687 (1984). The petitioner bears the burden of establishing both elements. Id.; Williams v. Taylor, 529 U.S. 362, 390 (2000). The deficiency prong requires a person challenging a conviction to show that "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. There is a "strong presumption" that counsel's actions "might be considered sound trial strategy." Id. at 689. The prejudice prong requires a petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

"The pivotal question [when applying 28 U.S.C. § 2254(d)(1)'s deferential standard of review] is whether the state court's application of the Strickland standard was unreasonable. This is

different from asking whether defense counsel's performance fell below Strickland's standard." Harrington v. Richter, 131 S. Ct. 770, 785 (2011). Harrington explained that "it is a necessary premise that the two questions are different . . . an *unreasonable* application is different from an *incorrect* application of federal law." Id. at 783 (emphasis in original). Thus, relief under 28 U.S.C. § 2254(d)(1) requires a finding that "there is [no] reasonable argument that counsel satisfied Strickland's deferential standard." Id. at 788.

"The standards created by Strickland and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." Id. (citations omitted); see also Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) (stating that a review of a Strickland claim pursuant to Section 2254(d)(1) is "doubly deferential"). A petitioner must "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 131 S. Ct. at 786–77. Under this standard, "if the state court reasonably concluded that Petitioner failed to establish either prong of the Strickland test," then a federal court cannot grant relief. Cannedy v. Adams, 706 F.3d 1148, 1157 (9th Cir. 2013).

The California Court of Appeal found that seven of the alleged claims of ineffective assistance asserted by Petitioner did not satisfy the deficient performance prong of Strickland. Moreover, the

court found that, although the five remaining claims established deficient performance, these instances of counsel's deficient performance did not result in cumulative prejudice warranting habeas relief. (See Lodgment 6, at 34; see also supra Section VI.B.6.)[4] As set forth below, the California Court of Appeal reasonably determined that Petitioner did not satisfy both prongs of the Strickland test as to each of his asserted claims.

1. Deficient Performance

a. Trial Counsel Did Not Render Deficient Performance By Failing To Object To The Expert Witness's Reliance On Hearsay Testimony

Petitioner alleges that trial counsel should have objected to Detective Brown's *testimony* about the .41-caliber Smith & Wesson handgun found at Victor Enciso's home after the murder.[5] (Pet. 14.) Encisco was a Middleside gang member who stored guns for other gang

[4] The California Court of Appeal identified the following instances of deficient performance: (1) Failure to object to admission of the .41-caliber handgun; (2) Failure to object to cumulative and gruesome crime scene photographs; (3) Emphasis on an unrelated gang crime during closing argument; (4) Failure to request CALCRIM No. 1403; and (5) Failure to object to evidence and argument regarding the Mexican Mafia (other than expert testimony interpreting Saldivar's tattoos). (See Lodgment 6, at 34.)

[5] The prosecutor told the jury the .41-caliber gun was not used to shoot Yessayan, but was a merely a gang gun taken to Encisco's house after the murder. (Pet. 14.) The Court of Appeal held that the "relevance of that handgun was tenuous, at best," and that there was no rational tactical purpose for failing to object to the receipt in evidence of the actual .41-caliber gun. (Lodgment 6, at 22.)

members after they knew the police were looking for them. (4 R.T. 664—66.) According to Petitioner, Detective Brown testified that Enciso told him the following: Oliveros and Fernandez came to his house on June 12, 2006, told him "the neighborhood was hot," and asked him to hold a gun for them. (Pet. 14.) Petitioner contends that Enciso's statements were hearsay because they were offered to prove the truth of the matter asserted. (Pet. 14.)

The California Court of Appeal rejected this purported instance of ineffective assistance of counsel, holding the following:

> "[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance." (People v. Hillhouse (2002) 27 Cal.4th 469, 502.) There were rational tactical reasons for not objecting to Brown's testimony or the prosecutor's closing argument; for instance, the desire not to emphasize the testimony or argument, or not to seem obstreperous. (People v. Frierson (1991) 53 Cal.3d 730, 749 ["in the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings"].) The trial court instructed the jury it could consider statements made by other persons to Brown only to evaluate Brown's opinion, not for the truth. We presume the jury followed the instruction. (People v. Thomas (2011) 51 Cal.4th 449, 489.)

(Lodgment 6, at 21.)

Just as the California Court of Appeal presumed the jurors followed the instructions they were given, "[a] habeas court must presume that jurors follow the jury instructions." Doe v. Busby, 661 F.3d 1001, 1017 (9th Cir. 2011). The trial court issued CALCRIM No. 360, which specifically directed jurors, in regard to statements made

by other persons to Detective Brown, to "not consider those statements as proof that the information contained in the statements is true." (5 C.T. 1319.) Because the Court presumes the jury followed this instruction, trial counsel's objection would have been futile. Jones v. Smith, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000); see also Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) ("the failure to take a futile action can never be deficient performance").

Accordingly, the California Court of Appeal's finding that the deficient performance prong was not satisfied for this purported instance of ineffective assistance of counsel was a reasonable application of Strickland.

b. Trial Counsel Did Not Render Deficient Performance For Failing To Object To Gang Evidence And Expert Testimony Interpreting Petitioner's Tattoos

Petitioner contends that trial counsel was ineffective for failing to object to Detective Brown's testimony of gang evidence, including: (1) a "jumping out" ritual in which an individual is severely beaten before leaving a gang; (2) a "sexing in" ritual in which females are initiated into a gang by having sex with all the male gang members or female gang members in a public setting; and (3) a practice whereby gang members are killed after going into another gang's territory and marking out graffiti. (Pet. 18—21.) Additionally, Petitioner contends that trial counsel was ineffective for failing to object to Detective Brown's interpretations of

Petitioner's tattoos, because they indicated his propensity for violence. (Pet. 25.)

The California Court of Appeal rejected Petitioner's arguments, stating that this testimony was relevant to show the "culture, sociology, and habits of criminal street gangs." (Lodgment 6, at 23–24 (citing People v. Gardeley, 14 Cal. 4th 605, 617 (1997).) With regard to the testimony about Petitioner's tattoos, the court held: "If Saldivar's trial counsel had objected to an interpretation of the tattoo, which the jury could already see, he risked being perceived by the jury as trying to prevent it from hearing relevant evidence." (Lodgment 6, at 29.)

Gang evidence is admissible if it is relevant to a material issue in the case. See United States v. Takahashi, 205 F.3d 1161, 1164 (9th Cir. 2000); United States v. Santiago, 46 F.3d 885, 889 (9th Cir. 1995); see also Studebaker v. Uribe, 658 F. Supp. 2d 1102, 1115–17 (C.D. Cal. 2009) (discussing California case law regarding the admissibility of gang expert evidence). Here, the gang evidence was relevant to prove Petitioner's charge of participation in a criminal street gang (Count Two), and the special circumstances allegation that he was an active participant in a criminal street gang within the meaning of P.C. § 190.2(a)(22). Thus, an objection to the gang evidence would have been meritless because it was relevant to establishing one of Petitioner's charges. See Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985) ("[f]ailure to raise a meritless argument does not constitute ineffective assistance.")

Accordingly, the California Court of Appeal's finding that the deficient performance prong was not satisfied for this purported instance of ineffective assistance of counsel was a reasonable application of Strickland.

c. Trial Counsel Did Not Render Deficient Performance For Failing To Object During the Prosecutor's Closing Argument

Petitioner argues that trial counsel rendered constitutionally defective assistance when he failed to make objections to statements the prosecutor made during his closing argument. (Pet. 16—18, 30—31, 32—33.)

First, Petitioner argues that trial counsel should have objected when the prosecutor used Jose Muniz's testimony beyond the limited purpose for which the jury was permitted to use it. (Pet. 16—18.) Muniz testified that he was beaten up by Middleside gang members because of his involvement in the case. (2 R.T. 411.) To point out why witnesses would be scared to testify against Petitioner, the prosecutor reminded the jury how Muniz left Santa Ana after Middleside gang members beat him up saying "Rat, rat," knocked his tooth out, and held a gun to his son's head. (5 R.T. 810.) Petitioner argues that the "jury could speculate that it was [P]etitioner who authorized these crimes against Muniz and from that it could infer guilt."

Second, Petitioner contends that trial counsel should have objected to the prosecutor's explanation of the natural and probable consequences doctrine. (Pet. 27—29.) The prosecutor defined the natural and probable consequences doctrine as follows: "What it just has to be is within the continuum or within the universe or within the possibility of things that might happen. It doesn't even have to be something you believe." (Pet. 28.)

The California Court of Appeal rejected both of these contentions, stating that although the prosecutor erred in his statements, trial counsel might have appeared "obstreperous" by objecting and calling unnecessary attention to the issue. (See Lodgment 6, at 23, 30—31.)

As a preliminary consideration, failing to object during closing argument rarely constitutes ineffective assistance. See United States v. Molina, 934 F.2d 1440, 1448 (9th Cir. 1991) ("From a strategic perspective, for example, many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality."); United States v. Neoechea, 986 F.2d 1273, 1281 (9th Cir. 1993) ("Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument . . . is within the 'wide range' of permissible professional legal conduct.").

Moreover, as the California Court of Appeal noted, in each of these instances the jury was given an instruction eliminating the need for trial counsel to object. "A habeas court must presume that jurors follow the jury instructions." Doe v. Busby, 661 F.3d 1001, 1017—18 (9th Cir. 2011); see also Richardson v. Marsh, 481 U.S. 200, 206 (1987) (referring to the "almost invariable assumption of the law that jurors follow their instructions."). With regard to Muniz's testimony, the jury was given the following limiting instruction:

> If you find that witness Jose Muniz and or his son were threatened or harmed by Middle Side Gang Members or by any other persons, you may consider that evidence only for the limited purpose of evaluating Jose Muniz's testimony as it reasonably tends to prove or disprove the truth or accuracy of that testimony.
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> You may not consider any such threats or harm for any other purpose.

(5 C.T. 1309) Additionally, in regard to the natural and probable consequences explanation, the jury was given the proper CALCRIM No. 403 instruction on natural and probable consequences.[6] (5 C.T. 1327.) The trial court judge also gave the jurors the following instruction:

> You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.

[6] The prosecutor also referred jurors to this specific jury instruction during his closing argument. (5 R.T. 822.)

(5 C.T. 1293.) Thus, any objection to the prosecutor's statements would have been futile, because the jury was instructed to follow the law as given by the trial judge.

Accordingly, the California Court of Appeal reasonably concluded that trial counsel's failure to object during the prosecutor's closing argument fell within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689.

d. Trial Counsel Did Not Render Deficient Performance For Conceding That Middleside Los Chicos Was A Criminal Street Gang

Petitioner alleges that trial counsel rendered constitutionally defective assistance by making certain statements during closing argument that effectively conceded that Middleside Los Chicos is a criminal street gang. (Pet. 32—33.)

The California Court of Appeal rejected Petitioner's argument, stating the following:

> Counsel had a rational tactical purpose for making these statements: The prosecution had made a good case that Middleside Los Chicos was a criminal street gang, and Saldivar's trial counsel would have lost credibility before the jury by arguing to the contrary. (See People v. Freeman (1994) 8 Cal. 4th 450, 498 ["Recognizing the importance of maintaining credibility before the jury, we have repeatedly rejected claims that counsel was ineffective in conceding various degrees of guilt"].)

(Lodgment 6, at 32.)

