FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEITH DWAYNE LEWIS, Petitioner-Appellant, v. WARREN L. MONTGOMERY, Respondent-Appellee.	No. 17-56604 D.C. No. 2:16-cv-08073-SJO-AFM Central District of California, Los Angeles ORDER

Before: PAEZ and RAWLINSON, Circuit Judges.

Appellant's motion for reconsideration with suggestion for rehearing en banc (Docket Entry No. 3) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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MAY 4 2018

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

KEITH DWAYNE LEWIS,

Petitioner-Appellant,

v.

WARREN L. MONTGOMERY,

Respondent-Appellee.

No. 17-56604

D.C. No.
2:16-cv-08073-SJO-AFM
Central District of California,
Los Angeles

ORDER

Before: BYBEE and BEA, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KEITH DWAYNE LEWIS,

Petitioner,

v.

W.L. MONTGOMERY, Warden,

Respondent.

Case No. CV 16-08073 SJO (AFM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file and the Report and Recommendation of United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report to which Petitioner has objected. The Court accepts the findings and recommendations of the Magistrate Judge.

IT THEREFORE IS ORDERED that (1) the Report and Recommendation of the Magistrate Judge is accepted and adopted; (2) petitioner's request for an evidentiary hearing is denied; and (3) Judgment shall be entered denying the Petition and dismissing the action with prejudice.

DATED: 9/12/17

S. James Otero

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KEITH DWAYNE LEWIS,

Petitioner,

v.

W.L. MONTGOMERY, Warden,

Respondent.

Case No. CV 16-08073 SJO (AFM)

JUDGMENT

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

IT IS ORDERED AND ADJUDGED that the Petition is denied and the action is dismissed with prejudice.

DATED:

9/12/17

S. James Otero

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KEITH DWAYNE LEWIS,

Petitioner,

v.

W.L. MONTGOMERY, Warden,

Respondent.

Case No. CV 16-08073 SJO (AFM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

INTRODUCTION

On October 31, 2016, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254). The Petition raises one ground for federal habeas relief: The evidence presented at trial was insufficient to support petitioner's convictions of premeditated attempted murder and assault with a firearm, under the prosecutor's theory of aiding and abetting.

On April 25, 2017, respondent filed an Answer. On August 9, 2017,

petitioner filed a Traverse.

Thus, this matter is ready for decision. For the reasons discussed below, the Court recommends that the Petition be denied and that this action be dismissed with prejudice.

PROCEDURAL BACKGROUND

On February 27, 2014, a Los Angeles County Superior Court jury found petitioner guilty of two counts of attempted murder and one count of assault with a firearm. The jury found true allegations that the attempted murders were deliberate and premeditated, that the crimes were committed to benefit a criminal street gang, and that a principal intentionally discharged a firearm causing great bodily injury. Petitioner was sentenced to state prison for 50 years to life plus 18 years. (Clerk's Transcript ["CT"] 131-33, 176-78; 3 Reporter's Transcript ["RT"] 902-05, 1213.)

Petitioner appealed, raising, *inter alia*, a claim corresponding to the insufficiency-of-the-evidence claim raised in this Petition. (Respondent's notice of lodging, Lodgment 4.) In an unpublished decision filed on June 2, 2015, the California Court of Appeal rejected the claim, but reversed the judgment on a separate claim that the trial court erred by failing to grant petitioner a hearing on his request for substitution of counsel under *People v. Marsden*, 2 Cal. 3d 118 (1970). (Lodgment 7.) Accordingly, the matter was remanded to the trial court for the sole purpose of conducting a *Marsden* hearing. (*Id.*) On August 12, 2015, the California Supreme Court summarily denied a Petition for Review with respect to the insufficiency-of-the-evidence claim. (Lodgments 8 and 9.)

On remand, after holding a *Marsden* hearing, the trial court found petitioner had failed to show good cause for substitution of counsel, denied petitioner's *Marsden* motion, and reinstated his conviction. (Lodgment 10 at 9.) In an unpublished decision filed on January 30, 2017, the California Court of Appeal found no abuse of discretion in the trial court's denial of the *Marsden* motion and

affirmed the judgment. (*Id.* at 13.) On April 19, 2017, the California Supreme Court summarily denied a Petition for Review with respect to the *Marsden* claim. (Lodgments 11 and 12.)

SUMMARY OF THE TRIAL EVIDENCE

Petitioner was convicted of attempted murder of Daniel and Miguel Meza and assault with a firearm on Alejandro Arroyo. Based on its independent review of the record, the Court adopts the following factual summary from the California Court of Appeal's opinion as a fair and accurate summary of the evidence presented at trial. (Lodgment 7 at 3-5.)

