No. 19-

In the United States Supreme Court

JOEL ELIAS SANCHEZ,,

Petitioner,

v.

JEFFREY A. BEARD, Warden,,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). At Joel Sanchez's murder trial, he sought as part of his self-defense case to present toxicological evidence that the decedent was under the influence of alcohol and methamphetamine, to corroborate his statements that the man had approached him in a threatening way that made him fear for his life. But the trial court excluded the evidence as irrelevant.

This petition presents two questions:

1. Did excluding this evidence violate Sanchez's clearly established right under *Crane*?
2. Did the Ninth Circuit exaggerate the degree of deference required under 18 U.S.C. § 2254(d)(1) by holding (in the alternative) that the exclusion here could not amount to an unreasonable application of the Court's existing precedents?

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PETITION FOR WRIT OF CERTIORARI

After a mistrial, Joel Sanchez was recharged and convicted for second degree murder in the shooting death of Manuel Torres. Sanchez's theory at trial was perfect or imperfect self-defense: Torres had approached him so angrily while wielding an opened tri-fold knife that he'd shot Torres in fear for his life.

To corroborate his account of Torres's approach, Sanchez sought to present a toxicology report showing Torres was on both alcohol and methamphetamine, the behavioral effects of which are considered "common knowledge" under California law. Yet the trial court excluded the evidence, stating that without an expert's testifying that the specific levels of these substances in Torres's blood would have led to violent behavior, the report was irrelevant.

This ruling violated Sanchez's clearly established right to a "meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The toxicological evidence was all that could have corroborated his statements about the way Torres had approached him, and was thus critical to his ability to present a viable self-defense case. Excluding it on relevancy grounds was arbitrary given California's "common knowledge" rule.

The Ninth Circuit panel's contrary decision, holding that there was no due process violation, overlooks the arbitrariness of the state court's ruling. The panel's decision also inappropriately expands the deference already required under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

The Court should grant certiorari, vacate, and remand so that the Ninth Circuit can decide the matter in view of the correct background considerations and operative constitutional and statutory standards.

OPINIONS BELOW

The Ninth Circuit's unpublished memorandum disposition is at App. 1a, and reported at 742 F. App'x 334. The final report and recommendation adopted by the U.S. District Court is at App. 12a. The unpublished opinion of the California Court of Appeal is at App. 67a.

JURISDICTION

The Ninth Circuit issued its decision on November 16, 2018. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [No State shall] deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> 1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal

law, as determined by the Supreme Court of the United States; or

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

STATEMENT OF THE CASE

Joel Sanchez admitted he fatally shot Manuel Torres. The question was whether it was murder or self-defense.[1]

A. The shooting

Nearby residents had reported the 2005 shooting. By the time officers arrived, they found Torres, losing consciousness. App. 129a. There'd later be officer testimony that Torres had said, "[H]e shot me. He was trying to steal the stereo from my van and he shot me" App. 129a–130a, and that Torres had been chasing Sanchez before Sanchez turned around and shot him. Torres was transported to the hospital and later died. App. 131a–132a.

Police had no suspects until the next day, when 15-year-old Gary Bailey turned himself in. Before doing so, Bailey had spoken to his uncle, who worked for the Indio Police Department. App. 120a. Bailey would later testify under a grant of immunity. App. 107a–108a.

According to his testimony at Sanchez's first trial,[2] he and Sanchez were members of a local gang. He considered Sanchez an acquaintance.

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[1] Unless otherwise noted, the facts in this section are as stated in the California Court of Appeal's opinion. App. 68a–70a.

[2] His testimony at the first (which ended in a mistrial) would be read into the record at the second.

The day of the shooting, Bailey and Sanchez were hanging out and smoking methamphetamine together. They saw fellow gang members Flaco and Kiwi, and they were all talking when they saw Torres drive his van in, "booming" loud music. Torres parked the van and walked away from it.

Flaco asked Bailey to help him remove the speakers from the van, but Bailey refused. So Flaco removed them himself, took them to a truck, and drove away. After Kiwi left, Bailey and Sanchez looked inside the van to see what they could steal. They entered the van to remove another speaker and a CD player. But when Sanchez saw Torres coming back they both ran away.

According to Bailey, while they hid, Sanchez suggested that they rob Torres at gunpoint, but Bailey declined. Torres was getting into his van when he spotted Sanchez and Bailey. He started to chase them. App. 112a–113a. After running through some parking areas and between buildings in the apartment complex, they stepped into a dumpster enclosure to hide. Torres must have spotted Sanchez peeking over the wall, App. 113a–114a, because he sped toward the enclosure, App. 115a–116a. Bailey told Sanchez that they needed to leave, but Sanchez refused, and Bailey ran away without him.

Bailey ran about 20 feet, then turned around and saw Sanchez with a gun in his hand and his arm extended at a downward angle. Bailey heard Torres say, "No. It's okay." Bailey said he kept running and heard the shot.

The incident left Bailey in "shock." App. 110a. He hadn't expected any of this to happen. Sanchez didn't fight or threaten people, and he'd never seen Sanchez do anything "bad." App. 123a–124a.

Sanchez was arrested three days after the shooting. He spoke to the police, and his recorded statements were later played for the jury at trial. Like Bailey, Sanchez told the police that he was in a parking lot with Flaco and some others when Torres drove up. He first denied shooting anyone, but later admitted he shot Torres in self-defense. He claimed that Torres asked who stole his "system" as he quickly approached Sanchez carrying a folding knife. He thought Torres was going to stab him. App. 48a–49a, 154a. So he pulled the gun out of his pocket and shot Torres, once, then ran. Sanchez denied that Torres put his hands up or said "hey" or "okay." Sanchez said he didn't run away when Bailey did because he wasn't the one who stole anything. App. 151a, 157a, 159a. He repeatedly said that he had not intended to kill Torres, and acted in self-defense.

When police processed the crime scene, they found Torres's van parked askew in a handicapped spot, engine still running. App. 98a, 101a. One of the rear tires had left a 15 foot skid mark running up to where the van was parked. The police found an open, tri-fold knife and a shell casing from an expended bullet near the dumpster enclosure.

B. The toxicology report

A forensic pathologist prepared a toxicology report that showed that Torres had a blood alcohol level of .10 and a blood methamphetamine level of 263 nanograms per milliliter. App. 86a. The prosecutor

moved before trial to exclude the results, arguing that defense counsel was trying to "dirty the victim," and that expert testimony was necessary to explain what impact the drugs or alcohol had on Torres and that the blood had been properly drawn. Defense counsel countered that the effects of alcohol above the legal limit were a matter of "common knowledge," and that the jury could decide the likely effects of the toxicology results on Torres's conduct. App. 86a–87a, 91a–92a. The trial court took the matter under submission and eventually ruled that the toxicology results were irrelevant without other evidence that would "point to relevance."

C. The trial and retrial

The first trial ended in a hung jury, in 2009. At the second trial in 2010, the jury rejected the first-degree murder charge, but found Sanchez guilty of second-degree murder, and found gun and gang allegations true.

D. Direct review

On direct appeal, the California Court of Appeal affirmed in an unpublished reasoned decision. App. 67a. The court acknowledged that "[t]he effects of drugs and alcohol have become the subject of common knowledge." App. 75a. But it held that exclusion did not violate Sanchez's due process right to present a defense because the toxicology results were irrelevant without an offer of proof that the psychological effect of a combination of methamphetamine and alcohol in Torres's system would cause him to act "in a crazed or maniacal manner." App.

76a. Finding no error, the court did not review for harmlessness. The California Supreme Court summarily denied review. App. 66a.

A. Federal proceedings

After Sanchez raised his due process and other claims in a federal habeas petition in district court, the court denied relief on all claims and denied a certificate of appealability. App. 10a.

The Ninth Circuit granted a COA, but ultimately affirmed. The panel held much the same as the state court did, stating that Sanchez offered the evidence only so that the jury could "speculate" and "infer" that Torres had been aggressive based "solely" on the toxicology results, and that the exclusion was not constitutionally improper because Sanchez failed to offer any expert testimony or evidence to suggest that the combined effect of the methamphetamine and alcohol causes violent or aggressive behavior. App. 2a.

But the Ninth Circuit also held that in any event the exclusion could not amount to an unreasonable application of this Court's precedent because the Court "has never held that evidence excluded on relevancy grounds violates a defendant's constitutional rights." App. 3a. (citing *Holmes v. South Carolina*, 547 U.S. 319, 326–27 (2006)).

This petition follows.

REASONS FOR GRANTING THE WRIT

Review should be granted because the Ninth Circuit's unreported disposition both overlooks the state court's arbitrary application of binding state law and relies on a cramped interpretation of AEDPA's already stringent deference standards. Because correcting these purely

legal errors would require only modest expenditure of the Court's resources, this is an appropriate case for the Court to exercise its discretion to grant the petition, vacate the Ninth Circuit's judgment, and remand for further proceedings consistent with the Court's decision.

A. The state court's exclusion of the toxicology report violated Sanchez's due process right under *Crane*.

The constitution guarantees every criminal defendant the fundamental right to "a meaningful opportunity to present a complete defense." *Crane*, 476 U.S. at 687. While states may promulgate evidentiary rules that ensure the efficient presentation of evidence and exclude evidence that is misleading, irrelevant, cumulative, or unduly prejudicial, those rules "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Federal courts thus must evaluate the rule "as applied" in the particular case to determine whether that ruling violated due process. *Id.* at 296 (1973); *Holmes v. South Carolina*, 547 U.S. 319, 329 (2006). And as applied, the rule must "rationally serve the end that [it] w[as] designed to promote." *Holmes*, 547 U.S. at 330 (holding that right to fair trial was violated by blanket exclusion of third-party guilt evidence conditioned on prosecutor's forensic showing).

Here, the trial court violated these core principles by prohibiting Sanchez from presenting the only evidence that would have corroborated his statements describing Torres's affect as he approached:

Objective toxicological evidence, developed by law enforcement, showing that Torres had been under the influence of alcohol and methamphetamine.

No one needed an "expert" to explain the significance of this evidence to the jury—not to render it merely relevant, at any rate. The relevance question is simply whether the evidence "has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence." *Jackson v. Virginia*, 443 U.S. 307, 320 (1979). And it's a matter of "common sense" that the behavior of a person who has been drinking and using methamphetamine is at least slightly more likely to be "altered and erratic." *Harris v. Cotton*, 365 F.3d 552, 556 (7th Cir. 2004) (observing same about drinking and using cocaine). The toxicological evidence thus "directly corroborates [Sanchez's] contentions about how he perceived [Torres's] behavior at the time." *Id.* at 556–57. And it's not difficult to see that "an affirmative defense of self-defense against a drunk and [methamphetamine]-high victim stands a better chance than the same defense against a stone-cold-sober victim." *Id.*

The State is in no position to disagree with this analysis because the California Supreme Court has already acknowledged its premises. In *People v. Wright*, 39 Cal.3d 576 (1985), for example, the court held that it was an abuse of the trial court's discretion in a first-degree murder trial to exclude evidence tending to show that the alleged victim was under the influence of heroin. *Id.* at 583. Notably, Wright's express aim in seeking to present this evidence was the same as Sanchez's

here—to "support his perception of the victim's irrational state of mind by introducing evidence from which the jury could infer the victim was under the influence of a narcotic." *Id.* at 583. And given that no other evidence was presented to corroborate Wright's "version of the incident," the "probative value" of this evidence was "significant." *Id.* By obvious implication, then, it was at least relevant.[3]

The clear relevance of this evidence has been affirmed in another California Supreme Court decision, *People v. Yeoman*, 31 Cal. 4th 93 (2003), which expressly held that the behavioral effects of drugs have become a subject of "common knowledge." *Id.* at 162. The court noted that fact on the way to rejecting the defendant's claim that jurors had committed misconduct by recounting personal experiences involving drugs. The court was also keen to point out that the jurors' appeal to these experiences during deliberation was not just permitted but "expected." *Id.* at 161 ("[L]ay jurors are expected to bring their individual backgrounds and experiences to bear on the deliberative process."). And the legal issue they were expected to bring this common knowledge to bear on was the defense claim that defendant's "*conduct* was related to his drug use." *Id.* at 162 (emphasis added). Though this issue turned on the opinion testimony of a defense expert, *id.* at 106–07, a juror's common knowledge about the behavioral effects of drug

[3] That the *Wright* court went on to find the error harmless on the facts there, *id.* at 586 has no bearing here, since the Ninth Circuit has not purported to address harmlessness, and Sanchez does not ask this Court to reach the issue.

use can hardly be relevant in evaluating expert testimony about the effect of drug use on intent, *id.*, yet irrelevant in evaluating the effects of drug use on behavior.

Nor is there any question that the trial court here found the evidence irrelevant rather than overly prejudicial. App. 94a, 104a. And that ruling, as in *Wright*, went to self-defense, the core issue at trial and the only one seriously contested: Sanchez was not guilty of murder if there was reasonable doubt about whether he killed Torres believing that he was in imminent danger of suffering great bodily harm.

Trial counsel thus "sought to paint a picture" of the situation Sanchez faced, *Crane*, 476 U.S. at 691—Torres approaching, wielding an opened knife, showing enough menace to lead Sanchez to actually fear for his life and think, in that moment, that shooting Torres was the only way to save himself. The burden, on the prosecution, was to disprove that picture. App. 135a. And that burden could only be met absent reasonable doubts about whether Torres's manner was threatening enough. App. 138a. So defense counsel did not need to show that Torres was "crazed or maniacal" for the defense to be effective. *Cf.* App. 75a. Evidence that Torres was "high" on alcohol and methamphetamine—objective evidence whose reliability was beyond dispute, *cf. Chambers*, 410 U.S. at 302—could have been enough to create the necessary reasonable doubt. So "[whatever] the strength or merits of [Sanchez's] defense," it's "plain that introducing evidence" tending to show Torres was acting violently "was all but indispensable to any chance of its succeeding." *Crane*, 476 U.S. at 691.

The state court's ruling thus gutted Sanchez's ability to defend against the charge, depriving him of the basic right to have the prosecutor's case "encounter and survive the crucible of meaningful adversarial testing." *Crane*, 476 U.S. at 690–91. For in its absence, the prosecution was free to dismiss defense argument that Torres was high as "mere speculation"—precisely because the only evidence of that was the "crack" pipe found at the scene. App. 141a–144a. This emphasis on the absence of evidence the prosecutor himself successfully sought to exclude "left no doubt about the importance the State attached" to it once the matter was before the jury. *Banks v. Dretke*, 540 U.S. 668, 700 (2004). And because the state had no valid justification for the exclusion of this important defense evidence on relevancy grounds, the exclusion was unconstitutional. *Crane*, *supra*.

In sum, the state court excluded this critical evidence on relevancy grounds despite binding—and correct—state law that such evidence is at the very least relevant. The exclusion was thus arbitrary, and particularly problematic given that it kept from the jury the only corroboration available. In this respect Sanchez presents an easier case than *Chambers*, since here the Court need not deprecate the use or rationality of the state's operative rule. *Cf. Chambers*, 410 U.S. at 296–97 (holding that violation consisted in state court's applying otherwise rational rule "mechanical[ly]"). For the rule was already on Sanchez's side; it was the state court's arbitrary failure to apply it that lead to the constitutional violation.

The Court should therefore reverse the Ninth Circuit's ruling, and hold that the exclusion violated Sanchez's right to due process under *Crane*.

B. The Ninth Circuit's alternative rationale improperly overstated AEDPA's already demanding standard.

But the Ninth Circuit panel also held, in the alternative, that even if there is a due process violation, the state court's decision "cannot be contrary to or an unreasonable application of clearly established Supreme Court precedent," because this Court has "has never held that evidence excluded on relevancy grounds violates a defendant's constitutional rights." App. 3a.

But this puts an inappropriate gloss on the deference standard set out in subsection (d)(1)—a standard that is already "difficult to meet" as it is. *Johnson v. Williams*, 568 U.S. 289, 292 (2013). By its terms, the standard requires (as a prerequisite to a grant of habeas relief by a federal court) that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [the Court]." 28 U.S.C. § 2254(d)(1). Yet as the Court has noted, the fact that the relevant "clearly established Federal law" is "stated in general terms does not mean the [state court's] application was reasonable." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). Nor, along similar lines, does AEDPA "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Id.*

So if the Court agrees with Sanchez that the state court's exclusion of the toxicological evidence was arbitrary and thus a violation of clearly established law, the Court should remand to the Ninth Circuit to apply subsection (d)(1) in the first instance—and to do so with no more deference than that subsection requires.[4]

C. Limited error correction here would provide valuable guidance on an important issue otherwise likely to evade review.

Though it isn't "customary," this Court will review factbound decisions involving the application of established standards "when the issue is properly before [it] and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (citing cases) (so holding with respect to review for sufficiency).

On these terms, review here would yield a net benefit. For starters, there's no need for "a detailed review of the particular facts." *Kyles v. Whitley*, 514 U.S. 419, 455 (1995) (Stevens, J., concurring) (noting why review was justified there). For there is no real dispute about them. The core issues raised in this petition are thus narrow and purely legal.

Nor does Sanchez's claim entail a "case-by-case balancing of interests." *Nevada v. Jackson*, 569 U.S. 505, 511 (2013). The state court

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[4] The Court should similarly leave it to the Ninth Circuit to determine harmlessness, since the panel did not reach that question.

didn't "balance" anything. It simply ruled—in an unpublished case that thus "must not be … relied on … in any other action," Cal. R. Ct. 8.1115—that the evidence here was categorically irrelevant.

This leaves review here highly circumscribed, and accordingly far less burdensome than would be review to decide the claim itself, which would involve both an analysis under section 2254(d)(1) and (if the (d)(1) bar is met) a fact-intensive, de novo determination of harmlessness. The Court can thus address the narrow questions here in short order and leave plenary review of the claim to the Ninth Circuit. *See*, *e.g.*, *Spears v. United States*, 555 U.S. 261 (2009) (per curiam) (issuing GVR, where Eighth Circuit treated district court rejection of 100:1 crack-to-cocaine ration as impermissible despite its having been "explicitly approved by *Kimbrough* [*v. United States*, 552 U.S. 85 (2007)]" one year before). *See also In re Davis*, 557 U.S. 952 (2009) (summarily transferring case to district court for hearing and findings on petitioner's innocence).

The minimal effort would be worth it. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 294. That right "would be an empty one if the State were permitted to exclude competent, reliable evidence … central to [a] defendant's claim of [self-defense]." *Crane*, 476 U.S. at 690 (holding same about evidence of innocence). At the same time, it would "break no new ground" in observing that an essential component of that opportunity is a meaningful opportunity to present relevant evidence. The Court should

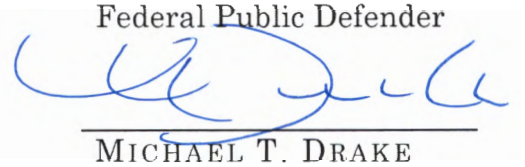
say so, and with that much clarified remand to the Ninth Circuit to conduct further proceedings consistent with the Court's opinion.

CONCLUSION

The Court should grant the petition, vacate the Ninth Circuit's judgment, and remand so that the panel can decide the case under the correct background assumptions and constitutional and statutory standards.

Respectfully submitted,

HILARY L. POTASHNER
Federal Public Defender



February 13, 2019

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APPENDIX

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NOT FOR PUBLICATION

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOEL ELIAS SANCHEZ, Petitioner-Appellant, v. JEFFREY A. BEARD, Respondent-Appellee.	No. 15-56369 D.C. No. 5:13-cv-01448-MMM-VBK MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Submitted November 13, 2018**
Pasadena, California

Before: GOULD and MURGUIA, Circuit Judges, and AMON,*** District Judge.

Joel Sanchez was convicted in California state court of second-degree murder for the shooting and killing of Manuel Torres. In this habeas petition, Sanchez challenges the exclusion of a toxicology report during his murder trial. The

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Carol Bagley Amon, United States District Judge for the Eastern District of New York, sitting by designation.

toxicology report showed that Torres was under the influence of methamphetamine and alcohol at the time of the shooting. Without offering any expert testimony to explain the toxicology results, Sanchez sought to introduce the report to corroborate his claim of self-defense that he shot a "crazed" and "maniacal" Torres out of fear for his own life. Sanchez unsuccessfully appealed the trial court's evidentiary ruling. We have jurisdiction under 28 U.S.C. §§ 1291 and 2254, and we affirm.

Our review of the state court's decision denying Sanchez's appeal is governed by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2254(d). Sanchez argues that the toxicology report constituted "critical" evidence that directly corroborated his self-defense theory. He claims that the exclusion of the report violated his constitutional right to present a complete defense, and was therefore contrary to, and an unreasonable application of, Supreme Court precedent.

However, unlike the excluded evidence in *Chambers v. Mississippi*, 410 U.S. 284 (1973), which directly corroborated the defendant's main defense that a third party in fact had killed the victim, the toxicology report in this case by itself provided little support to Sanchez's theory that he shot Torres in self-defense. Sanchez wanted the jury to infer and speculate, based solely on the toxicology results, that the amount of drugs and alcohol in Torres's body caused Torres to act in an aggressive manner, justifying Sanchez to shoot Torres out of fear. Yet, Sanchez offered no expert testimony and no evidence to suggest that it is common knowledge that the combined effect of methamphetamine and alcohol causes an individual to act aggressively or

violently. This is not the type of "critical, corroborative" evidence the Supreme Court has held leads to a constitutional violation when erroneously excluded. *DePetris v. Kuykendall*, 239 F.3d 1057, 1062 (9th Cir. 2001) (citing *Chambers*, 410 U.S. at 302 and *Washington v. Texas*, 388 U.S. 14, 18–19 (1967)).

Even assuming the toxicology report constituted relevant defense evidence, Sanchez still fails to overcome AEDPA deference. The Supreme Court has never held that evidence excluded on relevancy grounds violates a defendant's constitutional rights. *Holmes v. South Carolina*, 547 U.S. 319, 326–27 (2006) ("While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose . . . , we have stated that the Constitution permits judges to exclude evidence that is repetitive, only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues.") (internal quotation marks and citations omitted; alterations incorporated). Thus, the state appellate court's decision to affirm the trial court's evidentiary ruling "cannot be contrary to or an unreasonable application of clearly established Supreme Court precedent." *Moses v. Payne*, 555 F.3d 742, 759 (9th Cir. 2009) (citing *Wright v. Van Patten*, 552 U.S. 120, 124–26 (2008)).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

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

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

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

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

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

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

(1) A. Purpose (Panel Rehearing):

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

B. Purpose (Rehearing En Banc)

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

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

(2) Deadlines for Filing:

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

(3) Statement of Counsel

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

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

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

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

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

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

Attorneys Fees

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

Petition for a Writ of Certiorari

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

Counsel Listing in Published Opinions

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

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

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

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

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

_____ v. _____ 9th Cir. No. _____

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

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

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

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

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

Continue to next page

Form 10. Bill of Costs - *Continued*

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

Signature _____

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

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOEL ELIAS SANCHEZ, Petitioner, v. JEFFREY BEARD, Respondent.	No. ED CV 13-01448-MMM (VBK) JUDGMENT

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

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed with prejudice.

DATED: July 9, 2015

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOEL ELIAS SANCHEZ, Petitioner, v. JEFFREY BEARD, Respondent.	No. ED CV 13-01448-MMM (VBK) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. §636, the Court has reviewed the Petition for Writ of Habeas Corpus ("Petition"), the records and files herein, and the Report and Recommendation of the United States Magistrate Judge ("Report").

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IT IS ORDERED that: (1) the Court accepts the findings and recommendations of the Magistrate Judge, and (2) the Court declines to issue a Certificate of Appealability ("COA").[1]

DATED: July 9, 2015

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

[1] Under 28 U.S.C. §2253(c)(2), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that, to obtain a Certificate of Appealability under §2253(c), a habeas petitioner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further'." Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S.Ct. 1595 (2000)(internal quotation marks omitted); see also Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029 (2003). After review of Petitioner's contentions herein, this Court concludes that Petitioner has not made a substantial showing of the denial of a constitutional right, as is required to support the issuance of a COA.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOEL ELIAS SANCHEZ, Petitioner, v. JEFFREY BEARD, Respondent.	No. ED CV 13-01448-MMM (VBK) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

INTRODUCTION

On August 15, 2013, Jose Elias Sanchez (hereinafter referred to as "Petitioner"), a California state prisoner proceeding pro se, initiated this federal habeas action by filing a form "Petition for Writ of Habeas Corpus By a Person in State Custody 28 U.S.C. § 2254" ("Petition"); and on September 22, 2014, Petitioner filed a "First Amended Petition [etc.]," together with an attached Memorandum of

Points and Authorities and various exhibits in Support of the First Amended Petition (collectively "First Amended Petition" or "FAP"). On October 24, 2014, Respondent filed an Answer to the First Amended Petition ("Answer"), together with a separate "Memorandum of Points and Authorities in Support of the Answer [etc.]" ("R's MPA"). On December 2, 2014, Petitioner filed a "Reply to Respondent's Answer [etc.]" ("P's Reply").

