No. _____

IN THE

Supreme Court of the United States

TODD J. TIBBS,

Petitioner,

v.

RANDY GROUNDS,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FILED

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD J. TIBBS, Petitioner-Appellant, v. RANDY GROUNDS, Warden, Respondent-Appellee.	No. 17-55665 D.C. No. 5:14-cv-00834-SJO-MRW MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted April 10, 2019
Pasadena, California

Before: GRABER and BYBEE, Circuit Judges, and HARPOOL,** District Judge.

Todd J. Tibbs appeals the district court's denial of his federal habeas petition, in which he alleged that the California Superior Court erred in omitting a

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

** The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

jury instruction on willfulness, deliberation, and premeditation when providing an instruction for an attempted murder charge. We affirm.

We review de novo the district court's denial of a habeas petition and we review factual findings for clear error. *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010). Assuming that the California Superior Court committed error when it omitted the instruction on attempted murder, Tibbs cannot establish that the error caused actual prejudice under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), or that the California Court of Appeal's harmlessness finding was objectively unreasonable under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. *See Hall v. Haws*, 861 F.3d 977, 1000 (9th Cir. 2017).

1. Tibbs' claim fails under *Brecht* review. To establish actual prejudice under *Brecht*, Tibbs must show that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Davis v. Ayala*, 135 S. Ct. 2187, 2197–98 (2015) (citation omitted); *see Brecht*, 507 U.S. at 637. "This requires much more than a 'reasonable possibility' that the result of the hearing would have been different." *Ayala*, 135 S. Ct. at 2203. The government presented some evidence that Tibbs acted with premeditation, deliberation, and willfulness, including that he had a dispute with the victim over the victim's sister, that there

was a prior occasion where he showed the victim a gun, and that he picked up the gun and fired it at the victim. In addition, the court defined premeditation, deliberation, and willfulness when it gave the murder instruction and told the jury to "[p]ay careful attention to all of these instructions and consider them together," and the jury indicated on the verdict form that it made a finding of premeditation, deliberation, and willfulness. Thus, because the jury knew the definitions of premeditation, deliberation, and willfulness, and there were sufficient facts to support that finding, Tibbs cannot show that the omitted instruction had a "substantial and injurious effect or influence" that leaves us with "grave doubt" about the verdict's correctness. *Id.* at 2198 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)).

2. Although we need not formally do so, we also address Tibbs' arguments that the California Court of Appeal's harmlessness finding was objectively unreasonable under AEDPA. *See Fry v. Pliler*, 551 U.S. 112, 120 (2007); *Mays v. Clark*, 807 F.3d 968, 980 (9th Cir. 2015). To succeed, Tibbs must show that the decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Ayala*, 135 S. Ct. at 2199 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

First, Tibbs asserts that, despite stating it was applying a harmlessness standard of review, the California Court of Appeal actually applied the standard of review for an insufficient evidence claim. This is because, to support its finding of harmlessness, the court quoted the exact factual findings it made when analyzing his insufficient evidence claim on direct appeal. An insufficient evidence claim requires the court to construe all the evidence in the government's favor, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)—which is not the standard for a harmlessness claim. *See United States v. Lane*, 474 U.S. 438, 476 n.20 (1986) ("[T]he harmless-error analysis is fundamentally different from the sufficiency analysis."). While it is questionable that the court would refer to the same factual findings, just because these findings were more favorable to the government than Tibbs does not render them objectively unreasonable. We overturn a court's factual findings only if they were unreasonably drawn from the evidence presented at trial. *See* 28 U.S.C. § 2254(d)(2). The court's findings here are supported by the evidence and thus are insufficient to show that the court applied the wrong standard of review.

Tibbs also asserts that the court made an unreasonable determination of the facts when it found that his case was distinguishable from *People v. Banks*, in which the California Supreme Court found that the omission of a premeditation,

deliberation, and willfulness instruction was not harmless. 331 P.3d 1206, 1238 (Cal. 2014), *abrogated in part on other grounds by People v. Scott*, 349 P.3d 1028 (Cal. 2015) (per curiam). But there were enough differences between the cases that "'fairminded jurists could disagree' on [the decision's] correctness," and thus it was not objectively unreasonable under AEDPA. *Ayala*, 135 S. Ct. at 2199 (quoting *Harrington*, 562 U.S. at 101). In addition, under AEDPA, we review only to determine whether the decision was an objectively unreasonable application of "clearly established *Federal* law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (emphasis added). Tibbs does not point to any United States Supreme Court case that the California Court of Appeal misapplied.

AFFIRMED.

JS-6

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

TODD J. TIBBS,

Petitioner,

v.

GROUNDS, Warden-SVSP,

Respondent.

Case No. ED CV 14-834 SJO (MRW)

JUDGMENT

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

IT IS ADJUDGED that the petition is denied and this action is dismissed with prejudice.

DATE: April 29, 2017

S. James Otero

HON. S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

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

TODD J. TIBBS, Petitioner, v. GROUNDS, Warden-SVSP, Respondent.	Case No. ED CV 14-834 SJO (MRW) 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.

SUMMARY OF RECOMMENDATION

This is a habeas action involving a state prisoner. A jury convicted Petitioner of attempted murder in a gang-related shooting. Petitioner challenges the sufficiency of the evidence and a jury instruction error regarding a sentencing enhancement to that conviction.

The Court finds no basis to recommend habeas relief. The state court decisions rejecting Petitioner's claims were not contrary to, nor unreasonable applications of, clearly established federal law. Moreover, assuming constitutional error, Petitioner has not convincingly demonstrated that this error was more than harmless. Accordingly, the Court recommends that the petition be denied.

FACTS AND PROCEDURAL HISTORY

The trial in this case involved two separate shootings. Petitioner and his co-defendant confronted an individual at gunpoint – they had a dispute regarding Petitioner's relationship with the individual's underage sister. Petitioner shot at the man without injuring him. That shooting formed the basis of the attempted murder charge in the case.

Petitioner was also accused of fatally shooting another person as retribution for a separate, gang-involved incident. At trial, the jury deadlocked on a murder charge regarding that shooting. (During the later retrial on the murder charge, Petitioner pled guilty to a reduced charge of voluntary manslaughter.) (Docket # 41 at 20.)

Trial and State Appellate Proceedings

There was no physical evidence presented at trial to link Petitioner to the attempted murder charge. Rather, the prosecution presented trial testimony from two percipient witnesses to the shooting. Their testimony was quite hesitant. Consistent with California law, the prosecution bolstered this evidence by presenting contemporary statements that the individuals gave to the police immediately after the incident. (Lodgment # 2, 3RT at 325-27, 397-98, 410.)

The jury convicted Petitioner of attempted murder. The jury also returned a finding that the crime was committed willfully, deliberately, and with premeditation (the "WDP enhancement") even though the trial court did not give

an instruction regarding this provision (discussed below). Cal. Penal C. §§ 187, 664. The trial court sentenced Petitioner to a prison term of 35 years to life. (Lodgment # 9 at 23.) Petitioner subsequently received a concurrent six-year prison sentence for the manslaughter conviction.

The state appellate court affirmed Petitioner's conviction in a reasoned, unpublished decision. In that decision, the appellate court concluded that sufficient evidence supported Petitioner's conviction for the WDP enhancement. The court also found no reversible error regarding the trial court's failure to properly instruct the jury on the WDP enhancement. The state supreme court denied review without comment. (Lodgment # 12.)

Federal and State Habeas Proceedings

This federal action followed. Petitioner raised four issues (including his challenges to the WDP enhancement) in his original petition.

While the federal case was pending, the California Supreme Court unanimously reversed a WDP enhancement in a case that resembled Petitioner's. People v. Banks, 59 Cal. 4th 1113 (2014). In light of the Banks decision, this Court (Magistrate Judge Wilner) appointed the Federal Public Defender to represent Petitioner after the completion of briefing on Petitioner's original claims. (Docket # 14.) The Court then stayed the federal action to allow Petitioner to pursue additional habeas relief in the state courts. (Docket # 31.)

On state habeas review, the appellate court reconsidered Petitioner's claim regarding the failure of the trial court to instruct the jury regarding the WDP enhancement (along with several other claims). In a reasoned decision, the appellate court found Petitioner's case distinguishable from the circumstances in Banks. (Lodgment # 16.) Applying harmless error analysis, the state appellate court denied habeas relief. The state supreme court denied review without comment. (Lodgment # 18.)

Following the state proceedings, the Court lifted the stay of the federal case. Petitioner filed an amended petition that stated two exhausted, constitutional claims: sufficiency of the evidence for the WDP enhancement, and the failure of the trial court to properly instruct the jury on this issue. (Docket # 41.) The Court received briefing on the claims, conducted a hearing with the lawyers, and solicited additional briefing on the standard of review of the harmless error analysis in the state habeas decision. (Docket # 42, 46, 49, 52-54.) The case is now at issue.

DISCUSSION

Standard of Review Under AEDPA

Petitioner's claims are subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (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).

In a habeas action, this Court generally reviews the reasonableness of the state court's last articulated decision addressing a prisoner's claims. Murray v. Schriro, 746 F.3d 418, 441 (9th Cir. 2014); Harrington v. Richter, 562 U.S. 86, 99 (2011). Here, the state appellate court's opinion on direct appeal (Lodgment # 9) will be reviewed for reasonableness as to Petitioner's insufficient evidence claim. The appellate court's opinion on state habeas review (Lodgment # 16) will be reviewed for reasonableness as to Petitioner's instructional error claim.