> [Petitioner] belonged to the East Side Trece gang. Attempted murder victim Daniel Meza belonged to the rival Loco Park gang. Around 8:30 p.m. on January 5, 2013, Daniel and his younger brother Miguel (who was not a gang member) entered a family market near 25th and Hooper in Los Angeles, which was in Loco Park territory. After buying beer, they were leaving when Daniel saw [petitioner] and two other men whom he recognized as East Side Trece gang members outside: [petitioner], Robert Grandos (who Daniel knew as Little Rob) and an unidentified third man. When they saw Daniel, [petitioner] and Grandos called out confrontationally "East Side Trece," and said (among other things) "Fuck lollypops," an insult "dissing" Daniel's gang, Loco Park. Daniel was standing next to his brother, perhaps a foot away from [petitioner]. He then saw [petitioner] wave with his hand as if to demand that Daniel come outside, and heard [petitioner] say, "Get him." Daniel started to go outside, and at the doorway heard shooting. He did not see anyone with a gun. He turned and ran into the store. He was shot seven times (three in his chest, two in his back, and two in his arm), but survived. Daniel's brother, Miguel, was shot

once in the shoulder. A third victim, Alejandro Arroyo, who happened to be in the store, was shot in the wrist.

The events were captured by video security cameras at the market and an edited video compilation was played for the jury during testimony. The video (Exh. 3A) showed the following. [Petitioner] and two companions walked past the front window of the market. [Petitioner] (identified as the heavy set one of the group) looked in through the window as they passed, and did a double take, craning his neck as if to look again more closely through the window. All three men stopped, and then walked back to the front door, stopped, and separated, [petitioner] standing in the doorway facing the market, Grandos a few feet to [petitioner's] right on the sidewalk, and the unidentified man on the sidewalk a few feet to [petitioner's] left. According to Daniel, who viewed the video while testifying, it was at this point that [petitioner] hurled insults against the Loco Park gang. Shortly thereafter, the video showed [petitioner] stepping away from the doorway. Miguel Meza walked out the door onto the sidewalk. Daniel appeared on the sidewalk at the doorway. At that point, [petitioner's] unidentified companion approached from behind [petitioner] and started shooting in the direction of the store. [Petitioner], who was only a few feet away from the shooter, appeared to flinch slightly and step aside toward the street. Miguel and Daniel fled inside the store. The shooter approached nearer to the store and fired several more times. Then he, [petitioner], and Grandos ran off.

[Petitioner] was wearing an ankle bracelet monitored by the Department of Corrections and Rehabilitation. On the date of the shooting, GPS tracking data showed that at 8:38 p.m. he was at 25th Street and Hooper (the approximate time and site of the shooting), and

that approximately five minutes later he was at 1225 and 1227 West 27th Street, the location of the home of Robert Grandos.

The prosecution gang expert, Los Angeles Police Officer David Dixon, who was familiar with the East Side Trece gang, was asked a hypothetical question based on the evidence of the shooting. He testified that such a shooting would have been committed to benefit the East Side Trece gang as a means of gaining respect and instilling fear. He further testified that gang members entering a rival gang's territory would typically be armed in anticipation of violence. Similarly, Daniel testified that a gang member would enter a rival gang's territory "I guess to go put in work . . . to go shoot somebody," and "no one would ever walk into another neighborhood without no gun . . . because you will get shot."

PETITIONER'S CLAIM

Petitioner contends that the evidence presented at trial was insufficient to support his convictions of premeditated attempted murder and assault with a firearm, under the prosecutor's theory of aiding and abetting. (Petition at 5.)

STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> "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."

Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *see also Carey v. Musladin*, 549 U.S. 70, 74 (2006).

Although a particular state court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. *See Williams*, 529 U.S. at 391, 413. A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam); *Williams*, 529 U.S. at 405-06. When a state court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." *See Williams*, 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *See Early*, 537 U.S. at 8.

