APPENDIX

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FILED

MAY 30 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM JOVIAN DAVIS, Petitioner-Appellant, v. CLARK E. DUCART, Warden, Respondent-Appellee.	No. 16-56662 D.C. No. 2:13-cv-08179-GW-LAL Central District of California, Los Angeles ORDER

Before: WALLACE, FARRIS, and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and recommend denying the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

NOT FOR PUBLICATION

FILED

APR 5 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM JOVIAN DAVIS, Petitioner-Appellant, v. CLARK E. DUCART, Warden, Respondent-Appellee.	No. 16-56662 D.C. No. 2:13-cv-08179-GW-LAL MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Submitted April 3, 2019**

Before: WALLACE, FARRIS, and TROTT, Circuit Judges.

California state prisoner William Jovian Davis appeals from the district court's judgment denying his habeas petition under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 2253. We review de novo the district court's denial of Davis's petition, *see Emery v. Clark*, 643 F.3d 1210, 1213 (9th Cir. 2011), and

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

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

we affirm.

Davis contends that the sentencing enhancement imposed under Cal. Penal Code § 186.22(b)(1) was not supported by sufficient evidence. On this record, the California Court of Appeal's determination that there was sufficient evidence to support all elements of the gang enhancement was neither contrary to nor an unreasonable application of clearly established federal law, nor based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d); *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *Johnson v. Montgomery*, 899 F.3d 1052, 1056-60 (9th Cir. 2018); *see also Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam) ("We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference.").

We construe Davis's additional argument concerning the denial of an evidentiary hearing as a motion to expand the certificate of appealability. So construed, the motion is denied. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood,* 195 F.3d 1098, 1104-05 (9th Cir. 1999).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

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

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

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

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

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

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

(1) A. Purpose (Panel Rehearing):

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

B. Purpose (Rehearing En Banc)

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

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

(2) Deadlines for Filing:

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

(3) Statement of Counsel

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

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

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

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

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

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

Attorneys Fees

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

Petition for a Writ of Certiorari

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

Counsel Listing in Published Opinions

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

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Reply Brief / Cross-Appeal Reply Brief			$	$
Supplemental Brief(s)			$	$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				$
			TOTAL:	$

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:*
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOVIAN WILLIAM DAVIS, Petitioner, v. RAYMOND MADDEN, Warden, Respondent.	Case No. CV 13-8179-GW(LAL) **JUDGMENT**

Pursuant to the Order Accepting Report and Recommendation of United States Magistrate Judge,

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

DATED: October 17, 2016

HONORABLE GEORGE H. WU
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOVIAN WILLIAM DAVIS, Petitioner, v. RAYMOND MADDEN, Warden, Respondent.	Case No. CV 13-8179-GW(LAL) **ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AND DENYING CERTIFICATE OF APPEALABILITY**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the Magistrate Judge's Report and Recommendation, Petitioner's Objections to the Report and Recommendation, and the remaining record, and has made a *de novo* determination.

Petitioner's Objections generally lack merit for the reasons set forth in the Report and Recommendation.

Accordingly, IT IS ORDERED THAT:

1. The Report and Recommendation is approved and accepted;

2. Judgment be entered denying the Petition and dismissing this action with prejudice; and

3. The Clerk serve copies of this Order on the parties.

Additionally, for the reasons stated in the Report and Recommendation, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right.[1] Thus, the Court declines to issue a certificate of appealability.

DATED: October 17, 2016

HONORABLE GEORGE H. WU
UNITED STATES DISTRICT JUDGE

[1] See 28 U.S.C. § 2253; Fed. R. App. P. 22(b); Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOVIAN WILLIAM DAVIS,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. CV 13-8179-GW (LAL)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable George H. Wu, United States District Judge, under the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On November 5, 2013, Jovian William Davis ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. On June 2, 2014, Petitioner filed a First Amended Petition ("FAP"). On December 11, 2014, Respondent filed an Answer to the First Amended Petition.[1] On May 12, 2015, Petitioner filed a Traverse. Thus, this matter is ready for decision.

[1] This Court substitutes Raymond Madden, Warden at Centinela State Prison, as Respondent in this action. Fed. R. Civ. P. 25(d).

II.

PROCEDURAL HISTORY

On May 4, 2010, Petitioner was convicted after a jury trial in the Los Angeles County Superior Court of one count of attempted first degree murder[2] and one count of second degree robbery.[3] (Clerk's Transcript ("CT") at 170-71, 174-75, 198, 200; Volume 6 Reporter's Transcript ("RT") at 3302-04.) The jury also found true allegations that Petitioner personally and intentionally used and discharged a firearm during the commission of the crimes,[4] and that he committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members.[5] (CT at 170-71; 6 RT at 3303-05.) On September 20, 2010, the trial court sentenced Petitioner to a state prison term of 65 years to life.[6] (CT at 195-98, 200; 4 CT at 928-31; 6 RT at 4212.)

Petitioner appealed the conviction to the California Court of Appeal. (Lodgments C-F.) On February 9, 2012, the California Court of Appeal stayed Petitioner's sentence on the robbery conviction and otherwise affirmed the judgment.[7] (Lodgment G.)

Petitioner next filed a petition for review in the California Supreme Court. (Lodgment H.) On May 16, 2012, the supreme court denied the petition. (Lodgment I.)

Next, Petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court. (Lodgment J.) On March 29, 2013, the superior court denied the petition. (Lodgment J.)

Petitioner then filed a habeas corpus petition in the California Court of Appeal. (Lodgment K.) On May 6, 2013, the court of appeal denied the petition. (Lodgment L.)

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[2] Cal. Penal Code §§ 187(a), 664.
[3] Cal. Penal Code § 211.
[4] Cal. Penal Code §§ 12022.53(b)-(e).
[5] Cal. Penal Code § 186.22(b)(1)(C)
[6] There is confusion in the record about the exact sentence the trial court imposed. The trial court summarized the sentence as 13 years plus life with the eligibility of parole after 65 years. Respondent seems to have simplified this sentence by stating it as 65 years to life. (Answer at 2.) However, the California Court of Appeal states the sentence as 40 years to life plus 38 years to life. (Lodgment G at 2 n.1.) Because, as discussed below, the court of appeal later modified Petitioner's sentence, this Court assumes that Respondent has correctly stated the original sentence as 65 years to life.
[7] The court of appeal stated Petitioner's new sentence as 40 years to life. (Lodgment G at 19.)

Petitioner next filed a habeas corpus petition in the California Supreme Court. (Lodgment M.) On September 18, 2013, the supreme court denied the petition. (Lodgment N.)

Next, Petitioner filed a second habeas corpus petition in the Los Angeles County Superior Court. (Lodgment O.) On February 5, 2014, the superior court denied the petition. (Lodgment O.)

Petitioner also filed a second habeas corpus petition in the California Court of Appeal. (Lodgment P.) On March 6, 2014, the court of appeal denied the petition on the merits and with citations to In re Robbin,[8] In re Harris,[9] and In re Dixon.[10] (Lodgment Q.)

Finally, Petitioner filed a second habeas corpus petition in the California Supreme Court. (Lodgment R.) On May 14, 2014, the supreme court denied the petition. (Lodgment S.)

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

Because Petitioner challenges the sufficiency of the evidence, this Court has independently reviewed the state court record.[11] Based on this review, this Court adopts the factual discussion of the California Court of Appeal opinion in this case as a fair and accurate summary of the evidence presented at trial:[12]

A. The People's Case

> . . . [T]he evidence established that in March 2009, defendant lived on the 4600 block of South Wilton Place, which was within the territory claimed by the criminal street gang known as the Rolling 40's; defendant was a member of the Rolling 40's and his moniker was "Cheddar Bob."[] Clive Usher was also a member of the Rolling 40's and lived across the street from defendant. Thomas, the victim, was familiar with the 4600 block of South Wilton Place because his

[8] 18 Cal.4th 770, 779 (1998).
[9] 5 Cal.4th 813, 829 (1993).
[10] 41 Cal.2d 756, 759 (1953).
[11] See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997).
[12] "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary . . . ." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing 28 U.S.C. § 2254(e)(1)). Thus, Ninth Circuit cases have presumed correct the factual summary set forth in an opinion of the California Court of Appeal under 28 U.S.C. §2254(e)(1). See, e.g., Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009) (citations omitted).

grandmother lived there and because his job as a promoter for clients such as rappers Ice Cube and Tupac Shakur and boxing champion Floyd Mayweather, often brought him into the neighborhood. Thomas was not a gang member but was friends with members of the Rolling 40's, including Usher and defendant's uncle. It was not unusual for Thomas to be carrying between $500 and $1,000 in cash.

On March 12, 2009, after visiting Usher at his home, Thomas was walking back to his car when defendant called out to Thomas from his front porch and asked Thomas for a ride to his girlfriend's home a few blocks away. Unaware that defendant was going to that location to get a gun, Thomas agreed. When they arrived, Thomas acquiesced to wait for defendant to bring him back to Wilton Place. While waiting, Thomas turned his car around and pulled over. Defendant came back within a few minutes and sat in the front passenger seat of Thomas's car. Without saying anything, defendant pulled a silver firearm from somewhere on his right side, aimed it at Thomas's head and fired, shooting Thomas once in the neck and immediately paralyzing him.[13] Still conscious, Thomas watched as defendant went through Thomas's pockets and removed $140, comprised of one $100 bill and two $20 bills, from Thomas's right front pants pocket. After putting the money into his own pants pocket, defendant got out of the car, closed the car door and ran north towards 48th Street. For 20 minutes, Thomas sat in his car gasping for air while cars drove past. Eventually someone stopped, saw Thomas's condition and called for help. In response to questions, Thomas told paramedics, "Cheddar Bob from 40 shot me." Thomas repeated the accusation to a police officer. Thomas spent two weeks in the hospital and seven months at Rancho Los Amigos Rehabilitation Center. He is now able to move only his left hand.

[13] A ballistics expert testified that holes and gun residue on a blood-stained sweatshirt found in defendant's car suggest the gun was fired through the sweatshirt. Thomas was adamant that the gun did not fire accidentally; defendant drew the gun, aimed and fired at Thomas.

Los Angeles Police Officer Ara Hollenback and her partner were the first officers on the scene. Thomas was already in the ambulance when he told Hollenback that Cheddar Bob shot him; when Hollenback asked why, Thomas said, "I don't know why. I was just dropping him off." Defendant was arrested later that night. The arresting officers found a clear plastic baggy and about $2,850 in cash (including thirteen $100 bills and some $20 bills) on defendant's person; from inside defendant's car, they recovered a Yankees baseball cap, a cell phone and a blood-stained sweatshirt. Officers searching defendant's home found a black backpack containing a fully loaded blue steel .357 Smith & Wesson.[]

Thomas was in a coma for several days. On March 17 or 18, 2009, he was well enough to be briefly interviewed by Detective Mark Cleary. But Cleary had to read Thomas's lips because a tracheotomy and breathing tube made it difficult for Thomas to speak. Because of his precarious physical condition, Cleary did not ask Thomas details about the shooting. From a photographic six-pack lineup, Thomas identified defendant as his assailant. In an interview a few days later, Thomas said that defendant used a gray .25–caliber semiautomatic pistol. By March 24, Thomas's condition had improved and he was able to speak. Cleary videotaped an interview in which Thomas once again identified defendant as the person who shot and robbed him. For the first time, Thomas mentioned that defendant took money out of Thomas's pocket after shooting him.

In April 2009, DNA testing established that it was Thomas's blood on the sweatshirt found in defendant's car. A warrant for defendant's arrest was issued (defendant had been released from custody because, with Thomas in a coma and without the DNA results, there had not been enough evidence to hold him) and on April 15, defendant was arrested in Indiana; he voluntarily returned to California.

B. The Defense Case

Defendant testified he joined the Rolling 40's when he was 13 years old, got his gang tattoos when he was 14 or 15 years old and was still active when he

was 16 years old. But by 2008, he was no longer in the gang. When asked about a DVD showing him flashing gang signs at a Rolling 40's party in April 2008, defendant admitted attending the party, explaining that he continued to "associate" with gang members in 2008; he maintained that he was not flashing gang signs, just twisting his wrist while dancing. In March 2009, defendant lived with his girlfriend and her two children on Garthwaite Avenue. On March 12, 2009, defendant drove to his uncle's home on South Wilton Place to watch a basketball game. While there, a friend called defendant and asked him to help dispose of a gun. Defendant agreed to help but did not want to drive his own car because he was afraid if stopped by the police and found in possession of a gun, he would go to prison. So when defendant saw Thomas, he asked Thomas to give him a ride to pick up the gun and then bring him back. Thomas agreed. While Thomas waited in the car, defendant got the gun from his friend. Defendant noticed that the hammer was cocked, but he did not know how to uncock it so he just put the gun in his sweatshirt pocket in the cocked position. As defendant was opening the passenger door of Thomas's car, he felt the gun slipping out of his pocket. When defendant grabbed for the gun, it accidentally discharged a single shot. Defendant was not hit but he got into the car to check Thomas's condition; defendant thought Thomas was dead because Thomas did not respond to defendant calling his name or shaking him. Panicked, defendant ran back to his uncle's home on South Wilton Place to ask his advice. Defendant threw the gun into a trash can behind the house. Unable to find his uncle, defendant got into his own car and drove away. He was stopped by police a few blocks away. Defendant falsely told the police he had nothing to do with the shooting. The gun police later found in the backpack at his uncle's house was not the gun that accidentally shot Thomas. Defendant testified that he had no reason to shoot Thomas, whom he considered a friend and a friend of the family. The shooting was an accident, which has caused difficulties for defendant and his whole family.

He did not take any money out of Thomas's pockets.

C. Gang Expert Evidence

Los Angeles Police Officer John Flores testified as an expert on gangs, in particular the Rolling 40's, which is affiliated with the Crips gang. The term "40's" refers to the numbered blocks the gang claims as its territory: the area between King Boulevard on the north, 49th or 50th Street on the south, the 110 Freeway on the east and Crenshaw Boulevard on the west. The Rolling 40's is divided into four cliques: the Dark Side, Park Side, Original Western and Avenues. The primary activities of the Rolling 40's are narcotics sales, firearm possession, robbery, extortion, murder, attempted murder and driveby shootings. Membership in a gang is for life and members rise in the gang hierarchy by "putting in work," in other words, committing crimes. The more violent the crime, the more respect it engenders from other gang members for the perpetrator and the more nongang members are intimidated by the gang. It is this intimidation of nongang members that allows gangs to operate without getting caught. Flores was familiar with defendant as a self-admitted member of the Rolling 40's Avenues clique. Defendant used the moniker "Cheddar Bob" and had various tattoos that signified his membership in the Rolling 40's. Flores obtained a copy of a video of defendant at a Rolling 40's "Hood Day" party in April 2008. This videotape was played for the jury. Defendant can be seen making hand signs associated with the Rolling 40's. Based on a hypothetical using the facts of this case, Flores testified that he believed the crimes were committed for the benefit of the Rolling 40's gang. Flores based his opinion on the "ambush" like manner in which the crimes were committed—asking someone known to carry large amounts of cash to drive defendant to a location where defendant intended to acquire a gun, when defendant has his own car available. Flores conceded that if the shooting was an accident, it would not be gang related.

(Lodgment G at 2-6.)

IV.

PETITIONER'S CLAIMS

Petitioner raises the following claims for habeas corpus relief:

(1) The gang enhancement is not supported by sufficient evidence (FAP at 5; Attachment at 1-3);

(2) The trial court violated Petitioner's due process rights by admitting prejudicial gang evidence (FAP at 5; Attachment at 4-5);

(3) The attempted murder conviction is not supported by sufficient evidence (FAP at 5-6; Attachment at 6-7);

(4) The robbery conviction is not supported by sufficient evidence (FAP at 6; Attachment at 8-9);

(5) Petitioner's trial counsel was ineffective (FAP at 6; Attachment at 9-10);

(6) The prosecutor committed misconduct (FAP at 5B; Attachment at 11-13);

(7) Petitioner's appellate counsel was ineffective (FAP at 5B-5C; Attachment at 13);

(8) Cumulative trial errors violated Petitioner's rights to due process and equal protection (FAP at 5C; Attachment at 14-15); and

(9) The jury committed misconduct by disobeying instructions (FAP at 5D; Attachment at 16).

V.

STANDARD OF REVIEW

A. 28 U.S.C. § 2254.

The standard of review that applies to Petitioner's claims is stated in 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in

the State court proceeding.

28 U.S.C. § 2254(d). If these standards are difficult to meet, it is because they were meant to be. As the Supreme Court stated in Harrington v. Richter,[14] while the AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings[,]" habeas relief may be granted only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with United States Supreme Court precedent. Further, a state court factual determination must be presumed correct unless rebutted by clear and convincing evidence.[15]

B. Sources of "Clearly Established Federal Law."

According to Williams v. Taylor,[16] the law that controls federal habeas review of state court decisions under the AEDPA consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." To determine what, if any, "clearly established" United States Supreme Court law exists, a federal habeas court also may examine decisions other than those of the United States Supreme Court.[17] Ninth Circuit cases "may be persuasive."[18] A state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law, if no Supreme Court decision has provided a clear holding relating to the legal issue the habeas petitioner raised in state court.[19]

Although a particular state court decision may be both "contrary to" and an "unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings under Williams.

A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts.[20] If a state

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[14] 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011).
[15] 28 U.S.C. § 2254(e)(1).
[16] 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).
[17] LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000).
[18] Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).
[19] Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004); see also Carey v. Musladin, 549 U.S. 70, 77, 127, S. Ct. 649, 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect of spectators' courtroom conduct, the state court's decision could not have been contrary to or an unreasonable application of clearly established federal law).
[20] Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S. at

court decision denying a claim is "contrary to" controlling Supreme Court precedent, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)."[21] However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them."[22]

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'"[23] Accordingly, this Court may reject a state court decision that correctly identified the applicable federal rule but unreasonably applied the rule to the facts of a particular case.[24] However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable" under Woodford v. Visciotti.[25] An "unreasonable application" is different from merely an incorrect one.[26]

Where, as here with respect to Claims One through Four, the California Supreme Court denied a petitioner's claims without comment on direct review, the state high court's "silent" denial is considered to be "on the merits" and to rest on the last reasoned decision on these claims - in the case of Claims One through Four, the grounds the California Court of Appeal stated in its decision on direct appeal.[27]

Where, as here with respect to Claim Five, the last reasoned decision by a state court is that of the Los Angeles County Superior Court on habeas corpus review, this Court defers to that opinion in applying the AEDPA standard.[28]

Where, as here with respect to Claims Six through Nine, the state courts have supplied no reasoned decision for denying the petitioner's claims on the merits, this Court must perform an

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405-06).

