ORIGINAL

No. 18-8179

FILED
AUG 13 2018
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

KEITH DWAYNE LEWIS, PETITIONER

V.

W.L. MONTGOMERY, WARDEN
AND ATTORNEY GENERAL OF CALIFORNIA
RESPONDENT

PETITION FOR WRIT OF CERTIORART TO
THE NINTH CIRCUIT COURT OF APPEALS
PETITION FOR WRIT OF HABEAS CORPUS

KEITH DWAYNE LEWIS
P.O. BOX 1906
TEHACHAPI, CA 93581

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SUPREME COURT, U.S.

COURT PAPER
STATE OF CALIFORNIA
STD 113 (REV. 3-95)

OSP 10 119947

QUESTION PRESENTED

WHETHER A STATE CRIMINAL CONVICTION SHOULD STAND WHEN A STATE HAS INCORRECTLY CONCLUDES THE SUFFICIENCY OF EVIDENCE TO SUPPORT THE CONVICTION OF AIDING AND ABETTING PREMEDITATED ATTEMPTED MURDER AND ASSUALT WITH A FIREARM.

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CAL. PENAL CODES;
245 (A) (2)
186.22 (b) (1) (C)
664/187
12022.53 (d)

STATE JURY INSTRUCTION FORMS:
CAL. CRIM 400
CAL. CRIM 401
CAL. CRIM 600
CAL. CRIM 601

28 U.S.C. 2241, 28 U.S.C. 2242 28 U.S.C. 2254
SUPREME COURT RULE 10 (C)
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List Of Parties

All Parties Appear In The Caption Of The Case On The Cover Page.

Index Of Appendices

OPINION BELOW

THE OPINION OF THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS APPEAR AT APPENDIX A. AND IS UNPUBLISHED

JURISDICTION

THE DATE ON WHICH THE UNITED STATES COURT OF APPEALS DECIDED MY CASE WAS JUNE 22, 2018, THE CERTIORARI JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. 1254(1)

THIS COURT'S HABEAS JURISDICTION IS INVOKED UNDER 28 U.S.C. 2241, 2242.

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CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

28 U.S.C. 2241

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Statement Of The Case

This Case Presents This Court A Prime Opportunity To Review A Critical Legal Issue Regarding The Scope Of Habeas Jurisdiction Under The Anti-Terrorism Effectiv Death Penalty Act (AEDPA) Whether There Were Sufficient Evidence To Sustain A Conviction Of Aiding And Abetting Premeditated Attempted Murder And Assault With A Firearm.

Petitioner Was Convicted By A Jury In Los Angeles County Superior Court Case Number BA406579 Of Two Counts Of Attempted Murder Cal. Penal Code 664/187) And Assault With A Firearm Cal. Penal Code 245 (A)(2)). The Jury Also Found True Special Allegations Made As To Firearm And Criminal Street Gang Special Enhancements Cal Penal Code 12022.53(d), 186.22(b)(1)(C). On March 20, 2014 Petitioner Was Sentenced To State Prison For Two Consecutive Terms Of Life With The Possibility Of Parole. Plus Twenty-Five Years To Life, Plus Eighteen Years To Life.

PETITIONER APPEALED ON JUNE, 2, 2015 THE CALIFORNIA COURT OF APPEAL ISSUED AN OPINION IN CASE NUMBER B-255077, IN WHICH IT FOUND THE EVIDENCE SUFFICIENT TO PROVE THAT PETITIONER AIDED AND ABETTED THE ATTEMPTED DELIBERATE AND PREMEDITATED MURDER AND ASSAULT WITH A FIREARM, BUT FOUND THAT THE TRIAL COURT IMPROPERLY DENIED PETITIONER'S REQUEST FOR A HEARING UNDER PEOPLE V. MARSDEN, 2 CAL. 2d 118 (1970), TO ALLOW PETITIONER TO CONVEY HIS DIS-SATISFACTION WITH COURT APPOINTED ATTORNEY AND STATE THE REASONS HE SHOULD BE GRANTED A NEW ATTORNEY. THE COURT OF APPEAL REVERSED THE JUDGMENT AND REMANDED THE CASE TO THE TRIAL COURT TO CONDUCT A MARSDEN HEARING. THE COURT OF APPEAL STATED THAT IF THE COURT DETERMINED THAT GOOD CAUSE FOR THE APPOINTMENT OF NEW COUNSEL WAS NOT SHOWN AT THE HEARING, THE COURT SHOULD REINSTATE THE VERDICTS AND JUDGMENT, BUT IF THE COURT FOUND THERE WAS GOOD CAUSE FOR THE APPOINTMENT OF NEW COUNSEL, THE COURT SHOULD APPOINT NEW COUNSEL AND SET THE CASE FOR RETRIAL.