Attorneys are accorded wide latitude in making tactical decisions. Strickland, 466 U.S. at 689. Here, trial counsel may have conceded that Middleside Los Chicos was a criminal street gang in hopes that the jury would find his remaining defenses more credible. See United States v. Martinez, No. 13-30300, 2014 WL 4099843, at *1 (9th Cir. Aug. 21, 2014) (holding that trial counsel did not render ineffective assistance by conceding defendant's guilt on multiple counts in closing argument); United States v. Swanson, 943 F.2d 1070, 1075–76 (9th Cir. 1991) ("in some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense or his guilt of one of several charges."). Accordingly, the California Court of Appeal's finding that the deficient performance prong was not satisfied for this purported instance of ineffective assistance of counsel was a reasonable application of Strickland.

e. Trial Counsel Did Not Render Deficient Performance For Introducing Evidence And Eliciting Speculation Of Petitioner's Drug Dealing

Petitioner claims that his trial counsel elicited bad character evidence regarding Petitioner's drug dealing when questioning Alex Preciado. (Pet. 22.) According to Petitioner, the record shows "it was trial counsel who first brought up the word 'heroin' and [] asked [Alex] Preciado about the number of times he had been [to

Petitioner's house]. Thus, trial counsel introduced what he believed to be bad character evidence about his client."

As set forth below, the California Court of Appeal found there was a rational tactical purpose for trial counsel's questioning of Alex Preciado:

> Alex Preciado, a prosecution witness, testified on direct examination he went to Saldivar's house during the early evening of June 6, 2006 to buy drugs and saw Yessayan's black Nissan Altima parked outside. Alex Preciado testified he saw Saldivar, Fernandez, Yessayan, and a woman inside the car. Alex Preciado also testified that on June 7, Saldivar told him, "remember that car you saw yesterday, you didn't see nothing."
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> On cross-examination, Saldivar's counsel asked Alex Preciado if he was "doing heroin at the time." He answered, "[c]orrect." Saldivar's counsel later asked whether Alex Preciado had a specific recollection of being at Saldivar's home on June 6, 2006. After he answered that he did not, Saldivar's counsel asked, "[h]ow many times have you been to Mr. Saldivar's home?" Ensuing questions and answers established Preciado had been to Saldivar's home more than 50 times over more than 10 years. No mention was made of buying heroin.
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> On redirect examination, the prosecutor asked Alex Preciado if there was more than one date in 2006 on which he went to Saldivar's house to buy heroin and saw Saldivar and others in Yessayan's black Nissan parked outside. Alex Preciado answered, "just one time." In a sidebar conference relating to a different question, Saldivar's trial counsel stated, "I know [the prosecutor] had asked [Alex Preciado] about whether he had gone there or not on other occasions, numerous occasions to buy heroin from my client. I was under the impression that we weren't going to get into the impression of my client's heroin dealing." The trial court offered to give the jury an admonition and instruction. The prosecutor explained he was not trying to establish that Alex Preciado had been to Saldivar's home many times

> to buy drugs, but the opposite—"[t]hat he hadn't gone there and had all these same series of things happen over and over." In response, Saldivar's trial counsel argued, "to say, 'how many times have you been over there buying heroin' assumes, first of all, facts not in evidence. And beyond that, I don't know that it is really that probative under [Evidence Code section] 352."
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> Saldivar asserts his trial counsel's questioning of Alex Preciado elicited testimony about Saldivar's drug dealing. Saldivar's counsel did not seek to elicit testimony from Alex Preciado that he had been to Saldivar's house many times to buy heroin; counsel simply asked Preciado how many times he had been to Saldivar's house.
>
> There was a rational tactical purpose for that line of questioning: To undermine the accuracy and credibility of Alex Preciado's testimony placing Saldivar, Fernandez, and Yessayan in Yessayan's black Nissan Altima during the evening of the murder. To undermine Alex Preciado's credibility, Saldivar's trial counsel made the decision to elicit testimony establishing Preciado had visited Saldivar's home on numerous occasions and therefore could not remember whether he saw Saldivar in the black Nissan specifically on June 6, 2006 or at some other time. Trial counsel's representation of Saldivar was not deficient for eliciting this testimony.

(Lodgment 6, at 24—26; see also 1 R.T. 204—228.)

Under Strickland, the Court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. Petitioner bears the burden to overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Id. at 689. Here, asking Alex Preciado how many times he had been to Petitioner's house in order to undermine his credibility was an act well within the "wide range of professionally

competent assistance," Strickland, 466 U.S. at 690, even if it opened the door to speculation about Petitioner's drug dealing.

Petitioner contends that trial counsel elicited speculation about his drug dealing again when he asked similar questions during his cross-examination of Renée Preciado. (Pet. 26.) In particular, Petitioner points out that trial counsel asked Renée Preciado how many times she had been to Petitioner's house, and whether she told the police that Petitioner was "fiddling with something" in his car and "might [have] be[en] rolling a joint or something." (Pet. 26.)

The California Court of Appeal described this line of questioning and why it was appropriate under Strickland:

> Specifically counsel asked Renee Preciado whether she had been to Saldivar's house at least 50 times. She answered "[y]es." Later, counsel asked Renee Preciado a series of questions about statements she made to the police on June 26, 2006:
>
> Q. [Saldivar's trial counsel] . . . In fact, you even went on to say [to the police] that you saw Mr. Saldivar in the front seat kind of fiddling with something. You thought he might be rolling a joint or something, right?
>
> A. [Renee Preciado] Yes.
>
> Q. You could see this girl clearly enough in the front passenger seat, you could see that she had rings under her eyes, kind of black, correct?
>
> A. Yes.
>
> Q. You thought she was cute and you were wondering why would she even be with Aurelio, right?

> A. Yes.
>
> Q. You remember those details specifically, right?
>
> A. Yeah. Well, whenever my husband communicates with somebody it is my job to make sure, you know, I know who he is communicating with.
>
> Q. Right. Because you don't want him with some girl who is smoking meth or doing stuff and having — I think you even said that in your interview. You don't want your husband exposed to some loose woman, right?
>
> A. Yes.
>
> Rational tactical purposes for this line of questioning were (1) to undermine the credibility of Renee Preciado's trial testimony that she saw Yessayan in the backseat of the black Nissan Altima on the evening of June 6, 2006 and (2) to reinforce Renee Preciado's statement to the police on June 26 she did not see Yessayan in the car. Counsel's questioning was intended to establish that Renee Preciado looked carefully into the black Nissan Altima on June 6 and made mental notes about whom and what she saw inside. When she was interviewed by the police 20 days after the murder, when her memory was fresher, she denied seeing Yessayan in the black Nissan. Trial counsel's representation of Saldivar was not deficient for eliciting this testimony.

(Lodgment 6, at 29—30 (internal quotation marks omitted); see also 1 R.T. 243, 247—48.) Trial counsel's decision to impeach Renée Preciado's credibility with prior statements she made to police was a tactical decision worthy of deference under Strickland. See Strickland, 466 U.S. at 689; U.S. v. Marulanda, 226 F. App'x 709, 711 (9th Cir. 2007) (counsel's reference to defendant's prior trial testimony to impeach a witness was a tactical decision to impeach and therefore not unreasonable).

Accordingly, the California Court of Appeal reasonably found that trial counsel's questioning of Alex and Renée Preciado fell within the wide range of reasonable professional assistance. See Strickland, 466 U.S. at 689.

2. Cumulative Prejudice

Petitioner asserts five remaining claims of ineffective assistance. (See Pet. 8–43.) According to Petitioner, trial counsel:

(a) Failed to object to admission of a .41-caliber handgun that was not used in the murder into evidence;

(b) Failed to object to gruesome crime scene photographs and a photograph of Yessayan in graduation robes;

(c) Emphasized an unrelated gang crime during closing argument;

(d) Failed to request CALCRIM No. 1403 jury instruction (a limiting instruction on gang evidence); and

(e) Failed to object to testimony regarding, and the prosecutor's references to, the Mexican Mafia.

(See id.)

The Ninth Circuit has recognized that "cumulative prejudice from trial counsel's deficiencies may amount to sufficient grounds for a finding of ineffectiveness of counsel." Silva v. Woodford, 279 F.3d 825, 834 (9th Cir. 2002) (citing Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995)). Cumulative prejudice results when counsel's errors were so egregious as to deprive defendant of a fair trial, one whose result is unreliable. Strickland, 466 U.S. at 687. The Court must

evaluate whether the entire trial was fundamentally unfair or unreliable because of counsel's ineffectiveness. Id.

The Court need not decide whether Petitioner's trial counsel rendered deficient performance with respect to each of these claims before examining the cumulative prejudice the alleged deficiencies caused Petitioner. See Smith v. Robbins, 528 U.S. 259, 286 n.14 (2000) ("'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.'") (quoting Strickland, 466 U.S. at 697).

The California Court of Appeal made the following finding with regard to whether the five remaining purported instances of ineffective assistance of counsel resulted in cumulative prejudice:

> The evidence that Saldivar was guilty of first degree murder with a robbery-murder special circumstance was so overwhelming that there could be no reasonable probability that, but for these deficiencies of counsel, the results of the trial would have been different. This jury convicted Saldivar based on the strength of the evidence. None of counsel's deficiencies in representing Saldivar, considered individually or cumulatively, undermines our confidence in the outcome of the trial. For the same reasons, Saldivar's retained counsel was not ineffective for failing to specify each and every ground of ineffective assistance in the motion for a new trial. We reject Saldivar's ineffective assistance of counsel argument.

(Lodgment 6, at 35 (citation omitted) (citing to Strickland, 466 U.S. at 694).)

Petitioner alleges that trial counsel's errors (*e.g.*, failing to object to the admission of an unrelated handgun, gruesome crime scene photographs, and a graduation photograph of Yessayan; emphasizing an unrelated gang crime in closing argument; failing to request a limiting instruction on gang evidence; and failing to object to the prosecutor's references to the Mexican Mafia), when considered all together, results in cumulative prejudice. (Reply 9.) He contends that the California Court of Appeal's decision was unreasonable because it did not reference with specificity any evidence to support its determination that despite all of trial counsel's errors, the jury nonetheless would have convicted Petitioner. (Reply 9.)

As the California Court of Appeal noted, evidence of Petitioner's guilt of first degree murder with a robbery-murder special circumstance allegation, was overwhelming. First, there was evidence that Petitioner may have had a motive to kill Yessayan because of the way he treated one of Petitioner's female associate gang members. About a month before the murder, Petitioner rode in a car with Yessayan, Heriberto Tejeda (Yessayan's friend and associate gang member), Sujey Toscano (a female associate of Middleside gang), and Toscano's daughter. (4 R.T. 595—98, 600, 616—17, 626.) Petitioner was wearing two big handguns in black holsters hanging on both sides of his body. (4 R.T. 595—598, 600.) After Yessayan made sexual overtures toward Toscano in the car in front of her daughter, Petitioner warned Tejeda that "if [Yessayan] doesn't stop disrespecting Toscano in front of her daughter, he was going to get attacked." (4 R.T. 607—10, 625, 630.) In the week before the

murder, Yessayan made another unwanted sexual advance at Toscano while she drove Yessayan's car. (1 R.T. 113—14, 116—17.)

Second, evidence at trial demonstrated that Petitioner was present and involved in the events immediately preceding the murder. On June 6, 2006, at approximately 5:30 p.m., Petitioner was seen parked outside of his house in a black Nissan along with Yessayan and some other Middleside gang members, including Fernandez. (1 R.T. 238—39, 244, 263.) Petitioner used Fernandez's cell phone to make calls and Fernandez's cell phone records revealed that the car was in the area where Yessayan's body was found at the time that gunshots were heard in the vicinity. (2 R.T. 279—81, 298, 355—58, 450—51; 4 R.T. 733—44, 750—51.)

Third, Petitioner's actions after the murder further implicated his involvement in the murder. For example, the day after the murder, Petitioner made a hand gesture in the shape of a gun and said to his neighbor, "there were problems and there had to be a 187" (the California Penal Code section for murder). (2 R.T. 315—16, 335—36, 344—45.) Petitioner also told Alex Preciado not to tell anyone that Yessayan's car had been at Petitioner's home the day before. (1 R.T. 209.) Also that day, while driving over a concrete river bed overpass, Petitioner threw "shiny stuff" out the car window. (2 R.T. 300—03, 315—16, 334—36, 344-45.) Police investigators used a metal detector near this overpass and found three bullet casings from a .357 magnum gun, one of which was consistent with the Fiocchi .357 Magnum revolver bullet found in the dirt at the murder site. (3 R.T. 495—96, 500—01, 508, 568—69.)

