No. 18-

In the United States Supreme Court

JOE FLORES,

Petitioner,

v.

W. L. MONTGOMERY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

HILARY L. POTASHNER
Federal Public Defender
MICHAEL T. DRAKE*
Research and Writing Attorney
*Counsel of Record**
321 East 2nd Street
Los Angeles, California 90012
(213) 894-7520
michael_drake@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Under the standard clearly established by this Court in *Jackson v. Virginia*,[1] can a rational juror find an essential fact beyond a reasonable doubt based on the mere say-so of a gang officer "expert"?

[1] 443 U.S. 307, 318 (1979).

CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Cases (cont'd)

Federal Cases (cont'd)

State Cases

State Cases (cont'd)

Federal Statutes

State Sentencing Provisions

State Sentencing Provisions (cont'd)

Supreme Court Rules

Federal Court Rules

Constitutional Provisions

Miscellaneous

PETITION FOR WRIT OF CERTIORARI

Petitioner Joe Flores respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit in *Flores v. Montgomery*, No. 14-56977.

OPINIONS BELOW

The Ninth Circuit's memorandum disposition (Pet. App. 2a) is reported at 727 F. App'x 273. The California Court of Appeal's unpublished opinion (Pet. App. 12a) is unreported.

JURISDICTION

The Ninth Circuit entered judgment on March 13, 2018 (Pet. App. 2a), and denied a timely petition for rehearing en banc on April 24, 2018 (Pet. App. 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"No state shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amdt. 14, § 1.

STATEMENT OF THE CASE

After trying to stop a brawl at a party attended by hundreds of young partygoers, Joe Flores was struck in the head, kicked in the

face, and held in a chokehold until he couldn't breathe.[2] Pulling a gun he had brought with him, and aiming behind him (RT 473, 478), he fatally shot 15 year old Sam Reeves.

Neither Reeves nor the others in the fight were gang members. No gang signs were thrown; no gang names shouted. No one claimed the shooting for the gang. No one at the party knew who the shooter was, or whether he belonged to a gang.

But Flores was a member of a Hispanic gang. And other members attended the party as well. So once it came to light that he was the shooter, he was charged with first degree murder and with violating California's gang enhancement statute, which increases the punishment for any crime committed "for the benefit of" or "in association with" the gang, "with the specific intent to promote, further, or assist in any criminal conduct by [the gang's] members." Cal. Penal Code § 186.22(b). He was also charged with violating the related gang special circumstance, which mandates either life in prison without parole or death for an intentional murder committed by an active gang participant to "further the activities of the … gang." Cal. Penal Code § 190.2(a)(22).

---

[2] The facts in this section are taken from the state court of appeal's unpublished decision, unless otherwise indicated by citation to the Reporter's Transcript ("RT") or Clerk's Transcript ("CT"). The relevant portions of the state court of appeal's decision are at Pet. App. 13a–14a, 20a–23a and CT 501–502.

At Flores's trial, a gang officer named Tom Mendez testified as a "gang expert." The Ninth Circuit panel's memorandum aptly summarizes Mendez's key opinion testimony:

> Flores was a member of a gang that commanded respect from the community through fear, violence, and intimidation.
>
> [A]n apparent affront could be seen as disrespectful and would not be tolerated by the gang, and a gang member could be expected to retaliate immediately with violence to regain respect.
>
> [A] gang member intervening in a large fight between non-gang members would essentially be acting on behalf of his gang and putting his gang's reputation at risk.
>
> [A] gang member would not need to fear significant harm during a physical assault because he would know that his fellow gang members would come to his aid.

(Pet. App. 14a–15a (paragraph breaks added).)

Testimony by eyewitnesses suggested that another member of the gang, Nathaniel Maloney, had approached the melee and ordered another brawler at gun point to stop attacking Flores after the shooting. One other prosecution witness, a gang "shot caller" named Mauricio Reyes—who had not attended the party—affirmed that a member who (in the prosecutor's phrase) "moves in to sort of stop something" at a big party would be doing so "for the benefit or furtherance of the gang." But Reyes was adamant that a *shooting* under the circumstances here would violate the gang's culture and rules. (RT 461, 465.)

Based on this evidence, the jury found Flores guilty of first degree murder, and found the gang allegations true. The jury thus found that Flores, beyond a reasonable doubt, did not shoot in the heat of passion.

(*See* CT 501.) The state court of appeal affirmed against Flores's *Jackson*[3] challenge to the gang findings, and rejected his claim of prosecutorial misconduct as well.

On federal habeas review, the district court denied relief. The Ninth Circuit panel affirmed, holding that Mendez's opinion testimony was sufficient to sustain the jury's findings under *Jackson*, and that in rejecting Flores's challenge the state court did not apply *Jackson* unreasonably under 28 U.S.C. § 2254(d). (Pet. App. 14a.)

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's decision sanctions the state court's egregious reliance on conclusory opinion testimony and unjustly perpetuates Flores's mandatory life sentence.

1. The mere say-so of a "gang expert" is not entitled to any weight under *Jackson*.

At the threshold, the Ninth Circuit states that expert opinion that a crime benefited a gang by enhancing its reputation for viciousness "can be sufficient" to sustain the enhancement under *Jackson v. Virginia*, 443 U.S. 307 (1979). (Pet. App. 15a (citing *People v. Albillar*, 244 P.3d 1062, 1073 (Cal. 2010)).) If by this the court means that expert opinion can be sufficient without any objective facts to support it, it is clearly mistaken.

The "critical inquiry" under *Jackson* is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable

---

[3] *Jackson v. Virginia*, 443 U.S. 307 (1979).

doubt." 443 U.S. at 318. The test is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This standard demands more than a "mere modicum" of evidence. *Id.* at 320.

It follows that "no rational juror would rely" on a witness's "bare, unsubstantiated assertion" as sufficient to prove an essential fact beyond a reasonable doubt. *Chein v. Shumsky*, 373 F.3d 978, 989 (9th Cir. 2004) (en banc). After all, such an assertion by definition lacks any "tendency to make the existence of an element of a crime [even] slightly more probable than it would be without the[m]." *Jackson*, 443 U.S. at 320.

On this point, *Jackson* makes no distinction between "lay" witnesses on the one hand and "experts" on the other. Indeed, reading *Jackson* as if it categorically entitled the opinions of state-designated experts to confidence would make it impossible for federal habeas courts to distinguish "reasonable" inferences from "mere speculation." *Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (per curiam). *See also Juan H. v. Allen*, 408 F.3d 1262, 1277 (9th Cir. 2005) ("[A] 'reasonable' inference is one that is supported by a chain of logic, rather than … mere speculation dressed up in the guise of evidence."). *Cf. Cavazos v. Smith*, 565 U.S. 1, 7–8 (2011) (holding that jury was "entitled to believe" prosecution experts' opinion about cause of death, where it was supported by "affirmative indications of trauma" in victim's brain).

Were California law to the contrary, it wouldn't matter. *See Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (per curiam) ("[I]t [i]s error … to look to [state] law in determining what distinguishes a reasoned inference from 'mere speculation.' "). But it isn't. And in fact the California Supreme Court has expressly held that when an expert fails to "describe any facts," "articulate any reasons," or "describe [any of] the material[s] he relied on" in reaching his opinion, the opinion is "essentially of no use," and thus cannot be relied on by jurors. *People v. Prunty*, 62 Cal. 4th 59, 85 (2015). *Albillar*'s holding about expert opinion is thus most sensibly read as saying that while an expert's opinion "can" be held sufficient when there is specific support for it, "purely conclusory and factually unsupported opinions" cannot. *People v. Perez*, 18 Cal. App. 5th 598, 608 (2017); *accord People v. Rios*, 222 Cal. App. 4th 542, 568 (2013), *as modified on denial of reh'g* (Jan. 15, 2014) (holding that similar generic opinion testimony failed to support gang enhancement where there was otherwise "no specific evidentiary support" for it). And this dovetails perfectly with review under *Jackson*, which "essentially addresses whether the government's case was so lacking that it should not have even been submitted to the jury." *Musacchio v. United States*, ___ U.S. ___, 136 S. Ct. 709, 715 (2016) (internal quotation marks omitted).

The upshot is that no rational juror "properly instructed" on these points of California law would give any weight to such unsubstantiated testimony. *Jackson*, 443 U.S. at 318 (stating that critical inquiry is not "simply" to determine whether jury was properly instructed, but

whether record reasonably supports its findings). *See also Musacchio*, 136 S. Ct. at 715 ("A reviewing court's limited determination on sufficiency review … does not rest on how the jury was [actually] instructed."). Any way you slice it, then, *Jackson* requires that convictions be based on reasonable inferences drawn from evidence rather than mere speculation. And because the bare, unsubstantiated opinion of a "gang expert" can't support any reasonable inferences, no rational juror would rely on it.

2. Far from "corroborated," the gang officer's testimony here was undermined by the prosecution's own evidence.

Nor, *pace* the Ninth Circuit panel here, is there a reasonable case to be made that gang officer Mendez's testimony here was "corroborated." (Pet. App. 15a.) The panel specifies that the ostensibly corroborating witness was a "high-ranking" gang member (*id.*), which would be Reyes.

But the only corroboration Reyes could offer for Mendez's opinions was that (1) gang members "establish … respect on the streets[] through fear and intimidation" (RT 476), and (2) "you could say" that the gang benefits when a member "moves in" to "sort of stop something" at a party when other members are there. And nothing in these vague, equivocal statements—formulated in part by the prosecutor (*see id.*)—speaks to whether the gang benefits when one of its members shoots an unarmed non-gang-member high schooler at a party.

Indeed, Reyes's own opinion about *that* question was resolutely contrary to Mendez's. The shooting transgressed "gang culture [and] its rules," he explained. (RT 465.) "We can't hurt innocent people. We can't kill kids." (RT 461.) And this testimony, never rebutted by even a single witness, plainly "reflected that [Flores's] crime should have resulted in the *loss* of respect" for the gang—as the Warden has conceded. Br. of Appellee at 21, *Flores v. Montgomery*, No. 14-56977 at 21 (9th Cir. filed June 26, 2017) (emphasis added). In fact even Flores himself—while being surreptitiously recorded and pumped by Reyes for statements that could be used against him at trial—similarly expressed the shamefulness of his act: When Reyes asked him whom he'd told about the shooting, he replied, "I don't think that's nothing to talk about[.]" (RT 713.)

This repudiation of Mendez's opinion points up just how outlandish it was. Though Mendez provided a laundry list of the gang's supposed "primary" activities (RT 432–36), for example, none involved murder. Or retaliatory violence. Or guns.[4] The upshot is that Mendez couldn't link the freak occurrence here to the gang's primary activities even in the most generic terms. Much less could he link it to anything like a "signature" or "common practice" of the gang. *Cf. People v. Weddington*, 246 Cal. App. 4th 468, 485 (2016) (signature); *People v. Gardeley*, 14 Cal. 4th 605, 613 (1996) (common practice).

---

[4] Though Maloney used a gun in assaulting David Reeves (*see* RT 436), the assault doesn't qualify as a predicate "primary activity" because it "occurr[ed] after the charged offense." *People v. Duran*, 97 Cal. App. 4th 1448, 1458 (2002).

Simply put, not only did Mendez fail to provide any rational, objective basis for his opinion that shooting an unarmed high schooler in front of a public crowd at a party would "benefit" the gang—much less that in doing so Flores *intended* to promote gang crimes—the idea was outright refuted by the prosecution's own "corroborating" witness. That such testimony could be used not just to send Flores to prison for life but to render him *death-eligible* is profoundly unsettling.

