No._____

In the
Supreme Court of the United States

NATHAN SMITH III, Petitioner

v.

SHERRY PENNYWELL, and P.L. VASQUEZ Respondents

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

VOLUME OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

DENIAL OF REHEARING

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATHAN SMITH III, Petitioner-Appellant, v. SHERRY PENNYWELL and P. L. VAZQUEZ, Respondents-Appellees.	No. 16-56195 D.C. No. 3:13-cv-00102-JAH-KSC Southern District of California, San Diego ORDER

Before: THOMAS, Chief Judge, NGUYEN, Circuit Judge, and SETTLE,* District Judge.

The panel has voted to deny Petitioner-Appellant's petition for panel rehearing. Chief Judge Thomas and Judge Nguyen have voted to deny Petitioner-Appellant's petition for rehearing en banc, and Judge Settle has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

* The Honorable Benjamin H. Settle, United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX B

NINTH CIRCUIT MEMORANDUM OPINION

NOT FOR PUBLICATION

FILED

JUL 18 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATHAN SMITH, III, Petitioner-Appellant, v. SHERRY PENNYWELL and P.L. VASQUEZ, Respondents-Appellees.	No. 16-56195 D.C. No. 13-cv-102-JAH-KSC MEMORANDUM *

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Argued and Submitted March 5, 2018
Pasadena, California

Before: THOMAS, ** Chief Judge, NGUYEN, Circuit Judge, and SETTLE, District Judge***

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This case was submitted to a panel that included Judge Reinhardt. Following Judge Reinhardt's passing, Chief Judge Thomas was drawn by lot to replace him. 9th Cir. Gen. Order 3.2.h. Chief Judge Thomas has read the briefs, reviewed the record, and listened to oral argument.

*** The Honorable Benjamin H. Settle, United States District Judge for the Western District of Washington, sitting by designation.

Petitioner-Appellant Nathan Smith, III ("Smith") appeals the denial of his petition for writ of habeas corpus seeking relief from a jury conviction in state court. Specifically, he argues that he received ineffective assistance of counsel and cumulative trial errors deprived him of a fair trial. We review *de novo* a district court's decision on a petition for writ of habeas corpus. *Hall v. Haws*, 861 F.3d 977, 988 (9th Cir. 2017). We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.[1]

1. Smith's first claim for relief is that his trial counsel was ineffective because he failed to offer impeachment evidence from Smith's co-defendant, Nina Ortiz ("Ortiz"). The California Court of Appeal ("CCA") denied this claim, concluding that counsel's decision fell within the wide range of reasonable professional assistance. Deficient performance requires a showing that counsel's performance "fell below an objective standard of reasonableness" at the time of the trial. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Defense counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690. On federal habeas review, the "pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86,

[1] We deny Smith's motion to reargue.

101 (2011). Smith fails to show that the CCA's conclusion is objectively unreasonable because Ortiz's testimony was undermined by her pretrial guilty plea. During trial, Smith's counsel was forced to weigh the probative value of Ortiz denying any involvement in the crime against the prejudicial nature of her subsequent plea to committing the crime. It is not objectively unreasonable to conclude that counsel made a tactical decision not to offer Ortiz's testimony. Therefore, the district court's denial of this claim is affirmed.

2. Smith's second claim for relief is that his trial counsel was ineffective for failing to offer other impeachment evidence. Smith first argues that this claim should be reviewed *de novo* because the CCA seriously mischaracterized key evidence that supported Smith's claim. According to an investigating officer's report, victim Prado Pacheco ("Pacheco") exited his car and stated "Let's go" before the assaults began. The CCA found that Pacheco was referring to his family leaving the scene instead of indicating a willingness to fight.

"[A] federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014). "[W]e must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude

that the finding is supported by the record." *Id*. at 1000. "This is a daunting standard—one that will be satisfied in relatively few cases." *Id*.

In this case, Smith has failed to establish that the CCA's fact-finding process was defective. Although Smith offers a rational interpretation of Pacheco's statement, Smith fails to show that the CCA's finding is not supported by the record. At most, Smith has shown that the CCA's finding is possibly wrong and has failed to meet the "daunting standard" that the finding is "actually unreasonable." *Id*. at 999–1000. Therefore, Smith is not entitled to *de novo* review.

Under the deferential standard of review, Smith has failed to show that the CCA's "application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101. Although Smith has identified numerous pieces of evidence that his counsel could have offered to impeach the state's witnesses, the CCA concluded that Smith's counsel made reasonable decisions to not offer the evidence and that any error resulting from counsel's failure to offer the evidence was not prejudicial. Upon review of each individual alleged error, Smith fails to establish a CCA conclusion that is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Therefore, the district court's denial of this claim is affirmed.

3. Smith's final claim for relief is that the cumulative errors of his counsel denied him a fair trial and that these errors, in addition to the trial court's erroneous admission of prejudicial evidence, also deprived him of a fair trial. "The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973)). We have "granted habeas relief under the cumulative effects doctrine when there is a 'unique symmetry' of otherwise harmless errors, such that they amplify each other in relation to a key contested issue in the case." *Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011) (quoting *Parle*, 505 F.3d at 933). Although Smith and the CCA have identified several actual and potential errors in Smith's trial, Smith has failed to establish a unique symmetry of errors that amplify a key contested issue. Therefore, the district court's denial of this claim is affirmed.

AFFIRMED.

APPENDIX C

JUDGMENT OF THE DISTRICT COURT

United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Nathan Smith, III

Plaintiff,

V.

Sherry Pennywell, Warden; P.L. Vazquez

Defendant.

Civil Action No. 13CV0102-JAH(KSC)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

Petitioner's objections are overruled. The Magistrate Judge's Report and Recommendation is adopted. The Petition for Writ of Habeas Corpus is denied. Petitioner is granted a certificate of appealability.

Date: 4/25/16

CLERK OF COURT
JOHN MORRILL, Clerk of Court
By: s/ J. Petersen
J. Petersen, Deputy

APPENDIX D

REPORT AND RECOMMENDATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NATHAN SMITH III, Plaintiff, vs. SHERRY PENNYWELL, Warden, Defendant.	CASE NO. 13cv0102-JAH(KSC) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE RE: DENYING PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner Nathan Smith III, a state prisoner, has filed a Petition for Writ of Habeas Corpus pursuant to Title 28, United States Code, Section 2254, challenging his conviction in San Diego Superior Court Case No. SCD220269 for offenses that occurred on or about March 11, 2009. [Doc. No. 1, p. 1]

This Report and Recommendation is submitted to United States District Judge John A. Houston pursuant to Title 28, United States Code, Section 636(b), and Civil Local Rules 72.1(d) and HC.2 of the United States District Court for the Southern District of California. Based on the moving and opposing papers, and for the reasons outlined below, this Court RECOMMENDS that the Petition be DENIED.

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FACTUAL AND PROCEDURAL BACKGROUND

An information was filed on July 2, 2009, charging the petitioner under California Penal Code § 245(a)(1)[1] with three counts of felony assault with a deadly weapon (to wit: a wooden stick) and by means of force likely to produce great bodily injury to three named victims: Prado Pacheco (Count One), Theresa Pacheco (Count Two), and Gary Lopez (Count Three). [Lodgment No. 1, pp. 1-4] The Information further alleged that the petitioner had one prior serious or violent felony conviction within the meaning of Sections 1170.12(a) through (d) and 667(b) (*i.e.*, a "strike" under California Three Strikes Law) for a 1992 robbery conviction. *Id.* Finally, the information charged a co-defendant, Nina Ortiz, with two counts of assault by means of force likely to cause great bodily injury under § 245(a)(1) against Crystal Pacheco (Count Four) and Theresa Pacheco (Count Five). *Id.* An amended complaint was filed on January 26, 2010, but it did not substantively change the allegations against the petitioner. [Lodgment No. 1, pp. 5-8]

A preliminary hearing for the petitioner and his co-defendant was held on June 23, 2009. [Lodgment No. 3, Vol. 1-2] The state called witnesses Crystal Pacheco, Theresa Pacheco, Prado Pacheco, Star (Estrella) Pacheco, and Officer Ronald Baliff of the San Diego Police Department. *Id.* The attorneys for both defendants were present and each cross-examined the state's witnesses. *Id.* The petitioner did not testify at the preliminary hearing, but his co-defendant, Nina Ortiz, did. *Id.* at pp. 85-115. Her testimony will be discussed in § II.1, *infra*.

A jury trial against the petitioner commenced on January 26, 2010. [Lodgment No. 4, Vol. 1, p. 1] The petitioner's co-defendant pled guilty to related charges on the morning of trial. *Id.* at p. 5. The state called Ms. Ortiz to testify at the petitioner's trial, but she invoked her Fifth Amendment privilege against self-incrimination, and the trial judge excused her. *Id.* at p. 4. At the petitioner's trial, the State presented evidence that

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[1] All further statutory references in this section are to the California Penal Code unless otherwise specified.

at about 9:30 p.m. on March 11, 2009, the petitioner and his co-defendant were involved in an altercation with the Pacheco family at a drive-through taco shop in San Diego, California. Since this Court is directed to "be particularly deferential" to state court findings of fact, *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), this Court will rely on the California Court of Appeal's summary of the facts of the case:

> At about 9:30 p.m. on March 11, 2009, the victims and other family members were in a Jeep waiting to receive their food at the drive-through area of a taco shop. The people in the Jeep were Prado Pacheco and Theresa Pacheco, their two young-adult daughters (Crystal Pacheco and Star Pacheco), and Theresa's brother (Gary Lopez). Star was driving; Theresa was in the front seat; and the others were in the back seat. At trial, the events surrounding the assaults were described by Prado, Theresa, Crystal, Star, and taco shop employee Margarita Villanueva.
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> While waiting for their food, Crystal, accompanied by Lopez, got out of the Jeep so that Crystal could use a bathroom located by the back entrance of the taco shop. At Crystal's request, a taco shop employee came out of the restaurant to unlock the bathroom door, but after checking the door, the employee told Crystal someone must be inside. Defendant's female companion (Nina Ortiz) was inside the bathroom. When Ortiz came outside, she said to Crystal, "'Don't you fucking know someone is in the bathroom.'" Crystal responded, "'Sorry you're having a bad day.'" Ortiz walked to her car (a red vehicle) and spoke to defendant. Defendant and Ortiz started screaming at Crystal and Lopez. Employee Villanueva came outside to check what was occurring. Villanueva testified that a man arguing with defendant (apparently Lopez) tried to calm the situation down, telling defendant that it was "just a misunderstanding."
>
> Hearing the altercation, Prado got out of the Jeep. Prado heard Lopez tell Ortiz that Crystal just had to go to the bathroom. Prado told Crystal to go back to the Jeep, and told Lopez that their food was probably almost ready and they should go. Defendant told Lopez to wait, and Lopez responded that he should forget about it and they were leaving. Defendant went to the trunk of the red car and pulled out a baseball bat or wooden stick. Lopez asked defendant what he was doing. Prado told defendant they did not want any problems, grabbed Lopez, and said they were leaving. Theresa, who had also come over from the Jeep, told

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defendant and Ortiz that "this nonsense had to stop;" she and her family were just getting their food and leaving; and if they did not stop she would call the police.

As they were returning to the Jeep, Prado looked back to see if defendant was coming after them. Prado testified that defendant, with a "smirky" look on his face, said "'You ain't going nowhere,'" and put his cell phone to his ear. Villanueva testified that defendant said that he was going to call his friends, and speaking into his cell phone said, "'I'm having some problems. Come over.'"

Theresa, Prado and Crystal got into the Jeep. The Jeep was at the taco shop drive-through window, and Prado told Star not to worry about the money but to just go. Defendant ran up to the Jeep and said, "'Wait a minute, homies. You don't want to leave yet.'" Several cars then came from a parking lot across the street and blocked the Jeep. About nine people (males and females) jumped out of the cars.

As Lopez was getting into the Jeep, he was attacked. Theresa and Prado testified that five or six men (including defendant) assaulted Lopez. According to Prado, defendant was the first to reach Lopez as Lopez was trying to get into the Jeep, and defendant held Lopez and repeatedly hit Lopez with a wooden stick.[2] When the men got Lopez out of the Jeep, they dragged him towards Ortiz's car.

Theresa got out of the Jeep and a man (not defendant) started hitting her in the face. She fell to the ground and felt herself being struck on the back. Crystal and Star testified that defendant was one of the people attacking Theresa on the ground. According to Crystal, defendant was armed with a bat when he attacked Theresa.[3] When Prado came to assist Theresa, defendant and another man hit him in the knee with bats or wooden sticks. When Prado helped Theresa get back in the Jeep, a man (not defendant) hit Prado in the face.

During the altercation, employee Villanueva called 911. Villanueva told the operator that a man was outside "trying to hit some other people"

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[2]Crystal and Star testified that a man other than defendant was hitting Lopez and trying to pull him out of the Jeep. Theresa testified she saw defendant beating Lopez, but she could not tell if he had anything in his hands.

[3]Star did not recall that defendant had any weapons in his hands when he was hitting Theresa. Prado testified that a man (not defendant) and two females attacked Theresa. Theresa did not know who was hitting her after she fell to the ground.