Fourth, the evidence demonstrated that Petitioner brought Yessayan's black Nissan to a local "chop shop" to be disassembled and participated in chopping up the car. (2 R.T. 393—95; 400—404, 426—428, 430—31, 435.) Yessayan's car keys were found in Petitioner's car when Petitioner was arrested on June 12, 2006. (2 R.T. 398, 447—448.)

The California Court of Appeal properly found that, given the abundant evidence of Petitioner's involvement in Yessayan's murder, there was little or no likelihood that the jury improperly considered the unrelated gun, gang evidence, or gruesome photographs as proof of Petitioner's guilt. Accordingly, the court reasonably determined that trial counsel's errors did not affect the outcome of the trial. See Strickland, 466 U.S. at 695; see also Benitez v. Diaz, No. 12-1237-W(WVG), 2012 WL 7007793, at *8 (S.D. Cal. Nov. 1, 2012) (finding no undue prejudice caused by trial counsel's decision to not request limiting instruction on gang activity evidence); Hernandez v. Lewis, No. CV 12-2238 DSF(FFM), 2013 WL 1498892, at *7—9 (C.D. Cal. Apr. 8, 2013) (no prejudice resulted from trial counsel's failure to object to "gruesome and shocking" autopsy photographs because the prosecutor had introduced substantial evidence establishing Petitioner's guilt).

3. Retained Post-Trial Counsel Was Not Ineffective

After the jury returned its verdict, Petitioner retained counsel for the purpose of filing a motion for a new trial. (Pet. 34.) Petitioner asserts that his retained counsel rendered

constitutionally defective assistance for failing to assert trial counsel's errors as alleged in the instant Petition. (Pet. 34—35.)

Because the Court finds that none of trial counsel's purported errors constitute ineffective assistance of counsel, the Court also rejects Petitioner's claim that his post-trial counsel was ineffective for failing to raise those same purported claims of ineffective assistance in the motion for a new trial.

Accordingly, Petitioner is not entitled to habeas relief on Ground Three of the Petition.

C. Ground Four: California's Felony-Murder Special Circumstances Statute Is Not Unconstitutionally Vague

In Ground Four, Petitioner contends that California's felony-murder special circumstance statute for murders committed while the defendant was engaged in a robbery, P.C. § 190.2(a)(17)(A), is unconstitutionally vague because the statute "makes no meaningful distinction between first-degree felony murder based on robbery and the robbery-murder special circumstance in this case." (Pet. 40—41.) Petitioner contends that, depending on how the prosecutor chooses to frame the charge, defendants face disparate sentences – death or life in prison without the possibility of parole for the robbery-murder special circumstance or 25-years-to-life for first degree murder without the special circumstance. (See Pet. 41.)

The California Court of Appeal described the relevant statutes as follows:

> Section 189 provides, in relevant part: "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree."
>
> Section 190.2 provides, in relevant part: "(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: [¶] . . . [¶] (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [¶] (A) Robbery in violation of Section 211 or 212.5."
>
> The penalty for first degree murder is death, life imprisonment without the possibility of parole, or imprisonment for a term of 25 years to life. (§ 190, subd. (a).) The penalty for first degree murder with a special circumstance is death or life imprisonment without the possibility of parole. (§ 190.2, subd. (a).)

(Lodgment 6, at 36—37.) The court then cited a state case which had rejected a similar claim challenging the lying-in-wait special circumstance under P.C. § 190.2(a)(15) as unconstitutionally vague.

(Lodgment 6, at 37 (citing to People v. Superior Court (Bradway), 105 Cal. App. 4th 297, 300–01 (2003).) The court in Bradway noted that, "[i]n noncapital cases, [a vagueness] challenge comes under the due process clause and 'rest[s] on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.' Where there is no First Amendment right implicated, such due process challenges 'are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis.'" Bradway, 105 Cal. App. 4th at 309 (quoting Maynard v. Cartwright, 486 U.S. 356, 361–62 (1988)). The court held that P.C. § 190.2(a)(15) "provides a clear definition of what is required to satisfy its elements" and "what conduct would subject a person to possible punishment by death or life without the possibility of parole." Id. at 310.

The Court then rejected Petitioner's claim by applying similar reasoning to the robbery-murder special circumstance under P.C. § 190.2(a)(17).

> We find the reasoning of Bradway persuasive and equally applicable to the robbery-murder special circumstance under section 190.2, subdivision (a)(17). Any reasonable person considering Saldivar's conduct would know the robbery-murder special circumstance could be alleged against him. Sections 189 and 190.2, subdivision (a)(17) provided Saldivar with clear and explicit notice his conduct was criminal and subjected him to any one of three severe penalties—a prison term of 25 years to life, life without the possibility of parole, or death.
>
> Prosecutorial discretion to determine which penalty among these three to seek did not violate due process. As stated in United States v. Batchelder (1979) 442 U.S. 114, 125: "[T]here is no appreciable difference between the

> discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause. [Citations.] Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentenced." (See also People v. Carter (2005) 36 Cal.4th 1215, 1280 ["The circumstance that under California law an individual prosecutor has discretion whether to seek the death penalty in a particular case did not deny defendant his constitutional rights to equal protection of the laws or to due process of law"].)
>
> Unlike the lying-in-wait special circumstance, the robbery-murder special circumstance appears to have the same elements as first degree felony murder based on robbery. First degree murder liability and a special circumstance finding may have common elements without violating the Eighth Amendment (People v. Catlin, supra, 26 Cal.4th at p. 158); likewise, in a noncapital case, they may have common elements without violating due process.

(Lodgment 6, at 38—39.)

As Respondent notes, the Ninth Circuit upheld the state court's determination in Bradway on habeas review, (Mem. P. & A. 22 (citing Bradway v. Cate, 588 F.3d 990, 993 (9th Cir. 2009)), finding that the state court did not err in applying the notice requirement under Maynard: "Bradway's due process challenge failed because he would reasonably know that preparing to and committing murder in the

way that he did would fall under the lying in wait special circumstance umbrella." Id. Similarly, Petitioner was on notice that committing a murder during the commission of a car robbery would subject him to the special circumstance penalty pursuant to P.C. § 190.2(a)(17)(A).

Accordingly, it was not objectively unreasonable for the California Court of Appeal to reject Petitioner's vagueness claim, and Petitioner is not entitled to habeas relief on Ground Four. See 28 U.S.C. § 2254(d).

D. Ground Five: Cumulative Error

In Ground Five, Petitioner contends that the "cumulative effect of the errors" denied Petitioner his right to due process of law. (Pet. 42—43.) The California Court of Appeal rejected Petitioner's cumulative error claim on the basis that it did not find multiple prejudicial errors. (Lodgment 6, at 40.)

"Cumulative error applies where, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002) (citing United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996)); see also Parle v. Runnels, 505 F.3d 922, 928 (9th Cir. 2007) ("[T]he Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even

where each error considered individually would not require reversal.").

Because Petitioner has failed to show any error of constitutional magnitude, and his claims together create no more prejudice than they do independently, Petitioner's allegation of cumulative error lacks merit. See Hayes v. Ayers, 632 F.3d 500, 523-24 (9th Cir. 2011); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996); see also Turner v. Calderon, 281 F.3d 851, 890 (9th Cir.2002) ("Cumulatively, Turner's claims of alleged trial error create no more prejudice than they do independently.").

Therefore, the Court of Appeal did not act unreasonably in rejecting Petitioner's cumulative error claim. See 28 U.S.C. § 2254(d). Accordingly, Petitioner is not entitled to habeas relief on Ground Five.

VII.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting this Report and Recommendation, (2) denying the Petition for Writ of Habeas Corpus, and (3) dismissing this action with prejudice.

Dated: December 2, 2014

/ s /
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE

VIII.

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

Court of Appeal, Fourth Appellate District, Division Three - No. G043935

S203027

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

AURELIO FIDENCIO SALDIVAR, JR., Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

AURELIO FIDENCIO SALDIVAR, JR.,

Defendant and Appellant.

G043935

(Super. Ct. No. 06CF2031)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed.

Patricia Ihara, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

*

Saldivar, Aurelio Fidencio
CV 13-7757 ABC (AS)
Lodgment 6

INTRODUCTION

On the morning of June 7, 2006, a jogger found the dead body of 26-year-old Raffi Yessayan, face down, on a dirt trail in the City of Orange. Yessayan had been murdered, execution-style, by two gunshots to the back of his head at sometime between 9:15 and 9:30 p.m. the night before. He had last been seen earlier that evening in his black Nissan Altima with Aurelio Fidencio Saldivar, Jr., who was a gun-toting member of the Middleside Los Chicos criminal street gang, and two others, one of whom was another member of that gang. Cell phone records of the other gang member placed Yessayan's car near the murder scene at 9:15 p.m. At about that time, a security guard on duty nearby heard two loud gunshots.

The next day, Saldivar told an acquaintance, "there were problems and there had to be a 187," referring to the Penal Code section for murder, and told the person who had seen him the previous day in Yessayan's car, "remember that car you saw yesterday, you didn't see nothing." That night, Saldivar took Yessayan's Nissan to a "chop shop" to be dismantled. Yessayan's car keys later were found inside of Saldivar's car.

The jury convicted Saldivar of the first degree murder of Yessayan (Pen. Code, § 187, subd. (a) [count 1])[1] and participation in a criminal street gang (§ 186.22, subd. (a) [count 2]). The jury found true the special circumstance allegations that when he murdered Yessayan, Saldivar was engaged in the commission of a robbery (§ 190.2, subd. (a)(17)(A)) and was an active participant in a criminal street gang (§ 190.2, subd. (a)(22)). The jury also found true the enhancement allegations that Saldivar committed the murder for the benefit of a criminal street gang (§ 186.22, subd. (b)) and

[1] Further code references are to the Penal Code.

that, in committing the murder, he personally and intentionally discharged a firearm causing great bodily injury (former § 12022.53, subds. (d) & (e)(1)).

The trial court sentenced Saldivar to a term of life in prison without the possibility of parole under count 1 and stayed execution of sentence on count 2 and the enhancements.

We affirm the judgment in full. We disagree with Saldivar's contention the evidence was insufficient to establish the primary activities of the Middleside Los Chicos gang included criminal activities enumerated in section 186.22, subdivision (e). (See Discussion, pt. I.) The trial court was not required sua sponte to instruct the jury on theft as a lesser included offense of robbery because robbery only formed the basis for a special circumstance allegation and was not a charged offense. (See Discussion, pt. II.) Although the trial court erred by giving CALCRIM No. 1603, the error was harmless beyond a reasonable doubt. (See Discussion, pt. III.)

We reject Saldivar's claim his trial counsel, both appointed and retained, were ineffective. In part IV.B. of the Discussion, we examine each of the 15 identified instances of asserted deficient representation and conclude counsel's performance was not deficient in most cases and was deficient in some. But, as we conclude in part IV.C. of the Discussion, the overwhelming evidence of guilt establishes beyond any reasonable probability the results of the trial would not have been different in the absence of trial counsel's errors, individually or cumulatively considered.

We also reject Saldivar's argument the robbery-murder special circumstance of section 190.2, subdivision (a)(17)(A) is unconstitutionally vague (see Discussion, pt. V.) and, as we find only one instance of trial court error, conclude there was no cumulative error (see Discussion, pt. VI.). Finally, we summarily reject Saldivar's claim the trial court miscalculated presentence custody credits because Saldivar did not first seek correction in the trial court. (See Discussion, pt. VII.)

