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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT JOE GONZALES Petitioner-Appellant, v. KELLY SANTORO, Acting Warden Respondent-Appellee.	No. 16-55846 D.C. No. 2:15-cv-01941-MRW ORDER

Before: TASHIMA and CHRISTEN, Circuit Judges, and RUFE,* District Judge.

Petitioner-Appellant Robert Joe Gonzales's petition for panel rehearing, Dkt. No. 48, is DENIED. The panel has unanimously voted to deny the petition for rehearing.

* The Honorable Cynthia M. Rufe, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT JOE GONZALES, Petitioner-Appellant, v. KELLY SANTORO, Acting Warden, Respondent-Appellee.	No. 16-55846 D.C. No. 2:15-cv-01941-MRW MEMORANDUM* and ORDER

Appeal from the United States District Court
for the Central District of California
Michael R. Wilner, Magistrate Judge, Presiding

Argued and Submitted August 9, 2018
Pasadena, California

Before: TASHIMA and CHRISTEN, Circuit Judges, and RUFE,** District Judge.

Petitioner Robert Joe Gonzales appeals a district court order dismissing as untimely his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We have

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

** The Honorable Cynthia M. Rufe, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we review de novo. *Curiel v. Miller*, 830 F.3d 864, 868 (9th Cir. 2016) (en banc). We affirm.

1. Gonzales's request for judicial notice, Dkt. No. 19, is GRANTED. *See Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011) (citing Fed. R. Evid. 201(f)).

2. Gonzales is not entitled to statutory tolling under 28 U.S.C. § 2244(d)(2) because the California Court of Appeal deemed his petition untimely under state law by citing *In re Clark*, 5 Cal. 4th 750, 765 (1993), as an alternative to its ruling on the merits. *See Curiel*, 830 F.3d at 868–69. Although, as Gonzales argues, the pincited page of *Clark* describes three procedural rules including the timeliness rule, *Clark* is understood primarily to represent California's timeliness rule. *See id.*; *Lakey v. Hickman*, 633 F.3d 782, 786 (9th Cir. 2011). To the extent *Clark* signifies a different California rule, that rule is the one against second or successive petitions, *see Curiel*, 830 F.3d at 877 n.3 (Bybee, J., concurring), which Gonzales concedes is not relevant here. The citation to *Clark* establishes that the California Court of Appeal deemed Gonzales's petition untimely, and this court must defer to that determination.

3. Gonzales is not entitled to equitable tolling. The self-styled tolling notice that Gonzales filed in a different case—the dismissal of which Gonzales did

not appeal—was not a protective petition under *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005), and the district court in that case was not obligated to treat it as one. Consequently, Gonzales's reliance on *Jefferson v. Budge*, 419 F.3d 1013 (9th Cir. 2005), and *Smith v. Ratelle*, 323 F.3d 813 (9th Cir.2003), to obtain equitable tolling in this case is unavailing.

4. Gonzales does not identify a date from which the statute of limitations should be calculated if analyzed under 28 U.S.C. § 2244(d)(1)(D). We decline Gonzales's invitation to remand for further factual development. Assuming the date on which Gonzales received his trial transcripts qualifies for treatment under § 2244(d)(1)(D), the question of when he obtained those transcripts is not "highly fact-dependent." *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (per curiam). Gonzales was capable of submitting dispositive evidence of the date in the form of a declaration, but he did not. Under the circumstances, we conclude that a remand is unwarranted.

AFFIRMED.

16-55846

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT JOE GONZALES,

Petitioner and Appellant,

v.

KELLY SANTORO, Acting Warden,

Respondent and Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. CV 15-1941-MRW
The Honorable Michael R. Wilner, Magistrate Judge

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1. The Superior Court Petition

Petitioner waited 139 days to constructively file a habeas petition in the superior court on June 2, 2014, which was denied on June 25, 2014, for failure to present sufficient facts warranting relief as to the ineffective assistance of counsel claims, and with a citation to *In re Reno*, 55 Cal. 4th 428 for failure to raise the remaining claims on direct appeal. (ER at 13.) Petitioner is entitled to the twenty-three days this petition was pending, which extended the statute of limitations to February 6, 2015.

2. The California Court of Appeal Petition

On July 15, 2014, Petitioner constructively filed a habeas petition in the California Court of Appeal, which was denied on September 30, 2014, for "failure to state sufficient facts demonstrating entitlement to relief requested. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474-475; see also *In re Clark* (1993) 5 Cal.4th 750, 765; *In re Lindley* (1947) 29 Cal.2d 709, 723." (ER at 11.) As will explained in detail below, the state court's citation to *Clark* signaled that the denial was for failing to explain his delay, and therefore, was untimely.

3. The California Supreme Court Petition

On October 23, 2014, Petitioner constructively filed a habeas petition in the California Supreme Court, which was summarily denied on January

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ROBERT JOE GONZALES,
Petitioner,
v.
KELLY SANTORO, Warden,
Respondent.

Case No. CV 15-1941 MRW

JUDGMENT

IT IS ADJUDGED that the action is dismissed with prejudice as untimely.

DATE: May 3, 2016

HON. MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ROBERT JOE GONZALES,
Petitioner,
v.
KELLY SANTORO, Warden,
Respondent.

Case No. CV 15-1941 MRW

ORDER DISMISSING HABEAS ACTION WITH PREJUDICE

SUMMARY OF OPINION

This is a habeas action involving a prisoner in state custody. The Attorney General contends that the action should be dismissed as untimely under AEDPA.

The Court concludes that Petitioner filed his federal case after the expiration of the statute of limitations. Additionally, Petitioner is not entitled to tolling of the limitations period or an alternate start date under the statute. The Court therefore grants the Attorney General's dismissal motion.

PROCEDURAL HISTORY

In 2011, a state court jury convicted Petitioner of murder. The trial court sentenced Petitioner to 15 years to life in prison. (Lodgment # 4 at 19, 25.) The state appellate court affirmed the conviction in August 2013. (Lodgment # 1.) The state supreme court denied review two months later. (Lodgment # 3.) Petitioner did not seek further review of his conviction in the U.S. Supreme Court.

In June 2014, Petitioner filed a habeas petition in the Los Angeles County Superior Court. The superior court denied the petition later that month. (Lodgment # 4 at 27-28.) In July 2014, Petitioner filed a habeas petition in the state court of appeal. (Lodgment # 5.) The appellate court summarily denied relief in September 2014. The court denied habeas relief:

> for failure to state sufficient facts demonstrating entitlement to the relief requested. (See People v. Duvall [citation]. See also In re Clark (1993) 5 Cal. 4th 750, 765; In re Lindley [citation].)

(Lodgment # 6.) Petitioner subsequently filed a habeas petition in the state supreme court. The state supreme court denied relief without comment or citation. (Lodgment # 7, 8.)

This federal action followed. Petitioner filed his petition in March 2015. (Docket # 1.) The Attorney General moved to dismiss the Petition on the grounds that it is untimely under AEDPA. (The Attorney General also contends that the petition contains two procedurally-barred claims. Because the time-bar issue is meritorious, the Court declines to take up the alternate arguments presented in the motion.) (Docket # 21.)

In his opposition, Petitioner argues that his action is timely if he receives statutory tolling for the time during which all three of his state habeas petitions were pending and related gap tolling. He alternatively contends the statute of

limitations should not have started running until he received and reviewed his transcripts from his appellate lawyer. (Docket # 30.)

DISCUSSION

Statute of Limitations Under AEDPA

Under AEDPA, state prisoners have a one-year period within which they must seek federal review of their habeas claims. 28 U.S.C. § 2244(d)(1). The limitations period is generally triggered when the time for appellate review becomes final, or under other specific conditions set forth in the statute. 28 U.S.C. §2244(d)(1)(A-D); Lee v. Lambert, 653 F.3d 929, 933 (9th Cir. 2011). When a California prisoner does not seek certiorari review of a conviction in the U.S. Supreme Court, the conviction becomes final under AEDPA when the Supreme Court's 90-day filing period filing elapses. Shannon v. Newland, 410 F.3d 1083, 1086 (9th Cir. 2005).

The AEDPA limitations period can be tolled under the statute. If a prisoner properly files an application for state post-conviction review, the prisoner is entitled to statutory tolling of the AEDPA limitations period for the time that the habeas action is pending in state court. 28 U.S.C. § 2244(d)(2). A prisoner may also be entitled to "gap tolling" for the period of time (typically 30 to 60 days) between an adverse ruling in a state habeas action and the commencement of a new habeas action in a higher state court. Chaffer v. Prosper, 592 F.3d 1046, 1048 (9th Cir. 2010).

However, when the state court rejects a petition for post-conviction relief as untimely, that petition is not "properly filed" and does not toll the limitations period. Pace v. DiGuglielmo, 544 U.S. 408, 414 (2005); Allen v. Siebert, 552 U.S. 3, 7 (2007); Lakey v. Hickman, 633 F.3d 782, 785-86 (9th Cir. 2011). If a state court determines that a habeas action is "untimely under state law, that is the end of the matter for purposes of § 2244(d)(2)." Pace, 544 U.S. at 414 (quotation omitted). As a result, statutory and gap tolling under AEDPA are "unavailable

where a state habeas petition is deemed untimely under California's timeliness standards." White v. Martel, 601 F.3d 882, 884 (9th Cir. 2010); Bonner v. Carey, 425 F. 3d 1145, 1149 (9th Cir. 2005) (same); Hamilton v. Adams, 533 F. App'x 802, 803 (9th Cir. 2013).