Briefing having now been deemed completed, the case is ready for decision. Having reviewed the allegations of the First Amended Petition, the matters set forth in the record, and the parties' filings, it is recommended that the First Amended Petition be denied and this case be dismissed with prejudice.

PROCEDURAL HISTORY

On March 5, 2008, an Information was filed in the Riverside County Superior Court charging Petitioner with two counts in connection with the shooting of victim Manuel Torres that allegedly occurred on or about August 28, 2005: (1) first degree murder (count 1; California Penal Code ["P.C."] § 187(a)); and (2) willfully participating in a criminal street gang (count 2; P.C. § 186.22(a)). (See Clerk's Transcript, Volume 1 ["1 CT"] 205-06.) A trial commenced in December 2008; and one of the prosecution's main witnesses was Gary Bailey ("Bailey"), who testified under a grant of immunity, and who, along with Petitioner, was a member of the Varrio Mecca Vineyards gang, and who had been with Petitioner moments before the shooting. (See 1 CT 197; see also 1 RT 166-67.) The jury in that first trial was unable to reach a verdict on the murder count, and on January 8, 2009 the trial judge declared a mistrial. (See 1 CT 238-39.)

On January 21, 2009, a "First Amended Information" was filed (see 1 CT 241-42); and on February 5, 2009, a "Second Amended Information" was filed, now charging only a single count, for murder, and dropping the separate gang charge, but setting forth two separate allegations, that (1) Petitioner committed the murder for the benefit of a criminal street gang (in violation of P.C. § 186.22(b)(1)(C)), and that (2) Petitioner personally and intentionally discharged a firearm causing great bodily injury or death (P.C. §§ 1192.7(c)(8) and 12022.53(d)). (See 1 CT 244-45.)

In the lead-up to a second trial, around April 2010, witness Bailey was not responding to subpoenas and could not be located, and a bench warrant was issued. (See 12 CT 259-60.) As detailed more fully below, on June 21, 2010, the trial judge held a hearing, where he heard testimony from an Investigator for the District Attorney and, after hearing arguments from the parties, the judge declared Bailey unavailable for the second trial, and ordered that Bailey's testimony from the first trial could be read to the jury at the second trial. (See 1 CT 259-60, 267; 1 RT 16-25.)

Petitioner was represented at the second trial by new counsel (i.e., not the same counsel who represented Petitioner at the first trial). (Cf., e.g., 1 CT 55-61 with 1 RT 1.) Following the second trial, on July 1, 2010, another jury in the Riverside County Superior Court found that Petitioner was not guilty of first degree murder, but found him guilty of second degree murder. (See 2 CT 421-22, 454-47.) The jury also found true the allegations that petitioner committed the murder for the benefit of a criminal street gang and that he personally discharged a firearm. (See id.) The trial court sentenced Petitioner to a total indeterminate term of 40 years to life in state

prison. (2 CT 465, 482-83.)

On February 7, 2011, Petitioner filed a direct appeal in the California Court of Appeal. (Lodgment 3.) On June 4, 2012, the appellate court denied that appeal in a reasoned, unpublished opinion. (Lodgment 6.) On June 15, 2012, Petitioner filed a Petition for Rehearing in the California Court of Appeal, and the appellate court denied that request without comment. (Lodgments 7, 8.)

On July 12, 2012, Petitioner filed a Petition for Review in the California Supreme Court; and on August 17, 2012, the California Supreme Court denied that petition without comment. (Lodgments 9, 10.)

As noted, on August 15, 2013, Petitioner initiated this federal habeas action by filing his initial Petition, and on that same date Petitioner filed a separate "Motion to Stay and Hold Petition for Writ of Habeas Corpus . . . in Abeyance Pending Exhaustion" (hereinafter "Motion for Stay"). (Docket No. 2.) Respondent did not oppose a stay; and on September 13, 2013, this Court granted Petitioner's request and stayed this action. (See Docket Nos. 8, 9.)

On February 7, 2014, Petitioner filed a "Petition for Writ of Habeas Corpus" in the California Supreme Court. (See Lodgments 12, 13.) On April 16, 2014, the California Supreme Court denied that state habeas petition without substantive comment, apparently stating as follows: "The petition for writ of habeas corpus is denied. (See In re Dixon (1945) 41 Cal. 2d 756, 759.)." (Lodgment 13.)[1]

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[1] In re Dixon, 41 Cal. 2d 756, 759 (1945) stands for the proposition that, as a general rule, habeas corpus cannot serve as a substitute for an appeal and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, a habeas writ will not lie where the claimed errors could have been, but were (continued...)

As noted, on September 22, 2014, Petitioner returned to federal court and filed the First Amended Petition. (See Docket No. 34.)

FACTUAL BACKGROUND

The California Court of Appeal set forth a factual background in denying Petitioner's direct appeal (see Lodgment 6 at 1-4) which this Court summarizes and supplements with its own review of the record as follows:

Petitioner and Gary Bailey were members of the Varrio Mecca Vineyards gang (sometimes hereinafter "VMY"). On August 28, 2005, Bailey met with Petitioner to hang out and smoke methamphetamine at a parking lot within the gang's territory. Bailey was around 15 years old at that time. Petitioner and Bailey saw fellow VMY gang members "Flaco" and "Kiwi," and the four of them were hanging out and talking when a van driven by victim Manuel Torres drove up, "booming" loud music. Torres parked the van and walked away from it.

Flaco asked Bailey to help him remove the speakers from Torres's van, but Bailey refused. Petitioner claimed that Flaco wanted to show a "little homie" how to "jack" things. Flaco removed the speakers from the van by himself, took them to a truck, and then drove away. Kiwi eventually left too; and after Kiwi left, Petitioner and Bailey looked inside the van to see what they could steal. They entered the van to remove another speaker and the CD player. However, Petitioner and Bailey ran away when Petitioner saw Torres approaching.

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[1](...continued)
not, raised upon a timely appeal from a judgment of conviction. See, e.g., Fields v. Calderon, 125 F.3d 757, 759 (9th Cir. 1997) (discussing the adequacy of the Dixon rule as a procedural bar to consideration of a federal habeas petition).

As Petitioner and Bailey hid behind a bush, Petitioner suggested to Bailey that they rob Torres at gunpoint, stating, "Let's go put the strap [i.e., gun] on. We will take everything he has." Bailey told Petitioner "Fuck that." The men then walked back and saw Torres's van pulling out. They watched the van leave, and then they walked to a dumpster by another parking lot. The van then approached quickly, and left about a 15-foot skid mark when it stopped. Bailey told Petitioner that they needed to leave. When Petitioner refused to leave, Bailey ran away without him.

Bailey ran about 20 feet, then turned around and saw Petitioner with a gun in his hand and his arm extended at a downward angle. Bailey heard the victim Torres say, "No. It's okay. No tambien. No. No. Tambien. Tambien. It's okay." "Tambien" means "it's okay" in Spanish. Bailey kept running and then he heard a shot. He later saw Petitioner run away.

Police investigators called to the scene found the van still running; 15-foot skid marks left by the van's rear tires; an expended .25-caliber bullet casing in front of the van; and a tri-fold knife with its blade exposed, also in front of the van. (See 1 RT 69-73.) A prosecution expert testified that, based on Torres's height, the bullet's path was consistent with the bullet striking Torres as he was turning away from the shooter and bending forward at the waist or running. (1 RT 123-24.)

The day after the shooting, Bailey turned himself in to the police. Petitioner was arrested about two days later. A search of Petitioner's home resulted in the discovery of two boxes of .25-caliber ammunition in Petitioner's father's closet. The casings of that ammunition were consistent with the .25-caliber casing found at

the scene of the shooting. (1 RT 97-98.)

Petitioner gave several interviews to the police that were recorded and eventually played for the jury. Petitioner initially denied shooting anyone; but he eventually admitted that he shot a man in self-defense, and he said he did not mean to kill the man, and he was surprised that the man had died. (See 2 CT 324, 330.) Petitioner claimed that Torres had come at him and Bailey, walking quickly and carrying a knife, and Torres asked who stole his "system." Petitioner claimed that Bailey ran away because he was scared; but Petitioner says he did not run because he thought Torres would chase him. Petitioner pulled the gun out of his pocket, pointed it at Torres, fired a single shot, and then ran away. Petitioner denied that Torres put his hands up or said "hey" or "okay."

By the time of Petitioner's first trial, Bailey was 18 years old, and, as noted, he testified under a grant of immunity. Petitioner's first defense counsel had complained at the preliminary hearing that he suspected Bailey was getting "favorable treatment" because he was not arrested, charged, or even detained for his involvement in the crime – perhaps because Bailey's uncle was apparently an Indio Police Officer. (See, e.g., 1 CT 37-38, 65-66.)

Because Bailey was unavailable and did not personally testify at the second trial, the court allowed representatives from the District Attorney's Office to read Bailey's testimony from the first trial into the record at the second trial (see 2 RT 166 et seq.); and the Court eventually instructed the jury that it "must evaluate this testimony by the same standards that you would apply to a witness who testified here in court." (3 RT 424.)

The prosecutor established the facts of the shooting through

Petitioner's recorded statements to the police, and through a video which showed Petitioner re-creating the shooting for police at the scene. (See 2 CT 296-365, 367-413.) The prosecutor also successfully moved to exclude the results of a toxicology analysis performed on the victim Torres that showed that he had methamphetamine in his system and a blood alcohol level of 0.10 percent. A gang expert testified for the prosecution; he opined that Petitioner was a VMY gang member, and that Petitioner had committed the shooting on VMY turf and for the benefit of the VMY gang. (See, e.g., 2 RT 361-62, 384, 387-90.)

Petitioner himself did not testify at the second trial, and he did not present any defense witnesses or additional evidence. (See 2 RT 401.) In closing, Petitioner' defense counsel admitted that Petitioner was the shooter (see 3 RT 462); but he argued that Petitioner acted in self-defense because Torres was acting "crazy," as evidenced by the fact that Torres drove up quickly in his van, leaving skid marks as he approached Petitioner and Bailey, and noting that a knife allegedly belonging to Torres was found at the scene. (See 3 RT 460.) Defense counsel argued that Petitioner was "just a scared kid who reacted the way he reacted because he saw a knife [and he] had a gun . . . ." (3 RT 466.) As noted, the jury rejected Petitioner's self-defense theory, and found him guilty of second degree murder, and found "true" the gang and firearm enhancements.

The record also reflects that on the day the jury found Petitioner guilty, July 1, 2010, Gary Bailey was present in court, and the trial court recalled the bench warrant on Bailey. (See 2 CT 423.)

At sentencing on August 19, 2010, Petitioner was allowed to address the court, and he complained about his relationship with his second attorney, and argued that his rights under the Confrontation

Clause were violated by the use of Gary Bailey's prior testimony. The judge considered some of Petitioner's complaints a request for a Marsden hearing to replace his attorney, pursuant to People v. Marsden, 2 Cal. 3d 118 (1970), and the judge held a Marsden hearing, after which Petitioner's second attorney continued to represent him. (See 3 RT 498-506; 2 CT 464-65.)

After the Marsden hearing, Petitioner went on to allege at sentencing that Bailey, after the first trial, had gone to the office of Petitioner's first attorney and, when the attorney was not there, Bailey left a contact phone number. Petitioner alleged that his second attorney questioned Bailey about going in to the first attorney's office, but Bailey denied that he had ever gone there; but Petitioner insisted that "there is a video of him [Bailey] speaking to the secretary and handing her a piece of paper, which I believe was his [Bailey's] phone number." (3 RT 505.) Petitioner went on to state that "during the conversation [sic], Gary Bailey stated, 'I testified on Joe once. My story is not going to change [sic], and I'm going to testify against [sic].' When after saying all this, he goes on the run, and he's nowhere to be found. How obvious that he was arrested after I was found guilty." (3 RT 505.) Petitioner then stated: "under all these facts, my Sixth Amendment rights, my right to a fair trial, and ineffective counsel [sic], and the Confrontation Clause were violated, and considering Gary Bailey's arrest as new evidence, I ask that the Court please grant me a new trial." (3 RT 506.)

The sentencing court conferred with Petitioner's defense counsel and reviewed the fact that Bailey had been found unavailable; and then the judge denied the motion for new trial. (See 3 RT 506-07.)

PETITIONER'S CONTENTIONS

The First Amended Petition nominally sets forth headings for five claims; but Respondent argues that Petitioner in fact presents six claims (including two sub-grounds within Ground Five); and, construing the First Amended Petition liberally, the Court finds that the following six contentions are presented:

1. Ground One: The trial court erred in denying Petitioner's request that the jury be instructed with CALCRIM No. 334, which would have given the jury the option of finding that Bailey was an accomplice, and instructed the jury that accomplice testimony needed to be corroborated under California state law.

2. Ground Two: The trial court erred in excluding the murder victim Torres's toxicology results.

3. Ground Three: The evidence was constitutionally insufficient under Jackson v. Virginia, 443 U.S. 307 (1979), to support the gang enhancement because California law requires that the underlying crime be committed by two or more persons from the same gang.

4. Ground Four: Trial counsel was ineffective, pursuant to Strickland v. Washington, 466 U.S. 668 (1984), for failing to conduct a proper investigation into whether witness Bailey was in fact unavailable to testify in person at the second trial.

5(a). Ground Five 5(a): The prosecutor violated Crawford v. Washington, 541 U.S. 36 (2004), by failing to conduct a reasonable, good faith investigation into Bailey's whereabouts and availability.

5(b). Ground Five(b): The prosecutor violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose information to the defense regarding unavailable witness Bailey's whereabouts before the second trial. (See First Amended Petition at 5-6.)

DISCUSSION

I

STANDARD OF REVIEW

A. Standard of Review.

This case is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Koerner v. Grigas, 328 F.3d 1039, 1044 (9th Cir. 2003). Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "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).

Section "2254(d)(1)'s 'contrary to' and 'unreasonable application' clauses have independent meaning." Bell v. Cone, 535 U.S. 685, 694 (2002). The Supreme Court has explained that:

> [u]nder the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on

> a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13; see also Brown v. Payton, 544 U.S. 133, 141 (2005); Weighall v. Middle, 215 F.3d 1058, 1061 (9th Cir. 2000) (discussing Williams).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). It is not necessary for the state court to cite or even to be aware of the controlling federal authorities "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002); see also Smith v. Hedgpeth, 706 F.3d 1099, 1102 (9th Cir. 2013) (citing Early). And while Supreme Court precedent is the only authority that is controlling under the AEDPA, this Court may also look to Ninth Circuit case law as persuasive authority "for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law." Howard v. Clark, 608 F.3d 563, 568 (9th Cir. 2010) (citation omitted).

Furthermore, the AEDPA provides that state court findings of fact are presumed to be correct unless a petitioner rebuts that presumption

by clear and convincing evidence. See 28 U.S.C. §2254(e)(1); Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (citing § 2254(e)(1)).

Where a higher state court has denied a petitioner's claim without substantive comment, a federal habeas court "looks through" such a denial to the "last reasoned decision" from a lower state court to determine the rationale for the state courts' denials of the claim. See Cannedy v. Adams, 706 F.3d 1148, 1156 (9th Cir. February 7, 2013) (citing, inter alia, Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)). There is a presumption that a claim that has been silently denied by a state court was "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d), and that AEDPA's deferential standard of review applies, in the absence of any indication or state-law procedural principle to the contrary. See Johnson v. Williams, ___ U.S. ___, 133 S. Ct. 1088, 1094 and n.1 (February 20, 2013) (citing, inter alia, Richter, 131 S. Ct. at 784-85 and Ylst, 501 U.S. at 806). Here, looking through the California Supreme Court's silent denial of Petitioner's direct appeal, it is clear that the California Court of Appeal considered and denied Petitioner's Ground One (instruction claim) and Ground Two (exclusion of toxicology results) on the merits. Accordingly, those two claims are analyzed under AEDPA's deferential standard here.

Respondent argues that the two sub-grounds within Ground Five (Petitioner's claims of prosecutorial misconduct regarding witness Bailey) are procedurally defaulted because the California Supreme Court denied those claims, when they were presented in a state habeas petition, with a citation to In re Dixon, 41 Cal. 2d 756, 759 (1945). (See Answer at 3; R's MPA at 27-30; Lodgment 12.) As discussed more fully below, the Court finds that Respondent is correct; the Dixon

citation indicates that the claims are procedurally barred, and Petitioner has not carried his burden to show that the Dixon bar is not adequate to bar federal habeas consideration here. See, e.g., Bennett v. Mueller, 322 F.3d 573, 585-86 (9th Cir. 2003) (where state has adequately pled existence of independent and adequate procedural bar, burden shifts to petitioner to place that defense in issue). However, in an abundance of caution, this Court will also consider these two sub-grounds on their merits, under a de novo standard of review. See Lambrix v. Singletary, 520 U.S. 518, 525 (1997) (court may consider and deny habeas petition on its merits notwithstanding asserted procedural bar); Lewis v. Mayle, 391 F.3d 989, 996 (9th Cir. 2004) (standard of de novo review, rather then independent review, is applicable to claim that state court did not consider on the merits); see also Berghuis v. Thompkins, 560 U.S. 370, 388-89 (2010) (where claim fails under de novo review, state court's denial of claim must also be found reasonable under AEDPA's more deferential standard).

Lastly, Respondent argues that Petitioner's Ground Three (Petitioner's claim that the evidence is insufficient to support the gang enhancement) and Ground Four (Petitioner's claim that his second trial counsel was ineffective) are unexhausted because they were never presented to the California Supreme Court for consideration on the merits. (See Answer at 3; R's MPA at 19.) This Court's review of Petitioner's state court pleadings reveals that Respondent's assertion about Grounds Three and Four are correct. To satisfy AEDPA's exhaustion requirement, as set forth at 28 U.S.C. § 2254(b)(1)(A), a state prisoner must "fairly present" his federal habeas claims to a state's highest court. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995). To "fairly present" a federal habeas claim, a state prisoner

must alert the reviewing state court to both the "operative facts" and the "federal legal theory" underlying the claim. See Gray v. Netherland, 518 U.S. 152, 162-63 (1996). A review of Petitioner's state court pleadings reveals that, in spite of the fact that this Court stayed this case to allow Petitioner to exhaust his unexhausted claims in state court, Petitioner has never presented these precise claims to the California Supreme Court. (See, e.g., Lodgments 9, 12.)

However, a federal habeas court may review and deny on the merits an unexhausted ground for relief, notwithstanding the applicant's failure to exhaust that ground. See 28 U.S.C. § 2254(b)(2); see also Cassett v. Stewart, 406 F.3d 614, 623 (9th Cir. 2005) (federal court may deny unexhausted claim on merits where claim is not colorable). In such a circumstance, the habeas court reviews the unexhausted claim de novo, rather than under AEDPA's deferential standard of review, since the state courts did not reach the merits of the claim. See, e.g., Lewis v. Mayle, 391 F.3d at 996; Berghuis v. Thompkins, 560 U.S. at 388-89.

Nevertheless, even though Grounds Three, Four, and the two sub-grounds within Ground Five will be reviewed de novo here, even under de novo review a federal habeas court still presumes the correctness of state court factual findings and defers to those findings in the absence of convincing evidence to the contrary or a demonstrated lack of fair support in the record for those findings. See, e.g., Mayfield v. Woodford, 270 F.3d 915, 922 (9th Cir. 2001) (en banc). Furthermore, even where a state court does not address a constitutional issue, where the reasoning of a state court is relevant to the resolution of a constitutional issue, that reasoning must be part of a federal habeas court's consideration even under a de novo

standard of review. See Frantz v. Hazey, 533 F.3d 724, 738 (9th Cir. 2008) (en banc). In addition, when conducting review de novo, the federal habeas court generally grants relief only if the petitioner can show that he suffered actual prejudice, that is, that the error "had substantial and injurious effect or influence in determining the jury's verdict." See Fry v. Pliler, 551 U.S. 112, 121-22 (2007) (in § 2254 habeas proceedings, federal court must assess any alleged prejudicial impact of constitutional error in state-court criminal proceedings under the "substantial and injurious effect or influence" standard set forth in Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993)). Lastly, a federal court sitting in habeas review independently conducts its own harmless error inquiry in applying the Brecht test, without regard for any state court's harmlessness determination. See Pulido v. Chrones, 629 F.3d 1007, 1012 (9th Cir. 2010) (citing Fry).

B. Ground One: Trial Court's Refusal to Give Accomplice Instruction.

1. Procedural Background, California Court of Appeal Opinion.

The trial court denied defense counsel's request for CALCRIM No. 334 at the second trial, finding that there was no evidence that Bailey was an accomplice to the murder that Petitioner was charged with, and finding irrelevant defense counsel's contention that Bailey was also an accomplice to the un-charged theft of a part of Torres's

CD player from Torres's van. (See 3 RT 410-12.)[2]

The California Court of Appeal also denied this claim, noting that the lack of evidence that Bailey was an accomplice to the murder supported the trial court's findings and the trial court's refusal to give the instruction; and stating that, even assuming that the evidence warranted the instructions, any error was harmless.

In particular, the appellate court stated:

> Bailey's testimony that after Sanchez showed him the gun and suggested robbing Torres, the men walked back to observe the van pulling out is possibly sufficient to show Bailey was an accomplice to an attempted robbery . . . . [However, t]his evidence . . . does not show Bailey acted as an accomplice to murder. [¶] After the men observed the van pull out, Bailey testified that they walked to a dumpster and when Sanchez refused to leave, Bailey ran away without him. Significantly, Sanchez pulled out the gun after Bailey had started to flee. Similarly, Sanchez repeatedly told the police that while hiding behind the dumpster with Bailey, Bailey ran away before he pulled out his

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[2] The proposed CALCRIM No. 334, which is entitled "Accomplice Testimony Must Be Corroborated," and which is based on P.C. § 1111, "Conviction on testimony of accomplice; corroboration []," would have instructed the jury that before it considered the testimony of Bailey as evidence against Petitioner regarding the murder, the jury must decide whether Bailey was an accomplice to the crime; and, if Bailey was an accomplice, the jury could not convict Petitioner based on Bailey's testimony alone. The instruction states that the jury could use the testimony of an accomplice to convict the defendant only if: (1) the accomplice's testimony is supported by other evidence that you believe; (2) that support evidence is independent of the accomplice's testimony; and (3) that supporting evidence tends to connect the defendant to the commission of the crime. See CALCRIM No. 334.

> gun. Thus, the evidence shows that Bailey did nothing that could be interpreted as aiding, promoting, encouraging or instigating Torres's murder. [¶] Sanchez asserts that Bailey was an accomplice to the murder under the natural and probable consequences line of cases because it is reasonably foreseeable that a person may be killed during the commission of an armed robbery. Here, however, Sanchez did not commit an armed robbery and he has not explained how the evidence shows that Torres's murder was the natural and probable consequence of any attempted robbery.

(Lodgment 6 at 6-7.)

The appellate court also stated that "[e]ven assuming the evidence could have supported a finding that Bailey was Sanchez's accomplice, the asserted instructional error was harmless" because "[Petitioner's] statements to the police closely tracked Bailey's testimony and amply corroborated Bailey's testimony." (Lodgment 6 at 7-8.)

2. Applicable Federal Law, Analysis.

Federal habeas corpus relief does not lie for errors of state law; and a claim that a state court failed to follow its own state law in regard to jury instructions given at trial does not necessarily invoke a federal constitutional question. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Gilmore v. Taylor, 508 U.S. 333, 343 (1993). Furthermore, the Constitution does not provide a due process right to have accomplice testimony corroborated. See Lankford v. Arave, 468 F.3d 578, 585 (9th Cir. 2006) (federal law permits the uncorroborated

testimony of an accomplice to serve as the basis for a conviction). Since there is no United States Supreme Court case holding that accomplice testimony must be corroborated in order to support a conviction, federal habeas relief is not available on this claim. See, e.g., Loza v. Ryan, No. CV 06-338 ODW (JWJ), 2009 WL 2059877, at *7 (C.D. Cal. July 8, 2009) (no Supreme Court case hold that accomplice testimony must be corroborated) (citing Carey v. Musladin, 549 U.S. 70, 77 (2006)).