> and "trying to call some of the other friends." As the events were unfolding, Villanueva told the operator that the man had called some friends and they were fighting; other people had arrived; they were attacking people with sticks; the attackers were leaving; and the people in the red car had "started everything." When interviewed by the police at the scene, Villanueva stated that defendant was one of the people hitting a man on the ground.[4]
>
> The assailants who had arrived in the cars got back in their vehicles, drove across the street to a liquor store parking lot, and then drove away. Defendant and Ortiz also drove away. Witnesses provided the authorities with the license plate number for Ortiz's car, and identified defendant in photo lineups as one of the aggressors. To support the theory that defendant summoned his friends from across the street to commit the attack, the prosecution presented evidence to show that the area near the assault was defendant's "local hangout."[5]
>
> As a result of the assault, Theresa suffered bruising to her back, facial swelling, a large bump on her head, and impaired vision. Prado suffered facial swelling and an injury to his knee that required surgery and the use of a wheelchair and crutches. Lopez suffered welts and swelling on his forehead, bruising of his rib cage area, and rib fractures, and his ability to walk and work were impaired.

[Lodgment No. 10, pp. 3-7]

Following the state's presentation of the evidence, the petitioner elected not to testify, and his counsel did not put on a case. [Lodgment No. 4, Vol. 2, pp. 259-60] Before closing arguments, the court instructed the jury using the standard CALCRIM model jury instructions. *Id*. at pp. 269-96. The judge instructed the jury on three distinct theories of criminal liability: direct liability, *see id*. at pp. 289-91 (instructing on the elements of assault), aiding and abetting, *id*. at pp. 282-83, and conspiracy, *id*. at pp. 284-85. Finding that the case law did not so require, the court declined to give a unanimity instruction that would have compelled the jury to agree on a theory of

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[4]At trial, Villanueva testified she could not remember if defendant participated in the attacks. She acknowledged she was uncomfortable about testifying.

[5]This evidence consisted of a stipulation that defendant and Ortiz were at the liquor store parking lot across the street on one occasion, and defendant was about one-half block from this location on another occasion.

liability in order to render a guilty verdict. *Id*. at p. 265. The judge also instructed the jury that the defense of voluntary intoxication could negate the specific intent required for aiding and abetting. *Id*. at 283-84.

The jury convicted the petitioner of all three counts of assault, in violation of § 245(a)(1), and of use of a deadly weapon (to wit: a wooden stick), within the meaning of § 1192.7(c)(23). [Lodgment No. 1, pp. 68-71] The petitioner retained new counsel for sentencing. [Lodgment No. 4, Vol. 3, p. 356] The petitioner was sentenced on June 2, 2010, to a total of seventeen (17) years in custody: eight (8) years for the assault against Prado Pacheco (Count One), two (2) years each for the assaults against Theresa Pacheco and Gary Lopez (Counts Two and Three), and a five (5) year enhancement for the felony strike prior under § 667(a)(1). [Lodgment No. 1, p. 95]

The petitioner appealed his conviction and also filed a petition for writ of habeas corpus, which was consolidated with the appeal for resolution in state court. [Lodgment Nos. 8-10] In his direct appeal, the petitioner raised several arguments challenging the court's uncharged conspiracy[6] jury instruction. [Lodgment No. 5] He also argued that the court erred in failing to instruct the jury that voluntary intoxication could be a defense to conspiracy, as well as to aiding and abetting. *Id*. Finally, he challenged the trial court's admission of evidence of an encounter between the Pachecos and the petitioner eight months after the assault, which will be discussed in detail in § V, *infra*. *Id*. In his habeas petition to the California Court of Appeal, the petitioner raised several issues of ineffective assistance of counsel. [Lodgment No. 8, pp. 19-57]

On November 4, 2011, the Court of Appeal issued a 42-page unpublished opinion denying all arguments in the direct appeal and habeas petition. [Lodgment No. 10] The petitioner appealed to the California Supreme Court, which denied his petition for review without comment on February 15, 2012. [Lodgment No. 12]

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[6]By "uncharged," the petitioner adopts a phrase from the CALCRIM model jury instructions and appears to refer to a conspiracy theory of liability that was promulgated by the state but not charged as a separate cognizable offense.

On January 14, 2013, the petitioner filed his Federal habeas petition. [Doc. No. 1] The initial petition was filed *pro se*, though the traverse was filed through counsel. The petitioner raises four claims of ineffective assistance of counsel, two claims of instructional error, and one claim challenging the admission of the aforementioned evidence at trial. [Doc. No. 1, pp. 6-18] The respondent admits that the petitioner has successfully met the exhaustion requirement for all his claims. [Doc. No. 9, p. 2]

DISCUSSION

I. Standard of Review

Federal habeas corpus relief is available only to those who are in custody in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984). "[A] mere error of state law is not a denial of due process." *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982) (internal quotations omitted).

This Petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). AEDPA imposes a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (internal citations and quotations omitted). Under AEDPA, a habeas petition "on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim– (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)&(2). For purposes of § 2254(d)(1), "clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the

time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Therefore, a lack of controlling Supreme Court precedent can preclude habeas corpus relief. *Wright v. Van Patten*, 552 U.S. 120, 126 (2008).

The AEDPA standard is highly deferential and "difficult to meet." *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 785-786 (2011). For mixed questions of fact and law, federal habeas relief may be granted under the "contrary to" clause of section 2254 if the state court applied a rule different from the governing law set forth in Supreme Court cases, or if it decided a case differently than the Supreme Court on a set of materially indistinguishable facts. *Bell v. Cone*, 535 U.S. 685, 694 (2002). The focus of inquiry under the "contrary to" clause is "whether the state court's application of clearly established federal law is objectively unreasonable." *Id.* "[A]n unreasonable application is different from an incorrect one." *Id.* In other words, federal habeas relief cannot be granted simply because a reviewing court concludes based on its own independent judgment that the state court decision is erroneous or incorrect. *Id.* Habeas relief is only available under § 2254(d)(1) "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with Supreme Court precedents. *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 786 (2011).

Where there is no reasoned decision from the state's highest court, a federal court "looks through" to the "last reasoned state-court opinion" and presumes it provides the basis for the higher court's denial of a claim or claims. *Ylst v. Nunnemaker*, 501 U.S. 797, 805-806 (1991). If the state court does not provide a reason for its decision, the federal court must conduct an independent review of the record to determine whether the state court's decision is objectively unreasonable. *Crittenden v. Ayers*, 624 F.3d 943, 947 (9th Cir. 2010). To be objectively reasonable, a state court's decision need not specifically cite Supreme Court precedent. "[S]o long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent]," the state court's decision will not be "contrary to clearly established Federal law." *Early v. Packer*, 537 U.S. 3, 8 (2002).

Here, the California Court of Appeal's written opinion constitutes the "last reasoned state-court opinion" in the record, since the California Supreme Court denied the petition for review without comment. This Court will look to the Court of Appeal's decision when evaluating each of the petitioner's claims under AEDPA's standards.

II. Ineffective Assistance of Counsel

The Petition asserts four claims of ineffective assistance of counsel, all of which were raised below and denied by the state court. The petitioner contends that his trial attorney was ineffective because he failed to: (1) call the co-defendant, Nina Ortiz, as a defense witness at trial, or in the alternative, seek to introduce her testimony from the preliminary hearing through the "unavailable witness" hearsay exception after Ms. Ortiz invoked her Fifth Amendment privilege; (2) request a jury instruction on voluntary intoxication as a defense to the uncharged conspiracy (though a voluntary intoxication instruction was requested and given as to the crime of aiding and abetting); (3) argue voluntary intoxication as a defense to aiding and abetting; and (4) impeach the prosecution's complaining witnesses through the testimony of Officers Wallin and Luth, who interviewed the Pachecos on the day of the incident. [Doc. No. 1, pp. 6-9e]

The standard of review for a claim of ineffective assistance of counsel is well established under *Strickland v. Washington*, 466 U.S. 668 (1984), and "[s]urmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). To prevail, a defendant must show two things: first, that counsel's performance was so deficient as to fall short of the guarantee of "counsel" under the Sixth Amendment; and second, that counsel's errors were so prejudicial as to deprive the defendant of a fair trial. *Strickland*, 446 U.S. at 687. The *Strickland* standard is "highly deferential" to trial counsel; the Supreme Court recognized that "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence." *Id*. at 689. The Court further held that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*.

The standard of review for a claim of ineffective assistance raised in a federal habeas petition is even more deferential. Here, the petitioner's claim has already been evaluated and rejected once by the state court. This Court, therefore, is not called upon to determine anew whether trial counsel was ineffective. Rather, the only question before this Court is whether the state court's denial of the petitioner's claim was "unreasonable." *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 785 (2011). A state court's decision is reasonable as long as "fairminded jurists could disagree" on the correctness of the decision. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

As the Supreme Court explained in *Harrington*, a federal court's review of a state court's denial of an ineffective assistance claim receives double deference: "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington*, 131 S. Ct. at 788, *citing Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id*.

When examining the instant petition in light of this "doubly deferential" standard of review, this Court concludes that the petitioner has failed to show that the state court's decision was unreasonable. A fair-minded juror could find that the state court correctly denied the petitioner's ineffective assistance of counsel claims. Accordingly this Court RECOMMENDS that the claims be DENIED.

1. Counsel's Failure to Introduce Testimony from Nina Ortiz

At a preliminary hearing on June 23, 2009, the petitioner's co-defendant, Nina Ortiz, testified in her own defense, represented by her attorney Bill Nimmo. [Lodgment No. 3, Vol. 1-2, pp. 85-115] Ms. Ortiz then pled guilty before trial. [Lodgment No. 4, Vol. 1, p. 4] At the petitioner's trial, the state called Ms. Ortiz as a prosecution witness and she successfully invoked her Fifth Amendment privilege against self-incrimination.

Id. The petitioner's trial counsel did not call Ms. Ortiz as a defense witness and did not seek to introduce the transcript of her pre-trial testimony into evidence. The petitioner himself also did not testify. [Lodgment No. 4, Vol. 1-3]

The petitioner claims today that his attorney's failure to introduce Ms. Ortiz's testimony into evidence was ineffective assistance of counsel. He argues that portions of her testimony from the preliminary hearing would have benefitted him at trial, especially since he did not testify. Ms. Ortiz testified at the preliminary hearing that on the night of March 11, 2009, she got a call from petitioner asking for a ride home as he had been drinking at the liquor store. [Lodgment No. 3, Vol. 2, p. 86] She acknowledged that the petitioner "h[u]ng around" the liquor store and had a lot of friends who also spent time there. *Id*. at pp. 86-87. She picked him up from the liquor store and drove across the street to the taco shop to use the restroom. *Id*. at p. 88. The petitioner was "pretty intoxicated." *Id*. at p. 87. Ms. Ortiz testified that while she was using the restroom, someone kept jiggling the handle and banging on the door. *Id*. at p. 89. As she left the restroom, Ms. Ortiz saw Crystal Pacheco waiting outside and said, "A locked door usually means that somebody is using the bathroom, bitch." *Id*. at pp. 89-90. The women exchanged heated words and Ms. Ortiz returned to the car, where the petitioner was waiting outside. *Id*. The argument escalated as the petitioner and a man with Crystal Pacheco joined in. *Id*.

The petitioner's Memorandum of Points and Authorities in Support of the Traverse highlights the three parts of Ms. Ortiz's preliminary hearing testimony perceived to be most favorable to the petitioner. [Doc. No. 17, pp. 20-21] First, when asked on direct examination whether she had seen the petitioner make a phone call (to request backup help in the fight), Ms. Ortiz replied, "No, I did not." *Id*. at p. 91. However, when directly questioned, she could not say definitively that he did *not* make the phone call. *Id*. Second, Ms. Ortiz testified that the Pachecos were the aggressors in the fight; she testified that the Pachecos approached her and "mainly [the petitioner] in a very aggressive way," making "threatening words" and "throwing their hands up

[] as [a] form of a challenge." *Id*. at 113-114. Third, Ms. Ortiz testified that neither she nor the petitioner was involved in the fight. *Id*. at pp. 93-94.

In support of his petition, the petitioner submitted a declaration from his trial counsel, Benjamin Sanchez. [Doc. No. 1, Ex A] Attorney Sanchez admits in his declaration, "I clearly remember considering introducing Nina Ortiz's testimony at the beginning of trial... I should have introduced Nina Ortiz's testimony from the preliminary exam once I became aware of the fact, during the trial, that Mr. Smith was not going to testify as I had no other testimonial voice to present to the jury to hear in Mr. Smith's defense." *Id*. The attorney's declaration concludes, "I can honestly say that I was not myself and this was not my best effort." *Id*.

On review, the California Court of Appeal held that the petitioner's trial attorney was effective even in light of his decision not to introduce Ms. Ortiz's testimony. [Lodgment 10, pp. 32-35] The Court of Appeal acknowledged Attorney Sanchez's after-the-fact opinion that he should have introduced Ms. Ortiz's statement, but noted that the standard for ineffective assistance of counsel is objective, not subjective. *Id*. at p. 16. The Court of Appeal therefore decided that reasonably competent counsel could make the same decision as Attorney Sanchez, believing that Ms. Ortiz's testimony was potentially more harmful than helpful to the defense. *Id*. at p. 34. ("Reasonably competent defense counsel could conclude that Ortiz's testimony would strengthen the prosecution's case because it tied defendant to the assailants who arrived from across the street, and because Ortiz implicitly acknowledged that defendant could have made a phone call even though she did not see it.")