Overall, AEDPA presents "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Burt v. Titlow, ___ U.S.___, 134 S. Ct. 10, 16 (2013). On habeas review, AEDPA places on a prisoner the burden to show that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" among "fairminded jurists." Richter, 562 U.S. at 101, 103. Federal habeas corpus review therefore serves as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Id. at 102.

Sufficiency of Evidence (Ground Two)[1]

Petitioner contends that the prosecution failed to present sufficient evidence to support the WDP enhancement.

Facts and State Court Decision

According to the trial testimony, Petitioner was in a relationship with an underage girl. The girl's brother (the victim) did not approve. The two men previously had a physical altercation over the issue. Two weeks before the shooting, the victim stated that Petitioner – a known member of a local gang – pointed a gun at him. (3RT at 321-22, 408-09.)

On the evening of the shooting, the victim told the police that he was standing near his car with several other people. Petitioner drove by the group twice and then confronted the victim. (Id. at 407.) During the confrontation, Petitioner's colleague pulled out a gun and aimed it at a friend of the victim. (Id. at 325-26.) Petitioner pointed at the victim and said, "Shoot him first."

[1] The Court takes up Petitioner's sufficiency claim first to provide the reader with a recitation of the prosecution's evidentiary presentation at trial. The Court notes Petitioner's contention that the state court conflated the deferential Jackson standard of review with its subsequent evaluation of the evidence in its harmless error analysis.

Petitioner's armed colleague and the victim then grappled with each other, which caused the gun to fall to the ground. (Id. at 325-27, 396, 409-11.)

The victim told the police that Petitioner then picked up the weapon and fired a shot. The victim turned around to see Petitioner pointing the gun at him. The victim "knew that he had been shot at," and grabbed Petitioner's co-defendant as a shield. (Id. at 397-98, 410.) Petitioner and the other assailant left the scene after the victim's girlfriend called 911. (Id. at 398.) As he ran away, Petitioner shouted the name of his gang. (Id. at 412.)

The police conducted a field show-up that night. The victim and his girlfriend both identified Petitioner and his colleague as the attackers. (Id. at 413.) However, at trial, both witnesses provided only grudging testimony against the two alleged active gang members. Further, the victim moved away from the area after the shooting. The prosecution flew him back to California for the trial; the victim admitted that he did not appear or testify voluntarily. (Id. at 345.) As a result, the bulk of the inculpatory evidence described above was presented through the testimony of police officers recounting their interviews with the victim and his girlfriend on the night of the shooting. See California v. Green, 399 U.S. 149 (1970); Cal. Evid. C. §§ 770, 1235 (prior inconsistent statements not inadmissible hearsay).

On direct appeal, the state appellate court affirmed Petitioner's conviction for attempted murder with the WDP enhancement. The court noted the elements of the enhancement under state law and methods establishing them. These included whether there was proof of: an apparent motive for the incident; any prior relationship between the assailant and the victim; and "preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse" for the defendant's actions. (Lodgment # 9 at 13-15 (quoting People v. Perez, 2 Cal 4th 1117, 1125 (1992)).) In analyzing the claim, the court noted

that it did not reweigh the evidence at trial; it was required to determine "whether a rational juror could, on the evidence presented, find the essential elements of premeditation and deliberation beyond a reasonable doubt." (Id. at 13 (quotation omitted).)

The appellate court noted that the evidence regarding the WDP enhancement "is circumstantial for the most part and rests on inferences." (Id. at 15.) Even so, the court determined that this evidence was sufficient to support the enhancement. The court specifically cited testimony that Petitioner and the victim had a dispute about the victim's underage sister, and that Petitioner previously brandished a weapon at him. The court noted that Petitioner twice passed the victim on the night of the shooting before confronting him. Finally, the appellate court emphasized that Petitioner told his friend to aim at the victim during the confrontation – and shortly before Petitioner ultimately fired the weapon at the victim.

The court concluded that Petitioner had opportunities to reflect on his conduct at "several junctures during that chain of events." "The logical conclusion" from the evidence was that Petitioner shot at the victim in a deliberate, willful, and premeditated manner. (Id. at 16.) From this, the court found sufficient evidence to support the WDP enhancement.

Relevant Federal Law

Under the Due Process Clause, a criminal defendant may be convicted only by proof beyond a reasonable doubt of every element necessary to constitute a charged crime or enhancement. Jackson v. Virginia, 443 U.S. 307, 319 (1979). The relevant issue under Jackson "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." Id. (emphasis in original).

Review under AEDPA is doubly-deferential; a federal court's consideration is limited to the determination of whether the state court analysis – which itself is deferential to a jury's verdict – was "objectively unreasonable." Cavazos v. Smith, ___ U.S. ___, 132 S. Ct. 2, 4 (2011).

In applying the Jackson standard, the federal court must refer to the substantive elements of the criminal offense as defined by state law. Jackson, 443 U.S. at 324 n.16. A federal court sitting in habeas review generally is "bound to accept a state court's interpretation of state law." Butler v. Curry, 528 F.3d 624, 642 (9th Cir. 2008).

Under California law, the "process of premeditation and deliberation does not require any extended period of time." People v. Mayfield, 14 Cal. 4th 668, 767 (1997). Evidence establishing this element includes proof of: (1) planning activity; (2) a motive to kill, such as a prior relationship between defendant and the victim; and (3) the manner of the attempted murder. People v. Ramos, 121 Cal. App. 4th 1194, 1208 (Cal. Ct. App. 2004); People v. Anderson, 70 Cal. 2d 15, 26-34 (1968).

A federal habeas court has "no license" to evaluate the credibility or reliability of a witness who testified in a state court case. Marshall v. Lonberger, 459 U.S. 422, 434 (1983). Instead, a reviewing court "must respect the province of the jury to determine the credibility of witnesses" who give evidence at trial. Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995). A "jury's credibility determinations are [ ] entitled to near-total deference" on federal habeas review. Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004).

Analysis

On doubly-deferential review, the Court concludes that Petitioner is not entitled to habeas relief. The state appellate court analyzed Petitioner's claim regarding the WDP using a state court analogue of the Jackson standard. In

doing so, the court expressly summarized and reviewed the evidence at trial to determine whether a rational juror could find the elements of the enhancement. The state court also recited the key components of the enhancement under state criminal law.

The court then discussed the trial evidence in some amount of detail. The court concluded that Petitioner's actions and statements in the run-up to the shooting were sufficient under California law to satisfy the WDP enhancement per Perez / Ramos / Anderson. The court found that a rational juror could conclude that Petitioner shot at the victim in a deliberate and premeditated manner. The court described the evidence of Petitioner's negative pre-existing relationship with the victim (a previous threat with a gun, conflict about Petitioner dating the victim's young sister). The court also described Petitioner's measured conduct on the night of the shooting (circling the block twice before confronting the victim, then instructing his colleague to turn the weapon away from one individual and toward the victim).

Sufficient evidence – be it the direct testimony of the victim and another witness, or the Greened statements to the police – certainly supported those conclusions. Jackson, 443 U.S. at 319; Cavazos, 132 S. Ct. at 4. And the state court's determination that a jury could properly return a finding on the WDP enhancement from this showing is a state law issue that is unreviewable in federal court.

This federal court must defer to the state appellate court's analysis of its own law. Butler, 528 F.3d at 642. If the California court says that an earlier menacing event and an instruction to a conspirator to aim a weapon satisfy the elements of the WDP enhancement, then that determination is binding on this Court. Federal review is limited to the question of whether the state court reasonably concluded that there was enough evidence of the underlying facts to

meet the elements of the enhancement under state law. In the present case, fairminded judges would not find the state court's analysis unreasonable. The appellate decision: (a) reviewed the facts and evidence at trial; (b) applied the correct federal standard; and (c) analyzed the jury's finding in detail under relevant state criminal law. Jackson, 443 U.S. at 319 (1979). The Court finds no "extreme malfunction" of the state criminal justice system here. Richter, 562 U.S. at 102.

Instructional Error (Ground 1)

The trial court failed to properly instruct the jury as to the WDP enhancement on the attempted murder charge. Assuming constitutional error, Petitioner contends that the error was not harmless and entitles him to habeas relief.

Relevant Facts

Petitioner went to trial on separate criminal charges arising from two separate shootings.

Petitioner faced a murder charge regarding a fatal shooting. The trial court instructed the jury about the elements that distinguish first degree murder from second degree murder under California law – namely, whether the killing was done in a willful, deliberate, and premeditated manner. The judge defined each of those terms for the jury. (Lodgment # 1, 2CT at 376; 5RT at 707-08; Lodgment # 9 at 16-17.)

Petitioner was also charged with attempted murder for shooting at (without injuring) the victim as discussed above. The charging document that the clerk read to the jury at the beginning of the trial explained that "it is further alleged that the aforesaid attempted murder was committed willfully, deliberately, and with premeditation within the meaning of Penal Code Section 664(a)" – that is, the WDP enhancement. (1RT at 47.)

At the close of trial, the judge instructed the jury on the elements of the attempted murder charge. (5RT at 708.) However, the court did not read the form instruction that separately told the jury that, if it found Petitioner guilty of attempted murder, "you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation." (CALCRIM 601.) That omitted instruction further defined each of those terms using the same definitions as in the first degree murder instruction. (The trial judge did give instructions regarding the other sentencing enhancements in the case (crime for benefit of a criminal street gang, personally discharged a firearm).)

The prosecutor's closing argument – as to the murder charge and all of the other issues in the case – covers 15 pages of the trial transcript. (5RT at 716-31.) The argument regarding the attempted murder charge was even briefer: a little over one page. (Id. at 725-26.) Before sitting down, the prosecutor briefly reminded the jury that "there is another special allegation as to Count 2 that that attempt [to murder] was deliberate and premeditated, and that goes to the evidence of putting the gun to the head[.] So you use the same type of evidence as to both counts" of first degree murder and the WDP enhancement. (Id. at 730.)