In order to warrant federal habeas relief, a challenged jury instruction, or omitted or ambiguous instruction, must violate due process to the extent that it so infected the entire trial that it rendered the resulting conviction "fundamentally unfair." See Estelle, 502 U.S. at 67, 71-73; McKinney v. Rees, 993 F.2d 1378, 1379-80 (discussing Estelle); see also Laboa v. Calderon, 224 F.3d 972, 979 (9th Cir. 2000) (state laws requiring accomplice testimony corroboration do not implicate constitutional concerns; habeas relief will only lie for violation of due process right to "fundamental fairness"). Due process does not require that an instruction be given unless the evidence supports it. See Hopper v. Evans, 456 U.S. 605, 611 (1982); Menendez v. Terhune, 422 F.3d 1012, 1029 (9th Cir. 2005). Furthermore, a criminal defendant is not entitled to have jury instructions raised in his or her precise terms where the given instructions adequately embody the defense theory. United States v. Del Muro, 87 F.3d 1078, 1081 (9th Cir. 1996). A defendant's right to due process is adequately protected when the trial judge gives jury instructions that adequately convey the defendant's theory of the case. See United States v. Romm, 455 F.3d 990, 1002 (9th Cir. 2006). Furthermore, where a petitioner claims that an instruction was

erroneously omitted, the petitioner bears an "especially heavy burden" because an omitted or incomplete instruction is less likely to be prejudicial than a misstatement of the law. Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997). In evaluating whether an omitted jury instruction violated a petitioner's constitutional rights, courts must consider the instructions that were given as a whole, along with the evidence presented in the case. Murtishaw v. Woodford, 255 F.3d 926, 971 (9th Cir. 2001); Duckett v. Godinez, 67 F.3d 734, 745 (9th Cir. 1995) (whether constitutional violation has occurred will depend upon evidence in case and overall instructions given to jury). Lastly, even where it is found that a trial court's failure to give a jury instruction violated a petitioner's due process rights, a petitioner must still show "actual prejudice," that is, that the failure to give an instruction "had a substantial and injurious effect or influence in determining the jury's verdict." See Brecht, 507 U.S. at 623; see also Clark v. Brown, 450 F.3d 898, 916 (9th Cir. 2006) (even where failure to give instruction violated due process, error may be harmless) (citing Brecht, 507 U.S. at 637).

In light of the foregoing authorities, it must be found that the California courts' implicit determination that the lack of an accomplice testimony corroboration instruction did not render Petitioner's trial "fundamentally unfair" is entitled to deference under the AEDPA standard. The state courts reasonably found that the evidence did not show that Bailey was an "accomplice" to the murder under California law. Bailey fled with Petitioner from the scene after their initial entry into Torres's vehicle; and Bailey ran away again when Torres approached in his van. It was Petitioner who stayed to confront Torres, and it was Petitioner who independently decided that

he would shoot Torres. Petitioner himself told police that Bailey ran away before Petitioner pulled out the gun and shot Torres. (See 2 CT 392-93, 397-98.) Likewise, the state courts reasonably found that the murder was not a "natural and probable consequence" of any attempted robbery, since there was no evidence that Bailey planned or participated in an attempted robbery.

Even assuming, arguendo, that the trial court erred under state law in refusing to give the instruction, Petitioner was not prevented from presenting and arguing his self-defense theory, and the trial court instructed the jury on self-defense. (See, e.g., 3 RT 427-28, 467.) Petitioner's defense counsel also urged the jury in closing to closely evaluate Bailey's testimony; and he argued that because Bailey got immunity to testify, in spite of being involved in the crime, and because the jury could not evaluate Bailey's demeanor because he was unavailable, the jury should reject Bailey's testimony. (See, e.g., 3 RT 457-58.) Taken together, then, "fundamental unfairness" of a constitutional dimension cannot be found because Petitioner was still able to argue that Bailey's testimony was suspect, and that, notwithstanding Bailey's testimony, Petitioner acted in self-defense; and the lack of a CALCRIM No. 334 instruction also did not have a "substantial and injurious effect or influence" on the verdict.

C. Ground Two: Erroneous Exclusion of Victim's Toxicology Results.

In Ground Two, Petitioner complains that the trial court erroneously excluded evidence of toxicology test results which purportedly showed that the victim Torres had methamphetamine in his system, and a blood alcohol level of 0.10, at the time of the

shooting. Petitioner argues that the exclusion of this evidence violated his right to "compulsory process," and hampered his ability to obtain a "not guilty" self-defense verdict, or a conviction on a lesser manslaughter charge for "unreasonable, imperfect" self-defense.

1. California Court of Appeal Opinion.

The California Court of Appeal noted that the evidence was properly excluded because Petitioner "presented no authority that it is a matter of common knowledge that a person with the amount of methamphetamine and alcohol found in Torres's system would act in a crazed or maniacal manner. Rather, such evidence is irrelevant without an offer of proof because the psychological effect of a combination of methamphetamine and alcohol is not a matter of common knowledge that the average juror could be expected to understand without the aid of expert testimony." (Lodgment 6 at 10, citing California Evidence Code § 801.) The Court of Appeal said that Petitioner "essentially wanted jurors to speculate regarding the combined effect of methamphetamine and alcohol on Torres; but, speculative inferences are irrelevant." (Lodgment 6 at 10 [citations omitted].) The appellate court also stated that "the critical issue in this case was how Torres acted before the shooting, not what might have prompted him to take the actions that he did. Accordingly, on this record, we cannot conclude that the trial court abused its discretion in excluding the toxicology results in the absence of an offer of proof by the defense of expert testimony as to the effects of these levels of alcohol and methamphetamine on the victim." (Lodgment 6 at 11.)

2. Applicable Federal Law, Analysis.

Federal habeas relief is not available for errors in the interpretation or application of state law; and a state evidentiary ruling does not give rise to a cognizable federal habeas claim unless the ruling violated a petitioner's due process right to a fair trial. Estelle, 502 U.S. at 70; Rhoades v. Henry, 638 F.3d 1027, 1034 n.5 (9th Cir. 2011) (state evidentiary rulings cannot form independent basis for federal habeas relief, citing Estelle).

However, under the Sixth and Fourteenth Amendments, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). See also Moses v. Payne, 555 F.3d 742, 757 (9th Cir. 2009) (right to present a defense stems from right to due process under Fourteenth Amendment and right to have compulsory process for obtaining witnesses under Sixth Amendment). When evidence is excluded on the basis of a state evidentiary rule, such exclusion may violate due process if the evidence is sufficiently reliable and critical to the defense. See Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973).

Nevertheless, "'[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions,' such as evidentiary and procedural rules." Moses, 555 F.3d at 757 (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998)). Well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, irrelevance, confusion of the issues, or potential to mislead the jury. See Holmes v. South Carolina, 547 U.S. 319, 326 (2006) (citations omitted). Furthermore,

the Supreme Court has noted that "[o]nly rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." Nevada v. Jackson, ___ U.S. ___, 133 S. Ct. 1990, 1992 (2013) (citations omitted).

Lastly, even if it can be found that a trial court committed a constitutional error in excluding evidence, it still must be shown that such error had a substantial and injurious effect or influence on the jury's verdict. See Moses, 555 F.3d at 760 (even where exclusion of evidence was constitutional error, habeas relief not warranted unless harmless error standard set forth in Brecht is satisfied).

In light of the foregoing authorities, it must be found that Petitioner is not entitled to relief on Ground Two. The state trial court's decision to exclude Torres's toxicology results on the ground that they could potentially mislead the jury without further expert testimony was reasonably based on the facts. Furthermore, Petitioner was not precluded from presenting his self-defense theories and, in particular, his argument that Torres was acting "like a crazy man," leaving skid marks as he approached Petitioner in his van, and coming at Petitioner with a knife. (See, e.g., 3 RT 460-63.) In light of all of the evidence and argument presented at trial, it must be found that the exclusion of the victim's toxicology results did not have a "substantial and injurious effect or influence" on the verdict.

D. Ground Three: Insufficient Evidence to Support Gang Enhancement.

In Ground Three, Petitioner argues that there was insufficient evidence to sustain the jury's "true" finding on the gang enhancement. (See FAP at 6.) Respondent argues that Petitioner is simply confused

about what section of the Penal Code the gang enhancement finding was based on; and this Court's review of the record reveals that Respondent is apparently correct.

As noted above, Petitioner was originally charged in the first trial with a separate offense for willfully participating in a street gang (count 2) based on P.C. § 186.22(a). (See 1 CT 205-06.) Petitioner argues here that "the Penal Code 186.22 et seq. [sic] enhancement requires that the underlying crime be committed by at least two gang members"; and Petitioner cites People v. Rodriguez, 55 Cal. 4th 1125 (2012) in support of that argument. (FAP at 6.) However, Petitioner does not specify precisely what section of "P.C. 186.22" he is referring to; and a review of the Rodriguez case reveals that it concerns P.C. § 186.22(a), and the issue of whether a gang member who commits a felony but acts alone can violate P.C. § 186.22(a). See Rodriguez, 55 Cal. 4th at 1128.

However, in Petitioner's second re-trial, Petitioner was charged with an enhancement based on P.C. § 186.22 (b)(1)(C), and not a separate gang count; and the jury found that enhancement charge "true." (See 1 CT 244-45, 2 CT 421-22, 454-47.) Petitioner admits in his Reply that he was convicted under P.C. § 186.22(b)(1)(C), and not under P.C. § 186.22(a). (See P's Reply, Docket No. 41 at 9.) However, he calls the distinction "disingenuous"; and goes on to argue that "the enhancement must be stricken" because "when another principal in the offense uses or discharges a firearm but the defendant does not, the defendant is subject only to the greater of the applicable sentencing enhancements," apparently under either P.C. § 186.22(b) or P.C. § 12022.53(e)(1).

To the extent that Petitioner now purports to bring a challenge

to the sentence that he received for the gang and firearm enhancements, that argument is problematic for a number of reasons. First, Petitioner did not raise that claim in the First Amended Petition; and it is a general rule that new habeas claims may not be raised by a petitioner in a Reply (because, among other things, it deprives Respondent of the opportunity to address the new claim). See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1992) (claims not raised in a habeas petition and raised for the first time in a traverse are not cognizable on review). Furthermore, as Respondent argues, it appears that Petitioner never presented a sentencing error claim to the California Supreme Court, and therefore the claim appears to be unexhausted. See 28 U.S.C. § 2254(b)(1)(A); Gray v. Netherland, 518 U.S. at 162-63. In addition, a sentencing error claim is generally not cognizable on federal habeas review because it solely involves the interpretation and application of state sentencing law. See, e.g., Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994) (absent a showing of fundamental unfairness, state court's misapplication of its own sentencing law does not justify federal habeas relief); Castillo v. Clark, 610 F. Supp. 2d 1084, 1119-20 (C.D. Cal. 2009) (Block, M.J.) (habeas relief not warranted on petitioner's sentencing error claim that enhancements should have been stricken, not stayed) (citing, inter alia, Christian v. Rhode). Petitioner's own argument seems to undercut this ground as well, since Petitioner admitted he was the shooter, and therefore he would apparently not qualify for a lesser sentence under his cited statutes.

Finally, even if this Court were to construe the Petition liberally and assume, arguendo, that Petitioner means to challenge the sufficiency of the evidence in support of the § 186.22(b)(1)(C) gang

enhancement that was found true here, that claim would still be unavailing. Under the Jackson standard governing sufficiency-of-the-evidence claims in federal habeas petitions, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original).

As the trial court correctly instructed the jury, the elements of the P.C. § 186.22(b)(1)(C) gang enhancement included, in pertinent part, that: "the People must prove that: one, the defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang; and, two, the defendant intended to assist, further, or promote criminal conduct by gang members. (See 3 RT 434; see also People v. Lopez, No. B236174, 2012 WL 4243829, at *5 (Cal. Ct. App. Sept. 21, 2012) (unpublished) (discussing elements of P.C. § 186.22(b)(1)(C) gang enhancement).

Here, even under a de novo standard of review, there was certainly sufficient evidence to support the gang enhancement. Petitioner was a VMY gang member, and he was hanging around with three other VMY gang members on their gang turf on the day of the incident. When Torres, who was not a VMY gang member, drove up "booming" his music, Flaco suggested that Petitioner show Bailey how to commit a robbery by robbing Torres' van. Petitioner himself encouraged Bailey, apparently a younger gang member, to join him in using a gun to rob Torres. The prosecution's gang expert opined that the subsequent crimes were committed for the benefit of the gang, and the expert detailed the past criminal activities of the VMY gang. Taken together, a rational juror could reasonably find that Petitioner

committed the crime in association with his gang, and to assist, further, or promote the gang.

E. Ground Four: Ineffective Assistance of Trial Counsel.

In Ground Four, Petitioner argues that his trial counsel was ineffective for failing to conduct a reasonable investigation into the whereabouts of unavailable witness Gary Bailey. (See Docket No. 34, FAP at 6.) Petitioner alleges that "[a]fter the first trial . . . [w]itness Gary Bailey attempted to contact defense counsel [sic]." (Id.) Petitioner alleges that "[i]nformation from the public [sic] indicated that Witness [sic] had testified falsely and wanted to clarify his prior testimony by contacting defense counsel"; and Petitioner alleges that "Witness [sic] appeared at Counsel's [sic] office but counsel was not available." Petitioner complains that "[h]ad counsel spoken with the witness he would have had the witnesses [sic] contact info and called him to exonerate Petitioner. As a result, the State relied upon prior trial transcript to convict." (Id.)

Respondent argues that this Ground Four is unexhausted because it was never presented to the California Supreme Court; and, as noted above, that argument appears to be correct. (See Docket No. 39, R's MPA at 22.)[3]

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[3] This Court also notes that Petitioner does not mention this claim in what this Court construes to be a Memorandum of Points and Authorities attached to the First Amended Petition. (See, e.g., Docket No. 34 at 12.) In his Reply, Petitioner makes only conclusory arguments, stating only that his "fourth claim . . . is exhausted" and that "Respondent is mistaken." (P's Reply, Docket No. 41 at 10.) In support of Ground Five in the First Amended Petition (concerning Petitioner's claims of prosecutorial misconduct), Petitioner states that "[t]he State's primary witness, Gary Bailey, recanted his prior trial testimony just before the retrial in the case." (FAP at 6.)
(continued...)

Construing this Ground Four liberally, the Court notes that Petitioner, as detailed above, argued at sentencing that Bailey had gone into his first attorney's office and left a phone number with the attorney's secretary. (See 3 RT 505.) Petitioner apparently alleges that Bailey was going to "clarify" or "recant" his earlier testimony, and that somehow this new testimony would have benefitted Petitioner. Thus, the gravamen of Ground Four here appears to be a contention that, had Petitioner's second trial attorney conducted an investigation and located Bailey, Bailey would have "recanted" his earlier testimony and Petitioner would not have been convicted.

Despite the fact that this claim is unexhausted, vague, and confusing, the Court will consider it under a de novo standard of review. See Cassett, 406 F.3d at 623; Lewis, 391 F.3d at 996.

1. Applicable Federal Law.

To prevail on a claim of ineffective assistance of trial counsel, a federal habeas petitioner must establish two things: (1) that counsel's performance was deficient, that is, that it fell below an "objective standard of reasonableness" under prevailing professional norms; and (2) that petitioner was prejudiced by counsel's deficient performance, that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

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[3](...continued)
However, Petitioner provides no details about how, precisely, Bailey "recented" his testimony, or was going to recant his testimony if he appeared at the second trial. Accordingly, the only facts and argument that Petitioner presents in support of this ground in the First Amended Petition are the five sentences set forth in support of this Ground Four, which this Court has excerpted and quoted above, and the snippet of a related accusation in Ground Five. (See FAP, Docket No. 34 at 6.)

would have been different." Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). A petitioner bears the burden of establishing both deficient performance and prejudice, see Cheney v. Washington, 614 F.3d 987, 995 (9th Cir. 2010); and a petitioner's failure to satisfy either one of these two prongs defeats the claim. See Strickland, 466 U.S. at 697. See also Thomas v. Borg, 159 F.3d 1147, 1151-52 (9th Cir. 1998).

To establish deficient performance, a petitioner must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Strickland, 466 U.S. at 689. A "reasonable probability" that a petitioner was prejudiced by a defense counsel's deficient performance is a probability that is sufficient to undermine confidence in the outcome. See Strickland, 466 U.S. at 694. The Supreme Court has stated that the Strickland standard is "highly deferential," and that "[s]umounting Strickland's high bar is never an easy task"; and that "[e]ven under de no review, the standard for judging counsel's representation is a most deferential one." Richter, 562 U.S. at 105 (citations omitted). Furthermore, conclusory allegations of ineffective assistance of counsel which are not supported by a statement of specific facts do not warrant habeas relief. James v. Borg, 24 F.3d 20, 26 (9th Cir.), cert. denied, 513 U.S. 935 (1994). See also United States v. Taylor, 802 F.2d 1108, 1119 (9th Cir. 1986) (vague and speculative assertions that counsel was ineffective do not meet Strickland burden).

While a lawyer is under a duty to make reasonable investigations, the lawyer may make a reasonable determination that particular investigation is unnecessary. Leavitt v. Arave, 646 F.3d 605, 609 (9th Cir. 2011) (citing, inter alia, Pinholster, 131 S. Ct. at 1406-

07). A reviewing federal habeas court does not need to divine counsel's actual reasons for failing to investigate; rather, the court need only affirmatively entertain the range of possible reasons counsel may have had for proceeding as counsel did. See Leavitt, 646 F.3d at 609.

A trial attorney also has wide discretion in making tactical decisions. See Correll v. Stewart, 137 F.3d 1404, 1411-12 (9th Cir. 1998). A difference of opinion as to trial tactics does not constitute denial of effective assistance, see United States v. Mayo, 646 F .2d 369, 375 (9th Cir. 1981), and tactical decisions are not ineffective assistance simply because in retrospect better tactics are known to have been available. See Bashor v. Risley, 730 F.2d 1228, 1241 (9th Cir. 1984). Again, a reviewing court need not determine the actual reason for an attorney's actions, as long as the act falls within the range of reasonable representation. See Morris v. California, 966 F.2d 448, 456-57 (9th Cir. 1991); Leavitt, 646 F.3d at 609.

To establish prejudice caused by the failure to call a witness, a petitioner must show that the witness was likely to have been available to testify; that the witness would have given the proffered testimony; and that the witness's testimony would have created a reasonable probability that the jury would have reached a verdict more favorable to the petitioner. Alcala v. Woodford, 334 F.3d 862, 872-73 (9th Cir. 2003); see also United States v. Harden, 846 F.2d 1229, 1231-32 (9th Cir. 1988) (claim of ineffective assistance based on failure to call witness requires, at minimum, evidence that uncalled witness would in fact have testified). As a general rule, the requirement that a habeas petitioner demonstrate what testimony an

alleged witness would have provided means that the petitioner must present an affidavit from the witness. Dows v. Wood, 211 F.3d 480, 486 (9th Cir. 2000). In addition, a reviewing court may assume that the failure to call a witness was a reasonable trial tactic where it is clear from the record that the witness's credibility could have been at issue. Harden, 846 F.2d at 1232.

2. Analysis.

In light of the foregoing authorities, it must be found that Petitioner is not entitled to habeas relief on this claim. The most glaring deficiency in Petitioner's claim here is the lack of any declaration from Bailey confirming that he wanted to testify and that he intended to somehow "recant" his testimony at the second trial. Petitioner gives no credible indication what the substance of Bailey's new testimony would have been, even if it could be found that Bailey would have testified. In other words, even assuming that Petitioner's trial counsel might have performed deficiently in failing to locate Bailey to testify at the second trial, without a showing as to what, exactly, Bailey would have testified to, Petitioner has not satisfied Strickland's prejudice prong.

Petitioner also does not convincingly show that his counsel was deficient for not locating Bailey before the second trial. As noted above, the record reflects that the trial court held a hearing in which it commented that Bailey was being charged with other crimes, and was in and out of custody; but the trial court ultimately found that Bailey was unavailable for the start of Petitioner's second trial in spite of these facts. (See 1 RT 14 et seq.) The D.A.'s Investigator testified that he had gone to Bailey's residence, and

contacted Bailey's family, but could not locate Bailey; so the assertion that Petitioner's defense counsel could have located Bailey from a phone number that Bailey allegedly gave to Petitioner's first attorney's secretary is doubtful, unless perhaps the number was for a phone that Bailey used and that his family was unaware of. (See id.) Ultimately, the length to which the prosecution must go to produce a witness is a question of "reasonableness" (see Ohio v. Roberts, 448 U.S. 56, 74 (1980), overruled on other grounds by Crawford v. Washington, 541 U.S. 36 (2004)); and it would seem to follow that, where a court has determined that the prosecution had acted reasonably in searching for an unavailable witness, a defense counsel's performance would not be deficient for relying on that determination, absent a showing that the defense counsel had any further information regarding the witness's whereabouts.

This Court also notes that Petitioner's defense counsel chose not to cross-examine the D.A.'s Investigator at the unavailability hearing. (See 1 RT 23.) That may have been a reasonable trial tactic, given the facts that Bailey's testimony from the first trial was a matter of record, and on that record Petitioner obtained a mistrial, and perhaps almost an acquittal. Defense counsel may have decided that it was a better tactic to prepare for trial based on Bailey's known testimony, rather than take a chance on what Bailey might testify to at the second trial. See Morris v. California, 966 F.2d at 456-57 (reviewing court need not determine counsel's actual motivation as along as acts fall within range of reasonable representation); Leavitt, 646 F.3d at 609. The Court also notes that defense counsel argued in closing that Bailey's testimony was suspect because Bailey did not testify in-person and the jury could not

evaluate his demeanor (see 3 RT 457-58); and that tactic would not have been available if Bailey had appeared at trial.

As also mentioned above, the ideas that Bailey would have testified at the second trial, and that Bailey would have "recanted" his testimony if he had testified, are uncertain. Bailey testified under a grant of immunity at the first trial; and it is uncertain, if he had told prosecutors that he intended to change his testimony in material respects, if the grant of immunity would have still been continued, in which case Bailey might have decided to invoke his Fifth Amendment rights and not testified at all. This Court can only speculate as to what testimony Bailey might, or might not, have given, and whether, based on that new testimony there would be a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. See Strickland, 466 U.S. at 687-88. See also Woods v. Adams, 631 F. Supp. 2d 1261, 1277 (C.D. Cal. 2009) (Johnson, M.J.) (right to Sixth Amendment compulsory process does not necessarily include right to compel grant of immunity to unwilling witness).

F. Grounds Five(a) and Five(b): Prosecutorial Violations.

In light of Petitioner's arguments in the First Amended Petition, the Court recognizes two sub-grounds to Petitioner's Ground Five: (1) the prosecutor violated Petitioner's Confrontation Clause rights by failing to make a "good faith" effort to locate witness Bailey; and (2) the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963) by failing to disclose what it knew about Bailey's whereabouts. (See FAP

at 6.)[4]

1. Sub-Grounds Five(a) and Five(b) Are Procedurally Defaulted.

At the outset, Respondent argues that the California Supreme Court's denial of Petitioner's habeas petition with a citation to In re Dixon, 41 Cal. 2d 756, 759 (1945), means that both sub-grounds Five(a) and Five(b) are procedurally defaulted and barred from federal habeas review because Petitioner could have, but did not, present those claims on direct appeal. (See R's MPA at 25, 31.) That argument appears superficially correct, since Petitioner's claims here concern the prosecutor's efforts to find or conceal Bailey's whereabouts before the trial, and Petitioner presented related arguments regarding Bailey's whereabouts at sentencing, and most, if not all, of these facts were apparently known to Petitioner before he filed his state court appeals.

