**APPENDIX A**

FILED

JAN 14 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| JAIME B. GARCIA,<br><br>Petitioner-Appellant,<br><br>v.<br><br>WARREN L. MONTGOMERY, Warden,<br><br>Respondent-Appellee. | No. 20-56109<br><br>D.C. No. 2:14-cv-01319-VBF-JPR<br>Central District of California,<br>Los Angeles<br><br>ORDER |

Before: PAEZ and HURWITZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 7) 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 B**

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| JAIME B. GARCIA,<br>Petitioner,<br>v.<br>CHRISTIAN PFEIFFER, Warden,<br>Respondent. | Case No. CV 14-1319-VBF (JPR)<br>**J U D G M E N T** |

Pursuant to the Order Accepting Findings and Recommendations of U.S. Magistrate Judge,

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

DATED: September 30, 2020

Valerie Baker Fairbank

VALERIE BAKER FAIRBANK
U.S. DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| JAIME B. GARCIA,<br><br>Petitioner,<br><br>v.<br><br>CHRISTIAN PFEIFFER, Warden,<br><br>Respondent. | Case No. CV 14-1319-VBF (JPR)<br><br>ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE |

The Court has reviewed the First Amended Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge, which recommends that judgment be entered denying the FAP and dismissing this action with prejudice. See 28 U.S.C. § 636(b)(1). Petitioner filed objections to the R. & R. on August 6, 2020; Respondent did not reply. Having reviewed de novo those portions of the R. & R. to which Petitioner objects, see 28 U.S.C. § 636(b)(1)(C), the Court accepts the findings and recommendations of the Magistrate Judge.

Petitioner argues that the Magistrate Judge incorrectly concluded that the state courts were not objectively unreasonable in finding that any error in instructing the jury on an invalid natural-and-probable-consequences theory of aider-and-abettor

guilt for first-degree murder was harmless beyond a reasonable doubt because the prosecutor "conceded" at sentencing that it was impossible to determine under which theory the jury found Petitioner and his codefendants guilty of first-degree murder. (Objs. at 3-4.)

During sentencing, the prosecutor recognized that if Petitioner and his codefendants received separate sentences for first-degree murder and kidnapping, that might run afoul of California Penal Code section 654, which prohibits imposition of multiple punishments for the same act or omission. Specifically, she explained that because the jury was not asked to make any special findings in reaching its verdict on first-degree murder, the parties didn't "know which of the theories or if more than one theory was used as a basis for [its] verdict." (Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3920.) Thus, the jury might have convicted Petitioner and the others solely on a felony-murder theory, and imposing a separate sentence for the underlying kidnapping conviction would violate section 654. (See id. at 3920-21 (citing People v. Mulqueen, 9 Cal. App. 3d 532 (1970) (holding that when defendant was convicted of first-degree murder under felony-murder theory with robbery as underlying felony, he was improperly sentenced for both first-degree murder and robbery)).) To avoid "difficulties later on," she asked the court to stay execution of the sentence for kidnapping, which the court agreed to do. (See Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3921-22.)

Initially, this Court is not bound by the prosecutor's purported "concession." Beyond that, her acknowledgment that it was not absolutely certain on which of several first-degree-murder theories the jury convicted was not an admission that it was unclear whether Petitioner in particular was convicted under a natural-and-probable-consequences theory of aiding-and-abetting guilt. For all of the reasons discussed in the R. & R. — including several statements made by the prosecutor during trial — the record makes plain that Petitioner was not convicted under that theory. (See R. & R. at 42-47.) Further, the prosecutor's section 654 argument was based on the likelihood that Petitioner and the others were sentenced under a felony-murder theory with kidnapping as the underlying felony, which the Magistrate Judge correctly concluded was one of the two theories, both valid, most likely credited by the jury. (See id. at 42-43.) Indeed, Petitioner's own attorney acknowledged that the natural-and-probable-consequences theory likely did not apply to Petitioner. (See id. at 44-45.) Finally, as the Magistrate Judge rightly recognized, the prosecutor never "conceded she did not know who the shooter was." (Objs. at 4.) Rather, she expressly argued in closing that it was Petitioner who fired the gun, and the evidence supported that contention. (See R. & R. at 26-27, 45-46.) Thus, no "grave doubt" exists that Petitioner was convicted under a valid theory of first-degree murder. Davis v. Ayala, 576 U.S. 257, 268 (2015).

Having reviewed de novo those portions of the R. & R. to which Petitioner objects, the Court agrees with and accepts the findings and recommendations of the Magistrate Judge. IT

THEREFORE IS ORDERED that judgment be entered denying the FAP and dismissing this action with prejudice.

DATED: September 30, 2020

Valerie Baker Fairbank

VALERIE BAKER FAIRBANK
U.S. DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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|---|---|
| JAIME B. GARCIA,<br><br>Petitioner,<br><br>v.<br><br>CHRISTIAN PFEIFFER, Warden,<br><br>Respondent. | Case No. CV 14-1319-VBF (JPR)<br><br>ORDER DENYING A CERTIFICATE OF APPEALABILITY |

Rule 11 of the Rules Governing § 2254 Cases in the U.S. District Courts provides as follows:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of

appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were '"adequate to deserve encouragement to proceed further."'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted).

Here, Petitioner hasn't made the necessary showing as to the merits of any of his claims.

Accordingly, a certificate of appealability is denied.

DATED: September 30, 2020

Valerie Baker Fairbank
VALERIE BAKER FAIRBANK
U.S. DISTRICT JUDGE

Presented by:

Jean Rosenbluth
U.S. Magistrate Judge

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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|---|---|
| JAIME B. GARCIA,<br><br>Petitioner,<br><br>v.<br><br>CHRISTIAN PFEIFFER, Warden,[1]<br><br>Respondent. | Case No. CV 14-1319-VBF (JPR)<br><br>REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE |

This Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, U.S. District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the U.S. District Court for the Central District of California.

**PROCEEDINGS**

On February 13, 2014, Petitioner, proceeding pro se, filed a Petition for Writ of Habeas Corpus by a Person in State Custody,

[1] Petitioner is incarcerated at Kern Valley State Prison, whose warden is Christian Pfeiffer. See Cal. Dep't of Corr. & Rehab. Inmate Locator, https://inmatelocator.cdcr.ca.gov (search for "Jaime Basilio" with "Garcia") (last visited May 20, 2020). Pfeiffer is therefore substituted in as the proper Respondent. See Fed. R. Civ. P. 25(d); see also R. 2(a), Rs. Governing § 2254 Cases in U.S. Dist. Cts.

raising two claims challenging his 2011 convictions for first-degree murder and kidnapping; he simultaneously moved for appointment of counsel and a stay to exhaust three additional claims in state court. On February 27, 2014, the Court denied appointment of counsel but granted a stay. On February 13, 2015, after the state supreme court had denied his habeas petition raising the additional claims, Petitioner filed a First Amended Petition, asserting those claims as well as the original Petition's two claims.

On March 26, 2015, Respondent moved to dismiss the FAP as "mixed," containing both exhausted and unexhausted claims. He argued that the three recently added claims were not presented to the state courts with sufficient particularity and that ground two of the original Petition had been rendered unexhausted by People v. Chiu, 59 Cal. 4th 155, 166 (2014) (holding that aiders and abettors cannot be guilty of first-degree murder on natural-and-probable-consequences theory). On May 18, 2015, Petitioner moved to again stay the case while he returned to state court. The Court appointed him counsel on June 11, 2015, and on May 26, 2016, recommended that his motion for a stay be granted and Respondent's motion to dismiss be denied. That recommendation was accepted on June 27, 2016.

Petitioner subsequently exhausted his Chiu claim, and on April 16, 2018, at his request, the Court vacated the stay and dismissed the FAP's three still unexhausted claims, leaving only grounds one and two. On July 20, 2018, Respondent filed his Answer with a memorandum of points and authorities; on November 19, 2018, Petitioner filed his Traverse. For the reasons

discussed below, the Court recommends that the FAP be denied and this action be dismissed with prejudice.

**PETITIONER'S CLAIMS**

I. The trial court's instruction on coconspirator guilt unconstitutionally allowed the jury to find him guilty of kidnapping and murder without finding that he or a coconspirator actually committed those crimes. (FAP at 7-10;[2] Traverse at 20-23.)

II. The trial court's instructions on several theories of guilt for first-degree murder unconstitutionally allowed the jury to find Petitioner guilty without finding that he had the requisite intent. (FAP at 13-18; Traverse at 23-25.)

**BACKGROUND**

On January 21, 2011, after a joint trial with codefendants Javier Esparza and Claudio Bernardino,[3] Petitioner was convicted by a Los Angeles County Superior Court jury of first-degree murder under California Penal Code section 189 and kidnapping under section 207(a).[4] (July 20, 2018 Lodged Doc. ("Suppl.

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[2] Because the pages in the FAP are not sequentially numbered, the Court uses the pagination from its official Case Management/Electronic Case Filing system.

[3] Esparza and Bernardino also have habeas petitions pending in this Court. See Claudio Lamas Bernardino, Jr. v. Warren Montgomery, No. 2:13-cv-8447-VBF (JPR) (C.D. Cal. filed Nov. 15, 2013); Javier Esparza v. John Soto, No. 2:14-cv-00577-VBF (JPR) (C.D. Cal. filed Jan. 24, 2014). Another codefendant, Cesar Reyes, was tried and convicted separately, see People v. Reyes, No. B248663, 2014 WL 1827080 (Cal. Ct. App. May 8, 2014), and does not appear to have filed a federal habeas petition.

[4] Section 189 provides in relevant part that "willful, deliberate, and premeditated" murder, as well as murder "committed

Lodged Doc. 1"), 2 Clerk's Tr. at 377-80.) The jury also found true a firearm-use enhancement under section 12022(a)(1). (Id. at 377, 379.) On March 22, 2011, the court sentenced Petitioner to prison for 26 years to life. (Id. at 461-62.)

Petitioner appealed, raising the FAP's two remaining claims. (Lodged Doc. 3.) On August 17, 2012, the court of appeal affirmed the judgment. (Lodged Doc. 7); see also People v. Garcia, No. B231949, 2012 WL 3538984 (Cal. Ct. App. Aug. 17, 2012). Petitioner and his codefendants thereafter jointly filed a petition for review in the supreme court (Lodged Doc. 8), which summarily denied it on November 20, 2012, "without prejudice to any relief to which [they] might be entitled" after the court decided Chiu, which was then pending (Lodged Doc. 9). Petitioner does not appear to have filed a petition for a writ of certiorari in the U.S. Supreme Court, and he did not file a state habeas petition before seeking federal habeas relief. (See FAP at 3.)

On July 27, 2016, after Chiu rendered the FAP's second claim unexhausted, Petitioner filed a habeas petition in the state superior court, arguing that his first-degree murder conviction

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in the perpetration of," among other offenses, "kidnapping," is "murder of the first degree." Cal. Penal Code § 189(a).

The original information charged Petitioner and his codefendants with murder under section 187(a), for "the unlawful killing of a human being . . . with malice aforethought." (See Suppl. Lodged Doc. 1, 1 Clerk's Tr. at 70-71.) Before the jury's verdict was announced, on January 21, 2011, the information was amended on the court's motion to change count one to a violation of section 189 (see id., 2 Clerk's Tr. at 387), and the verdict forms show a guilty finding under section 189 for all defendants (see id. at 377, 381, 385). Petitioner has not contested the amendment to the information in these habeas proceedings.

had to be reversed because the jury was improperly instructed that an aider and abettor may be guilty of first-degree murder on a natural-and-probable-consequences theory. (July 28, 2016 Notice of Lodging, Attach. 2, ECF No. 62-1.) On September 7, 2016, the court denied the petition, finding that the "instructional error did not affect the jury's verdict" because the record "clearly shows that the People relied on the theory that the Petitioner was the actual shooter, and that the others acted as aiders and abettors." (Sept. 26, 2016 Notice of Lodging, Attach. 1 at 2, ECF No. 64-1.)

On November 3, 2016, Petitioner raised the same claim in a habeas petition to the court of appeal. (See Nov. 4, 2016 Notice of Lodging, Attach. 2, ECF No. 66-2.) On December 12, 2016, that court denied the petition, holding that the "trial court's error in instructing the jury on the natural and probable consequences theory of aider and abettor liability for first degree murder was harmless beyond a reasonable doubt." (Dec. 13, 2016 Notice of Lodging, Attach. 1, ECF No. 67-1.)

On December 13, 2016, Petitioner filed a petition for review with the supreme court. (Id., Attach. 2, ECF No. 67-2.) On February 15, 2017, that court granted the petition, deferring further action "pending consideration and disposition of a related issue in In re Martinez on Habeas Corpus." (Feb. 19, 2017 Notice of Lodging, Ex. 1, ECF No. 69.) On December 4, 2017, the court decided Martinez, holding that an instruction on an invalid theory of guilt may be harmless when "other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary" under a legally valid theory.

3 Cal. 5th 1216, 1226 (2017) (citation omitted). On February 28, 2018, it dismissed Petitioner's petition for review. (Mar. 29, 2018 Req. Extension of Time, Ex. 2, ECF No. 70.)

**SUMMARY OF THE EVIDENCE**

The factual summary in a state appellate-court opinion is entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). See Crittenden v. Chappell, 804 F.3d 998, 1010-11 (9th Cir. 2015). But see Murray v. Schriro, 745 F.3d 984, 1001 (9th Cir. 2014) (discussing "state of confusion" in circuit's law concerning interplay of § 2254(d)(2) and (e)(1)). Although Petitioner does not directly challenge the sufficiency of the evidence, the Court has nonetheless independently reviewed the state-court record. See Nasby v. McDaniel, 853 F.3d 1049, 1054-55 (9th Cir. 2017). Based on this review, the Court finds that the following statement of facts from the court-of-appeal decision fairly and accurately summarizes the evidence.

> The body of Nicholas Ramirez was found in the trunk of his own car by police on September 18, 2006. The car was located in a desert field. Ramirez had been shot nine times. Ramirez had last been seen by his family on September 16, 2006.
>
> Some physical evidence connected [Petitioner, Esparza, and Bernardino] to the murder of Ramirez, but most of the evidence against them came from the testimony of Matthew Foust.
>
> Foust testified that on September 16, 2006, about 2:00 a.m., he arrived at [Petitioner's] house in Littlerock, California. Foust had driven from his home

in Arizona to purchase a set of car rims from [Petitioner]. When Foust arrived, a party was going on in the garage, but Foust went in the house and slept.

That morning, about 6:00 or 7:00 a.m., Foust drove [Petitioner] to [Petitioner's] girlfriend's house, where they picked up the rims. When they returned to [Petitioner's] house, [Petitioner] noticed that the tires on his car were slashed and his speakers were missing. [Petitioner] was noticeably upset. . . . Javier Esparza, who is [Petitioner's] brother, speculated that it "could have been them guys from last night."

The party the previous night had been a birthday party for [Petitioner's] close friend, Jesse Ramirez. Jesse's brother Nicholas Ramirez, the victim in this case, was at the party. . . . Esparza and Bernardino were also at the party.

At some point during the party, Jesse got into a fight with Esparza. Jesse left the party about 7:00 or 8:00 a.m., with Martin Guzman, who was living with [Petitioner] at the time. According to Jesse, Guzman took a suitcase and clothes that belonged to [Petitioner], and slashed the tires of [Petitioner's] car. The two men then took a train to Los Angeles.

After Esparza's comment, [Petitioner] went into the house and got his gun. He then told Foust, "You are going to take us to go find this guy." Foust was scared and did what he was told. He drove [Petitioner] and Esparza to Cesar Reyes's house. Reyes was standing

outside, waiting for them. Foust then drove to Ramirez's house.