Petitioner's lawyer also gave a fairly short and direct closing argument. (Id. at 733-59.) Like the prosecutor, the defense lawyer did not dwell heavily on the attempted murder charge – the main challenge was toward the prosecution's reliance on a jailhouse informant to support the murder charge. On the attempted murder charge, the defense argument challenged the overall adequacy of the evidence. The lawyer argued that the two percipient witnesses (the victim and his girlfriend) "didn't tell the truth" because they were unable to remember the incident in any credible way. (Id. at 750.) The lawyer claimed that "this

second case [is] much weaker than" the murder case, which should lead the jury to find reasonable doubt as to Petitioner's guilt. (Id. at 752.) The defense never addressed issues regarding the WDP enhancement in closing argument.

The jury failed to reach a verdict regarding the murder charge. The jury found Petitioner guilty of attempted murder. The jury also filled out the verdict form to indicate a true finding regarding the WDP enhancement. (2CT at 401; 5RT at 816.)

State Appellate Court Decisions

On direct appeal, the state appellate court found no reversible error regarding the failure to instruct on the WDP enhancement. The court "presumed[d] the jury applied the definitions of the terms from the instruction on first degree murder [ ] to this attempted murder count under the reasonable assumption the definitions would be no different." (Lodgment # 9 at 17.) Moreover, in light of the evidence regarding Petitioner's conduct and the express wording of the jury form, the court concluded that "any error was harmless under any standard of review." (Id. at 18.)

The state appellate court re-visited the issue on habeas review after the commencement of this federal action. (Lodgment # 16.) The bulk of the court's analysis dealt with the state supreme court's intervening decision in Banks (issued shortly after the completion of Petitioner's direct appeal). The Banks Court also dealt with a situation in which a trial court gave a complete instruction regarding a first degree murder charge (including the definitions of willfullness, deliberateness, and premeditation) and attempted murder, but failed to instruct on the WDP enhancement. On direct appeal, the supreme court could not find the error in Banks's case harmless beyond a reasonable doubt; it vacated the enhancement. Banks, 59 Cal. 4th at 1150-54.

In Petitioner's habeas action, the state appellate court found Banks distinguishable. The court noted that the Banks jury was specifically admonished to consider the willful-deliberate-premeditated instruction for the murder charge only. Conversely, the trial court in Petitioner's case gave the same instruction "without limiting the jury's use of the instruction to the murder charge." The appellate court concluded that Petitioner's "jury would have applied the same definitions [for the WDP enhancement] had it been instructed" with the omitted, parallel CALCRIM form instruction. (Lodgment # 16 at 12-13.)

The appellate court also found a stronger factual basis for premeditated attempted murder in Petitioner's case than in Banks. The court recited the evidence demonstrating Petitioner's pre-existing animus and menacing actions toward his victim. That contrasted with the "afterthought" by which Banks shot at his attempted murder victim (the surviving witness of a gruesome and brutal homicide and sexual attack) "as defendant was leaving" the scene of the killing. (Id. at 10, 11.) Citing Banks, the court stated that it was "certain beyond a reasonable doubt that the jury would have found [Tibbs] guilty of attempted willful, deliberate, and premeditated murder had it been properly instructed." (Id. at 14.) That conclusion was further based on "the record evidence, the arguments of counsel and the jury's verdict form" at trial. (Id. at 13.)

Relevant Federal Law

The failure to instruct a jury as to the elements of an offense or enhancement violates due process. United States v. Neder, 527 U.S. 1, 19-20 (1999); United States v. Gaudin, 515 U.S. 506, 510 (1995). The omission of a jury instruction is subject to harmless error review. Pensinger v. Chappell, 787 F.3d 1014, 1029 (9th Cir. 2015) (citing Neder).

Harmless constitutional errors are those that "in the setting of a particular case are so unimportant and insignificant" that they do not require automatic reversal. Chapman v. California, 386 U.S. 18, 22 (1967). To determine whether a constitutional error is harmless, a reviewing court "must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24. This test puts the "burden on the beneficiary of the error" – the prosecution – "to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." (Id.) The likelihood that an instructional error was harmless "increases with the strength of the government's evidence." United States v. Murphy, 824 F.3d 1197, 1204 (9th Cir. 2016) (evidence in case was "sufficient to avoid a judgment of acquittal," but "not sufficient to convince us that the jury made the necessary finding" of element of offense).

When a California court engages in a Chapman / harmless-beyond-reasonable-doubt analysis on direct appeal, "we may assume that it found the trial court's error to be a federal constitutional error." Rademaker v. Paramo, 835 F.3d 1018, 1023 (9th Cir. 2016). It is the state court's Chapman finding – that is, its harmlessness analysis – that constitutes a constitutional decision on the merits and is reviewable in federal habeas proceedings. Davis v. Ayala, ___ U.S. ___, 135 S. Ct. 2187, 2199 (2015). A federal court "may not overturn the [state court's] decision unless that court applied Chapman in an objectively unreasonable manner." Id. at 2198. When a state court's "Chapman decision is reviewed under AEDPA, a federal court may not award habeas relief under § 2254 unless the harmlessness determination itself was unreasonable." Id. at 2199 (quotation omitted, emphasis in original).

In federal habeas proceedings, the test for harmless error becomes more difficult for a prisoner to meet. A prisoner must show "actual prejudice" resulting from the trial error. Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

Habeas relief is only available if the constitutional error had a "substantial and injurious effect or influence" on the jury verdict. (Id.) This standard is met if a reviewing court has "grave doubts" about whether the error influenced the jury's decision. Ayala, 135 S. Ct. at 2203; Jones v. Harrington, 829 F.3d 1128, 1141 (9th Cir. 2016) (same). Put another way, if the evidence and trial record are "so evenly balanced that a judge feels [ ] in virtual equipoise as to the harmlessness of the error," the error cannot be harmless. Merolillo v. Yates, 663 F.3d 444, 454 (9th Cir. 2011) (quotations omitted).

If a state court's Chapman determination was not unreasonable, then "a federal court need not 'formally apply'" Brecht's test for error, too. Ayala, 135 S. Ct. at 2198 ("a state court's harmlessness determination has [ ] significance under Brecht"); Calvin v. Davis, 649 F. App'x 458, 460 (9th Cir. 2016) (Brecht test "includes the limitations imposed by AEDPA"); Rademaker, 835 F.3d at 1024 ("Because a fairminded jurist could agree with the state court's Chapman determination, [prisoner] necessarily cannot satisfy the requirement under Brecht [ ] of showing that he was actually prejudiced by the trial court's error.") (quotations omitted); Robertson v. Pichon, ___ F.3d ___, 2017 WL 816886 (9th Cir. Mar. 2, 2017) (same); Sifuentes v. Brazelton, 825 F.3d 506, 536 (9th Cir. 2016).

However, to obtain habeas relief, a prisoner still "must satisfy Brecht" by showing actual prejudice from the state court's constitutional error. Ayala, 135 S. Ct. at 2199. A federal court determination that constitutional error caused actual prejudice under Brecht "necessarily means that the state court's harmlessness determination was not merely incorrect, but objectively unreasonable[.] A separate AEDPA/Chapman determination is not required." Mays v. Clark, 807 F. 3d 968, 980 (9th Cir. 2015). The Brecht analysis is therefore "more stringent" (from a prisoner's perspective) in demonstrating

whether an error was harmless or not than the Chapman test. Id.; Deck v. Jenkins, 814 F.3d 954, 986 (9th Cir. 2014) (describing "the difficult hurdle that petitioners must surmount in order for a federal court to reverse a state court's determination that a trial error was harmless under Brecht") (Smith, C.J., dissenting) (emphasis added).

Analysis

On habeas review in this action, the Court begins its analysis on the assumption that the trial court committed constitutional error when instructing the jury. The judge failed to adequately inform the jury of the elements of the WDP enhancement or the definitions of the terms contained in the elements. That violates due process. Neder, 527 U.S. at 19-20; Gaudin, 515 U.S. at 510.

When the state appellate court examined the case on habeas review, it engaged in a harmless error analysis. Under Ninth Circuit precedent, this Court assumes that the appellate court found instructional error at the trial.[2] Rademaker, 835 F.3d at 1023. Federal review is limited to analyzing whether the failure to instruct on the WDP enhancement was harmless or not. That, in turn, requires the Court to examine the state court's harmlessness decision under AEDPA or to conduct a Brecht analysis of its own. Ayala, 135 S. Ct. at 2198; Mays, 807 F. 3d at 980.

Petitioner fails to convincingly demonstrate that he is entitled to habeas relief under either test. The state appellate court expressly concluded that, had Petitioner's jury been properly instructed regarding the WDP enhancement, it

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[2] For this reason, the Court declines to address the Attorney General's argument that the appellate court found no instructional error, but merely conducted the harmless error analysis as an alternate basis for denying relief. There's some support for that – the appellate decision contains a point heading that states "The Trial Court Did Not Err in Instructing the Jury." (Lodgment # 16 at 9.) However, fairly read, the decision builds to the distinction between Petitioner's case and Banks, not whether the lack of a WDP instruction was proper under state law.

was "certain beyond a reasonable doubt" that the jury's verdict would not have been different. (Lodgment # 16 at 14.) The state court unquestionably applied Chapman here. As a result, the state court's decision is reviewed with AEDPA deference to determine whether it unreasonably applied federal law. Ayala, 135 S. Ct. at 2199.

