No._____

In the
Supreme Court of the United States

DAVID R. URIBE, Petitioner

v.

SCOTT KERNAN, Secretary, CDCR, Respondent

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

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VOLUME OF APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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APPENDIX A	Ninth Circuit Order Denying Motion for Reconsideration of Denial of COA
APPENDIX B	Motion for Reconsideration and First Denial of COA by the 9TH CIRCUIT
APPENDIX C	Judgment of the District Court Denying Habeas and COA
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APPENDIX A
NINTH CIRCUIT ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF CERTIFICATE OF APPEALABILITY (COA)

FILED

APR 1 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID R. URIBE, Petitioner-Appellant, v. SCOTT KERNAN, Secretary, CDCR, Respondent-Appellee.	No. 18-55936 D.C. No. 5:16-cv-00616-JVS-RAO Central District of California, Riverside ORDER

Before: SILVERMAN and CALLAHAN, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 6) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

APPENDIX B
MOTION TO NINTH CIRCUIT PANEL TO RECONSIDER ORDER DENYING MOTION FOR CERTIFICATE OF APPEALABILITY (COA)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID R. URIBE, Petitioner-Appellant. **v.** SCOTT KERNAN, Secretary, CDCR Respondent-Appellee.	No. 18-55936 D.C. No. 5:16-cv-00616-JVS-RAO Central District of California, Los Angeles

MOTION TO RECONSIDER DENIAL OF CERTIFICATE OF APPEALABILITY

Appeal from the United States District Court
for the Central District of California
Honorable James V. Selna
United States District Judge

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APPELLANT'S MOTION TO RECONSIDER THE DENIAL OF CERTIFICATE OF APPEALABILITY

Appellant DAVID R. URIBE hereby respectfully applies for a reconsideration of the certificate of appealability (COA).

MOTION UNDER CIRCUIT RULE 27-10 TO RECONSIDER THE DENIAL OF THE REQUEST FOR CERTIFICATE OF APPEALABILITY

Appellant moves this Court to reconsider the denial[1] of his request for a certificate of appealability (COA), which occurred on March 1, 2019.

Circuit Rule 27-10 states that "A party seeking relief under this rule shall state with particularity the points of law or fact which, in the opinion of the movant, the Court has overlooked or misunderstood. " This motion for reconsideration seeks to carry out this intention of rule 27-10 by pointing to specific cases, similar to this case, where reasonable jurists have differed on the decision to grant or not grant relief . Every case discussed is one where at least one jurist, if not the entire panel, voted to reverse the underlying

[1] The denial is attached hereto.

criminal charges because the gang enhancements, which had an injurious effect on the fair trial rights of the defendant, were all reversed. That is exactly what happened here, therefore a COA should issue as is discussed below.

A COA SHOULD ISSUE IF REASONABLE JURISTS COULD DIFFER ON THE DECISION TO GRANT OR NOT TO GRANT A COA

A COA must issue if jurists of reason could debate the decision of the district court to deny relief on this ground. It is submitted that this disagreement of "jurists of reason" has already occurred in this Circuit in a case closely tracking the facts of the instant case. That case is *Pirtle v. Morgan*, 313 F.3d 1160(2003) cert denied June 9, 2003. In that case, Pirtle's counsel requested an involuntary intoxication jury instruction and did not request a diminished capacity instruction, which the appellate court found to be deficient performance. The jury could have believed petitioner's evidence of diminished capacity and yet could have convicted him because of evidence that he was not intoxicated when the crimes were committed. As the jury could reasonably have reached a different verdict if provided with

the diminished capacity instruction, counsel's error was prejudicial.

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

"To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that . . . includes 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, 483-84 (2000) (quotation marks omitted).

The applicant need not prove that some jurists would grant the habeas corpus petition. *Miller-El v. Cockrell*, 537 U.S.322, 338 (2003).

Because a COA does not require a showing that the appeal will succeed, the Court of Appeals should not decline an application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. *Id*. at 337. This Court resolves any doubts about issuing a COA in favor of the petitioner. *Rhoades v. Henry*, 598 F.3d 511, 518 (9th Cir. 2010).

so that he may appeal to this Court from the judgment entered by the

District Court on July 19, 2018, denying his petition for writ of habeas corpus. District Court Document 44.

In an order filed that same day, the District Court declined to issue a COA requested by appellant. District Court Document 45.

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

To obtain a COA, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The applicant need not prove that some jurists would grant the habeas corpus petition. *Miller-El v. Cockrell*, 537 U.S.322, 338 (2003).

Because a COA does not require a showing that the appeal will succeed, the Court of Appeals should not decline an application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. *Id*. at 337.

This Court resolves any doubts about issuing a COA in favor of the petitioner. *Rhoades v. Henry*, 598 F.3d 511, 518 (9th Cir. 2010).

ARGUMENT

Each of the five claims made by petitioner has valid reasons for the grant of a COA and that is set forth clearly in petitioner's objections, document 42. CLAIM ONE

1. The CCA misstated the record in stating that the trial judge "was aware of its proper role in determining the admissibility of the victim's statement". There was not a single word in the CCA opinion to support this assertion. It is an objective unreasonable determination of the facts by creating a record when there is none to create. Once deference is removed from this case under 2254(d)(2) there is no litigation bar. *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir. 2014). Once the litigation bar disappears, this federal Court is free to examine the issue *de novo* of the admission of hearsay evidence which is unreliable or denies confrontation.

With that freedom to proceed *de novo* this Court may grant relief on a state law claim in those rare instances where the violation of state law amounts to a due process violation and a denial of Confrontation under the federal constitution. This is one of those rare instances. A COA should issue

as to Claim One.

2. **CLAIMS THREE AND FOUR**

This case must be judged without AEDPA deference as has been set forth above.

The R&R gains evidentiary support for this retaliation special circumstance from gang expert testimony and gang affiliation testimony. It is submitted since all the gang enhancements were reversed by the CCA due to insufficiency of the evidence, all that gang testimony must not be used find true this special circumstance. In *People v. Ramirez,* 244 Cal.App.4th 800 (2016), another CCA ruled the gang testimony should be reversed as did the CCA in the instant case. The critical difference in the two CCAs is what the *Ramirez* CCA then ruled after reversing the gang enhancements for insufficiency of the evidence. That CCA ruled at page 822 that without the gang testimony there was a reasonable probability that Ramirez and his co-defendant would have achieved a more favorable result. The CCA held "[t]he prejudicial gang evidence resulted in a miscarriage of justice and

violated Ramirez's state and federal due process rights to a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 70 (1979); *People v. Partida*, 37 Cal.4th 428, 439, 435 (2005)."

A COA must issue if jurists of reason could debate the decision of the district court to deny relief on this ground. *Barefoot v. Estelle*, 463 U. S. 880, 893, n.4 (1983). It is submitted that this disagreement of "jurists of reason" has already occurred **in** *Ramirez, supra***.**

In the case of petitioner, there can be no doubt just how prejudicial was the gang testimony, all reversed on appeal due to insufficiency of the evidence, when the prosecutor commenced his argument as "Ladies and gentlemen, we talked about, at the outset of this case, this is a murder carried out for the gang."

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Petitioner objects to the R&R characterization of the reversal of the gang enhancements as just a "technical" violation because some elements required of those enhancement was not proven. How can a violation of the constitution under *In re Winship*,397 U.S. 358 (1970) be just "technical". It is a

violation of the constitutional requirement of *Jackson v. Virginia,* 443 US 307 (1979) and *Winship* that every element of the charge be proven beyond a reasonable doubt. The CCA concluded that indeed the gang enhancements were not so proven so they were reversed.

Due to appellate counsel ineffectiveness however, the next step was never taken on the direct appeal. That step was to ascertain if the evidence the prosecution put before the jury to prove the gang enhancements contributed to the verdict of the substantive charges. Those charges were the special circumstances of grounds three and four and also all the remaining substantive charges which are set forth in Ground Five discussed next in these objections.

CLAIM FIVE

The R&R again labels the reversal of the gang enhancements as technical violations. Many violations of the constitution could be considered "technical" since the constitution, although grounded in the dignity of humans, can be considered "technical" but that does not make a violation

less harmful to a fair trial. At page 41 the R&R points out that the jury believed Henslick had been killed for the benefit of the Dodd Street gang"and the evidence certainly supported this." But the Dodd Street gang enhancement was reversed. That reversal had to have an effect on the substantive claims because it showed insufficient evidence that "Dodd Street" was even a criminal street gang at all. There cannot be a stronger case of "undermining" the substantive convictions than occurred here.

As has been pointed out in the two previously filed Memoranda in this case by petitioner, the entire thrust of the prosecution case was that this was a "gang" case. How could that be if there was insufficient evidence that Dodd Street was even a criminal street gang?

All that criminal street gang evidence was deemed insufficient to prove Dodd Street was a criminal street gang. Yet it was allowed to buttress the prosecution case that this was a gang killing and that had to have a prejudicial effect on the jury.

The test of ineffectiveness of appellate counsel in a federal habeas petition is correctly set forth on page 40 of the R&R as *Smith v. Robbins,* 528

U. S. 259, 285.

The R&R relies on the CCA opinion that there was no chance that once the gang testimony was taken away there would still be error. Even if some of the gang testimony were allowed to stand on relevance grounds, no court has even begun to assess the harm done to petitioner's fair trial rights by the huge volume of *irrelevant*[2] gang testimony later determined to be insufficient because of insufficient proof that Dodd Street was a criminal street gang at all.

At page 40 of the R&R is the statement that the District s Court agrees

with the CCA that the reason the street gang enhancement was reversed was lack of sufficient evidence of the primary activities of Dodd Street to make it a street gang. But the point is missed that the prosecutor told the jury that this was a gang killing by a street gang and that was wrong under the law. The prejudicial effect of just the word "gang" has been amply

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[2]The only purpose of the Mexican Mafia evidence was to inflame the jury and it worked here and it worked in the *Albarran* case until reversal.

shown in *Ramirez, supra* and *Albarran,* discussed below.

As in *Ramirez,* there were two choices for the jury one leading to conviction and the other to acquittal. Here the jury had evidence before it that Uribe was trying to warn away Henslick from coming and the CCA even pointed out that alternative of the jury but said in their opinion "unfortunately for Uribe"the victim was a "cockeyed optimist " for coming to the trailer despite all the warnings. Yet they affirmed a conviction and sentence of life without parole, death in prison for this young man, for "unfortunate" David Uribe. The court in *Ramirez* could not rule out the effect of the gang evidence on the jury in that case taking the path of conviction.

Neither can this Ninth Circuit Court of Appeals rule out the jury taking the path of convicting David Uribe because of the street gang evidence which was ruled insufficient.

The impact on the jury cannot be overstated when they heard testimony from the prosecution's gang expert that "gang members from Bakersfield south are protected by the Mexican Mafia when they go to

prison. All that gang evidence, later ruled insufficient to show that Dodd street was a street gang at all, was set forth in the Memorandum in Support of the Traverse at page 18 and starting at page 19 of the CCA opinion.

The R&R never mentions a case directly on point with the case of David Uribe and that case is *People v. Albarran*, 149 Cal.App.4th 214 (2007)(*Albarran*).

In *Albarran*, as in this case, the prosecutor linked Albarran's gang to the Mexican Mafia, p. 227, when there was no relevance at all to the *Albarran* case and the Mexican Mafia.

In the case of David Uribe, the prosecutor did the same thing, putting before the jury expert testimony on the Mexican Mafia (fn. 22 of CCA opinion.)

In *Albarran*, the CCA pointed out in fn. 15 " Indeed, more than one California court has recognized references to the Mexican Mafia are extremely prejudicial. "

The *Albarran* CCA concluded as follows at page 232 in a case where the gang allegations had already been dismissed by the trial court for insufficiency of the evidence:

> This case presents one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair. Given the nature and amount of this gang evidence at issue, the number of witnesses who testified to Albarran's gang affiliations and the role the gang evidence played in the prosecutor's argument, we are not convinced beyond a reasonable doubt that the error did not contribute to the verdict.

Appellate counsel, in this case, had to raise this issue on appeal to be effective. He did not.

Appellate counsel did raise it in *Albarran* and the above paragraph is the result. That itself illustrates prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984).

The CCA in petitioner Uribe's case was objectively unreasonable in applying the facts to the clearly established law of the Supreme Court in concluding that the gang evidence which was insufficient, had no effect on

the verdict. Just restating what the CCA said in response to the Motion to Recall the Remittitur illustrates its objective unreasonableness.

The denial of the motion to Recall the Remittitur asserted that the "opinion implicitly holds that the gang reversal does not require the reversal of the murder conviction". The CCA never said how the opinion *implied* a decision on an issue never raised by direct appeal counsel. Nor could they because just as in *Albarran,* the testimony and the prosecution arguments all successfully pointed to conviction on the basis of petitioner's gang status in a gang killing making him guilty of murder as an aider and abettor.

The gang evidence, was not only insufficient, which the court found it was, it deprived Uribe of a fair trial.

Accordingly a COA should be granted.

The *Albarran* case, *supra*, illustrates where reasonable jurists have disagreed with the CCA in petitioner Uribe's case. A COA should be granted since petitioner Uribe has shown that reasonable jurists could debate that the issue presented in Claims One through Claim Five are adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell,*

537 U.S. 322, 336 (2003),

The questions raised in this petition are adequate to deserve encouragement to proceed further. *Ibid*.; *Lozada v. Deeds*, 498 U.S. 430, 432 (1991)(per curiam).

CONCLUSION

A COA should issue on all of appellant's grounds.

Respectfully submitted,

/s/Charles R. Khoury Jr.
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2018, I electronically filed the foregoing request for Certificate of Appealability with the Clerk of the Ninth Circuit Court of Appeals by using the CM/ECF system for that Court. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Petitioner will be served by mail at his place of incarceration.

/s/ Charles R. Khoury Jr.

Attorney for Petitioner/Appellant

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID R. URIBE, Petitioner-Appellant, v. SCOTT KERNAN, Secretary, CDCR, Respondent-Appellee.	No. 18-55936 D.C. No. 5:16-cv-00616-JVS-RAO Central District of California, Riverside ORDER

Before: TROTT and MURGUIA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX C
JUDGMENT OF THE DISTRICT COURT DENYING HABEAS PETITION AND CERTIFICATE OF APPEALABILITY (COA)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID R. URIBE,

Petitioner,

v.

SCOTT KERNAN, Secretary, CDCR,

Respondent.

Case No. ED CV 16-00616 JVS (RAO)

JUDGMENT

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

IT IS ORDERED AND ADJUDGED that the First Amended Petition is denied, and this action is dismissed with prejudice.

DATED: June 19, 2018

JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID R. URIBE,

Petitioner,

v.

SCOTT KERNAN, Secretary, CDCR,

Respondent.

Case No. ED CV 16-00616 JVS (RAO)

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, all of the records and files herein, and the Magistrate Judge's Report and Recommendation. The Court has further engaged in a *de novo* review of those portions of the Report and Recommendation issued on January 3, 2018, to which Petitioner has objected. The Court hereby accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge. IT IS ORDERED that the First Amended Petition is denied, and Judgment shall be entered dismissing this action with prejudice.

DATED: June 19, 2018

JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID R. URIBE,

Petitioner,

v.

SCOTT KERNAN, Secretary, CDCR,

Respondent.

Case No. ED CV 16-00616 JVS (RAO)

ORDER DENYING CERTIFICATE OF APPEALABILITY

The Court has reviewed the Report and Recommendation of United States Magistrate Judge and the other papers on record in these proceedings. For the reasons set forth in the Magistrate Judge's Report and Recommendation, filed January 3, 2018, the Court finds that the Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253, Fed. R. App. P. 22(b); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

IT IS ORDERED that the Certificate of Appealability is denied.

DATED: June 19, 2018

JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

APPENDIX D
OBJECTIONS TO REPORT AND RECOMMENDATION AND REQUEST FOR CERTIFICATE OF APPEALABILITY (COA)

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID R. URIBE,

Petitioner,

v.