As Foust and his passengers arrived at the Ramirez house, Nicholas had just finished washing his car and was leaving in that car. According to Ramirez's brother, David, and sister, Yvonne, this occurred around 10:30 a.m. Yvonne saw Foust's car. Ramirez did not stop. Both [Petitioner] and Esparza told Foust to follow Ramirez.

Foust followed Ramirez to a gas station and pulled in right behind Ramirez's car. [Petitioner] and Reyes got out of the car, approached Ramirez and, after the three men talked, Ramirez returned to his car accompanied by [Petitioner] and Reyes. [Petitioner] entered the front passenger seat and Reyes returned to Foust's car and told him to follow Ramirez's car.

Foust followed Ramirez to . . . Bernardino's house. Foust initially told police that the others went inside the house, but he stayed outside and talked with his girlfriend on his phone. He never went inside. At trial, he denied making those statements. He testified that he went inside with the others.

Inside the house, both [Petitioner] and Reyes asked Ramirez, "Where is my stuff?" or "Where is my stereo?" Reyes hit Ramirez in the face, knocking him to the ground. Reyes began kicking Ramirez. [Petitioner] continued to ask, "Where is my stuff?" Ramirez replied he did not have it and did not know where it was.

Bernardino told [Petitioner] to stop because Ramirez was bleeding on his carpet. Bernardino directed Esparza to take Ramirez to the garage. Reyes forced Ramirez into the garage and everyone followed. [Petitioner] ordered Foust to go to the garage.

In the garage, [Petitioner] bound and tied Ramirez to a chair. Ramirez continued to deny he had [Petitioner's] stolen items or that he knew where they were. Esparza now had [Petitioner's] gun and sat down in front of Ramirez while both [Petitioner] and Reyes threatened to kill him if he did not disclose the location of [Petitioner's] items, as well as Reyes's stereo. Eventually, Ramirez said, "I want to die. Just take my life." [Petitioner] then inserted a gag into Ramirez's mouth, Reyes used a pipe to strike Ramirez several times on his head and upper body, and [Petitioner] hit Ramirez several times. For their part, Esparza and Bernardino kicked Ramirez. At some point, Reyes asked [Petitioner] if Foust was "cool." [Petitioner] told Reyes, "Yeah. It's okay," which increased Foust's fear.

Ramirez was walked out of the garage. [Petitioner] ordered him into the trunk of his own car. After [Petitioner] closed the trunk lid,[5] he told Esparza and

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[5] Foust actually testified that it was either Petitioner or Bernardino who closed the trunk lid. (June 25, 2015 Lodged Doc. ("Suppl. Lodged Doc. 2"), 11 Rep.'s Tr. at 2570.) Bernardino's fingerprints were later found on the trunk. (See, e.g., id., 7 Rep.'s Tr. at 1504-15.)

Reyes to follow him. Esparza and Reyes told Foust, "We're taking your car to follow" [Petitioner]. Esparza sat in the back seat and Reyes sat in the front passenger seat as Foust drove, following [Petitioner]. Having seen what the men had just done to Ramirez and recognizing that Reyes by himself could have beaten him in a fight, Foust was even more afraid.

After about 5 to 10 minutes of driving, Reyes told Foust to stop the car. When he did so, Reyes got out of the car and ran away. Esparza ordered Foust to continue following [Petitioner]. Foust did as he was told. After [Petitioner] pulled off onto the shoulder near some shrubs, Foust continued on past Ramirez's car for about 100 feet and stopped his car when Esparza told him to stop. Esparza got out of the car and walked towards Ramirez's car while Foust remained inside his car. Foust realized he had an opportunity to leave, but he stayed because he was aware that these men knew where his sister lived and that they were perfectly capable of finding him.

When Foust looked back, he saw [Petitioner] standing over the trunk with the same handgun which he brought with him, the same one Esparza had been holding in the garage. Foust looked away. He then heard at least four to five gunshots. When Foust looked back, he saw [Petitioner] in the back seat area of Ramirez's car and Esparza standing near the driver's door. As [Petitioner] and Esparza entered Foust's car, they both told Foust

"Go."

[Petitioner] gave Foust directions to the house where they had earlier picked up Reyes. There, all three went into the house. [Petitioner] and Esparza changed their clothes and shoes, and Foust drove them back to [Petitioner's] house. [Petitioner] and Esparza both told Foust they were going to Arizona with him. Out of fear, Foust drove [Petitioner] and Esparza to Arizona. [Petitioner] and Esparza stayed with Foust for a day or two before leaving on different buses. Before [Petitioner] left, he told Foust "we're going to come and get you" if Foust told anybody what had happened.

Bernardino fled to Mexico. He was eventually arrested by the FBI and brought to California.

On September 18, 2006, the police responded to a call about a suspicious vehicle in a desert field. The vehicle was Ramirez's car with his body in the trunk. Ramirez was bound at the wrists with cords, and gagged with a cloth and masking tape. There were nine bullet holes in the top of the trunk, and the prosecution expert opined that Ramirez had been shot when the trunk lid was closed. Ramirez had suffered nine gunshot wounds. The bullet pattern on the trunk lid and Ramirez's position inside the trunk were consistent with the shooter firing straight down into the trunk, firing three shots at Ramirez's head and six shots over Ramirez's torso.

Ramirez was shot with James Wilson's .40–caliber Smith & Wesson semi-automatic handgun, which was stolen

during a September 2005 burglary of Wilson's Littlerock residence.[FN2] Blood splatter matched to [Petitioner] was found on the wall of the Wilson residence immediately after the burglary, leading to the conclusion that [Petitioner] was the burglar.

[FN2] This gun was not recovered after the murder. Matching was possible because Wilson had kept spent casings from rounds fired by the gun.

Ramirez's car was tested for fingerprints and five fingerprints were obtained from the right trunk lid on the left edge. Two of those prints matched Bernardino's fingerprints, specifically his right ring finger and his right little finger.

Blood stains found on the entry way carpet of Bernardino's house were consistent with Ramirez's blood. Blood stains consistent with Ramirez's blood were also found in the garage.

The exterior and interior passenger side door handles of Ramirez's two-door car were swabbed for DNA evidence. DNA samples were taken from underneath the door handles where someone would grab them to open the door and on the edge. None of the DNA samples taken from Ramirez's car matched Ramirez. Based on two of the swabs taken from the driver's side door, there was enough for a partial profile. However, there was insufficient genetic information for a complete profile as to either.

> One of the swabs had a mixture of the DNA. The other swab contained DNA contributed by a single source, a male. It was possible to exclude Esparza's brother, Yvan Esparza, and Bernardino as the contributors of the DNA.
>
> A partial profile was also taken from passenger side interior and exterior door handles. It was a partial profile because there was a single locus where there was no genetic information. Genetic information was obtained from the rest of the sample, and it was a near complete profile. The genetic profile was consistent with having been contributed by Esparza. By contrast, Ramirez, [Petitioner], Yvan Esparza, [and] Bernardino were all excluded from that profile. The frequency of occurrence of that genetic profile was one in 831 trillion. The sample was not classified as a "match" to Esparza's profile due to the missing information as to the single locus.
>
> A partial DNA profile obtained from the gag found in Ramirez's mouth was consistent with a mixture of at least two people. There was not enough genetic information to include or exclude Esparza. However, it was possible to exclude Ramirez, [Petitioner], Yvan Esparza, and Bernardino.
>
> . . .
>
> [Petitioner, Esparza, and Bernardino] presented no evidence on their behalf.

(Lodged Doc. 7 at 3-7).

**LEGAL STANDARDS**

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under AEDPA, the "clearly established Federal law" that controls federal habeas review consists of holdings of Supreme Court cases "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). As the Supreme Court has "repeatedly emphasized, . . . circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" Glebe v. Frost, 135 S. Ct. 429, 431 (2014) (per curiam) (quoting § 2254(d)(1)). Further, circuit precedent "cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the] Court has not announced.'" Lopez v. Smith, 574 U.S. 1, 4 (2014) (per curiam) (quoting Marshall v. Rodgers, 569 U.S. 58, 64 (2013) (per curiam)).

Although a particular state-court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 412-13. A state-court decision is "contrary to" clearly established federal law if it either applies a rule that contradicts governing Supreme Court law or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (citation omitted). A state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Id.

State-court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts' (emphasis added)." Id. at 11 (quoting § 2254(d)). A state-court decision that correctly identifies the governing legal rule may be rejected if it unreasonably applies the rule to the facts of a particular case. Williams, 529 U.S. at 407-08. To obtain federal habeas relief for such an "unreasonable application," however, a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Id. at 409. In other words, habeas relief is warranted only if the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v.

Richter, 562 U.S. 86, 103 (2011). "[E]ven clear error will not suffice." Woods v. Donald, 135 S. Ct. 1372, 1376 (2015) (per curiam) (citation omitted).

Here, Petitioner raised the Petition's first claim on direct appeal (see Lodged Doc. 3), and the court of appeal rejected it in a reasoned decision on the merits (see Lodged Doc. 7). The supreme court then summarily denied review. (See Lodged Doc. 9.) Thus, the Court "looks through" the supreme court's silent denial to the court of appeal's decision, the last reasoned state-court decision, as the basis for the state courts' judgment on the Petition's first claim. See Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018). In reasoned decisions on the merits, the superior court and court of appeal then denied Petitioner's habeas petitions putting a Chiu gloss on the Petition's second claim, the latter finding that any error was "harmless beyond a reasonable doubt." (Dec. 13, 2016 Notice of Lodging, Attach. 1, ECF No. 67-1.) The supreme court summarily dismissed Petitioner's petition for review. (Mar. 29, 2018 Req. Extension of Time, Ex. 2, ECF No. 70.) Thus, the Court "looks through" the supreme court's silent denial to the court of appeal's decision, the last reasoned state-court decision, as the basis for the state courts' judgment on Petitioner's Chiu-based claim. See Wilson, 138 S. Ct. at 1192. Because the state court found that any constitutional error was harmless, habeas relief is not available unless that finding was objectively unreasonable. Davis v. Ayala, 135 S. Ct. 2187, 2198-99 (2015).

## DISCUSSION

### I. Petitioner Is Not Entitled to Habeas Relief on His Claim that a Jury Instruction on Guilt for Coconspirators Violated Due Process

Petitioner contends that the trial court's version of CALCRIM 417, the instruction on a defendant's guilt for a coconspirator's acts, particularly the portion on natural and probable consequences, improperly permitted the jury to convict him of first-degree murder and kidnapping "without ever finding that a coconspirator committed [those] offenses." (FAP at 8.) The court of appeal's rejection of the claim was not contrary to or an unreasonable application of clearly established federal law.

A. Applicable Law

Claims of error in state jury instructions are generally matters of state law only and thus not cognizable on federal habeas review. See Gilmore v. Taylor, 508 U.S. 333, 344 (1993). A federal court is bound by the state appellate court's conclusion that an instruction was a correct statement of state law. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam).

"When considering an allegedly erroneous jury instruction in a habeas proceeding, [a] court first considers whether the error in the challenged instruction, if any, amounted to 'constitutional error.'" Dixon v. Williams, 750 F.3d 1027, 1032 (9th Cir. 2014) (per curiam) (as amended). "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." Middleton v.

McNeil, 541 U.S. 433, 437 (2004) (per curiam). Rather, the appropriate inquiry is whether an "ailing instruction," when viewed in the context of the overall charge, "so infected the entire trial that the resulting conviction violates due process." Dixon, 750 F.3d at 1032-33 (citing McNeil, 541 U.S. at 437).

"If the charge as a whole is ambiguous, the question is whether there is a 'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." Id. at 1033; see Waddington v. Sarausad, 555 U.S. 179, 191 (2009) (in determining whether instruction violated due process, "it is not enough that there is some 'slight possibility' that the jury misapplied the instruction" (emphasis and citation omitted)).

"[H]armless-error analysis applies to instructional errors so long as the error at issue does not categorically 'vitiat[e] all the jury's findings,'" Hedgpeth v. Pulido, 555 U.S. 57, 61 (2008) (per curiam) (emphasis in original), and an instructional error "arising in the context of multiple theories of guilt" does not "vitate[] all the jury's findings," id. (emphasis in original). Thus, federal habeas relief is unwarranted unless the defective instruction caused a substantial and injurious effect or influence in determining the jury's verdict. Id. at 61-62 (holding that prejudice analysis in instructional-error cases is governed by "substantial and injurious effect" standard of Brecht v. Abrahamson, 507 U.S. 619 (1993)).

B. Jury Instructions

The trial court instructed the jury that the prosecution

had presented evidence of Petitioner's and the other defendants' conspiracy to commit kidnapping and murder, and that to prove a defendant's participation in the conspiracy the prosecution needed to establish that he "intended to agree or did agree with one or more of the other defendants or Cesar Reyes to commit kidnap and/or murder," "intended that [he and one or more of the others] would commit kidnap and/or murder," and one or more of the coconspirators committed one of several crime-specific overt acts. (Suppl. Lodged Doc. 2, 14 Rep.'s Tr. 3334-35; see also Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 342.)

It then instructed the jury on a version of CALCRIM 417, labeled "Liability for Coconspirators' Acts," as follows:

> A member of a conspiracy is criminally responsible for the crimes that he conspires to commit, no matter which member of the conspiracy commits the crime.
>
> A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan. Under this rule, a defendant who is a member of the conspiracy does not need to be present at the time of the act.

(Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3337-38; see also Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 343.)

It then immediately explained, as part of CALCRIM 417, that a defendant could also be guilty for a coconspirator's acts under

a natural-and-probable-consequences theory:

> A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.
>
> A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of that common plan.
>
> To prove that a defendant is guilty of the crime charged in Counts 1 and 2 [first-degree murder and kidnapping], the People must prove that:
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> One, the defendant conspired to commit one of the following crimes: kidnap and murder;[6]
>
> Two, a member of the conspiracy committed assault with a deadly weapon and/or assault by force likely to

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[6] The trial court correctly recognized that the instructions on a defendant's guilt for the natural and probable consequences of a coconspirator's acts should mirror the instructions on an aider and abettor's guilt under a natural-and-probable-consequences theory, which the court also instructed the jury on. (Suppl. Lodged Doc. 2, 13 Rep.'s Tr. at 3134, 3143-44, 3159-60; see also id., 14 Rep.'s Tr. at 3330-32; Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 340-41.) Although it "deleted" "any reference to kidnapping" in the latter instruction given the prosecutor's view that the natural-and-probable-consequences theory was relevant only to first-degree murder (Suppl. Lodged Doc. 2, 13 Rep.' Tr. at 3134-35, 3143, 3160-63), it retained the reference to kidnapping in the coconspirator's-guilt instruction in light of the prosecutor's position that the defendants had conspired to commit both kidnapping and murder (id. at 3142-43; see id. at 3138, 3158, 3163).

produce great bodily injury to further the conspiracy;[7]

AND

Three, murder was a natural and probable consequence of the common plan or design of the crime that a defendant conspired to commit.

(Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3338-39; see also Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 343-44.)

C. Court-of-Appeal Decision

The court of appeal rejected Petitioner's claim that the instructions on coconspirator guilt "permitted the jury to convict the defendants of kidnapping and murder without finding that a kidnapping or murder occurred" and "omit[ted] an element" of those offenses (Lodged Doc. 7 at 19), finding "no reasonable possibility or probability that the jury understood the instruction in the manner [he] suggested" (id. at 20):

The first half of CALCRIM No. 417 sets forth general principles of liability for coconspirators' acts. The

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[7] The trial court initially intended to instruct the jury that the prosecution had to prove that a member of the conspiracy "comitt[ed] murder" – not "assault with a deadly weapon and/or assault by force" – to "further the conspiracy." (Suppl. Lodged Doc. 2, 13 Rep.'s Tr. at 3142.) But after Petitioner's counsel complained that that was "confus[ing]" and "redundant" (id.), the prosecutor proposed replacing murder with aggravated assault (id. at 3159). The court agreed, making the same change to the natural-and-probable-consequences instruction for aider-and-abettor guilt. (Id. at 3160; see id., 14 Rep.'s Tr. at 3330-32; Suppl. Lodged Doc. 2, 2 Clerk's Tr. at 340-41.) In some sense, then, Petitioner invited the error of which he now complains. Cf. Price v. Hall, No. CV 06-03172 JSL (AN)., 2010 WL 1325371, at *16 (C.D. Cal. Feb. 19, 2010) ("Under California's invited error doctrine, a defendant's objection to a jury instruction is an invited error that can procedurally bar the defendant from seeking appellate relief."), accepted by 2010 WL 1325357 (C.D. Cal. Mar. 31, 2010).

