

No. _____

IN THE
Supreme Court of the United States

JOSE OSVALDO ARTEAGA,

Petitioner,

v.

KEN CLARK, WARDEN

Respondent.

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

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 28 2019

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

JOSE OSVALDO ARTEAGA,

Petitioner-Appellant,

v.

KEN CLARK, Warden,

Respondent-Appellee.

No. 18-56591

D.C. No. 2:08-cv-00599-DDP-KK
Central District of California,
Los Angeles

ORDER

Before: O'SCANNLAIN and RAWLINSON, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 6) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE OSVALDO ARTEAGA,

Petitioner,

v.

KEN CLARK, Warden,

Respondent.

Case No. CV 08-599-DDP (KK)

ORDER DENYING CERTIFICATE OF
APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts reads as follows:

(a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

1 (b) **Time to Appeal.** Federal Rule of Appellate Procedure
2 4(a) governs the time to appeal an order entered under these rules. A
3 timely notice of appeal must be filed even if the district court issues a
4 certificate of appealability.

5 Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue
6 “only if the applicant has made a substantial showing of the denial of a
7 constitutional right.” The Supreme Court has held that this standard means a
8 showing that “reasonable jurists could debate whether (or, for that matter, agree
9 that) the petition should have been resolved in a different manner or that the issues
10 presented were adequate to deserve encouragement to proceed further.” Slack v.
11 McDaniel, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)
12 (internal citation and quotation marks omitted).

13 Here, after duly considering Petitioner’s contentions in support of the claims
14 alleged in the First Amended Petition, the Court finds and concludes that Petitioner
15 has not made the requisite showing with respect to any of those claims.

16 Accordingly, a Certificate of Appealability is DENIED in this case.

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19 Dated: 11-5-18

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HONORABLE DEAN D. PREGERSON
United States District Judge

22 Presented by:

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25 KENLY KIYA KATO
United States Magistrate Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE OSVALDO ARTEAGA,
Petitioner,
v.
KEN CLARK, Warden,
Respondent.

Case No. CV 08-599-DDP (KK)

JUDGMENT

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

IT IS HEREBY ADJUDGED that the First Amended Petition is DENIED
and this action is DISMISSED with prejudice.

Dated: 11-5-18

HONORABLE DEAN D. PREGERSON
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE OSVALDO ARTEAGA,
Petitioner,
v.
KEN CLARK, Warden,
Respondent.

Case No. CV 08-599-DDP (KK)

ORDER ACCEPTING FINAL FINDINGS
AND RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

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

IT IS THEREFORE ORDERED that Judgment be entered (1) denying the
First Amended Petition for a Writ of Habeas Corpus; and (2) dismissing this action
with prejudice.

Dated: 11-5-18

HONORABLE DEAN D. PREGERSON
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE OSVALDO ARTEAGA,
Petitioner,
v.
KEN CLARK, Warden,
Respondent.

Case No. CV 08-599-DDP (KK)

FINAL REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

This Final Report and Recommendation is submitted to Senior United States District Judge Dean D. Pregerson, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

SUMMARY OF RECOMMENDATION

On April 23, 2008, Petitioner Jose Osvaldo Arteaga (“Petitioner”), proceeding *pro se*, filed a First Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his 2003 state conviction for attempted murder. Petitioner asserts claims of insufficient evidence, error in calculating Petitioner’s presentence custody credits, and ineffective assistance of counsel.

1 Because Petitioner’s claims fail on their merits, the Court recommends denying the
2 First Amended Petition.

3 **II.**

4 **PROCEDURAL HISTORY**

5 On June 4, 2003, following a jury trial in the Los Angeles County Superior
6 Court, Petitioner was convicted of attempted murder in violation of sections 187(a)
7 and 664 of the California Penal Code. CT at 105, 108, 128.¹ The jury also found
8 true allegations that the attempted murder was willful, deliberate, and
9 premeditated; Petitioner personally inflicted great bodily injury upon the victim
10

11 ¹ The Court’s citations to Lodged Documents refer to documents lodged in
12 response to the Court’s May 3, 2016 Order, see ECF Docket No. (“Dkt.”) 86, and
13 in support of Respondent’s February 13, 2017 Answer, see Dkt 99. Respondent
numbers the Lodged Documents as follows:

- 14 1. Abstract of Judgment in Los Angeles County Superior Court case number
BA235633
- 15 2. California Court of Appeal opinion on direct review
- 16 3. Petition for Review in California Supreme Court
- 17 4. California Supreme Court order denying review
- 18 5. Petition for Writ of Habeas Corpus in the Los Angeles County Superior
Court
- 19 6. Los Angeles County Superior Court opinion denying habeas relief
- 20 7. Petition for Writ of Habeas Corpus in the California Court of Appeal
- 21 8. Petitioner’s Sworn Declaration in Support of Court of Appeal Habeas
Petition
- 22 9. Motion for Production of Documents in California Court of Appeal
- 23 10. California Court of Appeal order denying habeas relief
- 24 11. Letter from California Supreme Court regarding unsigned habeas corpus
petition
- 25 12. Petition for Writ of Habeas Corpus in the California Supreme Court
- 26 13. Petitioner’s Sworn Declaration in Support of Court of Appeal Habeas
Petition
- 27 14. California Supreme Court order denying habeas relief
- 28 15. District Court Order dismissing federal habeas corpus petition with leave
to amend
16. Clerk’s Transcript (“CT”) in Los Angeles County Superior Court case
number BA235633
17. Supplemental Clerk’s Transcript (“Supp. CT”) in Los Angeles County
Superior Court case number BA235633
18. Reporter’s Transcript (“RT”) in Los Angeles County Superior Court
case number BA235633, four volumes
19. Appellant’s Opening Brief in California Court of Appeal
20. Respondent’s Brief in California Court of Appeal
21. Appellant’s Reply Brief in California Court of Appeal

1 pursuant to section 12022.7(a) of the California Penal Code; Petitioner personally
2 and intentionally discharged a firearm pursuant to section 12022.53(c) of the
3 California Penal Code; Petitioner personally used a firearm pursuant to section
4 12022.53(b) of the California Penal Code; Petitioner personally and intentionally
5 discharged a firearm causing great bodily injury pursuant to section 1202.53(d) of
6 the California Penal Code; and Petitioner committed the attempted murder for the
7 benefit of, at the direction of, and in association with a criminal street gang with the
8 specific intent to promote, further, and assist in criminal conduct by gang members
9 pursuant to section 186.22(b)(1) of the California Penal Code. Id. On March 19,
10 2004, the trial court sentenced Petitioner to twenty-five years to life in state prison.
11 Id. at 127-28.

12 On November 16, 2004, Petitioner appealed his conviction to the California
13 Court of Appeal. Lodg. 19. On June 14, 2005, the California Court of Appeal
14 modified the judgment to award Petitioner additional presentence conduct credits
15 but otherwise affirmed the judgment. Lodg. 2.

16 On July 19, 2005, Petitioner filed a petition for review in the California
17 Supreme Court. Lodg. 3. On August 24, 2005, the California Supreme Court
18 denied review. Lodg. 4.

19 On July 2, 2006, Petitioner filed a habeas corpus petition in the Los Angeles
20 County Superior Court. Lodg. 5. On August 7, 2006, the superior court denied the
21 petition. Lodg. 6.

22 On February 2, 2007, Petitioner filed a habeas corpus petition in the
23 California Court of Appeal. Lodg. 7. On February 22, 2007, the Court of Appeal
24 denied the petition. Lodg. 10.

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1 On June 22, 2007, Petitioner filed a habeas corpus petition in the California
2 Supreme Court. Lodg. 12. On June 3, 2008, the Supreme Court denied the
3 petition. Lodg. 14.²

4 On January 9, 2008, Petitioner, proceeding pro se, constructively filed³ the
5 Petition in this Court. See Dkt. 1. On April 23, 2008, Petitioner filed a First
6 Amended Petition (“FAP”). See Dkt. 10, FAP. On February 13, 2017,
7 Respondent filed an Answer. Dkt. 98.⁴ On April 14, 2017, Petitioner, proceeding
8 with counsel,⁵ filed a Traverse. Dkt. 102.

9 On July 14, 2017, the Court issued its original Report and Recommendation
10 denying the FAP. Dkt. 103. On September 13, 2017, Petitioner filed Objections to
11 the original Report and Recommendation. Dkt. 107. Thus, the Court herein issues
12 a Final Report and Recommendation, addressing Petitioner’s objection in Section
13 VI.B.3.d. and footnote 13.

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19 ² According to the California Supreme Court’s public docket, Petitioner filed
20 two subsequent habeas corpus petitions in the California Supreme Court, which
21 were both summarily denied with citations to In re Robbins, 959 P.2d 311, 18 Cal.
22 4th 770, 780 (Cal. 1998) and In re Clark, 855 P.2d 729, 5 Cal. 4th 750 (Cal. 1993).
23 Petitioner’s May 20, 2010 habeas petition was denied by the California Supreme
24 Court on December 15, 2010 (see California Supreme Court case number
25 S182858), and his November 5, 2010 habeas petition was denied by the California
26 Supreme Court on May 11, 2011 (see California Supreme Court case number
27 S187973).

28 ³ Under the “mailbox rule,” when a pro se prisoner gives prison authorities a
pleading to mail to court, the court deems the pleading constructively “filed” on
the date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010).

⁴ In the intervening time between the FAP and the Answer, the timeliness of
Petitioner’s action was adjudicated in the District Court and the Ninth Circuit
Court of Appeals. See Dkts. 19-89. Ultimately, on December 13, 2016, the District
Court issued an order finding the FAP timely and ordered Respondent to file an
Answer. Dkt. 93.

⁵ On January 23, 2015, the Court appointed the Office of the Federal Public
Defender to represent Petitioner in this matter. Dkt. 56.

1 **III.**

2 **SUMMARY OF FACTS**

3 For a summary of the facts, this Court relies on the California Court of
4 Appeal's opinion, as those facts pertain to Petitioner's conviction:⁶

5 Richard Carlyle (the victim) and Sergio Ulloa were walking to
6 their car near Santa Monica Boulevard and Western Avenue when
7 they were approached by two Latino men, one of whom was short and
8 bald (Arteaga), the other taller, with a darker complexion and more
9 hair. Arteaga and his cohort asked Carlyle and Ulloa, "What's up?
10 Where are you from?" Ulloa said they didn't want any trouble, but
11 Arteaga persisted and asked whether one was the other's
12 "boyfriend." When Carlyle responded affirmatively ("Yeah. So
13 what's the big deal?"), Arteaga pulled a gun from under his shirt and
14 shot Carlyle in the torso five times. While hospitalized, Carlyle helped
15 a sketch artist draw a picture of the shooter, and later identified
16 Arteaga from a photographic lineup, a live lineup, and in court. Ulloa
17 also described the assailants to the police and identified Arteaga from
18 a photo array.

19 Both Carlyle and Ulloa testified at Arteaga's trial. In addition,
20 the People presented the testimony of a gang expert (Detective Frank
21 Flores) who explained that the area of the attack was within the
22 territory of the Mara Salva Trucha Gang, that Arteaga was an active
23 member of M.S., and that M.S. is involved in drug trafficking, robbery,
24 murder, vandalism and assaults with deadly weapons. Detective

25
26 ⁶ Because this factual summary is drawn from the California Court of Appeal's
27 opinion, "it is afforded a presumption of correctness that may be rebutted only by
28 clear and convincing evidence." Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir.
2008). To the extent Petitioner alleges the summary is inaccurate, the Court has
independently reviewed the trial record and finds the summary accurate.

1 Flores opined that, based on the facts of this shooting (including a
2 “smart-aleck” remark by a gay man), it was done for the benefit of or
3 in association with a criminal street gang. When Arteaga was arrested,
4 he was in the same area as the shooting and in the company of a known
5 M.S. member.

6 Lodg. 2 at 2-3.

7 **IV.**

8 **PETITIONER’S CLAIMS FOR RELIEF**

9 Petitioner presents the following claims in the FAP:

- 10 1. Claim One: The evidence was insufficient to support the jury’s finding of
11 premeditation and deliberation;
- 12 2. Claim Two: The evidence was insufficient to support the jury’s finding that
13 Petitioner committed the offense for the benefit of a gang;
- 14 3. Claim Three: Petitioner’s trial counsel was ineffective for failing to object to
15 gang expert testimony;
- 16 4. Claim Four: The trial court erred in calculating Petitioner’s presentence
17 custody credits;
- 18 5. Claim Five: Petitioner’s trial counsel was ineffective for “failing to
19 competently challenge the identification procedures” by which the victims
20 identified Petitioner;
- 21 6. Claim Six: Petitioner’s trial counsel was ineffective for failing to “raise
22 Petitioner’s alibi defense at trial” and the superior court erred on habeas
23 corpus review by failing to address the merits of Petitioner’s claim; and
- 24 7. Claim Seven: Petitioner’s appellate counsel was ineffective for failing to
25 investigate and present facts demonstrating Petitioner’s factual innocence,
26 and for failing to present on direct appeal claims of ineffective assistance of
27 trial counsel.

28

1 See FAP at 24-61.⁷

2 Respondent contends these claims fail on the merits. Dkt. 98, Answer at 7-
3 24. In his Traverse, Petitioner focuses on Claim Six. Dkt. 102, Traverse at 1.

4 V.

5 **STANDARD OF REVIEW**

6 Under the Antiterrorism and Effective Death Penalty Act of 1996
7 (“AEDPA”), a federal court may not grant habeas relief on a claim adjudicated on
8 its merits in state court unless the adjudication:

- 9 (1) resulted in a decision that was contrary to, or involved an
10 unreasonable application of, clearly established Federal law, as
11 determined by the Supreme Court of the United States; or
12 (2) resulted in a decision that was based on an unreasonable
13 determination of the facts in light of the evidence presented in the
14 State court proceeding.

15 28 U.S.C. § 2254(d).

16 “[C]learly established Federal law’ for purposes of § 2254(d)(1) includes
17 only ‘the holdings, as opposed to the dicta, of th[e] [United States Supreme]
18 Court’s decisions’” in existence at the time of the state court adjudication. White
19 v. Woodall, ___ U.S. ___, 134 S. Ct. 1697, 1702, 1706, 188 L. Ed. 2d 698 (2014).
20 However, “circuit court precedent may be ‘persuasive’ in demonstrating what law
21 is ‘clearly established’ and whether a state court applied that law unreasonably.”
22 Maxwell v. Roe, 628 F.3d 486, 494 (9th Cir. 2010).

23 Overall, AEDPA presents “a formidable barrier to federal habeas relief for
24 prisoners whose claims have been adjudicated in state court.” Burt v. Titlow, ___
25 U.S. ___, 134 S. Ct. 10, 16, 187 L. Ed. 2d 348 (2013). The federal statute presents
26 “‘a difficult to meet’ and ‘highly deferential standard for evaluating state-court
27

28 ⁷ The Court refers to the pages of FAP as they are assigned by the Court’s
electronic docketing system.

1 rulings, which demands that state-court decisions be given the benefit of the
2 doubt.’” Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d
3 557 (2011) (citation omitted). On habeas review, AEDPA places the burden on
4 petitioners to show the state court’s decision “was so lacking in justification that
5 there was an error well understood and comprehended in existing law beyond any
6 possibility for fairminded disagreement.” Harrington v. Richter, 562 U.S. 86, 103,
7 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Put another way, a state court
8 determination that a claim lacks merit “precludes federal habeas relief so long as
9 fairminded jurists could disagree” on the correctness of that ruling. Id. at 101.
10 Federal habeas corpus review therefore serves as “‘a guard against extreme
11 malfunctions in the state criminal justice systems,’ not a substitute for ordinary
12 error correction through appeal.” Id. at 102-03.

13 Where the last state court disposition of a claim is a summary denial, this
14 Court must review the last reasoned state court decision addressing the merits of
15 the claim under AEDPA’s deferential standard of review. Maxwell, 628 F.3d at
16 495; see also Berghuis v. Thompkins, 560 U.S. 370, 380, 130 S. Ct. 2250, 176 L. Ed.
17 2d 1098 (2010); Ylst v. Nunnemaker, 501 U.S. 797, 803-04, 111 S. Ct. 2590, 115 L.
18 Ed. 2d 706 (1991).

19 Here, with respect to Claims One through Four, the California Court of
20 Appeal’s June 14, 2005 opinion on Petitioner’s direct appeal stands as the last
21 reasoned decision. See Lodg. 2. With respect to Claims Five, Six,⁸ and a portion of
22 Claim Seven, the Superior Court’s August 7, 2006 opinion on habeas review stands
23 as the last reasoned decision. See Lodg. 6. Accordingly, the Court will review

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25 ⁸ Petitioner argues the Court should review the deficient performance element
26 of Claim Six *de novo*. Traverse at 14. Where the state court “has adjudicated a
27 claim on the merits with a written decision denying relief based on one element of
28 the claim and therefore does not reach the others, federal courts should give §
2254(d) deference to the element on which the state court ruled and review *de*
novo the elements on which the state court did not rule.” Amado v. Gonzalez, 758
F.3d 1119, 1131 (9th Cir. 2014). Here, the Court finds the state court’s decision did
address both elements of Petitioner’s ineffective assistance of counsel claim.

1 these claims under AEDPA’s deferential standard of review for claims
2 “adjudicated on the merits.” 28 U.S.C. § 2254(d); Richter, 562 U.S. at 99.

3 With respect to the remaining portion of Claim Seven, because there is no
4 state court reasoned decision, this Court must perform an “‘independent review of
5 the record’ to ascertain whether the state court decision was objectively
6 unreasonable.” Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003) (citing
7 Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000)).

8 **VI.**

9 **DISCUSSION**

10 **A. CLAIMS ONE AND TWO - SUFFICIENCY OF THE EVIDENCE**

11 In Claim One, Petitioner argues the evidence was insufficient to support the
12 jury’s finding that the attempted murder was premeditated and deliberate. Dkt. 10
13 at 24-25. In Claim Two, Petitioner argues the evidence was insufficient to support
14 the jury’s finding on the gang allegation. Id. at 26-29.

15 **1. Relevant Law**

16 The Fourteenth Amendment’s Due Process Clause guarantees a criminal
17 defendant may be convicted only “upon proof beyond a reasonable doubt of every
18 fact necessary to constitute the crime with which he is charged.” In re Winship,
19 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The Supreme Court
20 announced the federal standard for determining the sufficiency of the evidence to
21 support a conviction in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed.
22 2d 560 (1979). Under Jackson, “[a] petitioner for a federal writ of habeas corpus
23 faces a heavy burden when challenging the sufficiency of the evidence used to
24 obtain a state conviction on federal due process grounds.” Juan H. v. Allen, 408
25 F.3d 1262, 1274 (9th Cir. 2005). The Supreme Court has held “the relevant
26 question is whether, after viewing the evidence in the light most favorable to the
27 prosecution, *any* rational trier of fact could have found the essential elements of the
28 crime beyond a reasonable doubt.” Jackson, 443 U.S. at 319. “Put another way,

1 the dispositive question under Jackson is ‘whether the record evidence could
2 reasonably support a finding of guilt beyond a reasonable doubt.’” Chein v.
3 Shumsky, 373 F.3d 978, 982-83 (9th Cir. 2004) (en banc) (quoting Jackson, 443
4 U.S. at 318).

5 When the factual record supports conflicting inferences, the federal court
6 must presume, even if it does not affirmatively appear on the record, that the trier
7 of fact resolved any such conflicts in favor of the prosecution, and the court must
8 defer to that resolution. Jackson, 443 U.S. at 326. “Jackson cautions reviewing
9 courts to consider the evidence ‘in the light most favorable to the prosecution.’”
10 Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004) (quoting Jackson, 443 U.S. at
11 319). Additionally, “[c]ircumstantial evidence and inferences drawn from it may
12 be sufficient to sustain a conviction.” Walters v. Maass, 45 F.3d 1355, 1358 (9th
13 Cir. 1995).

14 The Jackson standard applies to federal habeas claims attacking the
15 sufficiency of the evidence to support a state conviction. Juan H., 408 F.3d at
16 1274; Chein, 373 F.3d at 983; see also Bruce, 376 F.3d at 957. AEDPA, however,
17 requires the federal court to “apply the standards of Jackson with an additional
18 layer of deference.” Juan H., 408 F.3d at 1274. The federal court must ask
19 “whether the decision of the California Court of Appeal reflected an ‘unreasonable
20 application’ of Jackson and Winship to the facts of this case.” Id. at 1275 & n.13.
21 The federal court must refer to the substantive elements of the criminal offense as
22 defined by state law and look to state law to determine what evidence is necessary
23 to convict on the crime charged. Jackson, 443 U.S. at 324 n.16; Juan H., 408 F.3d
24 at 1275.

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1 **2. Premeditation and Deliberation**

2 **a. Additional Legal Authority**

3 Under California law, the elements of attempted premeditated murder are:
4 (1) the specific intent to kill the alleged victim; (2) a direct but ineffectual act
5 toward accomplishing the intended killing; and (3) a finding that the attempted
6 murder was willful, deliberate, and premeditated. People v. Smith, 124 P.3d 730,
7 734-35, 37 Cal. 4th 733, 739-40 (Cal. 2005). “‘Deliberation’ refers to the careful
8 weighing of considerations in forming a course of action; ‘premeditation’ means
9 thought over in advance.” People v. Koontz, 27 Cal. 4th 1041, 1080 (Cal. 2002).
10 “Premeditation can be established in the context of a gang shooting even though
11 the time between the sighting of the victim and the actual shooting is very brief.”
12 People v. Sanchez, 26 Cal. 4th 834, 849 (Cal. 2001). While not an exhaustive list,
13 three types of evidence commonly used to demonstrate premeditated murder are
14 “planning activity, preexisting motive, and manner of killing.” People v. Solomon,
15 234 P. 3d 501, 517, 49 Cal. 4th 792, 812 (Cal. 2010) (citing People v. Anderson, 447
16 P.2d 942, 70 Cal. 2d 15 (Cal. 1968)).

17 **b. State Court Opinion**

18 The California Court of Appeal denied Petitioner’s claim on direct appeal,
19 explaining Petitioner’s claim was “nothing more than a thinly veiled effort to have
20 [the court] reweigh the evidence.” Lodg. 2 at 4. The state court further held the
21 jury’s finding of premeditation and deliberation was supported by evidence
22 establishing Petitioner was an armed gang member who went to a known gang area,
23 challenged two men by asking where they were from, and then shot one of the men
24 five times because Petitioner felt disrespected. Id.

25 **c. Analysis**

26 Here, there is sufficient evidence to support the jury’s finding that the
27 attempted murder was premeditated and deliberate. Petitioner was a self-admitted
28 member of the Mara Salvatrucha (“MS”) gang. 2 RT at 166, 172, 176-77.

1 Petitioner armed himself with a loaded gun and confronted the victim in MS
2 territory. Id. at 93, 107, 131, 164-65, 229. Petitioner escalated the confrontation by
3 asking the victim for his gang affiliation and whether Ulloa was the victim’s
4 boyfriend. Id. at 99-102, 130-31, 228-29. After the victim gave a “smart aleck”
5 response to Petitioner, Petitioner pulled out his gun and shot the victim at least five
6 times at close-range. Id. at 100-01, 107-09, 232. This evidence is sufficient to
7 support the jury’s verdict under state law. See Solomon, 234 P. 3d at 517, 49 Cal.
8 4th at 812; see also People v. Gonzales, 256 P.3d 543, 576, 52 Cal. 4th 254, 295
9 (Cal. 2011) (holding close-range shooting without any provocation or evidence of
10 struggle supports a finding of premeditation and deliberation); People v. Martinez,
11 7 Cal. Rptr. 3d 49, 58-59, 113 Cal. App. 4th 400, 412-13 (Cal. Ct. App. 2003)
12 (finding sufficient evidence of premeditation where admitted gang member made
13 gang-related comment before placing gun to rival gang member’s head and pulling
14 trigger).

15 **3. Gang Allegation**

16 **a. Additional Legal Authority**

17 Subdivision (b) of section 186.22 of the California Penal Code provides for a
18 sentencing enhancement when the defendant is “convicted of a felony committed
19 for the benefit of, at the direction of, or in association with any criminal street gang,
20 with the specific intent to promote, further, or assist in any criminal conduct by
21 gang members” Cal. Penal Code § 186.22(b)(1).

22 **b. State Court Opinion**

23 The California Court of Appeal denied Petitioner’s claim on direct appeal,
24 finding sufficient evidence to support the gang allegation. The state court first
25 noted Petitioner did not dispute (1) his gang membership; (2) MS qualifies as a
26 criminal street gang; or (3) the crime occurred in MS territory. Lodg. 2 at 5. The
27 state court then detailed the testimony of the gang expert that (1) MS is a violent
28 gang that attempts to dominate its territory through fear and intimidation; (2) MS

1 members are known to confront strangers; (3) MS members demand respect; and
2 (4) the victim’s “smart aleck” response to Petitioner would demand violent
3 retaliation. Id.

4 **c. Analysis**

5 Here, Petitioner specifically challenges the sufficiency of the evidence to
6 prove he committed the attempted murder “for the benefit” of his gang. FAP at
7 11-14. As the California Court of Appeal found, however, the evidence supports
8 the jury’s finding that the shooting benefited Petitioner’s MS gang. Lodg. 2 at 5.

9 The prosecution’s gang expert first testified regarding specific training and
10 experience with the MS gang. 2 RT at 160-65. The expert explained that MS
11 maintains control over its territory through fear and intimidation, and that the gang
12 considers it disrespectful for rival gang members to enter its territory. Id. at 185-86.
13 The expert testified it is common for gang members to check an individual’s gang
14 affiliation by asking, “Where are you from?” Id. at 185-86. The expert also
15 testified that the area where Petitioner committed this crime was within MS
16 territory. Id. at 164-65. The expert confirmed Petitioner’s gang moniker was
17 found in graffiti located within blocks of the crime scene, and Petitioner had been
18 contacted by police in the area in the months before the crime. Id. at 170-71, 174-
19 76.

20 Finally, the expert was asked a hypothetical question based on the facts of
21 this case, and testified that shooting under those circumstances would have
22 benefited the MS gang by boosting the gang’s reputation for violence in the
23 community and furthering its goal of imposing fear and intimidation. Id. at 187-88.
24 Based upon the hypothetical, the expert further testified the shooter would likely
25 feel disrespected by the victim’s “smart-aleck remark,” and would, therefore, need
26 to defend his honor and the reputation of his gang after being disrespected in a
27 public space within the gang’s territory. Id. at 211-12.

28

1 Ultimately, the gang expert’s testimony established (1) the shooting
2 occurred in MS territory; (2) Petitioner was an active MS member; (3) Petitioner
3 would have felt the need to defend the honor of his gang after being disrespected by
4 the victim; and (4) the shooting would have increased the gang’s reputation for
5 violence. This evidence is sufficient to prove the “for the benefit of” element of
6 the gang enhancement. People v. Xue Vang, 262 P.3d 581, 584-90, 52 Cal. 4th
7 1038, 1044–52 (Cal. 2011) (“Expert opinion that particular criminal conduct
8 benefitted a gang is not only permissible but can be sufficient to support the Penal
9 Code section 186.22(b)(1) gang enhancement.”).

10 **4. Habeas Relief Is Not Warranted On Claims One And Two**

11 Hence, after viewing the evidence presented at trial in the light most
12 favorable to the prosecution and presuming the jury resolved all conflicting
13 inferences from the evidence against Petitioner, the Court finds a rational juror
14 “could reasonably have found beyond a reasonable doubt” that the attempted
15 murder was premediated and deliberate, and that Petitioner committed the crime
16 for the benefit of the MS gang. Jackson, 443 U.S. at 325-26. Under these
17 circumstances, the Court of Appeal’s finding of sufficient evidence to support the
18 jury’s findings was not “contrary to” or an “unreasonable application” of “clearly
19 established federal law.” 28 U.S.C. § 2254(d). Thus, habeas relief is not
20 warranted on Claims One and Two.

21 **B. CLAIMS THREE, FIVE, AND SIX - INEFFECTIVE ASSISTANCE**
22 **OF TRIAL COUNSEL**

23 In Claim Three, Petitioner argues his trial counsel rendered ineffective
24 assistance by failing to object to the testimony of the prosecution’s gang expert.
25 FAP at 30-35. In Claim Five, Petitioner argues his trial counsel was ineffective for
26 failing to competently challenge the identification procedures used by police. Id. at
27
28

1 37-48. In Claim Six, Petitioner argues his trial counsel was ineffective for failing to
2 present alibi evidence.⁹ Id. at 50-55.

3 **1. Relevant Law**

4 In order to prevail on a claim of ineffective assistance of counsel, a petitioner
5 must satisfy a two-prong test establishing: (1) counsel’s performance was deficient,
6 and (2) prejudice resulted from the deficient performance. Strickland v.
7 Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A court
8 evaluating an ineffective assistance of counsel claim need not address both
9 components of the test if a petitioner cannot sufficiently prove one of them. Id. at
10 697; see also Thomas v. Borg, 159 F.3d 1147, 1152 (9th Cir. 1998).

11 To prove deficient performance, a petitioner must show counsel’s
12 representation fell below an objective standard of reasonableness. Strickland, 466
13 U.S. at 687-88. “[A] court must indulge a strong presumption that counsel’s
14 conduct falls within the wide range of reasonable professional assistance; that is,
15 the defendant must overcome the presumption that, under the circumstances, the
16 challenged action ‘might be considered sound trial strategy.’” Id. at 689 (“A fair
17 assessment of attorney performance requires that every effort be made to eliminate
18 the distorting effects of hindsight.”); see also LaGrand v. Stewart, 133 F.3d 1253,
19 1271 (9th Cir. 1998) (a reviewing court cannot “second-guess” counsel’s decisions
20 or view them under the “fabled twenty-twenty vision of hindsight”). This
21

22 ⁹ Respondent characterizes Claim Six solely as a due process attack on the
23 state post-conviction proceedings and argues it is not cognizable. Answer at 21.
24 The Court finds Petitioner’s Claim Six adequately alleges ineffective assistance of
25 counsel and any lack of clarity appears to stem from Petitioner’s pro se attempt to
26 argue the state court’s denial of his claim was unreasonable. Further, in his
27 Traverse, Petitioner specifically states he did not intend to raise a separate “due
28 process attack on California’s post-conviction proceedings” and concedes such a
claim would not be cognizable on federal habeas review. Traverse at 11 (citing
Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989)). Nevertheless, to the extent
Petitioner did intend to raise such a due process claim in his pro se FAP, that
portion of Claim Six should be DENIED. See also Ortiz v. Stewart, 149 F.3d 923,
939 (9th Cir. 1998) (“[F]ederal habeas relief is not available to redress alleged
procedural errors in state post-conviction proceedings.”).

1 presumption of reasonableness means not only must the court “give the attorneys
2 the benefit of the doubt,” it must also “affirmatively entertain the range of possible
3 reasons [defense] counsel may have had for proceeding as they did.” Pinholster,
4 563 U.S. at 196.

5 Establishing counsel’s deficient performance does not warrant setting aside
6 the judgment, however, if the error had no effect on the judgment. Strickland, 466
7 U.S. at 691; see also Seidel v. Merkle, 146 F.3d 750, 757 (9th Cir. 1998). Thus, a
8 petitioner must also show prejudice, such that there is a reasonable probability that,
9 but for counsel’s unprofessional errors, the result of the proceeding would have
10 been different. Strickland, 466 U.S. at 694.

11 Moreover, a habeas court’s review of a claim under the Strickland standard
12 is “doubly deferential.” Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411,
13 173 L. Ed. 2d 251 (2009). The relevant question “is not whether a federal court
14 believes the state court’s determination under the Strickland standard was
15 incorrect but whether that determination was unreasonable – a substantially higher
16 threshold.” Id. (citations omitted).

17 **2. Gang Expert Testimony**

18 In Claim Three, Petitioner argues trial counsel should have objected to the
19 gang expert’s testimony as “exceed[ing] the scope of permissible expert witness
20 testimony under evidence code § 802” because the expert offered opinions
21 regarding Petitioner’s knowledge and intent. FAP at 32-33. Alternatively,
22 Petitioner argues his trial counsel should have objected to the expert’s testimony
23 regarding Petitioner’s knowledge and intent as irrelevant and overly prejudicial
24 under sections 350 and 352 of the California Evidence Code. Id. at 33-35.

25 **a. State Court Opinion**

26 The California Court of Appeal rejected Petitioner’s claim on direct review,
27 finding the gang expert’s testimony was permissible under state law and, thus, any
28 objection by Petitioner’s trial counsel would have been overruled. Lodg. 2 at 5-7.

1 **b. Analysis**

2 As stated above, the California Court of Appeal held on direct review that
3 the gang expert’s testimony was permissible under state law, and this Court is
4 bound by the state court’s interpretation of state law. Bradshaw v. Richey, 546
5 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (“We have repeatedly held
6 that a state court’s interpretation of state law, including one announced on direct
7 appeal of the challenged conviction, binds a federal court sitting in habeas
8 corpus.”). Because the testimony was permissible under state law, any objection
9 by Petitioner’s trial counsel would have been meritless and counsel was not
10 ineffective for failing to lodge a meritless objections. Juan H., 408 F.3d at 1273.

11 Hence, the Court of Appeal’s finding that Petitioner’s trial counsel was not
12 ineffective was not “contrary to” or an “unreasonable application” of “clearly
13 established federal law.” 28 U.S.C. § 2254(d). Thus, habeas relief is not
14 warranted on Claim Three.

15 **3. Identification Procedures**

16 In Claim Five, Petitioner argues his trial counsel was ineffective for failing to
17 “competently challenge” the identification procedures used by police to obtain
18 eyewitness identifications of Petitioner as the shooter. FAP at 37-48.

19 **a. Background**

20 On August 14, 2002, while in the hospital and heavily medicated, the victim
21 identified Petitioner’s photograph, in addition to several others, from a gang book
22 compiled by the police department. 3 RT at 283-84. The victim stated the
23 individuals in the photographs “resembled . . . one of the two suspects.” Id. at
24 286. With respect to Petitioner’s photograph, specifically, the victim stated
25 Petitioner looked like “the guy with the shooter.” Id. at 287-88.

26 Five days later, the victim worked with a police sketch artist to develop a
27 sketch of the shooter. 2 RT at 113-14, 121, 135-36. Ultimately, however, the victim
28

1 did not believe the sketch accurately depicted the shooter because the sketch
2 looked to be of a Caucasian person. Id. at 136-37.

3 Based on the belief of Los Angeles Police Officer Frank Flores that Petitioner
4 resembled the individual in the sketch, police included Petitioner’s photograph in a
5 “six pack”, which is an array of six photographs, that was shown to Ulloa on
6 August 20, 2002 and to the victim on August 21, 2002. Id. at 189-91, 195. From
7 this “six pack”, the victim and Ulloa positively identified Petitioner. Id. at 192-95,
8 198. Eyewitness Bayron Peres identified Petitioner as someone who looked
9 familiar, but he told police Petitioner was not the shooter. 3 RT at 316-17, 320.

10 Later, the defense requested that police conduct a live lineup. Id. at 289. On
11 February 5, 2003, the victim positively identified Petitioner at the live lineup. 2 RT
12 at 122-23; 3 RT at 289. Ulloa did not identify anyone from the live lineup. 3 RT at
13 248. At trial, Ulloa testified he believed he “needed to be 100 percent sure” to
14 make an identification at a live lineup, but that Petitioner appeared from that lineup
15 to be “similar to the person who committed the offense.” Id. at 248-50, 264-65.

16 **b. State Court Opinion**

17 The Los Angeles County Superior Court denied Petitioner’s claim on habeas
18 review, finding that any objection to the identification evidence by Petitioner’s trial
19 counsel would have been unsuccessful. Lodg. 6 at 4.

20 **c. Additional Legal Authority**

21 Due process requires suppression of eyewitness identification evidence
22 “when law enforcement officers use an identification procedure that is both
23 suggestive and unnecessary.” Perry v. New Hampshire, 565 U.S. 228, 238-39, 132
24 S. Ct. 716, 181 L. Ed. 2d 694 (2012). A pretrial identification violates due process
25 where: (1) the identification procedure is impermissibly suggestive; and (2) the
26 suggestive procedure gives rise to a “very substantial likelihood of . . .
27 misidentification.” Neil v. Biggers, 409 U.S. 188, 197, 93 S. Ct. 375, 34 L. Ed. 2d
28 401 (1972); see Manson v. Braithwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed.

1 2d 140 (1977) (holding due process challenges to identification procedures are
2 reviewed using Biggers' test).

3 "An identification procedure is suggestive when it emphasizes the focus
4 upon a single individual thereby increasing the likelihood of misidentification."
5 United States v. Carr, 761 F.3d 1068, 1074 (9th Cir. 2014). "To determine if an
6 identification procedure was unduly suggestive, the court must examine the totality
7 of the surrounding circumstances." Id. (citing United States v. Bagley, 772 F.2d
8 482, 492 (9th Cir. 1985)).

9 Even if the identification procedure is unnecessarily suggestive, the court
10 must consider "whether under the 'totality of the circumstances' the identification
11 is reliable." Biggers, 409 U.S. at 199. The factors to be considered in evaluating
12 the reliability of an identification after a suggestive procedure include: (1) the
13 opportunity of the witness to view the criminal at the time of the crime; (2) the
14 witness' degree of attention; (3) the accuracy of the witness' prior description of
15 the criminal; (4) the level of certainty demonstrated by the witness at the
16 confrontation; and (5) the length of time between the crime and the confrontation.
17 Id. at 199-200 (finding no substantial likelihood of misidentification where victim
18 spent up to half an hour with assailant, under adequate artificial light, was able to
19 describe assailant to police in considerable detail, and expressed certainty in the
20 identification, despite a lapse of seven months).

21 The state courts apply the same standard to claims regarding suggestive
22 identification procedures. People v. Cunningham, 25 Cal. 4th 926, 989 (Cal. 2001).

23 **d. Analysis**

24 **i. The Victim's Identification**

25 It appears Petitioner's main argument is that the procedure was suggestive.
26 See FAP at 39-40. However, even if Petitioner could show the identification
27 procedure used on the victim was suggestive, any objection by Petitioner's counsel
28 would have been meritless because the victim's identifications did not give rise to a

1 very substantial likelihood of misidentification under the Biggers factors. First, the
2 victim was face to face with the shooter, just ten to fourteen feet away. 2 RT at
3 102. Second, the victim paid close attention to the shooter as he looked directly at
4 his face and engaged in a verbal confrontation with him. Id. at 103, 106-07. Third,
5 the victim was able to describe the shooter with sufficient detail to allow a sketch
6 artist to draw a picture that alerted Officer Flores to the possibility that Petitioner
7 was the shooter. Id. at 104-06, 189. Fourth, although, while hospitalized and
8 heavily medicated, the victim could only identify Petitioner as “the guy with the
9 shooter,” 3 RT at 287-88, the victim was certain of both his identifications when he
10 was shown the “six pack” and at the live lineup. 2 RT at 198; 3 RT at 289-90, 293.
11 Finally, the victim identified Petitioner as being present at the crime scene just six
12 days after the shooting, and identified Petitioner as the shooter seven days after the
13 first identification. 2 RT at 195; 3 RT at 283-88.

14 Because the Biggers factors weigh in favor of a finding of reliability, any
15 objection by Petitioner’s trial counsel to the victim’s identification evidence would
16 have been rejected. See Biggers, 409 U.S. at 201. Counsel was not ineffective for
17 failing to lodge such a meritless objection. See Juan H., 408 F.3d at 1273; Herrera
18 v. Biter, No. CV 13-7965-SS, 2017 WL 1129915, at *18 (C.D. Cal. Mar. 24, 2017)
19 (holding trial counsel was not ineffective for failing to object to meritless claim of
20 suggestive identification).