PETITIONER FILED A PETITION FOR

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REVIEW IN THE CALIFORNIA SUPREME COURT ON AUGUST 12, 2015, REVIEW WAS DENIED. ON REMAND, THE TRIAL COURT CONDUCTED THE MARSDEN HEARING, FOUND THAT GOOD CAUSE WAS NOT SHOWN FOR THE APPOINTMENT OF NEW COUNSEL, AND REINSTATED THE JUDGMENT. PETITIONER APPEALED FROM THE REINSTATED JUDGMENT, AND CHALLENGED THE TRIAL COURT'S DENIAL OF HIS MARSDEN MOTION.

ON JANUARY 30, 2017 THE CALIFORNIA COURT OF APPEALS ISSUED AN OPINION IN CASE NUMBER B.269597, IN WHICH IT FOUND NO ABUSE OF DISCRETION AND AFFIRMED THE JUDGMENT OF THE CONVICTION. ON MARCH 13, 2017 PETITIONER FILED A PETITION FOR REVIEW IN THE CALIFORNIA SUPREME COURT. ON APRIL 19, 2017 REVIEW WAS DENIED.

Reason For Granting The Petition

A. This Court's Jurisdiction.

A Petition For Habeas Corpus May Be Issued Pursuant To 28 U.S.C. 2241, If The Petitioner Is In Custody In Violation Of The Constitution Or Laws Of Treaties Of The United States" 2241 (3)). The Provisions Of The (AE)PA) Do Not Deprive This Court Of Jurisdiction To Hear Original Habeas Petition Felker V. Turpin 518 U.S. 651, 658, 662 (1996). The Court Can Decide In Habeas Petitions Pure Questions Of Law Aside From Issues Of Constitution Error Like That Presented In This Case In. V St. Cvr. 533 U.S. 289, 301, 304-07.

Exceptional Circumstances Warrant This Court's Excercise Of Its Discretionary Power's And Adequate Relief Cannot Be Obtain In Any Other Form Or From Any Other Court. Supreme Court Rule 20.4(A)). The Question Presented By This Petition Has Been Decided Against Petitioner By The Court Of Appeals, Thus Preventing

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RELIEF IN EITHER IN THAT COURT OR THE DISTRICT COURT. AS A RESULT, PETITIONER IS NOT SEEKING RELIEF IN THE DISTRICT COURT (28 U.S.C. 2242.)

IN THE ALTERNATIVE, EXERCISE OF CERTIORARI JURISDICTION IS JUSTIFIED BECAUSE THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, OR HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT" SUPREME COURT RULE 10(c)).

THE QUESTION ADDRESSED BY THE COURT BELOW REGARDING THE SUFFICIENT OF EVIDENCE SHOULD BE FINALLY DECIDED BY THIS COURT THE ISSUE POTENTIALLY AFFECTS THE AVAILBILITY OF HABEAS RELIEF FOR A LARGE NUMBER OF STATE AND FEDERAL PRISONERS. FURTHER, THE NINTH CIRCUIT CONCLUSION CONTRADICTS THIS COURT

CONSTRUCTION OF THE SUFFICIENCY OF EVIDENCE. SEE JACKSON V. VIRGINIA (1979) 443 U.S. 307, 318-320 60 L.Ed 2d 560 S.Ct. 278).