> very first sentence of CALCRIM No. 417 tells the jury that "A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime." Thus, the instruction clearly requires that the charged crimes have been actually committed and that the perpetrator was a member of the conspiracy. The second sentence of the instruction tells the jury that "a member of a conspiracy is also more [sic] criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and the act is a natural and probable consequence of the common plan or design of the conspiracy." Again, the instruction requires that the criminal act for which the conspirator is responsible has actually occurred.
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> [Petitioner] complains of error . . . in the second half of the instruction. . . .
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> At worst, this portion of the instruction fails to repeat the requirements already spelled out at the beginning of the instruction. It does not suggest that the jury disregard those requirements. We see no possibility that the jury understood the instruction as a whole as permitting them to convict a defendant of a crime which did not actually occur.

(Id. at 20-21 (emphasis in original).)

D. Analysis

Petitioner maintains that the "trial court's instruction on coconspirator natural and probable consequence liability

permitted the jurors to return guilty verdicts on the charged offenses without ever finding that a coconspirator committed the charged offenses." (FAP at 8; see Traverse at 21-22.) As the court of appeal found, however, there is "no reasonable possibility" that the jury understood the instructions that way. (Lodged Doc. 7 at 20.) After all, the first sentence of the instruction states, "[a] member of a conspiracy is criminally responsible for the crimes that he conspires to commit, no matter which member of the conspiracy commits the crime." (Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3337.) That sentence underscores the common-sense notion that guilt under that theory extends only to crimes that were in fact "committ[ed]" by a coconspirator (id.), and the jury is presumed to have followed its instructions, Weeks v. Angelone, 528 U.S. 225, 234 (2000). Similarly, the instruction's second sentence, that a member of a conspiracy is criminally responsible "for any act of any member of the conspiracy if that act is done to further the conspiracy and . . . is a natural and probable consequence of the common plan or design of the conspiracy" (Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3337-38), emphasizes that guilt must be based on "acts" actually committed. Thus, although the trial court went on to explain how a defendant could be guilty of murder when a coconspirator committed aggravated assault without spelling out that the assault had to have resulted in murder (id. at 3338-39; see Traverse at 21-22), the instructions as a whole make that clear.

Petitioner contends that the court of appeal improperly "relie[d] on the preamble to th[e] conspiracy instruction to find

that the jurors would not have followed the trial court's erroneous delineation of elements." (FAP at 9.) But jury instructions are not to be evaluated "in artificial isolation [and] must be viewed in the context of the overall charge." Dixon, 750 F.3d at 1033 (citation omitted). And even assuming the first two sentences of the instruction are properly characterized as "preamble" – which is questionable given that they provide guidance that doesn't appear elsewhere in the instructions – and that a preamble is somehow less important than what follows, "[a]t worst," as the court of appeal recognized, the second portion "fail[ed] to repeat the requirements already spelled out." (Lodged Doc. 7 at 21.)

Petitioner also contends that the reference to kidnapping in the natural-and-probable-consequences portion of the CALCRIM 417 instruction was "flatly inappropriate." (FAP at 7; see Traverse at 20.) To be sure, that portion of the instruction was at least somewhat ambiguous because it suggested that a defendant could be convicted of kidnapping under a natural-and-probable-consequences theory when the prosecutor agreed that wasn't the case (see Suppl. Lodged Doc. 1, 13 Rep.'s Tr. at 3134-35, 3143-44, 3159-60) and because that section dealt primarily with murder. But the language immediately preceding that portion of the instruction, that a member of a conspiracy is criminally responsible for the crimes he or she conspires to commit no matter who in the conspiracy actually commits those crimes (id., 14 Rep.'s Tr. at 3337), applies equally to kidnapping and murder. Therefore, the prosecutor correctly requested that kidnapping be included in the overall instruction despite agreeing that it was not relying on

the natural-and-probable-consequences doctrine to establish Petitioner's guilt of that crime. (Id., 13 Rep.'s Tr. at 3134-35, 3143.) And although the challenged language does not expressly state that the jury must find that a coconspirator's aggravated assault resulted in Ramirez's death (see FAP at 8), the more general natural-and-probable-consequences instruction the court gave earlier in its charge made that clear, stating that "a defendant is guilty of murder" when "during the commission of [an aggravated assault], a co-participant in th[at] crime[] committed the crime of murder." (Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3331; see Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 340-41.)

Moreover, given the jury instructions as a whole, there is no reasonable likelihood that the jury would have believed that it could find Petitioner guilty of first-degree murder or kidnapping without finding that those crimes were actually committed. Indeed, the trial court's instructions stressed that the jury had to find that those crimes were committed, explaining various theories of guilt that it could rely on to do so. (See, e.g., Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3329 (instructing that person was guilty of crime if he "directly committed the crime" or "aided and abetted the perpetrator, who directly committed the crime" and that "[u]nder some specific circumstances . . . a person may also be guilty of other crimes that occurred during the commission of the first crime"), id. at 3330 (instructing that for aider and abetter to be guilty of crime someone had to "commit[]" it), id. at 3341 (instructing that jury "may not find a defendant guilty of murder unless . . .

the People have proved that a defendant committed murder")); see United States v. Navarro-Montes, 521 F. App'x 611, 615 (9th Cir. 2013) (denying habeas relief on instructional-error claim because "jury instructions here, read together, correctly state[d]" law).

Further, during her closing argument the prosecutor never so much as hinted that the jury could find Petitioner guilty of either charged crime without finding that it had been committed. To the contrary, she expressly argued that Petitioner and the others committed a kidnapping together. (See Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3390-91 (arguing that all defendants "participated in this kidnapping" by beating Ramirez, taking him to desert, binding and gagging him, and shoving him in trunk of his car).) Even when she briefly mentioned the natural-and-probable-consequences theory, she did not discuss it as a source of guilt for kidnapping and argued instead that a murder was committed during the uncharged assault. (See, e.g., id. at 3391-92.)

And although Petitioner correctly notes that the prosecutor remarked that the jury did not have to agree on "the theory for murder" (id. at 3397), she insisted that the jury must find that the murder was in fact committed, whether as a "willful, deliberate or premeditated murder" by a perpetrator or aider and abetter, as a "logical connection to the kidnapping," or as a "natural and probable consequence of the beating of the earlier assaults" (id.). She also expressly argued that Petitioner committed the murder. On that score, Petitioner's claim that the prosecutor "did not argue that [Petitioner] or anyone else was the shooter" and "ultimately conceded she did not know who was

the principal and who was the aider and abettor" (Traverse at 23) is misleading. Although she remarked when discussing the firearm enhancement – which required only a finding that a principal was armed during the crimes (see Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3348-49) – that the jury "would not be asked to determine who the shooter [was]" or who "ha[d] the gun" (id. at 3393), elsewhere she made plain the prosecution's theory that it was Petitioner who fired the gun (see, e.g., id. at 3402 (arguing that "all of the evidence . . . shows you that [Petitioner] is committing a willful, deliberate and premeditated murder" and the others "aid[ed] and abett[ed] him"), 3377-78 (arguing that Petitioner "positioned his gun above that trunk" and "decide[d] to kill [Ramirez] before he finished firing")).

Indeed, while Petitioner now points the finger at the natural-and-probable-consequences instruction as resulting in an unlawful conviction (see FAP at 7-10; Traverse at 22-23), he took a significantly different position during the parties' extensive discussions about the jury instructions. Specifically, Petitioner's counsel repeatedly observed that the instructions on the natural-and-probable-consequences doctrine were irrelevant to Petitioner. (See, e.g., Suppl. Lodged Doc. 2, 13 Rep.'s Tr. at 3135 (noting that he didn't "see any major consequence" to Petitioner of giving the natural-and-probable-consequences instruction), id. at 3152 (remarking, "I don't see the consequences, no pun intended, in regard to natural and probable consequences as it relates to [Petitioner]"); see also id. at 3135 (Esparza's counsel noting that this was "mainly . . . Bernardino's issue").) What's more, after the parties finished

discussing CALCRIM 417, Petitioner's counsel did not object to the trial court's observation that the instruction was "really not a big issue" for Petitioner and Esparza because "if [the jury] believe[s] the evidence as to [Petitioner and Esparza], we are talking a direct shooting." (Id. at 3162.) Indeed, the court noted, the natural-and-probable-consequences theory pertained to Bernardino. (Id.) The prosecutor agreed with that sentiment, pointing out that she had "been thinking about Bernardino as [she was] crafting" that instruction (id.), and she told the jury in her closing argument that the natural-and-probable-consequences theory "applies most fittingly to Claudio Bernardino" (id., 14 Rep.'s Tr. at 3397).

In any event, as Respondent contends (see Answer, Mem. P. & A. at 10), any instructional error was harmless. As the trial court recognized (see Suppl. Lodged Doc. 2, 13 Rep.'s Tr. at 3162), Foust's testimony and the prosecution's other evidence, if credited, firmly established that Petitioner directly committed the kidnapping and at a minimum directly aided and abetted the murder. After all, Foust's testimony established that Petitioner, "upset" that his tires had been slashed and speakers stolen (id., 11 Rep.'s Tr. at 2539-41), retrieved his gun and set off with Esparza and Reyes to find Ramirez (id. at 2541, 2544-46). When they did, Petitioner confronted him, eventually getting into Ramirez's car and directing him to Bernardino's house; there, he tied him to a chair (id. at 2563) and interrogated him about his stolen things, threatening to "blast him or shoot him" if he did not disclose where they were (id. at 2568, 12 Rep.'s Tr. at 2712-13). Eventually he gagged Ramirez

(id., 11 Rep.'s Tr. at 2565-67) and forced him into the trunk of his own car (id. at 2569-70). He then drove away with him still in the trunk, instructing Esparza and Reyes to follow him, and ultimately stopped the car in a deserted area surrounded by shrubs. (Id. at 2571, 2575.) There, he got out of the car with his gun in his hands and stood over the trunk; Foust turned away at that point but heard multiple gunshots. (Id. at 2576, 12 Rep.'s Tr. at 2727.)

Petitioner's claims that Foust's "inconsistent testimony was the only evidence of [Petitioner's] guilt" and that "[t]here was no physical evidence linking [Petitioner] to the murder of Ramirez" (Traverse at 22) are incorrect. To start, there is no question that Ramirez was kidnapped and murdered, as his bullet-riddled body was discovered gagged and bound in the trunk of his car. (Suppl. Lodged Doc. 2, 5 Rep.'s Tr. at 1025-26, 7 Rep.'s Tr. at 1610, 1615-16, 8 Rep.'s Tr. at 1914-17, 9 Rep.'s Tr. at 2144-47.) And as the court of appeal found, the evidence at least "slightly" corroborated Foust's testimony that it was Petitioner and his coconspirators who committed those crimes. (See Lodged Doc. 7 at 24.) Evidence showed that the gun used to shoot Ramirez had been stolen by Petitioner during an unrelated burglary (Suppl. Lodged Doc. 2, 6 Rep.'s Tr. at 1308-16, 8 Rep.'s Tr. at 1922, 1946, 10 Rep.'s Tr. at 2435), tying him to the shooting. Further, the bullet pattern in Ramirez's body suggested that the shooter fired straight down into the trunk (id., 6 Rep.'s Tr. at 1287), which was consistent with where Foust testified he saw Petitioner standing before he heard gunfire. Bernardino's and Esparza's DNA was found on Ramirez's

car and Ramirez's blood was found in Bernardino's home (id., 7 Rep.'s Tr. at 1594-99, 8 Rep.'s Tr. at 1930-40, 10 Rep.'s Tr. at 2412-16, 2430-35), corroborating major aspects of Foust's account. And certainly, as the state court recognized (Lodged Doc. 7 at 16), Petitioner had the most motive to kill Ramirez, as he believed him responsible for slashing his tires and stealing his property and had expressed his intent to kill him if he did not reveal the location of the stolen property. Thus, other evidence beyond Foust's testimony implicated Petitioner. See Waddington, 555 U.S. at 193-94 (finding that "[g]iven the strength of the evidence supporting the conviction . . . it was not objectively unreasonable for the [state] courts to conclude that the jury convicted" petitioner under correct theory despite potentially ambiguous instruction); cf. Neder v. United States, 527 U.S. 1, 17 (1999) (finding erroneous instruction omitting element of offense harmless because "the jury verdict would have been the same absent the error").

Petitioner points out weaknesses in Foust's testimony, including that at times he confused Petitioner's and Esparza's roles and gave inconsistent accounts to police officers (see Traverse at 22), but defense counsel for all three defendants stressed those and other issues with the evidence during their summations (see, e.g., Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3408, 3426-30, 3433-35). And the trial court instructed the jury that it could consider a witness's "crime[s] or other misconduct" and his pretrial statements in "evaluating [his] credibility" and "whether [his] testimony in court is believable" (id. at 3321-22). The jury apparently nonetheless credited Foust by finding

Petitioner and the others guilty.

Accordingly, habeas relief is not warranted on Petitioner's challenge to the coconspirator-guilt instruction.

**II. Petitioner Is Not Entitled to Habeas Relief on His Chiu Claim**

Petitioner claims that the trial court erroneously instructed the jury on several "theories of vicarious liability" for first-degree murder that did not require it to find that he had the requisite state of mind to commit the crime.[8] (FAP at 14; see id. at 13-18.) In his Traverse, he supplements the claim with an argument that Chiu, 59 Cal. 4th at 167, decided after his conviction, established that one of those theories – aider-and-abettor liability for the natural and probable consequences of the aggravated assault of Ramirez – was improper and that the error was not harmless.[9] (See Traverse at 23-25); see also California v. Roy, 519 U.S. 2, 4-6 (1996) (per curiam) (Brecht's harmless-error standard applies to instructional-error claims alleging omission of element of crime).

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[8] Petitioner acknowledges that the jury was correctly instructed on felony murder and a coconspirator's liability for murder when that crime is the object of the conspiracy. (FAP at 14.)

[9] Two years before Chiu, the court of appeal denied Petitioner's claim because "the evidence establishe[d] that the greater offense of first degree murder was a reasonably foreseeable consequence of the assault." (Lodged Doc. 7 at 18.) Under Chiu, that assessment of the evidence can no longer support a first-degree-murder conviction and would warrant federal habeas relief under Reyes v. Montgomery, 759 F. App'x 575, 579 (9th Cir. 2018) (reversing denial of habeas relief on Chiu claim of instructional error) and Reyes v. Madden, 780 F. App'x 436, 437 (9th Cir. 2019), if not harmless.

The court of appeal denied Petitioner's habeas petition raising his Chiu claim, holding that the "trial court's error in instructing the jury on the natural and probable consequences theory of aider and abettor liability for first degree murder was harmless beyond a reasonable doubt." (Dec. 13, 2016 Notice of Lodging, Attach. 1, ECF No. 67-1.) Therefore, to obtain habeas relief, he must establish that the court of appeal's harmlessness finding was an unreasonable application of clearly established federal law by showing that the instructional error had a "substantial and injurious effect or influence" on the jury's verdicts. Davis, 135 S. Ct. at 2198 (citation omitted). He has not done so for the reasons discussed below.