[21] Williams, 529 U.S. at 406.

[22] Early, 537 U.S. at 8.

[23] Id. at 11 (citing 28 U.S.C. § 2254(d)).

[24] See Williams, 529 U.S. at 406-10, 413.

[25] 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

[26] Williams, 529 U.S. at 409-10.

[27] See Ylst v. Nunnemaker, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991).

[28] See Maxwell v. Roe, 628 F.3d 486, 495 (9th Cir. 2010).

"'independent review of the record' to ascertain whether the state court decision was objectively unreasonable."[29]

VI.

DISCUSSION

A. Sufficiency of the Evidence.

1. Background.

In Claim One, Petitioner argues the evidence at trial was insufficient to support the jury's finding on the gang enhancement. (FAP at 5; Attachment at 1-3.) In Claim Three, Petitioner claims the evidence was insufficient to support his attempted murder conviction. (FAP at 5-6; Attachment at 6-9.) In Claim Four, Petitioner asserts the evidence was insufficient to support his robbery conviction. (FAP at 6.) As explained below, the evidence at trial was sufficient to support both of Petitioner's convictions and the gang enhancement.

2. Legal Standard.

The Fourteenth Amendment's Due Process Clause guarantees that a criminal defendant may be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[30] The United States Supreme Court announced the federal standard for determining the sufficiency of the evidence to support a conviction in Jackson v. Virginia.[31] Under Jackson, "[a] petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds."[32] The Supreme Court has held that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[33] "Put another way, the dispositive question under Jackson is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'"[34]

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[29] Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003) (citing Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000)).
[30] In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).
[31] 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).
[32] Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005).
[33] Jackson, 443 U.S. at 319.
[34] Chein v. Shumsky, 373 F.3d 978, 982-83 (9th Cir. 2004) (en banc) (quoting Jackson, 443 U.S. at 318).

When the factual record supports conflicting inferences, the federal court must presume, even if it does not affirmatively appear on the record, that the trier of fact resolved any such conflicts in favor of the prosecution, and the federal court must defer to that resolution.[35] Additionally, "[c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction."[36] Also, the federal court must refer to state law to define the substantive elements of the criminal offense and determine what evidence is necessary to convict on the crime charged.[37]

The Jackson standard applies to federal habeas claims attacking the sufficiency of the evidence to support a state conviction.[38] In addition, the AEDPA requires the federal court to "apply the standards of Jackson with an additional layer of deference."[39] The federal court must ask "whether the decision of the California Court of Appeal reflected an 'unreasonable application' of Jackson and Winship to the facts of this case."[40]

3. Analysis.

i. Gang Enhancement.

First, Petitioner argues the evidence was insufficient to support the gang enhancement. (FAP at 5; Attachment at 1-3.) The California Court of Appeal rejected this claim on direct appeal, as follows:

> [F]or the [gang] enhancement to be found true, two prongs must be met. First, there must be evidence from which it is reasonable to infer that the underlying felony was "committed for the benefit of, at the direction of, or in association with any criminal street gang." Second, there must be evidence that the defendant had "the specific intent to promote, further, or assist in any criminal conduct by gang members." (*Gardeley*, *supra*, 14 Cal.4th at pp. 615–616.) At issue here is whether, when a defendant acts alone to shoot and rob a victim, both

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[35] Jackson, 443 U.S. at 326.
[36] Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted).
[37] Jackson, 443 U.S. at 324 n.16; Juan H., 408 F.3d at 1275.
[38] Juan H., 408 F.3d at 1274; see also Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004).
[39] Juan H., 408 F.3d at 1274.
[40] Id. at 1275 & n.13.

prongs of the enhancement can be met. We answer the questions in the affirmative.

The first prong, requiring evidence from which it can reasonably be inferred the underlying felony was gang-related, can be satisfied by expert testimony. "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[ ] criminal street gang' within the meaning of section 186.22(b)(1)." (*Albillar*, at p. 63; *Vang*, *supra*, 52 Cal.4th at p. 1048.)

. . .

Here, that the crimes benefited a criminal street gang can reasonably be inferred from the evidence that defendant was a member of the Rolling 40's criminal street gang, he committed the crimes in territory claimed by the Rolling 40's, and the gang expert's testimony that crimes such as occurred here are intended to benefit the gang by enhancing its reputation for viciousness, which gang members believe garners respect from the community. Thus, there was substantial evidence of the "benefit of" element of the enhancement.

To meet the second prong, there must be evidence from which it is reasonable to infer the defendant committed the underlying offense with the specific intent to promote, further or assist in any criminal conduct by gang members. (§ 186.22, subd. (b); *Albillar*, *supra*, 51 Cal.4th at p. 64.) "'In common usage, 'promote' means to contribute to the progress or growth of; 'further' means to help the progress of; and 'assist' means to give aid or support. (Webster's New College Dict. (1995) pp. 885, 454, 68.)" (*People v. Ngoun*, *supra*, 88 Cal.App.4th at p. 436 [construing § 186.22, subd. (a)].)

The "any criminal conduct by gang members" element of the second prong can be satisfied by evidence that the defendant committed the underlying crime to promote/further/assist in some other crime by gang members. . . . But

there is no requirement that the criminal conduct the defendant specifically intends to promote/further/assist be *other* than that upon which the substantive crime is based. (*Albillar*, *supra,* 51 Cal.4th at p. 66.) For example, in *People v. Hill* (2006) 142 Cal.App.4th 770 (*Hill*), the court affirmed a gang enhancement on a conviction for making criminal threats, reasoning that the defendant's own criminal conduct in making the criminal threat qualified as "any criminal conduct by gang members." (*Id.* at p. 774.) Evidence from which it is reasonable to infer that the underlying felony was committed to promote/further/assist the gang in the "maintenance of gang respect," can satisfy the promote/further/assist element. (See *People v. Salcido* (2007) 149 Cal.App.4th 356, 368 (*Salcido*) [construing § 186.22, subd. (a)].)

The promote/further/assist element is most often satisfied by evidence that the defendant committed the crime with other known gang members. . . . But it can also be satisfied by evidence that the defendant perpetrated a felony alone or with other non-gang members. Four cases are instructive: *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank S.*); *Hill, supra,* 142 Cal.App.4th 770; *Margarejo, supra,* 162 Cal.App.4th 102; and *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*).

In *Frank S.*, the earliest of the four cases, the court found insufficient evidence to support a gang enhancement on a finding the minor possessed a concealed dirk or dagger where there was no evidence that the minor was in gang territory, had gang members with him or had any reason to expect to use the knife in a gang-related offense. (*Frank S., supra,* 141 Cal.App.4th at p. 1199.) In *Hill,* the making criminal threats conviction and gang enhancement were based on evidence that after a fender-bender, the victim admonished the defendant to look where he was going; the defendant referenced his gang and accused the victim of disrespecting him, then left the scene but returned with a gun and threatened to shoot the victim; a gang expert testified that in gang culture taking action when

one feels disrespected is important; defendant's conduct benefited the gang by showing that there were consequences to disrespecting a gang member. The court found the evidence sufficient to establish the promote/further/assist element of the enhancement, reasoning that the defendant was assisting himself in committing the underlying felony. (*Hill, supra*, 142 Cal.App.4th at p. 774.) In *Margarejo*, the court found evidence the defendant gave the gun to another gang member, instead of throwing it away, was sufficient to support the promote/further/assist element because it showed the defendant's intention to preserve the gun for future use by the gang. (*Margarejo, supra*, 162 Cal.App.4th at p. 111.) And in *Sanchez*, the court found the defendant gang member's commission of a robbery with a non-gang member accomplice satisfied the promote/further/assist element, reasoning that a "gang member who perpetrates a felony by definition also promotes and furthers that same felony." (*Sanchez, supra*, 179 Cal.App.4th at p. 1307.)

Frank S. is distinguishable from this case because here there was evidence the crimes occurred in territory claimed by defendant's gang. As in *Margarejo*, in this case there was evidence from which it could reasonably be inferred that the gun defendant acquired while Thomas waited in the car was a gang gun. Under the reasoning of the court in *Sanchez*, by committing the shooting and robbery, defendant by definition also promoted and furthered those same felonies by a gang member—himself. And under the reasoning of *Salcido, supra*, 149 Cal.App.4th at page 368, from the gang expert's testimony and the evidence that the unusually vicious crimes were committed in broad daylight, in territory claimed by defendant's gang, it is reasonable to infer that defendant committed the crimes to promote/further/assist the gang in the "maintenance of gang respect," fear and intimidation. The absence of evidence that the defendant harbored some personal animosity towards the victim, who by all accounts was a popular figure in the neighborhood, is consistent with an inference that defendant

> was motivated by a desire to promote and further his own and the gang's reputation for viciousness. Thus, we conclude that substantial evidence supported the finding that defendant committed the crimes for the benefit of the gang, and with the specific intent to promote, further, or assist in any criminal conduct by gang members.

(Lodgment G at 11-16 (footnotes omitted).)

Applying the elements of the gang enhancement as the court of appeal detailed on direct appeal,[41] this Court finds sufficient evidence to support the gang enhancement. First, the testimony of the prosecution's gang expert supported an inference that the crime was committed for the benefit of the Rolling 40's gang, as the expert testified that a crime such as the one committed here would benefit the gang.[42] (4 RT at 1839-40.) The inference that the crime benefited the Rolling 40's gang was further supported by the circumstances of the crime. Petitioner shot the victim in Rolling 40's territory, (4 RT at 1818) and did so sometime around sunset when members of the public would be able to witness the gang violence and become fearful of Petitioner and his gang (3 RT at 659).

Second, it was reasonable for the jury to infer from the evidence at trial that Petitioner harbored the specific intent to promote, further, or assist in any criminal conduct by gang members, specifically, his own actions in shooting the victim.[43] Petitioner, a self-admitted member of the Rolling 40's gang, (4 RT at 1203, 1224, 1243, 1830-31, 1833), approached the victim in Rolling 40's territory, (4 RT at 1818), and asked the victim to drive him to a location where a gun was located (3 RT at 659, 5 RT at 2118-20). Once Petitioner got the gun out of the house, he re-entered the victim's car and fired. (3 RT at 666-67, 683, 5 RT at 2471.) This evidence supported a finding that Petitioner carried out a calculated shooting with the intent of

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[41] See Bradshaw v. Richey, 546 U.S. 74, 77, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) ("state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"). Though the court of appeal decision on this issue was 2 to 1, the decision is no less binding on this Court.

[42] See People v. Albillar, 51 Cal.4th 47, 63 (2010) ("Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang.").

[43] Id. at 66.

promoting the reputation of his gang and himself as a member of that gang.

To the extent Petitioner argues that the gang expert's testimony alone was insufficient to support the gang enhancement, his claim still fails. As detailed above, the expert's testimony was not the only evidence supporting the gang enhancement. To the extent the "for the benefit" element of the gang enhancement was largely supported by the expert's testimony, under California law, a gang expert's testimony that a crime was committed for the benefit of a criminal street gang may be based on the expert's professional experience and need not be corroborated by additional evidence.[44]

This evidence, when considered in the light most favorable to the judgment, as this Court must, was sufficient to support the jury's finding on the gang allegation.

ii. Attempted Murder.

In Claim Three, Petitioner challenges the sufficiency of the evidence to support his attempted murder conviction. (FAP at 5-6; Attachment at 6-9.) Petitioner argues that the shooting was an accident and that the evidence supporting a finding of intent was not credible. (Attachment at 6-9.)

The California Court of Appeal denied Petitioner's claim on direct review, finding:

> "Firing a gun toward a victim at a close range in a manner that could have inflicted a mortal wound had the bullet been on target supports an inference of intent to kill." (*People v. Ramos* (2011) 193 Cal.App.4th 43, 48.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) Known as the "*Anderson* factors," three types of evidence are generally relied upon to support a finding of premeditation and deliberation: (1) planning activity, (2) motive, and (3) manner of killing. (*People*

[44] See German v. Horel, 473 Fed. Appx. 810, 811 (9th Cir. 2012) ("[T]he testimony of a gang expert regarding, among other things, how a gang might benefit from committing attacks on others was sufficient to support the gang enhancement.").; see also Bonilla v. Adams, 423 Fed. Appx. 738, 739-40 (9th Cir. 2011) (finding testimony about circumstances of the crime and expert testimony that explained in hypothetical terms how such offenses could be useful to the gang as a whole was sufficient to establish specific intent element of gang enhancement); see also U.S. Ct. App. 9th Cir. Rule 36-3(b); Fed. R. App. P. 32.1(a) (this Court may cite unpublished Ninth Circuit opinions issued on or after January 1, 2007).

> *v. Welch* (1999) 20 Cal.4th 701, 758 (*Welch*), citing *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*).) Typically, a finding of premeditation is supported by substantial evidence when there is evidence of all three types, extremely strong evidence of planning, or evidence of motive and manner of killing. (*Welch*, at p. 758.)
>
> Here, the record contains substantial evidence from which a reasonable juror could find intent to kill and premeditation. Thomas's testimony that defendant aimed a gun at Thomas's head and fired at close range in a manner that would have been fatal had the bullet been on target supports an inference of intent to kill. The premeditation finding is supported by extremely strong evidence of planning (it could reasonably be inferred that defendant lured Thomas to a place where he was alone in his car and where defendant could get access to a firearm); and manner of attempted killing (at close range, defendant aimed and fired at Thomas). This evidence of planning and manner of attempted killing was sufficient to support the finding of premeditation. That there was conflicting evidence which might also be reconciled with contrary findings does not warrant reversal. (*Virgil*, *supra*, 51 Cal.4th at p. 1263.)

(Lodgment G at 10-11 (footnote omitted.)

Under California law, murder is defined as "the unlawful killing of a human being . . . with malice aforethought."[45] "[M]urder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree."[46] As to a charge of attempted murder, the prosecutor must prove: (1) the defendant had the specific intent to kill the alleged victim; and (2) he committed a direct but ineffectual act toward accomplishing the intended killing.[47] If it is willful, deliberate, and premeditated, it is attempted murder of the first degree.[48]

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[45] Cal. Penal Code § 187.
[46] People v. Visciotti, 2 Cal.4th 1, 61 (1992) (internal quotation marks and citation omitted).
[47] Cal. Penal Code §§ 187(a), 664; People v. Houston, 54 Cal.4th 1186, 1217 (2012).
[48] Cal. Penal Code § 664(a).

Deferring to the elements of premeditation and deliberation the California Court of Appeal listed on direct review of Petitioner's conviction,[49] this Court finds sufficient evidence to support Petitioner's attempted first degree murder conviction. First, the evidence supported the jury's finding that Petitioner premeditated his crime. Petitioner asked Thomas for a ride to a house where Petitioner admitted he intended to pick up a gun, (3 RT at 659, 5 RT at 2118-20), even though Petitioner had access to his own car (5 RT at 2119). Then, once at the location, Petitioner got the gun from the house (5 RT at 2123-24) and shot Thomas immediately upon returning to the car (3 RT at 666-67, 683; 5 RT at 2125, 2188, 2190, 2194, 2471). After shooting Thomas, Petitioner ran from the scene and never attempted to get help for Thomas. (3 RT at 667-69, 674-75; 5 RT at 2125-26, 2200, 2471-72.) Ultimately, the jury could infer from this evidence that Petitioner lured Thomas to the crime scene, obtained a weapon, carried out a premeditated attack, and fled without calling for help.

Second, the evidence supports the jury's finding that Petitioner committed the shooting with the specific intent of killing Thomas. According to Thomas, Petitioner pulled out the gun and aimed it at the victim's head[50] before shooting him in the neck. (3 RT at 667, 683.)[51] Instead of calling for help after shooting Thomas, Petitioner stole his money and ran, leaving Thomas for dead. (3 RT at 667-69, 674-75; 5 RT at 2125-26, 2200, 2471-72.)[52]

Finally, the evidence supports the finding that Petitioner committed a direct but ineffectual act toward carrying out the murder. He shot Thomas in the neck and left him for dead. It was purely by luck that Thomas survived.

Petitioner does not appear to dispute any of this evidence. Rather, he would have this Court reconsider the evidence and make credibility determinations in his favor, thereby

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[49] See Bradshaw, 546 U.S. at 77.

[50] An LAPD criminalist testified at trial that a gun had been fired through the pocket of Petitioner's sweatshirt, potentially supporting Petitioner's theory that he accidentally fired the gun when it was in his pocket. (4 RT at 1534-38, 1540-43, 1545-46, 1548.) However, the same criminalist testified that there was no way for her to know when a gun had been fired from inside the sweatshirt. (4 RT at 1543-44.) Accordingly, Petitioner could have aimed at the victim's head and fired, just as the victim described, and then fired a weapon from his sweatshirt pocket at some later time.

[51] See People v. Jackson, 49 Cal.3d 1170, 1201 (1989) (shots fired at point-blank range give strong inference that killing is intentional).

[52] Cf. People v. Burt, 2002 WL 1825426, *3 (Cal. Ct. App., Div. 5 Aug. 9, 2002) (finding instructional error harmless where evidence of intent to kill included shooting victim at close range and fleeing the scene).

accepting his theory that the shooting was an accident. This Court cannot do so. Credibility determinations are left to the jury[53] and this Court may not reweigh the evidence.[54]

When this Court views all of this evidence in the light most favorable to the prosecution, as it must, it concludes that the evidence was sufficient to support Petitioner's attempted murder conviction.

iii. Robbery.

In Claim Four, Petitioner argues the evidence was not sufficient to prove he was guilty of robbery. (FAP at 6.) Specifically, Petitioner challenges the credibility of the victim's testimony regarding the robbery and insists it would have been impossible for him to rob Thomas in the manner Thomas described. (Attachment at 8-9.)

The California Court of Appeal rejected Petitioner's claim on appeal, as follows:

> Defendant contends the conviction for second degree robbery is not supported by substantial evidence. He argues that Thomas's testimony that defendant took a $100 bill and two $20 bills from Thomas's pocket is inherently improbable and physically impossible because Thomas's foot would necessarily have slipped off the brake if this occurred. First, we note that there was no evidence of where Thomas's foot was when he was found by paramedics—on or off the brake. Second, even assuming Thomas's foot was still on the brake, defendant's assertion that rifling through the pockets of a paralyzed person would necessarily have pushed that person's foot off the brake is not supported by any evidence. Third and finally, any conflicts between the physical evidence and Thomas's testimony were for the jury to resolve. (*Virgil, supra,* 51 Cal.4th at p. 1263.)

(Lodgment G at 11.)