In Clark, the state supreme court noted the longtime requirement under California law that a prisoner "explain and justify any significant delay in seeking habeas corpus relief." Clark, 5 Cal. 4th at 765. "California courts signal that a habeas petition is denied as untimely" by reference to cases such as Clark. Walker v. Martin, 562 U.S. 307, 310 (2011); Lakey, 633 F.3d at 786 (Clark "dealt specifically with the bar of 'untimeliness'").

If a state court addresses both the procedural defects of a habeas petition and the merits of its claims, that does not affect the court's timeliness analysis. A state court "need not fear reaching the merits of a federal claim in an alternative holding" beyond its analysis of procedural problems (such as untimeliness) with the action. Harris v. Reed, 489 U.S. 255, 263 n.10 (1989) (emphasis in original); Carey v. Saffold, 536 U.S. 214, 225-26 (2002) (state court's alternative rulings regarding petition's timeliness and "on the merits" did not make petition timely or properly filed under state law). Additionally, when the state supreme court denies relief without comment, a federal court "looks through" that decision to the last reasoned state court decision. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991); Bonner, 425 F.3d at 1148.

In some cases, the AEDPA triggering date may be "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D); Ford v. Gonzalez, 683 F.3d 1230, 1235 (9th Cir. 2012); Hasan v. Galaza, 254 F.3d 1150, 1155 (9th Cir. 2001). That later triggering date only applies when "vital facts could not have been known by the date the appellate process ended." Ford, 683 F.3d at 1235 (citation and internal quotation marks omitted). The "due diligence"

clock starts ticking when a person knows, or through diligence could have discovered, "the vital facts, regardless of when their legal significance is actually discovered." Id.

Analysis

Petitioner does not dispute that his federal habeas filing is untimely under AEDPA unless the Court finds that he is entitled to tolling of the statute of limitations or an alternate start date for that time period. After the state supreme court denied his petition for review in October 2013, his conviction became final 90 days later, or in January 2014. The one-year AEDPA period for Petitioner to file for federal habeas review expired in January 2015. However, Petitioner did not file this action until March 2015. Petitioner's action is clearly untimely on its face.

Is Petitioner entitled to statutory and gap tolling of the AEDPA clock based on his state habeas filings? The Attorney General concedes that the trial court reached the merits of his first petition in the state superior court. (Docket # 21 at 13.) On that basis, Petitioner should receive a nominal three weeks of statutory tolling attributable to the superior court action. That extends his filing deadline to February 2015.

Beyond that, though, he is not entitled to more tolling. The Court concludes that the state appellate and supreme courts denied Petitioner's subsequent habeas actions on timeliness grounds, which forecloses Petitioner's right to further tolling. The state appellate court expressly rejected Petitioner's petition for a variety of reasons. One was his failure to assert sufficient facts to state a claim for relief (the Duvall denial). Additionally, as signified by the state court's use of the legal term "see also," the court referred to Clark (page 765 – untimely petition) and Lindley (claim regarding sufficiency of evidence not brought on direct appeal) as additional bases to deny relief.

A fair reading of the specific citation to page 765 of the Clark decision is that the state appellate court intended to signify that the petition was not filed within a reasonable amount of time. The overarching message of this section of the decision is that a prisoner bears the burden of demonstrating the timeliness of his postconviction filing. For this reason, the bulk of the main text and the key footnote on that page of the decision focus on whether a "significant delay" is fatal to a claim. Clark, 5 Cal. 4th at 765.

To be sure, the Clark Court additionally noted that it is "also the general rule" that a habeas petitioner may not raise issues for a second time on habeas review (citing Waltreus) and cannot plead habeas claims that could have been reviewed on direct appeal (Dixon). Clark, 5 Cal. 4th at 765 (emphasis added). Yet, a state appellate court conversant with these rules 20 years after the publication of Clark would be unlikely to cite to Clark – the leading case on habeas timeliness under California law, according to the U.S. Supreme Court – to then silently and derivatively refer to a Dixon / should-have-raised-earlier bar as Petitioner suggests. (Docket # 30 at 4.) No, the reference to Clark in the appellate order (a) issued nearly a year after the supreme court denied review and (b) three years after conviction at trial is an unmistakable signal that the court denied the petition as untimely. Walker, 562 U.S. at 310; Lakey, 633 F.3d at 786.

Given that the appellate court found Petitioner's action to be untimely, it was not "properly filed" for statutory tolling purposes. Pace, 544 U.S. at 414; Lakey, 633 F.3d at 785-86. That eliminated the opportunity for any statutory tolling during the pendency of the action or gap tolling before the next action. And the Court must presume that the state supreme court silently denied relief in Petitioner's subsequent action for the same timeliness ground. Ylst, 501 U.S. at 803; Bonner, 425 F.3d at 1148; White, 601 F.3d at 884; Hamilton, 533 F. App'x at 803; see also Trigueros v. Adams, 658 F.3d 983, 990 (9th Cir. 2011)

(distinguishing Bonner based on "compelling factual circumstances" of order requiring merits briefing after lower court found habeas action untimely).

The bottom line: Petitioner filed his federal action about a month after his AEDPA deadline expired. The Ninth Circuit has long "recognize[d] the harshness of the result" of such a decision. Bonner, 425 F.3d at 1149. A prisoner may not realize that his action has been deemed untimely in state court – and may have blown his federal time deadline – until after the case is closed. Yet, that responsibility falls squarely on the prisoner's shoulders. Petitioner opted to pursue additional state relief rather than, say, file a protective petition in federal court and seek a stay of the action to properly exhaust his claims. Pace, 544 U.S. at 414. Petitioner's half-hearted attempt to do so in October 2014 fell far short of that bar, even as it demonstrated that Petitioner has long been aware of the urgency of complying with AEDPA's rigorous timing requirements. Gonzales v. Foulk, CV 14-8074 ODW (RZ) (C.D. Cal.).

Petitioner's alternative claim is that his AEDPA clock didn't start until he received his case file from his appellate lawyer. This argument is unavailing. Petitioner offers no convincing evidence properly establishing the nature of the delay in the transfer of these materials to him. (Docket # 30 at 6-7.) Moreover, he presents no understandable reason why he needed these items in order to bring claims of ineffective assistance against his trial lawyers. Petitioner was clearly aware of "the vital facts" giving rise to his IAC claims well before he received the transcripts.[1] Ford, 683 F.3d at 1235; Chessman v. Biter, No. CV 14-8768 FMO

[1] The only ineffective assistance claim that could plausibly have been brought to light by the transcripts involves Petitioner's contention that his lawyer failed to convey an informal plea offer from the prosecution. (Docket # 1 at 46.) However, the transcript page that Petitioner points to does not reference a plea offer. To the contrary, the prosecutor expressly stated (in Petitioner's presence) that there "have not been offers to any of the defendants." (Lodgment # 10, 2RT at A1, A24.) Petitioner's reliance on the new-found transcripts as the basis for his claims is therefore illusory.

(RZ), 2015 WL 350218 at *3 (C.D. Cal. 2015) ("Petitioner was present at his trial and thus immediately aware of what happened there (and what did not)") (citing § 2244(d)(1)(D)). And, his patent lack of diligence in obtaining the transcripts is fatal to his claim to a new start date for his limitations period.[2] Ford, 683 F.3d at 1235.

CONCLUSION

Petitioner filed this habeas action one month after the statute of limitations expired. He failed to demonstrate that he was entitled to sufficient statutory tolling to make his action timely in this Court.

The Attorney General's dismissal motion is GRANTED. The action is hereby DISMISSED with prejudice.

IT IS SO ORDERED.

Dated: May 3, 2016

HON. MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

[2] The Court offered Petitioner the opportunity to demonstrate equitable tolling of the limitations period. (Docket # 24 at 1.) Even though Petitioner did not formally request this, the Court sua sponte concludes that he cannot establish that there were "extraordinary circumstances" that prevented him from filing his federal action within the AEDPA one-year window. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003). Petitioner is not entitled to equitable tolling here for the reasons described above.

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ROBERT JOE GONZALES, Petitioner, **v.** **F. FOULK,** Respondent.	CV 15-1941-DDP (MRW) **MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES** Honorable Michael R. Wilner United States Magistrate Judge

MEMORANDUM OF POINTS AND AUTHORITIES

PROCEDURAL HISTORY

On May 3, 2011, a jury found Petitioner guilty of second degree murder (Cal. Penal Code § 187; Lodgment 1 at 2). The jury also found true a gang enhancement. (Cal. Penal Code § 186.22(b)(1)(C).) On December 12, 2011, Petitioner was sentenced to state prison for fifteen years to life. (Lodgment 1 at 2.) Petitioner appealed his conviction. (Pet. at 2, 3;[2] Lodgment 1.)