ARGUMENT

A. LEGAL PRECEDENT

THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION REQUIRES THE PROSECUTION TO PROVE BEYOND A REASONABLE DOUBT EVERY ELEMENT OF THE CRIMES WITH WHICH A DEFENDANT IS CHARGED. IN RE WINSHIP, 397 U.S. 358 (1970).

WHEN A DEFENDANT CHALLENGES THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE JUDGMENT OF THE CONVICTION, THE REVIEWING COURT MUST REVIEW THE ENTIRE RECORD, TO DETERMINE WHETHER THERE IS EVIDENCE, WHICH IS "REASONABLE, CREDIBLE, AND OF SOLID VALUE," AS TO EVERY ELEMENT OF EVERY CHARGE." (PEOPLE V. LEE (2011) 51 CAL 4TH 620, 632; JACKSON V. VIRGINIA (1979) 443 U.S. 307, 318-320 [61 L.Ed 2d 560, 99 S.Ct 278].) A CONVICTION WITHOUT PROOF MEETING THOSE STANDARDS VIOLATES STATE

AND FEDERAL DUE PROCESS REQUIREMENTS, AND MUST BE REVERSED. (JACKSON V. VIRGINIA, SUPRA. 443 U.S. AT 313-314 [61 L.Ed.2d 560, 99 S.G. 2781]; PEOPLE V. ROWLAND (1992) 4 CAL. 4TH 238, 269-270; U.S. CONST., 14 AMDT; CAL CONST., ART. I, SEC. 5.)

B ARGUMENT

APPELLANT WAS CONVICTED OF AIDING AND ABETTING ATTEMPTED PREMEDITATED MURDER, AND FELONY ASSAULT. ATTEMPTED MURDER REQUIRES A SPECIFIC INTENT TO KILL, AND A DIRECT ACT; GOING TOWARD THE ACCOMPLISHMENT OF THAT GOAL. (PEOPLE V. LASKO (2000) 23 CAL. 4TH 101, 107; PEOPLE V. McCLOUD (2012) 211 CAL. APP. 4TH 788, 796-797.) APPELLANT'S CONVICTIONS ON THE FIRST TWO COUNTS ALSO REQUIRED THAT HE OR THE SHOOTER PREMEDITATED. (1CT 143, 145; CAL. CRIM 400, 401, 600, AND 601.) PREMEDITATION IS CAREFULLY WEIGHING CONSIDERATIONS FOR AND AGAINST THE KILLING. (CAL. CRIM 601.) THE GRAVAMEN OF ASSAULT IS AN ACT COMMITTED IN CIRCUMSTANCES, INDICATIVE OF AN INTENT TO APPLY PHYSICAL FORCE TO ANOTHER. (PEOPLE V. COLANTUONO (1994) 7 CAL. 4TH 206, 218-219.) AIDING AND ABETTING REQUIRES THAT ONE ACT TO ENCOURAGE OR PROMOTE A CRIME, KNOWING OF

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AND SHARING THE REQUISITE INTENT, WITH THE PERPETRATOR. (PEOPLE V. PRETTYMAN (1996) 14 CAL. 4TH 248, 259; CAL. CRIM 400, 401; CT 143.)

REVIEW OF WHETHER EVIDENCE PROVES ALL THE ELEMENTS OF CRIMES CHARGED IS DEFERENTIAL. IT MUST DRAW EVERY REASONABLE INFERENCE IN SUPPORT OF THE JUDGMENT. NEVERTHELESS, THE "ENTIRE RECORD" MUST BE CONSIDERED, IN DETERMINING WHETHER A GIVEN INFERINCE IS REASONABLE. (PEOPLE V. JOHNSON (1980) 26 CAL. 3d 557, 576-578.) TO OBTAIN REVERSAL FOR INSUFFICIENCY OF EVIDENCE, A DEFENDANT MUST "SET FOR IN HIS OPENING BRIEF ALL OF THE MATERIAL EVIDENCE ON THE DISPUTED ELEMENTS IN THE LIGHT MUST FAVORABLE TO THE PROSECUTION, AND THEN MUST PERSUADE US THAT THE EVIDENCE CANNOT REASONABLY SUPPORT THE JURY'S VERDICT." PEOPLE V. BATTLE (2011) 198 CAL. APP. 4TH 50, 62; SEE ALSO; PEOPLE V. SANGHERA (2006) 139 CAL. APP. 4TH 1567, 1574.)

