Case No.

IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO ARGENIS PARRA,

Petitioner-Appellant,
v.

JOE A. LIZARRAGA, WARDEN,

Respondent -Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did Trial Counsel Render Ineffective Assistance by Failing to Request an Adequate Supplemental Credibility Instruction?

II. Did Trial Counsel Render Ineffective Assistance by Failing to Request an Alibi Instruction?

III. Did the Trial Court Violate Parra's Right to Confrontation [*Bruton v. United States*, 391 U.S. 123 (1968)] by Admitting Co-defendant Arciga's Extrajudicial Statements?

IV. Did the Trial Court Prejudicially Fail to Instruct the Jury That the Codefendants and the Drug Sellers' Extrajudicial Accomplice Statements Required Corroboration?

V. Did the Trial Court Prejudicially Fail to Instruct the Jury on the Lesser Included Offenses of Second Degree Murder and Manslaughter?

VI. Did the Trial Court Deprive Parra of Due Process and a Fair Trial by Failing to Instruct the Jury on Self-Defense?

VII. Did the Trial Court Err by Failing to Provide Proper and Complete Jury Instructions on the Special Circumstance Allegations?

VIII. Did the Combined Effect of the Errors Deprive Parra of His Constitutional Right to a Fair Trial?

IX. Is an Evidentiary Hearing Warranted?

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Case No.

IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO ARGENIS PARRA,

Petitioner-Appellant,
v.

JOE A. LIZARRAGA, WARDEN,

Respondent -Appellee.

Petitioner, FRANCISCO ARGENIS PARRA, petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's Order denying Parra's request for a certificate of appealablity. (Appendix A)

OPINION BELOW

On October 25, 2019, the Ninth Circuit Court of Appeals denied Parra's request for a certificate of appealablity. (Appendix A)

JURISDICTION

The jurisdiction of this Court is 28 U.S.C. § 2254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amends. V, VI, XIV; 28 U.S.C.§ 2254.

STATEMENT OF THE CASE

A. State Court Trial Proceedings

The jury convicted Parra and two co-defendants, Hector Aguilar Arciga and Pedro Huerta Zuniga, in an amended information, with the murder of Carlos Zarate (Cal. Penal Code §187 (a); Ct. 1), the attempted murder of Manuel Rojas (Cal. Penal Code § 664/187 (a); Ct. 2), assault with a deadly weapon of Rojas (Cal. Penal Code § 245 (b); Ct. 3), home invasion robbery of Zarate, Rojas, Martha Gutierrez, and Jesus Vasquez (Cal. Penal Code § 211; Cts. 6-9), and first degree burglary (Cal. Penal Code § 459; Ct. 10).

The jury also found that, as to Counts 1, 3, and 10, that Parra personally used a firearm in the commission of a felony (Cal. Penal Code § 12022.53 (a), (b)); and as to Counts 2, 6, 7, 8, and 9, he personally and intentionally discharged a firearm which caused great bodily injury and death to Zarate

(Cal. Penal Code § 12022.53 (b), (c), (d)).

The jury found the murder (Ct. 1) to be in the first degree, and found true both special circumstances allegations, viz., that the murder was committed in the commission of a burglary and a robbery. It also found true the personal firearm use allegations.

The trial court sentenced Parra to life without the possibility of parole plus 40 years for the gun use enhancement. (5 RT 5416.)

B. State Court Appeal Proceedings

The California Court of Appeal, Second Appellate District, Division Four affirmed Parra's conviction. (Case No. B25801)

On May 25, 2016, the California Supreme Court denied review of Parra's petition. (Case No. S233367) The California Supreme Court also denied review of Arciga's and Zuniga's petitions. (Case No. S233367)

C. Federal Habeas Corpus Proceedings

Parra filed a Petition for Writ of Habeas Corpus in the United States District Court. On December 27, 2018, the district court denied Parra's habeas petition and his request for a Certificate of Appealability. (Case No. 17-cv-05946) (Appendix B)

D. Ninth Circuit Appeal

Parra appealed and requested a certificate of appealability. On October 25, 2019, the Ninth Circuit denied his request. (Appendix A)

REASONS FOR GRANTING CERTIORARI

I. Trial Counsel Rendered Ineffective Assistance by Failing to Request an Adequate Supplemental Credibility Instruction

Drug sellers Vasquez, Rosas, and Gutierrez testified at trial about their involvement in the April 22, 2009 drug deal. (2RT 2127-2128; 3RT 2403, 2481-2482) Vasquez, Rosas and Gutierrez all admitted engaging in moral turpitude conduct by engaging in illicit drug trafficking.

Prosecution witness Alvarez testified about statements made by Arciga and Zuniga implicating Parra. Alvarez had pleaded guilty to federal drug charges and faced sentencing. (3RT 2723, 2726, 2727) The trial court issued a standard credibility instruction but failed to instruct the jury that a witness's other conduct reflects on his or her credibility. CALCRIM No. 105 ("Witnesses").

The District Court (DC) agrees that a state's instructional error rises to a constitutional error when the error ""so infected the entire trial that the resulting conviction violates due process.". . . " (RR 14) But the DC

finds any additional instruction would have been "repetitive" and "not required by California law under the circumstances." (RR 19) The DC finds that the California Court of Appeal (CCA) did not unreasonably apply Supreme Court precedent when rejecting the claim. (RR 17)

Parra disagrees. The trial court needed to issue the instruction because the prosecutor urged the jury to disregard the witnesses' bad conduct and find them credible. Secondly, during closing, trial counsel urged the jury to focus on the prosecution witnesses' bad conduct. (5RT 4282-4284)

The DC overlooks that, to state a prima facie case, a petitioner need not prove his claims with absolute certainty. *Nunes v. Mueller,* 350 F.3d 1045, 1052, 1054-1055 (9th Cir. 2003); see also *Cannedy v. Adams*, 706 F.3d 1148, 1160-61, 1166 (9th Cir. 2003) (Petitioner's allegations that trial counsel rendered ineffective assistance sufficient to state a prima facie case for relief and that petitioner suffered prejudice); see also *People v. Duvall,* 9 Cal.4th 464, 474 (1995) (To state a prima facie case for relief a petitioner

must " . . . include copies of reasonably available documentary evidence supporting the claim.")

The DC finds no ineffective assistance of counsel because the pinpoint instruction was unnecessary and duplicative and "meritless." (RR 23) The DC fails to consider that trial counsel's failure to request a jury instruction which prevented the jury from considering trial counsel's theory fell below the professional standard. *Id.* at 1162; *United States v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996) ("Counsel's errors with the jury instructions were not a strategic decision to forego one defense in favor of another. They were the result of a misunderstanding of the law.")

Trial counsel challenged the credibility of the witnesses who testified against Parra. Trial counsel urged the jury to reject the prosecution witnesses' version of events and the witnesses' identification of Parra. Based on trial counsel's argument and his theory of the case, trial counsel overlooked his duty to request a proper and complete jury instruction on credibility. *Strickland v. Washington,* 466 U.S. 668 (1984).

Trial counsel rendered ineffective assistance by failing to request a proper credibility instructions. But for trial counsel's unprofessional errors, the outcome of the trial would have been different. *Strickland,* 466 U.S. 668.

II. Trial Counsel Rendered Ineffective Assistance by Failing to Request an Alibi Instruction

Parra testified that he had nothing to do with the April 22, 2009 drug deal. Parra denied he went to the residence and denied any involvement in the drug-rip-off or Zarate's killing. (5RT 4820, 4283) Trial counsel argued that Parra never went to the residence on April 22, 2009. But trial counsel failed to ask the trial court to issue an alibi instruction and the trial court never issued one. *Strickland,* 466 U.S. 668.

The DC finds that the CCA did not unreasonably reject Parra's claim because, absent trial counsel's request, the trial court had no duty to issue an alibi instruction. The DC also finds that no evidence supported the alibi defense because Parra could not recall his whereabouts at the time of

the shooting. RR 20.

Parra disagrees. Parra was entitled to adequate instructions on the defense theory of the case. *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 2000) (error to deny defendant's request for instruction on simple kidnapping where such instruction was supported by the evidence). Secondly, CALCRIM No. 3400. ("Alibi') did not require Parra to prove his whereabouts at the time of the crime. CALCRIM No. 3400 only required that Parra contend he did not commit the crime and he was elsewhere. Parra did "not need to prove [he] was elsewhere at the time of the crime." *Id.*

Established Supreme Court law entitled Parra to jury instructions on a "recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United* States, 485 U.S. 58, 63, 108 S. Ct. 883, 887, 99 L. Ed. 2d 54 (1988). Parra denied he went to the crime scene and participated in the drug rip-off. Parra's testimony justified an alibi instruction.

The DC also finds no prejudice resulted because

overwhelming evidence countered Parra's claim that he was elsewhere. The DC overlooks that several witnesses could not identify Parra before they saw him in court. (2RT 2127-2128, 2135, 2153; 3RT 2452-2457, 2460, 2495-2496, 2506-2509) Based on the paltry evidence, the defense theory, and Parra's testimony, trial counsel rendered ineffective assistance by failing to request an alibi instruction. *Strickland v. Washington,* 466 U.S. 668.

III. The Trial Court Violated Parra's Right to Confrontation [*Bruton v. United States*, 391 U.s. 123 (1968)] by Admitting Co-defendant Arciga's Extrajudicial Statements

Alvarez, codefendants' Arciga's and Zuniga's acquaintance, testified over Parra's *Aranda-Bruton* objection [*Bruton v. United States*, 391 U.S. 123 (1968); *People v. Aranda*, 63 Cal.2d 518 (1965)] about what Arciga and Zuniga told him [Alvarez]. Arciga's statements to Alvarez implicated Parra as a perpetrator in the drug rip-off. (3RT 2708-2709, 2712, 2716-2718.)

The DC finds that, because Alvarez made his

statement to Arciga, the statements were not testimonial. The DC finds the statements permissible because Alvarez was not a government informant or law enforcement agent. RR 28. The DC cites to several circuit cases holding that *Crawford*, which prohibits testimonial statements, overrules *Bruton* which prohibits the admission of accomplice statements made to the police. RR 29.

The cases cited by the DC overlook established Supreme Court law which recognized that the use of an accomplice's confession during a joint trial '"creates a special, and vital, need for cross-examination.'" *Lilly v. Virginia,* 527 U.S. 116, 129 (1999), quoting *Gray v. Maryland,* 523 U.S. 185, 194- 195 (1998) and citing *Richardson v. Marsh,* 481 U.S. 200, 206 (1987) and *Cruz v. New York,* 481 U.S. 186, 189-190 (1987).

Bruton held that because of the substantial risk that the jury, despite instructions to the contrary, may look to the incriminating extrajudicial statements in determining guilt of those other than the declarant, admission of such

statements in a joint trial violates the right to cross-examination secured by the confrontation clause of the Sixth Amendment. *United States v. Truslow,* 530 F.2d 257, 260 (4th Cir. 1975)

Dutton v. Evans, 400 U.S. 74 (1970) noted "the accomplice's reliance upon the privilege against compulsory self-incrimination 'created a situation in which the jury might improperly infer both that the statement had been made and that it was true.'" *Id.* at 85, quoting *Douglas v. Alabama,* 380 U.S. 415, 419 (1965). *Dutton* also emphasized that the accomplice's statement "could not be tested by cross-examination." *Id.* at 84-85; see also *Jones v. Basinger,* 635 F.3d 1030 (7th Cir. 2011) (holding that *Crawford* and its testimonial and/or testimonial distinctions do not overrule or diminish *Bruton.*) *Id.* at 1049-1052.

The trial court committed *Bruton* error by admitting co-defendant Arciga's extrajudicial statements, via Alvarez. *Bruton,* 391 U.S. 123.

IV. The Trial Court Prejudicially Failed to Instruct the Jury That the Codefendants and the Drug Sellers' Extrajudicial Accomplice Statements Required Corroboration

The trial court admitted co-defendants Arciga's and Zuniga's out-of-court statements implicating Parra for their truth, but failed to sua sponte instruct the jury on the accomplice corroboration rule. Cal. Penal Code § 1111. (3RT2703-2704)

The drug sellers committed a felony burglary when they illegally entered the residence to sell the marijuana. See Cal. Health & Safety Code §§ 11359, 11360, 11362. Because the drug sellers were accomplices to and liable for Zarate's murder, their testimony required corroboration.

The DC finds that neither the Constitution nor federal law requires corroboration and that failure to issue a corroboration instruction does not rise to a constitutional violation. RR32. The DC considers the issue one solely of state evidentiary law. RR 34. The DC finds that, under California law, no corroboration was necessary because

Arciga's and Zuniga's statements were admissible as declarations against penal interest. RR 35. The DC finds the CCA properly found the accusers not to be accomplices and not subject to accomplice corroboration. RR 35.

The DC finds any instructional omission did not rise to a constitutional violation, did not infect the entire trial, and did not violate federal due process. *Id.* at 154; *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). RR 39. The DC finds "ample evidence of corroboration" consisting of fingerprints, and DNA found in the house corroborating Parra's involvement. RR 36.

Parra disagrees. The instructional omission prejudiced Parra because, without proper jury instructions, the jury would have unlawfully used one accomplice's testimony to corroborate another accomplice's testimony or statements. *People v. Bowley,* 59 Cal.2d 855, 859 (1963) (extra judicial statements of an accomplice may not be used to corroborate another accomplice's testimony); *People v. Clapp,* 24 Cal.2d 835, 837 (1944) (one accomplice may not corroborate

another); *People v. Boyce,* 110 Cal.App.3d 726, 737 (1980) (same) *People v. Scofield,* 17 Cal.App.3d 1018, 1026 (1971) (same).

Contrary to the DC's finding that sufficient evidence corroborated the convictions, without the drug sellers' identification and Arciga and Zuniga's corroborating statements, no substantial evidence placed Parra at the incident. Accomplice instructions would have required the prosecution to corroborate the drug sellers testimony. Accomplice instructions would have stopped the jury from using the drug sellers' testimony to corroborate Arciga and Zuniga's accomplice statements, or vice versa. Parra's fingerprint and DNA evidence failed to prove Parra's presence during the incidents. The trial court's failure to issue accomplice instructions violated Parra's rights to due process and a fair trial. *Brecht v. Abrahamson,* 507 U.S. 619, 637-38 (1993).

V. The Trial Court Prejudicially Failed to Instruct the Jury on the Lesser Included Offenses of Second Degree Murder and Manslaughter

The prosecution charged Parra with murder, but the trial court failed to instruct the jury with the lesser included offenses of second degree murder and/or voluntary manslaughter. (3CT 472; 5CT 960.) The DC finds *Teague* bars the claim, that Parra fails to present a federal constitutional question, and AEDPA bars relief because the CCA reasonably applied Supreme Court precedent in rejecting the claim. The DC finds no error prejudiced Parra. (RR 38-39)

The DC finds *Teague* bars relief because, granting relief on the claim would require that a new rule of constitutional law be announced, i.e., that a defendant's right to present a defense in a criminal trial includes the right to have the jury instructed on lesser included offenses. The DC finds that no *Teague* exception applies. (RR 38.)

Parra disagrees. In *Windham v. Merkle*, 163 F.3d 1092, 1105-06 (9th Cir. 1998), the Ninth Circuit stated,

"Under the law of this circuit, the failure of a state trial court to instruct on lesser included offenses in a noncapital case does not present a federal constitutional question." See *Turner v. Marshall*, 63 F.3d 807, 819 (9th Cir. 1995); see also *Bashor v. Risley*, 730 F.2d 1228 (9th Cir. 1984) (Generally the "[f]ailure of a state court to instruct on a lesser offense fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding.") *Bashor,* 730 F.2d at 1240, quoting *James v. Reese*, 546 F.2d 325, 327 (9th Cir. 1976).

The Ninth Circuit later receded from that position in *Solis v. Garcia*, 219 F.3d 922 (9th Cir. 2000), where the Court found "the refusal by a court to instruct a jury on lesser included offenses, when those offenses are consistent with defendant's theory of the case, may constitute a cognizable habeas claim" under clearly established United States Supreme Court precedent. *Solis*, 219 F.3d at 929 (emphasis added); see also *Bradley v. Duncan*, 315 F.3d 1091, 1098-1101 (9th Cir. 2002) (finding federal due process

violation in a post-AEDPA habeas case where defendant's request for instruction on the only theory of defense was denied.)

The DC finds Parra never suggested that the offense was less serious than first-degree felony murder. The DC finds Parra denied he was the shooter. RR 38-39. But the DC overlooks that instruction on lesser included offenses "are required whenever evidence that the defendant is guilty only of the lesser offense is substantial enough to merit consideration by the jury. . . . " *People* v. *Breverman,* 19 Cal.4th 142, 162 (1998) (citations and quotations omitted.)

The evidence showed that Arciga pulled out and fired the gun in response or "reaction" to Zarate pulling out his gun and firing. *People v. Campbell*, 233 Cal.App.4th at 164 (Voluntary manslaughter may be committed when one kills with the honest but unreasonable belief in the need to defend oneself.) If the drug sellers, including Zarate, planned to rip off the buyers, including Parra, the buyers had the right to defend themselves. A properly instructed

jury could reasonably have concluded that Parra was guilty of a lesser crime.

The DC finds Parra presents no federal constitutional question. RR 39. Parra agrees that, generally, a challenge to jury instructions does not state a federal constitutional claim. *Estelle*, 502 U.S. at 67-68; *Engle v. Isaac*, 456 U.S. 107, 119, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982); *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983). But Parra disagrees because due process requires that "'criminal defendants be afforded a meaningful opportunity to present a complete defense.'" *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir. 2006) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984).