SCOTT KERNAN, Secretary, CDCR
Respondent

No.16-cv-00616-JVS-RAO

OBJECTIONS TO THE REPORT AND RECOMMENDATION

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OBJECTIONS TO THE REPORT AND RECOMMENDATION

COMES NOW Petitioner Uribe and through his counsel files these Objections to the Report and Recommendation:

1. OBJECTION TO R&R DENIAL AS TO GROUNDS ONE AND TWO:

A. No Deference is Owed the CCA Opinion Due to the Exception of 2254(d)(2)

Petitioner asserts in claim One that the trial judge erroneously admitted the hearsay dying declaration by leaving it up to the jury to make the decision whether Henslick made a declaration when Henslick knew he faced imminent death.

What removed this case from AEDPA deference is the following unreasonable determination of the facts by the CCA in view of the evidence presented.

The CCA stated, when this issue was raised on direct appeal, "Contrary to defendant's assertions, the trial court's remarks, up to the last set, indicate that it was aware of its proper role in determining the admissibility of the victim's statements."(CCA at page 29.)

The problem with the CCA opinion is that the opinion did not cite a single place in the record to support this assertion of the trial court's indicating "it was aware of its proper role in determining the admissibility of the victim's statements".

There was in fact no part of the record whatsoever whether at the beginning middle, or end of the hearing on this issue that indicated that the trial court applied the correct rule. All of its statements reflect the incorrect rule. There is nothing in the trial record to support that conclusion of the CCA. This is an objectively unreasonable determination of the facts by creating a record when there is none.

A factual determination is objectively unreasonable when "the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim" and when "the state court has before it, yet apparently ignores, evidence that supports petitioner's claim." *Taylor v. Maddox*,366 F.3d 992, *supra*.

This unreasonable determination under 2254(d)(2) removes the AEDPA bar to the granting of the writ.

The R&R makes the same mistake of not recognizing this objectively unreasonable determination of the facts at page 27 of the R&R. The R&R makes the mistake of avoiding the effect of 2254(d)(2) by categorizing petitioner's contention as one of state law and therefore not justiciable under the constitution.

Petitioner's contention is that there is no *deference* owed to the CCA opinion because it does not admit that the trial judge "kicked the can down the road" and let the jury have the incredibly prejudicial task of deciding whether they should even consider the "dying declaration" by themselves being the evidentiary gatekeeper and deciding whether or not the statement was made in imminent fear of death by Henslick before considering it. That is not the law.

Once deference is removed from this case under 2254(d)(2) there is no litigation bar. *Hurles v. Ryan,* 752 F.3d 768,778 (9th Cir.2014). Once the litigation bar disappears, this federal court is free to examine the issue *de novo* of the admission of hearsay evidence which is unreliable or denies confrontation.

The Due Process Clause forbids the admission of unreliable evidence. The standard for admissibility "is that of fairness as required by the Due Process Clause of the Fourteenth Amendment." *(Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).)Indeed, "the linchpin of due process is reliability." (*Ibid*.)

Thus the United States Supreme Court has conditioned hearsay's admissibility on sufficient indicia of reliability under the Due Process Clause. In *Michigan v. Bryant,* 562 U.S. 344, fn. 13(2011) it noted: "the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence."

In *Chambers v. Mississippi,* 410 U.S. 284, 298, (1973) it found that the court violated a defendant's due process rights by excluding defense-favorable hearsay evidence "that provided considerable assurance of their reliability." (*Id*. at p. 300.) The California Supreme Court, too, has acknowledged that to satisfy due process, hearsay statements must contain "special indicia of reliability." (*People v. Otto,* 26 Cal.4th 200, 210 (2001); *In re Lucero L.* 22 Cal.4th 1227, 1244-1248 (2000).)

The R&R, led astray by the Answer, considers the petitioner's claim depends on an application of state evidentiary law, therefore not cognizable in federal habeas.

Petitioner is asserting, however, that a federal court, proceeding *de novo* as this Court must proceed, may grant habeas relief on a state law

claim in those rare instances where the violation of state law amounts to a due process violation and here also denies Confrontation.

B. There Is Clearly Established Federal Law Of the Supreme Court Which Does Not Disagree that Violations of State Law Could Deny Due Process

The clearly established federal law for that proposition is *Pulley v. Harris*, 465 U.S. 37, 41 (1984). In that case, the Supreme Court held that Alton Harris "conceded" the 9th circuit decision granting habeas to him was based on federal constitutional grounds. The Supreme Court did not deny there would be cases where an error of state law could be sufficiently egregious to amount to a denial of equal protection or of due process of law guaranteed by the Fourteenth Amendment. *Id* at p. 41. But the Court pointed out that proportionality review of a death sentence was not one of those egregious cases. The Court also concluded if it granted relief to Harris on that basis, it could not order the State Supreme Court to order such a review.

Accordingly, this Court must determine "whether the admission of the evidence so fatally infected the proceedings as to render them fundamentally unfair." *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991).

As the CCA ruled in its opinion and the State conceded in the Answer at page 8, the trial court's statements about whether the court would perform its gatekeeping function to determine if the statements of Henslick

were indeed "dying declarations" were not at all clear. Yet the CCA, by leaving out facts, was able to come to the conclusion that the trial court *did* independently decide on the admissibility of the statements. But the facts show otherwise. The facts show that indeed the judge did not decide *himself* the issue of admissibility. How can one say otherwise when this is the last statement he made on the issue:

> And so the Court's intention would be to find that the foundational facts under the dying declaration exception to the hearsay rule have been established *for purposes of submitting that issue to the jury.*

(3R453 emphasis added.)

As pointed out in the points and authorities already filed in this case, jurors treat such declarations "with reverence".

Petitioner objects that the R&R does not decide the issue of unreasonable fact determination in light of the evidence presented in the state court, does not then reach a decision *de novo* on the trial court unlawfully passing the buck to the jury to make the decision of admissibility without making it himself, and does not there even consider that petitioner Uribe was denied Due Process under the Fourteenth Amendment by the prejudicial nature of the Henslick confusing and contradictory statements as to who shot him.

2. OBJECTION TO R&R DECISION AS TO GROUNDS THREE AND FOUR

A. No deference is owed the CCA under 2254(d)(2) on the Witness Murder Special Circumstance as pointed out in the Traverse at pages 8-10.

Petitioner asserted in ground three there was insufficient evidence to support the witness murder special circumstances of retaliation and four, lying in wait.

At the outset, since this case must be judged without AEDPA deference under *Hurles, supra,* as set forth in the Traverse at pages 8-10, this objection is made on that basis of no deference to the CCA opinion.

At pages 32-33 of the R&R, support for the special circumstance is derived from gang expert testimony and gang affiliation testimony. It is submitted since all the gang enhancements were reversed for insufficiency of the evidence by the CCA, this gang testimony has to be disregarded.

This was the result in *People v. Ramirez*, 244 Cal.App.4th 800 (2016) (*Ramirez*). That CCA ruled the gang testimony should be reversed, as did the CCA in Uribe's case. The critical difference in the two CCA's is what the *Ramirez* CCA then ruled after reversing the gang enhancements for insufficiency of the evidence. The CCA in *Ramirez* noted there were two alternatives for the jury based on "two plausible factual scenarios".

On one hand a group of people confronted and hit a woman, Natalie, with a baseball bat, another person, Andy, tried to intervene and Ramirez shot Andy because of that attempted intervention.

On the other hand, Andy came at Ramirez with a baseball bat and Ramirez shot Andy in self defense. *Ramirez* at 821.

The CCA in *Ramirez* held that the jury's evaluation of the two differing factual scenarios was colored by the gang evidence admitted at trial but later reversed on appeal. There was gang expert evidence that the crime benefitted the gang of which Ramirez was a member, *Ramirez* at 808. The *Ramirez* CCA quoted the following from another CCA case, *People v. Albarran*, 149 Cal.App.4th 214,223 (2007): "California Courts have long recognized the potentially prejudicial effect of gang membership...'It is fair to say that when the word 'gang' is used...,one does not have visions of the

characters from "Our Little Gang" series. The word "gang"...connotes opprobrious implications. ...[T]he word "gang"...takes on a sinister meaning when it is associated with activities.'[Citation.]"

The CCA in *Ramirez* at page 822 concluded that without the gang testimony there was a reasonable probability that Ramirez and his co-defendant would have achieved a more favorable result. "The prejudicial gang evidence resulted in a miscarriage of justice and violated Ramirez's state and federal constitutional due process rights to a fundamentally fair trial (*Estelle v. McGuire* 502 U.S. 62, 70 (1979); *People v. Partida,* 37 Cal.4th 428, 439,435 (2005). "

In the case of petitioner, there can be no doubt just how prejudicial was the gang testimony, all reversed due to insufficiency of the evidence, when the prosecutor commenced his argument as "Ladies and gentlemen, we talked about, at the outset of this case, this is a murder carried out for the gang."

13RT2622

Petitioner objects to the R&R characterization of the reversal of the gang enhancements as just a "technical" violation because some elements required of those enhancement was not proven. How can a violation of the constitution under *In re Winship,*397 U.S. 358 (1970) be just "technical". It is a violation of the constitutional requirement of *Jackson v. Virginia,* 443 US 307 (1979) and *Winship* that every element of the charge be proven beyond a reasonable doubt. The CCA concluded that indeed the gang enhancements were not so proven so they were reversed.

Due to appellate counsel ineffectiveness however, the next step was never taken on the direct appeal. That step was to ascertain if the evidence the

prosecution put before the jury to prove the gang enhancements contributed to the verdict of the substantive charges. Those charges were the special circumstances of grounds three and four and also all the remaining substantive charges which are set forth in Ground Five discussed next in these objections.

3. OBJECTION TO GROUND FIVE

Petitioner Objects to the R&R Denying the Claim of Ineffective Assistance of Counsel in Not Raising the Issue of Reversal of the Substantive Claims Due to the Reversal of the Gang Enhancements and Objects to the Conclusion the CCA Did Not Err in Refusing to Reverse When That Issue Was Finally Put Before Them in the Recall Remittitur Application

The R&R again labels the reversal of the gang enhancements as technical violations. Many violations of the constitution could be considered "technical" since the constitution, although grounded in the dignity of humans, can be considered "technical" but that does not make a violation less harmful to a fair trial. At page 41 the R&R points out that the jury believed Henslick had been killed for the benefit of the Dodd Street gang"and the evidence certainly supported this." But the Dodd Street gang enhancement was reversed. That reversal had to have an effect on the substantive claims because it showed insufficient evidence that "Dodd Street" was even a criminal street gang at all. There cannot be a stronger case of "undermining" the substantive convictions than occurred here.

As has been pointed out in the two previously filed Memoranda in this case by petitioner, the entire thrust of the prosecution case was that this was a "gang" case. How could that be if there was insufficient evidence that Dodd Street was even a criminal street gang?

All that criminal street gang evidence was deemed insufficient to prove Dodd Street was a criminal street gang. Yet it was allowed to buttress the prosecution case that this was a gang killing and that had to have a prejudicial effect on the jury.

The test of ineffectiveness of appellate counsel in a federal habeas petition is correctly set forth on page 40 of the R&R as *Smith v. Robbins,* 528 U. S. 259, 285.

The R&R relies on the CCA opinion that there was no chance that once the gang testimony was taken away there would still be error. Even if some of the gang testimony were allowed to stand on relevance grounds, no court has even begun to assess the harm done to petitioner's fair trial rights by the huge volume of *irrelevant*[1] gang testimony later determined to be insufficient because of insufficient proof that Dodd Street was a criminal street gang at all.

At page 40 of the R&R is the statement that this Court agrees with the CCA that the reason the street gang enhancement was reversed was lack of sufficient evidence of the primary activities of Dodd Street to make it a street gang. But the point is missed that the prosecutor told the jury that this was a gang killing by a street gang and that was wrong under the law. The prejudicial effect of just the word "gang" has been amply shown in *Ramirez, supra* and *Albarran,* discussed below.

As in *Ramirez,* there were two choices for the jury one leading to conviction and the other to acquittal. Here the jury had evidence before it that Uribe was trying to warn away Henslick from coming and the CCA

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[1]The only purpose of the Mexican Mafia evidence was to inflame the jury and it worked here and it worked in the *Albarran* case until reversal.

even pointed out that alternative of the jury but said in their opinion "unfortunately for Uribe"the victim was a "cockeyed optimist " for coming to the trailer despite all the warnings. Yet they affirmed a conviction and sentence of life without parole, death in prison for this young man, for "unfortunate" David Uribe. The court in *Ramirez* could not rule out the effect of the gang evidence on the jury in that case taking the path of conviction.

Neither can this Court rule out the jury taking the path of convicting David Uribe because of the street gang evidence which was ruled insufficient. The impact on the jury cannot be overstated when they heard testimony from the prosecution's gang expert that "gang members from Bakersfield south are protected by the Mexican Mafia when they go to prison. All that gang evidence, later ruled insufficient to show that Dodd street was a street gang at all, was set forth in the Memorandum in Support of the Traverse at page 18 and starting at page 19 of the CCA opinion.

The R&R never mentions a case directly on point with the case of David Uribe and that case is *People v. Albarran*, 149 Cal.App.4th 214 (2007)(*Albarran*).

In *Albarran*, as in this case, the prosecutor linked Albarran's gang to the Mexican Mafia, p. 227, when there was no relevance at all to the *Albarran* case and the Mexican Mafia.

In the case of David Uribe, the prosecutor did the same thing, putting before the jury expert testimony on the Mexican Mafia (fn. 22 of CCA opinion.)

In *Albarran*, the CCA pointed out in fn. 15 " Indeed, more than one California court has recognized references to the Mexican Mafia are extremely prejudicial. "

The *Albarran* CCA concluded as follows at page 232 in a case where the gang allegations had already been dismissed by the trial court for insufficiency of the evidence:

> This case presents one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair. Given the nature and amount of this gang evidence at issue, the number of witnesses who testified to Albarran's gang affiliations and the role the gang evidence played in the prosecutor's argument, we are not convinced beyond a reasonable doubt that the error did not contribute to the verdict.

Appellate counsel, in this case, had to raise this issue on appeal to be effective. He did not. Appellate counsel did raise it in *Albarran* and the above paragraph is the result. That itself illustrates prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984).

The CCA in petitioner Uribe's case was objectively unreasonable in applying the facts to the clearly established law of the Supreme Court in concluding that the gang evidence which was insufficient, had no effect on the verdict. Just restating what the CCA said in response to the Motion to Recall the Remittitur illustrates its objective unreasonableness.

The denial of the motion to Recall the Remittitur asserted that the "opinion implicitly holds that the gang reversal does not require the reversal of the murder conviction". The CCA never said how the opinion *implied* a decision on an issue never raised by direct appeal counsel. Nor could they because just as in *Albarran,* the testimony and the prosecution arguments

all successfully pointed to conviction on the basis of petitioner's gang status in a gang killing making him guilty of murder as an aider and abettor.

The gang evidence, was not only insufficient, which the court found it was, it deprived Uribe of a fair trial.

Accordingly the Objections should be sustained and the writ should issue.

A CERTIFICATE OF APPEALABILITY SHOULD BE GRANTED

The *Albarran* case, *supra*, illustrates where reasonable jurists have disagreed with the CCA in petitioner Uribe's case. The writ should be granted but if it is not, a COA should be granted since petitioner Uribe has shown that reasonable jurists could debate that the issue presented in Claims One through Claim Five are adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003),

CONCLUSION

The objections should be sustained. As pointed out in the Memorandum in Support of the Traverse:

Lucero showed his gun to the people in the trailer, he was first out the door when Henslick arrived, the killing shots followed from that gun.

The first words Henslick said in the ambulance as to who shot him was Lucero's father's moniker, "Hubcaps" not petitioner's moniker.

The witnesses said petitioner tried to warn Henslick away, even on the night of the shooting.

The dying declaration, which was not a dying declaration, was helped along by witnesses suggesting petitioner Uribe's gang name, Clever, to Henslick in the Emergency Room and the premature removal of a breathing tube from Henslick, 23 days after the shooting and finally, by the trial judge turning over its admissibility to the jury without finding it admissible independently himself.

The prosecutor hung his hat, in argument to the jury, on irrelevant and prejudicial gang evidence introduced to support gang charges which could not stand.