3. Worse, the officer's opinions were based on case-specific "facts" conjured up out of gang stereotypes, thus infecting the entire trial with unfairness.

But an even deeper problem tainted the state court proceedings here, and it's one that the panel overlooks: Mendez based his opinions in the case on the assumption that Flores had "wade[d] into the fight" (RT 519) and "ordered" the brawlers to stop (RT 521). Yet neither of these assumptions is remotely supported by the record. For this reason alone, Mendez's opinion was entitled to no weight. *See People v. Vang*, 52 Cal. 4th 1038, 1046 (2011) ("[Expert] opinion may not be based on assumptions of fact without evidentiary support." (internal quotations omitted)).

Worse still, these rank fictions were evidently conjured up out of Mendez's unsupported stereotypes about gang "mentality":

> [W]e understand their mentality, the way they think[,] especially when they are dealing with non-gang members or … younger people like teenagers.

> The minute [gang members] enter that situation, they feel [that] the people in that situation should bow down to them or submit to their authority[.] Again, you don't know you are messing with[.]
>
> When that gang member is entering that situation it's almost like he's saying I'm Moses parting the Red Sea. Everybody stand back. Here I come.

(RT 520.)

But what makes this patchwork of baseless, stereotype-ridden conjecture so shocking—particularly in a case fraught with unspoken racial and ethnic tensions—is that it didn't just lend spurious support to the gang allegations; it served as the *core* of the prosecutor's theory that the underlying shooting amounted to first degree murder. (*See* RT 609 ("[T]here's *no other reason* for this murder than to prove how the gang should be feared." (emphasis added)).) In the hands of the prosecutor, then, Mendez's opinions "so infected [Flores's] trial with unfairness as to make [his] conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181 (1986).[5]

B. The Ninth Circuit's decision reflects a systematic misapplication of *Jackson* that could affect thousands of cases arising out of the nation's largest state.

Even taken on its own, then, this "exceptional combination of circumstances" provides "ample justification for a GVR order" from this

---

[5] Flores moved for a certificate of appealability on a prosecutorial misconduct claim under *Darden*. Though the standard for a COA is modest, *see Buck v. Davis*, ___ U.S. ___, 137 S. Ct. 759, 774 (2017), and though the Warden never disputed that Flores had met it, the Ninth Circuit panel summarily denied the motion. (Pet. App. 16a.)

Court. *Stutson v. United States*, 516 U.S. 193, 195–96 (1996) (per curiam) (issuing GVR order where government repudiated position it had advanced below, applicable Court precedent had not been considered below, and petitioner had had no plenary consideration of his appeal). But it's hardly the only justification.

To begin with, the importance of the question presented goes well beyond this case. Admittedly, its dimensions are hard to quantify given the limitations of readily available information.[6] And there's also the fact that California precedent *favors* Flores on the question presented, which means that the impact here would be limited to unpublished decisions that, like his, fail to apply that precedent faithfully.

Still, based on the rate of review in California criminal cases[7] and the total number of gang enhancement cases with searchable written dispositions available on Westlaw (over the same time period),[8] there

---

[6] The informational problem is illustrated by the decision here: The Ninth Circuit's memorandum contains no hint that Flores's core argument on appeal was about whether an expert's unsubstantiated opinion is entitled to under *Jackson*. Such could be the case with any other given written disposition.

[7] About six percent, based on data for California fiscal year 2015–16. *See* Judicial Council of California, *2017 Court Statistics Report: Statewide Caseload Trends 2006–2007 Through 2015–2016* (2017), at 17 (summarizing data), *available at* http://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf.

[8] 227. This number encompasses federal and California cases with written decisions on Westlaw issued during that period citing Penal Code 186.22, quoting at least one key phrase in the gang enhancement statute, and mentioning the word "expert."

are probably some 3,800 gang enhancement cases each year in state and federal court. And given that the issue here is necessarily implicated in all of them (you won't encounter a gang enhancement trial in California that doesn't rely on the opinions of a prosecution "gang expert"), a clear statement about the issue by this Court would almost certainly have systemic consequences for the development of the law and the administration of justice in thousands of gang enhancement cases each year.

At the same time, there are concrete reasons to believe that the Ninth Circuit is unlikely to correct the problem. Here, the panel didn't even address it, except to state—erroneously, and in conclusory fashion—that the gang officer's opinions were "corroborated." And at least three other citable[9] unpublished Ninth Circuit decisions have suggested that expert testimony could be sufficient to support a jury's gang enhancement findings, without any mention of the need for supporting facts, data, or reasoning. *See German v. Horel*, 473 F. App'x 810, 811 (9th Cir. 2012); *Huerta v. Adams*, 545 F. App'x 671, 672 (9th Cir. 2013); *Esparza v. Uribe*, 593 F. App'x 728, 729 (9th Cir. 2015). One of these has been expressly read by a district court as holding that an expert's opinions "need not be corroborated by additional evidence." *Davis v. Madden*, No. CV 13-8179, 2016 WL 6078276, at *9 & n.44, *report and recommendation adopted*, 2016 WL 6072328 (C.D. Cal. 2016)

---

[9] *See* Ninth Circuit Rule 36-3 (governing citation of unpublished dispositions).

(citing *German*). So this could well be the silent, guiding assumption[10] in the dozens of district court cases each year that address sufficiency challenges to the gang enhancement by pro se petitioners.

Nor do further relevant legal developments lie on the horizon. California's gang enhancement passed into law some thirty years ago. *See* Cal. Penal Code §§ 186.20. By 2010, the use of "perfunctory testimony [by] gang experts" to prove the enhancement had already been denounced by a "growing chorus" of California courts. *People v. Henley*, No. B215829, 2010 WL 2495984, at *8 (Cal. Ct. App. June 22, 2010) (unpub'd) (discussing cases). And though Flores's case exemplifies a willingness by state panels to sanction the practice in unpublished decisions, *published* California court opinions uniformly support Flores's position. *See*, *e.g.*, *Perez*, 18 Cal. App. 5th at 610–613 (summarizing cases and discussing "pattern [that] emerges" from them). Further litigation is unlikely to disturb that equilibrium.

At the same time, the question presented doesn't appear to be implicated in any cases addressing similarly targeted gang-related statutes or sentencing provisions in other jurisdictions.[11] *See* 18 U.S.C.

---

[10] *See supra* n.6.

[11] Though the same informational problem noted above at footnote 6 bears on this conclusion, the difference when it comes to these jurisdictions is that California does at least have published case law addressing the question presented (despite, again, its failure to follow its own precedent in unpublished cases like Flores's).

§ 521(d); Ala. Sent'g Comm'n, *Presumptive and Voluntary Sentencing Standards Manual* 32 (2013);[12] Ariz. Rev. Stat. Ann. § 13-2321(B); Del. Code Ann. tit. 11, § 616(c); Fla. Stat. Ann. § 921.0024; 720 Ill. Comp. Stat. Ann. 5/33-4(a); Ind. Code Ann. § 35-45-9-3(c); Iowa Code Ann. § 723A.2; Kan. Stat. Ann. § 21-6804(k)(1); La. Stat. Ann. § 15:1403(B), (C); Md. Code Ann., Crim. Law § 9-804(a)(2); Minn. Stat. Ann. § 609.229(2); Miss. Code. Ann. § 97-44-19(2), (3); Mo. Ann. Stat. § 578.423; Mont. Code Ann. § 45-8-404(1)(a); Nev. Rev. Stat. Ann. § 193.168(1); N.J. Stat. Ann. § 2C:33-29(a); N.C. Gen. Stat. Ann. § 15A-1340.16(d)(2a); Ohio Rev. Code Ann. § 2923.42; Tenn. Code Ann. § 40-35-121; Utah Code Ann. § 76-3-203.1(2)(b), (c); Va. Code Ann. § 18.2-46.2(A). Indeed, even though almost all of these provision date back at least ten years, most have been cited only infrequently, and some (like Missouri's, which dates to 1993) not at all. So there's no indication that any other courts are likely to weigh in.

But this Court can, and the time is ripe for it to do so. "[C]ourts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). And little could water that principle down more than allowing police officers to spout fact-free

---

[12] *Available at* http://sentencingcommission.alacourt.gov/Sent-Standards/Presumptive%20Manual_2013.pdf. Because the state commission's website was down when last visited (on July 11, 2018), the pin citation here was based on Google's cached version.

opinions to jurors; jurors to arbitrarily credit that testimony in their findings; and courts to sustain such findings on that same basis.

C. Review for error here is minimal, yet would provide guidance on an important issue that will otherwise evade review under the Court's traditional cert. criteria.

Nor would sufficiency review here be unduly burdensome. Though it isn't "customary," this Court will review for sufficiency "when the issue is properly before [it] and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (citing cases).

On these terms, review here would clearly yield a net benefit. For starters, there's no need for "a detailed review of the particular facts." *Kyles v. Whitley*, 514 U.S. 419, 455 (1995) (Stevens, J., concurring) (noting that such review was justified there). Rather, the Court need only review whatever evidence the Warden can proffer as support for the discrete opinions that have been specified. This highly circumscribed review is obviously far less burdensome than would be review to assess whether the evidence supports all of the essential facts. Indeed, if support for officer Mendez's highly generalized opinions exists, the Warden shouldn't need more than a few paragraphs to identify it. And if the Warden succeeds in that, the Court can simply deny this petition.

But if he fails, the Court should hold that under the standard clearly established in *Jackson*, no rational juror would rely on the mere

ipse dixit of a state-designated "expert" to find an essential fact beyond a reasonable doubt. This, after all, is only to say what should already be obvious to any reasonable jurist (and what the California Supreme Court itself has already held). The rest—plenary review of the record in light of the Court's announcement—can be left to the Ninth Circuit. *See*, *e.g.*, *Spears v. United States*, 555 U.S. 261 (2009) (per curiam) (issuing GVR, where Eighth Circuit treated district court rejection of 100:1 crack-to-cocaine ration as impermissible despite its having been "explicitly approved by *Kimbrough* [*v. United States*, 552 U.S. 85 (2007)]" one year before). *See also In re Davis*, 557 U.S. 952 (2009) (summarily transferring case to district court for hearing and findings on petitioner's innocence).

The minimal effort would be well worth it: The constitutional principle at stake "plays a vital role in the American scheme of criminal procedure." *In re Winship*, 397 U.S. 358, 363 (1970). And as California courts have aptly observed in published decisions, the kind of testimony at issue here is so "broadly worded" that it would "expand[] the gang enhancement statute to cover virtually *any* crime committed by someone while in the company of gang affiliates, no matter how … tenuous its connection with gang members or core gang activities." *Perez*, 18 Cal. App. 5th at 608. Yet, perversely, it's just this sort of "sweeping" approach, *id*. at 610, "soundly rejected" by California courts in published decisions, *id*., that both the state court and the Ninth Circuit have sanctioned in this unpublished one—and thus probably in others. *See supra* Part B. And even if such sweeping boilerplate weren't out of

bounds, it would still at the very least have to be supported by sufficient evidence. Mendez's wasn't even that.

Less obviously egregious errors have motivated this Court's exercise of its discretion to use the GVR procedure, in cases implicating matters of less public importance, and where courts had less time to digest the underlying issues. *See Spears*, *supra*; *Dye v. Hofbauer*, 546 U.S. 1, 3–4 (2005) (per curiam) (issuing GVR, where Sixth Circuit failed to correctly identify claims petitioner had raised in his state court briefs); *Fiore v. White*, 531 U.S. 225, 229 (2001) (per curiam) (issuing GVR, where Third Circuit denied petitioner's *Jackson* claim on erroneous determination that relevant state law was "new" and thus inapplicable to petitioner's conviction).