TO SATISFY THE FIRST REQUIREMENT FOR REVERSAL, FOR INSUFFICINCY OF EVIDENCE, APPELLANT HAS JET FORTH ALL THE FACTS OF THE CASE ABOVE, INCLUDING FACTS UNFAVORABLE TO HIS CASE. (AOB 4-9.) TO LEAVE NO DOUBT THAT HE IS NOT CHERRY-PICKING FAVORABLE FACTS, HE

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NOW PROVIDES A SUMMARY OF ALL THE EVIDENCE PRESENTED BY THE PROSECUTION. THERE WERE NO DEFENSE WITNESSES.

IN THIS CASE, PLAINLY DANIEL MEZA WENT UNAWARE TO A STORE ON THE BORDER OF HIS ENEMIES' TERRITORY, LITERALLY ACROSS THE STREET. THE LAST GANG PREDICATE CRIME BY EAST SIDE TRECE HAD BEEN COMMITTED IN 2010, AND THE EXPERT DID NOT SAY IT WAS COMMITTED AGAINST LOCO PARK, DANIEL MEZA'S GANG. (3RT 366-370.) SO THIS WAS NOT A GANG WAR CASE, OR ONE IN WHICH ESCALATING VIOLENCE BETWEEN TWO GANGS MAY ALLOW INFERENCE OF AIDING AND ABETTING MURDER, WITHOUT SPECIFIC EVIDENCE, THAT APPELLANT KNEW HIS COHORT WAS ARMED, AND INTENDED TO SHOOT SOMEONE. (PEOPLE V. MEDINA, SUPRA, 46 CAL. 4TH AT 921; QUOTING PEOPLE V. MONTES (1999) 74 CAL. APP. 4TH 1050, 1056.)

THE LACK OF ANY PHYSICAL FIGHT BEFORE THE SHOOTING, AND THE LACK OF ANY SPECIFIC HOSTILITIES BETWEEN EAST SIDE TRECE AND LOCO PARK, MEANS A SHOOTING WAS NOT A PREDICTABLE RESULT OF CALLING OUT OTHER GANG MEMBERS. AS SOMEONE ACCORDED "QUASI-EXPERT STATUS," BY THE JUDGE'S RULING ON THE OPINION EVIDENCE, DANIEL MEZA SHOULD HAVE BEEN AWARE IF THERE

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WAS A PROSPECT OF ARMED VIOLENCE, AT THIS SCENE. IF HES AND THE GANG EXPERT'S OPINIONS WERE VALID, THEN TO GO TO A STORE, ON THE VERY BORDER OF A HOSTILE GANG, HE SHOULD HAVE BEEN CARRYING A WEAPON. APPELLANT SHOULD HAVE BEEN ARMED, AND ROBERT "LITTLE ROB" GRANDOS AS WELL. GRANDOS WAS KNOWN TO DANIEL SINCE CHILDHOOD AS AN EAST SIDE TREECE. BUT DANIEL WAS PLAINLY NOT THINKING OF WEAPONS AT ALL, AS HE STEPPED OUTSIDE TO CONFRONT APPELLANT.