FACTS

We view the evidence in the light most favorable to the verdict and resolve all conflicts in its favor. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303.)

I.

Background

Yessayan, a member of the Family Mob gang, emigrated as a child from Russia with his parents. Although Family Mob is a "traditional Hispanic street gang," it accepted Yessayan "based on his level of participation." Yessayan had been albino and legally blind since birth and received Social Security disability income.

Saldivar is an active participant in the Middleside Los Chicos gang and has the monikers "Fat Boy" and "Bouncer." Middleside Los Chicos and Family Mob were not rival gangs but associated with each other through several women—Amy Belyea, Amie Hofstad, Seriah Martinez, and Sujey Toscano.

Though ineligible for a driver's license, Yessayan used some of his Social Security disability income to buy a black Nissan Altima with custom rims. Due to his vision impairment and lack of a driver's license, he drove the car only short distances. More often, he would let others, including Saldivar, Toscano, and Hofstad, drive the car while he sat in the front passenger seat or in the backseat, where his eyes were protected from bright light by dark-tinted windows. Toscano and Hofstad did not particularly like Yessayan, but they were willing to get together with him when he had methamphetamine to share.

II.

"If [Yessayan] Doesn't Stop Disrespecting . . . , He [Is] Going to Get Attacked."

About one month before his murder, Yessayan drove his car to pick up Toscano, her daughter, and Heriberto Tejeda, an associate of the Family Mob gang and

Yessayan's friend. Toscano took over driving the car, and, while she drove, Yessayan made unwanted sexual overtures to her. She rebuffed him and they argued.

Toscano decided she wanted Saldivar to join them and drove to his house to get him. When Saldivar got into the car, he was carrying two large handguns in holsters hanging on either side of his body. During the week before Yessayan's murder, Hofstad saw Saldivar armed with a silver-colored revolver. On many occasions, Alex Preciado, a Middleside Los Chicos associate, saw Saldivar carrying a chrome revolver.

Tejeda was scared when he saw Saldivar enter the car. Tejeda and Yessayan sat in the backseat, where Tejeda could hear Saldivar and Toscano whisper to each other. When Toscano and Saldivar insisted Tejeda be taken home, he refused because he did not want to leave his friend, Yessayan, alone with them. Instead, they drove back to Saldivar's home. Saldivar and Tejeda got out of the car, and Saldivar, still carrying the two handguns, took Tejeda aside and told him that if Yessayan did not stop "disrespecting in front of [Toscano's] little daughter, he [is] going to get attacked."

During the week before his murder, Yessayan made another sexual overture to Toscano while she drove his car. Toscano was upset.

III.

Robbery and Execution

Between 5:00 and 6:00 p.m. on June 6, 2006, Alex Preciado and his wife, Renee Preciado, drove to Saldivar's home to buy heroin. Alex Preciado and his wife noticed a black Nissan parked in front of Saldivar's house. Inside the car were Saldivar, Yessayan, a woman (possibly Seriah Martinez), and Marcos Antonio Charcas-Fernandez (Fernandez), a Middleside Los Chicos gang member with the moniker of "Youngster." Yessayan was in the backseat, and Saldivar was in the driver's seat.

Anthony Chargualaf lived down the street from Saldivar and sometimes used methamphetamine with Middleside Los Chicos gang members. At about 8:24 p.m. on June 6, Chargualaf spoke by cell phone with Saldivar, who was using Fernandez's cell

phone, to see if Saldivar wanted to get together later that evening. Saldivar said he was going to Los Angeles. Chargualaf could hear a female voice and a male voice in the background. Another call was made between Fernandez's cell phone and Chargualaf's cell phone at 8:31 p.m. Cell phone records were obtained and used to track calls made from and received by Fernandez's cell phone. When the 8:24 p.m. call was made, Saldivar and Fernandez were in the area of the intersection of the 91 and 605 Freeways and, when the 8:31 p.m. call was made, they were in Bellflower, further west.

At 8:41 p.m., two calls were made from Fernandez's cell phone to Michelle Asai. By this time, Yessayan's black Nissan had turned around and was travelling eastbound in the area of the 91 Freeway and Brookhurst Street in Anaheim/Fullerton. Another cell phone call to Asai at 9:15 p.m. established Yessayan's black Nissan was in the area of the intersection of the 91 and 57 Freeways. No more calls were made from or to Fernandez's cell phone until 9:59 p.m., when the cell phone was in Santa Ana.

At about 9:15 p.m. on June 6, a security guard at an asphalt company on East Lincoln Avenue in the City of Orange heard two loud gunshots fired eight to 10 seconds apart. The asphalt company was near a nursery that abutted a trail running along a concrete river channel. A couple watching television in their home near the nursery also heard loud gunshots sometime between 9:00 and 10:00 p.m.

On the morning of June 7, 2006, a jogger running along the path behind the nursery found Yessayan's body lying face down. The body was about 300 yards from the cell tower that had transmitted the 9:15 p.m. call from Fernandez's cell phone. A forensic analyst examined the murder scene and found a spent bullet about four inches deep in the soil under the spot where Yessayan's head had lain.

IV.

"There Were Problems and There Had to Be a 187."

Later on June 7, 2006, Chargualaf was driving by Saldivar's house and, seeing Saldivar in his driveway, stopped to ask him if he wanted to get together with

some girls. Saldivar made a hand gesture in the shape of a gun and said, "there were problems and there had to be a 187." The Penal Code section for murder is 187.

Also on June 7, Saldivar told Alex Preciado, "remember that car you saw yesterday, you didn't see nothing."

Sometime after 8:00 p.m. on June 7, Saldivar asked Chargualaf for a ride. Chargualaf drove, Saldivar was in the front passenger seat, and Belyea and another girl were in the backseat. As they drove on an overpass across the Santa Ana River, somewhere near Harbor Boulevard and Warner Avenue, Saldivar rolled down the window and threw "a bunch of shiny stuff," possibly bullets, out the window and into the riverbed below.

Also on the night of June 7, Saldivar and Ruben Oliveros, another Middleside Los Chicos gang member, appeared at the home of Jose Muniz with Yessayan's black Nissan Altima. Muniz operated the local "chop shop" where he would get rid of stolen cars by disassembling them. Oliveros asked if he could park the car in front of Muniz's home. When Saldivar and Oliveros returned the next day, Oliveros told Muniz that he and his girlfriend no longer could afford the car payments for the black Nissan. Muniz offered to take over the car payments, but Oliveros insisted that Muniz chop up the car.

Saldivar, Oliveros, and Muniz all participated in chopping up Yessayan's black Nissan. Oliveros paid Muniz $200 for his help. Oliveros took the engine, wheels, doors, hood, and trunk lid; Muniz took the interior black leather seats and whatever scrap was left.

V.

Arrest, Investigation, and Autopsy

Police officers arrested Saldivar on June 12, 2006. The officers searched his car and found Yessayan's car keys inside a "fanny pack" on the passenger seat.

When police officers searched Saldivar's house, they found gang graffiti on the inside of the garage door.

Police investigators used a metal detector to search the Santa Ana River riverbed under and around the Harbor Boulevard overpass, near the spot where Chargualaf saw Saldivar throw "shiny stuff" out the car window. The investigators found three .357 Magnum bullet casings. Two casings were Winchester, and one was Fiocchi; all the cases were corroded. The bullet found in the dirt at the murder site appeared to be a Fiocchi .357 Magnum revolver bullet.

Police officers recovered a .41-caliber Smith & Wesson handgun from the home of Victor Enciso, an active participant in the Middleside Los Chicos gang. Forensic testing established that gun could not have fired the bullet found at the murder site.

Dr. Joseph Halka, who conducted Yessayan's autopsy, testified Yessayan had been shot twice in the head and died from the second gunshot. A contact wound behind Yessayan's right ear showed that the barrel of the gun had been placed against Yessayan's head when it was first fired. The bullet entered behind Yessayan's right ear and exited above the top of his right ear without penetrating the skull. The bullet fractured Yessayan's skull and probably caused a concussion, but was not fatal. The second gunshot was aimed from behind Yessayan's left ear from a distance of six to 18 inches. The second bullet was fatal; it entered Yessayan through the back of his head, passed through his brain, and exited from his right cheek. Bleeding from the second wound indicated that Yessayan was still alive when the second gunshot was fired.

VI.

Gang Expert Testimony

Police Detective Craig Brown, the lead investigator in the case, testified at trial as a gang expert. He testified that Yessayan was a member of the Family Mob, a Costa Mesa gang, and that Saldivar, Oliveros, and Fernandez were members of

Middleside Los Chicos, a Santa Ana gang. In December 2003, Saldivar told a police officer he had been "jumped"[2] into Middleside Los Chicos gang 10 years earlier.

After recounting the history of the Middleside Los Chicos gang, Brown testified that in June 2006 and at the time of trial, that gang had about 50 active members. Brown explained gang structure as a series of concentric rings. At the hardcore center are the "O.G.'s," who call the shots and who are feared and respected because they have proven to be extremely violent. Around the O.G.'s is a ring of gang members who perform the work for the gang. The people in this ring are trusted to be violent, back up other gang members, and sell drugs. Next is a ring of persons who participate in gang activities but have not formally become gang members. Finally, at the periphery, there is a ring of semiactive gang participants who might show up at gang parties but who do no work for the gang. Muniz and Chargualaf, for example, were part of this peripheral ring of semiactive gang members.

In the culture of Hispanic street gangs, respect is gained through violence and intimidation. Disrespecting a gang member can lead to violent "payback," which must be equal to or greater than the disrespect. Minor acts and social indiscretions, such as staring, failing to nod, or whistling at a gang member's girlfriend, are viewed by gang members as disrespect deserving of payback. Brown explained that an unwanted romantic advance made by a gang member toward a female friend of a member of a nonrival gang is a form of disrespect. Women, Brown explained, are considered gang property and are "the most common catalyst for gang crimes."

Guns, as well as women, are considered gang property. Higher ranking gang members generally carry and brandish the guns. All gang members of ranking status have access to the gang gun, which might be stored at a gang member's house or

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[2] "Jumping in" is a means by which someone becomes a gang member by physically confronting two or more gang members and by getting beaten up.

passed around. Carrying a gun and killing people bolsters a gang member's status and reputation.

Brown explained that anybody—whether or not a gang member—who cooperates with law enforcement is considered a "rat." Within gang culture, a rat is violating the unwritten rules and could be beaten up or even killed. The rules of gang culture go so far as to prohibit a gang member from providing information to law enforcement about a crime committed by a rival gang member. During trial, Jesus Garcilazo refused to testify despite a grant of transactional immunity and was held in civil contempt. Brown identified Garcilazo as a Family Mob gang member and explained he refused to testify because doing so would have violated the rules of gang culture, even though he and Yessayan were members of the same gang.

Brown testified Middleside Los Chicos gang members Joseph Preciado and Joseph John Mason each committed a prior crime. Preciado was convicted of vehicle theft committed in February 2004. Mason was convicted of assault with a deadly weapon and street terrorism under section 186.22, subdivision (a). A true finding was made on the gang enhancement allegation (§ 186.22, subd. (b)(1)) against Mason.

When presented with a hypothetical mirroring the facts of this case, Brown testified the crime was committed at the direction of and for the benefit of the gang. The murder would enhance the status and reputation for violence of the gang members and the gang itself.

DISCUSSION

I.

The Evidence Was Sufficient to Support the Conviction for Participation in a Criminal Street Gang.

Saldivar argues the conviction under count 2 for participation in a criminal street gang must be reversed because the evidence was insufficient to establish the

primary activities of Middleside Los Chicos gang included criminal conduct identified in section 186.22, subdivision (e). We conclude the evidence sufficed.