21 **ii. Sergio Ulloa’s Identification**

22 Petitioner makes a similar claim that Ulloa’s identification of Petitioner was
23 the result of suggestive police procedures. FAP at 44. Once again, even if
24 Petitioner could show the identification procedure used on Ulloa was suggestive,
25 the majority of Biggers factors weigh against Petitioner’s claim. See Biggers, 409
26 U.S. at 201. First, Ulloa was just five feet from the shooter when the confrontation
27 took place, and the area was well-lit. 2 RT at 232. Second, like the victim, Ulloa
28 paid close attention to the shooter as the verbal confrontation took place. Id. at

1 228-29, 231. Third, Ulloa’s identification of Petitioner from the “six pack” was
2 definitive. Id. at 195. Finally, Ulloa identified Petitioner from the “six pack”
3 within two weeks of the crime. Id. at 191.

4 Because the Biggers factors weigh in favor of a finding of reliability, any
5 objection by Petitioner’s trial counsel to the victim’s identification evidence would
6 have been rejected. See Biggers, 409 U.S. at 201. Counsel was not ineffective for
7 failing to lodge such a meritless objection. See Juan H., 408 F.3d at 1273; Herrera,
8 2017 WL 1129915, at *18.

9 In his Objections, Petitioner cites additional facts that he claims weigh
10 against a finding that either identification was reliable. Dkt. 107 at 2-7. However,
11 the Court finds “fairminded jurists” could conclude the Biggers factors weigh in
12 favor of a finding of reliability under the totality of the circumstances. See Richter,
13 562 U.S. at 103. Hence, the superior court’s finding that Petitioner’s trial counsel
14 was not ineffective for failing to object to the identification procedures was not
15 “contrary to” or an “unreasonable application” of “clearly established federal
16 law.” 28 U.S.C. § 2254(d). Thus, habeas relief is not warranted on Claim Five.

17 **4. Alibi Witness**

18 In Claim Six, Petitioner argues his trial counsel was ineffective for failing to
19 present alibi evidence. FAP at 50-55. Specifically, Petitioner alleges Mauro Ortega
20 could have testified Petitioner was at a different location, the Pan-American
21 nightclub, at the time of the shooting, and that Ortega’s testimony would have been
22 corroborated by Baryon Peres’s statements that Petitioner was not the individual
23 he saw shoot the victim. See FAP at 50-55.

24 **a. Background**

25 After trial, but before sentencing, the trial court held a Marsden hearing at
26 which trial counsel represented his investigator had spoken with a possible alibi
27
28

1 witness before trial.¹⁰ 4 RT 520.¹¹ Nevertheless, trial counsel stated he “felt that
2 [Petitioner’s] strongest case strategically and tactically was the identification
3 defense, and that specifically involved – revolved around witness Bayron Peres.”
4 Id. Petitioner’s trial counsel represented that immediately after Petitioner was
5 found guilty he learned there may have been a videotape from the Pan-American
6 nightclub from the time of the shooting. Id. at 521. However, after speaking with
7 people from the Pan-American nightclub, he concluded such a videotape did not
8 exist. Id. The court then granted Petitioner’s Marsden motion and appointed new
9 counsel for sentencing and to investigate whether evidence existed to support a
10 motion for a new trial. Id. at 523.

11 On March 19, 2004, Petitioner, through his new counsel, filed a motion for
12 new trial. Supp. CT 1-7. At oral argument on Petitioner’s motion for new trial,
13 Petitioner’s new counsel argued trial counsel should have called Ortega as a
14 defense witness. Id. at 1-4; 4 RT at 531. Petitioner’s counsel offered an unsworn
15 statement by Ortega in support of the motion. Supp. CT at 5-7. In the statement,
16 Ortega states that “sometime around 10:30 pm [on August 9th, 2002] [Ortega] was
17 picked up by [Petitioner] and another guy named Turtle in Turtle’s car.” Id. at 5-
18 6. The three individuals arrived at a nightclub located at Temple and Rampart
19 streets “at approximately 10:30 pm.” Id. at 6. “Around midnite or thereabouts”
20 Ortega punched someone in the club who was saying “bad things” to Petitioner
21 and a “fight started involving 5 members of Temple gang.” Id. The security guard
22 attempted to break up the fight by using mace, and “as a result,” Ortega,
23 Petitioner, and Turtle “left the club and went back to their car where they
24
25

26 ¹⁰ It appears from trial counsel’s description of the proposed alibi testimony
27 that the witness he was referring to was Mauro Ortega. 4 RT at 420-21. However,
Ortega is not referred to by name at the Marsden hearing.

28 ¹¹ The transcript of the Marsden hearing is attached to Petitioner’s superior
court habeas petition. See Lodg. 5 at 31-39.

1 entered.” Id. “All three men drove back to Mauro’s home where he got out of the
2 vehicle and entered his home.” Id. at 6-7.

3 The trial court noted Ortega was not present in court at the time of the new
4 trial motion and the statement Ortega provided to the defense was not under oath.
5 4 RT at 534-35, 538-39. Petitioner’s counsel stated he was unable to serve Ortega
6 with a subpoena to appear at the hearing because he no longer lived at the address
7 where he had previously been interviewed. Id. at 534-35. Finding it was unable to
8 weigh the credibility of the alibi evidence, the trial court denied the new trial
9 motion. Id. at 538-89.

10 **b. State Court Opinion**

11 The Los Angeles County Superior Court denied Petitioner’s ineffective
12 assistance of counsel claim finding trial counsel “was not ineffective for failing to
13 call Ortega as an alibi witness.”¹² Lodg. 6 at 2. The court noted Ortega said they
14 left the bar that was “a few miles” from the scene of the shooting at “about
15 midnight,” and the shooting occurred “about midnight.” Id. The court found
16 “[g]iven the close proximity of the locations, and the lack of precision for the times
17 given by Ortega and for the shooting, it is far from impossible for petitioner to have
18 been in the location to shoot the victim, even if Ortega’s statement is to be
19 believed.” Id. at 2-3. The court went on to find even if trial counsel was deficient
20 for failing to call Ortega, Petitioner failed to show he suffered actual prejudice as a
21 result, particularly because “the alibi was not especially strong in light of the other
22 evidence of distance and timing.” Id. at 3.

23 ///

24 ///

25 _____
26 ¹² To the extent there is any ambiguity about whether the court ruled on the
27 deficient performance element, in finding appellate counsel’s performance was not
28 deficient the court stated “appellate counsel’s decision not to raise the issue on
appeal was *also* an appropriate tactical choice.” Lodg. 6 at 3 (emphasis added).
Therefore, it is clear the state court addressed both elements of the Strickland
analysis.

1 **c. Analysis**

2 First, trial counsel’s performance was not deficient. At the Marsden
3 hearing, trial counsel stated he made a strategic choice to forego the alibi defense in
4 favor of misidentification. 4 RT at 520. At trial, Petitioner’s counsel presented the
5 testimony of Bayron Peres that Petitioner was not the shooter or the shooter’s
6 companion. 3 RT at 316-17. In theory, an alibi defense could support a
7 misidentification defense. Here, however, the alibi defense would place Petitioner
8 within a few miles of the shooting at the approximate time of the shooting, rather
9 than the misidentification defense which could leave a jury assuming Petitioner was
10 nowhere near the scene.

11 Petitioner argues trial counsel could not have made a tactical decision about
12 Ortega’s credibility unless counsel interviewed Ortega himself. Traverse at 21-23.
13 However, even if Ortega was wholly credible and willing to testify, his testimony
14 would place Petitioner near the scene of the shooting, in a car able to travel quickly,
15 at the approximate time of the shooting. Therefore, counsel did not have to assess
16 Ortega’s credibility to make the tactical decision to rely on Peres’s
17 misidentification testimony.

18 Ultimately, Petitioner has not overcome the “strong presumption that
19 counsel’s conduct falls within the wide range of reasonable professional
20 assistance.” Strickland, 66 U.S. at 689. Trial counsel considered an alibi defense,
21 but made a tactical decision not to have Ortega testify. Even if this Court in
22 hindsight might have chosen a different trial tactic, this Court cannot “second-
23 guess” counsel’s decision and must give trial counsel the “benefit of the doubt.”
24 Id.; Pinholster, 563 U.S. at 196. Therefore, this Court cannot conclude trial
25 counsel was deficient for failing to present an alibi defense. Accordingly, the state
26 court’s finding counsel’s tactical decision not to present a weak alibi defense was
27 not deficient performance, was not “contrary to” or an “unreasonable
28 application” of “clearly established federal law.” 28 U.S.C. § 2254(d).

1 Second, even if Ortega had been called as a witness and been willing to
2 testify,¹³ a fair-minded jurist could conclude there was no reasonable probability the
3 result of the trial would have been different in light of the timing and proximity of
4 the proposed alibi. Petitioner argues Ortega provides a firm alibi because Ortega’s
5 statement “does not state that they took a detour anywhere else after being kicked
6 out of the club.” Traverse at 25. However, Ortega says Petitioner and Turtle
7 picked him up at 10:30 and they arrived at the club around 10:30. Supp. CT at 5-6.
8 Therefore, Ortega could not have lived very far from the club and, similarly, not
9 very far from the shooting. Thus, when they left the club around midnight and
10 dropped Ortega at his home, Turtle and Petitioner were still in a car within a few
11 miles of the shooting at the approximate time of the shooting.

12 Petitioner argues the failure to present the alibi defense was particularly
13 prejudicial because the case against Petitioner was “relatively weak.” Traverse at
14 23-24. Petitioner points out there was no physical evidence linking Petitioner to
15 the crime and the prosecution’s case rested entirely on the identification of
16 Petitioner by the victim and Ulloa. Traverse at 23. However, the victim and Ulloa
17 identified Petitioner as the shooter both before and during trial and, as discussed
18 above, the identifications were not unreliable. See Biggers, 409 U.S. at 199. In
19 addition, the victim provided information sufficient for the police sketch artist to
20 produce a sketch that officer Flores recognized as resembling Petitioner. 2 RT at
21 189-91, 195. Moreover, the gang expert testimony provided evidence of a motive
22 for the shooting by a known gang member in known gang territory. Accordingly,
23 the state court’s finding Petitioner was not prejudiced by the failure to call Ortega
24 to testify that Petitioner was nearby the scene of the shooting at the approximate
25

26 ¹³ In his Objections, Petitioner attaches a Declaration from Ortega in which
27 Ortega states his would testify consistently with the prior written statement. Dkt.
28 107, Ex. 1. Even without Ortega’s Declaration, the Court assumed the truth of the
written statement in the original Report and Recommendation. Therefore, the
addition of the declaration does not affect the Court’s analysis.

1 time of the shooting,¹⁴ was not “contrary to” or an “unreasonable application” of
2 “clearly established federal law.” 28 U.S.C. § 2254(d).

3 Hence, the state courts’ denial of Petitioner’s ineffective assistance of trial
4 counsel claims was not “contrary to” or an “unreasonable application” of “clearly
5 established federal law.” 28 U.S.C. § 2254(d). Thus, habeas relief is not
6 warranted on Claims Three, Five, or Six.

7 **C. CLAIM FOUR - CUSTODY CREDITS**

8 In Claim Four, Petitioner argues the trial court erred in calculating his
9 presentence conduct credits. FAP at 20-21. However, in his Traverse, Petitioner
10 concedes Claim Four is moot because the California Court of Appeal granted relief
11 on this claim on direct appeal. See Traverse at 23; Lodg. 2 at 8; see also Kittel v.
12 Thomas, 620 F.3d 949, 951 (9th Cir. 2010) (as amended) (“The Constitution
13 limits the jurisdiction of the federal courts to live cases and controversies, and as
14 such, federal courts may not issue advisory opinions.”). Moreover, Petitioner is
15 not entitled to relief on Claim Four, because his claim is based in state law only.
16 Estelle v. McGuire, 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (“In
17 conducting habeas review, a federal court is limited to deciding whether a
18 conviction violated the Constitution, laws, or treaties of the United States.”).
19 Thus, habeas relief is not warranted on Claim Four.

20 **D. CLAIM SEVEN - INEFFECTIVE ASSISTANCE OF APPELLATE**
21 **COUNSEL**

22 In Claim Seven, Petitioner argues his appellate counsel was ineffective for
23 (a) failing to investigate Petitioner’s factual innocence, and (b) failing to present
24
25

26 ¹⁴ Even if the state court unreasonably found Ortega’s testimony could be
27 easily rejected by a jury because he was a gang member, the court ultimately found
28 Petitioner was not prejudiced because, taking Ortega’s statement as true,
“Ortega’s alibi was not especially strong in light of the other evidence of distance
and timing.” See Lodg. 6 at 3.

1 Petitioner's claims on direct appeal regarding his trial counsel's failure to present
2 alibi evidence and to challenge the eyewitness identifications. FAP at 56-60.

3 **1. State Court Opinion**

4 The Los Angeles County Superior Court rejected Petitioner's claim on
5 habeas review finding that, because Petitioner failed to show his trial counsel was
6 ineffective for failing to present alibi evidence or challenge the eyewitness
7 identifications, he could not establish appellate counsel was ineffective for failing to
8 raise such claims on appeal. Lodg. 6 at 3.

9 **2. Relevant Law**

10 The Strickland standard also applies to claims of ineffective assistance of
11 appellate counsel based on the failure of counsel to raise particular claims on
12 appeal. Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756
13 (2000). A habeas petitioner must show that, but for appellate counsel's failure to
14 raise the omitted claim(s), there is a reasonable probability that the petitioner
15 would have prevailed on appeal. In the absence of such a showing, neither
16 Strickland prong is satisfied. See Pollard v. White, 119 F.3d 1430, 1435-37 (9th Cir.
17 1997); Miller v. Keeney, 882 F.2d 1428, 1434-35 (9th Cir. 1989).

18 Appellate counsel does not have a constitutional duty to raise every non-
19 frivolous issue requested by a defendant. Jones v. Barnes, 463 U.S. 745, 751, 103 S.
20 Ct. 3308, 77 L. Ed. 2d 987 (1983). Counsel "must be allowed to decide what issues
21 are to be pressed." Id. The weeding out of weaker issues is widely recognized as
22 one of the hallmarks of effective appellate advocacy, and counsel is not deficient for
23 failing to raise a weak issue. Miller, 882 F.2d at 1434. There is, of course, no
24 obligation to raise meritless arguments on a client's behalf. See Strickland, 466
25 U.S. at 687-88 (requiring a showing of deficient performance as well as prejudice).

26 **3. Analysis**

27 First, Petitioner has not presented any evidence, other than his own self-
28 serving assertions, that evidence of his factual innocence exists. Such unsupported

1 allegations are insufficient to prove ineffective assistance of counsel. Cf. Dows v.
2 Wood, 211 F.3d 480, 486 (9th Cir. 2000) (rejecting claim of ineffective assistance
3 of trial counsel for failing to investigate alibi witness where the only evidence the
4 witness existed and would have been helpful to the defense was defendant’s own
5 self-serving statement). Accordingly, the state court’s denial of this portion of
6 Petitioner’s ineffective assistance of appellate counsel claim was not objectively
7 unreasonable. Himes, 336 F.3d at 853.

8 Second, as discussed in sections VI.B.3 and 4, Petitioner’s claims that his
9 trial counsel was ineffective for failing to present alibi evidence and that the police
10 employed a suggestive lineup procedure, lack merit. Thus, the claims would not
11 have resulted in a more favorable decision on appeal and do not support
12 Petitioner’s claim of ineffective assistance of appellate counsel. Jones v. Ryan, 691
13 F.3d 1093, 1101 (9th Cir. 2012) (holding failure of appellate counsel to raise
14 meritless argument cannot be prejudicial); Wildman v. Johnson, 261 F.3d 832, 840
15 (9th Cir. 2001) (holding that “appellate counsel’s failure to raise issues on direct
16 appeal does not constitute ineffective assistance when appeal would not have
17 provided grounds for reversal”). Accordingly, the state court’s denial of this
18 portion of Petitioner’s ineffective assistance of appellate counsel claim was not
19 “contrary to” or an “unreasonable application” of “clearly established federal
20 law.” 28 U.S.C. § 2254(d).

21 Thus, habeas relief is not warranted on Claim Seven.

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VII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) accepting this Final Report and Recommendation; (2) denying the FAP; and (3) dismissing this action with prejudice.



Dated: October 11, 2017

HONORABLE KENLY KIYA KATO
United States Magistrate Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE OSVALDO ARTEAGA,
Petitioner,
v.
JENNIFER BARRETO, Warden,
Respondent.

Case No. CV 08-599-DDP (KK)

ORDER ACCEPTING FINDINGS
AND RECOMMENDATION OF
UNITED STATES MAGISTRATE
JUDGE

Pursuant to Title 28 of the United States Code, section 636, the Court has reviewed the First Amended Petition for a Writ of Habeas Corpus, the records on file, and the Report and Recommendation of the United States Magistrate Judge. No objections have been filed. The Court accepts the findings and recommendation of the Magistrate Judge that the First Amended Petition is timely.

IT IS THEREFORE ORDERED that Respondent shall file an Answer to the First Amended Petition within thirty (30) days of the date of this order.

Dated: December 13, 2016


HONORABLE DEAN D. PREGERSON
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE OSVALDO ARTEAGA,
Petitioner,
v.
JENNIFER BARRETO, Warden,
Respondent.

Case No. CV 08-599-DDP (KK)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE

This Report and Recommendation is submitted to the Honorable Dean D. Pregerson, United States District Judge, pursuant to Title 28 of the United States Code, section 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

SUMMARY OF RECOMMENDATION

On January 9, 2008, Petitioner Jose Osvaldo Arteaga (“Petitioner”) constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody, pursuant to Title 28 of the United States Code, section 2254 (“Petition”). ECF Docket No. (“dkt.”) 1. On April 20, 2008, Petitioner constructively filed a First Amended Petition (“FAP”). Dkt. 10. On April 17, 2009, Judgment was entered dismissing the action as untimely. Dkt. 36. On

1 September 26, 2013, the Ninth Circuit Court of Appeal reversed and remanded the
2 Judgment in part, ordering the District Court to hold an evidentiary hearing to
3 determine whether Petitioner would be entitled to statutory tolling that would
4 render the action timely. Dkt. 51.

5 For the reasons set forth below, the Court recommends finding the FAP
6 timely and ordering Respondent to file an Answer to the FAP.

7 **II.**

8 **PROCEDURAL HISTORY**

9 **A. STATE COURT PROCEEDINGS**

10 On June 4, 2003, following a jury trial in California Superior Court for the
11 County of Los Angeles, Petitioner was convicted of attempted murder in violation
12 of California Penal Code sections 664 and 187(a). See Lodgment Nos. (“lodg.”) 1,
13 2.¹ The jury also found true allegations Petitioner had (1) personally inflicted great
14 bodily injury, (2) personally used and personally discharged a firearm causing great
15 bodily injury, and (3) acted for the benefit of a criminal street gang. Id. On March
16 19, 2004, Petitioner was “sentenced to state prison for a term of 25 years to life.”
17 Lodg. 2 at 2.

18 Petitioner appealed his conviction to the California Court of Appeal. See
19 lodg. 2. On June 14, 2005, the California Court of Appeal issued a reasoned
20 decision modifying the presentence conduct credits awarded to Petitioner, but
21 otherwise affirming Petitioner’s conviction. Id.

22 On July 20, 2005, Petitioner filed a petition for review in the California
23 Supreme Court. Lodg. 3. On August 24, 2005, the California Supreme Court
24 summarily denied Petitioner’s petition for review. Lodg. 4.

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¹ The Court’s citation to Lodgments (“lodg.”) refer to the documents lodged by
28 Respondent in support of Respondent’s October 2, 2008 Motion to Dismiss. Dkts.
21, 86.

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V.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an order: (1) accepting the findings and recommendations in this Report; (2) finding the FAC timely; and (3) requiring Respondent to file an Answer addressing the merits of the FAP.

Dated: August 23, 2016



HONORABLE KENLY KIYA KATO
United States Magistrate Judge

S153738

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JOSE OSVALDO ARTEAGA on Habeas Corpus

The petition for writ of habeas corpus is denied.

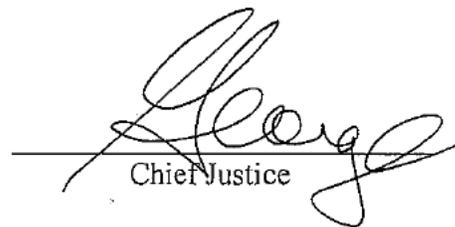
Werdegar, J., was absent and did not participate.

**SUPREME COURT
FILED**

JAN - 3 2008

Frederick K. Ohlrich Clerk


Deputy


Chief Justice

ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re

JOSE OSVALDO ARTEAGA,

on

Habeas Corpus.

B196552

(L.A.S.C. No. BA235633)

ORDER

COURT OF APPEAL - SECOND DIST.

FILED

FEB 22 2007

JOSEPH A. LANE

Clerk

Deputy Clerk

THE COURT*:

The petition for writ of habeas corpus, filed February 6, 2007, has been read and considered.

The petition is denied.

Spencer

*SPENCER, P.J.

Vogel

VOGEL, J.

ROTHSCHILD, J., Dissenting.

I would deny without prejudice to petitioner's filing a new petition in the superior court that includes petitioner's own declaration regarding the file on his appeal.


ROTHSCHILD, J.

motion after hearing. Petitioner was then sentenced to life in prison plus 25 years for the firearms enhancement.

Petitioner appealed and his conviction was affirmed by unpublished opinion in 2005. The issues raised on appeal were insufficiency of the evidence of premeditation and deliberation, and of the gang allegation.

This habeas petition raises two separate claims: (1) that trial counsel was ineffective for failing to present an alibi defense at trial, and that appellate counsel was ineffective for not raising the issue on appeal; and (2) that the eyewitness identifications in this case were the product of unconstitutional police coercion. For the reasons discussed below, both claims lack merit.

II. FAILURE TO RAISE ALIBI DEFENSE

Petitioner did not call an alibi witness at trial, nor did he testify that he was at a different location at the time of the shooting. The issue was first raised in the new trial motion, which included a statement from the proposed alibi witness, Mauro Ortega. Ortega stated that he and the defendant were members of the same gang; that on the night of the incident, they went to a bar a few miles away from the one involved in the shooting; that they arrived at 10:30 p.m.; and that they left the bar after a fight had broken out, about midnight. The shooting of which defendant was convicted occurred about midnight.

Trial counsel was not ineffective for failing to call Ortega as an alibi witness. To begin with, Ortega's statement does not even provide a firm alibi for the event. He states that they left the bar shortly after midnight, while the shooting a short distance away also occurred sometime around midnight. Given the close proximity of the locations, and the lack of precision

for the times given by Ortega and for the shooting, it is far from impossible for petitioner to have been in the location to shoot the victim, even if Ortega's statement is to be believed.

In order for counsel to have been constitutional ineffective, the two part test of *Strickland v. Washington*, 466 U.S. 668 (1984), must be satisfied. Petitioner must show not only that trial counsel's performance was deficient but also that he suffered actual prejudice, i.e., a reasonable probability that a more favorable outcome would have been obtained if the alibi evidence had been presented. *Id.*, at 694. The burden of showing such prejudice rests with the petitioner. *People v. Karis* (1988) 46 Cal. 3d 612.

Even assuming that the decision not to call Ortega and instead to focus on the weakness of the identification evidence constituted deficient performance, petitioner has nevertheless failed to show that he suffered actual prejudice as a result. Ortega was a fellow gang member whose purported alibi testimony could have been easily rejected by a jury for that reason. *See e.g., People v. Ruiz* (1998) 62 Cal. App. 4th 234. Moreover, his appearance would have been additional evidence of petitioner's gang membership. Finally, as noted before, Ortega's alibi was not especially strong in light of the other evidence of distance and timing.

Since trial counsel's failure to present an alibi defense at trial was not ineffective, it follows that appellate counsel's decision not to raise the issue on appeal was also an appropriate tactical choice.

III. DEFECTIVE EYEWITNESS IDENTIFICATION

Petitioner argues that the identification of him as the shooter by the victim Carlyle and witness Ulloa was the product of impermissibly suggestive police procedures which should not have been admitted at trial. This is based on the fact that a police artist initially did a sketch; thereafter witnesses participated in photographic and live lineups. The identification issue is

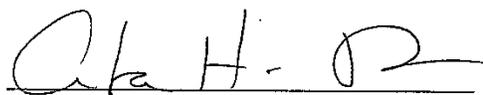
raised for the first time in the petition; it was not mentioned in either the new trial motion or on appeal.

Although not framed as an ineffective assistance claim, that appears to be the core of petitioner's argument. In general, the admissibility of evidence may not be litigated on habeas corpus. *In re Harris* (1993) 5 Cal. 4th 813, 826. Thus, the allegation that the identifications at trial were tainted and therefore inadmissible may not be raised in this proceeding.

Accordingly, the only claim that *could* be raised here is that trial counsel was ineffective in not moving to exclude the identifications. But petitioner's argument falls far short of demonstrating that such motion would have been successful, again failing to meet his burden of showing both a deficient performance and actual prejudice.

For the foregoing reasons, the petition is denied in its entirety. The clerk is directed to serve a copy of this order on the petitioner.

DATED: August 7, 2006



ANITA H. DYMANT
Judge of the Superior Court

194,CLOSED,REOPENED

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA (Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:08-cv-00599-DDP-KK**

Jose Osvaldo Arteaga v. Ken Clark
Assigned to: Judge Dean D. Pregerson
Referred to: Magistrate Judge Kenly Kiya Kato
Related Case: [2:16-cv-07702-DDP-KK](#)
Case in other court: 9th CCA, 09-56004
9th Circuit, 18-56591
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 01/30/2008
Date Terminated: 11/05/2018
Jury Demand: None
Nature of Suit: 530 Habeas Corpus
(General)
Jurisdiction: Federal Question

Petitioner

Jose O Arteaga

represented by **Michael David Weinstein**
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ATTORNEY TO BE NOTICED

V.

Respondent

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Warden

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TERMINATED: 12/18/2015

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TERMINATED: 02/07/2014

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Email: xiomara.costello@doj.ca.gov

ATTORNEY TO BE NOTICED

| Date Filed | # | Docket Text |
|------------|-------------------|-------------|
| 01/24/2008 | 4 | |

| | | |
|------------|--------------------|--|
| | | DECLARATION in Support of REQUEST to Proceed In Forma Pauperis filed by petitioner Jose Osvaldo Arteaga. (pcl) (Entered: 02/08/2008) |
| 01/30/2008 | 1 | PETITION for Writ of Habeas Corpus by a Person In State Custody (28:2254) Case assigned to Judge Dean D. Pregerson and referred to Magistrate Judge Rosalyn M. Chapman. (Filing fee \$ 5 DUE.), filed by Petitioner Jose Osvaldo Arteaga. (et) (Entered: 02/02/2008) |
| 01/30/2008 | 2 | NOTICE OF REFERENCE TO A U.S. MAGISTRATE JUDGE. Pursuant to the provisions of the Local Rules, the within action has been assigned to the calendar of Judge Dean D. Pregerson and referred to Magistrate Judge Rosalyn M. Chapman to consider preliminary matters and conduct all further matters as appropriate. The Court must be notified within 15 days of any change of address. (et) (Entered: 02/02/2008) |
| 02/04/2008 | 3 | MINUTES OF IN CHAMBERS ORDER held before Judge Rosalyn M. Chapman : Order Dismissing Petition with Leave to Amend. If petitioner wishes to pursue this action, he is ORDERED to file, w/in 30 days from the date of this ORDER. (SEE MINUTES FOR DETAILS). (kca) (Entered: 02/04/2008) |
| 03/03/2008 | 5 | EX PARTE APPLICATION FOR ENLARGEMENT OF TIME Pursuant to FRCP 6(b) filed by petitioner Jose Osvaldo Arteaga.(pcl) (Entered: 03/04/2008) |
| 03/05/2008 | 6 | MINUTES OF IN CHAMBERS ORDER held before Judge Rosalyn M. Chapman : Order GRANTING extension of time. Petitioner is granted until 04/01/07 to file his First Amended Petition. (kca) (Entered: 03/05/2008) |
| 03/28/2008 | 7 | APPLICATION for Second Extension of Time to Amend Petition 1 filed by petitioner Jose Osvaldo Arteaga. (pcl) (Entered: 04/01/2008) |
| 04/01/2008 | 8 | MINUTES OF IN CHAMBERS ORDER held before Judge Rosalyn M. Chapman : Order Granting Extension of Time to May 1, 2008 to file an Amended Petition. (kca) (Entered: 04/01/2008) |
| 04/01/2008 | 9 | MINUTES OF IN CHAMBERS ORDER held before Judge Rosalyn M. Chapman : Order Granting Extension of Time to 05/01/08 for Petitioner to file his First Amended Petition. (kca) (Entered: 04/07/2008) |
| 04/23/2008 | 10 | FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS by a Person in State Custody against Respondent Ken Clark 1 filed by petitioner Jose Osvaldo Arteaga. (pcl) (Entered: 05/05/2008) |
| 05/06/2008 | 11 | MINUTES OF IN CHAMBERS ORDER held before Judge Rosalyn M. Chapman : Order to Show Cause or Answer Petition for Writ of Habeas Corpus. Respondent has 60 days to file an Answer or Motion to Dismiss. If petitioner desires to file a reply to the Answer or Motion to Dismiss, he shall do so w/in 60 days. (SEE MINUTES FOR FURTHER DETAILS). (kca) (Entered: 05/06/2008) |
| 05/06/2008 | 12 | MINUTES OF IN CHAMBERS ORDER held before Judge Rosalyn M. Chapman : Procedural Order (SEE MINUTES FOR DETAILS). (kca) (Entered: 05/06/2008) |

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| 06/26/2008 | 13 | EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File MOTION TO DISMISS OR AN ANSWER filed by Respondent Ken Clark. (Attachments: # 1 Proposed Order to File a Motion to Dismiss or an Answer)(James, Nancy) (Entered: 06/26/2008) |
| 06/27/2008 | 14 | ORDER by Magistrate Judge Rosalyn M. Chapman: IT IS HEREBY ORDERED that the application 13 is GRANTED and that Respondent shall have to and including August 4, 2008, within which to file a Motion to Dismiss or an Answer. (pcl) (Entered: 06/30/2008) |
| 07/28/2008 | 15 | Second EXPARTE APPLICATION for Extension of Time to File A Motion to Dismiss or An Answer filed by Respondent Ken Clark. (Attachments: # 1 Proposed Order To File A Motion to Dismiss or An Answer)(James, Nancy) (Entered: 07/28/2008) |
| 07/29/2008 | 16 | ORDER by Magistrate Judge Rosalyn M. Chapman: IT IS HEREBY ORDERED that the APPLICATION 15 is GRANTED and that Respondent shall have to and including September 3, 2008, within which to file a Motion to Dismiss or an Answer. (pcl) (Entered: 07/31/2008) |
| 08/27/2008 | 17 | Third EXPARTE APPLICATION for Extension of Time to File A Motion to Dismiss or An Answer filed by Respondent Ken Clark. (Attachments: # 1 Proposed Order To File A Motion to Dismiss or An Answer)(James, Nancy) (Entered: 08/27/2008) |
| 08/27/2008 | 18 | ORDER by Magistrate Judge Rosalyn M. Chapman: IT IS HEREBY ORDERED that the application is GRANTED and that Respondent shall have to and including October 3, 2008, within which to file a Motion to Dismiss or an Answer. (pcl) (Entered: 08/27/2008) |
| 10/02/2008 | 19 | NOTICE OF MOTION AND MOTION to Dismiss First Amended Petition for Writ of Habeas Corpus; Memorandum of Points and Authorities; [Declaration of Mary Hildreth Concurrently Filed] filed by Respondent Ken Clark. (James, Nancy) (Entered: 10/02/2008) |
| 10/02/2008 | 20 | DECLARATION of Mary Hildreth In Support of Respondent's Motion to Dismiss MOTION to Dismiss First Amended Petition for Writ of Habeas Corpus; Memorandum of Points and Authorities; [Declaration of Mary Hildreth Concurrently Filed] 19 filed by Respondent Ken Clark. (Attachments: # 1 Exhibit A (Re Declaration of Mary Hildreth In Support of Respondent's Motion to Dismiss))(James, Nancy) (Entered: 10/02/2008) |
| 10/02/2008 | 21 | NOTICE OF LODGING filed <i>Notice of Lodging of Documents</i> re MOTION to Dismiss First Amended Petition for Writ of Habeas Corpus; Memorandum of Points and Authorities; [Declaration of Mary Hildreth Concurrently Filed] 19 (James, Nancy) (Entered: 10/02/2008) |
| 10/21/2008 | 22 | MOTION for Court Order directing respondent to furnish all documents lodged with the court in support of motion to dismiss filed by petitioner Jose Osvaldo Arteaga. (ca) (Entered: 10/22/2008) |
| 10/24/2008 | 23 | MINUTES (IN CHAMBERS) ORDER held before Magistrate Judge Rosalyn M. Chapman: DENYING MOTION for Order for directing respondent to |

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| | | furnish all documents lodged with the court in support of motion to dismiss, 22 . (ca) (Entered: 10/24/2008) |
| 12/09/2008 | 24 | REPORT AND RECOMMENDATION issued by Magistrate Judge Rosalyn M. Chapman. Re Petition for Writ of Habeas Corpus (2254) 1 (Attachments: # 1 Proposed Order Adopting Report and Recommendation, # 2 Proposed Judgment) (jy) (Entered: 12/09/2008) |
| 12/09/2008 | 25 | NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Rosalyn M. Chapman and Lodging of Proposed Judgment and Order. Objections to R&R due by 1/2/2009 (jy) (Entered: 12/09/2008) |
| 12/12/2008 | 26 | NOTICE OF DISCREPANCY AND ORDER: by Magistrate Judge Rosalyn M. Chapman, ORDERING Petitioner's Opposition to Respondent's motion to Dismiss Habeas Petition as Untimely with Memorandum of Points and Authorities in Support Thereof submitted by Petitioner Jose Osvaldo Arteaga received on 12/12/2008 is not to be filed but instead rejected. Denial based on: No Proof of Service. (Attachments: # 1 Petitioner's Opposition) (jy) (Entered: 12/12/2008) |
| 01/07/2009 | 28 | PETITIONER'S OBJECTIONS To Magistrate's Report and Recommendations (Issued) 24 Denying Petitioner's Habeas Corpus Petition filed by Petitioner Jose Osvaldo Arteaga. (Attachments: # 1 Exhibit B, # 2 Exhibit E, # 3 Exhibit G)(jy) (Entered: 01/12/2009) |
| 01/07/2009 | 29 | NOTICE OF DISCREPANCY AND ORDER: by Magistrate Judge Rosalyn M. Chapman, ORDERING Exhibits A, C, D and F to Petitioner's Objections to Magistrate's Report and Recommendation submitted by Petitioner Jose Osvaldo Arteaga received on 1/7/2009 is not to be filed but instead rejected. Denial based on: already part of file. (Attachments: # 1 Exhibits) (jy) (Entered: 01/12/2009) |
| 01/09/2009 | 27 | NOTICE OF DOCUMENT DISCREPANCIES AND ORDER by Magistrate Judge Rosalyn M. Chapman ORDERING Petitioner's Objections to Magistrate Report and Recommendation Denying Petitioner's Habeas Corpus Claim submitted by Petitioner Jose Osvaldo Arteaga received on 1/7/2009 to be filed and processed; filed date to be the date the document was stamped Received but not Filed with the Clerk. (jy) (Entered: 01/12/2009) |
| 01/12/2009 | 34 | FINAL REPORT AND RECOMMENDATION issued by Magistrate Judge Rosalyn M. Chapman. Re: Petition for Writ of Habeas Corpus (2254) 1 (jy) (Entered: 04/17/2009) |
| 01/15/2009 | 30 | NOTICE OF DISCREPANCY AND ORDER: by Magistrate Judge Rosalyn M. Chapman, ORDERING Notice of Motion and Motion for Reconsideration of Denial of Habeas Corpus on Timeliness Grounds Due to Court Not Receiving and Examining Petitioner's Pleadings submitted by Petitioner Jose Osvaldo Arteaga received on 1/15/2009 is not to be filed but instead rejected. Denial based on: Document not served on Respondent. (Attachments: # 1 Motion) (jy) (Entered: 01/16/2009) |
| 01/29/2009 | 31 | (STRICKEN FROM THE RECORD PER ORDER OF 1/29/2009) NOTICE AND MOTION for Reconsideration of Denial of Habeas Corpus on Timeliness |

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| | | Grounds Due to Court Not Receiving and Examining Petitioner's Pleadings filed by Petitioner Jose Osvaldo Arteaga. (jy) Modified on 1/29/2009 (jy). (Entered: 01/29/2009) |
| 01/29/2009 | 32 | ORDER by Magistrate Judge Rosalyn M. Chapman: the documents listed below were improperly filed for the following reasons: The motion is premature. No judgment has been entered yet.; therefore, the following document(s) shall be stricken from the record and shall not be considered by the Court: MOTION for Reconsideration 31 . (jy) (Entered: 01/29/2009) |
| 03/03/2009 | 33 | NOTICE AMENDED NOTICE OF APPEARANCE filed by Respondent Ken Clark. (Hill, Noah) (Entered: 03/03/2009) |
| 04/17/2009 | 35 | ORDER ADOPTING REPORT AND RECOMMENDATIONS by Judge Dean D. Pregerson for Report and Recommendation (Final) 34 ; IT IS ORDERED that (1) the Final Report and Recommendation is approved and adopted; (2) the Final Report and Recommendation is adopted as the findings of fact and conclusions of law herein; and (3) Judgment shall be entered dismissing the petition and the action as untimely. (jy) (Entered: 04/17/2009) |
| 04/17/2009 | 36 | JUDGMENT by Judge Dean D. Pregerson, Pursuant to the Order of the Court adopting the findings, conclusions, and recommendations of United States Magistrate Judge Rosalyn M. Chapman, IT IS ADJUDGED that the petition for writ of habeas corpus and the action are dismissed as untimely (MD JS-6, Case Terminated). (jy) (Entered: 04/17/2009) |
| 05/28/2009 | 37 | PETITIONER'S REQUEST FOR CERTIFICATE OF APPEALABILITY PURSUANT TO 28 U.S.C. 2253 AFTER HABEAS CORPUS DENIAL to the 9th CCA filed by petitioner Jose Osvaldo Arteaga. Appeal of Judgment, 36 Filed On: 4/17/09; Entered On: 4/17/09; Certificate of Appealability Pending; cc: Jose Osvaldo Arteaga; Attorney General. (car) Modified on 6/3/2009 (car). (Entered: 06/03/2009) |
| 05/28/2009 | 38 | SWORN DECLARATION of Jose Osvaldo Arteaga in support of Delayed Filing of Notice of Appeal/Certificate of Appealability re Notice of Appeal to 9th Circuit Court of Appeals, 37 filed by Petitioner Jose Osvaldo Arteaga. (dmap) (Entered: 06/03/2009) |
| 06/29/2009 | 39 | NOTIFICATION by Circuit Court of Appellate Docket Number 09-56004, 9th CCA regarding Notice of Appeal to 9th Circuit Court of Appeals, 37 as to Petitioner Jose Osvaldo Arteaga. (cbr) (Entered: 07/01/2009) |
| 09/09/2009 | | ORDER DENYING CERTIFICATE OF APPEALABILITY approved by District Judge.(jy) (Entered: 09/09/2009) |
| 09/09/2009 | 40 | Order by Judge Dean D. Pregerson denying Certificate of Appealability re Notice of Appeal to 9th Circuit Court of Appeals, 37 . (dmap) (Entered: 09/11/2009) |
| 09/11/2009 | 41 | CERTIFICATE OF RECORD Transmitted to USCA re Notice of Appeal to 9th Circuit Court of Appeals, 37 filed by Jose Osvaldo Arteaga. (dmap) (Entered: 09/11/2009) |
| 09/11/2009 | 42 | |

