No. _____

IN THE

Supreme Court of the United States

AURELIO SALDIVAR,

Petitioner,

v.

G.D. LEWIS,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a habeas corpus petitioner alleging a Sixth Amendment claim of ineffective assistance of trial counsel required to address and rebut hypothetical tactical rationales for trial counsel's challenged acts or omissions?

2. Did Aurelio Saldivar's trial counsel render constitutionally ineffective assistance by failing to object to inflammatory and irrelevant evidence about gangs and their practices, introducing harmful evidence, conceding that Saldivar's gang qualified for California's sentencing enhancement, and failing to request appropriate limiting instructions?

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Aurelio Saldivar ("Saldivar" or "Petitioner") petitions for a Writ of Certiorari to review the final order of the United States Court of Appeals for the Ninth Circuit in this case denying his appeal, and affirming the judgment of the United States district court denying him habeas corpus relief.

I. ORDERS AND OPINIONS BELOW

The district court adopted the Report and Recommendation of the magistrate judge, denied Saldivar's petition for writ of habeas corpus, and denied Saldivar's request for a Certificate of Appealability ("COA"). (Petitioner's Appendix ("Pet. App.") 6-10.) The Ninth Circuit granted a COA on April 25, 2016. (Pet. App. 4-5.)

Saldivar appealed, and the Ninth Circuit denied his ineffective assistance of counsel and cumulative error claims in an unpublished decision on June 25, 2018. (Pet. App. 1-3; *Saldivar v. Lewis*, 2018 WL 3099430 (9th Cir., June 25, 2018).)

II. JURISDICTION

The district court had jurisdiction over Saldivar's federal habeas corpus petition under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit entered judgment on June 25, 2018. (Pet. App. 1-3.) This Court has jurisdiction under 28 U.S.C. § 1254(1). *See Miller-El v. Cockrell*, 537 U.S. 322, 329-31 (2003).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(d)

28 U.S.C. § 2254(d) provides, in relevant part, "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

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

IV. STATEMENT OF THE CASE

At Saldivar's murder trial, his counsel failed to object to an avalanche of salacious, inflammatory, and irrelevant evidence about gangs and their practices: practices in which no evidence suggested Saldivar or his gang ever engaged. Trial counsel also introduced affirmatively harmful evidence against Saldivar, failed to request a limiting instruction that would have precluded the jury from considering

the gang evidence as character evidence, and unreasonably conceded an element of the gang special circumstance that rendered Saldivar eligible for life in prison without parole—the most severe possible sentence short of death. Proper objections would have sharply curtailed the prosecutor's use of gang evidence, as California law prohibited such evidence to the extent it did not pertain to Saldivar's personal culpability or the facts of the case. Yet trial counsel sat silent, lodging no protest as the prosecutor repeatedly presented far-ranging testimony the Mexican Mafia's wars with other gangs, gang members' alleged sexual rituals with female recruits, violent "jumping out" of members who want to leave the gang, and graffiti-motivated gang violence. Trial counsel did not even object when the prosecutor's gang expert testified—again without objection from trial counsel— that Saldivar's tattoos showed he was "the shooter in some crime" and had committed prior violent acts. Trial counsel again failed to object when the prosecutor made repeated references to a .41 handgun that was undisputedly not the murder weapon, and suggested Saldivar had used the .41 handgun in some other shooting about which the jury had not heard.

Had trial counsel objected, Saldivar's trial would have been much different. Stripped of the improper gang evidence, the state's case provided scant support for its claim that Saldivar murdered the victim, or that the killing was robbery- or gang-related so as to qualify Saldivar for a sentence of life without parole. No obvious gang motive appeared, and the taking of the victim's car was merely incidental to the murder—a fact that would have negated the robbery special

circumstance under California law. *See People v. Green*, 27 Cal. 3d 1, 52-54 (1980), *overruled in part on other grounds by People v. Hall*, 41 Cal. 3d 826, 834 n.3 (1986).

But despite trial counsel's many derelictions, and the state's thin case, the Ninth Circuit denied Saldivar's claim of ineffective assistance of counsel after finding that the state court reasonably posited hypothetical tactical rationales for trial counsel's acts and omissions. The Ninth Circuit reasoned that this Court "has never clearly resolved whether, in assessing the competence of counsel's representation under the Sixth Amendment, an appellate court may consider hypothetical strategic rationales for counsel's conduct and, if so, whether a defendant must negate every such rationale to demonstrate *Strickland* deficiency." This Court should grant certiorari to resolve a circuit split on that question, and affirm its prior statements in *Wiggins v. Smith* and *Harrington v. Richter* that "courts may not indulge in 'post hoc rationalization' for counsel's decisionmaking that contradict the available evidence of counsel's actions." *Harrington v. Richter*, 562 U.S. 86, 109 (2011); *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003).