In evaluating whether there was harmless or reversible error, the state court decision emphasized the key testimony of the victims and the statements attributable to them via their prior statements to the police. The court concluded – as it did in its Jackson analysis on direct appeal – that this evidence supported a finding that Petitioner shot at the victim with considerable forethought. Notably, Petitioner did not present evidence at trial to contradict that testimony or to offer a different narrative of the night's events. The appellate court was aware that the only evidence presented to the jury – if believed, although it wasn't seriously impeached at trial – supported the WDP finding. (Id. at 13.) Other factual issues that Petitioner raises on habeas review (the absence of a shell casing or gunshot residue, etc.) do not seriously undermine that evidentiary discussion. The state appellate court did not unreasonably analyze the trial evidence. Rademaker, 835 F.3d at 1024.

Further, the appellate court noted the "arguments of counsel" as a basis for finding the instructional oversight to be harmless. (Lodgment # 16 at 13.) The import of this is clear: neither side made much of the WDP issue at trial. The majority of the evidentiary presentation and the vast bulk of the parties' closing arguments dealt with the murder charge. The attempted murder charge and related WDP enhancement were barely mentioned at all in closings. Had the parties dwelled on this issue during the case, the failure to instruct might have been more problematic. However, the "arguments of counsel" that the appellate court cited – which the Court reads as the lack of arguments that the

parties advanced in realtime – strongly support the reasonableness of the state court's decision.[3]

Finally, the state appellate court offered additional, legitimate reasons to support its conclusion that the trial court's error was harmless. The court noted differences in the jury instructions between Petitioner's case and Banks. The appellate court concluded that Petitioner's jury was effectively instructed that it could use the identical definitions from the murder charge – including the terms that underlie the WDP enhancement – when evaluating Petitioner's culpability. (Id.) To that, the appellate court added the text of the verdict form that listed the elements of the enhancement. Regardless of the persuasiveness of these ancillary arguments, the state court articulated reasonable explanations for its harmlessness conclusion. Ayala, 135 S. Ct. at 2198.

Petitioner takes on the substance of the state court's comparison of his case to Banks. Petitioner pithily claims that he is "more Banks-worthy" than Banks was, and should have received the same favorable result as in that case. (Docket # 41 at 41.) And the state court undoubtedly expended great effort to distinguish the two cases in its opinion, which suggests what this Court observed at the start of the action – Banks raises issues pretty close to those in Petitioner's case.

But the question of whether the appellate court properly interpreted its supreme court's recent decision (which it likely did, given the supreme court's later denial of habeas relief) is not dispositive of the federal issue. Whether correctly or incorrectly examining California law on the issue, the issue under

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[3] The Court cannot conclude that the state court decision was based on an unreasonable determination of facts [28 U.S.C. § 2254(d)(2)] merely because the appellate court failed to expressly articulate – or, as Petitioner puts it, "ignored" – "evidence that showed room for doubt or that contradicted [the] reasoning" in its habeas decision. (Docket # 52 at 6.) The state court reasonably laid out the facts and evidence in support of its analysis. AEDPA deference of the Chapman analysis does not require more.

AEDPA is whether fairminded judges would uniformly find that the appellate court unreasonably considered the harmlessness issue. The Court concludes that the state appellate court's Chapman analysis was not "so lacking in justification" that habeas relief is warranted. Richter, 562 U.S. at 101.

* * *

Petitioner fares no better under a Brecht harmless error analysis. The Court independently reviewed the trial transcripts, the jury instructions, and the arguments of the trial lawyers. The Court is not convinced that Petitioner was actually prejudiced by the trial court's failure to recite the WDP instruction. His failure to carry his more difficult burden on habeas review prevents relief. Merolillo, 663 F.3d at 454.

The Court accepts the general premise that a jury may deliberate more closely over an enhancement for which it receives a detailed instruction than one for which it receives none. But, as the prosecutor noted in closing, the evidence of Petitioner's deliberation was the same as the proof linking him to the crime and establishing his criminal intent. The jury obviously believed the testimony (both from the victim and the Greened statements) on the attempted murder charge, even as they rejected the informant-based testimony on the murder charge.

The Court agrees with the key takeaway from the state appellate decision – there was a considerable amount of uncontroverted evidence to support the WDP enhancement. Petitioner offered no real response at trial to the proof that he and the victim previously had a dispute regarding the victim's sister. The jury also heard that Petitioner pulled a gun on the victim, an act he and his friend repeated on the night of the shooting (willfulness). Petitioner and his colleague circled the victim's block twice before the ultimate confrontation that led to a shot being fired (premeditation). The jury then heard the chilling statement that,

in the middle of the incident, Petitioner told his friend to point the gun away from one person and shoot the victim (deliberateness). Additionally, despite their later reluctance to testify, the victim and his girlfriend affirmatively identified Petitioner as the assailant shortly after the shooting. That tends to corroborate their statements to the police, which underlie the WDP enhancement.

Petitioner raises cogent criticisms of the use of the Greened statements at trial. The experienced federal practitioners now representing him also make legitimate observations about the adequacy of the police investigation, the sequence of the prosecution's charging decisions, and the lack of physical evidence (no gun, bullet, shell casing, or GSR residue recovered) in the prosecution's case. Petitioner also bluntly disputes the plausibility of the witnesses' description of the streetside shooting and its aftermath. (Docket # 41 at 18-19.) Some of those issues were explored at trial, others were not.

But, as the case was actually tried, the bottom line is that the evidence supporting the WDP enhancement was not contradicted or significantly undermined. Further, the defense mounted no argument challenging the application of the enhancement here. The attempted murder and related sentencing enhancement charges appear to have been defended on an all-or-nothing basis.

So, does the Court have "grave doubts" about the jury's true finding on the WDP enhancement – particularly in light of the attempted murder conviction? Ayala, 135 S. Ct. at 2203. And does the Court feel in "virtual equipoise" about the harmlessness of the instructional oversight? Merolillo, 663 F.3d at 454. Does the Court believe that Petitioner was actually prejudiced because the WDP enhancement instruction was not read? Brecht, 507 U.S. at 623.

No. The proof of Petitioner's culpability for the WDP enhancement moved quickly at trial, but it was compelling. The Court has no basis to conclude that an additional instruction laying out the terms of that enhancement would likely have led to a different result as the case was tried. The jury undoubtedly gleaned the substance of the enhancement from the original reading of the charges at the beginning of the short trial, the closing argument, and the verdict form. Additionally, the omitted CALCRIM instructions give common sense definitions to the key terms involved. The WDP enhancement didn't deal with complex legal concepts (Pinkerton liability, RICO criminal enterprise, etc.) for which a lay jury would be more likely to need detailed guidance from the court.

There's no reason to conclude that any juror would have declined to find the WDP enhancement if it had those definitions in hand during deliberations. Petitioner cannot demonstrate actual prejudice resulting from the instructional error. The Court does not recommend habeas relief here.

CONCLUSION

IT IS THEREFORE RECOMMENDED that the District Judge issue an order: (1) accepting the findings and recommendations in this Report; (2) directing that judgment be entered denying the Petition; and (3) dismissing the action with prejudice.

Dated: March 14, 2017

HON. MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

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Court of Appeal,
Fourth District, Division 1, California.

IN RE Todd Jose TIBBS on Habeas Corpus.

D067841
|
November 3, 2015

Original proceeding on a petition for writ of habeas corpus. Petition granted in part and denied in part with directions. (San Bernardino County Super. Ct. Nos. FSB703578, FSB800199)

Attorneys and Law Firms

Hilary Potashner, Acting Federal Public Defender, Alexandra W. Yates, John Stafford Crouchley, Deputy Federal Public Defenders, under appointment by the United States District Court, for Petitioner.

Kamala D. Harris, Attorney General, Julie L Garland, Assistant Attorney General, Kevin Vienna, Angela M. Borzachillo, Deputy Attorneys General, for Respondent.

Opinion

O'ROURKE, J.

***1** This case is before us a second time. In the prior case, Brandon Parks–Burns appealed his murder conviction and codefendant Todd Jose Tibbs appealed his premeditated attempted murder conviction. (*People v. Parks–Burns et. al.* (January 11, 2013, D059348) [nonpub. opn.] review den. Apr. 17, 2013, S208695 (*Tibbs I*).) [1] Tibbs contended, among other things, that the trial court prejudicially failed to instruct the jury on premeditation, deliberation, and willfulness on the attempted murder charge and on the lesser included offense of attempted involuntary manslaughter. We affirmed the judgment.

In this writ petition, Tibbs reiterates his claim of instructional error, relying on *People v. Banks* (2014) 59 Cal.4th 1113 (*Banks*), which postdates *Tibbs I*. He further contends (1) he is factually innocent of attempted murder based on purported new evidence included in two submitted declarations; (2) at trial, the prosecution's gang expert improperly testified regarding the gang enhancement; and, (3) the abstract of judgment was erroneous. Finding merit in Tibbs's last contention only, we grant the writ petition as to that issue and deny the petition in all other respects. The trial court is to amend the abstract of judgment.

PROCEDURAL BACKGROUND

The People alleged in an information that Tibbs and Parks–Burns committed the first degree murder of Charles Marshall. (Pen.Code, [2] § 187, subd. (a); count 1.) They also alleged Tibbs committed the attempted murder of Sequwan Lawrence and that Tibbs committed that crime willfully, deliberately and with premeditation; for the benefit of or in association with a criminal street gang; and he personally and intentionally discharged a firearm during its commission. (§§ 187, subd. (a), 664; count 2.) The first jury deadlocked on the murder count as to both defendants, and the court declared a mistrial as to that count. However, the jury convicted Tibbs of attempted murder. The court sentenced Tibbs to a determinate term of 20 years plus an indeterminate term of 15 years to life on the attempted murder count and its enhancements. At the start of Tibbs's second trial for the murder of Charles Marshall, Tibbs pleaded guilty to the lesser included offense of voluntary manslaughter. In exchange, the court sentenced him to a six-year term to be served concurrently with the term imposed after the first trial. [3]

FACTUAL BACKGROUND

***2** Sequwan Lawrence testified at trial that in the days before the September 7, 2007 attempted murder occurred, he had become "kind of" upset that 22–year–old Tibbs, a gang member, was dating Lawrence's then 15–year–old sister, Mariam Park Lawrence (Mariam). Mariam had threatened to have Tibbs beat him up. Lawrence also testified Tibbs had confronted him with a gun approximately two weeks before the attempted murder.