The trial court failed to issue adequate instructions on the defense theory of the case. *Conde v. Henry,* 198 F.3d at 739 (error to deny defendant's request for instruction on simple kidnapping where such instruction was supported by the evidence).

The DC finds the CCA properly rejected the claim

because no evidentiary support existed for the instructions, the evidence failed to support lesser included offense instructions and, by returning true findings on the robbery and burglary special circumstance, the jury rejected the unreasonable self-defense theory. RR 41.

Parra disagrees. Substantial evidence supported jury instructions on the lesser offenses of second degree murder and voluntary manslaughter. The evidence showed that Arciga pulled out and fired the gun in response or "reaction" to Zarate pulling out his gun and firing. *People v. Campbell*, 233 Cal.App.4th 148, 164 (2015) (Voluntary manslaughter may be committed when one kills with the honest but unreasonable belief in the need to defend oneself.)

Because under California law, unreasonable self-defense negates malice aforethought, a failure to instruct the jurors on that doctrine resulted in incomplete instructions on the malice element of murder, contrary to *United States v. Gaudin,* 515 U.S. 506 (1995). The error also relieved the prosecution of its burden, under *Mullaney v. Wilbur,* 421

U.S. 684 (1975), of proving beyond a reasonable doubt that the defendant did not kill in unreasonable self-defense.

VI. The Trial Court Deprived Parra of Due Process and a Fair Trial by Failing to Instruct the Jury on Self-Defense

After the drugs and money were exchanged, and while Arciga was checking the drugs, Zarate pulled out his gun and fired. (4CT 746. 2RT 2141-2142, 2413-2414; 3RT2707-2708.) A bullet fragment and gun shot residue evidence proved Zarate fired a shot. (2 RT 2150, 2174; (3RT 2803.) Rojas told the police that everyone, including Zarate, drew their guns simultaneously. Zarate pointed his gun at one of Zuniga's crew and Zuniga shot him. (3RT 2445, 2470.)

The DC finds the CCA reasonably rejected the self-defense claim. (Ans. 43) The DC finds the claim involves state law only and that the Supreme Court has left unclear whether due process applies to instructions requested by, or relating to a theory of, the defense. *Gilmore v. Taylor*, 508 U.S. 333, 343-44. (1993) RR 44.

Parra disagrees. The omission of an affirmative

defense instruction violates federal due process. See *Taylor v. Withrow,* 288 F.3d 846, 851 (6th Cir. 2002) (failure to instruct on self-defense when there is sufficient evidence violates defendant's fundamental due process rights); *Mathews v. United States,* 485 U.S. at 63 (federal constitutional grounds that "defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.")

The DC finds the CCA reasonably rejected Parra's claim because no evidence supported a self-defense instruction. RR 45. Parra disagrees. The evidence showed that Zarate drew and fired the gun first. (2RT 2141-2142, 2413-2414; 3RT 2707- 2708.) Arciga did not grab his gun and start shooting until after Zarate pulled his gun out. Zarate was armed, and the bullet fragment and gun shot residue proved he fired his gun. (2RT 2150, 2174; 3RT 2803.) Rojas told the police that everyone, including Zarate, drew their guns at the same time; Zarate pointed his gun at one of

Zuniga's crew and then that man shot him. (3RT 2445, 2470.) Vasquez also heard Zarate cocking his gun. (2 RT 2193.)

VII. The Trial Court Erred by Failing to Provide Proper and Complete Jury Instructions on the Special Circumstance Allegations

The special circumstances' instruction failed to specify what special circumstances the jury should consider, failed to specify the elements of the robbery and burglary special circumstances, and failed to instruct the jury how to evaluate circumstantial evidence in determining the special circumstances.

The DC finds that the CCA properly found that CALJIC No. 8.80.1 informed the jury that the special circumstances were robbery and burglary and the jury verdict forms set forth that the allegations were robbery and burglary. RR 48. The DC also finds that other jury instructions listed the elements of robbery and burglary. The DC finds the trial court instructed the jury with circumstantial evidence, so no error resulted from failing to

instruct the jury with the special circumstantial evidence instruction. RR 49.

The DC overlooks that, because the trial court failed to instruct the jury with the elements required to prove the special circumstance, the jury conflated the special circumstance allegations with the felony murder charge. The trial court's instructions lessened the prosecution's burden of proof and allowed the jury to find the special circumstance allegations true by finding that Parra committed a felony murder premised on a burglary and robbery, instead of the elements of the special circumstance allegations.

The DC finds Parra's first-degree murder verdict forms instructed the jury to make specific findings on the special circumstances. RR 48. Parra disagrees. Even though the jury verdict forms set forth the nature of the special circumstance allegation, instructional error still resulted. "The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration

of parts of an instruction or from a particular instruction." *People v. Smithey,* 20 Cal.4th 936, 963 (1999), citing, *People v. Musselwhite,* 17 Cal.4th 1216, 1248 (1998).) Verdict forms could not substitute for an incorrect jury instruction; no instruction identified the alleged special circumstances.

The DC finds that the trial court fully instructed on the nature of the special circumstances and what was required to prove the offenses for purposes of the special circumstances allegations. RR 49. Parra disagrees. Because the trial court failed to identify the charged special circumstances of burglary and robbery, the trial court never instructed the jury on the charged special circumstances.

VIII. The Combined Effect of the Errors Deprived Parra of His Constitutional Right to a Fair Trial

The DC finds no cumulative error resulted. RR 51. Parra disagrees. The errors cumulatively adversely affected the verdicts obtained and deprived Parra of his right to a fair trial. Cal. Const., Art. I, § 15; U.S. Const. amend. XIV; *Cargle v. Mullin*, 317 F.3d 1196, 1220 (10th Cir. 2003);

Thomas v. Hubbard, 273 F.3d 1164, 1179-1180 (9th Cir. 2001); *People v. Hill*,17 Cal.4th 800, 844-848 (1998).

IX. An Evidentiary Hearing Is Warranted

Parra sought an evidentiary hearing at every level of the state habeas proceedings and again in federal court. (Dkt. 19.) The DC finds no evidentiary hearing necessary because "even accepting [Parra's] factual assertions about counsel's performance at face value," Parra failed to state a prima facie case. RR 25.

Parra disagrees. The California courts should have held an evidentiary hearing to allow Parra to call trial counsel as a witness and prove that trial counsel rendered ineffective assistance by failing to request proper jury instructions. See, e.g., *People v. Pope*, 23 Cal.3d 412, 426 (1979) (An evidentiary hearing allows trial counsel to fully describe "his or her reasons for acting or failing to act in the manner complained of.")

The DC also finds no evidentiary hearing is required because 2254(d)(2) restricts federal habeas review to the

record before the state court. RR 52. Parra disagrees. Parra made a prima facie showing for relief. Assuming the record and other evidence to be true (See *Cullen v. Pinholster*, 563 U.S. at 188) nothing more was required. See *Nunes v. Mueller*, 350 F.3d at 1054.

CONCLUSION

Parra respectfully requests that this Court grant Certiorari because the record and case law shows that the issues are "debatable among jurists of reason," that "a court *could* resolve [the issue] in a different manner," and that it is not "squarely foreclosed by statute, rule, or authoritative court decision." *Barefoot v. Estelle*, 463 U.S. at 893-894. Park met the "minimal showing" required for a Certificate of Appealability and a COA should issue.

DATED: January 2, 2020

/s Fay Arfa

Fay Arfa, Attorney for Petitioner

FILED

OCT 25 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO ARGENIS PARRA, Petitioner-Appellant, v. JOE A. LIZARRAGA, Warden, Respondent-Appellee.	No. 18-56678 D.C. No. 2:17-cv-05946-VBF-KS Central District of California, Los Angeles ORDER

Before: O'SCANNLAIN and RAWLINSON, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) 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 A

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FRANCISCO ARGENIS PARRA, Petitioner, v. JOE A. LIZARRAGA (Warden), Respondent.	**No. LA CV 17-05946-VBF-KS** **FINAL JUDGMENT**

Final judgment is hereby entered in favor of respondent and against petitioner Francisco Argenis Parra. IT IS SO ADJUDGED.

Dated: December 27, 2018

Valerie Baker Fairbank

Honorable Valerie Baker Fairbank
Senior United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

FRANCISCO ARGENIS PARRA, Petitioner, v. JOE A. LIZARRAGA (Warden), Respondent.	**Case No. LA CV 17-05946-VBF-KS** **ORDER** Overruling Petitioner's Objections; Adopting Report & Recommendation; Denying the Habeas Corpus Petition; Dismissing the Action With Prejudice; Terminating and Closing Action (JS-6)

The Court has reviewed the 28 U.S.C. § 2254 petition for a writ of habeas corpus, CM/ECF Document ("Doc") 1; the respondent's Amended Answer (Doc 20) and lodged documents (Docs 16 and 21); petitioner's traverse (Doc 29); the November 9, 2018 Amended Report and Recommendation ("R&R") of the Honorable Karen L. Stevenson (Doc 34); and the applicable law. As required by Fed. R. Civ. P. 72(b)(3), the Court has engaged in de novo review of the portions of the R&R to which petitioner has specifically objected and finds no defect of law, fact, or logic in the R&R. The Court finds discussion of the objections to be unnecessary on this record. *See MacKenzie v. Calif. AG*, 2016 WL 5339566, *1 (C.D. Cal. Sept. 21, 2016); *Smith v. Calif. Jud. Council*, 2016 WL 6069179, *2 (C.D. Cal. Oct. 17, 2016). Accordingly, the Court will accept the Magistrate Judge's factual findings and legal conclusions and implement his recommendations.

APPENDIX B

ORDER

Petitioner's request for an evidentiary hearing is **DENIED**.

Petitioner's objection **[Doc # 35] is OVERRULED.**

The Amended Report and Recommendation **[Doc # 34] is ADOPTED.**

The petition for a writ of habeas corpus **[Doc # 1] is DENIED.**

Final judgment consistent with this order will be entered separately as required by Fed. R. Civ. P. 58(a). *See Jayne v. Sherman*, 706 F.3d 994, 1009 (9th Cir. 2013).

This action is DISMISSED with prejudice.

The case SHALL BE TERMINATED and closed (JS-6).

IT IS SO ORDERED.

Dated: December 27, 2018

Valerie Baker Fairbank

Hon. Valerie Baker Fairbank
Senior United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANCISCO ARGENIS PARRA, **Petitioner,** **v.** **JOE A. LIZARRAGA, Warden,** **Respondent.**	**NO. CV 17-5946-VBF (KS)** **AMENDED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, United States Senior 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.

INTRODUCTION

On August 10, 2017, Petitioner, a California state prisoner, filed through his counsel a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. (Dkt. No. 1.) On March 26, 2018, Respondent filed an Answer and lodged with the Court the relevant state court records. (Dkt. Nos. 15 and 16.) On April 26, 2018,

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Respondent, with the Court's permission, filed an Amended Answer and lodged an additional state court record. (Dkt. Nos. 20-21, 23.) On August 7, 2018, Petitioner filed a Traverse. (Dkt. No. 29.) Briefing in this action is now complete, and the matter is under submission to the Court for decision.

PRIOR PROCEEDINGS

On April 11, 2014, a Los Angeles County Superior Court jury convicted Petitioner of first-degree murder (California Penal Code ("Penal Code") § 187(a)), attempted murder (Penal Code § 664/187(a)), assault with a semiautomatic firearm (Penal Code § 245(b)), four counts of home invasion robbery (Penal Code § 211), and first-degree burglary (Penal Code § 459). (5 Clerk's Transcript ("CT") 971-78; 5 Reporter's Transcript ("RT") 4811-18.) The jury also found true allegations that Petitioner committed the murder during the commission of a robbery and a burglary (Penal Code § 190.2(a)(17)), that Petitioner personally used a firearm (Penal Code §§ 12022.53(b) and 12022.5(a)), and that Petitioner voluntarily acted in concert and entered an inhabited dwelling (Penal Code § 213(a)(1)(A)). (5 CT 971-78; 5 RT 4811-18.) Petitioner's co-defendants, Pedro Huerta Zuniga and Hector Aguilar Arciga, were also convicted of several crimes, including first-degree murder. (5 CT 961-70, 1077-88; 5 RT 4803-10, 5102-10.) On August 6, 2014, the trial court sentenced Petitioner to state prison for life without the possibility of parole plus 40 years. (6 CT 1235-38; 5 RT 5416.)

Petitioner appealed his judgment of conviction. (Lodgment ("Lodg.") No. A6.) On February 25, 2016, the California Court of Appeal affirmed the judgment in a reasoned unpublished opinion. (Lodg. No. A1.) Petitioner then filed a Petition for Review in the California Supreme Court (Lodg. No. B1), which summarily denied the petition without comment or citation of authority on May 25, 2016 (Lodg. No. B4).

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Petitioner filed a series of habeas petitions in the California courts. On August 1, 2017, Petitioner filed a habeas petition in the Los Angeles County Superior Court (Lodg. No. C1), which denied it on October 19, 2017 (Lodg. No. C2). On October 31, 2017, Petitioner filed a habeas petition in the California Court of Appeal (Lodg. No. D1), which denied it on November 30, 2017 (Lodg. No. D2). On January 8, 2018, Petitioner filed a habeas petition in the California Supreme Court (Lodg. No. E1 and E2), which denied it on March 28, 2018 (Lodg. No. E3).

SUMMARY OF THE EVIDENCE AT TRIAL

The following factual summary from the California Court of Appeal's unpublished decision on direct review is provided as background. *See also* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner by clear and convincing evidence).

A. *The Prosecution Case*.

According to the prosecution, appellants had a scheme to rob drug dealers. After gaining a drug dealer's trust by making an initial small purchase, they would set up a larger drug purchase. During this second encounter, they would rob the drug dealer of money and drugs. In the instant case, appellants killed Carlos Zarate and injured Manuel Rojas during the second drug purchase.

1. *The Victims' Testimony*.

Vasquez testified he was a close friend of Zarate's. About a week and a half before Zarate's murder, Vasquez was present when Zarate sold 20 pounds of marijuana to [Petitioner] and Zuniga. On April 22, 2009, Vasquez, Gutierrez

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(his mother-in-law), Zarate, and Rojas went to an apartment in Bellflower to sell 140 pounds of marijuana to [Petitioner] and Zuniga. They brought 60 pounds of the drug with them, and planned to deliver the remainder after receiving the money. [Petitioner] was waiting outside the apartment; Zuniga and Arciga were waiting inside. The parties exchanged drugs and money. Arciga checked the product, while Gutierrez started counting the money. She asked Vasquez to assist her. As Vasquez was walking toward Gutierrez, he glimpsed Zuniga pulling a handgun from his waist. He heard several gunshots and saw Zarate staggering. Vasquez also saw Arciga shooting at Zarate while walking toward him. After Zarate had fallen to the ground, Arciga fired five more shots at him. Zuniga then snatched the money from Gutierrez. At around the same time, Vasquez heard Rojas screaming. After another gunshot, Vasquez observed Rojas on the floor. [Petitioner] took the bag containing the marijuana and handed it to Zuniga. Zuniga then dragged the bag to the exit. Vasquez did not see Arciga, but presumed that he had already left the apartment. [Petitioner], who was armed with a semi-automatic, pointed the gun at Vasquez, and asked Vasquez if he had a gun. Vasquez told him, "No," and lifted his shirt to show he was not armed. Gutierrez also interposed herself between [Petitioner] and Vasquez. As [Petitioner] turned to leave, he struck Rojas, who was still on the ground, on the top of the head with his gun. After [Petitioner] left, Vasquez ran toward Zarate's body and started screaming to wake him up. He noticed a .45–caliber handgun on top of the body. Vasquez recognized that the gun belonged to him, and took it. He subsequently disposed of the gun. Vasquez, Gutierrez, and Rojas then left the apartment. Vasquez did not call 911 after the shooting or contact the police. Rather, the police contacted him later.

Rojas's and Gutierrez's trial testimony was substantially similar to Vasquez's testimony. Rojas testified that he realized it was a setup when

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Gutierrez was counting the stacks of money, and there were large bills on top of the stacks and $1 bills underneath. At almost the same instant, Rojas heard someone say, "This is a stick up." He saw Zarate reach for his gun, but Zarate did not have enough time to pull it out before he was shot. After Zarate fell to the ground, Gutierrez yelled out, "Oh, my God. Run. Run." Rojas panicked and ran toward the front door. Arciga then shot him in the left buttocks area, and Rojas fell to the ground. He closed his eyes and pretended to be dead. He heard people walking out and dragging the bag of drugs with them. As the last person left, he pistol-whipped Rojas. From their positions in the apartment, Rojas deduced that it was [Petitioner] who had pistol-whipped him.

After the men left, Gutierrez had someone drive Rojas to a nearby hospital, where he had surgery to repair a shattered left femur bone. Police officers interviewed Rojas at the hospital; he told them he had been shot in a driveby shooting by unknown assailants. However, Rojas, who was working as an informant for the Drug Enforcement Administration (DEA), called his handler that day and informed the DEA agent about what had happened. A few days later, Los Angeles Sheriff's Department deputy sheriff and homicide detective Steven Blagg, after being informed that Rojas had pertinent information about the shooting, met with Rojas. Rojas described the actual events to the detective.

Gutierrez testified that when the shooting started, she covered her face. Later, she saw Zuniga pointing a gun at Vasquez. She went over and pushed the gun away from Vasquez's face. Gutierrez did not know that Zarate had died until she was informed a few days later. She did not go to the police. Instead, the police contacted her.