In assessing the sufficiency of the evidence, we review the record in the light most favorable to the judgment, draw all reasonable inferences in its favor, and determine whether the judgment contains substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294; *People v. Manriquez* (2005) 37 Cal.4th 547, 576.) Substantial evidence means evidence which is reasonable, credible, and of solid value. (*People v. Gonzales and Soliz*, *supra*, at p. 294.) Reversal is unwarranted unless it appears "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation]." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 186.22, subdivision (a) states, in relevant part: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment . . . ."

The phrase "criminal street gang" is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) Among the criminal acts listed in section 186.22, subdivision (e) are assault with a deadly weapon, robbery, unlawful homicide or manslaughter, theft and unlawful taking or driving of a vehicle, and prohibited possession of a firearm. (§ 186.22, subd. (e)(1), (2), (3), (25) & (31).)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.)

Evidence of past or present criminal acts listed in section 186.22, subdivision (e) is admissible to prove a criminal street gang's primary activities. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 323.) The crimes relied on to establish the primary activities of a gang need not be gang related (*People v. Gardeley* (1996) 14 Cal.4th 605, 621, 624, fn. 10 (*Gardeley*)) and may include the charged offense (*People v. Loeun* (1997) 17 Cal.4th 1, 5). A criminal street gang's primary activities may be established through expert testimony. (*People v. Sengpadychith*, *supra*, at p. 324.)

Here, evidence of the primary activities of Middleside Los Chicos came through Detective Brown. Although he did not directly testify that criminal activities were the primary activities of Middleside Los Chicos, he identified several crimes committed by gang members. He testified that Joseph Preciado, a Middleside Los Chicos gang member, was convicted of vehicle theft committed in February 2004 and that Joseph John Mason, another Middleside Los Chicos gang member, was convicted of assault with a deadly weapon and street terrorism under section 186.22, subdivision (a). The latter crime, Brown testified, occurred in February 2004 and "involv[ed] multiple members of Middleside." The crime of murder, for which Saldivar was charged and convicted, and the uncharged crime of robbery, for which the jury found true the robbery-murder special-circumstance allegation constituted additional evidence of the Middleside Los Chicos gang's primary activities.

Brown also testified that Saldivar had corresponded with James Cardwell Boxer, a Middleside Los Chicos gang member, who was incarcerated "for a Middleside murder." Brown identified Middleside Los Chicos gang member George Andrade in a

photograph and testified Andrade was in custody "for a Middleside gang homicide where they kidnapped and burned to death an individual." Saldivar argues the crimes committed by Boxer and Andrade cannot be considered as proof of the gang's primary activities because Brown's testimony was hearsay and vague. Experts may rely on hearsay in forming their opinions (*Gardeley*, *supra*, 14 Cal.4th at p. 618), and Brown's testimony was sufficiently specific.

In assessing the sufficiency of the evidence of the Middleside Los Chicos gang's primary activities, we do not consider the murder purportedly committed by Boxer because the prosecutor told the jury in closing argument that crime was "not a predicate case." We do, however, consider Brown's testimony about the murder for which Andrade was incarcerated. Brown's testimony on that subject was as sound and reliable as an expert's conclusion that a gang was primarily engaged in crimes enumerated in section 186.22, subdivision (e), and such a conclusion would be admissible and probative of a gang's primary activities. (See *Gardeley*, *supra*, 14 Cal.4th at p. 620.)

In arguing sufficient evidence was presented of the Middleside Los Chicos gang's primary activities, the Attorney General relies on two cases: *People v. Vy* (2004) 122 Cal.App.4th 1209, 1225 (*Vy*) and *People v. Duran* (2002) 97 Cal.App.4th 1448 (*Duran*). In *Vy*, *supra*, 122 Cal.App.4th at page 1225, the prosecution identified two felony assaults occurring within the same year and the charged offense of attempted murder as evidence of the gang's primary activities. In addition, a gang expert testified the gang was engaged in criminal actions that constituted predicate crimes under the gang statute. (*Id.* at p. 1226.) The Court of Appeal held this evidence was sufficient to support the jury's finding the gang's primary activities included criminal acts. (*Ibid.*)

In *Duran*, *supra*, 97 Cal.App.4th at page 1465, the gang expert testified the gang's primary activity was "'putting fear into the community,'" which he clarified as "'often these gang members are committing robberies, assault with deadly weapons,

narcotics sales, and they're doing it as a group.'" The prosecution also identified one conviction for possession of cocaine base for sale and the charged offense as evidence the gang's primary activities included criminal acts. (*Id.* at pp. 1458, 1465.) The Court of Appeal concluded this evidence was sufficient to support the jury's true finding on the gang enhancement. (*Id.* at pp. 1465-1466.)

In contrast, Saldivar relies on *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*) and *People v. Perez* (2004) 118 Cal.App.4th 151 (*Perez*) to support his argument the crimes committed by Joseph Preciado and Mason, and the charged offenses, were insufficient to show that crime was a primary activity of Middleside Los Chicos. In *Alexander L.*, the petition alleged the juvenile committed vandalism ("'tagg[ing]'") for the benefit of a criminal street gang. (*Alexander L.*, *supra*, at p. 609.) At trial, the gang expert's complete testimony on the gang's primary activities was this: "'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" (*Id.* at p. 611.) The Court of Appeal, reversing the true finding on the gang enhancement, concluded the expert's testimony lacked an adequate foundation and "[the expert]'s conclusory testimony cannot be considered substantial evidence as to the nature of the gang's primary activities." (*Id.* at p. 612.) Although the expert also had testified about two specific crimes committed by gang members in 2004, the court concluded those two crimes, without more, did not provide substantial evidence to support the primary activities requirement. (*Id.* at pp. 612-613, 614.)

In *Perez*, *supra*, 118 Cal.App.4th at pages 157, 160, the prosecution relied on the charged offense, an attempted murder six years earlier, and several unsubstantiated shootings as evidence of the gang's primary activities. The gang expert did not testify in general about the gang's primary activities. (*Id.* at p. 160.) The Court of Appeal

concluded this evidence was insufficient to establish the gang's primary activities included criminal conduct. (*Ibid.*)

The evidence of the Middleside Los Chicos gang's primary activities places this case somewhere between *Vy* and *Duran*, at one end, and *Alexander L.* and *Perez*, at the other. Here, there was evidence of four crimes (including the Andrade crime) committed by Middleside Los Chicos gang members—two more than in *Alexander L.*, *Duran*, and *Perez* (excluding the unsubstantiated shootings)—and one more than in *Vy*. But the gang expert in this case, unlike his counterparts in *Vy* and *Duran*, did not directly testify that the primary activities of Middleside Los Chicos included criminal conduct.

On balance, we believe the evidence was sufficient to support a finding the Middleside Los Chicos gang's primary activities included crimes enumerated in section 186.22, subdivision (e). The crimes committed by Joseph Preciado and Mason occurred within the same month, and Mason's crime involved "multiple" Middleside Los Chicos gang members. Three of the crimes—two murders and an assault with a deadly weapon—were heinous. The evidence showed more than the occasional commission of crimes by Middleside Los Chicos gang members.

II.

The Trial Court Was Not Required to Give Jury Instructions on Theft.

Saldivar argues the trial court erred by failing to instruct the jury on theft as a lesser included offense of robbery. He was not charged with robbery; instead, robbery was the underlying predicate felony for the felony-murder special-circumstance allegation. "[W]hen robbery is not a charged offense but merely forms the basis for a felony-murder charge and a special circumstance allegation, a trial court does not have a sua sponte duty to instruct the jury on theft." (*People v. Valdez* (2004) 32 Cal.4th 73, 110-111.) The Attorney General does not cite *People v. Valdez*. With laudable candor,

Saldivar cites that case in the appellant's reply brief, but argues nonetheless the trial court had a sua sponte duty to instruct on theft because theft was raised by the evidence and instruction on theft was necessary to the jury's understanding of the case. We disagree.

Saldivar relies on the principle that "[i]n criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case." (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) The California Supreme Court has rejected the argument the trial court's duty to instruct on all applicable principles of law extends to lesser included offenses of an uncharged crime forming the predicate of the felony-murder rule. (*People v. Cash* (2002) 28 Cal.4th 703, 737.)

Instruction on theft neither would have been relevant to issues raised by the evidence nor necessary for the jury's understanding of the case. To decide whether Saldivar murdered Yessayan in the course of committing a robbery, the jury did not have to understand the elements of theft.

III.

Any Error in Instructing the Jury with CALCRIM No. 1603 Was Harmless.

Saldivar argues the trial court erred by instructing the jury with CALCRIM No. 1603, entitled "Robbery: Intent of Aider and Abettor." In a related argument, Saldivar asserts that because the trial court gave CALCRIM No. 1603, it should have given, or his trial counsel should have requested, a pinpoint instruction informing the jury that to convict under a felony-murder theory, it had to find he formed the intent to steal the car or aid and abet the robbery before Yessayan was shot.

The jury was instructed that Saldivar was being prosecuted for first degree murder under two theories: (1) the murder of Yessayan was willful, deliberate, and premeditated; and (2) the murder was committed during the course of a robbery—i.e.,

felony murder. The jury was instructed it could not convict Saldivar of first degree murder unless all jurors agreed the prosecutor had proved he committed murder, "[b]ut all of you do not need to agree on the same theory."

On the second theory, felony murder, the trial court read jury instructions on aiding and abetting, including CALCRIM No. 1603, which states: "To be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid and abet the commission of the robbery before or while a perpetrator carried away the property to a place of temporary safety. [¶] A perpetrator has reached a place of temporary safety with the property if he or she has successfully escaped from the scene, is no longer being pursued, and has unchallenged possession of the property."

Saldivar argues it is error to give CALCRIM No. 1603 when a defendant is charged with felony murder because the instruction permits a jury to convict a defendant who formed the intent to aid and abet the robbery after the act causing death. He is correct. A bench note to CALCRIM No. 1603 states: "**Do not** give this instruction if the defendant is charged with felony murder." (Judicial Council of Cal., Crim. Jury Instns. (2012) Bench Notes to CALCRIM No. 1603, p. 1220.) "[CALCRIM No. 1603] could well suggest to a jury that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule." (*People v. Pulido* (1997) 15 Cal.4th 713, 728.)

Saldivar argues the error in giving CALCRIM No. 1603 is reviewed under the *Chapman v. California* (1967) 386 U.S. 18 "beyond a reasonable doubt" prejudicial error standard because that instruction conflicted with others read to the jury and removed from its consideration the issue of intent to aid and abet the predicate act. (See *People v. Lee* (1987) 43 Cal.3d 666, 674-676 [if conflicting instructions on the mental state element of an alleged offense remove that element from the jury's consideration, the instructions constitute a denial of federal due process and invoke the *Chapman* "beyond a reasonable doubt" standard].) We will assume, for purposes of argument, that Saldivar is

correct. Under the *Chapman* standard, we ask whether it appears "beyond a reasonable doubt" the error in giving CALCRIM No. 1603 "did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, at p. 24.) We conclude other jury instructions and the special circumstance verdict establish the error was not prejudicial under the *Chapman* standard.

In addition to giving CALCRIM No. 1603, the trial court instructed the jury with a modified CALCRIM No. 540A, as follows: "The defendant is also charged in count 1 with murder under a theory of felony murder. [¶] To prove that the defendant is guilty of first degree murder under this theory, the People must prove that: number one, the defendant committed robbery; number two, the defendant intended to commit robbery; and, number three, while committing robbery, the defendant did an act that caused the death of another person. [¶] . . . [¶] . . . *The defendant must have intended to commit the felony of robbery before or at the time of the act causing the death.*" (Italics added.) The trial court also gave a modified CALCRIM No. 540B, which instructed the jury on felony murder when the defendant did not commit the act causing death but aided and abetted the perpetrator. That instruction concluded by stating: "*The defendant must have intended to commit or aid and abet the felony of robbery before or at the time of the act causing the death.*" (Italics added.)