Lawrence testified that on the night of the attempted murder, he was outside his residence with his girlfriend, his brother, and a cousin called "CJ." Tibbs and Parks–Burns approached and pushed Lawrence's brother and CJ against a car. Parks–Burns first held a gun to CJ's face; later, the gun was pointed in Lawrence's face. Lawrence grabbed the gun, which fell to the ground. Immediately afterwards, Tibbs pointed the gun at Lawrence, who restrained Parks–Burns and hid behind him to avoid getting shot by Tibbs. Lawrence heard a gunshot, eventually released Parks–Burns, and went home. On cross-examination, defense counsel questioned Lawrence about whether a gun was used in the incident; Lawrence insisted "there was a gun."

On the night of the incident, San Bernardino City Police Officer Jessie Ludikhuize responded to the crime scene and interviewed Lawrence, who stated that at least twice that evening Parks–Burns and Tibbs had passed by Lawrence and his companions before confronting them. Lawrence reported that during the confrontation Parks–Burns had pointed a gun at Lawrence's head, saying, "[Y]ou're going to get killed now." Lawrence grabbed the gun and struggled with Parks–Burns. The gun fell and Lawrence heard a gunshot that missed him. Lawrence turned around, saw Tibbs pointing a gun at him, and realized a shot had been fired at him. Tibbs shouted his gang's name, "18th Street." Lawrence identified both Parks–Burns and Tibbs in field showups that night.

Lawrence's girlfriend, Kianna Thomas, testified at trial that she did not remember much about the incident, including whether anyone had used a gun. But according to San Bernardino City Police Officer Joseph Shuck, when he had interviewed Thomas that night, she had said Parks–Burns initially asked Lawrence and CJ "where they're all from." Parks–Burns next pointed a gun to CJ's head, but Tibbs told Parks–Burns to shoot Lawrence first. Thomas had said Parks–Burns and Lawrence got into a "tussle," the gun fell, and Tibbs shot at Lawrence. Thomas also identified Parks–Burns and Tibbs in field showups that night.

Gang expert San Bernardino City Police Detective Travis Walker testified Tibbs was a member of the 18th Street gang who yelled his gang's name upon firing the gun. Detective Walker added that Tibbs's shooting at Lawrence served to further the gang's reputation.

The court instructed the jury regarding the definition of the terms "willfully," "deliberately" and "premeditation" with CALCRIM No. 521, in connection with the murder count: "A 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 the 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. The length of time alone is not determinative."

***3** The court did not instruct the jury on premeditation with CALCRIM No. 601 on the attempted murder charge. [4]

During closing arguments, Tibbs's attorney questioned whether a gun was used in the attempted murder: "The question—after you deal with the question whether this event occurred, whether there was a gun involved—even if there was a gun involved to convict someone of an attempted murder you have to find what the law calls a specific intent, not just a willy-nilly someone shot a gun into the ground or shot a gun into the air,

specific intent to kill, and then you have to ask yourself if Mr. Tibbs was there and if Mr. Tibbs had a gun and if Mr. Tibbs decided he had a specific intent to kill and he's four or five feet away from someone, why is Mr. Lawrence in here testifying? Not only is he not dead, he doesn't have any bullet holes on him. He doesn't have any gunshot residue on him. [¶] That circumstantial evidence suggests there was no intent, no attempt to kill Mr. Lawrence and in fact the other evidence suggests that there wasn't even a gun there. Now, the first call was man with a gun.... [¶] ... Do you think maybe someone is exaggerating to get the police out there? Could that be the explanation for why we got this man with a gun call?"

Defense counsel continued: "The witnesses testified that they don't remember. Now one explanation for witnesses saying I don't remember is they're scared to tell the truth. Another explanation is they're scared to admit that they lied in the first place; right? If Mr. Lawrence and his girlfriend said there was a gun, said there was a shooting and it wasn't true, wouldn't they have some reservations about coming in here and saying yes, that guy tried to kill me? Of course they would."

Defense counsel added, "So what's the explanation for no gunshot residue in this incident? Either Mr. Tibbs was tested and it was negative. There was none; that he actually fired a gun and there was no gunshot residue when the police arrive some five minutes later or the police didn't even believe there was a shot fired so they didn't bother doing gunshot residue; right? Can't find gun. Can't find the shell casing. Can't find a bullet hole. They don't think someone with a semiautomatic weapon who has a specific intent to kill fires one shot and misses and doesn't fire anymore. They didn't believe it."

***4** The jury's completed verdict form stated: "We the jury in the above-entitled action having found the defendant, Todd Jose Tibbs, guilty of the offense of attempted murder as charged in count 2 of the complaint[,][w]e *further find the special allegation that the attempted murder was committed willfully, deliberately and with premeditation to be: ... True* [.]" (Italics added, some capitalization omitted.)

Tibbs I

Tibbs contended on direct appeal that (1) the trial court violated his constitutional right to a fair trial by denying his motion to sever the charges against him from those against Parks–Burns; (2) insufficient evidence supported the allegation he acted with premeditation and deliberation in committing the attempted murder; and (3) the trial court erroneously failed to instruct the jury on premeditation, deliberation and willfulness as to both the attempted murder charge and on the lesser included offense of attempted voluntary manslaughter.[5] We affirmed the judgments on January 11, 2013.

Postappeal Proceedings

In April 2013, the California Supreme Court denied review of *Tibbs I*. (*Tibbs I, supra,* D059348.) In April 2014, Tibbs filed a writ of habeas corpus in the federal district court on the same grounds raised on direct appeal: (1) he was denied his constitutional right to a fair trial when the trial court denied his motion to sever the trial on the murder charge from that of the attempted murder charge; (2) his due process rights were violated because insufficient evidence supported his conviction for attempted willful, deliberate, premeditated murder; (3) the trial court erroneously failed to instruct the jury on premeditation, deliberation and willfulness on the attempted murder charge; and on the lesser included offense of attempted voluntary manslaughter.

The magistrate appointed counsel for Tibbs and granted him a stay to renew his claim of instructional error in this court in light of *Banks, supra,* 59 Cal.4th 1113.

DISCUSSION

I. *The Trial Court Did Not Err in Instructing the Jury*

Relying on *People v. Banks, supra,* 59 Cal.4th 1113, Tibbs contends the trial court prejudicially erred by failing to instruct the jury on the meaning of "willful," "deliberate," and "premeditated" as to the attempted murder charge. The People counter that Tibbs's instructional error claim is procedurally barred because we rejected it on direct appeal; *Banks* does not announce a new law impacting Tibbs's conviction, and

Banks is distinguishable on its facts. Our resolution of this issue requires a close analysis of *Banks,* to which we now turn.

A. *Legal Principles*

The willful, deliberate, and premeditated nature of an offense is the functional equivalent of an element of that offense. As such, it must be submitted to the jury and proved beyond a reasonable doubt. (*People v. Banks, supra,* 59 Cal.4th at p. 1152.) The trial court's failure to properly instruct on an element of an offense may be federal constitutional error because such an error violates the defendant's due process and Sixth Amendment rights to have a jury adjudicate guilt beyond a reasonable doubt. Such an error is harmless "if, after conducting a thorough review of the record, the court determines beyond a reasonable doubt that the jury verdict would have been the same absent the error." (*Banks,* at p. 1153.)

***5** In *Banks,* the defendant was tried for murder of two victims and attempted murder of another victim. He was acquitted of one of the murder charges. In an incident involving two different victims, the defendant was convicted of murdering one of them by shooting him in the back of the head at close range upon entering the house, and firing a parting shot to that victim's head, presumably to ensure he was dead. (*Banks, supra,* 59 Cal.4th at p. 1154.) The defendant was charged with attempted murder of another victim because as defendant was leaving the house, and from a distance of approximately six feet, he fired one shot that grazed her ear. (*Id.* at pp. 1124–1125, 1153.)

The defendant in *Banks* alleged that as to the attempted murder charge, the information did not state his conduct was "deliberate" or "premeditated;" therefore, it was constitutional error for the prosecutor to put that issue before the jury. The California Supreme Court noted this omission from the charging document was significant because the sentence for attempted murder is a determinate term of five, seven or nine years; by contrast, the sentence for attempted willful, deliberate, and premeditated murder is life without the possibility of parole. (*Banks, supra,* 59 Cal.4th at pp. 1150–1151.) Nonetheless, the *Banks* court assumed without deciding that the defendant was properly charged with willful, deliberate, and premeditated attempted murder. (*Id.* at p. 1152.)

Instead, the *Banks* court decided the case on instructional error grounds. The trial court's instruction with CALJIC No. 8.20 (predecessor to CALCRIM No. 521) regarding "deliberate," "willful," and "premeditated" was specifically limited to only one charge of murder; but as to that victim, the jury acquitted the defendant. Therefore, the Supreme Court ruled the trial court erred by not separately instructing the jury regarding "deliberate," "willful," and "premeditated" with the analogous CALJIC No. 8.67 (predecessor to CALCRIM No. 601), which applied in the context of an attempted murder charge of a different victim. (*Banks, supra,* 59 Cal.4th at pp. 1151–1152.) The Supreme Court reasoned that "the jury would have had little cause to consider what the critical terms 'deliberate' and 'premeditated' mean in connection with that charge. Thus, when the jury was deliberating on the attempted murder charge, the *only* instructions it likely would have considered are the ones the court gave regarding regular attempted murder, which did not explain the standard for a finding of deliberation and premeditation." (*Id.* at p. 1154.)