A. Applicable Law

The natural-and-probable-consequences doctrine provides that someone who aids and abets a "target offense" may be guilty of a nontarget offense if the latter, "judged objectively," "was reasonably foreseeable" as a consequence of the former. Chiu, 59 Cal. 4th at 161. In Chiu, the California Supreme Court held that an aider and abettor may not be convicted of first-degree murder on a natural-and-probable-consequences theory. See id. at 167. Chiu's rationale was extended to conspiracy instructions in People v. Rivera, 234 Cal. App. 4th 1350, 1356-57 (2015), which held that it was error to instruct a jury that a member of an uncharged conspiracy could be convicted of first-degree murder if the murder was a natural and probable consequence of the target crime. Walker v. Pfeiffer, No. EDCV 17-01931-DMG (JDE), 2019 WL 2902708, at *12 (C.D. Cal. Mar. 25, 2019) (holding that under Rivera, 234 Cal. App. 4th at 1356-57, "Chiu also applies to

murder based upon an uncharged conspiracy"), accepted by 2019 WL 7194557 (C.D. Cal. Dec. 26, 2019), appeal filed, No. 20-55132 (9th Cir. Feb. 6, 2020).

But Chiu expressly stated that "[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles," see 59 Cal. 4th at 166, and its holding also "d[id] not affect or limit an aider and abettor's liability for first degree felony murder," id. A defendant may be convicted of first-degree murder "based on direct aiding and abetting principles" when the prosecution "show[s] that [he] aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission." Id. at 166-67.[10]

As to felony murder, at the time of Petitioner's offense, murder "committed in the perpetration of, or attempt to perpetrate . . . kidnapping . . . is murder of the first degree." See Cal. Penal Code § 189 (effective Sept. 17, 2002, to Dec. 31, 2011).[11] Under then California law, a defendant could be guilty

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[10] To the extent Petitioner contends that instructing that a defendant may be guilty of first-degree murder if he directly aided and abetted that crime is improper (see FAP at 14-15), Chiu expressly rejected that argument. This Court is bound by Chiu's resolution of that question of state law. See Bradshaw, 546 U.S. at 76.

[11] Section 189 was amended effective January 1, 2019, to restrict the circumstances under which a coparticipant in an underlying offense may be guilty of murder on a felony-murder or natural-and-probable-consequences theory; another new statutory provision allows sentencing courts to grant retroactive relief to defendants convicted of murder who do not meet the revised criteria. See Cal. Penal Code §§ 189(e), 1170.95 (eff. Jan. 1,

of felony murder when the underlying felony was a "natural, reasonable, or probable result of [his] knowing and intentional acts," even if the killing itself was not a natural or probable consequence of the felony. People v. Anderson, 233 Cal. App. 3d 1646, 1655 (1991). Chiu evidently did not disturb that holding. See Chiu, 59 Cal. 4th at 166.

When a set of instructions allows a jury to convict a defendant under multiple theories of guilt, one or more of which is invalid, the resulting error is of constitutional magnitude. See Pulido, 555 U.S. at 58. In order to merit habeas relief, the petitioner must show that the error had a "substantial and injurious effect" in "determining the jury's verdict." Brecht, 507 U.S. at 638 (citation omitted). An error is not harmless if a reviewing court is left in "grave doubt" about its likely effect on the jury's verdict. O'Neal v. McAninch, 513 U.S. 432, 436 (1995). In other words, to uphold the conviction, the court must be "reasonably certain" that the jury convicted the petitioner "based on [a] valid theory." Riley v. McDaniel, 786 F.3d 719, 726 (9th Cir. 2015) (citation omitted); see also id. at 726-27 (reversing denial of writ because Nevada's jury instructions had improperly conflated elements of premeditation and deliberation and evidence left doubt whether conviction rested on alternative, valid felony-murder theory).

In Reyes v. Montgomery, the Ninth Circuit addressed a Chiu claim on federal habeas review. See 759 F. App'x 575, 577-79

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2019). Any such argument must first be presented to the state courts, which Petitioner has not done.

(9th Cir. 2018). The petitioner, a codefendant, and another man had participated in the shooting death of a rival gang member, and although the petitioner admitted to providing his coparticipants with the murder weapon, the evidence conflicted as to whether he was the shooter or was even present when the shooting happened. See id. at 576. The trial court, pre-Chiu, instructed the jury on three theories of guilt for first-degree murder: (1) petitioner committed a "willful, deliberate, and premeditated murder"; (2) he "directly aided and abetted a perpetrator in the killing"; and (3) he aided and abetted an assault with a firearm and the murder was a "'natural and probable consequence' of the assault." Id. "During three days of deliberations, the jury made several requests to review specific evidence and for clarification of the instructions." Id. It ultimately found the petitioner guilty of first-degree murder but was divided as to a personal-firearm-use allegation. Id. The petitioner filed a federal habeas petition challenging his murder conviction based on Chiu, which the district court denied. Id. The Ninth Circuit reversed, citing Pulido, 555 U.S. at 58, as the "clearly established Supreme Court precedent" demonstrating that Chiu errors could warrant habeas relief. Reyes, 759 F. App'x at 577-78; see also Reyes v. Madden, 780 F. App'x 436, 437 (9th Cir. 2019) (holding habeas relief warranted under Chiu when it was "undisputed that the trial judge erred by instructing the jury on the natural and probable consequences theory of first-degree murder, which did not require the jury to find that petitioner intended to kill").

It found the Chiu error not harmless because there were

"several reasons for grave doubt that the jury relied on a valid theory of liability." Reyes, 759 F. App'x at 578. "First, the trial court had directed the jury to the unconstitutional [natural-and-probable-consequences] instruction during deliberations." Id. The prosecution had also repeatedly informed the jury that the petitioner "could" or "would . . . have to" be found guilty of first-degree murder "under the natural and probable consequences theory" even if it believed his defense and found that he was not present at the shooting. Id. The jury "repeatedly requested review of the evidence that supported [the petitioner's] defense." Id. Further, the jury's "lengthy deliberations" suggested that "it did not find the case straightforward." Id. (citation omitted); see also United States v. Velarde-Gomez, 269 F.3d 1023, 1036 (9th Cir. 2001) (en banc) (longer deliberations weigh against finding of harmless error because they "suggest a difficult case" (citation omitted)). Finally, the district court had incorrectly assumed that "even under the natural and probable consequences theory . . . the jury was required to find that [the petitioner] was a shooter"; in fact, simply aiding and abetting an assault with a firearm would have been sufficient, the prosecution had argued as much, and the jury had not been unanimous on the personal-firearm-use allegation. Reyes, 759 F. App'x at 579.

Those factors together, the court concluded, showed "grave doubt" as to whether the jury had relied on a valid theory, and it remanded the case for retrial on the first-degree-murder charge or resentencing for second-degree murder. Id. & n.6; see also Reyes, 780 F. App'x at 440 ("jury's extensive five-day

deliberations and note indicating confusion regarding petitioner's intent" supported finding that Chiu error was not harmless).[12]

B. Factual Background

1. Jury instructions

Counsel discussed the proposed natural-and-probable-consequences jury instruction, in the context of both aider-and-abetter and coconspirator guilt, and other instructions at length. (See Suppl. Lodged Doc. 2, 13 Rep.'s Tr. at 3006-18, 3133-57.)

The jury was ultimately instructed with a version of CALCRIM 403, which provided, in relevant part, as follows:

> To prove that a defendant is guilty of murder, the People must prove that:
>
> One, a defendant is guilty of assault with a deadly weapon and/or assault by force likely to produce great

---

[12] Neither Reyes decision is published, and they therefore are not binding precedent. And the Chiu holding is not clearly established Supreme Court authority. As district courts in California have noted in the tolling context, "Chiu was a state supreme court decision that analyzed California state law," not a U.S. Supreme Court decision recognizing a new constitutional right. Escalante v. Beard, No. 3:15-cv-02514-JAH-NLS, 2016 WL 4742322, at *4 (S.D. Cal. June 2, 2016) (discussing applicability of § 2244(d)(1)(C)), accepted by 2016 WL 4729579 (S.D. Cal. Sept. 12, 2016). Although California has made Chiu retroactively applicable to cases on collateral review, see Martinez, 3 Cal. 5th at 1222, that has no bearing on whether any clearly established law barred Petitioner's murder conviction on a natural-and-probable-consequences theory at the time of his crimes, see § 2254(d)(1); see, e.g., Perry v. McCaughtry, 308 F.3d 682, 685-86 (7th Cir. 2002) (finding no constitutional problem with Wisconsin law allowing defendant to be convicted of first-degree murder if it was natural and probable consequence of some other offense).

bodily injury;

Two, during the commission of assault with a deadly weapon and/or assault by force likely to produce great bodily injury, a coparticipant in those crimes committed the crime of murder;

AND

Three, under all of the circumstances, a reasonable person in a defendant's position would have known that the commission of murder was a natural and probable consequence of the commission of assault with a deadly weapon and/or assault by force likely to produce great bodily injury.

(Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3330-31; see Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 340-41.) As discussed above, the coconspirators'-acts instruction contained a corresponding discussion of the natural-and-probable-consequences doctrine as it applied to a coconspirator's acts in furtherance of the conspiracy. (See Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3338-39; Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 343-44.)

The jury was also instructed on direct aiding-and-abetting guilt (see Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3329-30; Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 339-40), conspiracy (see Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3334-35; Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 342-43), and felony murder with kidnapping as the underlying felony (see Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3341, 3344-47; Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 347-49), among other instructions.

CALCRIM 540A is labeled, "Felony Murder: First Degree -

Defendant Allegedly Committed Fatal Act," and the version read to Petitioner's jury provided in relevant part as follows:

> To prove that a defendant is guilty of first degree murder under this theory, the People must prove that:
>
> One, a defendant committed kidnapping;
>
> Two, a defendant intended to commit kidnapping;
>
> AND
>
> Three, while committing kidnapping, a defendant caused the death of another person.
>
> A person may be guilty of felony murder even if the killing was intentional, accidental, or negligent.
>
> To decide whether a defendant committed kidnapping, please refer to the separate instructions that I will give you on that crime. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

(Suppl Lodged Doc. 2, 14 Rep.'s Tr. at 3344; see also Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 347.)

The jury was also charged with CALCRIM 540B, labeled "Felony Murder: First Degree – Coparticipant Allegedly Committed Fatal Act," which provided that a defendant is guilty of first-degree murder under a felony-murder theory if he "aided and abetted[] or was a member of a conspiracy to commit kidnapping"; intended to commit or aid and abet kidnapping; another perpetrator "committed kidnapping"; that perpetrator "did an act that caused the death of another person"; and "there was a logical connection between the act causing the death and the kidnapping." (Suppl. Lodged

Doc. 2, 14 Rep.'s Tr. at 3345-46; see Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 347-48.) Although the prosecution and counsel for all three defendants extensively debated the proper wording for the instructions on natural and probable consequences and conspiracy, defense counsel raised no objection to CALCRIM 540A or 540B. (See generally Suppl. Lodged Doc. 2, 13 Rep.'s Tr. at 3012-13, 3133-67, 14 Rep.'s Tr. at 3303-05.)

2. Closing argument

In her closing argument, the prosecutor argued that "all of the evidence" established that Petitioner — who had set events in motion after discovering that his tires had been slashed and his property stolen; stated his intent to kill Ramirez; tied, gagged, and beat Ramirez in Bernardino's house; forced Ramirez into the trunk of his own car, which he then drove to a remote area; and shot him multiple times with a gun he had stolen in an earlier burglary (Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3375, 3378, 3380-81) — "committ[ed] a willful, deliberate and premeditated murder" and was "aid[ed] and abett[ed]" by Esparza and Bernardino (id. at 3402; see id. at 3378 (arguing that Esparza and Bernardino "help[e]d aid and abet" Petitioner)).

Next, she argued that Petitioner, Reyes, Esparza, and Bernardino had participated in an uncharged conspiracy to commit murder, with the beating as one of the required overt acts in support. (See id. at 3383-85.)

She then discussed felony murder at length, using kidnapping as the underlying felony and discussing how Petitioner and the others, who "all participated in th[e] kidnapping," could be guilty of first-degree murder under that theory. (See id. at

3385-91.)

Finally, she briefly noted that the jury could find defendants guilty on a natural-and-probable-consequences theory if it found that Ramirez's assailants in the garage "could reasonably [have] expect[ed]" or "know[n]" that the assault would "end up with the murder of Nick Ramirez." (Id. at 3392; see also generally id. at 3391-93.) She did not explicitly discuss Petitioner's guilt under that theory and acknowledged that the natural-and-probable-consequences theory "applies most fittingly to Claudio Bernardino." (Id. at 3397.)

3. Deliberations and verdict

The jury began deliberating around 10:30 a.m. on January 21, 2011. (See Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 369, 375.) At 1:35 p.m. that day, shortly after returning from a 90-minute lunch break, the foreperson "buzze[d]" to indicate that the jurors had a question. (Id. at 375.) The foreperson submitted an inquiry requesting "clarification" on CALCRIM 540B, asking, "if a defendant did not personally commit kidnapping[] . . . [] then what did he/she do?" (Id. at 370.) Counsel were called and conferred with the court about how to respond. (See Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3632-36.) As a result of that conference, over objections by some defense counsel, the court instructed that "it is up to the jury to determine what a defendant did . . . or did not do" and that instruction 540B "applies to . . . aiders and abettors and or conspirators." (Id. at 3635-36; see also Suppl. Lodged Doc. 1, 2 Clerk's Tr. at

375.)[13] The record does not disclose exactly when the court gave the jury its written clarification, but it was evidently shortly after the conference with counsel. (See Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 375-76.)

At about 3 p.m., the jury "buzze[d]" to indicate that it had reached a verdict. (Id. at 376.) By 3:07 p.m., all counsel, defendants, and the jury were present for the reading of the verdicts. (Id. at 387.) The jury found Petitioner and his codefendants guilty of first-degree murder under section 189 and kidnapping under section 207(a). (See id. at 377-78, 381-82, 385-86.)

C. Analysis

This Court defers to the court of appeal's finding that the trial court erred by instructing the jury on the natural-and-probable-consequences theory as to first-degree murder. (See Dec. 13, 2016 Notice of Lodging, Attach. 1, ECF No. 67-1); Bradshaw, 546 U.S. at 76. Any error was harmless, however, as the court of appeal found (see Dec. 13, 2016 Notice of Lodging, Attach. 1, ECF No. 67-1), because the record leaves little doubt that the jury did not convict Petitioner on a theory that the murder was a natural and probable consequence of an aggravated assault; rather, it convicted him as the direct perpetrator of Ramirez's premeditated murder or on a felony-murder theory based on Ramirez's kidnapping.

To start, Petitioner's kidnapping conviction precludes him

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[13] The record evidently does not contain the court's written clarification to the jury.

from showing reversible error, as the jury could not have reasonably found him guilty of kidnapping without also finding him guilty of first-degree murder. To convict a defendant of felony murder in California at the time of Petitioner's trial, the prosecution had to show that the defendant intended to commit the underlying felony and that the murder occurred during the felony, in this case kidnapping. See Duncan v. Ornoski, 528 F.3d 1222, 1233 (9th Cir. 2008). Here, Petitioner has not challenged the court's felony-murder instructions or his kidnapping conviction, and it is undisputed that Ramirez's murder was committed "in the perpetration of, or attempt to perpetrate" that kidnapping. § 189(a). And although Petitioner, referencing ground one, argues that the jury instruction on guilt for coconspirator acts as to kidnapping violated due process (Traverse at 24), as discussed above the prosecutor did not rely on a natural-and-probable-consequences theory to establish kidnapping. Further, Foust's testimony, which the jury apparently credited, established Petitioner's central role in the kidnapping.