Like those cases, this one shows why the Court's traditional cert. criteria "neither control[] nor fully measur[e]" its discretion. Sup. Ct. R. 10. For one thing, consideration of the case would show the Court how one of its watershed decisions plays out in an important subset of cases. *See* Daniel Epps & William Ortman, *The Lottery Docket*, 116 Mich. L. Rev. 705, 708 (2018) (noting value in Court's learning about "day-to-day work of the lower federal courts in ordinary, 'unimportant' cases"). For another, it would provide an extra measure of accountability, by showing that review is always a live (if remote) possibility even in cases unrepresented by the Court's proxies for importance. *Id*. And if nothing else, the case shows how those proxies—circuit splits and nationwide implications, *see* Sup. Ct. R. 10—can "misfire[] in systematic and predictable ways." *Lottery Docket*, 116 Mich. L. Rev. at 708.

At bottom, though, a failure to address the question presented would have intolerably perverse consequences in the relevant class of cases—where prosecutors routinely exploit the potentially unwarranted "aura of special reliability and trustworthiness" that prosecution experts enjoy.[13] Couple that with the asymmetric barriers that California defendants face in having their own gang experts testify,[14] and it's clear that sustaining a mandatory life sentence on the basis of an expert's say-so in this context works a peculiarly grotesque mockery of due process.

For all these reasons, "the equities clearly favor a GVR order." *Stutson v. United States*, 516 U.S. 193, 196 (1996).

---

[13] *United States v. Pires*, 642 F.3d 1, 12 (1st Cir. 2011); *United States v. Groysman*, 766 F.3d 147, 162 (2d Cir. 2014); *United States v. Downing*, 753 F.2d 1224, 1236 (3d Cir. 1985); *United States v. Oti*, 872 F.3d 678, 691 (5th Cir. 2017), *cert. denied sub nom. Iwuoha v. United States*, 138 S. Ct. 1988 (2018) & *Okechuku v. United States*, 138 S. Ct. 1990 (2018); *United States v. Thomas*, 74 F.3d 676, 683 (6th Cir. 1996), *abrogated on other grounds by General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997); *United States v. Tranowski*, 659 F.2d 750, 757 (7th Cir. 1981); *Gehl by Reed v. Soo Line R. Co.*, 967 F.2d 1204, 1208 (8th Cir. 1992); *Cunningham v. Wong*, 704 F.3d 1143, 1167 (9th Cir. 2013); *United States v. Sandoval*, 680 F. App'x 713, 718 (10th Cir. 2017); *United States v. Williams*, 827 F.3d 1134, 1161 (D.C. Cir. 2016), *cert. denied sub nom. Edwards v. United States*, 137 S. Ct. 706 (2017).

[14] *See* Erin R. Yoshino, Note, *California's Criminal Gang Enhancements: Lessons from Interviews with Practitioners*, 18 S. Cal. Rev. L. & Soc. Just. 117 (2008) (relaying complaints by public defenders that testimony of qualified defense experts is often excluded as irrelevant because academics cannot speak to specifics of defendant's local gang).

CONCLUSION

Flores's case presents a disturbing injustice driven by speculation, distortion, and stereotypes—all wrapped up and presented to the jury in the guise of "expert" opinion. If the *Jackson* standard is what "gives concrete substance to the presumption of innocence, [ensures] against unjust convictions, and [reduces] the risk of factual error in a criminal proceeding," *Jackson*, 443 U.S. at 315, the panel's reliance on Mendez's baseless opinion testimony to perpetuate Flores's mandatory life sentence renders *Jackson*'s fundamental protections without substance.

Flores thus urges the court to grant his petition, vacate the Ninth Circuit's order, and remand so that the court of appeals can determine whether the record evidence was otherwise sufficient under *Jackson*, and whether the state court's answer to that question was unreasonable.

Respectfully submitted,

HILARY L. POTASHNER
Federal Public Defender

August 10, 2018

MICHAEL T. DRAKE
Research and Writing Attorney
Counsel of Record
321 East 2nd Street
Los Angeles, California 90012
(213) 894-7520
michael_drake@fd.org

Counsel for Petitioner

INDEX TO APPENDIX

Case: 14-56977, 04/24/2018, ID: 10847943, DktEntry: 71, Page 1 of 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 24 2018

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

JOE FIDEL FLORES, Petitioner-Appellant, v. W. L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 14-56977 D.C. No. 2:14-cv-02687-RGK-KK Central District of California, Los Angeles ORDER

Before: CALLAHAN and NGUYEN, Circuit Judges, and PRATT,* District Judge.

Judges Callahan and Nguyen vote to deny the petition for rehearing en banc and Judge Pratt so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. On behalf of the Court, the petition for rehearing en banc is denied.

* The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

NOT FOR PUBLICATION

FILED

MAR 13 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE FIDEL FLORES, Petitioner-Appellant, v. W.L. MONTGOMERY, Acting Warden, Respondent-Appellee.	No. 14-56977 D.C. No. 2:14-cv-02687-RGK-KK MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted February 5, 2018
Pasadena, California

Before: CALLAHAN and NGUYEN, Circuit Judges, and PRATT,** District Judge.

Petitioner Joe Fidel Flores ("Flores") appeals from the district court's denial of his petition for a writ of habeas corpus under the Antiterrorism and Effective

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

** The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254.[1] We have jurisdiction under 28 U.S.C. § 2253. Under AEDPA, Flores can obtain relief on claims that have been "adjudicated on the merits in State court proceedings" only if the state court's adjudication resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Deck v. Jenkins*, 814 F.3d 954, 977 (9th Cir. 2014) (reviewing the decision of the California Court of Appeal as the last reasoned decision of the state court). Reviewing Flores's claims de novo, *see Emery v. Clark*, 643 F.3d 1210, 1213 (9th Cir. 2011), we affirm.

1. A jury convicted Flores, a known gang member, of first-degree murder and found both the gang-enhancement and special-circumstances allegations to be true.[2] On direct appeal, the California Court of Appeal affirmed. Flores now argues the state appellate court unreasonably applied the law clearly established in *Jackson v. Virginia*, 443 U.S. 307 (1979), and based its decision on an

[1] Flores asks us to take judicial notice of state court documents filed in a separate case that arose out of the same circumstances upon which Flores's own conviction is based. The Warden does not oppose the motion. We may properly take judicial notice of court filings and other matters of public record. *See* Fed. R. Evid. 201(b)–(d). Therefore, we grant Flores's motion to take judicial notice.

[2] Because the parties are familiar with the facts and procedural history, we restate them only as necessary to explain our decision.

unreasonable determination of the facts when it held there was sufficient evidence to support the jury's gang-enhancement and special-circumstances findings.

The gang enhancement may be applied only if the prosecution proves the following two elements beyond a reasonable doubt: (1) Flores committed a felony "for the benefit of, at the direction of, or in association with any criminal street gang," and (2) he did so "with the specific intent to promote, further, or assist in any criminal conduct by gang members." Cal. Penal Code § 186.22(b)(1). In order to apply the special-circumstances allegation, the prosecution needed to prove Flores (1) "intentionally killed the victim while [he] was an active participant in a criminal street gang" and (2) did so "to further the activities of the criminal street gang."[3] *Id.* § 190.2(a)(22).

Based on the evidence in the record, Flores cannot overcome the double layer of deference we must give to the state appellate court's decision regarding the sufficiency of the evidence. *See Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam) ("We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference."). The gang expert testified Flores was a member of a gang that commanded respect from the community through fear, violence, and intimidation; an apparent affront

[3] Flores only challenges the second element of the section 190.2(a)(22) analysis.

could be seen as disrespectful and would not be tolerated by the gang, and a gang member could be expected to retaliate immediately with violence to regain respect. The expert further testified that a gang member intervening in a large fight between non-gang members would essentially be acting on behalf of his gang and putting his gang's reputation at risk. Additionally, the expert testified a gang member would not need to fear significant harm during a physical assault because he would know that his fellow gang members would come to his aid. Furthermore, the testimony of a former high-ranking member of Flores's gang corroborated that of the gang expert.

A reasonable jury could infer from the testimony of the gang expert and the corroborating testimony of the former gang member that Flores committed the murder for the benefit of, or in association with, his gang. *See People v. Albillar*, 244 P.3d 1062, 1073 (Cal. 2010) ("Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to support raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1).").

A jury could also find based on the same testimony that Flores committed the murder with the specific intent to aid in the criminal conduct of other gang members and intentionally killed the victim while an active gang member to further the criminal activities of his gang. *See Emery*, 643 F.3d at 1215 n.2 ("As

there is no separate authority interpreting the language 'to further the activities of a criminal street gang,' we intend our discussion of the sufficiency of the evidence as to specific intent under section 186.22(b)(1) to pertain to the section 190.2(a)(22) special circumstance as well.").

On habeas review, we cannot hold unreasonable the California Court of Appeal's determination that there was sufficient evidence in the record for the jury to find the gang-enhancement and special-circumstances allegations true.

2. Flores also argues the state court of appeal unreasonably rejected his prosecutorial-misconduct claim. We treat Flores's briefing on the uncertified claim as a motion to expand the certificate of appealability. *See* 9th Cir. R. 22-1(e). Because Flores has not made a "substantial showing of the denial of a constitutional right," the motion is denied. *See* 28 U.S.C. § 2253(c)(2); *Doe v. Woodford*, 508 F.3d 563, 567 (9th Cir. 2007).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE FIDEL FLORES,

Defendant and Appellant.

2d Crim. No. B241833
(Super. Ct. No. 2009013438)
(Ventura County)

Joe Fidel Flores appeals his conviction, by jury, of the first degree murder of Samuel Reeves in October 2003. (Pen. Code, §§ 187, subd. (a), 189.)[1] The jury found true the special circumstance allegation that appellant committed the murder for the benefit of a criminal street gang (§ 190.2, subd. (a)(22), and a sentence enhancement allegation to the same effect. (§ 186.22, subd. (b)(1)(C).) It also found that he personally used a firearm in committing the offense. (§ 12022.53, subd. (c), (d).) The trial court sentenced appellant to life in prison without the possibility of parole, plus a consecutive indeterminate sentence of 25 years to life for the firearm use. Appellant contends the prosecutor committed misconduct by misstating, in closing arguments, the provocation required to reduce murder to voluntary manslaughter. He also contends the trial court erred when it denied his request to be represented by retained counsel at sentencing, that there was insufficient evidence to support the criminal street gang special circumstance and sentence enhancement findings,

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

and that the abstract of judgment should be corrected to reflect that no parole revocation fine was imposed or stayed. We correct the abstract of judgment and affirm.

Facts

The victim, Samuel Reeves, was 15 years old when he accompanied his older brothers Jesse and David, and Jesse's friend, Geno Roderick, to a large outdoor birthday party held at a ranch house on the outskirts of Santa Paula. Between 100 and 350 people attended the party, which featured kegs of beer, other alcohol and loud music. Most of the guests were college-aged, although some were older and others were high-school aged. The person whose birthday was being celebrated is not associated with any of the Santa Paula gangs, but some local gang members attended. Sam and his brothers were not affiliated with any gang, nor was Roderick.