Under the doctrine of procedural default, when a state court denies a challenge to a criminal conviction for failure to comply with a state procedural rule, a federal habeas court is precluded from

[4] Specifically, Petitioner alleges, under the heading for Ground Five, that "[t]he State's primary witness [i.e., Gary Bailey], recanted [sic] his prior trial testimony just before the retrial in the case. Being aware of this, the State failed to call him as a witness, but instead relied upon the trial transcript of the first trial. Had the state revealed documents in their possession, the defense could have impeached the prior trial testimony." (FAP at 6.) In Petitioner's Memorandum in support of the First Amended Petition, Petitioner describes this ground as follows: "A Brady v. Maryland violation occurred when the prosecution was aware that Bailey was on bail and was appearing to court on that charge [sic] at the same time of Mr. Sanchez's trial, thereby no good faith effort had been made to secure Bailey's attendance at trial." (Docket No. 34, FAP at 12.)

reviewing the claim if the state law procedural bar is "independent" of any federal question and "adequate" to support the judgment. See Coleman v. Thompson, 501 U.S. 722, 729 (1991). For a state law ground to be "independent," it must not be interwoven with federal law, La Crosse v. Kernan, 244 F.3d 702, 704 (9th Cir. 2001); and for a state law ground to be "adequate," it must be strictly or regularly followed and consistently applied. Id.

The Ninth Circuit had previously found that, prior to 1998, California courts necessarily addressed fundamental federal constitutional claims when applying the Dixon rule, and therefore California's Dixon rule was not independent of federal law, and was not a bar to federal habeas review. See Park v. California, 202 F.3d 1146, 1152-53 (9th Cir. 2000). However, in 1998, the California Supreme Court announced in In re Robbins, 189 Cal. 4th 770 (1998), that henceforth its review of procedural issues under the Dixon rule would establish the independence of the application of state law from any federal constitutional error. See, e.g., Smith v. Crones, No. 2:07-cv-02004-AK, 2010 WL 1660240, at *1 (E.D. Cal. April 22, 2010) (Kozinski, Chief Judge) (citing, inter alia, In re Robbins, 18 Cal. 4th at 811-12 and Park, 202 F.3d at 1152 n.4). Consequently, although the Ninth Circuit has not yet addressed the independence of California's Dixon rule, numerous District Courts within the Ninth Circuit have found that the Dixon rule is "independent" of federal law and is also "adequate" to support a procedural bar. See, e.g., Smith v. Crones, No. 2:07-cv-02004-AK, 2010 WL 1660240, at *1 ("Robbins thus converted Dixon into an independent state ground"); Protsman v. Pliler, 318 F. Supp. 2d 1004, 1007-08 (S.D. Cal. 2004) (same); Aguilar v. Long, No. CV 12-10926 MRW, 2013 WL 2456687, at *3 (C.D. Cal. June

6, 2013) (Wilner, M.J.) (same).

When a procedural bar has been deemed "independent," the Ninth Circuit sets out a three-part burden-shifting test to determine if the procedural bar should also be found "adequate." See Bennett v. Mueller, 322 F.3d 573, 585-86 (9th Cir. 2003). First, the State must adequately plead the existence of an independent and adequate state procedural ground as an affirmative defense. Id. Second, if the State has met its burden, the burden shifts to the petitioner to place that defense "in issue." Id. A petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Id. Third, if the petitioner meets his or her burden, the burden then shifts back to the State; and the ultimate burden is on the State to show that the procedural bar is not only independent but is also adequate and applicable. Id.

Here, Respondent has met its burden at step one of the Bennett three-part procedure, but it must be found that Petitioner has not met his burden at step two. Petitioner presents no substantive rebuttal to Respondent's procedural Dixon bar, and therefore Petitioner has not carried his burden at step two of the Bennett analysis.[5]

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[5] In particular, Petitioner states in his Reply regarding this fifth ground, under a heading that reads "Procedural Default Claim Is Meritless," that he "realleges the response in Para 4.i [sic] above as though set forth herein." (Docket No. 41, P's Reply at 11.) However, a review of the preceding paragraph 4.i in support of Petitioner's Ground Four also states that Petitioner "realleges the response in Para 4.i above as though set forth herein." (P's Reply at 10.) A review of paragraph 3.i in support of Ground Three does say that "procedural default assertion is meritless"; but then it goes on to discuss exhaustion, stating that "[h]ere, the petition was addressed by the highest court who denied Habeas Relief. As such, the Court should reject the Respondent's claim of procedural default." (P's (continued...)

Where a petitioner has procedurally defaulted a claim in state court pursuant to an independent and adequate state law procedural rule, federal habeas review is ordinarily barred unless the petitioner can demonstrate "cause" for the default and "actual prejudice," or demonstrate that the failure to consider the claim on federal habeas review will result in a "fundamental miscarriage of justice." See Coleman, 501 U.S. at 750; Detrich v. Ryan, 740 F.3d 1237, 1242 (9th Cir. 2013) (citing, inter alia, Coleman). To allege cause for a procedural default, a petitioner must assert that the procedural default is due to an "objective factor" that is "external" to the petitioner and that "cannot fairly be attributed to him." Manning v. Foster, 224 F.3d 1129, 1133 (9th Cir. 2000) (citing Coleman). "Prejudice" is "actual harm" resulting from the alleged constitutional error or violation. See Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice resulting from a procedural default, a habeas petitioner bears the burden of showing not merely that the errors at his trial raised a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimension. See United States v. Frady, 456 U.S. 152, 170 (1982); see also Jones v. Schriro, 450 F. Supp. 2d 1047, 1059 (D. Ariz. 2006). The petitioner bears the burden of showing both cause and prejudice to excuse a defaulted claim. See Bousley v. United States, 523 U.S. 614, 622 (1998). Lastly, a "fundamental miscarriage of justice" occurs where a "constitutional violation has probably resulted in the conviction of one who is actually innocent" (see Manning v. Foster, 224 F.3d 1129,

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[5](...continued)
Reply at 7-8.)

1133 (9th Cir. 2000) (citing Murray v. Carrier, 477 U.S. 478, 496 (1986)); and such a claim requires a petitioner to support the allegation with new, reliable evidence that was not presented at trial. See Cook v. Schriro, 538 F.3d 1000, 1028 (9th Cir. 2008) (citing, inter alia, Schlup v. Delo, 513 U.S. 298, 324 (1995)).

Here, Petitioner cannot meet any of the standards for showing cause, prejudice, or a fundamental miscarriage of justice. While ineffective assistance of appellate counsel may sometimes constitute an external "cause" to excuse a procedural default, here Petitioner does not allege that his appellate counsel was ineffective for failing to raise these claims on appeal, and the claims defaulted here are not based on ineffective assistance of trial counsel. Cf. Martinez v. Ryan, ___ U.S. ___, 132 S. Ct. 1309, 1315 (2012)) (ineffective assistance of counsel during postconviction proceedings may constitute "cause" to excuse procedural default); Dickens v. Ryan, 740 F.3d 1302, 1319 (9th Cir. 2014) (same). Furthermore, as discussed above, an ineffective assistance of appellate counsel claim would also logically require a declaration from Bailey to show prejudice; and Petitioner has not provided any statement from Bailey here. See, e.g., Hurles v. Ryan, 752 F.3d 768, 804 (9th Cir. 2014) (finding petitioner could not show cause for procedural default where claim that appellate counsel was ineffective under Strickland was not colorable).

Moreover, Petitioner cannot show a "fundamental miscarriage of justice" either, since he argues that he acted in self-defense, and since that claim is not buttressed by any new evidence (at least, any new evidence that Petitioner has convincingly proffered here), and since that claim was decided by the jury after the second trial. See Cook v. Schriro, 538 F.3d at 1028.

Taken together then, it must be found that Grounds Five(a) and Five(b) are procedurally defaulted and federal habeas review is barred.

2. Grounds Five(a) and Five(b) Fail on Merits Review as Well.

Assuming, arguendo, that Grounds Five(a) and Five(b) were not procedurally defaulted and could be reviewed on their merits here, those sub-grounds still would not warrant federal habeas relief. Petitioner has attached to the First Amended Petition what this Court construes to be a Memorandum of Points and Authorities (hereinafter "Memorandum" or "P's MPA"); and also attached to the First Amended Petition what are apparently "Criminal Case Reports" which Petitioner has designated as "Exhibit A." Taken together, Petitioner's Memorandum and "Exhibit A" purport to set forth dates that show that Bailey was apparently arrested, and released on bail, and making court appearances in the Riverside County Superior Court to answer criminal charges in case(s) un-related to Petitioner's case, all while Petitioner's own case was proceeding through pre-trial, trial, and sentencing proceedings. Petitioner argues that "the [trial court] released Bailey on his own recognizance for having previously failed to appear in this case"; and Petitioner alleges that "the D.A. Investigator knew this as a result of reviewing the CLETS [sic] report which indicated [Bailey's] bail status." (P's MPA at 14.) Petitioner alleges that "the Prosecutor's Office was in possession of the arrest report, Bail Release notice, and Bail Agent contact information." (P's MPA at 14.)

a. Chronology of Bailey's availability.

The Court has reviewed the record, the parties' filings, the exhibits submitted by Petitioner, and the items lodged by Respondent, and assembled the following chronology of relevant dates and events regarding Bailey's availability to testify at the second trial.[6]

As noted, Petitioner's first trial ended in a mistrial on January 8, 2009. (See 1 CT 238-39.) An Investigator for the District Attorney's Office was apparently assigned in late March 2009 to secure Bailey's attendance at Petitioner's second trial. (See 1 RT 19.) On April 1, 2010, the D.A. Investigator received a request to have Bailey subpoenaed for trial. (1 RT 19.) On April 15, 2010, Bailey apparently had not been located, and a bench warrant for his appearance was issued. The record reflects the following entry: "Court is informed by Deputy that Mr. Bailey is being booked in the Indio Jail at this time . . . . Court orders RSO [sic] to transport witness Gary Duane [sic] Bailey to Department 3M on 4/16/10 to have bench warrant recalled and order witness back for next court hearing in this matter." (1 CT 259-60.)

The record reflects that on April 16, 2010, "[w]itness in custody Gary Duane Bailey is present"; and Bailey was apparently ordered to

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[6] The Court notes here that, because these two sub-grounds were not considered "on the merits" by any California state court, the Court is not barred by the Supreme Court's holding in Cullen v. Pinholster, 131 S. Ct. 1388 (2011), which directed that in conducting review under § 2254(d)(1), a federal habeas court "is limited to the record that was before the state court that adjudicated the claim on the merits." Cullen v. Pinholster, 131 S. Ct. at 1399. Rather, where a claim was not "adjudicated on the merits" by a state court, a federal habeas petitioner is not barred from presenting new evidence to the federal court in support of the claim. See Dickens v. Ryan, 740 F.3d at 1320 (Pinholster does not apply to claim that state court did not adjudicate on the merits).

return on April 28, 2010. (1 CT 261.)

The records that Petitioner has attached as "Exhibit A" to the First Amended Petition reflect that Bailey was apparently being sentenced in drug court on April 17, 2010. (See FAP, Exhibit A, Docket No. 34 at 43.)[7]

Petitioner asserts that "[u]nbeknownst to the defense, Bailey was arrested by the Riverside Sheriff's Department on April 26, 2010 and booked into jail under booking number 201017577 in Superior Court case no. INF010001337 (see Exhibit A). He was released on bail bond no. DN5-2622354 on April 28, 2010. (See FAP at 5; see also Lodgment 12 at 5.) Petitioner apparently asserts that this arrest was for vehicle theft and receiving stolen property. (See FAP, Exhibit A, Docket No. 34 at 34-35.) Petitioner asserts that "[a]ccording to the minutes in that matter, Bailey was on bail and appeared at Court as ordered at all times, including the date of the hearing of the due diligence motion and the subsequent trial of Petitioner. (P's MPA at 6.)

On April 28, 2010, the record reflects that Bailey was not present at a hearing in Petitioner's case; and the court issued a bench warrant to secure Bailey's attendance at a hearing scheduled for April 28, 2010. (See 1 CTD 264.)

As noted, on June 21, 2010, the trial court held a hearing on

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[7] Petitioner has not consecutively numbered the pages of the First Amended Petition and the attached Memorandum of Points and Authorities or the exhibits set forth at "Exhibit A." (See Docket No. 34.) The pages of the attached Memorandum of Points and Authorities are numbered (though not consecutively); and to minimize confusion this Court will refer to the MPA by the page numbers it currently bears (e.g., P's MPA at 1 et seq.). However, the pages of the attached "Exhibit A" are not numbered; and this Court will refer to the un-numbered pages of "Exhibit A" by the page numbers assigned by the Court's docketing and electronic scanning system.

Bailey's unavailability (see 1 RT 16 et seq.); and in a trial brief filed by the State on that same date, the prosecution stated that "People have exercised due diligence into trying to compel the presence of witness Gary Bailey and is unable to do so thus allowing the People to proceed to trial with Mr. Bailey's former testimony." (See 1 CT 269, 276.) That Trial Brief also states: "[t]he People have served Gary Bailey to be present in court and have had him ordered to appear at the next court date on April 19, 2010 [sic]. Time and time again, he has failed to appear. Mr. Bailey has a current bench warrant issued for his failure to appear. [The D.A's Investigator] is prepared to testify to the following representation in court and to the efforts he has made in trying to locate him following the issuance of the bench warrant []. (See 1 CT 276.)

At the June 21, 2010 hearing on Bailey's availability, the trial court stated, in pertinent part, that: "I have in the minutes of 4-16, there was in front of Judge Jorge Hernandez . . . [w]itness in custody Gary Duane Bailey is present." (1 RT 16.) The judge then noted that the record reflected that "[t]he following person are ordered to return on April 28, 2010 . . .: Gary Duane Bailey. And then hearing on 4-22-2010 . . . for jury trial is to continue. Witness [i.e., Bailey] is to contact People's Investigator [] on a daily basis." (1 RT 16.) The judge then asked the parties "What occurred on April 28?" (1 RT 16.)

The prosecutor responded "He [Bailey] did not show. And we called the matter, brought it to the Court's attention, and he issued a bench warrant at that point. And he's currently still on the outstanding bench warrant, as well as to other felony warrants and a misdemeanor warrant." (1 RT 16-17.)

As noted, the D.A.'s Investigator testified at the June 21, 2010 hearing that he was assigned to locate Bailey; and he stated that he had contacted Bailey family members, including his mother, brother, grandfather, and sister, to no avail. (See 1 RT 17-19.)[8]

As noted, Petitioner's defense counsel did not ask the D.A.'s Investigator any questions on cross-exam; and the court went on to find that "there's substantial due diligence on the part of the People to locate this witness," and then declared that Bailey was unavailable within the meaning of Crawford v. Washington, 541 U.S. 36 (2004). (See 1 CT 259-60, 267; 1 RT 16-25.)

On June 22, 2010, the day after the availability hearing, jury voir dire began; and the parties made their opening statements in Petitioner's second trial on June 24, 2010. (See 1 CT 282, 286.)

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[8] In particular, the D.A.'s Investigator said that he had looked for Bailey at a mobile home park; and he had tried calling a phone number which Bailey had given him for Bailey's bother. (See 1 RT 20.) The D.A.'s Investigator testified that "Bailey has been in and out of custody several times since our original service; we've worked with Bailey on occasion to reinstate his work release program, or which he has re-violated, and warrants have been reissued on that. I have checked Bailey's phone number. I have recontacted family members, who have not had contact with Bailey for at least a month. I again tried [this morning] the phone number for his brother which said it was not in service at this time, which is a phone I had contacted him at many times before, and he had recontacted me also by that phone number . . . . I have checked the local jails, and CLETS printouts to see if Bailey is currently in custody anywhere in the State of California. He is not. I checked local hospitals this morning; Mr. Bailey is not admitted as a patient in any of our local hospitals." (1 RT 21-22.) The D.A.'s Investigator also said that he had contacted the "Gang Task Force," and they had also been looking for Bailey, to no avail. (1 RT 22.) The D.A.'s Investigator checked Bailey's prior work addresses: "he was no longer employed and hasn't been employed for at least six months"; but the Investigator did not try to contact the former employers. (1 RT 22.) The D.A.'s Investigator also contacted the DMV; but they only had an old address for Bailey. (1 RT 23.) All told, the Investigator said that he had personally tried to locate Bailey "35 to 40 times." (1 RT 23.)

Petitioner alleges that on June 25, 2010, apparently while Petitioner's trial was proceeding, "[t]he People filed charges against Bailey [in case no. INF10001337]." (See P's MPA at 6.)

The jury convicted Petitioner on July 1, 2010. (See 2 CT 421.) The record reflects that on that same date, July 1, 2010, an "[o]ral motion by the People regarding recall witness warrant is called for hearing. Motion granted. Witness Gary Bailey is present in court. Witness Gary Bailey (IN CUSTODY) [sic] excused and ordered released from custody as to this case. Bench warrant as to witness Gary Bailey is recalled." (2 CT 423.)

Petitioner claims that "[u]ltimately, on July 15, 2010, Bailey appeared at Court and accepted a guilty plea," apparently to the vehicle theft and receiving stolen property charges. (See P's MPA at 6.)

As noted, on August 19, 2010, Petitioner addressed the Court as his sentencing hearing and raised many of the same arguments about Bailey's availability that he raised here; and the trial court sentenced Petitioner, notwithstanding his complaints. (See 2 CT 464-65.)

3. Applicable Law Regarding Unavailability, Analysis.

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Crawford v. Washington established that "testimonial" out-of-court statements were barred under the Confrontation Clause unless the witness was unavailable and the defendant had a prior opportunity to cross-examine the witness. See Crawford v. Washington, 541 U.S. 36, 59 (2004);

Flournoy v. Small, 681 F.3d 1000, 1004 (9th Cir. 2012) (citing Crawford). Thus, prior trial testimony may be admissible at a later trial if the defendant was afforded the opportunity to cross-examine the witness. See, e.g., Crawford, 541 U.S. at 57 (citation omitted); California v. Green, 399 U.S. 149, 165-68 (1970).

The Supreme Court has held that "a witness is not 'unavailable' for purposes of the . . . confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." Barber v. Page, 390 U.S. 719, 724-25 (1968). However, "the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." Hardy v. Cross, ___ U.S. ___, 132 S. Ct. 490, 495 (2011) (per curiam). Both the Supreme Court and the Ninth Circuit have stated that the lengths to which the prosecution must go to produce a witness is a question of "reasonableness." See Ohio v. Roberts, 448 U.S. 56, 74-75 (1980), abrogated on other grounds by Crawford,541 U.S. 36; Carranza v. Waddington, 226 Fed. Appx. 777, 779 (9th Cir. April 2, 2007) (quoting California v. Green, 399 U.S. 149, 189, n. 22 (1970) (J. Harlan, concurring) (citations omitted)). Under both California state law and federal law, where the government seeks to admit prior testimony from an unavailable witness, the government has the burden of showing that the witness is unavailable. See Traxler v. Thompson, 4 Cal. App. 3d 278, 284 (1970) (citations omitted) (burden is on party seeking to offer former testimony to prove the unavailability of witness); Ohio v. Roberts, 448 U.S. at 74-75 (prosecution bears burden of establishing unavailability).

Lastly, even if the admission of testimony violated the Confrontation Clause, such an error is subject to harmless-error

analysis, and a petitioner is not entitled to habeas relief unless the error resulted in "actual prejudice" under the Brecht harmless-error standard. Woods v. Sinclair, 764 F.3d 1009, 1125-26 (9th Cir. 2014) (citing, inter alia, Brecht, 507 U.S. at 637).

Here, Petitioner's new evidence calls into question just how "reasonable" the prosecution's "good-faith effort" to locate Bailey actually was. If Petitioner has indeed set forth evidence showing that Bailey was in and out of jail and making court appearances before and during Petitioner's trial, it would appear that the prosecution and the D.A.'s Investigator were negligent at best in locating Bailey.

However, Petitioner's arguments are conclusory in certain respects, and leave some of the evidence in the record unexplained. For example, Petitioner offers no explanation or further elaboration on the statements that the trial judge and the prosecutor made at the June 21, 2010 unavailability hearing about Bailey's other court appearances, or, in particular, the prosecutor's statement that Bailey was "still on the outstanding bench warrant, as well as two other felony warrants and a misdemeanor warrant [sic]." (1 RT 16-17.) Respondent argues that the records proffered by Petitioner "do not state that Bailey was present. Rather they simply list actions which occurred in court." (R's MPA at 30.)

As noted, even under de novo review, a federal habeas court still presumes the correctness of state court factual findings and defers to those findings in the absence of convincing evidence to the contrary or a demonstrated lack of fair support in the record for those findings. See, e.g., Mayfield v. Woodford, 270 F.3d at 922. While Petitioner has raised questions, Petitioner has not convincingly rebutted the presumption of correctness that the state trial court's

findings on Bailey's unavailability and the prosecution's "good-faith effort" must be afforded. See id.

Stated another way, Petitioner has not convincingly shown why the state trial court's determination that Bailey was unavailable as of June 21, 2006, and that Bailey continued to be unavailable until the last day of Petitioner's trial on July 1, 2006, was a violation of Petitioner's Confrontation Clause rights. The trial court, and both parties, were apparently aware of Bailey's other pending criminal charges and prosecutions, and in spite of those proceedings the D.A. Investigator stated that he could not locate Bailey, and the trial court found that Bailey was unavailable. The record does not reflect that the trial judge, the prosecutor, or defense counsel commented on Bailey's appearance on the last day of trial on July 1, 2006 when the jury returned its verdict; and apparently no one raised an issue about the unavailability ruling at that time. (See 2 CT 423.) Taken together, it must be found that Petitioner has not shown that the efforts made to locate Bailey before trial were unreasonable and not made in good faith. See, e.g., Windham v. Merkle, 163 F.3d 1092, 1102 (9th Cir.1998) (prosecutor made a good-faith effort to locate witness where he subpoenaed witness, met with witness to discuss proposed testimony after issuing subpoena, tried to call witness three times as trial date approached, contacted witness's parole officer, had a bench warrant issued for witness's arrest, and assigned a criminal investigator who searched at places witness was known to frequent); Cooper v. McGrath, 314 F. Supp. 2d 967, 985 (N.D. Cal. 2004) (finding that California Court of Appeal's conclusion that State made a good faith effort to locate unavailable witness was not unreasonable where prosecutor's investigator diligently searched for witness for a month;

"[t]he 20/20 vision of hindsight does not mean the steps actually undertaken were not reasonable").[9] [10]

3. Applicable Law Regarding Brady Violation, Analysis.

In regards to sub-ground Five(b), under the Supreme Court's decision in Brady v. Maryland, the prosecution in a criminal case has a constitutional obligation to disclose exculpatory evidence to the accused if it is "material" either to guilt or to punishment. See Paradis v. Arave, 240 F.3d 1169, 1175 (9th Cir. 2001) (discussing Brady). There are three components of a Brady violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must

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[9] The finding of unavailability is further buttressed by the fact that Petitioner has not shown that Bailey would have agreed to testify at the second trial. It may be possible that Bailey, rather than "recanting" his testimony, and thereby possibly waiving his immunity or incriminating himself, would have invoked his Fifth Amendment right not to testify; and in such a circumstance Bailey would also have been "unavailable," and his prior testimony may have been admissible. See, e.g., Kennedy v. Knowles, 558 F. Supp. 2d 960, 968 (N.D. Cal. 2008) (finding that, where opportunity for cross-examination at preliminary hearing was adequate, witness's testimony from preliminary hearing could be admitted at trial in spite of fact that witness invoked Fifth Amendment and was therefore "unavailable" and did not testify in person at trial) (citing California v. Green, 399 U.S. at 167).

[10] Since the Court finds that the state courts' unavailability determination has not been convincingly shown to be incorrect, and there is no Confrontation Clause violation, the Court does not need to consider whether any such error was prejudicial. See, e.g., Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (setting forth five non-exclusive factors for analyzing harm from admission of testimony in violation of Confrontation Clause); Merolillo v. Yates, 663 F.3d 444, 455 (9th Cir. 2011) (same, citing Van Arsdall). The Court does note, however, that the testimony admitted in both Van Arsdall and Merolillo violated the Confrontation Clause because it was not subject to adequate cross-examination; whereas there is no question here that Bailey's testimony was adequately cross-examined at the first trial. Cf. Van Arsdall, 475 U.S. at 684; Merolillo, 663 F.3d at 455.

have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. See Strickler v. Greene, 527 U.S. 263, 281-82 (1999); see also Banks v. Dretke, 540 U.S. 668, 691 (2004); Silva v. Brown, 416 F.3d 980, 985 (9th Cir. 2005). A petitioner must establish that there was concealment; "suppression" is a necessary element of a Brady claim. See United States v. Dupuy, 760 F.2d 1492, 1502 n.5 (9th Cir. 1985). Petitioner must also show that the suppressed evidence was "material," that is, that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. See United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375 (1985). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 109-110 (1976). Mere speculation that the prosecution may have withheld some exculpatory material is insufficient to proceed on a Brady claim. See Strickler v. Greene, 527 U.S. at 285-86 (citing Brady). Thus, the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

Again, Petitioner's Brady claim must fail for the same reason that Petitioner's ineffective assistance claim failed above: Petitioner has not shown that Bailey's in-person testimony at the second trial would have differed at all from his testimony at the first trial. Here, Petitioner himself has not established how

Bailey's proposed new testimony would have been "exculpatory," let alone shown that the prosecution obstructed such "exculpatory" testimony; and Petitioner has not shown how the result of the proceeding would have been different if the proposed new testimony from Bailey had been obtained. See Paradis, 240 F.3d at 1175; Bagley, 473 U.S. at 682.