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2. *Statements Made to Eusebio Alvarez*.

Over appellants' objections under *Aranda–Bruton*,[2] Eusebio Alvarez, a friend of Arciga's, testified about certain statements Arciga and Zuniga had made to him after the shooting. Previously, Arciga had told Alvarez that Arciga and [Petitioner's] father were involved in "dope rips" — robbing drug dealers. On April 22, 2009, Arciga called Alvarez, saying, "I got some weed right now, but you got to let me know if you want it because something went wrong right now. It's hot. I just shot somebody." Later that day, Arciga came to Alvarez's house with some marijuana. Arciga asked Alvarez if Alvarez could "get rid of [the drugs] quick or something because it was real hot." Arciga said he had been involved in a shoot-out: he had shot a man and after the man fell down, he had walked up and shot him several times. Arciga said Zuniga and [Petitioner] were present.

[2] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

Alvarez testified he did not sell any of the marijuana for Arciga. However, for $100, he helped Arciga dispose of a nine-millimeter handgun Arciga said he had used to kill the man.

A few days later, Zuniga contacted Alvarez, saying he had some crystal methamphetamine he wanted Alvarez to sell. Zuniga admitted there had been a shoot-out, but said Arciga had lied about shooting the victim. He bragged, "[Arciga] is talking all this bullshit. I was the one that did it. I'm the one that shot the guy."

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3. *Other Trial Testimony*.

Maria Eduvina Arteaga de Ayala testified that she lived at the apartment where the shooting occurred. About a week before the shooting, Arciga and "Miguel" asked about using her apartment to host two people visiting from Mexico. Arciga also asked her if she wanted to work with them as a driver. He showed her a box of cash and a handgun. On April 22, 2009, Miguel called her and stated they wanted her apartment "empty." Ayala left the apartment, leaving the door unlocked. As she was driving away from her apartment that morning, she observed Arciga driving in the opposite direction. Later that day, the manager of the apartment complex called Ayala, and told her there was a dead man in her apartment. When Ayala was later interviewed by Detective Blagg, she initially lied before telling him the truth. Ayala testified she did not want to work with Arciga, and she never gave anyone permission to use her apartment to engage in drug deals or to rob drug dealers.

On November 10, 2009, [Petitioner] was stopped for speeding. He was arrested for driving without a license and the vehicle was impounded. During the inventory search of the vehicle, two handguns were recovered from the trunk, including a nine-millimeter Sig Sauer. After waiving his *Miranda* rights,[3] [Petitioner] told Los Angeles Police Officer Arturo Koenig that he was going to meet and rob a drug dealer of 200 pounds of marijuana. He admitted being involved in a prior robbery of a drug dealer, at "32nd and Central" in Los Angeles.

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

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4. *Forensic Evidence*.

Steven Scholtz, a coroner, testified that he performed an autopsy on Zarate's body. Zarate had suffered nine gunshot wounds, including three that Scholtz opined were fatal.

Phil Teramoto, a criminalist, testified about firearm-related evidence recovered at the crime scene. From various tests, Teramoto concluded that three firearms were used during the shoot-out: (1) a .45–caliber handgun that fired a single shot, (2) a nine-millimeter handgun that fired eight shots, and (3) a nine-millimeter Sig Sauer — the handgun recovered from [Petitioner's] vehicle — that fired one shot. A bullet recovered from Rojas's body was matched to bullets fired from the Sig Sauer handgun, and two bullets recovered from Zarate's body were matched with the bullets fired from the other nine-millimeter handgun. Teramoto also testified that the shot fired from the .45–caliber handgun had a northern trajectory and hit an exercise machine at 16.5 inches above the ground.

Los Angeles County Sheriff Deputy Mario Cortez, a latent print examiner, testified that he matched latent prints developed from evidence found at the crime scene with fingerprint exemplars from [Petitioner] and Zuniga. Luis Olmos, a criminalist, testified that analysis of DNA found on certain items at the crime scene indicated that multiple persons handled the items. Based on their respective DNA profiles, Arciga and Zuniga were possible contributors to the DNA mixture found on some of the items.

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B. *The Defense Case*.

Arciga and Zuniga did not testify.

[Petitioner] testified he had never been to the crime scene. He stated that his father, Armando [Petitioner], was a drug dealer, and that he had helped his father sell drugs. [Petitioner] also testified that his father robbed drug dealers, but claimed he never participated because his father "didn't want to risk me." After [Petitioner's] father was arrested in May 2009, [Petitioner] assisted "Martinez" in a robbery at 32nd and Central. When [Petitioner] was arrested in November 2009, Martinez was one of the passengers in the vehicle.

Detective Blagg testified that he interviewed Ayala — the woman who lived in the apartment where the shooting occurred. During her interview, she told Detective Blagg that she had previously seen Arciga with [Petitioner's] father. Ayala also told the detective that "Miguel" had paid her money for the use of her apartment.

(Lodg. No. A1 at 4-9, 10.)

PETITIONER'S HABEAS CLAIMS

Petitioner presents the following grounds for habeas relief.

Ground One: The trial court denied Petitioner due process and a fair trial by failing to adequately instruct the jury on credibility, and trial counsel rendered ineffective assistance in this regard. (Petition at 5; Petition Memorandum ("Mem.") at 15-24; Traverse at 7-12.)

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Ground Two: The trial court denied Petitioner due process and a fair trial by failing to adequately instruct the jury on alibi, and trial counsel rendered ineffective assistance in this regard. (Petition at 5-6; Petition Mem. at 25-29; Traverse at 12-15.)

Ground Three: The trial court prejudicially erred and violated Petitioner's right to confrontation by admitting co-defendant Arciga's extrajudicial statements to an informant. (Petition at 6; Petition Mem. at 29-35; Traverse at 18-22.)

Ground Four: The trial court deprived Petitioner of due process and a fair trial by failing to instruct the jury that corroboration was required for the accomplice statements made by Petitioner's codefendants and the drug sellers. (Petition at 6; Petition Mem. at 36-46; Traverse at 22-29.)

Ground Five: The trial court prejudicially erred by failing to instruct the jury on second-degree murder and voluntary manslaughter as lesser-included offenses of first-degree murder. (Petition at 6; Petition Mem. at 47-52; Traverse at 29-33.)

Ground Six: The trial court deprived Petitioner of due process and a fair trial by failing to instruct the jury on self-defense. (Petition at 6.1; Petition Mem. at 53-57; Traverse at 34-36.)

Ground Seven: The trial court deprived Petitioner of due process and a fair trial by failing to provide proper and complete jury instructions on the special circumstance allegations. (Petition at 6.1; Petition Mem. at 58-61; Traverse at 37-41.)

Ground Eight: The combined effect of the errors deprived Petitioner of his constitutional right to a fair trial under the federal and state constitutions. (Petition at 6.1; Petition Mem. at 61; Traverse at 42.)

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STANDARD OF REVIEW

I. The Antiterrorism And Effective Death Penalty Act

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner whose claim has been "adjudicated on the merits" cannot obtain federal habeas relief unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

For the purposes of § 2254(d), "clearly established Federal law" refers to the Supreme Court holdings in existence at the time of the state court decision in issue. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011); *see also Kernan v. Cuero*, __ U.S. __, 138 S. Ct. 4, 9 (2017) (per curiam) ("circuit precedent does not constitute clearly established Federal law. . . . [n]or, of course, do state-court decisions, treatises, or law review articles") (citations omitted). A Supreme Court precedent is not clearly established law under § 2254(d)(1) unless it "squarely addresses the issue" in the case before the state court or establishes a legal principle that "clearly extends" to the case before the state court. *Moses v. Payne*, 555 F.3d 742, 760 (9th Cir. 2009); *see also Harrington v. Richter*, 562 U.S. 86, 101 (2011) (it "'is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by'" the Supreme Court) (citation omitted).

A state court decision is "contrary to" clearly established federal law under § 2254(d)(1) only if there is "a direct and irreconcilable conflict," which occurs when the state court either (1) arrived at a conclusion opposite to the one reached by the Supreme Court on

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a question of law or (2) confronted a set of facts materially indistinguishable from a relevant Supreme Court decision but reached an opposite result. *Murray v. Schriro*, 745 F.3d 984, 997 (9th Cir. 2014) (citing *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). A state court decision is an "unreasonable application" of clearly established federal law under § 2254(d)(1) if the state court's application of Supreme Court precedent was "objectively unreasonable, not merely wrong." *White v. Woodall*, 572 U.S. 415, 419 (2014). The petitioner must establish that "there [can] be no 'fairminded disagreement'" that the clearly established rule at issue applies to the facts of the case. *See id.* at 1706-07 (citation omitted). Finally, a state court's decision is based on an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d)(2) when the federal court is "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record before the state court." *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir.), *cert. denied*, 135 S. Ct. 710 (2014). So long as "'[r]easonable minds reviewing the record might disagree,'" the state court's determination of the facts is not unreasonable. *See Brumfield v. Cain*, ___ U.S. ___, 135 S. Ct. 2269, 2277 (2015).

AEDPA thus "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *White v. Wheeler*, __ U.S. __, 136 S. Ct. 456, 460 (2015) (per curiam) (citation omitted). Petitioner carries the burden of proof. *See Pinholster*, 563 U.S. at 181.

II. The State Court Decisions On Grounds One To Seven Are Entitled To AEDPA Deference

Petitioner presented his claims in Grounds One and Two in his state habeas petitions in the Los Angeles County Superior Court, the California Court of Appeal, and the California Supreme Court. (Lodg. Nos. C1, D1, and E1.) The California courts rejected these claims both on procedural grounds (Lodg. Nos. C2 and D2) and "on the merits" (Lodg.

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Nos. D2 and E2). Because the state courts' merits adjudications were unaccompanied by any reasoning, the Court "must determine what arguments or theories could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Haney v. Adams*, 641 F.3d 1168, 1171 (9th Cir. 2011) (alteration in original) (quoting *Pinholster*, 563 U.S. at 188).

Petitioner presented his claims in Grounds Three to Seven on direct review in the California Court of Appeal. (Lodg. Nos. A6 and A10.) The California Court of Appeal denied the claims in a reasoned decision on the merits. (Lodg. No. A1 at 10-22.) Petitioner then presented his claims in Grounds Three to Seven to the California Supreme Court in the Petition for Review (Lodg. No. B1), which the California Supreme Court denied summarily without comment or citation to authority (Lodg. No. B4). Thus, Section 2254(d) applies, and the Court looks through the California Supreme Court's silent denial to the last reasoned decision – the decision of the California Court of Appeal on direct review – to determine whether the state court's adjudication of Petitioner's claims in Grounds Three to Seven is unreasonable or contrary to clearly established federal law. *See Wilson v. Sellers*, ___ U.S. ___, 138 S. Ct. 1188, 1192 (2018); *see also Johnson v. Williams*, 568 U.S. 289, 297 n.1 (2013) ("Consistent with our decision in *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991), the Ninth Circuit 'look[ed] through' the California Supreme Court's summary denial of [the petitioner's] petition for review and examined the California Court of Appeal's opinion."); *see also*, *e.g.*, *Jones v. Harrington*, 829 F.3d 1128, 1136 (9th Cir. 2016) (looking through California Supreme Court's summary denial of a petition for review to the California Court of Appeal's decision on direct review).

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III. Ground Eight Is Unexhausted But May Be Resolved On The Merits

Petitioner's claim in Ground Eight, in which he alleges cumulative error premised on alleged errors arising from Grounds One to Seven, is unexhausted because he never presented the factual basis of that claim to any state court. The only version of this claim presented to the state courts was a claim premised on cumulative error arising from Grounds Three to Seven. (Lodg. No. B1 at 29.)

However, under 28 U.S.C. § 2254(b)(2), the Court may resolve an unexhausted claim "when it is perfectly clear that the applicant does not raise even a colorable federal claim." *See Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005). As discussed below, Ground Eight does not raise a colorable federal claim because there was no constitutional error to accumulate. This claim therefore may be resolved on this basis. *See generally Revilla v. Gibson*, 283 F.3d 1203, 1210-11 (10th Cir. 2002) (exercising its discretion to bypass exhaustion when "the claim may be disposed of in straightforward fashion on substantive grounds").

In the alternative, under 28 U.S.C. § 2254(b)(3), the Court may resolve the merits of any unexhausted claim for which Respondent "expressly waives" the exhaustion requirement. In the Amended Answer, Respondent asserted, "The grounds in the Petition appear to be exhausted." (Amended Answer at 1.) This language evinced a clear intent to expressly waive the exhaustion requirement. *See Sharrieff v. Cathel*, 574 F.3d 225, 229 (3d Cir. 2009) (holding that an assertion in the government's Answer that petitioner "appear[ed] to have exhausted" his claim was an express waiver); *see also Menendez v. Terhune*, 422 F.3d 1012, 1026 n.5 (9th Cir. 2005) ("Though we continue to question whether this claim was indeed exhausted, because the State has not argued that the claim is unexhausted, we proceed to the claim on its merits."). Respondent's express waiver was not rendered invalid by the possibility that Respondent's position on exhaustion for Ground Eight was incorrect.

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See Eichwedel v. Chandler, 696 F.3d 660, 671 (7th Cir. 2012) ("[A] State expressly waives exhaustion for purposes of § 2254(b)(3) where, as here, it concedes clearly and expressly that the claim has been exhausted, regardless of whether that concession is correct.").

DISCUSSION

I. Petitioner Is Not Entitled To Habeas Relief On His Claims of Instructional Error In Grounds One And Two

In Ground One, Petitioner claims that the trial court denied him due process and a fair trial by failing to instruct the jury adequately on the issue of credibility. (Petition at 5; Petition Mem. at 15-22; Traverse at 7-9.) In Ground Two, he claims that the trial court denied him due process and a fair trial by failing to instruct the jury on alibi. (Petition at 5-6; Petition Mem. at 25-29; Traverse at 12-15.)[1]

As an initial matter, Respondent contends that the instructional error claims in Grounds One and Two are procedurally defaulted because the California Court of Appeal, in denying Petitioner's habeas petition, found the claims forfeited by Petitioner's failure to raise them as issues on direct appeal. (Amended Answer at 8-12.) However, because it would be more efficient to resolve these claims on the merits, the Court elects to resolve them solely on that basis. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002).

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[1] Petitioner's related claims in Grounds One and Two of ineffective assistance of counsel based on counsel's failure to request these instructions during trial are discussed below in Section II.

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A. Legal Standard

"Failure to give [a jury] instruction which might be proper as a matter of state law," by itself, does not merit federal habeas relief. *See Miller v. Stagner*, 757 F.2d 988, 993 (9th Cir. 1985). Rather, in order to merit federal habeas relief on a claim that the trial court erred by failing to properly instruct a jury, petitioner must allege and then show that the trial court committed an error that so infected the entire trial that the resulting conviction violated his federal constitutional right to due process. *See Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *Dunckhurst v. Deeds*, 859 F.2d 110, 114 (9th Cir. 1988). Claims of instructional error may not be judged in artificial isolation, but must be considered in the context of the trial record and the instructions as a whole. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Boyde v. California*, 494 U.S. 370, 380 (1990); *see also Cupp*, 414 U.S. at 147; *Ho v. Carey*, 332 F.3d 587, 592 (9th Cir. 2003).

The omission of an instruction is less likely to be prejudicial than a misstatement of the law. *See Walker v. Endell*, 850 F.2d 470, 475-76 (9th Cir. 1987) (citing *Kibbe*, 431 U.S. at 155). Thus, a habeas petitioner whose claim involves a failure to give a particular instruction bears an "'especially heavy burden.'" *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th Cir. 1997); *see also Hendricks v. Vasquez*, 974 F.2d 1099, 1106 (9th Cir. 1992).

B. Analysis

1. Ground One: Instruction on Credibility

In Ground One, Petitioner claims that the trial court denied his rights to due process and a fair trial by failing to adequately instruct the jury on the issue of witness credibility. (Petition at 5; Petition Mem. at 15-22; Traverse at 7-9.)

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Under California law, the trial court had a *sua sponte* duty to give a general instruction on factors affecting witnesses' credibility. *See People v. Rincon-Pineda*, 14 Cal. 3d 864, 883-84 (1975). Here, the trial court did give the required general instruction, CALCRIM No. 2.20 ("Believability of Witness"). (5 CT 912-13; 5 RT 4209-10.) In pertinent part, CALCRIM No. 2.20 instructed the jury that it could assess the believability of a witness's testimony based on several factors such as, for example, the "character and quality of that testimony"; the "existence or nonexistence of a bias, interest, or other motive"; and the "attitude of the witness toward this action or toward the giving of testimony." (5 CT 912; 5 RT 4210.)

Petitioner claims, however, that this general instruction was inadequate and that the trial court should also have instructed the jury *sua sponte* with a portion of CALCRIM No. 105 ("Witnesses"), which contained language stating, "Has the witness engaged in [other] conduct that reflects on his or her believability?" (Petition Mem. at 16 and n.4.) This pinpoint instruction about "other conduct" by the witnesses, according to Petitioner, was required because the evidence in this case showed that the prosecution witnesses had tried to sell drugs or otherwise engage in criminal conduct, which the jury should have been instructed was relevant to their credibility assessment. (Petition Mem. at 22.)