A. Saldivar's Trial

On June 17, 2009, an Orange County jury convicted Saldivar of first-degree murder (Cal. Penal Code ("PC") § 187(a)), and active participation in a criminal street gang (PC §§ 186.22(a), 187(a)). (5.CT.1375, 1380.) The jury also found true the special circumstance allegations that the murder was committed during a robbery and for gang purposes. (PC §§ 190.2(a)(17)(A)/211, 190.2(a)(22), 212.5; 5.CT.1376-77.) The jury also imposed enhancements based on findings that the murder was committed for the benefit of, at the direction of, and in association with,

a criminal street gang (PC § 186.22(b)(1)), and that Saldivar was a gang member who vicariously discharged a firearm causing death. (PC §§ 12022.53(d), (e)(1), 1192.7 & 667.5; 5.CT.1266, 1284-1284B, 1378-79.) On June 25, 2010, the trial court sentenced Saldivar to life without the possibility of parole on count 1. Additional imposed terms were stayed. (6.CT.1462-63; 5.RT.1038-39.) After his conviction as affirmed by the California courts, Saldivar filed a federal habeas petition alleging claims for, *inter alia*, ineffective assistance of trial counsel. The district court denied relief. (Pet. App. 8-10.) After granting a COA, the Ninth Circuit denied relief on June 25, 2018. (Pet. App. 1-3.)

B. Raffi Yessayan's Body is Found

On June 7, 2006, a jogger found the body of Raffi Yessayan near a riverbed in the City of Orange. He had been shot twice in the head. Yessayan was a member of Family Mob, a Hispanic street gang in Costa Mesa, California. (4.RT.704-05.)

Yessayan was an albino, and legally blind. Though ineligible for a driver's license, he owned a black Nissan Altima with tinted rear windows. Because of his limited vision, he only drove it short distances. He often let others, including Saldivar, drive the car while he rode in it, and sometimes even when he was not present. (1.RT.62-65, 67, 140-42, 4.RT.756.)

C. Saldivar's Gang Membership

In June 2006, Saldivar was a member of Middleside Los Chicos ("MSLC"), a street gang in Santa Ana, California that originated as a local bicycle club in the 1970s. (2.RT.386; 4.RT.652-53.) He had several nicknames, including "Bouncer" and "Fat Boy." (4.RT.654.) Saldivar admitted his MSLC membership to Santa Ana

and Costa Mesa police officers multiple times between 1995 and 2006. (4.RT.717-18.)

Family Mob and MSLC were not hostile to each other. They associated through several women, including Amy Belyea, Sujey Toscano, Amie Hofstad, and Seriah Martinez. (4.RT.708-09.) No evidence was presented that any of these women was a gang member or romantically involved with any gang member, except that Belyea was the girlfriend of James Cardwell, known as "Boxer from Middleside." (4.RT.721-22.)

Saldivar had several tattoos. One on the back of his head said "MSLC," and another on the side of his head said "Santa Ana's Fattest." (2.RT.476-77; 4.RT.715-16.) One on his left arm showed women's faces, a skull, and a man standing behind the women holding a smoking double-barreled shotgun. (2.RT.478-79.) One on his right arm said "Varrio Middleside," surrounded by skulls, female breasts, and "X13." (2.RT.480; 4.RT.710-12; Pet. App. 96.) Saldivar also had a tattoo saying "County" and "Orange" (4.RT.712), and another saying "Los Chicos." (4.RT.713.)

D. Yessayan Offends Saldivar's Friend, Sujey Toscano

About a month before his murder, Yessayan drove his car to pick up his friend Heriberto Tejeda, then picked up Toscano and Toscano's young daughter. (4.RT.593-94, 609-10.) As they drove, Yessayan made sexual advances towards Toscano in front of her daughter. (4.RT.609-11.) Toscano became angry. (4.RT.624-25.) They then picked up Saldivar, who climbed into the front seat wearing two large guns in holsters on either side of his body. (4.RT.596-97.) The only evidence at trial about Saldivar's relationship to Toscano came from Amie Hofstad, who

testified that she "assumed" Saldivar and Toscano were "good friends," and that they "respect[ed] each other enough." (1.RT.114-15.) No evidence was presented that they were romantically involved. Nor did any evidence suggest that Toscano was the girlfriend of any MSLC member.