APPELLANT SUBMITS THAT THERE IS NO HARD AND FAST RULE THAT EVERY GANG MEMBER IN EVERY ENCOUNTER WITH RIVALS KNOWS OF OR INTENDS LETHAL VIOLENCE, OR INEVITABLY CARRIES A FIREARM. APPELLANT'S VISIBLE "PHYSICAL REACTION" TO THE SHOTS BEING FIRED, WAS NOT AT ALL WHAT ONE WOULD EXPECT, FROM SOMEONE PLANNING A COLD-BLOODED SHOOTING. NOR DID HIS VISIBLE DOUBLE-TAKE, AS HE STROLLED BY THE STORE, INDICATE THIS WAS ANYTHING BUT A CHANCE GANG ENCOUNTER, ESPECIALLY WHEN HE LITERALLY HAD TO BACK UP, TO LOOK DIRECTLY INTO THE STORE. THE SAME IS TRUE OF HIS LEISURELY PACE, WALKING TO THE SCENE, AT THREE MILES AN HOUR (3RT 612.) APPELLATE PASSED THE STORE DOOR, LOOKING AS THOUGH HE

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HAD NOTHING ON HIS MIND, WHEN HE SPOTTED DANIEL MEZA. (P. EX. 3A.) DANIEL MEZA DID NOT KNOW "APPELLANT'S NAME," AND REFERRED TO HIM IN TESTIMONY, AS "HIM." (2 RT 337.)

THERE IS NOTHING ON THE RECORD TO SHOW OR ESTABLISH AS A MATTER OF FACT THAT APPELLANT KNEW THAT THE SHOOTER HAD A GUN AND THAT HE WOULD USE IT TO COMMIT A MURDER, OR THAT THERE WAS A PRECONCEIVED PLAN TO DO SO. THE MOTIVE RELIED UPON BY THE PROSECUTION WAS A SIMPLE ONE: GANG CULTURE. BUT LIKE IN PEOPLE V. ANDERSON id. 70 CAL. 2d 15, IT IS NOT ENOUGH THAT THE CRIME WAS BRUTAL OR GANG RELATED. ALSO IN UNITED STATES V. GARCIA (9TH CIR (1998) 151. F. 3d. 1243. THE NINTH CIR. REJECTED THE "GOVERNMENT'S THEORY" THAT COMMON GANG MEMBERSHIP ESTABLISHED THE EXISTENCE OF A CONSPIRACY TO COMMIT ASSAULT ON RIVAL GANG MEMBERS; "BECAUSE THERE IS NO DIRECT EVIDENCE OF AN AGREEMENT TO COMMIT THE CRIMINAL ACT WHICH WAS THE ALLEGED OBJECT OF THE CONSPIRACY, AND BECAUSE THE CIRCUMSTANCES OF THE SHOOTINGS DO NOT SUPPORT THE EXISTENCE OF AN AGREEMENT, IMPLICIT OR

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EXPLICIT, THE GOVERNMENT RELIED HEAVILY ON THE GANG AFFILIATION OF THE PARTICIPANTS TO SHOW THE EXISTENCE OF SUCH AN AGREEMENT. WE HOLD THAT GANG MEMBERSHIP ITSELF CANNOT ESTABLISH GUILT OF A CRIME, AND A GENERAL AGREEMENT, IMPLICIT OR EXPLICT, TO SUPPORT ONE ANOTHER IN GANG FIGHTS DOES NOT PROVIDE SUBSTANTIAL PROOF OF THE SPECIFIC AGREEMENT REQUIRED FOR A CONVICTION OF CONSPIRACY TO COMMIT ASSAULT..." (id. 1244.) AS IN GARCIA, THE EVIDENCE IS MANIFESTLY INSUFFICIENT TO SUPPORT PETITIONER'S LIABILITY TO (COMMIT PREMEDITATED) ATTEMPTED MURDER. BASED ON THE FACT THAT THE VICTIMS WERE RIVAL GANG MEMBER. THE SHOOTER'S ACTIONS WERE A SPONTANOUS INDEPENDENT ACT, WHICH APPELLANT HAD NO PRECONCEIVED NOTION OR PLAN WITH THE SHOOTER THAT HE (WOULD) TAKE. AND CONTRARY TO WHAT THE PEOPLE TRY TO STATE AS FACT THE EVIDENCE AND VIDEO SHOWS JUST THAT. THAT APPELLANT DID NOT KNOW.