Petitioner does not argue the evidence failed to support the elements of the crime of

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[53] Walter, 45 F.3d at 1358 (federal habeas court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences").

[54] Cavazos v. Smith, --- U.S. ----, 132 S. Ct. 2, 7 n.*, 181 L. Ed. 2d 311 (2011) (Jackson precludes federal habeas court from reweighing evidence when conducting review for sufficiency of the evidence).

robbery. Rather, he challenges the credibility of the evidence that supports those elements. However, as explained above, it is for the jury to decide issues of credibility and this Court may not reweigh that evidence.[55] Thomas, who the jury necessarily found credible, testified that after Petitioner shot him in the neck, leaving him helpless and paralyzed, Petitioner searched his pockets and stole his money. (3 RT at 666-69, 674 683.) This direct evidence was sufficient to support Petitioner's robbery conviction.[56]

For all of the above reasons, this Court finds that the California courts' denial of Petitioner's sufficiency of the evidence claims was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Thus, habeas relief is not warranted on Claims One, Three, and Four.

B. Admission of Evidence.

1. Background.

In Claim Two, Petitioner argues the trial court violated his rights to due process by admitting a prejudicial video showing Petitioner attending a gang party. (Petition at 5; Attachment at 4-5.) Petitioner also argues the trial court erred by allowing the gang expert testimony to "exceed the permissible scope of expert testimony." (Petition at 5; Attachment at 4-5.

2. State Court Opinion.

The California Court of Appeal denied Petitioner's claim on direct review, as follows:

> ***A. No Error In Admission of Expert Testimony***
>
> Defendant contends the trial court prejudicially erred in allowing the gang expert to testify beyond the permissible scope of an expert. As we understand his argument, it is that the expert's answers to hypothetical questions that incorporated the facts of this case amounted to an inadmissible opinion about

[55] Id. at 7 n.* (Jackson precludes federal habeas court from reweighing evidence when conducting review for sufficiency of the evidence); Walter, 45 F.3d at 1358 (federal habeas court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences").

[56] See People v. Mungia, 234 Cal.App.3d 1703, 1708 (1991) ("Robbery is 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.'") (quoting Cal. Penal Code § 211).

defendant's subjective knowledge and intent. An identical contention was recently rejected by our Supreme Court in *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), which was still under review at the time of briefing.

We review the trial court's admission of expert testimony for abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.) It is well settled that expert testimony is admissible to establish the elements of a gang enhancement allegation. (Evid.Code, §§ 720, subd. (a), 801, subd. (a); *Vang, supra,* 52 Cal.4th at p. 1044; *People v. Gardeley*, (1996) 14 Cal.4th 605, 617 (*Gardeley*); *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) In *Vang*, our Supreme Court recently approved use of hypothetical questions that tracked the facts of the case to elicit testimony from a gang expert. However, the court reaffirmed the long standing rule that precludes an expert from testifying "whether the *specific* defendants acted for a gang reason. . . ." (*Vang*, at p. 1048.)

Here, the gang expert testified, based on a hypothetical question that tracked the facts of the case, that the hypothetical shooting and robbery were committed for the benefit of the gang. He explained, "gang members use tactics to commit crimes. What you described to me sounds like an ambush. He was being set up. [¶] And typically, gang members, they sometimes—well, they don't want to be caught with guns [in] their possession, so many times other people hold their guns for them, like girlfriends that are not on probation or that police will not be looking in their house for guns. [¶] So the gang member asks this person to drive him to the location, probably where his gun is at. He goes and gets the gun. Knowing that this person is known to carry hundreds of dollars on his person, that is very tempting to a gang member. It's easy money, where $140, even though that does not sound like a lot, it could take a person a day working a job to earn that, where a gang member can make that in a matter of seconds. [¶] Gang member comes out, shoots that person, and takes his money. He can—because doing an act like that, it will enhance his status within a gang. It's a very

violent act. It will have other gang members respect him more, and that will in turn benefit the gang, because the gang member or the gang would like to have the members of its gang that are violent and respected by other people." The expert in this case did not improperly testify regarding defendant's intent, and defendant has not shown any error in the form of the question.

B. Admission of the Videotape Was Not Error

Defendant contends the trial court erred in admitting, during the prosecutor's rebuttal, the videotape of defendant attending an April 2008 Rolling 40's Hood Day party. He argues it was improper impeachment evidence inasmuch as defendant admitted attending the party. We disagree.

We review a trial court's admission of evidence for abuse of discretion. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 274–275.) In *People v. Roberts* (2010) 184 Cal.App.4th 1149 (*Roberts*), two codefendants were convicted of conspiracy to commit murder and a gang enhancement was found true. At trial, one defendant denied being a gang member and the other claimed he had friendly relations with members of the rival gang so would not have sought to kill them. Over the defendants' Evidence Code section 352 objection, the trial court admitted photographs of them and others wearing gang colors, showing gang signs, displaying weapons and visiting grave sites of murdered fellow gang members. On appeal, the defendants argued that the testimonial evidence of their connection to the gang rendered the challenged evidence more prejudicial than probative. (*Roberts,* at pp. 1191–1192.) The appellate court found no abuse of discretion in admitting the challenged evidence.

Here, defendant denied being a member of the Rolling 40's at the time of the shooting. Although he admitted attending the Rolling 40's party in April 2008, he denied he did so as an active gang member. The videotape showing defendant making gestures that look like gang signs was thus probative of defendant's credibility when he said he was no longer a gang member in April

> 2008, which in turn was probative of the credibility of his denial that he was an active gang member in March 2009. The record shows that the trial court in this case, like the trial court in *Roberts*, was aware of its discretion to exclude the tape under Evidence Code section 352 and carefully considered its probative value, concluding that it was more probative than prejudicial. We find no abuse of discretion in that finding.

(Lodgment G at 7-9.)

3. Analysis.

To the extent Petitioner argues that the admission of this evidence violated state rules of evidence, he fails to state a federal claim. Federal habeas relief is not available for errors of state law only.[57]

Moreover, to the extent Petitioner argues that the admission of the evidence violated his federal constitutional rights, he does not state a claim for federal habeas corpus relief because he has not shown a violation of clearly established federal law.[58] Although the Supreme Court stated in Williams v. Taylor,[59] that habeas relief should be granted when constitutional errors have caused a trial to be fundamentally unfair, the Supreme Court has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant habeas relief. In fact, the Supreme Court has "expressly reserved" the question whether the admission of prior bad acts, or propensity evidence, violates due process.[60] With regard to the admission of expert testimony, the Ninth Circuit has noted that it has found no cases "support[ing] the general proposition that the Constitution is violated by the admission of expert testimony concerning an ultimate issue to be resolved by the trier of fact."[61] Absent such "clearly established Federal law," this Court cannot find that the state courts' denial of

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[57] See 28 U.S.C. § 2254(a); see also Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.").

[58] See Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (noting that the Supreme Court has not yet clearly ruled that the admission of irrelevant or overtly prejudicial evidence constitutes a due process violation).

[59] 529 U.S. 362, 375, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

[60] Mejia v. Garcia, 534 F.3d 1036, 1046 (9th Cir. 2008) (rejecting habeas petitioner's challenge to introduction of propensity evidence because the Supreme Court has "expressly reserved" consideration of the issue).

[6161] Moses v. Payne, 555 F.3d 742, 761 (9th Cir. 2009).

Petitioner's claim was an unreasonable application of Supreme Court precedent.[62]

Even assuming Petitioner has raised a cognizable claim, he cannot show that the admission of the evidence rendered his trial fundamentally unfair.[63] "Only if there are no permissible inferences the jury may draw from the [disputed] evidence can its admission violate due process."[64]

Here, Petitioner tried to distance himself from his gang in an apparent attempt to show he had no motive to commit the crimes and that he would not have committed them with the intent to promote his gang. (5 RT at 2141-48.) The video was filmed less than one year before the crime, showed Petitioner attending a gang celebration with fellow gang members, and possibly showed Petitioner using gang signs. [4 RT at 1835-36.][65] The video raised the permissible inference that Petitioner had stronger ties to the gang than he admitted. In addition, the gang expert's testimony led to the permissible inference that Petitioner committed the crime for the benefit of a criminal street gang.

Accordingly, the state courts' rejection of Petitioner's claims regarding the admission of evidence was not contrary to, or an unreasonable application of, federal law. Habeas relief is not warranted on Claim Two.

C. Ineffective Assistance of Trial Counsel.

1. Background.

In Claim Five, Petitioner alleges his trial counsel was ineffective for (1) failing to have the victim's car tested for gunshot residue (Attachment at 9); (2) failing to move to bifurcate the gang enhancement from the other charges for purposes of trial (Attachment at 9); (3) failing to present a defense forensic expert (Attachment at 10); (4) failing to object when the prosecutor had Petitioner handle a gun that was admitted into evidence even though the gun was not related

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[62] Wright v. Van Patten, 552 U.S. 120, 126, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) (where Supreme Court's cases give no clear answer to the question presented, state court's rejection of petitioner's claim did not constitute an unreasonable application of clearly established Federal law).

[63] See Williams, 529 U.S. at 375 (habeas relief is warranted when constitutional errors have rendered the trial fundamentally unfair).

[64] Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991).

[65] To the extent Petitioner argues the video was too remote in time to be relevant, (Attachment at 4), this Court disagrees. Petitioner's association with the Rolling 40's gang in April 2008 is relevant to whether he remained tied to the gang in March 2009, when the crime occurred.

to the crime (Attachment at 10); and (5) counsel's errors accumulated to amount to ineffective assistance (Attachment at 10).

2. State Court Opinion.

The Los Angeles County Superior Court on habeas review denied Petitioner's claims of ineffective assistance of trial counsel, finding that Petitioner's claims failed to account for the evidence that the shooting was an intentional act and not an accident, and that he did not show the gang allegation would have been bifurcated simply because counsel requested bifurcation. (Lodgment J.)[66]

3. Legal Standard.

In order to prevail on his ineffective assistance of counsel claim under the United States Supreme Court decision in Strickland v. Washington, Petitioner must prove two elements: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced him.[67] A court evaluating an ineffective assistance of counsel claim does not need to address both elements of the test if a petitioner cannot prove one of them.[68]

To prove deficient performance, a petitioner must show that counsel's performance was below an objective standard of reasonableness.[69] There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[70] Only if counsel's acts or omissions, examined in light of all the surrounding circumstances, fell outside this "wide range" of professionally competent assistance will petitioner prove deficient performance.[71]

Proof of deficient performance does not require habeas corpus relief if the error did not result in prejudice.[72] Accordingly, a petitioner must also show that, but for counsel's unprofessional errors, the result of the proceedings would have been different.[73] Thus, a petitioner will prevail only if he can prove that counsel's errors resulted in a "proceeding [that]

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[66] This Court notes that the copy of the superior court's order denying habeas corpus relief is not entirely legible. However, it is sufficient for this Court to make out the ruling of the state court.
[67] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
[68] Id. at 697.
[69] Id. at 687-88.
[70] Id. at 689.
[71] Id. at 690.
[72] Id. at 691.
[73] Id. at 694.

was fundamentally unfair or unreliable."[74]

4. Analysis.

a. Investigation.

First, Petitioner argues his trial counsel was ineffective for failing to have the victim's car tested for gunshot residue. (Attachment at 9.) Petitioner also faults his trial counsel for failing to present a defense forensic expert to fully develop Petitioner's defense and prove the gun displayed at trial was irrelevant to the case. (Attachment at 10.)

Petitioner cannot show he was prejudiced by either of these alleged failures because he cannot show that further investigation would have led to helpful evidence. First, Petitioner conceded that he shot the victim, but insisted it was an accident. Because there was no dispute that a gun was fired in the victim's car, there was no benefit to testing the car for gunshot residue. To the extent Petitioner believes the results of gunshot residue testing in the car would have proven his improbable claim that he accidentally fired the gun from the pocket of his sweatshirt, he has not provided the opinion of an expert suggesting that the existence or absence of gunshot residue in the victim's car would have supported the defense theory. Second, Petitioner merely speculates that a forensic expert would have offered testimony helpful to the defense. However, Petitioner does not present a declaration from such an expert or any other evidence that an expert would have been able and willing to testify in support of Petitioner's defense.[75]

b. Bifurcation of Gang Enhancement.

Next, Petitioner faults counsel for failing to seek bifurcation of the gang enhancement allegations from the other charges at trial. (Attachment at 9.) Petitioner supports his argument with the trial court's statement late in the trial that "this gang allegation really should be bifurcated." (5 RT at 2162.)

Even if Petitioner could show that his trial counsel should have moved the trial court to bifurcate the gang allegation, he cannot show he was prejudiced by his trial counsel's decision

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[74] Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993).

[75] Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001) (speculation as to what expert would have said insufficient to support ineffective assistance of counsel claim).

not to seek bifurcation. The evidence that Petitioner attempted to commit first degree murder and completed the commission of a robbery was strong. Curiously, Petitioner asked Thomas for a ride even though Petitioner had a car of his own. (3 RT at 659, 5 RT at 2118-20.) Petitioner then had Thomas drive him to a location where he got a gun and shot Thomas immediately upon returning to the car. (3 RT at 666-67, 683; 5 RT at 2123-25, 2188, 2190, 2194, 2471.) In the victim's first true interview with police following the shooting, he stated that Petitioner went through the pockets of his pants and stole his money; a story the victim confirmed at trial. (3 RT at 667-69, 674-75; 4 RT at 1276; 5 RT at 2471-72.) Thomas was also adamant that Petitioner pulled the gun out and pointed it at the victim's head before firing.[76] (3 RT at 667.) After shooting Thomas, Petitioner went through the victim's pockets and stole his money. (3 RT at 667-69, 674-75; 5 RT at 2471-72.) Moreover, Petitioner failed to aid the victim or call for help. Instead, Petitioner immediately fled the scene. (3 RT at 667-69, 674-75; 5 RT at 2125-26, 2200, 2471-72.) In light of this damning evidence of attempted first degree murder and robbery, it is not likely the introduction of evidence related to the gang allegation led the jurors to convict Petitioner when they otherwise would have credited his unlikely claim of an accidental shooting and voted to acquit him.

c. Objection to Prosecutorial Misconduct.

Next, Petitioner argues his trial counsel was ineffective for failing to object to prosecutorial misconduct. Specifically, Petitioner claims his counsel should have objected when the prosecutor "made petitioner get off the stand and hold a[n] actual gun in front of the jury." (Attachment at 10.) However, as explained in Section E.3.b., below, this Court finds the prosecutor did not commit misconduct by asking Petitioner to demonstrate with a gun how he was trying to get into the victim's car with a gun in his pocket. Petitioner's trial counsel could not have been ineffective for failing to object on the basis of misconduct. Petitioner has not suggested any other meritorious grounds upon which his trial counsel could have objected to the

[76] As stated within this opinion, an LAPD criminalist testified at trial that a gun had been fired through the pocket of Petitioner's sweatshirt, (4 RT at 1534-38, 1540-43, 1545-46, 1548), but admitted there was no way for her to know when a gun was fired from inside the sweatshirt. (4 RT at 1543-44.) Accordingly, the criminalist's testimony did not necessarily contradict the victim's testimony.

prosecutor's behavior. Accordingly, Petitioner cannot show his counsel was ineffective for failing to object.[77]

d. Cumulative Errors.

Finally, Petitioner argues that his trial counsel's cumulative errors amounted to ineffective assistance. (Attachment at 10.) However, as discussed above, this Court has not found that Petitioner's trial counsel committed any prejudicial acts of ineffectiveness. Thus, there are no errors to accumulate.

For these reasons, this Court finds that the California courts' denial of Petitioner's ineffective assistance of counsel claims was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Thus, habeas relief is not warranted on Claim Five.

D. Prosecutorial Misconduct.

1. Background.

In Claim Six, Petitioner argues the prosecutor engaged in multiple acts of misconduct. (Attachment at 11-13.)

2. Legal Standard.

Prosecutorial misconduct does not rise to the level of a constitutional violation unless it "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[78] The reviewing court considers first whether the prosecutor's conduct was improper, and if so, whether "it is more probable than not that the prosecutor's conduct materially affected the fairness of the trial."[79] "Th[is] standard allows a federal court to grant relief when the state-court trial was fundamentally unfair but avoids interfering in state-court proceedings when errors fall short of constitutional magnitude."[80]

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[77] See Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005) (trial counsel cannot be ineffective for failing to raise meritless objection).

[78] Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)).

[79] United States v. McKoy, 771 F.2d 1207, 1212 (9th Cir. 1985) (citations omitted).

[80] Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000).

3. Analysis.

a. Napue Violations.

First, Petitioner argues the prosecutor presented the false testimony of Thomas, the victim. (Attachment at 11.) Petitioner asserts that the victim's testimony that Petitioner intentionally pulled out a gun and fired is proven false by the evidence that a gun was fired through the pocket of Petitioner's sweatshirt. (Attachment at 11.)

In Napue v. Illinois,[81] the Supreme Court held that "a conviction obtained through use of false evidence, known to be such by representatives of the State," violates a defendant's right to due process under the 14th Amendment.[82] To establish a due process violation under Napue, a petitioner must prove that (1) the testimony was actually false, (2) the prosecution knew or should have known that the testimony was false, and (3) the false testimony was material.[83] Mere inconsistencies in testimony by government witnesses are insufficient to show actual falsity under Napue.[84] False evidence is material if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury."[85]

Petitioner cannot prove that Thomas gave any false testimony, let alone that the prosecutor knew or should have known the testimony was false. Although an LAPD criminalist testified that a gun had been fired through the pocket of Petitioner's sweatshirt, (4 RT at 1534-38, 1540-43, 1545-46, 1548), the criminalist also testified that there was no way for her to know when a gun had been fired from inside the sweatshirt (4 RT at 1543-44). Thus, the criminalist's testimony did not prove that Petitioner fired the gun in his sweatshirt during this shooting. Moreover, when Thomas testified that Petitioner pulled the gun out and aimed it at him, he merely offered his recollection of the events. Even if the forensic evidence had conclusively proved the Petitioner shot the victim through the sweatshirt pocket rather than pulling the gun out, this evidence would show only that the victim had a failed recollection. It would not prove

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[81] 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).
[82] See also Jackson v. Brown, 513 F.3d 1057, 1071 (9th Cir. 2008).
[83] Id. at 1071–72.
[84] See United States v. Bingham, 653 F.3d 983, 995 (9th Cir. 2011).
[85] United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); Libberton v. Ryan, 583 F.3d 1147, 1164 (9th Cir. 2009) (distinguishing standard from one asking whether there was reasonable probability of different outcome).

that Thomas purposely lied or that the prosecutor knew he had lied.