The trial court's failure to instruct the jury *sua sponte* with a pinpoint instruction about the "other conduct" of the witnesses, for purposes of assessing their believability, was purely an issue of California law and was not required by clearly established federal law. Under California law, a defendant may be entitled in appropriate circumstances to a pinpoint instruction on a defense theory of the case, including a pinpoint instruction on specific factors relevant to a witness's credibility. *See People v. Hovarter*, 44 Cal. 4th 983, 1021 (2008); *People v. Harrison*, 35 Cal. 4th 208, 253 (2005). Clearly established federal law, however, imposes no such requirement. *See Larsen v. Paramo*, 700 F. App'x 594, 596 (9th Cir. 2017) ("No clearly established federal law, as determined by the Supreme Court, holds

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that a state court's failure to give a pinpoint jury instruction on the defense theory of the case violates a criminal defendant's due process right to 'be afforded a meaningful opportunity to present a complete defense.'") (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Accordingly, it cannot be said that the California courts' rejection of this claim was contrary to or involved an unreasonable application of clearly established federal law. *See Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004).

Even if this claim were governed by clearly established federal law, it would not warrant habeas relief. The trial court did not violate due process by failing to give a pinpoint instruction on the "other conduct" of the prosecution witnesses. As a threshold matter, Petitioner was not entitled to the instruction as a matter of California law because he did not request it. *See People v. Kendrick*, 211 Cal. App. 3d 1273, 1278 (1989) (recognizing that a trial court has no *sua sponte* duty to give a particular instruction on the use of prior felony convictions to assess witness credibility); *see generally People v. Saille*, 54 Cal. 3d 1103, 1120 (1991) (recognizing that a trial court has no *sua sponte* duty to give a pinpoint instruction).

Even if the instruction had been requested, the trial court would have had no duty to give it if it was repetitive of other instructions on credibility that were already given. *See Harrison*, 35 Cal. 4th at 253. The context of the instructions on the whole reflects that, in addition to giving the standard credibility instruction of CALCRIM No. 2.20, the trial court also instructed the jury with CALCRIM No. 2.13 ("Prior Consistent or Inconsistent Statements as Evidence") and CALCRIM No. 2.22 ("Weighing Conflicting Testimony"). (5 CT 911, 915; 5 RT 4209, 4211.) These instructions on the whole adequately informed the jury to account for each of the particular circumstances of the witnesses in assessing credibility, by allowing the jury to disregard any testimony it found unconvincing and to consider particular factors such as prior inconsistent statements; the "existence or nonexistence of a bias, interest, or other motive"; and a witness's "attitude . . . toward this

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action or toward the giving of testimony." A pinpoint instruction highlighting the "other conduct" of the witnesses would have been repetitive and therefore not required by California law under the circumstances. *See Hovarter*, 44 Cal. 4th at 1020 (holding that a pinpoint instruction on a witness's particular status as a jailhouse informant was not required given the other general instructions on witness credibility); *Harrison*, 35 Cal. 4th at 253 (holding that a pinpoint instruction on a witness's expectation of leniency was not required given the other general instructions on witness credibility).

In sum, the trial court's failure to give a pinpoint instruction on witness credibility *sua sponte* did not violate California law, much less Petitioner's federal constitutional rights. *See Menendez v. Terhune*, 422 F.3d 1012, 1030 (9th Cir. 2005) (concluding that when a jury instruction was not warranted under California law, "the state court's decision was not error, much less a violation of due process"). Thus, the California courts' rejection of this claim was not objectively unreasonable, and habeas relief is unwarranted for this claim.

2. Ground Two: Instruction on Alibi

In Ground Two, Petitioner claims that the trial court denied him due process and a fair trial by failing to instruct the jury *sua sponte* on the issue of alibi. (Petition at 5-6; Petition Mem. at 25-28; Traverse at 12-13.)

In his trial testimony, Petitioner denied any involvement in the crimes. He testified that he had never gone to the apartment where the shooting had occurred. (4 RT 3625.) However, he could not specifically recall where he was at the time of the shooting: He testified that "I don't know" where he was on that day, that he was "supposedly working," and that it was "not a day that stands out that I remember specifically." (4 RT 3626.) The trial court did not instruct the jury with CALCRIM No. 3400 ("Alibi"). Petitioner contends

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that the trial court's failure to do so, given his trial testimony establishing an alibi, violated his right to due process and a fair trial. (Petition Mem. at 25-26.)

The California courts' rejection of this claim was not objectively unreasonable. State trial courts have no federal constitutional duty to give an alibi instruction, even when such an instruction is requested by the defense and when there is evidence in the record to support an alibi. *See Duckett v. Godinez*, 67 F.3d 734, 745 (9th Cir. 1995). Here, however, even these basic conditions were not met: an alibi instruction was neither requested by the defense nor supported by evidence in the record.

First, the trial court had no duty under California law to instruct the jury on that issue because the defense did not request it. *See People v. Freeman*, 22 Cal. 3d 434, 437 (1978) (holding that "although substantial alibi evidence may be given by the defense, in the absence of any request for an instruction in respect thereof, it is not the duty of the trial court to give a specific charge upon that subject") (citations omitted). Second, an alibi instruction was not warranted under California law because of the absence of supporting evidence in the record: Petitioner's trial testimony, the only evidence offered on the issue, was insufficient because Petitioner could not recall his specific whereabouts or activities at the time of the shooting, but at most only vaguely speculated that he was "supposedly working." This was insufficient as a matter of California law to warrant an alibi instruction. *See People v. Le Beau*, 136 Cal. App. 2d 69, 70 (1955) ("But he presented no evidence of an alibi for the date of the crime, February 6, 1952. Although he denied having made the sale, or any sale of narcotics at any time, he was unable to remember where he was on February 6th. He could not recall any of his activities on that day. There was, therefore, no basis in the evidence for an instruction on alibi."). The trial court had no duty to instruct the jury on alibi under these circumstances.

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In sum, the trial court's failure to give an alibi instruction *sua sponte* did not violate California law, much less Petitioner's federal constitutional rights to due process and a fair trial. *See Menendez*, 422 F.3d at 1030. Thus, the California courts' rejection of this claim was not objectively unreasonable, and habeas relief is unwarranted.

II. Petitioner Is Not Entitled To Habeas Relief For His Claims Of Ineffective Assistance Of Counsel In Grounds One And Two

In Ground One, Petitioner claims that his trial counsel was ineffective for failing to request jury instructions on witnesses' credibility. (Petition at 5; Petition Mem. at 22-24; Traverse at 9-12.) In Ground Two, Petitioner claims that his trial counsel was ineffective for failing to request an alibi instruction. (Petition at 5-6; Petition Mem. at 29; Traverse at 13-15.) Finally, Petitioner claims that the California Court of Appeal erred by rejecting these claims without first holding an evidentiary hearing. (Petition Mem. at 16-17; Traverse at 16-17.)

A. Legal Standard

To succeed on an ineffective assistance of counsel claim, Petitioner must demonstrate that counsel's performance was both deficient and prejudicial to the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because both prongs of the *Strickland* test must be satisfied to establish a constitutional violation, a petitioner's failure to satisfy either prong requires the denial of the ineffectiveness claim. *See Strickland*, 466 U.S. at 697 (no need to address deficiency of performance if prejudice is examined first and found lacking); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("[f]ailure to satisfy either prong of the *Strickland* test obviates the need to consider the other").

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"To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Richter*, 562 U.S. at 104 (citation omitted). However, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690; *see also Pinholster*, 563 U.S. at 196. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Richter*, 562 U.S. at 105. Notably, the failure to take a futile action or make a meritless argument can never constitute deficient performance. *See Rupe v. Wood*, 93 F.3d 1434, 1444-45 (9th Cir. 1996); *see also Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (counsel is not obligated to raise frivolous motions, and failure to do so cannot constitute ineffective assistance of counsel); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) ("Failure to raise a meritless argument does not constitute ineffective assistance.").

To establish prejudice, a habeas petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id*. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. The court must consider the totality of the evidence before the jury in determining whether a petitioner satisfied this standard. *Strickland*, 466 U.S. at 695. And in the specific context here of an attorney's failure to request particular jury instructions, a petitioner must show that there is a reasonable probability that, but for the omission of the instruction, the result of the trial would have been different. *See United States v. Bosch*, 914 F.2d 1239, 1248 (9th Cir. 1990).

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B. Analysis

1. Counsel's failure to request a pinpoint instruction on credibility

The California courts' rejection of Petitioner's claim premised on counsel's failure to request a pinpoint instruction on the "other conduct" of the witnesses, as it affected their believability, was not objectively unreasonable. Counsel's failure to request the instruction was neither deficient performance nor prejudicial.

As discussed above, the pinpoint instruction was unnecessary and duplicative because the instructions actually given were adequate under California law to instruct the jury on how to assess the witnesses' credibility. *See Hovarter*, 44 Cal. 4th at 1020; *Harrison*, 35 Cal. 4th at 253. Thus, counsel's performance could not have been deficient because he failed to make a meritless request to the trial court for a pinpoint instruction that was not necessary for the jury to properly assess the witnesses' credibility. *See Boag*, 769 F.2d at 1344.

Even assuming that counsel should have requested the instruction, the failure to do so did not result in prejudice because Petitioner has not shown that, but for the omission of the instruction, the result of the trial would have been different. A pinpoint instruction focusing on the drug-dealing conduct of the witnesses would have added nothing to the repeated efforts the defense actually made to attack the witnesses' credibility on that basis. And the instructions on witness credibility that were actually given did not impede the defense in any way from specifically arguing that the prosecution witnesses should not be believed because they were at the apartment to sell drugs or had a history of selling drugs. Indeed, Petitioner's counsel did cross-examine the prosecution witnesses on issues such as their experience as drug sellers (2 RT 2199; 3 RT 2509) and particularly the status of one of the witnesses, Manuel Rojas, as a drug informant (3 RT 2456-60). The counsel for Petitioner's co-

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defendants, Arciga and Zuniga, also extensively cross-examined the prosecution witnesses on these areas. (2 RT 2158, 2160, 2188; 3 RT 2431-32, 2461, 2500.) Moreover, Petitioner's counsel highlighted these areas during closing argument. (5 RT 4282-83, 4285-86.) Thus, because the jury was well aware of this basis for their assessment of the witnesses' credibility, an instruction pinpointing the issue would not have made any difference to the jury's ultimate verdict.

In sum, it was not objectively unreasonable for the California courts to reject Petitioner's claim that his counsel was ineffective for failing to request a pinpoint instruction on witness credibility. Thus, habeas relief for this claim is unwarranted.

2. Counsel's failure to request an alibi instruction

The California courts' rejection of Petitioner's claim premised on counsel's failure to request an alibi instruction was not objectively unreasonable. Counsel's failure to request the instruction was neither deficient performance nor prejudicial.

As discussed above, the only evidence offered on the issue, Petitioner's own testimony, was inadequate under California law to demonstrate an alibi because Petitioner could not recall his specific whereabouts at the time of the shooting. *See Le Beau*, 136 Cal. App. 2d at 70. Counsel even acknowledged this inadequacy by commenting during his closing argument that Petitioner could not establish an alibi but instead had essentially testified that "I can't tell you where I was that day." (5 RT 4290.) Thus, counsel's performance could not have been deficient because he failed to make a meritless request to the trial court for an alibi instruction that was unwarranted by California law. *See Boag*, 769 F.2d at 1344.

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Nor did counsel's failure to request an alibi instruction result in prejudice. Petitioner has not shown that, but for the omission of an alibi instruction, the result of the trial would have been different. Petitioner's testimony that purportedly supported an alibi, in which he claimed to have never been at the apartment where the crimes had occurred, was countered by overwhelming evidence placing him at the crime scene. Jesus Vasquez and Martha Gutierrez, two of the victims, testified that Petitioner was one of the buyers who appeared at the apartment. (2 RT 2132; 3 RT 2482-83.) Arciga, Petitioner's co-defendant, told a friend during a private conversation that Petitioner was at the apartment at the time of the shooting. (3 RT 2709.) Petitioner's fingerprints and DNA evidence were found on paraphernalia found inside the apartment. (3 RT 2819, 2827, 2831, 2836.) Seven months after the crimes, Petitioner was arrested while driving a car containing a gun consistent with one of the weapons used in the shooting. (3 RT 2795-96; 4 RT 3306.) Given these multiple and independent sources of evidence placing Petitioner at the crime scene, an alibi instruction premised on Petitioner's vague denial would not have made any difference to the jury's ultimate verdict.

In sum, it was not objectively unreasonable for the California courts to reject Petitioner's claim that his counsel was ineffective for failing to request an alibi instruction. Thus, habeas relief for this claim is unwarranted.

3. California Court of Appeal's failure to hold an evidentiary hearing

The existing record before the California courts was sufficient to conclude that Petitioner's trial counsel was not ineffective for failing to request a pinpoint instruction on witness credibility or an instruction on alibi. Thus, even accepting Petitioner's factual assertions about counsel's performance at face value, Petitioner's claims of ineffective assistance of counsel failed to state a prima facie case for relief and therefore did not warrant further development in the state courts through an evidentiary hearing. *Cf. Nunes v. Mueller*,

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350 F.3d 1045, 1055 (9th Cir. 2003) (finding that petitioner had pled a prima facie case for relief in the state court where his assertions, taken at face value, were supported by "ample evidence in the record before the state court to support those assertions"). Accordingly, it was not objectively unreasonable for the California Court of Appeal to reject Petitioner's ineffective assistance claims based on the existing record before it.

III. Petitioner Is Not Entitled To Habeas Relief On His Confrontation Clause Claim In Ground Three

In Ground Three, Petitioner claims that the trial court prejudicially erred and violated his right to confrontation by admitting co-defendant Hector Arciga's extrajudicial statements to the informant, Eusebio Alvarez. (Petition at 6; Petition Mem. at 29-35; Traverse at 18-22.)

A. Legal Standard

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the Supreme Court held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." And before *Crawford*, the Supreme Court "derived a more specialized principle from the Confrontation Clause." *See Lucero v. Holland*, 902 F.3d 979, 987 (9th Cir. 2018). Specifically, in *Bruton v. United States*, 391 U.S. 123, 135-36 (1968), the Supreme Court held that a defendant is deprived of his Sixth Amendment right of confrontation when a facially incriminating confession of a non-testifying codefendant is admitted during a joint trial.

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However, only "testimonial" hearsay statements implicate the Confrontation Clause. *See Michigan v. Bryant*, 562 U.S. 344, 354 (2011); *Whorton v. Bockting*, 549 U.S. 406, 420 (2007); *Davis v. Washington*, 547 U.S. 813, 823-24 (2006). Recently, the Ninth Circuit in *Lucero* concurred with other circuits to hold that this limitation to testimonial statements also applies to *Bruton* claims. *See Lucero*, 902 F.3d at 988 ("We agree [with every other circuit to have considered this issue], and conclude that only testimonial codefendant statements are subject to the federal Confrontation Clause limits established in *Bruton*.").

A hearsay statement is testimonial when it is "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52. Under the Supreme Court's post-*Crawford* precedents, the "primary purpose" of the statements must be testimonial, in the sense that they were made with the primary purpose of creating an out-of-court substitute for trial testimony or establishing evidence for a subsequent prosecution. *See Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (citing, *inter alia*, *Bryant*, 562 U.S. at 358). The Confrontation Clause has no application to nontestimonial statements. *See Whorton*, 549 U.S. at 420 (recognizing "*Crawford*'s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements"). A statement is nontestimonial if it is "made out-of-court with a primary purpose other than prosecutorial use." *See United States v. Solorio*, 669 F.3d 943, 953 (9th Cir. 2012). If it is nontestimonial, "the admissibility of a statement is a concern of state and federal rules of evidence, not the Confrontation Clause." *Bryant*, 562 U.S. at 359.

B. Analysis

During trial, Alvarez, the informant, testified about a private conversation he had with Arciga about the shooting and the marijuana stolen from the victims. (3 RT 2706-16.) In relevant part, Alvarez testified that, during the conversation, Arciga admitted the marijuana

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was "hot" and needed to be sold (3 RT 2706), Arciga admitted that he had shot somebody during the drug transaction (3 RT 2707-08), and Arciga said Petitioner had been at the crime scene posing as one of the buyers (3 RT 2709).

On appeal, Petitioner argued that his confrontation rights under *Bruton* were violated by the admission of Arciga's hearsay statements placing Petitioner at the crime scene. (Lodg. No. A6 at 18-25.) The California Court of Appeal disagreed, reasoning that Arciga's statements were admissible under California law because they were against Arciga's penal interest and because they were sufficiently trustworthy. (Lodg. No. A1 at 11.) The California Court of Appeal did not specifically address whether Arciga's statements were testimonial within the meaning of the Confrontation Clause. (*Id*.)

Notwithstanding the California Court of Appeal's reasoning to reject this claim, the Court may resolve it solely on the threshold issue of whether Arciga's statements were testimonial. *See Lucero*, 902 F.3d at 986 and n.3, 988 (resolving a *Bruton* claim solely on the threshold issue of whether the challenged statements were testimonial, notwithstanding the state court's reasoning to reject the claim). Because Arciga's hearsay statements, as discussed below, were not testimonial, the California Court of Appeal's rejection of this claim would be correct under any standard of review and "therefore necessarily reasonable under the more deferential AEDPA standard of review." *See id*. at 986 (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010)).