HERE THE PROSECUTOR ERED OUT HER CIRCUMSTANIAL CASE. IMAGINATIVELY SCRIPTING, A NUMBER OF SIGNIFICANT

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EVENTS AND DIALOGUE, FOR BEFORE AND AFTER THE SHOOTING. "SHE" DESCRIBED APPELLANT, LITTLE ROB, AND THE SHOOTER HIGH-FIVING EACH OTHER, AFTER THE OFFENSE, BACK AT LITTLE ROB'S HOUSE. (3RT 634-635.) SHE EVEN INVENTED DIALOGUE TO GO WITH THE GESTURE. "HOW DID WE DO? HIGH-FIVE. "WE HIT THOSE GUYS." WHAT COULD WE DO BETTER NEXT TIME? DID YOU DO WHAT YOU WERE SUPPOSED TO DO?" SHE SPOKE OF THE HOME OF ROBERT GRANADOS AS THEIR "BASE" FOR ASSAULTS AND SHOOTINGS, ALTHOUGH IN FACT NONE OF THE PREDICATE OFFENSES INVOLVED ROBERT GRANADOS!

BOTH DANIEL MEZA AND THE GANG OFFICER, DAVID DIXON, OPINED THAT GANG MEMBERS WOULD NOT GO UNARMED INTO RIVAL GANG TERRITORY. (2RT 345-346, 372.) THIS, APELLANT SUBMITS, IS THE WEAK LINK, IN THE CHAIN OF INFERENCES. THERE IS NO RATIONAL INFERENCE, THAT APPELLANT ACTED WITH AN INTENT TO HAVE ANYONE SHOT, MUCH LESS KILLED. MUCH LESS WITH ANY PREPLANNED INTENT, FOR ANY OF THAT TO OCCUR. UNLESS ALL GANG MEMBERS ALWAYS GO ARMED, THERE IS NO WAY TO INFER ON THIS BODY OF TRIAL EVIDENCE, THAT APPELLANT KNEW THE SHOOTER HAD A GUN AND INTENDED TO USE IT.

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ON THE VICTIMS.

PRESUMABLY, IF IT WAS TRUE THAT GANG MEMBERS HAD TO ALWAYS BE ON ALERT FOR GUNS CARRIED BY RIVALS, GANG MEMBERS ON EITHER SIDE OF THE STREET WOULD BE ON ALERT. YET DANIEL MEZA CAME TO THE STORE UNARMED. DANIEL'S YOUNGER NON-GANG-MEMBER BROTHER WAS THE ONLY ONE IN THE STORE WITH ANY KIND OF "WEAPON," A PELLET GUN, WHICH IT APPEARED WAS CONCEALED ON HIS PERSON. DANIEL MEZA WAS ABSOULTELY CLEAR THAT HE HAD NO IDEA WHATSOEVER THAT HIS OWN BROTHER HAD A WEAPON AT THE SCENE. (2RT 341-342, 354.) "TWO" OF THE "THREE" EAST SIDE TRECE MEMBERS HAD NO GUNS AT ALL, AND THAT INCLUDED APPELLANT, WHO VISIBLY FLINCHES AS SHOTS ARE FIRED. (P:EX. 3A [CHANNEL 6].) NO ONE SEEMED TO BE TREATING THIS AS A WAR ZONE, OR EXPECTING THE OUTBREAK OF VIOLENCE WHICH OCCURRED, IN WHICH APPELLANT WAS A NON-SHOOTER, WITH NO GUN, APPARENTLY STARTLED BY THE SHOTS!

THE ATTEMPTED MURDER COUNTS ARE PARTICULARLY UNSUPPORTED BY SUBSTANTIAL EVIDENCE, OF

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ANY INTENT TO HAVE VICTIMS KILLED. COURTS DO CONSIDER THE "OLD ANDERSON CRITERIA" AS USEFUL (IF NOT EXCLUSIVE) CRITERIA, FOR WHETHER THERE IS PROOF OF PREMEDITATION, IN THESE GANG CASES. (PEOPLE V. HERRERA (1999) 70 CAL. APP. 4TH 1456, 1462-1463; CITING PEOPLE V. ANDERSON (1968) 70 CAL. 2d 15, 26-27. IN ANDERSON, THE COURT SET FORTH THREE CATEGORIES OF EVIDENCE, TO BE CONSIDERED IN ASSESSING PREMEDITATION AND DELIBERATION. THESE WERE PRIOR PLANNING ACTIVITY, MOTIVE, AND AN [EXATING] METHOD OF KILLING.