The Supreme Court concluded that as to the second victim it could not determine beyond a reasonable doubt that the defendant acted deliberately and with premeditation as opposed to as an afterthought. Therefore, under the harmless error test, it ruled prejudicial the absence of a jury instruction regarding the meaning of "willful," "deliberate," and "premeditated" as to the attempted murder conviction. (*Banks, supra,* 59 Cal.4th at pp. 1153–1154.)

We review challenges to the adequacy of jury instructions under the independent or de novo standard of review. (*People v. Posey* (2004) 32 Cal.4th 193, 218; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) Reviewing courts should interpret jury instructions "so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.) " 'In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole ... [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' " (*People v.*

Yoder (1979) 100 Cal.App.3d 333, 338.) The jury instructions' correctness is determined from the court's entire charge and not just by considering isolated parts of an instruction. (*People v. Rhodes* (1971) 21 Cal.App.3d 10, 20; *People v. Salas* (1975) 51 Cal.App.3d 151, 156.) The necessary element of a jury charge can "be found in two instructions rather than in one instruction," and this "does not, in itself, make the charge prejudicial." (*Rhodes,* at p. 20.) Thus, an essential element "in one instruction may be supplied by another or cured in light of the instructions as a whole." (*People v. Galloway* (1979) 100 Cal.App.3d 551, 567–568.)

B. *Analysis*

***6** Under *Banks,* the question we decide is whether on the facts of this case we can be "certain beyond a reasonable doubt that the jury would have found defendant guilty of attempted willful, deliberate, and premeditated murder had it been properly instructed. In order to find defendant guilty of that charge, the jury would have had to conclude that his acts were the result of ' " ' " 'careful thought and weighing of considerations' " ' " ' rather than an ' " ' "unconsidered or rash impulse." ' " ' [Citations.] That standard is not met by showing only that a defendant acted willfully and with specific intent to kill. 'By conjoining the words "willful, deliberate, *and* premeditated" in its definition and limitation of the character of killings falling within murder of the first degree the Legislature apparently emphasized its intention to require as an element of such crime substantially more reflection than may be involved in the mere formation of a specific intent to kill.' " (*Banks, supra,* 59 Cal.4th at p. 1153.)

We conclude this case is distinguishable from *Banks, supra,* 59 Cal.4th 1113. Here, the trial court instructed the jury with CALCRIM No. 521 regarding "deliberate, willful, and premeditated" without limiting the jury's use of the instruction to the murder charge. Indeed, the court separately instructed the jury to "[p]ay careful attention to all of these instructions and consider them together"; and "[u]nless I tell you otherwise, all instructions apply to each defendant." (CALCRIM No. 203.) Furthermore, CALCRIM No. 521's definition of "deliberate," "willful," and "premeditated" is the same as that of the omitted CALCRIM No. 601 instruction regarding attempted murder. Therefore, the jury would have applied the same definitions had it been instructed with CALCRIM No. 601.

The *Banks* standard for finding premeditated attempted murder is met here, and reflected in our analysis in *Tibbs I,* which shows Tibbs acted with substantial reflection: "Tibbs and Lawrence had a dispute because Tibbs dated Lawrence's sister, who was a minor. Approximately two weeks before the attempted murder, Tibbs had displayed a gun while confronting Lawrence. The night of the attempted murder, Tibbs and Parks–Burns had twice passed the area where Lawrence was located before deciding to confront Lawrence and his party. At the start of the incident, when Parks–Burns aimed his gun at someone else first, Tibbs instructed him to aim at Lawrence instead. When the gun fell from Parks–Burns's hands, Tibbs got it and fired it at Lawrence. At several junctures during that chain of events, Tibbs had [ ] opportunities to reflect and deliberate, and each time he elected to proceed with targeting Lawrence. The logical conclusion is that Tibbs intended to shoot at Lawrence, and thus his attempted murder was deliberate, willful and premeditated." (*Tibbs I, supra,* D059348, at p. 16.)

Having reviewed the record evidence, the arguments of counsel and the jury's verdict form stating the jury found true the allegation the premeditated murder was willful, deliberate and premeditated, we conclude we can "be certain beyond a reasonable doubt that the jury would have found [Tibbs] guilty of attempted willful, deliberate and premeditated murder had it been properly instructed." (*Banks, supra,* 59 Cal.4th at p. 1153.)

II. *Tibbs's Actual Innocence Claim Fails*

Tibbs argues he is actually innocent of premeditated attempted murder. He proffers a declaration from Mariam stating: "On the evening of September 7, 2007, I met Todd Tibbs down the street from my house to give him a gift. He was with Brandon Parks[-]Burns. After giving Todd the gift I saw Todd and Brandon walk up the street towards the direction of my house. My brother, Sequwan, and his girlfriend were hanging out across the street from my house. [¶] When Todd and Brandon got to the part of the street in front of

my house, I saw them get into an argument with my brother. The argument turned into a fight. [¶] I saw my Dad, Don Lawrence[,] come out of our house to break up the fight. Soon after I saw Todd and Brandon leave the scene. I never heard a gun go off. I never saw a gun."

***7** Tibbs also proffers a declaration from Parks–Burns stating: "I recall the incident involving our altercation with Sequwan Lawrence in September 2007. That was the incident that resulted in one of the charges against us. [¶] ... There was never a gun drawn during that incident. We fought for a few minutes then broke it off." Tibbs contends the declarations suffice to warrant habeas relief, and we should remand the matter for the trial court to conduct an evidentiary hearing in light of the declarations.

The People argue Tibbs's actual innocence claim is untimely because he did not diligently pursue it in *Tibbs I* and, on the merits, neither declaration provides newly discovered evidence or undermines the jury's verdict; rather, the declarations are impeachable and unreliable.

A. *Legal Principles*

"Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) In habeas corpus collateral attacks, "all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.)

Further, any new evidence a habeas petitioner attempts to interject as a collateral attack on the judgment must be " 'evidence that could not have been discovered with reasonable diligence prior to judgment.' " (*In re Hardy* (2007) 41 Cal.4th 977, 1016.) The newly discovered evidence will only warrant habeas corpus relief if it " 'will completely undermine the entire structure of the case upon which the prosecution was based,' " and if the evidence is credited, it must "point unerringly to innocence." (*In re Lawley* (2008) 42 Cal.4th 1231, 1239.) Under this standard, "evidence which is uncertain, questionable or directly in conflict with other testimony does not afford a ground for relief." (*In re Lindley* (1947) 29 Cal.2d 709, 722.) If "a reasonable jury could have rejected" the new evidence, the petitioner has not satisfied his burden. (*In re Clark* (1993) 5 Cal.4th 750, 798, fn. 33.) This is because "[a] conviction obtained after a constitutionally adequate trial is entitled to great weight." (*In re Lawley, supra,* at p. 1240.)

B. *Analysis*

(i) *Mariam's Declaration*

In his petition, Tibbs does not claim the material included in Mariam's declaration was timely discovered; rather, he effectively concedes it was untimely, but obviates a discussion of that issue by raising an ineffectiveness assistance of counsel claim. Tibbs asserts in a footnote: "[T]o the extent [Mariam] could have been called as a defense witness but was not, trial counsel's failure to do so constitutes ineffective assistance of counsel."

"To establish ineffective assistance of counsel, a defendant must show (1) counsel's performance was deficient and fell below an objective standard of reasonableness and (2) it is reasonably probable that a more favorable result would have been reached absent the deficient performance. [Citation.] A reasonable probability is a 'probability sufficient to undermine confidence in the outcome.' " (*People v. Jones* (2013) 217 Cal.App.4th 735, 746–747.)

The court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) "Judicial scrutiny of counsel's performance must be highly deferential." (*Id.* at p. 689.) "[E]very effort [must] be made to eliminate the distorting effects of hindsight." (*Ibid.*) "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." (*Id*. at p. 700.) In considering a claim of ineffective assistance of counsel, it is not necessary to determine " 'whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies .... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so,

that course should be followed.' " (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland,* at p. 697.) It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a "reasonable probability" that absent the errors the result would have been different. (*People v. Williams* (1997)16 Cal.4th 153, 215; *People v. Ledesma* (1987) 43 Cal.3d 171, 217–218.)

***8** We need not discuss whether Tibbs's trial counsel and appellate counsel provided deficient performance by not obtaining Mariam's testimony earlier or not raising on direct appeal a claim about the absence of Mariam's testimony. Instead, we proceed to a prejudice analysis and conclude it is not reasonably likely that Tibbs would have obtained a different result otherwise. Even giving Tibbs the full benefit of Mariam's declaration, her statement about not seeing a gun during the incident would be evaluated at trial in light of the court's standard jury instruction: "Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently." (CALCRIM No. 226.) Here, defense counsel argued to the jury a likelihood existed that no gun was used in the incident. But the jury was not persuaded. At trial, Mariam would also be subject to cross examination about her allegiances to Tibbs, her boyfriend who was a gang member, and who she had threatened would harm her brother. It is not reasonably likely Tibbs would have received a different result even if the jury had heard the information included in Miriam's declaration.