RECOMMENDATION

For the foregoing reasons, **IT IS RECOMMENDED** that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; (2) denying the First Amended Petition; and (3) dismissing this case with prejudice.

DATED: April 27, 2015

/s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOEL ELIAS SANCHEZ, Petitioner, v. JEFFREY BEARD, Respondent.	No. ED CV 13-01448-MMM (VBK) [PROPOSED] ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. §636, the Court has reviewed the Petition for Writ of Habeas Corpus ("Petition"), the records and files herein, and the Report and Recommendation of the United States Magistrate Judge ("Report").

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IT IS ORDERED that: (1) the Court accepts the findings and recommendations of the Magistrate Judge, and (2) the Court declines to issue a Certificate of Appealability ("COA").[1]

DATED: _____

_____
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

[1] Under 28 U.S.C. §2253(c)(2), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that, to obtain a Certificate of Appealability under §2253(c), a habeas petitioner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further'." Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S.Ct. 1595 (2000)(internal quotation marks omitted); see also Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029 (2003). After review of Petitioner's contentions herein, this Court concludes that Petitioner has not made a substantial showing of the denial of a constitutional right, as is required to support the issuance of a COA.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOEL ELIAS SANCHEZ, Petitioner, v. JEFFREY BEARD, Respondent.	No. ED CV 13-01448-MMM (VBK) [PROPOSED] JUDGMENT

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

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed with prejudice.

DATED: _____

_____
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

L10(2)

Court of Appeal, Fourth Appellate District, Division One - No. D060315

S204000

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOEL ELIAS SANCHEZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

Joel Elias Sanchez v. Jeffrey Beard, Warden
U.S.D.C. Central Dist., 13-01448f MMM (VBK)
LODGMENT 6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOEL ELIAS SANCHEZ, Defendant and Appellant.	D060315 (Super. Ct. No. INF051951)

APPEAL from a judgment of the Superior Court of Riverside County, Stephen J. Gallon, Judge. Affirmed.

A jury convicted Joel Elias Sanchez of the second degree murder of Manuel Torres and found true the allegations that he personally discharged a firearm and committed the murder for the benefit of a criminal street gang. Sanchez appeals, contending the trial court erred in: (1) refusing to instruct the jury regarding accomplice testimony; and (2) excluding evidence of the toxicology analysis performed on Torres. Sanchez also asserts that cumulatively, the two errors deprived him of his right to due process.

As we shall explain, we reject Sanchez's individual claims of error. Because there were no individual errors, there is no cumulative error and we need not address this argument.

FACTUAL AND PROCEDURAL BACKGROUND

The prosecutor established the facts of the shooting through Sanchez's recorded interviews with police, and the testimony of his cohort, Gary Bailey, as read to the jury from an earlier proceeding.

At the time of trial, Bailey was 18 years old and testified under a grant of immunity. Bailey claimed that he and Sanchez were members of the Varrio Mecca Vineyards gang, and that he considered Sanchez an acquaintance. On August 28, 2005, Bailey met with Sanchez to hang out and smoke methamphetamine. They saw fellow gang members Flaco and Kiwi and were all talking when a van, driven by Torres, drove in "booming" loud music. Torres parked the van and walked away from it.

Flaco asked Bailey to help him remove the speakers from the van, but Bailey refused. Flaco removed the speakers from the van by himself, took them to a truck and drove away. After Kiwi left, Bailey and Sanchez looked inside the van to see what they could steal. They entered the van to remove another speaker and the CD player. However, the men ran away when Sanchez saw Torres approaching.

As the men hid behind a bush, Sanchez suggested to Bailey that they rob Torres at gunpoint by stating, "Let's go put the strap [gun] on. We will take everything he has." Bailey told Sanchez to "Fuck that." The men walked back and saw the van pulling out. They watched the van leave and then walked to a dumpster by another parking lot. The

van approached quickly and left about a 15-foot skid mark when it stopped. Bailey told Sanchez that they needed to leave. When Sanchez refused to leave, Bailey ran away without him.

Bailey ran about 20 feet, then turned around and saw Sanchez with a gun in his hand and his arm extended at a downward angle. Bailey heard Torres say, "No. It's okay. No tambien. No. No. Tambien. Tambien. It's okay." Tambien means "it's okay" in Spanish. Bailey kept running and heard the shot. He later saw Sanchez run away. The day after the shooting, Bailey turned himself into the police.

Sanchez similarly told the police that he was in a parking lot with Flaco and some other people when a van drove up with a loud stereo system. He claimed that Flaco wanted to show a "'little homie'" how to jack things. After the driver left the van, Flaco removed a speaker from the van, put it in a truck that pulled up and left. During the interviews, Sanchez referred to Bailey as "Bobo."

Sanchez claimed that Bailey was inside the van trying to take out the stereo when Sanchez saw Torres return, causing him and Bailey to run away. They ran toward a dumpster as Torres followed them in his van. As the men hid behind the dumpster, Sanchez observed the van drive in, Torres get out, and come towards them walking quickly while carrying a knife. Sanchez claimed that Bailey ran away because he was scared. Sanchez, however, did not run away because he thought Torres would chase him.

Sanchez claimed that Torres asked who stole his "system" as he quickly approached Sanchez carrying a folding knife. Sanchez pulled the gun out of his pocket, pointed it at Torres, fired a single shot and then ran away. Sanchez denied that Torres put

his hands up or said, "hey" or "okay." Sanchez asserted he did not know why he did not run away with Bailey, and claimed that he did not intend to "jack" Torres. Sanchez repeatedly claimed that he did not intend to kill Torres and that he acted in self defense. Sanchez claimed that he cleaned the gun with his shirt and then tossed it into the grass by a park. The police found an open, tri-fold knife and a shell casing from an expended bullet near the dumpster.

Presumably rejecting Sanchez's claim of self defense, the jury convicted him of second degree murder and found true the firearm and gang enhancements. The trial court sentenced Sanchez to prison for a total indeterminate term of 40 years to life.

DISCUSSION

I. *Accomplice Instruction*

Defense counsel requested that the court instruct the jury with CALCRIM No. 334, which directs jurors on deciding whether a person is an accomplice and tells them that accomplice testimony must be corroborated. The trial court refused the instruction, finding there was no evidence showing Bailey to be an accomplice in the charged crime of murder.

Sanchez claims the trial court erred in concluding that Bailey was not an accomplice as a matter of law and that the evidence was such that the jury could have concluded that Bailey was an accomplice. He asserts that the trial court's failure to give any accomplice instructions was prejudicial error. We conclude that the evidence in this case did not permit a finding that Bailey was Sanchez's accomplice in Torres's murder;

and, even assuming the evidence permitted such a finding, the assumed error was harmless.

An accomplice is a person "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111, undesignated statutory references are to this code.) To be chargeable with an identical offense, a witness must be considered a principal under section 31. (*People v. Horton* (1995) 11 Cal.4th 1068, 1113-1114 (*Horton*).) "Principals" include "[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission . . . ." (§ 31.) A mere accessory is not an accomplice. (*Horton*, at p. 1114.) An accomplice must have "'guilty knowledge and intent with regard to the commission of the crime.'" (*People v. Hoover* (1974) 12 Cal.3d 875, 879.) An aider and abettor is guilty not only of the intended crime, but also any other offense that is the natural and probable consequence of the intended offense. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

A witness's status as an accomplice "is a question for the jury if there is a genuine evidentiary dispute and if 'the jury could reasonably [find] from the evidence' that the witness is an accomplice." (*People v. Howard* (1992) 1 Cal.4th 1132, 1174.) If, however, the facts are not in dispute, "'the question is legal and to be determined by the trial judge.'" (*People v. Daniels* (1991) 52 Cal.3d 815, 867.)

The failure to instruct based on section 1111 is an error of state law, subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836-837. (*People*

v. Whisenhunt (2008) 44 Cal.4th 174, 214.) The failure to give an instruction on accomplice testimony is harmless where the witness's testimony was sufficiently corroborated. (*People v. Zapien* (1993) 4 Cal.4th 929, 982.) "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) Corroborating evidence "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*People v. Fauber* (1992) 2 Cal.4th 792, 834.)

Here, the evidence was insufficient to establish that Bailey acted as an accomplice to Torres's murder as an aider and abettor. An aider and abettor is one who aids, promotes, encourages or instigates a crime with knowledge of the unlawful purpose of the perpetrator and the intent to assist in the commission of the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Bailey's testimony that after Sanchez showed him the gun and suggested robbing Torres, the men walked back to observe the van pulling out is possibly sufficient to show Bailey was an accomplice to an attempted robbery. (*People v. Lindberg* (2008) 45 Cal.4th 1, 24 ["'An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission.'"].) This evidence, however, does not show Bailey acted as an accomplice to murder.

After the men observed the van pull out, Bailey testified that they walked to a dumpster and when Sanchez refused to leave, Bailey ran away without him.

Significantly, Sanchez pulled out the gun after Bailey had started to flee. Similarly,

Sanchez repeatedly told the police that while hiding behind the dumpster with Bailey, Bailey ran away *before* he pulled out his gun. Thus, the evidence shows that Bailey did nothing that could be interpreted as aiding, promoting, encouraging or instigating Torres's murder.

Sanchez asserts that Bailey was an accomplice to the murder under the natural and probable consequences line of cases because it is reasonably foreseeable that a person may be killed during the commission of an armed robbery. Here, however, Sanchez did not commit an armed robbery and he has not explained how the evidence shows that Torres's murder was the natural and probable consequence of any attempted robbery.

Pointing out that Bailey and Sanchez were fellow gang members, Sanchez next asserts that Bailey was an accomplice to the murder because of the gang nature of the crime. Sanchez essentially argues that any time a gang member uses a gun to commit a crime while in the presence of other gang members, the other gang members are accomplices because their presence supports and emboldens the shooter. The cases cited by Sanchez, however, do not support this broad proposition and are distinguishable on their facts. (See *People v. Gonzales* (2001) 87 Cal.App.4th 1, 9-10; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1054-1056.)

Even assuming the evidence could have supported a finding that Bailey was Sanchez's accomplice, the asserted instructional error was harmless. Sanchez's statements to the police closely tracked Bailey's testimony and amply corroborated Bailey's testimony. Sanchez focuses on Bailey's claim that after Sanchez pulled out his

gun, Torres repeatedly stated, "no" or "it's okay." This argument, however, overlooks the law that corroborating evidence may be slight (*People v. Brown* (2003) 31 Cal.4th 518, 556) and need not corroborate all of the accomplice's testimony (*People v. Heishman* (1988) 45 Cal.3d 147, 164-165; see also CALCRIM No. 334).

II. *Toxicology Results*

A. Background

The prosecutor moved in limine to exclude the results of a toxicology analysis performed on Torres that revealed methamphetamine in Torres's system and a blood alcohol level of 0.10 percent. The trial court excluded the evidence finding defense counsel had not shown its relevance. The following day, defense counsel requested that he be allowed to introduce Torres's blood alcohol level to show that Torres's actions resulted from being over the legal limit for alcohol. The prosecutor asserted that defense counsel was attempting to "dirty the victim" and expert testimony was necessary to explain what impact the drugs or alcohol had on Torres and that the blood had been properly drawn. The trial court took the matter under submission and eventually ruled that the toxicology results were irrelevant "absent some additional evidence or something that would point to relevance."

B. Analysis

Sanchez asserts the trial court deprived him of due process, a fair trial, and the right to present a defense when it excluded evidence that Torres had alcohol and methamphetamine in his system at the time of the shooting. He claims this evidence

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supported his argument that Torres acted and looked crazy in pursuing him and had the

jury heard this evidence, it might have concluded that he reacted in reasonable or unreasonable self defense, and returned a verdict of not guilty or manslaughter. We disagree.

A trial court has broad discretion to determine the relevance of evidence and to exclude evidence it deems irrelevant, confusing, cumulative, or unduly prejudicial. (*People v. Weaver* (2001) 26 Cal.4th 876, 933.) We review the trial court's determination on admissibility of evidence for an abuse of discretion, examining the evidence in the light most favorable to the court's ruling, and will reverse only if the trial "'"court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."' [Citations.]" (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438, abrogated on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn.14.) Application of the ordinary rules of evidence does not impair a defendant's right to present a defense (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428) and we review the erroneous exclusion of evidence to determine whether it was reasonably probable a result more favorable to the defendant would have been reached in the absence of the error (*id.* at p. 429; *People v. Watson*, *supra*, 46 Cal.2d at p. 836).

Here, Sanchez sought to introduce the toxicology results to show that Torres acted in a crazed manner and appeared maniacal because he was high on methamphetamine and intoxicated on alcohol. The effects of drugs and alcohol have become the subject of common knowledge among laypersons. (*People v. Stitely* (2005) 35 Cal.4th 514, 550 [lay jurors can assess the effect of alcohol on impulse and inhibitions]; *People v. Yeoman*

(2003) 31 Cal.4th 93, 162 [no juror misconduct in discussing personal experiences regarding the effect of drugs].)

Sanchez, however, presented no authority that it is a matter of common knowledge that a person with the amount of methamphetamine *and* alcohol found in Torres's system would act in a crazed or maniacal manner. Rather, such evidence is irrelevant without an offer of proof because the psychological effect of a combination of methamphetamine and alcohol is not a matter of common knowledge that the average juror could be expected to understand without the aid of expert testimony. (Evid. Code, § 801.) Sanchez essentially wanted jurors to speculate regarding the combined effect of methamphetamine and alcohol on Torres; but, speculative inferences are irrelevant. (*People v. Stitely*, *supra*, 35 Cal.4th at pp. 549-550; see *People v. Kelly* (1992) 1 Cal.4th 495, 523 ["evidence of substance abuse, without more, would be meaningless to a jury's consideration of the victims' conduct. The court properly disallowed the evidence"].)

Sanchez's reliance on *People v. Wright* (1985) 39 Cal.3d 576 (*Wright*) for the proposition that the methamphetamine and alcohol in Torres's system supported his perception that Torres acted irrationally during the confrontation, is misplaced. The *Wright* court found that evidence the victim had used illicit drugs was admissible to support a claim that the defendant acted in self defense in response to the victim's irrational behavior. (*Id.* at pp. 583-584.) It noted, however, that without expert testimony regarding the effects the drugs would have had on the victim, the evidence "would have done little towards corroborating defendant's testimony that the victim was, as a result, irrational and aggressive." (*Id.* at p. 585.) Accordingly, *Wright* is of no assistance to

Sanchez because it did not address whether, absent foundational expert testimony, evidence of a victim's drug use is admissible to show its effect on the victim's behavior. (*People v. Jennings* (2010) 50 Cal.4th 616, 684 [cases are not authority for propositions not considered therein].) Moreover, the critical issue in this case was *how* Torres acted before the shooting, not what might have prompted him to take the actions that he did. Accordingly, on this record, we cannot conclude that the trial court abused its discretion in excluding the toxicology results in the absence of an offer of proof by the defense of expert testimony as to the effects of these levels of alcohol and methamphetamine on the victim.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.

Joel Elias Sanchez v. Jeffrey Beard, Warden
U.S.D.C. Central Dist., 13-01448f MMM (VBK)
LODGMENT 6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOEL ELIAS SANCHEZ, Defendant and Appellant.	D060315 (Super. Ct. No. INF051951)

APPEAL from a judgment of the Superior Court of Riverside County, Stephen J. Gallon, Judge. Affirmed.

A jury convicted Joel Elias Sanchez of the second degree murder of Manuel Torres and found true the allegations that he personally discharged a firearm and committed the murder for the benefit of a criminal street gang. Sanchez appeals, contending the trial court erred in: (1) refusing to instruct the jury regarding accomplice testimony; and (2) excluding evidence of the toxicology analysis performed on Torres. Sanchez also asserts that cumulatively, the two errors deprived him of his right to due process.

gun, Torres repeatedly stated, "no" or "it's okay." This argument, however, overlooks the law that corroborating evidence may be slight (*People v. Brown* (2003) 31 Cal.4th 518, 556) and need not corroborate all of the accomplice's testimony (*People v. Heishman* (1988) 45 Cal.3d 147, 164-165; see also CALCRIM No. 334).

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A. Background

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B. Analysis

Sanchez asserts the trial court deprived him of due process, a fair trial, and the right to present a defense when it excluded evidence that Torres had alcohol and methamphetamine in his system at the time of the shooting. He claims this evidence supported his argument that Torres acted and looked crazy in pursuing him and had the

jury heard this evidence, it might have concluded that he reacted in reasonable or unreasonable self defense, and returned a verdict of not guilty or manslaughter. We disagree.

A trial court has broad discretion to determine the relevance of evidence and to exclude evidence it deems irrelevant, confusing, cumulative, or unduly prejudicial. (*People v. Weaver* (2001) 26 Cal.4th 876, 933.) We review the trial court's determination on admissibility of evidence for an abuse of discretion, examining the evidence in the light most favorable to the court's ruling, and will reverse only if the trial "'"court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."' [Citations.]" (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438, abrogated on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn.14.) Application of the ordinary rules of evidence does not impair a defendant's right to present a defense (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428) and we review the erroneous exclusion of evidence to determine whether it was reasonably probable a result more favorable to the defendant would have been reached in the absence of the error (*id.* at p. 429; *People v. Watson*, *supra*, 46 Cal.2d at p. 836).

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Sanchez because it did not address whether, absent foundational expert testimony, evidence of a victim's drug use is admissible to show its effect on the victim's behavior. (*People v. Jennings* (2010) 50 Cal.4th 616, 684 [cases are not authority for propositions not considered therein].) Moreover, the critical issue in this case was *how* Torres acted before the shooting, not what might have prompted him to take the actions that he did. Accordingly, on this record, we cannot conclude that the trial court abused its discretion in excluding the toxicology results in the absence of an offer of proof by the defense of expert testimony as to the effects of these levels of alcohol and methamphetamine on the victim.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.

Joel Elias Sanchez v. Jeffrey Beard, Warden
U.S.D.C. Central Dist., 13-01448f MMM (VBK)
LODGMENT 11 (1 of 3)

COURT OF APPEAL -

FOURTH APPELLATE DISTRICT

DIVISION II

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. JOEL ELIAS SANCHEZ, Defendant/Appellant.	DCA No. E051657 Riverside County Case No. INF051951 Volume 1 of 3 Pages 1 - 203 (Pages 2-10 sealed)

REPORTER'S TRANSCRIPT ON APPEAL

Before the Honorable Jorge Hernandez

April 22, 2010

Before the Honorable Stephen J. Gallon

June 21, 23 & 24, 2010

APPEARANCES:

For Plaintiff/Respondent: OFFICE OF THE ATTORNEY GENERAL
110 West A Street, Suite 1100
San Diego, California 92101

For Defendant/Appellant: APPELLATE DEFENDERS
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Reported by: DEMETRIA KOTTER, CSR No. 12602
DALLAS ANN ERWOOD, CSR No. 5056

Leslie Brock, CSR

COPY

INDIO, CALIFORNIA; JUNE 23, 2010

BEFORE THE HONORABLE STEPHEN J. GALLON

THE COURT: All right. Let's go on the record in People versus Joel Elias Sanchez. Both counsel are present, investigating officer present, Mr. Sanchez is present.

Yes, Mr. Lieman.

MR. LIEMAN: Your Honor, as the Court is aware, the issue of housing and documents have come up before. My client has been kept here in Indio, which, of course, we requested, and the Court so ordered.

THE COURT: So that's been done.

MR. LIEMAN: Right. But apparently, he's been separated from his papers. Apparently they may still be in Southwest. Or who knows where they are? And there are item -- there is documentation, it's an accordion folder; in discussing this with him, there are things in there that may be of great help to me in conducting the trial. And we don't seem to know where they are, and nor do, apparently -- clearly the bailiffs here in the courtroom don't.

So I wonder if somehow we can have the Court perhaps order the -- whoever is running the jail to come over and explain where Mr. Sanchez's papers are and why he isn't --

THE COURT: Well, I'm going to make one more order that the Court -- the Court is going to direct the jail to get any paperwork necessary for this trial to the defendant, and I'll make that order right now, that he be allowed access to his papers. And if that doesn't -- that situation doesn't change then, then I'll make a further order at that point.

But right now, I'm going to make one more order that he be given his paperwork.

MR. LIEMAN: Thank you, Your Honor.

THE COURT: All right. Let's go ahead and bring our jury.

MR. ORLANDO: Your Honor, I do have to put something on the record real quick.

THE COURT: Oh. Yes.

MR. ORLANDO: Okay. Sorry. Court's currently is reviewing the People's motions as we speak, and one of 'em, it said with regard to the toxicology results of the victim.

THE COURT: Do you have those numbers?

MR. ORLANDO: I do have the results.

THE COURT: And what are they?

MR. ORLANDO: The results are, he had a blood alcohol level of .10. He had amphetamines, it says detected. Methamphetamine of a 0.263-milligram over liter. Amphetamines, none detected. Methadone, none detected. So those are the -- those are the raw numbers.

THE COURT: So it's 263 nanos?

MR. ORLANDO: Milligrams. It says MG, not N -- not NG.

THE COURT: So it will be -- I think it will be 263 nanograms per milliliter, which is -- so with respect to absent -- absent an expert to explain those results, the most that I would allow the defense to go into is that there was methamphetamine detected in the system.

MR. LIEMAN: Also, Your Honor, the blood alcohol was

.10 which is above the legal limit of .08. And I think that's certainly common knowledge what the legal limit is. The victim was clearly over. I think the jury can certainly be told that.

MR. ORLANDO: First of all, Your Honor, I would object to even the mention of methamphetamines or any al- -- unless it can show some sort of relevance to the situation.

THE COURT: I would agree.

MR. ORLANDO: And I don't --

THE COURT: Because what's the relevance of having drugs in the system, or alcohol?

MR. LIEMAN: Well, clearly the victim in this case did drive. There was some -- a chase of some kind where the defendant -- where the victim was behind the wheel, and clearly him being behind the wheel where he's over the legal limit to drive, as far as the law's concerned, may affect his judgment. Because why else would they have a limit on how much you can drink and drive?

THE COURT: What is the relevance of him driving drunk?

MR. LIEMAN: Well, if he drove under the influence, clearly then that affected his reasoning. And since that affected his reasoning driving, the events that followed may have been, in part, due to his high alcohol content.

THE COURT: All right. I'm -- at this point, I am going to sustain the objection on -- on the mentioning of the alcohol and the methamphetamine, unless some other relevance can be shown to that.

MR. ORLANDO: And Your Honor, I believe --
THE COURT: And if that changes, I'll reconsider that. But at this point, I think it's a situation where unless there's some type of relevance that can be shown, I think that, counsel, you would be making the same motion if there was alcohol in your client and the prosecutor was arguing that the alcohol in his system made him more likely to kill someone, or something like that. So, I mean --
MR. LIEMAN: Well, that's putting up a straw man, Your Honor.
THE COURT: No, I'm not trying to do that. I'm just saying that I have to look at it from both sides, and unless some relevance is shown to that, that information, I will keep it out.
THE CLERK: So Your Honor, are you -- you had ruled that it could just go into the meth was detected. Are you going to --
THE COURT: Well, no. Just the toxicology itself is irrelevant.
THE CLERK: Okay.
THE COURT: All right. Anything further before --
MR. ORLANDO: Yes, Your Honor. With regard to Officer Perafan's testimony, the Court, I don't know, is still making a ruling? I just --
THE COURT: Yeah. I'm going to set that aside until we have more time to discuss that one.
MR. ORLANDO: Okay. And I was just going to cite a case for the Court to review. It's 14 Cal -- 14 Cal.4th 155,

INDIO, CALIFORNIA; JUNE 24, 2010

BEFORE THE HONORABLE STEPHEN J. GALLON

THE COURT: All right. Let's go back on the record in People of the State of California versus Joel Elias Sanchez. Our jury is not present. Counsel, investigating officer and Mr. Sanchez are present.