After Saldivar entered Yessayan's car, he and Toscano sat in the front seat and one of them drove. (4.RT.601.) Yessayan and Tejeda sat in back. (4.RT.600-01.) Toscano and Saldivar whispered to each other in the front seat, then suggested to Tejeda that they drop him off at his house. (4.RT.601-02.) Tejeda refused to be dropped off because he did not want to leave Yessayan alone. (*Id.*)

After driving around for a while, Toscano dropped Saldivar off at his house. (4.RT.602.) When Saldivar got out of the car, he pulled Tejeda aside and told him that if Yessayan did not "stop disrespecting in front of [Toscano's] little daughter, he was going to get attacked." (4.RT.628-30.) In the week before his murder, Yessayan made another sexual overture to Toscano as she drove his car, again in the presence of Toscano's daughter. (1.RT.113-14.) Saldivar was not present. (1.RT.117.)

E. Saldivar is seen with a Gun Weeks Before the Crime

Hofstad testified about having seen a silver revolver in the possession of Saldivar and Ruben Oliveros, another MSLC member, in the weeks before Yessayan's murder. (1.RT.124, 142-43, 194.) The prosecutor argued at trial that this gun, which was never found, was the murder weapon. (5.RT.809.) Hofstad told police in 2006 that she had seen a silver revolver in Saldivar's possession at Saldivar's house about two weeks before Yessayan's murder. (1.RT.194-95.) One week before the murder, Hofstad saw the gun at Oliveros's home, in Oliveros's

possession, while Saldivar was present. (1.RT.123, 143, 161, 194-95.) Hofstad also saw the gun a third time, in Oliveros's possession, about 2-3 days before Yessayan's murder. (1.RT.196-97.) Oliveros, not Saldivar, was the last person Hofstad saw in possession of the silver revolver. (*Id.*)

Alex Preciado, an acquaintance of Saldivar, also testified that he had seen Saldivar carrying a chrome revolver at some point before Yessayan's murder. (1.RT.217-18.)

F. The .41 Revolver that was Not the Murder Weapon

The prosecutor also presented extensive testimony and argument about a gun that was undisputedly not involved in Yessayan's murder: a black .41 revolver. This gun was presented at trial as an exhibit, and displayed to the jury. (*See e.g.*, 1.RT.83-84 (showing Amie Hoffstad the .41 revolver); 3.RT.485; 4.RT.665, 698, 771.) The prosecutor also presented evidence that MSLC members delivered the gun to a fellow MSLC member named Victor Enciso, some days after Yessayan's murder, claiming the neighborhood was "hot." (4.RT.665, 698-700.)

Because trial counsel never objected, the prosecutor was not required to explain the relevance of the non-murder weapon .41 handgun or its delivery to Enciso on the record. The prosecution's only explanation at trial was a vague and tautological statement, in closing argument, that the .41 was relevant "to explain about guns, about what happened. About [Oliveros] and [Fernandez] taking [the .41] to Mr. Enciso." (5.RT.911.) The prosecutor told the jury that there was evidence in the case about which it had not heard, and which it "would never know." (5.RT.785-86, 911.)

Trial counsel made no objection to any of the testimony or argument about the .41 or its delivery to Enciso.

G. Saldivar and Fernandez are Seen Leaving with Yessayan

Between 5:00 and 6:00 p.m. on June 6, 2006, the night of Yessayan's murder, Alex and Renee Preciado drove to Saldivar's home to buy drugs and saw a black Nissan parked in front. (1.RT.204-05.) Alex Preciado saw Saldivar in the Nissan with MSLC member Marcos Antonio Charcas-Fernandez ("Fernandez"), and also possibly Yessayan and a young woman named Seriah Martinez. (1.RT.205-07.) Renee Preciado also saw Saldivar and a female in the car, and Yessayan in the back seat. (1.RT.237-39.)

Anthony Chargualaf lived down the street from Saldivar. (2.RT.275-77.) He sometimes paid for drugs for Saldivar and others, in the hope that Saldivar would arrange for him to spend time with Amy Belyea. (2.RT.293-94, 347-48.) Saldivar did, in fact, arrange at least one such encounter. (2.RT.293-94.)

At about 8:24 p.m. on June 6, 2006, Chargualaf spoke by cell phone with Saldivar, who was using Fernandez's cell phone, and asked Saldivar if he wanted to get together later that evening with some girls. Saldivar asked Chargualaf for $30-40 for gas because he was going to Los Angeles. (2.RT.286, 346.) Chargualaf heard a female voice and a male voice in the background. (2.RT.294-95.) Another call was made between Fernandez's and Chargualaf's cell phones at 8:31 p.m. (4.RT.739.)