On August 13, 2013, Division Four of the Second Appellate District in the Court of Appeal in the State of California affirmed Petitioner's conviction in its entirety. (Lodgment 1.)

On September 13, 2013, Petitioner filed a petition for review in the California Supreme Court.[3] (Lodgment 2.) On October 16, 2013, the California Supreme Court denied review. (Lodgment 3.)

On June 2, 2014, Petitioner constructively filed a habeas petition in the Los Angeles County Superior Court.[4] (Lodgments 4 at 26 and 9 at 1-2.) On June 25,

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[2] Respondent refers to ECF-generated numbering.

[3] Respondent verified this by accessing the California appellate court website: www.courts.ca.gov/supremecourt.htm.

[4] Petitioner claims in his Petition that he filed his Los Angeles County Superior Court habeas petition on May 31, 2014. (Pet. at 3.) The Los Angeles Superior Court docket shows that Petitioner filed a petition on June 6, 2015. (Lodgment 4 at 26.) Respondent made numerous unsuccessful attempts to get a copy of the Los Angeles Superior Court habeas petition to find a potentially earlier constructive filing date. Unable to get the petition, Respondent requested Petitioner's outgoing mail log for May and June 2014. There was no mail log generated for May 2014, indicating that Petitioner did not deliver any legal mail to prison authorities for mailing that month. (Lodgment 9 at 3.) The outgoing mail log for June 2014 shows that on June 2, 2014, a piece of legal mail was delivered by Petitioner to prison authorities and was mailed to the Los Angeles County Superior Court. (Lodgment 9 at 3 & attached mail log.) Accordingly, based on the documents available, Respondent concludes that Petitioner constructively filed his Los Angeles County Superior Court habeas petition on June 2, 2014.

Application of the "mailbox rule" does not render the Petition timely. *See Houston v. Lack*, 487 U.S. 266, 276, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988). Nevertheless, Respondent assumes *arguendo* for purposes of the arguments made herein that Petitioner delivered each of his state petitions and his federal petition to prison authorities for mailing on the date of the proof of service, or in the case of (continued...)

2014, the court denied Petitioner's ineffective assistance of trial and appellate counsel claims on the merits. (Lodgment 4 at 27.) In addition, as to Petitioner's six claims of alleged error by the trial court, the court denied the petition on the basis that a "writ of habeas corpus will not lie where the claimed errors could have been, but were not, raised via timely appeal." (*Id.* (citing *In re Reno*, 55 Cal. 4th 428, 146 Cal. Rptr. 3d 297 (2012)).)

On July 15, 2014, Petitioner constructively filed a habeas petition in the California Court of Appeal. (Lodgment 5.) On September 30, 2014, the court denied the petition as follows: "The petition is denied for failure to state sufficient facts demonstrating entitlement to relief requested. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474-475; see also *In re Clark* (1993) 5 Cal.4th 750, 765; *In re Lindley* (1947) 29 Cal.2d 709, 723." (Lodgment 6.)

On October 5, 2014, Petitioner constructively filed a document in the United States District Court captioned "Request and Notice to File a 28 U.S.C.A. [*sic*] § 2254." (USDC CV14-08074-ODW (RZ) Dkt. 1.)[5] The district judge noted that Petitioner had not presented an actual petition but rather was seeking statutory tolling. (*Id.*, Dkt. 3 at 1.) Finding that Petitioner "ha[d] not properly initiated a 'case' or 'controversy,'" the district judge concluded that "the Court lacks subject matter jurisdiction." (*Id.*; *see id.* at 3-4.) The Court therefore "denie[d] the request for an extension of time and dismisse[d] the action without prejudice for lack of jurisdiction." (*Id.* at 4 (original capitalization omitted).)

(...continued)
Petitioner's superior court habeas petition, on the date that it was delivered to prison authorities for mailing, but does not concede that Petitioner did so. *See Roberts v. Marshall*, 627 F.3d 768, 770 n.1 (9th Cir. 2010) ("When a prisoner gives prison authorities a habeas petition or other pleading to mail to court, the court deems the petition constructively 'filed' on the date it is signed.").

[5] Respondent respectfully requests that this Court take judicial notice of the files and records in United States District Court case number CV14-08074-ODW (RZ). *See* Fed. R. Evid. 201; *see, e.g., United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) ("[A] court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases.").

On October 23, 2014, Petitioner returned to state court where he constructively filed a habeas petition in the California Supreme Court, which was denied on January 21, 2015. (Lodgments 7 and 8.)

On March 5, 2015, Petitioner constructively filed the instant federal habeas Petition.

On March 18, 2015, this Court ordered Respondent to file a response to the Petition.

ARGUMENT

I. THE PETITION IS BARRED BY THE STATUTE OF LIMITATIONS

Respondent submits that the Petition should be dismissed as time-barred for the reasons set forth below.

A. The Petition Is Untimely By Twenty-Seven Days As To All Grounds

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner ordinarily has one year from the date a state judgment becomes final to file a federal habeas corpus petition. 28 U.S.C. § 2244(d)(1)(A). This statute of limitations "encourag[es] prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Carey v. Saffold*, 536 U.S. 214, 226, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002).

Here, Petitioner appealed his conviction. (Pet. at 2-3.) His petition for review was denied by the California Supreme Court on October 16, 2013 (Lodgment 3.), and there is no indication Petitioner filed a petition for writ of certiorari in the United States Supreme Court. Thus, the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review was January 14, 2014, when the ninety-day period for Petitioner to petition the United States Supreme Court for a writ of certiorari expired. *See Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999); *see also Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994) ("A state conviction and sentence

become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."). Accordingly, under the one-year period of limitations, Petitioner had until January 14, 2015, to file a habeas petition in federal court. *See* 28 U.S.C. § 2244(d)(1)(A); *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001).

This limitations period is tolled while a "properly filed" application for state post-conviction relief is pending. 28 U.S.C. § 2244(d)(2). Tolling is available under § 2244(d)(2) for the period between the denial of relief on a state-court petition and the filing of another petition, so long as the subsequent petition is filed in a higher court within a "reasonable time" under California law and raises the same claims. *See Evans v. Chavis*, 546 U.S. 189, 191-92, 201, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006); *Carey v. Saffold*, 536 U.S. at 222-23; *Gaston v. Palmer*, 417 F.3d 1030, 1043 (9th Cir. 2005), *amended*, 447 F.3d 1165 (9th Cir. 2006); *Biggs v. Duncan*, 339 F.3d 1045, 1047-48 (9th Cir. 2003). However, "a state postconviction petition rejected by the state court as untimely" is not "properly filed" for statutory tolling purposes, and thus does not toll the limitations period. *Pace v. DiGuglielmo*, 544 U.S. 408, 410 & 417, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005).

Here, Petitioner constructively filed a habeas petition in the Los Angeles County Superior Court on June 2, 2014.[6] (Lodgment 4.) At that point, 139 days had elapsed from the one-year statute of limitations. The Los Angeles County Superior Court denied the petition on June 25, 2014. (Lodgment 4 at 27.) The court denied Petitioner's ineffective assistance of trial and appellate counsel claims

[6] As noted, Respondent has been unable to obtain a copy of the superior court habeas petition and, as such, is uncertain whether Petitioner raised the same claims as in his instant Petition. However, the superior court's docket indicates that petitioner raised two claims of ineffective assistance of counsel (for trial and appellate counsel, respectively) and six claims of alleged errors by the trial court. (Lodgment 4 at 27.) In the instant Petition, Petitioner likewise raises two ineffective assistance of counsel claims, as well as six claims of alleged error made by the trial court. (Pet. at 34-49.)

on the merits. In addition, as to Petitioner's six claims of alleged error by the trial court, the court denied the petition on the basis that the claims could have been but were not raised on direct appeal. (*Id.* (citing *In re Reno*, 55 Cal. 4th 428.) Petitioner is entitled to statutory tolling for the pendency of his superior court habeas petition.

The statute of limitations was statutorily tolled for the twenty-three days that Petitioner's superior court habeas petition was pending. Those twenty-three days of tolling extended the expiration of the statute of limitations from January 14, 2015, to February 6, 2015.

On July 15, 2014, Petitioner constructively filed a habeas petition in the California Court of Appeal, [7] which was denied on September 30, 2014. (Lodgments 5 and 6.) The state appellate court denied the petition as follows: "The petition is denied for failure to state sufficient facts demonstrating entitlement to relief requested. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474-475; see also *In re Clark* (1993) 5 Cal.4th 750, 765; *In re Lindley* (1947) 29 Cal.2d 709, 723." (Lodgment 6.) The *Clark* citation signified that the state habeas petition was untimely.[8] *See Walker v. Martin*, 562 U.S. 307, 310, 131 S. Ct. 1120, 1126, 179 L. Ed. 2d 62 (2011) (quoting *Clark*, 5 Cal. 4th at 765 n.5 to note that "California directs petitioners to file known claims 'as promptly as the circumstances allow'"); *see also id.* at 313 ("A summary denial citing *Clark* and [*In re Robbins*, 18 Cal. 4th

[7] Petitioner raised the same claims in his California Court of Appeal habeas petition as in Grounds Three and Four of the instant federal Petition. (*Compare* Lodgment 5 *with* Pet. at 34-49.) Grounds One and Two the instant federal Petition were raised and rejected on direct appeal. (*Compare* Lodgment 1 at 11-26 *and* Lodgment 2 at 7-27 *with* Pet. at 14-34.)