Mariam's posttrial declaration having failed to meet the threshold for an ineffective assistance of counsel claim, a fortiori, it does not meet the higher standard set forth above for newly discovered evidence. (*People v. Gonzalez, supra,* 51 Cal.3d 1179.) In contrast with ineffective assistance claims, "[t]he high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged." (*Strickland, supra,* 466 U.S. at p. 694.)

In *In re Branch* (1969) 70 Cal.2d 200, the California Supreme Court stated: "[T]he term 'new evidence' ... should be held to include any evidence not presented to the trial court and which is not merely cumulative in relation to the evidence which *was* presented at trial. This does not mean that a defendant is entitled to a hearing on habeas corpus merely by producing some evidence tending to show his innocence not presented at his trial." [6] (*Id.* at p. 214.) The court subsequently explained that this "language should not be read to imply that a petitioner may routinely use habeas corpus proceedings to reassess unsuccessful tactical decisions at trial; the expressed concern is for the *innocent* defendant. Accordingly, a habeas corpus petitioner must first present newly discovered evidence that raises doubt about his guilt." (*In re Hall* (1981) 30 Cal.3d 408, 420.) The mere existence of the conflict does not, without more, warrant the granting of relief. In every case where defendant has been convicted and seeks, in a subsequent habeas corpus proceeding, to establish innocence with new evidence, such a conflict will exist because of the evidence of guilt received at trial. (*In re Branch, supra,* at p. 215.)

"The standard for determining whether to afford prisoners habeas corpus relief on the ground that newly discovered evidence demonstrates actual innocence is ... established. Under principles dating back to *In re Lindley, supra,* 29 Cal.2d 709, '[a] criminal judgment may be collaterally attacked on habeas corpus on the basis of newly discovered evidence if such evidence casts "fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability. [Citations.]" [Citation.] "[N]ewly discovered evidence does not warrant relief unless it is of such character 'as will completely undermine the entire structure of the case upon which the prosecution was based.' " ' " (*In re Lawley, supra,* 42 Cal.4th at pp. 1238–1239.) A petitioner carries a "heavy burden of demonstrating he is actually innocent. ' "Depriving" an accused of facts that "strongly" raise issues of reasonable doubt is not the standard. Where newly discovered evidence is the basis for a habeas corpus petition, as alleged by defendant, the newly discovered evidence must "undermine[ ] the prosecution's entire case. It is not sufficient that the evidence might have weakened the prosecution case or presented a more

difficult question for the judge or jury." ' " (*In re Hardy, supra,* 41 Cal.4th at p. 1017.)

***9** Because Mariam's declaration is merely "some evidence tending to show his innocence not presented at his trial" (*In re Branch, supra,* 70 Cal.2d at p. 214), Tibbs is not entitled to an evidentiary hearing. Moreover, Mariam's declaration does not warrant habeas relief because it does not "point unerringly to innocence or reduced culpability" or " 'completely undermine the entire structure of the case upon which the prosecution was based.' " (*In re Lawley, supra,* 42 Cal.4th at p. 1239.)

(ii) *Parks–Burns's Declaration*

Tibbs claims that Parks–Burns was legally unavailable to testify at trial because he was a co defendant; therefore, his declaration that there "was never a gun drawn" during the incident is assertedly new evidence. We conclude that under the applicable standards, Parks–Burns's declaration does not meet the standard for new evidence.

The trial evidence from two police officers and Lawrence was that the night of the incident, Lawrence and Thomas reported to police that Tibbs had used a gun. In closing arguments, defense counsel raised the possibility that Tibbs did not use a gun in the incident. The jury specifically found true an enhancement that Tibbs personally and intentionally discharged a firearm during the attempted murder. In light of the fact the issue was squarely before the jury, Parks–Burns's proffered declaration would do no more than sharpen a conflict in the trial testimony. It would add to Thomas's testimony that she did not remember a gun being used during the incident. But Parks–Burns's declaration does not point unerringly to Tibbs's innocence. Rather, the jury could reasonably disbelieve it, and conclude it was self-serving because Parks–Burns had also been involved in the attempted murder incident. Accordingly, this declaration also provides us no basis to order an evidentiary hearing or grant habeas relief.

III. *Tibbs's Claim about the Gang Expert's Testimony Lacks Merit*

Tibbs contends the prosecutor's gang expert "improperly testified on an ultimate question of law regarding the applicability of the gang enhancement." Specifically, he maintains the prosecutor did not pose her question to the expert in the form of a hypothetical; further, the expert's testimony that the crime was gang related usurped the jury's function, and violated Tibbs's right to due process and a jury determination of his guilt.

The People argue Tibbs's claim is untimely, procedurally barred, and meritless as Tibbs did not object to the gang expert's testimony during the trial or raise it on direct appeal. The People alternatively argue any error was harmless because even if defense counsel had objected to the prosecutor's question that was not in the form of a hypothetical, the People would have simply restated the question and the gang expert's testimony would have been admitted. Thus, Tibbs fails to demonstrate that a more favorable outcome would have resulted absent any error.

Tibbs concedes in his traverse that defense counsel did not object to the gang expert's testimony at trial or raise the claim in *Tibbs I*. Nonetheless, he argues we should reach the merits of the claim because both trial and appellate counsel provided ineffective assistance of counsel. Tibbs further acknowledges the trial court did not apply this enhancement for sentencing purposes; therefore, he raises this contention for purposes of federal review.

A. *Background*

***10** At trial, the prosecutor asked the gang expert whether the altercation between Tibbs and the victim resulted from a "personal problem" between them, caused by Lawrence dating Tibbs's minor sister. The expert responded in the negative, elaborating: "The first statement that was made was a gang challenge—a common gang challenge that was issued by Mr. Parks–Burns challenging the victim as to saying 'where you from.' This is a typical gang challenge that's provided or issued by gang members on individuals that aren't from the neighborhood, where they may not recognize from being from the neighborhood. [¶] The second claim that was made was a statement that was taken from the victim stating that Mr. Tibbs had yelled out '18th Street' upon firing the shots from the firearm. This is another common gang term that's used to identify

or show hey, this is who we are and this is what we're doing and this is where—what neighborhood you're in and by yelling '18th Street' that statement alone—the challenge of 'where you from'—that directly leads me to believe that this wasn't a personal beef between anybody. This was definitely a gang-related shooting that was purely for the benefit of the gang based on those statements that were made by both defendants to the victim prior to and during the shooting."

B. Legal Principles

The California Supreme Court has outlined several "procedural bars," limiting the availability of habeas relief: "Given the ample opportunities available to a criminal defendant to vindicate statutory rights and constitutional guarantees, and consistent with the importance of the finality of criminal judgments, this court has over time recognized certain rules limiting the availability of habeas corpus relief. Sometimes called 'procedural bars' [citations], these rules require a petitioner mounting a collateral attack on a final criminal judgment by way of habeas corpus to prosecute his or her case without unreasonable delay, and to have first presented his or her claims at trial and on appeal, if reasonably possible." (*In re Reno* (2012) 55 Cal.4th 428, 452.) Habeas corpus will not serve as a supplemental direct appeal "where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." (*In re Dixon* (1953) 41 Cal.2d 756, 759.)

We conclude that under the authorities cited above, Tibbs is not entitled to habeas relief because he failed to raise this claim in the trial court or on direct appeal. In any event, Tibbs's ineffective assistance of counsel claim also fails.

"[A] criminal defendant is guaranteed the right to effective legal representation on appeal." (*In re Sanders* (1999) 21 Cal.4th 697, 715–716.) To be competent, appellate counsel must prepare a legal brief containing citations to the appropriate authority, and set forth all arguable issues but need not raise all nonfrivolous issues. (*Ibid*.) Even if Tibbs could demonstrate his appellate attorney acted unreasonably, he must still show prejudice, but he has not done so. (*Smith v. Robbins* (2000) 528 U.S. 259, 285–286; *In re Harris, supra,* 5 Cal.4th at p. 833.)

" 'California law permits a person with "special knowledge, skill, experience, training, or education" in a particular field to qualify as an expert witness (Evid.Code, § 720) and to give testimony in the form of an opinion ([Evid.Code,] § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*Id.* at subd. (a).) The subject matter of the culture and habits of criminal street gangs ... meets this criterion.' " (*People v. Vang* (2011) 52 Cal.4th 1038, 1044 (*Vang*).)

" 'When expert opinion is offered, much must be left to the trial court's discretion.' [Citation.] The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion." (*People v. McDowell* (2012) 54 Cal.4th 395, 426.) " 'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." ' " (*Vang, supra,* 52 Cal.4th at p. 1045.) "Use of hypothetical questions is subject to an important requirement. 'Such a hypothetical question must be rooted in facts shown by the evidence.' " (*Ibid*.) Failure to object to a gang expert's testimony at trial forfeits any contention regarding that testimony on appeal. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 818–819.)

C. *Analysis*

***11** Here, the People failed to pose their question to the gang expert in the form of a hypothetical. The normal manner of proceeding in such cases is to ask the expert witness a question based upon a hypothetical situation grounded in the facts of the case being tried. The better manner of proceeding here would have been to pose the question in the form of a hypothetical that embraced the particular facts of the case, but did not directly refer to defendant. Nevertheless, the admission of such expert evidence is not necessarily error: "[N]o statute prohibits an expert from expressing an opinion regarding whether a crime was gang related. Indeed, [it] is settled that an expert may express such an opinion. To the extent the expert may not express an opinion regarding the actual defendants, that is

because the jury can determine what the defendants did as well as an expert, not because of a prohibition against the expert opining on the entire subject. Using hypothetical questions is just as appropriate on this point as on other matters about which an expert may testify." (*Vang, supra,* 52 Cal.4th at p. 1052.)