AEDPA cannot save this case against petitioner which should not be saved in any event because of the exceptions in 2254(d)(1) and (d)(2).

The objections should be sustained, the writ should issue and, at a minimum, a COA should be granted.

Respectfully submitted
/s/Charles R. Khoury Jr.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on 05/14/2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Central District of California by using the CM/ECF system for that Court. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Petitioner will be served by mail at his place of incarceration.

/s/Charles R. Khoury Jr

APPENDIX E
REPORT AND RECOMMENDATION

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAVID R. URIBE, Petitioner, v. SCOTT KERNAN, Secretary, CDCR Respondent.	Case No. EDCV 16-00616 JVS (RAO) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable James V. Selna, 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.

I. INTRODUCTION

In 2011, a jury in the Riverside County Superior Court convicted David Ruben Uribe ("Petitioner") of first degree murder of David Henslick and active participation in a criminal street gang. (Clerk's Transcript ("CT") 2325, 2329.) The jury also found true allegations that the murder was committed for the benefit of a criminal street gang, that a principal personally discharged a firearm causing death, and that the victim was a witness to a crime and killed in retaliation for testimony and by means of lying in wait by active criminal street gang participants.

/ / /

(CT 2259-60, 2322-23, 2326-28, 2330-31.) The trial court sentenced him to life without the possibility of parole, plus 25 years to life in prison.[1] (CT 2345-46.)

Petitioner appealed to the California Court of Appeal, which found there was insufficient evidence to support the substantive gang offense and gang enhancements, but otherwise affirmed the judgment in a reasoned decision. (Lodg. Nos. 4-6.) The matter was remanded to the trial court for re-sentencing. (*See* Lodg. No. 6.) Thereafter, the California Supreme Court denied his Petition for Review summarily. (Lodg. Nos. 7-8.)

On remand, the Riverside County Superior Court dismissed the convictions and resultant 25 years-to-life sentence based on the gang offense and enhancements and sentenced Petitioner to life in prison without the possibility of parole for first-degree murder. (Lodg. No. 9 at 7.) Petitioner again appealed to the California Court of Appeal, which affirmed the judgment. (Lodg. Nos. 11-13.) A subsequent Petition for Review filed in the California Supreme Court was again denied summarily. (Lodg. Nos. 14-15.)

On April 5, 2016, Petitioner, a California state prisoner proceeding with the assistance of counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"), pursuant to 28 U.S.C. § 2254. (Docket No. 1.) On April 21, 2016, Petitioner filed a First Amended Petition ("FAP"), which is the current petition of record in this action.[2] (Dkt. No. 5.) Respondent filed an Answer

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[1] Petitioner was tried jointly with co-defendant Nathan Lucero, who was convicted of the same offenses and received the same sentence of life without the possibility of parole, plus 25 years to life in prison. (*See* CT 2321-31, 2347-48.)

[2] Concurrent with the filing of the FAP, Petitioner requested a stay and abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed. 2d 440 (2005), so that he could exhaust Ground Five of the newly amended petition in state court. (Dkt. No. 6.) Respondent opposed the motion (Dkt. No. 20) and, on February 22, 2017, the Court denied the motion without prejudice because Petitioner had not demonstrated "good cause for a *Rhines* stay or that his unexhausted claim [was] potentially meritorious." (Dkt. No. 21.) During the course of this federal habeas action, however, Petitioner sought—and was denied—

to the FAP and a supporting memorandum ("Answer"). (Dkt. No. 14.) Respondent also lodged the relevant state records. Thereafter, Petitioner filed a Traverse. (Dkt. No. 26.)

II. PETITIONER'S CLAIMS

The FAP raises five grounds for relief, as follows:

1. The trial court violated Petitioner's right to a fair trial by admitting the victim's hearsay statements and allowing the jury to decide if they qualified as dying declarations under the law.

2. There was insufficient evidence that the victim was "certain his death was imminent" to admit statements under the dying declaration exception to the hearsay rule.

3. There was insufficient evidence to support the special circumstance finding that the murder was committed in retaliation for the victim's testimony in court.

4. There was insufficient evidence to support the special circumstance finding that the victim was killed by means of lying in wait to support a first-degree murder conviction.

5. Appellate counsel was ineffective for failing to raise a claim that the failure to dismiss Petitioner's murder conviction after reversing the substantive gang offense and gang enhancements violated his due process rights.

(FAP at 5-6.)

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relief on the merits of the claim by both the California Court of Appeal and the California Supreme Court. (*See* Traverse, Appendices A & C.) Thus, Ground Five of the FAP is now exhausted and any further request for a stay and abeyance is denied as moot.

III. FACTUAL SUMMARY

The Court adopts the factual summary, including footnotes (renumbered and italicized here), set forth in the California Court of Appeal's opinion affirming Petitioner's first-degree murder conviction.[3]

> The parties stipulated that around January 2003, the victim and his friend, who was a drug dealer and was living at the victim's home at the time, went to the home of Dodd Street gang member Jason Lucero (hereinafter, Jason) so the victim's friend could complete a drug deal with Jason. Instead, Jason robbed the victim's friend. On March 1, 2003, Jason and two fellow Dodd Street gang members entered the victim's home and shot at the victim and his friend. In the gun battle that ensued, the victim shot Jason four times, but he survived. The victim's friend chased the three, firing several shots. The three gang members were tried for attempted murder of both men. The victim's friend also was charged with attempted murder, pled guilty and was sentenced to prison. At the trial of the three gang members, in 2004, the victim testified against all three and they were convicted. The victim's mother and his sister testified at the instant trial that the victim did this even though he was very scared. Jason was sentenced to prison for 57 years to life and the other two also received prison sentences. Jason's gang moniker was "Hubcaps" and he is the father of [co-defendant Nathan] Lucero. The victim's sister testified that after the 2003 incident, the victim left the area and lived with his aunt in Los Angeles County for one year and with his father in the mountains for another six months.
>
> The Mira Loma ranch property where the crimes occurred consisted of a house, trailer and several other structures. The trailer was a place where people bought, sold and used drugs. Lindsey, the granddaughter of the ranch's owners, lived in the trailer and used and sold drugs there. Lucero and [Petitioner] were friends of Lindsey's and, together, would visit her at the trailer, and use drugs there, as did many others.

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[3] The Court "presume[s] that the state court's findings of fact are correct unless [p]etitioner rebuts that presumption with clear and convincing evidence." *Tilcock v. Budge*, 538 F.3d 1138, 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1). Because Petitioner has not rebutted the presumption with respect to the underlying events, the Court relies on the state court's recitation of the facts. *Tilcock*, 538 F.3d at 1141. To the extent that an evaluation of Petitioner's individual claims depends on an examination of the trial record, the Court herein has made an independent evaluation of the record specific to those claims.

> By the time of the crimes, the victim, who was also a friend of Lindsey's, was only an occasional visitor to the ranch. His mother testified that he stopped going to the ranch altogether for one to two years after his testimony in the 2003 case. She and others testified that thereafter, he would always call and make sure Lindsey was there before going to the ranch. Lindsey testified that she was concerned about him being at the ranch when Lucero and [Petitioner] were there, due to his testimony in Lucero's father's trial. Therefore, when they were at the ranch and the victim called to come over, she would offer to come to where he was or she would tell him it was not a good time to come over and he "would get the hint." Lindsey told a law enforcement officer that on two occasions, the victim was at the ranch when Lucero and [Petitioner] were there and things were "tense." During those occasions, she escorted the victim off the ranch for his safety and Lucero and [Petitioner] asked her if the victim was "David" (the victim's first name). It was after that that the victim called before each time he came to the ranch. She said that she last saw Lucero and [Petitioner] together two and one-half days before the shooting when Lucero was released from juvenile detention. The victim's sister, who also used drugs, testified that between September 2005 and February 2006, she went to the ranch four times a week, inter alia, to make sure the victim was not there when others were there. The victim sold marijuana, methamphetamine and ecstasy and he used methamphetamine.
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> The victim's sister testified that at some point before the shooting, she had gone to the ranch to pick the victim up and had run into Lucero, who stared at the victim. She asked Lucero what he was doing there and at whom he was staring. She told Lucero that she had been at Lucero's grandfather's funeral, because there was no reason for Lucero to be after the victim or to be staring at him, and she wanted to give the victim a chance to get away, which he did. She also testified that a few weeks before the shooting, she ran into [Petitioner] in Lindsey's bedroom. [Petitioner] told her, not in a mean way, not to bring the victim to the ranch. When she related this to the victim, he said that he calls first before he goes to the ranch and that everything was okay.
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> The evening of February 17, 2006, the victim and a male companion arrived at the ranch after the victim had made a phone call, during which he told the person he was speaking to that he was going to go and "they'd be there."[4] The victim's companion expressed concern about

[4] *During an interview with the police, the companion said that the victim had said during the call, "I'll be there in a minute," and they arrived at the ranch shortly thereafter.*

> the victim being at the ranch due to the 2003 case, but the victim said it would be "cool." According to the companion, he and the victim approached the trailer, three men[5] came out and the victim said, "Let's go. We're leaving. It isn't cool."[6] Both ran, then the companion heard shots ring out.
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> Karla, the girlfriend of a man who was staying at the ranch at the time, and a methamphetamine user, testified that shortly before the shooting, she went into the trailer and sat on a folding chair in Lindsey's bedroom. She heard the gate through which cars entered the ranch property open and saw two Hispanic men, one approximately five feet, five inches tall and the other about six feet tall approach and enter the trailer. She identified them at trial as Lucero and [Petitioner]. The phone rang, she answered it, the caller asked for Lindsey, and Karla indicated that Lindsey was not there and hung up. Then, seven more men, who said they were from Mira Loma, including a man called "Lucky," came into Lindsey's bedroom. Lucky introduced the others in the room as his "killers."[7] He said he was from Mira Loma, which, to Karla, meant that he was a gang member. Dodd Street was mentioned one or two times. The victim's sister was a topic of conversation and Karla was asked, since she knew the sister, if she also knew the victim. She felt they were fishing for information about the victim. Karla said she did not know that the victim was the sister's brother. Lucero, [Petitioner] and Lucky said that he was. A second call came on Lindsey's phone and Lucero picked it up and spoke briefly to the caller. Lucero seemed agitated and he moved around. Lindsey's phone rang for a third time and Lucero picked it up, but [Petitioner] snatched it from him. The caller asked for Lindsey and [Petitioner] said that she was in the house. The caller asked if it was cool to come by. [Petitioner] said it was and he added that there was nobody there. [Petitioner] then held the phone up to Karla and told her to tell the caller that it was cool to come by, which she did.[8] Karla was told that the caller was someone she used to date, but she did not believe this. Thereafter, [Petitioner] looked more serious than he had before.

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[5] *During an interview with the police, the companion said that the men were Hispanic. The companion also said that he did not want to testify in this case for fear that what happened to the victim would happen to him.*

[6] *During an interview with the police, the companion said that the victim stuck his head into the trailer, turned around and said to him, "We need to get out of here."*

[7] *An investigator testified that Karla told him a year after the shooting that it was Lucero who said that the others in the room were his "killers."*

[8] *Karla later testified that she could not remember if it was Lucero or Clever who did this.*

Between 5 and 15 minutes after this call, Karla saw the victim's sister's car pull into the driveway and someone said that they heard the gate open. One of the men looked out the sliding glass door of the trailer and said, "Yes, yes, yes. Someone's here. Someone's here." Someone (but not Lucero or [Petitioner]) asked what kind of car had arrived and was told what kind it was. A few minutes later, the sliding glass door of the trailer opened and the victim walked in with someone behind him. When the victim entered the trailer, all the men were in Lindsey's bedroom, except for Lucero, who was in the day room adjacent to the sliding glass door, next to Lindsey's bedroom. The victim saw all the men in Lindsey's bedroom, then turned and left the trailer. He had an expression on his face as though he was thinking, "Whoa, maybe I shouldn't be here." The man who had arrived with the victim had turned around before the victim did. Then, Karla heard the first gunshot. The shooter wore a dark bomber jacket, but no hat, and he was the same height and build as Lucero.

When shown a photo lineup containing Lucky's picture in 2007, Karla picked out the picture as that of the shooter, saying, variously, that it looked a bit like Lucky and that it was Lucero. She wrote on the admonition form, which she received with the photo lineup, concerning her identification of the photo as Lucero, "His head came to a point as the shooter's did. [¶] . . . [¶] . . . [And] his ears stick . . . out, and the scar on his right eyebrow." She told the officer who showed her the photo lineup that Lucero had been sitting next to her on the bed before the shooting, but he had said disrespectful things to her and Lucky had told him to get up and Lucky sat in his place. She said that [Petitioner] had sat on her other side on the bed and he was quiet. Lucero then paced around the trailer in an agitated state. Lucero wore a baseball cap which he took off and put on several times. Both Lucky and Lucero asked her about the victim's sister and [Petitioner] asked her if the sister had a brother named David. She said that it was [Petitioner] who answered Lindsey's phone the first time it rang and she did not answer it. She also said that when the phone rang again, it was [Petitioner] who picked it up, and Lucero who grabbed it from him and told the caller not to trip, everything was all right, no one was there, Lindsey was in the house and to just come by. Lucero handed the phone to Karla and told her to say that Lindsey was there and Karla did, adding that it was alright and that nobody was there. Lucero got back on the phone and said to the caller, "See, see." Lucero went into the dayroom. Then there was a knock on the sliding glass door and the victim walked into the trailer. He appeared to be afraid, but he tried to maintain a poker face. He turned around and walked out and began walking towards the pedestrian gate. Karla got up and stretched and looked out the

window onto the porch outside the trailer's sliding glass door. She saw a left hand holding a handgun, which had been pulled from a waistband. She heard a shot, then a pause, then five more shots, while seeing the shooter's hand. She told the police that [Petitioner] was the shooter. Karla mixed up the names of Lucero and [Petitioner] throughout her interview.

During another interview with the police, Karla said she thought some of the men in Lindsey's bedroom with her the night of the shooting had weapons by the way they held their arms across their mid-sections. She said both that "Ras or whoever" and [Petitioner] had asked about the victim before he arrived at the trailer. She also said that as the victim walked into the trailer, someone said, "David, David, David." She said that she then realized that the victim was the one who had been calling Lindsey's phone. She said that after the victim left the trailer, Lucero was the first one to walk out the sliding glass door, then one or two other of the men, then [Petitioner], like he was trying to catch the victim. They all moved quickly. All the other men, except Lucky, went out the sliding glass door. She went over to the window to either stretch or to make sure there was no trouble. Through an opening in the curtain on the window, from about 10 feet away, she saw one of the men, who was the same height as Lucero, standing on the patio and saw the flash of a muzzle, then heard a clap. She said this man did not have a hat on and was wearing a tight-fitting dark jacket. The flash was on the man's left side, suggesting that he fired the gun with his left hand. She ducked down for the subsequent shots. She said that Lucero wore a "poofy" white jacket with a blue stripe that night and [Petitioner] wore a dark or black jacket that was contoured to the body. In fact, the shooter's clothes were a closer match to [Petitioner's] than to Lucero's. She twice declared during the interview that she saw [Petitioner] "do it."

The victim's sister testified that the day after the shooting, she asked Karla if Lucero had shot the victim and Karla replied she had seen the shooting and the man who wore the white hooded sweatshirt was the shooter, and she seemed not to know that that was Lucero. Karla also said that [Petitioner] was there and he had answered the phone.