Arciga's hearsay statements to the informant were not testimonial under any possible formulation for testimonial statements. The primary purpose of Arciga's statements could not be reasonably understood as creating an out-of-court substitute for trial testimony or establishing evidence for a subsequent prosecution. *See Clark*, 135 S. Ct. at 2180. No evidence suggested that Arciga had the primary purpose "to impact a trial or other criminal proceeding" through his statements to the informant. *See Lucero*, 902 F.3d at 990. Rather,

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the only evident purpose of Arciga's statements to the informant, whom Arciga spoke to as a friend and confidant, was to obtain help in disposing of the stolen marijuana or to brag about the murder. Statements made under such circumstances are not testimonial. *See, e.g., United States v. Lopez*, 649 F.3d 1222, 1238 (11th Cir. 2011) ("[B]ragging to a friend about the fruits of a robbery is not testimonial."); *United States v. Smalls*, 605 F.3d 765, 780 (10th Cir. 2010) (holding that a declarant's boasts about the details of a "cold-blooded murder" to an apparent friend were not testimonial); *United States v. Jordan*, 509 F.3d 191, 201 (4th Cir. 2007) ("To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates."); *United States v. Franklin*, 415 F.3d 537, 545 (6th Cir. 2005) (holding that a declarant's statements to "his friend and confidant" detailing a robbery he had committed were not testimonial); *United States v. Saget*, 377 F.3d 223, 229 (2d Cir. 2004) (holding that a declarant's statements about a gun-running scheme to an informant, whom the declarant believed was "a friend and potential co-conspirator," were nontestimonial); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004) (holding that a private conversation between private individuals about the victim's connection to one of his killers was nontestimonial). The Confrontation Clause has no application here.

Thus, the admission of Arciga's hearsay statements did not violate *Bruton*, and Petitioner's constitutional right to confront the witnesses against him was not violated. Under any standard of review, habeas relief under the Confrontation Clause is not warranted for this claim. *See Lucero*, 902 F.3d at 990.

Finally, although Petitioner's claim challenging the admission of Arciga's hearsay statements appears to be limited to an argument under the Confrontation Clause, Petitioner raised an additional argument on appeal that the admission of Arciga's statements was prejudicial error because the statements did not satisfy California's hearsay exception for statements against penal interest. (Lodg. No. A6 at 12-17.) It does not appear that Petitioner has renewed this claim of evidentiary error in the instant Petition, other than vaguely arguing

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that the trial court "prejudicially erred" in allowing the statements. (Petition Mem. at 29, 30.) Even if Petitioner had clearly articulated this argument, he would not be entitled to habeas relief.

Federal habeas relief is unavailable for alleged errors in the application of a state's rules of evidence, including hearsay rules. *See Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998); *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991); *see also Su Chia v. Cambra*, 360 F.3d 997, 1008 (9th Cir. 2004) (noting that a state court's erroneous application of the hearsay exception for statements against penal interest generally would not be cognizable on federal habeas review) (citing *Estelle*, 502 U.S. at 67). Moreover, because this argument would be subject to the AEDPA standard of review, it would fail for the lack of clearly established federal law precluding the admission of overtly prejudicial evidence. *See Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) (stating that a federal habeas court constrained by the AEDPA would have no power to grant habeas relief for a claim premised on the erroneous admission of evidence because the United States 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").

Accordingly, Petitioner's Confrontation Clause challenge to the admission of Arciga's hearsay statements fails because the statements were not testimonial. To the extent that Petitioner also is arguing prejudicial evidentiary error from the admission of the statements, the argument is non-cognizable and precluded by the absence of clearly established federal law. Hence, habeas relief for this claim is unwarranted.

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IV. Petitioner Is Not Entitled To Habeas Relief On His Instructional Error Claims In Grounds Four To Seven

In Grounds Four to Seven, Petitioner claims that the trial court violated his rights to due process and a fair trial by failing to instruct the jury in various additional respects. As stated above with respect to Petitioner's claims of instructional error in Grounds One and Two, Petitioner must allege and then show that, by omitting a jury instruction, the trial court committed an error that so infected the entire trial that the resulting conviction violated his federal constitutional right to due process. *See Henderson*, 431 U.S. at 154. Moreover, such claims may not be judged in artificial isolation, but must be considered in the context of the trial record and the instructions as a whole. *See Estelle*, 502 U.S. at 72 (1991).

A. Ground Four: Failure to instruct on accomplice corroboration

In Ground Four, Petitioner claims that the trial court deprived him of due process and a fair trial by failing to instruct the jury *sua sponte* that corroboration was required for the accomplice statements made by both Petitioner's co-defendants and the drug sellers. (Petition at 6; Petition Mem. at 36-46; Traverse at 22-29.)

1. State legal requirement for accomplice corroboration

The California Court of Appeal set out the following state legal standard for an instruction on corroboration of accomplice testimony:

> Under [Penal Code] section 1111, "[a] conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense

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> or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Thus, "[i]f sufficient evidence is presented at trial to justify the conclusion that a witness is an accomplice, the trial court must so instruct the jury, even in the absence of a request." (*People v. Brown* (2003) 31 Cal.4th 518, 555.)

(Lodg. No. A1 at 20.)

2. Analysis

The accomplice corroboration rule of § 1111 "is not required by the Constitution or federal law." *Laboa v. Calderon*, 224 F.3d 972, 979 (9th Cir. 2000); *see also Redding v. Minnesota*, 881 F.2d 575, 578 (8th Cir. 1989) ("However, this corroboration requirement is a matter of state law which does not implicate a constitutional right cognizable on habeas review."). Moreover, "the failure of a state court to give such an instruction does not rise to the level of a constitutional violation." *Kappos v. Hanks*, 54 F.3d 365, 367 (7th Cir. 1995). Thus, it appears that Petitioner has failed to allege a federal question by claiming that he was entitled under § 1111 to an instruction on accomplice corroboration. In any event, relief for this claim would be unwarranted for the additional reasons discussed below.

a. Out-of-court statements by co-defendants

Arciga and Zuniga, Petitioner's co-defendants, each made out-of-court statements to the informant, Alvarez, about the crimes. Arciga told the informant that Petitioner had been at the crime scene as one of the buyers. (3 RT 2709.) Zuniga told the informant that Zuniga was the person who had killed Carlos Zarate. (3 RT 2716-17.)

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The California Court of Appeal concluded that, although Arciga and Zuniga were accomplices, their statements did not require an accomplice corroboration instruction:

> In *People v. Brown*, the California Supreme Court held that no corroboration was necessary where the statements of an accomplice were admissible as declarations against interest. (*People v. Brown*, *supra*, 31 Cal.4th at p. 556 [where accomplice's statements were sufficiently trustworthy to permit their admission as declarations against interest, "no corroboration was necessary, and the court was not required to instruct the jury to view [the] statements with caution and to require corroboration"].) Here, Arciga's statements were admissible as declarations against penal interest (Evid. Code, § 1230). Thus, the trial court was not required to provide an accomplice corroboration instruction with respect to such statements.
>
> Similarly, Zuniga's statements to Alvarez also were admissible as declarations against penal interest. Zuniga stated that he, not Arciga, shot the drug dealer. He made the statement to an acquaintance in a noncoercive setting. Under [*People v. Greenberger*, 58 Cal. App. 4th 298 (1997)], Zuniga's statements were sufficiently trustworthy to be admissible despite the hearsay rule. Under *People v. Brown*, those same statements did not require corroboration.
>
> In addition, Zuniga's statements to Alvarez did not implicate [Petitioner] in any crime. Testimony is subject to the accomplice corroboration rule only when it is used as substantive evidence of guilt. (*People v. Williams* (1997) 16 Cal.4th 153, 245; *People v. Andrews* (1989) 49 Cal.3d 200, 214.) Thus, [Petitioner] cannot claim error with respect to the trial court's failure to provide an accomplice corroboration instruction regarding Zuniga's statements.

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(Lodg. No. A1 at 20-21.)

The California Court of Appeal's determination that an accomplice corroboration instruction for Arciga and Zuniga was not required under California's evidentiary rules, particularly because of the hearsay exception for declarations against penal interest, also fails to raise a federal question. The Court may not review alleged violations of state evidentiary rules in a federal habeas proceeding. *See Windham*, 163 F.3d at 1103; *Jammal*, 926 F.2d at 919; *see also Su Chia*, 360 F.3d at 1008. Even purely as a matter of state evidentiary law, Petitioner's claim here does not negate the soundness of the California Court of Appeal's reasoning that the instruction was not required either because the statements satisfied the hearsay exception for declarations against penal interest or because they did not implicate Petitioner in any crime. Thus, the absence of an accomplice corroboration instruction under these circumstances fails to state a federal question.

b. Testimony by drug sellers (victims)

The trial court considered but rejected the theory that any of the drug sellers (victims) were accomplices for any identical offense charged against Petitioner. (4 RT 3677-79.) Specifically, the trial court agreed with the prosecutor that the victims were not liable for prosecution for any of the charged crimes of murder, attempted murder, robbery, or burglary. (4 RT 3678.) Accordingly, the trial court declined to give the accomplice corroboration instruction for the victims' testimony. (4 RT 3679.)

The California Court of Appeal agreed that the instruction was not required for the victims' testimony:

> [W]ith respect to the victims, their testimony was not subject to the accomplice corroboration rule because they were not accomplices. As set forth in section

> 1111, an accomplice is a person "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Gutierrez, Rojas, and Vasquez were not liable for any crimes charged in the amended information. Thus, the trial court was not required to provide instructions on the accomplice corroboration rule with respect to their testimony.

(Lodg. No. A1 at 21-22.)

The California Court of Appeal's determination that the victims were not accomplices as a matter of California law is binding upon the Court. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (state court's interpretation of state law binds a federal court on habeas review); *see also Boyd v. Ward*, 179 F.3d 904, 922 (10th Cir. 1999) (state court's determination that a witness was not an accomplice as a matter of state law requires deference by a federal habeas court). Similarly, it is not the province of the Court to decide the question of whether any of the victims fell within California's definition of accomplices for purposes of the instruction. *See Johnson v. Turner*, 429 F.2d 1152, 1155 (10th Cir. 1970) (rejecting as non-cognizable petitioner's contention that a state witness was an accomplice as matter of state law); *see also Alcantara v. Rackley*, 554 F. App'x 674, 675 (9th Cir. 2014) (rejecting as non-cognizable petitioner's contention that the jury instructions failed to adequately convey that a prosecution witness was an accomplice whose testimony required corroboration). Petitioner's disagreement with the California Court of Appeal's determination—by arguing that the victims actually were accomplices because they could have been prosecuted for the identical offenses of burglary or murder—raises solely a dispute of state law whose resolution by the state court is entitled to deference. Thus, the absence of an accomplice corroboration instruction under these circumstances fails to state a federal question.

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c. Evidence of corroboration

Even if the trial court's failure to instruct the jury on accomplice corroboration did raise a federal question, relief would still be unwarranted because Petitioner has not shown that the error so infected the entire trial that the resulting conviction violated his federal constitutional right to due process. *See Henderson*, 431 U.S. at 154. The omission of the instruction could not have violated Petitioner's federal constitutional rights because the evidence in the trial record did include ample evidence of corroboration. *See Laboa*, 224 F.3d at 979 (rejecting due process claim that petitioner was convicted solely from uncorroborated accomplice testimony when such testimony was adequately corroborated by other evidence). California law requires "only slight corroboration, and the evidence need not corroborate the testimony in every particular." *See People v. Gurule*, 28 Cal. 4th 557, 628 (2002). Here, Petitioner's fingerprints and DNA evidence were found on paraphernalia discovered inside the apartment where the crimes occurred. (3 RT 2819, 2827, 2831, 2836.) And seven months after the crimes, Petitioner was arrested while driving a car containing a gun consistent with one of the weapons used in the shooting. (3 RT 2795-96; 4 RT 3306.) Because this evidence amply corroborated the challenged statements by the co-defendants and victims, habeas relief would not be warranted for this claim in any event.

B. Ground Five: Failure to instruct on lesser-included offenses

In Ground Five, Petitioner claims that the trial court prejudicially erred by failing to instruct the jury on the lesser-included offenses of second-degree malice murder and voluntary manslaughter based on unreasonable self-defense. (Petition at 6; Petition Mem. at 47-52; Traverse at 29-33.)

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1. *Teague* doctrine

Respondent contends that this claim is barred by *Teague v. Lane*, 489 U.S. 288 (1989). (Amended Answer at 35-38.) Where the state properly raises a *Teague* argument, the Court generally must address it before reaching the merits of a petitioner's claim. *See Horn v. Banks*, 536 U.S. 266, 267 (2002) (per curiam); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994); *Butler v. Curry*, 528 F.3d 624, 633 (9th Cir. 2008); *Fields v. Brown*, 503 F.3d 755, 770 (9th Cir. 2007). Here, Respondent contends that granting relief on Ground Five would require the announcement of a new rule of constitutional law that a non-capital defendant is entitled to an instruction on a lesser-included offense. (Amended Answer at 36-37.)

Under the *Teague* doctrine, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310. "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. Put another way, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *See id*. A new rule of constitutional law cannot be applied retroactively on federal collateral review to upset a state conviction or sentence unless the new rule forbids criminal punishment of primary, individual conduct or is a "watershed" rule of criminal procedure. *See Teague*, 489 U.S. at 311-13; *see also Caspari v. Bohlen*, 510 U.S. at 396. To determine whether a habeas petitioner is entitled to the application of a particular rule, the habeas court performs a three-step analysis: (1) the date on which the defendant's conviction became final is determined; (2) the habeas court considers whether the rule is new; and (3) if the rule is new, the court determines whether the rule nonetheless falls within one of the two narrow exceptions. *See O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997).

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At the time that Petitioner's conviction became final in August 2016, the United States Supreme Court had never held that a defendant has a constitutional right to a jury instruction on a lesser offense in a non-capital case. *Cf. Beck v. Alabama*, 447 U.S. 625 (1980) (holding in a capital case that the death sentence was not constitutionally imposed where the jury was not permitted to consider a lesser included non-capital offense when the evidence supported such a verdict). Moreover, the Ninth Circuit explicitly has held that "the failure of a state court to instruct on a lesser offense [in a non-capital case] fails to present a federal constitutional question and will not be considered in a federal habeas corpus proceeding." *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984); *see also Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000) (noting that the Ninth Circuit declined to extend *Beck* to non-capital cases); *Windham*, 163 F.3d at 1106 ("Under the law of this circuit, the failure of a state court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question."). The Ninth Circuit has also held that to extend habeas relief under *Beck* to non-capital cases would create a new rule in violation of *Teague*. *See Turner v. Marshall*, 63 F.3d 807, 819 (9th Cir. 1995), *overruled on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999). Thus, by the time that Petitioner's conviction became final, the trial court's failure to instruct the jury on lesser-included offenses implicated a new rule under the *Teague* doctrine.

Petitioner contends that *Teague* is inapplicable because he is claiming that the omitted instructions went directly to his ability to present a theory of defense. (Traverse at 30-31.) Petitioner is correct to the extent that federal courts have repeatedly rejected *Teague* arguments directed at habeas claims alleging entitlement to jury instructions that implicated a theory of defense. *See Bernal v. Biter*, 2015 WL 1383508, at *10-*12 (C.D. Cal. Mar. 24, 2015) (citing district court cases rejecting similar *Teague* arguments). Here, however, Petitioner's argument is unavailing because his claim of entitlement to instructions on lesser-included offenses did not implicate any theory of his defense. Petitioner's theory of defense was that he had been misidentified and was never at the apartment where the crimes

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occurred (4 RT 4280-88), not that the shooting was less serious than first-degree felony murder. Petitioner never suggested this latter theory during trial. Thus, the omitted instructions had nothing to do with Petitioner's theory of defense, and *Teague* remains applicable.

Finally, Petitioner has failed to show that either of *Teague*'s two exceptions applies here. The first exception—the decriminalization of primary, individual conduct—is inapplicable because the proposed new rule would not decriminalize any class of conduct. The second exception—for a "watershed" rule of criminal procedure—is inapplicable because the proposed rule does not implicate the fundamental fairness and accuracy of a criminal trial. *See Whorton*, 549 U.S. at 417.

For the foregoing reasons, Petitioner's claim of instructional error in Ground Five appears to be barred by the *Teague* doctrine.

2. Merits

Even apart from the *Teague* doctrine, habeas relief is unwarranted for this claim for several additional reasons. First, as noted, this claim is not cognizable on federal habeas review. See *Bashor*, 730 F.2d at 1240; *Windham*, 163 F.3d at 1106.

Second, this claim is not governed by clearly established federal law. In the absence of a Supreme Court holding that a defendant has a constitutional right to a *sua sponte* jury instruction on a lesser-included offense in a non-capital case, it cannot be said that the California Court of Appeal's rejection of this claim was contrary to or involved an unreasonable application of clearly established federal law. *See McMullan v. Booker*, 761 F.3d 662, 666 (6th Cir. 2014) ("This claim fails because McMullan cannot point to any 'clearly established [f]ederal law' requiring a trial court to instruct the jury on a lesser

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included offense in a non-capital case.") (alteration in original); *Vived v. Marshal*, 242 F. App'x 448, 449 (9th Cir. 2007) ("Because there is no 'clearly established' Supreme Court law that requires giving a lesser included offense instruction in a non-capital case, we cannot grant habeas relief.").