Finally, the fact that the prosecutor spoke to the victim about his statements being inconsistent with the forensic evidence does not prove the victim lied. In fact, it proves the opposite. Despite being informed that the forensic evidence did not support his testimony about Petitioner pulling the gun out of his pocket, Thomas stood firm in his recollection. Had it been the victim's intent to give false statements, he would have conformed his story to match the forensic evidence.

b. Asking Petitioner to Demonstrate with Gun.

Next, Petitioner claims the prosecutor committed misconduct by asking Petitioner to stand up and demonstrate with a gun how he attempted to enter the victim's car while holding a gun in his sweatshirt pocket. However, Petitioner does not explain what rule the prosecutor violated by asking Petitioner to demonstrate his actions or how the prosecutor's request otherwise was improper. Nor has Petitioner shown that it is more probable than not that the demonstration materially affected the fairness of the trial. Petitioner admitted to trying to enter the victim's car with a gun when the gun fired and hit the victim. (5 RT at 2125, 2188, 2190.) Thus, the demonstration the prosecutor requested of Petitioner did not lead to any inferences or suggestions that were harmful to the defense theory.

c. Improper Questioning.

Petitioner also claims that the prosecutor committed misconduct by asking Petitioner questions about his silence after invoking his rights under Miranda.[86] (Attachment at 12.) Petitioner bases his claim on the following excerpts from the prosecutor's cross-examination of Petitioner:

> [Prosecutor]: Okay.
>
> Q Now this gun, the story that you told today to the jury, this is the first time you're telling this story; isn't it true?
>
> A On -- on -- on testimony, yes.
>
> Q And you have had a whole year, almost, to think about it, haven't you?

[86] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

A Uh, I didn't have a year to think about it. I know what happened. This is what happened, ma'am.

Q You have had a whole year to articulate and organize your story for the jury, haven't you?

A No, because I stated this -- I stated this from June and the preliminary of what had happened, to my attorney, and he presented it in the cross examination of Mr. Mason, and Mr. Mason gave different testimony prior to what he's saying now.

Q You didn't testify at the preliminary hearing, did you?

A No, I never -- didn't.

Q You didn't tell your story to a judge or to a court?

A No, but I did to the attorney.

The Court: Stop you there, Miss Humphrey. Ladies and gentlemen, if you go back to when we selected the jury, I very carefully tell you that, if a defendant does not testify, you cannot consider that in any way. If a defendant does testify, then he's a witness like any other witness whose (sic) testified at this trial.

Now when we get into questions about various stages in the criminal proceedings and what the defendant may or may not have said, we get into some difficult situations. At no time up to this point was the defendant ever required to say anything, so you should not draw any inference from the fact that at the preliminary hearing or any time prior or any time up to this point, the defendant has not said anything concerning this case.

I want you to be absolutely clear about that. So I don't want you to go back into the jury room and base some decision on fact that the defendant never told anybody about this before he's telling you folks here.

He's not required to. He's under no obligation to. And that you have to [] understand. All right? Go ahead.

(5 RT at 2158-59.)

After the trial court's instruction, the prosecutor changed topics. However, later she again questioned Petitioner on his failure to tell his story earlier:

> Q When Detective Cleary picked you up, you didn't tell him information about the case, did you?
>
> A We didn't discuss the case at all.
>
> The Court: Ladies and gentleman, I want you to disregard the question and the answer as well. The man was taken into custody, and whether he gave any explanation or what was said or not said is not to be considered by you. In other words, at that point defendant is not required to say anything. So not saying anything is something that you must not take into consideration. Go ahead.

(5 RT at 2210.) However, the prosecutor was undeterred:

> Q By [The Prosecutor]: Well, Detective Cleary asked you where you worked; isn't that true?
>
> A He asked me where I worked?
>
> Q Yes. When he met you in Indiana?
>
> A Yes.
>
> Q And you weren't able to tell him?
>
> A Yes, I was able to tell him. I was on a job. I was actually on the clock when I had got -- I was going to get a gas respirator mask –
>
> Q Well –
>
> [Defense Counsel]: Let him answer the question.
>
> [The Prosecutor]: I am.
>
> [Defense Counsel]: Going to object to the People not allowing him to answer the question.
>
> [The Prosecutor]: I am objecting as non-responsive. Move to strike.
>
> The Court: I think it was most responsive. You said you were on a job, and you were on the way to get a gas respirator mask?
>
> The Witness: Yes.

The Court: Go ahead.

Q By [The Prosecutor]: My question is, did you ever tell Detective Cleary where you worked and the company you worked for?

A Yes.

Q In fact, you weren't able to tell him the name of the company you worked for; isn't that right?

A Why wasn't I able if I told him?

Q Is that a yes or no?

A Yes, I did tell him.

(5 RT at 2211-12.)

A suspect in a criminal investigation has a Fifth Amendment right to remain silent.[87] The United States Supreme Court explained in Doyle v. Ohio, that this constitutional guarantee includes the assurance that a defendant's "silence will carry no penalty."[88] A prosecutor violates Doyle when he uses the defendant's post-arrest silence as evidence of guilt.[89] Thus, for example, when a defendant takes the stand and explains what happened, a prosecutor is not allowed to try to impeach the defendant's testimony by pointing out to the jury that the defendant failed to offer that explanation following his arrest and, instead, elected to remain silent.[90] To prevail on a Doyle claim, a petitioner has the burden of establishing that any error had a substantial and injurious effect on the verdict.[91]

Here, the prosecutor's questions were at the least ill-advised and at the most a violation of Doyle.[92] However, Petitioner cannot show the prosecutor's questions had a substantial and injurious effect on the verdict. The prosecutor's questions were minimal, particularly when compared to the length of Petitioner's testimony as a whole. In addition, the trial court

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[87] U.S. Const. amend. V.
[88] 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).
[89] Greer v. Miller, 483 U.S. 756, 763-64, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987).
[90] Doyle, 426 U.S. at 618-20.
[91] Brecht v. Abrahamson, 507 U.S. 619, 622, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).
[92] Id. at 629 ("[T]he State's references to petitioner's . . . failure to come forward with his version of events at any time before trial . . . crossed the Doyle line. For it is conceivable that, once petitioner had been given his Miranda warnings, he decided to stand on his right to remain silent because he believed his silence would not be used against him at trial.").

admonished the jury twice that it was not to consider Petitioner's silence during its deliberations. Moreover, the evidence of Petitioner's guilt, as detailed throughout this opinion, was overwhelming. Under these circumstances, there is no likelihood that the prosecutor's brief questions influenced the verdict.[93]

d. Cumulative Error.

Finally, Petitioner argues the cumulative effect of the prosecutor's misconduct resulted in a denial of due process. (Attachment at 12.) However, as explained above, this Court has found that no prejudicial prosecutorial misconduct occurred at trial. Accordingly, there is no prejudice to accumulate.

For all of the above reasons, this Court finds that the California courts' denial of Petitioner's prosecutorial misconduct claims was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Thus, habeas relief is not warranted on Claim Six.

E. Juror Misconduct.

1. Background.

In Claim Nine, Petitioner argues the jury committed misconduct by considering testimony that the trial court struck from the record. (Attachment at 16.)[94] Petitioner's argument is based on the testimony by the gang expert regarding a hypothetical question related to the facts of this case, and a question one of the jurors asked the parties to ask of the expert. The expert testified as follows:

> [The Witness:] . . . Gang life is like like (sic) a drug, if you will. It's something that it gives you a level of high, a sense of feeling and belonging and power, respect from other people. And there is only one way to get that. Well,

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[93] See id. at 639 (finding Doyle error harmless in part because the prosecutor's questions were infrequent in long trial and "the State's evidence of guilt was, if not overwhelming, certainly weighty.").

[94] Respondent argues that this claim is procedurally barred in light of the California Court of Appeal's denial of the claim with citations to In re Robbins, 18 Cal.4th 770, 779 (1998); In re Harris, 5 Cal.4th 813, 829 (1993); and In re Dixon, 41 Cal.2d 756, 759 (1953). (Answer at 66-71.) In the interest of judicial economy, this Court will address Petitioner's claims on the merits rather than perform the procedural default analysis. See Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same.").

there's several ways. One of them is to be a member of the gang. To be a member of the gang, you got to earn respect within the gang. You got to be commit (sic) crimes or be initiated into the gang to earn this level of high.

The other way is to get a pass. And people get passes. For example, family members or friends in the neighborhood or girlfriends get passes to share in this gang lifestyle.

It appears to me that this person who has money in his pockets all the time and is known, has ties to the music industry, that would be something somebody (sic) that the Rolling 40's or any gang would be likely to get a pass to hang out with them in their gang and enjoy the gang lifestyle.

But my experience that I know as a pass can be revoked at any time for any reason. And that's something that most likely happened with this person. His pass was revoked.

[Defense Counsel]: Objection. That's a conclusion. That's not a part of the hypothetical. Motion to strike.

The Court: I will sustain that, and we will strike that, just that portion, from the record. Go ahead. You can continue, officer.

The Witness: Okay. So like I was saying before, passes can be revoked at any time. So it doesn't surprise me that he would be a victim of a crime, even though he was at one point liked within the community.

(4 RT at 1841-42.)

Following the expert's testimony, a juror requested that the trial court ask the expert whether Petitioner "(or someone at his level) could revoke [the victim's] 'pass' on his own or would he need approval of higher leaders?" (CT at 91.) In response to the juror's question, the prosecutor engaged the expert in the following questioning:

By [The Prosecutor]:

Q Officer, you testified on direct examination regarding a gang member being able to revoke a pass of someone who at previous occasions may have been

allowed to travel freely within the gang territory?

A Yes.

Q Basically? Okay. Could a person of Mr. Davis' level -- and you testified you considered him a low-level leader -- of his level revoke an individual's pass, so to speak, or would he require approval from someone on a higher level?

A He has enough influence within the gang to be able to make a decision like that on his own. More than likely, he may confer with other gang members.

(4 RT at 1859-60.)

2. Legal Standard.

The Sixth Amendment guarantees to criminal defendants a fair trial by impartial and indifferent jurors. U.S. Const. amend. VI; Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). A criminal defendant also is entitled to a jury that reaches a verdict only on the basis of evidence produced at trial."[95] The introduction of prejudicial extraneous influences into the jury room constitutes misconduct which may result in the reversal of a conviction.[96]

No "bright line test exists to assist courts in determining whether a petitioner has suffered prejudice from juror misconduct."[97] The key question is whether the constitutional violation "had a substantial and injurious effect or influence in determining the jury's verdict."[98]

3. Analysis.

Petitioner appears to misunderstand the record. The trial court sustained an objection to the expert's conclusion that in this case Petitioner revoked the victim's pass. The trial court did not strike all of the expert's testimony regarding the concept of a pass. Moreover, when the juror proposed the additional question about whether someone of Petitioner's status in the gang could revoke a pass, the trial court allowed the prosecutor to ask the question and the expert to provide an answer. Accordingly, the juror did not commit misconduct by considering information the

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[95] Turner v. Louisiana, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965).
[96] Parker v. Gladden, 385 U.S. 363, 364-65, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966).
[97] Mancuso v. Olivarez, 292 F.3d 939, 950 (9th Cir. 2002).
[98] Brecht v. Abrahamson, 507 U.S. 619, 627, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

trial court had instructed him not to consider.

F. Ineffective Assistance of Appellate Counsel.

In Claim Seven, Petitioner claims his appellate counsel was ineffective for failing to raise on direct appeal Petitioner's claims of prosecutorial misconduct, ineffective assistance of trial counsel, cumulative errors, and juror misconduct. (Attachment at 13.)

The Strickland standard also applies to claims of ineffective assistance of appellate counsel based on the failure of counsel to raise particular claims on appeal.[99] A habeas petitioner must show that, but for appellate counsel's failure to raise the relevant claim(s), there is a reasonable probability that the petitioner would have been successful on appeal. In the absence of such a showing, neither Strickland prong is satisfied.[100] Appellate counsel does not have a constitutional duty to raise every non-frivolous issue a defendant requests.[101] Counsel "must be allowed to decide what issues are to be pressed."[102] Otherwise, the ability of counsel to present the client's case in accord with counsel's professional evaluation would be "seriously undermined."[103] There is, of course, no obligation to raise meritless arguments on a client's behalf.[104] The weeding out of weaker issues is widely recognized as one of the duties of effective appellate lawyers, and counsel is not deficient for failing to raise a weak issue.[105] In order to prove prejudice in this context, Petitioner must show that he probably would have been successful on appeal but for appellate counsel's errors.[106] A court evaluating an ineffective assistance of appellate counsel claim does not need to address both components of the test if the petitioner cannot sufficiently prove one of them.[107]

As explained herein, the claims Petitioner argues his appellate counsel should have raised on appeal lack merit. Accordingly, his appellate counsel was not ineffective for failing to raise

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[99] Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).
[100] See Pollard v. White, 119 F.3d 1430, 1435-37 (9th Cir. 1997).
[101] Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).
[102] Id.
[103] Id.
[104] See Strickland, 466 U.S. at 687-88 (requiring a showing of deficient performance as well as prejudice).
[105] Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989).
[106] Id. at 1434 n.9.
[107] See Strickland, 466 U.S. at 697.

them on appeal.[108]

G. Cumulative Error.

Finally, in Claim Eight, Petitioner argues the cumulative impact of all the trial errors alleged violated Petitioner's rights to due process and a fair trial. (FAP at 5C; Attachment 14-15.)

"The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal."[109] Here, however, this Court has found only that the Doyle claim Petitioner includes in Claim Six might present a meritorious claim of constitutional error, albeit a harmless error. Because this would amount to a single constitutional error, there are no errors to accumulate.[110]

VII.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the First Amended Petition and dismissing this action with prejudice.

DATED: February 16, 2016

Louise A. LaMothe

HONORABLE LOUISE A. LAMOTHE
United States Magistrate Judge

[108] Id. at 687-88.
[109] Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).
[110] See Hayes v. Ayers, 632 F.3d 500 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible.").

S211759

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JOVIAN WILLIAM DAVIS on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

E PRINTED: 04/02/13

E NO. BA354723

PEOPLE OF THE STATE OF CALIFORNIA
VS.
ENDANT 01: JOVIAN WILLIAM DAVIS

ORMATION FILED ON 06/19/09.

NT 01: 664-187(A) PC FEL
NT 02: 211 PC FEL

3/29/13 AT 830 AM IN CENTRAL DISTRICT DEPT 116

CALLED FOR HABEAS CORPUS PETITION

IES: NORM SHAPIRO (JUDGE) MICHAEL TORRES (CLERK)
NONE (REP) NONE (DDA)

NDANT IS NOT PRESENT IN COURT, AND NOT REPRESENTED BY COUNSEL

COURT HAS READ AND REVIEWED THE CASE FILES AND COURT'S
S CONCERNING PETITIONERS TRIAL. FURTHER, THE COURT HAS READ
CONSIDERED PETITIONER'S REQUEST FOR WRIT RELIEF WHICH IS
ARILY BASED ON HIS ASSERTION OF INEFFECTIVE ASSISTANCE OF
SEL IN REGARD TO A FAILURE TO CONDUCT A SCIENTIFIC
STIGATION WHICH MAY HAVE SUPPORTED HIS CONTENTION OF

DENTIAL FIREARM DISCHARGE.
TIONER'S CONTENTIONS FAILS TO ADDRESS OTHER EVIDENCE WHICH
CATED AN INTENTIONAL ACT AND NOT AN ACCIDENT.
PPEAL, THE FINDING ON THE GANG ALLEGATION WAS AFFIRMED.
TIONER SPECULATES THAT THE COURT WOULD HAVE, ON THE
TIONERS REQUEST, BIFURCATED THE GANG ALLEGATION. ALTHOUGH
ISSUE WAS DISCUSSED, PETITIONERS BELIEF IS THAT THE COURT
LD HAVE", ON PETITIONERS REQUEST GRANTED BIFURCATION IS NOT
.

TIONERS REQUEST FOR WRIT RELIEF IS DENIED.

PY OF THIS MINUTE ORDERED IS SENT THIS DATE VIA U.S. MAIL
HE PETITIONER IN AN ENVELOPE PROVIDED BY THE PETITIONER.

T ORDERS AND FINDINGS:

ITION FOR WRIT OF HABEAS CORPUS IS DENIED.

SCHEDULED EVENT:

Exhibit A

Appellate Courts Case Information

Supreme Court

Change court ▼

Court data last updated: 10/28/2019 10:08 AM

Docket (Register of Actions)

PEOPLE v. DAVIS
Division SF
Case Number S200913

Date	Description	Notes
03/19/2012	Petition for review filed	Defendant and Appellant: Jovian William Davis Attorney: Tara K. Hoveland
03/19/2012	Record requested	
03/21/2012	Received Court of Appeal record	one doghouse
03/22/2012	Received:	proof of service with original signature from appellant's counsel Tara Hoveland, Esq.
03/22/2012	Received:	notice of errata to include page 3 of petition for review, from appellant's counsel Tara Hoveland.
04/13/2012	Additional record requested	
04/18/2012	Received additional record	one doghouse (volume 2 0f 2)
05/16/2012	Petition for review denied	The petition for review is denied without prejudice to any relief to which defendant may be entitled after this court decides People v. Rodriguez, S187680. Werdegar, J., is of the opinion the petition should be granted.
05/22/2012	Returned record	2 doghouses

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOVAN WILLIAM DAVIS, Defendant and Appellant.	B227566 (Los Angeles County Super. Ct. No. BA354723)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norm Shapiro, Judge. Affirmed in part; reversed in part.

Tara K. Hoveland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jovan William Davis appeals from his convictions for attempted premeditated murder and second degree robbery, both committed for the benefit of a criminal street gang.[1] He contends: (1) the convictions of the substantive charges and gang enhancement were not supported by substantial evidence; (2) reversal of the gang enhancement warrants reversal of the convictions of the substantive charges; (3) the gang expert testified beyond the permissible scope of an expert; (4) admitting a videotape into evidence was error; and (5) consecutive sentences on the attempted murder and robbery counts violated section 654. We stay the sentence on the robbery count and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

It is undisputed that on March 12, 2009, defendant shot Thomas M. in the neck at close range, immediately paralyzing Thomas from the neck down. Our summary of the facts is limited to those relevant to the only disputed issues: whether there was substantial evidence of intent and premeditation, a taking by force or fear, and of the gang enhancement, and whether section 654 applies.