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law, or based on 'an *unreasonable* determination of the facts.'" *See Early*, 537 U.S. at 11 (citing 28 U.S.C. § 2254(d)) (emphasis added). A state-court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. *See Williams*, 529 U.S. at 406-10, 413 (*e.g.*, the rejected decision may state the *Strickland* standard correctly but apply it unreasonably);

Woodford v. Visciotti, 537 U.S. 19, 24-27 (2002) (per curiam). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." *Visciotti*, 537 U.S. at 24-27; *Williams*, 529 U.S. at 413. An "unreasonable application" is different from an erroneous or incorrect one. *See Williams*, 529 U.S. at 409-10; *Visciotti*, 537 U.S. at 25; *Bell v. Cone*, 535 U.S. 685, 699 (2002). Moreover, review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

As the Supreme Court explained in *Harrington v. Richter*, 562 U.S. 86, 102 (2011):

> "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here [i.e., where there was no reasoned state-court decision], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."

Furthermore, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

Petitioner's insufficiency-of-the-evidence claim was denied by the California Court of Appeal in a reasoned decision on direct appeal. The claim then was presented in his Petition for Review, which the California Supreme Court summarily denied. Thus, the California Court of Appeal's decision on direct appeal constitutes the relevant state court adjudication on the merits for purposes of the AEDPA standard of review. *See Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010)

(where state supreme court denied discretionary review of decision on direct appeal, the decision on direct appeal is the relevant state-court decision for purposes of the AEDPA standard of review).

DISCUSSION

A. Legal Standard.

The Due Process Clause of the Fourteenth Amendment protects a criminal defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *accord Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). Thus, a state prisoner who alleges that the evidence introduced at trial was insufficient to support the jury's findings states a cognizable federal habeas claim. *See Herrera v. Collins*, 506 U.S. 390, 401-02 (1993). But the prisoner faces a "heavy burden" to prevail on such a claim. *See Juan H.*, 408 F.3d at 1274, 1275 n.13. Under *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (italics in original), the question is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

When determining the sufficiency of the evidence, a reviewing court makes no determination of the facts in the ordinary sense of resolving factual disputes. *See Sarausad v. Porter*, 479 F.3d 671, 678 (9th Cir.), *vacated in part*, 503 F.3d 822 (9th Cir. 2007), *rev'd on other grds*, 555 U.S. 179 (2009). Rather, the reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." *See Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995); *see also Jackson*, 443 U.S. at 319, 324, 326. Thus, in determining the sufficiency of the evidence, "the assessment of the credibility of witnesses is generally beyond the scope of review." *See Schlup v. Delo*, 513 U.S. 298, 330 (1995); *see also*

United States v. Lindsey, 634 F.3d 541, 552 (9th Cir. 2011); *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004) ("A jury's credibility determinations are . . . entitled to near-total deference under *Jackson*.").

Moreover, while "'mere suspicion or speculation cannot be the basis for the creation of logical inferences,'" *see Maass*, 45 F.3d at 1358 (citation omitted), "'[c]ircumstantial evidence can be used to prove any fact, including facts from which another fact is to be inferred, and is not to be distinguished from testimonial evidence insofar as the jury's fact-finding function is concerned,'" *Payne v. Borg*, 982 F.2d 335, 339 (9th Cir. 1992) (citation omitted). Furthermore, "to establish sufficient evidence, the prosecution need not affirmatively 'rule out every hypothesis except that of guilt.'" *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000) (en banc) (*quoting Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion)).

In post-AEDPA cases, where, as here, a state court has issued a reasoned decision rejecting a claim of insufficient evidence under a standard that is not "contrary to" *Jackson*, a reviewing federal court applies an additional layer of deference. *See Juan H.*, 408 F.3d at 1274. A federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees; rather, it "may do so only if the state court decision was 'objectively unreasonable.'" *Cavazos v. Smith*, 565 U.S. 1, 4 (2011) (per curiam); *see also Juan H.*, 408 F.3d at 1275 n.13. This "double dose of deference . . . can rarely be surmounted." *See Boyer v. Belleque*, 659 F.3d 957, 964 (9th Cir. 2011); *see also Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (per curiam) ("We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference.").

Thus, a state court's resolution of an insufficiency of the evidence claim is evaluated under 28 U.S.C. § 2254(d)(1), not § 2254(d)(2). *See Emery v. Clark*, 643 F.3d 1210, 1213-14 (9th Cir. 2011) ("When we undertake collateral review of a

state court decision rejecting a claim of insufficiency of the evidence pursuant to 28 U.S.C. § 2254(d)(1), . . . we ask only whether the state court's decision was contrary to or reflected an unreasonable application of *Jackson* to the facts of a particular case."); *see also Long v. Johnson*, 736 F.3d 891, 896 (9th Cir. 2013) ("The pivotal question, then, is whether the California Court of Appeal . . . unreasonably applied *Jackson* in affirming Petitioner's conviction for second-degree murder."); *Boyer*, 659 F.3d at 965 ("[T]he state court's application of the *Jackson* standard must be 'objectively unreasonable' to warrant habeas relief for a state court prisoner."); *Juan H.*, 408 F.3d at 1275 ("[W]e must ask whether the decision of the California Court of Appeal reflected an 'unreasonable application of' *Jackson* and *Winship* to the facts of this case.") (citing 28 U.S.C. § 2254(d)(1)).