Counsel, we need to address the issues of the coroner's photographs, as well as the transcript, Officer Perafan. I think the issue is going to be at this point the admissibility of the statements?

MR. ORLANDO: Correct.

THE COURT: Either counsel wish to be heard?

MR. ORLANDO: Your Honor, I think that issue can be addressed on Monday. If we can have -- if the Court would like, just to make it cleaner, I've provided the Court case law with my theory of why those statements come in. I can have the officer here in a 402 to do a motion which was done at the last trial which I feel is --

THE COURT: That would be better to actually have 402 and allow counsel the opportunity to cross-examine on those issues pertaining to that. I think that's acceptable. The only issues is opening statements are going to be in about 20 minutes. Are you going to leave that portion out?

MR. ORLANDO: Well, I was -- I did my opening statement with it. I can just say that officers arrived and -- I would like to add it in, but I leave that to the Court. If the Court hasn't made a ruling, I could submit on the actual transcript. I believe the transcript's sufficient

enough, but if the Court doesn't feel it needs more testimony, we can do that, and I can leave that out.

THE COURT: Mr. Lieman, what is your preference?

MR. LIEMAN: Well, if the Court hasn't ruled on it, I'd prefer it be left out.

THE COURT: I mean, I could -- I could rule on it with what I have, or if we need to have a 402, since we haven't had a 402 hearing yet.

MR. LIEMAN: Yes.

THE COURT: Obviously, things that haven't been litigated yet wouldn't be admissible in the opening statement and wouldn't be able to be used in the opening statement.

MR. ORLANDO: I could stay away from it in my opening statement, Your Honor. I could go basically off of it; wasn't that -- it was a small part of my opening statement. But it's not a major part, so I can leave it out.

THE COURT: Just because if we are going to have a 402 hearing on it, I want to listen to both sides.

MR. ORLANDO: Sure.

THE COURT: So let's just stay away from that one statement in the opening statement until the Court's made a ruling.

MR. ORLANDO: That's fine.

MR. LIEMAN: Another issue that I would like to readdress, I guess, Your Honor, since the coroner's coming in this afternoon is the question of toxicology. I'm aware of the Court's ruling, and I was not going to go into any kind of information with regard to drug use or drugs found. But we

were informed that the -- apparently, the decedent's blood alcohol level was at a .01 -- .10. I'm sorry. It was a .10, which, of course, the Court's aware, 23152(b) makes it absolute crime to drive over a .08. And I'd like to get -- I think that that information is relevant. And clearly, we don't need any testimony as to anybody's opinion as to what that means. The law says anything over an 08 is, in fact, illegal.

MR. ORLANDO: Your Honor, I still don't understand the relevance of whether it is a .08 or a .10 as to this issue in this case.

THE COURT: And that's the Court's concern is the relevance of the fact that he's an 01 -- or .10.

MR. LIEMAN: Well, there is driving in this case by the victim; I think we all concede that. And of course there are actions by the victim. And of course it could -- they could be, and of course it could be argued that his actions were, in fact, in part, at least, caused by the fact that he was over the legal limit, breath, blood, alcoholwise.

THE COURT: But, I mean, are his actions, I mean, as to the motivations behind his actions, the issue? Or is it the issue of what your client perceived?

MR. LIEMAN: Well, I think they both come into play. Clearly, what my client perceived is extremely important to Mr. --

THE COURT: Well, if he was making a good decision to go recover his property or a poor decision, what the evidence comes out speaks for itself. The issue is what your client

perceived the threat or the threat level. And so, I mean, with the blood alcohol level of the victim, I don't see the relevance of --

MR. LIEMAN: Well, his actions or -- or could be at least explained in part by his blood alcohol level, how he reacted and how my -- his reactions and how his reaction was perceived by my client; my client's reaction to basically his reaction.

THE COURT: Mr. Orlando.

MR. ORLANDO: First of all, relevance. Second, foundation. Because the coroner's coming in here does not lay the adequate foundation for these results to come in. Those were taken by a separate agency; it was taken by Biotox. So for Mr. Lieman to just blanketly say that he's a .10 would -- one, it doesn't -- it lacks foundation. Two, it's not relevant.

And again, Mr. Lieman's argument that it explains his actions is total speculation. And you do need an expert to explain actions with regard to blood alcohol level, and any type of drug. These are not common knowledge things that someone can just say, oh, he's going to act in this way. It is pure speculation. It's nothing but an attempt to dirty the victim in this case.

And I believe that without him proffering an expert, one, under a proper blood draw, two, there was an analysis of this blood level, three, this could have been taken post mortem, which brings in a whole slew of issues as the coagulation of the blood, and we all know these things. So to

simply say .10 nanograms is not relevant, and he has not provided a proper foundation to even bring those in.

THE COURT: What I'm going to do is, I don't want it mentioned in the opening statement. I want to research one thing before I make a ruling, and I'll give you a ruling prior to 1:30 today on that. My initial inclination is that it is irrelevant, and so -- but before I foreclose any issues with the defense, I do want to research one issue. So the Court's initial ruling is that it is not going to come in because there's no relevance to this information, but I want to check one thing before I give you a final ruling.

MR. ORLANDO: And Your Honor, and I would just ask that for counsel, since he's made these statements, I would like to see some authority in which he's basing this on. Besides, I would like to see case law, because --

THE COURT: Well, I think I'm not so much concerned about the foundational requirements as I -- as the Court it has issues with the relevancy.

Because the issue in this case is going to be the conduct, obviously, the conduct of the victim in the case. But without some type of clear nexus between the two, the -- whatever toxicology results and the ultimate actions, the question is going to be what it was observed, conduct of the victim, and what can be proven, and what the defendant's state of mind is as to how he reacted to those threats.

So at this point, I don't see a nexus between the blood alcohol level and those other issues. But that's the Court's initial ruling. I'm going to check on one more issue

before I give you a final on that.

MR. ORLANDO: And Your Honor, if it's even allowed, I would only ask how that's going to come in. A coroner cannot testify to those. He did not -- there's no foundation to that.

THE COURT: Well, there would have to be somebody from Biotox would have to come in.

MR. ORLANDO: Yeah.

THE COURT: Maureen Black or Ola Bawardi or someone like that.

MR. ORLANDO: We did not mention it in our witness list.

THE COURT: If the Court makes a ruling as relevant, those -- that's not going to be a huge issue. The Court's main concern is relevance, and I still don't believe it's relevant.

MR. ORLANDO: Your Honor, at this time, I'm just going to show you the exhibits that the People are intending to proffer through their --

THE COURT: Have they been marked?

MR. ORLANDO: Yes. Well, I've marked them in the back.

THE COURT: Okay.

MR. ORLANDO: In sequence to the exhibit list that was provided yesterday, so --

THE COURT: Can I see them all, actually?

MR. ORLANDO: Sure.

THE COURT: Can you approach, please?

THE CLERK: You provided an exhibit list yesterday?
MR. ORLANDO: No, no. Your old exhibit list, we were just going to go off of that number; that's what I was told yesterday.
(Discussion held off the record)
THE COURT: Mr. Lieman, have you seen these?
MR. LIEMAN: I have, Your Honor.
THE COURT: Where's the -- are there other photos? What photos are being objected to?
MR. LIEMAN: I don't have --
MR. ORLANDO: Those are the ones I intend to introduce.
MR. LIEMAN: Your Honor, can't refer to them by number because I don't have the photos in front of me. But if I could have -- approach the bench, if I may?
THE COURT: Yes. Are there any other photos from the autopsy that you're intending to introduce?
MR. ORLANDO: No. That's it.
THE COURT: This is it?
MR. ORLANDO: That's it.
MR. LIEMAN: If I may just approach.
I don't understand one of the photos, but I'm sure that the coroner will explain it, Your Honor.
THE COURT: Are you talking about the track?
MR. LIEMAN: Yeah, No. 67, Your Honor. I'm not quite sure what -- what this really shows; ask counsel that I'd like --
MR. ORLANDO: Is there a trajectory rod in him?

(People's Opening Statement was conducted and reported, but not transcribed as part of the record on appeal.)

(Defendant's reservation of Opening Statement was stated and reported but not transcribed as part of the record on appeal.)

THE COURT: All right, Mr. Orlando. Are you prepared to call your first witness?

MR. ORLANDO: Yes, Your Honor. At this time, the People call Investigator Dan Marshall to the stand.

THE DEPUTY SHERIFF: Face the clerk, raise your right hand.

THE CLERK: Solemnly state the testimony you'll give in the matter now pending before the Court will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Thank you. Have a seat.

Could you please state your name, and spell your first and last name.

THE WITNESS: Daniel Marshall, D-A-N-I-E-L, M-A-R-S-H-A-L-L.

THE COURT: Counsel, you may inquire.

DANIEL MARSHALL,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ORLANDO:

Q. Investigator Marshall, by who are you employed?

the suspect is immediately.

So it's kinda this ongoing machine.

So when I first arrived, we needed to process a crime scene, because the victim had already been transported, and it was critical that we get the initial crime scene documented, because it was in a parking lot, and there was a lot of foot traffic that could potentially come into the crime scene.

Q. Was the crime scene what you called secured?

A. Yes, it was. It was cordoned off with, as you see on TV, the yellow police tape.

Q. And was that done this time?

A. Yes, when I arrived.

Q. And approximately what time did you arrive, if you know?

A. I -- I'm going to say around sometime in the mid afternoon, maybe between 5:00 to 6:00 o'clock, somewhere in there.

Q. And when you arrived, you said the victim of the crime was already been taken away?

A. Yes.

Q. So were there items of evidence that need to be marked?

A. Yes, there were.

Q. 'Kay. I'm going to show you what's been marked as People's Exhibit 9 for identification and ask you if you recognize that photo?

A. Yes, sir, I do.

Q. And what is that a photo of?

A. That's a photo of the van, 5EOX001, that was parked when I arrived with the motor running that we later determined belonged to the victim.

Q. Publishing People's Exhibit 9.

Now, looking at People's Exhibit 9, that's from a distance, but could you please describe, you said it was running; what do you mean by running?

A. The engine was on.

Q. Okay. And near People's Exhibit 9, did you notice anything of -- did you look inside People's Exhibit 9, the van in People's Exhibit 9?

A. I did.

Q. And what did you notice, if anything, within People's Exhibit 9?

A. There was -- there was no key in the ignition. There was just several tools. You could see the wire hanging out of the -- the back. That's kinda my initial assessment of the -- the van when I got there.

Q. Did you also look what was behind the van, by chance?

A. In front of the van or --

Q. Behind it.

A. The speaker wire and the skid marks. There was a skid mark there and a speaker wire.

Q. Showing you People's Exhibit 11 for identification. Can you please describe what we're looking at there?

A. Yes. That's the skid mark with relation to the rear tire of the van.

Q. Okay. Publishing People's Exhibit 11. Hopefully

we'll get a -- darken the screen. There you go.

THE DEPUTY SHERIFF: Is that better?

MR. ORLANDO: Yeah.

Q. What are we looking at right there, sir?

A. That is the skid mark that starts basically at that draining drainage ditch and then runs right up to the right rear tire of the -- the van.

Q. Did you measure that skid mark?

A. I did.

Q. Approximately how far was that skid mark?

A. It's about 15 feet.

Q. Now, sir, in addition to that skid mark, did you notice anything around the van?

A. Yes.

Q. What did you notice?

A. There was the mattress that you could see leaned up against the dumpster enclosure. There was also a folded three-by-five card to the right of the van there on the sidewalk. Underneath that was a shell casing from an expended bullet or -- correct, expended bullet. And in the front of the van after the parking space berm, I don't know what they're called, the -- was a trifold knife that was all the blades out, was laying in the ground.

Q. And so let's take these in order. I'm going to show you People's Exhibit 10 for identification. If you could please describe what we're looking at there.

A. Okay. That would be a clearer view of the mattress on the dumpster enclosure and the three-by-five card that was

crime scene, specifically be 72. Next one.

THE CLERK: 71?

MR. ORLANDO: 72 will be the next one.

THE CLERK: 72.

MR. ORLANDO: Thank you.

MR. LIEMAN: Your Honor, it's agreeable if I move to observe?

THE COURT: Oh, yes, sir.

MR. ORLANDO: Your Honor, may the witness come out into the well?

THE COURT: Yes.

Q. BY MR. ORLANDO: Now, what are we looking at on People's Exhibit 73. Are you familiar with that, 73?

A. I am. This is a computer generated sketch of the dumpster enclosure that was done by someone other than myself, but that's a fair and accurate representation of how the dumpster enclosure currently is, and was at the time.

Q. Now, sir, did I ask you to go out there and take measurements at certain points on that dumpster in relation to all those items there?

A. You did.

Q. And when you took those measurements, what did you use to take those measurements?

A. Just a household, you know, a regular tape measure.

Q. Okay. Now, looking at this exhibit, People's Exhibit 73, is this consistent with the locations of north, south, east, west?

A. Yes.

Q. Now, what we're looking at here on People's Exhibit 73 with that handicap, is that the handicap parking spot where you located the van on August 28th, 2005?

A. It is.

Q. And when that van pulled in there, was it parked -- well, we saw the photos. It was parked at an angle, correct?

A. It was.

Q. Okay. Now, did you take a measurement from the end of the parking lot in the handicap, to the front of the dumpster, by chance?

A. From -- from where I discovered the knife is where I took the measurement from.

Q. Okay. So where -- could you please draw a berm that roughly indicates where you took your measurement from?

Could you please put your initials there?

A. Sure.

Q. Okay. So you took a measurement from that berm?

A. From this horizontal line right at the berm, right, right here.

Q. Approximately in the middle?

A. The middle.

Q. Okay. When you took that measurement from the middle, where did you measure it to?

A. I measured it to the north end of the -- the northeast end of the dumpster.

Q. And based on that measurement, what was your measurement?

A. It was about 19 and a half feet.

Q. Could you please put down 19 feet by the mark six inches; please put your initials there.
A. Sure.
Q. Now, did you also take a measurement from the end of the dumpster, to where an opening is within the dumpster?
A. I did.
Q. And approximately how far is that?
A. Could -- could I refer to the -- the notes I used?
MR. ORLANDO: Your Honor, may he do so?
THE COURT: Yes.
THE WITNESS: May I refer to my notes just real quick. Okay. I've refreshed my memory.
Q. BY MR. ORLANDO: Okay. If your memory's refreshed, what is the distance?
A. It's two feet.
Q. Could you please put two feet there?
A. Sure.
Q. So the entire distance from where you -- at least from your approximation of where that knife was located, to where the opening is of that dumpster enclosure on People's 73 is roughly 21 feet, six inches?
A. Correct.
Q. And did you also take other measurements of this dumpster?
A. I did.
Q. Okay. And approximately how long was this dumpster's -- measuring from the tip here where the -- or the edge of the dumpster was, to where I believe the doors were;

A. Yes.
Q. 'Kay. And you did tell us that a meth pipe is, in your words, cherished by users?
A. Yes.
Q. And you're not aware of how many people were on that median with the paramedics before you got there; that true statement?
A. That's correct.
Q. Okay.
I have nothing further, Your Honor.
THE COURT: All right.
Anything further, Mr. Orlando?
MR. ORLANDO: No, Your Honor.
THE COURT: All right. Can this witness step down?
MR. ORLANDO: Yes, subject to recall.
MR. LIEMAN: I have no objection.
THE COURT: All right. Thank you.
And I believe, Mr. Orlando, your next witness is available at 1:30?
MR. ORLANDO: Yes. That's the coroner.
THE COURT: Okay.
All right, ladies and gentlemen. We are going to go ahead and take our noon recess at this point, and I'll see everybody back here at 1:30, and enjoy the 107-degree heat out there today.
But same reminders: Please don't talk about the case with anyone or any subject involved in the case or form any opinions about the verdict. Thank you.

(Lunch recess)

THE COURT: Let's go back on the record in People versus Joel Elias Sanchez. I have both counsel present, the investigating officer and Mr. Sanchez are present.

And before we bring in our jury, there was an issue with respect to toxicology I wanted to address. I've done some further research on the issue. It's still the Court's position that this evidence would be irrelevant to the proceedings, and absent some additional evidence or something that would point to relevance, it's still the Court's position that this evidence is irrelevant at this point.

Would either side wish to be heard?

MR. LIEMAN: I'll submit it, Your Honor.

MR. ORLANDO: No, Your Honor.

THE COURT: All right. Let's go ahead and --

MR. ORLANDO: Your clerk's not here, Your Honor.

THE COURT: Thank you. All right. Court's in recess.

(Recess)

(Jurors returned, proceedings followed:)

THE COURT: Good afternoon, everybody.

MR. LIEMAN: Good afternoon.

THE COURT: All right. Let's go back on the record in People versus Sanchez. I have both counsel present, investigating officer's present, Mr. Sanchez is present, and all of our jurors and alternates are present.

And People, you may call your next witness.

MR. ORLANDO: Yes, Your Honor. At this time, the

People call Dr. Darryl Garber to the stand.

THE DEPUTY SHERIFF: Face the clerk, raise your right hand.

THE CLERK: Do you solemnly state that the testimony you'll give in the matter now pending before the Court will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE DEPUTY SHERIFF: Watch your step.

THE COURT: Could you please state your name, and spell your first and last name for the records.

THE WITNESS: Darryl Garber, D-A-R-R-Y-L, G-A-R-B-E-R.

THE CLERK: Thank you.

THE COURT: Counsel, you may inquire.

MR. ORLANDO: Thank you, Your Honor.

DARRYL GARBER,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ORLANDO:

Q. Dr. Garber, by who are you currently employed?

A. I work as an independent contractor. I'm a medical doctor, a licensed physician and surgeon in the state of California, and I work as chief forensic pathologist of Imperial County, California.

Q. Okay. I believe August 31st, of 2005, were you a coroner with the Riverside County Coroner's Office?

unavailable as a witness.

MR. LIEMAN: Well, of course, I realize that the People are free to speculate why he's not here, and I have no objection to that. So I mean, clearly, if it's what's good for me is good for him.

MR. ORLANDO: Your Honor.

MR. LIEMAN: So I'm not seeking to him being precluded of raising that issue.

MR. ORLANDO: There's a reason why 317 is left the way it is, and we should not upset it, should not be made amended.

THE COURT: I'm going to leave it consistent with the jury instructions, and the jury instructions specifically tell the jury not to speculate; they leave it very -- is that he is unavailable.

MR. LIEMAN: And just for the record, Your Honor, obviously I'm going to ask for the same thing when we come to 317, so it's not a surprise.

THE COURT: And counsel, if you can show me some authority that allows deviation from that, I will consider that. But the jury instruction is very, very clear and as written. Okay.

(Open court)

THE COURT: All right, counsel. You may continue.

GARY BAILEY,

called as a witness on behalf of the People, having been previously duly sworn, was examined and testified, through readers, as follows:

DIRECT EXAMINATION

BY MR. ORLANDO:

Q. Good morning, Mr. Bailey. Are you a little nervous today?

A. Kind of.

Q. How old are you?

A. Eighteen.

Q. How old were you on August 28th, 2005?

A. Fifteen.

Q. Did you drive at that time?

A. No.

Q. Back up. August 28th, 2005, were you living here in the Coachella Valley?

A. Yes.

Q. With who?

A. My sister.

Q. Where did your sister live?

A. In the Mecca Vinyards Apartments in Indio.

Q. At that time were they known as the Summerfield Apartments?

A. Yeah, Summerfield.

Q. How long have you been living with your sister at that time?

A. A few months.

Q. Now, do you have a relative that works for the Indio Police Department?

A. Yes.

Q. Who is that?

A. Abraham Plata.
Q. And what's his relation to you?
A. My uncle.
Q. Which side?
A. My mom.
Q. Now, Mr. Bailey, do you speak Spanish?
A. Yeah.
Q. Who did you learn that from?
A. My mom's parent.
Q. You are currently testifying under what is called a use immunity agreement, aren't you?
A. Yes.
Q. Let me show you the document that you and your attorney -- Court's Exhibit 43. You and your attorney, Mr. Forth from the Public Defender's Office, went over this document; is that correct?
A. Yes.
Q. Is that your signature on that document?
A. Yes.
Q. That's Mr. Forth's signature, your attorney?
A. Yes.
Q. Is it your understanding, in agreeing to testifying today, that you are to give truthful testimony, and it just can't be used against you if this office chooses to charge you with a crime, correct?
A. Correct.
Q. That's your signature, correct?
A. Yes.

Q. Publishing Court's Exhibit 43. That's your attorney's signature?
A. Yes.
Q. You know what you say in court cannot be used against you; however, the office has made the decision on whether to file against you or not. You understand that, correct?
A. Yes.
Q. Outside of this use immunity agreement, are you currently out of any witness protection program?
A. No.
Q. Are you currently receiving any other benefits from the District Attorney's Office?
A. No.
Q. Do you know that -- do you know a person by the name of Joel Sanchez?
A. Yes.
Q. Did you know him as Joel Sanchez back on August 28th, 2005?
A. No.
Q. What did you know him as?
A. Capone.
Q. Do you see that person by the name Capone sitting in court today?
A. Yes.
Q. Could you please point to where that person named Capone is sitting and what he's wearing?
A. Right here, with a brown coat.
Q. When you say "Right here with a brown coat," Your

A. Or after smoking?
Q. Yes.
A. I would say 30 to 45 minutes.
Q. You went over to your sister's house?
A. Yes.
Q. How long were you at your sister's house?
A. For a couple minutes.
Q. So you were there just briefly?
A. Uh-huh.
Q. Is that a yes?
A. Yes.
Q. Okay. And then what happened next after that?
A. Went out, we walked around the corner and saw two other guys.
Q. What did you do when you saw those two other guys?
A. They lived there, too, and they are from there, too, so we just hang out and talk to them.
Q. Did these two guys have names?
A. Yeah.
Q. What are they?
A. One is known as Flaco, and the other one was Kiwi.
Q. Kiwi?
A. Yeah. Criminal.
Q. Criminal?
A. Yeah.
Q. Were they, to your knowledge, part of the Mecca Vinyards gang?
A. Yeah, but they are older.

A. No.
Q. So you guys go back to building 21?
A. Yes.
Q. Then what happened after that?
A. The guy's barely down on his head, he sees us, so he pulls out real fast, and we run around building 20, and then a little more about in the center there.
Q. Okay.
A. By the church.
Q. By building 17?
A. Yes. There's a bush there, when we were standing behind the bush.
Q. Okay. Standing behind the bush over there on building 17. Before we get to that, when you say he said, "Let me put a strap on," what was your response to that?
A. I told him -- I told him, "Fuck that."
Q. Why did you go back with him?
A. Why did I go back with him?
Q. Yeah.
A. We were just going back to see if he was gone.
Q. When he said, "Put the strap on him," where were you when he said that?
A. I was with him.
Q. So you guys stopped? Or were you running when he said this?
A. When he said that, we were stopped behind the bush.
Q. So when he says, "Let's put the strap on him"?
A. Yes.

Q. You said you were at the bush now?
A. We were looking around to see if he coming.
Q. You were at the bush now. The second time you were running, correct?
A. Yes.
Q. My question is, and I just need for jury's clarification, at what point did he make the statement, "Let's put the strap on him and take his own system"? After the first time the guy chased him?
A. Right. When we arrived to where we stopped.
Q. Stopped where?
A. At that bush.
Q. Seventeen?
A. Yes.
Q. Okay.
A. We didn't see him coming. And then he said that.
Q. So you did not see him coming. And that's when you guys went back?
A. Yes.
Q. Then what happened after you went to 21 and then he saw you? Or what happened? Why did he --
A. That's when the van was pulling out.
Q. So the van was pulling out?
A. Yes.
Q. And then what happened?
A. Then he said that, and then we didn't go back after that.
Q. Okay.