Appellant, Nathan Maloney, and Michael and Peter Carrillo were members of Bad Boyz, a Santa Paula gang, who also attended the party. Appellant, Maloney, and Michael Carrillo were each armed with a handgun. Maloney testified that he brought a gun to the party because he was a gang member and expected someone might confront him or his fellow gang members for that reason.

At some point during the party, a fist fight broke out between Roderick, the Reeves brothers and five to 10 other party guests. Corey Nicholson, who was involved at the beginning of the fight, testified that he was knocked to the ground; others were standing and throwing punches.

Appellant entered the fray, attempting to stop the fight. David Reeves punched appellant and was choking him. Another blow struck appellant and he was "knocked out." Someone, possibly Sam Reeves, kicked appellant in the face as he lay on the ground. Appellant's nose was bloodied, but not broken. When appellant came to, he was on the ground. He later told a friend and fellow gang member that he was being "jumped." Someone was choking him and he could not breathe because his nose was bleeding. Appellant fired his gun at one of the people surrounding him.

Sam Reeves sustained a fatal gunshot wound to the chest at point blank range. . Appellant's blood was found on Reeves' shirt and shoes. There were no grass stains on his

clothing, or recent injuries to his body that would indicate he had been fighting or wrestling before he was shot.

Meanwhile, Nathan Maloney was standing nearby with his own handgun in his hand. David Reeves was running toward him, so Maloney pointed the gun at him. David put his hands up. Maloney was shouting to the crowd to keep away. He put his gun to David Reeves' head to stop him from attacking appellant. Maloney waited for appellant to collect himself and get up off of the ground. Then, they ran away from the scene together.[2]

When the shooting occurred, Mauricio Reyes was a leader of and "shot caller" for the Bad Boyz. He did not attend the birthday party because he was in custody that night. Six years after the shooting, Reyes agreed to provide information about it to law enforcement, in exchange for the dismissal of an ammunition possession charge and relocation assistance. Reyes secretly recorded conversations with both Maloney and appellant in which both men acknowledged that appellant was the person who shot Reeves.

The trial court instructed the jury on murder, the lesser included offense of voluntary manslaughter on a heat of passion theory and on an imperfect self-defense theory, justifiable self-defense and the role of self defense in a mutual combat situation. The jury found appellant guilty of first degree murder and found true the special circumstance allegation that he intentionally killed the victim while he was a participant in a criminal street gang, the sentence enhancement allegation that he committed the murder for the benefit of the gang and the sentence enhancement allegation that he personally used a firearm in committing the murder.

Discussion

Prosecutorial Misconduct

In his opening and closing arguments, the prosecutor argued the crime was first degree murder, not voluntary manslaughter, because appellant did not shoot on adequate provocation in the heat of passion. The evidence that appellant brought a gun with

[2] Maloney was prosecuted for Sam Reeves' murder and for assault with a deadly weapon on David Reeves. He was acquitted of the murder but convicted on the assault charge. Maloney was on parole at the time of appellant's trial.

him to the party negated voluntary manslaughter on a heat of passion theory because, the prosecutor argued, "a gang member who brings a loaded gun to a party in preparation for something going down is not somebody who is dealing with a sudden heat of passion. That's somebody who is prepared for war." The prosecutor made a similar point in rebuttal: "Heat of passion doesn't mean I'm in a fight and you hit me and then I get angry. Heat of passion is I'm walking by and somebody clocks me and I don't expect it and then I overreact. [¶] . . . It's such an outrageous thing it overcomes your ability to think. Think about how many justified shootings we'd have, you know. I get in a fight, we are punching away, you get a good shot. Okay. I got my gun and I kill you. That's not what the law provides. That's not heat of passion. When he entered that fight he was expecting a fight and the fact that somebody licked out and hit him is not a heat of passion."

The defense theory of the case was that appellant acted in the heat of passion or in the unreasonable belief that he needed to shoot Reeves in self defense, so the crime was voluntary manslaughter rather than murder. Defense counsel described the scene this way: "Now, the unfortunate circumstance is that [appellant] does shoot. Why? Because he's scared that he's going to be injured by the choking primarily or he's going to be either further beaten or injured. He should not have had a gun. I'm never going to argue anything about that. But even if you determine that [appellant] didn't have the right of self-defense, he would have reasonably believed he was in imminent danger of injury from the choking and/or other deadly force and the deadly force would be necessary. ¶] Additionally, the events clearly point to this heat of passion since and it had to happen so, so very quickly and in the midst of this melee. And what happened is essentially voluntary manslaughter."

Our Supreme Court recently summarized the standards governing review of prosecutorial misconduct claims. " ' A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such " ' unfairness as to make the resulting conviction a denial of due process.' " (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 . . .; see *People v. Cash* (2002) 28 Cal.4th 703, 733 . . . .) 'Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a

fundamentally unfair trial.' (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328 . . . .) 'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' (*Ibid.*) When a claim of misconduct is based on the prosecutor's comments before the jury, ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' (*People v. Smithey* (1999) 20 Cal.4th 936, 960 . . . , quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841 . . . .)" (*People v. Williams* (2013) 56 Cal.4th 630, 671.)

Prosecutorial misconduct is subject to harmless error analysis. Misconduct is prejudicial as a matter of federal law only where it so infects a trial with unfairness as to make the defendant's resulting conviction a denial of due process. (*People v. Prieto* (2003) 30 Cal.4th 226, 260.) Where the misconduct does not rise to the level of federal constitutional error, it is harmless unless there is a reasonable probability that a result more favorable to the defendant would have been obtained had the prosecutor not engaged in the misconduct at issue. (*People v. Castillo* (2008) 168 Cal.App.4th 364, 386.)

Appellant contends the prosecutor committed misconduct because he misstated the provocation needed to prove voluntary manslaughter on a heat of passion theory. We conclude appellant has forfeited appellate review of this issue because he failed to object to the prosecutor's statement in the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Had the contention not been forfeited, we would reject it because the prosecutor's statement did not amount to prejudicial misconduct.[3]

Voluntary manslaughter has both an objective and a subjective component. The defendant must actually , subjectively act in the heat of passion. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) Objectively, the circumstances that create the heat of

---

[3] Appellant also contends trial counsel's failure to object to this argument constituted ineffective assistance of counsel. Because we conclude the prosecutor did not engage in prejudicial misconduct, the failure to object did not render defense counsel ineffective. (*People v. Espiritu* (2011) 199 Cal.App.4th 718, 726 [failure to object may constitute prejudicial ineffective assistance of counsel only where objection should properly have been sustained].)

passion must be sufficient to cause an ordinary, reasonable person to react " 'rashly or without due deliberation and reflection, and from this passion rather than from judgment.' " (*People v. Beltran* (June 3, 2013, S192644) ___ Cal.4th ___ [2013 WL 2372307 at p. 7.], quoting *People v. Logan* (1917) 175 Cal. 45, 49.) As our Supreme Court recently explained, "Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation. While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice." (*People v. Beltran* (June 3, 2013, S192644) __ Cal.4th ___ [2013 WL 2372307 at p. 3].) This provocation must be sufficient to "cause an emotion so intense that an ordinary person would simply *react*, without reflection . . . . [T]he anger or other passion must be so strong that the defendant's reaction bypassed his though process to such an extent that judgment could not and did not intervene. Framed another way, provocation is not evaluated by whether the average person would *act* in a certain way: to kill. Instead, the question is whether the average person would *react* in a certain way: with his reason and judgment obscured." (*Id.* [2013 WL 2372307 at p. 8].)

This objective standard is based on the reaction of an ordinarily reasonable person, not "the reaction of a 'reasonable gang member.' " (*People v. Enraca* (2012) 53 Cal.4th 735, 759.) " '[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253, quoting *People v. Logan* (1917) 175 Cal.45, 49.)

It is certainly possible for a person who is carrying a firearm to be presented with circumstances that would cause an ordinarily reasonable person to react without reflection and with his or her reason and judgment obscured. Thus, the prosecutor would have misstated the applicable legal standard if he had argued that an armed person like appellant can never experience sufficient provocation to act in the heat of passion. That is not, however, a fair reading of the argument. We understand the prosecutor's argument to

have been that appellant did not actually shoot in the heat of passion because he was mentally and physically prepared for a fight. The jury could infer that appellant was not shocked or surprised when he became involved in a fight because he arrived at the party with a gun, expecting to become involved in a violent confrontation, and voluntarily entered the fight after others had started it. As a consequence, the jury could infer that his reason and judgment were not in fact overcome by passion and the shooting therefore constituted murder rather than voluntary manslaughter. (*People v. Lee* (1999) 20 Cal.4th 47, 60, fn. 6 [mutual combat form of voluntary manslaughter inapplicable where defendant takes undue advantage or uses a dangerous weapon].) This is a fair comment on the evidence that does not misstate the legal standard of provocation needed to reduce a murder to voluntary manslaughter. There is no reasonable likelihood the jury understood or applied the comments in an improper or erroneous manner. (*People v. Dykes* (2009) 46 Cal.4th 731, 771-772.)

Denial of Request to Substitute Counsel at Sentencing Hearing

After the jury returned its guilty verdict on March 13, 2012, the trial court scheduled appellant's sentencing hearing for May 18, 2012. On May 16, at appellant's request, the sentencing date was continued to June 6. Appellant and his trial counsel appeared at the June 6 hearing. Another attorney, Robin Bramson, informed the trial court that she had been approached by a third party about representing appellant for a new trial motion and for sentencing. It was her "understanding" that appellant also wanted her to substitute in as his counsel, although she had not spoken directly to him. Ms. Bramson requested "a continuance of two to three days so that we may be retained and paid by the third party . . . ." The trial court declined to grant the continuance. It reasoned that appellant's right to be represented by counsel of his choosing is not "absolute, particularly when a substitution would delay the proceedings or interfere with the process of justice. And I think that's exactly what would happen today should I allow Ms. Bramson to substitute in for Mr. Cassy on the date of sentencing." The trial court also noted that neither the parties nor the court received prior notice of Ms. Bramson's appearance or her request for a continuance. In addition, "it has been three months since [appellant's] conviction in

this matter and certainly almost a decade since the crime. So for those reasons I do find an attempted substitution . . . would delay the proceedings and interfere with the process of justice. So the request is denied."

Appellant contends the trial court's refusal to grant a continuance to allow him to retain Ms. Bramson as his counsel deprived him of his right to counsel in violation of the Sixth Amendment to the federal Constitution. We review the trial court's decision to deny a continuance of the sentencing hearing for abuse of discretion. (*People v. Snow* (2003) 30 Cal.4th 43, 77.) " '[B]road discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.' " (*People v. Alexander* (2010) 49 Cal.4th 846, 934-935, quoting *Morris v. Slappy* (1983) 461 U.S. 1, 11-12.)

There was no abuse. Appellant's sentencing hearing was continued once, at his request, and ultimately held nearly three months after the jury returned its verdict. Ms. Bramson first came to the trial court's attention at the hearing itself. Neither the parties nor the trial court had any prior notice of her appearance and she had not yet met with or been retained by appellant. Appellant's trial counsel had filed a motion to reduce the level of his offense from murder to voluntary manslaughter. Ms. Bramson offered no indication of whether she would withdraw that motion and file something else or how long she would need to decide on her approach to the sentencing hearing. There was no explanation for the untimely requests to continue the hearing and to substitute counsel, nor did appellant establish good cause for either request. In light of all these circumstances, the trial court acted within its discretion when it declined to continue the hearing or allow appellant to substitute new counsel. (*People v. Courts* (1985) 37 Cal.3d 784, 790-791; *People v. Jeffers* (1987) 188 Cal.App.3d 840, 850-851 [request for continuance made on day of trial properly denied where defendant failed to present trial court with "compelling circumstances" justifying request].)