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| | | RECORD ON APPEAL sent to Circuit Court re: The record consists of One (1) brown folder of State Lodged Documents re Notice of Appeal to 9th Circuit Court of Appeals, 37 . (dmap) (Entered: 09/11/2009) |
| 03/14/2011 | 43 | ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 37 filed by Jose Osvaldo Arteaga, CCA # 09-56004. A review of the record indicates that although appellant's request for a certificate of appealability was not filed or delivered to prison officials within 30 days from entry of the April 17, 2009, judgment, appellant filed a declaration in support of delayed filing of notice of appeal/certificate of appealability on May 28, 2009. The district court properly construed petitioner's request for a certificate of appealability as a notice of appeal, see Tinsley v. Borg, 895 F.2d 520, 523 (9th Cir. 1990), but did not address appellant's declaration. Instead, the district court characterized the notice of appeal as untimely and ruled that appellant had not made the requisite showing to warrant a certificate of appealability. We construe appellant's declaration as a timely motion for an extension of time to file a notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(5). See Fed. R. App. Pro. 4(a)(5); Woods v. Carey, 525 F. 3d 886, 889-90(9th Cir. 2008)(a document filed pro se is to be liberally construed). Accordingly, this appeal is remanded to the district court for the limited purpose of ruling on appellant's May 28, 2009, request for an extension of time to appeal. The district court is requested to electronically serve a copy of its decision on this court at its earliest convenience. The Clerk shall serve this order directly on the chambers of the district court. Order received in this district on 3/14/2011. (lr) (Entered: 03/15/2011) |
| 03/17/2011 | 44 | ORDER by Judge Dean D. Pregerson, Granting Motion for Extension of Time to File Notice of Appeal re Notice of Appeal to 9th Circuit Court of Appeals, 37 , Declaration (non-motion) 38 (lr) (Entered: 03/18/2011) |
| 10/24/2011 | 45 | ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 37 filed by Jose Osvaldo Arteaga CCA # 09-56004. Appellant's submission of a completed Form CJA 23 is construed as a motion to proceed in forma pauperis. So construed, the motion is granted. Appellant's motion for appointment of counsel in this appeal from the denial of a 28 U>S>C. 2254 petition for writ of habeas corpus is granted. SEE THE ORDER FOR THE REST OF THE DETAILS. Order received in this district on 10/24/2011. (dmap) (Entered: 10/26/2011) |
| 12/03/2011 | 46 | APPEAL RECORD RETURNED from 9th CCA RE: Appeal Record Sent to USCA (A-26) 42 . Received 1 yellow envelope of state lodged documents. (cbr) (Entered: 12/06/2011) |
| 03/28/2012 | 47 | ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 37 filed by Jose Osvaldo Arteaga, CCA # 09-56004. The appellant's unopposed motion for a 2nd extension of time in which to file the opening brief is granted. [See document for further information]. Order received in this district on 3/28/12. (car) (Entered: 03/30/2012) |
| 05/24/2012 | 48 | ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 37 filed by Jose Osvaldo Arteaga CCA # 09-56004. The appellant's unopposed motion for a third extension of time in which to file the opening |

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| | | brief is granted. The opening brief is due June 28, 2012; the answering brief is due July 30, 2012; and the optional reply brief is due within 14 days after service of the answering brief. Order received in this district on 5/24/2012. (dmap) (Entered: 05/29/2012) |
| 09/14/2012 | 49 | ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 37 filed by Jose Osvaldo Arteaga, CCA # 09-56004. The appellee's unopposed motion for a 2nd extension of time in which to file the answering brief is granted. The answering brief is due 10/15/12, and the optional reply brief is due within 14 days after service of the answering brief. Order received in this district on 9/14/12. (car) (Entered: 09/14/2012) |
| 10/11/2012 | 50 | ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 37 filed by Jose Osvaldo Arteaga CCA # 09-56004. The appellee's unopposed motion for a third extension of time in which to file the answering brief is granted. The answering brief is due November 14, 2012. The optional reply brief is due within 14 days after service of the answering brief. Order received in this district on 10/11/2012. (dmap) (Entered: 10/16/2012) |
| 09/26/2013 | 51 | MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 37 CCA # 09-56004. The decision of the district court is reversed and remanded in part; affirmed in part. Mandate received in this district on 9/26/2013. (dmap) (Entered: 09/27/2013) |
| 11/18/2013 | 52 | TEXT ONLY ENTRY: The state lodged documents are ready for destruction. The Records Department will destroy the documents lodged by AG (14) days from the date of this entry. Please notify the Records Department no later than (14) days from the date of this entry if the documents should not be destroyed. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (mo) TEXT ONLY ENTRY (Entered: 11/18/2013) |
| 02/07/2014 | 53 | NOTICE OF REASSIGNMENT of California Attorney General Office Eric E. Reynolds on behalf of respondent Ken Clark. California Attorney General Nancy G James terminated. (Attorney Eric E Reynolds added to party Ken Clark(pty:res))(Reynolds, Eric) (Entered: 02/07/2014) |
| 09/03/2014 | 54 | NOTICE OF REASSIGNMENT OF CASE due to Unavailability of Judicial Officer filed. The previously assigned Magistrate Judge is no longer available. Pursuant to directive of the Chief Magistrate Judge and in accordance with the rules of this Court, the case has been returned to the Clerk for reassignment. This case has been reassigned to Magistrate Judge Kenly Kiya Kato for all proceedings in accordance with General Order 05-07. Case number will now read as CV 08-00599 DDP(KK). (m) (Entered: 09/03/2014) |
| 09/04/2014 | 55 | MINUTE ORDER IN CHAMBERS by Judge Dean D. Pregerson: Pursuant to the Judge's directive, this case is ordered re-opened and the MANDATE 51 is referred to the Magistrate Judge for all proceedings. (Case reopened. MD JS-5.) (lc) (Entered: 09/04/2014) |
| 01/23/2015 | 56 | MINUTE ORDER (IN CHAMBERS) by Magistrate Judge Kenly Kiya Kato, re USCA Mandate 51 Court orders the following: 1. Counsel, through the Office of the Federal Public Defender, is appointed to represent petitioner; 2. |

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| | | Counsel for petitioner shall serve and file a Notice of Appearance no later than February 6, 2015, notifying the Court of the name of the attorney who will have principal charge of the case, together with the address where the attorney may be served, and the attorneys telephone and fax number; 3. In addition, the parties are ordered to meet and confer within 10 (ten) days of the date of this order to establish a timetable to gather all the evidence that will be presented at the evidentiary hearing. The parties will, thereafter, file a joint proposed briefing schedule no later than February 13, 2015. If the Office of the Federal Public Defender is unable to accept this appointment, the Court shall be so notified no later than January 30, 2015. (dts) (Entered: 01/23/2015) |
| 01/27/2015 | 57 | Notice of Appearance or Withdrawal of Counsel: for attorney Xiomara Costello counsel for Respondent Ken Clark. Adding Xiomara Costello as attorney as counsel of record for Respondent for the reason indicated in the G-123 Notice. Filed by Respondent Xiomara Costello. (Attorney Xiomara Costello added to party Ken Clark(pty:res))(Costello, Xiomara) (Entered: 01/27/2015) |
| 02/03/2015 | 58 | NOTICE OF APPEARANCE OR REASSIGNMENT of Deputy Public Defender Emily Jean Beaghan on behalf of Petitioner Jose Osvaldo Arteaga. Filed by Petitioner Jose Osvaldo Arteaga. (Attorney Emily Jean Beaghan added to party Jose Osvaldo Arteaga(pty:pet))(Beaghan, Emily) (Entered: 02/03/2015) |
| 02/13/2015 | 59 | Joint STIPULATION for Order to approve the joint briefing schedule filed by Petitioner Jose Osvaldo Arteaga. (Attachments: # 1 Proposed Order)(Beaghan, Emily) (Entered: 02/13/2015) |
| 04/02/2015 | 60 | MINUTE (IN CHAMBERS) ORDER by Magistrate Judge Kenly Kiya Kato, On or before May 4, 2015, the parties shall file a joint stipulation regarding discovery, pursuant to Local Rules 37-2.1 and 83-17.7(f). The joint stipulation shall specify what discovery, including depositions, the parties have agreed upon; and will set forth each item of discovery in dispute. With respect to the agreed upon depositions, the parties shall provide the name of the witness, along with a proffer as to what relevant subject areas the witness is anticipated to address. With respect to the items in dispute, the parties shall strictly follow the requirements of Local Rule 37-2. (dts) (Entered: 04/02/2015) |
| 04/24/2015 | 61 | REQUEST for Extension of Time to File Joint Proposed Briefing Schedule filed by Petitioner Jose Osvaldo Arteaga. (Attachments: # 1 Proposed Order) (Beaghan, Emily) (Entered: 04/24/2015) |
| 04/24/2015 | 62 | ORDER by Magistrate Judge Kenly Kiya Kato: granting 61 Request for Extension of Time to File the joint proposed briefing schedule to and including May 11, 2015. (dts) (Entered: 04/24/2015) |
| 05/11/2015 | 63 | Joint STIPULATION for Discovery filed by Petitioner Jose Osvaldo Arteaga. (Attachments: # 1 Proposed Order)(Beaghan, Emily) (Entered: 05/11/2015) |
| 05/12/2015 | 64 | ORDER RE DISCOVERY by Magistrate Judge Kenly Kiya Kato, re Stipulation for Discovery 63 . The Court sets a status conference regarding |

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| | | discovery and the anticipated evidentiary hearing for August 4, 2015 at 10:00 a.m. See Order for details. (vp) (Entered: 05/12/2015) |
| 06/30/2015 | 65 | NOTICE OF APPEARANCE OR REASSIGNMENT Filed by (Attorney Michael David Weinstein added to party Jose Osvaldo Arteaga(pty:pet)) (Weinstein, Michael) (Entered: 06/30/2015) |
| 07/06/2015 | 66 | APPLICATION for Order for Modification of the Court's Scheduling <i>Order</i> ; <i>Declaration of Counsel</i> filed by PETITIONER Jose Osvaldo Arteaga. (Attachments: # 1 Proposed Order) (Weinstein, Michael) (Entered: 07/06/2015) |
| 07/07/2015 | 67 | ORDER by Magistrate Judge Kenly Kiya Kato: granting 66 APPLICATION to Modify the Courts May 15, 2015 Scheduling Order.Petitioner shall have until September 25, 2015, to depose: Mary Hildreth, Senior Law Librarian at the California Substance Abuse and Treatment Facility in Corcoran, California, or the person most knowledgeable. The status conference presently scheduled for August 4, 2015 is continued untilOctober 2, 2015 at 10:00 a.m. (dts) (Entered: 07/07/2015) |
| 09/04/2015 | 68 | NOTICE of Taking Deposition of Jason Barba on September 22, 2015 filed by Petitioner Jose Osvaldo Arteaga. (Weinstein, Michael) (Entered: 09/04/2015) |
| 09/04/2015 | 69 | NOTICE of Taking Deposition of Velva Hampson on September 22, 2015 filed by Petitioner Jose Osvaldo Arteaga. (Weinstein, Michael) (Entered: 09/04/2015) |
| 09/04/2015 | 70 | NOTICE of Taking Deposition of Wayne Tilley on September 22, 2015 filed by Petitioner Jose Osvaldo Arteaga. (Weinstein, Michael) (Entered: 09/04/2015) |
| 10/02/2015 | 71 | MINUTES OF Status Conference held before Magistrate Judge Kenly Kiya Kato: The parties advised the Court that an evidentiary hearing may not be necessary to resolve the pending issues. Therefore, the Court instructs the parties to submit a status report along with a proposed briefing no later than one week from todays hearing.Court Recorder: RS 4 10-02-15. (dts) (Entered: 10/02/2015) |
| 10/09/2015 | 72 | STATUS REPORT <i>Joint Status Report and Proposed Briefing Schedule</i> filed by Petitioner Jose Osvaldo Arteaga. (Attachments: # 1 Proposed Order) (Weinstein, Michael) (Entered: 10/09/2015) |
| 10/13/2015 | 73 | ORDER APPROVING THE PARTIES JOINT STATUS REPORT by Magistrate Judge Kenly Kiya Kato, re Status Report 72 (SEE DOCUMENT FOR DETAILS) (dts) (Entered: 10/13/2015) |
| 12/18/2015 | 74 | NOTICE OF REASSIGNMENT of California Attorney General Office Toni R. Johns Estaville on behalf of Respondent Ken Clark. California Attorney General Eric E Reynolds terminated. (Attorney Toni R Johns Estaville added to party Ken Clark(pty:res))(Estaville, Toni) (Entered: 12/18/2015) |
| 12/22/2015 | 75 | BRIEF filed by Petitioner Jose Osvaldo Arteaga. <i>Petitioner's Opening Brief</i> (Weinstein, Michael) (Entered: 12/22/2015) |
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| 12/22/2015 | 76 | EXHIBIT Filed filed by Petitioner Jose Osvaldo Arteaga. as to Brief (non-motion non-appeal) 75 . (Attachments: # 1 Exhibit A-C)(Weinstein, Michael) (Entered: 12/22/2015) |
| 12/22/2015 | 77 | EXHIBIT Filed filed by Petitioner Jose Osvaldo Arteaga. as to Brief (non-motion non-appeal) 75 . (Attachments: # 1 Exhibit D Part 1, # 2 Exhibit D Part 2, # 3 Exhibit D Part 3)(Weinstein, Michael) (Entered: 12/22/2015) |
| 12/22/2015 | 78 | EXHIBIT Filed filed by Petitioner Jose Osvaldo Arteaga. as to Brief (non-motion non-appeal) 75 . (Attachments: # 1 Exhibit E-I, # 2 Exhibit J-L, # 3 Exhibit M)(Weinstein, Michael) (Entered: 12/22/2015) |
| 12/22/2015 | 79 | EXHIBIT Filed filed by Petitioner Jose Osvaldo Arteaga. as to Brief (non-motion non-appeal) 75 . (Attachments: # 1 Exhibit N Part 1, # 2 Exhibit N Part 2)(Weinstein, Michael) (Entered: 12/22/2015) |
| 02/03/2016 | 80 | APPLICATION for Extension of Time to File Respondent's Brief Regarding the Gap Tolling Issue filed by Respondent Ken Clark. (Attachments: # 1 Proposed Order Granting Respondent to and including March 21, 2016, to File Respondent's Brief.) (Estaville, Toni) (Entered: 02/03/2016) |
| 02/05/2016 | 81 | ORDER by Magistrate Judge Kenly Kiya Kato: granting 80 APPLICATION for Extension of Time to File Respondent's Brief regarding the gap tolling issue due by March 21, 2016. Petitioner's Reply shall be due April 20, 2016. (dts) (Entered: 02/05/2016) |
| 03/21/2016 | 82 | BRIEF filed by RESPONDENT Ken Clark. <i>BRIEF ON REMAND REGARDING THE STATUTE OF LIMITATIONS</i> (Estaville, Toni) (Entered: 03/21/2016) |
| 04/18/2016 | 83 | REPLY filed by Petitioner Jose Osvaldo Arteaga to Brief (non-motion non-appeal) 75 , Brief (non-motion non-appeal) 82 <i>Petitioner's Post-Evidentiary Hearing Reply Brief</i> (Weinstein, Michael) (Entered: 04/18/2016) |
| 04/18/2016 | 84 | EXHIBIT Filed filed by Petitioner Jose Osvaldo Arteaga. as to Reply 83 . (Attachments: # 1 Exhibit O)(Weinstein, Michael) (Entered: 04/18/2016) |
| 05/03/2016 | 85 | MINUTES (IN CHAMBERS) ORDER by Magistrate Judge Kenly Kiya Kato, re Notice of Lodging 21 Respondent is ordered to reodge all documents previously lodged in support of Respondent's Motion to Dismiss no later than May 17, 2016. (dts) (Entered: 05/03/2016) |
| 05/13/2016 | 86 | NOTICE OF LODGING filed <i>Lodged Documents (LD) Numbered LD-1 to LD-15</i> re Order 85 (Attachments: # 1 LD-1, # 2 LD-2, # 3 LD-3, # 4 LD-4, # 5 LD-5, # 6 LD-6, # 7 LD-7, # 8 LD-8, # 9 LD-9, # 10 LD-10, # 11 LD-11, # 12 LD-12, # 13 LD-13, # 14 LD-14, # 15 LD-15)(Estaville, Toni) (Entered: 05/13/2016) |
| 08/02/2016 | 87 | MINUTES (IN CHAMBERS) ORDER Requesting Supplemental Briefing by Magistrate Judge Kenly Kiya Kato. The supplemental briefs shall not exceed five (5) pages from each party and shall be filed no later than August 16, 2016. (dts) (Entered: 08/02/2016) |
| 08/16/2016 | 88 | |

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| | | SUPPLEMENT <i>Respondent's Supplemental Brief</i> filed by Respondent Ken Clark. (Estaville, Toni) (Entered: 08/16/2016) |
| 08/16/2016 | 89 | SUPPLEMENT <i>Petitioner's Response to the Court's August 2, 2016 Request for Supplemental Briefing</i> filed by Petitioner Jose Osvaldo Arteaga. (Weinstein, Michael) (Entered: 08/16/2016) |
| 08/23/2016 | 90 | REPORT AND RECOMMENDATION issued by Magistrate Judge Kenly Kiya Kato. Re FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS (2254) 10 (vp) (Entered: 08/23/2016) |
| 08/23/2016 | 91 | NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Kenly Kiya Kato and Lodging of Proposed Judgment and Order. Objections to R&R due by 9/23/2016 (Attachments: # 1 Rep and Rec) (vp) (Entered: 08/23/2016) |
| 10/31/2016 | 92 | NOTICE TO PARTIES by District Judge Dean D. Pregerson. Effective November 7, 2016, Judge Pregerson will be located at the 1st Street Courthouse, COURTROOM 9C on the 9th floor, located at 350 W. 1st Street, Los Angeles, California 90012. All Court appearances shall be made in Courtroom 9C of the 1st Street Courthouse, and all mandatory chambers copies shall be hand delivered to the judge's mail box outside the Clerk's Office on the 4th floor of the 1st Street Courthouse. The location for filing civil documents in paper format exempted from electronic filing and for viewing case files and other records services remains at the United States Courthouse, 312 North Spring Street, Room G-8, Los Angeles, California 90012. The location for filing criminal documents in paper format exempted from electronic filing remains at Edward R. Roybal Federal Building and U.S. Courthouse, 255 East Temple Street, Room 178, Los Angeles, California 90012. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (trp) TEXT ONLY ENTRY (Entered: 10/31/2016) |
| 12/13/2016 | 93 | ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE by Judge Dean D. Pregerson for Report and Recommendation (Issued) 90 . IT IS THEREFORE ORDERED that Respondent shall file an Answer to the First Amended Petition within thirty (30) days of the date of this order. (iva) (Entered: 12/13/2016) |
| 12/15/2016 | 94 | REQUEST for Order for Modificaton of Briefing Schedule to Allow Filing of Traverse ; <i>Declaration of Michael D. Weinstein</i> filed by Petitioner Jose Osvaldo Arteaga. (Attachments: # 1 Proposed Order) (Weinstein, Michael) (Entered: 12/15/2016) |
| 12/15/2016 | 95 | ORDER by Magistrate Judge Kenly Kiya Kato: granting 94 REQUEST for Order to file a Traverse within thirty (30) days of Respondent filing his Answer. (dts) (Entered: 12/15/2016) |
| 01/05/2017 | 96 | APPLICATION to Extend Time to File Answer to 2/11/2017 re Amended Petition for Writ of Habeas Corpus 10 filed by Respondent Ken Clark. (Attachments: # 1 Proposed Order Granting Respondent to and including February 11, 2017, to File an Answer.) (Estaville, Toni) (Entered: 01/05/2017) |
| 01/05/2017 | 97 | |

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| | | ORDER by Magistrate Judge Kenly Kiya Kato: granting 96 APPLICATION for Extension of Time to Answer Ken Clark answer due 2/11/2017. IT IS HEREBY ORDERED that Respondent is granted to and including February 11, 2017, to file an Answer to the First Amended Petition for Writ of Habeas Corpus. (vp) (Entered: 01/05/2017) |
| 02/13/2017 | 98 | ANSWER to Amended Petition for Writ of Habeas Corpus 10 <i>Memorandum of Points and Authorities</i> filed by Respondent Ken Clark.(Estaville, Toni) (Entered: 02/13/2017) |
| 02/13/2017 | 99 | NOTICE OF LODGING filed <i>Supplement Lodged Documents ("LD") Numbered LD-16 through LD-21</i> re Answer to Complaint 98 (Attachments: # 1 LD-16, # 2 LD-17, # 3 LD-18-RT-Vol 1 of 4, # 4 LD-18-RT-Vol 2 of 4, # 5 LD-18-RT-Vol 3 of 4, # 6 LD-18-RT-Vol 4 of 4, # 7 LD-19, # 8 LD-20, # 9 LD-21)(Estaville, Toni) (Entered: 02/13/2017) |
| 03/09/2017 | 100 | APPLICATION for Enlargement of Time to File Traverse filed by Petitioner Jose O Arteaga. (Attachments: # 1 Proposed Order) (Weinstein, Michael) (Entered: 03/09/2017) |
| 03/10/2017 | 101 | ORDER by Magistrate Judge Kenly Kiya Kato: granting 100 APPLICATION for Enlargement of Time to File Traverse. The traverse is now due on April 14, 2017. (dts) (Entered: 03/10/2017) |
| 04/14/2017 | 102 | TRAVERSE to Amended Petition for Writ of Habeas Corpus 10 filed by Petitioner Jose O Arteaga. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Weinstein, Michael) (Entered: 04/14/2017) |
| 07/14/2017 | 103 | REPORT AND RECOMMENDATION issued by Magistrate Judge Kenly Kiya Kato re Petition for Writ of Habeas Corpus (2254) 1 . (jlo) (Entered: 07/14/2017) |
| 07/14/2017 | 104 | NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Kenly Kiya Kato. Objections to R&R due by 8/14/2017. (jlo) (Entered: 07/14/2017) |
| 08/10/2017 | 105 | APPLICATION for Extension of Time to File Objection to Notice of Report and Recommendation 104 filed by Petitioner Jose O Arteaga. (Attachments: # 1 Proposed Order) (Weinstein, Michael) (Entered: 08/10/2017) |
| 08/10/2017 | 106 | ORDER by Magistrate Judge Kenly Kiya Kato: granting 105 APPLICATION for Extension of Time to File Objection to re Notice of Report and Recommendation 104 , Report and Recommendation (Issued) 103 . Objections to theReport and Recommendation due by September 13, 2017. (dts) (Entered: 08/10/2017) |
| 09/13/2017 | 107 | OBJECTION to Report and Recommendation (Issued) 103 filed by Petitioner Jose O Arteaga. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Weinstein, Michael) (Entered: 09/13/2017) |
| 10/11/2017 | 108 | FINAL REPORT AND RECOMMENDATION issued by Magistrate Judge Kenly Kiya Kato. Re: Petition for Writ of Habeas Corpus (2254) 1 (dts) (Entered: 10/11/2017) |
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| 11/05/2018 | 109 | ORDER ACCEPTING FINAL FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE by Judge Dean D. Pregerson for Report and Recommendation (Final) 108 . IT IS THEREFORE ORDERED that Judgment be entered (1) denying the First Amended Petition for a Writ of Habeas Corpus; and (2) dismissing this action with prejudice. (see order for details) (hr) (Entered: 11/06/2018) |
| 11/05/2018 | 110 | JUDGMENT by Judge Dean D. Pregerson. Related to: R&R - Accepting Report and Recommendations, 109 . IT IS HEREBY ADJUDGED that the First Amended Petition is DENIED and this action is DISMISSED with prejudice. (MD JS-6, Case Terminated). (hr) (Entered: 11/06/2018) |
| 11/05/2018 | 111 | Order by Judge Dean D. Pregerson denying Certificate of Appealability. (mat) (Entered: 11/06/2018) |
| 12/04/2018 | 112 | NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Petitioner Jose O Arteaga. Appeal of Judgment 110 , R&R - Accepting Report and Recommendations, 109 , Order on Petition for Certificate of Appealability 111 . (Appeal Fee - Fee exempt pursuant to statute). (Weinstein, Michael) (Entered: 12/04/2018) |
| 12/04/2018 | 113 | NOTIFICATION from Ninth Circuit Court of Appeals of case number assigned and briefing schedule. Appeal Docket No. 18-56591 assigned to Notice of Appeal to 9th Circuit Court of Appeals, 112 as to Petitioner Jose O Arteaga. (shb) (Entered: 12/07/2018) |
| 10/28/2019 | 114 | ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 112 filed by Jose O Arteaga. CCA # 18-56591. The request for a certificate of appealability is denied. (see document for further details) (hr) (Entered: 10/31/2019) |

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| Description: | Docket Report | Search Criteria: | 2:08-cv-00599- DDP-KK End date: 2/5/2020 |
| Billable Pages: | 11 | Cost: | 1.10 |

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JOSE OSVALDO ARTEAGA
7

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**

11
12 JOSE OSVALDO ARTEAGA,

13 Petitioner,

14 v.

15 KEN CLARK, Warden,

16 Respondent.

NO. CV 08-00599-DDP (KK)

**PETITIONER'S OBJECTIONS TO THE
REPORT AND RECOMMENDATION;
EXHIBITS 1-2**

Honorable Kenly Kiya Kato
United States Magistrate Judge

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EXHIBIT 1

1 I declare under penalty of perjury under the laws of the United States of America
2 and of the State of California that the foregoing is true and correct.

3 Executed on September 12, 2017 at Los Angeles, California.

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6 MAURO ORTEGA

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11/23/03 Mauro Ortega, age 25, dob-1/3/78 in Los Angeles, Ca, married and has 1 child with his wife Claudia, age 20. He fathered another child, a 5 yr old son. He has a 3-month old son with his present wife. He lives at #53 North Westmoreland Ave, apt 8 in Los Angeles, Ca. His occupation is that of a Demonstrator of marketable products and is also a part-time painter. The company's name is "Action Demo" located on San Fernando Rd in Glendale.

Mauro states that he has known Jose Ortega for approximately 5 years, that he met him as a being a member of the Salva Chucha gang of which Mauro had been a member for approximately 5 years. However, for the past two years he has been inactive.

Mauro further states that back on August 9th 2007, he had telephoned Jose at the latter's home in La Puente and arrangements were made for Jose to pick up Mauro at the latter's address sometime after 10 pm that date in order to get together. That sometime around 10:30 pm he was picked up by Jose and another guy

EXHIBIT "A"

EX. 1 - 15

Pet. App. 64

(2)

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named Turtle in Turtle's car. It was decided to go to a nightclub located on Temple and Rampart streets, across from the Rampart police station. They arrived at this location at approximately 10:30 pm.

All 3 men entered the club and they began drinking Corona beer. Around midnight or thereabouts Mauro saw a guy who had apparently been drinking, as he approached Jose and began shouting off and saying bad things to him. Mauro, who was standing next to Jose overheard what this guy was saying to Jose and he got angry and swung and hit this guy in the face. A fight started involving 5 members of Temple gang of which this guy was a member.

Because of the fighting, the security guard attempted to quell this action by using mace on the combatants. As a result, the melee stopped and Mauro and his two companions left the club and went back to their car where they entered.

All three men drove back

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to Mauro's home where he got out of the vehicle and entered his home.

One week later Mauro heard that Jose had been arrested. Jose's brother later called & told Mauro that Jose's arrest was for attempted murder.

The foregoing statement is true and correct.

~~by Mauro Entuz~~
Taken by Malcolm Richards
On 11/23/03

1 HILARY POTASHNER (Bar No. 167060)
Federal Public Defender
2 MICHAEL D. WEINSTEIN (Bar No. 262179)
E-Mail: Michael.Weinstein@fd.org
3 Deputy Federal Public Defender
321 East 2nd Street
4 Los Angeles, California 90012-4202
Telephone: (213) 894-7526
5 Facsimile: (213) 894-1679

6 Attorneys for Petitioner
JOSE OSVALDO ARTEAGA
7

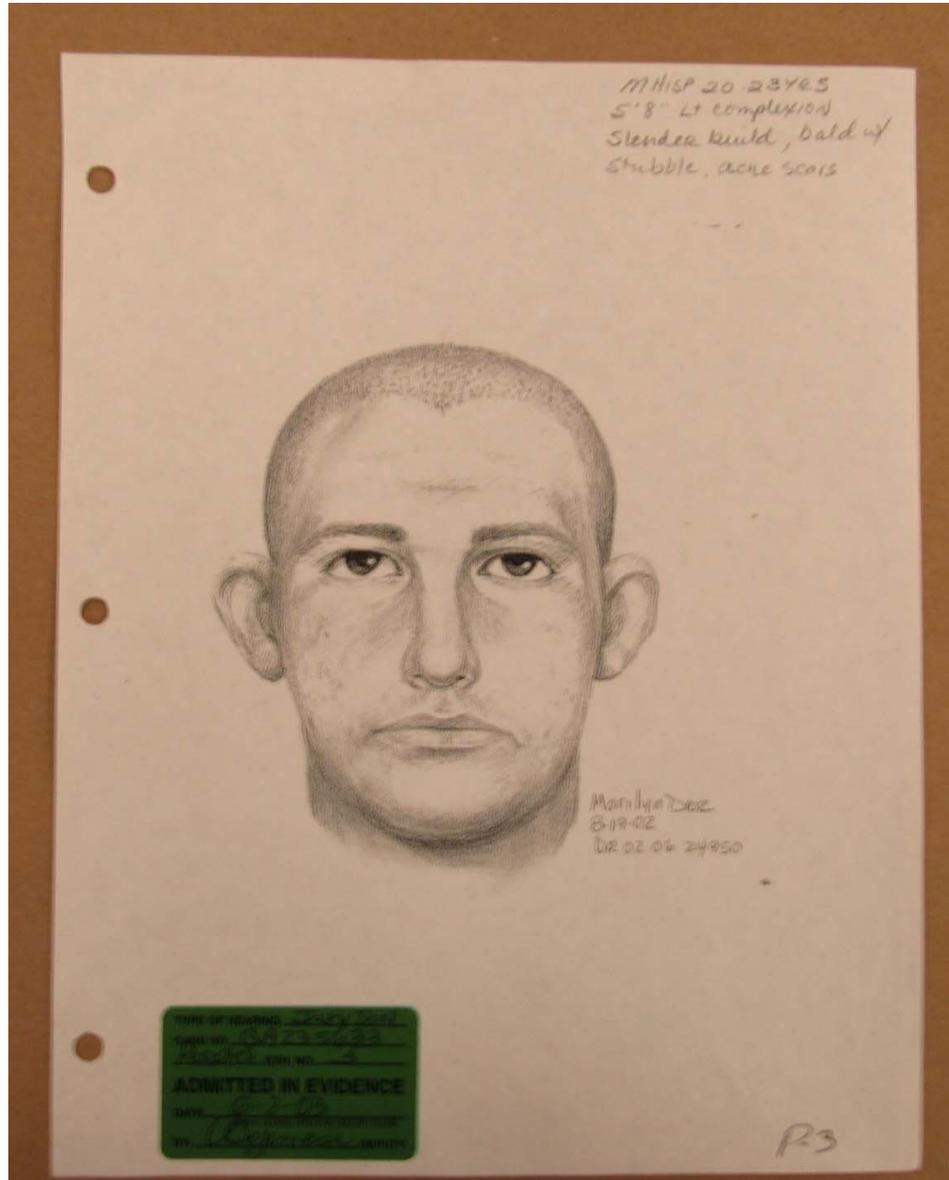
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
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12 JOSE OSVALDO ARTEAGA,
13 Petitioner,
14 v.
15 JENNIFER BARRETO, Warden,
16 Respondent.
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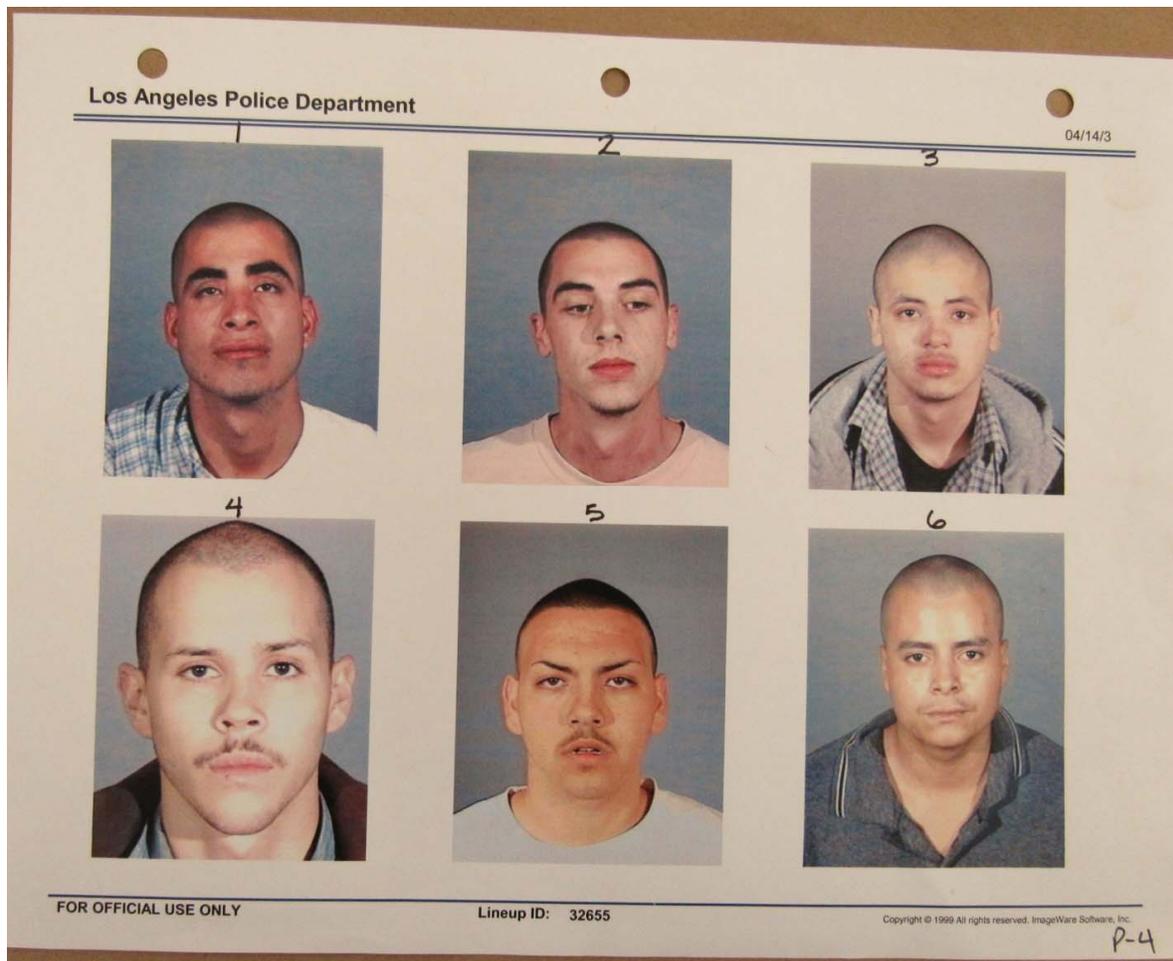
NO. CV 08-00599-DDP (KK)
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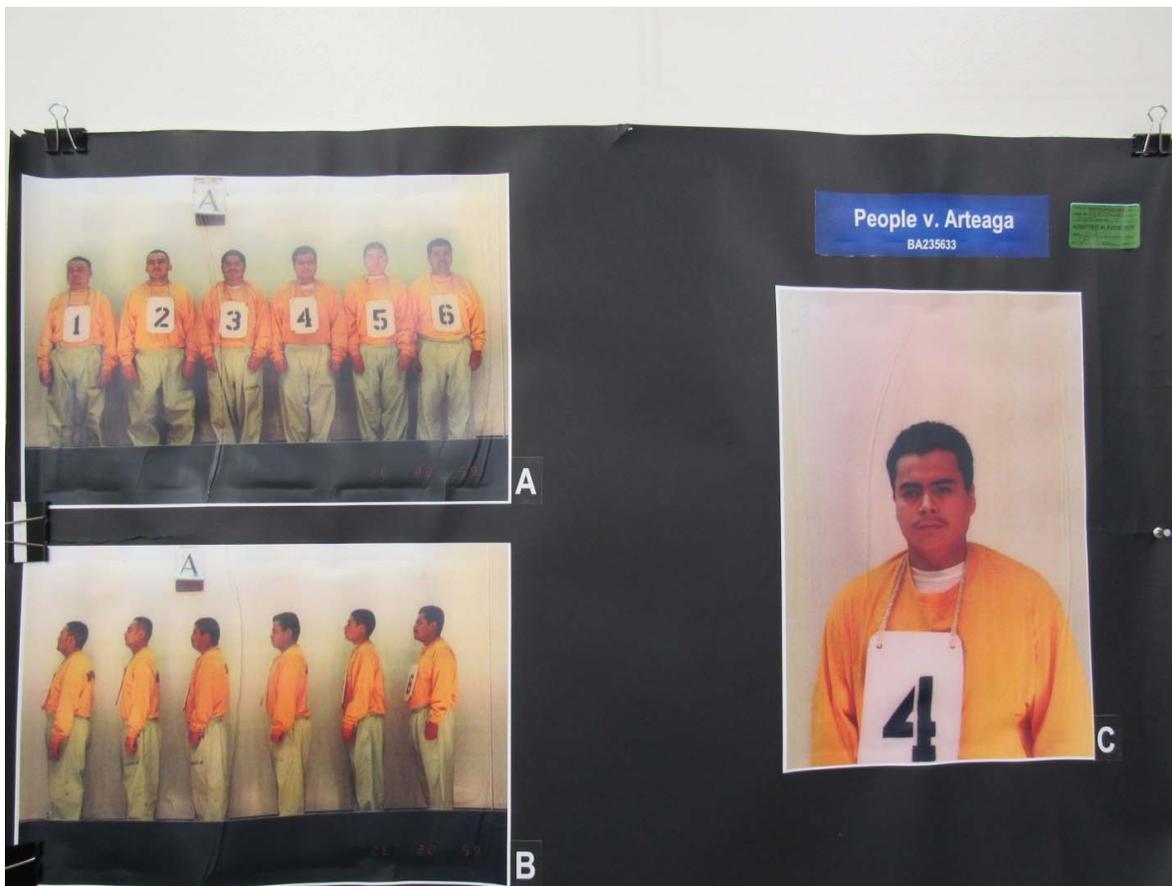
PEOPLE'S TRIAL EXHIBIT 3



PEOPLE'S TRIAL EXHIBIT 4



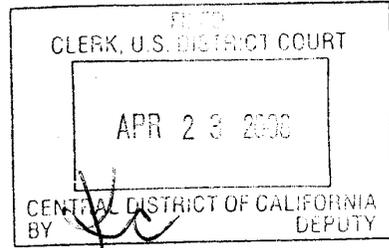
PEOPLE'S TRIAL EXHIBIT 8



DEFENSE TRIAL EXHIBIT A



Jose Osvaldo Arteaga
NAME
V29993
PRISON IDENTIFICATION/BOOKING NO.
Post Office Box 5242
ADDRESS OR PLACE OF CONFINEMENT
Corcoran, Ca., 93212-5242



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.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Jose Osvaldo Arteaga
FULL NAME (Include name under which you were convicted)
Petitioner,

CASE NUMBER:
CV 08-0599 DDP (RC)
To be supplied by the Clerk of the United States District Court

v.

FIRST AMENDED

Ken Clark, Warden
NAME OF WARDEN, SUPERINTENDENT, JAILOR OR AUTHORIZED
PERSON HAVING CUSTODY OF PETITIONER
Respondent.

**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

- 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.
- 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.
- 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.
- 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.
- 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.
- 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.
- 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

provided the following answers:

Q. And what is different about him? What looks different about him today?

A. More facial hair, more hair on his head.

Q. What did Mr. Arteaga look like the day this--with respect to his hair, specifically the top of his hair?

A. It was like shaved off, no hair, thinner mustache, thinner build.

[RT 230, ¶¶ 5-12].