While CALCRIM No. 1603 generally deals with aiding and abetting a robbery, CALCRIM Nos. 540A and 540B specifically deal with robbery as the predicate crime for felony murder. In addition, the jury was given CALCRIM No. 730, which is specifically directed to the robbery-murder special-circumstance allegation, modified and read to the jury as follows: "The defendant is charged with the special circumstance of murder committed while engaged in the commission of robbery in violation of Penal Code section 190.2(a)(17). [¶] To prove that this special circumstance is true, the People must prove that: Number one, the defendant committed or aided and abetted a robbery; number two, the defendant intended to commit or intended to aid and abet the perpetrator

in committing a robbery; number three, if the defendant did not personally commit or attempt to commit the robbery, then a perpetrator whom the defendant was aiding and abetting before or during the killing personally committed robbery; number four, the defendant did an act that caused the death of another person; and, number five, the act causing the death and the robbery were part of one continuous transaction. [¶] . . . [¶] *The defendant must have intended to commit or aided and abetted the felony of robbery before or at the time of the act causing death.*" (Italics added.)

The italicized passage told the jury that to find the robbery-murder special-circumstance allegation to be true, the jury had to find that Saldivar must have formed the intent to commit or aid and abet the robbery before or at the time of the act causing Yessayan's death. We presume the jury followed the trial court's instructions (*People v. Boyette* (2002) 29 Cal.4th 381, 436), and the jury returned a verdict finding the robbery-murder special-circumstance allegation to be true. Thus, the jury must have found that Saldivar formed the requisite intent before or at the time Yessayan was shot and killed. The error in giving CALCRIM No. 1603 did not, beyond any reasonable doubt, contribute to the verdict.

The italicized passage from modified CALCRIM No. 730 was in substance, if not in precise terms, the pinpoint instruction that Saldivar argues should have been given to the jury. Saldivar's trial counsel therefore was not ineffective for failing to request such a pinpoint instruction.

IV.

Saldivar Fails to Establish Ineffective Assistance of His Trial Counsel.

A. *Introduction and Legal Standards*

In seeking reversal for ineffective assistance of counsel, Saldivar identifies some 15 instances in which, he contends, his trial counsel's representation was deficient

for failing to object to or move to strike objectionable evidence, failing to object to or move to strike objectionable argument or statements made by the prosecutor, introducing or eliciting testimony harmful to him, and arguing against his interests.

To prevail on a claim of ineffective assistance of counsel, Saldivar must prove both (1) his attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards; and (2) his attorney's deficient representation subjected him to prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Cain* (1995) 10 Cal.4th 1, 28.) Prejudice means a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington*, *supra*, at p. 694.) A reasonable probability means a "probability sufficient to undermine confidence in the outcome." (*Ibid.*)

"'"[W]e accord great deference to counsel's tactical decisions" [citation], and we have explained that "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts."'" (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.)

"Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) We reverse on direct appeal for ineffective assistance of counsel only when "the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions." (*People v. Lucas* (1995) 12 Cal.4th 415, 442.)

In part IV.B. of the Discussion, we examine each identified claim of ineffective assistance of counsel and determine in each instance whether trial counsel's representation was deficient. In part IV.C. of the Discussion, we determine whether those instances in which representation was deficient cumulatively caused Saldivar to suffer prejudice.

B. *Asserted Deficiencies in Representation*

1. Evidence of the .41-caliber Handgun

Police officers found a .41-caliber Smith & Wesson handgun at Enciso's home. That gun was received in evidence although it was not the murder weapon. Brown testified that Enciso had told him that Oliveros and Fernandez came to Enciso's house on June 12, 2006, told Enciso "the neighborhood was hot" and "they didn't want to get caught with the gun," and asked him to hold the gun for them. Saldivar's trial counsel did not object or move to strike Brown's testimony.

Saldivar argues his trial counsel was ineffective for not objecting to admission of the .41-caliber handgun and not objecting or moving to strike Brown's testimony of Enciso's hearsay statements. He points out that during closing argument, the prosecutor reminded the jury the .41-caliber handgun, received as exhibit 6, was the gun Oliveros gave to Enciso, not the gun used to kill Yessayan. The prosecutor told the jury: "It [(the gun)] is not for effect. It is to explain about guns, about what happened. About [Oliveros] and [Fernandez] taking this to Mr. Enciso."

"[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) There were rational tactical reasons for not objecting to Brown's testimony or the prosecutor's closing argument; for instance, the desire not to emphasize the testimony or argument, or not to seem obstreperous. (*People v. Frierson* (1991) 53 Cal.3d 730, 749 ["in the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings"].) The trial court instructed the jury it

could consider statements made by other persons to Brown only to evaluate Brown's opinion, not for the truth. We presume the jury followed the instruction. (*People v. Thomas* (2011) 51 Cal.4th 449, 489.)

Objecting to the .41-caliber handgun is, however, a different matter. The relevance of that handgun was tenuous, at best, because it was not used to kill Yessayan. Receipt in evidence of the .41-caliber handgun was unnecessary to establish the importance of guns in gang culture or the use of gang guns because Brown could and did testify on those issues based on reliable hearsay. The failure to object to the .41-caliber handgun could not be justified by the heat of trial because the prosecutor's motion to receive the prosecution's exhibits in evidence was made at the end of trial, outside the jury's presence. The record does not reveal a rational tactical purpose for failing to object to the receipt in evidence of the .41-caliber handgun at that time.

2. Threats to Muniz

Muniz testified that, after he had agreed to testify, two men from Middleside Los Chicos beat him up, threatened to kill him, called him a rat, and swore at him. On further questioning, he testified a couple of Middleside Los Chicos gang members put a gun to his son's head, forcing Muniz and his family to move out of the area even though he had lived in Santa Ana his entire life. At the request of Saldivar's trial counsel, the court read to the jury a limiting instruction stating the jury could consider this testimony only to evaluate Muniz's credibility.

During closing argument, the prosecutor asserted Garcilazo had invoked his Fifth Amendment rights and refused to testify out of fear of reprisal. The prosecutor used Muniz's testimony as an example of what could have happened to Garcilazo: "[L]ooking at the 38 years in Santa Ana, gets beat up by a bunch of Middlesiders. He said they are saying, 'rat, rat.' His tooth is knocked out, a gun held to his kid's head, and he leaves." In explaining why other witnesses were afraid to testify, the prosecutor stated, "Muniz,

beaten up" and later referred to Muniz as the one "who got the tar beat out of him and his tooth knocked out, and [had a] gun held to [his] kid's head and split and [moved] away."

Saldivar argues his counsel was ineffective for failing to object to the prosecutor's use of Muniz's testimony "beyond the limited purpose the jury was permitted to use." As we have explained, "[d]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 502.) Saldivar's trial counsel might have believed that objecting would only draw attention to Muniz's testimony and emphasize the prosecutor's argument, and that objecting was unnecessary due to the trial court's limiting instruction.

3. "Jumping Out" Testimony

Brown testified that "jumping out" is a ritual during which a gang member is beaten before being allowed to leave the gang. He testified the severity of the beating during a jumping out ritual is worse than that for being jumped in, and he knew of people who had died from being jumped out of a gang. Saldivar argues his trial counsel should have objected to or moved to strike this testimony on relevance grounds because no evidence in the case involved a gang member leaving a gang, and the evidence was highly inflammatory.

The testimony about jumping out of a gang was relevant to show the culture, sociology, and habits of criminal street gangs. (*Gardeley*, *supra*, 14 Cal.4th at p. 617.) Saldivar's trial counsel was not ineffective "by failing to make motions or objections that counsel reasonably determines would be futile." (*People v. Price* (1991) 1 Cal.4th 324, 387.)

4. "Sexed In" Testimony

Brown testified about the means by which women are "sexed" into a gang. He testified a woman is initiated into a gang by having sex with all of the male gang members or with female gang members in a public setting. During closing argument, the

prosecutor told the jury that Hofstad was "kind of the bait" to lure men like Yessayan and, in explaining the concept of "backup," referred to the gang's "crazy, sick rituals," such as "[s]exing women into the gang." Saldivar argues his trial counsel was ineffective for failing to object to Brown's testimony and to the prosecutor's comments about sexing in female gang members.

The testimony about sexing in female gang members was relevant to show the culture, sociology, and habits of criminal street gangs. (*Gardeley*, *supra*, 14 Cal.4th at p. 617.) In addition, testimony about sexing in female gang members was relevant to understanding the nature, function, and role of women within gangs, and, therefore, was relevant to the issue of a motive for Yessayan's killing.

5. Gang Graffiti Testimony

Saldivar argues Brown's testimony about the use and significance of graffiti in gang culture was irrelevant and highly inflammatory because the only evidence of gang graffiti was of graffiti found on the inside of Saldivar's garage door, where it could not be seen publicly. He argues his trial counsel was ineffective for not objecting to the testimony about gang graffiti.

The testimony about gang graffiti was relevant to showing the culture, sociology, and habits of criminal street gangs. (*Gardeley*, *supra*, 14 Cal.4th at p. 617.) Gang graffiti, in particular, is a recognized topic of expert testimony. (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657.) Evidence of gang graffiti was relevant too to establish Saldivar was an active gang participant. Saldivar's trial counsel was not ineffective "by failing to make motions or objections that counsel reasonably determines would be futile." (*People v. Price*, *supra*, 1 Cal.4th at p. 387.)

6. Alex Preciado's Testimony

Alex Preciado, a prosecution witness, testified on direct examination he went to Saldivar's house during the early evening of June 6, 2006 to buy drugs and saw Yessayan's black Nissan Altima parked outside. Alex Preciado testified he saw Saldivar,

Fernandez, Yessayan, and a woman inside the car. Alex Preciado also testified that on June 7, Saldivar told him, "remember that car you saw yesterday, you didn't see nothing."

On cross-examination, Saldivar's counsel asked Alex Preciado if he was "doing heroin at the time." He answered, "[c]orrect." Saldivar's counsel later asked whether Alex Preciado had a specific recollection of being at Saldivar's home on June 6, 2006. After he answered that he did not, Saldivar's counsel asked, "[h]ow many times have you been to Mr. Saldivar's home?" Ensuing questions and answers established Preciado had been to Saldivar's home more than 50 times over more than 10 years. No mention was made of buying heroin.

On redirect examination, the prosecutor asked Alex Preciado if there was more than one date in 2006 on which he went to Saldivar's house to buy heroin and saw Saldivar and others in Yessayan's black Nissan parked outside. Alex Preciado answered, "just one time." In a sidebar conference relating to a different question, Saldivar's trial counsel stated, "I know [the prosecutor] had asked [Alex Preciado] about whether he had gone there or not on other occasions, numerous occasions to buy heroin from my client. I was under the impression that we weren't going to get into the impression of my client's heroin dealing." The trial court offered to give the jury an admonition and instruction. The prosecutor explained he was not trying to establish that Alex Preciado had been to Saldivar's home many times to buy drugs, but the opposite—"[t]hat he hadn't gone there and had all these same series of things happen over and over." In response, Saldivar's trial counsel argued, "to say, 'how many times have you been over there buying heroin' assumes, first of all, facts not in evidence. And beyond that, I don't know that it is really that probative under [Evidence Code section] 352."

Saldivar asserts his trial counsel's questioning of Alex Preciado elicited testimony about Saldivar's drug dealing. Saldivar's counsel did not seek to elicit

testimony from Alex Preciado that he had been to Saldivar's house many times to buy heroin; counsel simply asked Preciado how many times he had been to Saldivar's house.

There was a rational tactical purpose for that line of questioning: To undermine the accuracy and credibility of Alex Preciado's testimony placing Saldivar, Fernandez, and Yessayan in Yessayan's black Nissan Altima during the evening of the murder. To undermine Alex Preciado's credibility, Saldivar's trial counsel made the decision to elicit testimony establishing Preciado had visited Saldivar's home on numerous occasions and therefore could not remember whether he saw Saldivar in the black Nissan specifically on June 6, 2006 or at some other time. Trial counsel's representation of Saldivar was not deficient for eliciting this testimony.