Finally, in adjudicating an insufficiency of the evidence claim, a federal habeas court "look[s] to [state] law only to establish the elements of [the crime] and then turn[s] to the federal question of whether the [state court] was objectively unreasonable in concluding that sufficient evidence supported [the conviction]." *See Juan H.*, 408 F.3d at 1278 n.14 (*citing Jackson*, 443 U.S. at 324 n.16); *Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir. 2004) (en banc) ("The *Jackson* standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.") (internal quotation marks omitted).

B. Analysis.

1. Premeditated attempted murder.

As the California Court of Appeal noted, in *People v. Lee*, 31 Cal. 4th 613, 623-24 (2003), the California Supreme Court set out the substantive requirements for attempted murder under a theory of aiding and abetting:

> Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. To be guilty of a crime as an aider and abettor, a

person must aid the direct perpetrator by acts or encourage him or her by words or gestures. In addition, except under the natural-and-probable-consequences doctrine, which is not implicated on the facts presented here, the person must give such aid or encouragement with knowledge of the criminal purpose of the direct perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of the crime in question. 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. 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 — which means that the person guilty of attempted murder as an aider and abettor must intend to kill. [Citations, quotation marks, and brackets omitted.]

In addition, the California Court of Appeal noted that where, as in this case, it is alleged that the attempted murder was deliberate and premeditated, it is necessary only that the actual perpetrator deliberated and premeditated. So long as the aider and abettor shared the intent to kill, he is liable for the enhanced punishment for deliberate and premeditated attempted murder, even though he himself did not deliberate and premeditate. *See Lee*, 31 Cal. 4th at 624.

Petitioner argued that the evidence presented at trial was insufficient to support his convictions because the evidence reflected only a "chance gang

encounter." The evidence did not reflect, according to petitioner, a "preplanned attack," his knowledge of the gun, or his intent that anyone be shot or killed. (Petition at 5; Lodgment 4 at 16-17; Lodgment 8 at 2.)

In rejecting petitioner's argument, the California Court of Appeal commented that "the crux of his contention is a reweighing and parsing of the evidence into unconnected pieces, an aversion to drawing reasonable inferences, and a cataloguing of evidence that in his view might have been sufficient but was absent." (Lodgment 7 at 5.) The Court of Appeal then explained why the evidence was sufficient to support petitioner's convictions of two counts of premeditated attempted murder under a theory of aiding and abetting (*id.* at 6-8):

> Here, the evidence showed that [petitioner] and his two companions, Grandos and the unidentified shooter, were East Side Trece gang members. They entered the territory of a rival gang, Loco Park, and passed the market that was the scene of the shooting. As Officer Dixon and Daniel testified, gang members entering a rival's territory typically arm themselves. Indeed, Daniel was more specific: a gang member enters a rival gang's territory "I guess to go put in work . . . to go shoot somebody," and "no one would ever walk into another neighborhood without no gun . . . because you will get shot."
>
> The evidence of the shooting — Daniel's testimony and the surveillance video — strongly support the inference that [petitioner] entered Loco Park territory with the expectation of "put[ting] in work," knowing that one of his companions was armed. The video showed that as [petitioner] and his two companions walked past the front window of the market, [petitioner] looked in and did a double take, inferably recognizing Daniel as a member of Loco Park into whose territory they had entered, and suspecting that Daniel's companion, Miguel, was also a rival gang member. [Petitioner] and his two

companions walked back to the front door, stopped, and separated. According to Daniel, [petitioner], who was standing in the doorway facing the market, and Grandos issued gang threats, calling out the name of their gang ("East Side Trece") and insulting Daniel's gang ("Fuck lollypops."). [Petitioner] waved his hand calling on Daniel to come outside, and then said "Get him." Almost immediately thereafter, Daniel started to go outside, and at the doorway heard shooting.