Lucky, who had received use immunity for his testimony, testified that he was a member of Dodd Street before February 2006, but, thereafter, continued to associate with Dodd Street members and was "inactive." He was on and off methamphetamine. On February 17, 2006, he was with fellow Dodd Street associate, "Woody," at the home of a female. Dodd Street members Lucero, [Petitioner], and a man named "Goofy," as well as others, were there. Lucero had a brown-handled black revolver in his

> waistband which he pulled out and showed off, then returned to his waistband. Lucky told police it may have been a .38-caliber and that Lucero told him he had a gun. After 7:00 p.m., Lucky and Woody drove to the ranch in Lucky's car and Goofy followed in his car with Lucero and [Petitioner]. Lucky and Woody went into Lindsey's bedroom, where Karla was on the bed in the presence of three white males and there was a large bald man in the kitchen. Lucero and [Petitioner] stood in the day room, while Goofy was on the couch in the day room. Lucky and Woody joined Karla on the bed. They passed around a pipe of methamphetamine and smoked it for about 20 minutes. Lindsey's phone in the bedroom rang and [Petitioner] picked it up and then walked into the day room with it, where Goofy and Lucero were. [Petitioner] told the caller not to come there because Mira Loma was there, then had a hostile argument with the caller, during which [Petitioner] said that he did not give a "shit,"[9] then he hung up. After the call, Lucero and [Petitioner] talked to each other in the day room. Five to ten minutes after the call ended, the victim put his head in the doorway of Lindsey's bedroom, glanced around and darted out of the trailer, running. Lucero and [Petitioner] took off from the day room after him, with Lucero in the lead. Lucky then heard gunshots.[10] Everyone else got up and ran out of the trailer, with Lucky headed in the same direction as Lucero and [Petitioner], which was towards where they had parked their cars. Lucero and [Petitioner] had gone out of the trailer first, two-to-three feet apart from each other. There was a big space, then Goofy went out next, 10 feet behind Lucero and [Petitioner], then Lucky and Woody. When the shots went off, Lucero and [Petitioner] were already out of the trailer and all the shots had been fired before Lucky got out. Lucky ran to his truck and, ahead of him, Goofy, Lucero and [Petitioner] were already getting into Goofy's car. Halfway to Woody's house, [Petitioner] called Woody's cell phone and Lucky then drove to [Petitioner's] house, picked him up and drove him to his grandmother's house. [Petitioner] was very scared.
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> Woody, who also had use immunity and a methamphetamine habit, testified that he was a former member of Dodd Street. He knew Lucero and [Petitioner]. On February 17, 2006, he, Lucky, Lucero, [Petitioner], Goofy and perhaps another member of Dodd Street visited the home of the same female Lucky had mentioned in his testimony. While there, he saw a brown-handled black revolver that was either a .357 caliber or a

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[9] *This is what Lucky told the police.*

[10] *He testified that before the shots rang out, Karla had been lying on the bed. When the shots were fired, she was still on the bed. He did not see her get up and look out the window.*

> .38 caliber being shown off by some, including Lucero, who had the gun first and last. Woody also had a gun—a .38 semiautomatic, but no one else there knew about it. Lindsey came by at some point and told them that it was alright for them to go to the ranch later—that she had drugs there. After dark, Woody left with Lucky in Lucky's vehicle and went to the ranch. Goofy drove Lucero, [Petitioner] and everyone else present who did not live at the female's house to the ranch. All went into the trailer. Woody sat on Lindsey's bed, where a girl was sitting. Lucky also got on the bed. Goofy sat in a chair in the bedroom, while Lucero and [Petitioner] stayed in the day room, talking to each other. The phone rang two different times, but Woody did not remember anyone answering it. When it rang the third time, the phone got passed to [Petitioner], who was in the day room with Lucero, and [Petitioner] answered it. It sounded to Woody like the caller was asking who was there. Someone said, "There's nothing but a bunch of Dodd Streeters here. That's who's over here if you plan on coming over here. [¶] . . . [¶] . . . You can come if you want to." Lucero and [Petitioner] talked to each other after the call. Then the victim either came in or poked his head into the bedroom, looked around at the people in there, and went outside. He looked like he did not expect to see who he saw. Two to three seconds later, Lucero and [Petitioner] went outside the trailer from the day room, one right behind the other, and two or three seconds later, shots rang out. The victim had not closed the sliding glass door when he left, so Lucero and [Petitioner] did not have to open it to leave. No one in the bedroom had gotten up when the victim poked his head in or when the first shot had been fired and no one else moved during this time. No one had entered the day room except Lucero and [Petitioner]. No one besides Lucero and [Petitioner] left the trailer until the last shot had been fired.[11] Lucky left the bedroom first, then Woody, then the rest. After the last shot had been fired, Lucky went out of the trailer. As Woody ran to Lucky's vehicle, he threw his gun across the street, and retrieved it a few days later.
>
> The victim's sister testified that she and her mother went to the ranch after receiving a call that the victim had been shot, but they were not allowed onto the property by the police. The mother went to the hospital where the victim had been taken, dropping the sister off at their home so the sister's boyfriend could drive her to the hospital. The sister arrived at the hospital at 1:45 or 2:00 a.m. on the 18th. During the detective's interview of the victim in the

[11] *Woody admitted that he lied to the police when he said that he was outside by the cars when the shooting started. He testified that he was scared to say where he was at the time.*

> emergency room, after the victim mentioned DK (a party/tagging crew), and the sister told the victim she did not know who that was, the victim told her to look in his high school yearbook[12] and ask his friend, Daniel.[13] She told the detective that "Clever" was the one who had told her previously not to have her brother, presumably, at the ranch. She identified "Clever" to the detective as having the same first name as [Petitioner's]. Afterward, she told the detective that the only person she could think of would be "Clever" because that's the name the victim had given her. She also testified that the police asked her if "Raskal" had shot the victim and she asked them if he had in reply. However, she added that she probably said, "It's Raskal" four times.[14] The police then told her that they had asked the victim if the shooter was "Raskal" and he had said that it was not, and she responded, "No, his name is Raskal. His name is little Raskal." According to the detective, after he reiterated that the victim had said it was not Lucero, she said, "Then it was Clever." She added that Clever had been hanging out with Lucero since being released from juvenile custody two days before the shooting. She also testified that at some point, when the police had told her that the victim had said that the shooter was from DK, but now he's with Dodd Street, she had responded, "That's Raskal."[15] She also had said that the victim did not get along with DK when he was younger, so the only person she could think of would be Raskal.[16]

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[12] *The victim and [Petitioner] had attended the same high school.*

[13] *This statement was impeached by the playing of a recording of that portion of the interview in which the sister volunteered the name "Clever" and the victim replied, "Yes, it's Clever."*

[14] *According to the detective, this occurred before the sister went into the emergency room and participated in the detective's interview of the victim. The detective testified that her statements were made in response to his assertion that the victim had told him at the shooting scene that Lucero was not the shooter.*

[15] *According to the detective, this occurred before the sister went into the emergency room and participated in the detective's interview of the victim.*

[16] *For the sake of the reader, according to the transcript of a portion of a tape that was not played for the jury, during the discussion between the sister and the detective before they went into the emergency room to talk to the victim, the sister went back and forth between Lucero and [Petitioner], trying to guess which one was the shooter, while attempting to incorporate the detective's assertions that the victim had said it was not Lucero, but it was someone who used to be DK, and Lucero had never been DK. It was during this back and forth that she said, "It's Raskal," four times and it was "Little Nathan" or "Little Raskal." Finally, she said she didn't know at that point who it was and she needed to find this out.*

> The victim made several statements before he died. A detective testified that at the scene of the shooting, he asked the victim who shot him and the victim kept saying, "Hubcaps," but the detective knew the victim could not be referring to Jason because the latter was in prison, so he assumed it had something to do with Jason. The detective asked the victim if Lucero did it and the victim said no, but the detective was unsure whether the victim meant that Lucero was not the shooter. The detective rode in the ambulance with the victim to the hospital. The detective asked the victim again who shot him and the victim continued to say, "Hubcaps." The victim also told the detective to ask the victim's sister who had done it—that she would know his name. The detective had recorded a portion of the interview he conducted with the victim while in the ambulance and it was played for the jury. During this portion, the victim said he did not remember what name "he" (presumably the shooter) went by on the streets or where "he" lives, but he was from DK. When the victim was asked why he thought he had been shot, he said, "Hubcaps." When the detective told the victim that DK does not get along with "Hubcaps,"[17] the victim said, "'[he]'s with Mira Loma now.'" The victim elaborated that "he" was with Mira Loma now, but used to be from DK. In another recording made in the ambulance, also played for the jury, the detective said to the victim, "It was the guys from DK?" and the victim replied, "The guys from DK." The victim appeared to say that if the detective could name the members of Dodd Street, the victim could tell the detective which member it was. Another officer asked the victim at the hospital if Lucero had shot him and the officer reported back to the detective that it was not "Raskal."[18] A recording of an interview the detective had with the victim while the latter was in the emergency room, in the company of his sister, was also played for the jury. During that interview, the

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Immediately thereafter, she and the detective entered the emergency room and they began talking to the victim, the recording of which was played for the jury. Unfortunately, the jury was not given this context for her conflicting statements, which left the impression that she was all over the place. She was, but she was merely guessing, having known only that the victim told the detective that Lucero was not the shooter.

[17] *The detective testified that to his knowledge at the time, DK, which was a party/tagging crew, a precursor to a full gang, feuded with Mira Loma Dodd Street, a full-fledged gang.*

[18] *For the sake of the reader, according to [Petitioner's] moving papers, this occurred after the victim's sister had insisted during her discussion with the detective prior to going into the emergency room and seeing the victim that Lucero must have been the shooter. Unfortunately for the jury, they were not told this.*

> victim's sister asked the victim if he could tell her anything. In his response, the victim mentioned DK. The sister replied that she did not know who that was and the victim told her that she did. The sister said, "Clever?" and the victim said, "Yes, it's Clever" and he added, "And two other dudes. . . ." The detective asked the victim who it was besides Clever and the victim replied, "I don't know." The detective asked the victim if "Clever's" last name was Uribe and the victim said it was. The detective asked the victim if Lucero was there. The victim replied that he was not sure. After the victim said he knew who Lucero was, then he said that Lucero was there and he added that it was "Clever" for sure. When the detective asked the victim what color clothing "this guy" was wearing, the victim replied that he went to shake his hand, and the person looked at him funny, and the victim recalled that the last time he had seen this person, the person had shaken his hand. The victim added, "Then he pulled the gun. [¶] . . . [¶] I start running. [¶] . . . [¶] They shoot me." When asked if he remembered the person wearing a baseball cap, at first the victim said he did not remember, then he said "Yeah, yeah."[19] In none of the interviews whose recordings were played for the jury was the victim asked if Lucero shot him and the victim replied, "No."
>
> The victim's sister testified that based on her belief that Lucero was involved, she asked the victim whether it was "Raskal" and he replied that it was the little one.[20]
>
> The victim's mother testified that the victim told her at the hospital that he and his companion had gone into the trailer, after he had called there. He said he had never before had problems with the person whose hand he tried to shake at the trailer. This person crossed his arms and stood back and the victim knew something was wrong. The victim saw a gun, went out the sliding glass door and yelled for his companion to run. The victim told his mother, "They got me." When being interviewed by the District Attorney's Office the year after the shooting, the mother added that the victim had told her that after the person would not shake his hand, a bunch of guys "jumped out," then he saw a gun, turned, yelled at his companion and ran out the sliding glass door. He did not say that the person who refused to shake his hand was the shooter.

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[19] *It appears, based on a follow-up question by the detective, that the victim was talking about "Clever."*

[20] *This appears to be an unrecorded either portion of the detective's interview with the victim during which the sister was present or a conversation between the victim and the sister.*

During an interview with the police, [Petitioner] admitted that he knew Jason as "Hubcaps" and he knew that Jason was Lucero's father and was in prison. He also knew Lucero. He admitted having been, probably throughout high school, in DK.

[Petitioner's] mother testified that [Petitioner] is left handed. A deputy sheriff testified that [Petitioner] signed documents at the jail with his left hand. Another law enforcement officer testified that [Petitioner] is 5 feet 11 inches or 6 feet tall. Lucero is 5 feet 6 inches or 5 feet 7 inches tall. Lucero used his right hand to sign documents. During a search of [Petitioner's] house, the police found a blue hoodie with an elastic bottom, a black hoodie with an elastic bottom and a black Fubu hooded coat with a drawstring bottom. At Lucero's house, officers found a white Reebok jacket with blue stripes. The parties stipulated that the victim had used his cell phone to call the ranch three times on February 17, 2006 and once on February 18 at 12:50 a.m.

A ballistics expert testified that the murder weapon was a .38 special or a .357 Magnum, both revolvers.

The pathologist who conducted the autopsy of the victim testified that the victim had been shot in the back twice, in the buttocks once and in the right arm once, the latter front to back. There was possibly a fifth wound, which was a grazing one.

Gang evidence

Lindsey's mother, who lived with her in the trailer, testified that there were lots of gangs in the area surrounding the ranch and some of the people who visited Lindsey at the ranch may have been gang members.

Lindsey testified that she knew [Petitioner] for a year before the shooting and she knew that Lucero and [Petitioner] were Dodd Street gang members, with the monikers, "Raskal" and "Clever" respectively.

When shown a photograph which included himself, Goofy and others, Lucky testified that two of the people in the photograph were throwing a hand sign for Mira Loma, which means Dodd Street. He said that Lucero and [Petitioner] were Dodd Street members up to the day of the shooting. He also testified that talking to the police or testifying meant death in the gang, therefore, he was very afraid to testify at this trial. He added that Dodd Street tagging includes the letters "MLR."

The victim's sister, who testified that she had known members of Dodd Street since she was 11 or 12, said that [Petitioner] had been in DK.

> Woody testified that if someone cooperates with the police in a way that harms gang members, there will be consequences. He occasionally saw Dodd Street members at the ranch. He knew Lucero's moniker to be "Raskal" and [Petitioner's] to be "Clever." He testified that "putting in work" in the gang meant committing a robbery, harming someone or doing anything, including committing crimes, to benefit the gang. This gets one status and respect in the gang. A gang member is expected to do this. Woody testified that there could be consequences if one claims to be in a gang, but is not. He said that [Petitioner] hung out with some members of DK, which was a tagging crew. According to Woody, Lucky was a Dodd Street member in 2006, although Lucky was not a leader in the gang. He also testified that Dodd Street members wear hats with the letter "D" on them and used the letters, inter alia, "LM."
>
> The detective testified that DK was a party crew that feuded with Dodd Street. Sometimes, full-fledged gang members join tagging or party crews before they join a gang.
>
> A gang investigator testified that on March 5, 2005, he asked Lucero, "What about [the victim in the instant case]? I bet you would like to get him for testifying against your dad." He also testified that in May 2005, Lucero was in the company of a Dodd Street member and someone else the police had been told had been jumped into Dodd Street. Lucero told the investigator that he was a member of Dodd Street and his moniker was "Raskal." Lucero has Dodd Street tattoos on the back of his neck and on his arms.[21] The investigator opined that Goofy was a Dodd Street member. During a February 2006 search of the area of the home where the investigator was told Lucero slept, papers, a VHS tape and a notebook containing references to Dodd Street and to Goofy were found. In [Petitioner's] room in his house on March 30, 2006, a photo was found in which [Petitioner] was making a hand sign for "L" while another person in the photo was making a hand sign for "M."[22] On a CD was written, "Clever" and other references to Dodd Street.
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> The parties stipulated that on March 9, 2006, when he was booked into jail on this case, [Petitioner] said he belonged

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[21] *In his statement of facts, appellate counsel for Lucero refers to photos the gang expert was shown in the Reporter's Transcript at page 2281, but the expert was referring at that point to Jason's tattoos, although the exhibit list identifies them as those of yet another gang member.*

[22] *The prosecution's gang expert testified that this other person claimed to be a member of Dodd Street.*