Were this Court to conduct a *de novo* review, this Court would likely agree with the petitioner and Attorney Sanchez himself that trial counsel erred in failing to admit Ms. Ortiz's testimony. On balance, this Court believes that Ms. Ortiz's testimony from the preliminary hearing would have strengthened the petitioner's criminal case, especially since the defense did not call any other witnesses or introduce any evidence. However, the Supreme Court has cautioned time and again that federal courts must not

second guess the state court's reasoned judgment on habeas review. Applying *Harrington*'s "doubly deferential" standard of review, this Court must conclude that the Court of Appeal's decision was reasonable. A fair-minded juror could believe that the state court correctly decided that the petitioner failed to set out a prima facie case of ineffective representation. Therefore, this Court RECOMMENDS that Ground One of the federal habeas petition be DENIED.

2. Counsel's Failure to Request a Voluntary Intoxication Instruction With Respect to the Uncharged Conspiracy

The trial court instructed the jury that it could find the petitioner guilty of assault as a direct participant, an aider and abettor, or a conspirator. At the prosecutor's request, the trial court instructed the jury that voluntary intoxication could negate the specific intent required to prove aiding and abetting. *Id*. at 48. However, the court neglected to provide, and neither lawyer requested, a similar instruction for the uncharged conspiracy. *Id*.

The petitioner argues that his trial counsel was ineffective for failing to request a jury instruction for voluntary intoxication with respect to the uncharged conspiracy. The Court of Appeal considered this argument in tandem with petitioner's argument that the trial court committed instructional error, and concluded that the trial court should have instructed the jury that voluntary intoxication could be a defense to the uncharged conspiracy. [Lodgment No. 10, pp. 13-14] However, the state court concluded that this error, overall, was not prejudicial because the jury was informed by the trial court and in the prosecutor's closing arguments that intoxication could serve as a defense to derivative, but not direct, liability for assault. *Id*. at p. 15. Trial counsel should have requested the instruction, but his failure to do so did not render the trial fundamentally unfair. *Id*.

Applying the "doubly deferential" standard of review to the Court of Appeal's decision, this Court concludes that the decision was reasonable. A fair-minded juror could believe that the state court correctly decided that the petitioner failed to set out

a prima facie case of ineffective representation. Therefore, this Court RECOMMENDS that Ground Two of the federal habeas petition be DENIED.

3. Counsel's Failure to Argue Voluntary Intoxication as a Defense

The petitioner's third ground for ineffective assistance of counsel is that his trial lawyer did not argue the voluntary intoxication defense in closing. The Court of Appeal rejected this contention by holding, "Reasonably competent counsel could have concluded that if he referred to the intoxication defense during closing arguments, this would have detracted from the core defense argument that defendant did not summon people to the scene and did not assist in the attacks." [Lodgment No. 10, p. 17] The state court noted that the intoxication defense assumes that a defendant committed a criminal act, but that his conduct should be excused because he was too drunk to entertain the required intent. *Id*. The petitioner's counsel could have reasonably decided that it would be a stronger argument to focus the jury's attentions on inconsistencies in the witnesses' statements and argue in closing that the petitioner was not at all involved in the attack. *Id*. The Court of Appeal found this logic strengthened by the fact that the prosecutor's closing arguments made much of the fact that the petitioner was drunk during the incident. *Id*.; *see* [Lodgment No. 4, Vol. 2, p. 317] ("Voluntary intoxication... I mean, let's be honest about it. Common sense dictates that you don't drink to get smarter. No one really makes better decisions when they're drunk.")

Again, applying the "doubly deferential" standard of review to the Court of Appeal's decision, this Court concludes that the decision was reasonable. A fair-minded juror could believe that the state court correctly decided that the petitioner failed to set out a prima facie case of ineffective representation. Therefore, this Court RECOMMENDS that Ground Three of the federal habeas petition be DENIED.

4. Counsel's Failure to Impeach the Complaining Witnesses

The petitioner argues that his trial counsel was ineffective because he failed to impeach several of the state's key witnesses with facts contained in two police reports. Officer Wallin interviewed Prado Pacheco, Gary Lopez and Crystal Pacheco, and

documented their statements in a report dated the day of the incident. [Doc. No. 1, Exs. B-C] Officer Luth interviewed Star Pacheco, and documented her statement and the officer's independent observations in a second report. *Id*. at Ex. D. The petitioner argues that these police reports contained facts, inconsistent witness statements, and material omissions that would have furthered his defense. He argues that his counsel was ineffective for failing to elicit these facts at trial. Each of the petitioner's arguments will be considered in turn.

A. Prado Pacheco's Statement to Officer Wallin

The police report documents that Prado Pacheco told Officer Wallin:

> ...The Black guy started to talk shit to Crystal and Gary while pulling out what looked like a axe handle from the back of the red hatchback. I got out of the Jeep and told the Black guy 'Let's go' since it would be Gary and I against the Black guy. The Black guy backed off and started to talk shit telling me he was going to call his homies over here. I told the Black guy to go ahead and call his homies because I really thought we would be gone before his friends showed up....

[Doc. No. 1, Ex. C]

The petitioner's interpretation of Officer Wallin's police report is that Prado Pacheco admitted that he instigated the fight and challenged the petitioner to call his friends for backup. [Doc. No. 1, pp. 9d-9e] If the petitioner's interpretation is correct, these statements would directly contradict the prosecutor's theory – and Prado Pacheco's trial testimony – that the petitioner was the aggressor, and the Pachecos kept trying to withdraw from the conflict. Therefore, the petitioner argues that his trial counsel was ineffective for failing to impeach Prado Pacheco on these prior, inconsistent statements in front of the jury. *Id*.

The Court of Appeal disagreed with the petitioner's interpretation of Prado Pacheco's words. Specifically, the Court of Appeal examined Prado's words, "Let's go." The court concluded, "Prado's statements to the police cannot be construed as showing that Prado and Lopez were attempted assailants rather than victims. Read in context, Prado's statements reflect that Prado was verbally responding to *defendant's*

aggression, and that Prado and his family were trying to leave the area but were prevented from doing so by the arrival of defendant's accomplices." [Lodgment No. 10, p. 25] (emphasis in original) The Court of Appeal thereby concluded that reasonable counsel could have made a tactical decision not to elicit this testimony in front of the jury. *Id.*

This Court believes that the Court of Appeal's interpretation of Prado Pacheco's comments is a stretch. This Court finds that the more reasonable reading of Prado Pacheco's statements in the police report is that they were words of aggression and escalation, not retreat. The petitioner's defense likely would have been stronger if his trial counsel had elicited these statements on cross-examination or called Officer Wallin as an impeachment witness. Nonetheless, this Court is not in a position to make a *de novo* review of trial counsel's tactical decision or the Court of Appeal's factual finding. Instead, this Court is guided by the principle of double deference to counsel and to the court.

Under the appropriate standard of double deference, this Court finds that the Court of Appeal's decision to deny the petitioner's claim was reasonable. Even if the Court of Appeal's interpretation of Prado Pacheco's statements in the police report is strained, it is a plausible and therefore reasonable one. Furthermore, Prado Pacheco had already denied these statements once when cross-examined by the co-defendant's attorney at the preliminary hearing. [Lodgment No. 3, Vol. 1, pp. 58-59] Reasonably competent counsel could have decided that it was not worth the risk to attempt to impeach him in front of a jury, since he presumably would have denied them again. A fair-minded juror could believe that the state court correctly decided that the petitioner failed to set out a prima facie case of ineffective representation. Therefore, this Court RECOMMENDS that Ground Eight of the federal habeas petition, as it relates to trial counsel's failure to elicit Prado Pacheco's statements to Officer Wallin, be DENIED.

B. Crystal Pacheco's Statement to Officer Wallin

According to the police report, Crystal Pacheco told Officer Wallin that she saw

the petitioner put the wooden stick back in the trunk of his car before the fight broke out. [Doc. No. 1, pp. 9f, Ex. B] Further, the police report contains no mention that Crystal reported seeing the petitioner strike her or her family. *Id*. Neither of these facts were raised at trial. The petitioner argues that these facts would have strengthened his trial case by showing that he was not a participant in the attacks, and he argues that his trial counsel was ineffective for failing to elicit them. *Id*.

The Court of Appeal agreed with the petitioner that "reasonably competent counsel would have presented evidence about the statement that defendant put the stick back, which could support a theory that defendant was not part of the attack and/or that he did not use a deadly weapon during the attack." [Lodgment No. 10, p. 27]. However, the state court concluded that the omission was not prejudicial because in light of the rest of the evidence, including the state's five eye witnesses' testimony, there is no reasonable probability that jurors would have rejected findings that the petitioner participated in and used a stick during the fight even if they had heard Ms. Pacheco's prior statements to Officer Wallin. *Id*. at pp. 27-28.

The Court of Appeal was equally unpersuaded by the petitioner's argument that his lawyer should have cross-examined Crystal about her failure to specify that the defendant was one of the assailants. *Id*. at 29. The state court observed that the police report was not intended to contain detailed statements exploring the extent of the petitioner's involvement. "Notably, the police reports were derived from interviews that occurred at the chaotic scene immediately after the assault; there were not witness statements taken during the investigation of the case by a detective who could question the witnesses in more detail." *Id*. at 29-30. The court concluded that even if reasonably competent counsel would have elicited evidence about the omissions at trial, there is no reasonable probability that this would have affected the outcome of the trial. *Id*. at 30.

Applying the "doubly deferential" standard of review to the Court of Appeal's decision, this Court concludes that the decision was reasonable. A fair-minded juror could believe that the state court correctly decided that the petitioner failed to set out

a prima facie case of ineffective representation. Therefore, this Court RECOMMENDS that Ground Eight of the federal habeas petition, as it relates to trial counsel's failure to elicit Crystal Pacheco's statements to Officer Wallin, be DENIED.

C. Officer Luth's Observations of Star Pacheco

Officer Luth reports that at the time of her interview, Star Pacheco "had been drinking and was difficult to understand." [Doc. No. 1, Ex. D]. This fact was not adduced at trial. The petitioner argues that reasonably competent counsel would have called Officer Luth to testify at trial about Star's condition. Presumably the petitioner believes that the evidence about Star's drinking could cast doubt on her credibility as a witness, as the jury might conclude that the alcohol impaired Star's ability to perceive and remember the events in question.

The Court of Appeal disagreed that competent trial counsel would have elicited evidence about Star Pacheco's drinking, or that the petitioner was prejudiced. [Lodgment No. 10, p. 31] The state court reasoned that the record shows that she could not have been intoxicated, as police officers permitted her to drive away from the scene. *Id.* Therefore, there was little chance that the alcohol substantially impaired her perception or memory.

Applying the "doubly deferential" standard of review to the Court of Appeal's decision, this Court concludes that the decision was reasonable. A fair-minded juror could believe that the state court correctly decided that the petitioner failed to set out a prima facie case of ineffective representation. Therefore, this Court RECOMMENDS that Ground Eight of the federal habeas petition, as it relates to trial counsel's failure to elicit Officer Luth's testimony about Star Pacheco's condition, be DENIED.

In conclusion, for all the reasons stated above, this Court RECOMMENDS that Ground Eight of the petition be DENIED in its entirety.

5. Cumulative Errors

The petitioner raises a separate claim, Ground Seven, in which he alleges that the cumulative effect of his trial counsel's failings collectively demonstrates ineffective

assistance of counsel. [Doc. No. 1, p. 9c] A federal court may engage in a cumulative review of errors to assess whether the trial was so infected as to violate a petitioner's due process rights. *See Rose v. Lundy*, 455 U.S. 509, 531 n.8 (1982) ("Conceivably, habeas relief could be justified only on the basis of a determination that the cumulative impact of the four alleged errors so infected the trial as to violate respondent's due process rights.") (J. Blackmun, concurring); *McKaskle v. Vela*, 464 U.S. 1053, 1053 (1984) ("Both the state courts and the Federal District Court found that the three errors, when considered in the context of the entire record, were not cumulatively of such magnitude to render counsel's conduct of the trial as a whole constitutionally infirm.").

This Court considers all of the petitioner's claims of ineffective assistance of counsel both individually and in the aggregate. The applicable standard for federal habeas review is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard," *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 788 (2011). Even when looking at the cumulative effect of trial counsel's errors, this Court finds that the petitioner has failed to show that his counsel's errors were so egregious as to merit federal habeas relief. Accordingly, this Court RECOMMENDS that Ground Seven of the petition, insofar as it raises a cognizable federal claim, be DENIED.

III. Instructional Error

In Ground Five of the Petition, the following is alleged: "There was Federal Constitutional error in the failure of the Judge to instruct on voluntary intoxication negating the specific intent required for conspiracy to aid and abet the assaults." [Doc. No. 1, p. 9a] The trial judge instructed the jury that voluntary intoxication could be a defense to aiding and abetting, but said nothing about whether it could be a defense to conspiracy, and explicitly instructed that it could not be a defense to assault. [Lodgment No. 1, pp. 40-41, 49-51, 54-55] [Lodgment No. 4, Vol. 2, p. 269] The petitioner contends that the trial court should have instructed the jury that voluntary intoxication could be a defense to conspiracy, and as a result of the judge's omission, he was

prejudiced because the jury was misled and confused. [Doc. No. 1, p. 9a]

The Court of Appeal agreed that the trial judge erred in failing to so instruct the jury. [Lodgment No. 10, pp. 13-14] The court recognized that voluntary intoxication can be a defense to the specific intent crime of aiding and abetting under California state law. *Id., citing People v. Mendoza*, 959 P.2d 735, 742-46 (Cal. 1998). It reasoned that if voluntary intoxication can negate the specific intent required for aiding and abetting liability, "It follows that a defendant who did not personally commit the assault, and whose intoxication prevented the intent to agree to commission of the crime, can be relieved of culpability under a conspiracy theory." *Id.*

To the extent that the Court of Appeal's opinion renders a final ruling on a matter of state law, namely that voluntary intoxication can be a defense to conspiracy, this Court is precluded from further review. *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). The only question before this Court is whether the trial judge's failure to properly instruct the jury "so infected the entire trial that the resulting conviction violates due process," *Estelle v. McGuire*, 502 U.S. 62, 72 (1991).