Third, the California Court of Appeal explained that the evidence did not warrant instructions on either second-degree malice murder or voluntary manslaughter based on unreasonable self-defense. As to second-degree malice murder, the crux of Petitioner's argument was that the evidence showed the murder was committed during the commission of a drug sale, rather than during the commission of an enumerated felony such as burglary or robbery. (Lodg. No. A6 at 48.)[2] The California Court of Appeal disagreed:

> [Appellants] contend[] there was substantial evidence from which a jury could conclude that appellants went to the Bellflower apartment to engage in a drug sale, not to commit a burglary or a robbery. [They] argue[] there was no burglary because Ayala gave Arciga permission to use the apartment, and there was no robbery by force or fear, but rather "a drug deal gone bad," as Rojas told Detective Blagg when he was interviewed at the hospital after the shooting. We disagree. Ayala expressly denied giving anyone permission to use the apartment to conduct drug sales or to rob drug dealers. At trial, Rojas testified that when Gutierrez was counting the money, he heard, "This is a stick up," before

[2] Because burglary and robbery are enumerated in Penal Code § 189, either offense was a predicate for first-degree felony murder, which was the prosecutor's sole theory at trial (5 RT 3959) and which relieved the prosecutor of proving malice aforethought. *See People v. Valdez*, 32 Cal. 4th 73, 116 n.19 (2004). But because the prosecutor initially charged Petitioner with murder with malice aforethought (3 CT 472), second-degree malice murder was a lesser-included offense. *See People v. Gonzalez*, 5 Cal. 5th 186, 198 and n.2 (2018). The defense's theory of second-degree malice murder was that the assailants did not intend to commit either enumerated felony, but instead found themselves in a "drug deal gone bad," resulting in Arciga shooting at Zarate "suddenly in a non-deliberate, rash impulse upon Gutierrez announcing there was a problem with the money." (Lodg. Nos. A7 at 20 and A8 at 31-32.)

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> appellants drew their guns. Thus, Rojas's trial testimony did not suggest that the shooting was the result of a drug deal gone bad.

(Lodg. No. A1 at 13-14.)

Even if this claim were cognizable and governed by clearly established federal law, it was not objectively unreasonable for the California Court of Appeal to determine that the evidence did not warrant an instruction on second-degree malice murder. *See Hopper v. Evans*, 456 U.S. 605, 611 (1982) (stating that, in a capital case, "due process requires a lesser included offense instruction be given *only* when the evidence warrants such an instruction") (emphasis in original). No substantial evidence supported an inference that the assailants went to the apartment with the intention to complete a drug deal, rather than to commit a burglary or robbery. The owner of the apartment, Ayala, denied giving the assailants permission to use the apartment to buy drugs (or to rob drug dealers). (2 RT 2218.) The surviving victim of the shooting, Rojas, testified that the assailants said "[t]his is a stick up" right before they began shooting at the drug sellers (3 RT 2412), consistent with the prosecutor's theory of felony murder based on a robbery or burglary. Although Rojas earlier had told the police that "it was a drug purchase that had gone bad" (4 RT 3664), this statement was not inconsistent with the prosecutor's theory that the victims, while initially believing they were going to complete a drug deal without incident, were ambushed by the assailants' commission of a robbery or burglary. Thus, an instruction on second-degree malice murder was unwarranted.

As to voluntary manslaughter based on unreasonable self-defense, the California Court of Appeal explained why the evidence did not warrant such an instruction:

> Appellants also contend there was substantial evidence to support voluntary manslaughter based on unreasonable self-defense. They argue Rojas

> told Detective Blagg that Zarate had pulled out a handgun at the same time appellants did. In addition, the forensic evidence suggests that Zarate fired a shot. Finally, Arciga's jury heard Arciga's interview, in which he told the officers that Zarate drew his gun before Zuniga drew his. However, at trial, Rojas testified consistently that Zarate was shot before he could draw his gun. Additionally, Vasquez testified that Zuniga started shooting without any provocation; Vasquez was walking toward Gutierrez to assist her in counting the money when Zuniga started shooting. As to Arciga's self-serving statement that Zarate drew a gun first, no other evidence supports this factual scenario. Moreover, in the same interview, Arciga stated he was unarmed and acting only as a lookout, evidence contradicted by extensive trial testimony. Specifically, Vasquez testified that Arciga shot Zarate multiple times and continued shooting after Zarate had fallen to the ground. On this record, we conclude Arciga's statement did not constitute substantial evidence to support an instruction on voluntary manslaughter.

(Lodg. No. A1 at 14.)

Even if this claim were cognizable and governed by clearly established federal law, it was not objectively unreasonable for the California Court of Appeal to conclude that the evidence did not warrant an instruction on voluntary manslaughter based on unreasonable self-defense. No substantial evidence supported an inference that the assailants started shooting because of an actual but unreasonable belief in the necessity to defend against an imminent peril of death or great bodily injury. *See In re Christian S.*, 7 Cal. 4th 768, 771 (1994) (discussing imperfect self-defense). An inference of unreasonable self-defense is unwarranted when the assailants, through their own wrongful conduct, created the circumstances that legally justified the victim's use of force. *See id*. at 773 n.1. Here, the evidence demonstrated that the only victim who had a weapon, Zarate, was ambushed and

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shot before he had any chance to reach for his gun and return fire. Vasquez testified that Zuniga suddenly pulled out his gun and started shooting (2 RT 2140, 2142), while Rojas testified that the assailants pulled out their guns first and that Zarate was shot before he could reach for his gun (3 RT 2413-15, 2441-44). The strongest evidence that Zarate drew his gun first was Arciga's self-serving statement to the police, but that evidence could not help Petitioner because it was presented only to Arciga's jury. (4 CT 746.) Thus, the trial court lacked a sufficient evidentiary basis to give this instruction to Petitioner's jury.

In sum, federal habeas relief is precluded for Petitioner's claim that he was entitled to instructions on lesser-included offenses, and the record did not support the instructions in any event. Thus, habeas relief is unwarranted on this claim.

C. Ground Six: Failure to instruct on self-defense

In Ground Six, Petitioner claims that the trial court deprived him of due process and a fair trial by failing to instruct the jury on the affirmative defense of perfect self-defense. (Petition at 6.1; Petitioner Mem. at 53-57; Traverse at 34-36.)

During trial, Petitioner joined in his co-defendants' request for a self-defense instruction, but the trial court denied their request. (4 RT 3679.) Although a self-defense theory was inconsistent with Petitioner's defense theory that he had been misidentified as one of the assailants, the trial court was required by California law to grant Petitioner's request if substantial evidence supported an instruction on an "alternate defense" of self-defense. *See People v. Elize*, 71 Cal. App. 4th 605, 615 (1999). The California Court of Appeal concluded that the trial court was not required to give a self-defense instruction because substantial evidence did not support it:

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> In a related contention, [appellants] argue the trial court erred in not instructing the jury on self-defense, based on evidence suggesting that Zarate drew his gun first or at the same time as appellants. For the same reasons discussed above, there was no substantial evidence to support the giving of this instruction. At trial, Rojas testified consistently that Zarate was shot before he could pull out his handgun. Vasquez testified that Zuniga fired his gun without provocation. Only Arciga's jury heard his statement to the police that Zarate drew his gun first, but the statement was unsupported by any other evidence. On this record, no substantial evidence supported an instruction on self-defense.

(Lodg. No. A1 at 16-17.)

As an initial matter, habeas relief for this claim is precluded because of the absence of clearly established federal law. Although a habeas petitioner has a right under clearly established federal law to present a complete defense, it is not clearly established by Supreme Court precedent that this right encompasses an entitlement to jury instructions on affirmative defenses. *See Marquez v. Gentry*, 708 F. App'x 924, 925 and n.2 (9th Cir. 2018) (denying habeas relief premised on a state trial court's refusal to instruct the jury on the affirmative defense of insanity because "the extent of the right to present a 'complete defense' under federal law does not extend to 'restrictions imposed on a defendant's ability to present an affirmative defense,' but only the 'exclusion of evidence' and the 'testimony of defense witnesses.'") (quoting *Gilmore v. Taylor*, 508 U.S. 333, 343-44 (1993)). Accordingly, it cannot be said that the California Court of Appeal's rejection of this claim was contrary to or involved an unreasonable application of clearly established federal law. *See Brewer*, 378 F.3d at 955.

Even if this claim were governed by clearly established federal law, habeas relief would nonetheless be unwarranted because an instruction on reasonable self-defense lacked

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an adequate foundation in the evidence. Like unreasonable self-defense, perfect self-defense, based on an actual and reasonable belief in the need to defend against death or great bodily injury, may not be invoked by a defendant who, through his own wrongful conduct, created the circumstances that legally justified the victim's use of force. *See In re Christian S.*, 7 Cal. 4th at 773 n.1. Thus, for the same reasons that the record did not contain substantial evidence for an instruction premised on unreasonable self-defense, it did not contain substantial evidence for an instruction on the affirmative defense of perfect self-defense. The trial record did not contain substantial evidence that Petitioner actually and reasonably believed in the need to defend himself, but rather demonstrated that he and his co-defendants were the initial aggressors who created the circumstances justifying Zarate's response: according to the eyewitnesses, the assailants drew their guns first and shot Zarate before Zarate could reach for his gun. (2 RT 2140, 2142; 3 RT 2413-15, 2441-44.) And Arciga's self-serving statement to the police that Zarate drew a gun first (4 CT 746) could not have been the basis for the instruction because the statement was never presented to Petitioner's jury.

In sum, Petitioner's claim of entitlement to a jury instruction on the affirmative defense of perfect self-defense is precluded by the absence of clearly established federal law, but the evidence in the record did not support such an instruction in any event. Thus, habeas relief is not warranted for this claim.

D. Ground Seven: Failure to give complete instructions on the special circumstance allegations

In Ground Seven, Petitioner claims that the trial court deprived him of due process and a fair trial by failing to provide proper and complete jury instructions on the special circumstance allegations. (Petition at 6.1; Petition Mem. at 58-61; Traverse at 37-41.)

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1. Background

The special circumstance allegations against Petitioner were that the murder of Carlos Zarate was committed during the commission of a robbery and during the commission of a burglary. (3 CT 472.) The California Court of Appeal set out the following factual background:

> The jury for [Petitioner] and Zuniga was instructed with CALJIC No. 8.80.1 as follows:
>
> "If you find a defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following special circumstances are true or not true.
>
> "The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> "[¶] . . . [¶]
>
> "If you find that a defendant was not the actual killer of the human being or if you are unable to decide whether the defendant was the actual killer or an aider and abettor or a co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill, aided, abetted, counseled, commanded, induced, requested or assisted any actor in the commission of the murder in the first degree or with reckless indifference to human life and as a major participant aided, abetted, counseled, commanded, induced, solicited,

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> requested or assisted in the commission of the crime of *robbery or burglary* which resulted in the death of a human being, namely, Carlos Zarate." (Italics added.)
>
> The jury also was instructed on robbery with CALJIC Nos. 9.40, 9.42, and 9.42.1; on burglary with CALJIC Nos. 14.50, 14.51, and 14.52; and on circumstantial evidence with CALJIC Nos. 2.00 and 2.01.
>
> The jury verdict forms had separate entries for each special circumstance allegation. As to each appellant, the jury found that the murder of Zarate was committed during the commission of a robbery and during the commission of a burglary.

(Lodg. No. A1 at 17-18.)

2. Analysis

On appeal, Petitioner joined in the argument of his co-defendant, Zuniga, that the foregoing instructions were inadequate in three particular respects: the instructions (1) did not specify what special circumstances the jury was to consider; (2) did not set forth the elements of the robbery and burglary special circumstances; and (3) did not instruct the jury on how to evaluate circumstantial evidence in determining the special circumstances allegations. (Lodg. Nos. A1 at 18; A8 at 20-25; and B1 at 27-28.)

a. What special circumstances the jury was to consider

First, the California Court of Appeal disagreed that the instructions did not specify what special circumstances the jury was to consider:

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> [A]s given here, CALJIC No. 8.80.1 informed the jury that the special circumstances were robbery and burglary. Moreover, the jury verdict forms set forth that the special circumstances were robbery and [burglary], and the jury marked "TRUE" next to each special circumstance allegation on the verdict form. On this record, no reasonable jury would have been confused about what special circumstances should be considered.

(Lodg. No. A1 at 18.)

The California Court of Appeal's conclusion was not objectively unreasonable. The special circumstance instruction itself (CALCRIM No. 8.80.1) clearly informed the jury that the allegations were that the murder was committed "in the commission of the crime of Robbery or Burglary." (5 CT 947; 5 RT 4230.) The jury's verdict form also clearly stated that the special circumstances were robbery and burglary, and the form also cited Penal Code § 190.2(a)(17), the special circumstances statute applicable to first-degree murder. (5 CT 971.) Thus, the instructions on the whole were adequate to apprise the jury of what the special circumstance allegations were.

b. Elements of the robbery and burglary special circumstances

Second, the California Court of Appeal disagreed that the instructions did not set forth the elements of the robbery and burglary special circumstances:

> [A]lthough CALJIC No. 8.80.1 did not set forth the elements of robbery and burglary, the jury was instructed about the elements of robbery and burglary in other jury instructions. Thus, when the instructions are considered as a whole, no reasonable jury would have been confused about what elements constitute the offense of robbery or burglary. (See *People v. Rhodes* (1971) 21 Cal.App.3d 10,

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> 20 ["fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial"].)

(Lodg. No. A1 at 18-19.)

The California Court of Appeal's conclusion was not objectively unreasonable. Immediately before giving the special circumstances instruction, the trial court fully instructed the jury on the elements of both robbery and burglary. (5 CT 939, 944; 5 RT 4224-26, 4228-29.) This was sufficient to apprise the jury of what was required to prove those offenses for purposes of the special circumstances allegations. It was unnecessary for the trial court to restate the elements of robbery and burglary, after having just stated them, when it instructed the jury on the special circumstances allegations. *See United States v. Burnette*, 698 F.2d 1038, 1052 (9th Cir. 1983) (rejecting argument that a trial court was required to restate the elements of armed bank robbery for purposes of an instruction about being an accessory after the fact when the trial court had previously given a full instruction on the elements of armed bank robbery).

c. How to evaluate circumstantial evidence

Third, the California Court of Appeal disagreed that the instructions did not instruct the jury on how to evaluate circumstantial evidence in determining the special circumstances allegations:

> [A]lthough the jury was not instructed with CALJIC Nos. 8.83 and 8.83.1 on considering circumstantial evidence to determine the special circumstance allegations, the jury was instructed with CALJIC Nos. 2.00 and 2.01, the general instructions on evaluating circumstantial evidence. The California Supreme

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> Court has held that CALJIC Nos. 8.83 and 8.83.1 are duplicative of CALJIC No. 2.01. (See *People v. Hines* (1997) 15 Cal.4th 997, 1051 [trial court need not instruct on CALJIC Nos. 8.83 and 8.83.1 where the jury was instructed with CALJIC No. 2.01].)

(Lodg. No. A1 at 19.)

The conclusion of the California Court of Appeal was not objectively unreasonable. The jury was given two general instructions on how to consider circumstantial evidence. (5 CT 907-08; 5 RT 4206-08.) Thus, the instructions on the whole were adequate to guide the jury's deliberations in the use of circumstantial evidence. It was unnecessary for the trial court to restate this standard when it instructed the jury on the special circumstances allegations. *See United States v. Orozco-Acosta*, 607 F.3d 1156, 1165-66 (9th Cir. 2010) (rejecting argument that a trial court erred by failing to give a particular instruction on circumstantial evidence where the instructions on the whole showed that the trial court instructed the jury on the meaning and significance of direct and circumstantial evidence) (citing *United States v. James*, 576 F.2d 223, 227 and n.2 (9th Cir. 1978) (same where the instructions on the whole reflected that the substance of the defendant's desired instruction on circumstantial evidence "was more than adequately given")).

3. Conclusion

For the reasons discussed above, the California Court of Appeal's rejection of each of Petitioner's three arguments as to the special circumstances instruction was not objectively unreasonable because, when considered in the context of the trial record and the instructions on the whole, the jury was adequately instructed on how to consider the allegations. Thus, habeas relief for this claim is unwarranted.

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V. Petitioner Is Not Entitled To Habeas Relief On His Cumulative Error Claim In Ground Eight

In Ground Eight, Petitioner claims that the combined effect of the errors from Grounds One to Seven deprived him of the right to a fair trial. (Petition at 6.1; Petition Mem. at 61; Traverse at 42.)

"The cumulative error doctrine in habeas recognizes that, even if no single error were prejudicial, where there are several substantial errors, their cumulative effect may nevertheless be so prejudicial as to require reversal." *Parle v. Runnels*, 387 F.3d 1030, 1045 (9th Cir. 2004). Habeas relief for cumulative error is therefore appropriate "when there is a 'unique symmetry' of otherwise harmless errors, such that they amplify each other in relation to a key contested issue in the case." *Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011) (quoting *Parle v. Runnels*, 505 F.3d 922, 933 (9th Cir. 2007)). Here, however, Petitioner has failed to establish that there are multiple errors to cumulate. *See also Hayes v. Ayers*, 632 F.3d 500, 525 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible."); *Mancuso v. Olivarez,* 292 F.3d 939, 957 (9th Cir. 2002) ("Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation."). Consequently, it is clear that Petitioner has not raised a colorable federal claim on this basis, and habeas relief is unwarranted.

VI. An Evidentiary Hearing Is Unwarranted

Finally, Petitioner requests an evidentiary hearing. (Petition Mem. at 62.)