At least one court has found the admission of an expert witness's opinion that the crimes of the particular defendants in question were committed for the benefit of the respective defendants' gangs, without the use of a hypothetical, was within the trial court's discretion. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 509.) The court in *People v. Prince* (2007) 40 Cal.4th 1179 approvingly cited *Valdez* for this very point. (*Prince,* at p. 1227.) Likewise, the court in *Vang,* albeit in dicta, expressed support for that holding: "It appears that in some circumstances, expert testimony regarding the specific defendants might be proper." (*Vang, supra,* 52 Cal.4th at p. 1048, fn. 4.) Nonetheless, assuming error, we conclude it is not reasonably probable an outcome more favorable to defendant would have resulted in the absence of the expert's testimony. (*People v. Clark* (2011) 52 Cal.4th 856, 940–941 [error in admission of prosecution's expert witness testimony subject to *Watson* standard of harmless error]; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

IV. *Correction of the Abstract of Judgment*

The People concede, and we agree, the abstract of judgment should be amended. It is well settled that " '[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]' [Citation.] When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties." (*People v. Jones* (2012) 54 Cal.4th 1, 89.) Here, the court orally sentenced Tibbs to a 20–year determinate sentence and a 15–year indeterminate sentence. Nevertheless, the abstract of judgment erroneously reflects a determinate sentence of 26 years. We direct the trial court to correct this error on remand.

DISPOSITION

The petition for habeas corpus is granted as to Todd Jose Tibbs's claim that the abstract of judgment is erroneous. In all other respects the petition is denied. The trial court is directed to amend the abstract of judgment to reflect the trial court's oral pronouncement of judgment of a 20–year determinate sentence and a 15–year indeterminate sentence, and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

WE CONCUR:

HUFFMAN, Acting P.J.

NARES, J.

All Citations

Not Reported in Cal.Rptr.3d, 2015 WL 6732270

Footnotes

1 We take judicial notice of the trial court record and our decision in *Tibbs I*. (Evid.Code, §§ 452, subd. (d)(1), 459, subd. (a).) Although that opinion was not published, and thus has no precedential value, we mention it because it states reasons for a decision affecting the same defendant in another action (Cal. Rules of Court, rule 8.1115(b)(2))—and involves the same facts. We also grant respondent's request to take judicial notice of Parks–Burns's juvenile court records.

2 Statutory references are to the Penal Code unless otherwise stated.

3 A second jury convicted Parks–Burns of first degree murder and found true allegations that a principal personally and intentionally discharged a firearm, causing death (§ 12022.53, subd. (d)), and the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b).)

4 But that instruction defines the terms "willfully," "deliberated" and "premeditation" in substantially identical terms as they are defined in CALCRIM No. 521. "(The defendant/_____<*insert name or description of principal if not defendant* >) acted *willfully* if (he/she) intended to kill when (he/she) acted. (The defendant/_____<*insert name or description of principal if not defendant* >) *deliberated* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. (The defendant/_____ <*insert name or description of principal if not defendant* >) acted with *premeditation* if (he/she) decided to kill before completing the act[s] of attempted murder." (CALCRIM No. 601.)

5 Parks–Burns contended the trial court erroneously (1) failed to instruct the jury about accomplice testimony, thus denying him due process and a jury trial under the federal Constitution; (2) admitted irrelevant evidence regarding the attempted murder of Lawrence at Parks–Burns's trial for murder; (3) sentenced him to a cruel and unusual term of 50–years to life instead of nine years, simply because he exercised his right to a jury trial; and (4) imposed a victim restitution award without making a finding that substantial evidence supported the amount. Tibbs joined in Parks–Burns's contentions as applicable.

6 Although the passage just quoted refers to a hearing on habeas corpus, nothing in the opinion suggests the court's definition of what constitutes new evidence is limited to the preliminary determination of whether to issue an order to show cause or hold an evidentiary hearing.

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CASE NO. E051830

COURT OF APPEAL - FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

Appeal From
Superior Court of the State of California
for the County of San Bernardino

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, vs. BRANDON PARKS-BURNS, TODD TIBBS, Defendants-Appellants.	FSB 800199 FSB 703578 Volume 5 of 11 Pages 632 - 818-A

Reporter's Transcript of Proceedings on Appeal

JUDGE: BRYAN FOSTER, DEPARTMENT S-26

SUPERIOR COURT, SAN BERNARDINO, CALIFORNIA

March 24 & 25, 2009

APPEARANCES:

For the Appellant: In Pro Per

For the Respondent: ATTORNEY GENERAL
Department of Justice
110 West "A" Street, Ste. 600
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and
MICHAEL RAMOS
District Attorney
316 N. Mt. View Avenue
San Bernardino, CA 92415

Reported By: LAWANA VASQUEZ
CSR # 12582
Official Reporter

with trial. Again, do not talk among yourselves or with anyone else on any subject connected with the trial. Don't form or express any opinion on the case. See you back here at 1:30.

(Whereupon the following proceedings were held outside the presence of the jury.)

THE COURT: Okay. Record will reflect all jurors have now left. In terms of surrebuttal I take it -- Mr. King, you've indicated -- for the record you've indicated that you're going to call, I guess, your investigator to testify regarding -- to rebut sight distances that were testified to in the rebuttal by the prosecution; is that correct?

MR. KING: Correct.

THE COURT: That's fine. He'll be here at 1:30 hopefully.

MR. KING: Yes.

THE COURT: As far as timing is concerned, I've gone over the jury instructions again and also prepared verdict forms. I've reconsidered. I'm not going to give an instruction on voluntary manslaughter under the facts of the case. I took a look at the transcript of the testimony, and it appears that the issue in this case is identity as to whether or not the defendants are the individuals that committed the offense or not.

As far as the actual offense is concerned, it does not appear that there was any hot blood involved in

as we can.

MS. ROGAN: I just need to intertwine my --

THE COURT: Okay. Go ahead.

MR. GASS: And I'll need -- we'll take probably a four-minute break in between the two.

THE COURT: Yes, fine.

(Whereupon a short break was taken.)

THE COURT: Okay. Back on the record in the matter of People versus Tibbs and Parks-Burns. Counsel and defendants are present. All jurors are present. Okay, ladies and gentlemen, I'm now going to give you the law that applies to this case. The law requires me to read it to you. You'll be given a copy of these instructions for you in -- during your deliberations. I should indicate to you I put them up on the board. The headings are not part of the instruction. They're there just so you can find the instructions as you go through.

Also, I have to apologize ahead of time. Sometimes some of these become repetitive in nature. The reason for that is that we want to have all of the information on each one of the instructions even though we may have mentioned it somewhere before. That way if you're looking at that instruction, you don't have to keep looking back and forth. So bear with us as far as that goes.

Members of the jury, I will now instruct you on the law that applies to this case. I'll give you a copy of the instructions to use in the jury room. You must

sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

If you do not believe the witness' testimony that he or she no longer remembers something, that testimony is inconsistent with the witness' earlier statement on that subject.

If you decide a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or if you think the witness lied about some things but told the truth about others, you may simply accept the part that you think is true and ignore the rest.

The crimes charged in this case requires proof of the union or joint operation of act and wrongful intent.

For you to find a person guilty of either of the crimes, that person must not only intentionally commit the prohibited act, but must do so with specific intent and mental state. The act and the specific intent and mental state required are explained in the instruction for that crime or allegation.

The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony you should consider the extent to which it may have been influenced by the receipt of or expectation of any benefits from the party calling that witness. This does not mean that you may

call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it.

Homicide is the killing of one human being by another. Murder is a type of homicide. The defendants are charged with attempted murder. Actually, I should indicate to you they're charged with both murder and attempted murder. Let me back up. Mr. Tibbs is charged with both attempted murder and murder. Mr. Parks-Burns is charged with murder only.

The defendants are charged in Count 1 with murder. To prove that a defendant is guilty of this crime the People must prove that first, the defendant committed an act that caused the death of another person and second, when the defendant acted, he had a state of mind called malice aforethought.

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 he intentionally committed an act; that the natural consequences of the act were dangerous to human life; at the time he acted he knew his act was dangerous to human life and 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.

If you decide that a defendant has committed murder, you must decide whether it's murder of the first or second degree.

A 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 the person spends considering whether to kill does not alone determine whether the killing is deliberate or 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. The length of time alone is not a determinative. 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.

The Defendant Todd Jose Tibbs is charged in Count 2 with attempted murder. To prove the defendant guilty of attempted murder the People must prove that the defendant took a direct but ineffective step toward killing another person and second, the defendant intended to kill that person.

The direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

You'll be given verdict forms for guilty of first-degree and second-degree murder and not guilty. You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of

expressed malice someone saying oh, I'm going to kill you and bam. They kill you. You find that through their actions which can be used such as shooting someone in a vital portion of their body.

Implied malice is well, they knew it was dangerous. If I hit you in the head with a bat, might that cause your death? Yes, and I do it any way. That is implied. If you find either of those, that has been met.

The two levels -- the difference between the two levels -- I know you heard the first-degree. The difference is one willful, deliberate and premeditated. If you don't find willful, deliberate and premeditated, you're automatically at second-degree, but here we'll establish why it's first-degree and not second-degree.

Did the defendant intend to kill? How do we know that, and you go through the evidence provided by testimony in this case. Was the act deliberate? Yes. If you think back, what did they do for the murder -- and this is only to the murder. They're talking about their remembrance of Edward Griffin. It's Hood Day. They're somber. Mr. Tibbs is teary-eyed, and they're talking about seeking revenge. When gang members seek revenge they're talking about going and exacting from what was taken from them a life. They're going to get one.

Did they decide to kill before they committed the act? Here -- if you believe the testimony that is