> to the "Sureno"[23] gang from Mira Loma and he goes by the name "Clever." The parties also stipulated that while [Petitioner] was being booked into jail on January 18, 2005, he was asked about his gang affiliation and he responded that he went by the name of "Clever" and he had a Mira Loma gang tattoo. In fact, in one of his booking photos, the words, "Too Clever" appeared, tattooed on the back of his neck.
>
> The prosecution's gang expert testified that in 2006, there were over 150 documented members of Dodd Street. Its members were mostly Hispanic, with the exception of Lucky and Woody. Lucero was an active Dodd Street member in 2006 and he had Dodd Street tattoos on his body. [Petitioner] was also an active member at the time of the shooting. Dodd Street graffiti showed that they were rivals with DK in 2006. One piece of grafitti [*sic*] also made the same reference to "Cleves" that was found in the notebook in [Petitioner's] house. The expert said that DK started as a skaters' crew, but was getting picked on by Dodd Street, so members of the former armed themselves to defend themselves and became a gang, too. Some members of crews become members of gangs. Someone in DK could become a member of Dodd Street even though they were rivals. A female member of Dodd Street told him that [Petitioner] was a member and had the moniker, "Clever." During the search of Lucero's house, an article about the 2003 incident involving the victim and Jason was found. Pictures taken from Lucero's home included shots of Jason. During the March 30, 2006 search of the house where [Petitioner] lived, references to Dodd Street and [Petitioner's] moniker, "Clever" were found.
>
> The expert reported that a Dodd Street member was investigated for an attempted murder in the parking lot of a fast food restaurant on July 18, 2000. The victim of this crime had looked at the member the wrong way and a fight had broken out, during which the victim had been shot several times by the member. The member was charged with attempted murder and the parties stipulated that he was convicted of attempted voluntary manslaughter, with gang "enhancements." The expert also cited the attempted murder of the victim in 2003 by Jason and two other Dodd Street members, which resulted in all three being convicted, which has already been discussed. In 2004, Lucky had tried to pull a rifle on the expert, along with other officers, and was shot. [Petitioner] and another Dodd Street member were

[23] *The prosecution's gang expert testified that gang members from Bakersfield, south, are protected by the Mexican Mafia when they go to prison, while gang members from north of Bakersfield (or "Norento") are protected by Nuestra Familia.*

> apprehended for a January 18, 2005, grand theft auto and were subsequently convicted—[Petitioner] pleading guilty to a violation of Vehicle Code section 10851.[24] The parties stipulated that [Petitioner] had also admitted violating that code section and evading a police officer in August 2004.
>
> The expert opined that a person who is not in a gang, but who advertises where they are from, for example, with a tattoo, will be retaliated against by members of the gang from that area. In order to be a gang member, one has to "put in work," meaning a criminal act has to be performed. The fear people outside the gang have for members of the gang equates with respect. A gang operates on fear. Fear is necessary to allow the gang members to continue to commit crimes and to control their territory. Respect within the gang is acquired by committing crimes and acts of violence—the more violent the act, the more respect is garnered within the gang and fear of the gang by those outside it. People outside the gang who were aware of the gang committing crimes would not report them or would not testify about them because of their fear. It is common for witnesses who were once cooperative to become uncooperative due to their fear of retaliation. Suspects or witnesses who talk to law enforcement are considered "snitches." If a gang member is labeled a "snitch" and goes to prison, that person will have to be in protected housing. It is common for gang membership to be intergenerational. When a gang's name has been crossed out in graffiti, the gang members retaliate. If one gang member is challenged to a fight by the member of another gang, he would have to respond or be considered a "punk" and disrespected and he would be seen as being weak and not upholding his gang's reputation, which can negatively impact the entire gang. A witness coming forward against a gang or cooperating in an investigation involving a gang would be an insult to the gang. If a gang member is threatened or shot at, he has an obligation to respond.
>
> In response to a hypothetical question, the expert said that if someone shot at three gang members, then testified against them in court, resulting in their convictions, their gang would be insulted. A few years later, if two other members of the gang, one of whom was the son of one of the people shot at and convicted, shot and killed the

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[24] *The police officer who stopped [Petitioner] in the stolen vehicle testified that [Petitioner] was driving and admitted he had been in the car and was in the company of two others who were identified by the prosecution's gang expert as being Dodd Street members. In his statement of facts, appellate counsel for Lucero reports that [Petitioner] was the passenger, citing the Reporter's Transcript at page 2201, which contains no information about who drove the car.*

> person who shot at and testified against the three gang members, the shooting would benefit the gang by convincing anyone who ever contemplated testifying against a member of the gang not to do so and this would further the criminal activities of the gang.

(Lodg. No. 6 at 3-24 (footnotes renumbered and italicized).)

IV. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). In particular, this Court may grant habeas relief only if the state court adjudication was contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court or was based upon an unreasonable determination of the facts. *Id.* at 100 (citing 28 U.S.C. § 2254(d)). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt[.]" *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (internal citation and quotations omitted).

A state court's decision is "contrary to" clearly established federal law if: (1) the state court applies a rule that contradicts governing Supreme Court law; or (2) the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court but nevertheless arrives at a result that is different from the Supreme Court precedent. *See Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). A state court need not cite or even be aware of the controlling Supreme Court cases "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002).

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A state court's decision is based upon an "unreasonable application" of clearly established federal law if it applies the correct governing Supreme Court law but unreasonably applies it to the facts of the prisoner's case. *Williams*, 529 U.S. at 412-13. A federal court may not grant habeas relief "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be *unreasonable*." *Id.* at 411 (emphasis added).

In determining whether a state court decision was based on an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), such a decision is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L.Ed.2d 738 (2010). The "unreasonable determination of the facts" standard may be met where: (1) the state court's findings of fact "were not supported by substantial evidence in the state court record"; or (2) the fact-finding process was deficient in some material way. *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (citing *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004)).

In applying these standards, a federal habeas court looks to the "last reasoned decision" from a lower state court to determine the rationale for the state courts' denial of the claim. *See Cannedy v. Adams*, 706 F.3d 1148, 1156 (9th Cir. 2013) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)). There is a presumption that a claim that has been silently denied by a state court was "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d), and that AEDPA's deferential standard of review therefore applies, in the absence of any indication or state-law procedural principle to the contrary. *See Johnson v. Williams*, 568 U.S. 289, 298, 133 S.Ct. 1088, 1094, 185 L.Ed.2d 105 (2013) (citing *Richter*, 562 U.S. at 99).

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Here, Petitioner raised all his claims in both the California Court of Appeal and the California Supreme Court on direct appeal or on collateral review. (*See* Lodg. Nos. 3, 7; Traverse, Appendices A & C.) The California Court of Appeal rejected Petitioner's claims on the merits in a reasoned opinion, and the California Supreme Court denied them without comment or citation. (*See* Lodg. Nos. 6, 8; Traverse, Appendices A & C.) Accordingly, under the "look through" doctrine, these claims are deemed to have been rejected for the reasons given in the last reasoned decision on the merits, which was the Court of Appeal's decisions, and entitled to AEDPA deference. *Ylst*, 501 U.S. at 803.

V. DISCUSSION

A. Grounds One and Two: Evidentiary Error

In Grounds One and Two, Petitioner challenges the admission of statements made by the victim, David Henslick, that were admitted at trial under the dying declaration exception to the hearsay rule. (FAP at 5.) First, he contends that the trial court erred by applying the wrong standard of admissibility before allowing the jury to hear Henslick's dying declaration statements. (FAP, Attached Memorandum at 31-34.) Second, he claims that the statements were improperly admitted as dying declarations because they were not made at a time when his death was imminent. (FAP, Attached Memorandum at 35-41.)

1. *Background*

Prior to trial, the prosecution moved to admit statements Henslick made to Deputy Padilla and his sister and mother on the night of the shooting under the dying declarations exception to the hearsay rule.[25] (CT 659-70.) Petitioner's counsel objected on numerous grounds (CT 588-98), and the trial court held a

[25] In California, "a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death." Cal. Evid. Code § 1242.

hearing to determine their admissibility. (*See* Reporter's Transcript ("RT") 320-32.)

At the hearing, Deputy John Tometich testified that when he arrived at the scene of the shooting, Henslick was lying facedown in a laundry room doorway and bleeding from multiple gunshot wounds to his back. (RT 346-49.) At the time, Henslick was unresponsive with shallow breathing. (RT 349.) Soon thereafter paramedics arrived and began to treat him. (RT 350.)

Two other officers, Corporal Joel Wilson and Deputy Nathan Padilla tried to get a statement from Henslick at the scene. According to Deputy Padilla, when asked who shot him, Henslick replied, "Hubcaps." (RT 383.)

Deputy Padilla rode in the ambulance with Henslick as he was being transported to the hospital. (RT 357, 383.) Padilla asked Henslick, "Why do you think they shot you, David?"[26] (CT 1023.) Henslick responded by repeating the name, "Hubcaps," and told the deputy, the shooter "used to be from DK," but "[h]e's with Mira Loma now." (CT 1024.) According to Deputy Padilla, Henslick went in and out of consciousness on the ride and his condition was getting worse. (RT 384-85.) Henslick asked the deputy to tell his parents and sister that he loved them. (RT 384-85.) Henslick asked "if he was going to make it," and a paramedic responded, "If it's up to me, you will." (RT 384-85.) Henslick told the paramedic he could "barely breathe." (RT 389.)

Corporal Wilson met Henslick when he arrived in the emergency room. Wilson testified that Henslick appeared to be in "pretty serious condition" and had lost a "significant amount of blood." (RT 359.) According to Wilson, Henslick appeared "[v]ery frightened." (RT 360.) Henslick told Wilson that Lucero was not the one who shot him. (RT 362-63.)

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[26] The conversation between Henslick and Deputy Padilla during the ambulance ride to the hospital was recorded.

Shortly thereafter, Denae Gill, Henslick's sister, spoke with Henslick in the presence of Deputy Padilla. (RT 390, 415.) Henslick told her that Lucero was there, but that "Clever" was the one who shot him. (RT 390-91, 421.) He told her that he tried to run, but "[t]hey shoot me." (RT 391.) When speaking to Gill, Henslick appeared to be in "extreme pain" and had difficulty breathing and keeping his eyes open. (RT 392, 396-97.) Gill recalled her brother telling her that he loved her and then saying, "bye," which confused her because she was not leaving the room. (RT 420.)

When Henslick's mother arrived at the hospital, he yelled, "Mommy; mom, I love; I love you, mom." (RT 439.) He repeatedly told her that he loved her and appeared scared, telling her, "They got me, mom. They got me, mom." (RT 439, 443.) He told his mother that he was paralyzed and that he had a bullet in his spine.[27] (RT 444.)

The trial court ruled that Henslick's statements would qualify as dying declarations because they were made with a "sense of immediately impending death." (RT 452-53.) Noting Henslick's question of whether he was "going to make it" and telling his sister goodbye, the court found the evidence sufficient to demonstrate that Henslick "feared that he was going to die and die imminently." (RT 453.) Although the trial court admitted that the facts supporting the "requisite sense of impending death" were "ambiguous," the court found that the evidence was "sufficient to let the jury make that determination." (RT 458.) Thereafter, the court admitted all of Henslick's statements to the officers and his mother and sister as dying declarations. (RT 765-66.)

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[27] The morning following the shooting, Petitioner was put on a ventilator, later fell into a coma, and died several weeks afterwards without ever regaining consciousness. (*See* RT 1606-08.)

2. *The California Court of Appeal Opinion*

On appeal, the California Court of Appeal noted that state evidentiary law provided that the trial court must decide whether there were sufficient foundational facts to admit a dying declaration, rather than allowing the jury to independently determine whether the requisite foundational facts were established before considering the declaration as evidence. (Lodg. No. 6 at 28.) Thereafter, the appellate rejected Petitioner's argument that the trial court had erred in this case by using the wrong standard to admit Henslick's statements:

> Contrary to [Petitioner's] assertions, the trial court's remarks, up to the last set, indicate that it was aware of its proper role in determining the admissibility of the victim's statements. The last set of remarks, however, gives us pause. If this were the only remarks the trial court made, we would be inclined to agree with [Petitioner]. However, it was not. At this point, we are being called upon to divine the trial court's meaning with regards to this last set of remarks, not in isolation, but in combination with its earlier remarks. Unfortunately for [Petitioner], the burden is on them to convince us that, despite its earlier correct pronouncement, the trial court suddenly misunderstood its duty. They do not persuade us. We believe that what the trial court meant in making the last set of remarks was that [Petitioner] was free to argue to the jury that the victim did not have a strong sense that he was going to die at the time that he made his statements, therefore, those statements lacked trustworthiness and should not be relied on by the jury. Neither [Petitioner nor Lucero] made such an argument because each found support for their position in various statements by the victim. However, the trial court had no way of knowing this at the time of its ruling, and it correctly stated that such an argument was possible.

(Lodg. No. 6 at 29-30.)

Further, the state appellate court determined that the trial court had not erred in finding that sufficient foundational facts existed to allow Henslick's statements to be admitted under the dying declaration exception to the hearsay rule:

> [Petitioner] contend[s] that the . . . evidence failed to show that [Henslick] had abandoned all expectation of living and believed that death was inevitable. Because [Petitioner] expressly withdrew from consideration the foundation for admission of statements [Henslick] made before he arrived at the hospital, we will not discuss this

> aspect of [Petitioner's] argument on appeal. As to the statements the victim made to the detective's partner and to his mother and to his sister and the detective, [Petitioner] assert[s] that the victim "knew he was receiving state of the art [tertiary] care . . . [at a] teaching hospital [which was a] level II adult and pediatric facility with a trauma center" and they cite the hospital's website as the source of this information.[28] We rather doubt that the victim, a drug user and dealer, had such detailed knowledge of the hospital and appreciation for it. We are also aware that [Petitioner], at trial, raised the specter of malpractice committed at this "state of the art" institution by extubating the victim perhaps before he should have been, thus actually causing his death. [Petitioner] also assert[s] that the fact that the victim knew he had survived being at the scene, first without medical care, then with it, and survived the trip to the hospital, necessarily meant that he no longer abandoned all expectation of living and believed that death was inevitable. We disagree. The victim made no statement to this effect. In fact his statements in the emergency room demonstrated the opposite—in particular, his calling his mother "Mommy"[29] and his telling his sister that he loved her and goodbye, when she was not leaving. We decline [Petitioner's] invitation to speculate that the fact that a doctor had told him that he was paralyzed meant that the doctor also told him that he was going to live. [Petitioner's] assertion that a physician would not have told a patient who was about to die that he was paralyzed is worth considering if we are determining whether the doctor believed the victim was about to die. But, we are not.[30] We are determining whether the victim believed that death was inevitable. [Petitioner's] assertion that by the time the victim made statements to the detective and his sister he "must have known he was . . . actually getting better" is not supported by the record. Also, the fact that the victim was able to have a conversation with the detective and his sister did not mean that he no longer felt death was inevitable. [Petitioner] point[s] to the

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[28] *We note that in [Petitioner's] reply brief, [Petitioner] reiterate[s] the argument made at trial that this "state of the art" hospital was actually responsible for the victim's death. [Petitioner] can't have it both ways.*

[29] *Not too many grown men, especially men who have lived in the type of society kept by the victim, refer to their mother as "Mommy" unless they are in dire straits.*

[30] *In [Petitioner's] reply brief, [Petitioner] turn[s] the argument around and assert[s] that the victim would have thought that no physician would have told him he was paralyzed if he was dying. Again, what the doctor thought and what the victim thought are two different things and to impute such reasoning to someone who had just been shot multiple times and was in excruciating pain in a chaotic situation is not reasonable.*

> victim's question in the ambulance whether he was going to make it as suggestive that he had not abandoned all expectation of living. However, this is a common question asked at the scene of emergencies and is suggestive of a number of states of mind. Moreover, later, when the victim's mother attempted to reassure him about his condition, he greeted her words with silence and a look of being scared. [. . .] Finally, we reject [Petitioner's] argument that the nature of the wounds inflicted on the victim could not have suggested to him that death was inevitable. He had been shot twice in the back and knew that one of the bullets was in his spine and had paralyzed him. There is no wound, other than a head wound or chest wound, that is more suggestive of death to a layperson than a bullet to the back.

(Lodg. No. 6 at 32-35 (citation omitted; footnotes renumbered and italicized.)

3. *Federal Law and Analysis*

Federal habeas relief is not available for errors in the interpretation or application of state law; and a state evidentiary ruling does not give rise to a cognizable federal habeas claim unless the ruling violated a petitioner's due process right to a fair trial. *Estelle v. McGuire*, 502 U.S. 62, 70, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). A federal habeas petitioner may not transform a state-law issue into a federal constitutional issue "merely by asserting a violation of due process." *See Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996). Furthermore, a federal habeas court is bound by a state court's interpretation of its own state laws. *See Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S.Ct. 602, 604, 163 L.Ed.2d 407 (2005) ("[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.").