Criminal Street Gang Special Circumstance
and Sentence Enhancement

The jury found true the special circumstance allegation that appellant committed the murder while he was an active member of Bad Boyz, a criminal street gang, and that he did so to further the gang's activities. (§ 190.2, subd. (a)(22).) It also found true the sentence enhancement allegation that appellant committed the murder for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1)(C).) Appellant contends these findings are not supported by substantial evidence.

Our role in evaluating a substantial evidence claim on appeal is a limited one. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We review the whole record to determine whether any rational trier of fact could have found the essential elements of the special circumstance or sentence enhancement allegation true beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*Id.*) We do not resolve credibility issues or conflicts in the evidence because these are matters for the jury. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) "Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)" (*People v. Zamudio, supra,* 43 Cal.4th at p. 357.)

The prosecution alleged as a special circumstance that appellant "intentionally killed" Samuel Reeves while appellant "was an active participant in a criminal street gang," and "the murder was carried out to further the activities of the gang." (§ 190.2, subd. (a)(22).) To establish this special circumstance, the prosecution was required to prove: "1.

The defendant intentionally killed Samuel Reeves; [¶] 2. At the time of the killing, the defendant was an active participant in a criminal street gang; [¶] 3. The defendant knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; and [¶] 4. The murder was carried out to further the activities of the criminal street gang." (Cal Crim. No. 736.)

Appellant does not challenge the evidence establishing his own active membership in Bad Boyz or Bad Boyz's status as a criminal street gang. He does, however, contend the evidence is insufficient to establish that he committed a murder "to further the activities of the gang." Appellant relies on the evidence that neither the victim nor the other participants in the fight were gang members. No gang signs were thrown prior to the shooting and appellant did not "claim" his gang or make any other statements related to gang membership either before or after the shooting. There was no evidence that anyone at the party knew who the shooter was or whether the shooter belonged to a gang.

There was, however, other evidence from which a reasonable jury could have found that appellant committed the murder to further the activities of the gang. Tom Mendez, a former Santa Paula police officer now employed as an investigator by the Ventura County District Attorney's office, testified as the prosecution's expert witness on criminal street gangs in Santa Paula. He opined that the idea of respect was very important to gang members, including members of the Bad Boyz. They equated respect with fear, and used fear to intimidate members of other gangs and members of the community. If the community did not respect and fear the Bad Boyz, they might be more willing to cooperate with law enforcement, thereby disrupting the gang's criminal activity. As a consequence, gang members could not tolerate disrespect from the community.

Investigator Mendez opined that, if a gang member intervened in a large fight involving non-gang members at a party, he would be putting the reputation of his gang at risk. If the community members did not respect the gang member by following his instruction to stop fighting, for example, they would be disrespecting both the gang and that specific member. The gang member would feel obligated to enforce respect for himself and the gang by retaliating, particularly with violence. Thus, a shooting carried out under these

circumstances would benefit or further the activities of the gang because the shooting would enforced "respect" for both the shooter and his gang.

According to the expert, "When the gang member goes into the situation and gives an order [to stop fighting], the first sign of disrespect is that that order is not followed. . . . A higher level of disrespect is if that gang member is punched or physically assaulted by a non-gang member." The gang member would be expected to "immediately deal" with this disrespect, both to preserve his status within the gang and to enhance others' "respect" for the gang. The gang member would also know that his "homeboys" would come to his rescue, if he is being punched or choked during the fight. "So at some point he's going to get the help that he needs and it's my opinion that shooting somebody in that situation is more to prove a point you disrespected me than to get himself out of that situation, because he knows help is on the way."

Mauricio Reyes, the former Bad Boyz member and "shot caller" who secretly recorded a conversation with appellant, corroborated Mendez' testimony in this regard. He testified as follows: "Q: . . . [I]f you are at a party, a large party, with members of your street gang and something happens and one of the members of the street gang moves in to sort of stop something, is that taking the impact of the gang to whatever that event is? [¶] A: Yes. [¶] Q: And so would that, in essence, be acting for the benefit or furtherance of the street gang? [¶] A: You could say that." Reyes confirmed that respect is a "very important concept" for Bad Boyz members. It is, he testified, the same thing as power or fear. According to Reyes, "Fear is probably the biggest factor in the Bad Boyz. Respect comes out of fear. That's how you establish your respect on the streets, through fear and intimidation."

Expert opinion that particular conduct benefited a gang by enhancing its reputation for violence can be sufficient to support the inference that the conduct "was carried out to further the activities of the gang[,]" within the meaning of section 190.2, subdivision (a)(22). (See, e.g., *People v. Albillar* (2010) 51 Cal.4th 47, 62; *People v. Carr* (2010) 190 Cal.App.4th 475, 489-490.) The jury could reasonably have relied on the testimony of Mendez and Reyes to find that appellant committed the murder to further the

activities of his criminal street gang because he believed his actions would enhance respect for (or fear of) his gang in the community and among other gang members.

For similar reasons, we conclude the sentence enhancement finding is supported by substantial evidence. Section 186.22, subdivision (b)(1) mandates an enhanced sentence for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members . . . ." A reasonable jury could infer from the testimony of Mendez and Reyes that appellant committed the murder "for the benefit of" a criminal street gang because doing so would enhance his status within the Bad Boyz and "respect" for (or fear of) the gang in the community. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

In addition, the evidence established that appellant attended the party with fellow gang members, at least one of whom came to his aid when his first efforts to stop the fight failed. Mendez testified that a gang member "knows that his fellow gang members have his back, that they are going to assist him in anything that he gets involved in. So the second he makes that decision to go into that crowd or that situation, he knows that he's not only making that decision for himself, he's making it for his entire gang. [¶] Because regardless of what goes down after he decides to get into that situation, his fellow gang members, his expectation of them is that they have his back. So no matter what happens he's gonna have their assistance." The jury could reasonably have relied on this testimony to infer that appellant committed the shooting "in association with" those other gang members. (*People v. Albillar, supra*, 51 Cal.4th at pp. 61-62; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1197-1198.)

Abstract of Judgment

The abstract of judgment in this matter reflects a parole revocation fine that is both inconsistent with the trial court's oral pronouncement of sentence and with appellant's sentence of life in prison without the possibility of parole. As a consequence, we will order the abstract of judgment to reflect the correct sentence. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

Disposition

The clerk of the superior court is directed to prepare and forward to the Department of Corrections a corrected abstract of judgment that omits the parole revocation fine. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Patricia Murphy, Judge
Superior Court County of Ventura

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, William N. Frank, Deputy Attorney General, for Plaintiff and Respondent.

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOE FIDEL FLORES, Petitioner, v. W.L. MONTGOMERY, Warden, Respondent.	Case No. CV 14-2687-RGK (KK) **JUDGMENT**

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

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

Dated: 11/13/14

Gary Klausner

HONORABLE R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

O

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOE FIDEL FLORES, Petitioner, v. W.L. MONTGOMERY, Warden, Respondent.	Case No. CV 14-2687-RGK (KK) **ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for a Writ of Habeas Corpus, the records on file, and the Final Report and Recommendation of the United States Magistrate Judge. The Court has engaged in a de novo review of those portions of the Report to which Petitioner has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered (1) denying the Petition for a Writ of Habeas Corpus; and (2) dismissing this action with prejudice.

DATED: 11/13/14

Gary Klausner

HONORABLE R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOE FIDEL FLORES, Petitioner, v. W.L. MONTGOMERY, Warden, Respondent.	Case No. CV 14-2687-RGK (KK) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Final Report and Recommendation is submitted to the Honorable R. Gary Klausner, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

SUMMARY OF RECOMMENDATION

Joe Fidel Flores ("Petitioner"), a California state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254. Petitioner alleges various constitutional violations, including prosecutorial misconduct, ineffective assistance of counsel, denial of counsel of choice, and insufficient evidence.

For the reasons that follow, the Petition should be denied in its entirety.

II.

PROCEDURAL HISTORY

On March 13, 2012, after a jury trial in the Superior Court of California, County of Ventura, Petitioner was convicted of one count of first degree murder in violation of Cal. Penal Code § 187. Lodged Doc. ("Lodg.") 1, Clerk's Transcript Vol. 3 ("3 CT")[1] at 573; 4 CT at 607; Lodged Doc. 2, Vol. 4 ("4 RT")[2] at 666. The jury also found that Petitioner intentionally killed the victim while an active participant in a criminal street gang in violation of Cal. Penal Code § 190.2(a)(22), that Petitioner committed the offense for the benefit of, at the direction of, or in association with a criminal street gang in violation of Cal. Penal Code § 186.22(b)(1)(C), and that Petitioner personally and intentionally discharged a firearm proximately causing death in violation of Cal. Penal Code §§ 12022.53(c), (d). 3 CT at 560, 573; 4 CT at 607; 4 RT at 666-67. The trial court sentenced Petitioner to a prison term of life without the possibility of parole, plus 25 years to life. 4 CT at 603-04, 607; 4 RT at 699.

Petitioner appealed his conviction to the California Court of Appeal. Lodged Docs. 3-5. On August 22, 2013, the California Court of Appeal affirmed the judgment in an unpublished opinion.[3] Lodg. 6.

Petitioner next filed a petition for review with the California Supreme Court. Lodg. 7. On November 20, 2013, the California Supreme Court denied the petition.

---

[1] Lodged Document 1 is a copy of the Clerk's Transcript from Petitioner's trial. Any further citations to Lodged Document 1 will cite the Clerk's Transcript or "CT," in addition to the volume number.

[2] Lodged Document 2 is a copy of the Reporter's Transcript of Petitioner's trial. Any further citations to Lodged Document 2 will cite the Reporter's Transcript or "RT," in addition to the volume number.

[3] The court of appeal ordered that a corrected abstract of judgment be prepared to omit a parole revocation fine, but otherwise affirmed the judgment.

Lodg. 8.

On April 9, 2014, Petitioner filed the instant Petition in this Court. On June 30, 2014, Respondent filed an Answer to the Petition ("Answer"). Petitioner filed a Traverse on July 14, 2014.

Thus, this matter has been submitted for decision.

III.

FACTUAL BACKGROUND

In affirming Petitioner's conviction, the California Court of Appeal summarized the underlying factual background. Lodg. 6. Petitioner has not challenged the state court's summary, and a review of the record reveals its accuracy.[4] See Cooper v. Brown, 510 F.3d 870, 919 (9th Cir. 2007) ("Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary.") (citations and internal quotation marks omitted). Accordingly, the Court adopts the factual discussion of the California Court of Appeal opinion as a fair and accurate summary of the evidence:

> The victim, Samuel Reeves, was 15 years old when he accompanied his older brothers Jesse and David, and Jesse's friend, Geno Roderick, to a large outdoor birthday party held at a ranch house on the outskirts of Santa Paula. Between 100 and 350 people attended the party, which featured kegs of beer, other alcohol and loud music. Most of the guests were college-aged, although some were older and others were high-school aged. The person whose birthday was being celebrated is not associated with any of the Santa Paula gangs, but some local gang members attended. Sam and his brothers were not affiliated with any gang, nor was Roderick.
>
> Appellant, Nathan Maloney, and Michael and Peter Carrillo were members of Bad Boyz, a Santa Paula gang, who also attended the party.