THERE IS "NO SOLID EVIDENCE" THAT APPELLANT HAD THE INTENT AND KNOWLEDGE, REQUIRED FOR CONVICTIONS OF KNOWINGLY AIDING AND ABETTING MURDER, OR AN ASSUALT WITH A FIREARM. IN GANG CASES, THE INTENT OF ONE PERSON SEEMS TO BE MORE READILY ASCRIBED TO OTHER, AND EVIDENCE OF INTENT MAY OF NECESSITY BE CIRCUMSTANTIAL. STILL, MERE SPECULATION, OR NON-EVIDENTIARY EXPERT OPINION, CANNOT SUSTAIN A CRIMINAL CONVICTION OR ENHANCEMENT, EVEN FOR GANG MEMBERS. (IN RE ALEXANDER L. (2007) 149 CAL. APP. 4TH 605, 612; AND SEE PEOPLE V. RIOS (2013) 222 CAL. APP. 4TH 542, 573-575.)

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AT THE OUTSET, THERE ARE LIMITS TO THE EXTENT TO WHICH GANG EXPERT OPINION ALONE MAY SUSTAIN CONVICTIONS. (SEE CASES DESCUSSED IN PEOPLE V. RIOS, SUPRA, 222 CAL. APP. 4TH AT 569-575.) THE DEFENSE OBJECTED TO DANIEL MEZA OPINING WHETHER GANG MEMBERS WOULD EVER GO INTO RIVAL GANG TERRITORY, UNARMED. THE COURT OVER-RULED THE OBJECTION, IN EFFECT CONFERRING EXPERT STATUS TO DANIEL MEZA. THE COURT SAID HE OFFERED INFORMATION, ON MATTERS OUTSIDE THE JUROR'S COMMON EXPERIENCE, WHICH IS THE PURVIEW OF EXPERTS. (2RT 345-346; PEOPLE V. PRINCE (2007) 40 CAL. 4TH 1179, 1222.) DANIEL MEZA WAS SAYING THAT ONE WOULD NOT GO INTO RIVAL GANG TERRITORY WITHOUT A GUN, "BECAUSE YOU WILL GET SHOT." (2RT 346.) YET THERE WAS APPELLANT, STROLLING CASUALLY DOWN THE STREET, UNARMED AND DANIEL MEZA DID NOT EVEN HAVE A GUN, WITH WHICH TO SHOOT HIM. THE ONLY WEAPON WAS A PELLET GUN, CONCEALED BY DANIEL MEZA'S YOUNGER NON-GANG BROTHER, INSIDE HIS CLOTHES.

BOTH DANIEL MEZA'S OPINION, AND THE PROSECUTION GANG EXPERT OPINION, THAT GANG

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MEMBERS DO NOT GO INTO RIVAL GANG TERRITORY WITHOUT BEING ARMED, ~~IT'S~~ OBVIOUSLY NOT - CONSIDERING THE EVIDENCE OF THIS CASE - ANYTHING LIKE AN UNALTERABLE RULE. IT IS MORE AKIN TO A STATISTIC LIKELIHOOD, WHICH IS NOT PROPERLY PROBATIVE OF GUILT, VIA EXPERT OR LAY OPINION. (PEOPLE V. COLLINS (1968) 68. CAL. 2d 319, 320.) AS THE COURT STATED IN COLLINS, A DEFENDANT SHOULD NOT HAVE HIS GUILT "DETERMINED BY THE ODDS" OF SOMETHING OCCURRING. (IBID.)