As the video tape showed, Miguel walked out the door onto the sidewalk. Daniel appeared at the doorway just onto the sidewalk. [Petitioner's] unidentified companion approached from behind [petitioner] and started shooting in the direction of the store. [Petitioner], who was only a few feet away from the shooter, appeared to flinch slightly at the sound of the shots and stepped aside toward the street, getting out of the way of the shooter. Miguel and Daniel fled inside the store. The shooter approached nearer to the store and fired several more times. Daniel was shot seven times and Miguel was shot once. Then the shooter, [petitioner], and Grandos ran off. As Officer Dixon testified based on a hypothetical question mirroring the evidence of the shooting, such a shooting would be committed to benefit the East Side Trece gang, enhancing the reputation of the gang and instilling fear. Within minutes after the shooting, GPS tracking of [petitioner's] ankle bracelet showed that [petitioner] went to Grandos' home.

From this evidence, it could reasonably be inferred that the shooter intended to kill Daniel and Miguel, and that he deliberated and premeditated that intent. In rival gang territory, he was "put[ting] in work," firing multiple shots at people he perceived to be associated

with a rival gang.

It could also be inferred that [petitioner] shared the shooter's intent to kill. That is, knowing that his companion was armed in rival gang territory, he observed Daniel (a member of a rival gang) and Miguel together in the market. He hurled gang insults, motioned for Daniel to come outside, and then called on his companion to "get him," meaning to shoot Daniel and (it may be inferred) Daniel's companion, Miguel. On this basis, the evidence was sufficient to support the [petitioner's] conviction of the attempted murders, with the finding that the attempted murders were deliberate and premeditated.

[Petitioner's] arguments to the contrary simply ignore the standard of review on appeal and fail to admit the reasonable inferences that can be drawn from the evidence. Thus, he asserts "it is . . . speculative that [he] himself knew of the shooter, who came from behind him." He downplays the testimony of Officer Dixon and Daniel that gang members typically arm themselves before going into a rival gang's territory, and argues that there is "no evidence of specific pre-offense planning, or specific references to using a gun." He notes the absence of evidence of an ongoing gang war between East Side Trece and Loco Park, and speculates that [petitioner's] reaction to the shooting shown on the video tape suggests surprise not complicity. All such arguments are appropriate for, and were made at, trial. But they do not undercut the sufficiency of the evidence to prove [petitioner's] guilt of attempted murder on appeal.

The Court concurs with the Court of Appeal's conclusion that the evidence presented at trial was sufficient for a reasonable jury to find that petitioner aided and abetted the premeditated attempted murders of Daniel and Miguel Meza. The Court of Appeal's conclusion is supported by the trial testimony and the

surveillance video, both of which the Court has independently reviewed. (Lodgment 13.)

First, the evidence permitted a reasonable inference that petitioner shared, with the shooter, the specific intent to kill. Petitioner was the perpetrator who first detected and then targeted the victims. Petitioner did a "double take" when walking by the liquor store, apparently because he had spotted Daniel Meza, a member of a rival gang. (Lodgment 13.) Petitioner then returned to the store with the shooter and made a "come here" gesture to Daniel, who was leaving the store with his brother Miguel. (2 RT 332, 336-37.) Petitioner stood in front of Daniel and started insulting Daniel's gang, while Miguel was standing nearby. (2 RT 336, 353-54.) Petitioner told the shooter to "get him" or "get them." (2 RT 336-37, 354-55.)

Second, evidence was presented that petitioner gave aid or encouragement to the shooter with the intent or purpose of facilitating the shootings. A reasonable jury could conclude that petitioner targeted the victims by making a hand gesture to lure one of them outside the store. (2 RT 336-37.) Petitioner then told the shooter to "get him" or "get them" while the two victims were standing next to each other. (2 RT 336-37, 354-55.)

Third, the evidence permitted a reasonable inference that the commission of the attempted murders was deliberate and premeditated. California law sets out three factors to support a finding of deliberation and premeditation: (1) planning activity; (2) motive; and (3) manner of killing. *See People v. Anderson*, 70 Cal. 2d 15, 26-27 (1968). All three factors are not required, "nor are they exclusive in describing the evidence that will support a finding of premeditation and deliberation." *People v. Gonzalez*, 54 Cal. 4th 643, 663 (2012).

All three factors were proven in this case. Petitioner and the shooter entered a rival gang's territory while armed, permitting a reasonable inference of a plan to "put in work." (2 RT 345.) Daniel Meza's membership in a rival gang and petitioner's commission of the crimes in a rival gang's territory permitted a

reasonable inference of motive. (2 RT 327, 338, 371-72, 380.)