A. We stood there in the van. We saw it pass across the street and turn into the other street.
Q. So you are here. And you're watching the van go?
A. Yes.
Q. And it turns and Torres --
A. Yes.
Q. Going really fast?
A. Yes.
Q. So what do you guys do when this happens?
A. From there, we go to the other parking lot by building 18.
Q. To this parking lot over here?
A. Yes.
Q. Okay. When you guys get to building 18 and by the parking lot, where do you guys go?
A. In the corner of the parking lot, there was a dumpster area; we go in there.
Q. Okay. Showing what's been marked as People's 20, Exhibit 21; do you see that right here?
A. Yes.
Q. Are you familiar with that location?
A. Yes.
Q. What is that location?
A. That's location by the dumpster area that you were in.
Q. That's the dumpster area that you were in?
A. Yes.
Q. Okay. So you guys do what? Once again. So you guys

do what when you go by the dumpster?
A. We get inside the wall, and we were just watching to see who was coming, and he is coming really fast. Joel looks over, and I guess the guy sees him and comes in real fast.
Q. You say he looks over; what do you mean?
A. He looks over the -- there was a gate that opens to throw the trash; he looked over it.
Q. Showing you what's marked as People's Exhibit 9. Do you see the dumpster there?
A. Yes.
Q. Do you see a gate?
A. Yes.
Q. You said Joel looks over that gate?
A. Yes.
Q. Where, approximately? Tell me when to stop my pen where is he looking.
A. More to the left. There.
Q. Right here?
A. Yes.
Q. So he looks over there?
A. Yes.
Q. So he on -- how does he look over; what does he do?
A. He just looks over, just goes like this with his head up.
Q. Okay. How tall is -- was Joel at this time?
A. I don't know.
Q. About the same size you see him right now?
A. Yes.

Q. Did he try to pull himself up or step on -- on the toes? Did he use anything to look over?
A. I don't remember.
Q. But you say you are focusing on him looking over?
A. He looks over.
Q. After he looks over, what happens next?
A. The van comes in really fast, and I tell him, "Let's go."
Q. Were you inside the dumpster?
A. Yes.
Q. When Joel goes from that area, does he go up? Does he go up front? Or does he stay right there?
A. We were both up front by the exit.
Q. The exit part, which is up --
A. In the left corner.
Q. -- about right here?
A. Yes.
Q. Sorry. We don't have a front view of that, but that's kind of an open area, right?
A. No.
Q. No gates?
A. No.
Q. So you and Joel are sitting there. At this time, what is Joel doing, the defendant?
A. He is -- he took off his shirt. He had his shirt in his arm, and he left it on the dumpster. At that point, I told him, "Let's go," and he didn't want to, so I ran without him.

Q. He say he didn't want to?
A. He said, "Fuck that."
Q. Did you hear the van pull in?
A. Yeah.
Q. Okay. And --
A. I seen it, as well.
Q. How'd you see it?
A. From the side of the exit.
Q. Okay.
A. I was at the corner by the little exit.
Q. About right here?
A. Yes.
Q. Do you see the van come in?
A. Yes. You could hear him coming real fast and up a little.
Q. Okay. Now, you hear the van come in and say, "Let's go"?
A. Right.
Q. You guys ran away the first time, right?
A. Yes.
Q. Was he anywhere close to you the first time running after you?
A. The first time running after us?
Q. Yes. Did he get close to you at all?
A. Yeah. He was about 30, 40 feet behind us when we were running.
Q. About right here?
A. Yeah, right there.

Q. You guys are up ahead?
A. We are up ahead. We turn the corner, and he just goes back.
Q. So he's running at you, stops, goes back, looks inside his van, and then you guys come back?
A. Yeah.
Q. Did you ever see -- did you ever have -- did he ever have a knife with him?
A. I never seen a knife.
Q. Did he ever have any weapons?
A. Not that I seen.
Q. Okay. So to your knowledge, you never saw this guy before in your life?
A. Now?
Q. He did not give you permission to take this stuff?
A. No.
Q. You or Joel, correct?
A. No.
Q. The reason he's running after you is because you guys just jacked his car?
A. Yes.
Q. So then you hide in that dumpster. You say, "Let's go." You say you take off, right?
A. Yes.
Q. After you take off, what happens next?
A. I run about 20 feet, I turn around, and Joel is standing with a gun in his hand.
Q. Joel is standing with a gun in his hand?

Joel Elias Sanchez v. Jeffrey Beard, Warden
U.S.D.C. Central Dist., 13-01448f MMM (VBK)
LODGMENT 11 (2 of 3)

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION II

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. JOEL ELIAS SANCHEZ, Defendant/Appellant.	DCA No. E051657 Riverside County Case No. INF051951 Volume 2 of 3 Pages 204 - 409

REPORTER'S TRANSCRIPT ON APPEAL

Before the Honorable Stephen J. Gallon

June 28 & 29, 2010

APPEARANCES:

For Plaintiff/Respondent: OFFICE OF THE ATTORNEY GENERAL
110 West A Street, Suite 1100
San Diego, California 92101

For Defendant/Appellant: APPELLATE DEFENDERS
555 West Beech Street, Suite 300
San Diego, California 92101

Reported by: LESLIE BROCK, CSR No. 12984

A. One guy jump one guy in, and then two jump the next guy in.

Q. Okay. And what type of -- and what type of -- as a member of a gang, what do you do? You said you hang out and you do things at Summerfield Apartment. What else do you do as a member of this gang?

A. Well, what I would do is just hang out with the guys there all the time.

Q. Okay. When you hang out, what do you do with them? You said you smoke methamphetamine; right?

A. Yes. That's what I did, but not just that. I just hung out, you know. We did stuff. We played basketball. You know, we did stuff to keep busy, that's all.

Q. Okay. I understand that. But as far as doing the job, what does that mean to you?

A. What do you mean, "The job"?

Q. Well, what did Flaco ask you to do?

A. To step him in.

Q. Have you ever been asked to do other crimes by these other members of the Mecca Vineyard gang?

A. No.

Q. Ever?

A. I have been asked to go with then, but I never did go.

Q. And this is something you did when Flaco didn't ask you to do, but you did it when the defendant went; correct?

A. Yeah.

Q. Why?

A. I don't know. I don't know why.
Q. Whose idea was it to go up to the van?
A. I thought we would go get it so we could put the system in his car.
Q. And you assisted him in this; correct?
A. Yes.
Q. And you went into the van?
A. Yes.
Q. What made you go to the police?
A. I was scared. I didn't know what to do. I felt lost. I kept talking to my sisters, and they kept telling me to call my uncle, turn myself in. My sister told me that she got the homicide detectives in front of me. She was trying. I didn't know what else to do.
Q. So who asked you to turn yourself in?
A. My sister.
Q. Is that Valerie Bailey?
A. Yeah.
Q. Did you talk to your uncle?
A. I called him after I talked to them, and he just told me -- he couldn't tell me what to do, but just do the right thing.
Q. Based on that, what did you do?
A. I told him I wanted to turn myself in, and he got me a ride.
Q. And this is the day after the incident?
A. Yes.
Q. Showing you People's Exhibit 5. Let me publish it.

Did you ever see that?
A. No.
Q. That day?
A. No.
Q. Is that a no?
A. No.
Q. Did you ever see the person in the van with anything like that?
A. No.
Q. I have one last question, Mr. Bailey. How do you feel about what happened to Mr. Torres that day?
A. I feel like it didn't need to happen.
Q. Why is that?
A. Because I felt if I were just to run, I would have got away. And I am pretty sure I did, because I said, "Let's go," and I saw them coming.
Q. And there was nothing blocking your path or running from --
A. There was nothing. I didn't see nobody.
MR. ORLANDO: Thank you. I have no further questions.
THE COURT: The Court then directs the defense attorney for cross-examination in this transcript.

CROSS-EXAMINATION

BY MR. LIEMAN:
Q. You had been smoking methamphetamine -- let me start over. You had been smoking methamphetamine for about two and a half weeks before this?

Q. Does that mean you come down from methamphetamine? Did you ever experience that?
A. Yes.
Q. When you started to crash, is it a fair statement to say that you want more of the drug; you crave it?
A. I don't think so.
Q. When you were not smoking methamphetamine during those two weeks, didn't you want some more? Didn't you want to go get some?
A. Not really. I just did it when it came around with the guys.
Q. Did you ever steal around that time to get money to buy drugs, methamphetamine?
A. No.
Q. Before this day, that afternoon with Flaco, had you ever gone to a car to steal something?
A. No.
Q. This was the first time you ever did it?
A. Right.
Q. You said being a member of Mecca Vineyards gang meant for you hanging out in the neighborhood?
A. Yeah.
Q. Playing basketball?
A. Just hanging out with my friend.
Q. Your friends, were they all members of the Mecca Vineyards gang?
A. Yeah.
Q. Everybody was?

A. Yeah.
Q. Being part of that group, did you guys ever, like, get together and talk about committing crimes, stealing stuff?
A. No. We talked -- we talked about going tagging, doing graffiti, stuff like that.
Q. Did you ever talk about going out and shooting people?
A. No.
Q. Did you ever talk about, "Let's go fight some other gangs"? Did you ever talk about that stuff?
A. No. That only came up when there was a problem with one of them.
Q. When was that?
A. When another gang would have a problem -- want to fight with one of the guys.
Q. You never went with them to do anything like that, did you?
A. No.
Q. You guys ever get together and talk about, "You know what, we're going to get together and go steal cars to get money for the gang"? Did you ever talk about that stuff?
A. No.
Q. Did Joel Sanchez ever talk about committing crimes?
A. No.
Q. Did you guys ever talk about, you know, "Let's go together and go steal a car"?
A. Since that day, no.
Q. Well, okay. Ever? Ever other than that van?

A. No.

Q. What kind of things did you and Joel talk about?

A. We didn't really talk about stuff. We would talk about when we would go look for other friends, see what they doing, like that's what we were going to do that day. But when out, just walking with friends, being around.

Q. So guys talk about hanging out with your friends?

A. Hanging out with friends, girls, stuff that we do.

Q. Stuff that normal teenagers do?

A. Yes.

Q. Play basketball?

A. Yes.

Q. Did you play basketball with Joel there at the apartment?

A. No. He was never there when we did.

Q. So when you would see Joel Sanchez there at the Summerfield Apartments, he was mostly just visiting Myra or hanging out with you there at the apartments?

A. You know -- hanging out with the guys there.

Q. Did you ever see him get into a fight there at the Summerfield Apartments?

A. No.

Q. Did you ever see him threaten anybody at the apartments?

A. No.

Q. If I understand you correctly, he would just hang out with you, and you guys would sit around and shoot the breeze; is that a fair statement?

A. Yeah. Just kick back.

Q. Okay. All right. Other than what happened that day with that van, did you ever see Joel Sánchez do anything wrong there at the apartments?

A. No. I didn't always see him there.

Q. You did not always see him there; right?

A. Yeah.

Q. But the time he was there, did you say he was kind of, like, behaving himself pretty well?

A. I never seen him do nothing else.

Q. He would talk about going to church and stuff; right?

A. What?

Q. He would talk about going to church?

A. I don't know if I remember that.

Q. Okay. You had a nickname too, did you?

A. Yeah.

Q. What did they call you?

A. Bubba.

Q. Bubba?

A. Yes.

Q. Why?

A. I already had that nickname.

Q. Did they also call you Clumsy?

A. Yeah.

Q. Is it a pretty fair statement to say that pretty much everybody there who lived there at Summerfield Apartments, at least the guys, all had nicknames?

A. Yeah.
Q. Did you think having a nickname meant that you were a gang member; is that what that meant to you?
A. Yeah.
Q. Did you have the name Bubba before you got jumped into the Mecca Vineyards?
A. Yeah.
Q. When did you get that name?
A. When I was a kid. My mom and dad.
Q. Your mom and dad gave you that name?
A. Yes.
Q. When did you get the Clumsy?
A. The day I got jumped into the gang.
Q. So from that day on. That was in May, you said; right?
A. Yes.
Q. You said Mr. Sanchez got jumped in the same day?
A. Yes.
Q. Were you there when that happened?
A. Yes.
Q. Flaco jumped you guys in?
A. No.
Q. I just want to ask you about what happened when the van drove up; okay? When the van drove up, were you still feeling the effects of the methamphetamine you had smoked earlier that day?
A. Not that I knew. I didn't feel -- I didn't really feel anything at all. I wanted to go do what we were going to

THE CLERK: You solemnly state the evidence you shall give in this matter shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: And can you please spell your first and your last name.

THE WITNESS: It's L-e-o-n-a-r-d-o, P-e-r-a-f-a-n.

THE COURT: Counsel, you may inquire.

MR. ORLANDO: Thank you.

LEONARDO PERAFAN,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ORLANDO:

Q. Officer Perafan, by whom are you employed?

A. By the City of Indio, Indio Police Department.

Q. What's your current assignment?

A. I'm a detective with the Coachella Valley Violent Crime Gang Task Force.

Q. And how long have you been a peace officer with the City of Indio?

A. Going on seven years.

Q. Now, do you have any prior law enforcement experience?

A. Yes. I was a Border Patrol agent for two years in the El Centro sector.

Q. Prior to becoming a peace officer, did you have to attend an academy?

A. Yes.
Q. And did you complete that academy?
A. I did.
Q. And have you had assignments as a patrol deputy?
A. Yes.
Q. And were you working as a patrol deputy back on August 28th of 2005?
A. Yes.
Q. And did you get called out to 38400 Gemini Street?
A. Yes, I did.
Q. What's was the nature of that call?
A. The call came out as a man down. It was either -- a person that was holding their stomach; either had been shot or stabbed.
Q. And approximately when did you receive that call?
A. It was about 5:39 p.m. that evening.
Q. From the time you received that call, how long did it take for to you get to 83400 Gemini?
A. It was about six minutes; 5:45, approximately.
Q. And when you arrived, can you tell for the jury what you saw.
A. Well, Gemini Street is an L-shaped street that's nearby Calhoun Street and Highway --
MR. LIEMAN: Objection; nonresponsive, Your Honor.
THE COURT: Sustained.
Q. (BY MR. LIEMAN) What did you see when you arrived?
A. When I arrived at the scene, I saw there were two officers present prior to my arrival, Officers Studdard and

Hellawell. And there was a fire engine and a paramedic crew that were already on scene.

Q. Now, was the firemen and paramedic crew attending to anybody?

A. Yes. They were attending to the victim.

Q. Do you know if Officer Studdard or Hellawell spoke Spanish?

A. They do not.

Q. And were they trying to converse, to your knowledge, with the victim at this time?

A. They knew the victim spoke Spanish, but they couldn't get anything -- they couldn't understand him.

Q. So what did you do based on that?

A. I'm sorry?

Q. What did you do based on that at this point?

A. I assisted them; asked the victim questions regarding the circumstances of why he had been shot.

Q. Can you please describe for the jury how this victim appeared to you.

A. He was critical. He was losing consciousness, and I was only able to speak to him for a short amount of time.

Q. When you say critical, could you please describe for the jury if you have any medical background.

A. I do have medical background.

Q. And what is that?

A. I was an EMT in San Diego for five years. I worked on a paramedic ambulance when I was employed by Rural/Metro. We provided the paramedic services for the city of San Diego.

Q. And so prior to August 28th, 2005, have you seen people in the condition as you described the victim in this case?

A. Unfortunately, yes.

Q. And can you please describe for the jury what's your first language.

A. My first language is Spanish.

Q. You speak and write it fluently?

A. I do.

Q. So when you approached the person who was being treated by the paramedics and fire crew, what did you ask, if anything?

A. Actually, I believe he -- when I asked him what happened, he said, "He shot me. He was trying to steal the stereo from my van, and he shot me."

Q. And you said it very strongly. Was that the -- did he say it in that type of strong voice?

A. No. He was fading in and out of consciousness. So I was actually pretty close to him, with my ear close to his face so I could understand what he was saying.

Q. So -- again, what did he say at that point?

A. He said, "He shot me. He was trying to steal the stereo out of my van, and he shot me."

Q. And after -- were you with the victim the entire time?

A. I was with the victim at the scene, and then I followed the paramedic ambulance when he was transported to the Desert Regional Medical Center, the trauma center.

Q. And was this in English or in Spanish when he told you this?
A. Spanish.
Q. Did you try to obtain a physical description of the suspect as well?
A. Yes.
Q. And did you do that?
A. Yes.
Q. At this point -- was there any suspects taken into custody at this point? Did he give a name?
A. No.
Q. What was the description he gave of the suspect?
A. He told me he was a Hispanic male in his 20s with a shaved head and was wearing a light-colored shirt and dark pants.
Q. And, again, his -- his -- at this point he was, you said, drifting in and out of consciousness?
A. Yes.
Q. Did you learn if he later expired or passed away?
A. He did die later, yes. He died at the hospital.
Q. Just quickly I'm going to show you People's Exhibit 1 and 2 for identification. Showing you People's Exhibit 1 and 2. Do you recognize those photographs?
A. Yes.
Q. And who are these photographs?
A. That's Mr. Escamilla, the victim on that day.
Q. That you spoke with at 83400 Gemini?
A. Yes.

Q. Publishing People's Exhibit 1, People's Exhibit 2. Are those pictures fair and accurate as -- well, did Mr. Escamilla have clothes on that day, or was he being attended to?

A. He did have clothing on, but I think it was -- by the time I got there, it had been removed by the paramedics to treat his wounds.

MR. ORLANDO: Thank you. I have nothing further.

THE COURT: Thank you, Mr. Orlando.

Mr. Lieman?

MR. LIEMAN: Yes.

CROSS-EXAMINATION

BY MR. LIEMAN:

Q. Good morning, sir.

A. Good morning.

Q. You told us what he said. Did he say anything about chasing anybody before he was shot?

A. He did say.

Q. What did he say?

A. He said he was chasing the suspect before he turned around and shot him, something to that effect.

Q. You said, "Something to that effect." I gather that's not an exact statement of what he said?

A. Not exactly.

MR. LIEMAN: Okay. I have nothing further.

THE COURT: All right.

Mr. Orlando, anything further?

All right. Can this witness be excused?

Joel Elias Sanchez v. Jeffrey Beard, Warden
U.S.D.C. Central Dist., 13-01448f MMM (VBK)
LODGMENT 11 (3 of 3)

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION II

THE PEOPLE OF THE STATE OF CALIFORNIA,	DCA No. E051657
Plaintiff/Respondent,	Riverside County Case No. INF051951
vs.	
JOEL ELIAS SANCHEZ,	Volume 3 of 3 Pages 410 - 512 (Pages 501-504 Sealed)
Defendant/Appellant.	

REPORTER'S TRANSCRIPT ON APPEAL

Before the Honorable Stephen J. Gallon

June 30, 2010; July 1, 2010; August 19, 2010

APPEARANCES:

For Plaintiff/Respondent: OFFICE OF THE ATTORNEY GENERAL
110 West A Street, Suite 1100
San Diego, California 92101

For Defendant/Appellant: APPELLATE DEFENDERS
555 West Beech Street, Suite 300
San Diego, California 92101

Reported by: LESLIE BROCK, CSR No. 12984
DALLAS ANN ERWOOD, CSR No. 5056

COPY

the killing is unlawful, and depending on the circumstances, the person is guilty of either murder or manslaughter. You must decide whether the killing in this case was unlawful, and if so, what specific crime was committed.

I will now instruct you in more detail on what is a justification for a homicide. I will also instruct you on the different types of murder or manslaughter.

The defendant is not guilty of murder or voluntary manslaughter if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if: One, the defendant reasonably believed he was in imminent danger of being killed or suffering great bodily injury; the defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and, three, the defendant used no more force than was reasonably necessary to defend against that danger.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed that there was imminent danger of great bodily injury to himself. The defendant's belief must have been reasonable, and he must have acted only because of that belief.

The defendant is not entitled to use that amount of force that was -- excuse me, the defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant, and consider what a reasonable person in a similar situation with similar knowledge would have believed.

If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself, and if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

The People have the burden of proving beyond a reasonable doubt -- excuse me, not attempted -- that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or voluntary manslaughter.

The defendant is charged in Count 1 with murder, a violation of Penal Code Section 187. To prove that the defendant is guilty of this crime, the People must prove that: The defendant committed an act that caused the death of another person; and, two, when the defendant acted, he had a state of mind called malice aforethought; and, three, he killed without lawful justification.

There are two kinds of malice aforethought: Express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. The defendant acted with express malice if he unlawfully intended to kill.

The defendant acted with implied malice if: One, he intentionally committed an act; two, the natural and probable consequences of the act were dangerous to human life; three, at the time he acted, he knew his act was dangerous to human life; and, four, he deliberately acted with conscious disregard for human life.

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

An act causes death if the act is a direct, natural, and probable consequence of the act, and death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural or probable, consider all of the circumstances established by the evidence.

If you decide that the defendant has committed murder, you must decide whether it is murder in the first or second degree.

You may not find the defendant guilty of first-degree murder unless all of you agree that the People

have proved that the defendant committed murder. The defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation.

The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice, and knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the act that caused death.

The length of time a person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances.

A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. All other murders are of the second degree.

The People have the burden of proving beyond a reasonable doubt that the killing was first-degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first-degree murder.

A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person

because he acted in imperfect self-defense.

If you conclude the defendant acted in complete self-defense, his action was lawful, and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.

The defendant acted in imperfect self-defense if: One, the defendant actually believed that there was imminent danger of being killed or suffering great bodily injury; and, two, the defendant actually believed immediate use of deadly force was necessary in order to defend against the danger; and, three, at least one of those beliefs was unreasonable.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder.

You will be given verdict forms for guilty and not guilty of first-degree murder, second-degree murder, and voluntary manslaughter. You may consider these different

versus Joel Elias Sanchez. Both counsel are present, investigating officer is present, Mr. Sanchez is present, all of our jurors and alternates are present.

People, you may proceed with your argument.

MR. ORLANDO: Thank you, Your Honor.

Good morning. When we started this case last week, I gave my opening statement. I said this case was about a case of fatal courage. And nothing in the facts and the law have changed. That exhibit, Number 73, is up there for a reason. Saying it's self-defense, calling it self-defense doesn't make it so.

I guess when Manuel Torres was found dead, and I guess there was a knife found out at the scene, and I guess when a person named Gary Bailey came in and said Joel Sanchez was the one who did it, then I guess when Joel Sanchez came in and said -- after denying ever being at Mecca Vineyards, after ever denying the name Scooby or Capone, after denying being there or even doing this, finally comes to the realization he's caught. He says, "Yeah, I did it, but I did it in self-defense."

I guess with the circumstances -- the knife, the witness that we had -- it would have been easy to just say, you know what, just chalk this up to self-defense. That would have been easy. But, ladies and gentlemen, what happened that day was murder. And that 19 feet, 6 inches speaks volumes to what happened that day. It speaks volumes to his story. It speaks volumes to the acts that he has to do in order to do what he said he did, which as you heard would have been quote,

to say about adrenaline, whatever he wants to say about people can do amazing things in that short amount of time, you as jurors must use the facts and articulate reasonable inferences on those facts. Beyond a reasonable doubt; that is what we have to prove our case, beyond a reasonable doubt, with the facts and with the law.

"Proof beyond a reasonable doubt" -- and you've got your instructions, but it's 220, "is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt." Just like the miracle shot from the person who grabbed the gun from his pocket.

Counsel says, "Well, they never asked him how his arm was or how he reached in." Well, you have the video. He showed them how he did it. He says to Tira, "Just went like that." Just went as simply as that. Reached in, pulled out, and shot. You can look at that video, listen to his statement, and focus in on that. He showed them what he said he did.

Now, in deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence. That means the testimony, that means the casings, that means where the knife is located, that means the distance. Those are the objective facts.

He's saying that the coroner -- it's that -- it's consistent with somebody crouching and going forward, or

whatever, like that. I don't remember the coroner saying anything like that. All he said was it had to have been a disparity between height. Five seven and five four is not a huge disparity. It's not.

The disparity of a 45-degree angle is quite a bit, so that means someone had to have been lower. If he's on the curb right here coming up, he's lower. If he sees this man with a knife pointed at him, I guarantee he's trying to get smaller at that point, and he's turning. Whatever slight offset it is, he doesn't need a dramatic turn. He's in the process of turning, retreating. He's not going towards him anymore. He's not going towards the defendant anymore, which is entirely consistent with what Gary Bailey said about, "No, okay." He's not the attacker.

And to say because you found a crack pipe out there this guy must have been high on meth, what evidence do we have of that? How can we draw reasonable inferences based on just a pipe out in a high-drug area? What possible explanation in the evidence do you have of that? What possible explanation other than him just saying, "Yeah, he must have been high; normal people don't react that way. He's crazy, out to kill"?