[4] Because Petitioner is challenging the sufficiency of the evidence to support the gang and special circumstance allegations, the Court has independently reviewed the state court record. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997).

Appellant, Maloney, and Michael Carrillo were each armed with a handgun. Maloney testified that he brought a gun to the party because he was a gang member and expected someone might confront him or his fellow gang members for that reason.

At some point during the party, a fist fight broke out between Roderick, the Reeves brothers and five to 10 other party guests. [Crosby] Nicholson, who was involved at the beginning of the fight, testified that he was knocked to the ground; others were standing and throwing punches.

Appellant entered the fray, attempting to stop the fight. David Reeves punched appellant and was choking him. Another blow struck appellant and he was "knocked out." Someone, possibly Sam Reeves, kicked appellant in the face as he lay on the ground. Appellant's nose was bloodied, but not broken. When appellant came to, he was on the ground. He later told a friend and fellow gang member that he was being "jumped." Someone was choking him and he could not breathe because his nose was bleeding. Appellant fired his gun at one of the people surrounding him.

Sam Reeves sustained a fatal gunshot wound to the chest at point blank range. Appellant's blood was found on Reeves' shirt and shoes. There were no grass stains on his clothing, or recent injuries to his body that would indicate he had been fighting or wrestling before he was shot.

Meanwhile, Nathan Maloney was standing nearby with his own handgun in his hand. David Reeves was running toward him, so Maloney pointed the gun at him. David put his hands up. Maloney was shouting to the crowd to keep away. He put his gun to David Reeves' head to stop him from attacking appellant. Maloney waited for appellant to collect himself and get up off of the ground. Then, they ran away from the scene together.

When the shooting occurred, Mauricio Reyes was a leader of and "shot caller" for the Bad Boyz. He did not attend the birthday party because

he was in custody that night. Six years after the shooting, Reyes agreed to provide information about it to law enforcement, in exchange for the dismissal of an ammunition possession charge and relocation assistance. Reyes secretly recorded conversations with both Maloney and appellant in which both men acknowledged that appellant was the person who shot Reeves.

The trial court instructed the jury on murder, the lesser included offense of voluntary manslaughter on a heat of passion theory and on an imperfect self-defense theory, justifiable self-defense and the role of self defense in a mutual combat situation. The jury found appellant guilty of first degree murder and found true the special circumstance allegation that he intentionally killed the victim while he was a participant in a criminal street gang, the sentence enhancement allegation that he committed the murder for the benefit of the gang and the sentence enhancement allegation that he personally used a firearm in committing the murder.

Lodg. 6 at 2-3 (footnote omitted).

IV.

PETITIONER'S CLAIMS FOR RELIEF

Petitioner's claims, as presented in his Petition, are as follows.

1. Claim One: The prosecutor committed misconduct by misstating the legal requirements for voluntary manslaughter.
2. Claim Two: Petitioner received ineffective assistance of counsel when trial counsel failed to object to the prosecutor's alleged misconduct.[5]
3. Claim Three: The trial court violated Petitioner's Sixth Amendment right to

[5] Petitioner includes his ineffective assistance of counsel claim within his argument accompanying Claim One. For clarity, this Court has separated Petitioner's ineffective assistance of counsel claim and refers to it as Claim Two. Petitioner's original Claims Two and Three will be referred to as Claims Three and Four, respectively.

counsel of choice by refusing to allow the substitution of retained counsel.

4. Claim Four: The evidence presented at trial was insufficient to prove the gang and special circumstance allegations.

Petition, at 5. Respondent contends that all of these claims fail on the merits. Answer, at 7-24.[6]

V.

STANDARD OF REVIEW

A federal court may review a habeas petition by a person in custody under a state-court judgment "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Federal habeas relief is not available for state-law errors. Swarthout v. Cook, 562 U.S. 216, 131 S. Ct. 859, 861, 178 L. Ed. 2d 732 (2011) (*per curiam*) (citing Estelle v. McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless the adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

---

[6] Respondent contends that Claim One is procedurally barred in light of Petitioner's failure to object to the alleged error at trial. Answer, at 4-7. Because Petitioner's claims are easily resolved on the merits, while the procedural default argument is much more complex, in the interest of judicial economy, this Court considers the claims on the merits rather than addressing the procedural default issue. See 28 U.S.C. § 2254 (b)(2) (district court has authority to deny unexhausted claims on their merits); see also Lambrix v Singletary, 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997) ("We do not mean to suggest that the procedural-bar issue must invariably be resolved first; only that it ordinarily should be."); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same.").

Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"Clearly established federal law" means federal law that is clearly defined by the holdings of the Supreme Court at the time of the state-court decision. See, e.g., Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388, 1399, 179 L. Ed. 2d 557 (2011). Although only Supreme Court law is binding, "circuit court precedent may be persuasive in determining what law is clearly established and whether a state court applied that law unreasonably." Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011) (citation omitted).

In determining whether a decision is "contrary to" clearly established federal law, a reviewing court must evaluate whether the decision "'applies a rule that contradicts [such] law'" and how the decision "confronts [the] set of facts that were before the state court.'" Cullen, 131 S. Ct. at 1399 (quoting Williams v. Taylor, 529 U.S. 362, 405, 408, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). If the state decision "'identifies the correct governing legal principle' in existence at the time," a reviewing court must assess whether the decision "'unreasonably applies that principle to the facts of the prisoner's case.'" Id. (quoting Williams, 529 U.S. at 413). An "unreasonable application" of law is "'different from an incorrect application'" of that law. Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 785, 178 L. Ed. 2d 624 (2011) (quoting Williams, 529 U.S. at 410) (emphases omitted). Similarly, a state-court decision based upon a factual determination may not be overturned on habeas review unless the factual determination is "'objectively unreasonable in light of the evidence presented in the state-court proceeding.'" Stanley, 633 F.3d at 859 (quoting Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004)).

The AEDPA standard requires a high level of deference to state-court decisions, such that a state court's decision will be upheld if "fairminded jurists could disagree as to whether it was correct." Gulbrandson v. Ryan, 738 F.3d 976, 990 (9th Cir. 2013) (citation and internal quotation marks omitted). Even if this Court finds such a state-

court error of clear constitutional magnitude, habeas relief is not available unless the error "had substantial and injurious effect or influence in determining the jury's verdict." Fry v. Pliler, 551 U.S. 112, 116, 121-22, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007) (citations and internal quotation marks omitted).

Where, as here, the California Supreme Court denies a petitioner's claims without comment, the state high court's "silent" denial is considered to be "on the merits" and to rest on the last reasoned decision on these claims. See Ylst v. Nunnemaker, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992); see also Kennedy v. Lockyer, 379 F.3d 1041, 1052 (9th Cir. 2004); Gill v. Ayers, 342 F.3d 911, 917 n.5 (9th Cir. 2003). Hence, in this case, the California Supreme Court's denial of review rests on the grounds articulated by the California Court of Appeal in its decision on direct review.

VI.

DISCUSSION

A. Petitioner Fails to Demonstrate Prosecutorial Misconduct

1. Background

In Claim One, Petitioner argues that the prosecutor committed misconduct by misstating the legal requirements for voluntary manslaughter. Petition, at 5, 12-23. Specifically, Petitioner argues that the prosecutor misstated the provocation needed to warrant a voluntary manslaughter conviction rather than a murder conviction. Petitioner claims the prosecutor improperly argued that "manslaughter requires a reasonable person to react reasonably in a homicidal manner after being provoked," or in other words, that in order to establish provocation, the evidence had to show that a reasonable person would have reacted to the same scenario by killing the other person. Petition, at 12, 17. Petitioner concludes the prosecutor's argument was that "provocation is not available to someone who is armed, particularly a gang member." Petition, at 15.

Petitioner's theory of defense was that he committed nothing more than voluntary manslaughter, as the altercation he was engaged in amounted to the requisite heat of

passion to find him guilty of the lesser offense. 1 RT at 65-66.

Before the prosecutor began closing arguments, the jury was instructed on the definition of voluntary manslaughter pursuant to CALCRIM 570, as follows:

> A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.
>
> The defendant killed someone because of a sudden quarrel or in the heat of passion if:
>
> One, the defendant was provoked.
>
> Two, as a result of the provocation the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment.
>
> And three, the provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than judgment.
>
> Heat of passion does not require anger, rage or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.
>
> In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.
>
> It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In deciding whether the provocation was sufficient, consider whether a person of average disposition in the same situation and knowing the same facts would have reacted from passion rather than from judgment.

> The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.

3 RT at 552-53. The prosecutor then offered the following arguments:

> Sudden heat of passion is like I'm sitting here and somebody comes up and blind sides me -- not side blinds me -- and I'm angry and all of a sudden I overreact, I grab something and that. That's a sudden heat of passion. I submit to you a gang member who brings a loaded gun to a party in preparation for something going down is not somebody who is dealing with a sudden heat of passion. That's somebody who is prepared for war.
>
> . . .
>
> Heat of passion. It's a misnomer here. Heat of passion doesn't mean I'm in a fight and you hit me and then I get angry. Heat of passion is I'm walking by and somebody clocks me and I don't expect it and then I overreact.
>
> Or the classic heat of passion is you come home and you hear noises upstairs and you find your significant other engaged in a situation with somebody else. That's classic heat of passion. It's such an outrageous thing it overcomes your ability to think. Think about how many justified shootings we'd have, you know. I get in a fight, we are punching away, you get a good shot. Okay. I got my gun and I kill you. That's not what the law provides. That's not heat of passion. When he entered that fight he was expecting a fight, and the fact that somebody licked out and hit him is not a heat of passion.

3 RT at 620, 650-51.

2. State Court Opinion

The California Court of Appeal rejected Petitioner's claim on direct appeal, as

follows:

> It is certainly possible for a person who is carrying a firearm to be presented with circumstances that would cause an ordinarily reasonable person to react without reflection and with his or her reason and judgment obscured. Thus, the prosecutor would have misstated the applicable legal standard if he had argued that an armed person like appellant can never experience sufficient provocation to act in the heat of passion. That is not, however, a fair reading of the argument. We understand the prosecutor's argument to have been that appellant did not actually shoot in the heat of passion because he was mentally and physically prepared for a fight. The jury could infer that appellant was not shocked or surprised when he became involved in a fight because he arrived at the party with a gun, expecting to become involved in a violent confrontation, and voluntarily entered the fight after others had started it. As a consequence, the jury could infer that his reason and judgment were not in fact overcome by passion and the shooting therefore constituted murder rather than voluntary manslaughter. This is a fair comment on the evidence that does not misstate the legal standard of provocation needed to reduce a murder to voluntary manslaughter. There is no reasonable likelihood the jury understood or applied the comments in an improper or erroneous manner.

Lodg. 6 at 6-7 (citations omitted).

3. Legal Standard

A habeas petition alleging prosecutorial misconduct will be granted only when the misconduct did "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)); see also Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). "[T]he touchstone of due process analysis in cases of alleged

prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Under Darden, the first issue is whether the prosecutor's remarks or conduct were improper; if so, the next issue is whether such remarks or conduct infected the trial with unfairness. Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir. 2005) (citing Darden, 477 U.S. at 181).

A prosecutor is permitted to argue reasonable inferences from the evidence. Duckett v. Godinez, 67 F.3d 734, 742 (9th Cir. 1995). "Counsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom." Ceja v. Stewart, 97 F.3d 1246, 1253-54 (9th Cir. 1996); see also United States v. Birges, 723 F.2d 666, 672 (9th Cir. 1984) (noting that prosecutor's characterization of defense theory as a "fabrication" fell "well within the bounds of acceptable comment"). The Court views a prosecutor's challenged remarks in the context of the entire trial. See Greer, 483 U.S. at 765-66; see also Donnelly, 416 U.S. at 639-43.