Noteworthy and of major importance, during the mode of trial, petitioner retained a full head of hair and a thinning mustache. This presentation as supported by the sworn testimony of Mr. Carlyle, represented the same exact features petitioner possessed on the night in question. Namely, Mr. Carlyle conveys:

Q. And how was Mr. Arteaga's hair at that time when he made the statement to you, right before the shooting?

A. Like about the same.

[RT 103, ¶¶ 24-27].

With absolutely no doubt, the descriptions afforded by these two individuals with respect to the physical characteristics of petitioner were and continue to be inconsistent with

VI.

**THE SUPERIOR COURT FAILED TO ADDRESS THE MERITS
OF TRIAL COUNSEL'S INEFFECTIVENESS IN FAILING TO
RAISE PETITIONER'S ALIBI DEFENSE AT TRIAL.**

In accordance with new amendments to California Rules of Court made effective January 01, 2002,² in denying any writ of habeas corpus, it is incumbent on all California Superior Courts to provide and ensure that a brief recital of reasons upon which it bases it's decision is provided to the petitioning individual. In Rose v. Superior Court, (2000) 81 Cal. App. 4th 564, California's Appellate Court discussed Rule 260(e)'s predecessor Rule 4.551 and as a result, arrived to several rationales as to why a Superior Court should provide justifications in the denial of petitions. [emphasis added].

In the instant case at bench, while the Superior Court did in fact satisfy it's ministerial duties in considering half of the contentions with respect to trial counsel's ineffective performances during the mode of trial for failing to raise petitioner's requested alibi defense, the issue in it's entirety was never addressed and the current court cannot decipher or determine why the Superior Court rule the way it did. In this instance, preconceiving problems to be caused from such a practice, the Rose court emphasized in it's holding the reasonable-

2. California Rules of Court ("CRC"), rule 260(e), [previously CRC Rule 4.551(g)].

ness of providing brief statements indicative of the reasons that serve the basis of the denial and which further, in turn, facilitates expediency and assists the appellate courts in review of the merits of the petition. Rose, supra, 81 Cal. App. 4th at p. 569.

In petitioner's case, given the Superior Court's failure to comport with the guidance enunciated by and envisioned in Rose, and in light of the Superior Court's half-hearted efforts of fully addressing the issues, all subsequent review courts, including the instant court, lack the guidance envisioned in Rose to decide the instant controversy. Not only did petitioner raise counsel's ineffectiveness for declining to summon an alibi witness to trial, but petitioner indistinguishably presented this issue during collateral petitioning the sentencing court. Upon being presented an opportunity to consider the contention, the sentencing court merely iterated and reasoned that petitioner's alibi witness, Mauro Ortega, was a gang member of the same gang as petitioner's and his testimony would have been easily rejected by the jury for that reason and the close proximity of where petitioner was located at the time of the shooting and given the lack of precision for the time frame given by Ortega it was far from impossible for petitioner to have been at the location of the shooting.

From the foregoing, assuming arguendo that such was the only evidence available, the underlying issue would probably prove to be not so prejudicial to petitioner's defense. However and consequently, the sentencing court considering the underlying

petition failed to factor in and take under consideration the fact that another witness who was at the scene of the crime and who retained absolutely no connection to petitioner whatsoever and who made it unequivocally clear that petitioner was not the shooter. At petitioner's trial, Mr. Bayron Peres was summoned for testimony by trial counsel. Mr. Peres was an eyewitness to the shooting and made it unequivocally clear that petitioner did not look like the triggerman as follows:

Q. I'm pointing to my client, Mr. Arteaga. Is this the man you saw shoot somebody that day?

A. No.

Q. Does Mr. Arteaga look like the person who was with the person who shot somebody?

A. No.

[RT 317, ¶¶ 12-18].

This witness not only made it clear that petitioner was not the shooter, but further made clear that petitioner was not the individual present with the shooter either. In light of these facts, it is apparently obvious and undisputable that no doubt exists that Mr. Peres' testimony doesn't call into question the identification of petitioner by both Mr. Carlyle and Mr. Ulloa. As such, petitioner was indeed able to locate an eyewitness who was not associated with petitioner and made it abundantly clear that petitioner was not the triggerman in the incident. Although petitioner raised this fact with the sentencing court, the sentencing court in its decision denying petitioner's Writ of Habeas Corpus makes absolutely no mention of Mr. Peres' testimony, nor does the sentencing court weigh Mr. Peres' testimony with petitioner's factual and legal contention relating to the suggestive nature of the identification procedures utilized in this case.

Taking all of the foregoing into consideration, it is evidently clear that a reviewing court retains the affirmative duty in reviewing ineffective assistance of counsel claims[as presented by petitioner in the sentencing court for counsel's failure to summon Ortega to trial when counsel possessed knowledge that petitioner sought the presence and testimony of Ortega to his defense] under the standard of "totality of the circumstances." In other words, in the context of whether a reasonable probability of different results existed, the court must examine counsel's professional errors for propriety evaluating whether those misdeeds, incompetences or errors were of such magnitude as to affect the end results of the proceedings. Strickland v. Washington, 466 U.S. 668, 694. As an essential aspect of a court's Strickland analysis, the court must closely balance and observe the strengths and weaknesses of the prosecution's case. Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986).

In the instant case at bench, not only was the state's case against petitioner weak but the case would have demonstrated to be weaker and lacking credibility had counsel made appropriate and diligent objections to the identification testimony mentioned, supra. All that is required of petitioner is that he demonstrate that counsel withdrew a meritorious defense due to oversight or neglect of counsel and that such omission and ineffectiveness was the product of counsel's failure to make an adequate investigation into the facts of the case. People v. Shaw, (1984) 35 Cal. 3d 535, 540-41.

Under the aforementioned standard, petitioner satisfied his obligation in making a threshold showing of trial counsel's ineffectiveness. However, the sentencing court in reviewing petitioner's post-conviction collateral petition, failed to take into account all facts presented by petitioner such as the testimony of Mr. Peres which unequivocally made the fact apparent that petitioner was not the triggerman and that petitioner was not even present at the crime scene during the interval of time prior to, contemporaneous with and subsequent to the shooting. In light of these facts, the sentencing court, solely reviewed a portion of petitioner's ineffective assistance of counsel claim while leaving untouched the portion of the claim favorable to petitioner. As a result, such resulted in undue prejudice to and during the hearing process of the habeas corpus petition that requires re-examination by this court or at minimum requires that petitioner receive written explanation as required by Rose v. Superior Court, supra, indicative of the weight that should lawfully be afforded to Mr. Peres' testimony.

For instance, it appears proper for any reviewing court to observe both Mr. Peres' testimony and the testimony of the party not called or summoned for testimony [Mr. Ortega] due to counsel's ineffectiveness. Both of these witnesses place petitioner else where during the course of the crime. The identifications of petitioner by Mr. Carlyle and Mr. Ulloa retained doubt as to their reliability as well. In the face of these factors, it is obvious that they had a prejudicial cumulative effect on the outcome and reliability of the conclusive results in petitioner's trial resulting in a finding of his culpability. Conversely, but for these cumulative errors,

the results of the trial would have been different.

In conclusion to the instant contention, not only is it clear that the sentencing court failed to review the facts in a complete fashion, but it also appears that an on-going conflict exists with respect to the distance of petitioner at the time of the offense. When initially presented in the sentencing court during the mode of trial, the court, given counsel's failure in properly briefing the court on the issue, presumed that petitioner was in the same bar where Mr. Carlyle and Mr. Ulloa were drinking. [RT 531, ¶¶ 17-26]. Subsequently, counsel was relieved due to a conflict and new counsel was appointed by the sentencing court following conviction. Belatedly, the newly appointed counsel emphasized with clarity that at the very least the bar in which petitioner was presumably located at the time of the crime was at minimum a matter of miles away.

Mr. Miller: It's a matter of a couple of miles at least, at the very least. There was another bar mentioned, your honor, you're right, across the street. But that's not the bar were talking about with the alibi. Were talking about the Pan American Bar.

[RT 534, ¶¶ 2-7].

In this respect, while the sentencing court may have been accurate in it's initial rendition of judgment that Mr. Ortega failed to provide an actual time frame as to when he and petitioner actually departed the Pan American Bar, the purposes petitioner left the bar was due to a big fight in the bar. While Mr. Ortega

maybe would have been unable to supply a specific time frame as to when petitioner left, a specific time frame was accessible (and still remains accessible) reflective of the actual time the fight initiated at the Pan American Bar. As a contingency and to preserve such, petitioner presented said issues to the lower courts in the event that local law enforcement agency records were generated and exist as a result of the bar fight alleged to afford petitioner an alibi.

VII.

PETITIONER'S APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO BRIEF THE APPELLATE COURT ON PETITIONER'S ALIBI WITNESS AND FOR FAILING TO INVESTIGATE AND PRESENT FACTS DEMONSTRATIVE OF PETITIONER'S FACTUAL INNOCENCE OF THE CHARGES FOR WHICH HE WAS TRIED.

Although this issue accompanied with all factual and legal authorities were first presented to the sentencing court, the sentencing court never explicitly addressed the merits of this contention as it retained a ministerial duty to do so as mandated under the Rose requirement just as the identification contention. Although this issue is of constitutional magnitude, the sentencing court left this court absolutely nothing to gauge which would be slightly indicative of the reasoning behind the sentencing court's denial.

Currently law as existing at the time of petitioner's direct appeal, specifically did not require appellate counsel to raise every conceivable appellate error appearing from the trial court transcript. Jones v. Barnes, 463 U.S. 745, 752. On the other hand and conversely, appellate issues that should have but were not raised on direct review are usually precluded from review through collateral petitions. In re Dixon, (1953) 41 Cal. 2d 756.

In the instant case at bench, as previously demonstrated by petitioner, supra, a sufficient portion of trial record existed to persuade any reasonable person of normal sensibilities to conclude that the identification procedures utilized

by police which constructively encouraged Mr. Ulloa and Mr. Carlyle to identify petitioner were indeed unduly suggestive and should have been objected to. Notwithstanding this transparent record of trial error, petitioner's appellate counsel did absolutely nothing to protect petitioner's constitutional and appellate rights in this matter. With such being the case and while California courts have procedures such as those handed down in Dixon, supra, to preclude tardiness in raising these claims petitioner engaged these claims as well and should not be punished for appellate counsel's failure to raise these issues. In re Mazoros, (1977) 76 Cal. App. 3d 50, 54-55; In re Smith, (1970) 3 Cal. 3d 192, 202 cited with approval in In re Harris, (1993) 5 Cal. 4th 813, 833.

In this case, not only is it the opinion of petitioner that counsel failed to engage comprehensive investigative duties incumbent on counsel and present the misidentification and alibi issues, which were indeed suggestive that petitioner stood wrongfully convicted of the criminal accusations, aggravating such is the fact that petitioner remitted valuable correspondence to counsel which contained valid implications and details reflective of the culprit(s) responsible for the commission of the offenses in which petitioner was wrongfully being charged.

In the correspondence, petitioner afforded counsel sufficient information [all that he possessed] to ensure that comprehensive investigations of counsel, if undertaken, was capable of validating the legitimacy of petitioner's contentions. Particularly in the correspondence, petitioner conveyed that

that an individual locally known within the M.S. gang as "Lil Pony" confessed to petitioner that he had committed a murder at a bar named "Margarita Jones" during which in this same conversation "Lil Pony" boasted to petitioner that he had also been involved in a attempted murder shooting taking place in the vicinity of Santa Monica and Western in the City of Los Angeles. Coincidentally, this is the same geographical vicinity in which the criminal allegations alleged against petitioner were committed and in which petitioner proclaims he stands wrongfully convicted. The correspondence further emphasized to appellate counsel the likelihood that "Lil Pony" committed both offenses utilizing the same caliber weapon. Petitioner sought that counsel pursue this critical lead through contacting appropriate local law enforcement departments and forensic agencies involved in the collection, processing and/or analysis of the related firearm evidence recovered from each of the crime scenes.

At no time did appellate counsel merely attempt to pursue these credible leads through investigation. To ensure the clarity of ambiguity contained herein, upon this court's observation of the fact that at least one other independent person besides petitioner's own alibi witness places petitioner no where near the crime scene and in light of the fact that substantial questions remain regarding the reliability and credibility of the identification procedures utilized in the instant case,

-
3. "Lil Pony" was convicted of the murder at "Magarita Jones." So any weapons used or recovered and analyzed remain in evidence of respective local law enforcement for ballistic comparisons with those firearm projectiles recovered from the Santa Monica/Western shooting.

the court should conclude reasonably that these combined factors give clear credence to the fact that petitioner was not the culprit in the charged offense.

At the very minimum, appellate counsel was under an affirmative obligation and retained both an ethical and moral responsibility and duty to inquire into the facts provided counsel from petitioner. Although under the governing law "actual innocence" claims without more, are not sufficient grounds for habeas relief, the false imprisonment and incarceration of one who stands innocent and wrongfully convicted lies as a central grain of fundamental fairness and basis for habeas relief and further represents the very miscarriages of justice so long preserved in our jurisprudence for challenge through the vehicle of habeas corpus petitions. Engle v. Isaac, (1982) 456 U.S. 107, 135); Riddle v. Dyche, (1923) 262 U.S. 333, 335-36; Herrera v. Collins, (1993) 506 U.S. 390, 400.

In light of appellate counsel's demonstration of ineffectiveness given the fact that these credible reports were rebuffed by counsel, petitioner is entitled to habeas corpus relief. Douglas v. California, (1963) 372 U.S. 355-57. In discussing trial counsel's responsibility to put on evidence establishing the innocence of his client, our Circuit Court in Avila v. Galaza, 297 F.3d 911 (9th Cir. 2002) clearly emphasized that counsel's failure to put on such evidence constitutes ineffective assistance of counsel.

The Ninth Circuit in Avila, supra, stated:

"[W]e have repeatedly found that a lawyer who fails adequately to investigate, and to introduce into evidence--[evidence] that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict renders deficient performance."

Avila, supra, 297 F.3d at p. 919.

Here, while Avila is specifically tailored to the deficient performance in the context of trial counsel, the same analysis and logistics applied to appellate counsel as well given the fact that both counsels practice law under the State Bar standards of this state and are equally morally and ethnically charged with a moral responsibility to prevent the knowing conviction of the innocent and permitting miscarriages of justice such as that in the instant case.

In this case, appellate counsel made absolutely no inquiry into the validity or falsity of information provided by petitioner in the above referenced correspondence. Given petitioner's clear demonstration of appellate counsel's ineffectiveness and incompetence, under constitutional law, this court is charged with fashioning a remedy tailored at correcting and curing the error. See In re Alvernaz, (1992) 2 Cal. 4th 924.

The sole relief remaining in which to rectify the errors made by the incompetence and ineffectiveness of appellate counsel is to grant a new appeal appointing appellate counsel willing to satisfy his ethical responsibilities and duties in investigating petitioner's innocence.

CONCLUSION

For all of the foregoing reasons, this court should issue an Order to Show Cause to respondent making it incumbent on respondent to demonstrate why the writ should not be granted.

VERIFICATION

I, Jose Osvaldo Arteaga, declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct to the best of my personal knowledge except as to those matter alleged on information and belief, to which I believe them to be true and correct.

Executed this 20 day of April , 2008.

By: Jose Arteaga
(Jose Osvaldo Arteaga)
Petitioner In Pro Se

PROOF OF SERVICE VIA U.S. MAIL

I, **Jose Osvaldo Arteaga**, am the petitioner in the above entitled action and am over the legal age of (18) eighteen years of age.

On April ___ 2008, I served the foregoing:

**PETITION FOR WRIT OF HABEAS CORPUS BY PERSON IN STATE CUSTODY
AND PURSUANT TO 28 U.S.C. § 2254**

on the below enlisted party by placing a true and correct copy thereof into a prepaid/pre-addressed envelope and depositing said contents into the U.S. Mail in the City of Corcoran [County of Kings] addressed as follows:

**Edmund G. Brown, Jr.
California Attorney General
300 South Spring Street
Los Angeles, California,
90013**

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20 day of April, 2008.

By: Jose Osvaldo Arteaga
(Jose Osvaldo Arteaga)
Declarant/Petitioner

ORIGINAL

MC-275

Name Jose Osvaldo Arteaga
Address P.O.B. 5242
Corcoran, California, 93212
D2-120L
CDC or ID Number V29993

SUPREME COURT
FILED

JUN 22 2007

Frederick K. Ohlrich Clerk

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Court)

Jose

| |
|-------------------------------|
| Jose Osvaldo Arteaga, |
| Petitioner |
| vs. |
| Ken Clark, Warden, |
| Respondent |
| <i>on Habeas Corpus.</i> |

PETITION FOR WRIT OF HABEAS CORPUS

\$153738

No.

(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 need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

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JUN - 1 2007

CLERK SUPREME COURT

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JUN 22 2007

CLERK SUPREME COURT

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.

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B175560(1) A/D

COURT OF APPEAL - SECOND DISTRICT

FILED

FEB 06 2007

JOSEPH A. LANE Clerk

R. FLORES Deputy Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

In re JOSE OSVALDO ARTEAGA,
Petitioner,
On HABEAS CORPUS.

LOS ANGELES COUNTY SUPERIOR COURT
No. BA235633

B196552

PETITION FOR WRIT OF HABEAS CORPUS

Assigned to DIVISION ONE

JOSE OSVALDO ARTEAGA
SATF
V-29993/2-D-109
P.O. Box 5242
Corcoran, CA 93212

IN PROPRIA PERSONA

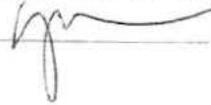
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FILED
Los Angeles Superior Court

JUL 14 2006

John A. Clarke, Executive Officer/Clerk

By  Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

In re JOSE OSVALDO ARTEAGA,
Petitioner,

On HABEAS CORPUS.

LOS ANGELES COUNTY SUPERIOR COURT
No. BA235633

SECOND DISTRICT APPELLATE No. B175560

PETITION FOR WRIT OF HABEAS CORPUS

JOSE OSVALDO ARTEAGA
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IN PROPRIA PERSONA

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| <u>PETITIONER'S APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO BRIEF THE APPELLATE COURT ON PETITIONER'S ALIBI WITNESS AND FOR FAILING TO INVESTIGATE AND PRESENT FACTS THAT WOULD SHOW PETITIONER IS FACTUALLY INNOCENT OF THE CHARGES</u> | 14-17 |
| <u>ARGUMENT (III)</u> | |
| <u>UNDER THE CIRCUMSTANCES OF HIS CASE, THE VICTIMS IDENTIFICATION OF PETITIONER AS THE SHOOTER WAS A PRODUCT OF POLICE COERCION</u> | 18-23 |
| CONCLUSION | 24 |

(SPACE BELOW FOR FILING STAMP ONLY)

1 HALVOR THOMAS MILLER, JR.
2 ATTORNEY AT LAW
3 3307 WEST 43RD PLACE
4 LOS ANGELES, CALIFORNIA 90008
5 (213) 295-6679

FILED
LOS ANGELES SUPERIOR COURT

MAR 19 2004

6 Attorney for Jose Osvaldo Arteaga

JOHN A. CLARKE, CLERK
Sonia Herda
BY SONIA HERDA, DEPUTY

7 SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

9 PEOPLE OF THE STATE OF CALIFORNIA,)
10 Plaintiff,)

CASE NO. BA-235633

11 -vs-

MOTION FOR NEW TRIAL

POINTS AND AUTHORITIES

12 JOSE OSVALDO ARTEAGA,)
13 Defendant.)

ARGUMENT: ORAL

14 TO: THE HONORABLE RAND S. RUBIN, JUDGE OF THE SUPERIOR COURT, and
15 STEVE COOLEY, THE DISTRICT ATTORNEY OF THE COUNTY OF LOS ANGELES, and
16 JOSE ARIAS, HIS DEPUTY.

17 I

18 STATEMENT OF THE CASE

19 The defendant was charged with attempted murder with special
20 allegations. He stood jury trial, represented by his counsel Bruce
21 Loren Karey. He was tried by jury and convicted. The special all-
22 egations were found to be true. On the date set for sentencing, Mr.
23 Karey was removed by the Court on defendant's motion. The under-
24 signed was appointed by the court to review the case, and to make
25 motion for new trial. The record has been reviewed and an indepen-
26 dant investigation made, with limited results.

27 II

28 STATEMENT OF THE FACTS

1.

1 It was alleged and shown at trial that defendant, and another
2 person approached the victim Richard Carlyle, and his companion
3 Sergio Ulloa, at the intersection of Santa Monica Boulevard and Wes-
4 tern Avenue, on August 9, 2002, around midnight. The defendant,
5 armed with a handgun asked the victim "Where are you from?" and
6 after a response from the victim, fired numerous bullets into the
7 victim. Both the victim and his companion recited this set of facts
8 to the jury. The witness Bayron Perez a passerby, from his moving
9 vehicle observed the shooting, and at one point observed the assail-
10 ant and his companion, to run from the scene, pass directly in front
11 of his vehicle, and away to a location a few blocks away, where he
12 followed them. At trial the victim and Ulloa identified defendant
13 as the shooter. At trial Perez testified that defendant was not
14 the shooter nor the person that he followed. During trial prepar-
15 ation, defendant's counsel Mr. Karey became aware of an alibi wit-
16 ness, Mauro Ortega, who placed defendant a distance away at a club,
17 at the time of the assault. Ortega was interviewed. He was avail-
18 able to be called at trial as a witness for defendant. He was not
19 called. A copy of that witnesses interview taken during investig-
20 ation after trial and conviction by the jury is attached hereto.
21 The prosecution called a gang expert at trial. His testimony was
22 not rebutted by the defense. The defendant was not called to tes-
23 tify on his own behalf.

24 LII

25 DEFENDANT'S CONTENTIONS

26 The defendant contends that evidence presented by the People
27 was insufficient to support to support his conviction on the issue
28 of eyewitness identification.

4

1 The opinions given by the People's gang expert, in this case
2 should have been contested. Had same been done after calling the
3 alabi witness, and defendant's own testimony about past gang mem-
4 bership may have rendered the people's uncontroverted witness unbel-
5 levable on that issue. At least, a credible gang expert called by
6 the defense would have given counsel for defendant arguments against
7 the prosecution.

8 V

9 CONCLUSIONS

10 The failure to produce and call witness as referred to above
11 has deprived defendant of a fair trial. This defendant was not eff-
12 ectively assisted by his counsel, as argued above. Although, after
13 my reading of the record and discovery materials, the errors raised
14 here about counsel's representation may have been his judgment calls
15 nonetheless they damaged defendant's case, resulting in a miscarri-
16 age and a conviction. The jury did not have everything available
17 and they should have. It is respectfully requested that the Court
18 grant defendant another trial, in fairness

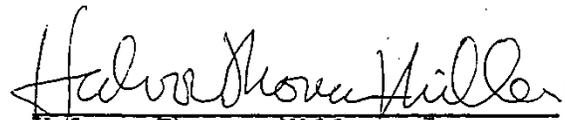
19 VI

20 POINTS AND AUTHORITIES

21 The defense submits the following cases for the Court's con-
22 sideration: People vs. Andrade, (79 Cal.App.4th 651); and People
23 vs Victor Louie Rodriguez, (73 Cal.App3rd 1023).

24 Dated: March 18, 2004

25 Respectfully submitted,

26 

27 Halvor Thomas Miller, Jr.
28 Attorney for defendant

11/23/03

Mauro Ortega, age 25; dob-1/3/78 in Los Angeles, Ca, married and has 1 child with his wife Claudia, age 20. He fathered another child, a 5 yr old son. He has a 3-month old son with his present wife. He lives at 453 North Westmoreland Ave, apt 8 in Los Angeles, Ca. His occupation is that of a Demonstrator of marketable products and is also a part-time painter. The company's name is "Action Demo" located on San Fernando Rd in Glendale.

Mauro states that he has known Jose Ortega for approximately 5 years, that he met him as a being a member of the Salva Chucha gang of which Mauro had been a member for approximately 5 years. However, for the past two years he has been inactive.

Mauro further states that back on August 9th 2007, he had telephoned Jose at the latter's home in La Puente and arrangements were made for Jose to pick up Mauro at the latter's address sometime after 10 pm that date in order to get together. That sometime around 10:30 pm he was picked up by Jose and another guy

EXHIBIT "A"

(2)

6

named Turtle in Turtle's car. It was decided to go to a nightclub located on Temple and Rampart streets, across from the Rampart police station. They arrived at this location at approximately 10:30 pm.

All 3 men entered the club and they began drinking Corona beer. Around midnite or thereabouts Mauro saw a guy who had apparently been drinking as he approached Jose and began shouting off and saying bad things to him. Mauro, who was standing next to Jose overheard what this guy was saying to Jose and he got angry and swung and hit this guy in the face. A fight started involving 5 members of Temple gang of which this guy was a member.

Because of the fighting, the security guard attempted to quell this action by using mace on the combatants. As a result, the melée stopped and Mauro and his two companions left the club and went back to their car where they entered.

All three men drove back

7

(3)

to Mauro's home where he got out of the vehicle and entered his home.

One week later Mauro heard that Jose had been arrested. Jose's brother later called & told Mauro that Jose's arrest was for attempted murder.

The foregoing statement is true and correct.

~~Mauro Enters~~
Taken by Malcolm Richards
On 11/23/03

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

8
Arteaga, Jose Osvaldo
BA235633-01

I, JOHN A. CLARKE, EXECUTIVE OFFICER/CLERK of the Superior Court for the County and State aforesaid, do hereby certify that I have compared this transcript with the original documents on file and/or of record in this office and it is a full, true and correct copy.



JOHN A. CLARKE, EXECUTIVE OFFICER/CLERK
of the Superior Court of California, County of Los Angeles

Date:

June 10, 2004

By: _____, Deputy

S. Barrón

- Notice of Completion of the Clerk's Transcripts on appeal of the within action having been mailed/delivered to the attorneys representing the appellant and the respondent pursuant to Rule 35(c) of the rules on appeal, I hereby certify the foregoing record consisting of 8 pages to be a full, true and correct transcript on appeal.

JOHN A. CLARKE, EXECUTIVE OFFICER/CLERK
of the Superior Court of California, County of Los Angeles

Date:

By: _____, Deputy

- Portions of this transcript are governed by the provisions of Code of Civil Procedure Section 237(a)(2), and all of the personal juror identifying information has been redacted.

JOHN A. CLARKE, EXECUTIVE OFFICER/CLERK
of the Superior Court of California, County of Los Angeles

Date:

June 10, 2004

By: _____, Deputy

S. Barrón

CERTIFICATION

Attorney General

COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

DOCKET
CR. LA.
No. 04DAD332
Entered by LSA
Date 10/16/04

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Respondant

vs

Arteaga, Jose Osvaldo

Defendant(s) and Appellant

No. BA235633-01

Volume 1 of 1 Volumes

CLERK'S TRANSCRIPT

Appearances:
Counsel for Plaintiff:
THE ATTORNEY GENERAL

Appeal from the Superior Court,
County of Los Angeles

Counsel for Defendant and Appellant

Honorable Rand S. Rubin, Judge

C. A. P.

2-CF-130
4-RT-547

Date Mailed to:
Defendant (in pro per) _____
Defendant's Trial Attorney _____
Defendant's Appellate Atty _____
District Attorney _____
Attorney General _____

6

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ALBERT BRONCO
CLERK

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
01 JOSE OSVALDO ARTEAGA (9/9/1981) (Bk#
7390407)
Defendant(s).

CASE NO. BA235633 2002 4 2002

INFORMATION

Arraignment Hearing
Date: 12/24/2002
Department: CEN 112

DEC 24 2002

JOHN A. CLARKE
BY R. YOUNG, DEPUTY

INFORMATION
SUMMARY

| Ct. No. | Charge | Charge Range | Defendant | Special Allegation | Alleg. Effect |
|---------|---------------|--------------|-----------------------|---|--|
| 1 | PC 664/187(a) | Check PC664 | ARTEAGA, JOSE OSVALDO | PC 12022.53(d) PC 12022.7(a) PC 186.22(b)(1) PC 667.5(b) | +25Y-Life, MSP* +3 Yrs +2-3-4-5-10 +1 yr. per prior |

The District Attorney of the County of Los Angeles, by this Information alleges that:

COUNT 1

MAY 28 2003
DATE AMENDED
on THIS DATE

On or about August 29, 2002, in the County of Los Angeles, the crime of ATTEMPTED WILLFUL, DELIBERATE, PREMEDITATED MURDER, in violation of PENAL CODE SECTION 664/187(a), a Felony, was committed by JOSE OSVALDO ARTEAGA, who did unlawfully and with malice aforethought attempt to murder RICHARD CARLYLE, a human being.

It is further alleged that the aforesaid attempted murder was committed willfully, deliberately and with premeditation within the meaning of Penal Code section 664(a) and is a serious felony pursuant to Penal Code section 1192.7(c).

"NOTICE: Conviction of this offense will require you to provide specimens and samples pursuant to Penal Code section 296. Willful refusal to provide the specimens and samples is a crime."

MAY 23 2003
S. Miller
TTS
GHT

It is further alleged that said defendant(s), JOSE OSVALDO ARTEAGA personally and intentionally discharged a firearm, a handgun, which proximately caused great bodily injury ~~and death~~ to RICHARD

7

CARLYLE within the meaning of Penal Code section 12022.53(d).

It is further alleged that said defendant(s), JOSE OSVALDO ARTEAGA personally and intentionally discharged a firearm, a handgun, within the meaning of Penal Code section 12022.53(c).

It is further alleged that said defendant(s), JOSE OSVALDO ARTEAGA personally used a firearm, a handgun, within the meaning of Penal Code section 12022.53(b).

It is further alleged that in the commission of the above offense the said defendant(s), JOSE OSVALDO ARTEAGA, personally inflicted great bodily injury upon Richard Carlyle, not an accomplice to the above offense, within the meaning of Penal Code Section 12022.7(a) and also causing the above offense to become a serious felony within the meaning of Penal Code Section 1192.7(c)(8).

"NOTICE: This offense is a serious felony and a violent felony within the meaning of Penal Code sections 1192.7(c)(8) and 667.5(c)(8)."

It is further alleged pursuant to Penal Code section 186.22(b)(1) that the above offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members.

"NOTICE: Conviction of this offense will require you to register pursuant to Penal Code Section 186.30(a). Willful failure to register is a crime."

It is further alleged as to count(s) 1 pursuant to Penal Code section 667.5(b) that the defendant(s), JOSE OSVALDO ARTEAGA, has suffered the following prior conviction(s):

| <u>Case No.</u> | <u>Code/Statute</u> | <u>Conv. Date</u> | <u>County of Court</u> | <u>State</u> | <u>Court Type</u> |
|-----------------|---------------------|-------------------|------------------------|--------------|-------------------|
| BA140818 | PC 32 | 07/30/1997 | Los Angeles | CA | Superior |

and that a term was served as described in Penal Code section 667.5 for said offense(s), and that the defendant(s) did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term.

8

* * * * *

THIS INFORMATION CONSISTS OF 1 COUNT(S).

STEVE COOLEY
DISTRICT ATTORNEY
County of Los Angeles,
State of California

BY: 
JOSE LUIS ARIAS
DEPUTY DISTRICT ATTORNEY

Filed in Superior Court,
County of Los Angeles

/MEG

DATED: 12/24/02

Pursuant to Penal Code Section 1054.5(b), the People are hereby informally requesting that defense counsel provide discovery to the People as required by Penal Code Section 1054.3.

126

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 06/10/04

CASE NO. BA235633

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: JOSE OSVALDO ARTEAGA

INFORMATION FILED ON 12/24/02.

COUNT 01: 664-187(A) PC FEL - ATTEMPTED MURDER.

ON 03/19/04 AT 830 AM IN LASC -CENTRAL DEPT 112

CASE CALLED FOR P & S/MOT FOR NEW TRIAL

PARTIES: RAND S. RUBIN (JUDGE) SONIA HERDA (CLERK)
LINDA SWARTZ (REP) JOSE L. ARIAS (DA)

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY HALVOR MILLER, JR BAR PANEL ATTORNEY

DEFENDANT WAIVES ARRAIGNMENT FOR JUDGMENT AND STATES THERE IS NO LEGAL CAUSE WHY SENTENCE SHOULD NOT BE PRONOUNCED. THE COURT ORDERED THE FOLLOWING JUDGMENT:

AS TO COUNT (01):

DEFENDANT GIVEN TOTAL CREDIT FOR 577 DAYS IN CUSTODY 577 DAYS ACTUAL CUSTODY AND 0 GOOD TIME/WORK TIME

IN ADDITION:

-THE DEFENDANT IS TO PAY A RESTITUTION FINE PURSUANT TO SECTION 1202.4(B) PENAL CODE IN THE AMOUNT OF \$ 5,000.00

-DEFENDANT IS TO PAY A PAROLE RESTITUTION FINE, PURSUANT TO PENAL CODE SECTION 1202.45, IN THE AMOUNT OF \$ 5,000.00 SAID FINE IS STAYED AND THE STAY IS TO BECOME PERMANENT UPON SUCCESSFUL COMPLETION OF PAROLE.

-THE COURT ORDERS THAT THE DEFENDANT PROVIDE TWO SPECIMENS OF BLOOD, A SALIVA SAMPLE, RIGHT THUMBPRINT, AND A FULL PALM PRINT IMPRESSION OF EACH HAND FOR LAW ENFORCEMENT IDENTIFICATION ANALYSIS.

-THE COURT ADVISES THE DEFENDANT OF APPEAL RIGHTS.

-THE COURT ADVISES THE DEFENDANT OF PAROLE RIGHTS.

PAGE NO. 1 P & S/MOT FOR NEW TRIAL
HEARING DATE: 03/19/04

1 COURT OF APPEAL OF THE STATE OF CALIFORNIA

2 SECOND APPELLATE DISTRICT

| |
|-----------------------|
| DOCKET |
| CR. LA. |
| No. <u>04DA0882</u> |
| Entered by <u>LSA</u> |
| Date <u>6/16/04</u> |

3
4 THE PEOPLE OF THE STATE OF CALIFORNIA)

5 PLAINTIFF-RESPONDENT,)

6 VS.)

7 JOSE OSVALDO ARTEAGA,)

8 DEFENDANT-APPELLANT.)

NO. BA235633

MAY 24 2004

9
10
11
12 APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

13 HONORABLE RAND S. RUBIN, JUDGE PRESIDING

14 REPORTER'S TRANSCRIPT ON APPEAL

15 APRIL 28, 29, AND 30, 2003

16
17
18 APPEARANCES:

19 FOR PLAINTIFF-RESPONDENT:

BILL LOCKYER,
STATE ATTORNEY GENERAL
300 S. SPRING STREET
NORTH TOWER, SUITE 5001
LOS ANGELES, CA 90013

20
21
22 FOR DEFENDANT-APPELLANT:

IN PROPRIA PERSONA

23
24
25 **COPY**

LINDA K. SWARTZ, CSR 4648
OFFICIAL REPORTER

26
27 VOLUME 2 OF 4

28 PAGES 1 THROUGH 240, INCLUSIVE

1 FIRED FIVE TIMES, SHOOTING MR. CARLYLE
2 FIVE TIMES, TWICE IN THE STOMACH, ONCE IN THE CHEST,
3 TWICE IN THE ARM, PUTTING HIS ARM UP TO PROTECT HIMSELF
4 WITH THAT ARM.

5 IMMEDIATELY AFTER THAT MR. ARTEAGA AND
6 THE OTHER INDIVIDUAL, STILL UNIDENTIFIED SUSPECT, RAN
7 FROM THE LOCATION AND LEFT.

8 MR. CARLYLE WAS TAKEN TO THE HOSPITAL,
9 CEDARS SINAI. HE WENT TO THE EMERGENCY ROOM, EMERGENCY
10 SURGERY, HAD HIS CHEST OPENED BASICALLY AND WAS TREATED
11 FOR HIS WOUND.

12 YOU'LL LEARN THE EXTENT OF HIS INJURY.
13 HE WAS IN THE HOSPITAL FOR ABOUT A MONTH, CRITICAL
14 CONDITION FOR ABOUT TWO WEEKS, LOST PART OF HIS LUNG,
15 LOST PART OF HIS -- USE OF HIS HANDS, AND YOU'LL LEARN
16 SOME OF THE OTHER INJURIES HE SUSTAINED.

17 SERGIO ULLOA WAS NOT INJURED DURING THE
18 ASSAULT. HE WAS STANDING NEXT TO MR. CARLYLE, BUT HE
19 SUSTAINED NO INJURIES.

20 IMMEDIATELY AFTER MR. RICHARD CARLYLE WAS
21 TAKEN TO THE HOSPITAL, SERGIO ULLOA THE WITNESS WAS
22 TAKEN TO THE STATION, THE HOLLYWOOD STATION, AND
23 INTERVIEWED.

24 HE GAVE A STATEMENT, A TAPED STATEMENT,
25 OF WHAT HAD HAPPENED, GAVE A DETAILED DESCRIPTION OF
26 WHAT OCCURRED, DESCRIPTION OF THE SUSPECT, HEIGHT,
27 WEIGHT, WAY HE LOOKED.

28 AND AT THAT POINT IN TIME THE DETECTIVES

1 LOOK, I SAW THE SHOOTING AND I CAME FORWARD BECAUSE I
2 THINK THIS IS IMPORTANT. I THINK THAT IT'S IMPORTANT
3 THAT I COME FORWARD WITH THIS BECAUSE WHAT HAPPENED TO
4 THIS VICTIM, THIS PERSON THAT GOT SHOT, IS A HORRIBLE
5 THING AND I WANT TO CORRECT WHAT I JUST TOLD YOU ON THE
6 DATES.

7 WHAT I ANTICIPATE THE EVIDENCE TO SHOW IS
8 THAT MR. PERES CONTACTS SGT. SMITH ON AUGUST 14. HE
9 MEETS WITH THE L.A.P.D. DETECTIVES ON AUGUST 19, AND
10 HE'S SHOWN A SIX-PACK PHOTO LINEUP, AND THE SAME LINEUP
11 YOU ARE GOING TO SEE.

12 AND WHAT HE SAYS TO THE DETECTIVES IS,
13 WELL, I'VE SEEN MR. ARTEAGA IN THIS VICINITY BEFORE. I
14 DON'T KNOW HIM, BUT I'VE SEEN HIM, AND HE'S NOT THE
15 SHOOTER.

16 ON AUGUST 14 THE DETECTIVES WENT AND
17 INTERVIEWED -- WENT AND SPOKE TO MR. CARLYLE, THE
18 VICTIM, AND THEY WENT TO THE HOSPITAL AND THEY SPOKE TO
19 MR. CARLYLE.

20 AND MR. CARLYLE GIVES THEM A VERY
21 DETAILED STATEMENT AS TO WHAT HAPPENS. HE DESCRIBES IN
22 DETAIL THE EVENTS THAT LED UP TO HIM BEING SHOT.

23 THE DETECTIVES SHOW MR. CARLYLE A BOOK,
24 WHICH HAS APPROXIMATELY 200 PHOTOGRAPHS IN IT, AND HE
25 PICKS OUT FIVE PHOTOGRAPHS THAT RESEMBLE -- HE DOESN'T
26 SAY TO THEM, THAT PHOTOGRAPH IS THE GUY WHO DID THE
27 FOLLOWING. HE SAYS -- PICKS OUT FIVE PHOTOGRAPHS AND
28 SAYS THAT THIS RESEMBLES THE PERSON WHO SHOT ME.

1 AN L.A.P.D. OFFICER WHO WILL BE LIKELY QUALIFIED IN
2 THIS COURTROOM AS WHAT WE CALL AN EXPERT WITNESS.

3 HE'S GOING TO BE AN EXPERT ON GANG
4 ACTIVITY, AND YOU'RE GOING TO HEAR ABOUT THIS GANG
5 CALLED MARA SALVA TRUCHA, M.S..