He must make him a killer. He must make him frothing at the mouth, ready to tear this guy apart, because if he doesn't have that, he doesn't have self-defense. So you need to make this guy a monster. You need to. There's no ifs, ands, or buts about it. Not a victim of a crime, a monster.

"He overreacted seeing some kids break into his

car." And if Gary -- if Joel Sanchez had the gun, he would have pulled him right there and said, "Hey, man, what are you doing? Not coming after me." No, because the guy probably -- he does have a gun in his possession. Probably not showing it all the time. I'm not saying this guy is out there waving it and toting it. It's a crappy gun. It's a single-shot loaded gun. It's just in his pocket.

All of a sudden he's running, and he tells him, "I am strapped. I can take his whole system. I have the power. It's a single-shot; I can just point it on him. Let's go back and do it." It's not something he has in his holster; it's in his pocket, it's on safe. He's running, he's caught, "Oh, shit," -- I'm sorry, excuse the language. He's taking off.

So for him to say, you know, "This guy, if he had the gun," it's like everything else; it was -- happened fast. When Manuel Torres confronted him, things -- their initial reaction was to run. Okay. It's a common reaction. Common reaction when you got caught stealing. But what's not a common reaction, and I think is way overboard, is now that he has the power, he's going to take and kill that guy or shoot him to teach him a lesson. That's overboard. That's overkill.

If Manuel Torres brought a knife, he brought a knife to a gunfight. Manuel Torres didn't have to die that day. And, of course, you're going to have to dirty him. It's what we have to live with in bringing forward this case. He's absolutely presumed innocent. But that presumption of innocence only lasts until we prove our case beyond a

reasonable doubt.

And those distances and why I gave you all those ridiculous angles, sometimes of the vehicle and positioning and angles and all that other stuff, is because I want you to be that day in Mecca Vineyards as best you can under the circumstances. I want you to be there as jurors that day, and to think of yourself and to put yourself in the mind of the defendant at that time, if you believe what he said.

And if you believe what he said, he's coming out with the most innocent state of mind, according to him. "I have no reason to run." Therefore, he's stepping out, and he -- when he gets to that front, he sees this crazed, deranged, frothing at the mouth . . . .

And when he said he was holding the knife, it was down to his right coming fast. Where he got this crouching coming up, even his own statement doesn't say that. Just coming at him fast. So where does he get that crouching coming up? If that's what happened, wouldn't he have said it to them, to the cops? No, he just wants to make that up, because he has to make that angle happen. That's objective evidence.

And at that point he's making split-second decisions like that. He's not turned around and running, which Gary Bailey did. No, he's just going to reach into his pocket, pull out a gun, extend his arm 45, everything's fine. It's that simple. "Self-defense. Come on, believe me. It's that easy." No, it's not that easy. You've got to explain that distance.

We had an expert in here to explain what trained people with use of firearms can do. There could be miracle shots, but not with your arm extended, not with getting it out at that angle, not with that close distance with somebody coming at you fast. That's impossible. The People submit that's impossible, that's improbable, that is not reasonable under these circumstances.

And that is -- as jurors, you must give weight to reasonable inferences based on the facts and evidence as told, not mere speculation of an attorney who says, "Well, the guy must be on crack because there's a crack pipe. The guy must have been frothing at the mouth, must have lost control because there's a 15-foot skid mark."

Well, yeah, he went in fast. But according to -- it didn't show, like, he hit the berm or anything. Left the engine running because he's trying to confront the people that took his stuff. He wasn't a crazed man, he wasn't a maniac. He was a victim of vehicle burglary. He was trying to get his stuff back. That's the reasonable interpretation.

Was he mad? Yes. But did he give up? Yes. When confronted by the gun, he says, "You can take -- you can take my stereo. In the end, it ain't worth it." And does he say "no tambien"? Yes, he does.

Gary Bailey doesn't even make that up. If he saw his friend getting attacked, why turn himself in? If he saw this friend getting attacked by this crazed person, why turn himself in? There's -- that makes absolutely no sense. What he saw was a murder. Just like you're seeing it here in this

court with these facts.

We can't go back to August 28th, 2005. I can't put you in a time machine and make you see exactly what happened. But when you look at the facts and apply a reasonable interpretation, your common-sense interpretation to the objective facts -- when you go back there, that's what you need to do. He's just saying, "Don't believe Gary Bailey." I'm saying don't believe him.

Your job is to decide who do we believe based on the evidence, the facts. And that comes from the coroner, experts, and all that other stuff that we brought forward.

You don't like Gary Bailey, fine. I don't want you to like him. But I want you to give him a fair reading of his statement based on the objective facts that we have here.

I don't care if you like the defendant or not, but his story has to comport with the objective evidence, and his story does not. Saying self-defense doesn't make it so, just like saying I'm seven foot two doesn't make it so. It is what it is. And this case is murder in the first degree with the gun allegation.

And whether he wants to say it's gang -- "Oh, these guys" -- whatever, in the heart of Varrio Mecca Vineyards territory with four gang members jacking this guy with weapons, how that is not associating with one another, how that's not assisting, or how that's not furthering the interest . . .

Whether he's out there and not getting out of a car and recreating it for officers, that can be shown another way:

000296

EVIDENCE TAPE

People v. JOEL ELIAS SANCHEZ
INF051951
Transcript of Interview: Joel Elias Sanchez, Defendant
Interview Date: 8/30/05
Agency Case Number: IPD/05085531

Key: **SANCHEZ:** Joel Elias Sanchez, Defendant

CARRILLO: Sergio Carrillo, Investigator, IPD

TIRA: Enrique Tira, Investigator, IPD

(Indistinctive distant conversations in background)

(Sound of door opening)

TIRA: Where do you live right now?

SANCHEZ: Thermal.

TIRA: Where?

SANCHEZ: Fifty-six (56). Jackson and the *(unintelligible)* por allí (around there)!

TIRA: Oh. Oh, oh that housing tract right there?

SANCHEZ: Yeah.

TIRA: Okay. As soon as the detective gets here, okay? And you met him out there, no?

SANCHEZ: *(Inaudible response)*

TIRA: Okay.

(Sound of door opening/closing)

ROB PACHECO
DISTRICT ATTORNEY
County of Riverside
4075 Main Street
Riverside, California

000324

CARRILLO: You're family knows me, dude. Because I…'cause I dealt with your brother, Jonathan. And I was pretty straight up with your family. I was very honest with them. And tonight, I felt really bad, I felt horrible. I said "Look, I'm sorry that we showed up the way we did but we had to because this is what we gotta do", so…

SANCHEZ: I mean, that's messed up, my sister's were crying, man.

CARRILLO: I apologized to them, bro'. I let them all hang out, I took the cuffs off your father. Alright? So, I extended some respeto (respect) to your family.

SANCHEZ: Alright.

CARRILLO: Alright, so what I'm trying to get at here, bro'. Is, all I want is your side of the story, alright?

TIRA: Was this person chasing you down, man? Tell us why he was chasing you down, man? We know, 'ey, we know…'Flaco' (Skinny) took some shit from that car. We know that. Guess what? We happen to have that property that he took. Okay? Now, was this guy chasing you down for a little shit that happened? Tell us. We know what happened. But we don't wanna tell you about it, you tell us, man. We know you were running. Tell us why? Why was he chasing you down?

SANCHEZ: Fucking, shit…

TIRA: Dude!

SANCHEZ: …Psshht, damn…

TIRA: Exactly. Exactly. Because we already know. Tell us, but tell us in your words, man. Tell us in your words.

SANCHEZ: I can't believe I killed that fool, man , damn.

TIRA: Did you intent to, let me ask you that.

SANCHEZ: No.

TIRA: Did you have it planned to kill him?

SANCHEZ: No, I don't even, I was defending myself.

TIRA: Okay, what happened? Okay, you tell us what happened. Tell us from the beginning, man. When you were in the parking lot, tell us what happened?

SANCHEZ: Alright. I was, um…I with, um…'Flaco' (*'Skinny'*)…some other guys, I ain't gonna say names.

TIRA: That's fine, that's fine. You fend for yourself. Don't say names, tell us what happened.

SANCHEZ: And, um…some van showed up, a van…

TIRA: Okay.

SANCHEZ: …this, this guy I never seen him around. And, uh…this guy showed up with a system, se oía (*it sounded*) loud. 'Flaco' (*'Skinny'*)…told me that, que le digiera al otro (*to tell the other*) homie, 'cause he was barely jumped in.

TIRA: Um hmm…*(affirmative response)*

SANCHEZ: Enséñale, como hacer el jale (*teach him, how to do the job*) and I'm like "No, you", they go…they open the back of the trunk…and, um…they start pulling out speakers and all kinds of stuff. Y (*and*), uh, he called me over to go help them out, I just, the only thing I got, two (2) CD's cases, that's all I got. Y (*and*), um…me los dio (*he gave them to me*), um…some guy, he gave them to me, I was holding them. Y ya (*that's it*), this guy came out, running, y (*and*) I threw the CD cases, I just threw 'em, I didn't want 'em. Pero (*but*)…y ya (*that's it*). Y (*and*), ah, this guy just started chasing everybody. Y (*and*), um, I was running too. Y (*and*), um, this guy, um…he got out with a knife, he was gonna stab me. I got scared! And I shot him…and I got away.

TIRA: He was gonna stab you with what?

SANCHEZ: With a knife.

TIRA: Did he have a knife on him?

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SANCHEZ: Yeah! He was gonna stab me. He was, like, right in front of me, he was gonna stab me, and I shot him.

CARRILLO: Where were you guys at?

SANCHEZ: I don't know, man. Um...by the trash can, by the dumpster, that side. I don't know, I can't think right now. ...Oh, man...

TIRA: Let me ask you this: When you went to Mecca Vineyards, why did you have a gun...with you?

SANCHEZ: I don't know, I...I never carry a gun with me.

TIRA: It's that gun that we got from your dad's car?

SANCHEZ: No not, no not that one, that's, um...that's his. That's, um...his brother's.

TIRA: Órale *(alright)*.

CARRILLO: Where's...el *(the)* Ruben?

SANCHEZ: Who?

CARRILLO: Ru...Ruben, in Porterville?

SANCHEZ: Yeah, that's his brother, Marco.

TIRA: Where's the gun that you had?

SANCHEZ: That part I can't say nothing, man. I, I don't know what happened to that gun, I got rid of it. I don't, I don't...

TIRA: You got rid of it?

SANCHEZ: Yeah, I don't know what happened to it.

TIRA: Okay.

SANCHEZ: I need a cigarette, man.

CARRILLO: Alright, we'll get you that, bro'.

SANCHEZ: *(Sighs)*

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TIRA: You went straight to your car and took off?

SANCHEZ: Yeah.

TIRA: The guy that was with you, without mentioning names, where did he go?

SANCHEZ: Who? The guy? I don't know, I mean, I didn't see him.

TIRA: No? Okay.

CARRILLO: Where's the gun at, when this guy was with you?

SANCHEZ: There's...well, yeah, Flaco (Skinny) and some other guy.

CARRILLO: Okay, yeah, well...

TIRA: Describe the gun.

SANCHEZ: It's, uh...little...twenty-five (25).

TIRA: How is it? What color is it?

SANCHEZ: Chrome.

TIRA: It's chrome?

SANCHEZ: Yeah.

TIRA: Did it have a clip?

SANCHEZ: No.

TIRA: No clip?

SANCHEZ: Didn't work.

TIRA: How many bullets has it got now?

SANCHEZ: No, no traeba clip ni nada (no it didn't have a clip or anything).

TIRA: Okay, so it had one (1) bullet?

SANCHEZ: Yeah.

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CARRILLO: It just had one (1) in the pipe?

CARRILLO: Alright. listen on this, man, bro'…

SANCHEZ: …But I can't believe I killed that guy, man. I, I knew, I didn't mean to kill him though, man. I was…trying to defend myself. man *(smacks lips. speaks in a low voice)*…oh, man.

TIRA: Why did you carry a gun in the first place?

SANCHEZ: I don't know, man. I was stupid, man, why I carried it…

CARRILLO: Why didn't you just keep running, bro'?

SANCHEZ: I don't know, man. *(Smacks lips)*…Psshht.

TIRA: When you were in the dumpster and he got outta the car, the van…

SANCHEZ: Well I stayed there, man.

TIRA: Why, why didn't you run? Why didn't you run?

SANCHEZ: Well, 'cause I didn't get it, I'm, I'm not the one who jacked the system. The only thing that, que me dieron, son *(that they gave me, was)*…is a CD case, that was, that's all I was holding.

TIRA: Okay.

CARRILLO: But who had already started running before, bro', you should've just kept running!

SANCHEZ: …Oh, man, I'm stupid, man! I don't even know why I did that. *)*…Psshht…shit…

CARRILLO: Did you get tired of him chasing you? I mean, I, I can't think for you, dude, I wanna know what's up.

SANCHEZ: I don't even I, why, why I was running, running for. I didn't even jack the system. I don't, I don't know what I was running for. So, I stopped, you know…by that dumpster.

CARRILLO: Did you try talking with him?

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SANCHEZ: No. I stopped, *y (and)* I was looking around, *y ya (that's it).* Like, I got off, he was gonna stab me!

TIRA: Did you tell, did you say anything?

SANCHEZ: Nope, nothing.

TIRA: Oh.

SANCHEZ: No.

TIRA: Look, I wanna clear something, there's something that I wanna clear up real quick before. When you were in the parking lot…and you said "the other little homie" without mentioning…mentioning names yet, just been jumped, alright?

SANCHEZ: Yeah.

TIRA: And then, basically, Flaco ('Skinny') wanted to…show him how to jack things?

SANCHEZ: Yeah.

TIRA: Alright? Because he had just been jumped in, is Flaco ('Skinny')…from Mecca Vineyards, too?

SANCHEZ: No.

TIRA: Okay. But the little homie had just been jumped in and, and then…and Flaco ('Skinny') wanted to show him…how to…how to do it…

SANCHEZ: Yeah.

TIRA: …how to jack things?

SANCHEZ: Yeah.

TIRA: Okay. And Flaco ('Skinny') said "'Ey, you do it" and then you said "No. You do it." Okay?

SANCHEZ: Well, me dijo a mi, "enséñale, que onda" *(he told me, "show him what's up")* he said, I'm like "No" y, y, ya dijo, "a ver, vente" *(and,*

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TIRA: I know, what I wanna know, though is…when you left your house…and you drove to Mecca Vineyards and you got outta your car, why were you strapped?

SANCHEZ: I don't know, man.

TIRA: I mean, you tell us, man, why? I mean…do you have beef with anybody?

SANCHEZ: No.

TIRA: No. Nomás *(only)* show, showing it off, o que onda? *(or what's the deal?)*

SANCHEZ: No, nomás *(only)*, it's a security, you know.

TIRA: For what though, man? For what?

SANCHEZ: *(Smacks lips)*

TIRA: Protection, I don't know?

SANCHEZ: Psshht, I guess.

TIRA: Well, who would you protect yourself from?

SANCHEZ: Other gang members, or something.

TIRA: But, yeah, has, has Mecca Vineyards been having issues with people, o que onda? *(or what's up?)*

SANCHEZ: Ah, not right now.

TIRA: But just in case, you don't wanna get caught slipping or what?

SANCHEZ: *(Inaudible response))*

TIRA: And so, obviously, if…let me ask you this…if some guys from 'JT'…or some guys from somewhere else, from Coachella, came over…and they…they had some shit with you, and they, they hit you up, obviously, you would protect yourself, that's why you carry the gun?

SANCHEZ: I don't know, man but but…I, I, I, can't believe I killed that guy, man,…psshht…

TIRA: How do you feel about that right now?

SANCHEZ: Psshht…are you serious, killed him?

TIRA: Yeah.

SANCHEZ: …Damn. I didn't mean to kill him, man.

TIRA: Did you see him drop?

SANCHEZ: Huh?

TIRA: Did you see him drop when you shot?

SANCHEZ: No, he just screamed, y ya *(that's it)*, I took off running.

TIRA: Why didn't you stop to help him?

SANCHEZ: I don't know, I was scared, man. I was…I was just scared, man, psshht.

TIRA: Did you know you had hit him?

SANCHEZ: Like, yeah, 'cause I seen him screaming, y luego *(and then)* I took off running, pero *(but)* I…I didn't mean to shoot him, man. I was just defending myself! He was gonna stab me. What was I supposed to do, man? …oh, man.

CARRILLO: Now, now, were you all, while you were *(unintelligible)* was he watching you or chasing you?

SANCHEZ: Nah, I don't know, I don't think so. I don't know, I was…I don't know, I don't remember. …Oh, man…damn.

TIRA: Let me ask you this: Why were you telling us before you came clean, why were you trying to cover up for the *(unintelligible)*? Is there a reason why you were…not telling us the truth?

SANCHEZ: …I don't know, man, psshht.

TIRA: In your own words, man, I mean…why, when we started this, this little talk here, why didn't you say you…

CARRILLO: You told us you didn't...you didn't know nothing about it, bro'.

SANCHEZ: ...I don't know, man....

TIRA: Who did you come to Mecca Vineyards with?

SANCHEZ: Huh?

TIRA: From your house. When you drove over here...who did you drive over here with?

SANCHEZ: No one, by myself.

TIRA: You were by yourself?

SANCHEZ: Yeah.

TIRA: In your car, right?

SANCHEZ: Yeah.

CARRILLO: Have you gone back to Mecca Vineyards since then, bro'?

SANCHEZ: No.

TIRA: This is the story, carnal (*homeboy*). We need that gun...and we need to get it off the streets.

SANCHEZ: I tell you the truth...I'm a tell you the truth, the truth...

TIRA: That's fine.

SANCHEZ: ...I don't know what happened to that gun. I don't know, seriously.

TIRA: I mean, is it, is it behind a bush or something that we need to get. We don't want a kid to get a hold of it, you see what I'm saying? That's the only reason, bro'.

SANCHEZ: I threw it away, I don't know what happened with it.

TIRA: Where did you throw it away, though? We need to go find it before a kid gets a hold of it, carnal (*homeboy*). Where, and what. I don't care, I don't care if it takes us two (2) days, you tell us where you threw it, we'll go find it. We need to get it off the

SANCHEZ:	Yeah.
TIRA:	And then you guys ran again, right?
SANCHEZ:	We ran again?
TIRA:	Yeah, you guys started running again.
SANCHEZ:	No. I stayed there, by the dumpster and he ran…he left me by myself.
TIRA:	Um…no, no. When you're in the parking lot…
SANCHEZ:	The first one?
TIRA:	The guy went to the van…
SANCHEZ:	Yeah.
TIRA:	And then he went around Calhoun…and you guys started running towards the dumpster. At one point 'Bobo' says that.
SANCHEZ:	Yeah…
TIRA:	You told him, "You know, what? Let's just stop here, let's just go jack the guy."
SANCHEZ:	No…
TIRA:	"Let's just go jack him."
SANCHEZ:	I, I swear to God I never said that.
TIRA:	You never said that?
SANCHEZ:	I, I, I didn't even meant to Jack him, man.
TIRA:	Okay. When…
SANCHEZ:	I swear…
TIRA:	…when you ran to the dumpster…when you ran to the dumpster, you were behind the dumpster, then the car drives in and 'Bobo' takes off running…
SANCHEZ:	Yeah.

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TIRA: Why didn't you run with 'Bobo'?

SANCHEZ: Psshht, I don't know, you know, I, I mean…I didn't wanna jack…I didn't jack the guy, man. I mean…*(unintelligible)*

TIRA: But why didn't run anyway? Why didn't run if…if you know he wouldn't of caught up to you guys? Why didn't you take off running?

CARRILLO: He already chased you once, bro', he couldn't catch up with you.

SANCHEZ: Pero *(but)* pero *(but)* I stopped y digo *(I said)* 'Why should I be running? Why? I, I didn't get his system, why?'

TIRA: Okay, when he got outta the car and you said that he had a knife…

SANCHEZ: Yeah.

TIRA: Okay? Why didn't you…why didn't you…if you had every direction that you could've run to, why didn't you run away? He wouldn't of caught up to you.

SANCHEZ: I don't know, man. I don't know, man.

TIRA: Why? I mean…can you explain what you were thinking? That's what we're trying to figure is…why didn't you take off? Here I am with a knife, I'm not close up to you, I can't – from where he was…you said "We were about this far", verdad? *(right?)*

SANCHEZ: Yeah.

TIRA: I can't stab you from here.

SANCHEZ: Pero *(but)* he was…walking fast towards me…*(unintelligible)*

TIRA: Okay. Why didn't you run away?

SANCHEZ: I don't know, 'ey, I knew he was gonna chase me or something, man, I don't know.

CARRILLO: When, when, when you pulled out your gun, where'd you have your gun?

SANCHEZ: On this side of my pocket.

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CARRILLO: In your pocket?

SANCHEZ: Yeah.

CARRILLO: Okay. 'Bobo' takes off running, this guys coming…right?

SANCHEZ: Yeah, I…

CARRILLO: And you pull the gun out…

SANCHEZ: Yeah.

CARRILLO: You point it at the guy…

SANCHEZ: Yeah.

CARRILLO: Then the guy goes "Hey!"

SANCHEZ: No.

CARRILLO: He never did that?

SANCHEZ: No.

TIRA: He never put his hands up?

SANCHEZ: No. Not that I…

TIRA: Are you sure?

CARRILLO: He never said "Okay"?

SANCHEZ: I put it, I swear to God, nothing. 'Cause everything happened so fast. He was walking fast towards me, with a knife…*y yo estaba (and I was)* by the dumpster…*y (and)* he parked his van right next…to the dumpster. He got off and I seen the knife, he was gonna stab me! I got scared and I pulled it real quick, fast, but fast, and I shot him "Pah!" and I put it inside my pocket and I ran fast!

CARRILLO: But…what you were saying 'Hey, you know what? Fuck it.' Why didn't you just keep running, bro'?

SANCHEZ: …Psshht, I don't know, man. …Psshht…

CARRILLO: Why instead of saying 'Fuck it' why didn't you take off running?

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SANCHEZ: But I, I didn't mean to kill him, man.

CARRILLO: Well, I understand that, dude, but, but here's the thing: I wanna know how come you didn't run?

SANCHEZ: 'Cause I...I'm not the one who jacked his system, why should I? Because...

CARRILLO: Is it 'cause 'Bobo' was brand new and you gotta, you gotta show him what's up or what?

SANCHEZ: No, it's not that, you know, dije *(I said)* "Why should I be running, you know, I'm not the one who jacked his system, I was just holding the...the CDs."

CARRILLO: Have you run before?

SANCHEZ: Before that?

CARRILLO: From people? From different people?

SANCHEZ: Hmm...

CARRILLO: I would imagine you have, bro'. I mean...

SANCHEZ: From cops...*(unintelligible)*

CARRILLO: Even me as a kid...anybody!

SANCHEZ: From cops, when I was with Bart, when he already got chased, I ran.

CARRILLO: So, so...I mean, if...it's no big deal to run. You got a cuete *(gun)* on you, bro', you could've just, you know what, hit your strides that way.

SANCHEZ: ...I know, man, ...psshht.

CARRILLO: Was it because...'cause Lupe was there?

SANCHEZ: No, he, he left me by myself, he took off.

CARRILLO: Well, he told you "Let's go!" and you said "Fuck it!"

SANCHEZ: No, I stayed by myself, why should I be running? He took off.

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TIRA: But did he tell you "Let's go?"

SANCHEZ: No, he...

TIRA: Did he...

SANCHEZ: ...I tell you the truth, I don't remember him telling me that, he probably did and I didn't hear.

TIRA: Okay.

SANCHEZ: I...he probably did, I don't know. I was...

TIRA: You weren't drinking or anything were you?

SANCHEZ: No, no. Nothing.

TIRA: You weren't high?

SANCHEZ: No, nothing.

TIRA: I mean, so you were on your...your pure senses?

SANCHEZ: Yeah...

TIRA: Me entiendes? *(You understand?)*

SANCHEZ: Yeah.

TIRA: You hadn't been smoking any weed, any dope...

SANCHEZ: No.

TIRA: ...you hadn't done any speed, coke, or anything.

SANCHEZ: ...Well, I still do drugs, pero *(but)*...

TIRA: But you weren't – that day...

SANCHEZ: No...

TIRA: ...you didn't do any, right?

SANCHEZ: No, nothing.