[8] Page 765 of *Clark* discusses California's rule that "a petitioner explain and justify delay in seeking habeas corpus relief." And footnote 5 on that page discusses standard to judge delay. The latter half of page 765 also begins to discuss the "general rule that issues resolved on appeal with not be reconsidered on habeas corpus" and that a writ will not lie for claims that should have been, but were not, raised on appeal. *Clark*, 5 Cal. 4th at 765. The discussion of these latter rules, however, continues on to page 766. Here, the state appellate court cited only to page 765. Thus, it appears that the court cited *Clark* for the explain-and-justify-delay rule.

770, 77 Cal. Rptr. 2d 153 (1998)] means that the petition is rejected as untimely."); *Lakey v. Hickman*, 633 F.3d 782, 786 (9th Cir. 2011) (state habeas petition was "deemed untimely under California law" because "the California Supreme Court cited its decision of *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729 (1993), which 'dealt specifically with the bar of untimeliness'" such that the petition "must be treated as improperly filed, or as though it never existed, for purposes of section 2244(d)").

Because the California Court of Appeal rejected the petition as untimely, it was not "properly filed." *See Pace*, 544 U.S. at 410, 417; *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010) ("the petition cannot be untimely or an improper successive petition" for statutory tolling to apply); *Thorson v. Palmer*, 479 F.3d 643, 645-46 (9th Cir. 2007) ("[t]he California Supreme Court's citation to *Robbins* was a clear ruling that [the] petition was untimely" such that it was not properly filed for statutory tolling purposes); *Silva v. Cate*, 2013 WL 3353845, at *4 n.3 (S.D. Cal. July 3, 2013) (state habeas petition denied as successive under *Clark* "is not considered 'properly filed' under § 2244(d), and therefore cannot be used when calculating statutory tolling"); *Coston v. McDonnell*, 2012 WL 3728022, at *3 (E.D. Cal. Aug. 24, 2012) ("Under 28 U.S.C. § 2244(d)(2), a petition is not considered properly filed where it is untimely or successive.").

Because the petition was not "properly filed," Petitioner is not entitled to any statutory tolling for the pendency of his California Court of Appeal habeas petition, or for the interval between the June 25, 2014, denial of his superior court habeas petition and the July 15, 2014, constructive filing of his habeas petition in the California Court of Appeal. *See Bonner v. Carey*, 425 F.3d 1145, 1149 (9th Cir. 2005), *amended*, 439 F.3d 993 (9th Cir. 2006) ("Under *Pace*, if a state court denies a petition as untimely, none of the time before or during the court's consideration of that petition is statutorily tolled.").

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 07/24/2015 12:39 PM

Docket (Register of Actions)

GONZALES (ROBERT JOE) ON H.C.
Case Number S222282

Date	Description	Notes
10/30/2014	Petition for writ of habeas corpus filed	Petitioner: Robert Joe Gonzales Pro Per Exhibits attached with petition.
01/21/2015	Petition for writ of habeas corpus denied	

Click here to request automatic e-mail notifications about this case.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re	)	B 257608
	)	
ROBERT GONZALES,	)	(Super. Ct. No. NA072796)
	)	(Stephen A. Marcus, Judge)
on Habeas Corpus.	)	
	)	**ORDER**
	)	
	)	

THE COURT:*

The petition for writ of habeas corpus has been read and considered, along with the file in the related appeal, B237860.

The petition is denied for failure to state sufficient facts demonstrating entitlement to the relief requested. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474-475; see also *In re Clark* (1993) 5 Cal.4th 750, 765; *In re Lindley* (1947) 29 Cal.2d 709, 723.)

*EPSTEIN, P. J. WILLHITE, J. MANELLA, J.

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 09/12/17

CASE NO. NA072796

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 03: ROBERT JOE GONZALES

COUNT 09: 187(A) PC FEL

ON 06/25/14 AT 830 AM IN CENTRAL DISTRICT DEPT 101

CASE CALLED FOR HABEAS CORPUS PETITION

PARTIES: RONALD S. COEN (JUDGE) EMILY LOPEZ (CLERK)
NONE (REP) NONE (DDA)

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

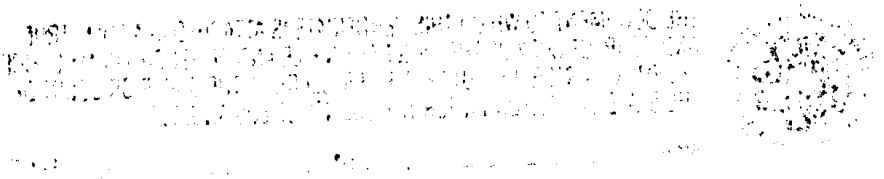
DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS READ AND CONSIDERED. DEFENDANT WAS CONVICTED OF SECOND DEGREE MURDER. THE CONVICTION WAS AFFIRMED ON APPEAL ON AUGUST 13, 2013. DEFENDANT'S FIRST SIX GROUNDS FOR RELIEF DEALT WITH ALLEGED ERROR BY THE TRIAL COURT DURING DEFENDANT'S TRIAL. THESE ARE MATTERS THAT COULD HAVE BEEN RAISED IN DEFENDANT'S DIRECT APPEAL. A WRIT OF HABEAS CORPUS WILL NOT LIE WHERE THE CLAIMED ERRORS COULD HAVE BEEN, BUT WERE NOT, RAISED VIA TIMELY APPEAL. (IN RE RENO (2012) 55 C4TH 428).

.
DEFENDANT'S LAST GROUND FOR APPEAL IS INADEQUACY OF TRIAL AND APPELLATE COUNSEL. DEFENDANT FAILED TO PRESENT SUFFICIENT FACTS WARRANTING RELIEF.

.
PETITION IS DENIED.

.
A COPY OF THIS MINUTE ORDER IS MAILED TO THE DEFENDANT AT:
P.O. BOX 3030, SUSANVILLE, CA 96127-3030

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED



Court of Appeal, Second Appellate District, Division Four - No. B237860

S213294

IN THE SUPREME COURT OF CALIFORNIA

Tahnaz Kouhpainezhad

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ROBERT GONZALES, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

Supreme Court of California
Clerk of the Court
350 McAllister Street
San Francisco, CA 94102-4797

S213294
Tannaz Kouhpainezhad
Office of the Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013

Filed 8/13/13 P. v. Gonzales CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROBERT GONZALES, Defendant and Appellant.	B237860 (Los Angeles County Super. Ct. No. NA072796)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Deborah L. Hawkins, 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, Assistant Attorney General, Paul M. Roadarmel, Jr., and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

The People charged defendant Robert Gonzales with the first degree murder of Christopher Ash (Pen. Code, § 187, subd. (a)),[1] with three special circumstances allegations, an allegation of a personal use of a deadly weapon (knife), and a gang enhancement. The jury acquitted him of first degree murder but convicted him of second degree murder. In addition, it found the gang enhancement (§ 186.22, subd. (b)(1)(C)) to be true, but found the personal use of a knife enhancement (§ 12022, subd. (b)(1)) not to be true. The court sentenced him to a term of 15 years to life.

In this appeal, defendant raises two contentions. The first is that the evidence is insufficient to sustain his conviction for second degree murder. The second is that the trial court erred when it denied his motion for a new trial based upon a claim of juror misconduct. We find no merit to either contention and therefore affirm the judgment.

STATEMENT OF FACTS

A. THE PROSECUTION'S CASE

1. *Factual Overview*

Defendant, among others, was convicted of Ash's murder. Ash was a 204th Street gang member who was killed because fellow gang members believed he was a "snitch" regarding the murder of Cheryl Green (Green) committed by 204th Street member Jonathan Fajardo. In separate proceedings, Fajardo, Daniel Aguilar and Raul Silva were also convicted of Ash's murder.[2]

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[1] All undesignated statutory references are to the Penal Code.

[2] Defendant, Fajardo, Aguilar and Silva were jointly charged. Aguilar and Fajardo were tried together. Aguilar was convicted of Ash's first degree murder and sentenced to life without the possibility of parole. We affirmed his conviction in *People v. Aguilar* (May 31, 2012) B227935. Fajardo was convicted of the first degree murders of Green

2. *The Green Murder*

The Green murder occurred during the afternoon of December 15, 2006, when Fajardo fired on a group of African Americans gathered in the driveway of a home in Los Angeles. Ernesto Alcarez, a member of the 204th Street gang, acted as lookout during the shooting. Fajardo killed 14-year-old Green and wounded three other individuals.

As part of the investigation of Green's murder, the police executed search warrants on December 21, 2006 at eight residences of individuals connected to the 204th Street gang. Pursuant to warrant, Ash's apartment was searched. During that search, the police escorted Ash and seven other individuals, including Aguilar, Alcarez, Fajardo and Jose Covarrubias, out of Ash's apartment. The police arrested Alcarez and took Ash and Aguilar into custody for questioning but later released the two men.