7. Cumulative and Gruesome Photographs

Saldivar argues his trial counsel was ineffective for failing to object to photographs of Yessayan's corpse and to a photograph of Yessayan at his high school graduation. Six enlarged color autopsy photographs of Yessayan were shown to the jury. Four of the photographs show Yessayan's corpse displayed on an autopsy table, with projectile rods placed in the head to show the trajectories of the bullets, and two other photographs show the wounds to Yessayan's head without the projectile rods. Also, eight enlarged color photographs of Yessayan's corpse at the crime scene were received in evidence. During the testimony of Yessayan's father, the prosecution introduced an enlarged color photograph of Yessayan, in graduation robes and smiling, at his high school graduation.[3]

In support of the argument his trial counsel was ineffective, Saldivar cites *People v. Burns* (1952) 109 Cal.App.2d 524 and *People v. Marsh* (1985) 175 Cal.App.3d 987, both of which concluded the trial court erred by receiving in evidence gory autopsy

[3] We received from the superior court all of the photographs of Yessayan that were received in evidence at trial. Saldivar also attached photocopies of the autopsy photographs to his reply brief.

photographs of the victim. More recently, in *People v. Booker* (2011) 51 Cal.4th 141, 170, the California Supreme Court stated: "Defendant cites a variety of cases, some more than 50 years old, for the proposition that a trial court can abuse its discretion by admitting particularly gruesome photographs. As a general rule this may be true, but cases of more recent vintage have recognized that photographs of murder victims are relevant to help prove how the charged crime occurred, and that in presenting the case a prosecutor is not limited to details provided by the testimony of live witnesses. [Citations.]"

The autopsy photographs were admissible to show the trajectory of the bullets and their sequence, supporting the conclusion of an execution-style murder. The prosecutor was not limited to Dr. Halka's testimony in proving the manner of killing. (*People v. Booker*, *supra*, 51 Cal.4th at pp. 170, 171.) Although, as Saldivar argues, there was no dispute about the trajectory of the bullets, "'[t]he state is not required to prove its case shorn of photographic evidence merely because the defendant agrees with a witness or stipulates to a fact.'" (*People v. Boyette*, *supra*, 29 Cal.4th at p. 424.) Saldivar's trial counsel was not ineffective "by failing to make motions or objections that counsel reasonably determines would be futile." (*People v. Price*, *supra*, 1 Cal.4th at p. 387.)

The crime scene photographs were admissible to demonstrate not only that Yessayan was murdered execution-style, but to demonstrate Yessayan was murdered, a fact placed in issue by Saldivar's not guilty plea. (*People v. Booker*, *supra*, 51 Cal.4th at p. 171 ["defendant's plea of not guilty put all elements of each offense at issue"].) "Despite the graphic nature of some of these photographs, the prosecution may present a persuasive and forceful case and, except as limited by Evidence Code section 352, it is not required to sanitize its evidence." (*Ibid.*)

Saldivar argues the large "blowup" photographs of Yessayan's corpse at the crime scene were cumulative, and "[o]ne or two carefully selected photos would have been sufficient." Given the strength of the evidence against Saldivar, we conclude there

was no reasonable probability the result of the trial would have been different if his trial counsel had objected to some of the crime scene photographs as cumulative. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

Saldivar argues the photograph of Yessayan, taken at his high school graduation several years before his death, was calculated to produce "a knee-jerk reaction of sympathy" for him. "Courts should be cautious in the guilt phase about admitting photographs of murder victims while alive, given the risk that the photograph will merely generate sympathy for the victims. [Citation.] But the possibility that a photograph will generate sympathy does not compel its exclusion if it is otherwise relevant. [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 331.) The Attorney General argues the photograph was admissible to identify Yessayan—a questionable theory of relevance, given the victim's identity was not in dispute and no eyewitnesses to the crime testified. The photograph of Yessayan at his high school graduation arguably was admissible to counter evidence of unsavory aspects of his life—i.e., he was a gang member, used methamphetamine, and supplied it to others. Assuming Saldivar's counsel was ineffective for failing to object to the photograph of Yessayan at his high school graduation, we find no prejudice in light of the strong evidence of Saldivar's guilt.

8. Testimony Interpreting Saldivar's Tattoos

A photograph of Saldivar showed he had a tattoo of women behind whom was a man holding a double-barreled shotgun with smoke coming out of it. Brown interpreted the tattoo to mean Saldivar is a "lady's man" who is willing to protect his women with violence, and the double-barreled shotgun meant Saldivar had been a shooter in some crime. Saldivar also had a tattoo of a skull with a bullet hole in it, which Brown interpreted to mean Saldivar had engaged in violent acts. Saldivar's trial counsel did not object to Brown's testimony interpreting the tattoos.

Saldivar argues Brown's interpretation of the tattoos was "a backdoor way to implicate Saldivar in prior crimes of violence which is bad character evidence." There

was nonetheless a rational tactical reason for not objecting to Brown's testimony. The jury saw photographs of Saldivar's tattoos. If Saldivar's trial counsel had objected to an interpretation of the tattoo, which the jury could already see, he risked being perceived by the jury as trying to prevent it from hearing relevant evidence.

9. Renee Preciado's Testimony

Saldivar argues his trial counsel was ineffective because he mentioned or asked questions of witnesses eliciting speculation about Saldivar's drug use. Specifically, counsel asked Renee Preciado whether she had been to Saldivar's house at least 50 times. She answered "[y]es." Later, counsel asked Renee Preciado a series of questions about statements she made to the police on June 26, 2006:

"Q. [Saldivar's trial counsel] . . . In fact, you even went on to say [to the police] that you saw Mr. Saldivar in the front seat kind of fiddling with something. You thought he might be rolling a joint or something, right?

"A. [Renee Preciado] Yes.

"Q. You could see this girl clearly enough in the front passenger seat, you could see that she had rings under her eyes, kind of black, correct?

"A. Yes.

"Q. You thought she was cute and you were wondering why would she even be with Aurelio, right?

"A. Yes.

"Q. You remember those details specifically, right?

"A. Yeah. Well, whenever my husband communicates with somebody it is my job to make sure, you know, I know who he is communicating with.

"Q. Right. Because you don't want him with some girl who is smoking meth or doing stuff and having—I think you even said that in your interview. You don't want your husband exposed to some loose woman, right?

"A. Yes."

Rational tactical purposes for this line of questioning were (1) to undermine the credibility of Renee Preciado's trial testimony that she saw Yessayan in the backseat of the black Nissan Altima on the evening of June 6, 2006 and (2) to reinforce Renee Preciado's statement to the police on June 26 she did not see Yessayan in the car. Counsel's questioning was intended to establish that Renee Preciado looked carefully into the black Nissan Altima on June 6 and made mental notes about whom and what she saw inside. When she was interviewed by the police 20 days after the murder, when her memory was fresher, she denied seeing Yessayan in the black Nissan. Trial counsel's representation of Saldivar was not deficient for eliciting this testimony.

10. Prosecutor's Explanation of Natural and Probable Consequences Doctrine

Saldivar argues his trial counsel was ineffective for failing to object when, during closing argument, the prosecutor explained the natural and probable consequences doctrine in this way: "Now, natural and probable consequences is, again, sort of one of those misleading . . . titles that we have because it doesn't really have to be natural and probable. What it just has to be is within the continuum or within the universe or within the possibility of things that might happen. It doesn't even have to be something you believe."

Under the natural and probable consequences doctrine, "[a] person who encourages or facilitates the commission of a crime is criminally liable not only for that crime, but also for any other crime that is a natural and probable consequence of the target crime. [Citation.]" (*People v. Hoang* (2006) 145 Cal.App.4th 264, 269.) "A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes." (CALCRIM No. 402.)

Although the prosecutor misstated the natural and probable consequences doctrine, by objecting, Saldivar's trial counsel might have appeared obstreperous, called attention to the argument, and prompted sidebar discussions that could have annoyed the jury. Risking a negative reaction from the jury might have seemed unnecessary given

that the jury would be instructed: "You must follow the law as I explain it to you even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We presume the jury followed this and all other instructions (*People v. Thomas*, *supra*, 51 Cal.4th at p. 489), and, therefore, counsel's failure to object would not have been prejudicial in any event.

11. Argument Regarding Other Gang Crime

Saldivar argues his trial counsel argued against him in closing argument by emphasizing an unsubstantiated crime allegedly committed by Andrade. In so doing, Saldivar argues, his trial counsel breached the duty to represent him "zealously within the bounds of the law and to refrain from arguing against his client." (*People v. Cropper* (1979) 89 Cal.App.3d 716, 720.)

Brown testified that in searching Fernandez's house, he found a photograph of George Andrade who "is presently in custody for a Middleside gang homicide where they kidnapped and burned to death an individual from Santa Nita." Saldivar contends this description of Andrade was admissible only as a basis for Brown's opinion that Fernandez was a gang member. In closing argument, Saldivar's trial counsel described the crime committed by Andrade as a "predicate crime" and "one of these vicious gang members burned another human being." Saldivar's counsel argued: "Does that have anything to do with my client? Well, if it is one of his fellow gang members, yes. Under the theory that these guys are committing certain crimes that are listed in the Penal Code. But what does it do to you as jurors? [¶] Can you imagine a human being set ablaze? Imagine the horror of that. If that's not inflaming, if that's not an emotional issue, what is? [¶] There is no evidence that . . . my client . . . had anything to do with the burning of this guy. . . . I mean, this is just a predicate offense. But don't let that kind of stuff interfere, because in this case my client is on trial for murder."

On rebuttal, the prosecutor stated: "Detective Brown used the fact that the defendant has been writing to someone named Boxer in a different case, not a predicate

case, who is tried for murder or been convicted for murder. One of the two of burning another human being alive, and that person [*sic*] is Middleside."

Trial counsel's description of the crime allegedly committed by Andrade as a predicate crime was not a mistake because, as we have concluded, that crime may be considered in determining whether Middleside Los Chicos's primary activities include criminal conduct listed in section 186.22, subdivision (e). More problematic is the decision by Saldivar's counsel to mention that crime in closing argument. There are tactical reasons for doing so—blunting the impact of the photograph and Brown's testimony, distancing Saldivar from that crime, refocusing the jury on the charged offenses, and suggesting the prosecutor was trying to inflame the jury. Although these reasons support trial counsel's tactical decision, we have included this instance of asserted deficient performance in analyzing cumulative prejudice.

12. Counsel's Concession Middleside Los Chicos is a Criminal Street Gang

In closing argument, Saldivar's trial counsel stated, "I think the government has made a very, very good case that Middleside is a criminal street gang. They have proven that. But you see, Middleside is not on trial." Saldivar argues his trial counsel was again arguing against him. We disagree. Counsel had a rational tactical purpose for making these statements: The prosecution had made a good case that Middleside Los Chicos was a criminal street gang, and Saldivar's trial counsel would have lost credibility before the jury by arguing to the contrary. (See *People v. Freeman* (1994) 8 Cal.4th 450, 498 ["Recognizing the importance of maintaining credibility before the jury, we have repeatedly rejected claims that counsel was ineffective in conceding various degrees of guilt"].)

13. Failure to Request CALCRIM No. 1403

Saldivar argues his trial counsel was ineffective by failing to request the court to instruct the jury with CALCRIM No. 1403, which would have limited the uses for which the jury could consider gang evidence. CALCRIM No. 1403 would have

instructed the jury it could not conclude from the gang evidence that "the defendant is a person of bad character or that (he/she) has a disposition to commit crime." (CALCRIM No. 1403.) A trial court has no sua sponte duty to give a limiting instruction, but should give one if requested to do so. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051.)