H. Yessayan's Nissan Makes a U-Turn Shortly Before he is Killed

Cell phone records were used to track the location of calls made to and from Fernandez's cell phone shortly before Yessayan's murder on June 6, 2006. When

the 8:24 p.m. call was made, Saldivar and Fernandez were near the intersection of the 91 and 605 freeways. (4.RT.738-39.) When the 8:31 p.m. call was made, the phone was in Bellflower, further West. (4.RT.739.)

After the 8:31 call, approximately half an hour before Yessayan's murder, the car turned back East. At 8:41, a call was received on Fernandez's cell phone near the intersection of the 91 and 5 freeways, near Fullerton. (4.RT.740.) More calls were made to and from Fernandez's phone between 8:41 p.m. and 9:01 p.m., and showed the phone moving Eastward. (4.RT.740-43.) At 9:15 p.m., Fernandez's phone made a call that reflected off of a cell phone tower about 300 yards away from the site where Yessayan's body was found. (4.RT.743.) No further calls were made to or from Fernandez's phone until 9:59 p.m, when the phone was back in Santa Ana. (4.RT.744.)

Between 9:00 and 10:00 p.m., a neighborhood resident and a security guard heard gunshots near the location in the City of Orange where Yessayan's body was discovered the next morning. (2.RT.363-65, 453-56.)

I. Statements by Saldivar and Attempts to Destroy Evidence

The next day, June 7, 2006, Chargualaf was driving by Saldivar's house, saw Saldivar in the driveway, and stopped to ask him if he wanted to get together with some girls. Saldivar put his hand in the shape of a gun, and said "there were problems and there had to be a 187," which is the California Penal Code section for murder. (2.RT.314-16, 335-36, 344-45.) Saldivar did not say he himself had committed the "187." (2.RT.338.) The same day, Saldivar told Alex Preciado, "Remember that car you saw yesterday? You didn't see nothing." (1.RT.209.)

At about 8:00 or 9:00 that evening, Saldivar asked Chargualaf to give him a ride. As they drove on an overpass over the Santa Ana River, Saldivar threw "a bunch of shiny stuff," possibly bullets, out of the car window. (2.RT.300-01.)

J. Saldivar and Oliveros Dispose of Yessayan's Car

Jose Muniz operated a "chop shop" that disposed of stolen cars. (2.RT.394.) Muniz testified that Saldivar and Oliveros came to his house on the night of June 7, 2006, with a black Nissan car. (2.RT.391-97.) Oliveros came to Muniz's door, while Saldivar remained outside by the Nissan. (2.RT.397-98.) Oliveros asked Muniz if he could park the car in front of Muniz's house overnight, and Muniz said yes. (2.RT.398-400.)

The next morning, Oliveros and Saldivar returned. (2.RT.400-02.) Oliveros came to the door, while Saldivar stood down the block. (2.RT.401-02.) Oliveros asked Muniz to get rid of the car, saying it belonged to him and his girlfriend but they could not keep up with the payments. (2.RT.403.) Muniz offered to take over the payments, but Oliveros insisted the car be chopped up. (2.RT.403-04.) Oliveros and Muniz then chopped up the car with a sawzall. (2.RT.403-04.) Saldivar initially helped a little bit, but soon left. (2.RT.404.) Oliveros paid Muniz $200 for his help, and Muniz took the car pieces to a scrap yard. (2.RT.430-32.) Oliveros kept the wheels, doors, hood, and trunk lid, while Muniz kept the interior black leather seats and whatever scrap was left. (2.RT.432-35.)

Muniz testified that he feared he would be attacked for testifying, and that after he agreed to testify he was attacked by two men he thought were from MSLC. (2.RT.414-15.) He also testified that MSLC gang members put a gun to his son's

head. (2.RT.415-16.) Though he had lived in Santa Ana all his life—38 years—Muniz and his family moved away from Santa Ana after that. (2.RT.420-21.)

After Muniz's testimony, trial counsel requested a limiting instruction to the effect that his testimony could be considered by the jury only to gauge his credibility. The court gave the instruction. (2.RT.411-14.)

K. Arrest, Investigation, and Autopsy

On June 12, 2006, five days after Yessayan's body was found, police arrested Saldivar, searched his car, and found Yessayan's car keys in a fanny pack on the passenger seat. (2.RT.448.) In Saldivar's house, they found "several items of indicia" of gang membership, including graffiti on the inside of the garage door that read, "Rube Dog kills. Rube Dog. Rube. Rube Dog Kills. L.B." (4.RT.748.) Though no evidence was presented about the meaning of this graffiti, it may have pertained to Oliveros, whose first name was Ruben.