3. *The Ash Murder*

Covarrubias, a member of the 204th Street gang and an accomplice in Ash's killing, was the key prosecution witness at defendant's trial.[3] According to Covarrubias, Ash was murdered on December 28, 2006 in the garage of the home belonging to Silva, a 204th Street gang member.

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and Ash and was sentenced to death. In a separate proceeding, Silva was convicted of Ash's first degree murder. We affirmed his conviction in *People v. Silva* (Feb. 27, 2013) B236916.

In this case, the trial court submitted CALJIC No. 2.11.5 ("Unjoined Perpetrators of Same Crime") to the jury at the close of trial.

[3] Covarrubias pled guilty to voluntary manslaughter in exchange for a 22-year state prison sentence on the condition that he testify truthfully against his accomplices, including defendant.

a. *Testimony of the Accomplice Covarrubias*[4]

Covarrubias testified to the following sequence of events. After the police had searched the residences connected to 204th Street gang members on December 21, 2006, rumors circulated that the 204th Street gang believed "somebody might be snitching" about the Green murder. The belief was grounded in the fact that no one except Alcarez had been taken into custody following the search of Ash's apartment.

During the late afternoon of December 28, 2006, Covarrubias and four other 204th Street gang members (Silva,[5] Aguilar, Eugenio Claudio, and Christian Claudio) met for an hour at the Claudio residence. Silva asked Covarrubias about the December 21 search of Ash's home and whether there was a "snitch" in the gang. After awhile, the men (except for Christian Claudio) decided to go to Silva's home.

The men drove to Silva's house and entered the garage where defendant and an unidentified woman were present. This was the first time that Covarrubias had met defendant. The woman stayed "for a couple of minutes, and . . . left." Later on, Fajardo and Juan Carlos Pimentel (also a member of the 204th Street gang) arrived.

Pimentel pulled Covarrubias aside and asked him if he thought Ash was a snitch and was keeping a journal about their gang's activity. Covarrubias said that

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[4] The pattern instructions defining an accomplice and explaining the requirement to corroborate accomplice testimony were submitted to the jury. (CALJIC Nos. 3.10, 3.11, 3.12, 3.16 and 3.18.) We presume that the jury found that Covarrubias's testimony was sufficiently corroborated and defendant does not contend to the contrary in this appeal.

[5] Silva's two brothers are also members of the 204th Street gang.

he believed Ash was a snitch and that he had heard about the journal. Pimentel then had a private conversation with Aguilar.

Thereafter, all seven men, including defendant, gathered together and discussed the matter. Pimentel stated: "[W]e're gonna take care of Christopher Ash because of some snitching." In front of the entire group, Pimentel told Covarrubias to follow his (Pimentel's) lead when Ash arrived at the garage and "tear up" Ash's "body." Defendant, along with the other men, nodded his head up and down during this discussion. Everyone agreed that Ash would be brought to the garage and killed. The men decided that because Ash trusted Aguilar the most, Aguilar would bring Ash to the garage. Defendant offered to drive Aguilar to pick up Ash.

Before defendant and Aguilar left, defendant gave both Covarrubias and Pimentel a knife.[6] Everyone, including defendant, agreed that Ash would be killed when he was brought to the garage.

After approximately 20 minutes, defendant and Aguilar returned to the garage with Ash.[7] Fajardo struck Ash from behind with the butt of a shotgun. Ash stumbled forward and yelled: "What the fuck? I'm not a snitch." Defendant, Aguilar, Silva, and Claudio rushed forward and began to punch Ash. Pimentel told

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[6] When Covarrubias first spoke with the police in January 2007 about Ash's murder, he did not tell them that defendant "had supplied the knife to [him]." Rather, he told them that Pimentel had "pulled out a shank" and attacked Ash. However, Covarrubias explained at defendant's trial (conducted in 2011) that he was not certain if the police had even asked him in 2007 "where people got the knives from." Further, in a 2010 proceeding, Covarrubias gave ambiguous, if not inconsistent, testimony. When asked "When were [the knifes] produced?" he replied: "When they were on the way, when Ash, [Aguilar and defendant] were on the way." However, Covarrubias then proceeded to testify, (as he subsequently did at defendant's trial) that defendant had handed the knife to him and Pimentel before defendant and Aguilar left to pick up Ash.

[7] Ash's mother testified that Aguilar picked up her son shortly before 11 p.m.

everyone to calm down, walked Ash toward a Pepsi machine, and stabbed Ash in the neck. Ash fell and Pimentel stabbed him in the chest. Covarrubias stabbed Ash in the stomach four or five times but then vomited and dropped the knife. Defendant "pushed [Covarrubias] to the side," picked up the knife and rapidly stabbed Ash "a lot of times" in the stomach. When defendant finished stabbing Ash, Pimentel turned Ash over and "stabbed him one good time in his back."

Silva retrieved a tarp and blanket and the men wrapped Ash's body in it. Everyone, including defendant, loaded Ash's body into a van. Fajardo and Pimentel left in the van. Five of the men, including defendant, stayed behind to clean the garage, using water and paint thinner, and to dispose of blood soaked items, including the two knifes used to kill Ash.[8]

b. *The Discovery of Ash's Body and the Subsequent Police Investigation*

The police discovered Ash's body later that evening, approximately a mile and a half from Silva's home. Ash died of multiple stab wounds, 11 to the chest and 32 to the abdomen. Blood in Silva's garage and in the van used to transport Ash's body matched Ash's blood.

On February 7, 2007, Deputy Sheriff Ferguson and Sergeant Rodriguez interviewed defendant about Ash's murder. A recording of the interview was played to the jury. In that interview, defendant gave inconsistent and false statements about the events of December 28.[9] First, he stated he "definitely wasn't" at Silva's home that evening; that he had "never seen" Ash; that he had no

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[8] In his January 2007 interview with the police, Covarrubias said that defendant had been "going in and out of the garage during this . . . incident."

[9] A transcript of the interview was distributed to the jury and admitted into evidence. Our statement of facts is taken from the transcript.

knowledge about Ash's murder; and that he had never met Covarrubias or Aguilar. Then, he conceded that he had seen Ash on December 28 at Silva's residence and that "a murder went down" but claimed that he "was there, but [he] wasn't present" because he was inside of the house. He asserted that he had not participated in the murder (including the stabbing of Ash), the cleaning of the crime scene or the loading of Ash's body into the van and had not seen anyone clean up blood in the garage. But later in the interview, defendant admitted that he had heard the men talk about identifying a snitch; that he, along with Aguilar, had picked up and driven Ash to the garage; and that when he, Aguilar and Ash returned to the garage, someone hit Ash with a stick. At that point, defendant claimed that he left the garage for the house. When he returned later, he saw the men cleaning the garage. He realized that a murder had been committed. He knew that three of the men were members of the 204th Street gang and the murder was "a 204 thing."

4. *Gang Evidence*

Los Angeles County Deputy Sheriff Mark Wedel, a gang expert, testified about the Fries Street gang. The gang, a subset of the Carson 13 gang,[10] existed until the early 2000's. Its activities included commission of burglaries and robberies. Two men involved in Ash's murder had been members of the Fries Street gang: defendant and Silva. In 1996 and 1997, defendant admitted membership in the gang and Silva admitted membership in 1999, 2002, and 2004. The territory and membership of the Fries Street gang were "pretty small." The Silva residence at which Ash was murdered was within that territory. In Deputy Wedel's opinion, it would not be surprising for a member of the Fries Street gang to kill a snitch to prevent him from testifying in a serious case.

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10 The Carson gang is also known as the Varrio Carson gang.

Sergeant Daniel Robbins of the Los Angeles Police Department testified as an expert about the 204th Street gang. In 2006, the gang had approximately 100 members. Its primary activities included community intimidation, attempted murder and murder. When he arrested defendant on December 30, 2006, defendant "said he was from Fries." Sergeant Robbins had no opinion as to whether defendant was a member of the 204th Street gang but the sergeant knew of at least one member of the Fries Street gang (John Martin) who later joined the 204th Street gang. Further, Sergeant Robbins believed that Silva—who in the past had admitted he was a member of the Fries Street gang—was, by December 2006, a member of the 204th Street gang. (In Sergeant Robbins' opinion, the Fries Street gang was "defunct" in 2006.)

The prosecutor, utilizing the evidence presented at trial, posed a hypothetical question to Sergeant Robbins as to what, in his opinion, motivated the December 28 group murder of Ash.[11] The sergeant replied that he believed that it was "motivated for two reasons: for the protection of the 204th Street gang and for the protection of some of its members" and that the murder was committed "to advance the interests" of the 204th Street gang because a gang needs to eliminate snitches. Sergeant Robbins further believed that defendant had "act[ed] to benefit 204th Street by helping to kill Christopher Ash" even if he was not a member of the 204th Street gang. He explained that, in his opinion, an individual "can help a gang even without necessarily being [a] documented member[] of it." "[I]f he's

[11] Immediately before Sergeant Robbins answered the hypothetical question, the court instructed the jury: "[E]xperts are allowed to offer opinions about a myriad of subjects. It is up to you to decide how much weight to give that opinion." At the close of trial, the court submitted, inter alia, CALJIC Nos. 2.80 ("Expert Testimony—Qualifications of Expert") and 2.82 ("Hypothetical Questions") to the jury.