We conclude, as the Attorney General appears to acknowledge, that Saldivar's trial counsel was deficient in his representation for failing to request the court to instruct the jury with CALCRIM No. 1403.

14. Failure to Object to Testimony and Argument About the Mexican Mafia

Saldivar argues his trial counsel was ineffective for failing to object to testimony regarding, and the prosecutor's references to, the Mexican Mafia. During opening statement, the prosecutor told the jury the evidence would show that Saldivar had the number 13 tattooed on his left shoulder, the number 13 referred to the letter "M," and the letter "M" stands for the Mexican Mafia. Brown testified that Saldivar's "13" tattoo meant "allegiance to the Mexican Mafia or Southern California gang subculture." He added, "[g]enerally speaking, these tattoos in the gang subculture are indicative of experiences where they have been" and "[t]hey identify who you are and where you have been."

In explaining why gang members dress as they do, Brown testified: "The Mexican Mafia controls from, essentially, Bakersfield down. The Norteños are the northern structure. They control everything from Bakersfield up. [¶] There was a long, long war between the Norteños and the Sureños starting back from the mid '40's that evolved from the streets into the prison system. And through that, the style of dress was gained based on what they were issued." Brown testified that Hispanic gangs in Southern California align with the Mexican Mafia. Inside prison, rival gangs are expected "to align under the race umbrella," but, once back on the street, "can go back to business as long as they are not disrespecting any of the laws from the Mexican Mafia." In other parts of his testimony, Brown mentioned the Mexican Mafia. In closing argument, the

prosecutor mentioned Saldivar's 13 tattoo several times and described Saldivar as "the shot caller[,] . . . the O.G. with the M 13 for Mexican Mafia tattooed on him. He is the one who says he is going to attack the victim. That's how you know he is guilty."

Saldivar's trial counsel did not object to or move to strike any of the testimony or argument regarding the Mexican Mafia. In some instances, an objection would have been futile. Brown's testimony interpreting Saldivar's tattoo was a legitimate means of establishing Saldivar was an active gang participant,[4] and, as we have explained with respect to other of Saldivar's tattoos, there was a rational tactical reason for not objecting to Brown's testimony interpreting them.

We cannot, however, discern a rational tactical reason for failing to object to other testimony and argument about the Mexican Mafia. Neither the charged offense nor the predicate gang offenses were alleged to be connected to the Mexican Mafia. References to the Mexican Mafia can be "unduly prejudicial" (*People v. Ayala* (2000) 23 Cal.4th 225, 276-277) or "extremely prejudicial" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 230, fn. 15). Although references to the Mexican Mafia were made repeatedly, an objection could have been preserved by motion in limine or standing objection, or counsel could have requested a limiting instruction.

15. Retained Counsel

After the jury returned its verdict, Saldivar's trial counsel was relieved and Saldivar retained counsel to file a motion for a new trial. The motion for a new trial asserted ineffective assistance of counsel, but did not raise the instances of asserted ineffectiveness asserted on appeal. For that reason, Saldivar contends his retained counsel, as well as appointed counsel, was ineffective.

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[4] Brown testified, at one point, the tattoo was "X 13" meaning the number 13, and in closing argument, the prosecutor referred to the tattoo as "M 13." Apparently, the tattoo was "X 13."

C. *Prejudice*

We ask whether the deficiencies of Saldivar's trial counsel were cumulatively prejudicial. First, we recap those deficiencies. They were numbers 1, 7, 11, 13, and 14, more specifically:

1. Failure to object to admission of the .41-caliber handgun;

7. Failure to object to cumulative crime scene photographs and failure to object to photograph of Yessayan in graduation robes;

11. Argument regarding the crime allegedly committed by George Andrade;

13. Failure to request CALCRIM No. 1403; and

14. Failure to object to evidence and argument regarding the Mexican Mafia (other than expert testimony interpreting Saldivar's tattoos).

The evidence that Saldivar was guilty of first degree murder with a robbery-murder special circumstance was so overwhelming that there could be no reasonable probability that, but for these deficiencies of counsel, the results of the trial would have been different. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) This jury convicted Saldivar based on the strength of the evidence. None of counsel's deficiencies in representing Saldivar, considered individually or cumulatively, undermines our confidence in the outcome of the trial. For the same reasons, Saldivar's retained counsel was not ineffective for failing to specify each and every ground of ineffective assistance in the motion for a new trial. We reject Saldivar's ineffective assistance of counsel argument.

V.

Robbery-Murder Special Circumstance Under Section 190.2, Subdivision (a)(17) Is Not Unconstitutionally Vague.

Saldivar contends section 190.2, subdivision (a)(17), the robbery-murder special circumstance, is unconstitutionally vague because there is no meaningful

distinction between it and first degree felony murder based on robbery under section 189. He argues, "[t]he absence of a meaningful distinction encourages arbitrary enforcement, giving prosecutors unfettered discretion as to which defendants will be subjected to the possibility of death or life in prison without the possibility of parole, rather than 25-to-life for first degree murder without a special circumstance."

A penal statute is unconstitutionally void on its face for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.) "Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361.)

Section 189 provides, in relevant part: "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree."

Section 190.2 provides, in relevant part: "(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special

circumstances has been found under Section 190.4 to be true: [¶] . . . [¶] (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [¶] (A) Robbery in violation of Section 211 or 212.5."

The penalty for first degree murder is death, life imprisonment without the possibility of parole, or imprisonment for a term of 25 years to life. (§ 190, subd. (a).) The penalty for first degree murder with a special circumstance is death or life imprisonment without the possibility of parole. (§ 190.2, subd. (a).)

In *People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 307-309 (*Bradway*), the defendant challenged the lying-in-wait special circumstance under section 190.2, subdivision (a)(15) as unconstitutionally vague because it was not meaningfully different from lying-in-wait first degree murder following the passage of Proposition 18 in 2000. In rejecting the constitutional challenge, the *Bradway* court explained: "Generally, there are two separate and distinct legal theories for challenging a statute on vagueness grounds, depending on the interests at stake. [Citation.] A person challenging aggravating circumstance statutes in death penalty cases brings such under the Eighth Amendment, asserting 'the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with . . . open-ended discretion . . . .' [Citation.] In noncapital cases, the challenge comes under the due process clause and 'rest[s] on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.' [Citation.] Where there is no First Amendment right implicated, such due process challenges 'are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis.' [Citation.]" (*Bradway*, *supra*, at p. 309.)

Because the defendant in *Bradway* no longer faced the death penalty, the court examined section 190.2, subdivision(a)(15) as applied to him under the facts of the

case. (*Bradway*, *supra*, 105 Cal.App.4th at p. 309.) The court concluded the facts of the case satisfied the terms of the lying-in-wait special circumstance. (*Ibid.*)

The *Bradway* court then addressed the defendant's argument the special circumstance of lying in wait was unconstitutionally vague because there was no means to differentiate it from first degree murder by lying in wait. (*Bradway*, *supra*, 105 Cal.App.4th at p. 309.) The court concluded the special circumstance was distinguishable because it required the specific intent to kill, while first degree murder by lying in wait did not. (*Ibid.*) However, the court noted, first degree murder and special circumstance findings may be based on common elements without violating the Eighth Amendment. (*Bradway*, *supra*, at p. 310; see also *People v. Catlin* (2001) 26 Cal.4th 81, 158 ["first degree murder liability and special circumstance findings may be based upon common elements without offending the Eighth Amendment"].)

Finally, the *Bradway* court addressed whether the lying-in-wait special circumstance provided the defendant notice of what conduct was prohibited sufficiently enough to prevent arbitrary or discriminatory enforcement. (*Bradway*, *supra*, 105 Cal.App.4th at p. 310.) The court concluded, "[s]ection 190.2, subdivision (a)(15) provides a clear definition of what is required to satisfy its elements. . . . Any reasonable person considering [the defendant]'s conduct, or planning similar acts, would know that those acts constituted murder by means of lying in wait and that the special circumstance could be alleged . . . ." (*Ibid.*) As for arbitrary and discriminatory enforcement, the statute clearly identified what conduct would subject a person to possible punishment by death or life without the possibility of parole. (*Ibid.*)

We find the reasoning of *Bradway* persuasive and equally applicable to the robbery-murder special circumstance under section 190.2, subdivision (a)(17). Any reasonable person considering Saldivar's conduct would know the robbery-murder special circumstance could be alleged against him. Sections 189 and 190.2, subdivision (a)(17) provided Saldivar with clear and explicit notice his conduct was

criminal and subjected him to any one of three severe penalties—a prison term of 25 years to life, life without the possibility of parole, or death.

Prosecutorial discretion to determine which penalty among these three to seek did not violate due process. As stated in *United States v. Batchelder* (1979) 442 U.S. 114, 125: "[T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause. [Citations.] Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentenced." (See also *People v. Carter* (2005) 36 Cal.4th 1215, 1280 ["The circumstance that under California law an individual prosecutor has discretion whether to seek the death penalty in a particular case did not deny defendant his constitutional rights to equal protection of the laws or to due process of law"].)

Unlike the lying-in-wait special circumstance, the robbery-murder special circumstance appears to have the same elements as first degree felony murder based on robbery. First degree murder liability and a special circumstance finding may have common elements without violating the Eighth Amendment (*People v. Catlin*, *supra*, 26 Cal.4th at p. 158); likewise, in a noncapital case, they may have common elements without violating due process.

VI.

There Was No Cumulative Error.

Saldivar argues the trial court's errors, considered cumulatively, support reversal. We have identified only a single error, instructing the jury with CALCRIM No. 1603, and have concluded Saldivar suffered no prejudice from that error. "Because the trial court did not make multiple errors, [Saldivar]'s claim of cumulative prejudice necessarily fails." (*People v. Brents* (2012) 53 Cal.4th 599, 619.)

VII.

Presentence Custody Credit

Saldivar argues the trial court erred by shorting him 16 days of pretrial custody credits. As the Attorney General asserts, this argument seems to exalt form over substance because Saldivar was sentenced to life without the possibility of parole. Because we are affirming the judgment in full, addressing whether the trial court miscalculated presentence custody credit seems to be a purely academic exercise.

Saldivar maintains nonetheless that recalculation of pretrial custody credits is important, and "the law requires that appellant be given credit for every day he is incarcerated." The trial court found the actual time Saldivar spent in presentence custody was 1,459 days. The court's calculation was based on the probation report, which noted Saldivar was arrested on June 28, 2006. Saldivar contends his presentence custody credits must be based on the testimony of the arresting officer, who testified he arrested Saldivar on June 12, 2006.

A defendant asserting miscalculation of presentence custody credits must first seek correction in the trial court, unless the error resulted only from arithmetic computation. (*People v. Wrice* (1995) 38 Cal.App.4th 767, 773.) In *People v. Wrice*, the defendant contended, as does Saldivar, the trial court miscalculated his presentence custody credits by using the arrest date reflected in the probation report rather than the

arrest date established by the testimony at trial. (*Id.* at p. 772.) The Court of Appeal summarily rejected the defendant's claim of error because he did not first seek correction in the trial court: "[A] sentenced prisoner who complains that custodial credits were miscalculated by the trial court must first move to correct the alleged error in that court. The trial court is in the best position to determine the facts and correct custodial credit errors if there were any. . . . [¶] . . . [¶] . . . We may henceforth summarily dismiss appellate claims of error in presentence custody calculations when factual disputes or discretionary determinations are involved, unless the record discloses that efforts to correct the claimed errors were made in the trial court." (*Id.* at pp. 772-773.)

Here, as in *People v. Wrice*, the trial court calculated presentence custody credits based on the arrest date in the probation report instead of the arrest date to which the arresting officer testified. Saldivar's claim of error in calculation of presentence custody credits thus involves a factual dispute over his arrest date. We summarily reject the claim because Saldivar did not first seek correction in the trial court.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.

Relevant Constitutional and Statutory Provisions

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the United States Constitution, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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.