A. The People's Case

Viewed in accordance with the usual rules on appeal (*People v. Virgil* (2011) 51 Cal.4th 1212, 1263 (*Virgil*)), the evidence established that in March 2009, defendant lived on the 4600 block of South Wilton Place, which was within the territory claimed by

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[1] Defendant was charged with the attempted premeditated murder and second degree robbery of Thomas M. Enhancements for personal gun use causing great bodily injury and committing the offenses for the benefit of a criminal street gang were also alleged. A jury convicted defendant as charged and found true the enhancements. Defendant was sentenced to 40 years to life on count one (15 years to life for attempted murder, plus a consecutive 25 years to life for the gun use enhancement), plus a consecutive 38 years to life on count two (3 years for second degree robbery, plus a consecutive 25 years to life for the gun use enhancement, plus 10 years for the gang enhancement). He timely appealed.

All undesignated code references are to the Penal Code.

the criminal street gang known as the Rolling 40's; defendant was a member of the Rolling 40's and his moniker was "Cheddar Bob."[2] Clive Usher was also a member of the Rolling 40's and lived across the street from defendant. Thomas, the victim, was familiar with the 4600 block of South Wilton Place because his grandmother lived there and because his job as a promoter for clients such as rappers Ice Cube and Tupac Shakur and boxing champion Floyd Mayweather, often brought him into the neighborhood. Thomas was not a gang member but was friends with members of the Rolling 40's, including Usher and defendant's uncle. It was not unusual for Thomas to be carrying between $500 and $1,000 in cash.

On March 12, 2009, after visiting Usher at his home, Thomas was walking back to his car when defendant called out to Thomas from his front porch and asked Thomas for a ride to his girlfriend's home a few blocks away. Unaware that defendant was going to that location to get a gun, Thomas agreed. When they arrived, Thomas acquiesced to wait for defendant to bring him back to Wilton Place. While waiting, Thomas turned his car around and pulled over. Defendant came back within a few minutes and sat in the front passenger seat of Thomas's car. Without saying anything, defendant pulled a silver firearm from somewhere on his right side, aimed it at Thomas's head and fired, shooting Thomas once in the neck and immediately paralyzing him.[3] Still conscious, Thomas watched as defendant went through Thomas's pockets and removed $140, comprised of one $100 bill and two $20 bills, from Thomas's right front pants pocket. After putting the money into his own pants pocket, defendant got out of the car, closed the car door and ran north towards 48th Street. For 20 minutes, Thomas sat in his car gasping for air while cars drove past. Eventually someone stopped, saw Thomas's condition and called for help. In response to questions, Thomas told paramedics, "Cheddar Bob from 40 shot

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2 A gang expert testified that "Cheddar" is a slang term for money.

3 A ballistic expert testified that holes and gun residue on a blood-stained sweatshirt found in defendant's car suggest the gun was fired through the sweatshirt. Thomas was adamant that the gun did not fire accidentally; defendant drew the gun, aimed and fired at Thomas.

me." Thomas repeated the accusation to a police officer. Thomas spent two weeks in the hospital and seven months at Rancho Los Amigos Rehabilitation Center. He is now able to move only his left hand.

Los Angeles Police Officer Ara Hollenback and her partner were the first officers on the scene. Thomas was already in the ambulance when he told Hollenback that Cheddar Bob shot him; when Hollenback asked why, Thomas said, "I don't know why. I was just dropping him off." Defendant was arrested later that night. The arresting officers found a clear plastic baggy and about $2,850 in cash (including thirteen $100 bills and some $20 bills) on defendant's person; from inside defendant's car, they recovered a Yankees baseball cap, a cell phone and a blood-stained sweatshirt. Officers searching defendant's home found a black backpack containing a fully loaded blue steel .357 Smith & Wesson.[4]

Thomas was in a coma for several days. On March 17 or 18, 2009, he was well enough to be briefly interviewed by Detective Mark Cleary. But Cleary had to read Thomas's lips because a tracheotomy and breathing tube made it difficult for Thomas to speak. Because of his precarious physical condition, Cleary did not ask Thomas details about the shooting. From a photographic six-pack lineup, Thomas identified defendant as his assailant. In an interview a few days later, Thomas said that defendant used a gray .25-caliber semiautomatic pistol. By March 24, Thomas's condition had improved and he was able to speak. Cleary videotaped an interview in which Thomas once again identified defendant as the person who shot and robbed him. For the first time, Thomas mentioned that defendant took money out of Thomas's pocket after shooting him.

In April 2009, DNA testing established that it was Thomas's blood on the sweatshirt found in defendant's car. A warrant for defendant's arrest was issued (defendant had been released from custody because, with Thomas in a coma and without

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[4] Defendant testified that his aunt and uncle lived in the house on South Wilton Place where the backpack was found. Defendant used to live with his mother and siblings in the house behind his aunt and uncle's house, but in March 2009 defendant was living with his girlfriend and her two children somewhere else entirely.

the DNA results, there had not been enough evidence to hold him) and on April 15, defendant was arrested in Indiana; he voluntarily returned to California.

B. The Defense Case

Defendant testified he joined the Rolling 40's when he was 13 years old, got his gang tattoos when he was 14 or 15 years old and was still active when he was 16 years old. But by 2008, he was no longer in the gang. When asked about a DVD showing him flashing gang signs at a Rolling 40's party in April 2008, defendant admitted attending the party, explaining that he continued to "associate" with gang members in 2008; he maintained that he was not flashing gang signs, just twisting his wrist while dancing. In March 2009, defendant lived with his girlfriend and her two children on Garthwaite Avenue. On March 12, 2009, defendant drove to his uncle's home on South Wilton Place to watch a basketball game. While there, a friend called defendant and asked him to help dispose of a gun. Defendant agreed to help but did not want to drive his own car because he was afraid if stopped by the police and found in possession of a gun, he would go to prison. So when defendant saw Thomas, he asked Thomas to give him a ride to pick up the gun and then bring him back. Thomas agreed. While Thomas waited in the car, defendant got the gun from his friend. Defendant noticed that the hammer was cocked, but he did not know how to uncock it so he just put the gun in his sweatshirt pocket in the cocked position. As defendant was opening the passenger door of Thomas's car, he felt the gun slipping out of his pocket. When defendant grabbed for the gun, it accidentally discharged a single shot. Defendant was not hit but he got into the car to check Thomas's condition; defendant thought Thomas was dead because Thomas did not respond to defendant calling his name or shaking him. Panicked, defendant ran back to his uncle's home on South Wilton Place to ask his advice. Defendant threw the gun into a trash can behind the house. Unable to find his uncle, defendant got into his own car and drove away. He was stopped by police a few blocks away. Defendant falsely told the police he had nothing to do with the shooting. The gun police later found in the backpack at his uncle's house was not the gun that accidentally shot Thomas. Defendant testified that he

had no reason to shoot Thomas, whom he considered a friend and a friend of the family. The shooting was an accident, which has caused difficulties for defendant and his whole family. He did not take any money out of Thomas's pockets.

C. Gang Expert Evidence

Los Angeles Police Officer John Flores testified as an expert on gangs, in particular the Rolling 40's, which is affiliated with the Crips gang. The term "40's" refers to the numbered blocks the gang claims as its territory: the area between King Boulevard on the north, 49th or 50th Street on the south, the 110 Freeway on the east and Crenshaw Boulevard on the west. The Rolling 40's is divided into four cliques: the Dark Side, Park Side, Original Western and Avenues. The primary activities of the Rolling 40's are narcotics sales, firearm possession, robbery, extortion, murder, attempted murder and driveby shootings. Membership in a gang is for life and members rise in the gang hierarchy by "putting in work," in other words, committing crimes. The more violent the crime, the more respect it engenders from other gang members for the perpetrator and the more nongang members are intimidated by the gang. It is this intimidation of nongang members that allows gangs to operate without getting caught. Flores was familiar with defendant as a self-admitted member of the Rolling 40's Avenues clique. Defendant used the moniker "Cheddar Bob" and had various tattoos that signified his membership in the Rolling 40's. Flores obtained a copy of a video of defendant at a Rolling 40's "Hood Day" party in April 2008. This videotape was played for the jury. Defendant can be seen making hand signs associated with the Rolling 40's. Based on a hypothetical using the facts of this case, Flores testified that he believed the crimes were committed for the benefit of the Rolling 40's gang. Flores based his opinion on the "ambush" like manner in which the crimes were committed – asking someone known to carry large amounts of cash to drive defendant to a location where defendant intended to acquire a gun, when defendant has his own car available. Flores conceded that if the shooting was an accident, it would not be gang related.

DISCUSSION

A. No Error In Admission of Expert Testimony

Defendant contends the trial court prejudicially erred in allowing the gang expert to testify beyond the permissible scope of an expert. As we understand his argument, it is that the expert's answers to hypothetical questions that incorporated the facts of this case amounted to an inadmissible opinion about defendant's subjective knowledge and intent. An identical contention was recently rejected by our Supreme Court in *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), which was still under review at the time of briefing.

We review the trial court's admission of expert testimony for abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.) It is well settled that expert testimony is admissible to establish the elements of a gang enhancement allegation. (Evid. Code, §§ 720, subd. (a), 801, subd. (a); *Vang, supra,* 52 Cal.4th at p. 1044; *People v. Gardeley*, (1996) 14 Cal.4th 605, 617 (*Gardeley*); *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) In *Vang*, our Supreme Court recently approved use of hypothetical questions that tracked the facts of the case to elicit testimony from a gang expert. However, the court reaffirmed the long standing rule that precludes an expert from testifying "whether the *specific* defendants acted for a gang reason . . . ." (*Vang*, at p. 1048.)

Here, the gang expert testified, based on a hypothetical question that tracked the facts of the case, that the hypothetical shooting and robbery were committed for the benefit of the gang. He explained, "gang members use tactics to commit crimes. What you described to me sounds like an ambush. He was being set up. [¶] And typically, gang members, they sometimes – well, they don't want to be caught with guns [in] their possession, so many times other people hold their guns for them, like girlfriends that are not on probation or that police will not be looking in their house for guns. [¶] So the gang member asks this person to drive him to the location, probably where his gun is at. He goes and gets the gun. Knowing that this person is known to carry hundreds of dollars on his person, that is very tempting to a gang member. It's easy money, where $140, even though that does not sound like a lot, it could take a person a day working a

job to earn that, where a gang member can make that in a matter of seconds. [¶] Gang member comes out, shoots that person, and takes his money. He can – because doing an act like that. it will enhance his status within a gang. It's a very violent act. It will have other gang members respect him more, and that will in turn benefit the gang, because the gang member or the gang would like to have the members of its gang that are violent and respected by other people." The expert in this case did not improperly testify regarding defendant's intent, and defendant has not shown any error in the form of the question.

B. Admission of the Videotape Was Not Error

Defendant contends the trial court erred in admitting, during the prosecutor's rebuttal, the videotape of defendant attending an April 2008 Rolling 40's Hood Day party. He argues it was improper impeachment evidence inasmuch as defendant admitted attending the party. We disagree.

We review a trial court's admission of evidence for abuse of discretion. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 274-275.) In *People v. Roberts* (2010) 184 Cal.App.4th 1149 (*Roberts*), two codefendants were convicted of conspiracy to commit murder and a gang enhancement was found true. At trial, one defendant denied being a gang member and the other claimed he had friendly relations with members of the rival gang so would not have sought to kill them. Over the defendants' Evidence Code section 352 objection, the trial court admitted photographs of them and others wearing gang colors, showing gang signs, displaying weapons and visiting grave sites of murdered fellow gang members. On appeal, the defendants argued that the testimonial evidence of their connection to the gang rendered the challenged evidence more prejudicial than probative. (*Roberts,* at pp. 1191-1192.) The appellate court found no abuse of discretion in admitting the challenged evidence.

Here, defendant denied being a member of the Rolling 40's at the time of the shooting. Although he admitted attending the Rolling 40's party in April 2008, he denied he did so as an active gang member. The videotape showing defendant making gestures that look like gang signs was thus probative of defendant's credibility when he said he

was no longer a gang member in April 2008, which in turn was probative of the credibility of his denial that he was an active gang member in March 2009. The record shows that the trial court in this case, like the trial court in *Roberts*, was aware of its discretion to exclude the tape under Evidence Code section 352 and carefully considered its probative value, concluding that it was more probative than prejudicial. We find no abuse of discretion in that finding.

C. *Sufficiency of the Evidence*

Defendant challenges the sufficiency of the evidence to support the attempted murder and robbery convictions, as well as the gang enhancement. We find substantial evidence supports conviction of both the substantive offenses and the gang enhancement.

The standard of review for a sufficiency of the evidence claim is well settled. We must determine " ' "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." [Citations.] We examine the record to determine "whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.] This standard applies whether direct or circumstantial evidence is involved. "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' " [Citation.]' [Citation.]" (*Virgil, supra*, 51 Cal.4th at p. 1263.) The uncorroborated testimony of a single witness is sufficient to support a conviction unless the testimony is

physically impossible or inherently improbable. (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 845, citing *People v. Scott* (1978) 21 Cal.3d 284, 296.)

1. Substantial Evidence of Intent to Kill and Premeditation

Defendant contends there was insufficient evidence of intent to kill and premeditation. He argues that Thomas's "credibility was suspect" because he did not mention the robbery the first few times he spoke to police, the physical evidence showed that the gun was fired from inside defendant's pocket, and there was no evidence of planning or motive. We disagree.

"Firing a gun toward a victim at a close range in a manner that could have inflicted a mortal wound had the bullet been on target supports an inference of intent to kill." (*People v. Ramos* (2011) 193 Cal.App.4th 43, 48.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) Known as the "*Anderson* factors," three types of evidence are generally relied upon to support a finding of premeditation and deliberation: (1) planning activity, (2) motive, and (3) manner of killing. (*People v. Welch* (1999) 20 Cal.4th 701, 758 (*Welch*), citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*).)[5] Typically, a finding of premeditation is supported by substantial evidence when there is evidence of all three types, extremely strong evidence of planning, or evidence of motive and manner of killing. (*Welch,* at p. 758.)

Here, the record contains substantial evidence from which a reasonable juror could find intent to kill and premeditation. Thomas's testimony that defendant aimed a gun at Thomas's head and fired at close range in a manner that would have been fatal had the bullet been on target supports an inference of intent to kill. The premeditation finding is supported by extremely strong evidence of planning (it could reasonably be inferred that defendant lured Thomas to a place where he was alone in his car and where defendant

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5 *Welch* was overruled on another point in *People v. Blakeley* (2000) 23 Cal.4th 82, 91.

could get access to a firearm); and manner of attempted killing (at close range, defendant aimed and fired at Thomas). This evidence of planning and manner of attempted killing was sufficient to support the finding of premeditation. That there was conflicting evidence which might also be reconciled with contrary findings does not warrant reversal. (*Virgil, supra*, 51 Cal.4th at p. 1263.)

2. Substantial Evidence of Taking by Force or Fear

Defendant contends the conviction for second degree robbery is not supported by substantial evidence. He argues that Thomas's testimony that defendant took a $100 bill and two $20 bills from Thomas's pocket is inherently improbable and physically impossible because Thomas's foot would necessarily have slipped off the brake if this occurred. First, we note that there was no evidence of where Thomas's foot was when he was found by paramedics – on or off the brake. Second, even assuming Thomas's foot was still on the brake, defendant's assertion that rifling through the pockets of a paralyzed person would necessarily have pushed that person's foot off the brake is not supported by any evidence. Third and finally, any conflicts between the physical evidence and Thomas's testimony were for the jury to resolve. (*Virgil, supra*, 51 Cal.4th at p. 1263.)

3. Substantial Evidence of the Gang Enhancement

Defendant contends the gang enhancement was not supported by substantial evidence. He argues that defendant's membership in the Rolling 40's was insufficient to establish that the crimes were committed for the benefit of the gang and with the specific intent to promote, further or assist in any criminal conduct by gang members. We disagree.

Section 186.22 is a provision of the California Street Terrorism Enforcement and Protection Act of 1988, also known as the STEP Act. (*People v. Castenada* (2000) 23 Cal.4th 743, 744-745.) When the charged offenses occurred in 2009, the statute read in part as follows: "(a) Any person who actively participates in any criminal street gang

with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment . . . . [¶] (b)(1) . . . [A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, [be punished] in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted. . . ."[6]

Violation of section 186.22, subdivision (a) is a substantive offense, the gravamen of which is participation in the gang itself. (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.) Violation of subdivision (b)(1) results in an enhanced sentence. The scienter element of the substantive offense and the enhancement are essentially the same: intent to promote, further, or assist in *any* criminal conduct by gang members. The enhancement has the additional element that the crime to which the enhancement is attached must be gang-related. (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1260 (*Galvez*); see also *People v. Albillar* (2010) 51 Cal.4th 47, 56 (*Albillar*) [distinguishing between the criminal street gang enhancement and substantive offense].) Thus, for the enhancement to be found true, two prongs must be met. First, there must be evidence from which it is reasonable to infer that the underlying felony was "committed for the benefit of, at the direction of, or in association with any criminal street gang." Second, there must be evidence that the defendant had "the specific intent to promote, further, or assist in any criminal conduct by gang members." (*Gardeley, supra,* 14 Cal.4th at pp. 615-616.) At issue here is whether, when a defendant acts alone to shoot and rob a victim, both prongs of the enhancement can be met. We answer the questions in the affirmative.

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6 Section 186.22 has since been amended, but there have been no changes to subdivisions (a) and (b)(1).

a. For the Benefit of Any Criminal Street Gang

The first prong, requiring evidence from which it can reasonably be inferred the underlying felony was gang-related, can be satisfied by expert testimony. "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1)." (*Albillar*, at p. 63; *Vang, supra*, 52 Cal.4th at p. 1048.)

In *Albillar*, each of three gang members (twin brothers and their cousin) took turns raping the victim while the other two held her down. All three were convicted of various sex crimes as well as active participation in a criminal street gang (§ 186.22, subd. (a)).) Section 186.22, subdivision (b)(1) enhancements were also found true. (*Albillar, supra,* 51 Cal.4th at p. 54.) Our Supreme Court found the evidence sufficient to establish that the sex crimes were gang-related in two ways: (1) they were committed in association with the gang and (2) they were committed for the benefit of the gang. (*Id.* at p. 60.) That the crimes were committed for the benefit of the gang was supported by a gang expert's testimony that " '[w]hen three gang members go out and commit a violent brutal attack on a victim, that's elevating their individual status, and they're receiving a benefit. They're putting notches in their reputation. When these gang members are doing that, the overall entity benefits and strengthens as a result of it.' Reports of such conduct 'rais[e] the [] level of fear and intimidation in the community.' " (*Id.* at pp. 63, 71.)