THE OPINIONS THAT GANG MEMBERS ALWAYS OR NEVER DO SOMETHING, IS REALLY MORE A MATTER OF ODDS, THAN ACTUAL EVIDENCE IN A SPECIFIC CASE. WHERE THE PROSPECT OF ARMED VIOLENCE HAS BEEN INFERRED IN GANG CASES, WITHOUT SPECIFIC INFORMATION A GIVEN GANG MEMBER KNEW THERE WERE GUNS THERE, THE CIRCUMSTANCES ARE READILY DISTINGUISHABLE FROM APPELLANT'S CASE. THOSE CASES INVOLVE A PREDICTABLE ESCALATION OF VIOLENCE, TYPICALLY FROM AN ACTUAL, ONGOING, "HOT" GANG WAR. MANY INVOLVE EXPLICIT ADVANCE PLANNING FOR A PARTICULAR CONFRONTATION, WHICH THEN BEGINS WITH

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A PHYSICAL ASSAULT, AND RAMPS UP TO A SHOOTING. THE LEADING CASE, DISCUSSING INFERENCES OF INTENT IN SUCH TYPES OF GANG CASES, IS PEOPLE V. MEDINA (2009) 46 CAL. 4TH 913, 924. IT INVOLVED ALL THOSE FACTS, AND THEN SOME. THERE WAS EVEN EVIDENCE THAT SOMEONE YELLED "GET THE HEAT (GUN)" DURING A MELEE, BEFORE THE SHOOTING. THE SUPREME COURT ALSO CATALOGUED SIMILAR CASES. (Id., AT 920-927.) MEDINA IS DISCUSSED MORE BELOW. NEITHER MEDINA, NOR THE CASES DISCUSSED BY THE SUPREME COURT IN MEDINA, INVOLVED SHOOTINGS LIKE THOSE IN APPELLANT'S CASE WHICH CAME OUT OF THE BLUE.

WHEN THE CRIME AT ISSUE REQUIRES A SPECIFIC INTENT, IN ORDER TO BE GUILTY AS AN AIDER AND ABETTOR THE PERSON MUST SHARE THE SPECIFIC INTENT OF THE DIRECT PERPETRATOR, THAT IS TO SAY, THE PERSON MUST KNOW THE FULL EXTENT OF THE DIRECT PERPETRATOR'S CRIMINAL PURPOSE AND MUST GIVE AID OR ENCOURAGEMENT WITH THE INTENT OR PURPOSE OF FACILITATING THE DIRECT PERPETRATOR'S COMMISSION OF THE CRIME. PEOPLE V. BEEMAN, 35 CAL. 3d AT 560.

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THUS, TO BE GUILTY OF ATTEMPTED MURDER AS AN AIDER AND ABETTOR, A PERSON MUST GIVE AID OR ENCOURAGEMENT WITH KNOWLEDGE OF THE DIRECT PERPETRATOR'S INTENT TO KILL AND WITH THE PURPOSE OF FACILITATING THE DIRECT PERPETRATOR'S ACCOMPLISHMENT OF THE INTENDED KILLING - WITH MEANS THAT THE PERSON GUILTY OF ATTEMPTED MURDER AS AN AIDER AND ABETTOR MUST INTEND TO KILL. PEOPLE V. LEE, 31 CAL 4TH 613, 623-24 (2003); PEOPLE V MCCOY, 25 CAL 4TH AT 1118.

. BECAUSE NO RATIONAL JUROR COULD FIND THAT THE EVIDENCE IS SUFFICIENT TO FIND EVERY ELEMENT OF THE CRIMES CHARGED BEYOND A REASONABLE DOUBT, THE TRIAL COURT'S SENTENCE OF PETITIONER VILOLATED HIS DUE PROCESS RIGHTS UNDER THE U.S. CONSTITUTION. BASED ON THE FACTS ABOVE THE STATE COURT'S DECISION WAS CONTRARY TO AND UNREASONABLY APPLIED CLEARLY ESTABLISHED U.S. SUPREME COURT PRECEDENT.

DATED: AUGUST 13TH 2018

RESPECTFULLY SUBMITTED

PETITIONER PRO PER