Here, Petitioner's claims that the admission of the victim's statements under the dying declaration exception to the hearsay rule was improper under state law are plainly not cognizable on federal habeas review. Petitioner's argument in Ground One that the trial court used the wrong standard in allowing the jury to determine whether sufficient foundational facts established that Henslick's statements were made with a sense of impending death relies entirely on the interpretation of

California Evidence Code § 1242 and state case law. (*See* FAP, Attached Memorandum at 31-32.) "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle*, 502 U.S. at 68.

Petitioner's claim in Ground Two that the trial court "abused its discretion" in finding that Henslick's statements were made under fear of imminent death as required by California law (*see* FAP, Attached Memorandum at 35) is equally unavailing. *See Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998) ("We have no authority to review alleged violations of a state's evidentiary rules in a federal habeas proceeding."); *Williams v. Borg*, 139 F.3d 737, 740 (9th Cir. 1998) (holding federal habeas relief is available "only for constitutional violation, not for abuse of discretion").

Petitioner's attempt to transform these state evidentiary claims into a federal constitutional violation by simply adding the words "fundamentally unfair" is not persuasive. *See Langford*, 110 F.3d at 1389; *see also Gryger v. Burke*, 334 U.S. 728, 731, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948) (holding federal reviewing courts "cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question"). Accordingly, Grounds One and Two fail to state a cognizable claim.[31] *See, e.g., Reyes v. Adams*, 2010 WL 2557528, at *14

[31] Even were the Court to consider the merits of Petitioner's claims that the dying declaration evidence rendered his trial fundamentally unfair, (*see* FAP at 35, 40), the Supreme Court has never held that the admission of overly prejudicial evidence can constitute a due process violation. *See Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) ("The Supreme Court . . . has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ."). Further, the Ninth Circuit has held that only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). No credible argument can be made in this instance that

(C.D. Cal. Apr. 22, 2010) (holding that whether witness statement should have been admitted as a dying declaration was a matter of state law that did not allow for federal habeas relief); *Leighton v. Scribner*, 2009 WL 6441470, at *16-17 (C.D. Cal. Dec. 4, 2009) (rejecting claim that admission of statements was improper under Cal. Evid. Code § 1242 as "not cognizable on federal habeas review").

Nevertheless, the Court has considered Petitioner's claim that the state court's ruling 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)(2). He contends that the admission of Henslick's statements as dying declarations violated his rights because "no reasonable jurist could conclude that Henslick was in the 'expectation of certain and imminent death'" based on the record. (*See* Traverse, Attached Memorandum at 5-7.)

Under California law, a dying declaration constitutes an exception to the hearsay rule if the statement was made "under a sense of immediately impending death." Cal. Evid. Code § 1242. In determining whether a hearsay statement qualifies as a "dying declaration," a court may consider the victim's "physical condition, the nature of his wounds, his knowledge of his serious condition, his conduct, and his statements." *People v. Gonzales*, 87 Cal.App.2d 867, 879, 198 P.2d 81 (1948). The victim does not necessarily have to state that he believes he is going to die. *People v. Wilson*, 54 Cal.App.2d 434, 441-42, 129 P.2d 149 (1942). Nor does the "duration of time which elapses between the declaration and the actual death of the person furnishes no criterion for the admission or the rejecting of the evidence." *Id.* at 441.

Here, Henslick's injuries were clearly life-threatening. He had been shot four times and was bleeding profusely. (*See* RT 349-50, 1708.) One bullet had passed through his spine, leaving him paralyzed, while another had penetrated his

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Henslick's statements to the police and his family identifying who shot him failed to offer a permissible inference as to Petitioner's guilt.

right lung and lodged in his chest wall. (RT 1708-09.) Henslick was having trouble breathing, keeping his eyes open, was in extreme pain, and had lost a significant amount of blood. (RT 349-50, 359, 392, 396-97.) Moreover, he was plainly aware of the severity of his injuries, asking a paramedic in the ambulance if he was going to die. (RT 384-85, 444.) On the ride to the hospital, he asked the deputy to tell his parents and sister that he loved them. (RT 384-85.) Upon seeing his sister at the hospital, he told her he loved her and said goodbye, though she was not leaving the room. (RT 420; CT 2041.) He told his mother that he was paralyzed and repeatedly yelled, "I love you, mom." (RT 439, 444.) Several witnesses said he looked scared. (RT 360, 439.) Henslick died several days later while still in the hospital. (RT 1608.)

Reviewing this evidence, the Court finds that "the prosecution established the objective severity of [the victim's] fatal wounds as well as his subjective awareness of those wounds." *People v. Monterroso*, 34 Cal.4th 743, 763, 22 Cal.Rptr.3d 1, 101 P.3d 956 (2004). As such, the state court's determination that the victim spoke "under a sense of immediately impending death" was not an unreasonable determination of the facts in light of the evidence presented. *See, e.g., id.* (finding statement by victim who "knew he had been shot, was in great pain and on the ground in a fetal position, [and] was fearful of dying" was admissible as dying declaration even though victim "lingered on for several more days before dying"); *People v. Mayo*, 140 Cal.App.4th 535, 553-54, 44 Cal.Rptr.3d 497 (2006) (holding circumstantial evidence supported admission of statement as a dying declaration when made after victim was "shot multiple times from close range" and asked for a "fan to cool himself down" before dying).

For these reasons, Petitioner's claims in Grounds One and Two do not merit federal habeas relief.

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B. Grounds Three and Four: Insufficient Evidence

In Grounds Three and Four, Petitioner challenges the sufficiency of evidence supporting the special circumstance findings that the murder was committed in retaliation for the victim's testimony in court and that the victim was killed by means of lying in wait. (FAP at 6.)

1. *Applicable Federal Law*

It is well established that sufficient evidence exists to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis included). "[I]t is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." *Cavazos v. Smith*, 565 U.S. 1, 2, 132 S.Ct. 2, 181 L.Ed.2d 311 (2011) (per curiam). Accordingly, a federal reviewing court must not usurp the role of the finder of fact by considering how it would have resolved any conflicts in the evidence, made the inferences, or considered the evidence at trial. *See Jackson*, 443 U.S. at 318-19, 326 (holding that if the record supports conflicting inferences, a reviewing court "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution"); *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995) (holding that the reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict").

In applying the *Jackson* standard, the federal court must refer to the substantive elements of the criminal offense as defined by state law at the time that a petitioner committed the crime and was convicted, and look to state law to determine what evidence is necessary to convict on the crime charged. *See*

Jackson, 443 U.S. at 324 n.16; *see also Boyer v. Belleque*, 659 F.3d 957, 965 (9th Cir. 2011) (stating that, when assessing sufficiency of the evidence claims in a habeas petition, the court looks to state law to establish the elements of the crime, then turns to the federal question of whether the state court was objectively unreasonable in concluding that the evidence was sufficient).

Finally, under AEDPA, federal courts must "apply the standards of *Jackson* with an additional layer of deference." *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). A federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees; rather, it "may do so only if the state court decision was objectively unreasonable." *Cavazos*, 565 U.S. at 2 (internal quotations omitted). Thus, where a *Jackson* claim is "subject to the strictures of AEDPA, there is a double dose of deference that can rarely be surmounted." *Boyer*, 659 F.3d at 964; *see also Coleman v. Johnson*, 566 U.S. 650, 651, 132 S.Ct. 2060, 182 L.Ed.2d 978 (2012) (per curiam) ("We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference.").

2. *Retaliation for Testimony Special Circumstance*

In Ground Three, Petitioner argues there was no direct or circumstantial evidence presented at trial that Petitioner murdered Henslick for testifying against Lucero's father, Jason. (FAP, Attached Memorandum at 42.) Although Petitioner concedes that "it was *possible* that [Petitioner and co-defendant Lucero] were motivated in part by Henslick's decision to testify" against Jason Lucero, he contends that the murder was actually revenge for Henslick's shooting of Jason, not his subsequent testimony. (FAP, Attached Memorandum at 42; Traverse, Attached Memorandum at 8.) Petitioner argues there was no evidence that Petitioner "even knew that [Henslick] testified against co-defendant Lucero's father." (Traverse, Attached Memorandum at 8-9.)

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a. *The California Court of Appeal Opinion*

In denying Petitioner's claim on direct appeal, the California Court of Appeal found that witness testimony amply supported the jury's finding that the murder was committed in retaliation for the victim's prior testimony against co-defendant Lucero's father:

> [Petitioner and Lucero] contend there was insufficient evidence that retaliation for the victim's testimony against Jason (and the other two Dodd Street members) was a motive for the killing of the victim. They point out that the victim's sister never said that the victim should not come to the ranch because of his testimony. However, the victim's mother, Lindsey and the victim's companion all testified to this.
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> [Petitioner and Lucero] also assert that there was no circumstantial evidence that the victim was killed due to his testimony. However, the gang expert provided that circumstantial evidence—specifically, that fear instilled in witnesses allows the gang to operate with impunity and a witness testifying against a gang member would be considered an insult to the gang. His response to the hypothetical question, which incorporated the facts of this case, additionally provided a basis upon which the jury could conclude that the victim was killed because he testified against Dodd Street gang members. [Petitioner's and Lucero's] argument . . . that the killing had only a deterrent effect as to future witnesses, and, therefore, was not done for retaliation, misses the mark. The jury was not called upon to assess the effect of the killing, just its motive, and its motive clearly was, at least in part, to retaliate against the victim for testifying against Dodd Street members. If, as the expert testified, the intent was that this would have a deterrent effect on future victims, this did not mean that it was not motivated by retaliation.
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> Finally, [Petitioner and Lucero] suggest that because they might have wanted to kill the victim because he shot Jason, the jury's finding cannot be supported. However, as [Petitioner and Lucero], themselves, concede, retaliation for testimony need not be the sole or even the predominate motive for killing the victim. (*People v. Sanders* (1990) 51 Cal.3d 471, 519.) While it may well be that [Petitioner and Lucero] had the added motive of killing the victim because he had shot and wounded Jason, the jury could also reasonably infer that a motive was the victim's testimony against Jason (and the others), which ensured not only that Jason was temporarily sidelined by his wounds, but permanently taken from a life outside and with his family by a 57–years–to–life sentence.

> We have already disposed of the argument that the killing of the victim could not have been motivated by his testimony because it did not follow immediately that testimony. By parity of reason, it was even farther away, chronologically, from the victim's shooting of Jason, yet [Petitioner and Lucero] insist that the latter was their motive for killing the victim.
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> [Petitioner] asserts that there was no evidence that he was aware that the victim had testified against Jason. [Petitioner] told the police that he knew Jason as "Hubcaps," he knew Jason was Lucero's father and he knew Jason was in prison. More importantly, [Petitioner] was the one who told the victim's sister, some time before the shooting, not to let her brother come to the ranch. The jury could reasonably conclude that [Petitioner] would not have made this statement "out of the blue," but was well aware why it would not be safe for the victim to be there.

(Lodg. No. 6 at 42-44.)

b. *Analysis*

California law provides that a defendant who commits first degree murder where "the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal . . . proceeding" is subject to imprisonment for life without the possibility of parole. Cal. Penal Code § 190.2(a)(10). Here, the evidence established that the victim in this case, Henslick, testified against co-defendant Lucero's father in January 2004, resulting in an attempted murder conviction and a 57 years-to-life sentence. (RT 1205-06.) Lucero was certainly aware that Henslick had testified against his father. (RT 2046-47, 2313-14.) And, Petitioner told police that he knew that Lucero's father was in prison. (RT 2163-64.) The fact that Lucero and Petitioner were both Dodd Street gang members who hung out together made it reasonably likely that Petitioner also knew that Lucero's father was in prison, in part, because of Henslick's testimony against him.

Other evidence made such an inference even more reasonable. Henslick's mother and sister both testified that Henslick had been fearful about testifying against Lucero's father because he was in a gang. (RT 1596, 1633.) After the trial,

Henslick took steps to try to avoid Petitioner and Lucero by checking to see if any Dodd Street gang members were at Rodriguez's ranch before he visited. (*See* RT 1174, 1633-35, 2212-13.) Moreover, Petitioner told Henslick's sister, "Tell your brother I said not to come over here" and to stay away from the ranch. (RT 1654.) Finally, the gang expert testified that testifying against Jason Lucero, a Dodd Street gang member, would be perceived as an insult to the gang and, thus, provide motivation for a retaliatory action. (RT 2329-31.)

Nevertheless, Petitioner argues that, even if he and Lucero did kill Henslick out of revenge, it was only revenge for Petitioner shooting and wounding Lucero's father, not for Petitioner's subsequent testimony at trial that led to Lucero's father's conviction and sentence. As the California Court of Appeal noted, however, the retaliatory killing special circumstance applies even if there is more than a single motive to kill the victim witness. *See People v. Clark*, 52 Cal.4th 856, 954, 131 Cal.Rptr.3d 225, 261 P.3d 243 (2011) ("As this court has recognized, a defendant may be motivated by multiple purposes in killing the victim. For this reason, the witness-murder special circumstance can apply 'even when only one of those motives was to prevent the witness's testimony.'" (quoting *People v. San Nicolas*, 34 Cal.4th 614, 656, 21 Cal.Rptr.3d 612, 101 P.3d 509 (2004))).

It is not this Court's role on habeas corpus to decide which motivation of the killer was more likely but, rather, only to decide whether the evidence was sufficient to permit the jury to rationally infer that Petitioner was motivated, at least in part, to kill Henslick because he had testified against Lucero's father and effectively sent him to prison for the rest of his life. *See Cavazos*, 565 U.S. at 2 (holding that a federal reviewing court on habeas may not substitute its judgment for that of the jury). In this instance, the Court finds that there was ample evidence to support the jury's finding that Petitioner and Lucero killed Henslick for his

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testimony against Lucero's father. Thus, the state court's denial of this claim was objectively reasonable.[32]

3. *Lying in Wait Special Circumstance*

In Ground Four, Petitioner claims that there was insufficient evidence to support the special circumstance finding that the victim was killed by means of lying in wait, which supported both his first degree murder conviction and life-without-parole sentence. (FAP at 6.) He argues that the evidence did not demonstrate that Petitioner had gained a position of advantage over Henslick at the time of the killing or that Henslick qualified as an "unsuspecting victim" because Henslick knew the risk of going to the ranch. (FAP, Attached Memorandum at 45-48.)

a. *The California Court of Appeal Opinion*

On appeal, the California Court of Appeal rejected Petitioner's claim that the murder was committed by means of lying-in-wait.[33] The state appellate court

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[32] Petitioner suggests that the Court should review the claim de novo because the California Court of Appeal unreasonably determined the facts when it found that the victim's mother and companion testified that Henslick was warned not to come to the ranch "because of his testimony." (Traverse, Attached Memorandum at 8-9.) While it is true that neither witness articulated Henslick's fear of confronting Petitioner and Lucero to his trial testimony specifically, the context of their testimony made it clear that the warning was made because of Henslick's involvement in the shooting and subsequent conviction of Lucero's father. (*See* RT 963-65, 1596.) Henslick's "testimony" was part and parcel of those actions. Thus, the Court rejects Petitioner's argument that the California Court of Appeal unreasonably determined the facts in rejecting Petitioner's claim of insufficient evidence.