6 YOU ARE ALSO GOING TO FIND OUT, THIS IS
7 VERY CLEAR, THE DEFENSE WILL NOT BE CONTRADICTING THIS
8 OR TRYING TO SAY OTHERWISE, YOU'LL FIND OUT THAT
9 MR. ARTEAGA HAS BEEN A GANG MEMBER AND THAT HE'S A
10 MEMBER OF MARA SALVA TRUCHA.

11 AND YOU'LL LIKELY SEE SOME PHOTOGRAPHS
12 THAT MAYBE -- THAT TO SOME OF YOU MIGHT BE STUNNING BUT
13 THEY ARE GOING TO BE STRIKING, AND THEY'RE GOING TO BE
14 PHOTOGRAPHS OF HIS UPPER TORSO WITHOUT A SHIRT ON AND
15 YOU WILL SEE SOME TATTOOS.

16 THE EVIDENCE WILL CLEARLY SHOW THAT
17 MR. ARTEAGA HAS BEEN A MEMBER OF THE MARA SALVA TRUCHA
18 GANG. YOU'RE GOING TO FIND OUT THAT THAT AREA, OF
19 COURSE, IS AN AREA WHICH MARA SALVA TRUCHA, AS GANGS
20 DO, QUOTE, CLAIMS, END QUOTES, THAT IT'S THEIR AREA.

21 BUT WHAT YOU'RE NOT GOING TO FIND OUT
22 FROM THE EVIDENCE, YOU'RE NOT GOING TO REALLY FIND OUT
23 ANY PARTICULAR MOTIVE, AND THAT'S WHAT I BELIEVE THE
24 EVIDENCE IS GOING TO DEMONSTRATE TO YOU.

25 I BELIEVE THAT THIS EVIDENCE IS CLEARLY
26 GOING TO DEMONSTRATE TO YOU THAT THERE IS A CONFLICT IN
27 EYEWITNESS TESTIMONY, AND I BELIEVE THAT THERE'S GOING
28 TO BE SOME VERY SIGNIFICANT EVIDENCE BY THESE

1 WITNESSES, IN PARTICULAR, MR. PERES, WHO WILL TELL YOU
2 THAT HE THOUGHT ENOUGH ABOUT WHAT HE SAW TO COME
3 FORWARD AND PRESENT THAT TO THE POLICE.

4 YOU'RE GOING TO FIND OUT ONE OTHER THING
5 ABOUT MR. PERES. MR. PERES WILL HAVE -- MAY BE TO SOME
6 OF YOU AN UNUSUAL APPEARANCE. HE IS WHAT WE CALL A
7 TRANSGENDER, A CROSS-DRESSER. HE DOES A FEMALE
8 IMPERSONATION SHOW.

9 HE WORKS I THINK THREE OR FOUR TIMES A
10 WEEK IN A NIGHTCLUB DOING THAT. HE IMPERSONATES
11 SELENA, JENNIFER LOPEZ, AND YOU'RE GOING TO -- YOU WILL
12 SEE THAT HE IS VERY, VERY SMALL IN STATURE. HE'S NOT A
13 BIG MAN.

14 BUT HE THOUGHT ENOUGH TO COME FORWARD AND
15 SPEAK ABOUT THIS. AND YOU'LL ALSO FIND OUT THAT HE WAS
16 NOT SUBPOENAED BY THE PROSECUTION, AND THAT I THINK IS
17 A SIGNIFICANT FACT.

18 THIS IS A DEFENSE WITNESS AND HE'S COME
19 FORWARD. HIS TESTIMONY WILL CONTRAST WITH THE
20 TESTIMONY OF MR. CARLYLE AND MR. ULLOA, AND THERE ARE
21 INCONSISTENCIES IN THEIR TESTIMONY WHICH I THINK WILL
22 BE DEMONSTRATED BY THE EVIDENCE.

23 THANK YOU FOR YOUR ATTENTION. THE TRIAL
24 IS NOW GOING TO BEGIN WITH THE PRESENTATION OF
25 WITNESSES. THANK YOU.

26 THE COURT: THANK YOU, MR. KAREY.

27 MR. ARIAS, YOU MAY CALL YOUR FIRST
28 WITNESS.

1 A. GOOD MORNING.

2 Q. SIR, WHAT COUNTY DO YOU LIVE IN?

3 A. VENTURA COUNTY.

4 Q. AND HOW LONG HAVE YOU LIVED IN THAT

5 COUNTY?

6 A. I WAS BORN THERE.

7 Q. YOU WERE BORN THERE?

8 I'M GOING TO TAKE YOU BACK TO AUGUST 8 OF

9 2002. DID YOU ON THAT DAY SOMETIME IN THE EVENING

10 HOURS, AROUND 9:30 IN THE EVENING, DID YOU HAVE AN

11 OPPORTUNITY TO COME DOWN TO LOS ANGELES FOR ANY REASON?

12 A. YES.

13 Q. WHAT WAS THE PURPOSE FOR YOU COMING DOWN

14 TO LOS ANGELES?

15 A. ME AND MY FRIEND SERGIO ULLOA WERE GOING

16 TO GO, YOU KNOW, DANCING.

17 Q. AND DOES SERGIO ULLOA LIVE OUT THERE WITH

18 YOU IN VENTURA OR DOES HE LIVE SOMEWHERE ELSE?

19 A. HE LIVES IN SAN DIEGO.

20 Q. AND HAD HE COME DOWN TO VISIT YOU IN

21 ORANGE --

22 A. VENTURA.

23 Q. VENTURA COUNTY?

24 A. YES.

25 Q. AND APPROXIMATELY WHAT TIME DID YOU AND

26 MR. ULLOA COME DOWN TO LOS ANGELES?

27 A. I'M NOT SURE. SOMETIME IN THE AFTERNOON

28 OR SO, I'M NOT EXACTLY SURE WHAT TIME.

1 Q. AND THIS CLUB THAT YOU WERE PLANNING ON
2 ATTENDING, WHAT IS THE NAME OF THIS CLUB?

3 A. TEMPO.

4 Q. AND WHERE IS THIS CLUB LOCATED?

5 A. NEAR SANTA MONICA AND WESTERN.

6 Q. AND HAD YOU BEEN TO THAT CLUB IN THE
7 PAST?

8 A. YES.

9 Q. AND APPROXIMATELY WHAT TIME WOULD YOU SAY
10 YOU AND MR. ULLOA ARRIVED AT THE CLUB?

11 A. I'M NOT EXACTLY SURE WHAT TIME EXACTLY.

12 Q. WAS IT DAYTIME? WAS IT NIGHTTIME?

13 A. I BELIEVE IT WAS LIKE AT SUNSET ALREADY.
14 SUN WAS SETTING.

15 Q. AND WHILE AT THE CLUB DID YOU OR
16 MR. ULLOA HAVE ANY PROBLEMS OR CONFRONTATION WITH
17 ANYBODY?

18 A. NO.

19 Q. AND WHILE AT THE CLUB DID YOU HAVE
20 ANYTHING TO DRINK?

21 A. YES, WE DID.

22 Q. HOW MUCH WOULD YOU ESTIMATE YOU DRANK
23 DURING THE EVENING?

24 A. PROBABLY LIKE A BEER OR TWO.

25 Q. DO YOU DRINK A LOT?

26 A. NO. JUST LIKE OCCASIONALLY WE GO DANCING
27 OR WHATEVER.

28 Q. AND WHO DROVE TO LOS ANGELES?

1 A. I DID. I DROVE MY CAR.
2 Q. WERE YOU GOING TO DRIVE BACK AS WELL?
3 A. YES.
4 Q. AND YOU WERE PLANNING ON DRIVING BACK TO
5 VENTURA?
6 A. YES.
7 Q. NOW, WHAT TIME APPROXIMATELY DO YOU
8 RECALL LEAVING THE CLUB?
9 A. I DON'T REMEMBER. IT WAS NIGHT. IT MUST
10 HAVE BEEN AROUND MAYBE NINE OR TEN. I'M NOT SURE. IT
11 WAS EARLY, THOUGH, EVENING.
12 Q. AND AFTER LEAVING THE CLUB DID ANYTHING
13 UNUSUAL HAPPEN TO YOU?
14 A. NO, NOT TILL THE INCIDENT TOOK PLACE.
15 Q. AND WHAT INCIDENT ARE YOU REFERRING TO?
16 A. THE INCIDENT WHEN WE WERE GOING TO CROSS
17 THE STREET AND, YOU KNOW, TWO GUYS WERE TELLING US, YOU
18 KNOW, THINGS AND THAT'S WHEN, YOU KNOW, I GOT SHOT.
19 Q. AND HOW MUCH TIME AFTER LEAVING THE CLUB
20 DID YOU GET SHOT?
21 A. PROBABLY LIKE A MINUTE OR SO.
22 Q. SO YOU HAD JUST LEFT THE CLUB?
23 A. YES.
24 Q. AND THEN WITHIN A MINUTE OR SO IS WHEN
25 YOU WERE SHOT?
26 A. YES.
27 Q. NOW, YOU MENTIONED THAT THIS CLUB IS ON
28 SANTA MONICA AND WESTERN, SOMETHING ABOUT TWO GUYS

1 APPROACHING YOU AND YOU GETTING SHOT, RIGHT?

2 A. YES.

3 Q. HOW MANY PEOPLE FIRED AT YOU?

4 A. JUST ONE.

5 Q. AND DO YOU SEE THAT PERSON IN THE
6 COURTROOM TODAY?

7 A. YES.

8 Q. COULD YOU PLEASE POINT TO HIM AND TELL US
9 WHAT HE'S WEARING, FOR THE RECORD.

10 A. HE'S WEARING A WHITE SHIRT.

11 THE COURT: THE WITNESS HAS IDENTIFIED THE
12 DEFENDANT, JOSE OSVALDO ARTEAGA, FOR THE RECORD.

13 BY MR. ARIAS:

14 Q. NOW, WHEN YOU LEFT THE CLUB, YOU WERE --
15 YOU SAY YOU WERE INJURED, AND WERE YOU TAKEN TO THE
16 HOSPITAL?

17 A. YES.

18 Q. DO YOU RECALL EXACTLY WHAT TIME THAT WAS?

19 A. NO.

20 Q. WOULD LOOKING AT A POLICE REPORT
21 INDICATING THE RESPONSE BY THE POLICE OFFICERS, WOULD
22 THAT HELP YOU IN MAYBE REFRESHING YOUR MEMORY AS TO THE
23 TIME THE SHOOTING OCCURRED?

24 A. YES.

25 Q. DRAWING YOUR ATTENTION TO DET. VICKI
26 BYNUM'S REPORT AND DRAWING YOUR ATTENTION TO THE FIRST
27 PARAGRAPH, COULD YOU JUST REVIEW THAT BRIEFLY AND SEE
28 IF THAT REFRESHES YOUR MEMORY.

1 A. (COMPLIES.) YES.

2 Q. NOW, DOES THE REPORT INDICATE WHAT TIME
3 THE POLICE CAME TO THE SHOTS FIRED CALL?

4 A. ON THE REPORT IT SAYS --

5 MR. KAREY: OBJECTION.

6 THE COURT: THE OBJECTION SUSTAINED. LET'S SEE
7 IF HIS RECOLLECTION IS REFRESHED.

8 BY MR. ARIAS:

9 Q. OKAY. DOES THAT HELP YOU IN REFRESHING
10 YOUR MEMORY AS TO WHAT TIME IT WAS WHEN YOU WERE SHOT?

11 A. IT MUST HAVE BEEN AROUND THAT TIME,
12 MIDNIGHT.

13 Q. NOW, WHEN YOU LEFT THE CLUB, TEMPO, HOW
14 FAR DID YOU HAVE TO WALK IN ORDER TO GET TO THE CORNER
15 OF WESTERN AND SANTA MONICA?

16 A. LIKE A BLOCK OR SO.

17 Q. DRAWING YOUR ATTENTION TO THIS DIAGRAM I
18 HAVE UP ON THE BOARD, YOUR HONOR, WHICH I'D LIKE TO
19 MARK AS PEOPLE'S 1.

20 THE COURT: IT IS MARKED PEOPLE'S 1, FOR THE
21 RECORD.

22

23 (MARKED FOR IDENTIFICATION,

24 PEOPLE'S 1, DIAGRAM.)

25

26 BY MR. ARIAS:

27 Q. THIS SHOWS THE CORNER OF SANTA MONICA AND
28 WESTERN, SPECIFICALLY THE SOUTHWEST CORNER WITH THE

1 BOARD, IS THE SOUTHWEST CORNER OVER HERE ON PEOPLE'S 1,
2 THE CORNER THAT I'M POINTING TO WHERE IT SAYS THE WORD
3 "DRIVEWAY," ALONG WITH SOME WHAT APPEAR TO BE POSTS AND
4 HALF WEDGES.

5 LET'S ASSUME FOR A MOMENT THAT THAT'S
6 DEPICTING THE INTERSECTION THAT YOU ARE REFERRING TO IN
7 PEOPLE'S 2.

8 DOES THAT HELP YOU ORIENT YOURSELF WITH
9 RESPECT TO THE DIAGRAM?

10 A. YES.

11 Q. OKAY. SO THE CORNER WHERE YOU WERE SHOT
12 WOULD BE, AS YOU'VE INDICATED IN PEOPLE'S 1, THIS
13 SOUTHWEST CORNER, OKAY?

14 A. YES.

15 Q. ASSUMING THAT'S THE CASE, WHERE WOULD
16 CLUB TEMPO BE FROM THAT?

17 A. CLUB TEMPO WOULD BE OVER HERE IN THIS
18 LOCATION.

19 Q. REFERRING TO THE LEFT SIDE OF THE
20 DIAGRAM, GOING WEST ON SANTA MONICA?

21 A. YES, GOING THIS WAY.

22 Q. WOULD IT BE ON THE SOUTH SIDE OF SANTA
23 MONICA OR ON THE NORTH SIDE OF SANTA MONICA?

24 A. ON THIS SIDE.

25 Q. THE SOUTH SIDE, OKAY. AND YOU SAY YOU
26 WALKED FROM CLUB TEMPO, AND WHICH DIRECTION DID YOU
27 WALK AFTER LEAVING CLUB TEMPO?

28 A. WE WALKED TOWARD THIS WAY.

1 Q. AND THAT WOULD BE, ACCORDING TO THE --

2 A. EAST.

3 Q. EASTBOUND ON SANTA MONICA TOWARDS THE
4 OTHER SOUTHWEST CORNER; IS THAT CORRECT?

5 A. YES.

6 Q. NOW, WHEN YOU GOT TO THE SOUTHWEST CORNER
7 OF SANTA MONICA, WHERE WERE YOU INTENDING TO PROCEED TO
8 NEXT?

9 A. WE WERE GOING TO CROSS RIGHT HERE, ACROSS
10 SANTA MONICA BOULEVARD.

11 Q. OKAY. AND THAT WOULD BE WEST -- I'M
12 SORRY, NORTHBOUND WESTERN ACROSS SANTA MONICA?

13 A. YES.

14 Q. AND WHERE WERE YOU GOING?

15 A. WE WERE GOING TO HEAD TOWARDS MY CAR IN
16 THE PARKING LOT WHICH IS LOCATED OVER HERE.

17 Q. AND THE PARKING LOT YOU'RE REFERRING TO
18 WOULD BE ON THE NORTH SIDE OF SANTA MONICA?

19 A. YES.

20 Q. SOMEWHERE WEST OF WESTERN?

21 A. YES.

22 Q. IS THAT WHERE YOU PARKED YOUR VEHICLE?

23 A. CLUB TEMPO PARKING AREA. THEY HAVE A
24 PARKING AREA FOR THE CLUB.

25 Q. IS THAT ACROSS FROM THE CLUB?

26 A. YES.

27 Q. ACROSS THE STREET? SO NOW WHILE YOU'RE
28 AT THE CORNER OF SANTA MONICA AND WESTERN, THE

1 SOUTHWEST CORNER, SOMETIME AFTER MIDNIGHT DID ANYBODY
2 APPROACH YOU?

3 A. YES. I SAW TWO GUYS WALKING ACROSS, BUT
4 I WASN'T PAYING ATTENTION TO THEM.

5 Q. AND WHICH WAY WERE THEY WALKING WHEN YOU
6 FIRST NOTICED THEM?

7 A. I SAW THEM WALKING ACROSS THE STREET.

8 Q. AND THAT WOULD BE ON THIS DIAGRAM
9 SOUTHBOUND ON WESTERN ON THE SAME SIDE OF THE STREET
10 THAT YOU WERE ON?

11 A. YES.

12 Q. OKAY. AND THEY WERE -- WERE THEY ALSO
13 WALKING FROM THE NORTHWEST CORNER TO THE SOUTHWEST
14 CORNER?

15 A. YES.

16 Q. IS THAT WHERE THEY WERE? AND HOW MANY
17 WERE THERE?

18 A. JUST TWO GUYS.

19 Q. AND DO YOU SEE ONE OF THOSE PERSONS IN
20 THE COURTROOM?

21 A. YES.

22 Q. YOU'VE IDENTIFIED HIM ALREADY, IS THAT --

23 A. I ALREADY DID.

24 Q. AND YOU MENTIONED THERE WAS A SECOND
25 INDIVIDUAL WITH MR. ARTEAGA, CORRECT?

26 A. YES, THERE WAS.

27 Q. AND WHAT DID THIS INDIVIDUAL LOOK LIKE?

28 A. I JUST REMEMBER HE WAS DARK, DARKER,

1 SHOT ME.

2 BY MR. ARIAS:

3 Q. SO AFTER THEY, MEANING MR. ARTEAGA AND
4 THIS OTHER INDIVIDUAL, PASSED BY YOU, COULD YOU HEAR
5 MR. ARTEAGA WAS SAYING SOMETHING BEFORE YOU HEARD THE
6 WORDS "IS THAT YOUR BOYFRIEND"?

7 A. NO. I HEARD -- HE MUST HAVE BEEN
8 TALKING, BUT I DON'T KNOW EXACTLY WHAT HE WAS SAYING.

9 Q. BUT AT THAT POINT YOU COULDN'T HEAR WHAT
10 WAS BEING SAID?

11 A. NO. I DIDN'T EVEN KNOW WHO HE WAS
12 TALKING TO. I WASN'T EVEN PAYING ATTENTION TO HIM.

13 Q. AT SOME POINT YOUR ATTENTION IS DRAWN,
14 CORRECT?

15 A. YES.

16 Q. AND WHEN YOUR ATTENTION IS DRAWN, WHAT DO
17 YOU DO?

18 A. I TURNED AROUND AND HE STARTED TELLING ME
19 THINGS LIKE, YOU KNOW, "IS THAT YOUR BOYFRIEND," LIKE
20 REALLY, LIKE FOR NO REASON, LIKE HE HAD NOTHING TO DO,
21 YOU KNOW, WITH US AT ALL.

22 HE JUST STARTED, YOU KNOW, TELLING ME
23 STUFF, YOU KNOW, "IS THAT YOUR BOYFRIEND" OR WHATEVER
24 AND STUFF LIKE THAT. AND I JUST SAID, "YEAH, YOU KNOW,
25 SO WHAT'S THE BIG DEAL?" AND THAT'S WHEN HE JUST
26 PULLED THE GUN AND STARTED SHOOTING ME FOR NO REASON.

27 Q. SO WE'RE GOING TO GO STEP BY STEP. SO
28 YOU HEAR SOMETHING, YOUR ATTENTION IS DRAWN. YOU

1 MR. ARIAS: ABOUT 12 FEET, TEN TO 12 FEET?

2 THE COURT: I'D SAY MAYBE 12, 13, MAYBE A LITTLE
3 MORE. WHAT DO YOU THINK? DO YOU WANT TO GET YOUR IDEA
4 IN THERE, MR. KAREY?

5 MR. ARIAS: IS THERE A MEASUREMENT FROM HERE?

6 THE COURT: HAVE HIM SIT IN THE JURY BOX, IN THE
7 WITNESS STAND, AND I CAN GIVE YOU A MEASUREMENT. I
8 CAN'T GIVE ONE FROM OUT THERE.

9 MR. ARIAS: OKAY. WHAT WOULD YOU SAY, YOUR
10 HONOR, 13, 14 FEET, IF THE COURT THINK'S THAT'S MORE
11 APPROPRIATE.

12 Q. NOW, WHEN YOU'RE FACING MR. ARTEAGA AND
13 MR. ARTEAGA IS MAKING STATEMENTS TO YOU, IS MR. ARTEAGA
14 HOLDING ANYTHING IN HIS HANDS AT THAT POINT?

15 A. NO.

16 Q. SO WHAT PART OF HIS BODY ARE YOU LOOKING
17 AT WHEN YOU'RE HAVING THIS EXCHANGE WITH HIM ABOUT YOUR
18 BOYFRIEND?

19 A. JUST HIS FACE.

20 Q. HIS FACE? WAS MR. ARTEAGA WEARING
21 ANYTHING BLOCKING HIS FACE, BASEBALL CAP OR ANYTHING TO
22 THAT EFFECT?

23 A. NO.

24 Q. AND HOW WAS MR. ARTEAGA'S HAIR AT THAT
25 TIME WHEN HE MADE THE STATEMENT TO YOU, RIGHT BEFORE
26 THE SHOOTING?

27 A. LIKE ABOUT THE SAME.

28 Q. I'M SORRY?

1 A. THE SAME AS IT IS RIGHT NOW. HE HAD
2 HAIR, OR JUST NOT -- NOT LIKE AS -- IT WAS NOT AS
3 COMBED OR, YOU KNOW, MAYBE LIKE -- I DON'T RECALL HIS
4 HAIR. I REALLY -- NOT THAT WELL, BUT I REMEMBER HIS
5 FACE.

6 Q. OKAY. DO YOU REMEMBER GIVING A
7 DESCRIPTION TO THE DETECTIVE ABOUT 13 DAYS AFTER THIS
8 SHOOTING OCCURRED?

9 A. YES.

10 Q. AND DO YOU REMEMBER GIVING THE
11 DESCRIPTION TO A SKETCH ARTIST WHO DREW A DIAGRAM?

12 A. YES.

13 Q. WOULD LOOKING AT THAT SKETCH AND THE
14 DESCRIPTION YOU GAVE MAYBE HELP YOU IN REMEMBERING WHAT
15 MR. ARTEAGA LOOKED LIKE, 13 DAYS AFTER THIS MURDER -- I
16 MEAN, THIS ATTEMPTED MURDER?

17 A. YEAH. THE SKETCH TOTALLY WAS TOO PERFECT
18 AND, YOU KNOW, WAS JUST -- I KNEW IT DIDN'T MATCH UP TO
19 WHAT HE REALLY LOOKED LIKE, BUT SHE SAID THAT'S THE
20 BEST SHE CAN DO AND SHE DID REALLY WELL.

21 Q. MY ONLY QUESTION IS, WOULDN'T YOU THINK
22 YOUR MEMORY AS TO WHAT MR. ARTEAGA LOOKED LIKE, TODAY,
23 A YEAR AND A HALF AFTER THE INCIDENT OR 13 DAYS AFTER
24 THE INCIDENT? WHEN DO YOU THINK IT WAS BETTER, YOUR
25 MEMORY OF WHAT MR. ARTEAGA LOOKED LIKE THE DAY OF THE
26 SHOOTING?

27 A. PROBABLY WHEN I STARTED TO RECOVER AND
28 EVERYTHING STARTED TO GET CLEARER TO ME.

1 Q. DID YOU EVER USE THE WORD BALD?
2 A. YEAH, I MIGHT HAVE USED THE WORD BALD.
3 Q. BALD WITH STUBBLE?
4 A. YEAH. WITH HAIR.
5 Q. ALL RIGHT. THANK YOU. YOU CAN GO AHEAD
6 AND TAKE A SEAT.
7 NOW, YOU'VE INDICATED THAT -- LET ME ASK
8 YOU, YOUR MEMORY AS TO WHEN THIS INCIDENT OCCURRED,
9 WOULD IT BE FRESHER A COUPLE OF WEEKS AFTER THE
10 SHOOTING OR TODAY? WHEN DO YOU THINK IS BETTER FOR
11 YOU?
12 A. PROBABLY TODAY.
13 Q. I'M SORRY?
14 A. TODAY WOULD BE MORE CLEAR.
15 Q. OKAY.
16 A. BECAUSE WHEN I WAS IN THE HOSPITAL, I WAS
17 TRYING TO RECOVER.
18 Q. I UNDERSTAND.
19 NOW, WHEN MR. ARTEAGA AND THIS OTHER
20 INDIVIDUAL CAME UP TO YOU AND THEY WERE ABOUT THE
21 DISTANCE THAT WE TALKED ABOUT, 13 TO 14 FEET, AWAY FROM
22 YOU, DID THE OTHER INDIVIDUAL THAT WAS WITH
23 MR. ARTEAGA, DID HE EVER SAY ANYTHING?
24 A. NO. I DIDN'T HEAR HIM SAY ANYTHING.
25 Q. AND YOU SAY YOU FOCUSED ON MR. ARTEAGA,
26 CORRECT?
27 A. YES.
28 Q. WHY DID YOU FOCUS ON MR. ARTEAGA?

1 A. BECAUSE HE WAS TALKING TO ME DIRECTLY.

2 Q. OKAY. NOW, YOU MENTIONED A DISTANCE AND
3 YOU'VE INDICATED THERE WAS NOTHING BLOCKING YOUR VIEW
4 OF HIS FACE AND YOU WERE LOOKING AT HIS FACE, RIGHT?

5 WHAT WAS THE LIGHTING LIKE AT THAT CORNER
6 WHEN YOU WERE LOOKING AT MR. ARTEAGA? WAS LIGHTING AN
7 ISSUE OF YOUR VIEW OF MR. ARTEAGA?

8 A. NO. THE LIGHTING AROUND THERE WAS VERY
9 WELL.

10 Q. NOW, YOU MENTIONED MR. ARTEAGA, THE
11 QUESTION HE ASKED YOU IS, "IS THAT YOUR BOYFRIEND,"
12 RIGHT?

13 A. YES.

14 Q. AND WHAT WAS YOUR RESPONSE TO THAT?

15 A. IT WAS LIKE A RESPONSE OF LIKE "YEAH,
16 AND, YOU KNOW, SO WHAT'S THE PROBLEM?"

17 Q. OKAY. AND DID MR. ARTEAGA SAY ANYTHING
18 ELSE AT THAT POINT?

19 A. HE JUST PULLED OUT HIS GUN AFTER THAT AND
20 STARTED SHOOTING ME.

21 Q. WHERE DID HE PULL HIS GUN FROM?

22 A. HIS MIDSECTION.

23 Q. AND DID YOU SEE THE GUN PRIOR TO HIM
24 PULLING HIS GUN OUT?

25 A. NO.

26 Q. AND WHEN HE PULLED HIS GUN OUT, DID HE
27 AIM IT AT ANYBODY?

28 A. HE AIMED IT AT ME, DIRECTLY.

1 Q. AND WHAT PART OF YOUR BODY WAS HE AIMING
2 IT AT WHEN HE POINTED IT?

3 A. HE -- HE WAS AIMING AT THIS CENTER OF MY
4 BODY (INDICATING).

5 Q. YOUR UPPER TORSO?

6 A. YES.

7 Q. MIDSECTION? AND DID HE -- IF YOU RECALL,
8 WHICH HAND WAS HE HOLDING THE GUN WITH?

9 A. I'M NOT SURE EXACTLY.

10 Q. AND WHEN YOU SAW THE GUN, WHAT WAS YOUR
11 REACTION, IF ANY?

12 A. I WAS LIKE SCARED, YOU KNOW, I DIDN'T
13 KNOW WHAT TO THINK. I DIDN'T UNDERSTAND. AND IT JUST
14 WENT FAST, I DIDN'T HAVE ANY TIME TO THINK, YOU KNOW,
15 WHAT WAS GOING ON.

16 Q. AND WHEN MR. ARTEAGA FIRED THE FIRST
17 ROUND, DID YOU FEEL THAT BULLET STRIKE?

18 A. YES. IT FELT LIKE A HARD BLOW.

19 Q. AND WHICH PART OF YOUR BODY DID YOU FEEL
20 THE FIRST SHOT?

21 A. I'M NOT EXACTLY SURE. I THINK I REMEMBER
22 IT LIKE MY HAND AND THEN MY CHEST OR MY STOMACH,
23 SOMEWHERE. I DON'T REMEMBER, I DON'T EXACTLY.

24 Q. DID YOU EVER FALL TO THE GROUND?

25 A. YES, I DID.

26 Q. AND HOW MANY SHOTS DO YOU RECALL
27 SUSTAINING PRIOR TO FALLING TO THE GROUND?

28 A. PROBABLY THREE. AND AS I WAS FALLING HE

1 WAS STILL SHOOTING.

2 Q. AND WHAT HAPPENED -- WHAT IS THE NEXT
3 THING YOU REMEMBER HAPPENING AFTER THE SHOTS STOPPED,
4 WHEN YOU STOPPED HEARING SHOTS?

5 A. THE NEXT THING, ALL I CAN REMEMBER IS
6 JUST HEARING LIKE SILENCE AND I FELT LIKE HE MUST HAVE
7 LEFT. I FELT LIKE HE WASN'T GOING TO KEEP ON SHOOTING
8 ANYMORE, BUT IT FELT LIKE IT WAS A NONSTOP THING.

9 Q. WERE YOU TAKEN ANYWHERE?

10 A. I'M SORRY?

11 Q. WERE YOU TAKEN ANYWHERE?

12 A. YEAH. THAT'S WHEN THE AMBULANCE HAD
13 CAME.

14 Q. AND WERE YOU TAKEN TO A HOSPITAL?

15 A. YES.

16 Q. AND YOU SAID YOU WERE AT THE HOSPITAL FOR
17 ABOUT A MONTH?

18 A. YES, THAT'S CORRECT.

19 Q. HOW MANY GUNSHOT WOUNDS DID YOU SUSTAIN?

20 A. FIVE OR MORE SHOTS.

21 Q. AND WHAT PART OF YOUR BODY DID YOU
22 SUSTAIN THESE SHOTS?

23 A. ONE IN MY HAND AND MY ELBOW AND I HAVE A
24 BULLET IN MY CLAVICLE SO AS I WAS FALLING IT MUST HAVE
25 WENT UP THIS WAY. AS I WAS STANDING I GOT A BULLET
26 THROUGH MY STOMACH AND IT CAME OUT THROUGH THE BACK.

27 ANOTHER BULLET IN MY LUNG WHICH PUNCTURED
28 MY LUNG AND I THINK A COUPLE OF OTHER BULLET HOLES ON

1 ANYTHING UP TO DATE. THEY WERE ALL OLD PICTURES AND
2 SHE JUST WANTED TO SEE, I GUESS.

3 Q. AND WHAT WAS YOUR CONDITION --

4 MR. KAREY: MOTION TO STRIKE, SPECULATION.

5 THE COURT: IT'S OVERRULED.

6 BY MR. ARIAS:

7 Q. AND HOW SOON AFTER DET. BYNUM'S INTERVIEW
8 DID THIS LADY SHOW YOU THESE OTHER PHOTOGRAPHS THAT YOU
9 RECALL? WAS IT THAT SAME AFTERNOON OR THE NEXT DAY?

10 A. IT WAS LIKE THE NEXT DAY. I'M NOT SURE
11 EXACTLY WHAT DAY.

12 Q. AND COULD YOU WRITE THINGS AT THAT TIME?

13 A. I CAN BARELY LIFT MY HAND TO WRITE REALLY
14 GOOD.

15 Q. DO YOU REMEMBER IF IT WAS A MAN OR FEMALE
16 THAT SHOWED YOU THESE PHOTOGRAPHS?

17 A. I BELIEVE IT WAS A FEMALE. I THINK IT
18 WAS THE ONE WHO DREW THE PICTURE. SHE WAS JUST TRYING
19 TO GET AN IDEA OF WHAT, YOU KNOW, SHE CAN PULL AND DRAW
20 SOMETHING FROM.

21 Q. NOW, YOU WERE THEN AT SOME POINT ASKED TO
22 GIVE A DESCRIPTION. DO YOU REMEMBER?

23 A. YEAH.

24 Q. AND WHAT -- AND THAT WAS A LADY, CORRECT?

25 A. YEAH.

26 Q. DO YOU REMEMBER WHEN THAT WAS THAT THIS
27 LADY ASKED YOU TO GIVE A DESCRIPTION OF THE SUSPECT, TO
28 MAKE A SKETCH?

1 A. YES.

2 Q. OR A SKETCH, AS YOU SAY. DO YOU
3 RECOGNIZE THIS SKETCH?

4 MR. ARIAS: LIKE TO MARK AS PEOPLE'S 3, YOUR
5 HONOR.

6 THE COURT: MARKED PEOPLE'S 3.

7

8 (MARKED FOR IDENTIFICATION,
9 PEOPLE'S 3, SKETCH.)

10

11 BY MR. ARIAS:

12 Q. DO YOU RECOGNIZE THAT SKETCH?

13 A. YES.

14 Q. OKAY. WAS THAT THE SKETCH THAT THE LADY
15 DREW BASED ON WHAT YOU DESCRIBED TO HER?

16 A. YEAH.

17 Q. NOW, YOU INDICATED THAT THIS SKETCH WAS
18 NOT EXACT, WAS NOT PERFECT?

19 A. I TOLD HER IT WAS TOO TOTALLY -- LIKE TOO
20 MADE UP OR JUST NOT, BUT (SIC).

21 Q. OKAY. NOW, SOMETIME AFTER THIS SKETCH
22 WAS MADE AND YOU WERE INTERVIEWED BY DET. BYNUM, DID
23 SOMEONE COME OVER TO YOUR HOSPITAL ROOM AND ASK YOU TO
24 VIEW SOME PHOTOGRAPHS, A SET OF SIX PHOTOGRAPHS?

25 A. YES.

26 Q. AND WHEN DID THAT OCCUR, IF YOU RECALL?

27 A. I'M NOT EXACTLY SURE.

28 Q. NOW, WAS THAT DET. FLORES?

1 Q. AND WHO PLACED THAT CIRCLE, INITIAL, AND
2 DATE AROUND PHOTOGRAPH NO. 6?

3 A. I DID.

4 Q. AND DRAWING YOUR ATTENTION TO PEOPLE'S 7,
5 DO YOU RECOGNIZE THAT DOCUMENT?

6 A. YES.

7 Q. AND WHO WROTE THE STATEMENT THAT'S
8 WRITTEN ON THAT DOCUMENT?

9 A. I DID.

10 Q. AND WHAT DID YOU WRITE?

11 A. "THE GUY I CIRCLED IN THE PHOTOGRAPH, NO.
12 6, WAS THE ONE WHO HAD THE GUN AND SHOT ME AND ALMOST
13 SHOOTING MY FRIEND."

14 Q. THANK YOU.

15 NOW, WHEN DET. FLORES GAVE YOU THIS SET
16 OF PHOTOGRAPHS AND HE PLACED THESE BEFORE YOU, PEOPLE'S
17 NO. 4, WAS -- DID ANY ONE OF THESE INDIVIDUALS, 1
18 THROUGH 6, DID ANY ONE OF THEM COME TO MIND
19 IMMEDIATELY?

20 MR. KAREY: EXCUSE ME, I DIDN'T HEAR THE
21 QUESTION.

22 BY MR. ARIAS:

23 Q. DID --

24 MR. KAREY: THE END OF THE QUESTION.

25 THE COURT: DO YOU WANT TO REPEAT THE QUESTION.

26 BY MR. ARIAS:

27 Q. YES. WHEN DET. LOPEZ -- I'M SORRY,
28 DET. FLORES PLACED THIS SET OF PHOTOGRAPHS, PEOPLE'S

1 NO. 4, IN FRONT OF YOU, DID ANY ONE OF THOSE
2 PHOTOGRAPHS COME TO MIND IMMEDIATELY OR ANY OF THE
3 PEOPLE DEPICTED IN THESE PHOTOGRAPHS COME TO MIND?

4 A. YES.

5 Q. WHICH ONE?

6 A. NO. 6.

7 Q. AND HOW LONG DID IT TAKE INTERNALLY,
8 MEANING IN YOUR MIND, WHEN YOU LOOKED AT THIS SET OF
9 PHOTOGRAPHS FOR NO. 6 TO STAND OUT AS SOMEONE YOU
10 RECOGNIZED?

11 A. LIKE TEN SECONDS.

12 Q. DID YOU LOOK AT ALL THE PHOTOGRAPHS?

13 A. YES, I DID.

14 Q. AND AT SOME POINT DID YOU TELL
15 DET. FLORES THAT YOU RECOGNIZED NO. 6?

16 A. YES.

17 Q. AND HOW LONG DID IT TAKE YOU TO TELL
18 DET. FLORES THAT YOU RECOGNIZED NO. 6 AS THE SHOOTER?

19 A. I'M NOT SURE. TEN SECONDS.

20 Q. WAS IT WITHIN A MINUTE? MORE THAN A
21 MINUTE? HOW MUCH TIME WOULD YOU ESTIMATE?

22 A. WITHIN A MINUTE.

23 Q. NOW, WHEN YOU RECOGNIZED THE PERSON
24 DEPICTED ON POSITION NO. 6 AS BEING THE SHOOTER, HOW
25 CERTAIN WOULD YOU SAY YOU WERE?

26 A. HUNDRED PERCENT SURE.

27 Q. YOU'RE PRETTY SURE?

28 A. YEAH.

1 Q. NOW, YOU UNDERSTAND WHAT THE ADMONITION
2 WAS ABOUT, RIGHT?

3 A. YES.

4 Q. THAT THE PERSON MAY OR MAY NOT BE
5 DEPICTED IN THIS SET OF PHOTOGRAPHS?

6 A. YES.

7 Q. YOU UNDERSTAND THESE ARE SERIOUS CHARGES?

8 A. YES.

9 Q. WOULD YOU WANT TO SEE AN INNOCENT PERSON
10 GO TO JAIL FOR SOMETHING THEY DID NOT COMMIT?

11 A. NO.

12 Q. KEEPING THAT IN MIND, THE FACT THAT THE
13 PERSON WHO YOU WOULD IDENTIFY WOULD POTENTIALLY BE
14 FACING A CHARGE OF THIS SORT --

15 MR. KAREY: NO OBJECTION.

16 BY MR. ARIAS:

17 Q. -- ARE YOU STILL CERTAIN THAT NO. 6 WAS
18 THE PERSON WHO SHOT YOU?

19 A. YES.

20 Q. NOW, WHEN YOU WROTE OUT YOUR STATEMENT,
21 YOU DIDN'T SAY "I THINK" OR "I BELIEVE" OR "IT KIND OF
22 LOOKS LIKE." YOU SAID, "THE PERSON IN PHOTO NO. 6 WAS
23 THE ONE WHO HAD THE GUN AND SHOT ME," CORRECT?

24 A. THAT'S CORRECT.

25 Q. NOW, SOMETIME AFTER THIS IDENTIFICATION
26 DID -- AND DO YOU RECALL HOW MUCH TIME HAD PASSED FROM
27 THE TIME OF THE SHOOTING TO THE TIME YOU MADE THIS
28 IDENTIFICATION?