Police used a metal detector to search the Santa Ana River riverbed near where Chargualaf said Saldivar threw the "shiny stuff" out of the car window. They found three .357 magnum shell casings: two made by Winchester and one made by Fiocchi. (2.RT.464-68, 3.RT.500-01, 521-22.) Because of their caliber, the casings could not have been fired from a .41 caliber firearm. (3.RT.494-500.) One casing was too corroded to be suitable for comparison. (3.RT.501.) The other two had marking suggesting they could have been fired from the same gun, but the marks were insufficient to permit any conclusive determination. (3.RT.502.)

Police did not find any bullets during their initial search of the crime scene. About a week later, however, they dug up the dirt where Yessayan's head had lain

and found a Fiocchi .357 magnum bullet about four inches down. (3.RT.505-07, 568-69.) Like the casings, the bullet could not have been fired from a .41 caliber gun. (3.RT.508.)

Dr. Joseph Halka conducted Yessayan's autopsy. He testified that Yessayan was shot twice in the head. The first bullet was fired from a gun pressed against Yessayan's skin, behind Yessayan's right ear, and exited above the top of his right ear without penetrating the skull. It was not fatal. The second gunshot, which was fatal, was fired from six to eighteen inches away while Yessayan was lying on the ground. It entered behind Yessayan's left ear, passed through his brain, and exited from his right cheek. (3.RT.545-51.)

L. Gang Expert Testimony

Trial counsel also made no objection to testimony by prosecution expert, Detective Craig Brown. Brown testified that Saldivar, Oliveros, and Fernandez were members of MSLC, which had about 50 active members by June 2006. There is a hierarchy of gang membership: at the top are the "O.G.s", who call the shots and are feared and respected because they have proven they are violent. Saldivar is an O.G. in MSLC. Below the O.G.s are "gang members" who perform work for the gang by committing violent acts. They are trusted to be violent, back up other gang members, and sell drugs. Next, there is a tier of "active participants," who participate in gang activities but have not formally become gang members. Finally, at the bottom, are semiactive gang participants, who attend gang parties but do not put in work for the gang. Muniz and Chargualaf were part of this lowest tier. (4.RT.658-65.)

Brown testified that disrespecting a gang member can lead to violent "payback." Minor acts such as staring, failing to nod, or whistling at a gang member's girlfriend are viewed by gang members as disrespect deserving of reprisals. Unwanted romantic advances by gang members to girlfriends of other gang members are a form of disrespect.[1] Gang members' girlfriends are considered gang "property," and women are "the most common catalyst for gang crimes." (4.RT.687-692.)

Guns are also considered gang property, and are carried and brandished by higher ranking gang members. All gang members of ranking status have access to the gang gun, which might be stored at a gang member's house or passed around. (4.RT.697-98.) Carrying a gun and killing people bolsters a gang member's status by instilling "fear and intimidation" in other gang members and non-gang-members. It also fosters the impression that gang members are "loco" which is "considered to be a good thing." Gang members "shoot to kill" to appear loco and dangerous. (4.RT.701-03.)

Brown testified about various gang practices in which no evidence suggested Saldivar ever engaged. These included "jumping in," or violently attacking new

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[1] The CCA misapprehended Brown's testimony as being that "an unwanted romantic advance made by a gang member *toward a female friend* of a member of a nonrival gang is a form of disrespect." (Pet. App. 71)(emphasis added). This misconstrued the record and is unreasonable, 28 U.S.C. § 2254(d)(2); (e)(1), because Brown's testimony about romantic advances pertained specifically to advances made towards romantic partners of gang members rather than towards platonic female "friends." The only women Brown testified are considered gang "property" are "girlfriend[s]" of gang members and girls that gang members "think[] that [they are] dating." (4.RT.689, 691-92.)

recruits, "jumping out" gang members by attacking them even more severely when they want to leave the gang, "sexing in" female gang members by requiring them to have sex with all male members of the gang or with female gang members in a public setting, and using graffiti to show respect or disrespect to other gang members. Brown also testified about the Mexican Mafia's predominance over Southern California gangs, and its role in the ongoing "war" between the Southern California "sureños" and the Northern California "norteños." (4.RT.670-686, 712.)

Brown also testified that anyone who testifies against a gang member, or cooperates with law enforcement, is considered a "rat" and may be attacked or killed. During trial, Jesus Garcilazo refused to testify despite a grant of transactional immunity and was held in civil contempt. (2.RT.368-76.) Brown identified Garcilazo as a Family Mob gang member, and testified that Garcilazo refused to testify because doing so would have violated the rules of gang culture even though Garcilazo and Yessayan were from the same gang. (2.RT.386-87.)

When presented with a hypothetical mirroring the facts of this case, Brown testified that Yessayan's murder was committed at the direction of and for the benefit of the gang. He testified that the murder would enhance the status and reputation for violence of the gang members and the gang itself. (4.RT.728-34.)