Here, that the crimes benefited a criminal street gang can reasonably be inferred from the evidence that defendant was a member of the Rolling 40's criminal street gang, he committed the crimes in territory claimed by the Rolling 40's, and the gang expert's testimony that crimes such as occurred here are intended to benefit the gang by enhancing its reputation for viciousness, which gang members believe garners respect from the community. Thus, there was substantial evidence of the "benefit of" element of the enhancement.

b. Specific Intent to Promote/Further/Assist

To meet the second prong, there must be evidence from which it is reasonable to infer the defendant committed the underlying offense with the specific intent to promote, further or assist in any criminal conduct by gang members. (§ 186.22, subd. (b); *Albillar, supra*, 51 Cal.4th at p. 64.) " 'In common usage, 'promote' means to contribute to the progress or growth of; 'further' means to help the progress of; and 'assist' means to give aid or support. (Webster's New College Dict. (1995) pp. 885, 454, 68.)" (*People v. Ngoun, supra,* 88 Cal.App.4th at p. 436 [construing § 186.22, subd. (a)].)

The "any criminal conduct by gang members" element of the second prong can be satisfied by evidence that the defendant committed the underlying crime to promote/further/assist in some other crime by gang members. For example, in *People v. Margarejo* (2008) 162 Cal.App.4th 102 (*Margarejo*), the court affirmed a gang enhancement found true on the substantive offense of being a felon in possession of a firearm. The court concluded evidence that, instead of throwing the gun away the defendant gave it to another gang member constituted substantial evidence of the enhancement. The court explained, "The jury fairly could infer his goal was to preserve the gun for the gang's future use." (*Margarejo,* at p. 111.) But there is no requirement that the criminal conduct the defendant specifically intends to promote/further/assist be *other* than that upon which the substantive crime is based. (*Albillar, supra*, 51 Cal.4th at p. 66.) For example, in *People v. Hill* (2006) 142 Cal.App.4th 770 (*Hill*), the court affirmed a gang enhancement on a conviction for making criminal threats, reasoning that the defendant's own criminal conduct in making the criminal threat qualified as "any criminal conduct by gang members." (*Id.* at p. 774.) Evidence from which it is reasonable to infer that the underlying felony was committed to promote/further/assist the gang in the "maintenance of gang respect," can satisfy the promote/further/assist element. (See *People v. Salcido* (2007) 149 Cal.App.4th 356, 368 (*Salcido*) [construing § 186.22, subd. (a)].)

The promote/further/assist element is most often satisfied by evidence that the defendant committed the crime with other known gang members. From evidence the defendant "intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar, supra*, 51 Cal.4th at p. 68.) But it can also be satisfied by evidence that the defendant perpetrated a felony alone or with other non-gang members.[7] Four cases are instructive: *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank S.*); *Hill, supra*, 142 Cal.App.4th 770; *Margarejo, supra,* 162 Cal.App.4th 102; and *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*).

In *Frank S.*, the earliest of the four cases, the court found insufficient evidence to support a gang enhancement on a finding the minor possessed a concealed dirk or dagger where there was no evidence that the minor was in gang territory, had gang members with him or had any reason to expect to use the knife in a gang-related offense. (*Frank S., supra,* 141 Cal.App.4th at p. 1199.) In *Hill,* the making criminal threats conviction and gang enhancement were based on evidence that after a fender-bender, the victim admonished the defendant to look where he was going; the defendant referenced his gang and accused the victim of disrespecting him, then left the scene but returned with a gun and threatened to shoot the victim; a gang expert testified that in gang culture taking action when one feels disrespected is important; defendant's conduct benefited the gang by showing that there were consequences to disrespecting a gang member. The court found the evidence sufficient to establish the promote/further/assist element of the enhancement, reasoning that the defendant was assisting himself in committing the underlying felony. (*Hill, supra,* 142 Cal.App.4th at p. 774.) In *Margarejo,* the court found evidence the defendant gave the gun to another gang member, instead of throwing

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[7] The issue of whether section 186.22 can apply to a gang member acting alone is currently before our Supreme Court. (*People v. Rodriguez*, review granted Jan. 12, 2001, S187680; *People v. Gonzales*, review granted Dec. 14, 2011, S197036; and *People v. Cabrera*, review granted March 23, 2011, S189414.)

it away, was sufficient to support the promote/further/assist element because it showed the defendant's intention to preserve the gun for future use by the gang. (*Margarejo, supra,* 162 Cal.App.4th at p. 111.) And in *Sanchez,* the court found the defendant gang member's commission of a robbery with a non-gang member accomplice satisfied the promote/further/assist element, reasoning that a "gang member who perpetrates a felony by definition also promotes and furthers that same felony." (*Sanchez, supra,* 179 Cal.App.4th at p. 1307.)

Frank S. is distinguishable from this case because here there was evidence the crimes occurred in territory claimed by defendant's gang. As in *Margarejo*, in this case there was evidence from which it could reasonably be inferred that the gun defendant acquired while Thomas waited in the car was a gang gun. Under the reasoning of the court in *Sanchez*, by committing the shooting and robbery, defendant by definition also promoted and furthered those same felonies by a gang member – himself. And under the reasoning of *Salcido, supra*, 149 Cal.App.4th at page 368, from the gang expert's testimony and the evidence that the unusually vicious crimes were committed in broad daylight, in territory claimed by defendant's gang, it is reasonable to infer that defendant committed the crimes to promote/further/assist the gang in the "maintenance of gang respect," fear and intimidation. The absence of evidence that the defendant harbored some personal animosity towards the victim, who by all accounts was a popular figure in the neighborhood, is consistent with an inference that defendant was motivated by a desire to promote and further his own and the gang's reputation for viciousness. Thus, we conclude that substantial evidence supported the finding that defendant committed the crimes for the benefit of the gang, and with the specific intent to promote, further, or assist in any criminal conduct by gang members.

Inasmuch as we affirm the gang enhancement, we need not address defendant's related contention that reversal of the gang enhancement undermines the validity of the convictions on the substantive offenses.

D. Section 654

In a supplemental brief, defendant contends imposition of consecutive sentences on the attempted murder and robbery counts violated section 654. He argues the crimes arose from a single course of conduct and therefore could not be separately punished.[8] We agree.

Section 654, subdivision (a) precludes multiple punishments for a single act or indivisible course of conduct. Whether a course of conduct is divisible and therefore punishable under more than one statute depends on the intent and objective of the defendant. (*People v. Hairston* (2009) 174 Cal.App.4th 231, 240.) If the defendant had multiple or simultaneous objectives, he or she may be punished for each violation in pursuit of each objective. But if one offense was merely the means of accomplishing the other offense, the defendant harbored a single intent and therefore may be punished only once. (*Ibid.*; *Galvez, supra*, 195 Cal.App.4th at pp. 1262-1263.) Whether the defendant had more than one objective is a factual question, trial court determination of which will not be reversed on appeal unless unsupported by the evidence. (*Hairston, supra*, at p. 240.) Because this factual question is not an element of the offense, it may be established by a mere preponderance of the evidence. (See, e.g., *People v. Harris* (2009) 171 Cal.App.4th 1488, 1497-1498 [not true finding on enhancement does not preclude trial court from redetermining the issue for Proposition 36 purposes]; *People v. Lewis* (1991) 229 Cal.App.3d 259, 264 [not true finding on weapon-use enhancement did not preclude trial court from considering weapon use as a reason to impose consecutive sentences].) "We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) If the

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8 Defendant's failure to object on section 654 grounds in the trial court does not constitute a waiver or forfeiture of the issue, because a court acts in excess of its jurisdiction and imposes an unauthorized sentence when it erroneously stays or fails to stay execution of a sentence under section 654. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17; *People v. Bui* (2011) 192 Cal.App.4th 1002, 1013, fn. 15 (*Bui*).)

court makes no express section 654 finding, a finding that the crimes were divisible and thus subject to multiple punishments is implicit in the judgment and must be upheld if supported by substantial evidence. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717.)

Where a murder (or attempted murder) is committed to facilitate a robbery, section 654 generally precludes separate terms for each such "indivisible" offense. (*Bui, supra*, 192 Cal.App.4th at p. 1015.) An exception to this general rule is an act of " 'gratuitous violence against a helpless and unresisting victim,' " which can be viewed as not incidental to the robbery for section 654 purposes. (*Bui,* at p. 1016.) In *Bui*, for example, section 654 did not preclude separate punishment for attempted murder and robbery where the defendant continued to shoot the victim even after he fell to the floor, face down, unable to move. And in *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271-272, section 654 did not preclude separate punishments where the defendant repeatedly hit the feeble, unresisting victim with a two-by-four, using far more force than necessary to achieve the robbery.

Here, implicit in the imposition of separate sentences is a finding that defendant had multiple objectives in shooting and robbing Thomas. We conclude no substantial evidence supports this finding. Immediately after firing a single shot, defendant rifled through Thomas's pockets without saying a word, taking the money he found there. The only reasonable inference from this evidence is that defendant shot Thomas just once to immobilize him so as to accomplish the robbery. In other words, the shooting was incidental to the robbery. That defendant could have used a less violent means to accomplish his objective is not determinative. Because there is no evidence that defendant had multiple criminal intents for counts one and two, sentence on count two must be stayed.

DISPOSITION

The judgment of conviction is reversed only as to imposition of consecutive sentences on counts one and two. The sentence imposed on count two is stayed, the stay to become permanent upon completion of the sentence for attempted murder. As a result,

the total sentence will be reduced to 40 years to life, comprised of 15 years to life for attempted murder, plus a consecutive 25 years to life for the gun use enhancement. The trial court is directed to prepare a new sentencing minute order and a new abstract of judgment reflecting these changes and to send it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

RUBIN, ACTING P. J.

People v. Jovan William Davis

B227566

FLIER, J., Concurring and dissenting opinion

I concur in the lead opinion except I respectfully dissent from part C.3. of the Discussion, in which the lead opinion finds sufficient evidence to support the gang enhancement. I instead conclude that viewing the record in the light most favorable to the prosecution, no rational trier of fact could have found defendant guilty of the gang enhancement beyond a reasonable doubt.

Under Penal Code section 186.22, subdivision (b)(1), the prosecution was required to prove defendant Jovan William Davis's crimes were committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."[1] "[T]he Legislature included the requirement that the crime to be enhanced be committed for the benefit of, at the direction of, or in association with a criminal street gang to make it 'clear that a criminal offense is subject to increased punishment . . . only if the crime is "gang related." ' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).) The enhancement applies "when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*Id.* at p. 68.) Mere gang membership is insufficient to support the gang enhancement. (*People v. Gardeley* (1996) 14 Cal.4th 605, 623 (*Gardeley*); *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 (*Frank S.*).) Because the prosecution failed to present evidence supporting either prong required by section 186.22, subdivision (b)(1), I would reverse the gang enhancement.

1. Benefit of the Gang

The lead opinion concludes that the following constituted substantial evidence defendant's crimes were committed for the benefit of the gang: "defendant was a

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1 All statutory citations are to the Penal Code.

member of the Rolling 40's criminal street gang, he committed the crimes in territory claimed by the Rolling 40's, and the gang expert's testimony that crimes such as occurred here are intended to benefit the gang by enhancing its reputation for viciousness, which gang members believe garners respect from the community." (Lead Opn., *ante*, at p. 13.) This evidence was insufficient.

A. Gang Membership

Our Supreme Court has made clear that gang membership is insufficient to support the gang enhancement. (*Gardeley, supra,* 14 Cal.4th at p. 623.) Instead, "the record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang." (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762, italics omitted (*Martinez*).) The fact that defendant was a member of the Rolling 40's criminal street gang does not show that the attempted murder and robbery were for the benefit of his gang.

B. Territory Claimed by Gang and Community Respect in Territory

The location of defendant's crimes was irrelevant to the gang enhancement unless it supported the inference that the crime was committed for the benefit of the gang. To attempt to link the location to the gang, the lead opinion relies on Officer Flores's testimony that violent crimes enhance a gang's reputation for viciousness, which gang members believe garners respect from the community. Specifically, Flores testified that having a violent gang member benefits the gang because the "gang would like to have the members of its gang that are violent and respected by other people." Flores also testified that gang members commit crimes "within their regular community" because it maintains fear within the community and allows gang members to continue to commit crimes without being caught.

Officer Flores's unsupported testimony does not constitute substantial evidence. (*Gardeley, supra,* 14 Cal.4th at p. 618 ["'Like a house built on sand, the expert's opinion

is no better than the facts on which it is based'"].) Here, no facts in the record support the inference that defendant, who was alone, was acting on behalf of the Rolling 40's criminal street gang, instead of on his own behalf, when he robbed and attempted to murder Thomas. There was no evidence defendant flashed gang signs, announced his gang, used a gun shared among gang members, shared the proceeds of the robbery with the gang, acted at the instruction of the gang, or intimidated anyone in the community during the instant crimes. Even the victim Thomas, who was familiar with gangs and friends with members of the Rolling 40's criminal street gang, did not claim the shooting was related to defendant's gang, testifying instead that "he didn't know" why defendant shot him.

Expert testimony *supported by evidence* that a crime benefits the gang because it instills fear in the community constitutes substantial evidence to support a gang enhancement. For example, in *People v. Margarejo* (2008) 162 Cal.App.4th 102 (*Margarejo*), the court found substantial evidence supported the finding that the defendant's flight from officers was for the benefit of his gang. In that case, as the defendant fled from officers he made gang signs to pedestrians unaffiliated with any gang. (*Id.* at p. 109.) An officer testified that "'the Highland Park gang [uses] intimidation and fear to create an air of terror in their communities, and by letting these people know that despite the fact that he's being pursued by the police, despite the fact that his arrest is imminent, he's still claiming that Highland Park gang is in charge of the area. He's creating an air for the common person, the average person on the street[,] of fear and intimidation . . . .'" (*Ibid.*)

Similarly, in *Albillar*, *supra*, 51 Cal.4th 47, the expert's testimony of gang crimes instilling fear in the community was supported. The expert testified that a gang rape benefitted the gang because "'[m]ore than likely this crime is reported as not three individual[ly] named Defendants conducting a rape, but members of [Southside] Chiques conducting a rape, and that goes out in the community by way of mainstream media or by way of word of mouth. That is elevating [Southside] Chiques' reputation to be a violent, aggressive gang that stops at nothing and does not care for anyone's humanity.'" (*Id.* at

p. 63.) In support of the expert's testimony, there was evidence that the victim did not want to tell anyone about the rape because "'she feared that since the suspects were gang members they [would] come after her family.'" (*Id.* at p. 53.) When she did report the crime, the victim was threatened by another Southside Chiques gang member. (*Ibid.*) Thus, in *Albillar* testimony that the victim was afraid of reporting the crime and other members of the defendants' gang were aware of the crime *and* actually threatened the victim supported the expert's conclusion.

In contrast to *Margarejo* and *Albillar*, there is no evidence here linking defendant's crimes to intimidation of community members. There was no testimony that defendant made gang signs to Thomas or to persons in the community. Thomas was not afraid to report the crime and immediately told police that defendant shot him. Nor was there evidence that defendant's fellow gang members were aware of defendant's crimes or in any manner benefitted from the crimes. This case is distinguishable from *Margarejo* and *Albillar* because Officer Flores's testimony that defendant's crimes were intended to benefit his gang by enhancing his gang's reputation for viciousness, which in turn garnered respect from the community was rank speculation, not substantial evidence.

Several cases support this conclusion. In *People v. Ochoa* (2009) 179 Cal.App.4th 650, 662, the court reversed a gang enhancement finding expert testimony that stealing a car raises gang reputation in the community insufficient to support the enhancement. The court explained that although the expert "testified that the carjacking could benefit defendant's gang in a number of ways, he had no specific evidentiary support for drawing such inferences." (*Ibid.*) In *People v. Ramon* (2009) 175 Cal.App.4th 843, 851, the court found expert testimony that a stolen vehicle could be used to spread fear and intimidation insufficient to support gang enhancement. Similarly here, expert testimony that defendant's vicious crimes create intimidation in the neighborhood was insufficient to support the gang enhancement. (See also *Martinez, supra*, 116 Cal.App.4th at p. 757 [reversing gang enhancement because auto burglary not connected to the defendant's gang activities].) Because the record is devoid of evidence that defendant's crimes were gang-related, the gang enhancement must be reversed. (*Ochoa, supra*, at p. 663 ["[a]n

appellate court cannot affirm a conviction based on speculation, conjecture, guesswork, or supposition"].)

2. Specific Intent to Promote the Gang

The record also lacks support for the second prong of the gang enhancement – that defendant had the specific intent to promote, further, or assist in criminal conduct by gang members. To show intent, the prosecution was required to show defendant "had the specific intent when he committed the [crimes] to 'promote, further or assist' . . . gang members who themselves were engaged in criminal conduct." (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1359.) No evidence supported the inference that defendant was motivated to promote criminal conduct by gang members. Because there was no evidence defendant had the requisite specific intent, the gang enhancement must be reversed. (*Id.* at pp. 1363-1364 [gang expert testimony that robbery furthered gang because violent crime intimidates community insufficient to support gang enhancement]; *Frank S., supra,* 141 Cal.App.4th at p. 1199 [expert testimony without other substantial evidence insufficient to support intent element of gang enhancement].)

None of the cases cited by the lead opinion are analogous. In contrast to *Margarejo, supra*, 162 Cal.App.4th 102, in which the defendant gave his gun to another gang member suggesting an intent to preserve the gun for the gang's further use, here there was no similar evidence. (*Id.* at p. 111.) The distinction is important because the act of giving the gun to a fellow gang member supported the inference that the *Margarejo* defendant sought to promote or assist his gang. He was assisting it by sharing the gun with another gang member for later use. Here, in contrast, there is no evidence to support the inference that defendant sought to promote his gang.

Nor is this case comparable to *People v. Hill* (2006) 142 Cal.App.4th 770, in which the defendant specifically referenced his gang prior to committing a crime. Following criticism from another driver, the defendant referenced his gang and said that he had been "disrespected." (*Id.* at p. 772.) The defendant later returned and threatened the driver whom he believed had disrespected him. (*Ibid.*) Thus, in *Hill*, a reasonable

juror could infer that the defendant's threat was an effort to promote the defendant's gang, which he had specifically referenced. Here, there was no similar evidence that defendant intended to promote his gang when he attempted to kill and robbed Thomas.

People v. Sanchez (2009) 179 Cal.App.4th 1297 is also distinguishable. In *Sanchez*, the court considered the substantive offense of gang participation (§ 186.22, subd. (a)) and rejected the defendant's argument that the promote/further/assist element could not "be satisfied by evidence that he was a direct perpetrator" of a crime. (*Sanchez*, at p. 1308.) Section 186.22, subdivision (a) is a substantive offense; its gravamen is the participation in the gang. (*Albillar, supra*, 51 Cal.4th at p. 55.) The *Sanchez* court held that a direct perpetrator may promote his gang. It did not hold that sufficient evidence supported the gang enhancement when a gang member commits a crime alone under circumstances evincing no intent to promote the gang. Indeed, in *Sanchez*, jurors found the gang enhancement not true. (*Sanchez*, at p. 1301.)