Though the Court of Appeal found instructional error, it concluded that the error was not prejudicial. [Lodgment No. 10, pp. 14-15] The Court of Appeal determined that the jury had sufficient information from the instructions actually given to understand that intoxication could be a defense to the specific intent crime of conspiracy. *Id*. The Court of Appeal noted that the judge had instructed the jury that intoxication could negate the intent required for aiding and abetting. *Id*. [Lodgement No. 1, p. 48] Further, the jury had been instructed that an element of conspiracy was "the intent[] to agree." [Lodgement No. 10, pp. 14-15] [Lodgment No. 1, p. 49] The Court of Appeal concluded that putting two and two together, "the jury understood that it should not consider intoxication if defendant was a direct perpetrator, but that it could consider intoxication for the states of mind required for the two derivative theories of liability, including whether intoxication prevented defendant from intending to agree under a conspiracy theory." [Lodgment No. 10, p. 15]

The petitioner argues that the Court of Appeal's conclusion amounts to unreasonable speculation. [Doc. No. 1, p. 9a] Keeping in mind the deferential standard of review, however, this Court cannot say that the state court's decision was unreasonable, and the petitioner has put forth no evidence to affirmatively demonstrate prejudice. To the contrary, the record suggests that the jury found the petitioner guilty as a direct participant in the attacks, not as a conspirator or aider and abettor. The jury found as part of its verdict that the defendant personally used a deadly weapon, to wit: a wooden stick, in commission of the assault under § 245(a)(1) and within the meaning of § 1192.7(c)(23). [Lodgment No. 4, Vol. 2, 347-49] This finding, coupled with the testimony of multiple eyewitnesses who purported to see the petitioner participate in the attacks, leads the Court to conclude that a voluntary intoxication instruction on conspiracy would not have made a difference in the ultimate outcome of the petitioner's trial, since the jury did not appear to convict him under that theory.

Based on the foregoing, the petitioner has not met his burden to show that any part of the jury instructions violated due process. This Court finds that the California courts reasonably rejected the petitioner's claim of instructional error. As a result, there is nothing to indicate that the state court proceedings resulted in a decision on the petitioner's instructional error claim that is contrary to, or involved an unreasonable application of, clearly established Supreme Court law. It is therefore RECOMMENDED that the District Court DENY the petitioner's Ground Five regarding instructional error.

IV. The State's Theory of Uncharged Conspiracy Liability

In Ground Four, the petitioner argues that uncharged conspiracy was an improper legal basis for his criminal conviction. [Doc. No. 1, p. 9] The Court of Appeal rejected this claim. [Lodgment No. 10, pp. 8-10] It is long established under California law that uncharged conspiracy is a proper basis for criminal liability for a co-conspirator. *E.g. People v. Lopez*, 60 Cal.2d 223, 250 (Cal. 1963). The Court of Appeal accordingly concluded, "Even when (as here) conspiracy is not charged as a substantive offense, an

uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator." [Lodgment No. 10, p. 8] (citations omitted)

Since the Court of Appeal's decision constitutes an interpretation of California's state law, this issue is foreclosed from federal habeas review. The Supreme Court has "repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546, U.S. 74, 76 (2005). Accordingly, this Court has no authority to review the finding, and RECOMMENDS that Ground Four of the petition be DENIED.

V. Testimony About Defendant's Presence at the Walk-Through

Before the trial began, the prosecutor informed the judge that he planned to elicit testimony from two of the state's witnesses about an incident that occurred eight or nine months after the assault. Specifically, the prosecutor sought to introduce evidence that when Theresa and Crystal Pacheco did a "walk-through" of the taco shop with the prosecutor to prepare for their trial testimony, they saw the defendant drive by slowly and stare at them. [Lodgment No. 4, Vol. 1, pp. 10-16] The prosecutor informed the court that he was planning to elicit this testimony for three reasons: a) to establish the defendant's identity; b) to show that the defendant routinely hung out at the area around the taco shop and considered it "his area," (thus establishing a motive for the defendant to instigate the fight over a perceived turf violation); and c) to show that the defendant was trying to intimidate the witnesses at the walk-through. *Id.* The defense counsel objected on the grounds that this testimony would be irrelevant and prejudicial, and that identity was not a fact at issue since the petitioner did not dispute that he was present at the fight. *Id*. at p. 14. The trial court ruled that the proffered evidence was relevant to show the defendant's motive, but that "the concept of intimidation... interjects a prejudicial aspect that is based, based on [the prosecutor's] offer of proof, more on speculation than evidence." *Id*. at p. 15.

At trial, Crystal Pacheco and Theresa Pacheco testified that when they did a

walk-through of the taco shop with the prosecutor, they saw the defendant drive by, park across the street, get out of his car, and stare at them with his head resting on the hood of his car. [Lodgment No. 4, Vol. 2, pp. 135-36, 164-165] Crystal Pacheco testified that the encounter made her feel "very uncomfortable," "scared," and "a little bit [afraid]." *Id*. at p. 135. Theresa Pacheco testified that she felt "very afraid" and "pretty upset." *Id*. at p. 165.

In closing, the prosecutor made the following argument about the petitioner:

> We know he was there when we did the walk-through with the family. How chilling is that? What the heck was Mr. Smith doing coming and driving by our walk-through? Well, I will argue to you and tell you common sense dictates it's one thing. He's not ordering food, because he certainly didn't do that. He is coming over there to intimidate and make sure that he knows that he feels good about scaring those victims, which he already beat to the ground.

[Lodgment No. 4, Vol. 2, p. 303]

In Ground Five, the petitioner raises two arguments regarding this testimony. First, the petitioner argues that admission of the women's testimony, over his counsel's objections, was "irrelevant and inflammatory." [Doc. No. 1, p. 9b] Second, he agues that the prosecutor's closing argument that the petitioner was trying to intimidate the witnesses was improper and prejudicial. *Id*. He argues that these errors were so egregious that they violated his right to a fair trial. *Id*.

1. Admission of the Witnesses' Testimony

The petitioner's first claim challenges the admission of the women's testimony that they were afraid at the walk-through. This claim was properly preserved at the trial level and on appeal; the petitioner's trial counsel timely objected that the evidence was irrelevant and prejudicial. [Lodgment No. 4, Vol. 1, p. 14] However, the state Court of Appeal denied the petitioner's claim on direct appeal, finding that trial courts have broad discretion to determine the admissibility of evidence under California Evidence Code § 352 and binding state court precedent. [Lodgment No. 10, p. 22], *citing People*

v. Rodrigues, 36 Cal. Rptr. 2d 235, 267 (Cal. Ct. App. 1994). The Court of Appeal found that the trial court could reasonably conclude that the evidence was relevant, and not unduly prejudicial. *Id*. at pp. 22-23.

To the extent that the petitioner is claiming that there was a violation of state evidentiary rules, that argument is not cognizable on federal habeas. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). A petitioner may raise a claim that the exclusion (or admission) of evidence by the trial court violated a petitioner's right to due process. *Miller v. Stagner*, 757 F.2d 988, 994 (9th Cir. 1985), *amended by*, 768 F.2d 1090 (9th Cir. 1985). However, "errors of state evidentiary law do not entitle one to federal habeas relief unless the alleged error so fatally infected the proceedings as to render them fundamentally unfair." *Gonzalez v. Knowles*, 515 F.3d 1006, 1011 (9th Cir. 2008). Rulings on the admission of evidence in state trials rarely rise to the level of a federal constitutional violation needed to warrant habeas relief.

In this instance, the petitioner fails to show that the trial court's admission of the evidence was error, much less error that rendered the criminal proceedings fundamentally unfair. The testimony about the petitioner's presence at the walk-through was relevant to establishing a motive for his actions on the day of the assault, that "he was involved in instigating and committing the group assaults because his sense of turf had been violated." [Lodgment No. 10, p. 22] The Pachecos' testimony that they felt "afraid" and "upset" helped explain the method and manner in which the petitioner watched them at the walk-through. Further, that testimony was relevant to establishing the petitioner's identity in that the Pachecos recognized him from the

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attacks. Even if this testimony was admitted in error, the petitioner has not demonstrated prejudice. His arguments are mere speculation. Accordingly, this Court finds that the petitioner fails to prove that the state court's decision violated his right to due process.

2. The Prosecutor's Closing Argument

The petitioner's second claim is that the prosecutor's reference to intimidation in his closing argument violated the petitioner's right to a fair trial. The Court of Appeal found that the prosecutor's closing argument was improper in light of the trial court's pre-trial ruling that the concept of intimidation was speculative and prejudicial. "However, this claim of error is forfeited on appeal because defense counsel failed to object." [Lodgment No. 10, p. 23] *(citing People v. Harrison*, 35 Cal. 4th 208, 243 (2005)). "Moreover, there is no showing of prejudice." *Id*. The court explained that even if the argument had been preserved, there would have been no prejudice since the jury had all the facts at hand to conclude that the petitioner was trying to intimidate the witnesses at the taco shop even if the prosecutor had not so argued in closing. *Id.*

The state urges this Court to find that the petitioner's claim is procedurally barred. When a state court declines to address a prisoner's federal claims because the prisoner fails to meet a state procedural requirement, the Supreme Court has held that the state judgment rests on independent and adequate state procedural grounds and federal habeas review is barred. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). The state argues that because the Court of Appeal declined to decide the petitioner's claim on the grounds that the claim was forfeited under state law, this Court is precluded from federal habeas review with respect to the issue of the prosecutor's allegedly improper closing argument.

However, the sentence, "Moreover, there is no showing of prejudice," appears to this Court to be an alternative ruling on the merits. The Ninth Circuit has adopted the position of other circuits that when a state court issues an "alternative ruling on the merits," this merit-based decision is entitled to ADEPA's deferential review. *James v.*

Ryan, 679 F.3d 780, 802 (9th Cir. 2012) (overturned on unrelated grounds) (*citing Stephens v. Branker*, 570 F.3d 190, 208 (4th Cir. 2009).

Viewing the state court's ruling through AEDPA's deferential lens, it appears that the prosecutor's closing remarks, while improper, did not prejudice the petitioner. The jury had already been instructed twice that the attorneys' arguments were not evidence. [Lodgment No. 4, Vol. 1, p. 32] [Lodgment No. 4, Vol. 2, p. 273] Therefore, the jury would know to draw their own conclusions from the witness testimony, not to rely on the prosecutor's closing statements. Furthermore, the evidence that was introduced at trial created a strong inference that the defendant did attempt to intimidate the Pachecos at the walk-through. By the time the prosecutor made his closing remarks, the jury had heard testimony that the petitioner drove by the taco shop, got out of his car, and stared at Crystal and Theresa Pacheco, causing the women to feel "very afraid" and "pretty upset." Thus the issue of witness intimidation was already before the jury, and the jury would have been thinking about it with or without the prosecutor's improper argument. This Court agrees with the Court of Appeal's conclusion that, "There is no reasonable probability the prosecutor's erroneous comment about defendant's intentional presence affected the outcome." [Lodgment No. 10, p. 24]

Accordingly, this Court RECOMMENDS that Ground Five of the petition be DENIED in its entirety.

CONCLUSION

For the reasons outlined above, IT IS HEREBY RECOMMENDED that the District Court issue an order (1) approving and adopting this Report and Recommendation; and, (2) denying the Petition for Writ of Habeas Corpus.

IT IS HEREBY ORDERED THAT any party may file written objections with the District Court and serve a copy on all parties ***no later than September 18, 2014***. The document should be entitled "Objections to Report and Recommendation."

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IT IS FURTHER ORDERED THAT any reply to the objections shall be filed with the District Court and served on all parties ***no later than September 28, 2014***. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the District Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

IT IS SO ORDERED.

Date: August 15, 2014

KAREN S. CRAWFORD
United States Magistrate Judge

APPENDIX E

OPINION OF CCA

Filed 11/3/11 P. v. Smith CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. NATHAN SMITH III, Defendant and Appellant.	D057482 (Super. Ct. No. SCD220269)
In re NATHAN SMITH III on Habeas Corpus.	D059929 (Super. Ct. No. SCD220269)

CONSOLIDATED APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge, and petition for writ of habeas corpus. Judgment affirmed and petition denied.

In this appeal and petition for writ of habeas corpus, Nathan Smith III seeks to overturn a judgment convicting him of three counts of aggravated assault. The prosecution presented evidence showing there was a verbal altercation between defendant

and the victims outside a taco shop; defendant retrieved a baseball bat or stick from a car and made a call on a cell phone; and immediately thereafter a group of people arrived at the taco shop and (joined by defendant) assaulted the victims. The prosecution's theory was that defendant was liable for the assaults as a direct perpetrator, an aider and abettor, or a coconspirator. The jury found defendant guilty of three counts of assault with a deadly weapon or by means of force likely to produce great bodily injury, and for each count found true an allegation that defendant personally used a deadly weapon (i.e., a wooden stick).