[defendant's] there, whether he was in a gang or not, he was there to benefit the 204th Street gang."

B. THE DEFENSE CASE

Defendant testified on his own behalf, denying membership in the 204th Street gang and any involvement in Ash's murder.

According to defendant, he had been a member of the Fries Street group, "a group of kids" that "just" "hung out on" Fries Street in "the late '90s." At that time, the group had, at most, 10 members. Defendant "wouldn't necessarily say Fries Street is a gang." By 2006, when defendant was 29, he and Silva were the last remaining members of Fries Street. Defendant was also a member of RSK, a tagging crew. Defendant was never a member of the 204th Street gang and did not "hang out on a regular basis" with its members. Defendant and Silva were "best friends," having known each other for the last 17 years. Defendant knew that two of Silva's brothers were members of the 204th Street gang and that members of the gang "h[u]ng out" at the Silva residence. According to defendant, the Fries Street group and the 204th Street gang were "tolerable of each other," "the two groups could get along."

In December 2006, defendant was living with Silva. Prior to December 28, 2006, defendant had met Fajardo and Pimentel but not Aguilar, Covarrubias, or Ash. He knew that Pimentel, whom he had met five times, was a member of the 204th Street gang. On December 28, defendant was in Silva's garage with a women he identified only as "Trisha," "just hanging out." After 20 to 30 minutes, Aguilar, Silva, Claudio and Covarrubias arrived. Defendant stayed and spoke with the men but, at some point, began to go back and forth from the garage to his car because he was in the process of removing his belongings from the Silva residence. Defendant heard the men say "that they were looking for somebody that was

telling on something" and that "somebody was snitching" but he did not hear a conversation about anyone being stabbed. Defendant did not give a knife to either Pimentel or Covarrubias. At one point, Aguilar asked defendant "to give him a ride to pick up his friend [Ash]." Defendant agreed to do so. Aguilar never told defendant why he wanted to bring Ash to Silva's garage.

When defendant, Aguilar and Ash returned to Silva's garage, defendant saw someone hit Ash in the back of the head with an object. At that point, defendant "knew it was none of [his] business, whatever was going on; so [he] just left" the garage and went into the Silva residence. Defendant never participated in assaulting Ash, either with his fists or a knife and never again saw Ash after he (defendant) left the garage.

Once defendant was inside the Silva residence, he went to Silva's bedroom where he visited with Silva and "Trisha" for "at least a half hour."[12] When defendant returned to the garage, there was "water everywhere." In light of that fact and how "Covarrubias and Aguilar were acting at the time" by cleaning up the garage, defendant knew "that something happened." Defendant, who denied participating in either cleaning the garage or disposing of Ash's body, left the Silva premises.

When asked why Covarrubias would falsely accuse him of participating in Ash's murder, defendant opined: "I think he would be pointing me out as somebody being a participant in that because . . . he doesn't really care . . . if anything was to happen with me because he doesn't know me. And he knows that I'm not from 204th Street; so it wouldn't be nothing really to him. That's what I think."

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[12] "Trisha" did not testify at defendant's trial.

C. THE JURY INSTRUCTIONS

The trial court submitted the pattern CALJIC instructions defining murder, malice aforethought, and first degree murder. (CALJIC Nos. 8.10, 8.11, 8.20, 8.25.) Further, the court instructed on two theories of second degree murder: (1) a homicide committed with malice aforethought but without deliberation and premeditation and (2) a homicide that is the natural and probable consequence of an intentional act (in this case either assault with a deadly weapon or intimidating a witness by force) committed with conscious disregard for human life. (CALJIC Nos. 8.30, 8.31 & 9.00.) In addition, the pattern instructions about aiding and abetting were submitted. (CALJIC Nos. 3.00, 3.01 & 3.02.)

DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the evidence is insufficient to sustain his conviction for second degree murder. He reasons as follows. First, he argues that the jury, by convicting him of second degree murder instead of first degree murder, "necessarily rejected Mr. Covarrubias' testimony that [defendant] was part of a group that agreed to kill Christopher Ash for snitching before [defendant] left with Mr. Aguilar to pick [Ash] up." Defendant further argues that "[n]o jury could have reached a second degree murder conviction based upon the testimony of Mr. Covarrubias, who was clearly out to pin the murder on [defendant] to preserve the benefit of his bargain with the prosecution." Relying upon a few inconsistencies and discrepancies in Covarrubias' testimony (see fns. 6 & 8, *ante*), defendant claims that the "jury did not believe Mr. Covarrubias and did not convict [defendant] based upon his testimony," and that the "second degree murder verdict indicates the jury proceeded under the theory that Mr. Ash's death was a natural and probable consequence of an assault or of intimidation of a witness."

Defendant then proceeds to argue, based upon a one-sided and selective presentation of the evidence, that he did not know that "an assault or witness intimidation was the reason [he and Aguilar] picked up Mr. Ash" so that "there was no evidence that [he] intended to aid and abet an assault or intimidation of a witness." From that, defendant concludes that "the evidence did not prove [him] guilty of second degree murder beyond a reasonable doubt."

Defendant's approach is not persuasive. To begin, his assumption that the jury's acquittal on the first degree murder charge means that the jury rejected the entirety of Covarrubias' testimony and that we cannot rely upon that testimony in reviewing his contention of insufficient evidence is not correct. It is well settled that the jury can accept a portion of a witness' testimony while rejecting another portion of it. (*People v. Maxwell* (1979) 94 Cal.App.3d 562, 574-575; see also CALCRIM No. 105 [the jury "may believe all, part, or none of any witness's testimony."].)

Because it is the exclusive province of the jury to determine a witness' credibility, the jury's (implied) acceptance of a portion of Covarrubias' testimony is binding upon us unless that testimony was inherently improbable. (*People v. Ennis* (2010) 190 Cal.App.4th 721, 728-729.) But defendant does not urge that Covarrubias' testimony was inherently improbable. Instead, defendant relies upon Covarrubias' purported motive to fabricate (the plea bargain, see fn. 3, *ante*) and inconsistencies and discrepancies in his testimony (see fns. 6 & 8, *ante*) to argue, as he did in the trial court, that Covarrubias' testimony was not credible.[13]

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[13] As noted earlier, defendant does not contend that insufficient evidence was presented to corroborate Covarrubias' accomplice testimony. (See fn. 4, *ante*.) Corroborated accomplice testimony is sufficient to sustain a conviction. (*People v. Beaver* (2010) 186 Cal.App.4th 107, 115.)

Defendant's attempt to reargue the evidence on appeal must fail because "it is not a proper appellate function to reassess the credibility of the witnesses." (*People v. Jones* (1990) 51 Cal.3d 294, 314-315.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) We therefore assume that the jury believed that portion of Covarrubias' testimony that supports the judgment. (*People v. Swanson* (1962) 204 Cal.App.2d 169, 173.) We view that evidence in the light most favorable to the judgment and presume the existence of every fact that the jury could reasonably infer from it. (*People v. Medina* (2009) 46 Cal.4th 913, 917.) With those principles in mind, we turn to the issue of substantial evidence to sustain the second degree murder conviction.

As noted earlier, the jury was properly instructed about the two theories of second degree murder raised by the evidence: (1) a homicide committed with malice aforethought but without deliberation and premeditation (2) a homicide that was the natural and probable consequence of aiding and abetting an assault with a deadly weapon or witness intimidation. The jury's general verdict convicting defendant of second degree murder does not, of course, disclose upon which of the two theories it relied. A reviewing court may sustain a general verdict of guilty on any one of the theories upon which the jury was properly instructed as long as substantial evidence supports the theory. (*People v. Curtin* (1994) 22 Cal.App.4th 528, 531.) In this case, we explain below that substantial evidence supports the theory of second degree murder based upon the theory of a homicide committed with malice aforethought. We therefore need not determine whether the evidence supports the verdict on the theory of a homicide that was the natural and probable consequence of aiding and abetting an assault with a deadly weapon or witness intimidation. (See, e.g., *People v. Memro* (1985) 38 Cal.3d 658, 695.)

Second degree murder is the unlawful killing of a human being with malice aforethought. (§§ 187, subd. (a), 189.) Malice may be express or implied. (§ 188.) Express malice is "a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) Implied malice exists when the defendant deliberately commits an act naturally dangerous to human life knowing "'that his conduct endangers the life of another and who acts with conscious disregard for life.'" (*People v. Lasko* (2000) 23 Cal.4th 101, 107.)

As explained above, defendant's argument that the jury's acquittal of the first degree murder charge meant that it rejected all of Covarrubias' testimony is incorrect. The acquittal meant only that the jury found that the People had failed to prove first degree murder beyond a reasonable doubt. Here, the jury was instructed that a defendant commits a second degree murder when he kills with malice aforethought "but the evidence is insufficient to prove deliberation and premeditation." (CALJIC No. 8.30.)