M. Testimony about Predicate Crimes for MSLC's Status as a Criminal Street Gang

Craig Brown also testified about two other criminal convictions sustained by MSLC members Joseph Preciado and John Joseph Mason. These convictions were presented as predicates to show that MSLC met the statutory definition of a

"criminal street gang" under Penal Code sections 186.22 and 190.2(a)(22). These sections require, *inter alia*, a showing that the gang's "primary activities" include the commission of statutorily-enumerated crimes. PC §§ 186.22(f)(defining "criminal street gang" as an "ongoing organization . . . of three or more persons . . . having as one of its primary activities the commission of one or more [enumerated] criminal acts"); 190.2(f)(incorporating the definition of a "criminal street gang" in PC § 186.22.) Because Preciado and Mason were MSLC members, the prosecution submitted their prior convictions as proof that MSLC's primary activities included committing crimes.

Preciado was convicted of vehicle theft committed in February 2004. Mason was convicted of assault with a deadly weapon, also committed in February 2004, that, Brown testified, "was done in association with a murder that occurred February 12 of 2004 involving multiple members of Middleside," and street terrorism under Penal Code section 186.22(a).[2] A true finding was made against Mason on the gang enhancement allegation, under section 186.22(b)(1). (4.RT.722-24; 6.CT.1466-83, 1484-1516.)

In closing argument, trial counsel conceded to the jury that MSLC met the statutory definition of a criminal street gang under California law, (5.RT.855), despite prior California case law that had found similar evidence insufficient. *See, e.g., In re Alexander L.*, 149 Cal. App. 4th 605, 611 (2007) (gang expert's "conclusory

[2] Brown did not explain what he meant by "done in association with a murder," how he learned about the murder, how MSLC members were allegedly "involved" in the murder, or even whether the MSLC members were perpetrators or victims.

testimony" about crimes by members of purported gang, and two convictions of gang members during the same month, were insufficient to satisfy the statutory definition of a criminal street gang); *People v. Perez*, 118 Cal. App. 4th 151, 160 (2004) (evidence of retaliatory shootings of Asian people, together with a beating six years earlier, were insufficient to establish that defendant's gang met the statutory definition of a criminal street gang). Indeed, the California Supreme Court even noted on direct appeal that the evidence in Saldivar's case was "somewhere between" the cases in which the evidence was found insufficient and those in which it was held adequate. (Pet. App. 77.)

N. The California Court of Appeal Denies Relief, Finding Possible Tactical Rationales for Most of Trial Counsel's Errors

Saldivar was convicted of first-degree murder, and his jury found true the charged special circumstances that the murder was committed in the course of a robbery and for purposes of a criminal street gang. (5.CT.1375-80.) On appeal, Saldivar argued that his trial counsel performed ineffectively by failing to object to the prosecution's evidence and argument about the .41 gun that was not the murder weapon, the gun's delivery to Enciso, gratuitous autopsy and crime photographs, concession that MSLC met the statutory definition of a criminal street gang, and other errors. The California Court of Appeal denied relief, holding that a hypothetical tactical rationale existed for most of the challenged errors, and that the remaining errors were not prejudicial to Saldivar. (Pet. App. 81-97.) The California Supreme Court denied review. (Pet. App. 62.)

V. REASONS FOR GRANTING THE WRIT

A. The Circuit Courts Are In Conflict Regarding Whether Courts May Consider Hypothetical Reasons for Trial Counsel's Actions in Determining Whether Trial Counsel Performed Deficiently

On appeal, Saldivar argued to the Ninth Circuit that the California Supreme Court's standard for determining whether trial counsel rendered deficient performance was contrary to the clearly established federal law in *Strickland v. Washington* because California requires the petitioner on direct appeal to show that "there could be no rational tactical purpose for counsel's omissions." *People v. Lucas*, 12 Cal. 4th 415, 3442 (1995). The Ninth Circuit held that standard was not contrary to clearly established federal law, because "the Supreme Court has never clearly resolved whether, in assessing the competence of counsel's representation under the Sixth Amendment, an appellate court may consider hypothetical strategic rationales for counsel's conduct and, if so, whether a defendant must negate every such rationale to demonstrate *Strickland* deficiency." (Pet. App. 2.)