Nor is there any merit to Petitioner's claim that the court of appeal erroneously deemed Foust "credible and reliable" to find that there was no instructional error. (FAP at 13; see id. at 16-18; Traverse at 25.) The jury's finding of guilt reflects that it credited Foust's testimony, which contrary to his suggestion otherwise was corroborated by other evidence, as the court of appeal found. (See Lodged Doc. 7 at 24; see supra sec. I.D.) Not only was Petitioner plainly guilty of first-degree murder under a felony-murder theory, but that was the theory of

guilt the prosecutor devoted the most time to. (See Suppl. Lodged Doc. 1, 14 Rep.'s Tr. at 3385-91.)[14] Beyond that, she never argued that Petitioner was guilty under a natural-and-probable-consequences theory. To the contrary, she singled out Petitioner as having "committ[ed] a willful, deliberate and premeditated murder," remarking that he was "aid[ed] and abett[ed]" by Esparza and Bernardino. (Id. at 3402.) Indeed, she acknowledged that the natural-and-probable-consequences theory "applies most fittingly to Claudio Bernardino." (Id. at 3397; see id., 13 Rep.'s Tr. at 3162.)

Petitioner's counsel appears to have agreed with that assessment. As noted, he repeatedly observed that the instructions on the natural-and-probable-consequences doctrine did not apply to Petitioner. (See id., 14 Rep.'s Tr. at 3135 (noting that he didn't "see any major consequence" to Petitioner of giving natural-and-probable-consequences instruction), 3152 (remarking, "I don't see the consequences, no pun intended, in regard to natural and probable consequences as it relates to [Petitioner]"); see also id. at 3135 (Esparza's counsel noting that it was "mainly . . . Bernardino's issue").) And he did not object to the court's assessment that natural-and-probable-consequences guilt pertained primarily to Bernardino and that for Petitioner and Esparza the doctrine was "really not a big issue" because "if [the jury] believe[d] the evidence" against them,

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[14] Her discussion of direct aiding and abetting spans roughly the same number of pages in the transcript but includes a three-page recap of the evidence of intent to kill that would apply to all three defendants and all the theories she went on to argue. (See Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3375-83.)

then "we are talking a direct shooting." (Id. at 3162.)

Thus, neither Chiu nor either Reyes case involved the situation here, where the trial court instructed the jury on felony murder and the prosecutor not only favored that theory but essentially told the jury that the natural-and-probable-consequences theory did not apply to Petitioner. Cf. Reyes, 759 F. App'x at 577; Reyes, 780 F. App'x at 437. Moreover, the trial court did not direct the jury's attention to the natural-and-probable-consequences instruction. Cf. Reyes, 759 F. App'x at 577. Rather, the jury itself asked for — and received — clarification on CALCRIM 540B, the instruction on guilt for felony murder as an aider and abettor. (See Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3632-36; Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 370, 375.) And that question, which sought clarification about what it meant "if a defendant did not personally commit kidnapping[]," likely applied to Bernardino, the only defendant who did not travel to the murder scene. The jury found Petitioner guilty of kidnapping and murder within an hour or so of submitting its inquiry, suggesting that it relied on the felony-murder theory, and after just over three total hours of deliberation in a single day. (See Suppl. Lodged Doc. 1, 2 Clerk's Tr. at 375-76, 385-87). The jury thus apparently did not consider the case difficult. Cf. Reyes, 759 F. App'x at 577; Reyes, 780 F. App'x at 437.

Aside from the tremendous evidence showing that the jury relied on a felony-murder theory, there was also compelling evidence to demonstrate that, as the prosecutor argued (see Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3402), Petitioner had the

necessary mental state for first-degree murder all by himself, with no bootstrapping required. After all, the evidence established that Petitioner, after binding and gagging Ramirez at Bernardino's house, forced him into the trunk of his car and drove him to a secluded location, where he fired his gun repeatedly into the trunk. (See supra sec. I.D.) He was also the defendant with the most motive to kill Ramirez, in retaliation for slashing his tires and stealing from him. Petitioner's claim that the prosecutor "did not argue that [Petitioner] or anyone else was the shooter" (Traverse at 23; id. at 24-25) is baseless. The prosecutor expressly stated that Petitioner fired the gun. (See Suppl. Lodged Doc. 2, 14 Rep.'s Tr. at 3378 (arguing that Petitioner drove Ramirez to remote area where he could "leave him . . . after he . . . fired th[e] gun"); id. (arguing that Petitioner positioned his gun above trunk and decided to kill Ramirez "before he finished firing").) Further, other evidence corroborated Foust's testimony that the gun was Petitioner's and that he fired it into the trunk while standing directly above it.

For these reasons, no "grave doubt" exists on whether the jury relied on a valid theory of guilt to convict Petitioner of first-degree murder. Davis, 135 S. Ct. at 2198. Thus, the instructional error was harmless. See Thomas-Weisner v. Sherman, No. LACV 17-349-R (LAL), 2019 WL 2907853, at *12 (C.D. Cal. Apr. 15, 2019) (instruction on invalid theories of first-degree murder harmless when "record firmly establishes Petitioner's liability under a permissible felony murder theory," which prosecutor "favored"), accepted by 2019 WL 2903956 (C.D. Cal. June 28,

2019), appeal filed, No. 19-55866 (9th Cir. July 29, 2019); Romero v. Warden, No. CV 14-488-JFW (AGR), 2017 WL 1197858, at *8 & n.2 (C.D. Cal. Feb. 14, 2017) (denying relief when "record does not indicate that the jury relied on the natural and probable consequences doctrine as distinguished from a theory of direct aiding and abetting" because prosecution argued that petitioner personally stabbed victim and "committed the murder" and that was supported by evidence), accepted by 2017 WL 1197663 (C.D. Cal. Mar. 29, 2017); Nunez v. Bitter, No. CV 12-10800-JVS (PLA)., 2015 WL 3454535, at *1 (C.D. Cal. May 29, 2015) (any error in natural-and-probable-consequences instructions was harmless when prosecutor argued only felony murder and jury convicted petitioner of kidnapping). Accordingly, habeas relief is not warranted.

**RECOMMENDATION**

IT THEREFORE IS RECOMMENDED that the District Judge accept this Report and Recommendation and direct that Judgment be entered denying the FAP and dismissing this action with prejudice.

DATED: May 29, 2020

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

**APPENDIX C**

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES



| | | |
|---|---|---|
| In re Jaime Garcia<br>Petitioner | ) | No. MA037295 |
| vs. | ) | |
| People of the State of California | ) | **DENIAL OF WRIT OF HABEAS CORPUS** |
| Respondent | ) | |

The court has read and considered the Writ of Habeas Corpus received on 7/27/16. The writ is **denied** for failure to state a prima facie case for relief.

The Petitioner requests a reversal based upon instuctional error. The court acknowledges that the trial court instructed the jury that they could find Petitioner guilty of 1st degree murder as an aider and abettor under the natural and probable consequences theory. The court also acknowledges that *People vs. Chiu* (2014) 59 Cal.4th 155 stands for the proposition that:

1) An aider and abettor may not be found guilty of 1st degree murder under a natural and probable consequences theory; and

2) If it is not possible to determine whether the jury relied upon a valid or invalid theory of guilt, a reviewing court must reverse that judgment, unless the reviewing court finds ". . . a basis in the record to find that the verdict was based on a valid ground." (*People v. Chiu*, 59 Cal.4th at 167).

The court finds, beyond a reasonable doubt, that the instructional error did not affect the jury's verdict. The record clearly shows that the People relied on the theory that the Petitioner was the actual shooter, and that the others acted as aiders and abettors.

For example, during closing argument, the Prosecutor stated the following:

*"And Matt Foust sees Jaime Garcia at the trunk with his gun at the trunk. He hears the shots. He looks over. He sees Jaime Garcia in the back seat of the car. He knows that Nick Ramirez has been killed." (R.T. 3365:20-23)*

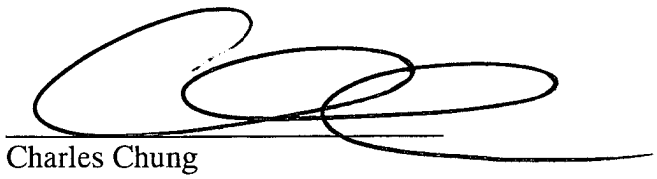
*"And now Jaime Garcia has the gloves on, and they talk about: Oh, wait, wait, wait. We've got to go back. We've got to go get those shell casings from the semi-automatic weapon that were discharged when that gun was fired, because says Jaime Garcia, I loaded those shell casings without gloves." (R.T. 336526-3366:3)*

*"And what does he [Javier Esparza] do with the gun? He gave it to Jaime Garcia. He knows Jaime Garcia's intent." (R.T. 3375:12-14)*

Throughout the Prosecutor's entire closing argument, the Prosecutor repeatedly stressed that the Petitioner was the actual shooter. She argued that the Petitioner stated his intent to kill the victim, and then followed through with the intent by shooting through the trunk and killing the victim.

Thus, the court finds beyond a reasonable doubt that the instructional error did not affect the verdict in this matter.

Dated: 9/7/2016



Charles Chung
Judge of the Superior Court

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 09/07/16

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CASE NO. MA037295

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: JAIME BASILIO GARCIA

---

INFORMATION FILED ON 06/27/08.

COUNT 01: 189 PC FEL
COUNT 02: 207(A) PC FEL

ON 09/07/16 AT 900 AM IN NORTH DISTRICT DEPT A18

CASE CALLED FOR HABEAS CORPUS PETITION

PARTIES: CHARLES A. CHUNG (JUDGE) SHANNON WARD (CLERK)
KATHY THORNTON (REP) NONE (DDA)

DEFENDANT IS NOT PRESENT IN COURT, AND NOT REPRESENTED BY COUNSEL

THE COURT HAS READ AND CONSIDERED THE WRIT OF HABEAS CORPUS RECEIVED ON 7/27/16. THE WRIT IS DENIED FOR FAILURE TO STATE A PRIMA FACIE CASE FOR RELIEF.

.

THE PETITIONER REQUESTS A REVERSAL BASED UPON INSTUCTIONAL ERROR. THE COURT ACKNOWLEDGES THAT THE TRIAL COURT INSTRUCTED

THE JURY THAT THEY COULD FIND PETITIONER GUILTY OF 1ST DEGREE MURDER AS AN AIDER AND ABETTOR UNDER THE NATURAL AND PROBABLE CONSEQUENCES THEORY. THE COURT ALSO ACKNOWLEDGES THAT PEOPLE VS. CHIU (2014) 59 CAL.4TH 155 STANDS FOR THE PROPOSITION THAT:

.

1)AN AIDER AND ABETTOR MAY NOT BE FOUND GUILTY OF 1ST DEGREE MURDER UNDER A NATURAL AND PROBABLE CONSEQUENCES THEORY; AND

.

2)IF IT IS NOT POSSIBLE TO DETERMINE WHETHER THE JURY RELIED UPON A VALID OR INVALID THEORY OF GUILT, A REVIEWING COURT MUST REVERSE THAT JUDGMENT, UNLESS THE REVIEWING COURT FINDS ". . . A BASIS IN THE RECORD TO FIND THAT THE VERDICT WAS BASED ON A VALID GROUND." (PEOPLE V. CHIU, 59 CAL.4TH AT 167).

.

THE COURT FINDS, BEYOND A REASONABLE DOUBT, THAT THE

INSTRUCTIONAL ERROR DID NOT AFFECT THE JURY'S VERDICT. THE RECORD CLEARLY SHOWS THAT THE PEOPLE RELIED ON THE THEORY THAT THE PETITIONER WAS THE ACTUAL SHOOTER, AND THAT THE OTHERS ACTED AS AIDERS AND ABETTORS.

FOR EXAMPLE, DURING CLOSING ARGUMENT, THE PROSECUTOR STATED THE FOLLOWING:

"AND MATT FOUST SEES JAIME GARCIA AT THE TRUNK WITH HIS GUN AT THE TRUNK. HE HEARS THE SHOTS. HE LOOKS OVER. HE SEES JAIME GARCIA IN THE BACK SEAT OF THE CAR. HE KNOWS THAT NICK RAMIREZ HAS BEEN KILLED." (R.T. 3365:20-23)

"AND NOW JAIME GARCIA HAS THE GLOVES ON, AND THEY TALK ABOUT: OH, WAIT, WAIT, WAIT. WE'VE GOT TO GO BACK. WE'VE GOT TO GO GET THOSE SHELL CASINGS FROM THE SEMI-AUTOMATIC WEAPON THAT WERE DISCHARGED WHEN THAT GUN WAS FIRED, BECAUSE SAYS JAIME GARCIA, I LOADED THOSE SHELL CASINGS WITHOUT GLOVES."(R.T. 336526-3366:3)"

"AND WHAT DOES HE [JAVIER ESPARZA] DO WITH THE GUN? HE GAVE IT TO JAIME GARCIA. HE KNOWS JAIME GARCIA'S INTENT." (R.T. 3375:12-14)

THROUGHOUT THE PROSECUTOR'S ENTIRE CLOSING ARGUMENT, THE PROSECUTOR REPEATEDLY STRESSED THAT THE PETITIONER WAS THE ACTUAL SHOOTER. SHE ARGUED THAT THE PETITIONER STATED HIS INTENT TO KILL THE VICTIM, AND THEN FOLLOWED THROUGH WITH THE INTENT BY SHOOTING THROUGH THE TRUNK AND KILLING THE VICTIM.

THUS, THE COURT FINDS BEYOND A REASONABLE DOUBT THAT THE INSTRUCTIONAL ERROR DID NOT AFFECT THE VERDICT IN THIS MATTER.

A COPY OF THE COURT'S RULING AND THIS MINUTE ORDER ARE SENT VIA UNITED STATES MAIL, ADDRESSED AS FOLLOWS:

VERNA WEFALD, ATTY AT LAW
65 NORTH RAYMOND AVENUE, #320
PASADENA, CA 91103

A COPY OF THE COURT'S RULING AND MINUTE ORDER IS SENT VIA INTEROFFICE MAIL, ADDRESSED AS FOLLOWS:

LOS ANGELES COUNT DISTRICT ATTORNEY
42011 4TH STREET WEST
LANCASTER, CA 93534

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE



In re JAIME GARCIA

on

Habeas Corpus.

B278777

(Super. Ct. No. MA037295)

(Charles Chung, Judge)

**ORDER**

THE COURT:

The court has read and considered the petition for writ of habeas corpus filed November 4, 2016. The petition is denied. The trial court's error in instructing the jury on the natural and probable consequences theory of aider and abettor liability for first degree murder was harmless beyond a reasonable doubt. (*People v. Chiu* (2014) 59 Cal.4th 155, 167.)

KRIEGLER, P.J. BAKER, J. KIN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Court of Appeal, Second Appellate District, Division Five - No. B278777

**S238945**

# IN THE SUPREME COURT OF CALIFORNIA



**En Banc**



In re JAIME GARCIA on Habeas Corpus.



The petition for review is granted. Further action in this matter is deferred pending consideration and disposition of a related issue in *In re Martinez on Habeas Corpus*, S226596 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court.

Cantil-Sakauye
*Chief Justice*

Werdegar
*Associate Justice*

Chin
*Associate Justice*

Corrigan
*Associate Justice*

Liu
*Associate Justice*

Cuéllar
*Associate Justice*

Kruger
*Associate Justice*

Court of Appeal, Second Appellate District, Division Five - No. B278777

**S238945**

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

---

In re JAIME GARCIA on Habeas Corpus.

---

Review in the above-captioned matter, which was granted and held for *In Re Martinez* (2017) 3 Cal.5th 1216, is hereby dismissed. (Cal. Rules of Court, rule 8.528(b)(1).)