[33] Petitioner was charged with both lying-in-wait as a theory of first degree murder and a lying-in-wait special circumstance, which allows for a sentence of death or life without the possibility of parole. (*See* CT 2224-25, 2227.) The California Court of Appeal noted that, under California law, the requirements for each are "slightly different." (Lodg. No. 6 at 44 (internal quotation marks omitted).) In analyzing Petitioner's claim, the appellate court chose to consider the "more stringent requirements" set forth in the lying-in-wait special circumstance under California Penal Code § 190.2(a)(15), because a finding of sufficient evidence as to

recounted the California Supreme Court case of *People v. Mendoza*, 52 Cal. 4th 1056, 1074, 132 Cal.Rptr.3d 808, 263 P.3d 1 (2011), which held that the defendant, who during a police detention kept his gun concealed behind another companion and shot the officer at close range while the officer patted down a third person, acted while lying-in-wait because the evidence showed that he acted in a "purposeful manner" by gaining a "position of advantage over the unsuspecting officer." (Lodg. No. 6 at 45-47.) In turn, the state appellate court found that the evidence in the instant case supported a finding that Henslick was an unsuspecting victim and particularly vulnerable when he was killed:

> Karla testified that once the victim entered the trailer and saw the men in Lindsey's bedroom, he left with an expression on his face as though he was thinking, "Whoa, maybe I shouldn't be here." Lucky testified that the victim "stuck his head in and looked around and he was gone. He took off . . . [¶] . . . [¶] [r]unning." Woody testified that the victim, "came in, he just looked, and then went out . . . ." "[H]e . . . look[ed] in . . . [¶] . . . [¶] . . . [for a] couple [of] seconds at the most [and looked both ways] and saw all of us, and then just turned around and went out [¶] . . . [¶] . . . like he wanted to get out of there quick." He added that the victim's "facial expression was like he wasn't expecting to see us . . . . [¶] . . . [H]e looked surprised . . . [¶] . . . like alert, kind of. Maybe nervous kind of look on his face. [¶] . . . [His] . . . eyes kind of opened wide." By parity of reason with *Mendoza*, the evidence supporting a finding that the victim was unsuspecting and was attacked from a position of advantage was sufficient.
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> [Petitioner] assert[s] that the "perpetrator's stratagem of striking by surprise must involve means that put the victim in a particularly vulnerable position." However, [Petitioner and Lucero's] efforts to lure the victim to the trailer by telling him (and having Karla reassure him) that everything was cool and okay, that nobody (presumably that would harm him) was there and that Lindsey was there, put the victim in a particularly vulnerable position.
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> [Petitioner] assert[s] that no one in the trailer had a gun at the ready. They cite no authority holding that this is a requirement for a finding of a position of advantage. We see no difference between the gunman here having the

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that section would "necessarily support[] the theory of first degree murder." (Lodg. No. 6 at 44 (internal quotation marks omitted).).

> gun so available that he was able to produce it and shoot the victim as the latter got a short distance from the trailer and the gunman in *Mendoza*, who pulled the gun out while inching towards the officer behind his female companion. [Petitioner's] suggestion that the gunman must have been able to shoot the victim the moment the victim came in the trailer is not logical, and it flies in the face of the holding in *Mendoza*. Additionally, as the California Supreme Court held in *People v. Russell* (2010) 50 Cal.4th 1228, 1245, "As long as the murder is immediately preceded by lying in wait, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking the victim by surprise."
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> Finally, [Petitioner] claim[s] that the victim was actually in an advantageous position as he fled the trailer. We disagree. Contrary to [Petitioner's] suggestion, it was not dark where the victim ran. Karla testified that there was a light shinning [*sic*] in her eyes from across the way as she looked outside onto the patio, which obscured her vision of the gunman on the porch of the trailer. She also testified that people inside the trailer, including herself, were able to describe the car in which the victim and his companion arrived which was farther away than the area where the victim was shot. She further testified that she was able to see, from inside the trailer, the victim, while being shot at, go towards the gate, then turn and go towards the laundry room, where he collapsed and was found lying face-down. Lucky testified that he ran out of the trailer in the same direction [Petitioner and Lucero] had taken to get to the cars in which they had arrived. There had to have been adequate light for him to see this. In fact, an officer who arrived at the scene testified that it was not pitch dark outside. All this testimony suggested that it was not dark in the area where the victim was fired upon. Additionally, by chasing the victim, the gunman placed the victim in the position of getting shot in the back, thus making him vulnerable.

(Lodg. No. 6 at 48-50.)

b. *Analysis*

Under California law, the special circumstance of murder while lying in wait requires "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." *People v. Casares*, 62 Cal.4th

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808, 827, 198 Cal.Rptr.3d 167, 364 P.3d 1093 (2016) (internal quotation marks omitted). Petitioner challenges the sufficiency of evidence as to the third element.

First, Petitioner argues that Henslick was not an unsuspecting victim because he had been warned to stay away from the ranch and was "extremely cautious" about going there. (FAP, Attached Memorandum at 47-48.) While this may be true, testimony from Karla showed that Henslick was lured to the ranch under false pretenses—specifically, by Petitioner telling Henslick that Lindsey was at the ranch and it was safe for him to come over.[34] (RT 1260-63, 1268, 1333, 1341, 1546-47.) Moreover, testimony from several witnesses regarding Henslick's reaction to seeing the Dodd Street gang members when he entered the ranch house demonstrated that, regardless of Henslick's general cautiousness, he was in fact surprised to see Petitioner and Lucero and their fellow gang members on the day in question. (RT 1276-77, 1471-74, 1857.) The fact that Henslick had generally been wary of Lucero and his fellow gang members and had even been warned to stay away from the ranch does not negate the surprise element of the lying-in-wait special circumstance. *See People v. Arellano*, 125 Cal.App.4th 1088, 1094-95, 23 Cal.Rptr.3d 172 (2004) (rejecting defendant's argument that the victim was aware of his purpose on the night of the murder based on the defendant's prolonged history of threats of violence: "While a victim of domestic violence and continuing death threats might well suspect she will be attacked sometime in the future, she has no way of knowing exactly when or where that attack will occur."); *see also People v. Jantz*, 137 Cal.App.4th 1283, 1291, 40 Cal.Rptr.3d 857 (2006) (holding that a

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[34] Petitioner suggests that the Karla's testimony is not believable because she was "wildly inconsistent" and made contradictory statements about whether it was Petitioner or Lucero who told Henslick that it was safe to come over. (Traverse, Attached Memorandum at 12.) As stated previously, however, on federal habeas review, this Court "must respect the province of the jury to determine the credibility of witnesses" and draw reasonable inferences from the evidence. *Walters*, 45 F.3d at 1358. Accordingly, this argument is rejected.

victim of threats and violence may be fearful of further violence, but is not necessarily on notice that they may be murdered).

Second, Petitioner suggests there was no "position of advantage" because Henslick, after seeing Lucero, immediately fled outside into the darkness where he was less vulnerable. (FAP, Attached Memorandum at 46.) This argument is even less persuasive. Here, Henslick was lured into a situation in which he believed he would only be among friends (and, thus, likely not to be armed or prepared for a fight), when in fact Lucero and Petitioner were not only armed but accompanied by other gang members. Clearly, this evidence could have been rationally viewed as a position of advantage for Petitioner in the killing. *See, e.g.*, *People v. Webster*, 54 Cal.3d 411, 448, 285 Cal.Rptr. 31, 814 P.2d 1273 (1991) (finding sufficient evidence that defendants ambushed victim from a position of advantage after they lured the victim "to an isolated location on a pretext").

In sum, viewing the evidence in a light most favorable to the prosecution, a reasonably jury could have concluded that Henslick was taken by surprise in a location with little to no opportunity to escape or fight back and, thus, that Petitioner and Lucero murdered Henslick while lying in wait. Accordingly, the state court did not act unreasonably in denying this claim and, as such, it fails to merit habeas relief.

C. Ground Five: Ineffective Assistance of Appellate Counsel

In Ground Five, Petitioner claims that appellate counsel was ineffective for failing to argue on appeal that his murder conviction should have been overturned after the substantive gang offense and gang enhancements were reversed for insufficient evidence. (FAP, Attached Memorandum at 49-50; Traverse, Attached Memorandum at 14-24.)

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1. *The California Court of Appeal Opinion*

The California Court of Appeal rejected Petitioner's claim of ineffective assistance on collateral review, finding that there was no reasonable possibility that, even had counsel raised the issue on appeal, it would have succeeded:

> [Petitioner] argues that the gang reversal required the reversal of the murder conviction because the "gang charges" were "intertwined" "with the ultimate murder conviction." They were not. The gang reversal was based on a finding of insufficient evidence on the requirement that the gang's primary activities included murder, attempted murder, and vehicle theft, which did not imply an insufficiency of the evidence that [Petitioner and Lucero] murdered the victim for the benefit of the gang. Indeed, while expressly holding that the evidence about the gang's activities was insufficient[,] the [California Court of Appeal] opinion expressly held that "[b]y making the gang enhancement and gang special circumstance findings and convicting Lucero of the substantive gang offense, the jury signaled their belief that the victim had been killed for the benefit of Dodd Street and the evidence certainly supported this." Although this holding applies expressly to [Lucero], who alone argued that insufficient evidence supported premeditation and deliberation, the discussion of the evidence of motive leading up to this conclusion applies to [Petitioner] as well, such that the holding implicitly applies to [Petitioner], who did not attack the sufficiency of the evidence supporting premeditation and deliberation. The same must be said with respect to the special circumstances findings, both of which were upheld as supported by substantial evidence, against both [Petitioner's and Lucero's] contentions to the contrary, despite the insufficiency of the evidence regarding the gang's activities.
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> Thus, the opinion implicitly holds that the gang reversal does not require the reversal of the murder conviction. This implicit holding in turn implies that, contrary to [Petitioner's] contention, the insufficient evidence of the gang's activities was not "intertwined" with the substantial evidence supporting the murder conviction. Therefore, [Petitioner's] counsel did not omit an issue that arguably required a reversal or modification and, accordingly did not commit ineffective assistance of counsel.

(Traverse, Attached Memorandum, Appendix A (internal citations omitted).)

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2. *Federal Law and Analysis*

The Sixth Amendment right to counsel guarantees not only assistance, but effective assistance, of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This right to effective assistance of counsel extends to a criminal defendant on appeal. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); *Evitts v. Lucey*, 469 U.S. 387, 391-97, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). To establish a claim for ineffective assistance of appellate counsel, Petitioner "must show that appellate counsel's representation fell below an objective standard of reasonableness, and that, but for counsel's errors, a reasonable probability exists that he would have prevailed on appeal." *Hurles v. Ryan*, 752 F.3d 768, 785 (9th Cir. 2014); *see also Smith*, 528 U.S. at 285 (holding habeas petitioner claiming ineffective assistance of appellate counsel "must first show that his counsel was objectively unreasonable in failing to find arguable issues to appeal, and . . . then has the burden of demonstrating prejudice").

Appellate counsel has no constitutional duty, however, to raise every issue where, in the attorney's judgment, the issue has little or no likelihood of success. *Jones v. Barnes*, 463 U.S. 745, 751-53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997). In fact, "the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." *Bailey v. Newland*, 263 F.3d 1022, 1028-29 (9th Cir. 2001) (internal quotations omitted). Consequently, a petitioner is entitled to relief only if counsel failed to raise a "winning issue" on appeal. *Id*. at 1033-34.

The Court agrees with the state appellate court that there simply was no reasonable possibility that Petitioner would have prevailed on a claim to overturn his murder conviction even had counsel raised it on appeal. On appeal, the California Court of Appeal reversed Petitioner's convictions for active participation in a criminal street gang and the related gang enhancements for one specific reason:

that the prosecution failed to offer sufficient evidence that the "primary activities" of the Dodd Street gang included murder, attempted murder, and vehicle theft or that its "members *consistently and repeatedly* committed these three crimes." (Lodg. No. 6 at 57 (italics in original.) Under California law, the required proof of a criminal street gang includes, among other things, sufficient evidence that one of the "primary activities" of the gang is the commission of certain criminal acts. *People v. Gardeley*, 14 Cal.4th 605, 617, 59 Cal.Rptr.2d 356, 927 P.2d 713 (1996), *overruled on other grounds by People v. Sanchez*, 63 Cal.4th 665, 686, n.13, 204 Cal.Rptr.3d 102, 374 P.3d 320 (2016). In reversing the gang convictions, the state appellate court noted there "was no testimony by the gang expert that murder, attempted murder and vehicle theft were among Dodd Street's primary activities or that Dodd Street members often engaged in these crimes." (Lodg. No. 6 at 58.)

Petitioner's contention that this ruling undermined the use of the gang evidence to support his murder conviction is misplaced. The state appellate court did not find that the gang evidence was immaterial or irrelevant or somehow unconvincing as a motive for the retaliatory shooting of Henslick. Quite the contrary, finding that the jury "belie[ved] that the victim had been killed for the benefit of Dodd Street and the evidence certainly supported this." (Lodg. No. 6 at 41.) Although the state appellate court ruled that the prosecution had failed to prove one of the technical elements of the gang offenses, it found sufficient evidence supported the first degree murder conviction based, in part, on evidence of Petitioner's and Lucero's gang affiliation, which provided motive for the killing. *See People v. Williams*, 16 Cal.4th 153, 193, 66 Cal.Rptr.2d 123, 940 P.2d 710 (1997) (holding evidence of gang members' behavior has tendency to prove motive for killing). There simply is no support for Petitioner's argument that the appellate court's ruling undermined the validity of his murder conviction.

Because there was no reasonable likelihood that this claim would have prevailed on appeal, Petitioner cannot show that appellate counsel was deficient in

failing to raise the issue or that he was prejudiced from appellate counsel's failure to do so. *See Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001) ("[A]ppellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal."); *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002) (holding that failure to raise untenable issues on appeal does not fall below *Strickland* standard). Accordingly, the state court reasonably rejected Petitioner's claim of ineffective assistance of appellate counsel and, as such, it fails to merit habeas relief.

VI. RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the District Court issue an Order (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: January 3, 2018

Rozella A. Oliver

ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

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 Local Civil Rule 72 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.

APPENDIX F
CIVIL DOCKET

ACCO,194,CLOSED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA (Eastern Division - Riverside)
CIVIL DOCKET FOR CASE #: 5:16-cv-00616-JVS-RAO

David R. Uribe v. Scott Kernan
Assigned to: Judge James V. Selna
Referred to: Magistrate Judge Rozella A. Oliver
Case in other court: 9th Circuit, 18-55936
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 04/05/2016
Date Terminated: 06/19/2018
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

David R. Uribe

represented by **Charles R Khoury , Jr**
Law Offices of Charles R Khoury
P O Box 791
Del Mar, CA 92014
858-764-0644
Fax: 858-876-1977
Email: charliekhouryjr@yahoo.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Respondent

Scott Kernan
Secretary, CDCR

represented by **Daniel Brian Rogers**
CAAG - Office of Attorney General
California Department of Justice
600 West Broadway Suite 1800
San Diego, CA 92101
619-738-9127
Fax: 619-645-2012
Email: daniel.rogers@doj.ca.gov
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
04/05/2016	1	PETITION for Writ of Habeas Corpus by a Person in State Custody (28 USC 2254), Receipt No. 0973-17594324 for $5 filing fee, filed by Petitioner DAVID RUBEN URIBE. (Attachments: # 1 Memorandum, # 2 Exhibit) (Attorney Charles R Khoury, Jr added to party DAVID RUBEN URIBE(pty:bkmov))(Khoury, Charles) (Entered: 04/05/2016)