As the Ninth Circuit indicated, the circuits are in conflict as to whether and when appellate courts may consider hypothetical strategic rationales for challenged conduct by trial counsel, as opposed to focusing on trial counsel's actual rationale as it appears from the record. The Third Circuit permits consideration of hypothetical rationales only when trial counsel's actual strategy is not apparent from the record, "either due to lack of diligence on the part of the petitioner or due to the unavailability of counsel." *Thomas v. Varner*, 428 F.3d 491, 500 (3d Cir. 2005). In that instance, the Third Circuit holds, "the presumption [of competence] may only be rebutted through a showing that *no sound strategy posited by the [state] could*

have supported the conduct." *Id.* (emphasis added). By contrast, when trial counsel's strategy is clear from the record, the Third Circuit holds that "an inquiry into whether counsel actually had some strategy is permissible." *Id.* at 499 & n.7. "The defendant can rebut th[e] 'weak' presumption [of a reasonable strategy] by showing . . . that the conduct was not, in fact, part of a strategy" as a subjective matter. *Id.* at 499.

The Eleventh Circuit, by contrast, does not consider trial counsel's actual rationale even when it is clear from the record. Instead, it treats the performance inquiry as "objective" in all circumstances. *Hammond v. Hall*, 586 F.3d 1289, 1332 (11th Cir. 2009). Thus, in the Eleventh Circuit, "[t]o overcome *Strickland*s presumption of reasonableness, [a petitioner] must show that no competent counsel would have taken the action that his counsel did take." *Id.* at 1324 (internal quotations omitted). "[T]he question is not why [trial] counsel [took the challenged action] but whether a competent attorney reasonably *could have decided [to take it].*" *Id.* at 1332 (emphasis added). In other words, even if trial counsel's actual reason for the act or omission was unreasonable, the Eleventh Circuit precludes relief under *Strickland* so long as some other, hypothetical, counsel could have taken the same action for a different reason. *See also Pittman v. Sec'y, FL Dept. of Corrections*, 871 F.3d 1231, 1250 (11th Cir. 2017) ("Because [*Strickland*s performance] standard is objective, it matters not whether the challenged actions of counsel were the product of a deliberate strategy or mere oversight. The relevant

question is not what actually motivated counsel, but what reasonably could have motivated counsel.") (internal quotation marks omitted).

B. Federal and State Courts Need Guidance on How to Evaluate Trial Counsel's Conduct Under *Strickland*

The question of whether counsel's performance is to be judged based on counsel's actual rationale, or on the existence of some hypothetical strategic rationale, is an important one. This Court's prior decisions in *Wiggins* and *Harrington* establish that it is trial counsel's actual rationale, not the existence of some hypothetical reasonable rationale that is the focus of the *Strickland* inquiry. "[C]ourts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *Harrington v. Richter*, 562 U.S. 86, 109 (2011); *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003).

This Court should grant certiorari to affirm its statements in *Wiggins* and *Harrington* that prisoners are entitled to trial counsel who *actually* employs reasonable strategy; not simply unthinking counsel whose conduct is justifiable through post-hoc rationalizations. Defense counsel at trial "play[] a role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685. Indeed, this Court has deemed the right to effective trial counsel "the foundation of our adversary system," and one that serves "to ensure that the proceedings serve the function of adjudicating guilt or innocence while protecting the rights of the person charged." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). In *Martinez*, this Court affirmed the importance of effective trial counsel by carving out a special exception to procedural default rules for claims of ineffective

assistance at trial, holding that this type of claim is so fundamental that, for only these claims, prisoners may overcome a procedural default by showing deficient performance by counsel in the petitioner's initial-review collateral proceeding. *Id.* This Court reasoned that "[t]he right to the effective assistance of [trial] counsel is a bedrock principle in our justice system," rendering it "of particular concern" that such claims not be forfeited in federal court. *Id.*

Permitting the state to use hypothetical rationales to justify negligent or uninformed conduct by trial counsel would erode prisoners' protection against ineffective assistance at trial. It would deprive criminal defendants of the right to have trial counsel actually employ a reasonable, and reasonably-informed, tactical strategy instead of committing unthinking errors. As the Third Circuit has held, if the state can defeat a claim of incompetence by pointing to a hypothetical rationale that trial counsel did not actually employ, but that could possibly had justified the conduct, then "incompetency of defense counsel could be rewarded by ingenuity on the part of a State's attorney[] in supplying hypothetical strategies to explain defense counsel's uninformed prejudicial oversights." *Thomas*, 428 F.3d at 500 n.7. It would also excuse trial counsel from formulating a unified, reasonable strategy that takes into account the entire scope of the trial, so long as any individual decision could be justified in isolation and hindsight.