The jury, coupling some inconsistencies in Covarrubias' testimony (see fns. 6 & 8, *ante*) with defendant's testimony, could have concluded that the People failed to prove that by the time defendant left the garage with Aguilar to pick up Ash, defendant had heard or participated in the conversation(s) in which the other men agreed to kill Ash and/or had given both Covarrubias and Pimentel a knife. On that basis, the jury could have acquitted defendant of first degree murder. But after reaching that verdict, the jury, relying upon the remainder of Covarrubias' testimony,[14] reasonably could have concluded that after defendant, Aguilar and

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[14] Defendant's contention, based upon rearguing facts presented below, that his "own testimony about what took place is credible" is inappropriate on this appeal. The parties' closing arguments explained to the jury that determining the credibility of both defendant and Covarrubias was key to deciding the case. By convicting defendant of second degree murder, the jury implicitly rejected defendant's version of the events that transpired after he and Aguilar brought Ash to Silva's garage and credited Covarrubias's testimony on

Ash returned to the garage and Fajardo hit Ash on the back of the head with the butt of a shotgun, *defendant joined in the fatal assault upon Ash by stabbing him multiple times*.[15] Defendant took this action after Pimentel had stabbed Ash in the neck and chest and Covarrubias had stabbed Ash in the stomach four to five times.

Defendant's role as one of the three men who stabbed Ash to death constitutes more than ample evidence that defendant acted with malice: either express (intent to kill) or implied (an action taken in conscious and knowing disregard of life). We therefore find that substantial evidence supports defendant's second degree murder conviction.

B. MOTION FOR A NEW TRIAL

Defendant moved for a new trial based upon juror misconduct. He offered declarations from two jurors that the jury had received and considered evidence not presented at trial: information about the convictions and sentences of Aguilar and

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those events. That credibility determination is binding upon us. (*People v. Young, supra,* 30 Cal.4th at p. 1181.)

In addition, we note that when the trial court denied defendant's new trial motion it stated, in relevant part: "I thought the strength of the case against [defendant] was pretty strong. Clearly, . . . a lot of it depended upon a single witness, Mr. Covarrubias. But Mr. Covarrubias did not get some fantastic deal, and I thought his testimony in viewing him was fairly strong."

[15] That the jury found the allegation that defendant personally used a knife during the commission of the murder to be "not true" does not undermine our conclusion. This finding "was a determination more favorable to the defendant[] than the evidence warranted and was within the province of the jury as an exercise of their mercy. It does not compel reversal of the conviction. [Citation.]" (*People v. Brown* (1989) 212 Cal.App.3d 1409, 1421; see also *People v. Santamaria* (1994) 8 Cal.4th 903, 911 ["[I]f a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both"] and *People v. Lewis* (2001) 25 Cal.4th 610, 654-656 and cases cited therein discussing the principle that inconsistent verdicts do not require reversal of a conviction supported by substantial evidence.)

Fajardo. The trial court found that this constituted juror misconduct that created a rebuttable presumption of prejudice. An evidentiary hearing was conducted at which nine jurors testified. Two testified that misconduct had occurred but the other seven denied any misconduct. In addition, affidavits were submitted from the three remaining jurors, each of whom averred that no misconduct had occurred. In a detailed and thoughtful ruling, the trial court found that the two jurors who alleged misconduct were not credible but that the ten jurors who denied misconduct were believable. On that basis, it concluded that extraneous information had *not* been presented to the jury; thus, no misconduct had occurred. In addition, it found that even if that information had been presented, there was no substantial likelihood that one or more of the jurors had been biased by it. The trial court therefore denied the new trial motion.

Defendant now contends that the trial court erred when it denied his new trial motion. We disagree.

1. *Factual and Procedural Background*

a. *Motion to Release Juror Information*

After the jury returned its verdict on May 3, defendant sought release of juror information to support a new trial motion based upon the claim that the jury had improperly considered extraneous information during deliberations. Defendant included affidavits from two jurors: Nos. 6 and 11. Each averred that during deliberations, other jurors (either two or three) had stated that they had learned from newspaper articles that Aguilar had been sentenced to life without the possibility of parole and that Fajardo had been sentenced to death. The trial court found good cause to contact the remaining jurors. It ruled that the defense had made "a showing that there is juror misconduct, and that raises a rebuttable presumption of prejudice," and, as a result, ordered an evidentiary hearing.

b. *The Evidentiary Hearing*

At the evidentiary hearing, nine jurors testified: Juror Nos. 6 and 11 supported the claim of misconduct and seven other jurors testified that no misconduct had occurred. The particulars are the following.

i. *Evidence of Juror Misconduct*

Juror No. 6 testified to one incident. During deliberations, Juror Nos. 7 and 12 told the jury that they had read articles about the sentences the co-defendants had received and that "they felt that the defendant was guilty, too." Juror No. 6 testified: "One of [the two jurors] said one of them got life, and I don't remember the other one." The conversation lasted "probably two minutes." The conversation was "loud enough that everybody could hear it." Juror No. 6 concluded: "I just didn't think in the deliberation room that it was fair." Juror No. 6 testified that he recognized then that this constituted misconduct but explained that he did not report it to the trial judge "because we were right at the end of deliberations," "maybe 20 minutes."

Juror No. 11 testified as follows. After the trial concluded, she and Juror No. 6 had a discussion with defense counsel that led to her writing a letter to the court.[16] The three-page typed letter, dated May 12, 2011 (nine days after the trial ended), explained that she was "very troubled by the outcome of this trial." But in the letter she made no claim that the jury had improperly received information about the convictions or sentences of two of defendant's accomplices. Instead, the letter launched a broadside attack on her fellow jurors. She accused two of being

[16] No evidence was presented that the issue of juror misconduct was discussed in the conversation between defense counsel and Jurors No. 6 and 11.

"flagrantly racist," stated one slept "through half the testimony," claimed another "did not know sufficient English to understand the nuances" of the trial or jury deliberation, asserted others "completely ignored the concept of 'reasonable doubt,'" and averred another was biased. Further, she suggested defense counsel provided ineffective representation. She hoped the trial court would impose "the absolute minimum [sentence]" on defendant. She believed defendant "could be rehabilitated," offered "to help him at least get his GED," and explained that Juror No. 6 had "offered to get [defendant] employment upon his release." Lastly, Juror No. 11 had "reached out" to legal counsel at Homeboy Industries "for advice" and hoped defendant would "get a good appeal attorney."

After Juror No. 11 sent her letter to the court, defense counsel contacted her. Thereafter, she signed the affidavit submitted in support of the request to release juror information in which she alleged that the jury had received extraneous information.

At the hearing, Juror No. 11 testified to four instances of misconduct. The first occurred during the second day of jury selection: the individual who was ultimately seated as Juror No. 12 told her in the hallway (with no one else around) that the trial of Aguilar and Fajardo had concluded the previous week. The second occurred during jury deliberation: Juror No. 12 stated that Aguilar "had received life in prison" and that Fajardo "had gotten murder one, capital." The third occurred "[a] little bit later" when Juror No. 7 and the foreman discussed "Aguilar's conviction and the implications on [defendant's] conviction." Juror No. 11 characterized it as "a very heated conversation" in which the foreman argued that because "Aguilar was guilty, . . . therefore [defendant] had to be guilty because there's no way that they could have driven to Mr. Ash's house and not discussed what was going to happen." She opined that "at least eight" jurors heard this discussion. The fourth instance of misconduct was a "very abbreviated" and

"incomplete" conversation with Juror No. 12 concerning a newspaper article about the co-defendants' trial. When asked why she had not brought any of these instances to the court's attention during the trial, Juror No. 11 replied: "My impression actually was that our foreman was the only person who was allowed to speak to the bailiff [who, in turn, would relay the information to the trial judge]. We were supposed to talk to our foreman, who was supposed to convey anything [but he] was very arbitrary and difficult to deal with. [And] I also felt very intimidated in the deliberations room."

When the prosecutor asked Juror No. 11 why her letter of May 12 did not raise any issue about the jury's receipt of extraneous information, she replied: "That was not the purpose of the letter. [¶] . . . [¶] I was concerned about what would be [defendant's] future, not so much about this trial that had already taken place, but what would be the results." And when the court asked Juror No. 11 "Would it be fair to say . . . that you were acting as an advocate in the letter?", she replied: "Yes. I felt that there certainly wasn't one in the jury room."

ii. *Evidence that No Juror Misconduct Occurred*

Juror No. 1 testified that no one had discussed the co-defendants' trial, verdicts or sentences during deliberations. In addition, Juror No. 1 signed an affidavit averring: "I am not aware of any juror in this case having sought information from any source concerning co-defendants in this case. Neither the verdicts nor the sentences of any co-defendants entered our deliberations. . . . No outside information, outside the evidence from the trial, entered our deliberations."

Juror No. 3 testified that no juror ever mentioned having read a newspaper article about the case. In regard to the deliberations, Juror No. 3 testified that no juror brought in information about the conviction or sentencing of any co-defendant and that, in particular, no one said (as Juror No. 11 had claimed) that

defendant was guilty because a co-defendant had been found guilty in another trial. In addition, Juror No. 3 signed an affidavit that "no juror introduced any outside information regarding the trials of any co-defendant."