In his appeal and habeas petition, defendant raises several contentions concerning the conspiracy theory of culpability for the assaults, arguing (1) this theory should not have been presented to the jury because there was no evidence that he agreed the victims should be assaulted, (2) an uncharged conspiracy cannot be used to impose culpability independent of aider and abettor culpability, and (3) the corpus delicti requirement for conspiracy was not satisfied. Additionally, defendant raises challenges based on the issue of his intoxication, asserting (1) the court erred, and his counsel was ineffective, because the jury was not instructed that voluntary intoxication is a defense to the intent required under a conspiracy theory, and (2) his counsel was ineffective for failing to raise the intoxication defense during closing arguments to the jury. Further, defendant argues the trial court erred by (1) failing to instruct the jury on the unanimity requirement applicable when multiple acts can support a single charged offense, and (2) abused its discretion in admitting evidence concerning defendant's encounter with prosecution witnesses several months after the assaults. We reject these contentions of reversible error.

In his habeas petition defendant also asserts his counsel provided ineffective representation because counsel was not adequately prepared for trial and he failed to introduce several items of evidence to challenge the prosecution's case. We conclude defendant has not shown a basis for habeas relief on these grounds.

Finally, we reject defendant's contention that cumulative error deprived him of a fair trial.

We affirm the judgment and deny the petition for habeas corpus relief.

FACTUAL AND PROCEDURAL BACKGROUND

At about 9:30 p.m. on March 11, 2009, the victims and other family members were in a Jeep waiting to receive their food at the drive-through area of a taco shop. The people in the Jeep were Prado Pacheco and Theresa Pacheco, their two young-adult daughters (Crystal Pacheco and Star Pacheco), and Theresa's brother (Gary Lopez). Star was driving; Theresa was in the front seat; and the others were in the back seat. At trial, the events surrounding the assaults were described by Prado, Theresa, Crystal, Star, and taco shop employee Margarita Villanueva.

While waiting for their food, Crystal, accompanied by Lopez, got out of the Jeep so that Crystal could use a bathroom located by the back entrance of the taco shop. At Crystal's request, a taco shop employee came out of the restaurant to unlock the bathroom door, but after checking the door, the employee told Crystal someone must be inside. Defendant's female companion (Nina Ortiz) was inside the bathroom. When Ortiz came outside, she said to Crystal, " 'Don't you fucking know someone is in the bathroom.' " Crystal responded, " 'Sorry you're having a bad day.' " Ortiz walked to her car (a red

vehicle) and spoke to defendant. Defendant and Ortiz started screaming at Crystal and Lopez. Employee Villanueva came outside to check what was occurring. According to Villanueva, defendant appeared drunk. Villanueva testified that a man arguing with defendant (apparently Lopez) tried to calm the situation down, telling defendant that it was "just a misunderstanding."

Hearing the altercation, Prado got out of the Jeep. Prado heard Lopez tell Ortiz that Crystal just had to go to the bathroom. Prado told Crystal to go back to the Jeep, and told Lopez that their food was probably almost ready and they should go. Defendant told Lopez to wait, and Lopez responded that he should forget about it and they were leaving. Defendant went to the trunk of the red car and pulled out a baseball bat or wooden stick. Lopez asked defendant what he was doing. Prado told defendant they did not want any problems, grabbed Lopez, and said they were leaving. Theresa, who had also come over from the Jeep, told defendant and Ortiz that "this nonsense had to stop"; she and her family were just getting their food and leaving; and if they did not stop she would call the police.

As they were returning to the Jeep, Prado looked back to see if defendant was coming after them. Prado testified that defendant, with a "smirky" look on his face, said " 'You ain't going nowhere,' " and put his cell phone to his ear. Villanueva testified that defendant said that he was going to call his friends, and speaking into his cell phone said, " 'I'm having some problems. Come over.' "

Theresa, Prado, and Crystal got into the Jeep. The Jeep was at the taco shop drive-through window, and Prado told Star not to worry about the money but to just go.

Defendant ran up to the Jeep and said, " 'Wait a minute, homies. You don't want to leave yet.' " Several cars then came from a parking lot across the street and blocked the Jeep. About nine people (males and females) jumped out of the cars.

As Lopez was getting into the Jeep, he was attacked. Theresa and Prado testified that five or six men (including defendant) assaulted Lopez. According to Prado, defendant was the first to reach Lopez as Lopez was trying to get into the Jeep, and defendant held Lopez and repeatedly hit Lopez with a wooden stick.[1] When the men got Lopez out of the Jeep, they dragged him towards Ortiz's car.

Theresa got out of the Jeep and a man (not defendant) started hitting her in the face. She fell to the ground and felt herself being struck on the back. Crystal and Star testified that defendant was one of the people attacking Theresa on the ground. According to Crystal, defendant was armed with a bat when he attacked Theresa.[2] When Prado came to assist Theresa, defendant and another man hit him in the knee with bats or wooden sticks. When Prado helped Theresa get back in the Jeep, a man (not defendant) hit Prado in the face.

During the altercation, employee Villanueva called 911. Villanueva told the operator that a man was outside "trying to hit some other people" and "trying to call some

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1 Crystal and Star testified that a man other than defendant was hitting Lopez and trying to pull him out of the Jeep. Theresa testified she saw defendant beating Lopez, but she could not tell if he had anything in his hands.

2 Star did not recall that defendant had any weapons in his hands when he was hitting Theresa. Prado testified that a man (not defendant) and two females attacked Theresa. Theresa did not know who was hitting her after she fell to the ground.

of the other friends." As the events were unfolding, Villanueva told the operator that the man had called some friends and they were fighting; other people had arrived; they were attacking people with sticks; the attackers were leaving; and the people in the red car had "started everything."[3] When interviewed by the police at the scene, Villanueva stated that defendant was one of the people hitting a man on the ground.[4]

The assailants who had arrived in the cars got back in their vehicles, drove across the street to a liquor store parking lot, and then drove away. Defendant and Ortiz also drove away. Witnesses provided the authorities with the license plate number for Ortiz's car, and identified defendant in photo lineups as one of the aggressors. To support the theory that defendant summoned his friends from across the street to commit the attack, the prosecution presented evidence to show that the area near the assault was defendant's "local hangout."[5]

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3 Responding to the operator's questions, Villanueva stated: "He's taking out stuff. I think they're already fighting. [¶] . . . [¶] . . . [There are] cars. [¶] . . . [¶] . . . They're hitting. [¶] . . . [¶] . . . Eight people. They're beating him up. They're hitting people. . . . They're all fighting. [¶] . . . [¶] . . . [T]hey have sticks. [¶] . . . [¶] . . . There's like ten of them. . . . [The man] called some other friends of his and they're just fighting, like crazy. [¶] . . . [¶] . . . [T]hey're gonna leave. [¶] . . . [¶] The license plate number is [ ]. That's the one that started everything. [¶] . . . [¶] . . . The car it was red. [¶] . . . [¶] The red, the one's that I gave you the license plate[.]"

4 At trial, Villanueva testified she could not remember if defendant participated in the attacks. She acknowledged she was uncomfortable about testifying.

5 This evidence consisted of a stipulation that defendant and Ortiz were at the liquor store parking lot across the street on one occasion, and defendant was about one-half block from this location on another occasion.

As a result of the assault, Theresa suffered bruising to her back, facial swelling, a large bump on her head, and impaired vision. Prado suffered facial swelling and an injury to his knee that required surgery and the use of a wheelchair and crutches. Lopez suffered welts and swelling on his forehead, bruising of his rib cage area, and rib fractures, and his ability to walk and work were impacted.

Jury Verdict and Sentence

Defendant was convicted of three counts of assault with a deadly weapon or by means of force likely to produce great bodily injury (victims Lopez, Theresa, and Prado). For each count, the jury found true allegations that he personally used a deadly weapon (i.e., a wooden stick). Based on his prior convictions and his current offenses, he was sentenced to a total determinate term of 17 years, consisting of 12 years for the three assault convictions, and five years for a serious felony prior conviction.[6]

DISCUSSION

I. *Conspiracy Theory of Culpability*

Defendant challenges the judgment based on the prosecution's presentation to the jury of the conspiracy theory of culpability for the assaults, arguing there was insufficient

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6 Due to a strike prior conviction, defendant received doubled terms, consisting of eight years (double the upper term) for the assault on Prado, and two terms of two years (one-third the middle term, doubled) for the assaults on Theresa and Lopez.

evidence to support this theory, this theory could not be used independently of aider and abettor culpability, and the corpus delicti rule was not satisfied for this theory.[7]

A. *Sufficient Evidence of Conspiracy*

Defendant argues there is insufficient evidence to support the theory that he was guilty of assault based on a coconspirator theory. He asserts that although the evidence supported that he made a call for help, there was no evidence of an agreement to commit an assault. Accordingly, he argues the jury should not have been instructed on this theory, and his counsel was ineffective when he failed to object to the prosecutor's reference to this theory in closing arguments to the jury.[8]

Even when (as here) conspiracy is not charged as a substantive offense, an "uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator." (*People v. Belmontes* (1988) 45 Cal.3d 744, 788, disapproved on other

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[7] We note that the jury's findings that defendant personally used a deadly weapon during the assaults suggests that it concluded defendant personally participated in the attacks on the victims, which would necessarily make any errors related to the derivative theories of liability (conspiracy and aiding and abetting) harmless. However, in closing arguments to the jury, the prosecutor told the jury that the personal weapon use allegations could be sustained based merely on defendant's act of displaying a weapon in a menacing manner, including when he pulled the stick out of the trunk. Because the personal weapon use allegation was presented to the jury in a manner which could support defendant's weapon use in the context of derivative culpability, we will address defendant's contentions based on the derivative theories of liability.

[8] The trial court instructed the jury on the uncharged conspiracy theory of culpability in the language of CALCRIM No. 416. This instruction told the jury that the prosecution had presented evidence of a conspiracy to commit assault and that a member of a conspiracy was responsible for the acts of coconspirators, and set forth the elements of a conspiracy. In closing arguments, the prosecutor argued defendant could be liable for the assaults as a direct perpetrator or an aider and abettor, or under conspiracy law.

grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The prosecution is entitled to show that the charged offenses were committed in furtherance of a conspiracy, and when there is evidence supporting all the elements of a conspiracy, the jury may be instructed on a conspiracy theory. (*People v. Belmontes, supra,* 45 Cal.3d at p. 789.)

A conspiracy exists when there is an agreement to commit a crime between two or more people, and an overt act in furtherance of the agreement. (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.) The conspirators must intend to agree and intend to commit the offense. (*Ibid.*) It is not necessary to show that the parties met and actually agreed to perform the crime or that they had previously arranged a detailed plan; rather the evidence is sufficient if it shows they positively or tacitly came to a mutual understanding to commit the crime. (*Ibid*.) A conspiracy may be proven by circumstantial evidence inferred from the conduct, relationship, interests and activities of the alleged conspirators before and during the alleged conspiracy. (*Ibid*.)

The prosecution presented evidence showing that defendant pulled a bat or stick out of the trunk; he indicated to the victims they were not going to leave; he made a call on his cell phone and asked people to come over because he was having problems; and immediately thereafter people arrived and helped defendant attack the victims. The jury could reasonably infer that defendant's retrieval of an object that could be used as a deadly weapon meant that he wanted to attack the victims, and that a request for people to come over because of problems reflected an understanding between defendant and his cohorts that violence would be used in response to these problems. These inferences

support that defendant intended to agree to commit the assaults, and intended to commit them. The record supports presentation of the conspiracy theory to the jury.

B. *Conspiracy as Distinct Theory of Culpability*

Defendant argues that an uncharged conspiracy theory (as opposed to a charged conspiracy count) can only be presented to support culpability based on an aiding and abetting theory, and that this principle was not made clear to the jury. Contrary to defendant's contention, there is no such restriction on the use of an uncharged conspiracy theory. (See *People v. Belmontes, supra*, 45 Cal.3d at p. 788.)

Defendant cites *People v. Durham* (1969) 70 Cal.2d 171 to support his claim that an uncharged conspiracy theory can only be used to support aiding and abetting culpability. *Durham* does not stand for this proposition. *Durham* notes that the prosecution *may* use the existence of an uncharged conspiracy to show that a defendant aided and abetted a crime, but *Durham* does not suggest this is the *exclusive* permissible use of an uncharged conspiracy theory. (*Id*. at pp. 180-181, & fn. 6.) In *Belmonte*s, the court recognized the well-established principle that an uncharged conspiracy can be used to show criminal liability, and did not restrict its use to aiding and abetting culpability. (See *People v. Belmontes, supra*, 45 Cal.3d at p. 788; see also *People v. Remiro* (1979) 89 Cal.App.3d 809, 842-843.)

C. *Corpus Delicti Rule*

Defendant argues the corpus delicti rule was not satisfied with respect to the conspiracy theory — i.e., there was no showing of an agreement to commit assault apart from defendant's out-of-court statement summoning his friends to help him.

The corpus delicti rule requires that the prosecution show "the body of the crime itself"; i.e., the fact of harm and the existence of a criminal agency as its cause. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168.) The prosecution cannot satisfy this burden by relying exclusively on the extrajudicial statements or admissions of the defendant; rather, there must be some independent proof of the corpus delicti. (*Id*. at p. 1169.) The rule is "intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*Ibid*.) The independent proof requirement may be satisfied by a slight or prima facie showing of harm by a criminal agency. (*Id*. at p. 1171.)

Here, the charged offenses were assaults. Conspiracy was not charged as an offense, but merely as a theory of liability for the assaults. This is not a case involving the issue of reliance on extrajudicial admissions by the defendant to show that a charged conspiracy has occurred. (See, e.g., *People v. Muniz* (1993) 16 Cal.App.4th 1083, 1087-1088.) Independent of any statements made by defendant, the occurrence of the charged assaults was shown by the numerous witness descriptions of what occurred and the injuries observed on the victims.