C. The Question of How to Measure Effectiveness Makes a Difference in Saldivar's Case

Whether or not hypothetical rationales can justify trial counsel's errors is not an academic question in this case. Although Saldivar's ineffective assistance claim

rests solely on the trial record—and is not supported by any extra-record statements by trial counsel about the reasons for his actions—the trial record clearly shows that trial counsel's numerous failure to object were not due to the purported hypothetical rationales on which the California Supreme Court relied to deny relief. For instance, the California Supreme Court held that trial counsel could have decided not to object to arguments about gang attacks, vague testimony suggesting that Saldivar's fellow gang members had burned a rival gang member alive, and an irrelevant .41 handgun in order to avoid "emphasiz[ing]" the statements and evidence. (Pet. App. 83, 85, 94.) But the record shows that this rationale was not trial counsel's actual one: on the contrary, trial counsel *himself* reemphasized in closing the .41 handgun and the testimony about the burning incident, describing the evidence for the jury anew and urging the jury to disregard it. (*See* 5.RT.853-54, 864-65.) Had trial counsel actually wished to avoid drawing attention to the testimony, he would not have brought these matters up. Indeed, the predominant theme of trial counsel's closing argument was that the prosecution's case was based on evidence that was irrelevant and inflammatory, indicating trial counsel knew it was harmful to Saldivar. (*See* 5.RT.845-51.)

Avoiding emphasizing evidence also fails to explain why trial counsel failed to move in limine to exclude or limit the evidence before trial. Trial counsel had ample notice and opportunity to file motions in limine to exclude the evidence, because the prosecutor previewed his intent to introduce much of it at the preliminary hearing and in his opening argument. (*See* 3.CT.791-92 (introducing evidence about the .41

handgun at the preliminary hearing); 1.RT.52 (discussing the .41 handgun and related issues in opening argument).) The California Supreme Court's positing of hypothetical rationales improperly excused trial counsel's oversight, and contradicted available evidence of trial counsel's intent.

Trial counsel's omissions deeply prejudiced Saldivar, such that far more than a reasonable probability exists that at least one juror would have acquitted him of the robbery and gang special circumstances, or of first-degree murder, had trial counsel performed competently. No evidence showed whether Saldivar shot the victim, whether he intended for the victim to die, or what role he played in the incident at all. Nor did evidence strongly suggest the murder was done for the benefit of a criminal street gang, so as to fall within the gang special circumstance, California Penal Code section 190.2(a)(22). Yessayan and Saldivar's gangs were not rivals and no evidence suggested gang animosity sparked the shooting. Although some evidence suggested Saldivar was angry at Yessayan for making romantic advances towards Toscano, no evidence suggested Toscano was a gang member or gang girlfriend, such that attacking Yessayan to avenge the advances to Toscano would benefit the gang itself. Nor was the murder publicized, so as to benefit MSLC by intimidating its rivals. *See, e.g.*, *Briceno v. Scribner*, 555 F.3d 1069, 1081 (9th Cir. 2009) (insufficient evidence to support a finding that crime was for gang purposes under California's gang enhancement statute, where it was not committed in the "turf" of the defendant's gang or a rival gang, and the perpetrators did not announce their gang membership to the victims); *People v. Albarran*, 149 Cal. App.

4th 214, 221 (2007) (insufficient evidence of gang purpose were "the shooters made no announcements [of their gang], did not throw any gang signs and there was no graffiti referring to the crime.") On the contrary, Saldivar tried to conceal evidence of the murder and prevent Muniz and Alex Preciado from discussing it with anyone, indicating that the crime was not done to benefit MSLC by increasing its reputation for violence. Had trial counsel reasonably objected to the prosecutor's introduction of irrelevant and inflammatory evidence about gangs and their practices, there is at least a reasonable probability that Saldivar would not have been convicted of first-degree murder with special circumstances or sentenced to life in prison without parole.

VI. CONCLUSION

For the foregoing reasons, Saldivar respectfully requests that this Court grant his Petition for Writ of Certiorari to confirm that it is trial counsel's actual rationale, not the existence of hypothetical justifications, that is the focus of *Strickland*'s inquiry.

Respectfully submitted,

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DATED: August 23, 2018

By: _____
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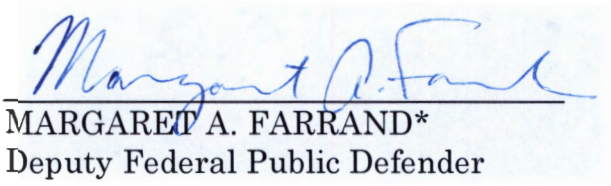
**Counsel of Record*

CERTIFICATE REGARDING WORD LIMITATIONS

Pursuant to Supreme Court Rule 33(h), I hereby certify that this Petition for Writ of Certiorari complies with the word limitation in Rule 33.1(g), because it contains 6,252 words, excluding the portions listed in Rule 33.1(d) as not included in the word limit.



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