Finally, *Frank S., supra*, 141 Cal.App.4th 1192 cannot be meaningfully distinguished from the present case. In *Frank S.*, a minor was convicted of possessing a dirk or dagger and a gang enhancement was found true. (*Id.* at p. 1194.) The court concluded, "In the present case, the expert simply informed the judge of her belief of the minor's intent with possession of the knife, an issue reserved to the trier of fact. She stated the knife benefits the [defendant's gang] since 'it helps provide them protection should they be assaulted by rival gang members.' However, unlike in other cases, the prosecution presented no evidence other than the expert's opinion regarding gangs in general and the expert's improper opinion on the ultimate issue to establish that possession of the weapon was 'committed for the benefit of, at the direction of, or in association with any criminal street gang . . . .' (§ 186.22, subd. (b)(1).) The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. In fact, the only other evidence was the minor's statement to the arresting officer that he had been jumped two days prior and needed the knife for protection. To allow the expert to state the minor's specific intent for the knife without any other substantial evidence opens the

door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended." (*Frank S.*, at p. 1199.)

The lead opinion endeavors to distinguish *Frank S.* on the ground that here the crimes were committed in territory claimed by the Rolling 40's criminal street gang. But *Frank S.* did not hold that the location of the crime in gang territory standing alone supported the inference that a crime was intended to promote the gang. Instead, *Frank S.* held that an expert's statement with nothing to support it does not constitute substantial evidence. Applying *Frank S.* here, the gang enhancement must be reversed. There was no evidence defendant intended to promote his gang when he robbed and attempted to murder Thomas. Even Officer Flores did not testify to that fact.

It is a truism to say that gang members commit crimes and that nongang-member citizens are intimidated by gangs. The very definition of a gang is an ongoing organization of three or more people who commit crimes. (§ 186.22, subd. (f) [including numerous violent crimes]; see also § 186.22, subd. (e).) However, "[n]ot every crime committed by gang members is related to a gang." (*Albillar, supra,* 51 Cal.4th at p. 60.) Here, the gang enhancement must be reversed because no evidence showed defendant's crimes were for the benefit of his gang or with the specific intent to promote his gang.

3. Prejudice

Defendant's argument that reversal of the gang enhancement also requires reversal of the substantive offenses lacks merit. Assuming for the sake of argument the evidence should have been excluded, defendant fails to show prejudice under any standard. The jury was instructed that the gang evidence could be considered only with respect to the charged enhancement. Thus, jurors could not have considered the evidence in evaluating the substantive offenses. Additionally, the evidence against defendant was overwhelming. Thomas identified defendant, and defendant admitted to having shot Thomas. While defendant claimed the shooting was merely an accident, his defense was exceedingly week in that his testimony of the gun slipping out of his pocket and trying to retrieve it "before it hit the ground and discharged" was inconsistent with the evidence

that Thomas was shot in the neck. Moreover, defendant lied to Thomas about where he was going, fled the scene after the shooting, hid the weapon, and lied to officers when they caught up with him.

FLIER, J.

People v. Davis

B227566

Grimes, J., Concurring and Dissenting

I concur in the Factual and Procedural Background and parts *A.*, *B.*, and *C.* of the Discussion section of the majority opinion. I dissent from part *D.* of the Discussion section insofar as it reverses the consecutive sentencing order. "The applicability of [Penal Code] section 654 depends upon whether a separate and distinct act can be established as the basis of each conviction. . . . It is only when the two offenses are committed by the same act or when that act is essential to both that they may not both be punished." (*In re Chapman* (1954) 43 Cal.2d 385, 389-390.) I do not find it reasonable to conclude defendant's vicious attempt to murder Thomas was only for the purpose of facilitating the robbery. Rather, I find substantial evidence that defendant gratuitously decided to kill Thomas to promote his gang and separately decided to take his money. There was no evidence from which it might be inferred that defendant had to shoot Thomas in the head to immobilize him in order to effectuate the robbery. Thomas was unsuspecting, unresisting, and unarmed. The only reasonable inference from the evidence is that defendant aimed the gun at Thomas's head and shot first, then rifled through Thomas's pockets to rob him, because defendant wanted to kill Thomas in cold blood and he also wanted to take Thomas's money.

The majority conclude in their opinion that there is substantial evidence of intent to kill and premeditation. "Thomas's testimony that defendant aimed a gun at Thomas's head and fired at close range in a manner that would have been fatal had the bullet been on target supports an inference of intent to kill. The premeditation finding is supported by extremely strong evidence of planning (it could reasonably be inferred that defendant lured Thomas to a place where he was alone in his car and where defendant could get access to a firearm); and manner of attempted killing (at close range, defendant aimed

and fired at Thomas). This evidence of planning and manner of attempted killing was sufficient to support the finding of premeditation." (Maj. opn. *ante*, at pp. 10-11.)

The majority also conclude there is substantial evidence that defendant committed these crimes to benefit the Rolling 40's gang "by enhancing its reputation for viciousness, which gang members believe garners respect from the community." (Maj. opn. *ante*, at p. 13.) I cannot reconcile these conclusions, with which I wholeheartedly agree, with the conclusion that defendant harbored a single criminal intent to commit robbery. Our task is to view the evidence in the light most favorable to the judgment and to presume in support of the sentencing order every fact that may be reasonably deduced from the evidence. The trial court's findings may be implied from the sentencing order. When the trial court makes no reference to Penal Code section 654 during sentencing, "the fact that the court did not stay the sentence on any count is generally deemed to reflect an implicit determination that each crime had a separate objective. [Citations.]" (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626-627.) Guided by this standard of review, one must affirm the consecutive sentencing choice.

GRIMES, J.

Jovian W. Davis
NAME
AF0516
PRISON IDENTIFICATION/BOOKING NO.
Pelican Bay State Prison, P.O. BOX 7500
ADDRESS OR PLACE OF CONFINEMENT
Crescent City, CA 95532

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address. If represented by an attorney, provide his name, address, telephone and facsimile numbers, and e-mail address.

EVIDENTIARY HEARING REQUESTED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Jovian William Davis
FULL NAME (*Include name under which you were convicted*)
Petitioner,

v.

DUCART
NAME OF WARDEN, SUPERINTENDENT, JAILOR OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER
Respondent.

CASE NUMBER:
CV 2:13-CV-08179-GW-(CW)
To be supplied by the Clerk of the United States District Court

☑ FIRST AMENDED

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY
28 U.S.C. § 2254

PLACE/COUNTY OF CONVICTION
PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT (*List by case number*)
CV
CV

INSTRUCTIONS - PLEASE READ CAREFULLY

1. To use this form, you must be a person who either is currently serving a sentence under a judgment against you in a California state court, or will be serving a sentence in the future under a judgment against you in a California state court. You are asking for relief from the conviction and/or the sentence. This form is your petition for relief.
2. In this petition, you may challenge the judgment entered by only one California state court. If you want to challenge the judgment entered by a different California state court, you must file a separate petition.
3. Make sure the form is typed or neatly handwritten. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. Answer all the questions. You do not need to cite case law, but you do need to state the federal legal theory and operative facts in support of each ground. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a legal brief or arguments, you may attach a separate memorandum.
5. You must include in this petition all the grounds for relief from the conviction and/or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
6. You must pay a fee of $5.00. If the fee is paid, your petition will be filed. If you cannot afford the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out and sign the declaration of the last two pages of the form. Also, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account at the institution. If your prison account exceeds $25.00, you must pay the filing fee.
7. When you have completed the form, send the original and two copies to the following address:

Clerk of the United States District Court for the Central District of California
United States Courthouse
ATTN: Intake/Docket Section
312 North Spring Street
Los Angeles, California 90012

16

(1) Supporting FACTS: The prosecutor provided insufficient evidence that petitioner intentionally fired the gun, or had the intent to kill acting with premeditation and deliberation. The testimony of the only witness "Thomas Mason" is physically impossible & Inherently improbable being petitioner pulled a gun out and shot him (3RT·908-914) [Jackson V. Virginia (1979) 443 U.S. 307] SEE: ATTACHMENT

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☑ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☑ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☑ No

d. Ground four: A Conviction of Robbery based on insufficient evidence violates the due process as guarenteed by the 5TH & 14TH Amendments.

(1) Supporting FACTS: The evidence was insufficient to support petitioner took property from the victim. Detective clearY testified Mason never alleged robbery until eight days after petitioner was first arrested for attempted murder (4RT· 1281- 1282). [Jackson V. Virginia (1979) 443 U.S. 307] SEE: ATTACHMENT

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☑ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☑ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☑ No

e. Ground five: Petitioner's right to effective assistance of counsel guarenteed by the 6TH Amendment was violated by trial counsel's deficient performance.

(1) Supporting FACTS: Trial Counsel knowingly failed to investigate and fully develop the facts of petitioner's defense failing the adversarial testing to the prosecutors case (3RT·621). Trial counsel failed to object to the many instances of D.A. misconduct (5RT· 2195-2198). [STRICKland V. Washington 466 U.S. 668] SEE: ATTACHMENT

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☑ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☑ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☑ Yes ☐ No

8. If any of the grounds listed in paragraph 7 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons: _____

Declaration of Petitioner Jovian Davis

1.) My name is Jovian W. Davis, I am the petitioner in the current habeas action. I was represented by Counsel William McKinney in Criminal case # BA354723 in the Los Angeles County Superior Court Dept. 116.

2.) Petitioner was convicted by a jury on one count of attempted murder, one count second degree robery, including gun enhancement, and a gang enhancement.

3.) Counsel knowingly failed to investigate the interior of victims Car for gunshot residue which is the actual crime scene, therefore had Counsel Conducted a proper pre-trial investigation upon petitioner's request it would have discredited victim and undermined D.A. entire case being intentional and deliberate when petitioner's defense was accidental. Counsel failed to do an inquiry to make a reasonable decision to forego any pre-trial investigation SEE (3RT·621)

4.) Counsel failed to object to a gun being introduced as evidence when Counsel knew the gun had nothing to do with petitioner's case SEE: (5RT·2428)

5.) Counsel failed to object to the D.A. misconduct when the prosecutor made petitioner get off the stand and hold a gun infront of the jury, although Counsel knew the gun was false evidence to petitioner's case SEE: (5RT·2195-2198)

6.) Petitioner alleges trial counsels performance was deficient when he failed to have the gang evidence bifurcated, especially when the trial judge emphasized on several occasions at trial about having the gang portion of the case bifurcated but Counsel

failed to make the request, SEE: (5RT. 2161-2162; & 2463-2464).

7.) Counsel failed to present its own forensic expert inorder to rebut the prosecutor's theory of this case being intentional.

8.) Had petitioner been provided effective assistance from Counsel, he would not only have received a fair trial but also the outcome would have been different based on counsel having inadmissible prejudicial evidence excluded from trial, and also proper pre-trial investigations would have fully developed the facts to support petitioner's defense of accidental discharge of a firearm, so therefore counsels not constitutionally adequate unless effective.

I am over the age of 18 and if called upon to testify, I can and will testify to the foregoing.

I Jovian william Davis verify under the penalty of perjury under the laws of California that the foregoing is true and correct.

DATE: May 28TH, 2014

Jovian Davis

Jovi D.

person except upon proof sufficient to convince the trier of fact of guilt beyond a reasonable doubt.

B.) People V. Magallanes (2009) 173 cal. App. 4TH 529

Absent a felonious taking of property, the crimes of theft, robbery and carjacking do not occur.

C.) People V. Young (2005) 34 cal. 4TH 1149, 1181

Although the testimony of a single witness is sufficient to establish a fact, that is not the case where as here the testimony is physically impossible or inherently improbable.

Ground Five

Petitioner was denied his 6TH amendment right to effective assistance of counsel due to attorney's lack of pre-trial investigation and omissions during trial including failure to make appropriate objections and file proper adequate motions [STRICKLAND V. WASHINGTON (1984) 466 U.S. 668]

a. Supporting Facts

1.) Trial counsel knowingly failed to have the interior of the victims car examined for gun shot residue, which is the crime scene in this case SEE: (3RT. 621)

2.) Trial counsel failed to have the gang enhancement bifurcated during trial after the judge inquired the gang portion of the case should be bifurcated, SEE: (5RT. 2161-2162); Also SEE: (5RT. 2463-2464).

3.) Trial cansel failed to present it's own forensic expert to fully develop the facts of petitioner's defense and also to prove the gun used at trial was irrelevant to this case SEE: (EXHIBIT·F).

4.) Trial counsel failed to object to D.A. Misconduct, when the D.A. made petitioner get off the stand and hold a actual gun infront of the jury, SEE: (5RT·2195-2198), Trial counsel knew that gun had nothing to do with this case, SEE: (5RT·2104).

5.) Petitioner asserts the many instances of (I.A.C.) had a cumulative effect on the outcome of his trial. Trial counsels decicient performance fell below an objective standard in failing to develop the facts of petitioner's defense SEE: (3RT·621). Counsel failing to bifurcate gang evidence.

6. Supporting Cases

A.) STrickland V. Washington (1984) 446 U.S. 668

Counsels performance fell below an objective standard which presudiced petitioner's case.

B.) Wiggins V. Smith (2003) 123 S.CT. 2523

Trial counsel ineffective in failing to do pre-trial investigation

C.) Sims V. Livesay (1992) C.A.6 TENN 970 F.2d 1575

Counsel provided ineffective assistance in failing to present jury evidence that shooting was accidental

D.) Alcala V. Woodford 334 F.3d 862 (9th cir. 2003)

Errors when considered alone may not violate due process, it may cumulatively produce trial settings that is fundamentally unfair. Also see petitioner's declaration in support of (I.A.C.) claim.

MC-275

SUPREME COURT COPY

Name: Jovian William Davis
Address: Pelican Bay State Prison
P.O. Box 7500 Crescent city
CA, 95532
CDC or ID Number: AF0516

Evidentiary Hearing Requested

Supreme Court of California
(Court)

Jovian William Davis
Petitioner
vs.
Greg Lewis
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. S211750

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal and you are an attorney, file the original and 4 copies of the petition and, if separately bound, 1 set of any supporting documents (unless the court orders otherwise by local rule or in a specific case). If you are filing this petition in the Court of Appeal and you are *not* represented by an attorney, file the original and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2007). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

This petition concerns:

- [x] A conviction
- [ ] A sentence
- [ ] Jail or prison conditions
- [ ] Other *(specify)*:
- [ ] Parole
- [ ] Credits
- [ ] Prison discipline

1. Your name: Jovian William Davis
2. Where are you incarcerated? Pelican Bay State Prison
3. Why are you in custody? [x] Criminal conviction [ ] Civil commitment

Answer items a through i to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon")
Attempted murder, Second Degree Robbery, Gang Enhancement, Gun Enhancement

b. Penal or other code sections: 664/187, 211, 186.22(b)(1), 12022.53

c. Name and location of sentencing or committing court: Los Angeles County Superior Court

d. Case number: BA354723

e. Date convicted or committed: May 4TH, 2010

f. Date sentenced: September 20, 2010

g. Length of sentence: 65 years to life

h. When do you expect to be released?

i. Were you represented by counsel in the trial court? [x] Yes [ ] No *If yes, state the attorney's name and address:*
William McKinney, 3250 Wilshire Blvd. Suite 708
Los Angeles, California 90010

4. What was the LAST plea you entered? *(Check one)*:
[x] Not guilty [ ] Guilty [ ] Nolo contendere [ ] Other:

5. If you pleaded not guilty, what kind of trial did you have?
[x] Jury [ ] Judge without a jury [ ] Submitted on transcript [ ] Awaiting trial

E. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement." *(If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)*

Ineffective Assistance of trial Counsel; Petitioner was denied his 6TH & 14TH amendment rights of effective assistance of trial counsel and due process, due to attorneys lack pretrial investigation and omissions during trial including failure to make appropriate objections and file proper adequate motions.

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and now that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, *who* did exactly *what* to violate your rights at what time *(when)* or place *(where)*. *(If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

(A.) Trial Counsel failed to investigate and present key evidence in petitioners case to support petitioners defense theory of accidental discharge of a firearm. (1.) Counsel knowingly failed to investigate the interior of victims car for "Gun Shot Residue" even after petitioner made the request, which is the crime scene in this instant case, Counsel admitted to the jury in opening statements that there was never any examination done for "Gun Shot Residue" in the interior of the victims car (See: 3RT·621). Had Counsel conducted a proper pretrial investigation and presented jury with the ballistics test it would of had a major impact and effect on the outcome of the jury's verdict, due to the fact this instant case is based upon petitioner's assertion of the shooting being accidental. Victim testified that petitioner sat down in his car and deliberately pulled a gun out pointed it head level and shot him one time (See: 3RT·913-914) ALSO (See: 3RT·940-941).

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

Strickland V. Washington 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)
Sims V. LiveSay (C.A.6 (TENN) 1992) 970 F.2d 1575
Alcala V. Woodford (C.A.9 (Cal.) 2003) 334 F.3d 862
Wiggins V. Smith (U.S. 2003) 123 S.Ct 2527, 539 U.S. 510

Ground 1: I.A.C. continued

Petitioner testified that a firearm accidently discharged in his sweatshirt pocket once as he was entering victims car (See: 5RT-2125) Also (See: 5RT-2187-2188). If counsel had presented such key evidence it would have undermined prosecutions entire case by showing there wasn't any Gunshot residue inside victims car and supporting petitioner's testimony that this instant case was not intentional and nothing more than a accidental discharge of a firearm in petitioner's sweatshirt pocket. (2.) Trial Counsel failed to conduct a meaningful pretrial investigation of physical evidence. Trial Counsel failed to present its own forensic expert to have comparison done on petitioner's sweatshirt and alleged gun to show the gun presented to the jury was not part of crime and irrelevant. When questioning Carole Acosta L.A.P.D. firearm criminalyst expert trial counsel asked "do you think it might be beneficial to take the weapon behind you which is the weapon in question and make a comparison with the actual residue and location of the defect inside the jacket", then M.S. Acosta answered "When I was given the request I was informed that the firearm that was booked in evidence was not (See: 4RT-1548-1549). Had Counsel not relied solely on L.A.P.D. investigation and presented its own experts it would of proved the firearm in this case should have been excluded and not part of trial an appropriate pretrial would have supported any motion to suppress this evidence. Showing jury with a weapon in petitioners hand prejudiced jurors by making him appear to be a threat to society as

Ground 1: I.A.C. Continued

another gang banger with a gun (See: 5RT. 2195-2198).