Cantil-Sakauye
*Chief Justice*

Chin
*Associate Justice*

Corrigan
*Associate Justice*

Liu
*Associate Justice*

Cuéllar
*Associate Justice*

Kruger
*Associate Justice*

_____
*Associate Justice*

**APPENDIX D**

Filed 8/17/12 P. v. Garcia CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JAIME BASILIO GARCIA et al.,<br><br>Defendants and Appellants. | B231949<br><br>(Los Angeles County<br>Super. Ct. No. MA037295) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa M. Chung, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant Jaime Garcia.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant Javier Esparza.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant Claudio Bernardino.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Marc A. Kohm and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Jaime Garcia, Javier Esparza and Claudio Bernardino were convicted, following a jury trial, of one count of first degree murder in violation of Penal Code section 187, subdivision (a) and one count of kidnapping in violation of section 207, subdivision (a).[1] The jury found true the allegations that a principal was armed with a firearm during the commission of the murder within the meaning of section 12022, subdivision (a)(1). The trial court sentenced each appellant to a term of 26 years to life in state prison, consisting of 25 years to life for the murder plus a one-year enhancement term for the section 12022 allegation. The count stayed sentence on count 2 pursuant to section 654.

Appellants appeal from the judgment of conviction. Bernardino and Esparza contend that the trial court erred in denying appellants' *Wheeler/Batson* motions. Bernardino and Garcia contend that the trial court erred in instructing the jury on aider and abettor liability. Garcia contends the trial court also erred in instructing the jury on culpability under the law of conspiracy. Bernardino and Esparza contend that the trial court erred in failing to instruct the jury that witness Matthew Foust was an accomplice as a matter of law. Esparza also contends that the trial court erred in failing to instruct the jury that the prosecution had the burden of proving accomplice corroboration beyond a reasonable doubt, that duress is not a defense to accomplice aider and abettor liability and that the jury was required to acquit Esparza if it found that Foust was an accomplice. He further contends that cumulative error on the accomplice instructions requires reversal. Bernardino contends that the trial court erred in admitting crime scene photos of the victim. Each appellant joins in the other appellants' contention to the extent applicable. We affirm the judgment of conviction.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Facts

The body of Nicholas Ramirez was found in the trunk of his own car by police on September 18, 2006. The car was located in a desert field. Ramirez had been shot nine times. Ramirez had last been seen by his family on September 16, 2006.

Some physical evidence connected appellants to the murder of Ramirez, but most of the evidence against them came from the testimony of Matthew Foust.

Foust testified that on September 16, 2006, about 2:00 a.m., he arrived at appellant Jaime Garcia's house in Littlerock, California. Foust had driven from his home in Arizona to purchase a set of car rims from Garcia. When Foust arrived, a party was going on in the garage, but Foust went in the house and slept.

That morning, about 6:00 or 7:00 a.m., Foust drove Garcia to Garcia's girlfriend's house, where they picked up the rims. When they returned to Garcia's house, Garcia noticed that the tires on his car were slashed and his speakers were missing. Garcia was noticeably upset. Appellant Javier Esparza, who is Garcia's brother, speculated that it "could have been them guys from last night."

The party the previous night had been a birthday party for Garcia's close friend, Jesse Ramirez. Jesse's brother Nicholas Ramirez, the victim in this case, was at the party. Appellants Esparza and Bernardino were also at the party.

At some point during the party, Jesse got into a fight with Esparza. Jesse left the party about 7:00 or 8:00 a.m., with Martin Guzman, who was living with Garcia at the time. According to Jesse, Guzman took a suitcase and clothes that belonged to Garcia, and slashed the tires of Garcia's car. The two men then took a train to Los Angeles.

After Esparza's comment, Garcia went into the house and got his gun. He then told Foust, "You are going to take us to go find this guy." Foust was scared and did what he was told. He drove Garcia and Esparza to Cesar Reyes's house. Reyes was standing outside, waiting for them. Foust then drove to Ramirez's house.

As Foust and his passengers arrived at the Ramirez house, Nicholas had just finished washing his car and was leaving in that car. According to Ramirez's brother,

David, and sister, Yvonne, this occurred around 10:30 a.m. Yvonne saw Foust's car. Ramirez did not stop. Both Garcia and Esparza told Foust to follow Ramirez.

Foust followed Ramirez to a gas station and pulled in right behind Ramirez's car. Garcia and Reyes got out of the car, approached Ramirez and, after the three men talked, Ramirez returned to his car accompanied by Garcia and Reyes. Garcia entered the front passenger seat and Reyes returned to Foust's car and told him to follow Ramirez's car.

Foust followed Ramirez to appellant Bernardino's house. Foust initially told police that the others went inside the house, but he stayed outside and talked with his girlfriend on his phone. He never went inside. At trial, he denied making those statements. He testified that he went inside with the others.

Inside the house, both Garcia and Reyes asked Ramirez, "Where is my stuff?" or "Where is my stereo?" Reyes hit Ramirez in the face, knocking him to the ground. Reyes began kicking Ramirez. Garcia continued to ask, "Where is my stuff?" Ramirez replied he did not have it and did not know where it was. Bernardino told Garcia to stop because Ramirez was bleeding on his carpet. Bernardino directed Esparza to take Ramirez to the garage. Reyes forced Ramirez into the garage and everyone followed. Garcia ordered Foust to go to the garage.

In the garage, Garcia bound and tied Ramirez to a chair. Ramirez continued to deny he had Garcia's stolen items or that he knew where they were. Esparza now had Garcia's gun and sat down in front of Ramirez while both Garcia and Reyes threatened to kill him if he did not disclose the location of Garcia's items, as well as Reyes's stereo. Eventually, Ramirez said, "I want to die. Just take my life." Garcia then inserted a gag into Ramirez's mouth, Reyes used a pipe to strike Ramirez several times on his head and upper body, and Garcia hit Ramirez several times. For their part, Esparza and Bernardino kicked Ramirez. At some point, Reyes asked Garcia if Foust was "cool." Garcia told Reyes, "Yeah. It's okay," which increased Foust's fear.

Ramirez was walked out of the garage. Garcia ordered him into the trunk of his own car. After Garcia closed the trunk lid, he told Esparza and Reyes to follow him. Esparza and Reyes told Foust, "We're taking your car to follow" Garcia. Esparza sat in

the back seat and Reyes sat in the front passenger seat as Foust drove, following Garcia. Having seen what the men had just done to Ramirez and recognizing that Reyes by himself could have beaten him in a fight, Foust was even more afraid.

After about 5 to 10 minutes of driving, Reyes told Foust to stop the car. When he did so, Reyes got out of the car and ran away. Esparza ordered Foust to continue following Garcia. Foust did as he was told. After Garcia pulled off onto the shoulder near some shrubs, Foust continued on past Ramirez's car for about 100 feet and stopped his car when Esparza told him to stop. Esparza got out of the car and walked towards Ramirez's car while Foust remained inside his car. Foust realized he had an opportunity to leave, but he stayed because he was aware that these men knew where his sister lived and that they were perfectly capable of finding him.

When Foust looked back, he saw Garcia standing over the trunk with the same handgun which he brought with him, the same one Esparza had been holding in the garage. Foust looked away. He then heard at least four to five gunshots. When Foust looked back, he saw Garcia in the back seat area of Ramirez's car and Esparza standing near the driver's door. As Garcia and Esparza entered Foust's car, they both told Foust "Go."

Garcia gave Foust directions to the house where they had earlier picked up Reyes. There, all three went into the house. Garcia and Esparza changed their clothes and shoes, and Foust drove them back to Garcia's house. Garcia and Esparza both told Foust they were going to Arizona with him. Out of fear, Foust drove Garcia and Esparza to Arizona. Garcia and Esparza stayed with Foust for a day or two before leaving on different buses. Before Garcia left, he told Foust "we're going to come and get you" if Foust told anybody what had happened.

Bernardino fled to Mexico. He was eventually arrested by the FBI and brought to California.

On September 18, 2006, the police responded to a call about a suspicious vehicle in a desert field. The vehicle was Ramirez's car with his body in the trunk. Ramirez was bound at the wrists with cords, and gagged with a cloth and masking tape. There were

nine bullet holes in the top of the trunk, and the prosecution expert opined that Ramirez had been shot when the trunk lid was closed. Ramirez had suffered nine gunshot wounds. The bullet pattern on the trunk lid and Ramirez's position inside the trunk were consistent with the shooter firing straight down into the trunk, firing three shots at Ramirez's head and six shots over Ramirez's torso.

Ramirez was shot with James Wilson's .40-caliber Smith & Wesson semi-automatic handgun, which was stolen during a September 2005 burglary of Wilson's Littlerock residence.[2] Blood splatter matched to Garcia was found on the wall of the Wilson residence immediately after the burglary, leading to the conclusion that Garcia was the burglar.

Ramirez's car was tested for fingerprints and five fingerprints were obtained from the right trunk lid on the left edge. Two of those prints matched Bernardino's fingerprints, specifically his right ring finger and his right little finger.

Blood stains found on the entry way carpet of Bernardino's house were consistent with Ramirez's blood. Blood stains consistent with Ramirez's blood were also found in the garage.

The exterior and interior passenger side door handles of Ramirez's two-door car were swabbed for DNA evidence. DNA samples were taken from underneath the door handles where someone would grab them to open the door and on the edge. None of the DNA samples taken from Ramirez's car matched Ramirez. Based on two of the swabs taken from the driver's side door, there was enough for a partial profile. However, there was insufficient genetic information for a complete profile as to either. One of the swabs had a mixture of the DNA. The other swab contained DNA contributed by a single source, a male. It was possible to exclude Esparza's brother, Yvan Esparza, and Bernardino as the contributors of the DNA.

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[2] This gun was not recovered after the murder. Matching was possible because Wilson had kept spent casings from rounds fired by the gun.

A partial profile was also taken from passenger side interior and exterior door handles. It was a partial profile because there was a single locus where there was no genetic information. Genetic information was obtained from the rest of the sample, and it was a near complete profile. The genetic profile was consistent with having been contributed by Esparza. By contrast, Ramirez, Garcia, Yvan Esparza, Bernardino were all excluded from that profile. The frequency of occurrence of that genetic profile was one in 831 trillion. The sample was not classified as a "match" to Esparza's profile due to the missing information as to the single locus.

A partial DNA profile obtained from the gag found in Ramirez's mouth was consistent with a mixture of at least two people. There was not enough genetic information to include or exclude Esparza. However, it was possible to exclude Ramirez, Garcia, Yvan Esparza, and Bernardino.

A pair of Nike shoes were obtained from Esparza in late February 2007. Based on a presumptive blood test, the right shoe sole, close to the bottom of the sole, tested positively for blood. However, no DNA was found on the sole of the shoe, and DNA found on the side of the sole was insufficient for reliable testing.

Appellants presented no evidence on their behalf.

## Discussion

1. *Wheeler/Batson* motions

Bernardino and Esparza contend that the trial court erred in denying their motions for mistrial pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79, made on the ground that the prosecutor had improperly excluded two African-American jurors on the basis of their race. Garcia joins this contention. The court found that appellants had not made a prima facie case. Appellants contend that the prosecutor's use of peremptory challenges to exclude these two members from the jury panel without race-neutral justifications, was discriminatory and violated their state and federal constitutional rights to a fair trial.

The Sixth and Fourteenth Amendments of the United States Constitution, and Article I, section 16 of the California Constitution guarantee a right to trial by jury to the criminal defendant, including the right to a unanimous verdict rendered by an impartial jury. (*Batson v. Kentucky*, *supra*, 476 U.S. 79; *People v. Wheeler*, *supra*, 22 Cal.3d 258.)

The essential prerequisite to having an impartial jury is that it include as jurors a representative cross-section of the community. (*Taylor v. Louisiana* (1975) 419 U.S. 522, 528.) "[T]he only practical way to achieve overall impartiality [or a heterogeneous jury] is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out." (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 266-267.)

This rule is frustrated when a prosecutor, through the use of peremptory challenges, seeks to systematically exclude an identifiable segment of the community from the jury. (See, e.g., *People v. Motton* (1985) 39 Cal.3d 596; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 258.) Thus, peremptory challenges may not be used to remove prospective jurors solely on the basis of presumed group bias, which has been defined as a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds. (See, e.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 115; see also *People v. Johnson* (1989) 47 Cal.3d 1194, 1215.)

When an objection to a party's use of peremptory challenges is raised under *Batson v. Kentucky*, *supra*, 476 U.S. 79 or *People v. Wheeler*, *supra*, 22 Cal.3d 258, the trial court's first duty is to determine whether a prima facie case has been shown. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97.) If a prima facie case is shown then the burden shifts to the prosecutor to show a racially neutral reason for his use of peremptory challenges. (*Ibid*.) "'A "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]'" (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.)

"'[A] defendant may make out a prima facie case of group bias in jury selection by showing that 'the totality of the relevant facts gives rise to an inference of discriminatory

purpose.'" (*People v. Avila* (2006) 38 Cal.4th 491, 548.) "[A] defendant makes out a prima facie case of group bias when he produces 'evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" (*Ibid*.)

When a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, a reviewing court is required to consider the entire jury selection record. (*People v. Howard* (1992) 1 Cal.4th 1132, 1154; *People v. Sanders* (1990) 51 Cal.3d 471, 498.) This consideration is not solely limited to a review of counsel's presentation at the time of the motion. (*People v. Howard*, *supra*, 1 Cal.4th at p. 1155.)

a. Prospective Juror No. 8

During voir dire, Juror No. 8 stated she was a substitute resource teacher living in Lancaster. Her ex-husband worked as an assembler. She had one son, a minor. Juror No. 8 said she was familiar with the term "snitch" and said she assumed there were reasons people do not want to talk to the police, including being concerned for their personal safety.

When Juror No. 8's husband was a juvenile, he was arrested. According to Juror No. 8: "He had -- they had a trial in Juvenile Court, I guess. I don't know all the incident because I didn't know him then. I do know it was let go. It was against his father. His father and mother were having a domestic dispute, and he stepped in on behalf of his mother. [¶] *When the police came, somebody had to go*. He was one of the people taken because he was involved. Because it was against his mom and involved his father, they let him go." (Italics added.)

After the prosecutor used a peremptory challenge to excuse prospective Juror No. 8, Garcia's counsel made a *Batson* motion. He contended that the juror's answers were "within the bounds." He added that he thought her comments about snitches were favorable to the prosecution. Counsel for Esparza joined the motion and stated this juror was the first Black venire person seated in the jury box. The court disagreed, stating that there had been other Black venire persons. Bernardino's counsel also joined the motion, arguing that they really knew very little about the juror and that "nothing that she said []

would be detrimental at all to the prosecution's case." Counsel also argued that "there is no really valid reason for the prosecution to excuse her."

The trial court found that no prima facie case of racial discrimination had been established. The court reasoned: "There was an incident concerning her husband, domestic violence he suffered as a minor. It is, obviously, a close relationship. [¶] . . . I understand it may not be domestic violence. [¶] The Court finds a race-neutral reason."

The prosecutor asked for and received permission to explain her use of the peremptory challenge. She stated: "It was based on her statement that when she was talking about her husband was arrested as a minor, that someone -- when the police came, someone had to go, indicating that the police felt they had to make an arrest. Her husband was the victim of that decision and ultimately not convicted by the court system. [¶] I feel that shows a bias and a proper nonrace-related reason to excuse." The prosecutor also addressed Esparza's claim that Juror No. 8 was the first and only African-American venire person, pointing out the defense had previously excused an African-American venire person and that there was currently an African-American venire person in the jury box.

We see no error in the trial court's ruling that appellants did not establish a prima facie claim of racial discrimination. The prosecutor had excused only one out of three African-American venire persons.[3] When as here, the voir dire itself presents an obvious race-neutral reason for excusing the venire person in question, the defendant has failed to raise a reasonable inference of discrimination and so has failed to make a prima facie case. (*People v. Avila*, *supra*, 38 Cal.4th at p. 554 [no inference of discrimination where prospective juror's "written answers to the questionnaire and her responses during oral voir dire disclosed a number of 'reasons other than racial bias for *any* prosecutor to challenge her,'"]; *People v. Turner* (1994) 8 Cal.4th 137, 168.)