04/05/2016	2	CIVIL COVER SHEET filed by Movant DAVID RUBEN URIBE. (Khoury, Charles) (Entered: 04/05/2016)
04/05/2016	3	ELECTION REGARDING CONSENT to Proceed before a United States Magistrate Judge Declined, in accordance with Title 28 Section 636c filed by Petitioner David R. Uribe. The Petitioner does not consent. (car) (Entered: 04/06/2016)
04/06/2016	4	NOTICE OF REFERENCE to a U.S. Magistrate Judge. Pursuant to General Order 14-03, the within action has been assigned to the calendar of the Honorable District Judge James V. Selna. Pursuant to General Order 05-07, the within action is referred to Magistrate Judge Jay C. Gandhi, who is authorized to consider preliminary matters and conduct all further hearings as may be appropriate or necessary. The Court must be notified within 15 days of any address change. (car) (Entered: 04/06/2016)
04/21/2016	5	FIRST AMENDED PETITION against Secretary Scott Kernan amending Petition for Writ of Habeas Corpus, 1 , filed by Petitioner David R. Uribe (Attachments: # 1 Memorandum)(Khoury, Charles) (Entered: 04/21/2016)
04/21/2016	6	NOTICE OF MOTION AND MOTION to Stay Case pending Exhaustion of Issue filed by Petitioner David R. Uribe. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit) (Khoury, Charles) (Entered: 04/21/2016)
05/19/2016	7	MINUTES (In Chambers) ORDER REQUIRING RESPONSE TO MOTION FOR STAY AND ABEYANCE (28 U.S.C. § 2254) by Magistrate Judge Rozella A. Oliver: *Refer to Order for details.* (Attachments: # 1 Petition, # 2 Memorandum of PA) (es) (Entered: 05/19/2016)
05/19/2016	8	ORDER REQUIRING RESPONSE TO PETITION (28 U.S.C. § 2254) by Magistrate Judge Rozella A. Oliver. Respondent Scott Kernan shall file and serve an Answer to the Petition not later than 7/05/2016. Notice: The court has issued a ruling on preliminary review. Pursuant to the Agreement on Acceptance of Service between the Clerk of Court and the California Attorney Generals Office, this Notice constitutes service under Fed. R. Civ. P. 4. Motions to Dismiss shall be filed by 6/20/2016. (Attachments: # 1 Petition, # 2 Memorandum of PA) (es) (Entered: 05/19/2016)
05/26/2016	9	NOTICE OF APPEARANCE of California Attorney General Office Daniel Rogers on behalf of Respondent Scott Kernan. (Attorney Daniel Brian Rogers added to party Scott Kernan(pty:res))(Rogers, Daniel) (Entered: 05/26/2016)
07/01/2016	10	APPLICATION to Extend Time to File Answer to 8/2/2016 filed by Respondent Scott Kernan. (Attachments: # 1 Proposed Order) (Rogers, Daniel) (Entered: 07/01/2016)
07/01/2016	11	ORDER by Magistrate Judge Rozella A. Oliver: GRANTING 10 Respondent's Application for An Extension of Time. It is ordered Respondents Answer be extended thirty (30) days through August 2, 2016. (es) (Entered: 07/01/2016)
08/02/2016	12	APPLICATION to Extend Time to File Answer to 9/1/2016 filed by Respondent Scott Kernan. (Attachments: # 1 Proposed Order) (Rogers, Daniel) (Entered: 08/02/2016)

08/02/2016	13	ORDER by Magistrate Judge Rozella A. Oliver. Good cause having been shown, Respondent's Application for an extension of time is granted. It is ordered Respondent's Answer be extended thirty (30) days through September 1, 2016. 12 (gr) (Entered: 08/02/2016)
09/01/2016	14	ANSWER *to Petition for Writ of Habeas Corpus* filed by Respondent Scott Kernan. (Attachments: # 1 Memorandum, # 2 Appendix)(Rogers, Daniel) (Entered: 09/01/2016)
09/02/2016	15	NOTICE OF LODGING filed re Answer to Complaint 14 (Attachments: # 1 Lodgment #1 Clerks Transcript in Case No. E053314 1 of 9 volumes., # 2 Lodgment #1 Clerks Transcript in Case No. E053314 2 of 9 volumes., # 3 Lodgment #1 Clerks Transcript in Case No. E053314 3 of 9 volumes., # 4 Lodgment #1 Clerks Transcript in Case No. E053314 4 of 9 volumes., # 5 Lodgment #1 Clerks Transcript in Case No. E053314 5 of 9 volumes., # 6 Lodgment #1 Clerks Transcript in Case No. E053314 6 of 9 volumes., # 7 Lodgment #1 Clerks Transcript in Case No. E053314 8 of 9 volumes., # 8 Lodgment #1 Clerks Transcript in Case No. E053314 9 of 9 volumes., # 9 Lodgment #1 Clerks Transcript in Case No. E053314 7 of 9 volumes., # 10 Lodgment #2 Supplemental Clerks Transcript in Case No. E053314 1 volume., # 11 Lodgment #3 Reporters Transcript in Case No. E053314 1 of 14 volumes, # 12 Lodgment #3 Reporters Transcript in Case No. E053314 2 of 14 volumes., # 13 Lodgment #3 Reporters Transcript in Case No. E053314 3 of 14 volumes., # 14 Lodgment #3 Reporters Transcript in Case No. E053314 4 of 14 volumes, # 15 Lodgment #3 Reporters Transcript in Case No. E053314 5 of 14 volumes, # 16 Lodgment #3 Reporters Transcript in Case No. E053314 6 of 14 volumes., # 17 Lodgment #3 Reporters Transcript in Case No. E053314 7 of 14 volumes., # 18 Lodgment #3 Reporters Transcript in Case No. E053314 8 of 14 volumes., # 19 Lodgment #3 Reporters Transcript in Case No. E053314 9 of 14 volumes., # 20 Lodgment #3 Reporters Transcript in Case No. E053314 10 of 14 volumes., # 21 Lodgment #3 Reporters Transcript in Case No. E053314 11 of 14 volumes., # 22 Lodgment #3 Reporters Transcript in Case No. E053314 12 of 14 volumes., # 23 Lodgment #3 Reporters Transcript in Case No. E053314 13 of 14 volumes, # 24 Lodgment #3 Reporters Transcript in Case No. E053314 14 of 14 volumes., # 25 Lodgment #4 Appellants Opening Brief in Case No E053314, # 26 Lodgment #5 Respondents Brief in Case No. E053314, # 27 Lodgment #6 Opinion in Case No. E053314, # 28 Lodgment #7 Petition for Review in Case No. S209954, # 29 Lodgment #8 Order in Case No. S209954, # 30 Lodgment #9 Supplemental Clerks Transcript in Case No. E059294 1 volume, # 31 Lodgment #10 Reporters Transcript in Case No. E059294 1 volume, # 32 Lodgment #11 Appellants Opening Brief in Case No. E059294, # 33 Lodgment #12 Respondents Brief in Case No. E059294, # 34 Lodgment #13 Opinion in Case No. E059294, # 35 Lodgment #14 Petition for Review in Case No. S220399, # 36 Lodgment #15 Order in Case No. S220399)(Rogers, Daniel) (Entered: 09/02/2016)
09/14/2016	16	REQUEST for Order for Response to Motion to Stay and Abey and stay of briefing as to Answer filed by Petitioner David R. Uribe. (Khoury, Charles) (Entered: 09/14/2016)

11/17/2016	17	NOTICE OF MOTION AND MOTION for Enlargement of Time to File Traverse filed by Petitioner David R. Uribe. (Khoury, Charles) (Entered: 11/17/2016)
12/12/2016	18	MINUTES (IN CHAMBERS)by Magistrate Judge Rozella A. Oliver: 16 MOTION for Response to Stay. Respondent is ORDERED to file either a brief in opposition to Petitioners Motion to Stay or a notice that Respondent does not oppose the Motion to Stay within 30 days of the date of this order. Petitioner may file an optional reply brief within 21 days of service of any opposition. The Court will stay briefing on the merits of the Petition until Petitioners Motion to Stay is resolved. Denied as moot 17 MOTION for Enlargement of Time to File Traverse. (sbu) (Entered: 12/12/2016)
01/11/2017	19	to Request for Stay Opposition re: REQUEST for Order for Response to Motion to Stay and Abey and stay of briefing as to Answer 16 *Opposition to Request for Stay* filed by Respondent Scott Kernan. (Rogers, Daniel) (Entered: 01/11/2017)
01/11/2017	20	DECLARATION of N. Abundez re Objection/Opposition (Motion related) 19 filed by Respondent Scott Kernan. (Rogers, Daniel) (Entered: 01/11/2017)
02/02/2017	21	MINUTES (IN CHAMBERS) ORDER DENYING WITHOUT PREJUDICE MOTION FOR STAY AND ABEYANCE 6 by Magistrate Judge Rozella A. Oliver. On April 5, 2016, Petitioner David Uribe ("Petitioner"), who is represented by counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody. (Dkt. No. 1.) On April 21, 2016, Petitioner filed a First Amended Petition ("FAP"). (Dkt. No. 5.) Also on April 21, 2016, Petitioner filed a motion to stay his case pursuant to Rhines v. Weber, 544 U.S. 269, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005) ("Motion to Stay"). (Dkt. No. 6.) On January 11, 2017, Respondent filed an opposition to the Motion to Stay ("Opposition"). (Dkt. No. 19.) Petitioner has not filed a reply.1 The Court finds that Petitioner has not sufficiently supported his arguments that appellate counsel's failure to raise the claim that reversal of all of the gang charges in his case required reversal of the murder charge constitutes good cause for a Rhines stay or that his unexhausted claim is potentially meritorious. In light of the foregoing, Petitioner's Motion to Stay is DENIED WITHOUT PREJUDICE. Petitioner is ORDERED to file his traverse, if any, within 30 days of the date of this order. 6 (SEE ORDER FOR FURTHER DETAILS) (gr) (Entered: 02/02/2017)
04/07/2017	22	NOTICE OF MOTION AND MOTION for Extension of Time to File Traverse filed by Petitioner David R. Uribe. (Attachments: # 1 Proposed Order) (Khoury, Charles) (Entered: 04/07/2017)
04/07/2017	23	ORDER by Magistrate Judge Rozella A. Oliver. Good cause having been shown, petitioners Traverse is due on or before May 8, 2017. 22 (gr) (Entered: 04/07/2017)
05/14/2017	24	NOTICE OF MOTION AND MOTION for Leave to file Traverse and Memorandum filed by Petitioner David R. Uribe. (Attachments: # 1 Traverse, # 2 Memorandum, # 3 Appendix, # 4 Appendix, # 5 Appendix, # 6 Proposed Order) (Khoury, Charles) (Entered: 05/14/2017)
05/15/2017	25	ORDER by Magistrate Judge Rozella A. Oliver: granting 24 MOTION for Leave to File Traverse with Memorandum and Appendices which were due on or before 5/8/2017 (sbu) (Entered: 05/15/2017)

05/15/2017	26	TRAVERSE to Amended Petition 5 filed by petitioner David R. Uribe. (sbu) (Entered: 05/24/2017)
05/15/2017	27	MEMORANDUM of Points and Authorities in Support filed by petitioner David R. Uribe. Re: Traverse 26 (Attachments: # 1 a, # 2 b, # 3 c)(sbu) (Entered: 05/24/2017)
01/03/2018	28	NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Rozella A. Oliver. Objections to R&R due by 1/17/2018 (dml) (Entered: 01/03/2018)
01/03/2018	29	REPORT AND RECOMMENDATION issued by Magistrate Judge Rozella A. Oliver. Re Petition for Writ of Habeas Corpus, 1 (dml) (Entered: 01/03/2018)
01/18/2018	30	NOTICE OF MOTION AND MOTION for Extension of Time to File Objection to Report and Recommendation (Issued) 29 filed by Petitioner David R. Uribe. (Attachments: # 1 Proposed Order) (Khoury, Charles) (Entered: 01/18/2018)
01/18/2018	31	ORDER by Magistrate Judge Rozella A. Oliver: granting 30 MOTION for Extension of Time to File Objection to R&R. Petitioner's objections are due on or before February 19, 2018. (dml) (Entered: 01/18/2018)
02/20/2018	32	NOTICE OF MOTION AND MOTION for Extension of Time to File Objection to Report and Recommendation (Issued) 29 filed by Petitioner David R. Uribe. (Attachments: # 1 Proposed Order) (Khoury, Charles) (Entered: 02/20/2018)
02/20/2018	33	Notice of Withdrawal of Motion for Extension of Time to File Objection to R&R 32 filed by PETITIONER David R. Uribe. (Khoury, Charles) (Entered: 02/20/2018)
02/20/2018	34	NOTICE OF MOTION AND MOTION for Extension of Time to File Objection to Report and Recommendation (Issued) 29 filed by PETITIONER David R. Uribe. (Attachments: # 1 Proposed Order) (Khoury, Charles) (Entered: 02/20/2018)
02/21/2018	35	ORDER by Magistrate Judge Rozella A. Oliver: granting 34 MOTION for Extension of Time to File Objection to re Report and Recommendation (Issued) 29 . petitioners OBJECTIONS are due on or before Thursday, April 5, 2018. (sbu) (Entered: 02/21/2018)
04/10/2018	36	NOTICE OF MOTION AND MOTION for Extension of Time to File Objection to Report and Recommendation (Issued) 29 filed by Petitioner David R. Uribe. (Khoury, Charles) (Entered: 04/10/2018)
04/10/2018	37	ORDER by Magistrate Judge Rozella A. Oliver: granting 36 MOTION for Extension of Time to File Objection to Report and Recommendation. Good cause having been shown, petitioner's OBJECTIONS are due on or before Monday, May 7, 2018. (hr) (Entered: 04/10/2018)
04/11/2018	38	NOTICE TO PARTIES: Effective April 17, 2018, Magistrate Judge Rozella A. Oliver will be located at the Edward R. Roybal Federal Building and U.S. Courthouse, COURTROOM 590 on the 5th floor, located at 255 East Temple Street, Los Angeles, California 90012. All Court appearances shall be made in Courtroom 590 of the Roybal Federal Building, and all mandatory chambers copies shall be hand delivered to the judge's mail box located outside the Clerk's

		Office on the 12th floor of the Roybal Federal Building. The location for filing civil and criminal documents in paper format exempted from electronic filing and for viewing case files and other records services is located at the Roybal Federal Building, 255 East Temple Street, Room 180 (Terrace Level), Los Angeles, California 90012. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (rrey) TEXT ONLY ENTRY (Entered: 04/11/2018)
05/11/2018	39	NOTICE OF MOTION AND MOTION for Extension of Time to File Objection to Report and Recommendation (Issued) 29 filed by Petitioner David R. Uribe. (Khoury, Charles) (Entered: 05/11/2018)
05/11/2018	40	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: NOTICE OF MOTION AND MOTION for Extension of Time to File Objection to Report and Recommendation (Issued) 29 39 . The following error(s) was/were found: Proposed document was not submitted as separate attachment. Proposed Order is not attached. In response to this notice, the Court may: (1) order an amended or correct document to be filed; (2) order the document stricken; or (3) take other action as the Court deems appropriate. You need not take any action in response to this notice unless and until the Court directs you to do so. (hr) (Entered: 05/11/2018)
05/11/2018	41	ORDER by Magistrate Judge Rozella A. Oliver: granting 39 MOTION for Extension of Time to File Objection to Objections to R&R. Good cause having been shown, petitioner's OBJECTIONS are due on or before Monday, May 14, 2018. (hr) (Entered: 05/11/2018)
05/14/2018	42	OBJECTION to Report and Recommendation (Issued) 29 filed by Petitioner David R. Uribe.(Khoury, Charles) (Entered: 05/14/2018)
06/19/2018	43	ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE by Judge James V. Selna for Report and Recommendation (Issued) 29 . IT IS ORDERED that the First Amended Petition is denied, and Judgment shall be entered dismissing this action with prejudice. (hr) (Entered: 06/19/2018)
06/19/2018	44	JUDGMENT by Judge James V. Selna. Related to: R&R - Accepting Report and Recommendations 43 . IT IS ORDERED AND ADJUDGED that the First Amended Petition is denied, and this action is dismissed with prejudice. (MD JS-6, Case Terminated). (hr) (Entered: 06/19/2018)
06/19/2018	45	Order by Judge James V. Selna denying Certificate of Appealability. (mat) (Entered: 06/20/2018)
07/11/2018	46	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Petitioner David R. Uribe. Appeal of Judgment 44 . (Appeal Fee - In Forma Pauperis Request.) (Khoury, Charles) (Entered: 07/11/2018)
07/12/2018	47	NOTIFICATION from Ninth Circuit Court of Appeals of case number assigned and briefing schedule. Appeal Docket No. 18-55936 assigned to Notice of Appeal to 9th Circuit Court of Appeals 46 as to Petitioner David R. Uribe. (mat) (Entered: 07/13/2018)

07/16/2018	48	EX PARTE APPLICATION for Leave to Appeal In Forma Pauperis, Judgment 44 , filed by Petitioner David R. Uribe. (Khoury, Charles) (Entered: 07/16/2018)
07/20/2018	49	ORDER by Judge James V. Selna: granting 48 EX PARTE APPLICATION for Leave to Appeal In Forma Pauperis (car) (Entered: 07/23/2018)
03/01/2019	50	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 46 filed by David R. Uribe. CCA # 18-55936. The Request for a certificate of appealability is denied. [See document for further details.] (et) (Entered: 03/05/2019)
04/01/2019	51	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 46 filed by David R. Uribe. CCA # 18-55936. Appellant's motion for reconsideration is denied. (see document for further details) (hr) (Entered: 04/02/2019)

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