(B.) Trial Counsel failed to file proper motion during trial and have gang evidence bifurcated. (1.) Petitioners trial counsels unprofessional omissions prejudiced petitioners case when Counsel failed to file the appropriate motion to have evidence bifurcated during trial especially when the trial judge himself made two seperate comments about having such evidence bifurcated, trial judge first stated "that this gang allegation really should be bifurcated and it makes a fair trial somewhat more difficult when the jury has this spector of gang and if the defendant is convicted of Attempted murder and Robbery that he's convicted because he did it and not because he's a gang member (See: 5RT. 2161-2162.) And again trial judge himself stated "that its better to bifurcate the gang portion of the case and see what the case itself can be proven and then take up the gang issue later But that request won't made" (See: 5RT. 2463-2464). The trial record clearly supports petitioners contention that had the appropriate motion to bifurcate the gang evidence been filed by trial counsel the judge would have granted it and this very prejudicial evidence would not have had such a damaging impact on the jury's verdict. If evidence was bifurcated there is a strong probability that jury's verdict would have been different due to the fact that the prosecutors theory was based on the Attempted murder & Robbery motive was for the benefit of petitioners gang.

(C.) Trial Counsel failed to object to false evidence and

Ground 1: I.A.C. continued

also prosecutor misconduct. (1.) Trial counsel knowingly failed to object to allowing a gun which was false evidence, during trial counsel questioned the false evidence but never objected to it (See: 5RT. 2428). (2.) Trial counsels performance was deficient when he failed to object to prosecutor misconduct when the D.A. made petitioner get off the Stand and hold highly prejudicial irrelevant gun which was false evidence infront of the jury (See: 5RT. 2195-2198). Trial Counsels performance violated petitioners due process rights by allowing prosecutors misconduct to prejudice the jury when the D.A. made petitioner get off the Stand and hold a gun in his hand before the jury which ultimately painted a picture in the jury's mind due to the fact that very gun had nothing to do with this instant case what so ever. (D.) Petitioner contends that the many instances of (I.A.C.) had a cumulative error effect on the outcome of his trial. (1.) Trial counsels deficient performance when knowingly failed to investigate the crime scene prejudiced petitioners entire case due to the fact if that key evidence was present during trial it would have showed that petitioners testimany of a firearm accidently discharging in his sweatshirt pocket was true, instead when the victim testified that petitioner sat in his car and intentionally & deliberately pulled a gun out pointed it head level and shot him once. Therefore had trial counsel conducted a proper pretrial investigation of the crime scene it would have undermined prosecutions theory of this entire case being intentional deliberate

Ground 1: I.A.C. continued

Attempted murder, by showing victims testimony not only false but also scientifically impossible due to the fact the investigation would of shown no (Gun Shot Residue) in victims car. (2.) Trial Counsel failed to hire forensic experts to have proper examinations done. Counsel failed to have a comparison done on petitioners sweatshirt and a gun that was false evidence in petitioners trial, if that proper investigation was done it would show that the gun that was introduced at trial was not only false & irrelevant but also prejudicial. (3.) Petitioner argues that trial counsel failed to object to D.A. misconduct when the prosecutor made petitioner get off the Stand and hold a gun that trial counsel knew was false & irrelevant evidence infront of the jury (See: 5RT·2195-2198). (4.) Trial counsel failed to file proper adequate motion during trial to have gang evidence bifurcated. Counsel failed to have gang evidence bifurcated during trial when the trial judge himself made two seperate statements about having the gang evidence bifurcated "But the request was not made by trial counsel" (See: 5RT·2161-2162) AISO (See: 5RT· 2463-2464.) Therefore if Counsel would have filed the motion to have such prejudicial evidence bifurcated petitioners trial would have had a different outcome due to the fact that the prosecutors theory of the Attempted Murder & Robber motive was for the benefit of petitioners gang, also trial judge would have granted petitioners motion since it was the trial judges idea in the first place to have the gang evidence bifurcated.

Ground 1: I.A.C. continued

These errors if not alone had such a prejudicial effect cumulatively as to render petitioners trial fundamentally unfair and a violation of his due process rights. Also petitioner adds that to show the gang evidence prejudiced his trial attatched to this petition is (Exhibit- J) which is one of the jury read backs asking could someone of MR. Davis level revoke MR. Masons "pass" on his own or would he need approval of higher leaders, so therefore the jury based its motive & guilty verdict of attemped murder on petitioners false gang evidence.

7 Ground 2 or Ground _____ (if applicable):

Prosecutorial Misconduct; Petitioners constitutional rights under the 5TH Amendment due Process & 14TH Amendment equal protection was violated by prosecutors misconduct resulting in a unfair trial and constitutional deficiency.

a. Supporting facts:

(A.) Petitioner Contends that prosecutor committed misconduct when knowingly introducing false evidence during trial. (1.) One Could infer from the prosecutors expert witness testimony of Carole Acosta revealed that the prosecutor knew the alleged gun was not the actual gun used in this instant case, when expert testified during trial stating this firearm that was booked in evidence was not (See: 4RT. 1549). (B.) Prosecutor committed misconduct in making petitioner get off the stand and hold a gun that was false evidence infront of the jury. (1.) When prosecutor made petitioner get off the stand and hold a gun infront of jury it caused serious prejudice to petitioners case due to the fact the gun was irrelevant and failed to make any fact of consequence more or less probable also since the jury could have drawn no permissible inference from the petitioner infront of them with a gun in his hand (See: 5RT. 2195-2198). The misconduct not only violated petitioner's due process rights but also tainted the jury which ultimately deprived petitioner of a fundamentally fair trial. (C.) Petitioner contends that in violation of his 5TH & 14TH constitutional clauses the prosecutor

b. Supporting cases, rules, or other authority:

Darden V. Wainwright (1986) 477 U.S. 168
Brecht V. Abrahmson 507 U.S. 619 (1993)
Estelle V. McGuire (1991) 502 U.S. 62
McKinney V. Rees (9TH CIR. 1993) 993 F.2d 1378
Napue V. Illinois 79 S.CT. 1173

Ground 2: D.A. misconduct continued

Committed misconduct in knowingly using false testimony to obtain a tainted conviction. (1.) During trial defense Counsel cross examined the only witness whom is the victim in this case about the inconsistencies of his testimony from preliminary hearing to trial and how his testimony is the exact opposite of what the ballistics and physical evidence came to show, also the victim admitted to how the D.A. explained to him that the ballistic facts are inconsistent with his testimony (See: 3RT. 910-914). Petitioner argues this instant case is not an Identification case but it is based solely on how things occured, therefore it is a prosecutors duty to correct false testimony when it is discovered to be false. Victim testified during prelim & trial that petitioner sat down in his car and deliberately pulled a gun out aimed it at his head and shot one time specifically (See: 3RT. 908-914), even when asked did the gun go off in petitioners jacket pocket as he got into the car, victim stated "never" this was asked during prelim before any ballistics was ever done on petitioners sweatshirt. Now during trial petitioner testified that a firearm accidently discharged in his sweatshirt pocket one time unintentionally as he was entering victims car who was an acquaintance of his (See: 5RT. 2187-2188). The D.A.'s L.A.P.D. criminalist firearm expert M.S. Carole Acosta testified that in her analysis she performed is consistent with a firearm being fired in the pocket of petitioners sweatshirt (See: 4RT. 1545). Attatched to this petition is (exhibits B-G) which

Ground 2: D.A. misconduct continued

clearly supports petitioners testimony of how this case actually occurred, also (exhibits B-G) supports & shows the factual findings of the D.A.'s criminalist firearm expert analysis that petitioners sweatshirt is consistent with a firearm being discharged in the pocket. Victims false testimony is the only evidence against petitioner that this alleged crime happened intentionally & deliberately, therefore based solely on the physical & [redacted] forensic evidence the victims testimony is inherently impossible and by D.A. knowing an allowing this error to go uncorrected petitioner was deprived of his US. Constitutional 14TH amendment Right. Petitioner also contends that the firearm which was false evidence highly prejudiced his case when the D.A. not only introduced the firearm as evidence and made petitioner get of the stand an hold it before the jury but also when the jury was deliberating they summoned to have that firearm brought into the jury room to do an additional analysis of there own, so therefore the jury considered that false evidence to be true, to support this claim (See: Exhibit-I) which are questions from the jury readbacks. (D.) Petitioner argues the prosecutor committed misconduct when she questioned petitioners post miranda silence about not telling anyone about this case until testifying at trial (See: 5RT. 2158-2159), then the trial judge stopped the D.A. and admonished the jury about petitioner not being required to say anything about his case until he testified (See: 5RT. 2158-2159), Then prosecutor continued the misconduct when during closing arguments

PAGE 4.C

Ground 2: D.A. Misconduct continued

when she capitalized several times again to the jury about how petitioner had a whole year to make up this was an accident (See: 6RT. 2739) also again D.A. told jury how petitioner sat there listening to all the people's witnesse's to make up this story to fit for when he would testify (See: 6RT. 2750--2751, also 2740). (E.) Petitioner contends these many instances of prosecutorial misconduct had such a presudicial effect cumulatively as to render petitioners trial fundamentally unfair and a violation of his due process rights.

Ground 3: Ineffective Assistance of Appellate Counsel; Petitioners constitutional rights under the 14TH Amendment equal protection and due process clause was violated when appellate counsel failed to present meritorious claims.

Supporting facts: (A.) Petitioner contends that appellate Counsel failed to raise meritorious claims during opening brief that are clearly supported by the trial record. (1.) Appellate Counsel failed to present petitioners claim of prosecutorial misconduct when prosecution during trial not only introduced false irrelevant evidence but also made petitioner get off the stand and hold a gun infront of the jury which violated petitioners due process rights (see: 5RT. 2195-2198). (2.) Appellate counsel failed to file the many instances of cumulative errors that deprived petioner of a fundamentally fair trial. (3) Apellate Counsel failed to file Ineffective Assistance of trial Counsel that Continuosly occurred during petitioner's trial which ultimately deprived petitioner of a fair trial.

Supporting Cases:
Smith V. Robbins 120 S.Ct 746 (2000)

Ground 4: Cumulative Effect; Petitioner contends that in violation of his due process and equal protection clauses of the 5TH & 14TH Amendments of the U.S. Constitution he received a fundamentally unfair trial caused by the many instances of prosecutorial misconduct, an trial counsels deficient performance also the multiple errors of inadmissible evidence used in petitioners trial.

Supporting Facts: (A.) Trial counsel failed to investigate and present key evidence to support petitioner's defense. Trial counsel knowingly failed to investigate victims car which is the crime scene in this instant case for Gun Shot residue (See: 3RT·621), counsel told the jury there was never any examination done for gun shot residue in the victims car. (B.) Trial counsel failed to file a proper motion to have gang evidence bifurcated especially when the trial judge himself implied on two seperate occasions during trial that its best to have the gang evidence bifurcated because he wants to ensure petitioner has a fair trial but that request was not made (See: 5RT·2161-2162) Also (5RT·2463-2464). (C.) Gang expert exceeded the permissible scope of expert testimony depriving petitioner of his 5TH, 6TH & 14TH amendment rights. During trial gang expert Flores testified that to his experience a pass can be revoked at any time for any reason but thats something that happened with this person his pass was revoked (See 4RT: 1841), trial counsel objected to that being a conclusion and not a part of hypothetical, after trial court sustained officer flores continued

Ground 4: Cumulative Error. continued

to elaborate on a pass being revoked without any evidentiary support (See: 4RT-1841-1842). This testimony clearly offered expert testimony on the ultimate issue of petitioner's intent at the time of the alleged attempted murder and robbery. Petitioner contends this error had substantial and injurious effect and influence in determining jury's verdict, especially when the jury specifically questioned "Can petitioner or someone at his level revoke Mr. Mason's "pass" on his own or would he need approval of higher leaders" (See: Exhibit • J) also petitioner argues that trial court errored in allowing the admission of a gang video at a hood Party that was used as improper impeachment evidence after trial Counsel objected to the irrelevant evidence being more prejudicial than Probative, the Court then agreed the video was "offensive" but that since it was legitimate evidence it was admitted over defense objection (See: 5RT. 2462-2465). Petitioner argues this error had a substantial and injurious effect in determining the jury's verdict based on during closeing arguments the prosecutor capitalized on how petitioner lied during his testimony about certain instances that took place in that video (See: 6RT-2744). (D) Trial Counsel knowingly failed to object to a gun that was presented in petitioners case when Counsel knew the gun was false evidence, Counsel specifically states "The people's position also is then why do they have this .357 as one of the exhibits, are you going to withdraw that as an exhibit" (See: 5RT. 2428). Also trial Counsel failed to object to prosecutorial misconduct when the D.A. made petitioner get off the stand and hold a gun Counsel knew was false evidence

PAGE. 11. G

Ground 4: Cumulative Effect continued

infront of the jury (See: 5RT·2195-2198). (E.) Petitioner Contends the prosecutor committed misconduct when she knowingly used false testimony to obtain a conviction. The prosecutor knew her key witnesses testimony was false and inconsistent with the physical evidence, during trial the victim admitted how the DA discussed with him the fact that the physical evidence came back inconsistent with his testimony (See: 3RT·913-914). Petitioner argues the prosecutor committed misconduct when she made petitioner get off the stand and hold a gun infront of the jury (See: 5RT·2195-2198), the prosecutor knew this gun had nothing to do with petitioners case she even stated to the jury she didn't know if that was the weapon (See: 6RT·2787) therefore the jury still used that gun as evidence when they requested to have it during deliberation (See: Exhibit·I) attached to this petition. Petitioner claims the prosecutor violated his due process when she questioned his post miranda silence and how Petitioner had a whole year to articulate this story for the jury (See: 5RT·2158), the trial judge then stepped in and admonished the jury that petitioner was not ever required to say anything about his case (See: 5RT·2158-2159), then during closing arguments the prosecutor again told the jury how petitioner had a whole year to make up a story to prove this was an accident (See: 6RT·2739), prosecutor again told jury how petitioner sat there and heard all people's witnesses an had over a year to make up this story and how I could make it fit for when I would

Ground 4: Cumulative Effect continued
testify. (See; 6RT. 2750-2751, also 2740).

Supporting Cases:
Alcala V. Woodford, 334 F.3d 862 (C.A. 9. 2003)
U.S. V. Frederick, 78 F.3d 1370 (9TH 1996)
killian V. Poole 282 F.3d 1204 (9TH CIR 2002)
Brecht V. ABrahamson 113 S.CT. 1710 (1993)

8. Did you appeal from the conviction, sentence, or commitment? ☑ Yes ☐ No If yes, give the following information:
   a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"): Second Appellate District Division Eight
   b. Result: Denied c. Date of decision: February 9th, 2012
   d. Case number or citation of opinion, if known: B227566
   e. Issues raised: (1) Insufficient evidence to support Gang Enhancement
      (2) Insufficient evidence to support Convictions
      (3) Admission of expert opinion and video
   f. Were you represented by counsel on appeal? ☑ Yes ☐ No If yes, state the attorney's name and address, if known:
      Tara K. Hoveland, 1034 Emerald Bay Rd #235 SouthLake Tahoe, CA 96150
9. Did you seek review in the California Supreme Court? ☑ Yes ☐ No If yes, give the following information:
   a. Result: Denied b. Date of decision: May 16, 2012
   c. Case number or citation of opinion, if known: S200913
   d. Issues raised: (1) Insufficient evidence to support Gang Enhancement
      (2) Insufficient evidence to support Convictions
      (3) Admission of expert opinion and video
10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:
    Appellate Counsels assistance was ineffective for failing to present claims that are meritorious and clearly established by the court record.
11. Administrative review:
    a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500.) Explain what administrative review you sought or explain why you did not seek such review:
       N/A
    b. Did you seek the highest level of administrative review available? ☐ Yes ☐ No
       Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☑ Yes If yes, continue with number 13. ☐ No If no, skip to number 15.

13. a. (1) Name of court: Los Angeles County Superior Court

(2) Nature of proceeding (for example, "habeas corpus petition"): Habeas Corpus

(3) Issues raised: (a) I.A.C. Trial Counsel, Prosecutorial Misconduct

(b) I.A.C. Appellate Counsel

(4) Result *(attach order or explain why unavailable)*: Denied

(5) Date of decision: 3-29-13

b. (1) Name of court: California Court of Appeals Division 8

(2) Nature of proceeding: Habeas Corpus

(3) Issues raised: (a) I.A.C. Trial Counsel, Prosecutorial Misconduct

(b) I.A.C. Appellate Counsel

(4) Result *(attach order or explain why unavailable)*: Denied

(5) Date of decision: May 6, 2013

c. *For additional prior petitions, applications, or motions, provide the same information on a separate page.*

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

N-A

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

Petitioner was convicted September 20, 2010 and did not receive his trial transcripts until January 2013, and needed time to review transcripts.

16. Are you presently represented by counsel? ☐ Yes ☑ No If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes ☑ No If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

N/A

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 6-24-13

▶ _____
(SIGNATURE OF PETITIONER)

Petitioners Affidavit in Support of habeas Corpus

Petitioner contends that Los Angeles County Superior courts findings labeled (Exhibit. A) are incorrect of ruling that petitioner failed to address other evidence which indicated an intentional act and not an accident. Petitioner argues that the record clearly supports his contention of this case not being intentional and the exact opposite of the victims testimony. In this petition the petitioner submits (exhibits. B-G) that supports his testimony of firearm accidently discharging in his sweatshirt. Had trial Counsel conducted a scientific investigation for "gun shot residue" inside victims car which is the crime scene in this instant case, it would have proved and shown that a firearm was never intentionally pulled out aimed and pointed head level at victim inside of his car and shot just as he testified at trial (See: 3RT- 908-914) Also (See: 3RT- 938-941) So therefore the only evidence of intent in this case is the victims testimony of a gun being intentionally pulled out pointed head level and purposely firing. Now had Counsel provided the scientific evidence it would have not only shown that the victims testimony was false & impossible but also that petitioner never had any intent to harm or attempt to murder the victim due to the fact that petitioner never expressed or implied any malice. Trial Counsel failed to present gun shot residue evidence in petitioners defense which ultimately failed to show that this instant case was not intentional and was a mere accident. Also the Los Angeles County Superior Court failed to address petitioners allegation of prosecutorial misconduct and attached to this affidavit is (exhibit H) which supports and

Shows the false evidence the prosecutor used in petitioners trial.

I, the undersigned say: I am the petitioner in this action. I declare under penalty of persury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true

April 16TH, 2013

Jovian Bu