4. Discussion

Petitioner has not shown that the prosecutor's argument amounted to misconduct by misstating the law on voluntary manslaughter. Nowhere in the cited portions of the prosecutor's argument did he argue that the voluntary manslaughter standard required a finding that a reasonable person would have reacted to the same circumstances by killing the other individual. Neither did the prosecutor argue that a person armed with a firearm can never be sufficiently provoked to warrant a finding of voluntary manslaughter. Rather, the prosecutor argued that Petitioner approached the victim armed and ready for a fight. The prosecutor reasoned that, under this scenario, the victim could not have surprised Petitioner by engaging him in an altercation.

Importantly, the prosecutor's argument was a reasonable inference from the evidence. See Duckett, 67 F.3d at 742 (a prosecutor is permitted to argue reasonable inferences from the evidence). Petitioner's fellow gang member testified that he took a gun to the party because he was a gang member and he needed to protect himself from

people that might try to hurt him; Petitioner was also armed. 2 RT at 322; see 1 RT at 65; see also 3 RT at 463, 466, 473; 3 CT at 413, 459. When a fight broke out at the party, Petitioner "tried to intervene." 3 RT at 463. A gang expert testified that a gang member who is carrying a gun must be willing to use the gun for his gang. 3 RT at 514. This evidence supported an argument that Petitioner joined in the fight with full knowledge of his actions and an understanding that he might use his gun.

In addition, the prosecutor's argument was a direct response to the theory of defense that Petitioner was guilty of nothing more than voluntary manslaughter. United States v. Bagley, 772 F.2d 482, 494-95 (9th Cir. 1985) (prosecutor may properly reply to arguments made by defense counsel).

Even if this Court were to find that the prosecutor committed misconduct during closing argument, any error was harmless. As stated above, the trial court instructed the jury on the elements of voluntary manslaughter as defined by state law. 3 RT at 552-53. This instruction was accompanied by further instructions directing the jury to apply the law as the trial court defined it, cautioning the jury that the statements of the attorneys were not evidence, and directing that, if there was a discrepancy between the attorneys' statement on the law and that of the trial court, the jury was to follow the instructions given by the trial court. 3 RT at 535, 537. The jury is presumed to have followed these instructions and, thus, presumed to have applied the proper standard of voluntary manslaughter. Weeks v. Angelone, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000).

Accordingly, the state courts' rejection of Petitioner's claim was neither contrary to, nor an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on Claim One.

B. Petitioner Fails to Demonstrate That Trial Counsel Was Ineffective

In Claim Two, Petitioner argues his trial counsel was ineffective for failing to object to the alleged prosecutorial misconduct discussed in Section A, above. Petition, at 12, 18-21.

The California Court of Appeal rejected Petitioner's claim, finding he had not proven prosecutorial misconduct and, thus, could not show ineffective assistance for counsel's failure to object to the alleged misconduct. Lodg. 6 at 5 n.3.

For Petitioner to prevail on his ineffective assistance of counsel claim, he must satisfy a two-prong test: (1) he must show that counsel's performance was deficient, and (2) he must show that he was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A court evaluating an ineffective assistance of counsel claim does not need to address both components of the test if a petitioner cannot sufficiently prove one of them. Id. at 697; see also Thomas v. Borg, 159 F.3d 1147, 1152 (9th Cir. 1998).

To prove deficient performance, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. Strickland. 466 U.S. at 687-88. However, establishing counsel's deficient performance does not warrant setting aside the judgment if the error had no effect on the judgment. Id. at 691; see also Seidel v. Merkle, 146 F.3d 750, 757 (9th Cir. 1998). Thus, a petitioner must also show prejudice, such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

Moreover, a habeas court's review of a claim under the Strickland standard is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009). The relevant question "is not whether a federal court believes the state court's determination under the Strickland standard was incorrect but whether that determination was unreasonable – a substantially higher threshold." Id. (citations omitted). "[B]ecause the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." Id. (citation omitted).

As discussed in Section A, above, there is no merit to Petitioner's allegation of prosecutorial misconduct. Accordingly, trial counsel was not ineffective for failing to

object to the prosecutor's statements at trial. Jones v. Smith, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000) (an attorney's failure to make a meritless motion does not constitute ineffective assistance of counsel); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) ("[T]he failure to take a futile action can never be deficient performance.").

Accordingly, the state courts' rejection of Petitioner's ineffective assistance of counsel claim was neither contrary to, nor an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on Claim Two.

C. Petitioner Fails to Demonstrate That the Trial Court Violated His Right to Counsel of Choice

1. Background

Petitioner argues in Claim Three that the trial court violated his Sixth Amendment right to counsel when it denied his request to substitute retained counsel for appointed counsel at sentencing. Petition, at 24-41.

On the day of Petitioner's sentencing hearing, private counsel Robin Bramson appeared before the trial court. 4 RT at 673. Bramson informed the court that she had been approached by a third party about being retained to represent Petitioner for purposes of a new trial motion and sentencing. 4 RT at 673. Neither the trial court nor Petitioner were aware of any attempts to hire a lawyer for Petitioner, and did not have notice of Bramson's intention to request to be substituted in as counsel. However, once made aware of the situation, Petitioner wished to be represented by Bramson. 4 RT at 676. Bramson informed the trial court that it was not her intention to prolong the matter, but that she intended to file a motion for new trial and that she would need an immediate continuance of two to three days so that she could be retained and paid by the third party. 4 RT at 673-74.

Before engaging Bramson on her request to substitute in as Petitioner's counsel, the trial court held a hearing on Petitioner's motion to dismiss his appointed counsel pursuant to People v. Marsden, 2 Cal. 3d 118, 84 Cal. Rptr. 156 (1970). 4 RT at 675.

The trial court ultimately denied Petitioner's Marsden motion. 4 RT at 676. The court then denied Bramson's request to replace defense counsel, noting that there had been no notice that such a request would be made and that a substitution would "delay the proceedings or interfere with the process of justice." 4 RT at 677. The court specifically noted that the request was made three months after Petitioner's conviction and "almost a decade" after the crime was committed. 4 RT at 677.

2. State Court Opinion

The California Court of Appeal rejected Petitioner's claim on direct review. The state court explained:

> There was no abuse. Appellant's sentencing hearing was continued once, at his request, and ultimately held nearly three months after the jury returned its verdict. Ms. Bramson first came to the trial court's attention at the hearing itself. Neither the parties nor the trial court had any prior notice of her appearance and she had not yet met with or been retained by appellant. Appellant's trial counsel had filed a motion to reduce the level of his offense from murder to voluntary manslaughter. Ms. Bramson offered no indication of whether she would withdraw that motion and file something else or how long she would need to decide on her approach to the sentencing hearing. There was no explanation for the untimely requests to continue the hearing and to substitute counsel, nor did appellant establish good cause for either request. In light of all these circumstances, the trial court acted within its discretion when it declined to continue the hearing or allow appellant to substitute new counsel.

Lodg. 6 at 8 (citation omitted).

3. Legal Standard

Under longstanding Supreme Court authority, the Sixth Amendment right to counsel encompasses a criminal defendant's right to retain counsel of his choice. Powell v. Alabama, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932) (holding that a criminal

defendant must be afforded a "fair opportunity to secure counsel of his own choice"); see also Chandler v. Fretag, 348 U.S. 3, 10, 75 S. Ct. 1, 99 L. Ed. 4 (1954) (stating that "a defendant must be given a reasonable opportunity to employ and consult with counsel"). This Sixth Amendment principle applies to trial counsel, as well as counsel at sentencing. See United States v. Walters, 309 F.3d 589, 592 (9th Cir. 2002) (applying Sixth Amendment right to counsel standards to request to substitute counsel for purposes of sentencing).

However, "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) (citations omitted). Accordingly, the right to retained counsel of choice is not absolute. Id. (noting that "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects"); accord Walters, 309 F.3d at 592 (stating that the right to hire counsel of choice granted by the Sixth Amendment "is qualified in that it may be abridged to serve some 'compelling purpose'") (citing United States v. D'Amore, 56 F.3d 1202, 1204 (9th Cir. 1995), overruled on other grounds by United States v. Garrett, 179 F.3d 1143, 1145 (9th Cir. 1999)). Trial courts enjoy "wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar." United States v. Gonzalez-Lopez, 548 U.S. 140, 152, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (citations omitted). Trial courts also have the discretion to "make scheduling and other decisions that effectively exclude a defendant's first choice of counsel." Miller v. Blacketter, 525 F.3d 890, 895 (9th Cir. 2008).

On habeas review, a trial court's denial of choice of counsel is reviewed for abuse of discretion by balancing the defendant's right of chosen counsel with concerns of fairness and scheduling. Miller, 525 F.3d at 896. The Ninth Circuit has identified three factors that comprise this analysis: (1) whether the defendant had retained new counsel,

(2) whether current counsel was prepared and competent to proceed forward, and (3) the timing of defendant's request. Id. at 896-98.

4. Discussion

The first factor, whether defendant had retained new counsel, does not weigh in Petitioner's favor. At the time of the sentencing hearing, Petitioner had not spoken with or retained Bramson. 4 RT at 676. In addition, Bramson requested a continuance of "two to three days" so that she could be retained and paid by the third party who had approached her about Petitioner's case. It is unclear from the record how much additional time Bramson would have required to review the record in Petitioner's case and adequately prepare for the sentencing hearing. Compare Bradley v. Henry, 510 F.3d 1093, 1100 (9th Cir. 2007) (*en banc*) (plurality opinion) (concluding habeas corpus should be granted when the trial court denied the petitioner's motion to substitute retained counsel forty-six days before trial, even though substitute counsel indicated there would be no need to delay the start of trial) with Miller, 525 F.3d at 896 (concluding habeas corpus should be denied in part because "[i]t was unclear how much time a new attorney, once hired, would have needed to prepare for . . . trial.").

The second factor, whether current counsel was prepared and competent to proceed forward, also weighs against Petitioner. Petitioner's trial counsel was present and prepared at the sentencing hearing. Counsel appears to have conducted himself competently throughout that hearing.

Finally, the third factor, whether the request was timely, also weighs against Petitioner. Bramson appeared on the day of the sentencing hearing without any prior notification to the court or the parties of her intention to represent Petitioner. The Court recognizes that the timing of a motion to substitute counsel does not provide an absolute bar to granting the motion. Daniels v. Woodford, 428 F.3d 1181, 1200 (9th Cir. 2005) (noting that motions for substitution are well-taken even on the eve of trial if the conflict is serious enough). In Miller, however, the Ninth Circuit held that the trial court was justified in denying a motion for a continuance to substitute retained counsel when

Petitioner sought to replace his current counsel on the morning of trial. Miller, 525 F.3d at 897-98; see also Wheat, 486 U.S. at 157 (holding that the trial court did not abuse its discretion when it denied a motion for substitution two days before trial); Houston v. Schomig, 533 F.3d 1076, 1079 (9th Cir. 2008) (holding that the trial court acted within its discretion when it denied defendant's motion four days before trial to substitute retained counsel on the sole basis that defendant thought that trial counsel was unprepared). Indeed, the trial court here noted that if it allowed the substitution of counsel, it would delay the proceedings and interfere with the process of justice. 4 RT at 677. This was not a case, therefore, in which the trial court had an "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'" nor did the trial court unreasonably exceed "[i]ts discretion to balance Miller's right to his chosen counsel against concerns of fairness and scheduling." Miller, 525 F.3d at 897-98 (citations omitted).