1 A. I'M NOT SURE.

2 Q. I'M GOING TO DRAW YOUR ATTENTION TO THIS

3 SET OF THE SAME, PEOPLE'S 7. I BELIEVE THERE'S A DATE

4 WRITTEN ON THERE, CORRECT, SOMEWHERE DOWN HERE, THE

5 TIME?

6 A. YES.

7 Q. DID YOU WRITE THAT INFORMATION THERE?

8 A. YES.

9 Q. AND WHAT TIME IS THAT? DATE AND TIME,

10 I'M SORRY.

11 A. AUGUST 21, 2002, AT 8:05 P.M..

12 Q. AND DO YOU RECALL THE DATE WHEN YOU GAVE

13 THE INFORMATION REGARDING THE SKETCH?

14 A. NO, I DON'T.

15 Q. DO YOU SEE THAT DATE WRITTEN NEXT TO THE

16 NAME, MARILYN DIAZ?

17 A. YES.

18 Q. DROS, I'M SORRY.

19 DOES THAT HELP YOU REFRESH YOUR MEMORY AS

20 TO THE DATE THAT THAT MIGHT HAVE OCCURRED?

21 A. YES.

22 Q. AND WHAT DATE IS THAT?

23 A. AUGUST 19, 2002.

24 Q. NOW, AT SOME POINT WERE YOU ASKED TO

25 ATTEND A LINEUP AT MEN'S CENTRAL JAIL?

26 A. YES.

27 Q. AND DO YOU RECALL WHEN THAT WAS?

28 A. NO. I'M NOT SURE OF THE DATE.

1 Q. NOW, WHEN YOU WENT TO MEN'S CENTRAL JAIL,
2 WERE YOU EXPOSED TO A SET OF SIX INDIVIDUALS TO VIEW,
3 SEE IF YOU RECOGNIZED THE PERSON WHO HAD COMMITTED THIS
4 OFFENSE?

5 A. YES.

6 MR. ARIAS: YOUR HONOR, I HAVE A SET OF
7 PHOTOGRAPHS I'D LIKE TO MARK AS PEOPLE'S 8, I BELIEVE.

8 THE COURT: THESE ARE PHOTOS OF?

9 MR. ARIAS: A, B, C. OF A LINEUP.

10 THE COURT: THEY ARE MARKED PEOPLE'S 8, PHOTOS
11 8-A, -B, AND -C.

12 MR. ARIAS: THANK YOU.

13

14 (MARKED FOR IDENTIFICATION,
15 PEOPLE'S 8-A THROUGH 8-C,
16 PHOTOGRAPHS.)

17

18 BY MR. ARIAS:

19 Q. DRAWING YOUR ATTENTION TO PEOPLE'S 8, DO
20 YOU RECOGNIZE THE PHOTOGRAPHS 8-A AND 8-B TO BE THE
21 LINEUP THAT YOU WERE SHOWN THE DATE YOU WENT TO THE
22 COUNTY JAIL?

23 A. YES.

24 Q. AND DID YOU IDENTIFY ANYBODY FROM THOSE
25 SET OF PHOTOGRAPHS?

26 A. YES, I DID.

27 Q. WHO DID YOU IDENTIFY?

28 A. NO. 4.

1 TO BE WITH THE SHOOTER.

2 A. YES.

3 Q. WHAT WAS SUSPECT 1 WEARING? DO YOU
4 RECALL WHAT TYPE OF PANTS THIS PERSON WAS WEARING?

5 A. NO. I CAN'T RECALL IT.

6 Q. DO YOU RECALL WHAT TYPE OF SHIRT OR UPPER
7 COVERING THIS PERSON WAS WEARING?

8 A. I REMEMBER IT WAS A LIGHT COLOR SHIRT,
9 LIKE YELLOWISH OR A CREAM COLOR. I DON'T REMEMBER.

10 Q. YOU DON'T RECALL -- WAS EITHER ONE OF
11 THESE INDIVIDUALS WEARING A PLAID SHIRT?

12 A. I DON'T -- I DON'T REMEMBER.

13 Q. THE INDIVIDUAL WHO SHOT YOU, DID THIS
14 INDIVIDUAL HAVE FACIAL HAIR?

15 A. I REMEMBER LIKE A MUSTACHE.

16 Q. NO GOATEE OR BEARD?

17 A. NO. I DON'T RECALL A GOATEE OR A BEARD.

18 Q. AND DO YOU RECALL IF THE OTHER INDIVIDUAL
19 HAD FACIAL HAIR OR NOT?

20 A. NO, I CAN'T RECALL.

21 Q. DO YOU RECALL TELLING THE DETECTIVES THAT
22 THESE INDIVIDUALS WALKED ACROSS THE STREET AND
23 APPROACHED YOU?

24 A. YES.

25 Q. AND DO YOU RECALL TELLING THE DETECTIVES
26 THAT SUSPECT NO. 1, THE PERSON WHO SHOT YOU, WALKED UP
27 TO YOU AND SAID, "DO YOU WANT TO FIGHT ME?"

28 A. I DON'T RECALL THAT. I'M NOT SURE

1 PHOTOGRAPHS WHICH HAVE A TOTAL OF EIGHT PHOTOGRAPHS ON
2 THEM, SEVEN PAGES. THESE ARE DOCUMENTS PROVIDED TO
3 DEFENSE. ONE OF THE PAGES HAS TWO PHOTOGRAPHS ON THEM
4 AND ON THE FRONT OF EACH -- UNDERNEATH EACH PHOTOGRAPH
5 THERE IS A NUMBER.

6 I'D LIKE TO LABEL THESE --

7 THE COURT: DEFENSE EXHIBIT A?

8 MR. KAREY: A THROUGH G.

9 THE COURT: IF THAT'S WHAT YOU WANT. HOW ABOUT
10 A-1 THROUGH -7, SEVEN PAGES, A-1 THROUGH -7.

11 MR. KAREY: I'VE SEPARATED THE PAGES. I'LL
12 LABEL IT "A" --

13 THE COURT: ANY WAY YOU WANT.

14 MR. KAREY: DEFENSE A, B, C, D, E, F, AND G.

15 THE COURT: A THROUGH G.

16

17 (MARKED FOR IDENTIFICATION,
18 DEFENSE A THROUGH G,
19 PHOTOGRAPHS.)

20

21 THE COURT: WHICH IS THE EXHIBIT THAT HAS TWO
22 PHOTOS?

23 MR. KAREY: THAT WOULD BE DEFENSE A.

24 THE COURT: IT WILL BE SO MARKED.

25 BY MR. KAREY:

26 Q. EITHER ON AUGUST 14 OR AUGUST 19 OF 2002
27 DO YOU REMEMBER BEING SHOWN -- ASKED TO LOOK THROUGH A
28 LARGE NUMBER OF PHOTOGRAPHS?

1 A. YES, I DO. BUT I'M NOT REALLY CLEAR ON
2 THAT. I CAN'T BE CLEAR.

3 Q. SO YOU DON'T -- YOU'RE NOT SURE WHICH DAY
4 IT HAPPENED, BUT YOU --

5 A. YES.

6 Q. -- REMEMBER THAT PROCESS OF LOOKING
7 THROUGH --

8 A. YES.

9 Q. ABOUT HOW MANY PHOTOGRAPHS WERE YOU BEING
10 ASKED TO LOOK THROUGH?

11 A. I CAN'T RECALL.

12 Q. AND WAS THAT IN THE FORM OF A LARGE BOOK
13 OR NOTEBOOK?

14 A. I DON'T -- I DON'T RECALL.

15 Q. I'M GOING TO APPROACH AND I'M GOING TO
16 ASK YOU TO LOOK AT THESE, IF YOU WOULD. I JUST WANT
17 YOU TO EXAMINE ALL THESE PHOTOS.

18 MR. KAREY: AND YOUR HONOR, I'VE HANDED THE
19 WITNESS DEFENSE A THROUGH G, THE DOCUMENTS I JUST
20 LABELED.

21 Q. IF YOU CAN LOOK AT THOSE AND WHEN YOU'RE
22 DONE LOOKING AT THEM I'M GOING TO ASK YOU SOME
23 QUESTIONS, SO PLEASE INDICATE WHEN YOU'RE DONE.

24
25 (BRIEF PAUSE IN THE PROCEEDINGS.)

26
27 THE WITNESS: OKAY. YOU WANT TO KNOW IF I
28 REMEMBER LOOKING AT THESE PHOTOGRAPHS?

1 BY MR. KAREY:

2 Q. YES.

3 A. I REALLY DON'T REMEMBER LOOKING AT THEM.
4 I MIGHT HAVE. BUT LIKE I SAID, I WAS SO SEDATED AND
5 EVERYTHING AND I WAS IN PAIN. LIKE ANYTHING -- IF THEY
6 EVEN CAME IN LIKE SHOWING ME THESE PICTURES, I DON'T
7 REMEMBER.

8 Q. YOU DO REMEMBER ON AUGUST 14 GIVING A
9 DESCRIPTION THAT I JUST WALKED YOU THROUGH, BASICALLY?
10 YOU DO REMEMBER GIVING THAT DESCRIPTION TO DET. BYNUM
11 AND HER PARTNER?

12 A. YEAH. I REMEMBER THEM COMING IN MY ROOM.

13 MR. KAREY: I DON'T REMEMBER WHICH NUMBER THIS
14 IS.

15 THE COURT: IT'S 3.

16 BY MR. KAREY:

17 Q. THIS SKETCH WHICH HAS BEEN LABELED
18 PEOPLE'S EXHIBIT 3, THAT WAS DONE BY A POLICE SKETCH
19 ARTIST ON A DIFFERENT DATE, PROBABLY AUGUST 19,
20 ACCORDING TO YOUR MEMORY?

21 A. YES.

22 Q. AND THE ARTIST -- THAT ARTIST OR THE
23 PERSON WHO COMPILED THAT, WAS THAT COMPILED IN YOUR
24 PRESENCE? DID SHE DRAW IT IN YOUR PRESENCE?

25 A. YES.

26 Q. THAT TOOK A LITTLE WHILE FOR HER TO DO
27 THAT, CORRECT?

28 A. YES.

1 YOU. CAN YOU LOCATE PHOTOGRAPH NUMBER 252, PLEASE.

2 A. OKAY.

3 Q. AND WHICH -- AGAIN, WHICH DEFENSE EXHIBIT
4 IS THAT?

5 A. THAT'S DEFENSE C.

6 Q. AND CAN YOU LOCATE THE PHOTOGRAPH WHICH
7 IS NUMBER 264.

8 A. DEFENSE B.

9 Q. AND FINALLY, PHOTOGRAPH NUMBER 290.

10 A. THAT'S DEFENSE A.

11 Q. NOW, DO YOU RECALL ON AUGUST 14, 2002,
12 TELLING THE DETECTIVES THAT THOSE THREE PHOTOGRAPHS
13 RESEMBLE THE SECOND SUSPECT, THE PERSON WHO DID NOT
14 SHOOT YOU?

15 A. I DON'T REMEMBER. I'M NOT SURE. I DON'T
16 REMEMBER.

17 Q. IS IT POSSIBLE THAT YOU TOLD THE
18 DETECTIVES THAT?

19 A. IT'S POSSIBLE.

20 Q. AND DO YOU RECOGNIZE THE PERSON SHOWN IN
21 PHOTOGRAPH 290?

22 A. YES.

23 Q. WHO WOULD THAT BE?

24 A. THAT WOULD BE -- I'M NOT SURE OF HIS
25 NAME.

26 Q. MY CLIENT, MR. ARTEAGA?

27 A. YES, MR. ARTEAGA.

28 THE COURT: WHEN YOU GET TO A GOOD PLACE TO TAKE

1 AND MR. ARIAS AND A COUPLE OTHER DETECTIVES.

2 Q. YOUR MEMORY IS BETTER NOW THAN IT WAS TWO
3 WEEKS AFTER THE INCIDENT?

4 A. YES.

5 Q. DID YOU -- WHILE YOU WERE IN THE HOSPITAL
6 DID YOU SPEAK WITH YOUR FRIEND MR. ULLOA?

7 A. YES, I DID.

8 Q. AND WHEN WAS THE FIRST TIME YOU SPOKE TO
9 HIM AFTER YOU WERE SHOT?

10 A. MUST HAVE BEEN LIKE MAYBE A WEEK OR TWO
11 AFTER, WHERE IT'S A WEEK OR SO.

12 Q. DID THE TWO OF YOU DISCUSS YOU BEING
13 SHOT?

14 A. YES.

15 Q. THE TWO OF YOU -- IT WOULD BE --
16 OBVIOUSLY THE TWO OF YOU PROBABLY DISCUSSED YOUR
17 WELFARE, HOW YOU WERE DOING, CORRECT?

18 A. YES.

19 Q. CAN YOU DESCRIBE WHAT THE GUN LOOKED
20 LIKE?

21 A. NO, I CAN'T. I DON'T RECALL EXACTLY WHAT
22 THE GUN LOOKED LIKE.

23 Q. WHICH HAND DID THIS PERSON USE TO HOLD
24 THE GUN?

25 A. I'M NOT EXACTLY SURE IN WHICH HAND.
26 MIGHT HAVE BEEN HIS RIGHT HAND. I'M NOT SURE.

27 Q. AND HOW WAS HE HOLDING THE GUN WHEN HE
28 POINTED IT AT YOU?

1 A. I'M NOT SURE.

2 Q. YOU DON'T RECALL IF HE WAS HOLDING IT
3 STRAIGHT UP OR TILTING IT OR WAVING IT?

4 A. JUST HOLDING IT DIRECTLY AT ME.

5 Q. THIS ALL HAPPENED VERY -- WOULD IT BE
6 FAIR TO CHARACTERIZE THIS EVENT AS HAPPENING VERY FAST?

7 A. YES.

8 Q. MATTER OF SECONDS?

9 A. SECONDS.

10 THE COURT: MR. KAREY, WE'LL TAKE OUR AFTERNOON
11 BREAK AT THIS TIME.

12 LADIES AND GENTLEMEN, DURING THE BREAK
13 YOU'RE NOT TO DISCUSS THIS CASE AMONG YOURSELVES OR
14 WITH ANYONE ELSE. YOU'RE NOT TO FORM OR EXPRESS AN
15 OPINION ON THE CASE UNTIL IT IS FINALLY SUBMITTED TO
16 YOU. NO LEGAL RESEARCH, NO INVESTIGATION.

17 I HAVE A JUDICIAL MEETING TO GO TO SO
18 INSTEAD OF 1:30, WE'LL START UP AT 1:40, JUST TO GIVE
19 YOU A LITTLE EXTRA TEN MINUTES CROWD TIME. BUT I
20 SHOULD BE BACK AT 1:40 AND WE'LL CONTINUE AT THAT TIME.

21 MR. CARLYLE, YOU ARE ORDERED TO BE BACK
22 HERE AT 1:40 THIS AFTERNOON.

23 OKAY, EVERYONE. HAVE A GOOD LUNCH.

24
25 (THE LUNCH RECESS WAS TAKEN UNTIL
26 1:30 P.M. OF THE SAME DAY.)

27
28

1 F-R-A-N-K F-L-O-R-E-S.

2 THE CLERK: THANK YOU.

3 THE COURT: MR. ARIAS.

4 MR. ARIAS: THANK YOU, YOUR HONOR.

5

6

DIRECT EXAMINATION

7 BY MR. ARIAS:

8 Q. GOOD AFTERNOON, OFFICER FLORES. COULD
9 YOU TELL THE JURY YOUR OCCUPATION AND ASSIGNMENT,
10 PLEASE.

11 A. YES, SIR. I'M A POLICE OFFICER FOR THE
12 CITY OF LOS ANGELES CURRENTLY ASSIGNED TO HOLLYWOOD
13 DIVISION, GANG IMPACT TEAM.

14 Q. AND ARE YOU ON CURRENT LOAN TO THE
15 HOMICIDE UNIT?

16 A. YES, SIR. HOMICIDE-GANG TABLES
17 DETECTIVES.

18 Q. OKAY. AND HOW LONG HAVE YOU BEEN A SWORN
19 POLICE OFFICER?

20 A. JUST OVER SEVEN YEARS, COMING UP ON SEVEN
21 AND A HALF.

22 Q. AND HOW LONG HAVE YOU BEEN ASSIGNED TO
23 THE GANG DETAIL?

24 A. CURRENTLY, SINCE AUGUST OF 2000, COMING
25 UP ON THREE YEARS, AND I HAD ONE YEAR PRIOR IN
26 C.R.A.S.H..

27 Q. NOW, COULD YOU BRIEFLY TELL THE JURY YOUR
28 TRAINING AND EXPERIENCE IN THE AREA OF GANGS AND GANG

1 CULTURE.

2 A. YES, SIR. I GREW UP IN LOS ANGELES,
3 HOLLENBECK AREA, WHICH BUTTS UP AGAINST EAST LOS
4 ANGELES. I WAS RAISED THERE TO EARLY ADULTHOOD.

5 I WENT TO SCHOOL -- I WENT TO SCHOOL WITH
6 A LOT OF GANG MEMBERS. PEOPLE IN MY FAMILY WERE
7 INVOLVED IN GANGS. I HAD FRIENDS, AT LEAST GROWING UP,
8 THAT LATER WENT ON INTO GANGS.

9 WHEN I JOINED THE DEPARTMENT, WE HAD SOME
10 TRAINING AT THE ACADEMY. THROUGH PROBATION I WORKED
11 WITH TENURED OFFICERS, OFFICERS WHO WORKED GANG
12 ASSIGNMENTS WHO KIND OF BROUGHT ME ALONG IN THE
13 INVESTIGATIVE ASPECT AND DOCUMENTING IT, INVOLVED
14 INTELLIGENCE GATHERING RELATED TO THE JOB.

15 FROM THERE I CAME TO HOLLYWOOD, BACK IN
16 AUGUST OF '97, AND FROM THERE I WORKED THE DIVISION. I
17 BECAME FAMILIAR WITH THE GANGS. I WAS ASSIGNED TO
18 C.R.A.S.H. AT THE TIME.

19 I WAS TASKED AT THAT POINT WITH
20 MONITORING AND GATHERING INTELLIGENCE ON SPECIFICALLY
21 GANGS WHICH WAS MARA SALVA TRUCHA.

22 AT THAT POINT THERE WAS A CURRENT
23 INJUNCTION AGAINST M.S.. I BECAME INVOLVED IN THAT.
24 THE INJUNCTION PROHIBITS M.S. GANG MEMBERS FROM --
25 SPECIFIC M.S. GANG MEMBERS THAT ARE SERVED AND
26 IDENTIFIED FROM LOITERING OR COMMITTING CERTAIN ACTS
27 WITHIN A SAFETY ZONE, DEFINED AS A SAFETY ZONE
28 LOCATION.

1 A. MARA SALVA TRUCHA.

2 Q. AND ARE YOU FAMILIAR WITH THE DEFENDANT
3 MR. ARTEAGA?

4 A. YES, SIR, I AM.

5 Q. AND DO YOU HAVE AN OPINION AS TO WHETHER
6 MR. ARTEAGA IS A MEMBER OF ANY PARTICULAR CRIMINAL
7 STREET GANG?

8 A. YES, SIR, HE IS.

9 Q. AND WHAT GANG HAVE YOU FORMED THE OPINION
10 HE IS A MEMBER OF?

11 MR. KAREY: CAN WE APPROACH, YOUR HONOR, FOR A
12 MOMENT?

13 THE COURT: CERTAINLY.

14

15 (THE FOLLOWING PROCEEDINGS
16 WERE HELD AT THE SIDEBAR:)

17

18 THE COURT: MR. KAREY.

19 MR. KAREY: JUST A QUICK CONCERN. IT'S A
20 CONCERN ON MY PART THAT I DIDN'T NEED TO WORRY ABOUT
21 PROBABLY, BUT I WOULD OBJECT TO THIS OFFICER MENTIONING
22 ANYTHING ABOUT MY CLIENT'S PAST RECORD.

23 I'M NOT OBJECTING TO CONTACTS HE'S HAD,
24 BUT I JUST WANT -- I DON'T KNOW IF HE'S BEEN TOLD --

25 MR. ARIAS: I TOLD HIM NOT TO MENTION ANYTHING
26 ABOUT ARRESTS. HE IS GOING TO GO INTO STOPS AND
27 CONTACTS WITH POLICE OFFICERS, BUT HE IS SPECIFICALLY
28 NOT TO MENTION ANY ARRESTS. IF THE COURT WISHES, I CAN

1 A. YES, SIR. YES, SIR.

2 Q. AND WHAT KIND OF INFORMATION IS INPUTTED
3 IN CAL. GANGS?

4 A. INFORMATION, SOME OF THE STOPS, SOME OF
5 HIS ARRESTS, ASSOCIATES HE WAS STOPPED WITH,
6 INFORMATION WHERE THOSE STOPS OCCURRED, VEHICLE
7 INFORMATION THAT HE MIGHT BE ASSOCIATED WITH, AS WELL
8 AS IDENTIFYING DESCRIPTORS, MARKS. HIS MONIKER ALSO
9 WILL BE IN THERE.

10 Q. TATTOOS ALSO BE --

11 A. YES, SIR, TATTOOS AS WELL AS WE CAN ALSO
12 DOWNLOAD COPIES OF PHOTOS INTO THE CAL. GANG SYSTEM
13 WHICH WOULD ALSO COME UP.

14 Q. HAVE YOU REVIEWED MR. ARTEAGA'S CAL. GANG
15 RECORD?

16 A. YES, SIR.

17 Q. AND YOU SAY YOU'VE ALSO HAD CONTACT WITH
18 MR. ARTEAGA IN THE PAST?

19 A. YES, SIR, I HAVE.

20 Q. HOW MANY ENCOUNTERS WOULD YOU SAY YOU'VE
21 HAD WITH MR. ARTEAGA?

22 A. APPROXIMATELY THREE.

23 Q. AND WHEN WAS THE MOST RECENT ENCOUNTER
24 YOU HAD WITH MR. ARTEAGA?

25 A. PRIOR TO HIS ARREST ON THE 21ST, WOULD BE
26 BACK IN JULY, I THINK IT WAS JULY 3RD.

27 Q. SO ABOUT A MONTH PRIOR TO THIS INCIDENT?

28 A. YES, SIR.

1 Q. NOW, YOU MENTIONED THAT GANGS CONTROL BY
2 INTIMIDATION AND FEAR, INTIMIDATION AND FEAR INTO THE
3 COMMUNITY. HOW DO THEY GO ABOUT DOING THAT? WHAT DO
4 GANG MEMBERS DO TO DO THAT?

5 A. PARTICULARLY IN HOLLYWOOD, IT WOULD BE
6 EXTORTION, ROBBERY, NOT ONLY PEOPLE THAT HAVE
7 BUSINESSES OR LIVE WITHIN THE COMMUNITY, BUT THEY MAY
8 GO OUT AND DO IT IN THE GENERAL AREA.

9 GRAFFITI NOT ONLY SERVES AS A REMINDER TO
10 PEOPLE THAT LIVE THERE, BUT PEOPLE THAT MAY BE COMING
11 IN FROM THE OUTSIDE, ONCE THEY ENTER A CERTAIN DEFINED
12 AREA OR BOUNDARIES OF THE GANG, THEY KNOW WHAT AREA
13 THEY'RE IN BY WHAT'S WRITTEN ON THE WALLS, ANYWHERE
14 ELSE THAT THEY GRAFFITI.

15 Q. WHAT DOES THE TERM OR THE QUESTION "WHERE
16 ARE YOU FROM," WHAT IS THE MEANING OF THAT IN GANG
17 CULTURE?

18 A. PARTICULARLY THEY'RE ASKING YOU WHAT GANG
19 ARE YOU FROM.

20 Q. AND IS THERE A RIGHT ANSWER TO THAT
21 QUESTION, OR WHAT IS THE PURPOSE FOR ASKING THAT
22 QUESTION?

23 A. TO FIND OUT WHERE THAT PERSON IS FROM,
24 WHAT GANG THEY'RE FROM, MEANING -- I CAN'T SAY THERE'S
25 GOING TO BE A RIGHT ANSWER OR A WRONG ANSWER. I MEAN,
26 IT GOES FROM DIFFERENT GANG TO DIFFERENT GANG.

27 RIVALRY CHANGES FROM M.S. TO 18TH STREET
28 TO WHITE FENCE. EACH GANG MAY HAVE THEIR OWN RIVALS

1 WHICH MAY INCLUDE THEMSELVES.

2 Q. NOW, ARE YOU FAMILIAR WITH THE FACTS IN
3 THIS PARTICULAR CASE?

4 A. YES, SIR.

5 Q. YOU ARE INVOLVED IN THE IDENTIFICATION OF
6 MR. ARTEAGA, CORRECT?

7 A. YES, SIR.

8 Q. NOW, I'LL POSE YOU A HYPOTHETICAL THAT'S
9 BASED ON FACTS THAT MAY OR MAY NOT BE PROVEN UP IN THIS
10 CASE, BUT ASSUMING THEY ARE, ASK YOU A QUESTION ABOUT
11 THE FOLLOWING HYPOTHETICAL.

12 YOU HAVE TWO INDIVIDUALS WHO ARE NOT GANG
13 MEMBERS STANDING AT THE CORNER OF WESTERN AND SANTA
14 MONICA 12:00 IN THE EVENING APPROACHED BY TWO
15 INDIVIDUALS, ONE WHO IS A KNOWN HARD-CORE, TATTOOED,
16 SELF-ADMITTED MARA SALVA TRUCHA GANG MEMBER, AND ASKS
17 THESE INDIVIDUALS, "WHERE ARE YOU FROM?"

18 AND UPON THAT INDIVIDUAL ANSWERING IN A
19 METHOD -- A MANNER THAT WOULD INDICATE THAT THEY MAY
20 HAVE HOMOSEXUAL TENDENCIES OR BE GAY, IMMEDIATELY
21 PRODUCE A HANDGUN, SHOOT AND FIRE THIS INDIVIDUAL FIVE
22 TIMES INTO THE CHEST AND STOMACH AREA AND THEN FLEE.

23 DO YOU HAVE AN OPINION BASED ON THOSE SET
24 OF FACTS AS TO WHETHER SUCH A CRIME WAS COMMITTED FOR
25 THE BENEFIT, AT THE DIRECTION, OR IN ASSOCIATION WITH A
26 CRIMINAL STREET GANG?

27 A. YES, SIR, I DO.

28 Q. AND WHAT IS YOUR OPINION?

1 A. THAT IT IS, IT WOULD BE COMMITTED IN
2 FURTHERANCE, IT WOULD BENEFIT THE GANG.

3 Q. AND HOW WOULD SUCH AN ACT BENEFIT A GANG
4 SUCH AS MARA SALVA TRUCHA?

5 A. AS I WAS EXPLAINING, SIR, THE GANG
6 THRIVES AND EXISTS AND EXPANDS ON FEAR AND
7 INTIMIDATION.

8 THE REPUTATION OF THE GANG IS PARAMOUNT.
9 THE WAY IT'S VIEWED, THE WAY IT'S FEARED LENDS INTO
10 THEIR ABILITY TO KEEP CONTROL. I MEAN, KEEP WITNESSES,
11 MAYBE OTHER ACTS THAT MAY EXIST IN THE FUTURE, KEEP
12 THOSE PEOPLE FROM REPORTING THOSE ACTS BECAUSE THEY MAY
13 RECALL THIS EVENT WHERE, HEY, LOOK AT THE WAY THESE
14 GUYS ARE, THEY'RE VIOLENT. IF I GO AND REPORT THIS,
15 THIS MAY HAPPEN TO ME.

16 MAKE SURE IT'S A CONSTANT REMINDER.
17 THESE VIOLENT ACTS AT TIMES STAY WITH THE COMMUNITY AND
18 THE PEOPLE FOR A LONG TIME.

19 Q. NOW, THIS CASE, YOU WERE INVOLVED IN THE
20 INVESTIGATION ASPECT, CORRECT?

21 A. YES, SIR.

22 Q. YOU WERE NOT THE LEAD DETECTIVE?

23 A. NO, SIR.

24 Q. BUT YOU ASSISTED IN THE INVESTIGATION,
25 CORRECT?

26 A. YES, SIR, I DID.

27 Q. NOW, AT SOME POINT DID YOU BECOME
28 FAMILIAR WITH THE STATEMENTS PROVIDED BY SERGIO ULLOA,

1 THE WITNESS, AND MR. RICHARD CARLYLE?

2 A. YES, SIR.

3 Q. AND DID YOU BECOME AWARE OF THE
4 DESCRIPTION OF THE SUSPECTS, SPECIFICALLY THE SHOOTER,
5 AS GIVEN BY RICHARD CARLYLE AND SERGIO ULLOA?

6 A. YES, SIR.

7 Q. AT SOME POINT WERE YOU PRESENTED WITH A
8 SKETCH THAT WAS MADE BASED ON STATEMENTS GIVEN BY THE
9 VICTIM MR. RICHARD CARLYLE?

10 A. YES.

11 Q. AND DRAWING YOUR ATTENTION TO THIS
12 SKETCH, NOW, BASED ON THE INFORMATION YOU HAD FROM THE
13 POLICE REPORTS, THE DESCRIPTION OF THE SUSPECT, THE
14 LOCATION OF THE CRIME, THE STATEMENTS THAT WERE MADE BY
15 THE SUSPECTS, THE SKETCH MADE BY THE VICTIM, AND BASED
16 ON YOUR KNOWLEDGE OF THE ACTIVE M.S. GANG MEMBERS IN
17 THAT TERRITORY, DID YOU -- WAS YOUR INVESTIGATION
18 FOCUSED ON ANY ONE INDIVIDUAL?

19 A. YES, SIR. BY THE LOOKS OF THE SKETCH, MY
20 KNOWLEDGE OF THE GANG MEMBERS IN THE AREA AND THE ONES
21 THAT WERE ACTIVE, ONES THAT HAD BEEN STOPPED RECENTLY
22 OR IDENTIFIED ON RECENT STOPS, IN GOING THROUGH OUR
23 FILES I CAME ACROSS A PICTURE OF MR. ARTEAGA WHICH I
24 DREW TO -- I SAW AS SIMILAR LOOKING.

25 AT THAT POINT WE PLACED THE PHOTOGRAPH
26 INTO A SIX-PACK WHICH IS AN ARRAY OF SIX PHOTOS.

27 Q. DRAWING YOUR ATTENTION TO A SET OF
28 SIX-PACKS THAT HAS BEEN MARKED AS PEOPLE'S 4, DO YOU

1 A. I BELIEVE WE ONLY GENERATED ONE. WE WERE
2 WORKING MULTIPLE CASES AT THE TIME. I MAY HAVE
3 GENERATED SOME OTHER ONES FOR OTHER CASES.

4 Q. BUT WITH RESPECT TO THIS CASE.

5 A. I BELIEVE IT WAS ONLY THIS ONE, SIR.

6 Q. AND AT SOME POINT DID YOU CONTACT EITHER
7 THE WITNESS OR VICTIM IN ORDER TO HAVE THEM VIEW THAT
8 SIX-PACK?

9 A. YES, SIR.

10 Q. AND WHO DID YOU CONTACT FIRST, IF YOU
11 RECALL?

12 A. SERGIO. MR. ULLOA, I'M SORRY.

13 Q. AND WHEN DID THAT TAKE PLACE?

14 A. THAT TOOK PLACE ON THE 20TH, AUGUST 20.

15 Q. AND WHERE DID THAT TAKE PLACE?

16 A. WE DROVE DOWN TO -- HE'S IN THE SAN DIEGO
17 COUNTY AREA. WE DROVE DOWN AND MET HIM AT A -- I
18 BELIEVE IT WAS A 7-ELEVEN, A CONVENIENCE STORE PARKING
19 LOT.

20 Q. DRAWING YOUR ATTENTION TO TWO SETS OF
21 DOCUMENTS --

22 MR. ARIAS: LIKE TO MARK AS PEOPLE'S 15 AND
23 PEOPLE'S 16, YOUR HONOR. PEOPLE'S 15 WOULD BE THE
24 COLOR COPY OF THE SIX-PACK WITH A CIRCLE AROUND
25 PHOTOGRAPH NO. 6, INITIALS S.U. AND THE DATE 8-8-22.

26 THE COURT: IT IS PEOPLE'S 15.

27 (MARKED FOR IDENTIFICATION,

28 PEOPLE'S 16, COPY OF SIX-PACK.)

1 MR. ARIAS: AND PEOPLE'S 16 IS A PHOTO
2 IDENTIFICATION REPORT WITH STATEMENT, INITIALS S.U.,
3 AND A DATE AS WELL; LIKE TO MARK THAT PEOPLE'S 16.

4 THE COURT: IT IS PEOPLE'S 16.

5

6 (MARKED FOR IDENTIFICATION,
7 PEOPLE'S 16, PHOTO I.D. REPORT.)

8

9 BY MR. ARIAS:

10 Q. DRAWING YOUR ATTENTION TO THESE SET OF
11 DOCUMENTS, ARE THESE -- DO YOU RECOGNIZE THOSE
12 DOCUMENTS, PEOPLE'S 15 AND 16?

13 A. YES, SIR.

14 Q. WERE PEOPLE'S 16 SHOWN TO -- 15, I'M
15 SORRY, SHOWN TO MR. ULLOA?

16 A. YES, SIR.

17 Q. AND DID MR. ULLOA IDENTIFY ANYBODY?

18 A. YES, HE DID.

19 Q. WHICH ONE DID HE IDENTIFY?

20 A. POSITION NO. 6, WHICH IS MR. ARTEAGA.

21 Q. AND PRIOR TO YOU SHOWING MR. ULLOA THOSE
22 SET OF SIX-PACKS FOR HIM TO VIEW, DID YOU ADMONISH HIM
23 REGARDING WHAT WAS ABOUT TO HAPPEN?

24 A. YES, SIR, I DID.

25 Q. AND HOW DID YOU GO ABOUT DOING THIS?

26 A. ON THIS FORM HERE WHICH HE LATER WROTE ON
27 WHAT HE HANDED TO US, THE IDENTIFICATION PHOTOGRAPH,
28 WHICH IT'S A PHOTOGRAPHIC SHOWUP ADMONITION.

1 GEOGRAPHIC AREA? IS IT YOUR JOB TO MONITOR GANG
2 ACTIVITY, OR IS YOUR JOB PRIMARILY TO PREVENT CRIMES
3 CAUSED BY GANGS? WHICH ONE WOULD IT BE?

4 A. SIR, WE TRY TO DO BOTH. IT'S A BIG TASK.
5 WE'RE NOT ONLY TRYING TO PREVENT BUT ALSO
6 INVESTIGATION. WE CAN'T, UNFORTUNATELY, BE EVERYWHERE
7 AT ONCE, BUT WE TRY TO DO IT BOTH ENDS.

8 Q. SO YOUR CONCERN, SANTA MONICA AND WESTERN
9 IS THE GEOGRAPHIC AREA WHERE YOU WOULD BE BASICALLY
10 WORKING; IS THAT CORRECT?

11 A. THAT'S ONE OF THE AREAS, SIR. IT'S A
12 LARGE AREA WHICH I DEFINED BY THE BOUNDARIES OF THE
13 GANG.

14 Q. YOU WORK OUT OF THE HOLLYWOOD DIVISION,
15 CORRECT?

16 A. CORRECT, SIR.

17 Q. AND THAT'S L.A.P.D., AND POLICE DIVISIONS
18 ARE FAIRLY LARGE AREAS; IS THAT CORRECT?

19 A. YES, SIR. SOME ARE.

20 Q. AND YOU MIGHT DO YOUR WORK IN ANY PART OF
21 THE HOLLYWOOD DIVISION AREA?

22 A. CORRECT.

23 Q. OKAY. BUT IN THAT AREA YOU'RE NOT GOING
24 TO BE CONCERNED WITH PRIMARILY INVESTIGATING -- AND I
25 MEAN YOU AND YOUR PARTNERS.

26 YOU'RE NOT GOING TO BE INVESTIGATING SOME
27 OTHER CRIMES SUCH AS FORGERY, SEX CRIMES, DOMESTIC
28 VIOLENCE, THINGS LIKE THAT, UNLESS THEY INVOLVE A GANG

1 INJUNCTIONS, THE REAL PURPOSE IS TO KEEP THESE GANG
2 MEMBERS FROM BEING TOGETHER IN A CERTAIN AREA, CORRECT?

3 A. PRIMARILY IT'S FOR QUALITY OF LIFE ISSUES
4 FOR THE CITIZENS THAT LIVE IN THAT AREA WHO HAVE BEEN
5 TIRED OF DEALING WITH THESE GANG MEMBERS, NOT ONLY
6 PUBLIC NUISANCES LIKE THE LOITERING, LITTERING, THE
7 DRINKING IN PUBLIC, SMOKING IN PUBLIC, THE BLOCKING THE
8 SIDEWALKS, BUT AS WELL AS THE VIOLENT CRIME THAT COMES
9 FROM THOSE ACTS.

10 Q. IN THIS PARTICULAR CASE, THE ONE THAT
11 YOU'VE BEEN BROUGHT IN TO INVESTIGATE -- THIS IS A
12 HYPOTHETICAL QUESTION I WANT TO ASK YOU.

13 THIS MAY BE -- I BELIEVE THIS IS GOING TO
14 BE BASED ON SOME FACTS THAT ARE GOING TO BE IN EVIDENCE
15 IN THIS CASE.

16 YOU'VE GOT A SHOOTING ON A STREET CORNER
17 IN AN AREA MARKED BY THIS GANG INJUNCTION AGAINST MARA
18 SALVA TRUCHA GANG MEMBERS.

19 YOU HAVE TWO INDIVIDUALS WHO ARE PROBABLY
20 GAY MEN WHO LEAVE A GAY NIGHTCLUB AND ARE CONFRONTED BY
21 SOME INDIVIDUALS OF UNKNOWN IDENTITY, AND ONE OF THE
22 GAY MEN IS SHOT AT THIS INTERSECTION OF SANTA MONICA
23 AND WESTERN, RIGHT IN THE MIDDLE OF THIS AREA FOR THIS
24 GANG INJUNCTION.

25 AND RIGHT BEFORE THE SHOOTING THERE IS A
26 VERBAL CONFRONTATION BETWEEN THAT MAN, THE GAY MAN, AND
27 SOMEONE SHOTS HIM, AND THIS VERBAL CONFRONTATION
28 INVOLVES SOME COMMENTS ABOUT THIS MAN BEING GAY.

1 JUST BASED ON THAT, IN YOUR OPINION WOULD
2 THAT BE A GANG-RELATED CRIME?

3 A. YES, SIR.

4 Q. ARE YOU -- WHAT ARE YOU BASING THAT ON?

5 A. MY KNOWLEDGE OF THE AREA AS WELL AS THE
6 REPUTATION FOR THESE GANG MEMBERS. REPUTATION MEANS
7 EVERYTHING.

8 I GO UP WITH ANOTHER MEMBER OF MY GANG
9 AND WE CONFRONT TWO INDIVIDUALS, I ASK YOU "WHERE ARE
10 YOU FROM," AND THIS PERSON GIVES ME SOME SMART-ALECK
11 REMARK OR SOME RESPONSE THAT SHOWS SOME KIND OF
12 DISRESPECT, NOW I'M PUT ON THE SPOT BECAUSE IF I DON'T
13 DO SOMETHING OR DEFEND MY REPUTATION, THE REPUTATION OF
14 THE GANG, THIS OTHER PERSON THAT'S WITH ME WHEN WE GO
15 BACK, HE MAY TELL THE OTHER MEMBERS, HEY, HE PUNKED
16 OUT, THIS GUY DISRESPECTED HIM. HE HAPPENED TO BE A
17 MAN THAT WAS GAY, ON TOP OF THAT, AND HE DID NOTHING IN
18 RETURN.

19 Q. WHAT IS THE DIFFERENCE BETWEEN THIS TYPE
20 OF CONFRONTATION AND A GAY-BASHING CRIME?

21 A. WELL, SIR, I THINK THEIR PRIMARY
22 KNOWLEDGE OF THE FACTS IN THIS CRIME, WHEN THEY
23 APPROACHED THE VICTIM AND MR. ULLOA, THE FIRST THING
24 WAS, "WHERE ARE YOU FROM WHERE," TO ME, THEY'RE ASKING
25 THEM WHAT GANG THEY'RE FROM.