For the claims subject to the AEDPA standard of review in Grounds One to Seven, the Supreme Court held in *Pinholster*, 563 U.S. at 180, that the review of state court decisions

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under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." And by its express terms, § 2254(d)(2) restricts federal habeas review to the record that was before the state court. *See Pinholster*, 563 U.S. at 185 n.7 (noting that an unreasonable determination of fact under § 2254(d)(2) must be unreasonable "in light of the evidence presented in the State court proceeding," and stating that "[t]he additional clarity of § 2254(d)(2) on this point . . . does not detract from our view that § 2254(d)(1) also is plainly limited to the state-court record."). Thus, federal habeas courts may not consider new evidence on claims adjudicated on the merits in state court unless the petitioner first satisfies his burden under § 2254(d) and then satisfies his burden under § 2254(e)(2). *See Pinholster*, 563 U.S. at 181-85; *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004). Accordingly, the Court's findings above that Petitioner is not entitled to habeas relief under the AEDPA standard of review for Grounds One to Seven are dispositive of Petitioner's request for an evidentiary hearing on those claims. Moreover, for the claim in Ground Eight that is not subject to the AEDPA standard of review, it can be resolved solely by reference to the state court record, thus rendering an evidentiary hearing "nothing more than a futile exercise." *See Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998). Accordingly, an evidentiary hearing should be denied.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the District Judge issue an Order: (1) accepting the Report and Recommendation; (2) denying the Petition; (3) denying Petitioner's request for an evidentiary hearing; and (4) directing that Judgment be entered dismissing this action with prejudice.

DATED: November 9, 2018

Karen L. Stevenson

KAREN L. STEVENSON
UNITED STATES MAGISTRATE JUDGE

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NOTICE

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

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Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 08/10/2017 10:09 AM

Docket (Register of Actions)

PEOPLE v. ARCIGA
Case Number S233367

Date	Description	Notes
03/28/2016	Received premature petition for review	Defendant and Appellant: Francisco Parra Attorney: Waldemar D. Halka
03/28/2016	Note:	Court of Appeal record has been imported and is available in electronic format.
03/29/2016	Case start: Petition for review filed	Defendant and Appellant: Francisco Parra Attorney: Waldemar D. Halka
03/29/2016	Record requested	Appellate record imported and available in electronic format.
04/01/2016	Received Court of Appeal record	two doghouses (volumes 1 and 2)
04/01/2016	2nd petition for review filed	Defendant and Appellant: Pedro Zuniga Attorney: Jennifer L. Peabody
04/04/2016	3rd petition for review filed	Defendant and Appellant: Hector Aguilar Arciga Attorney: Brett Harding Duxbury
04/11/2016	Received:	Amended Proof of Service. Hector Aguilar Arciga, Defendant and Appellant Brett Harding Duxbury, CA appointed
05/25/2016	Petitions for review denied	
06/01/2016	Returned record	3 petitions, 2 doghouses

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Filed 2/25/16 P. v. Arciga CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. HECTOR AGUILAR ARCIGA et al., Defendants and Appellants.	B258201 (Los Angeles County Super. Ct. No. VA114995)

APPEAL from judgments of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant Hector Aguilar Arciga.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Pedro Huerta Zuniga.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant Francisco Argenis Parra.

Kamala D. Harris, Attorney General, Gerard A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellants Hector Aguilar Arciga, Pedro Huerta Zuniga and Francisco Argenis Parra appeal from judgments and sentences following their convictions for the murder of Carlos Zarate, the attempted murder of Manuel Rojas, and the robbery and burglary of Zarate, Rojas, Jesus Vasquez, and Martha Gutierrez. They contend the trial court erred in not excluding certain out-of-court statements, giving incomplete and/or erroneous jury instructions, and imposing unauthorized sentences. Finding no reversible error, we affirm.

PROCEDURAL HISTORY

Appellants were charged in an amended information with the murder of Zarate (Pen. Code, §187, subd. (a); count 1),[1] the attempted murder of Rojas (§§ 664/187, subd. (a); count 2), assault with a deadly weapon of Rojas (§ 245, subd. (b); count 3), home invasion robbery of Zarate, Rojas, Gutierrez, and Vasquez (§ 211; counts 6-9), and first degree burglary (§ 459; count 10). Arciga and Zuniga were also charged with possession of a firearm by a felon (§ 12021, subd. (a)(1); counts 4 and 5). As to count 1 (murder of Zarate), it was alleged that the murder was committed in the commission of a robbery and a burglary (§ 190.2, subd. (a)(17)).

With respect to Parra, it was alleged that: as to counts 1, 3, and 10, he personally used a firearm in the commission of a felony (§ 12022.53, subds. (a) & (b)); and as to counts 2, 6, 7, 8, and 9, he personally and intentionally discharged a firearm which caused great bodily injury and death to Zarate (§ 12022.53, subds. (b), (c), & (d)).

With respect to Zuniga, it was alleged that: as to counts 2, 3, and 5 to 10, he personally used a firearm in the commission of a felony (§ 12022.53, subds. (a) &

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

(b)); and as to counts 1, 6, 7, 8, and 9, he personally and intentionally discharged a firearm which caused great bodily injury and death to Zarate (§ 12022.53, subds. (b), (c), & (d)). It was further alleged that Zuniga had suffered three prior prison terms.

With respect to Arciga, it was alleged that: as to counts 2 to 10, he personally used a firearm in the commission of a felony (§ 12022.53, subds. (a) & (b)); and as to counts 1, 6, 7, 8, and 9, he personally and intentionally discharged a firearm which caused great bodily injury and death to Zarate (§ 12022.53, subds. (b), (c), & (d)). It was further alleged that Arciga had suffered a prior prison term (§ 667.5, subd. (b)).

A jury was empanelled for Parra and Zuniga, and a separate jury empanelled for Arciga. Parra was found guilty as charged on all counts. The jury found the murder (count 1) to be in the first degree, and found true both special circumstances allegations, viz., that the murder was committed in the commission of a burglary and a robbery. It also found true the personal firearm use allegations.

Similarly, Zuniga was found guilty as charged on all counts. The jury also found the murder to be in the first degree, and found true both special circumstances allegations and all personal firearm use allegations. In a bifurcated proceeding, the trial court found true the three prior prison term allegations.

Arciga was found guilty as charged on counts 1, 4, 6, 7, 8, 9, and 10. He was acquitted of the charges in count 2 (attempted murder of Rojas) and count 3 (assault on Rojas). The jury found the murder to be in the first degree and both special circumstances to be true. It found true the allegations of personal and intentional discharge of a firearm as to counts 1, 6, 7, 8, and 9, and the personal firearm use allegation as to count 10. In a bifurcated proceeding, the trial court found true the prior prison term allegation.

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As reflected in the abstracts of judgment, the trial court sentenced Parra to life imprisonment without the possibility of parole, plus 40 years; Zuniga to life imprisonment without the possibility of parole, plus 40 years, 8 months; and Arciga to life imprisonment without the possibility of parole, plus 40 years, four months.

Appellants filed timely notices of appeal.

FACTUAL BACKGROUND

A. *The Prosecution Case.*

According to the prosecution, appellants had a scheme to rob drug dealers. After gaining a drug dealer's trust by making an initial small purchase, they would set up a larger drug purchase. During this second encounter, they would rob the drug dealer of money and drugs. In the instant case, appellants killed Carlos Zarate and injured Manuel Rojas during the second drug purchase.

1. *The Victims' Testimony.*

Vasquez testified he was a close friend of Zarate's. About a week and a half before Zarate's murder, Vasquez was present when Zarate sold 20 pounds of marijuana to Parra and Zuniga. On April 22, 2009, Vasquez, Gutierrez (his mother-in-law), Zarate, and Rojas went to an apartment in Bellflower to sell 140 pounds of marijuana to Parra and Zuniga. They brought 60 pounds of the drug with them, and planned to deliver the remainder after receiving the money. Parra was waiting outside the apartment; Zuniga and Arciga were waiting inside. The parties exchanged drugs and money. Arciga checked the product, while Gutierrez started counting the money. She asked Vasquez to assist her. As Vasquez was walking toward Gutierrez, he glimpsed Zuniga pulling a handgun from his waist. He heard several gunshots and saw Zarate staggering. Vasquez also saw Arciga shooting at Zarate while walking toward him. After Zarate had fallen to the

ground, Arciga fired five more shots at him. Zuniga then snatched the money from Gutierrez. At around the same time, Vasquez heard Rojas screaming. After another gunshot, Vasquez observed Rojas on the floor. Parra took the bag containing the marijuana and handed it to Zuniga. Zuniga then dragged the bag to the exit. Vasquez did not see Arciga, but presumed that he had already left the apartment. Parra, who was armed with a semi-automatic, pointed the gun at Vasquez, and asked Vasquez if he had a gun. Vasquez told him, "No," and lifted his shirt to show he was not armed. Gutierrez also interposed herself between Parra and Vasquez. As Parra turned to leave, he struck Rojas, who was still on the ground, on the top of the head with his gun. After Parra left, Vasquez ran toward Zarate's body and started screaming to wake him up. He noticed a .45-caliber handgun on top of the body. Vasquez recognized that the gun belonged to him, and took it. He subsequently disposed of the gun. Vasquez, Gutierrez, and Rojas then left the apartment. Vasquez did not call 911 after the shooting or contact the police. Rather, the police contacted him later.

Rojas's and Gutierrez's trial testimony was substantially similar to Vasquez's testimony. Rojas testified that he realized it was a setup when Gutierrez was counting the stacks of money, and there were large bills on top of the stacks and $1 bills underneath. At almost the same instant, Rojas heard someone say, "This is a stick up." He saw Zarate reach for his gun, but Zarate did not have enough time to pull it out before he was shot. After Zarate fell to the ground, Gutierrez yelled out, "Oh, my God. Run. Run." Rojas panicked and ran toward the front door. Arciga then shot him in the left buttocks area, and Rojas fell to the ground. He closed his eyes and pretended to be dead. He heard people walking out and dragging the bag of drugs with them. As the last person left, he pistol-

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whipped Rojas. From their positions in the apartment, Rojas deduced that it was Parra who had pistol-whipped him.

After the men left, Gutierrez had someone drive Rojas to a nearby hospital, where he had surgery to repair a shattered left femur bone. Police officers interviewed Rojas at the hospital; he told them he had been shot in a driveby shooting by unknown assailants. However, Rojas, who was working as an informant for the Drug Enforcement Administration (DEA), called his handler that day and informed the DEA agent about what had happened. A few days later, Los Angeles Sheriff's Department deputy sheriff and homicide detective Steven Blagg, after being informed that Rojas had pertinent information about the shooting, met with Rojas. Rojas described the actual events to the detective.

Gutierrez testified that when the shooting started, she covered her face. Later, she saw Zuniga pointing a gun at Vasquez. She went over and pushed the gun away from Vasquez's face. Gutierrez did not know that Zarate had died until she was informed a few days later. She did not go to the police. Instead, the police contacted her.

2. *Statements Made to Eusebio Alvarez.*

Over appellants' objections under *Aranda-Bruton*,[2] Eusebio Alvarez, a friend of Arciga's, testified about certain statements Arciga and Zuniga had made to him after the shooting. Previously, Arciga had told Alvarez that Arciga and Parra's father were involved in "dope rips" -- robbing drug dealers. On April 22, 2009, Arciga called Alvarez, saying, "I got some weed right now, but you got to let me know if you want it because something went wrong right now. It's hot. I just shot somebody." Later that day, Arciga came to Alvarez's house with some marijuana.

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[2] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

Arciga asked Alvarez if Alvarez could "get rid of [the drugs] quick or something because it was real hot." Arciga said he had been involved in a shoot-out: he had shot a man and after the man fell down, he had walked up and shot him several times. Arciga said Zuniga and Parra were present.

Alvarez testified he did not sell any of the marijuana for Arciga. However, for $100, he helped Arciga dispose of a nine-millimeter handgun Arciga said he had used to kill the man.

A few days later, Zuniga contacted Alvarez, saying he had some crystal methamphetamine he wanted Alvarez to sell. Zuniga admitted there had been a shoot-out, but said Arciga had lied about shooting the victim. He bragged, "[Arciga] is talking all this bullshit. I was the one that did it. I'm the one that shot the guy."

3. *Other Trial Testimony.*

Maria Eduvina Arteaga de Ayala testified that she lived at the apartment where the shooting occurred. About a week before the shooting, Arciga and "Miguel" asked about using her apartment to host two people visiting from Mexico. Arciga also asked her if she wanted to work with them as a driver. He showed her a box of cash and a handgun. On April 22, 2009, Miguel called her and stated they wanted her apartment "empty." Ayala left the apartment, leaving the door unlocked. As she was driving away from her apartment that morning, she observed Arciga driving in the opposite direction. Later that day, the manager of the apartment complex called Ayala, and told her there was a dead man in her apartment. When Ayala was later interviewed by Detective Blagg, she initially lied before telling him the truth. Ayala testified she did not want to work with Arciga, and she never gave anyone permission to use her apartment to engage in drug deals or to rob drug dealers.

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On November 10, 2009, Parra was stopped for speeding. He was arrested for driving without a license and the vehicle was impounded. During the inventory search of the vehicle, two handguns were recovered from the trunk, including a nine-millimeter Sig Sauer. After waiving his *Miranda* rights,[3] Parra told Los Angeles Police Officer Arturo Koenig that he was going to meet and rob a drug dealer of 200 pounds of marijuana. He admitted being involved in a prior robbery of a drug dealer, at "32nd and Central" in Los Angeles.

4. *Forensic Evidence.*

Steven Scholtz, a coroner, testified that he performed an autopsy on Zarate's body. Zarate had suffered nine gunshot wounds, including three that Scholtz opined were fatal.

Phil Teramoto, a criminalist, testified about firearm-related evidence recovered at the crime scene. From various tests, Teramoto concluded that three firearms were used during the shoot-out: (1) a .45-caliber handgun that fired a single shot, (2) a nine-millimeter handgun that fired eight shots, and (3) a nine-millimeter Sig Sauer -- the handgun recovered from Parra's vehicle -- that fired one shot. A bullet recovered from Rojas's body was matched to bullets fired from the Sig Sauer handgun, and two bullets recovered from Zarate's body were matched with the bullets fired from the other nine-millimeter handgun. Teramoto also testified that the shot fired from the .45-caliber handgun had a northern trajectory and hit an exercise machine at 16.5 inches above the ground.

Los Angeles County Sheriff Deputy Mario Cortez, a latent print examiner, testified that he matched latent prints developed from evidence found at the crime scene with fingerprint exemplars from Parra and Zuniga. Luis Olmos, a criminalist, testified that analysis of DNA found on certain items at the crime scene

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

indicated that multiple persons handled the items. Based on their respective DNA profiles, Arciga and Zuniga were possible contributors to the DNA mixture found on some of the items.

5. *Evidence Presented Only to Arciga's Jury.*

On March 31, 2010, Detective Blagg and two fellow officers interviewed Arciga following his arrest on an unrelated crime. A recording of the interview was played for the jury. After waiving his *Miranda* rights, Arciga told the officers he had been acquainted with Parra and his father for about two years. According to Arciga, Parra's father was involved in robbing drug dealers. Arciga acted as a lookout during two of these robberies. On one of those occasions, Zuniga was present. Arciga said that by April 2009 he was no longer working with Parra's father or Zuniga. He also denied knowing Zarate, and initially denied ever being in Bellflower. After being informed that he had been identified by several witnesses as a shooter during Zarate's murder and that his cellphone had been used in Bellflower on April 22, 2009, Arciga conceded that he had gone with Parra's father on a drug deal and that they may have gone to Bellflower.

After further questioning, Arciga admitted going to an apartment in Bellflower with Parra's father, Parra, and Zuniga to rob drug dealers. Arciga was not armed, but Parra's father and Zuniga were armed with pistols. At the apartment, they met four drug dealers -- a woman and three men -- who brought 60 pounds of marijuana. Arciga checked the product while the woman counted the money. He heard some commotion and looked up. He saw one of the male drug dealers pull out a pistol, and almost simultaneously Zuniga pulled out his gun. Arciga did not see Zuniga shooting; he just heard shots. Arciga ran out of the apartment with the bag of drugs. As he did so, he saw the drug dealer with the pistol fall to the ground.

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B. *The Defense Case.*

Arciga and Zuniga did not testify.

Parra testified he had never been to the crime scene. He stated that his father, Armando Parra, was a drug dealer, and that he had helped his father sell drugs. Parra also testified that his father robbed drug dealers, but claimed he never participated because his father "didn't want to risk me." After Parra's father was arrested in May 2009, Parra assisted "Martinez" in a robbery at 32nd and Central. When Parra was arrested in November 2009, Martinez was one of the passengers in the vehicle.

Detective Blagg testified that he interviewed Ayala -- the woman who lived in the apartment where the shooting occurred. During her interview, she told Detective Blagg that she had previously seen Arciga with Parra's father. Ayala also told the detective that "Miguel" had paid her money for the use of her apartment.

DISCUSSION

Appellants contend the trial court should have excluded Arciga's out-of-court statements to Alvarez; that it gave erroneous jury instructions; and that it imposed an erroneous sentence on count 1. We address each contention in turn.

A. *The Trial Court did not Err in Admitting Arciga's Out-of-Court Statements to Alvarez.*

The trial court overruled defense objections to the testimony of Alvarez and admitted the testimony under Evidence Code section 1230, as a statement against penal interest. Alvarez subsequently testified that Arciga told him that he (Arciga), Parra's father, and Zuniga were involved in robbing drug dealers (dope rips); that during one such robbery, he had shot a man; and that Parra and Zuniga had been present. Parra and Zuniga contend the admission of Arciga's statements

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implicating them in the murder of Zarate was error under *Bruton* and violated their Sixth Amendment confrontation rights. For the reasons set forth below, we reject that argument.