The manner of the shooting also permitted a reasonable inference of deliberation and premeditation. Under California law, the discharge of several shots at close range permits a reasonable inference of an attempt to inflict death. *See People v. Francisco*, 22 Cal. App. 4th 1180, 1192 (1994) (manner of killing established by five or six shots at close range). Here, once petitioner saw Daniel Meza through the store window, petitioner and his confederates walked back to the store, stopped outside the door, and separated. (2 RT 332-33, 340; Lodgment 5 at 2; Lodgment 7 at 3; Lodgment 13.) Petitioner then made the "come here" gesture to lure the victim outside. (2 RT 336-37.) The shooter then shot several times at the victims at a close range and inflicted several wounds, including two gunshot wounds to Daniel Meza's back. (2 RT 317, 343.)

Petitioner argues that this evidence considered in a different context supports an inference contrary to guilt. For example, he points out that he and the victims were unarmed, that there were no pre-existing hostilities between the two gangs, and that petitioner appeared taken aback by the shootings. (Traverse at 10-15.) However, even assuming that petitioner is correct in arguing that the evidence permitted conflicting inferences, the Court must presume that the jury resolved that conflict in favor of the prosecution. *See Jackson*, 443 U.S. at 326 (federal habeas court must presume that the jury resolved any conflicts in the record in favor of the prosecution); *see also Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (rejecting insufficiency-of-the-evidence claim where the jury "was presented with competing views of how [the victim] died" and credited the prosecutor's theory).

In sum, the evidence presented at trial was sufficient to establish that petitioner committed premeditated attempted murders under a theory of aiding and abetting. Thus, the California Court of Appeal's rejection of this part of petitioner's claim did not involve an unreasonable application of the *Jackson* standard.

2. Assault with a firearm.

Under California law, "assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." *People v. Golde*, 163 Cal. App. 4th 101, 108 (2008). "An intent to do an act which will injure *any reasonably foreseeable person* is a sufficient intent for an assault charge." *People v. Felix*, 172 Cal. App. 4th 1618, 1628 (2009) (emphasis added) (assault does not require intent to injure the actual victim).

The California Court of Appeal rejected petitioner's "surprise shooting" argument with respect to the assault with a firearm on Alejandro Arroyo, the bystander inside the liquor store (Lodgment 7 at 9):

> For much the same reason, [petitioner] was liable as an aider and abettor for the shooter's assault with a firearm on Alejandro Arroyo. Using a firearm, the shooter willfully committed an act that probably would result in the application of physical force on Arroyo (§ 245, subd. (a)(2)), a bystander in the store into which the shooter fired. Indeed, Arroyo was wounded in the wrist. [Petitioner] aided and abetted that crime by encouraging the shooter to fire. Thus, the evidence was sufficient to sustain his conviction for assault with a firearm.

Based on its independent review of the record, the Court concurs with the Court of Appeal's conclusion that the evidence presented at trial was sufficient to establish that petitioner aided and abetted an assault with a firearm on Alejandro Arroyo. Petitioner encouraged the shooter to fire a gun into an open liquor store. (2 RT 336-37, 354-55.) A reasonable person would have known that such an act, by its nature, would probably and directly result in injury to another, and Arroyo did in fact sustain a gunshot wound to his wrist. (2 RT 318.) Accordingly, the California Court of Appeal's rejection of this part of petitioner's claim did not

involve an unreasonable application of the *Jackson* standard.

C. Request for an evidentiary hearing.

Finally, petitioner requests an evidentiary hearing for his insufficiency-of-the-evidence claim. (Traverse at 5.)

An evidentiary hearing is unwarranted because the Supreme Court has held that the sufficiency of the evidence review authorized by *Jackson* is "limited to record evidence" and "does not extend to nonrecord evidence, including newly discovered evidence." *See Herrera v. Collins*, 506 U.S. 390, 402 (1993); *see also, e.g., Dallas v. Arave*, 984 F.2d 292, 296 (9th Cir. 1993) ("Because the sufficiency of the evidence claims are clearly resolved from the record of the state court proceedings, Dallas's motion for discovery, attempt to supplement the record, and request for an evidentiary hearing were properly denied by the district court."); *Bashor v. Risley*, 730 F.2d 1228, 1233 (9th Cir. 1984) ("Whether the evidence was sufficient to support the verdict must be determined from a review of the evidence in the record in the state proceedings. No evidentiary hearing was required on this issue before the federal district court."). Thus, it is recommended that an evidentiary hearing be denied.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) denying petitioner's request for an evidentiary hearing; and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: 8/10/2017

ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.