26 MAYBE UPON THE RESPONSE, MAYBE THEY
27 REALIZED THAT THESE TWO PEOPLE WERE POSSIBLY GAY AND
28 THEY GIVE THEM SOME KIND OF SMART-ALECK REMARK WHERE HE

1 A. WE PARKED IN A PARKING LOT ABOUT A BLOCK
2 AWAY FROM THE ESTABLISHMENT.

3 Q. AND HOW LONG WOULD YOU SAY YOU WERE AT
4 THIS CLUB TEMPO THAT EVENING?

5 A. LESS THAN A COUPLE HOURS.

6 Q. AND AT SOME POINT YOU LEFT THE CLUB?

7 A. YES.

8 Q. AND APPROXIMATELY WHAT TIME WAS THAT WHEN
9 YOU LEFT THE CLUB?

10 A. ABOUT 11:30, I WOULD SAY.

11 Q. AND WHILE YOU WERE IN THE CLUB DID YOU OR
12 MR. CARLYLE TO YOUR KNOWLEDGE HAVE ANY CONFRONTATION
13 WITH ANYBODY?

14 A. NO.

15 Q. AND WHILE AT THE CLUB DID YOU HAVE
16 ANYTHING TO DRINK?

17 A. YES, I DID.

18 Q. AND WHAT DID YOU DRINK?

19 A. I HAD A BEER WHICH WAS LIKE A 32-OUNCE
20 BOTTLE. IT'S A BIG BEER.

21 Q. DID YOU HAVE ANY MORE THAN THAT?

22 A. YES.

23 Q. WHAT ELSE DID YOU HAVE?

24 A. PRIOR TO THAT I HAD A COUPLE DRINKS THAT
25 WE HAD PICKED UP ON THE WAY TO THE CLUB.

26 Q. AND WHEN YOU LEFT THE CLUB AROUND 11:30,
27 WHAT WAS THE PURPOSE FOR LEAVING THE CLUB? WHAT WERE
28 YOU GUYS GOING TO DO AFTER LEAVING THE CLUB?

1 DIAGRAM, FROM WHAT YOU KNOW, THEY WERE COMING FROM THE
2 EAST SIDE OF WESTERN WALKING TOWARDS THE WEST --
3 WESTBOUND ON SANTA MONICA, CORRECT?

4 A. CORRECT, YES.

5 Q. AND WHEN DID YOU FIRST NOTICE THESE
6 INDIVIDUALS?

7 A. WHEN WE WERE TALKING, THE CORNER OF MY
8 EYE I SAW THOSE TWO INDIVIDUALS APPROACHING. BUT I
9 DIDN'T -- I DIDN'T THINK NOTHING OF IT.

10 Q. AND AT SOME POINT DID EITHER ONE OF
11 THOSE TWO INDIVIDUALS MAKE ANY CONTACT WITH YOU AND
12 MR. CARLYLE?

13 A. VERBAL CONTACT OR PHYSICAL?

14 Q. VERBAL.

15 A. VERBAL, YES.

16 Q. AND WHAT WAS THE FIRST THING YOU HEARD?

17 A. "WHAT'S UP? WHAT'S GOING ON?" THOSE
18 WERE LIKE SOME WORDS THAT I REMEMBER.

19 Q. HAVE YOU HAD AN OPPORTUNITY SINCE THIS
20 INCIDENT HAPPENED, THE NIGHT OF THIS INCIDENT WHEN YOU
21 WERE INTERVIEWED, HAVE YOU HAD AN OPPORTUNITY TO REVIEW
22 YOUR TAPED STATEMENT THAT YOU GAVE TO THE POLICE?

23 A. NO.

24 Q. HAVE YOU REVIEWED THE TRANSCRIPT OR
25 LISTENED TO THE TAPE?

26 A. NO.

27 Q. HAS THE DETECTIVE INTERVIEWED YOU AGAIN
28 AND PREPARED YOU FOR YOUR TESTIMONY?

1 A. NO.

2 Q. DO YOU RECALL SPECIFICALLY WHAT IT WAS
3 THAT YOU TOLD DET. PELLETIER WHEN HE INTERVIEWED YOU
4 THAT EVENING WITH RESPECT TO WHAT THE SUSPECT SAID?

5 A. DO I REMEMBER WHAT I SAID? YEAH.

6 Q. WHAT DO YOU REMEMBER TELLING HIM?

7 A. WE WERE APPROACHED. "WHAT'S UP? WHAT'S
8 GOING ON? WHERE ARE YOU GUYS FROM?" AFTER THAT I
9 REMEMBER STATING, "WE DON'T CLAIM, WE DON'T WANT ANY
10 TROUBLE," SPEAKING FOR RICHARD AND MYSELF.

11 AFTER THOSE WORDS WERE EXCHANGED, I DO
12 RECALL THEM ASKING, "WHAT'S UP? IS THIS YOUR BOYFRIEND
13 OR WHAT?" AND THAT'S WHEN RICHARD SAID, "SO WHAT IF IT
14 IS?" AND FROM THERE, THAT'S WHEN EVERYTHING HAPPENED.

15 Q. WHAT HAPPENED AFTER THAT?

16 A. A GUN WAS PULLED OUT. I REMEMBER HEARING
17 FOUR SHOTS, FOUR, FIVE SHOTS. RICHARD WAS
18 APPROXIMATELY TWO, THREE FEET AWAY FROM ME, SO I SAW
19 HIM GET HIT. AFTER THAT, EVERYTHING HAPPENED SO FAST,
20 BUT RICHARD THEN --

21 Q. LET ME STOP YOU THERE. LET'S GO STEP BY
22 STEP, GO BACK FOR A SECOND. FIRST OF ALL, DO YOU SEE
23 ONE OF THE TWO INDIVIDUALS WHO APPROACHED YOU IN COURT
24 TODAY?

25 A. YES. DIFFERENT, LOOKS DIFFERENT, BUT
26 YES.

27 Q. COULD YOU PLEASE POINT TO THE INDIVIDUAL
28 AND TELL US WHAT HE IS WEARING AND WHERE HE'S SEATED.

1 A. THE GENTLEMAN SITTING IN THE WHITE SHIRT.

2 THE COURT: THE WITNESS HAS IDENTIFIED THE
3 DEFENDANT, JOSE OSVALDO ARTEAGA.

4 BY MR. ARIAS:

5 Q. AND WHAT IS DIFFERENT ABOUT HIM? WHAT
6 LOOKS DIFFERENT ABOUT HIM TODAY?

7 A. MORE FACIAL HAIR, MORE HAIR ON HIS HEAD.

8 Q. WHAT DID MR. ARTEAGA LOOK LIKE THE DAY
9 THAT THIS -- WITH RESPECT TO HIS HAIR, SPECIFICALLY THE
10 TOP OF HIS HAIR? WHAT DID HE LOOK LIKE THEN?

11 A. IT WAS LIKE SHAVED OFF, NO HAIR, THINNER
12 MUSTACHE, THINNER BUILD.

13 Q. YOU SAID THERE WERE TWO INDIVIDUALS THAT
14 APPROACHED YOU, RIGHT?

15 A. CORRECT.

16 Q. ONE WAS MR. ARTEAGA. CAN YOU DESCRIBE
17 THE OTHER INDIVIDUAL FOR US, PLEASE, AS BEST AS YOU
18 RECALL.

19 A. THE OTHER PERSON WAS MAYBE ABOUT FIVE
20 EIGHT, FIVE NINE, THIN, FADED HAIRCUT.

21 Q. WHEN YOU SAY FADE, WHAT DO YOU MEAN?

22 A. TAPERED. IT'S TAPERED FROM THE BOTTOM
23 UP. HE HAD MORE HAIR ON TOP.

24 Q. AND WHEN MR. ARTEAGA AND THIS INDIVIDUAL
25 FIRST APPROACHED YOU, WHO WAS THE PERSON WHO MADE THESE
26 COMMENTS AS TO, YOU KNOW, "WHAT'S UP, WHAT'S GOING ON,
27 WHERE ARE YOU FROM?"

28 A. HE WAS.

1 Q. WHO IS "HE"?

2 A. THE GENTLEMAN IN THE WHITE, MR. ARTEAGA.

3 Q. DO YOU REMEMBER TELLING THE DETECTIVES --
4 I'M SORRY, THAT MR. ARTEAGA INITIALLY ASKED YOU
5 SOMETHING TO THE EFFECT OF, "WHERE ARE YOU FROM, I KNOW
6 YOU'RE FROM SOMEWHERE, WHERE ARE YOU FROM?" DO YOU
7 REMEMBER THAT?

8 A. YES.

9 Q. NOW, ARE YOU A GANG MEMBER, BY ANY
10 CHANCE?

11 A. NO, I'M NOT.

12 Q. HAVE YOU EVER BEEN A GANG MEMBER?

13 A. NO.

14 Q. ARE YOU FAMILIAR WITH GANGS?

15 A. NOT REALLY.

16 Q. WHEN MR. ARTEAGA ASKED YOU THAT QUESTION,
17 WHAT DID YOU TAKE THAT TO MEAN?

18 A. BASICALLY MEANING THAT WHERE ARE YOU
19 FROM, IF I CLAIMED ANY GANG OR ANYTHING.

20 Q. SO YOU KNEW WHAT YOU WERE ASKED?

21 A. OH, YEAH.

22 Q. AND YOUR RESPONSE TO THAT WAS WHAT?

23 A. "WE DON'T CLAIM."

24 Q. AND INITIALLY WERE YOU THE ONE TALKING TO
25 MR. ARTEAGA?

26 A. YEAH.

27 Q. AND HOW FAR AWAY FROM YOU WAS MR. ARTEAGA
28 WHEN HE FIRST CONTACTED YOU AND ASKED YOU WHERE YOU

1 WERE FROM OR WHAT'S GOING ON OR WHATEVER IT WAS THAT
2 YOU SAID?

3 A. ABOUT FIVE FEET.

4 Q. I'M SORRY?

5 A. ABOUT FIVE FEET, RIGHT IN FRONT OF ME.

6 Q. AND AS FAR AS THE LIGHTING AT THE TIME
7 WHEN MR. ARTEAGA WAS MAKING STATEMENTS TO YOU AT THE
8 CORNER OF SANTA MONICA AND WESTERN, HOW WAS THE
9 LIGHTING? HOW WOULD YOU DESCRIBE IT?

10 A. IT'S GOOD LIGHTING, RIGHT UNDER THE LIGHT
11 POST.

12 Q. WAS THERE ANYTHING OBSTRUCTING YOUR VIEW
13 OF MR. ARTEAGA WHEN YOU WERE ENGAGING IN THIS
14 CONVERSATION?

15 A. NO.

16 Q. AND WHAT PART OF MR. ARTEAGA WERE YOU
17 FOCUSING ON WHILE YOU WERE ENGAGING MR. ARTEAGA IN THIS
18 CONVERSATION?

19 A. HIS FACE.

20 Q. DID MR. ARTEAGA HAVE ANYTHING IN HIS
21 HANDS PRIOR TO PULLING OUT A GUN AND SHOOTING YOUR
22 FRIEND?

23 A. NO.

24 Q. NOW, AS FAR AS THE TIME THAT YOU
25 ALLOCATED IN FOCUSING AND DISCUSSING -- STRIKE THAT.

26 AT ANY POINT DID THE OTHER INDIVIDUAL,
27 THE PERSON YOU DESCRIBED AS HAVING A TAPERED HAIRCUT,
28 DID THAT INDIVIDUAL EVER SAY ANYTHING OR GET ENGAGED IN

1 THE DISCUSSION THAT YOU AND MR. CARLYLE WERE HAVING
2 WITH MR. ARTEAGA?

3 A. NOT THAT I CAN REMEMBER, NO.

4 Q. WHERE WAS THIS INDIVIDUAL STANDING WITH
5 RESPECT TO MR. ARTEAGA?

6 A. TO HIS RIGHT, WEST SIDE OF THE STREET.

7 Q. AND YOU MENTIONED THAT MR. ARTEAGA ASKED,
8 "WHERE ARE YOU FROM," AND YOUR RESPONSE WAS, "WE DON'T
9 CLAIM"?

10 A. "WE DON'T CLAIM."

11 Q. AND WHAT HAPPENS NEXT? WHAT IS THE NEXT
12 QUESTION OR STATEMENT WITH RESPECT TO MR. ARTEAGA?

13 A. "IS THIS YOUR BOYFRIEND?"

14 Q. AND WHAT -- AT THAT POINT WHO RESPONDS TO
15 THAT QUESTION?

16 A. RICHARD.

17 Q. AND WHAT DOES RICHARD SAY TO THAT
18 QUESTION?

19 A. "SO WHAT IF HE IS?"

20 Q. AND HOW DID -- WHAT WAS MR. ARTEAGA'S
21 RESPONSE TO RICHARD'S COMMENT?

22 A. AFTER THAT, FROM WHAT I REMEMBER, JUST
23 THE BULLETS.

24 Q. HOW MANY SHOTS WOULD YOU SAY THAT
25 MR. ARTEAGA FIRED, AS YOU RECALL?

26 A. I REMEMBER HEARING ABOUT THREE OR FOUR.

27 Q. DO YOU RECALL WHICH -- WERE YOU STRUCK
28 WITH ANY TYPE OF BULLETS?

1 A. NO.

2 Q. WHO WAS MR. ARTEAGA POINTING THE WEAPON
3 AT?

4 A. RICHARD.

5 Q. AND DID YOU SEE WHERE MR. CARLYLE
6 RECEIVED THE FIRST BULLET STRIKE?

7 A. NO. I KNOW IT WAS IN THE FRONT, BUT I
8 DON'T KNOW WHERE EXACTLY, IF IT WAS HIS CHEST OR
9 STOMACH.

10 Q. WHAT HAPPENS TO MR. CARLYLE AFTER THE
11 FIRST SHOT?

12 A. HE BASICALLY JUST WEAVED, KIND OF LIKE
13 HIS ARMS WERE MOVING AROUND. HIS BODY JUST KIND OF
14 LIKE JOLTED.

15 Q. AND DID MR. ARTEAGA CONTINUE TO FIRE
16 AFTER THE FIRST SHOT?

17 A. YES.

18 Q. HOW WAS MR. ARTEAGA HOLDING THIS WEAPON,
19 IF YOU RECALL?

20 A. IF I'M CORRECT, HE WAS POINTING IT TO THE
21 SIDE LIKE SO (INDICATING).

22 MR. ARIAS: DESCRIBING, YOUR HONOR?

23 THE COURT: INDICATING PALM DOWN, THUMB TO THE
24 LEFT; IS THAT RIGHT?

25 THE WITNESS: CORRECT.

26 MR. ARIAS: THANK YOU.

27 Q. AND HOW FAR WAS RICHARD FROM MR. ARTEAGA
28 WHEN MR. ARTEAGA WAS FIRING AT RICHARD?

1 Q. AND AT SOME POINT AFTER RICHARD WAS TAKEN
2 TO THE HOSPITAL WERE YOU TAKEN TO THE POLICE STATION?

3 A. AT THE HOLLYWOOD STATION, YES.

4 Q. AND THAT'S THAT SAME MORNING, CORRECT?

5 A. YES.

6 Q. AND YOU WERE INTERVIEWED?

7 A. YES, I WAS.

8 Q. DO YOU RECALL WHAT DESCRIPTION YOU GAVE
9 OF MR. ARTEAGA IMMEDIATELY AFTER THE CRIME?

10 A. INDIVIDUAL WITH SHAVED HEAD, I BELIEVE A
11 BLUE CHECKERED SHIRT.

12 Q. WHAT TYPE OF ETHNICITY DID YOU GIVE?

13 A. LATINO.

14 Q. WHAT TYPE OF HEIGHT DID YOU GIVE?

15 A. FIVE EIGHT.

16 Q. DO YOU REMEMBER FIVE SEVEN?

17 A. THAT COULD HAVE BEEN IT, YES.

18 Q. WHAT WEIGHT DID YOU GIVE?

19 A. ABOUT 180, GIVE AND TAKE.

20 Q. 175, 180, SOUND APPROPRIATE?

21 A. (NODDING HEAD.)

22 Q. WHAT ABOUT THE AGE?

23 A. CLOSE TO 20'S.

24 Q. AND YOU MENTIONED THE HAIRCUT WAS BALD?

25 A. BALD, YES.

26 Q. NOW, AT SOME POINT AFTER YOUR INTERVIEW
27 WITH DET. PELLETIER WERE YOU SHOWN A SET OF PHOTOGRAPHS
28 BY A DETECTIVE BY THE NAME OF FLORES?

1 COURT OF APPEAL OF THE STATE OF CALIFORNIA

2 SECOND APPELLATE DISTRICT

3 DOCKET
CR. LA.
No. 04DA0332
Entered by LSA
Date 4/16/04

4 THE PEOPLE OF THE STATE OF CALIFORNIA)

5 PLAINTIFF-RESPONDENT,)

6 VS.)

7 JOSE OSVALDO ARTEAGA,)

8 DEFENDANT-APPELLANT.)

) NO. BA235633

) MAY 24 2004

9 _____)
10
11
12 APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

13 HONORABLE RAND S. RUBIN, JUDGE PRESIDING

14 REPORTER'S TRANSCRIPT ON APPEAL

15 MAY 2 AND 3, 2004

16
17
18 APPEARANCES:

19 FOR PLAINTIFF-RESPONDENT:

BILL LOCKYER,
STATE ATTORNEY GENERAL
300 S. SPRING STREET
NORTH TOWER, SUITE 5001
LOS ANGELES, CA 90013

20
21
22 FOR DEFENDANT-APPELLANT:

IN PROPRIA PERSONA

23
24
25 COPY

LINDA K. SWARTZ, CSR 4648
OFFICIAL REPORTER

26
27 VOLUME 3 OF 4

28 PAGES 241 THROUGH 502, INCLUSIVE

1 Q. NOW, YOU'VE NEVER SEEN ANYBODY SHOT
2 BEFORE. IS THAT A CORRECT STATEMENT?

3 A. THAT'S CORRECT.

4 Q. THIS HAS TO BE AN INCREDIBLY SHOCKING
5 EVENT TO YOU.

6 A. IT IS, YES.

7 Q. THIS EVENT WAS UNEXPECTED WHEN IT
8 HAPPENED?

9 A. YES.

10 Q. DID YOU ACTUALLY SEE TWO INDIVIDUALS
11 APPROACH YOU AND YOUR FRIEND, MR. CARLYLE?

12 A. YES, CROSSING THE STREET.

13 Q. NOW, WERE THEY CROSSING THE STREET FROM
14 THE SOUTHEAST CORNER? THE TWO OF YOU ARE ON THE
15 SOUTHWEST CORNER. YOU KNOW WHERE THE SOUTHEAST CORNER
16 WOULD BE OF SANTA MONICA AND WESTERN. DID THEY CROSS
17 FROM THE SOUTHEAST CORNER OR THE NORTHWEST CORNER
18 TOWARDS YOU?

19 A. THEY WERE COMING FROM THE EAST,
20 SOUTHEAST.

21 Q. THAT NIGHT, THAT MORNING THAT THAT
22 HAPPENED, YOU WERE INTERVIEWED AT THE HOLLYWOOD
23 DIVISION OF L.A. POLICE DEPARTMENT, CORRECT?

24 A. YES.

25 Q. YOU WERE INTERVIEWED BY DET. PELLETIER?

26 A. PELLETIER, YES.

27 Q. WHAT DID THE GUN LOOK LIKE?

28 A. I DON'T RECALL.

1 Q. YOU DIDN'T GET A GOOD LOOK AT THE GUN?
2 A. NO.
3 Q. HOW FAST DID THE EVENT -- HOW FAST -- HOW
4 LONG DID THIS EVENT TAKE?
5 A. SECONDS. IT WAS IN SECONDS.
6 Q. DID YOU SEE WHERE THE GUN CAME FROM?
7 A. NO.
8 Q. DID YOU SEE WHICH HAND THE PERSON WHO'S
9 HOLDING THE GUN HAD IT IN?
10 A. I WOULD SAY THE RIGHT HAND.
11 Q. ARE YOU SURE?
12 A. YES.
13 Q. YOU HAVE TO ANSWER OUT LOUD.
14 A. YES.
15 Q. WHAT DID THIS PERSON'S HAIR LOOK LIKE?
16 A. NO HAIR.
17 Q. AND DID YOU TELL DET. PELLETIER WHAT
18 COLOR WERE HIS EYES?
19 A. I DON'T REMEMBER STATING THE COLOR OF THE
20 EYES.
21 Q. AND WHAT TYPE OF PANTS WAS THIS PERSON
22 WEARING?
23 A. I BELIEVE JEANS.
24 Q. BLUE JEANS?
25 A. UM-HUMM.
26 Q. WAS HE WEARING A YELLOW SHIRT?
27 A. I REMEMBER BLUE, BLUE CHECKERED.
28 Q. WAS IT BLUE CHECKERED OR BLUE PLAID?

1 A. YES.

2 Q. WERE YOU ABLE TO IDENTIFY ANYBODY AT THE
3 LINEUP?

4 A. NO, I WAS NOT.

5 Q. THANK YOU.

6 THE COURT: REDIRECT, MR. ARIAS?

7 MR. ARIAS: CAN I HAVE A MOMENT, YOUR HONOR.

8 THE COURT: CERTAINLY.

9

10 (BRIEF PAUSE IN THE PROCEEDINGS.)

11

12 REDIRECT EXAMINATION

13 BY MR. ARIAS:

14 Q. NOW, WHEN YOU WENT TO THE LINEUP, THAT
15 WAS ABOUT SIX MONTHS AFTER THE SHOOTING OCCURRED,
16 CORRECT?

17 A. IT WAS SIX MONTHS, YES.

18 Q. WHEN DO YOU BELIEVE YOUR MEMORY OF THE
19 SHOOTER IN THIS CASE, MR. ARTEAGA, WAS FRESHER IN YOUR
20 MIND, ABOUT TWO WEEKS AFTER OR SIX MONTHS AFTER?

21 A. IT WAS TWO WEEKS AFTER.

22 Q. DO YOU HAVE ANY IDEA WHY IT TOOK SIX
23 MONTHS FOR THE DEFENSE TO REQUEST A LINEUP?

24 A. NO.

25 Q. NOW, AS FAR AS THE LINEUP ITSELF, DID
26 YOU -- DID ANY OF THOSE PEOPLE -- WHEN YOU WERE GIVEN
27 INSTRUCTIONS, THE WITNESS CARD ADMONITION, DO YOU
28 RECALL WHAT OPTIONS YOU HAD TO FILL OUT?

1 Q. SO YOU DON'T KNOW IF THE DEFENSE ASKED
2 FOR A LINEUP IN, SAY, LATE NOVEMBER OR DECEMBER?

3 A. CAN YOU REPHRASE THAT QUESTION?

4 Q. DO YOU KNOW IF THE DEFENSE, MYSELF OR ANY
5 OTHER ATTORNEY, ASKED FOR A LINEUP IN LATE NOVEMBER OR
6 EARLY DECEMBER?

7 A. NO.

8 Q. THE LINEUP ITSELF, GO BACK TO THE LINEUP,
9 IS THAT A CONFUSING SITUATION?

10 A. THAT DAY, YES.

11 Q. WHAT WAS CONFUSING ABOUT IT?

12 A. THE PEOPLE THERE.

13 Q. WHAT DO YOU MEAN?

14 A. THE LINEUP.

15 Q. WHAT'S CONFUSING ABOUT IT?

16 A. ONE, IT'S PEOPLE I HAVE NEVER SEEN. AND
17 TRYING TO POINT SOMEBODY OUT WHEN THE NIGHT THAT THAT
18 OCCURRED, IT'S A TOTAL LIFE LOOK (SIC).

19 Q. SO IT'S EASIER FOR YOU TO IDENTIFY
20 SOMEBODY IF THERE'S NOT A LOT OF OTHER PEOPLE AROUND
21 THAT LOOK SIMILAR TO THAT PERSON; IS THAT CORRECT?

22 A. YOU MIGHT SAY YES.

23 Q. SO IT'S EASIER FOR YOU TO IDENTIFY
24 MR. ARTEAGA IN COURT BECAUSE HE'S THE ONLY DEFENDANT,
25 CORRECT?

26 A. NO, NOT NECESSARILY.

27 Q. IT'S JUST THAT YOUR MEMORY NOW IS BETTER,
28 CORRECT?

1 A. IT'S THE SAME PICTURE THAT I SAW IN THE
2 SIX-PACK.

3 Q. THIS IS THE SAME PICTURE THAT YOU SAW IN
4 THE SIX-PACK?

5 A. YES.

6 Q. SO HE LOOKS MORE LIKE HE DID IN THE
7 SIX-PACK SITTING HERE THAN HE LOOKS LIKE WHEN HE WAS IN
8 THE LINEUP?

9 A. HE LOOKED FAMILIAR IN THE LINEUP.

10 Q. YOU HAD AN OPPORTUNITY TO WRITE THAT DOWN
11 ON THE PAPER -- COUNSEL JUST ASKED YOU SOME QUESTIONS
12 ABOUT IT, CORRECT?

13 A. YES.

14 Q. YOU COULD HAVE WRITTEN DOWN ANYTHING YOU
15 WANTED ON THAT PAPER, CORRECT?

16 A. I COULD HAVE, YES.

17 Q. SO YOU COULD HAVE WRITTEN DOWN, YOU KNOW,
18 I THINK THAT NO. 4 IS THE GUY BUT I'M NOT 100 PERCENT
19 SURE. YOU COULD HAVE WRITTEN THAT, COULDN'T YOU?

20 A. YES.

21 Q. BUT YOU DIDN'T WRITE THAT?

22 A. NO, I DIDN'T.

23 Q. AND WHEN YOU WERE AT THE LINEUP -- I WAS
24 THERE AT THE LINEUP, WASN'T I?

25 A. YES, YOU WERE.

26 Q. DID I INTERFERE?

27 A. NO.

28 Q. I JUST WAS THERE AND I WATCHED, CORRECT?

1 DIRECT EXAMINATION

2 BY MR. ARIAS:

3 Q. DET. PELLETIER, COULD YOU TELL THE JURY

4 YOUR OCCUPATION AND ASSIGNMENT, PLEASE.

5 A. I'M DETECTIVE-NIGHT WATCH SUPERVISOR AT

6 HOLLYWOOD DIVISION.

7 Q. AND I'M GOING TO ASK YOU TO GO BACK TO

8 AUGUST 9 OF 2002 AT APPROXIMATELY 12:35 IN THE MORNING,

9 WHICH IS ABOUT 15 MINUTES AFTER THE CALL, DID YOU

10 RESPOND TO THE CORNER OF SANTA MONICA AND WESTERN

11 REGARDING A SHOTS FIRED, VICTIM DOWN AT THAT LOCATION?

12 A. YES, I DID.

13 Q. WHEN YOU ARRIVED, WAS THE VICTIM STILL

14 THERE?

15 A. HE WAS IN THE PROCESS OF BEING

16 TRANSPORTED BY A RESCUE AMBULANCE.

17 Q. WAS THE CRIME SCENE SECURE WHEN YOU

18 ARRIVED?

19 A. IT WAS IN THE PROCESS OF BEING DONE SO,

20 YES.

21 Q. AND WERE YOU -- DID YOU RECOVER ANY

22 EVIDENCE AT THIS CRIME SCENE?

23 A. YES, I DID.

24 Q. AND AMONG THE EVIDENCE THAT YOU

25 RECOVERED, DID IT INCLUDE ANY TYPE OF BALLISTICS

26 EVIDENCE?

27 A. YES.

28 Q. WHAT TYPE OF BALLISTICS EVIDENCE DID YOU

1 A. YES, I WAS.

2 Q. AND AT SOME POINT DID YOU INTERVIEW THE
3 VICTIM, MR. RICHARD CARLYLE?

4 A. YES, I DID.

5 Q. AND WHERE DID YOU INTERVIEW HIM?

6 A. CEDARS SINAI HOSPITAL.

7 Q. AND DO YOU RECALL WHEN THAT WAS?

8 A. YES. IT WAS ON THE 14TH.

9 Q. OF AUGUST?

10 A. YES.

11 Q. AND COULD YOU DESCRIBE MR. CARLYLE'S
12 CONDITION ON THE DATE THAT YOU INTERVIEWED HIM THAT
13 FIRST TIME, AUGUST 14.

14 A. YES. MR. CARLYLE WAS -- THIS WAS POST
15 SURGERY AND HE WAS IN VERY SERIOUS CONDITION AT THE
16 TIME. HE WAS HEAVILY MEDICATED, HAD A LOT OF TUBES AND
17 MEDICATION, I.V.'S.

18 Q. AND WHY DID YOU -- WHY DIDN'T YOU WAIT
19 TILL HE WAS BETTER BEFORE INTERVIEWING HIM? WHY DID
20 YOU INTERVIEW HIM AT THIS STAGE?

21 A. I WANTED TO INTERVIEW HIM. I HAD
22 CONTACTED THE HOSPITAL TO SEE IF HE WAS CONSCIOUS. I
23 WANTED TO INTERVIEW HIM, HOPING TO GET INFORMATION FROM
24 HIM, BECAUSE I WASN'T SURE OF HIS STABILITY AT THE
25 TIME.

26 Q. AND WHERE -- WAS HE IN I.C.U. AT THIS
27 TIME?

28 A. THE TIME I INTERVIEWED HIM HE WAS IN A

1 PRIVATE HOSPITAL ROOM.

2 Q. AND AT SOME POINT DID YOU CUT THIS
3 INTERVIEW SHORT?

4 A. YES, I DID.

5 Q. AND WHY WAS THAT?

6 A. MR. CARLYLE WAS IN INCREDIBLE OR IN QUITE
7 A BIT OF PAIN AND THE INTERVIEW WAS CAUSING HIM
8 AGITATION.

9 Q. AT SOME POINT DID YOU OR SOME OTHER
10 OFFICER SHOW HIM PHOTOGRAPHS?

11 A. YES.

12 Q. AND WHAT TYPE OF PHOTOGRAPHS WERE THESE?

13 A. OUR GANG DETECTIVES WHO WORK IN
14 CONJUNCTION WITH US MAINTAIN WHAT WE CALL GANG BOOKS.
15 GANG BOOKS CONTAIN PHOTOGRAPHS OF GANG MEMBERS TAKEN
16 OVER A PERIOD OF YEARS. WE SHOWED HIM A BOOK
17 CONTAINING PHOTOGRAPHS OF THE GANG KNOWN AS MARA SALVA
18 TRUCHA.

19 Q. AND WHY WAS PHOTOGRAPHS OF MARA SALVA
20 TRUCHA SHOWN TO HIM?

21 A. BECAUSE OF THE AREA WHERE THE CRIME
22 OCCURRED, BECAUSE OF THE TYPE OF CRIME. THE
23 INFORMATION THAT I HAD AT THE TIME INDICATED TO ME THIS
24 WAS A GANG CRIME. BECAUSE THAT GANG CLAIMS THAT AREA.
25 THAT'S WHY WE SHOWED HIM THAT PARTICULAR BOOK.

26 Q. NOW, WHEN YOU SHOWED MR. CARLYLE THIS SET
27 OF BOOKS -- OR SET OF PHOTOGRAPHS, I SHOULD SAY, DID HE
28 POINT TO ANY INDIVIDUALS AS BEING THE PERSON WHO SHOT

1 HIM?

2 A. NO.

3 Q. DID HE MAKE ANY COMMENTS REGARDING SOME
4 OF THE PHOTOGRAPHS IN THE BOOK?

5 A. YES, HE DID.

6 Q. AND HOW MANY PHOTOGRAPHS DID HE POINT TO
7 YOU, OR POINT OUT, I SHOULD SAY.

8 A. I DON'T HAVE THE EXACT NUMBER WITHOUT
9 LOOKING AT MY NOTES, BUT I THINK ROUGHLY EIGHT TO TEN.

10 Q. WOULD LOOKING AT YOUR NOTES AND YOUR
11 REPORT ASSIST YOU?

12 A. YES.

13 MR. ARIAS: IF I MAY.

14 THE COURT: CERTAINLY.

15 THE WITNESS: THANK YOU.

16 WHAT I DID IN MY NOTES, ON PAGE 3 OF MY
17 HANDWRITTEN NOTES I INDICATED PHOTOGRAPHS THAT HE
18 PICKED OUT FROM THE BOOK, AND THERE ARE ONE, TWO,
19 THREE, FOUR, FIVE, SIX, SEVEN, EIGHT -- THERE ARE NINE
20 THAT HE PICKED IN REGARDS TO THE CASE I WAS
21 INVESTIGATING. THERE WAS ALSO ANOTHER PICTURE HE
22 PICKED IN REGARDS TO SOMETHING ELSE.
23 BY MR. ARIAS:

24 Q. NOW, WITH RESPECT TO THE CASE, THE
25 PHOTOGRAPHS THAT HE IDENTIFIED WITH RESPECT TO THIS
26 CASE, DID HE -- WHAT COMMENTS DID HE MAKE, IF ANY,
27 REGARDING THESE PHOTOGRAPHS?

28 A. HE MADE COMMENTS REGARDING SIMILAR,

1 GENERAL FEATURES OF THE PICTURES IN REGARDS TO HIS
2 RECOLLECTION OF WHAT THE SUSPECTS LOOKED LIKE.

3 Q. WERE ANY OF THESE INDIVIDUALS OR ANY OF
4 THESE PHOTOGRAPHS, DID ANY OF THEM DEPICT MR. ARTEAGA?

5 A. YES. ONE DID.

6 Q. AND WHICH PHOTOGRAPH WAS THAT?

7 A. I BELIEVE THAT WAS PHOTOGRAPH NO. 290,
8 TWO NINE ZERO.

9 Q. AND WHAT COMMENT DID HE MAKE REGARDING
10 THAT PHOTOGRAPH, IF ANY?

11 A. HE JUST LOOKED AT THEM AND -- HE LOOKED
12 AT THE PHOTOGRAPHS, MADE COMMENTS THAT THEY RESEMBLED
13 ONE OF -- ONE OF THE TWO SUSPECTS. I HAVE NO
14 PARTICULAR COMMENTS WRITTEN DOWN IN MY HANDWRITTEN
15 NOTES.

16 Q. NOW, WITH RESPECT TO MR. ARTEAGA'S
17 PHOTOGRAPH, DID HE MAKE ANY COMMENTS REGARDING THAT
18 PHOTOGRAPH?

19 A. NO.

20 Q. NOW, ON AUGUST 19 OF 2000 --
21 MR. ARIAS: HAVE A MOMENT, YOUR HONOR.

22 THE COURT: CERTAINLY.

23

24 (BRIEF PAUSE IN THE PROCEEDINGS.)

25

26 MR. ARIAS: IF I MAY APPROACH, YOUR HONOR.

27 THE COURT: CERTAINLY.

28 BY MR. ARIAS:

1 Q. DRAWING YOUR ATTENTION TO I THINK A
2 FOLLOW-UP REPORT I RECEIVED -- NOT YOUR NOTES, BUT A
3 FOLLOW-UP --

4 MR. KAREY: CAN I SEE WHICH REPORT?
5

6 (BRIEF PAUSE IN THE PROCEEDINGS.)
7

8 MR. ARIAS: NEXT I HAVE TWO DOCUMENTS, YOUR
9 HONOR. I DON'T NEED TO MARK THEM FOR EVIDENCE.
10 THEY'RE JUST COPIES OF A REPORT.

11 Q. DRAWING YOUR ATTENTION TO THESE TWO
12 DOCUMENTS, DO YOU RECOGNIZE THOSE DOCUMENTS?

13 A. YES, I DO.

14 Q. OKAY. AND WERE THOSE DOCUMENTS GENERATED
15 BY YOU?

16 A. YES, THEY WERE.

17 Q. AND IN THOSE DOCUMENTS DOES IT REFLECT --
18 DOES IT REFLECT YOUR NOTES FROM -- OTHER NOTES FROM
19 THAT INTERVIEW?

20 A. YES.

21 Q. AND IN THOSE DOCUMENTS DOES IT REFLECT
22 ANY STATEMENT THAT MR. ARTEAGA MADE REGARDING -- I'M
23 SORRY, MR. CARLYLE MADE REGARDING MR. ARTEAGA'S
24 PHOTOGRAPH, NO. 290?

25 A. YES, IT DOES.

26 Q. WHAT DOES IT SAY?

27 A. HE STATED IN REGARDS TO PHOTOGRAPH NO.
28 290, WHICH WAS THE PHOTOGRAPH IN THE M.S. BOOK OF THE

1 DEFENDANT, "LOOKS LIKE HIM, THE GUY WITH THE SHOOTER."

2 Q. AND AGAIN, MR. ARTEAGA'S CONDITION AT
3 THAT POINT WAS THAT HE WAS --

4 MR. KAREY: MR. CARLYLE.

5 BY MR. ARIAS:

6 Q. I'M SORRY, MR. CARLYLE'S CONDITION AT
7 THAT POINT WAS HE WAS HEAVILY MEDICATED, ABOUT FOUR
8 DAYS AFTER SURGERY?

9 A. THAT'S CORRECT.

10 Q. NOW, ON AUGUST 19 OF 2002 DID YOU SPEAK
11 WITH AN INDIVIDUAL BY THE NAME OF BAYRON PERES?

12 A. YES, I DID.

13 Q. AND DURING THAT INTERVIEW DID YOU TAKE
14 NOTES?

15 A. YES, I DID.

16 Q. AND DID YOU PROVIDE THOSE NOTES ALONG
17 WITH MR. PERES'S INFORMATION WHEN YOU FILED THIS CASE
18 IN THE -- NOT THE MURDER BOOK, THE ATTEMPTED MURDER
19 BOOK?

20 A. YES, I DID.

21 Q. NOW, AT SOME POINT DID YOU ASSIST THE
22 DEFENSE IN ACTUALLY ARRESTING MR. PERES AND BRINGING
23 HIM INTO COURT?

24 A. YES, I DID.

25 Q. WHAT DID YOU DO?

26 A. I HAD RECEIVED INFORMATION THAT THE
27 WITNESS HAD A WARRANT, WAS AT A CERTAIN LOCATION IN THE
28 HOLLYWOOD AREA, AND I HAD OFFICERS FLORES AND BURKE GO

1 TO THE LOCATION IN AN ATTEMPT TO MAKE CONTACT WITH HIM.
2 THEY DID SO. THEY WERE ABLE TO TAKE HIM
3 INTO CUSTODY, AND HE WAS THERE AND HE WAS THEREFORE
4 ARRESTED.

5 Q. NOW, ON FEBRUARY 5 OF 2003 WERE YOU AT
6 THE LINEUP THAT MR. ULLOA TESTIFIED TO JUST EARLIER
7 THIS MORNING?

8 A. YES, I WAS.

9 Q. AND THAT LINEUP WAS REQUESTED BY WHOM?

10 A. BY MR. ARTEAGA'S ATTORNEY.

11 Q. AND DO YOU RECALL WHEN THAT REQUEST CAME
12 IN, BY ANY CHANCE?

13 A. I DON'T -- I'D HAVE TO LOOK THROUGH MY
14 NOTES.

15 Q. COULD YOU SEE IF THERE'S ANYTHING IN
16 THERE.

17 A. SURE. (COMPLIES.)

18 I HAVE A FAX FROM MR. KAREY THAT WAS
19 FAXED TO THE HOLLYWOOD DETECTIVES AND IT'S A COURT
20 ORDER REQUESTING A LINEUP, AND IT LOOKS LIKE THE DATE
21 ON THE FAX IS JANUARY 8, 2003.

22 Q. NOW, AFTER THIS LINEUP DID YOU HAVE AN
23 OPPORTUNITY TO SPEAK TO MR. CARLYLE REGARDING HIS
24 IDENTIFICATION?

25 A. YES.

26 Q. DID HE MAKE ANY STATEMENTS REGARDING HIS
27 IDENTIFICATION?

28 A. YES.

1 THE WITNESS: YES.

2 THE CLERK: PLEASE BE SEATED IN THE WITNESS
3 STAND. PLEASE STATE AND SPELL BOTH YOUR FIRST AND LAST
4 NAME FOR THE RECORD.