Accordingly, when analyzing Petitioner's claim in light of the factors set forth in Miller, the trial court's denial of his motion to substitute counsel of choice was not an unreasonable exercise of discretion. Thus, the state courts' rejection of Petitioner's substitution of counsel claim was neither contrary to, nor an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on Claim Three.

D. Petitioner Fails to Demonstrate That the Evidence Presented at Trial Was Insufficient to Prove the Gang and Special Circumstance Allegations

1. Background

Finally, in Claim Four, Petitioner argues that the prosecution failed to present sufficient evidence to support the gang and special circumstance allegations. Petition, at 42-59.

2. State Court Opinion

The California Court of Appeal denied Petitioner's claim on direct appeal, as follows:

Appellant does not challenge the evidence establishing his own active membership in Bad Boyz or Bad Boyz's status as a criminal street gang. He does, however, contend the evidence is insufficient to establish that he committed a murder "to further the activities of the gang." Appellant relies on the evidence that neither the victim nor the other participants in the fight were gang members. No gang signs were thrown prior to the shooting and appellant did not "claim" his gang or make any other statements related to gang membership either before or after the shooting. There was no evidence that anyone at the party knew who the shooter was or whether the shooter belonged to a gang.

There was, however, other evidence from which a reasonable jury could have found that appellant committed the murder to further the activities of the gang. Tom Mendez, a former Santa Paula police officer now employed as an investigator by the Ventura County District Attorney's office, testified as the prosecution's expert witness on criminal street gangs in Santa Paula. He opined that the idea of respect was very important to gang members, including members of the Bad Boyz. They equated respect with fear, and used fear to intimidate members of other gangs and members of the community. If the community did not respect and fear the Bad Boyz, they might be more willing to cooperate with law enforcement, thereby disrupting the gang's criminal activity. As a consequence, gang members could not tolerate disrespect from the community.

Investigator Mendez opined that, if a gang member intervened in a large fight involving non-gang members at a party, he would be putting the reputation of his gang at risk. If the community members did not respect the gang member by following his instruction to stop fighting, for example, they would be disrespecting both the gang and that specific member. The gang member would feel obligated to enforce respect for himself and the gang by

retaliating, particularly with violence. Thus, a shooting carried out under these circumstances would benefit or further the activities of the gang because the shooting would enforce "respect" for both the shooter and his gang.

According to the expert, "When the gang member goes into the situation and gives an order [to stop fighting], the first sign of disrespect is that that order is not followed . . . . A higher level of disrespect is if that gang member is punched or physically assaulted by a non-gang member." The gang member would be expected to "immediately deal" with this disrespect, both to preserve his status within the gang and to enhance others' "respect" for the gang. The gang member would also know that his "homeboys" would come to his rescue, if he is being punched or choked during the fight. "So at some point he's going to get the help that he needs and it's my opinion that shooting somebody in that situation is more to prove a point you disrespected me than to get himself out of that situation, because he knows help is on the way."

Mauricio Reyes, the former Bad Boyz member and "shot caller" who secretly recorded a conversation with appellant, corroborated Mendez'[s] testimony in this regard. He testified as follows: "Q: . . . [I]f you are at a party, a large party, with members of your street gang and something happens and one of the members of the street gang moves in to sort of stop something, is that taking the impact of the gang to whatever that event is? [¶] A: Yes. [¶] Q: And so would that, in essence, be acting for the benefit or furtherance of the street gang? [¶] A: You could say that." Reyes confirmed that respect is a "very important concept" for Bad Boyz members. It is, he testified, the same thing as power or fear. According to Reyes, "Fear is probably the biggest factor in the Bad Boyz. Respect comes out of fear. That's how you establish your respect on the streets, through fear and

intimidation."

Expert opinion that particular conduct benefitted a gang by enhancing its reputation for violence can be sufficient to support the inference that the conduct "was carried out to further the activities of the gang[,]" within the meaning of section 190.2, subdivision (a)(22). The jury could reasonably have relied on the testimony of Mendez and Reyes to find that appellant committed the murder to further the activities of his criminal street gang because he believed his actions would enhance respect for (or fear of) his gang in the community and among other gang members.

For similar reasons, we conclude the sentence enhancement finding is supported by substantial evidence. Section 186.22, subdivision (b)(1) mandates an enhanced sentence for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members . . . ." A reasonable jury could infer from the testimony of Mendez and Reyes that appellant committed the murder "for the benefit of" a criminal street gang because doing so would enhance his status within the Bad Boyz and "respect" for (or fear of) the gang in the community.

In addition, the evidence established that appellant attended the party with fellow gang members, at least one of whom came to his aid when his first efforts to stop the fight failed. Mendez testified that a gang member "knows that his fellow gang members have his back, that they are going to assist him in anything that he gets involved in. So the second he makes that decision to go into that crowd or that situation, he knows that he's not only making that decision for himself, he's making it for his entire gang. [¶] Because regardless of what goes down after he decides to get into that situation, his fellow gang members, his expectation of them is that they have

his back. So no matter what happens he's gonna have their assistance." The jury could reasonably have relied on this testimony to infer that appellant committed the shooting "in association with" those other gang members.

Lodg. 6 at 10-12.

3. Legal Standard

The Fourteenth Amendment's Due Process Clause guarantees that a criminal defendant may be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The Supreme Court announced the federal standard for determining the sufficiency of the evidence to support a conviction in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Under Jackson, "[a] petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). The Supreme Court has held that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319; see also Wright v. West, 505 U.S. 277, 284, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992). "Put another way, the dispositive question under Jackson is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" Chein v. Shumsky, 373 F.3d 978, 982-83 (9th Cir. 2004) (*en banc*) (quoting Jackson, 443 U.S. at 318).

When the factual record supports conflicting inferences, the federal court must presume, even if it does not affirmatively appear on the record, that the trier of fact resolved any such conflicts in favor of the prosecution, and the court must defer to that resolution. Jackson, 443 U.S. at 326. Additionally, "[c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted). The federal court must refer to the

substantive elements of the criminal offense as defined by state law and look to state law to determine what evidence is necessary to convict on the crime charged. Jackson, 443 U.S. at 324 n.16; Juan H., 408 F.3d at 1275.

The Jackson standard applies to federal habeas claims attacking the sufficiency of the evidence to support a state conviction. Juan H., 408 F.3d at 1274; Chein, 373 F.3d at 983; see also Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004). The AEDPA, however, requires the federal court to "apply the standards of Jackson with an additional layer of deference." Juan H., 408 F.3d at 1274. The federal court must ask "whether the decision of the California Court of Appeal reflected an 'unreasonable application' of Jackson and Winship to the facts of this case." Id. at 1275 & n.13.

4. Discussion

In addition to the murder charge, Petitioner was charged and found liable for a criminal street gang enhancement pursuant to California Penal Code section 186.22(b)(1)(C) and a gang special circumstance allegation pursuant to California Penal Code section 190.2(a)(22). 1 CT at 27-28; 3 CT at 560, 573; 4 CT at 607; 4 RT at 666-67.

Subdivision (b) of section 186.22 provides for a sentencing enhancement when the defendant is "convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . ." Cal. Penal Code § 186.22 (b)(1). In addition, when "[t]he defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of section 186.22, and the murder was carried out to further the activities of the criminal street gang," the defendant shall be punished by life imprisonment without the possibility of parole or death. Cal. Penal Code § 190.2(a)(22).

As painstakingly detailed by the California Court of Appeal, there was sufficient evidence to prove Petitioner committed the murder for the benefit of a criminal street gang, and he killed the victim while an active gang member in order to further the

activities of his gang. Of particular importance, Petitioner admits he was a member of the Bad Boyz gang. Petition, at 46. In addition, Ventura County District Attorney Investigator Thomas Mendez testified as a gang expert at trial, explaining that the murder benefitted and furthered the Bad Boyz gang by sending a message to the community that the gang was a serious threat and was not to be disrespected. 3 RT at 518-24. Investigator Mendez further explained that killing someone who disrespected the gang in front of people would further the gang's activity by instilling fear in the community. 3 RT at 520-24. Finally, a former Bad Boyz "shot caller" also testified that if members of the gang were involved in an altercation "to sort of stop something," they would be acting for the benefit or the furtherance of the gang. 3 RT at 456, 476.

Petitioner would prefer that this Court accept his version of events that the crime was not gang related because Petitioner did not show off his gun before the shooting, "no gang taunts or signs were thrown," no claims of gang membership were made before or after the shooting, none of the non-gang member partygoers knew Petitioner was a gang member, and there was no evidence of what gang activities were furthered by the commission of the crime. Petition, at 46, 50-52, 57-58. However, this Court may not simply reweigh the evidence and conclude that Petitioner's version is more persuasive. Jones v. Wood, 207 F.3d 557, 563 (9th Cir. 2000) ("It is not enough that we might have reached a different result ourselves or that, as judges, we may have reasonable doubt."). As stated above, this Court's inquiry is not whether the evidence excludes every hypothesis except guilty, but whether the jury could reasonably arrive at its verdict. United States v. Mares, 940 F.2d 455, 458 (9th Cir. 1991). On the evidence detailed by the California Court of Appeal and highlighted above, this Court must find that the jury could have reasonably concluded Petitioner violated California Penal Code sections 186.22(b)(1)(C) and 190.2(a)(22).

After viewing the evidence presented at trial in the light most favorable to the prosecution and presuming that the jury resolved all conflicting inferences from the evidence against Petitioner, the Court finds that a rational juror "could reasonably have

found beyond a reasonable doubt" that Petitioner was in violation of Penal Code sections 186.22 (b)(1) and 190.2(a)(22). Jackson, 443 U.S. at 325-26. Thus, habeas relief is not warranted on Claim Four.[7]

VII.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order (1) accepting this Final Report and Recommendation; (2) denying the Petition; and (3) dismissing this action with prejudice.

DATED: November 5, 2014

HON. KENLY KIYA KATO
United States Magistrate Judge

[7] In Petitioner's Objections to this Court's 9/4/2014 Report and Recommendation, he attempts to refocus his sufficiency of the evidence claim on the intent element of California Penal Code section 186.22(b)(1). See Objections, at 7. Even assuming Petitioner has properly presented this new argument for review, his claim still fails. "According to the state courts, evidence that the defendant had the specific intent to help a gang member commit the charged crime is enough to justify application of the enhancement." Emery v. Clark, 643 F.3d 1210, 1215 (9th Cir. 2011) (citing People v. Hill, 142 Cal.App.4th 770 (2006); People v. Romero, 140 Cal.App.4th 15 (2006)). Stated differently, to sustain a gang enhancement, "there must have been evidence upon which a rational trier of fact could find that [the defendant] acted with the 'specific intent to promote, further, or assist in' *some* type of 'criminal conduct by gang members,' which may include the crime of conviction." Id. (citing People v. Albillar, 51 Cal.4th 47 (2010)) (emphasis in original). Certainly, when Petitioner and Nathan Maloney pulled their guns during a fist fight, resulting in the shooting of the victim, Petitioner was acting with the intent to promote, further, or assist criminal conduct by himself and Maloney, both of whom were identified as gang members. This evidence was sufficient under California law to prove the intent element of the gang enhancement.