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[3] The race-based challenge of even one prospective juror is wrong. However, standing alone, the mere fact that one prospective African-American out of three is excused suggests that the motivating factor in the excusal is not race-based.

Here, as the court pointed out, Prospective Juror No. 8 said that her husband had been involved in a domestic violence offense. She also indicated that he was arrested (and apparently prosecuted) simply because "somebody had to go." This answer clearly reflects a mistrust of the police, which would be a race-neutral reason to excuse her. Since this reason was apparent from the voir dire, her excusal did not give rise to an inference of discrimination. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 703 [use of peremptory challenges to exclude prospective jurors whose relatives or family members have had negative experiences with criminal justice system is not unconstitutional] disapproved on other grounds by *People* v. *Doolin* (2009) 45 Cal.4th 390; see also *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125 [prospective juror's view that her son "was harassed by authorities and falsely accused of using drugs" was sufficient race-neutral reason for exercising peremptory challenge]; cf. *People v. Arias* (1996) 13 Cal.4th 92, 137-139 [voir dire responses from which a prosecutor could infer an "apparent distrust of the system" adequate race-neutral reasons].) Appellants have not identified any non-African-American venire person who was similarly situated to prospective Juror No. 8 but who was not challenged by the prosecutor.

Even assuming for the sake of argument that the trial court erred in finding no prima facie case, we would find the error harmless. The prosecutor met her burden of providing a valid race-neutral reason for challenging the juror. The prosecutor explained that she challenged the juror because the juror stated that her husband was a "victim" of a decision by the police and the prosecutor believed that this showed bias. The prosecutor's belief is a reasonable one based on the record. Bias against the police is a valid non-racial reason to excuse a juror.

b. Prospective Juror No. 6

Juror No. 6 was a retired homemaker who lived in Palmdale and had three adult children. When asked what "bringing someone to justice" meant, she stated: "Well, I think just thinking of the phrase what is probably meant by those who are saying it is, it is almost an assumption that the person, the defendant, is already guilty so they are going to

let justice serve or, you know, they are going to be convicted. But I think it is an assumption that they are already guilty. So we're, you know, he's going, too."

In responding to the prosecutor's questions about the single-witness rule, Juror No. 6 stated she was uncomfortable with the rule because "I thought that it is supposed to be based on evidence which is objective and, personally, I feel like it is a totally subjective decision like I believe [the witness] is credible or I don't believe he is credible." She added: "And I know and I -- the law is saying, well, you can do that; you can make a subjective decision. And I am uncomfortable with that."

The prosecutor then explained that testimony is also evidence and "[t]he judge is telling you a person coming in and testifying, a single witness is sufficient to prove that fact" and asked Juror No. 6, "would you be able to do that?" Juror No. 6 responded, "If there was evidence to support what the witness was saying, I couldn't just make a subjective decision that I believe he was telling the truth or not."

After the prosecutor used a peremptory challenge to excuse Juror No. 6, Garcia's counsel made a *Batson* motion. Counsel for Bernardino and Esparza joined. Counsel for Garcia argued that he believed that this was the third African-American juror that the prosecutor had excused. Counsel stated that he believed that Juror No. 4 had been an African-American and been excused by the prosecutor, but noted that the prosecutor had stated that she believed the juror was White. Counsel argued that Juror No. 6 "seemed to agree with all the questions that were asked of her. She agreed with all the concepts. . . . [S]he had a little trouble in regard to the fact that she thought it was too subjective perhaps that rather than being an objective standard. And I think when the court explained that to her, she continued to nod her head and began to understand that although it is subjective, it is an objective look at all the facts."

The court did not make a finding as to Juror No. 4's race. There was no dispute that the juror at issue, Juror No. 6, was African-American. The court found no prima facie case. The court explained: "This particular juror had made mention of evaluating credibility of witnesses that she felt it was a subjective decision and that she was uncomfortable with that. She linked that to the concept that beyond a reasonable doubt it

appeared to be more of an objective decision. [¶] I did do some subsequent questioning, and I don't disagree with defense counsel's observation that she appears to be nodding her head when I talked about a juror's job as judging credibility or believability of witnesses. She also seemed somewhat uncomfortable in her responses on the issue of whether a single witness can prove a fact. She had mentioned that she would need additional evidence to support that."

The prosecutor explained her reasons for using the challenge. She stated: "She did have a very direct opinion that she wanted more than just a single witness. She wanted something else on top of that after having had the law explained to her, and she was firm when she stated that. [¶] She also made the assumption that the phrase 'bring someone to justice,' that she said -- she volunteered that the assumption was that the defendant is guilty. And she was also nodding to [Garcia's counsel's] discussion in his voir dire questions about the Innocence Project and misidentification of African American defendants. She was nodding throughout in response to [counsel's] discussion of that issue. And for all -- and she also said that the word 'justice' to her is finding someone not guilty."

We see no error in the trial court's ruling that appellants did not establish a prima facie claim of racial discrimination. When, as here, the voir dire itself presented an obvious race-neutral reason for excusing the venire person in question, the defendant has failed to raise a reasonable inference of discrimination. (*People v. Avila, supra*, 38 Cal.4th at p. 554 [no inference of discrimination where prospective juror's "written answers to the questionnaire and her responses during oral voir dire disclosed a number of 'reasons other than racial bias for *any* prosecutor to challenge her'"]; *People v. Turner, supra,* 8 Cal.4th at p. 168.)

Here, as the court pointed out, Prospective Juror No. 6 seemed uncomfortable with the idea of judging credibility and also uncomfortable with the rule that a single witness can prove a fact, and wanted more evidence to support a fact. This is an obvious race-neutral reason for excusing a juror. (See *People v. Crittenden, supra*, 9 Cal.4th at p. 116 [denial of *Wheeler* motion upheld where excused prospective juror "had shown

indecisiveness and could not decide whether she would be able to follow the law"].) Indeed, Juror No. 6's indecisiveness arguably provided grounds to excuse her for cause. (See, e.g., *People v. McDermott* (2002) 28 Cal.4th 946, 981; see also *People v. Pride* (1992) 3 Cal.4th 195, 229.)

Even assuming for the sake of argument that the trial court erred in finding no prima facie case, we would find the error harmless. The prosecutor met her burden of providing a valid race-neutral reason for challenging the juror. She explained that she excused the juror because of her statement that she wanted something on top of single witness testimony to prove a fact. As we discuss, *ante*, this is a valid non-racial reason to excuse a juror.

2. CALCRIM No. 400

The trial court instructed the jury with the following version of CALCRIM No. 400: "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator, who directly committed the crime. A person is guilty of a crime whether he committed it personally or aided and abetted the perpetrator."[4]

Bernardino contends that this instruction is erroneous and has been criticized as misleading by Division Two of this Court in *People v. Samaniego* (2009) 172 Cal.App.4th 1148. He further contends that the instruction omitted or misdescribed an element of the offense and so violated his federal constitutional right to a jury trial. Esparza and Garcia join in these contentions.

Respondent contends that appellants have forfeited these claims by failing to object and/or request a modification in the trial court. Appellants respond that there was no forfeiture because a trial court has a sua sponte duty to give correct instructions and erroneous instructions may be reviewed pursuant to section 1259 even in the absence of a

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[4] The second paragraph of that instruction, not relevant here, reads as follows: "Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be guilty of other crimes that occurred during the commission of the first crime."

trial court objection. They also contend that if these claims are forfeited, counsel was ineffective for failing to object and/or request modification.

The version of CALCRIM No. 400 used in this case was the 2010 version, which was modified to delete the "equally guilty of the crime" language that the Court in *Samaniego, supra,* found problematic. Now the instruction reads simply "is guilty of a crime." The 2010 version is a correct statement of the law, and is not misleading.

The trial court also instructed the jury with CALCRIM No. 401, which specifically told the jury that a person "*aids and abets* a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate a perpetrator's commission of that crime." Thus, the instructions as a whole made it clear that appellants could only be convicted as aiders and abettors if they shared the same intent as the perpetrator.[5]

Appellants are correct that the Court in *People v. McCoy* (2001) 25 Cal.4th 1111, held that an aider and abettor may be guilty of a greater crime than the perpetrator, and that the reasoning of *McCoy* also means that an aider and abettor may be guilty of a lesser crime than the perpetrator. However, even assuming that a trial court had a duty to instruct sua sponte on this principle of law, such a duty would only arise where there was evidence that an aider and abettor had a less culpable mental state than the perpetrator. Appellants point to no such evidence here.

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[5] To the extent that appellants contend that the jury's question about aiding and abetting showed that the instructions on aiding and abetting were flawed, we do not agree. The jury question involved the conspiracy instruction on felony murder, specifically, paragraph 3, which provides: "If a defendant did not personally commit Kidnapping, then a perpetrator, whom the defendant was aiding and abetting or with whom a defendant conspired, personally committed Kidnapping." The jury asked: "'If a defendant did not personally commit kidnapping, . . .' then what did he/she do?" If anything, this question suggests that the jury was troubled by the law of conspiracy, which would permit a defendant to be found guilty of a crime on the basis of his membership in a conspiracy, rather than on the defendant's own acts of assistance. It does not show error in the aiding and abetting instructions.

As Bernardino acknowledges, his culpability for murder under a direct aiding and abetting theory is based on his statement: "Don't blast him here. Take him out to the desert." This statement was made after Esparza sat down in front of Ramirez with a gun as Garcia and Reyes threatened to kill Ramirez if he did not reveal the location of the men's property, Ramirez replied that he wanted to die and the men gagged him. After Bernardino made his statement, Garcia untied Ramirez, made him walk to his car and told him to get in the trunk. Ramirez complied. Garcia drove off in Ramirez's car, telling Reyes and Esparza to follow in Foust's car.

Thus, Garcia and Reyes stated their intent to kill Ramirez. Bernardino told them to take Ramirez to the desert. "It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberations and premeditation, which is all that is required. [Citation.]" (*People v. Samaniego, supra*, 172 Cal.App.4th at p. 1166.) Bernardino points to nothing which would contradict that logic in his case. Thus, the trial court had no duty to instruct the jury that Bernardino could be guilty of a lesser degree of murder than the perpetrator.

Similarly, Esparza was aware of Garcia's stated intent to kill and provided assistance. Assuming Garcia was the shooter, Esparza returned the gun to him, and directed Foust to follow Garcia and thereby provide a ride after the killing. As is the case with Bernardino, it would have been virtually impossible for Esparza to have done these things with knowledge of Garcia's intent without at least a brief period of premeditation and deliberation. Esparza points to nothing which makes the impossible possible. Thus, the trial court had no duty to instruct the jury that Esparza could be guilty of a lesser degree of murder than the perpetrator.

Garcia stated his intent to kill Ramirez. Garcia then put Ramirez in the trunk of the car, arranged for Esparza and Reyes to follow in Foust's car, drove to the desert, stopped the car and waited for Esparza to come to the car. Assuming that it was Esparza who did the actual shooting, Garcia's statements and acts show intent, premeditation and deliberation. Thus, the trial court had no duty to instruct the jury that Garcia could be guilty of a lesser degree of murder than the perpetrator.

Further, even if we were to assume that the trial court had a sua sponte duty to instruct on the general principle of varying culpability in all aiding and abetting cases, we would find no prejudice to appellants because there is simply no evidence to suggest that their mental states only rendered them culpable of second degree murder. There is no possibility that appellants would have received a more favorable verdict if such an instruction had been given. For this same reason, appellants' counsels' failure to request such an instruction did not constitute ineffective assistance of counsel. Assuming that appellants' federal constitutional claims were not forfeited, we would find them meritless for the reasons set forth above. (See *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

3. CALCRIM Nos. 403 and 417

Bernardino contends that the trial court erred in instructing the jury that it only had to determine whether "the crime of Murder" was a natural and probable consequence of the target crime or, in the case of conspiracy, the common plan or design of the crime that a defendant conspired to commit. He contends that the court should have instructed the jury that in order to find Bernardino guilty of murder, it had to determine whether first degree murder was a natural and probable consequence of the target crime/conspired crime. Bernardino contends that the erroneous instruction violated his federal constitutional rights to a jury trial and due process. Garcia and Esparza join in these contentions.

Respondent contends that appellants have forfeited these claims by failing to object or request a modification of the instruction in the trial court. Appellants respond that there was no forfeiture because a trial court has a sua sponte duty to give correct instructions and erroneous instructions may be reviewed pursuant to section 1259 even in the absence of a trial court objection. They also contend that if these claims are forfeited, counsel was ineffective for failing to object and/or request modification.

Appellants and respondents agree that the only case discussing the degree of murder under the natural and probable consequences doctrine issue is *People v. Woods*

(1992) 8 Cal.App.4th 1570.[6] We agree as well. We will assume for the sake of argument that *Woods* is applicable.

In *Woods, supra*, the Court of Appeal stated: "If the evidence raises a question whether the offense charged against the aider and abettor is a reasonably foreseeable consequence of the criminal act originally aided and abetted but would support a finding that a necessarily included offense committed by the perpetrator was such a consequence, the trial court has a duty to instruct sua sponte on the necessarily included offense as part of the jury instructions on aider and abettor liability." (*People v. Woods, supra*, 8 Cal.App.4th at p. 1593.) The Court added: "However, the trial court need not instruct on a particular necessarily included offense if the evidence is such that the aider and abettor, if guilty at all, is guilty of something beyond that lesser offense, i.e., if the evidence establishes that a greater offense was a reasonably foreseeable consequence of the criminal act originally contemplated, and no evidence suggests otherwise. [Citations.]" (*Ibid.*)

Here, the evidence establishes that the greater offense of first degree murder was a reasonably foreseeable consequence of the assault and no evidence suggests that second degree murder was. During the assault, Garcia and Reyes stated their intent to kill

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[6] Both appellants and respondent devote a significant portion of their arguments on this issue to discussing cases which involve instructions on attempted murder under the natural and probable consequences doctrine. After completion of briefing in this matter, the California Supreme Court issued its opinion in *People v. Favor* (July 16, 2012, S189317) ___ Cal.4th ___. In *Favor*, the Supreme Court held that a trial court need only instruct the jury to determine whether attempted murder was the natural and probable consequence of the target. The court has no duty to instruct the jury that a premeditated attempt to murder must have been a natural and probable consequence of the target offense. In reaching this conclusion, the Supreme Court made it clear that its analysis rested on the fact that attempted premeditated murder and attempted unpremeditated murder are not divided into degrees and are not separate offenses. Thus, cases discussing attempted murder under the natural and probable consequences doctrine are not useful in this case. We note that in deciding *Favor*, the Supreme Court distinguished *People v. Woods, supra,* on the ground that *Woods* involved murder, where there are different degrees of the offense. Nothing in the Court's discussion of *Woods* suggests any disapproval of that case.

Ramirez unless he told them where their property was. Esparza was holding a gun in plain sight during these statements. Ramirez, who had been badly beaten at that point, stated that he just wanted to die. The men then gagged Ramirez, and thereby ended Ramirez's opportunity to tell them what they wanted to hear. Bernardino then told the men not to "blast" Ramirez there, but to take Ramirez to the desert. Under these facts, at the time of the garage assault, premeditated and deliberate first degree murder was not only foreseeable, it was inevitable. In order for Ramirez's subsequent murder to be second degree murder, the men would have had to abandon their plan to kill Ramirez, then end up killing him anyway without premeditation and deliberation. Such a turn of events was not reasonably foreseeable. Thus, the trial court had no duty to instruct the jury that second degree murder was a foreseeable consequence of the target crimes.