Alternatively, even assuming arguendo the corpus delicti rule applies to an uncharged conspiracy as a theory of culpability, there was no violation of the rule. The corpus delicti rule applies to a defendant's preoffense statements of later intent and postoffense admissions, but not to a statement that is part of the crime itself. (*People v. Carpenter* (1997) 15 Cal.4th 312, 394.) When a statement is part of the crime itself, there is no concern that a defendant is admitting to a crime that never occurred. (*Ibid*.)

Defendant's statements during the phone call were part of the facts supporting the conspiracy theory of culpability, and did not trigger application of the corpus delicti rule. Further, even assuming the corpus delicti rule was triggered, the evidence of an agreement to assault was not based merely on defendant's statements during the phone call, but on the evidence showing defendant's participation in the assaults once his accomplices arrived at the scene.

Defendant additionally asserts the jury should have been specifically instructed that the corpus delicti requirement applied to the conspiracy theory of culpability. The jury was provided the standard instruction on the corpus delicti rule, which states that the defendant may not be convicted of any crime based on his out-of-court statements alone. (See CALCRIM No. 359.) Assuming arguendo the corpus delicti requirement applied to the conspiracy theory, this instruction adequately informed the jury of the independent proof requirement.

There was no error concerning the corpus delicti rule.[9]

II. *Voluntary Intoxication Issues*

Defendant argues (1) the court erred, and his counsel was ineffective, because the jury was not instructed that intoxication can negate the intent required for a conspiracy theory of guilt for the assaults, and (2) his counsel was ineffective because he did not raise the intoxication defense during closing arguments.

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9 Given our holding, we need not consider the Attorney General's contention that the corpus delicti issue has been forfeited on appeal.

A. *Failure to Instruct that Intoxication Could Negate Intent for Conspiracy Theory of Culpability*

Voluntary intoxication is not a defense to assault when the defendant is the direct perpetrator. (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1127-1128.) However, voluntary intoxication can negate the state of mind required for aiding and abetting; i.e., knowledge of the perpetrator's purpose and the intent to facilitate commission of the offense. (*Id.* at pp. 1118, 1129-1131.) The California Supreme Court has explained that because assaults are frequently committed by intoxicated persons, an intoxicated defendant cannot be relieved of responsibility for an assault he or she commits; however, a defendant who was *not* the perpetrator of the assault may be relieved of responsibility for aiding and abetting the assault if, due to intoxication, the defendant was unaware of the perpetrator's purpose and did not intend to facilitate commission of the offense. (*Id.* at pp. 1129-1131.) It follows that a defendant who did not personally commit the assault, and whose intoxication prevented the intent to agree to commission of the crime, can be relieved of culpability under a conspiracy theory.

Although a trial court need not sua sponte instruct on intoxication, if it does instruct on this theory, it must do so correctly. (*People v. Mendoza, supra*, 18 Cal.4th at p. 1134; *People v. Letner & Tobin* (2010) 50 Cal.4th 99, 186.) Here, the trial court instructed the jury that intoxication can negate the intent required for the aiding and abetting theory of culpability, but failed to instruct that it can negate the intent required for the conspiracy theory. We agree with defendant that the trial court should have

instructed that the intoxication defense applied to the conspiracy theory. However, we conclude the instructional error was not prejudicial.

In the instruction defining the elements of assault, the jury was told that the defendant must act "willfully," meaning "willingly or on purpose," and that "[v]oluntary intoxication is not a defense to assault." (See CALCRIM No. 875.) In an instruction concerning aiding and abetting, the jury was told: "If you conclude that the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the defendant: [¶] A. Knew that other perpetrators intended to commit an Assault with a Deadly Weapon or with Force Likely to Cause Great Bodily Injury; AND [¶] B. Intended to aid and abet other perpetrators in committing an Assault with a Deadly Weapon or with Force Likely to Cause Great Bodily Injury." (See CALCRIM No. 404.) During closing arguments, the prosecutor stated to the jury that it could only consider the intoxication defense "when dealing with aiding and abetting [and] as to his intent to agree."[10]

Thus, the jury knew from the instructions that intoxication was not a defense to the willful state of mind required for assault, but that it could be a defense to the specific intent state of mind for aiding and abetting assault. Further, the prosecutor told the jury that intoxication could be considered for aiding and abetting and the state of mind

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10 The reporter's transcript states "when dealing with aiding and abetting as to his intent to agree." To make sense of the prosecutor's statement, we assume the reporter left out a word, such as "and" or "or."

required for conspiracy; i.e., intent to agree.[11] Based on the instructions given to the jury coupled with the prosecutor's closing argument, we are satisfied the jury understood that it should not consider intoxication if defendant was a direct perpetrator, but that it could consider intoxication for the states of mind required for the two derivative theories of liability, including whether intoxication prevented defendant from intending to agree under a conspiracy theory.

Given that the jury was informed that intoxication could serve as a defense to derivative, but not direct, liability for assault, we conclude the failure to specify that intoxication applied to the conspiracy theory was harmless under any standard of review. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089 [reasonable probability of different outcome standard applies to state law instructional error affecting defense; harmless beyond a reasonable doubt standard applies to instructional error that prevents presentation of defense].)[12]

B. *Defense Counsel's Failure to Raise Intoxication Defense During Closing Arguments*

Defendant asserts his counsel was ineffective because he did not mention the intoxication defense during closing arguments to the jury. In a declaration submitted

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11 The jury was instructed that for the conspiracy theory of culpability the defendant must have "intended to agree" with a perpetrator to commit assault.

12 To the extent defendant suggests that omission of the intoxication instruction for the conspiracy theory constituted structural error requiring automatic reversal, we reject this contention. (See *Washington v. Recuenco* (2006) 548 U.S. 212, 218-219.)

with the habeas petition, defendant's trial counsel (Benjamin Sanchez) states that he should have raised this defense in closing arguments.

To show ineffective representation the defendant must establish that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel's error the result would have been different. (*People v. Weaver* (2001) 26 Cal.4th 876, 925.) There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*Ibid*.) In reviewing a claim of ineffective representation, we are not bound by trial counsel's statement that he or she provided ineffective representation. Although we take counsel's hindsight viewpoint into consideration, we apply an objective standard to determine whether the defendant was afforded competent representation. (See *ibid.*; *People v. Beagle* (1972) 6 Cal.3d 441, 457 ["Self-proclaimed inadequacies on the part of trial counsel in aid of a client . . . are not persuasive"]; *In re Burton* (2006) 40 Cal.4th 205, 223.)

We may deny a habeas petition without issuing an order to show cause if the petitioner does not set forth a prima facie case for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 475.) We conclude defendant has not made a prima facie showing of ineffective representation arising from his counsel's failure to raise the intoxication defense in closing argument.

In closing arguments to the jury, Attorney Sanchez pointed to discrepancies and differences in the versions of the incident described by the prosecution's witnesses, and argued the prosecution had not shown beyond a reasonable doubt that defendant was one

of the perpetrators of the assaults. Sanchez also asserted that it was not clear that defendant made statements on the phone supporting guilt under aiding and abetting or conspiracy theories. Sanchez made no assertion that defendant was intoxicated and that his intoxication prevented him from intending to instigate or facilitate the assaults.

Reasonably competent counsel could have concluded that if he referred to the intoxication defense during closing arguments, this would have detracted from the core defense argument that defendant did not summon people to the scene and did not assist in the attacks. The intoxication defense assumes that defendant did engage in some conduct that generated or furthered the assault, but that he was too drunk to entertain the required intent. Counsel could have reasonably decided that it was more advantageous to focus the jury's attention on the discrepancies in the witness descriptions of what occurred to support that defendant was not involved in the attack.

The reasonableness of this conclusion is supported by the use that the *prosecutor* made of the intoxication issue during closing arguments. The prosecutor argued to the jury that, if anything, the intoxication claim pointed to defendant's guilt, stating: "[C]ommon sense dictates that you don't drink to get smarter. No one really makes better decisions when they're drunk. You heard evidence that the defendant was acting like he was intoxicated, like he was drunk, and there is a good chance that he was, if you believe that testimony. [¶] I mean, your inhibitions are lessened. You're a little bit impaired. Your decision-making stinks, and you act more like an idiot. That's what happens when you get drunk a lot of the time . . . ." Reasonably competent defense counsel could have assessed that reiterating the intoxication theme during the defense closing argument

would draw more attention to the prosecution's theory that if defendant was drunk, he was more likely to have participated in the attacks.

Defendant has not shown he was deprived of effective representation based on Sanchez's failure to refer to his intoxication during closing argument.

III. *Failure to Give Unanimity Instruction*

Defendant argues the trial court erred in refusing the prosecutor's request that a unanimity instruction be given to the jury. To support this, he notes that the descriptions of his conduct varied from witness to witness. He contends some jurors may have found he committed some acts, and others found he committed different acts, and they should have been told they had to unanimously agree which acts he committed.

A defendant's constitutional right to a unanimous jury verdict requires that when the evidence shows more than one unlawful act that could support a single charged offense, the prosecution must either elect which act to rely upon or the trial court must sua sponte give a unanimity instruction telling the jurors they must unanimously agree which act constituted the crime. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) The unanimity instruction is designed to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agreed the defendant committed. (*Ibid*.)

However, when only one discrete criminal event has occurred, the jury need not unanimously agree on the precise factual details of how the crime was accomplished. (*People v. Russo* (2001) 25 Cal.4th 1124, 1135; *People v. Jenkins* (2000) 22 Cal.4th 900, 1025.) "[W]here the evidence shows only a single discrete crime but leaves room for

disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or . . . the 'theory' whereby the defendant is guilty." (*People v. Russo, supra,* 25 Cal.4th. at p. 1132; *People v. Jenkins, supra,* 22 Cal.4th at pp. 1025-1026 [jurors need not unanimously agree whether defendant was aider and abettor or direct perpetrator even when different facts support each conclusion].)

Here, the assaultive acts occurred within minutes and at the same location, and the assaults against each victim constituted one discrete criminal event. Although the jury needed to unanimously agree that defendant participated in, facilitated, or conspired to commit the assaults against each victim, it was not necessary for it to unanimously agree which particular assaultive acts he committed or whether he participated as a direct perpetrator, aider and abettor, or coconspirator.[13] Likewise, the personal weapon use allegation consisted of a single discrete criminal event; thus, the jury had to unanimously agree that defendant used a deadly weapon against each victim, but it did not need to unanimously agree which particular acts showed this use. The trial court did not err in declining to give a unanimity instruction.

IV. *Evidence of Encounter with Defendant Several Months After the Assaults*

Defendant argues the trial court abused its discretion and violated his right to a fair trial by admitting evidence concerning an incident where members of the Pacheco family

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13 There was no need for a unanimity instruction concerning the assaults on each victim, because defendant was charged in separate counts for each victim. Thus, the jury knew it had to unanimously agree that defendant engaged in culpable conduct directed at each victim.

saw defendant by the taco shop about eight months after the assault. Prior to trial, the prosecutor moved to admit evidence concerning this encounter. The prosecutor told the court that in November 2009 he and two other persons from the district attorney's office were at the taco shop with Theresa, Crystal, and Star to conduct a walk-through of the scene. While they were at the taco shop, the Pachecos alerted the prosecutor that defendant was outside. Crystal began crying "that's him, that's him." Defendant drove a car slowly through the taco shop's outside area; parked across the street at the liquor store; got out of his car; and stared at them. A female who was with defendant took out a camera phone and acted like she was taking photographs of them as they were leaving the taco shop.

The prosecutor argued the evidence was relevant to numerous issues, including identity because it showed defendant "hangs out" in the area; motive because this was "his area" and he wanted to call people over; consciousness of guilt because it showed he was attempting to intimidate the witnesses by intentionally going there during the walk-through and then staring at them; and witness credibility because it showed the Pacheco family's continued fear of defendant.

Defense counsel opposed admission of the evidence, asserting it was irrelevant and prejudicial. Defense counsel stated there was no dispute that defendant frequented the area and was at the scene of the assault. Counsel claimed that defendant's presence at the time of the walk-through was coincidental; the area was his neighborhood and every-day "hangout"; when defendant saw the Pachecos there he left rather than stopping to buy food; and he was not trying to intimidate them.

The court ruled the witnesses could testify that they saw defendant drive through the parking lot and recognized him as the person who was involved in the incident. However, the court stated the concept of intimidation interjected a prejudicial aspect that was based more on speculation than evidence, explaining that defendant was entitled to be at that location and he could have simply gone there and left when he saw them. Further, the court concluded there should be no testimony concerning the woman who took photographs with her cell phone because she was a third party. The court stated the witnesses could describe defendant leaving the parking lot and going across the street but it "should end there." Requesting clarification, the prosecutor asked if he could ask the witnesses whether defendant "went across the street, parked, got out of his car, those type of questions," but he should not ask about the female. The court responded, "Yes. I think the third party needs to stay out."

At trial, Theresa and Crystal testified that in late November or early December they were participating in a walk-through of the scene with the district attorney representatives. They saw defendant drive past them through the drive-through area of the taco shop without ordering food. Defendant parked across the street, got out of his car, and stared at them. The women testified they were afraid during this encounter.

Defendant asserts the court should have excluded the evidence under Evidence Code section 352 because it had little or no relevance and its purpose was to inflame the jury. He asserts the encounter by the taco shop was a chance encounter and the claim that he engaged in intimidation was speculative.