Juror No. 7 testified that during deliberations, there was no mention of the co-defendants' convictions or sentencing. During defendant's trial, he never read any articles about the co-defendants' trial or learned of its outcome. Juror No. 7 signed an affidavit averring: "No juror mentioned any information from any outside source concerning any co-defendant in this case during deliberations. I am not aware of any juror having Googled or otherwise sought information concerning this case from any outside source. No outside information (from outside the evidence presented) concerning Gonzales' co-defendants was mentioned during deliberations or in the courthouse or anywhere else during the trial by any juror."

Juror No. 8 testified that at no point during deliberations was there any discussion about the co-defendants' convictions or sentences. He further testified that during the deliberative process, he never "c[a]me across" any article about the co-defendants' trial and was not aware that any juror had "sought" that "information." Juror No. 8 signed an affidavit averring: "No juror to my knowledge sought or introduced or spoke of any conviction or sentencing of any co-defendant. The subject of conviction and/or sentencing of co-defendants did not enter our deliberations."

Juror No. 9 testified that during deliberations, the co-defendants' convictions and sentences were not mentioned and that no one "ever [said] that [defendant] must be guilty because Aguilar must have discussed the purpose of picking up Ash with [defendant]." Juror No. 9 signed an affidavit averring: "I am not aware of any juror having sought information on the Internet concerning this case."

Juror No. 10 testified that she did not know the co-defendants' sentences during deliberations and that none of the jurors mentioned the co-defendants'

convictions or sentences during deliberations. Juror No. 10's affidavit averred: "No juror, to my knowledge introduced any outside information about the conviction or sentencing of any co-defendant during deliberations."

Juror No. 12 testified that neither before nor during trial did he "come across" any information about the co-defendants' trial or sentences and that none of the jurors mentioned the co-defendants' convictions or sentences during deliberations. He denied having made, either during trial or deliberations, any statements about the co-defendants' convictions and sentences. He conceded that he had spoken to Juror No. 11 during jury selection but testified that the conversation was only about the Green killing because "that was discussed in the court here." Juror No. 12's affidavit averred: "I am not aware of any juror seeking or receiving information from any source concerning the convictions or sentencings of any co-defendant. The subjects of conviction and sentencing of co-defendants did not enter deliberations."

Lastly, affidavits from the three remaining jurors were introduced. Juror No. 2 averred:

> "I am not aware of any juror having sought any information from any source concerning the conviction or sentencing of any co-defendant in this case. The issue of the convictions and sentencings of co-defendants did not arise during deliberations."

Juror No. 4 averred:

> "No juror, to my knowledge, sought or discussed the verdict or sentencing of any co-defendant in this case. Those issues, the verdict and sentencing of co-defendants, did not arise during deliberations."

And Juror No. 5 averred:

> "No one, no juror introduced any outside information relating to any co-defendant, including but not limited to defendants Aguilar

> and Fajardo. No juror introduced information from any outside source, including Google, concerning the verdict or sentencing of defendants Aguilar or Fajardo, or any other co-defendant."

c. *The Trial Court's Ruling*

The trial court ruled that "[a]fter reviewing the evidence in the evidentiary hearing as well as the affidavits filed, the court has decided that the prosecution has made an affirmative evidentiary showing that juror misconduct did not occur and, if the misconduct did occur, that there was no prejudice to the defendant."

The court found Juror No. 11's "credibility to be somewhat lacking because she evidenced a partiality towards the defendant and had buyer's remorse about her decision to vote a guilty verdict in this case. By her own admission, Juror 11 has attempted to be an advocate for defendant Gonzales." After setting forth multiple reasons why Juror No. 11 lacked credibility, the court stated: "This lack of neutrality *as well as her demeanor in court* has made me not credit her statements about what happened during deliberations. This is especially true when compared against the affidavits and evidentiary evidence that was offered by the People." (Italics added.)

In regard to Juror No. 6, the court stated: "I believe that Juror No. 6 also has an agenda and is somewhat biased towards the defense. [¶] . . . I do believe that Juror 11 and Juror 6 . . . entered into some kind of alliance to help [defendant] because they were not happy with the verdict despite having voted for it themselves." Juror No. 6's "willing[ness] to give [defendant] employment upon his release from prison . . . goes beyond a normal role a juror would play and calls into question Juror No. 6's neutrality." The court noted that it is "possible to conclude that [Jurors Nos.] 6 and 11, through the prism that they were looking at these deliberations, saw more than what happened."

In addition, the court noted that both Jurors Nos. 6 and 11 testified that the other jurors heard the extraneous information about the co-defendants' convictions and sentences but that the 10 other jurors denied that ever happened. The court explained: "[T]hese two assertions of what happened in the jury room in the jury deliberations cannot coexist. And I choose to find, based on the credibility and the questions asked of the testifying witnesses, the sheer weight of the testifying jurors, the three jurors who provided affidavits, that the seven jurors that testified here – I found them to be credible."

The court concluded that "the strength of evidence supporting misconduct is very weak and that the People have provided affirmative evidence supporting that no misconduct occurred, overcoming the presumption of prejudice." In addition, the court found that even if the jury had been exposed to the information about the convictions and sentences of Aguilar and Fajardo, there was no substantial likelihood that any juror was biased by the information.[17] The court therefore denied defendant's new trial motion.

d. *Discussion*

Determination of a new trial motion based upon a claim of juror misconduct involves a multi-step approach. First, the trial court determines whether the affidavits supporting the motion are admissible. If it finds that the evidence is admissible, it next determines whether it establishes misconduct. If it does, a rebuttable presumption of prejudice arises. The burden then shifts to the People to

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[17] The court reasoned that the information about Aguilar and Fajardo's convictions and sentences was not inherently prejudicial because significant evidence about both men's participation in Ash's murder and Fajardo's involvement in the Green murder had been presented at trial. We need not discuss the issue of prejudice because, as we explain, substantial evidence supports the trial court's finding that no misconduct occurred.

rebut the presumption of prejudice. (*People v. Hord* (1993) 15 Cal.App.4th 711, 724.)

In this case, defendant's assertion of juror misconduct was based upon the claim that the jury improperly received information about his co-defendants' convictions and sentences. "A juror's receipt or discussion of evidence not submitted at trial constitutes misconduct." (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) Here, the trial court found, based upon the *initial* defense showing, that juror misconduct had occurred that was presumptively prejudicial. At that point, it became the People's burden to rebut the presumption of prejudice. One manner in which the presumption can be rebutted is "'by an affirmative evidentiary showing that prejudice does not exist'" *because the misconduct, in fact, never occurred*. (*People v. Von Villas* (1995) 36 Cal.App.4th 1425, 1431.) The People carried that burden at the evidentiary hearing. The trial court disbelieved the claim of Jurors Nos. 6 and 11 that the jury received and considered information about the co-defendants' convictions and sentences. Based upon that credibility determination, the court found that no misconduct had occurred. We must accept the trial court's factual findings and credibility determinations if supported by substantial evidence. (*People v. Dykes, supra*, 46 Cal.4th at p. 809.)

In this case, substantial evidence supports the trial court's determination that Juror Nos. 6 and 11 were not credible. We begin with Juror No. 11. Nine days after the trial ended, she sent a three-page letter to the trial judge setting forth multiple concerns about the trial. Significantly, the letter contained no mention of the jury's receipt of outside information. Further, although Juror No. 11 testified to four purported instances of misconduct, she never brought any of the incidents to the trial judge's attention during trial. In addition, as conceded by her testimony, she was an "advocate" for defendant, and based upon her representations in her May 12 letter, sought to help him in multiple ways. Lastly,

10 jurors disputed her claim that the jury had received or considered evidence not submitted at trial. In particular, both Juror No. 12 (the individual whom she testified had introduced the extraneous information into the jury room) and Juror No. 7 (the individual whom she had claimed discussed the implication of Aguilar's conviction on defendant's case) denied any misconduct. On this record, the trial court did not abuse its discretion in finding that Juror No. 11's claim of misconduct was not credible.

As for Juror No. 6, his impartiality was called into question by his willingness to give defendant a job upon release from prison. Further, the trial court was not required to credit Juror No. 6's explanation that he did not immediately notify the court about the purported receipt of extraneous information because deliberations were almost over, given that he testified that he recognized misconduct had occurred and did not think that "it was fair." And, as with Juror No. 11, the ten other jurors—including the two he accused of misconduct (Jurors Nos. 7 & 12)—all directly contradicted Juror No. 6's assertion of misconduct. Given these circumstances, the trial court's finding that Juror No. 6 was not credible is more than amply supported by the record.

In sum, the trial court did not abuse its discretion in finding, after having conducted the evidentiary hearing, that the People had rebutted the presumption of prejudice by establishing that no outside information had been brought to the attention of the jury. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 651.)

Defendant's arguments for a contrary conclusion essentially rehash the arguments he unsuccessfully advanced in the trial court. It is not our role to reweigh the credibility of the jurors after the trial court has made its findings, particularly since the trial court observed the demeanor of nine jurors and questioned many of them at the evidentiary hearing. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 809.) Because the record more than amply supports the trial court's

finding that no misconduct occurred, it is not necessary for us to examine the trial court's further ruling that even if the extraneous information had been introduced, there was no substantial likelihood that any of the jurors had been biased as a result. (See fn. 17, *ante*.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.