Further, even if we were to assume for the sake of argument that the trial court had a sua sponte duty to instruct on the general principle of the foreseeability of the degrees of murder in all natural and probable consequences cases, we would find no prejudice to appellants because there is simply no evidence to suggest that second degree murder was a foreseeable consequence of the target crimes. There is no possibility that appellants would have received a more favorable verdict if such an instruction had been given. For this same reason, appellants' counsels' failure to request such an instruction did not constitute ineffective assistance of counsel. Assuming that appellants' federal constitutional claims are not forfeited, we would find them meritless for the reasons set forth above. (See *People v. Boyer*, *supra*, 38 Cal.4th at p. 441, fn. 17.)

4. Conspiracy instructions

Garcia contends that CALCRIM No. 417 as given permitted the jury to convict the defendants of kidnapping and murder without finding that a kidnapping or murder occurred. He further contends that the instruction omits an element of the offense and violates his federal constitutional rights to due process and trial by jury. Bernardino and Esparza join in these contentions.

In his opening brief, Garcia acknowledges that he did not object to the instruction in the trial court, but contends that his claim of error is based on the fact that a trial court

has a sua sponte duty to give legally correct instructions. He asks, in the alternative, that we review his claim pursuant to section 1259. Respondent replies that Garcia and his co-appellants have nevertheless forfeited their federal constitutional claims.

Claims that an instruction is misleading or erroneous are reviewed in the context of the instructions as whole to determine whether it is reasonably likely that the jury misconstrued or misapplied the challenged instruction. (*People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on another ground by *People v. Doolin*, *supra*, 45 Cal.4th 390.) We see no reasonable possibility or probability that the jury understood the instruction in the manner suggested by Garcia.

The first half of CALCRIM No. 417 sets forth general principles of liability for coconspirators' acts. The very first sentence of CALCRIM No. 417 tells the jury that "A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy *commits the crime*." (Italics added.) Thus, the instruction clearly requires that the charged crimes have been actually committed and that the perpetrator was a member of the conspiracy. The second sentence of the instruction tells the jury that "a member of a conspiracy is also more criminally responsible for any act of any member of the conspiracy if *that act is done* to further the conspiracy and the act is a natural and probable consequence of the common plan or design of the conspiracy." (Italics added.) Again, the instruction requires that the criminal act for which the conspirator is responsible has actually occurred.

Garcia complains of error in the following portion of the jury instruction, found in the second half of the instruction: "To prove that a defendant is guilty of the crime charged in Counts 1 and 2, the People must prove that: [¶] 1. A defendant conspired to commit one of the following crimes: Kidnap and Murder; [¶] 2. A member of the conspiracy committed Assault with a Deadly Weapon and/or Assault by Force likely to produce great bodily injury to further the conspiracy; [¶] AND [¶] 3. Murder was a natural and probable consequence of the common plan or design of the crime that a defendant conspired to commit."

At worst, this portion of the instruction fails to repeat the requirements already spelled out at the beginning of the instruction. It does not suggest that the jury disregard those requirements. We see no possibility that the jury understood the instruction as a whole as permitting them to convict a defendant of a crime which did not actually occur. Thus, assuming that appellants' federal constitutional claims were not forfeited, they would have no merit for the reasons set forth above. (See *People v. Boyer, supra*, 38 Cal.4th at p. 441, fn. 17.)

5. Accomplice instructions

Section 1111 provides: "A conviction cannot 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."

Esparza makes four arguments of error in connection with the court's instructions about accomplices. He contends that the court erred in failing to instruct the jury that (1) the prosecution had the burden of proving accomplice corroboration beyond a reasonable doubt; (2) duress is not a defense to aider and abettor liability for murder; (3) the jury was required to acquit Esparza if it determined that Foust was an accomplice; and (4) Foust was an accomplice as a matter of law. He further contends that cumulative error requires reversal. Esparza acknowledges that he did not object to the accomplice instructions in the trial court, or request their modification. He requests that we review the instructions pursuant to section 1259. Bernardino also argues that the trial court should have instructed that Foust was an accomplice as a matter of law. Bernardino and Garcia join Esparza's accomplice contentions.

a. Burden of proof

Esparza contends that accomplice corroboration is an element of the substantive charge or an additional fact that adds to a defendant's sentence, and so the prosecution must prove accomplice corroboration by proof beyond a reasonable doubt. He contends that CALCRIM No. 334, which tells the jury that only slight corroboration is required, constitutes a violation of his right to a jury trial and proof beyond a reasonable doubt

under *Apprendi v. New Jersey* (2000) 530 U.S. 466. Bernardino and Garcia join this contention. We do not agree.

"*Apprendi* held that every finding that exposes the defendant to punishment, or increases the punishment possible for a crime, must be submitted to a jury and proved beyond a reasonable doubt." (*People v. Anderson* (2009) 47 Cal.4th 92, 116.)

Accomplice corroboration does not expose a defendant to additional or increased punishment. The punishment for a crime remains the same for a defendant convicted of a crime whether he is convicted by corroborated testimony from an accomplice or by testimony from an eyewitness unconnected to the commission of the crime.

Section 1111, requiring corroboration of accomplice testimony, is not an element of murder or any other crime. (*People v. Frye, supra* 18 Cal.4th at p. 968 ["We are aware of no decision, and defendant cites to none, supporting the proposition that section 1111 establishes an issue bearing on the substantive guilt or innocence of the defendant or otherwise constitutes an element of a criminal offense"] disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th 390.)

Under federal law, "[t]he uncorroborated testimony of an accomplice is sufficient to sustain a conviction unless it is incredible or insubstantial on its face." (*United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282.) Thus, the Constitution does not require corroboration of accomplice testimony. There was no violation of appellants' constitutional rights.

b. Accomplice as a matter of law

Esparza and Bernardino contend that the trial court had a duty to instruct the jury that Foust was an accomplice as a matter of law. Bernardino contends that the trial court's failure to give this instruction violated his federal constitutional rights to due process and a fair trial, and to present a defense. Garcia joins these contentions. We do not agree.

Section 1111 provides: "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."

Whether a witness is an accomplice is a factual question for the jury "unless there is no dispute as to either the facts or the inferences to be drawn therefrom." (*People v. Garrison* (1989) 47 Cal.3d 746, 772; see also *People v. Brown* (2003) 31 Cal.4th 518, 557 ["'a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are "clear and undisputed"'"].)

Here, as the trial court noted in explaining the need to have the jury determine whether Foust was an accomplice, "there are enough ambiguities, there is prior inconsistencies with his prior statements to the detective versus his testimony. Some of them he says are admitted untruths."

The trial court was correct that the issue of whether Foust was an accomplice was a matter for the jury to decide. The jury was free to consider Foust's actions, disbelieve his claims that he was afraid and ignorant of appellants' intent and find that he was an accomplice. The jury was not required to reach that conclusion, however. Foust's claim that he only helped in the kidnapping because he was afraid would, if believed, provide a defense to the kidnapping charge and to felony murder based on that charge. He claimed that he did nothing during the assault, which, if believed, would mean that he did not commit assault and could not be convicted under a natural and probable consequence theory. To the extent Foust contended that any help he rendered in the assault was due to fear, that would also be a defense to assault and he could not be convicted under a natural and probable consequences theory. At one point, Foust contended that he was outside during the assault. He also testified that he did not know what the men were planning in driving the victim to the desert. If believed, these statements could make him not liable for murder under a direct aiding and abetting theory.

Since the facts were in conflict, it was for the jury to decide which facts to believe and thereby decide whether Foust was an accomplice or not. The court did not err in failing to instruct that Foust was an accomplice as a matter of law. There was no violation of appellants' federal constitutional rights.

c. Acquit as matter of law

Esparza contends that there was insufficient corroborating evidence and so the court had a duty to instruct the jury that it was required to acquit him if they found that Foust was an accomplice. Bernardino and Garcia join this contention. We do not agree.

"Circumstantial evidence is sufficient to corroborate the testimony of an accomplice, and slight evidence may be sufficient corroboration." (*In re Gay* (1998) 19 Cal.4th 771, 776.) It is enough that the corroborative evidence tends to connect defendant with the crime in a way that may reasonably satisfy a jury that the accomplice is telling the truth. (*People v. Sanders* (1995) 11 Cal.4th 475, 535.)

There is sufficient corroborating evidence to sustain the verdict. DNA evidence connected Esparza to the murder. Ramirez had just finished washing his car when appellants arrived. Ramirez was found two days later, dead in the trunk of his car, in an isolated area. When the car was examined after the murder, there were very few fingerprints or DNA deposits. Police did obtain DNA from underneath the interior and exterior passenger side door handles of Ramirez's car. This material provided a near complete genetic profile. There was only a single locus where there was no genetic information. Only one person in 841 trillion would have that profile. Esparza's genetic profile was consistent with the genetic profile of the DNA from the car. In addition, blood was found on one of Esparza's shoes, although there was not enough for reliable testing.

This is slight evidence linking Esparza to the commission of the offenses. Esparza speculates that he might have gone on a beer or drug run with Ramirez the night before during the party and left DNA on the car then and Esparza might not have thoroughly cleaned his car the next day. There is no evidence to support this speculation.

Similarly, Bernardino's fingerprints were found on the trunk of Ramirez's newly washed car. Blood stains consistent with Ramirez's blood were found in the entry way of Bernardino's house and in his garage.

This is slight evidence linking Bernardino to the commission of the offenses. Bernardino too speculates that he might have left his fingerprints on the car during a beer

run the night before, and then Esparza missed a spot in cleaning his car the next day. While there was evidence that Bernardino went on a beer run, there is no evidence that he touched the trunk.

There was evidence that Garcia stole a .40 caliber gun from James Wilson, and that this stolen gun was used in the murder. This is slight evidence linking him to the crime. Garcia speculates that he might have gotten rid of the gun before the shooting, and thereby implies that the gun could have been used by someone else. There is no evidence of this.

d. Sua sponte duty

Garcia contends that the trial court had a sua sponte duty to instruct the jury that duress is not a defense to aiding and abetting murder. He further contends that the trial court's failure to give this instruction violated his federal and state constitutional right to a jury trial. Bernardino and Esparza join these contentions. We do not agree.

Appellants are correct that duress is not a defense to first degree murder, or to aiding and abetting first degree murder. (*People v. Anderson* (2002) 28 Cal.4th 767, 770-773; *People v. Vieira* (2005) 35 Cal.4th 264, 290-291.) However, assuming for the sake of argument that a trial court would ever have a duty to give the instruction described by Garcia, it would have such a duty only if the evidence showed a person was seeking to avoid liability for murder by describing duress. That was not the case here.

Duress occurs when a person commits a crime or aids and abets a crime, but does so out of fear arising from threats or menace.[7] Foust did claim to fear that appellants would hurt him (or his family). Foust's claims of fear were coupled with claims that he did not know what appellants were planning to do, or in the case of the assault, that he merely observed the assault and did not help in any way.

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[7] The threat or menace must be accompanied by a direct or implied demand or requires that the actor commit the criminal act. (*People v. Steele* (1988) 206 Cal.App.3d 703, 706.) Here, Foust reported no demands that he commit a criminal act. Appellants' reported demands were simply that Foust drive them around.

When asked why he did not drive away after he got his tire rims, Foust stated that he did not want to drive appellants to find Ramirez, but did so because he was afraid. However, at that point, appellants had not made any threats against Ramirez. Foust described their subsequent contact with Ramirez as an apparently consensual one. Foust eventually pulled up behind Ramirez at a gas station, and Garcia and Reyes got out and walked up to Ramirez. Foust said: "It looked like they were talking to him." Ramirez then got into the driver's seat of his own car and Garcia got into the passenger side. Reyes returned to Foust's car. Foust did not see a gun during this encounter.

Once the group was at Bernardino's house, appellants' intent to at least assault Ramirez became clear. Foust claimed, however, that he simply stood around while the assault occurred, and did not participate in it or assist or encourage it in any way. Thus, even if Foust were in fear during this time, there is no evidence that his fear caused him to commit a criminal act.

After appellants put Ramirez in the trunk of the car, Foust stated that he was scared when told to follow that car. At the same time, Foust also claimed: "I didn't know what was going to go on." He added: "So I didn't – I didn't know what these guys were going to do next."

The issue of fear arose primarily in connection with Foust's explanation for not fleeing from appellants when he got the chance. Appellants suggested that if Foust really did not share in appellants' plans, he would have fled when given the opportunity. Foust claimed that fear prevented him from fleeing. Foust also implied that his fear prevented him from questioning what appellants were doing.

While Foust's arguments may have indirectly bolstered his claim that he did not intend to help appellants, they do not amount to a claim of duress. Thus, the trial court had no sua sponte duty to instruct that duress is not a defense to murder. Assuming that appellants' constitutional claim was not waived, we would find it meritless for the reasons set forth above. (See *People v. Boyer, supra,* 38 Cal.4th at p. 441, fn. 17.)

e. Cumulative error

Appellants contend that even if the above-described claims of error would be harmless individually, cumulatively they are prejudicial. We have found no error in the instructions, and so appellants' claim of cumulative prejudice fails.

6. Crime scene photos

The trial court admitted two photographs showing the victim in the trunk of the car. Bernardino contends that the photos were prejudicial and had no probative value and so the trial court abused its discretion in failing to exclude the photos under Evidence Code section 352. He also contends that the admission of the photos violated his federal constitutional rights to due process, a fair trial and trial by jury. Garcia and Esparza join this contention.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A trial court has broad discretion to weigh the probative value of evidence against its potential prejudicial impact. A court's decision that the probative value of the evidence outweighs its prejudicial impact will not be disturbed on appeal unless the court exercised its discretion in "'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Here, the trial court expressly weighed the risk of undue prejudice against the probative value of the photographs, and found that the probative value outweighed any prejudice. The court found that the state of the victim showed intent, premeditation and deliberation for the murder charge. The binding and gagging of the victim also showed intent for the kidnapping charge. The extent of the beating injuries helped explain the amount of blood in Bernardino's house and garage. The court found that although there was dried blood in the photos, the photos were not inflammatory.

We see no abuse of discretion in the trial court's decision. The photos showed the severity of Ramirez's beating injuries and thus provided physical evidence that corroborated Foust's testimony as to how the crime occurred, including explaining the blood stains at Bernardino's residence. (*People v. Gurule* (2002) 28 Cal.4th 577, 624 [the "jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case"]; *People v. Cowan* (2010) 50 Cal.4th 401, 476 ["a prosecutor is not required to rely solely on oral testimony when a visual image would enhance the jury's understanding of the issues"].) The photographs were also relevant to show appellants' mental state. (*People v. Crittenden, supra,* 9 Cal.4th at pp. 133-134 ["The photographs showing the victims' wounds, including the two autopsy photographs, were highly probative as to the kind and degree of force used on the victims, . . . The photographs depicting the thoroughness with which the victims had been bound were highly probative of, among other issues, the planning and deliberation with which the offenses were executed, because they tended to establish that defendant took great care to render his victims helpless, having brought from his own apartment a pillowcase from which he fashioned the bindings."].)

The trial court found that the photographs showed only dried blood and were not inflammatory. We have reviewed the photos and agree with the court. To the extent that Bernardino believes the photos were "gruesome," because of decomposition, we do not agree. (See, e.g., *People v. Davis* (2009) 46 Cal.4th 539, 558, 615 [photograph of victim's badly decomposed body not gruesome].)

There was other evidence of the extremely cruel and pointless nature of the crime itself. The photos simply illustrated that evidence; they did not show the crime as worse than it was. (See *People v. Zapien* (1993) 4 Cal.4th 929, 958 ["'the statute uses the word [prejudice] in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]'"].) Since the photos were probative and not unduly prejudicial, their admission did not deny appellants their rights to due process, a fair trial or trial by jury.

## Disposition

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.