A trial court has broad discretion to determine whether evidence should be excluded under Evidence Code section 352 because its probative value is outweighed by concerns of undue prejudice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) We do not disturb the trial court's ruling unless the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Ibid*.)

The trial court did not abuse its discretion in admitting the evidence. The court could reasonably conclude the evidence was relevant to the issue of identity because it showed defendant frequented the area where the assaults occurred and he recognized the victims as reflected by his conduct of staring at them. Although defendant did not dispute that he was present during the assaults, he did dispute that he called people over to commit the assaults and that he was one of the assailants. Assuming defendant's presence outside the taco shop during the prosecution's walk-through was accidental, defendant's decision to park across the street and stare at the Pachecos could support that he perceived the area as his turf, he did not approve of their presence there, and he was trying to intimidate them. This in turn could support findings that when the verbal altercation occurred on March 11, he was involved in instigating and committing the group assaults because his sense of turf had been violated. The court was not required to find the evidence was more prejudicial than probative given that it did not involve any physical violence and was much less egregious than the charged incident.

Defendant also argues it was improper to permit the witnesses to testify that they felt afraid of defendant when they encountered him during the walk-through. The

witnesses' fear supported the claim of intimidation which, as stated, was relevant to prove defendant's identity as one of the assailants responding to a perceived turf violation.

To support his claim of error, defendant cites the prosecutor's closing arguments to the jury stating that he intentionally went to the taco shop at the time of the walk-through and stared at the witnesses to intimidate them.[14] He asserts these inferences of intimidation were speculative, as found by the trial court. The record shows the trial court ruled the prosecutor could not present evidence of intimidation based on defendant's mere presence at the taco shop during the walk-through; however, the court did not preclude reference to defendant's staring conduct. Thus, the arguments premised on the staring were not improper. On the other hand, based on the court's ruling, the prosecutor should not have stated that defendant intentionally went to the taco shop to intimidate the witnesses. However, this claim of error is forfeited on appeal because defense counsel failed to object. (*People v. Harrison* (2005) 35 Cal.4th 208, 243-244.) Moreover, there is no showing of prejudice. The jury had been presented with admissible evidence of intimidation based on the staring; thus, the issue of intimidation was properly before the jury and was not introduced solely by the improper reference to defendant's

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14 The prosecutor argued that defendant was confident that he could summon his friends to commit the assault because this was his area; it was "chilling" that he went to the taco shop to intimidate the victims during the walk-though; defendant thought he was "above the law"; and the jurors should send him a message that he cannot beat up citizens and then intimidate them and "stare them down." During rebuttal arguments, the prosecutor suggested that prosecution witness Villanueva did not want to identify defendant at trial because his "local hangout" was across the street from the taco shop and she was afraid, which was supported by the fact that defendant was not afraid to come over to the taco shop during the prosecution's walk-through.

intentional presence. There is no reasonable probability the prosecutor's erroneous comment about defendant's intentional presence affected the outcome. (*Id.* at p. 244.)

V. *Failure to Present Evidence and Lack of Preparation*

In his habeas petition defendant asserts he was not provided effective assistance of counsel because his attorney did not subject the prosecution's case to meaningful adversarial testing. Defendant argues his counsel was not prepared for trial and failed to present various evidentiary items to challenge the prosecution's case. To support this, he cites witness statements set forth in police reports prepared by officers who interviewed witnesses at the scene; statements that could have been used for general impeachment; the preliminary hearing testimony of defendant's companion (Ortiz); and defendant's proffered version of what occurred. Defendant also argues his counsel failed to sufficiently meet with him prior to trial to discuss his case and was not prepared for trial. His habeas petition includes copies of police reports and several declarations (i.e., from defendant's trial counsel, the attorney who represented defendant at sentencing, a woman who helped defendant retain his trial counsel, and defendant.)

We conclude defendant has not set forth a prima facie case of reversible error based on these claims.

A. *Statements to Police Officers at the Scene of the Incident*

Defendant contends that his counsel should have presented evidence based on the following items of information reflected in the police reports prepared by the officers who conducted interviews at the scene of the crime: (1) Prado's description of the altercation to the police; (2) Crystal's statement to the police that defendant put the stick

back in the trunk; and (3) Crystal's, Star's, and Prado's failure to specify to the police that defendant was one of the assailants. He argues his counsel should have presented these statements or omissions through cross-examination of the witnesses and, if necessary, called the officers to testify about the inconsistencies or omissions in the witnesses' pretrial statements.

1. *Prado's Statements Describing the Altercation*

At trial, Prado testified that he told defendant they did not want any problems and they were leaving. Defendant argues reasonably competent counsel would have impeached this testimony by presenting evidence that Prado told an officer (Officer Wallin) that he challenged defendant to fight and dared defendant to call for help, which would have turned Prado and Lopez into "attempted assailants instead of victims."[15] In his habeas declaration, defendant's trial counsel states that he overlooked Prado's statements to Officer Wallin on this issue, and he had no tactical reason for not introducing them.

Contrary to defendant's contention, Prado's statements to the police cannot be construed as showing that Prado and Lopez were attempted assailants rather than victims. Read in context, Prado's statements reflect that Prado was verbally responding to *defendant's* aggression, and that Prado and his family were trying to leave the area but were prevented from doing so by the arrival of defendant's accomplices.

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15 At the preliminary hearing, Ortiz's counsel asked Prado if he "basically challenged" defendant to a fight, and Prado answered, "No."

According to Officer Wallin's report, Prado stated that during the verbal altercation he saw defendant pull what appeared to be an axe handle from his car, and then Prado got out of his Jeep and told defendant " 'Let's go' " since it "would be [Lopez and Prado] against [defendant]." Defendant "backed off" and told Prado he was going to "call his homies over here." Prado told defendant "to go ahead and call his homies" because Prado thought he and his family would be gone before defendant's friends showed up. Theresa told Lopez and Crystal to get back in the Jeep, but then a large group of males came running from across the street and began to attack Theresa. Prado got out of the Jeep to help his wife and he was attacked.

If defense counsel had presented evidence about *some* of Prado's statements to Officer Wallin, the prosecution would have been entitled to present *all* of Prado's statements to the officer. (Evid. Code, § 356.) Prado's statements to Officer Wallin indicated that defendant pulled out an axe handle; that Prado responded to this aggressive act by verbally indicating he was willing to fight; and that Prado and his family were trying to leave when defendant's accomplices arrived and started the attack. In their entirety, these statements showed that defendant, not Prado, was the aggressor and Prado was trying to leave, not fight. Significantly, there is nothing in Prado's statement to the police suggesting that he wanted to stay and fight if defendant retreated; to the contrary, Prado's statement indicates that after he responded verbally to defendant's aggression, he only reemerged from his vehicle when he saw his wife being attacked. Given that Prado's statements to Officer Wallin were essentially favorable to the prosecution,

defense counsel was not ineffective for failing to present evidence based on these statements.

2. *Crystal's Statement that Defendant Placed the Stick Back in the Car*

At trial, prosecution witnesses testified that defendant took a bat or stick out of the car and that he was armed with a bat or stick during the assaults. According to Officer Wallin's report, Crystal stated that defendant pulled out a stick from his car and then put it back. Defendant then pulled out his cell phone and called someone, and a group of men came from across the street and attacked them. Defendant argues reasonably competent counsel would have presented evidence showing that Crystal told Officer Wallin that defendant put the stick back in the car.[16]

We agree with defendant that reasonably competent counsel would have presented evidence about the statement that defendant put the stick back, which could support the theory that defendant was not part of the attack and/or that he did not use a deadly weapon during the attack. However, we conclude the omission was not prejudicial.

The evidence presented by the prosecution showed that defendant made a call to summon a group of assailants to the scene and that the assailants were armed with sticks. Prado, Theresa, Crystal, and Star all testified that defendant was one of the attackers, and employee Villanueva told the police that she saw defendant participate in the attack.

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16 The habeas corpus declaration submitted by trial defense counsel Sanchez does not address the evidentiary item of Crystal's statement about putting the stick back, nor does Sanchez address several other evidentiary items discussed below (i.e., witnesses' failure to specify that defendant was one of the assailants during at-the-scene police interviews, and general impeachment evidence.)

Crystal's statement that defendant put the stick back in the trunk did not foreclose the possibility that he retrieved it once he called the other people to come over and help him. Supportive of this, Prado and Crystal identified defendant as one of the assailants who was armed with a bat or stick. Prado testified that defendant repeatedly hit Lopez with a stick when Lopez was trying to get in the Jeep, and that defendant hit him (Prado) in the knee with a bat or stick. Crystal testified defendant was armed with a bat when he attacked Theresa on the ground.[17]

In short, the evidence showed that defendant was the initiator of the group assault, the overall melee involved the assailants' use of sticks, multiple witnesses saw defendant join in the attack, and two witnesses observed defendant using a bat or stick during the assaults. Given this evidence, we are satisfied that even if the jurors had been presented with evidence showing that defendant put the stick back in the trunk just before using the cell phone, there is no reasonable probability they would have rejected findings that defendant participated in, and used a stick during, the attack.

Because there is no showing of prejudice, defendant cannot prevail on his claim of ineffective representation arising from his counsel's failure to present evidence on this point.

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17 Although Star testified that she did not recall defendant having a weapon when he attacked her mother, her testimony suggested she did not have a full view of the assaults while she was inside the Jeep.

3. *Failure to Specify that Defendant Was One of the Assailants*

At trial, Crystal and Star testified that defendant attacked their mother, and Prado testified that defendant assaulted him and Lopez. In the reports summarizing Crystal's, Star's, and Prado's statements to the police, there is no mention that they identified defendant as one of the assailants during the group attack. Defendant argues his counsel was ineffective because he did not present evidence showing these omissions in the statements to the police.

According to Officer Wallin's report, Crystal stated that after an initial confrontation with a "Black guy," a "bunch of Black guys" came running from across the street; "[t]hree Black guys" started to attack Lopez; "another Black guy" pulled her mother out of the car; and "they" started to hit her mother with sticks. Concerning Prado's observations, Wallin's report reflects that Prado described an initial altercation with a "Black guy," and Prado then stated that a "large group of Black males along with a Mexican male came running from across the street and began to attack my wife"; "this Mexican guy with braided hair hit me on the knee with a stick"; "a Black guy [who] rolled up in a white Cadillac . . . tried to hit me in the head with a metal pipe. . . . I can identify the guys who attacked my wife and me." According to a report prepared by Officer Luth, Star stated that after a confrontation with a man, about 10 people got out of two cars; "only two of the ten" started to attack her family; and a girl hit her father in the legs with a bat.

The police reports do not contain detailed statements exploring the extent to which defendant may have been personally involved in the assaults. Notably, the police reports

were derived from interviews that occurred at the chaotic scene immediately after the assault; they were not witness statements taken during the investigation of the case by a detective who could question the witnesses in more detail. Further, there is nothing to suggest that the witnesses consistently failed to specify defendant as an assailant during subsequent police interviews. Given that the initial reports do not delve into defendant's particular participation in the assaults and there is no showing of subsequent failure to identify defendant, even assuming arguendo reasonably competent counsel would have elicited evidence about the omissions in the witnesses' statements, there is no reasonable probability this would have caused the jury to reject the trial testimony identifying defendant as an assailant.

B. *Failure to Present General Impeachment Evidence*

Defendant asserts his counsel should have presented several items of information to generally impeach the prosecution witnesses, including statements that Star had been drinking and that the family was trying to conform their stories.

Officer Luth's report states: "[Star] had been drinking and was difficult to understand. Several times during the interview she wandered off and lost her train of thought." At trial, Star testified on direct examination that she was the designated driver during the family's outing that evening; before they went to the taco shop she had "a

couple of drinks of beer and a sip of a margarita"; and after the officers completed their investigation they walked her over to the driver's seat and saw her go off in the car.[18]

Assuming arguendo that reasonably competent counsel would have sought to challenge the accuracy of Star's observations of the assaults based on Officer Luth's description of her drinking and demeanor, defendant has not shown prejudice from this omission. Defendant has not proffered any evidence to refute Star's testimony that she drove away after the police investigation and that the officers apparently had no concern about her driving. Given the showing that she was permitted to drive away in the presence of the police, there is no reasonable probability the jury would have concluded she was unable to make accurate observations based on an officer's observation that she had been drinking.

Defendant also asserts his counsel should have cross-examined Star based on her preliminary hearing testimony that her family had talked about what had occurred and were trying to "piece it together."[19] Assuming arguendo reasonably competent counsel would have pursued this issue on cross-examination, there is no showing of prejudice. The record shows that at trial each family member described details of what they observed, and the details varied from witness to witness. For example, Theresa testified that she saw defendant and others pulling Lopez out of the Jeep and she saw defendant

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18 Theresa testified that before going to the taco shop, the Pacheco family had drinks and chips at a restaurant in Old Town. According to Theresa, they ordered a pitcher of beer and three margaritas for all of them to share, and no one was drunk.

19 This statement was elicited during the preliminary hearing by Ortiz's counsel.

beating Lopez, but she could not tell if defendant had something in his hands or what he was specifically doing. Prado testified that he saw defendant hold Lopez and repeatedly hit him with a stick as Lopez was trying to get into the Jeep. Crystal and Star testified that they saw a man other than defendant attacking Lopez while Lopez was trying to get into the Jeep. Crystal testified that defendant was armed with a bat when he attacked Theresa, whereas Star did not recall defendant having a weapon. Prado did not state that defendant attacked Theresa, but instead stated Theresa was attacked by a different man and two females. Crystal testified she did not see defendant attack any of her family members other than her mother.