In *People v. Greenberger* (1997) 58 Cal.App.4th 298 (*Greenberger*), this court held that "*Bruton* does not stand for the proposition that all statements of one defendant that implicate another may not be introduced against all defendants in a joint trial." (*Id*. at p. 332.) We concluded that out-of-court statements implicating a codefendant may be admitted at a joint trial without denying the codefendant's right to confrontation, if the statements "satisfy the statutory definition of a declaration against interest and likewise satisfy the constitutional requirement of trustworthiness." (*Ibid*.) Arciga's statement to Alvarez satisfied each of these requirements and thus was admissible.

Under California law, a statement is a declaration against interest if "the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.) Here, Arciga was unavailable as a witness because he exercised his right not to testify at trial. His admission that he shot a drug dealer was a declaration against penal interest because it subjected him to criminal liability for Zarate's death. In addition, Arciga's statement met the trustworthiness requirement because it was made immediately after the murder in the context of a conversation between two acquaintances. As we observed in *Greenberger*, "the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (*Greenberger*, *supra*, 58 Cal.App.4th at p. 335.) Arciga's statements to Alvarez met that criterion. Thus, the trial court did not err in admitting the statements.

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Parra and Zuniga contend that Arciga's statements should have been sanitized to omit references to them. We disagree. In *People v. Samuels* (2005) 36 Cal.4th 96, the California Supreme Court held that the trial court did not err in admitting an unavailable declarant's remark that "'He had done it [killed the victim] and Mike [Silva] had helped him. And that [the defendant] had paid him.'" (*Id*. at p. 120.) The court rejected the defendant's argument that the declarant's assertion that "'[defendant] had paid him'" for the killing was either collateral to the declarant's statement against penal interest or an attempt to shift blame: "This admission, volunteered to an acquaintance, was specifically disserving to [declarant's] interests in that it intimated he had participated in a contract killing -- a particularly heinous type of murder -- and in a conspiracy to commit murder. Under the totality of the circumstances presented here, we do not regard the reference to defendant incorporated within this admission as itself constituting a collateral assertion that should have been purged from [the witness's] recollection of [declarant's] precise comments to him. Instead, the reference was inextricably tied to and part of a specific statement against penal interest." (*Id*. at p. 121.) Here, Arciga's references to Parra and Zuniga were in the context of a scheme in which all three men set out to rob drug dealers. During one such robbery, a shoot-out occurred. Thus, the references to Parra and Zuniga were inextricably tied to and part of Arciga's statement against penal interest. In any event, any error was harmless. Zuniga himself later admitted to Alvarez that he was present. The victims testified that all three men were present during the incident, and forensic evidence placed them at the crime scene. In short, there was no reasonable probability of a more favorable outcome had Alvarez's testimony been sanitized.

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B. *The Trial Court Properly Instructed the Jury.*

1. *The Trial Court did not Err by not Instructing on Lesser Included Offenses.*

Both juries were instructed on felony murder, first degree felony-murder, and first degree felony-murder as an aider and abettor. Aside from felony murder, the juries were not instructed on any other theory of murder. Appellants contend the trial court erred when it failed to instruct, sua sponte, on the lesser included offenses of second degree murder and voluntary manslaughter.

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*Ibid*., quoting *People v. Flannel* (1979) 25 Cal.3d 668, 684.)

We independently review a trial court's failure to instruct on a lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Posey* (2004) 32 Cal.4th 193, 218.) However, "[i]n deciding whether there is substantial evidence of a lesser offense, [we do] not evaluate the credibility of witnesses, a task for the jury." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.)

Zuniga contends there was substantial evidence from which a jury could conclude that appellants went to the Bellflower apartment to engage in a drug sale,

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not to commit a burglary or a robbery. He argues there was no burglary because Ayala gave Arciga permission to use the apartment, and there was no robbery by force or fear, but rather "a drug deal gone bad," as Rojas told Detective Blagg when he was interviewed at the hospital after the shooting. We disagree. Ayala expressly denied giving anyone permission to use the apartment to conduct drug sales or to rob drug dealers. At trial, Rojas testified that when Gutierrez was counting the money, he heard, "This is a stick up," before appellants drew their guns. Thus, Rojas's trial testimony did not suggest that the shooting was the result of a drug deal gone bad.

Appellants also contend there was substantial evidence to support voluntary manslaughter based on unreasonable self-defense. They argue Rojas told Detective Blagg that Zarate had pulled out a handgun at the same time appellants did. In addition, the forensic evidence suggests that Zarate fired a shot. Finally, Arciga's jury heard Arciga's interview, in which he told the officers that Zarate drew his gun before Zuniga drew his. However, at trial, Rojas testified consistently that Zarate was shot before he could draw his gun. Additionally, Vasquez testified that Zuniga started shooting without any provocation; Vasquez was walking toward Gutierrez to assist her in counting the money when Zuniga started shooting. As to Arciga's self-serving statement that Zarate drew a gun first, no other evidence supports this factual scenario. Moreover, in the same interview, Arciga stated he was unarmed and acting only as a lookout, evidence contradicted by extensive trial testimony. Specifically, Vasquez testified that Arciga shot Zarate multiple times and continued shooting after Zarate had fallen to the ground. On this record, we conclude Arciga's statement did not constitute substantial evidence to support an instruction on voluntary manslaughter.

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Arciga separately contends he was entitled to a second degree felony-murder instruction, as his action in checking the marijuana constituted substantial evidence supporting an inference that he did not intend to aid and abet the robbery. He argues that if he had wanted to aid and abet the robbery, "it would not have mattered whether the drugs passed inspection." We conclude Arciga's conduct was insufficient to support an instruction on the lesser included offense of second degree felony-murder. Appellant's inspection of the product assisted the robbery, as it lulled the sellers into believing the encounter was a typical drug sale. Arciga's subsequent conduct, as attested to by the victims, demonstrated that he had the intent to rob the victims, or at the least, to aid and abet in the robbery.

In any event, any error was harmless under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 837 (*Watson*). (See *People v. Breverman*, *supra*, 19 Cal.4th at p. 178 [in a noncapital case, error in failing sua sponte to instruct on lesser included offenses is reviewed for prejudice exclusively under *Watson*].) Here, after an examination of the entire record, it is not reasonably probable that appellants would have obtained a more favorable outcome had the juries been instructed on the lesser included offenses. In returning true findings on the robbery and the burglary special circumstances allegations as to all appellants, the jury necessarily rejected (1) Zuniga's theory that Ayala had given permission to use the apartment; (2) appellants' unreasonable self-defense theory; and (3) Arciga's theory that he did not share an intent to rob and aid the victims. As a murder committed in the perpetration of a robbery or a burglary is first degree murder (see § 189), the jury necessarily found beyond a reasonable doubt that appellants were guilty of first degree felony-murder. (See *People v. Elliot* (2005) 37 Cal.4th 453, 476 [trial court's failure to instruct on second degree murder harmless beyond a reasonable doubt because "the true finding as to the attempted-robbery-murder

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special circumstance establishes here that the jury would have convicted defendant of first degree murder under a felony-murder theory, at a minimum, regardless of whether more extensive instructions were given on second degree murder"]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087 [any error in failing to instruct the jury on the definition of manslaughter and the doctrine of unreasonable self-defense harmless, as jury necessarily rejected the unreasonable self-defense theory in returning a true finding on the robbery special-circumstance allegation].)

Unlike the circumstances in *People v. Campbell* (2015) 233 Cal.App.4th 148, relied on by Zuniga, here, there was substantial evidence that appellants committed a robbery or intended to aid and abet one. The victims testified that appellants robbed them at gunpoint. No evidence suggested any appellant was unaware he was going to the apartment to rob drug dealers. During the police interview, Arciga told the officers he acted only as a lookout during the incident, but admitted knowing he was going to an apartment with a group to rob drug dealers. (Cf. *People v. Campbell*, *supra*, at pp. 155-156 [appellant testified at trial he did not go with codefendant to commit a robbery].) Finally, although Parra presented a mistaken identity defense -- that it was his father who committed the crimes -- the verdicts demonstrated the jury did not believe his defense. "Once the jury concluded that the defendant was the perpetrator, . . . the special circumstance finding meant that the jury would not have found the defendant guilty of a lesser included offense." (*Id*. at p. 169.) In short, any error in failing to instruct on lesser included offenses was harmless.

2. *The Trial Court did not Err in not Instructing the Jury on Self-Defense.*

In a related contention, Arciga and Zuniga argue the trial court erred in not instructing the jury on self-defense, based on evidence suggesting that Zarate drew

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his gun first or at the same time as appellants. For the same reasons discussed above, there was no substantial evidence to support the giving of this instruction. At trial, Rojas testified consistently that Zarate was shot before he could pull out his handgun. Vasquez testified that Zuniga fired his gun without provocation. Only Arciga's jury heard his statement to the police that Zarate drew his gun first, but the statement was unsupported by any other evidence. On this record, no substantial evidence supported an instruction on self-defense.

3. *No Error Occurred with Respect to the Instructions on the Special Circumstances Allegations.*

The jury for Parra and Zuniga was instructed with CALJIC No. 8.80.1 as follows:

> "If you find a defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following special circumstances are true or not true.
>
> "The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> "[¶] . . . [¶]
>
> "If you find that a defendant was not the actual killer of the human being or if you are unable to decide whether the defendant was the actual killer or an aider and abettor or a co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill, aided, abetted, counseled, commanded, induced, requested or assisted any actor in the commission of the murder in the first degree or with reckless indifference to human life and as a major participant aided, abetted, counseled, commanded, induced, solicited, requested or assisted in the commission of the crime of *robbery or burglary* which resulted in the death of a human being, namely, Carlos Zarate." (Italics added.)

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The jury also was instructed on robbery with CALJIC Nos. 9.40, 9.42, and 9.42.1; on burglary with CALJIC Nos. 14.50, 14.51, and 14.52; and on circumstantial evidence with CALJIC Nos. 2.00 and 2.01.

The jury verdict forms had separate entries for each special circumstance allegation. As to each appellant, the jury found that the murder of Zarate was committed during the commission of a robbery and during the commission of a burglary.

Parra and Zuniga contend the trial court prejudicially erred in failing to provide proper and complete instructions on the special circumstances allegations. Specifically, they contend that the instructions (1) did not specify what special circumstances the jury was to consider; (2) did not set forth the elements of the robbery and burglary special circumstances; and (3) did not instruct the jury on how to evaluate circumstantial evidence in determining the special circumstances allegations. We disagree.

First, as given here, CALJIC No. 8.80.1 informed the jury that the special circumstances were robbery and burglary. Moreover, the jury verdict forms set forth that the special circumstances were robbery and robbery, and the jury marked "TRUE" next to each special circumstance allegation on the verdict form. On this record, no reasonable jury would have been confused about what special circumstances should be considered.

Second, although CALJIC No. 8.80.1 did not set forth the elements of robbery and burglary, the jury was instructed about the elements of robbery and burglary in other jury instructions. Thus, when the instructions are considered as a whole, no reasonable jury would have been confused about what elements constitute the offense of robbery or burglary. (See *People v. Rhodes* (1971) 21 Cal.App.3d 10, 20 ["fact that the necessary elements of a jury charge are to be

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found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial"].)

Similarly, although the jury was not instructed with CALJIC Nos. 8.83 and 8.83.1 on considering circumstantial evidence to determine the special circumstance allegations, the jury was instructed with CALJIC Nos. 2.00 and 2.01, the general instructions on evaluating circumstantial evidence. The California Supreme Court has held that CALJIC Nos. 8.83 and 8.83.1 are duplicative of CALJIC No. 2.01. (See *People v. Hines* (1997) 15 Cal.4th 997, 1051 [trial court need not instruct on CALJIC Nos. 8.83 and 8.83.1 where the jury was instructed with CALJIC No. 2.01].)

We also reject appellants' related contention that the trial court should have instructed the jury sua sponte with CALJIC No. 8.81.17, the felony-murder instruction. That instruction generally provides that to find the special circumstance allegation true, the jury must find (1) that the murder was committed while the defendant or an accomplice was engaged in the commission of another felony, and (2) that the other felony was not merely incidental to the commission of the murder. Here, the first part of CALJIC No. 8.81.17 was duplicative of CALJIC No. 8.80.1 as given. As to the second part of CALJIC No. 8.81.17, it must be given only where evidence would suggest that the robbery or burglary was merely incidental to the murder. (See *People v. D'Arcy* (2010) 48 Cal.4th 257, 297 ["trial court has no duty to instruct on the second paragraph of CALJIC No. 8.81.17 unless the evidence supports an inference that the defendant might have intended to murder the victim without having had an independent intent to commit the specified felony"].) Here, no substantial evidence suggested appellants intended to kill Zarate, but not rob him of money and/or drugs. Thus, the trial court had no duty to instruct with CALJIC No. 8.81.17.

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4. *The Trial Court did not Err in Failing to Give Accomplice Corroboration Instructions.*

Under section 1111, "[a] conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Thus, "[i]f sufficient evidence is presented at trial to justify the conclusion that a witness is an accomplice, the trial court must so instruct the jury, even in the absence of a request." (*People v. Brown* (2003) 31 Cal.4th 518, 555.)

Parra and Zuniga contend the trial court erred in failing to instruct that Arciga was an accomplice and that his out-of-court statements to Alvarez were subject to the accomplice corroboration rule. Parra also contends the court should have provided an accomplice corroboration instruction with respect to Zuniga's statements to Alvarez. Zuniga separately contends the court should have provided an accomplice corroboration instruction with respect to Parra's out-of-court statements to officers in November 2009. Both appellants further contend that the victims -- Gutierrez, Rojas, and Vasquez -- also were accomplices, and that their testimony was subject to the accomplice corroboration rule. We independently review appellants' contentions. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

In *People v. Brown*, the California Supreme Court held that no corroboration was necessary where the statements of an accomplice were admissible as declarations against interest. (*People v. Brown, supra,* 31 Cal.4th at p. 556 [where accomplice's statements were sufficiently trustworthy to permit their admission as

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declarations against interest, "no corroboration was necessary, and the court was not required to instruct the jury to view [the] statements with caution and to require corroboration"].) Here, Arciga's statements were admissible as declarations against penal interest (Evid. Code, § 1230). Thus, the trial court was not required to provide an accomplice corroboration instruction with respect to such statements.

Similarly, Zuniga's statements to Alvarez also were admissible as declarations against penal interest. Zuniga stated that he, not Arciga, shot the drug dealer. He made the statement to an acquaintance in a noncoercive setting. Under *Greenberger*, Zuniga's statements were sufficiently trustworthy to be admissible despite the hearsay rule. Under *People v. Brown*, those same statements did not require corroboration.

In addition, Zuniga's statements to Alvarez did not implicate Parra in any crime. Testimony is subject to the accomplice corroboration rule only when it is used as substantive evidence of guilt. (*People v. Williams* (1997) 16 Cal.4th 153, 245; *People v. Andrews* (1989) 49 Cal.3d 200, 214.) Thus, Parra cannot claim error with respect to the trial court's failure to provide an accomplice corroboration instruction regarding Zuniga's statements.

Similarly, Zuniga cannot claim error with respect to Parra's statements to the police following his arrest in November 2009. Parra's statements did not implicate Zuniga in any of the charged crimes.

Finally, with respect to the victims, their testimony was not subject to the accomplice corroboration rule because they were not accomplices. As set forth in section 1111, an accomplice is a person "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Gutierrez, Rojas, and Vasquez were not liable for any crimes charged in the amended information. Thus, the trial court

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was not required to provide instructions on the accomplice corroboration rule with respect to their testimony.

C. *There was no Cumulative Error.*

Finally, appellants contend that even if harmless individually, the cumulative effect of the claimed trial errors mandates reversal of their convictions. Because we have found no errors, their claim of cumulative error fails. (See *People v. Seaton* (2001) 26 Cal.4th 598, 639; *People v. Bolin* (1998) 18 Cal.4th 297, 335.)

D. *Appellants were Properly Sentenced.*

Appellants contend their sentences on count 1 are legally incorrect. They argue that the sentence for first degree murder with a special circumstance is life imprisonment without the possibility of parole. However, the trial court's oral pronouncement of judgment reflects that appellants were sentenced to 25 years to life without the possibility of parole on count 1. Arciga initially requested that this court correct the sentence, but in his reply brief, joined Parra's request that we remand for resentencing. The People concede the correct sentence is life imprisonment without the possibility of parole, and that the trial court orally imposed an unauthorized sentence on count 1. However, the People argue that no resentencing or correction is needed, as the correct sentences are reflected in the minute orders and the abstracts of judgment.

Parra further contends that his sentence on count 2 is unauthorized. He contends the correct sentence is 28 months, but the trial court orally imposed a three-year-and-four-month term. The People concede the correct term is 28 months, but argue no resentencing is necessary because the minute order and abstract of judgment reflect the correct term.

Appellants do not contest that the minute orders and abstracts of judgment correctly reflect lawful sentences. Although the general rule is that the oral

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pronouncements of the court are presumed correct (see *People v. Mesa* (1975) 14 Cal.3d 466, 471), under these circumstances we will deem the minute orders and abstracts of judgment to prevail over the reporter's transcript. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 768 [where trial court imposed an unauthorized sentence enhancement, but the minute order and abstract of judgment properly did not include the enhancement, "we will deem the minute order and abstract of judgment to prevail over the reporter's transcript"]; accord, *People v. Thompson* (2009) 180 Cal.App.4th 974, 978 [correct calculation of term was reflected in court's minutes and abstract of judgment; erroneous statements in reporter's transcript are of no effect].) Thus, resentencing is unnecessary.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J. COLLINS, J.

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