5 THE WITNESS: B-A-Y-R-O-N, FIRST NAME, LAST NAME
6 P-E-R-E-S.

7 THE CLERK: THANK YOU.

8 THE COURT: MR. KAREY.

9 MR. KAREY: THANK YOU, YOUR HONOR.

10

11 DIRECT EXAMINATION

12 BY MR. KAREY:

13 Q. GOOD AFTERNOON, MR. PERES.

14 A. GOOD AFTERNOON.

15 Q. ARE YOU FAMILIAR WITH THE AREA OF SANTA
16 MONICA BOULEVARD AND WESTERN AVENUE?

17 A. YES, I AM.

18 Q. NOW, DO YOU LIVE IN THIS GENERAL AREA?

19 A. I USED TO LIVE AROUND THERE.

20 Q. GOING BACK TO AUGUST 9, YEAR 2002, LAST
21 YEAR, THE EARLY MORNING HOURS, WERE YOU IN THAT AREA?

22 A. YES, I WAS.

23 Q. AND WHAT WERE YOU DOING IN THAT AREA?

24 A. I WAS GOING TO A RESTAURANT TO GET
25 SOMETHING TO EAT.

26 Q. WERE YOU ALONE OR WITH SOMEBODY?

27 A. I WAS ALONE.

28 Q. WERE YOU IN A CAR OR ON FOOT?

1 A. I WAS IN MY CAR.

2 Q. IF I COULD TURN YOUR ATTENTION TO THE
3 DIAGRAM, AND I DON'T KNOW WHICH EXHIBIT THAT IS, I
4 DIDN'T LOOK.

5 THE COURT: IF YOU NEED TO STEP DOWN TO GET A
6 BETTER LOOK AT IT, YOU CERTAINLY MAY.

7 MR. ARIAS: PEOPLE'S 1, YOUR HONOR.

8 MR. KAREY: PEOPLE'S 1.

9 THE COURT: THAT IS PEOPLE'S 1.

10 BY MR. KAREY:

11 Q. DOES THAT LOOK LIKE A BASIC DIAGRAM OF
12 SANTA MONICA BOULEVARD AND WESTERN AVENUE?

13 A. YES, IT DOES.

14 Q. I'M GOING TO ASK YOU SOME QUESTIONS
15 ABOUT SOME EVENTS THAT YOU MAY OR MAY NOT REMEMBER FROM
16 THAT MORNING, THE MORNING -- EARLY MORNING HOURS OF
17 AUGUST 9, 2002.

18 AND IF YOU NEED TO USE THAT DIAGRAM, JUST
19 WALK OVER TO IT. DON'T MARK IT. BUT IF I ASK YOU TO
20 POINT, POINT TO IT. IF YOU'RE DIRECTED TO MARK IT BY
21 EITHER MYSELF OR MR. ARIAS, THEN MARK IT.

22 A. OKAY.

23 Q. OKAY. NOW, YOU SAID YOU WERE IN A CAR?

24 A. YES.

25 Q. AND DID YOU NOTICE AN EVENT THAT CAUGHT
26 YOUR ATTENTION?

27 A. YES.

28 Q. WHAT WAS THAT EVENT?

1 THE WITNESS: YEAH, LIKE MAYBE TEN FEET MORE.

2 THE COURT: WELL, TO THE BACK WALL IS 36 FEET
3 FROM WHERE YOU'RE SITTING.

4 THE WITNESS: MAYBE 50 FEET, I WOULD SAY.

5 BY MR. KAREY:

6 Q. GOING TO ASK YOU TO LOOK AT THIS DIAGRAM.
7 I'M PUTTING UP ANOTHER DIAGRAM AND I DON'T ACTUALLY SEE
8 A MARKING ON IT. IT WAS REFERRED TO, I THINK, BY
9 DET. PELLETIER.

10 MR. ARIAS: IT'S A SET OF PHOTOGRAPHS, YOUR
11 HONOR, AND IT'S PEOPLE'S 18.

12 BY MR. KAREY:

13 Q. MR. PERES, IF YOU CAN LOOK AT THOSE
14 PHOTOS AND -- ARE YOU NERVOUS BEING HERE TODAY?

15 A. YES, I AM.

16 Q. OKAY. THAT'S UNDERSTANDABLE. IF YOU CAN
17 TAKE YOUR TIME, I WANT YOU TO EXAMINE THE PHOTOGRAPHS
18 AND TELL US IF YOU RECOGNIZE WHAT APPEARS TO BE AN
19 INTERSECTION IN THE PHOTOGRAPHS. IF YOU TAKE A LOOK AT
20 THOSE, AND YOU CAN GET CLOSER IF YOU'D LIKE TO.

21

22 (BRIEF PAUSE IN THE PROCEEDINGS.)

23

24 BY MR. KAREY:

25 Q. IS THAT THE AREA THAT'S DEPICTED IN THAT
26 DIAGRAM?

27 A. YES.

28 Q. YOU RECOGNIZE THAT?

1 Q. YOU SAW AN INDIVIDUAL HOLDING A GUN?

2 A. YES, I DID.

3 Q. NOW, WHAT HAPPENED -- PLEASE DESCRIBE TO
4 US, TELL US WHAT YOU SAW AND HEARD NEXT.

5 A. WELL, I DIDN'T ACTUALLY HEAR ANYTHING,
6 BUT JUST I SAW THE PUNCHING, THE FISTFIGHTING THAT WAS
7 GOING ON FIRST.

8 AND I SAW THE INDIVIDUAL PULL OUT A GUN
9 AND SHOOT THE OTHER PERSON, AND THEN THE PERSON STARTED
10 RUNNING WITH THE OTHER PERSON THAT WAS THERE, WITH THE
11 PERSON THAT WAS SHOOTING.

12 Q. WELL, WHAT DID YOU DO AT THAT POINT?

13 A. I MADE THE RIGHT TURN AFTER THIS
14 HAPPENED, AFTER THE SHOOTING. I MADE THE RIGHT TURN
15 AND THE TWO -- THE TWO INDIVIDUALS THAT -- I WOULD SAY
16 THE INDIVIDUAL AND HIS PARTNER IN CRIME, I WOULD SAY,
17 HAD CROSSED THE STREET OVER -- AS I MADE THE RIGHT
18 TURN, THEY RAN ACROSS THE STREET OVER LIKE IN THE
19 MIDDLE OF THE BLOCK WHEN I WAS -- WHEN I HAD ALREADY
20 MADE THE RIGHT TURN AND THEY LIKE LITERALLY PASSED
21 THROUGH THE FRONT OF MY CAR. THEY WERE IN FRONT OF ME.

22 SO I -- I WAS JUST, OKAY, WHERE ARE THEY
23 RUNNING TO NOW, YOU KNOW. SO THEY WERE RUNNING FOR A
24 MINUTE.

25 AND THEN THERE WAS A LITTLE STREET NEXT
26 TO THAT AND I MADE A RIGHT TURN THERE SO THEY MADE A
27 RIGHT TURN THERE AND THEY WERE STILL RUNNING.

28 AND FOR MY VIEW I WAS JUST, OKAY, THESE

1 PEOPLE ARE GOING TO GO CLOSE TO HERE, THEY LIVE AROUND
2 HERE OR SOMETHING.

3 SO I WAS JUST THERE AT THE TIME AND WHEN
4 THIS HAPPENED.

5 Q. DO YOU KNOW WHAT -- DO YOU KNOW THE NAME
6 OF THAT STREET THAT THEY RAN DOWN?

7 A. I BELIEVE IT'S ST. ANDREWS OR -- YES,
8 IT'S ST. ANDREWS.

9 Q. AND DID YOU CONTINUE TO FOLLOW THEM?

10 A. YES, I DID.

11 Q. AND WHAT HAPPENED NEXT?

12 A. THEY RAN INSIDE AN APARTMENT BUILDING.

13 Q. AN APARTMENT BUILDING ON WHAT STREET?

14 A. ON VIRGINIA.

15 Q. AND VIRGINIA GOES WHICH DIRECTION?

16 A. GOES WEST.

17 Q. SO YOU'RE SAYING THAT THEY STARTED
18 RUNNING WEST ON VIRGINIA?

19 A. YES.

20 Q. OKAY. AND DID YOU CONTINUE TO FOLLOW
21 THEM?

22 A. NOT TO FOLLOW THEM COMPLETELY, BUT I HAD
23 TO MAKE A STOP AT THE PLACE, AND IT WAS THE CORNER OF
24 ST. ANDREWS AND VIRGINIA THAT I HAD TO STOP AND I MADE
25 A LEFT TURN TO WHERE THEY CONTINUED RUNNING.

26 Q. DID YOU SEE WHERE THEY RAN TO?

27 A. HONESTLY I CAN'T SAY I SAW THE BUILDING,
28 BUT I SEEN CLOSE TO WHAT THE BUILDINGS WERE AND WHERE

1 THEY RAN INTO.

2 Q. WHAT DID YOU DO THEN?

3 A. I JUST WENT HOME AND WAS -- YOU KNOW, I
4 WAS -- JUST REALIZING THAT, YOU KNOW, SOMEBODY HAD -- I
5 DON'T KNOW IF THE PERSON WAS DEAD. I DIDN'T KNOW WHAT
6 WAS GOING ON.

7 BUT IT WAS JUST LIKE, YOU KNOW, SAD FOR
8 SOMEBODY TO SHOOT THE OTHER PERSON, YOU KNOW, FOR
9 WHATEVER REASON IT WAS -- YOU KNOW, THERE WAS NO REASON
10 FOR NOBODY TO PULL OUT A GUN AND SHOOT SOMEBODY.

11 Q. THIS MAN HERE, DO YOU -- LISTEN TO MY
12 QUESTION CAREFULLY. DO YOU KNOW HIM?

13 A. NO, I DON'T.

14 Q. YOU DON'T KNOW HIM PERSONALLY?

15 A. NO.

16 Q. NOW, HAVE YOU EVER SEEN HIM IN THAT
17 NEIGHBORHOOD BEFORE?

18 A. I DROVE AROUND THE AREA COUPLE OF TIMES
19 AND I NEVER SEEN HIM THERE BUT I -- HIS FACE LOOKS
20 FAMILIAR TO ME.

21 Q. NOW, SOMETIME AFTER THIS EVENT, THIS IS
22 AUGUST 9, EARLY MORNING HOURS, DID YOU CONTACT SOMEBODY
23 AT THE WEST HOLLYWOOD SHERIFF'S STATION?

24 A. YES, I DID.

25 Q. WHO IS THAT?

26 A. I CONTACTED -- HE'S A FRIEND OF MINE,
27 SGT. SMITH.

28 Q. AND WHAT WAS YOUR PURPOSE FOR CONTACTING

1 Q. WERE YOU SHOWN SOME PHOTOGRAPHS BY THE
2 DETECTIVES?

3 A. YES, I WAS.

4 MR. KAREY: APPROACHING, I'M SHOWING THE WITNESS
5 PEOPLE'S 4.

6 Q. IF YOU CAN LOOK AT THAT. DO YOU
7 RECOGNIZE THAT ITEM?

8 A. YES, I DO.

9 Q. HOW DO YOU RECOGNIZE THAT?

10 A. THESE PICTURES HERE, DET. BYNUM SHOWED
11 THEM TO ME AND I POINTED OUT A PERSON THAT'S IN THESE
12 PICTURES.

13 Q. WHEN YOU SAY YOU POINTED SOMEBODY OUT,
14 WHAT DID YOU DO EXACTLY? AND DESCRIBE TO US, WHEN YOU
15 SAID YOU POINTED HIM OUT, AND WHAT DID YOU SAY?

16 A. I SAID THIS PERSON LOOKS FAMILIAR. THIS
17 PERSON, YOU KNOW, I SEEN HIM SOMEWHERE. THAT'S WHAT I
18 SAID.

19 Q. AND WHICH PERSON ARE YOU TALKING ABOUT?

20 A. I'M TALKING ABOUT THE PERSON HERE,
21 PICTURE NO. 6.

22 Q. NOW, LOOKING AT THAT PERSON IN PICTURE
23 NO. 6, IS THAT THE SHOOTER?

24 A. NO.

25 Q. DID YOU TELL THE DETECTIVES THAT THAT WAS
26 NOT THE SHOOTER?

27 A. YES.

28 Q. AND DRAWING YOUR ATTENTION TO MY CLIENT,

1 THE MAN SITTING HERE, IS -- DOES THIS LOOK LIKE THE
2 SAME PERSON IN THAT PHOTOGRAPH?

3 A. NO, HE DOESN'T.

4 Q. COULD IT BE THE SAME PERSON?

5 A. YES.

6 Q. WHAT'S DIFFERENT?

7 A. THE HAIRCUT. THE PERSON LOOKS DARKER
8 HERE.

9 Q. I'M POINTING TO MY CLIENT, MR. ARTEAGA.
10 IS THIS MAN THE MAN YOU SAW SHOOT SOMEBODY THAT DAY?

11 A. NO.

12 Q. DOES MR. ARTEAGA LOOK LIKE THE PERSON WHO
13 WAS WITH THE PERSON WHO SHOT SOMEBODY?

14 A. NO.

15 Q. THE PERSON WHO'S IN PHOTOGRAPH NO. 6,
16 DOES THAT LOOK LIKE THE PERSON WHO WAS WITH THE PERSON
17 WHO SHOT SOMEBODY THAT NIGHT, OR THAT MORNING?

18 A. NO.

19 Q. IN THIS CASE DID IT HAPPEN THAT YOU WERE
20 TAKEN INTO CUSTODY AS A WITNESS?

21 A. YES.

22 Q. AND HOW MANY DAYS WERE YOU IN CUSTODY AS
23 A WITNESS?

24 A. FOUR DAYS.

25 Q. AND THE DEFENSE SUBPOENAED YOU AS A
26 WITNESS, CORRECT?

27 A. IT WAS -- I JUST WAS CONFUSED ABOUT ALL
28 THESE THINGS THAT WERE HAPPENING. PAPERS THAT WERE

1 YOU'RE HELPING SOMEBODY OUT, WHO DO YOU FEEL YOU'RE
2 HELPING?

3 A. THE PERSON, THE VICTIM THAT WAS SHOT.

4 Q. THE VICTIM THAT WAS SHOT?

5 A. YES.

6 Q. AND HOW ARE YOU HELPING THAT PERSON BY
7 SAYING -- BY TELLING THE POLICE THAT YOU COULDN'T
8 IDENTIFY ANYBODY FROM -- YOU DO REMEMBER LOOKING AT A
9 WHOLE BOOK OF M.S. GANG MEMBERS, RIGHT?

10 A. YES.

11 Q. AND YOU DIDN'T -- YOU SAID YOU COULDN'T
12 RECOGNIZE ANY OF THOSE PEOPLE FROM THAT --

13 A. NO.

14 Q. AND WHEN YOU WERE SHOWN THE SIX-PACK, YOU
15 POINTED TO NO. 6 SPECIFICALLY, RIGHT?

16 A. YES.

17 Q. AND SAID YOU SEEN HIM AROUND BUT HE WAS
18 DEFINITELY -- BUT HE WAS NOT THE SHOOTER?

19 A. YES.

20 Q. HOW DO YOU FEEL THAT YOU'RE HELPING THE
21 VICTIMS BY DOING THAT?

22 A. MEANING THAT THERE IS A PERSON THAT
23 COMMITTED A CRIME AND IT'S -- IT'S A PERSON THAT'S JUST
24 RUNNING OUT THERE, YOU KNOW, YOU NEVER KNOW WHAT THE
25 PERSON'S DOING, MAYBE COMMITTING EVEN MORE CRIMES, AND
26 IT NEEDS TO BE STOPPED.

27 Q. OKAY. OKAY. LET'S GO WITH THAT FOR A
28 SECOND. YOU SAID YOU SAW THIS CRIME, YOU FOLLOWED THE

1 A. YES.

2 Q. SO FROM THIS SIDE, IF YOUR CAR IS PARKED
3 UP HERE, WOULD YOU SAY YOU HAD A SIDE VIEW OF THESE
4 PEOPLE?

5 A. YES.

6 Q. OKAY. NOW, HYPOTHETICALLY SPEAKING, WHO
7 DO YOU THINK HAD A BETTER VIEW OF THE FACE OF THE
8 SHOOTER, YOU IN THE POSITION YOU ARE OVER HERE ACROSS
9 THE STREET IN YOUR CAR, OR THE TWO PEOPLE WHO WERE
10 STANDING RIGHT IN FRONT OF THE SHOOTER?

11 A. THE TWO PEOPLE THAT WERE STANDING IN
12 FRONT OF THE SHOOTER.

13 MR. KAREY: OBJECTION -- I'LL WITHDRAW.

14 BY MR. ARIAS:

15 Q. NOW, SHOOTING HAPPENS AND THESE TWO
16 INDIVIDUALS TAKE OFF, RIGHT?

17 A. YES.

18 Q. LET'S GO BACK TO THE SHOOTING FOR A
19 SECOND. THE PERSON WITH THE GUN, HOW WOULD YOU
20 DESCRIBE HIM?

21 A. HE WAS DARK COMPLETED. HE STANDS ABOUT
22 FIVE NINE TO FIVE 11, SLIM.

23 Q. WHAT NATIONALITY WOULD YOU SAY HE WAS?

24 A. SALVADOREAN.

25 Q. ARE YOU SALVADOREAN, BY ANY CHANCE?

26 A. NO.

27 Q. WHY DO YOU SAY SALVADOREAN? I'M JUST
28 WONDERING.

1 FIRST, TRY TO AGREE AMONG YOURSELVES WHAT THE FACTS
2 ARE, WHAT REALLY HAPPENED IN THIS CASE. MORE
3 IMPORTANTLY, WHO COMMITTED THIS OFFENSE.

4 ONCE YOU REACH THAT OR AGREE UPON THE
5 FACTS, THEN APPLY THE LAW. MAKES IT EASIER BECAUSE
6 SOMETIMES WHAT HAPPENS IS THAT JURIES, SOME JURORS
7 BEGIN TO DISCUSS THE LAW OR THE JURORS BEGIN TO DISCUSS
8 THE FACTS, THEY'RE NOT STARTING AT THE SAME POINT.
9 THEY TEND TO GO IN CIRCLES AND THAT SOMETIMES LEADS TO
10 HUNG JURIES.

11 THIS WAY IF YOU'RE ALL ON THE SAME PAGE,
12 START OFF AT THE SAME POINT, IT MIGHT MAKE IT EASIER.
13 AGAIN, THIS IS BY REASON OF SUGGESTION.

14 BUT ASIDE FROM WHAT YOUR SIDES ARE, THIS
15 ALL BOILS DOWN TO ANSWERING TWO QUESTIONS, AND ONLY TWO
16 QUESTIONS.

17 THE FIRST ONE IS, WAS A CRIME COMMITTED?
18 AND IF SO, WHO DID IT? IN THIS CASE THE CRIME I'LL
19 ARGUE TO YOU THAT WAS COMMITTED IS PREMEDITATED,
20 ATTEMPTED MURDER. THE PERSON WHO COMMITTED THIS
21 OFFENSE WAS JOSE ARTEAGA, A.K.A., LITTLE HOMBRE.

22 NOW, AS FAR AS THE CRIME, WHAT CRIME WAS
23 COMMITTED? I WANT TO DISCUSS THAT FIRST.

24 WHEN THE JUDGE GIVES YOU THE
25 INSTRUCTIONS, THESE INSTRUCTIONS, YOU'RE GOING TO
26 LEARN, ARE LABELED WITH CERTAIN NUMBERS. THEY'RE
27 CALJIC INSTRUCTION NUMBERS.

28 MURDER IS DEFINED IN CALJIC 8.66.

1 THIS BENEFITS MARA SALVA TRUCHA BECAUSE
2 WORD ON THE STREET WILL GET OUT AND PEOPLE WILL KNOW
3 THAT THIS WAS A GANG-RELATED CRIME AND THAT IT WAS M.S.
4 AND WE'VE GOT TO BE CAREFUL WITH M.S. BECAUSE WE KNOW
5 WHAT M.S. IS CAPABLE OF.

6 WHAT THAT WILL DO IS INTIMIDATE POTENTIAL
7 WITNESSES IN FUTURE CRIMES. IF YOU LIVE IN THAT
8 COMMUNITY AND YOU WITNESS A MURDER OR A SHOOTING
9 INVOLVING A GANG MEMBER, DO YOU THINK YOU'RE GOING TO
10 CALL THE POLICE AND TELL THEM, HEY, I KNOW WHO THE
11 SHOOTER IS, LET ME IDENTIFY HIM FOR YOU? NO.

12 IT'S VERY UNLIKELY THAT YOU WILL BECAUSE,
13 UNFORTUNATELY, AS YOU LEARNED FROM MR. BAYRON PERES
14 HIMSELF, THE POSSIBILITY OF RETALIATION AND TESTIFYING
15 AGAINST OR IDENTIFYING OR EVEN BEING INVOLVED IN THIS
16 CASE HERE, BENEFITING THEM, EVEN BEING INVOLVED IN SUCH
17 A CRIME INVOLVING A GANG MEMBER IS POTENTIAL FOR
18 RETALIATION, HIGH POTENTIAL FOR RETALIATION. SO THIS
19 BENEFITS M.S. BY INSTILLING FEAR IN THE COMMUNITY.

20 NOW, THE SUMMARY OF THE FACTS AND WHAT
21 THEY PROVE WITH RESPECT TO THE CRIME, THAT THIS WAS A
22 WILLFUL, DELIBERATE, PREMEDITATED, ATTEMPTED MURDER.
23 IT WAS WITH A GUN, CAUSING G.B.I., AND WAS FOR THE
24 BENEFIT OF M.S. GANG.

25 AND I SUBMIT TO YOU THAT THE FACTS
26 SURROUNDING THIS CASE ESTABLISH THAT.

27 NOW, THE SECOND QUESTION IS, WELL, WHO
28 DID IT? I'M SORRY THAT SOME OF YOU MAY NOT BE ABLE TO

1 READ THIS. I'LL ACTUALLY READ IT FOR YOU, APOLOGIZE
2 BECAUSE IT'S SO SMALL.

3 IN THIS CASE YOU HAVE TWO WITNESSES WHO
4 TESTIFIED FOR THE PEOPLE AND ONE WHO TESTIFIED FOR THE
5 DEFENSE. THE TWO WHO TESTIFIED FOR THE PEOPLE, RICHARD
6 CARLYLE, SERGIO ULLOA, WERE THE VICTIM AND THE WITNESS
7 TO THE MURDER. PERSON WHO TESTIFIED FOR THE DEFENSE
8 WAS BAYRON PERES.

9 NOW, MR. RICHARD CARLYLE, WE HAVE TO
10 CONSIDER THE CIRCUMSTANCES OF HIS OBSERVATION BECAUSE
11 YOU WILL BE INSTRUCTED, CALJIC 2.92, AND IT LISTS SOME
12 FACTS, NOT ALL OF THEM, BUT JUST LISTS SOME FACTS THAT
13 WHOEVER DRAFTED THE JURY INSTRUCTIONS THINKS ARE
14 IMPORTANT FOR YOU TO CONSIDER.

15 AND IT SAYS, "EYEWITNESS TESTIMONY HAS
16 BEEN RECEIVED IN THIS TRIAL FOR THE PURPOSE OF
17 IDENTIFYING THE DEFENDANT AS THE PERPETRATOR OF THE
18 CRIME CHARGED.

19 "IN DETERMINING THE WEIGHT TO BE GIVEN
20 EYEWITNESS IDENTIFICATION TESTIMONY, YOU SHOULD
21 CONSIDER THE BELIEVABILITY OF THE WITNESS AS WELL AS
22 OTHER FACTORS WHICH BEAR UPON THE ACCURACY OF THE
23 WITNESS'S IDENTIFICATION OF THE DEFENDANT, INCLUDING,
24 BUT NOT LIMITED TO, ANY OF THE FOLLOWING:"

25 IT SAYS, "THE OPPORTUNITY OF THE WITNESS
26 TO OBSERVE THE ALLEGED CRIMINAL ACT AND THE PERPETRATOR
27 OF THE ACT; THE STRESS, IF ANY, TO WHICH THE WITNESS
28 WAS SUBJECT TO AT THE TIME OF THE OBSERVATION;

1 OCCURRED. MR. ARIAS AND MYSELF ARE NOT GOING TO
2 DISAGREE REALLY ON THE NATURE OF THE CRIME. WHOEVER
3 DID THIS, THIS IS IN ALL LIKELIHOOD AN ATTEMPT MURDER.

4 YOU DON'T NEED TO REALLY ANALYZE THAT.
5 WHAT YOU NEED TO DETERMINE IS WHO THE PERSON IS. THIS
6 IS AN IDENTIFICATION CASE. IS IT MY CLIENT,
7 MR. ARTEAGA?

8 AND I SAW A T.V. SHOW THIS WEEKEND, I
9 DON'T KNOW IF ANY OF YOU HAVE SEEN IT, AND IT WAS A LAW
10 AND ORDER SHOW AND ONE OF THE ATTORNEYS MADE MENTION OF
11 SOMEONE, "HIS NAME IS NOT DEFENDANT. HE'S NOT JUST A
12 NAME ON A PAPER. HE'S A HUMAN BEING." MR. ARTEAGA.

13 YOU SAW THREE OTHER INDIVIDUALS TESTIFY
14 AND A VICTIM, MR. CARLYLE, WHO SUFFERED HORRENDOUS
15 INJURIES.

16 HIS FRIEND, A MAN WHO WAS PROBABLY IN A
17 CLOSE RELATIONSHIP WITH HIM, HIS FRIEND MR. ULLOA,
18 TESTIFIES. AND OF COURSE YOU SAW A BYSTANDER, SOMEONE
19 NOT CONNECTED TO -- APPARENTLY NOT CONNECTED TO
20 MR. ARTEAGA OR EITHER ONE OF THE WITNESSES OR VICTIMS
21 IN THIS CASE.

22 YOU'VE GOT A SITUATION THAT OCCURS ON
23 AUGUST 9. THIS CASE -- THE SITUATION UNFOLDS VERY
24 RAPIDLY. YOU'VE GOT TWO MEN COMING OUT OF A NIGHTCLUB.
25 THEY'VE BEEN DRINKING. MAYBE NOT A LOT, BUT THEY HAD
26 BEEN DRINKING.

27 IT'S AT NIGHTTIME. THE ONLY VISIBILITY
28 IS PROVIDED BY THE LIGHTS THAT ARE IN THE AREA. BUT

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COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA)
PLAINTIFF-RESPONDENT,)
VS.)
JOSE OSVALDO ARTEAGA,)
DEFENDANT-APPELLANT.)

DOCKET
CR. LA.
No. 04BA0882
Entered by LSA
Date 6/16/04

NO. BA235633
MAY 24 2004

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE RAND S. RUBIN, JUDGE PRESIDING
REPORTER'S TRANSCRIPT ON APPEAL
APRIL 4 AND SEPTEMBER 12, 2003; MARCH 19, 2004

APPEARANCES:
FOR PLAINTIFF-RESPONDENT: BILL LOCKYER,
STATE ATTORNEY GENERAL
300 S. SPRING STREET
NORTH TOWER, SUITE 5001
LOS ANGELES, CA 90013
FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

COPY LINDA K. SWARTZ, CSR 4648
OFFICIAL REPORTER

VOLUME 4 OF 4
PAGES 503 THROUGH 547, INCLUSIVE

1 CASE NUMBER: BA235633
2 CASE NAME: PEOPLE VS. ARTEAGA
3 LOS ANGELES, CA. FRIDAY, SEPTEMBER 12, 2003
4 DEPARTMENT 112 HON. RAND S. RUBIN, JUDGE
5 REPORTER: LINDA K. SWARTZ, C.S.R. 4648
6 TIME: 10:42 A.M.
7

8 APPEARANCES:

9 DEFENDANT ARTEAGA, PRESENT WITH COUNSEL,
10 BRUCE KAREY, BAR PANEL COUNSEL; AND
11 ROBERT SCHWARTZ, BAR PANEL COUNSEL
12

13 (THE FOLLOWING PROCEEDINGS
14 WERE HELD IN OPEN COURT:)
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16 THE COURT: DISTRICT ATTORNEY HAS STEPPED
17 OUTSIDE. THIS DOES APPEAR TO BE A MARSDEN MOTION.

18 I WANT YOU TO FEEL FREE TO SPEAK TO ME
19 OPENLY AND TELL ME THE REASONS THAT YOU WANT NEW
20 COUNSEL, WHAT YOU BELIEVE MR. KAREY SHOULD HAVE DONE
21 THAT HE HAS NOT DONE.

22 AND AT THE END OF THIS PROCEEDING I'M
23 GOING TO ORDER THE MARSDEN MOTION SEALED SO THE
24 PROSECUTOR WILL NOT BE ABLE TO LOOK AT IT, SO YOU CAN
25 FEEL FREE TO SPEAK TO ME OPENLY.

26 GO AHEAD, MR. ARTEAGA.

27 THE DEFENDANT: YES, SIR. I FEEL THAT THERE WAS
28 A CONFLICT OF INTEREST --

1 THE COURT: LET ME ASK YOU TO SPEAK TO ME LIKE
2 YOU SPEAK TO YOUR FRIENDS OUT ON THE STREET BECAUSE I'M
3 ONLY PROBABLY 12 FEET AWAY FROM YOU AND I CAN HARDLY
4 HEAR YOU, SO SPEAK UP, PLEASE.

5 THE DEFENDANT: I FEEL THAT THERE WAS LIKE A
6 MISUNDERSTANDING BETWEEN ME AND MY LAWYER. I COULD NOT
7 REALLY COMMUNICATE WITH HIM REGARDING A WITNESS.

8 THAT WITNESS WAS NOT BROUGHT UP UNTIL
9 RIGHT AFTER THE DATE I GOT FOUND GUILTY BY A JURY, AND
10 I FEEL THAT THAT WAS A VERY IMPORTANT WITNESS, AND I
11 FEEL THAT THERE'S MORE WITNESSES IN THAT NIGHTCLUB THAT
12 NIGHT THAT WILL REMEMBER, REMEMBER ME, FROM THAT NIGHT.

13 AND I ALSO FEEL THAT THESE TWO PEOPLE
14 THAT CAN POINT ME OUT, I FEEL LIKE IT'S JUST THAT THEY
15 WERE HAVING SOME DRINKS, ALCOHOLIC DRINKS, THAT NIGHT
16 AND THEY HAD A 32-OUNCE AND SOME --

17 THE COURT: LET ME STOP YOU THERE. THAT DOESN'T
18 HAVE ANYTHING TO DO WITH YOUR REQUEST --

19 THE DEFENDANT: OKAY.

20 THE COURT: -- SO LET'S STICK WITH YOUR REQUEST.

21 THE DEFENDANT: YES. MY REQUEST IS FOR -- I
22 WOULD LIKE TO CONTINUE WITH THE RETRIAL MOTION AND IF I
23 COULD GET ANOTHER STATE-APPOINTED.

24 THE COURT: MR. KAREY, DID YOU WANT TO RESPOND?

25 MR. KAREY: MAYBE I CAN ADD SOMETHING.

26 I DO WANT TO HELP MR. ARTEAGA, THAT IT'S
27 AN UNUSUAL SITUATION IN THAT I -- IN THAT MR. ARTEAGA
28 AND I, I THINK, HAVE A DIFFERENT VIEW AS TO WHETHER

1 THERE'S NEWLY DISCOVERED EVIDENCE AND WHETHER THERE IS
2 A -- REALLY A STRONG GROUNDS FOR A MOTION FOR A NEW
3 TRIAL.

4 IT WOULDN'T SHOCK ME IF ANOTHER ATTORNEY
5 TOOK A DIFFERENT POSITION THAN ME. THAT HAPPENS ALL
6 THE TIME.

7 THERE IS EVIDENCE -- THERE WAS A WITNESS
8 THAT MY INVESTIGATOR SPOKE TO BEFORE WE WENT TO TRIAL,
9 A POSSIBLE ALIBI WITNESS.

10 THE ALIBI DEFENSE WOULD HAVE BEEN THAT
11 MR. ARTEAGA WAS AT A NIGHTCLUB CALLED THE PAN-AMERICAN
12 NIGHTCLUB WHICH IS AT RAMPART AND TEMPLE, THE
13 INTERSECTION OF RAMPART AND TEMPLE; THAT HE WAS --
14 THERE WAS A FIGHT THAT WAS THERE.

15 HE WAS NOT PART OF THE FIGHT PER SE, BUT
16 THERE WERE SEVERAL PEOPLE THAT WERE ESCORTED OUT AND
17 BECAUSE OF -- THAT NIGHT, AND HE WAS ONE OF THOSE
18 PEOPLE. AND THAT WOULD HAVE BEEN AN ALIBI DEFENSE THAT
19 WOULD HAVE BEEN AT THE SAME DATE AND TIME AS THE
20 SHOOTING THAT HE GOT CONVICTED OF.

21 I FELT THAT OUR STRONGEST CASE
22 STRATEGICALLY AND TACTICALLY WAS THE IDENTIFICATION
23 DEFENSE, AND THAT SPECIFICALLY INVOLVED -- REVOLVED
24 AROUND WITNESS BAYRON PERES.

25 AND WE WENT THROUGH SOME DIFFICULTY AND
26 IT TOOK SOME TIME AND THE COURT IS AWARE OF THE FACTORS
27 AND ISSUES REGARDING THE SECURING OF MR. PERES AS A
28 WITNESS.

1 SOMETIME LATER, AND I BELIEVE RIGHT AFTER
2 MR. ARTEAGA WAS FOUND GUILTY BY THE JURY, THERE
3 SURFACED THE ISSUE OF THERE POSSIBLY BEING A VIDEOTAPE
4 AT THIS PAN-AMERICAN NIGHTCLUB SHOWING THE INTERIOR
5 AND/OR EXTERIOR, IN WHICH IT MIGHT HAVE DEPICTED AND
6 SHOWN MR. ARTEAGA BEING PRESENT THERE.

7 I DID NOT PRESENT AN ALIBI DEFENSE. I
8 WOULD HOPE THAT THE COURT, THIS COURT OR AN APPELLATE
9 COURT, WOULD SAY THAT I'M WRONG FOR HAVING DONE THAT
10 AND WOULD GRANT MR. ARTEAGA A NEW TRIAL.

11 HOWEVER, THAT WAS A TACTICAL DECISION BY
12 ME AT THE TIME. I DID DISCUSS IT WITH MR. ARTEAGA.

13 I THINK -- I THINK -- IF I CAN DESCRIBE
14 HIS FEELINGS ON THAT, I THINK HE SIMPLY WENT ALONG WITH
15 IT. HE MIGHT HAVE BEEN RELUCTANT TO GO ALONG WITH MY
16 TACTICAL DECISION AT THAT POINT.

17 HE HAS INDICATED BEFORE THAT HE DID WANT
18 TO PRESENT AN ALIBI DEFENSE. THAT ENDED UP BEING MY
19 DECISION.

20 NOW, REGARDING THE ISSUES OF WHETHER THIS
21 IS -- THERE IS EVIDENCE AVAILABLE OUT THERE THAT WOULD
22 SUPPORT A MOTION FOR NEW TRIAL, I'VE LOOKED FOR THE
23 VIDEOTAPE --

24 THE COURT: BY THE WAY, I DID RECEIVE THE
25 DECLARATION FROM MR. KAREY THIS MORNING THAT INDICATES
26 THAT YOU HAVE HAD DISCUSSIONS WITH PEOPLE FROM THE
27 PAN-AMERICAN CLUB AND A VIDEOTAPE DOES NOT EXIST.

28 SO THE BODY ATTACHMENT THAT IS STILL

1 ISSUED, I BELIEVE, IS NOW RECALLED AND QUASHED.

2 MR. KAREY: I HAVE NO REASON TO DOUBT, PER MY
3 DECLARATION -- I HAVE NO REASON TO DOUBT THESE PEOPLE,
4 THEY'RE NOT INVOLVED ONE WAY OR THE OTHER IN THIS CASE,
5 MR. ARTEAGA'S MATTER, WHICH WAS, OF COURSE, HE WAS
6 ACCUSED AND THEN CONVICTED -- OR FOUND GUILTY BY THE
7 JURY OF THE SHOOTING AT SANTA MONICA AND WESTERN ON
8 AUGUST 9 OF 2002.

9 IF GREATER MINDS THAN MINE DISAGREE WITH
10 ME THAT THERE IS EVIDENCE FOR A NEW TRIAL, I CAN BE
11 WRONG. THAT'S THE ONLY THING I CAN OFFER TO THE COURT.

12 I DO NOT WANT TO BE THE ONE -- I WOULD
13 HATE TO BE, BASED UPON MY DECISIONS AND MY CONDUCT,
14 THAT IT WOULD DEPRIVE MR. ARTEAGA OF A FAIR TRIAL AND
15 CERTAINLY A NEW TRIAL IF THAT IS WARRANTED.

16 I DON'T KNOW WHAT ELSE TO ADD, YOUR
17 HONOR.

18 THE COURT: ANYTHING ELSE YOU WANT TO ADD,
19 MR. ARTEAGA?

20 THE DEFENDANT: YES, YOUR HONOR --

21 MR. SCHWARTZ: YOUR HONOR, IF I COULD JUMP IN, I
22 THINK HE'S NERVOUS. HE'S NOT ARTICULATING EVERYTHING
23 THAT HE EXPRESSED TO ME --

24 THE COURT: YOU WANT TO KNOW SOMETHING, YOU'VE
25 ACTUALLY SAID ENOUGH, MR. ARTEAGA.

26 LET ME TELL YOU THAT I CERTAINLY CONSIDER
27 THIS A SERIOUS MATTER. MR. ARTEAGA IS LOOKING AT LIFE
28 IN PRISON ON COUNT 1 AND AN ADDITIONAL 25 YEARS TO LIFE

1 ON THE G.B.I. AND ANOTHER THREE YEARS FOR THE
2 INFLICTION OF GREAT BODILY INJURY, AND HE'S GOT AN
3 EARLIEST POSSIBLE RELEASE IN 15 YEARS.

4 I'M CERTAINLY CONCERNED IN THIS MATTER
5 AND I CERTAINLY APPRECIATE, MR. KAREY, YOUR MAKING A
6 TACTICAL DECISION. IT IS SOMETIMES HARD FOR THE TRIAL
7 ATTORNEY TO FILE MOTIONS FOR NEW TRIAL BASED ON YOUR
8 OWN TACTICAL DECISIONS.

9 I THINK IF THERE IS A WITNESS OR IF THERE
10 ARE WITNESSES THAT INDICATE MR. ARTEAGA IS SOMEWHERE
11 ELSE AT THE TIME OF THE ALLEGED SHOOTING, I CERTAINLY
12 THINK THAT THAT IS SOMETHING THAT COULD BE PUT IN A NEW
13 TRIAL MOTION.

14 I WOULD CERTAINLY WANT TO HEAR FROM THOSE
15 WITNESSES SO THAT I COULD ULTIMATELY MAKE A DECISION IF
16 I THINK IT WOULD HAVE MADE A DIFFERENCE TO THE JURY IN
17 THE TRIAL.

18 SO AT THIS POINT IN TIME I AM GOING TO
19 GRANT THE MARSDEN MOTION. WE WILL CALL CARL HENRY OF
20 THE I.C.D.A. AND ASK HIM TO SEND AN ATTORNEY OVER TO
21 HANDLE THE POST-TRIAL ISSUES REGARDING THE ARTEAGA CASE
22 WHICH I WILL GET A TRANSCRIPT OF THE PROCEEDINGS.

23 AND MR. KAREY, I'M SURE YOU WILL ALSO
24 ASSIST IN ANY WAY YOU CAN IN HELPING WHOEVER THE NEW
25 COUNSEL IS.

26 AT THIS TIME LET'S BRING IN MR. ARIAS SO
27 I CAN LET HIM KNOW THAT I'VE GRANTED THE MOTION.

28 MR. SCHWARTZ: MAY I BE EXCUSED, YOUR HONOR?

1 THE COURT: THANK YOU VERY MUCH, MR. SCHWARTZ.
2 YOU ARE EXCUSED AT THIS TIME.

3 THE MARSDEN MOTION PROCEEDING WILL BE
4 SEALED, NOT TRANSCRIBED WITHOUT FURTHER COURT ORDER.

5
6 (THE MARSDEN PROCEEDINGS
7 WERE CONCLUDED.)

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