Given that each witness had their own unique observations, there is no reasonable probability the jury would have found the family had fabricated their testimony to create matching descriptions even if Star had been cross-examined about her statement at the preliminary hearing.

C. *Ortiz's Preliminary Hearing Testimony*

Ortiz was charged as a codefendant in the case, and she testified on her own behalf at the preliminary hearing.[20] Prior to trial, she reached a plea agreement. She was subpoenaed to testify by the prosecution at trial, but she asserted her right against self-incrimination and the court ruled she was not required to testify. Defendant asserts reasonably competent counsel would have submitted Ortiz's preliminary hearing testimony into evidence to support that he did not participate in the fight. In his habeas

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20 Ortiz was charged with two counts of assault by means of force likely to produce great bodily injury, and was bound over on one of the counts.

declaration, defense trial counsel Sanchez states that he considered introducing Ortiz's preliminary hearing testimony but decided not to. Sanchez states that he should have introduced Ortiz's testimony once he became aware that defendant was not going to testify, because there was no other testimony to present in defendant's defense.

At the preliminary hearing Ortiz testified that defendant, who was her former boyfriend, called her to pick him up at the liquor store because he was intoxicated, and she drove with him to the taco shop because she needed to use the bathroom. Ortiz acknowledged that she got "mouthy" to Crystal when she exited the taco shop bathroom; she was yelling at Crystal and Lopez; and defendant joined the verbal altercation. As the argument continued, Prado and Lopez approached defendant in a "very aggressive way" and challenged him to a fight by "throwing their hands up" and saying " 'Come on. Let's go. What do you got?' " As the altercation continued, two other cars pulled up and blocked the Pachecos' car; about four people came out of these cars; the people attacked two men from the Pacheco group; and she did not see any sticks. She claimed that neither she nor defendant were involved in the fighting, and she and defendant got into her car as soon as the others pulled up and started the assault. She testified that she did not see anyone remove something from her car; she had no bats or sticks in her car; she had no knowledge of and nothing to do with the arrival of the other cars; she did not know where the other cars came from; and she did not recognize the cars or the people in them.

Ortiz testified she did not see defendant make a phone call during the altercation, but she did not know whether or not he did. She did not hear defendant tell the Pacheco

group that "they didn't want to leave yet." She acknowledged that defendant "h[u]ng around" the liquor store and had a lot of friends who also spent time by the liquor store.

The preliminary hearing transcript reflects that Ortiz denied making a phone call; she never affirmatively refuted that defendant made a phone call; she acknowledged that defendant had a group of friends that frequented the liquor store across the street; and she denied knowing the people who arrived and started the attack. Reasonably competent defense counsel could conclude that Ortiz's testimony would strengthen the prosecution's case because it tied defendant to the assailants who arrived from across the street, and because Ortiz implicitly acknowledged that defendant could have made a phone call even though she did not see it. That is, with respect to the issue of who summoned the attackers, Ortiz's testimony essentially shifted the blame away from her and onto defendant because it suggested the attackers were defendant's friends who were summoned by defendant, not her. Further, defense counsel could have considered that the jury might surmise that Ortiz's claim that defendant did not participate in the fight was suspect since she had an incentive to minimize his involvement in order to lessen her own culpability. On balance, counsel could have decided that Ortiz's testimony was potentially more detrimental than helpful to the defense because it could reinforce the prosecution's claim that defendant summoned his friends from across the street to commence the attack. Notably, in his habeas declaration, Attorney Sanchez acknowledges that he considered calling Ortiz but decided not to. Applying an objective standard, his decision was reasonable.

Defendant has not shown a basis for relief based on his counsel's failure to present Ortiz's testimony.

D. *Defendant's Proffered Testimony*

In his habeas declaration, defendant provides his version of what occurred during the incident. He states that he was drinking at the liquor store with some coworkers and got "really . . . drunk." After Ortiz arrived to give him a ride and they went to the taco shop, he noticed the verbal altercation between Ortiz and Crystal and he got out of the car to check on this. He told Ortiz, "leave that little bitch alone and let's go." Lopez and Prado started walking towards him and "backing [him] up"; he repeatedly told them to "stay back" but they kept coming. He popped open the trunk and grabbed a small stick. Theresa came and said they did not want any problems and asked him to put the stick back. Defendant said he also did not want problems and to tell the men to get back. Theresa said the men would back off. Defendant put the stick back in the trunk, and the family turned around and got into their car. During this incident, Ortiz was on the phone telling someone that defendant was "about to be jumped." Defendant had a phone in his hand, but he never called anyone and did not do anything during the attack but watch.

Defendant argues his version of the incident was consistent with various evidentiary items that he claims should have been presented by his counsel, including the statements and omissions reflected in the police reports and Ortiz's preliminary hearing testimony. He asserts that had this additional evidence, plus his own testimony, been

presented at trial, there is a reasonable probability that he would not have been found guilty.[21]

If defendant had been called to testify, his testimony would have supported the prosecution's case by firmly establishing that he had a group of friends across the street who were available to help him commit the assault. Moreover, if — as now urged by defendant — both defendant and Ortiz had testified on behalf of the defense, their testimony would have presented the jury with directly contradictory claims about who summoned the assailants from across the street; i.e., defendant stating Ortiz made a call, and Ortiz stating she did not do so and she did not know whether defendant made a call.

Further, the record does not support that the prosecution's version of the incident would have been significantly refuted by the additional items of evidence that defendant claims should have been presented along with his testimony. As set forth above, the police report does not reflect that Prado described himself, rather than defendant, as the aggressor. Crystal's statement to the police that defendant put the stick back into the car did not foreclose the possibility that he retrieved the stick and participated in the assault once he summoned his friends, which scenario was supported by the testimony of multiple witnesses. The on-the-scene interviews of Crystal, Star, and Prado did not delve into defendant's particular involvement, and there was no suggestion that these witnesses failed to identify defendant when they were interviewed in more depth during the police investigation of the case. Ortiz's preliminary hearing testimony would have shown that

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21 In trial counsel's habeas declaration, counsel does not address the issue of whether he should have recommended that defendant testify.

she did not know the attackers, while suggesting that defendant did know them and that he, not her, was the person who called them.

Defendant has not shown that reasonably competent counsel would have concluded that it was to the defense advantage to have defendant testify on his own behalf.

E. *Lack of Preparation for Trial*

Defendant argues that his counsel was not prepared for trial. To support this, he has submitted declarations from a woman who helped him retain trial counsel, himself, his sentencing attorney, and his trial counsel.

The woman (Jessica Holmes) who helped defendant retain his trial counsel declared as follows. In May 2009, after defendant's arrest, Attorney Sanchez agreed to accept payments on an $8,000 retainer to represent defendant, including an initial $800 payment followed by monthly payments of $400. Holmes and/or defendant paid Sanchez $800 on June 1, 2009, $395 in mid-July, and $400 on August 3, 2009. Meanwhile, defendant was released on bail on June 30, 2009. After his release, defendant and Holmes saw Sanchez, and Sanchez asked for a payment, but he did not ask defendant to meet to discuss his case.[22] When Holmes and defendant made the August 3 payment, defendant asked Sanchez how the case was looking, and Sanchez responded that the prosecution's case was based on circumstantial evidence and that if the prosecution did not present evidence that he assaulted the family the charges could be lowered to a

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22 Holmes and defendant were living with Sanchez's daughter at the time.

misdemeanor.[23] During this discussion, Sanchez did not ask defendant what occurred during the incident or set up any further meetings. On the day of trial, Sanchez told defendant that he was " 'going down.' "

In a declaration dated May 21, 2011, defendant states that he hired Sanchez while he was in jail, and that Sanchez never discussed his case with him but only told him he could get a 10-year sentence. Further, Sanchez never discussed his case when he went to make payments on the retainer fee or saw him at the house where defendant was living. (See fn. 22, *ante*.) Defendant declared that he did not know he needed a private investigator; he had a witness that Sanchez never talked to; at a court session Sanchez told him he was "going down for this"; and he wanted to testify to tell his version but Sanchez told him this was not the right thing to do. In a second declaration dated June 12, 2011, defendant sets forth his version of what occurred during the incident, and states that "he told Mr. Sanchez all of this in South Bay jail before prelim."

Defendant's sentencing attorney (Andrew Limberg) submitted a declaration stating that when he asked Sanchez to provide a copy of defendant's file, Sanchez sent him an incomplete file that was missing discovery and transcripts and that contained no notes by defense counsel. When Limberg inquired about this, Sanchez sent Limberg a few pages

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[23] Holmes's declaration also states that the "preliminary" was set for September 3, 2009, and that Sanchez told defendant that the judge would not bind the case over for trial if the prosecution did not have evidence proving defendant committed the assaults. These statements do not comport with the record, which shows that the preliminary hearing was held on June 23 and 24, 2009; defendant (who was present at the preliminary hearing) was bound over for trial; and *trial* was set for September 3, 2009.

of missing discovery, but not the missing transcripts and no notes.[24] Sanchez stated in a letter to Limberg that during the six months that defendant was out of custody between the preliminary hearing and trial, defendant did not contact Sanchez and there were no conferences.

Attorney Sanchez's habeas corpus declaration discusses several matters that he believes he should have done differently at trial, and concludes: "I can honestly say that I was not myself and this was not my best effort due to illness from heart disease and side [e]ffects from medication."[25]

Although defendant has submitted information indicating that Sanchez did not consult with him during the months before trial, defendant acknowledges that he fully informed Sanchez of his version of what occurred before the preliminary hearing. Complaints about the number of times a defendant sees his attorney do not, standing alone, show inadequate representation. (*People v. Valdez* (2004) 32 Cal.4th 73, 96.) Defendant has not shown that Sanchez failed to consider defendant's version of the incident when preparing his defense, nor that Sanchez did not diligently prepare for trial. Defendant's and Holmes's statements that Sanchez told defendant he was "going down" do not alone suggest ineffective representation. For example, assuming Sanchez said

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24 Limberg ultimately obtained the missing discovery and transcripts from Ortiz's counsel.

25 Sanchez states he should have presented Ortiz's preliminary hearing testimony and Prado's statements about the challenge to fight. He also states he should have requested an instruction stating that voluntary intoxication is a defense to a conspiracy, and argued to the jury that defendant's obvious intoxication prevented him from forming the intent to agree to commit assaults and the intent to assault.

something to this effect, he may merely have been providing his assessment of defendant's chances of success when discussing whether to consider a plea bargain. Further, Holmes's declaration reflects that at one point Sanchez told defendant there was a possibility the charges would be reduced because of deficiencies in the prosecution's proof, which shows Sanchez did not blindly assume defendant did not have a chance of success at trial. There has been no showing that Sanchez had formed a bias against his client even if he used colorful language to inform defendant about his ultimate opinion of the strength of the prosecution's case.

Attorney Limberg's statements that Sanchez did not provide him with portions of defendant's file at the time of sentencing do not indicate that Sanchez did not have the materials necessary for competent representation during trial. Attorney Limberg does not specify any materials that he was not provided that suggest that Sanchez ignored a crucial item of evidence that reasonably might have affected the outcome of the trial or prevented a fair trial.

Finally, Sanchez's self-described inadequacies do not, standing on their own, show that his representation fell below an objective standard of reasonableness. In evaluating claims of ineffective assistance of counsel, we "'"address not what is prudent or appropriate, but only what is constitutionally compelled." . . . [Citation.]'" (*In re Andrews* (2002) 28 Cal.4th 1234, 1255.) Although arguably defense counsel's representation could have been more vigorous, we have reviewed the entire record and are satisfied that counsel was adequately prepared for trial, he conducted appropriate cross-examination and presented proper arguments to challenge the prosecution's case,

and defendant was not deprived of a fair trial. The record does not show constitutionally deficient representation.

VI. *Cumulative Error*

Defendant argues that the cumulative effect of the errors in his case deprived him of a fair trial. The contention fails. As set forth above, the evidence supported presentation of a conspiracy theory of culpability to the jury, the conspiracy theory was properly presented as an alternative to aiding and abetting culpability, and there was no violation of the corpus delicti requirement. Although the jury should have been told that intoxication could negate the intent required for conspiracy culpability, we are satisfied the jury understood this principle based on the record as a whole, including the instructions on aiding and abetting and the prosecutor's closing arguments. Counsel was not ineffective for failing to raise the intoxication defense during closing arguments. There was no need for a unanimity instruction. The trial court was not required to exclude the evidence concerning the encounter at the taco shop several months after the assaults, and the prosecutor's improper comment to the jury that defendant intentionally went to the taco shop during the walk-through was not prejudicial. Defense counsel was not ineffective for failing to present evidence about Prado's description of the altercation to the police, nor for failing to introduce Ortiz's and defendant's testimony. To the extent reasonably competent counsel might have presented various evidentiary items in defense (i.e., Crystal's statement about defendant putting the stick back in the car, the failure of several witnesses to tell the police at the scene that defendant was one of the group of assailants, and general impeachment evidence), when considering the record as a whole,

none of these evidentiary items was of sufficient evidentiary weight to have significantly undermined the prosecution's case. Defendant concedes that his attorney interviewed him to secure his version of what occurred, and defendant has not shown that his counsel did not diligently prepare for trial.

Viewing the record in its entirety, we are satisfied that defendant received a fair trial.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.

APPENDIX F

CSC DENIAL OF PETITION FOR REVIEW

Court of Appeal, Fourth Appellate District, Division One - Nos. D057482/D059929

S198671

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

NATHAN SMITH III, Defendant and Appellant.

AND CONSOLIDATED CASE.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice