APPENDIX

FILED

DEC 20 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAUL CERVANTES, Petitioner-Appellant, v. M. D. BITER, Warden, Respondent-Appellee.	No. 19-55168 D.C. No. 2:13-cv-04880-R-SS Central District of California, Los Angeles ORDER

Before: TALLMAN and NGUYEN, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SAUL CERVANTES, Petitioner, v. M.D. BITER, Warden, Respondent.	Case No. CV 13-4880 R (SS) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

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

I.

INTRODUCTION

Effective June 26, 2013,[1] Saul Cervantes ("Petitioner"), proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). (Dkt. No. 1). On October 16, 2013, Respondent filed a Motion to Dismiss the Petition ("Motion") as untimely, and Petitioner filed an Opposition on January 14, 2014. (Dkt. Nos. 13, 18). On June 10, 2014, the Court granted the Motion and entered Judgment denying the Petition and dismissing the action with prejudice. (Dkt. Nos. 19-20, 25-26).

Petitioner filed a Notice of Appeal to the Ninth Circuit Court of Appeals, which on December 12, 2016, granted Petitioner's unopposed motion for remand to this court to "consider what effect, if any, the Supreme Court's decision in Montgomery v. Louisiana, 136 S. Ct. 718 (2016) has on the timeliness" of the Petition. (Dkt. Nos. 28, 35). Following remand, the parties briefed Montgomery's effect on the Petition's timeliness, and Petitioner also argued he is entitled to an evidentiary hearing to address his purported actual innocence. (Dkt. Nos. 40-41). Petitioner expanded on the latter issue in his Reply, arguing he is actually innocent and entitled to an equitable exception to AEDPA's limitation period.

[1] "When a prisoner gives prison authorities a habeas petition or other pleading to mail to court, [pursuant to the mailbox rule,] the court deems the petition constructively 'filed' on the date it is signed[,]" Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010); Houston v. Lack, 487 U.S. 266, 276 (1988), which in this case was June 26, 2013.

(Dkt. No. 61). On June 12, 2018, Respondent filed a Sur-Reply addressing Petitioner's actual innocence argument. (Dkt. No. 63). For the reasons discussed below, it is recommended that the Motion be GRANTED and this action be DISMISSED as untimely.

II.

PRIOR PROCEEDINGS

On May 12, 2003, a Los Angeles County Superior Court jury convicted Petitioner of three counts of willful, deliberate, and premeditated attempted murder in violation of California Penal Code ("P.C.") §§ 664/187(a) (counts 1-3) and also found it to be true that Petitioner used a firearm within the meaning of P.C. § 12022.53(b) (counts 1-3), personally and intentionally discharged a firearm within the meaning of P.C. § 12022.53(c) (count 1), and personally and intentionally discharged a firearm causing great bodily injury within the meaning of P.C. § 12022.53(d) (count 1). (Clerk's Transcript ("CT") 202-04, 207-09; Reporter's Transcript ("RT") 1205-11). On July 9, 2003, the trial court sentenced Petitioner to three consecutive terms of life imprisonment with the possibility of parole with an additional twenty-five years to life for the P.C. § 12022.53(d) enhancement and an additional 10 years for the count 2 P.C. § 12022.53(b) enhancement. (CT 227-31; RT 1804-06).

Petitioner appealed his conviction and sentence to the California Court of Appeal (2d App. Dist., Div. 8), which affirmed the judgment in an unpublished opinion filed December 9, 2004.

(Lodgments 3-9). Petitioner then filed a petition for review in the California Supreme Court. On March 2, 2005, the California Supreme Court denied the petition "without prejudice to any relief to which [Petitioner] might be entitled after this court determines in People v. Black, S126182, and People v. Towne, S125677, the effect of [Blakely v. Washington, 542 U.S. 296 (2004),] on California law."[2] (Lodgments 10-11).

On or around May 7, 2007, Petitioner filed a "Request for Order for Permission to File a Late Petition for Writ of Habeas Corpus" in this Court, which denied the request without prejudice on May 11, 2007. (See Cervantes v. Warden, United States District Court for the Central District of California case no. 07-2982 R (MLG)).

On or around November 5, 2012, approximately five years later, Petitioner filed a habeas corpus petition in the Los Angeles County Superior Court, which denied the petition on December 14, 2012. (Lodgments 12-13; Supplemental Lodgment ("Supp. Lodgment") 1, Exh. A). Effective January 15, 2013, Petitioner filed a habeas corpus petition in the California Court of Appeal (2d App. Dist., Div. 8), which denied the petition on February 14, 2013. (Lodgment 14; Supp. Lodgments 1-2). Effective March 12, 2013, and April 2, 2013, Petitioner filed habeas corpus petitions in the California Supreme

[2] People v. Black, 35 Cal. 4th 1238 (2005) ("Black I"), was decided on June 20, 2005, but on February 20, 2007, the Supreme Court granted a petition for writ of certiorari and vacated Black I in light of Cunningham v. California, 549 U.S. 270 (2007). Thereafter, the California Supreme Court issued a new decision, People v. Black, 41 Cal. 4th 799 (2007), on July 19, 2007.

Court, which denied the petitions on May 22, 2013. (Lodgments 15-18).

III.

PETITIONER'S CLAIMS

The Petition raises nine grounds for federal habeas relief. In Ground One, Petitioner contends there was insufficient evidence to support his attempted murder convictions. (Petition at 5, Exh. A at 8-18). In Ground Two, Petitioner claims there was insufficient evidence to support the personal firearm use findings. (Petition at 5, Exh. A at 18-20). In Ground Three, Petitioner asserts he was denied due process of law when an in-court identification was tainted by an unnecessarily suggestive and/or inherently unfair pretrial identification procedure. (Petition at 5-6, Exh. A at 20-23). In Ground Four, Petitioner alleges CALJIC 8.66 deprived him of due process of law because it did not instruct the jury that it must find a specific intent to kill each of the individual victims. (Petition at 6, Exh. A at 23-25). In Ground Five, Petitioner claims the imposition of consecutive sentences based on facts not found by the jury on proof beyond a reasonable doubt deprived him of due process and a jury trial. (Petition at 6, Exh. A at 25-26). In Ground Six, Petitioner contends his sentence constitutes cruel and unusual punishment because he committed the crimes when he was a juvenile and he would not be eligible for parole within his expected lifespan.[3] (Petition at 6A, Exh. B).

[3] Petitioner cites People v. Caballero, 55 Cal. 4th 262 (2012), in support of his Eighth Amendment claim. (Petition at 6A, Exh. B).

In Ground Seven, Petitioner asserts his trial and appellate counsel provided ineffective assistance. (Id.). In Ground Eight, Petitioner claims he was denied due process of law, there was insufficient evidence to convict him, and he was denied the right to a jury trial. (Petition at 6A-B, Exh. B). In Ground Nine, Petitioner asserts that he is actually innocent and there was insufficient evidence to convict him. (Petition at 6B, Exh. B).

IV.

DISCUSSION

In Miller v. Alabama, 567 U.S. 460 (2012), the Supreme Court held that "mandatory life without parole [sentences] for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[4] Id.

In Caballero, the California Supreme Court, applying Graham v. Florida, 560 U.S. 48 (2010), held that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." Caballero, 55 Cal. 4th at 268. In his brief following remand, Petitioner described his Eighth Amendment claim as challenging "his consecutive life sentences imposed for crimes committed as a juvenile. . . ." (Dkt. No. 40 at 7).

[4] Prior to Miller, the Supreme Court held in Graham that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide" and further concluded that a "State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." Graham, 560 U.S. at 82. "Graham broke new ground because the Supreme Court applied a categorical classification to a term-of-years sentence for the first time." Moore v. Biter, 725 F.3d 1184, 1188 (9th Cir. 2013). "All prior cases under the categorical approach involved the death penalty." Id. at 1188-89. For instance, in Roper v. Simmons, 543

at 465. In Montgomery v. Louisiana, 136 S. Ct. 718 (2016), the Supreme Court held that "Miller announced a substantive rule that is retroactive in cases on collateral review." Id. at 732-36. The Ninth Circuit remanded this matter so the Court could determine what effect, if any, Montgomery has on the Petition's timeliness. (Dkt. No. 35).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "establishes a 1-year period of limitation for a state prisoner to file a federal application for a writ of habeas corpus." Wall v. Kholi, 562 U.S. 545, 550 (2011); 28 U.S.C. § 2244(d)(1). Specifically, state prisoners must file their habeas petitions within one year of the latest of the following dates:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

U.S. 551, 578 (2005), the Supreme Court held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." Id. at 578. In Moore, the Ninth Circuit held that "Graham established a new rule of law that is retroactive on collateral review." Moore, 725 F.3d at 1190-91.

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D).

Petitioner asserts that, in light of Montgomery, his Petition was timely filed under Section 2244(d)(1)(C). (Dkt. No. 40 at 7-11). Petitioner's assertion is incorrect. Section 2244(d)(1)(C) applies on a claim-by-claim basis. Butler v. Long, 752 F.3d 1177, 1181 (9th Cir. 2014) (per curiam); Mardesich v. Cate, 668 F.3d 1164, 1166 (9th Cir. 2012); see also Pace v. DiGuglielmo, 544 U.S. 408, 416 n.6 (2005) (Section 2244(d)(1) "provides one means of calculating the limitation with regard to the 'application' as a whole, § 2244(d)(1)(A) (date of final judgment), but three others that require claim-by-claim consideration, § 2244(d)(1)(B) (governmental interference); § 2244(d)(1)(C) (new right made retroactive); § 2244(d)(1)(D) (new factual predicate)."). Accordingly, even if applicable, Section 2244(d)(1)(C) would only delay the start of the limitations period for Ground Six – the only

ground raising an Eighth Amendment claim. (See Dkt. No. 40 at 9 (clarifying that Petitioner intends Ground Six to raise a Miller claim)).

A. Even If Timely, Ground Six Is Without Merit

Applying Section 2244(d)(1)(C) to Ground Six, Petitioner argues that "the date Miller was decided started the one-year federal clock,"[5] and Respondent concedes that Ground Six appears timely. (Dkt. No. 40 at 7-11; Dkt. No. 41 at 3-6). However, Respondent also contends that Ground Six should be summarily rejected because Miller applies to crimes committed by juveniles and Petitioner was not a juvenile when he committed the crimes for which he was convicted.[6] (Dkt. No. 41 at 6). Assuming arguendo that Ground Six is timely, see Cooper v. Calderon, 274 F.3d 1270, 1275 n.3 (9th Cir. 2001) (per curiam); Van Buskirk v. Baldwin, 265 F.3d 1080, 1083 (9th Cir. 2001), Respondent is correct that Miller is inapplicable to Petitioner.[7]

---

[5] Miller was decided June 25, 2012, and the pending Petition was filed effective June 26, 2013. However, if the limitations period for Ground Six began running when Miller was decided, Petitioner would be entitled to sufficient statutory tolling to render Ground Six timely. See 28 U.S.C. § 2244(d)(2).

[6] Petitioner does not address this argument, stating he has "nothing further to add" because the Respondent concedes Section 2244(d)(1)(C) is timely. (Dkt. No. 61 at 4 n.1).

[7] Because Section 2244(d)(1)(C) applies to the "right asserted" and Petitioner asserts a Miller claim, Ground Six could arguably be timely even though Miller is inapplicable on the merits. See Young v. Biter, 2016 WL 4775465, *2 n.2 (C.D. Cal.) ("Respondent asserts that Miller does not apply to Petitioner's claims because he was not sentenced to life without the possibility of parole and thus Petitioner is not entitled to the later commencement of the limitations period under Section 2244(d)(1)(C). However, Section

As discussed above, Miller addresses the Eighth Amendment rights of juveniles. See Montgomery, 136 S. Ct. at 732 ("The 'foundation stone' for Miller's analysis was [the Supreme] Court's line of precedent holding certain punishments disproportionate when applied to juveniles. Those cases include [Graham v. Florida, 560 U.S. 48 (2010)], which held that the Eighth Amendment bars life without parole for juvenile nonhomicide offenders, and [Roper v. Simmons, 543 U.S. 551 (2005)], which held that the Eighth Amendment prohibits capital punishment for those under the age of 18 at the time of their crimes."); Miller, 567 U.S. at 471 ("[C]hildren are constitutionally different from adults for purposes of sentencing."). Here, it is undisputed that the crimes for which Petitioner was convicted occurred on July 21, 2002 (see Lodgment 9 at 2; Dkt. No. 40 at 6), and Petitioner was born on April 8, 1984. (See CT 235). Therefore, Petitioner was 18 years old – and not a juvenile – when the crimes occurred, and Petitioner cannot maintain an Eighth Amendment Miller claim. See United States v. Shill, 740 F.3d 1347, 1356 (9th Cir. 2014) ("Miller expressly turned on two

---

2244(d)(1)(C) applies when the right 'asserted' by a petitioner is recognized by the Supreme Court, and the right 'asserted' by Petitioner is that Miller renders his sentence unconstitutional." (citation omitted)), report and recommendation accepted by, 2016 WL 4770027 (C.D. Cal. 2016); Swokla v. Paramo, 2015 WL 3562574, *2 (N.D. Cal. 2015) ("Petitioner was 19 years and 7 months old when he committed the crimes. Respondent is correct that by its own terms, Miller does not establish that petitioner's sentence violated his Eighth Amendment rights. While this does not mean that Section 2244(d)(1)(C) does not apply, because Section 2244(d)(1)(C) applies when the right 'asserted' by the petitioner is recognized by the Supreme Court and the right 'asserted' by petitioner is that Miller renders his sentence unconstitutional, it does mean something far more damaging to petitioner: that even if his Miller-based claim were timely, . . . it is without merit.").

factors not present here: a juvenile offender and a sentence of life in prison without parole."); United States v. Edwards, 734 F.3d 850, 853 (9th Cir. 2013) ("The Supreme Court's recent Eighth Amendment jurisprudence on criminal punishment for juvenile conduct" is inapposite since "[t]he conduct for which Edwards is being punished occurred while he was an adult, not a juvenile as in Roper, Graham, and Miller."); United States v. Marshall, 736 F.3d 492, 500 (6th Cir. 2013) ("An immature adult is not a juvenile. Regardless of the source of the immaturity, an immature adult is still an adult. Because Marshall is not a juvenile, he does not qualify for the Eighth Amendment protections accorded to juveniles."); Nampula v. McDowell, 2017 WL 3224815, *14 & n.13 (C.D. Cal.) (Graham and Miller were inapposite when "Petitioner was over the age of 18 when he committed the attempted murders" even though Petitioner "had just turned 18 years old" and "'had never before been in [this] type of trouble[.]'"), report and recommendation accepted by, 2017 WL 3224462 (C.D. Cal. 2017); Mendez v. Sherman, 2016 WL 2753773, *15 (E.D. Cal. 2016) ("It is true that Eighth Amendment jurisprudence with respect to life sentences for juveniles is different than that for adults. However, these cases do not dictate the result in this case because petitioner was not a juvenile at the time he committed his crimes" as he had turned 18 less than four months before he committed the crimes at issue). Accordingly, even assuming Ground Six's timeliness, the state court's rejection of Ground Six was not

contrary to, or an unreasonable application of, clearly established federal law.[8]

Having so concluded, the Court applies Section 2244(d)(1)(A) to consider the timeliness of Grounds One through Five and Seven through Nine.[9]

B. The Remainder Of The Petition Is Facially Untimely

"AEDPA requires a state prisoner to file a federal habeas petition pursuant to 28 U.S.C. § 2254 within one year of the date on which his conviction becomes final on direct review, unless the petitioner qualifies for statutory or equitable tolling." Curiel v. Miller, 830 F.3d 864, 868 (9th Cir. 2016) (en banc); 28 U.S.C. § 2244(d)(1)(A). Here, the California Supreme Court denied Petitioner's petition for review on March 2, 2005. After the

---

[8] The Los Angeles County Superior Court's denial of Petitioner's habeas corpus petition provided the last reasoned decision addressing Ground Six. (see Lodgments 12-16; Supp. Lodgments 1-2); Curiel v. Miller, 830 F.3d 864, 869 (9th Cir. 2016) (en banc) ("When more than one state court has adjudicated a claim, the federal court analyzes the last 'reasoned' state court decision."). The Superior Court determined that "[o]n balance, considering that [Petitioner] was over 18 years old at the time of the offense, that he may be eligible for parole within his lifetime and that he was convicted of three extremely serious offenses, . . . there is no violation of the Eighth Amendment ban on cruel and unusual punishment." (Supp. Lodgment 12, Exh. A).

[9] "Although § 2244(d)(1) sets forth three alternate possible starting dates [other than § 2244(d)(1)(A)] for the commencement of the running of the statute of limitations, [Petitioner] does not argue that [§ 2244(d)(1)(B) or (D)] apply in this case[,]" Miranda v. Castro, 292 F.3d 1063, 1065 n.1 (9th Cir. 2002), and, as explained above, the claim to which § 2244(d)(1)(C) may apply is meritless.

California Supreme Court denied review, Petitioner had the option of seeking a writ of certiorari from the United States Supreme Court. 28 U.S.C. § 1257. A writ of certiorari must be sought within ninety days after the California Supreme Court denies review. 28 U.S.C. § 2101(d); Rules of the Supreme Court of the United States, Rule 13. If, as here, a petitioner does not seek certiorari in the Supreme Court, the direct review process is over at the end of the ninety-day period. Whalem/Hunt v. Early, 233 F.3d 1146, 1147 (9th Cir. 2000) (en banc); Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999). Thus, applying Section 2244(d)(1)(A), the statute of limitations began to run for Petitioner on June 1, 2005, and expired on May 31, 2006, one year from when Petitioner's state court judgment became final. Whalem/Hunt, 233 F.3d at 1159; Bowen, 188 F.3d at 1159. Since Petitioner did not file the pending Petition until June 26, 2013, it is untimely under Section 2244(d)(1)(A) absent tolling.

C. Petitioner Is Not Entitled To Statutory Tolling

Under 28 U.S.C. § 2244(d)(2), AEDPA's limitations period is tolled while "'a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.'" Allen v. Siebert, 552 U.S. 3, 4 (2007) (per curiam) (quoting 28 U.S.C. § 2244(d)(2)). Here, Petitioner did not file his initial habeas corpus petition in the Los Angeles County Superior Court until on or around November 5, 2012, well after the limitations period expired under § 2244(d)(1)(A). Since habeas corpus petitions filed after the

statute of limitations has run neither toll nor revive an expired limitations period, Petitioner is not entitled to statutory tolling of the limitations period. Larsen v. Soto, 742 F.3d 1083, 1088 (9th Cir. 2013); Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003).

D. Petitioner Is Not Entitled To Equitable Relief

Petitioner contends he is entitled to an equitable exception to the limitations period because he is actually innocent of the crimes for which he was convicted.[10] (Dkt. No. 40 at 11-13; Dkt. No. 61 at 4-9). Petitioner's contention is without merit.

"[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations." McQuiggin v. Perkins, 569 U.S. 383, 386 (2013); Stewart v. Cate, 757 F.3d 929, 937 (9th Cir 2014). However, "tenable actual-innocence gateway pleas are rare[.]" Perkins, 569 U.S. at 386; Stewart, 757 F.3d at 938. To make a credible actual innocence claim, a petitioner must "support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324 (1995); House v. Bell, 547 U.S. 518, 537 (2006); Stewart, 757 F.3d at 941. The habeas court then considers

[10] Petitioner does not otherwise argue for equitable relief.

"all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." House, 547 U.S. at 538 (citation and internal quotation marks omitted); Lee v. Lampert, 653 F.3d 929, 938 (9th Cir. 2011) (en banc). A "'petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" Perkins, 569 U.S. at 386 (quoting Schlup, 513 U.S. at 329); Lee, 653 F.3d at 937. Moreover, "'actual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623-24 (1998); Jaramillo v. Stewart, 340 F.3d 877, 882 (9th Cir. 2003). Nevertheless, "'where post-conviction evidence casts doubt on the conviction by undercutting the reliability of the proof of guilt, but not by affirmatively proving innocence, that can be enough to pass through the Schlup gateway to allow consideration of otherwise barred claims.'" Lee, 653 F.3d at 938 (citation omitted).

1. Background

Petitioner was convicted of three counts of willful, deliberate, and premeditated attempted murder for attacks on victims Stephanie Webb (count 1), Arash Zad-Behtooie (count 2), and Arturo Cisneros (count 3). (CT 202-04, 207-09; RT 1205-11). As to count 1, the jury also found it to be true that Petitioner used a firearm within the meaning of P.C. § 12022.53(b), personally and intentionally discharged a firearm within the meaning of P.C.

§ 12022.53(c), and personally and intentionally discharged a firearm causing great bodily injury within the meaning of P.C. § 12022.53(d). (CT 202, 207-08; RT 1206-07). As to counts 2 and 3, the jury found the P.C. § 12022.53(b) allegations true but the P.C. § 12022.53(c-d)[11] allegations not true. (CT 203-04, 208-09; RT 1207-09).

At trial, the jury heard evidence that shortly after midnight on July 21, 2002, a group of friends – Chris Awada, Arash Zad-Behtooie, Stephanie Webb, Arturo Cisneros, Carlos Barajas, and an individual named Joaquin – drove in two vehicles to a party in Pacoima. (RT 396-97, 409-10, 437). Awada drove Cisneros in the first vehicle, while Zad-Behtooie drove the second vehicle in which Webb, Barajas, and Joaquin were passengers. (RT 397, 410, 437). Awada parked his vehicle a couple of blocks away from the party, and Zad-Behtooie parked behind Awada. (RT 411). Cisneros and Joaquin exited the vehicles and began walking to the party while Awada remained in his vehicle to take the face plate off of his stereo, Webb moved to the driver's side of Zad-Behtooie's vehicle to turn off the stereo, and Zad-Behtooie stood by the rear driver's side door of his vehicle. (RT 397-98, 411, 413, 438-39).

While these activities took place, an SUV and a red hatchback drove up and stopped alongside the parked vehicles, facing the opposite direction from Awada and Zad-Behtooie's vehicles. (RT

[11] Since Cisneros was not injured by the gunfire, there was no P.C. § 12022.53(d) allegation as to count 3. (CT 204, 208-09; RT 1208-09).

411-12, 438-40). The SUV was in front and the hatchback, which was driven by Petitioner, stopped behind the SUV and alongside Zad-Behtooie's vehicle.[12] (RT 412-14, 450-53, 460-61, 755). The SUV's occupants began arguing with Cisneros and Joaquin, telling them "you guys gotta get out of here. You can't be here. Who are you guys? And stuff like that." (RT 415). The hatchback's occupants were yelling too. (RT 413-14). According to Webb, someone in the hatchback said "'Fuck you and your life. This is Pacoima[,]'" while someone else in either the hatchback or SUV asked "'Where are you from?'"[13] (RT 439-40).

Zad-Behtooie testified that he focused on the argument between the SUV's occupants, Cisneros and Joaquin, and he saw the SUV's driver pulled out a gun and said "'You guys got to get out of here.'" (RT 418-19). After the SUV driver drew his weapon, Zad-Behtooie's friends agreed to leave and started to walk away when the SUV driver started shooting. (RT 419-20). Zad-Behtooie did not pay any attention to the hatchback, and once the SUV driver pulled the gun out, Zad-Behtooie's attention was completely focused on the SUV and he "didn't even think of looking at the other car anymore." (Id.). Accordingly, Zad-Behtooie could not identify the hatchback's driver, he did not see anyone in the hatchback with

[12] Both Petitioner and the SUV's driver were gang members. (RT 741, 747-56).

[13] "Where are you from?" is a common challenge gang members use to try to determine if the person or persons questioned are rival gang members. (RT 722-25, 928-30). Persons with no gang affiliations – such as the victims in this case – are sometimes attacked and sometimes left alone. (RT 416-18, 724).

a gun, and he never heard any shots from the hatchback. (RT 422-23, 433).

Webb testified that Petitioner's vehicle was approximately eight feet away from her and that she saw Petitioner, who was wearing a blue Georgetown jacket, pull a gun out and extend his right hand toward her before she turned away, someone pushed her down, and she heard eight to ten gunshots. (RT 351-52, 441-44, 449, 471-72, 482). Zad-Behtooie was shot in the stomach,[14] Webb was shot in her left ankle,[15] and one of the shots went through Cisneros's pants, making a hole in the pants without injuring Cisneros. (RT 339, 356, 420-21, 423-24, 443, 455-56).

The California Court of Appeal summarized the events following the shooting, stating:[16]

> Ten minutes later, Los Angeles Police Department (LAPD) Officer Michael Smith observed a red hatchback with a black hood that matched the description of the hatchback involved in the shooting. When Smith and his partner stopped to investigate, four men standing near the hatchback, including [Petitioner], began to run away

---

[14] Zad-Behtooie stated that the SUV driver was not firing at him and he did not know where the bullet came from that hit him. (RT 420).

[15] Webb stated that when the incident occurred she was sitting in the driver's seat of Zad-Behtooie's vehicle with the door open and her left foot outside the car. (RT 439, 449-50).

[16] There is no real dispute about what occurred after the shooting. Accordingly, the Court relies on the California Court of Appeal's summary of these events. See 28 U.S.C. § 2254(e)(1).

from the officers. While chasing the four men, Smith witnessed [Petitioner], who was wearing a blue Georgetown jacket, remove a nine millimeter pistol from his waistband and throw it over a wall into a yard. [Petitioner] eluded Smith, but was later apprehended by a K-9 unit in the driveway of a nearby house. Although the pistol was never found, a second suspect was apprehended in the yard where the pistol was tossed. When [Petitioner] was apprehended, the arresting officer found in his pocket a live nine millimeter round bearing a Fiocchi imprint. At the shooting scene, two nine millimeter casings were found bearing the same Fiocchi imprint.[17]

Later that night, [Petitioner] was transported to Pacifica Hospital for treatment for the dog bite sustained during his arrest. [Webb] was a patient at the same hospital undergoing treatment for the gunshot wound she suffered during the shooting. Officer Mark Wilbur escorted [Petitioner] to the doorway of [Webb]'s hospital room to determine if she could identify him from the shooting. Wilbur instructed [Petitioner] to shut his eyes. He also admonished [Webb] that simply because [Petitioner] was in custody did not mean he was innocent or guilty of a crime. [Webb] was able to identify

[17] LAPD Officer Mark Wilbur recovered the casings as well as a live 9 mm. Fiocchi round in the middle of the street parallel to the rear bumper of Zad-Behtooie's car. (RT 341-47, 377).

> [Petitioner's] Georgetown jacket as the one worn by the shooter in the hatchback, but she could not identify his face because his eyes were closed.

(Lodgment 9 at 3 (footnote added)).

2. New Evidence

Petitioner has attached the Declaration of Arash Zad-Behtooie ("Zad-Behtooie Decl.") to his Reply. (Dkt. No. 61, Exh. A). In his declaration, which was signed on November 8, 2017, Zad-Behtooie seeks to "supplement and clarify" his trial testimony. (Id.). In particular, Zad-Behtooie states he "was not shot by anyone in the hatchback that was parallel to my car" but that he "was shot by the driver in the SUV" who Zad-Behtooie saw "extend his hand out the window and start shooting." (Zad-Behtooie Decl., ¶¶ 3-4). Zad-Behtooie states the SUV driver was shooting at Cisneros and Joaquin who were walking toward Zad-Behtooie when he was shot. (Id., ¶ 4). Zad-Behtooie also indicates that before the shooting he "heard the driver of the SUV yell out something like, 'Pacoima, Van Nuys Boys'" and the hatchback driver "yelled out something like 'Do you know these guys?'" (Id., ¶ 5). Zad-Behtooie states that he was closer to the hatchback than Webb and "would have been able to clearly see the driver of the hatchback shooting," but he never saw anyone in the hatchback with a gun and "[a]t no point did the driver of the hatchback have his arm out the window." (Id., ¶ 6). Zad-Behtooie also claimed that, "given the angle at which I was shot, I could not have been shot by anyone in the hatchback."

(Id.). Finally, Zad-Behtooie states that he "could tell from the sound of the shots that there was only one gun being fired" and that "[n]o shots were fired from the hatchback." (Id., ¶ 7).

3. Analysis

The Supreme Court has emphasized that "tenable actual-innocence gateway pleas are rare[,]" Perkins, 569 U.S. at 386, and involve "extraordinary" circumstances. See House, 547 U.S. at 538 ("[I]t bears repeating that the Schlup standard is demanding and permits review only in the extraordinary case." (citations and internal quotation marks omitted)); Larsen, 742 F.3d at 1095-96) ("The Schlup standard 'is demanding,' and precedents holding that a habeas petitioner satisfied its strictures have typically involved dramatic new evidence of innocence." (citation omitted)). For instance, in House, the petitioner presented new DNA evidence that semen found on the murder victim's nightgown and panties came from the victim's husband and not the petitioner, which contradicted the only forensic evidence at the scene linking the petitioner to the murder and negated the prosecutor's theory of motive. House, 547 U.S. at 540-41. The petitioner also presented new evidence that blood found on his jeans could not have come from the victim while she was alive, but instead might have gotten on the jeans when they were transported to the FBI along with improperly sealed samples of the victim's blood that spilled during transit. Id. at 542-48. Additionally, the petitioner presented "troubling evidence" that the victim's husband could have been the murderer. Id. at 548-53. In particular, "two different witnesses

. . . described a confession by [the victim's husband]; two more . . . described suspicious behavior (a fight and an attempt to construct a false alibi) around the time of the crime; and still other witnesses described a history of abuse." Id. at 551. The Supreme Court found that "although the issue is close, . . . this is the rare case where — had the jury heard all the conflicting testimony — it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." Id. at 554.

In Larsen, the petitioner was convicted of possession of a deadly weapon after two police officers, responding to a report of an assault with a deadly weapon at a bar, drove into the bar's parking lot and found a knife underneath a pickup truck after witnessing a man, who they identified as petitioner, pull "a linear object, about five or six inches long, from his waistband and [throw] it underneath a nearby car[.]" Larsen, 742 F.3d at 1086-87. On habeas review, Larsen presented evidence from multiple witnesses "who were never called to speak on his behalf at his trial" – including a former police chief and his wife who witnessed the incident, an individual named William Hewitt who admitted the knife was his, and Hewitt's girlfriend who declared that Hewitt had told her he had thrown the knife under a truck – "who gave credible testimony that someone other than Larsen committed the acts for which he was convicted and sentenced, while Larsen stood nearby and did nothing at all, much less a criminal act." Id. at 1088-90, 1096. The Ninth Circuit considered the evidence Larsen presented and concluded "it is more likely than not that no

reasonable juror hearing all of the evidence . . . would vote to convict [Larsen] under the beyond-a-reasonable-doubt standard." Id. at 1096.

In Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc), Carriger was sentenced to death for violently murdering a jewelry store owner during a robbery. Id. at 465. Dunbar, the chief prosecution witness, testified at Carriger's trial that he had been at home asleep at the time of the robbery and Carriger had awakened him and confessed to the crime. Id. at 470. However, some nine years later, Dunbar – a "habitual liar accustomed to blaming others for his own crimes" – "confessed under oath in open court that he had robbed [the] jewelry store and murdered" the victim and "had framed Carriger to avoid prosecution." Id. at 465, 467, 470-71. Dunbar also confessed to the crime on several other occasions and accurately described details about the crime and the crime scene that only a participant could have known. Id. at 467, 471-72, 478-79. Under these circumstances, the Ninth Circuit concluded that Carriger "has more than shown sufficient doubt about the validity of his conviction to satisfy Schlup and permit consideration of his constitutional claims." Id. at 478-79.

Unlike these cases, Petitioner has presented no "dramatic new evidence of innocence." Larsen, 742 F.3d at 1096. The only new evidence Petitioner presents is Zad-Behtooie's "clarify[ing]" declaration, which Petitioner argues supports his actual innocence claim and casts doubt on Stephanie Webb's eyewitness testimony. (See Dkt. No. 61 at 4-9). However, having reviewed the entirety

of the evidence, the Court concludes that Petitioner has not made "a showing of actual innocence sufficient to pass through the Schlup gateway." Stewart, 757 F.3d at 943; Lee, 653 F.3d at 945.

In his declaration, Zad-Behtooie asserts that he was shot by the SUV driver and not by anyone in the hatchback.[18] (Zad-Behtooie Decl., ¶¶ 3-4, 6). However, this statement is not as helpful to Petitioner as he contends. A review of the jury's findings on the firearm enhancements demonstrates that the jury concluded Petitioner did not shoot at Zad-Behtooie,[19] but nevertheless convicted Petitioner of all three attempted murder charges.[20] (See

[18] Contrary to this statement, at trial Zad-Behtooie testified that he "really [did not] know where the bullet came from." (RT 420).

[19] As noted above, the jury found it true that Petitioner personally used a firearm during the commission of all three attempted murders (P.C. § 12022.53(b)) and that Petitioner personally and intentionally discharged a firearm at Webb (P.C. § 12022.53(c)), causing Webb great bodily injury (P.C. § 12022.53(d)); however, the jury found the P.C. § 12022.53(c) allegations regarding Zad-Behtooie and Cisneros and the P.C. § 12022.53(d) allegation regarding Zad-Behtooie to be not true. (CT 202-04, 207-09; RT 1205-11). Before reaching these conclusions, the jury received clarification from the trial court that Section 12022.53(b) requires the defendant personally use a firearm and that Sections 12022.53(c-d) require a defendant personally discharge a firearm. (RT 1202-03).

[20] To be clear, the jury's finding that the prosecution did not prove beyond a reasonable doubt that Petitioner discharged a firearm at Zad-Behtooie did not foreclose Petitioner's conviction for the attempted murder of Zad-Behtooie. Rather, the jury was instructed that Petitioner could be guilty of attempted murder not only if he was the shooter but also if he aided and abetted the shootings (see CT 168-69, 174-76; RT 1028-29, 1032-36), and given the jury's findings on the firearm enhancements, it seems clear the jury concluded Petitioner shot Webb and the jury found Petitioner guilty of the attempted murders of Zad-Behtooie and Cisneros on an aiding and abetting theory. (See CT 202-04, 207-09; RT 1205-11). "Under California law, a person who aids and abets the commission of a crime is a 'principal' in the crime, and

CT 202-04, 207-09; RT 1205-11). Accordingly, Zad-Behtooie's declaration reaffirming a finding the jury already made does nothing to demonstrate Petitioner's actual innocence.[21]

---

thus shares the guilt of the actual perpetrator." People v. Prettyman, 14 Cal. 4th 248, 259 (1996); People v. Smith, 60 Cal. 4th 603, 611 (2014). An "aider and abettor is a person who, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." People v. Jurado, 38 Cal. 4th 72, 136 (2006) (citations and internal quotation marks omitted); People v. Delgado, 56 Cal. 4th 480, 486 (2013). The requisite intent to render such aid must be formed prior to or during the commission of the crime. People v. Montoya, 7 Cal. 4th 1027, 1046 (1994); People v. Cooper, 53 Cal. 3d 1158, 1164 (1991). Factors that may be considered in determining aiding and abetting include "presence at the scene of the crime, companionship, and conduct before and after the crime, including flight." People v. Haynes, 61 Cal. App. 4th 1282, 1294 (1998); People v. Medina, 46 Cal. 4th 913, 924 (2009). In this case, the evidence presented at Petitioner's trial demonstrated that "all of the probative factors relative to aiding and abetting are present - presence at the scene of the crime, companionship and conduct before and after the offense, including flight." People v. Mitchell, 183 Cal. App. 3d 325, 330 (1986).

[21] The prosecutor argued that Petitioner was guilty of attempted murder as the shooter of Webb and Zad-Behtooie, but as an aider and abettor to the attempted murder of Cisneros. (See RT 977-84). Defense counsel agreed that the SUV driver shot at Cisneros, but argued the SUV driver also shot Webb and Zad-Behtooie (and that Petitioner did not aid and abet the attempted murders). (See RT 994-1003). Given Zad-Behtooie's testimony that he did not know who shot him, that the shot entered his left side from the front and exited through his back, and that he was facing the SUV when he was shot (RT 420, 423, 435), it was entirely reasonable for the jury to conclude that the prosecution had not proven beyond a reasonable doubt that Petitioner shot Zad-Behtooie – so as to find the P.C. § 12022.53(c-d) enhancements not true as to him – but nevertheless convict Petitioner of the attempted murder of Zad-Behtooie on an aiding and abetting theory. Similarly, given Webb's testimony and the firearm, bullet, and shell casing evidence (discussed further below), the jury could reasonably conclude that Petitioner shot Webb. There is no dispute that the SUV driver – not Petitioner – shot at Cisneros and that Petitioner was convicted of the attempted murder of Cisneros on an aiding and abetting theory.

Moreover, several of the statements in Zad-Behtooie's declaration reiterate portions of his trial testimony. For instance, Zad-Behtooie indicates that before the shooting he heard Petitioner "yell[] out something like, 'Do you know these guys?'" (Zad-Behtooie Decl., ¶ 5). However, Zad-Behtooie testified similarly at Petitioner's trial.[22] (See RT 431-32 (Zad-Behtooie's testimony that the driver of the hatchback yelled "'Who are these guys?'")). Similarly, Zad-Behtooie's claim that he "could tell from the sound of the shots that there was only one gun being fired" and that "[n]o shots were fired from the hatchback" (Zad-Behtooie Decl., ¶ 7) essentially reiterates Zad-Behtooie's trial testimony that he never heard any shots fired from the hatchback. (RT 433). Thus, these portions of Zad-Behtooie's declaration do not advance Petitioner's actual innocence argument becuase "Petitioner may not make a showing of actual innocence based on what was known at the time of trial and presented to the jury." Cooper v. Brown, 510 F.3d 870, 874, 971 (9th Cir. 2007); see also Bannister v. Delo, 100 F.3d 610, 618 (8th Cir. 1996) ("[P]utting a different spin on evidence that was presented to the jury does not satisfy the requirements set forth in Schlup.").

Finally, Zad-Behtooie states that he "would have been able to clearly see the driver of the hatchback shooting," but he never saw anyone in the hatchback with a gun and "[a]t no point did the

[22] Zad-Behtooie also indicates that the SUV driver yelled out "something like, 'Pacoima, Van Nuys Boys.'" (Zad-Behtooie Decl., ¶ 5). Certainly, that the SUV's driver yelled out the name of the gang that both he and Petitioner belonged to (RT 741, 747-56, 950) does nothing to undermine Petitioner's convictions.

driver of the hatchback have his arm out the window." (Zad-Behtooie Decl., ¶ 6). However, at trial, Zad-Behtooie explained he was focused on the SUV's occupants and was "looking away towards the end of the street" rather than at the hatchback Petitioner was driving, that as soon as the SUV driver pulled a gun out, Zad-Behtooie was completely focused on the SUV and "didn't even think of looking at the other car anymore[,]" and that while he was watching the SUV he did not know what was happening in the hatchback. (RT 418-20). Zad-Behtooie also indicated that he did not get a good look at Petitioner – the hatchback's driver – and he was unable to identify him. (RT 421-22, 433).

Webb, on the other hand, did focus on Petitioner and was able to identify him as the hatchback's driver, describing, among other things, the blue Georgetown jacket he was wearing as well as the "mean look" in his eyes as she observed him from approximately eight feet away while he pulled out a gun and extended his hand toward her.[23] (RT 351-52, 441-44, 449, 471-72, 482). Moreover, Webb's testimony about Petitioner and the gun is supported by other evidence,[24] including that: Officer Mark Wilbur's found two shell casings as well as a live 9 mm. Fiocchi round in the middle of the

---

[23] After seeing Petitioner with a gun, Webb turned away, so she did not see if Petitioner fired the gun. (RT 443).

[24] Petitioner complains that Webb never indicated that she saw a gun in Petitioner's hand. (See Dkt. No. 61 at 6-7). But while Webb could not remember at trial whether she saw Petitioner with a gun, she affirmed her preliminary hearing testimony indicating that she saw Petitioner pull out a gun, and she stated that her memory was better at the hearing – which occurred less than two months after the shootings – than it was at trial, which occurred almost ten months after the shootings. (RT 442, 482; see also CT 8-9).

street parallel to the rear bumper of Zad-Behtooie's car – i.e., about where Petitioner's car was located at the time of the shooting;[25] Petitioner was observed getting rid of a 9 mm. handgun shortly after the shootings occurred; and Petitioner was arrested with a 9 mm. Fiocchi round in his pocket.[26] (RT 341-47, 377, 414, 664-67). Certainly, a reasonable juror considering the evidence presented at trial as well as Zad-Behtooie's new declaration could reach the same decisions as the jurors in this case made, including determining that Petitioner used a gun during the attempted murders and that he shot Webb. See Sistrunk v. Armenakis, 292 F.3d 669, 677 (9th Cir. 2002) (en banc) ("[E]ven "if all of the evidence Sistrunk now proffers had been introduced at the trial, we are unconvinced, in light of the [evidence presented at Sistrunk's trial], that 'it is more likely than not that no reasonable juror would have convicted him.'" (quoting Schlup, 513 U.S. at 327)); see also Coleman v. Johnson, 566 U.S. 650, 655 (2012) (Juries have "broad discretion in deciding what inferences to draw from the evidence presented at trial," and are only required to "'draw reasonable inferences from basic facts to ultimate facts.'" (citation omitted)).

Thus, considering the entirety of the evidence – including old and new evidence – Petitioner simply has not shown that, "'in

---

[25] Officer Wilbur explained the manner in which handguns work, including describing how shell casings are ejected from semiautomatic handguns and how a live bullet can be ejected from a semiautomatic handgun. (RT 342-44).

[26] Officer Wilbur testified that the Fiocchi brand was unique and that in his nine-and-a-half years with the LAPD and his four years in the military, he had never seen the brand Fiocchi. (RT 345).

light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" Perkins, 569 U.S. at 386 (quoting Schlup, 513 U.S. at 329); Stewart, 757 F.3d at 939-43; Lee, 653 F.3d at 943-45; Sistrunk, 292 F.3d at 677. Accordingly, Petitioner has not demonstrated that he is entitled to pass through the actual innocence gateway, and his Petition must be dismissed as untimely.[27]

[27] Petitioner requests an evidentiary hearing on his actual innocence assertion. (Dkt. No. 61 at 1-2, 9). However, an evidentiary hearing is not required because, as discussed herein, even crediting Zad-Behtooie's declaration, Petitioner is not entitled to pass through the Schlup gateway. See Stewart, 757 F.3d at 942-43 (district court properly denied evidentiary hearing on actual innocence gateway claim when Stewart was not entitled to the relief sought even if the court fully credited Stewart's new evidence); Gandarela v. Johnson, 286 F.3d 1080, 1087 (9th Cir. 2002) (evidentiary hearing on actual innocence claim not necessary when both the affidavits of the "new" witnesses and the trial record "speak for themselves and do not support Gandarela's claim of actual innocence").

Petitioner also argues he is entitled to an evidentiary hearing so that he can present the testimony of the actual perpetrator of the crime. (Dkt. No. 40 at 11-13). However, Petitioner has not identified the purported "actual perpetrator," let alone provided any evidence supporting this argument, and his conclusory allegation provides no basis for holding an evidentiary hearing. See Herrera v. Sec'y of Corrs., 2018 WL 3424583, *15 (C.D. Cal.) (unsupported and conclusory allegation of actual innocence does not warrant an evidentiary hearing), report and recommendation accepted by, 2018 WL 3410104 (C.D. Cal. 2018); Lyons v. Frigo, 2007 WL 2572338, *17 (D. Ariz. 2007) ("[C]onclusory allegations are insufficient to support a claim or justify an evidentiary hearing.").

V.

CONCLUSION

For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting this Report and Recommendation, (2) denying the Petition for Writ of Habeas Corpus, and (3) directing that Judgment be entered dismissing this action.

DATED: October 29, 2018

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

DECLARATION OF ARASH ZAD-BEHTOOIE

I, Arash Zad-Behtooie, declare as follows:

1. I am a resident of Los Angeles County and a licensed attorney in the State of California (California Bar No. 285054).

2. I was a victim of a shooting that occurred on July 21, 2002. I subsequently testified about that shooting in Los Angeles Superior Court, in the case of People of the State of California v. Saul Cervantes, No. PA042004. I submit this declaration to supplement and clarify that testimony.

3. I was not shot by anyone in the hatchback that was parallel to my car, around six to seven feet away from where I was standing in the street outside the rear driver's side door of my car. I was shot by the driver in the SUV who was farther up the street. I saw the driver of the SUV extend his hand out the window and start shooting.

4. I have reviewed my trial testimony. To the extent my testimony—that the gun being shot by the driver of the SUV was not pointed at me and the driver of the SUV was not firing at me—has been interpreted to mean that the driver of the SUV did not shoot me, that would be incorrect, and certainly was not what I meant. The driver of the SUV was shooting at Joaquin and Arturo who were walking toward me when I was shot by the driver of the SUV.

5. Before the shooting, I heard the driver of the SUV yell out something like, "Pacoima, Van Nuys Boys." The driver of the hatchback yelled out something like, "Do you know these guys?" I presumed he was referring to my two friends who were on the street, closer to the SUV.

6. At no point did the driver of the hatchback have his arm out of the window. The driver of the hatchback was closer to me than Stephanie Webb, who was seated in the driver's seat of my car. I would have been able to clearly see the driver of the hatchback shooting, had

A.Z.
Initials

that occurred. I never saw anyone in the hatchback with a gun. In addition, given the angle at which I was shot, I could not have been shot by anyone in the hatchback.

7. I also could tell from the sound of the shots that there was only one gun being fired. No shots were fired from the hatchback.

8. Had I been asked, I would have provided the information herein prior to or during the trial where I testified. No defense investigator ever interviewed me.

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct to the best of my knowledge. Executed this 8th day of November, 2017 at Los Angeles, California.

ARASH ZAD-BEHTOOIE

Initials
A 33

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SAUL CERVANTES, Petitioner, v. M.D. BITER, Warden, Respondent.	Case No. CV 13-4880 R (SS) **ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files herein, the Report and Recommendation of the United States Magistrate Judge, and Petitioner's Objections. After having made a de novo determination of the portions of the Report and Recommendation to which Objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge.

\\

\\

\\

\\

\\

IT IS ORDERED that the Petition is denied and Judgment shall be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on counsel for Petitioner and Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: January 24, 2019

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SAUL CERVANTES, Petitioner, v. M.D. BITER, Warden, Respondent.	Case No. CV 13-4880 R (SS) **JUDGMENT**

Pursuant to the Court's Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the above-captioned action is dismissed with prejudice.

DATED: January 24, 2019

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SAUL CERVANTES,

Petitioner,

v.

M.D. BITER, Warden,

Respondent.

Case No. CV 13-4880 R (SS)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases, this Court "must issue or deny a certificate of appealability [("COA")] when it enters a final order adverse to the applicant."

Under 28 U.S.C. § 2253(c)(1)(A), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), an appeal may not be taken from "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" unless the appellant first obtains a COA. Section 2253(c)(2), as amended by AEDPA, provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

In Slack v. McDaniel, 529 U.S. 473 (2000), the Supreme Court clarified the showing required to satisfy Section 2253(c)(2) and to warrant issuance of a COA when a petition has been denied on the merits:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under [Barefoot v. Estelle, 463 U.S. 880 (1983)], includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'"
>
> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack, 529 U.S. at 483-84 (citation omitted).

\\

\\

\\

\\

\\

Slack, however, does not require a showing by the petitioner that his appeal will succeed. Miller-El v. Cockrell, 537 U.S. 322, 337 (2003). Accordingly, a court should not deny a COA merely because the court believes that the applicant will not demonstrate an entitlement to relief on the merits. Id.

Slack also clarified the showing required to warrant issuance of a COA when a petition has been denied on procedural grounds:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id.

Both showings must be made before the Court of Appeals "may entertain the appeal." Id. at 485. In resolving the COA issue, "a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Id. To that end, the law "allows and encourages the court to first resolve procedural issues" rather than constitutional questions. Id.

In Slack, the Supreme Court remarked:

> Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

Id. at 484.

Petitioner, a California state prisoner, is serving three consecutive life sentences with the possibility of parole based on his 2003 conviction on three counts of willful, deliberate, and premeditated attempted murder in violation of California Penal Code ("P.C.") §§ 664/187(a), along with an additional thirty-five years for multiple firearm enhancements under P.C. § 12022.53(b). Petitioner unsuccessfully appealed his conviction and sentence in state court, and he unsuccessfully sought habeas relief in state court in 2012 and 2013.

The Petition in this action, filed on July 8, 2013, raised nine grounds for relief. On October 16, 2013, Respondent filed a Motion to Dismiss the Petition as untimely, and Petitioner filed an Opposition on January 14, 2014. (Dkt. Nos. 13, 18). On June 10, 2014, the Court granted the Motion and entered Judgment denying the Petition and dismissing the action with prejudice. (Dkt. Nos. 19-20, 25-26). Petitioner appealed, and on December 12, 2016, the

Ninth Circuit granted Petitioner's unopposed motion for remand to this Court to "consider what effect, if any, the Supreme Court's decision in Montgomery v. Louisiana, 136 S. Ct. 718 (2016) has on the timeliness" of the Petition. (Dkt. Nos. 28, 35). Following remand, the parties briefed Montgomery's effect on the Petition's timeliness, and Petitioner also argued he is entitled to an evidentiary hearing to address his purported actual innocence. (Dkt. Nos. 40-41). Petitioner expanded on the latter issue in his Reply, arguing he is actually innocent and entitled to an equitable exception to AEDPA's limitation period. (Dkt. No. 61). On June 12, 2018, Respondent filed a Sur-Reply addressing Petitioner's actual innocence argument. (Dkt. No. 63).

Upon review, the Court again granted Respondent's Motion to Dismiss and dismissed this action as untimely. The Court also concluded that the Petition's only claim that could potentially be rendered timely in light of Montgomery was Ground Six, and Ground Six is without merit regardless of untimeliness. In addition, the Court found that Petitioner's claims of actual innocence failed to overcome the untimeliness bar, nor did such claims warrant an evidentiary hearing.

//

//

//

//

//

//

In his Objections, filed on January 22, 2019, Petitioner requested a certificate of appealability. (Objections at 12-13). The Court remains satisfied that the denial of his claims was correct and concludes that reasonable jurists would not find its prior decision to be "debatable or wrong." Slack, 529 U.S. at 484. Accordingly, the Court declines to issue a COA.

IT IS SO ORDERED.

Dated: January 24, 2019

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

CV13-04880-R(RZ)
Lodged Doc. 9

RAMA MALINE

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORN

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SAUL CERVANTES, Defendant and Appellant.	B168802 (Los Angeles County Super. Ct. No. PA042004)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie E. Brown, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and Rama R. Maline, Deputy Attorney General, for Plaintiff and Respondent.

SUMMARY

Appellant Saul Cervantes challenges his convictions for attempted willful, deliberate and premeditated murder and personal firearm use on the grounds of insufficiency of evidence. He further alleges prejudicial error was committed by instructing the jury with CALJIC Nos. 2.52 and 8.66, refusing to suppress an out-of-court identification, and allowing a gang expert to testify. He also contends the imposition of consecutive prison terms violated due process.

We conclude substantial evidence supports the verdict that Cervantes was guilty of attempted murder and personal use of a firearm. CALJIC Nos. 2.52 and 8.66 were not given erroneously and Cervantes waived his right to raise the issue on appeal by failing to request clarification of the instructions at trial. The out-of-court identification was properly admitted. Although the identification was unnecessary, it was neither unduly suggestive nor unreliable. Gang evidence was properly admitted because its probative value in establishing motive was not substantially outweighed by its prejudicial effect against Cervantes. Finally, the trial court may impose consecutive sentences without submitting the factual basis for such terms to the jury.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Shortly after midnight on July 21, 2002, two cars parked near the intersection of Haddon Avenue and Kelowna Street in Pacoima. The first car, occupied by Chris A., Arturo C. and Joaquin, parked in front of the second car, occupied by Arash Z., Stephanie W. and Carlos B. As Arturo and Joaquin walked away from their cars, a sport utility vehicle (SUV) and a small hatchback driving down the street from the opposite direction pulled up and stopped in the street approximately parallel to the two parked cars. The passengers in the SUV and the hatchback started shouting at Arturo and Joaquin, "Where are you from?" and "Fuck you and your life, this is Pacoima."

The driver of the SUV then pulled out a pistol and told Arturo and Joaquin, "You guys got to get out of here." The driver of the hatchback, wearing a blue Georgetown jacket, pointed a gun at Stephanie. At that point, approximately eight to ten shots were fired. One of the shots struck Arash in the stomach, one hit Stephanie in the ankle, and one penetrated Arturo's pants without striking his body.

Ten minutes later, Los Angeles Police Department (LAPD) Officer Michael Smith observed a red hatchback with a black hood that matched the description of the hatchback involved in the shooting. When Smith and his partner stopped to investigate, four men standing near the hatchback, including Cervantes, began to run away from the officers. While chasing the four men, Smith witnessed Cervantes, who was wearing a blue Georgetown jacket, remove a nine millimeter pistol from his waistband and throw it over a wall into a yard. Cervantes eluded Smith, but was later apprehended by a K-9 unit in the driveway of a nearby house. Although the pistol was never found, a second suspect was apprehended in the yard where the pistol was tossed. When Cervantes was apprehended, the arresting officer found in his pocket a live nine millimeter round bearing a Fiocchi imprint. At the shooting scene, two nine millimeter casings were found bearing the same Fiocchi imprint.

Later that night, Cervantes was transported to Pacifica Hospital for treatment for the dog bite sustained during his arrest. Stephanie was a patient at the same hospital undergoing treatment for the gunshot wound she suffered during the shooting. Officer Mark Wilbur escorted Cervantes to the doorway of Stephanie's hospital room to determine if she could identify him from the shooting. Wilbur instructed Cervantes to shut his eyes. He also admonished Stephanie that simply because Cervantes was in custody did not mean he was innocent or guilty of a crime. Stephanie was able to identify Cervantes' Georgetown jacket as the one worn by the shooter in the hatchback, but she could not identify his face because his eyes were closed.

Cervantes was charged with three counts of attempted willful, deliberate and premeditated murder in violation of Penal Code section 664/187. The information alleged as to all counts that Cervantes personally used and discharged a firearm within the meaning of Penal Code section 12202.53, subdivisions (b) and (c). It further alleged as to the first two counts that Cervantes discharged a firearm proximately causing great bodily injury within the meaning of Penal Code section 12202.53, subdivision (d). Following a jury trial, Cervantes was found guilty on all charges. He was sentenced to three consecutive life terms for attempted murder, a 25 years to life enhancement under Penal Code section 12202.53 subdivision (d) for personal firearm use proximately causing great bodily injury, and a 10 year enhancement under Penal Code section 12202.53 subdivision (b) for personal firearm use.

Cervantes appeals the jury's verdict. He contends the evidence was insufficient to establish that he shot at Arash and Stephanie, aided and abetted in the shooting of Arturo, and personally used a firearm, as well as insufficient to establish the shooting was premeditated and deliberated. He further contends the trial court committed prejudicial error by instructing the jury with CALJIC Nos. 2.52 and 8.66, refusing to suppress the out-of-court identification, and allowing a gang expert to testify.

DISCUSSION

I. The motion to suppress the out-of-court identification was properly denied.

Cervantes contends Stephanie's out-of-court identification of him at the hospital was unduly suggestive and inherently unfair because, at the time of the identification, he was accompanied by police officers, was handcuffed, and was wearing a unique Georgetown jacket. Due to the unreliability of the out-of-court identification, Cervantes asserts the trial court committed prejudicial error by refusing to suppress Stephanie's identification. Further, Cervantes asserts Stephanie's subsequent identifications of him were tainted by the out-of-court identification. The issue of reliability in an identification

procedure depends on, "'(1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances . . . .'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) "'If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.'" (*Ibid.*) An examination of the totality of the circumstances includes the witness's opportunity to view the assailant at the time of commission of the crime, the level of certainty demonstrated by the witness at the identification, and the time differential between the crime and the identification. On appeal, the appellant bears the burden of demonstrating that the identification procedure was unreliable. (*Ibid.*)

An Evidence Code section 402 hearing was conducted to determine whether to suppress Stephanie's identification of Cervantes at the hospital. Officer Mark Wilbur, who escorted Cervantes to Stephanie's hospital room, described the circumstances surrounding the identification. Stephanie was given a "standard showup admonition" that she was "going to be viewing a person who may or may not be involved in the crime of her being shot in the ankle." She also was advised, "although the person is in police custody and has handcuffs on, does not necessarily mean that he is innocent or guilty, and that the purpose of her viewing this individual was to either eliminate or identify him as a possible suspect." Following the admonition, Cervantes was escorted to the doorway of Stephanie's hospital room with his eyes closed so that Stephanie could look at him without fear of retaliation. Wilbur stood beside Stephanie while two other officers stood next to Cervantes. Stephanie identified the Georgetown jacket Cervantes was wearing as the same jacket worn by the driver of the hatchback who pointed a gun at her. She was not able to identify Cervantes' face because his eyes were closed. At the conclusion of the hearing, Cervantes' motion to suppress was denied. The trial court found that nothing was inherently unfair or unduly suggestive about the out-of-court identification based upon the totality of the circumstances.

Cervantes contends Stephanie's out-of-court identification was inherently unfair and unduly suggestive because, when he was escorted to her hospital room, he was handcuffed, was accompanied by police officers, and was wearing clothing identical to that worn at the scene of the shooting. However, single-person identifications are not inherently unfair, but are encouraged because any risk of suggestion is offset by the reliability of an identification made while events remain fresh in the witness's mind. (*People v. Cowger* (1988) 202 Cal.App.3d 1066, 1071-1072.) Moreover, to present a suspect accompanied by officers to a witness receiving treatment in a hospital is not unduly suggestive. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 (*Carlos M.*).) In *Carlos M.*, officers brought a handcuffed suspect to a rape victim's hospital room for identification purposes two hours after her assault. (*Ibid.*) The suspect wore the same red shirt and jeans that the victim had described as the clothing worn by one of her assailants. (*Id.* at p. 380.) The denial of the motion to suppress the out-of-court identification was affirmed with a finding that the police did nothing to suggest that the people the victim observed in the hospital room were her assailants. (*Ibid.*)

Similarly, the record does not indicate the officers who accompanied Cervantes to Stephanie's room made any suggestion he was a shooter. Before escorting Cervantes to the hospital room, the officers admonished Stephanie against concluding that Cervantes was either guilty or innocent of the crime. Furthermore, *Carlos M.* establishes it is not unduly suggestive to present a handcuffed suspect to a victim in a hospital room for identification purposes. (*Carlos M., supra,* 220 Cal.App.3d at p. 386.) In view of surrounding circumstances, the out-of-court identification in this case was not unduly suggestive.

Notwithstanding the conclusion that the identification was not unduly suggestive, no evidence shows it was necessary. According to Wilbur, the out-of-court identification occurred simply because Stephanie and Cervantes were in the same hospital. While a strong public policy favors expeditious police work, (*People v. Cowger, supra,* 202

Cal.App.3d at p. 1072), *Ochoa* makes it clear the out-of-court identification must be necessary. (*People v. Ochoa, supra,* 19 Cal.4th p. at 412.) In this case, the identification procedure employed was more convenient than necessary. Stephanie's injury was serious but not life-threatening. This case must be contrasted with *Stovall v. Denno* (1967) 388 U.S. 293, where a permissible out-of-court identification occurred in the hospital room of a sole witness to a murder as she lay in critical condition from 11 stab wounds. (*Stovall v. Denno, supra,* 388 U.S. at p. 295.) Unlike *Stovall*, this case does not indicate any urgent need for immediate identification and, therefore, the out-of-court identification was not necessary.

The trial court's denial of the motion to suppress was proper nonetheless if the out-of-court identification was reliable under the totality of the circumstances. Cervantes contends Stephanie's identification at the hospital was not reliable. Applying the *Ochoa* factors, the evidence shows the identification was reliable. First, Stephanie had ample opportunity to observe Cervantes at the scene of the shooting. When Stephanie saw Cervantes point a gun at her from approximately eight feet away, she had an unobstructed view of him. Her car door was open and his car window was all the way down. Based on that encounter, she was able to provide a description of Cervantes to police that included his body build, hairstyle, age, ethnicity and clothing. Second, Stephanie was certain the Georgetown jacket worn by Cervantes at the hospital was the same jacket worn by the person who pointed a gun at her. While she could not identify his face because his eyes were closed at the time of the identification, her level of certainty as to the Georgetown jacket supports the conclusion that her identification was reliable. (*Carlos M., supra*, 220 Cal.App.3d at p. 387.) Third, the time between the shooting and the identification at the hospital spanned only a couple hours. Her recollection of the shooter remained fresh in her mind and presumably accurate. (*Ibid.*) Based upon the totality of the circumstances, there was no substantial likelihood of misidentification and, therefore, the trial court properly denied the motion to suppress the out-of-court identification. (*People v.*

Cunningham (2001) 25 Cal.4th 926, 990.)

Furthermore, the record does not support Cervantes' contention that Stephanie's in-court identification of him at the preliminary hearing and at trial was tainted by the out-of-court identification at the hospital. At the hospital, Stephanie was unable to identify Cervantes' face because his eyes were closed. She did identify the Georgetown jacket worn by Cervantes as the same one worn by the shooter in the hatchback. Two and a half weeks after the out-of-court identification at the hospital, Stephanie was able to identify Cervantes in a photographic six-pack as the person who pointed a gun at her. In particular, she recognized his eyes which she described as dark and aggressive. At the preliminary hearing and at trial, Stephanie again identified Cervantes based on her memory of the incident and the booking photo included in the photographic six-pack. The evidence therefore, does not support Cervantes' assertion that Stephanie's in-court identification of him at the preliminary hearing and at trial was based on seeing his face at the out-of-court identification at the hospital. Rather, she only later identified Cervantes' face when she could see his eyes in the photographic six-pack, at the preliminary hearing and at trial based on her observations of him at the shooting. The record accordingly does not indicate that the out-of-court identification tainted Stephanie's subsequent identifications of Cervantes.

II. Expert testimony on gang evidence was properly admitted.

Cervantes contends the admission of gang evidence was improper because it impeached his character and the prejudicial effect of the evidence exceeded its probative value.

In a gang-related case, gang evidence is admissible to prove motive, as long as its probative value is not substantially outweighed by its prejudicial effect. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) In this case, following a hearing under Evidence Code section 402, the trial court admitted the gang evidence, concluding the motive underlying the shooting appeared to be gang-related. The classic utterance "Where are

you from?," which was made immediately before the shooting, implied that the incident was gang-related. (*People v. Ruiz* (1998) 62 Cal.App.4th 234, 240.)

To inform the jury that the shooting was characteristic of a gang attack, the prosecution called Officer Marino Garde as a witness. Garde offered his knowledge about gang culture acquired while working with gangs over the past seven years. Garde indicated that gangs employ violence to maintain territorial control, enhance the reputation of the gang and gang members, and spread fear through intimidation. He stated gangs tend to commit crimes in groups, and the utterance "Where are you from?" is a classic precursor to an attack. Garde's evidence about gang culture was sufficiently beyond the common experience of jurors that it helped place the shooting in context. (*People v. Williams*, *supra*, 16 Cal.4th at p. 195 [Expert testimony must assist the trier of fact in reaching an informed conclusion].)

The record fails to support Cervantes' contention that the gang evidence was offered to impeach his character. While Evidence Code section 1101 makes evidence of a defendant's character inadmissible, the gang evidence was not offered for that purpose. Rather, Officer Garde's testimony related to the habits of gangs generally. The only evidence directly relating to Cervantes was Garde's opinion, based on two prior meetings with him while monitoring the Pacoima Van Nuys Boys Gang, that Cervantes was a member of that gang. While Cervantes may construe this opinion as an attack on his character, Cervantes later confirmed his gang membership. Moreover, following Garde's testimony, the jury was admonished not to consider the gang evidence for the purpose of showing that Cervantes was a person of bad character or was pre-disposed to commit crime. Because the record does not indicate Garde's testimony was offered as evidence of Cervantes' character, Evidence Code section 1101 does not render the gang evidence inadmissible.

The record further contradicts Cervantes' contention that the gang evidence was more prejudicial than probative under Evidence Code section 352. While California courts recognize the potential prejudicial effect of gang evidence, the evidence is admitted when the motive for the crime is gang-related. (*People v. Ruiz, supra,* 62 Cal.App.4th at p. 240.) Garde placed the shooting in the context of typical gang violence in which territorial attacks help bolster the reputation of both a gang and a gang member. Although Garde did not personally investigate the shooting, his expertise on gang customs generally and on the Pacoima Van Nuys Boys Gang specifically helped the jury place the shooting in the context of typical gang attacks. (*People v. McDaniels* (1980) 107 Cal.App.3d 898, 904 [testimony relating to gang customs and psychology was properly admitted].) By understanding the gang-related motive for the shooting, the jury was in a better position to determine Cervantes' motivation with respect to the shooting. As a result, Garde's testimony was admissible because its probative value in establishing Cervantes' motive was not substantially outweighed by any prejudicial effect regarding his character.

III. The flight instruction given was not erroneous.

Cervantes contends the trial court bore a sua sponte duty to modify CALJIC 2.52 to reflect his explanation that he ran from the police merely because he was scared rather than out of a consciousness of guilt. Although Cervantes does not specify the required modification, he claims the flight instruction improperly ignored his explanation for running from the police. According to Cervantes, the failure to modify the instruction constitutes *Watson* error as it is reasonably probable that, in the absence of the error, the jury would have reached a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Although Cervantes' claim of error can be decided on its merits, he failed to reserve the issue for appeal. (*People v. Bolin* (1998) 18 Cal.4th 297, 328.) Cervantes objected to the flight instruction, but did not request any clarifying language. Therefore, he cannot complain on appeal that a legally correct instruction was too general or

incomplete. (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

In support of his contention that the flight instruction was not given properly, Cervantes cites *People v. Hill* in which the flight instruction was modified. (*People v. Hill* (1967) 67 Cal.2d 105, 120.) However, the modification made in *Hill* merely informed the jury that it was required to determine the weight given to flight evidence.[1] (*Ibid.*) In this case, the flight instruction given cautioned that a defendant's flight was not sufficient to establish guilt, but was a fact for consideration. In comparing the language of the modified instruction in *Hill* and the flight instruction given in this case, there does not appear to be a substantial difference that could have resulted in prejudicial error.

Furthermore, we do not agree with Cervantes that CALJIC 2.52 essentially informs the jury that evidence of a defendant's flight establishes guilt. Rather, the instruction cautions the jury that flight alone does not establish guilt, but must be considered along with all the evidence. In this case, Cervantes sped away from the scene of the shooting in his hatchback immediately after shots were fired. Several minutes later, he fled from police when they approached him. Cervantes' conduct after the shooting and when he was approached by police suggest a consciousness of guilt and warrants a flight instruction. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) Under *Bradford*, flight is established where a defendant flees the scene of the crime in an effort to avoid detection, and by a defendants' attempt to avoid apprehension. (*Ibid.*) The trial court therefore properly instructed the jury that evidence of Cervantes' flight must be considered in determining his guilt or innocence.

---

[1] The modified flight instruction in *Hill* added the sentence, "Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination." (*People v. Hill*, *supra*, 67 Cal.2d at p. 120.) CALJIC 2.52 used in the present case states, "The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

IV. The specific intent instruction was not erroneous.

Cervantes contends CALJIC 8.66 was erroneous because it did not require the jury to find specific intent as to each of the three attempted murder victims. Not only was it not prejudicial error to give CALJIC 8.66, Cervantes failed to reserve the issue for appeal. (*People v. Bolin, supra,* 18 Cal.4th at p. 328.) By failing to object to CALJIC 8.66 at trial, Cervantes cannot complain on appeal that an instruction correct in law was too general or incomplete. (*People v. Lang, supra,* 49 Cal.3d at p. 1024.)

Although Cervantes failed to object to the specific intent instruction, he correctly asserts that the jury must be instructed that attempted murder requires a specific intent to kill. (*People v. Guerra* (1985) 40 Cal.3d 377, 386.) The language of CALJIC 8.66, however, is not vague as to specific intent. CALJIC 8.66 states, "In order to prove attempted murder, each of the following elements must be proved; [¶] (2) The person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being." Further, in accordance with the use notes following CALJIC 8.66, the trial court gave CALJIC 3.31.5 which states, "In the crime[s] charged in Counts 1, 2, and 3, namely Attempted Murder, there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists the crime to which it relates is not committed." Taken together, the two instructions make clear that specific intent is required on each count of attempted murder. (See CALJIC 1.01 [instructions to be considered as a whole].) The record, therefore, does not indicate the jury was erroneously instructed on specific intent.

V. Substantial evidence supports the finding that Cervantes shot Arash and Stephanie, aided and abetted in the shooting of Arturo, personally used a firearm, and that the shooting was premeditated and deliberated.

Cervantes contends the evidence was insufficient to establish that he shot at Arash and Stephanie, aided and abetted in the shooting of Arturo, personally used a firearm

within the meaning of Penal Code section 12022.53 subdivisions (b), (c), and (d), and that the shooting was premeditated and deliberated. The jury's verdict must be upheld on appeal if substantial evidence supports its finding. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) Moreover, the evidence must be viewed in a light most favorable to respondent, and we must indulge every inference in favor of the determinations made by the fact-finder. (*Ibid.*) The standard of review is the same whether the evidence presented at trial was direct or circumstantial. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

A. The finding that Cervantes shot Arash and Stephanie is supported by substantial evidence.

Notwithstanding Cervantes' contention that the evidence was insufficient to establish he shot Arash and Stephanie, the prosecution witnesses supported the theory that it was Cervantes who shot Arash and Stephanie. Arash testified he was standing next to the rear driver's side door of his car when he was shot in the stomach. While he could not identify anyone in the hatchback, he recalled that the shooter from the SUV was not pointing a gun at him. His testimony indicates the bullet that struck him was not fired from the SUV, but was fired from elsewhere.

Stephanie stated she was sitting in the diver's seat of Arash's car when she saw a man in a Georgetown jacket point a gun at her from the driver's seat of an old hatchback. She estimated the shooter was eight feet away from her. Although Stephanie did not see any muzzle flashes, she recalled turning her head away when she saw the gun pointed at her and then hearing gunshots. She also made an in-court identification of Cervantes as the person who pointed the gun at her. Stephanie's testimony, therefore, supports the conclusion that Cervantes shot her from the hatchback. Moreover, Arash was shot while standing a couple feet from Stephanie. Because Arash recalled that a person from the SUV did not point a gun at him, the inference can be reasonably drawn that Arash and Stephanie were shot by the same gunman.

Police officers responding to the shooting also corroborated the prosecution's theory that Cervantes shot Arash and Stephanie. Officer Michael Smith, who pursued Cervantes on foot within minutes after the shooting, recalled Cervantes was wearing the same blue Georgetown jacket identified by Stephanie as the jacket worn by the shooter. Smith witnessed Cervantes brandish a nine millimeter pistol during the pursuit when only five feet separated them. Smith also was able to make an in-court identification of Cervantes as the person whom he pursued following the shooting. Moreover, when Cervantes was arrested, an unused nine millimeter shell marked "Fiocchi" was found in his pocket. Officer Mark Wilbur, who investigated the scene of the shooting, found two nine millimeter casings bearing the same Fiocchi imprint. The nine millimeter pistol Cervantes discarded during the pursuit and the nine millimeter Fiocchi bullets found at both the scene of the shooting and in Cervantes' pants further suggest he was one of the shooters.

Despite the direct and circumstantial evidence establishing Cervantes as a shooter, he contends the evidence only supports a suspicion of guilt which is insufficient to support a conviction. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Cervantes analogizes to *People v. Blakeslee* where a defendant was convicted of murdering her mother. (*People v. Blakeslee* (1969) 2 Cal.App.3d 831, 833.) The conviction was reversed because the evidence showing that the defendant was the only one with her mother at the time of the killing did not "directly support an inference that [the defendant] committed the crime. At most [it] show[ed] opportunity." (*Id.* at p. 838.) The court in *Blakeslee* was troubled that no one witnessed the shooting, no one placed the defendant at the scene of the shooting, and no one identified the defendant with any particular weapon. (*Ibid.*) Cervantes contends that while the evidence may place him at the scene of the shooting, it does not establish him as the shooter. At best, he argues, the circumstantial evidence proves he had an opportunity to act as the shooter.

Cervantes' position is contradicted by the prosecution evidence that establishes the three elements missing in *Blakeslee*. First, Arash and Stephanie witnessed the shooting. Second, Cervantes admitted he was present at the scene of the shooting, and Stephanie saw Cervantes point a gun at her. Third, the arresting officer recovered a unique brand of bullet from the shooting scene that matched a bullet found in Cervantes' pocket, and the officer who pursued Cervantes on foot saw him discard a nine millimeter pistol. The evidence shows Cervantes had a gun and, based on the Fiocchi casings found at the scene of the shooting, a reasonable inference can be drawn that it was Cervantes who fired the gun twice. Because the testimony from Stephanie and Wilbur corroborate the prosecution's theory that Cervantes fired at Arash and Stephanie, the trier of fact's determination cannot be overturned for insufficiency of evidence. (*People v. Kunkin* (1973) 9 Cal.3d 245, 250.)

B. The finding that Cervantes aided and abetted in the shooting of Arturo is supported by substantial evidence.

Cervantes asserts the evidence was insufficient to show he aided and abetted the shooting of Arturo. To establish criminal liability on an aiding and abetting theory, it is not necessary that the aider and abettor be prepared to personally commit the offense in the event the perpetrator fails to do so. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Rather, aiding an abetting occurs when a person provides aid or encouragement with the intent of facilitating the perpetrator's commission of the crime. (*Ibid.*) No overt act is required to be guilty of aiding and abetting. (*People v. Moore* (1953) 120 Cal.App.2d 303, 306.)

Cervantes claims the evidence proves only that he was present at the scene of the shooting, and not that he aided an abetted. When the SUV stopped in front of him, he argues, his hatchback was presented with no alternative but to stop as well. While Cervantes correctly asserts mere presence is not sufficient to constitute aiding and

abetting, the evidence does not support his claim that he was merely present at the scene of the shooting. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530.) The SUV and the hatchback each contained members of Cervantes' gang who threatened the victims just before the shooting. The driver of the SUV pointed a gun at Arturo and Joaquin and then shot at them as they walked back to their car. One bullet passed through Arturo's pants without striking his body. As the driver of the SUV shot at Arturo and Joaquin, Stephanie saw Cervantes point a gun at her and then she heard eight to ten shots fired. Cervantes was later seen discarding a pistol during the police pursuit, and he was apprehended carrying a unique brand of bullet that matched two casings found at the scene of the shooting. Rather than merely placing Cervantes at the scene, the evidence indicates his active participation in the shooting. Examining the evidence in the light most favorable to the trial court's determination, we conclude substantial evidence supports the finding that Cervantes aided and abetted in the shooting of Arturo. (*People v. Rayford, supra,* 9 Cal.4th at p. 23.)

C. The finding that Cervantes personally used a firearm is supported by substantial evidence.

Cervantes argues the evidence was insufficient to establish his personal use of a firearm. He analogizes his case to *People v. Allen* (1985) 165 Cal.App.3d 616, in which a Penal Code section 12022.53 weapon enhancement finding was reversed, while a murder conviction was affirmed. (*Id.* at p. 626.) In that case, a murder occurred in a kitchen occupied only by the two defendants and the victim. Because there were no witnesses to the shooting, determining which defendant shot the victim was purely conjectural. (*Ibid.*) Similarly, Cervantes argues, the evidence presented in this case does not support the finding that he was the shooter, only that shots were fired.

Cervantes' assertion directly conflicts with Stephanie's recollection that Cervantes pointed a gun at her just before she turned her head away and heard gunshots. While no other victim identified Cervantes as a shooter, "[i]t is well settled that, absent physical

impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to support a criminal conviction." (*People v. Allen, supra*, 165 Cal.App.3d at p. 623.) Stephanie's testimony provides ample support for the finding that Cervantes used a firearm. Moreover, circumstantial evidence showing that Cervantes discarded a pistol shortly after the shooting and his subsequent apprehension carrying the same Fiocchi brand bullets found at the scene of the shooting further indicates Cervantes was a shooter. The finding that Cervantes personally used a firearm within the meaning of Penal Code section 12022.53 subdivisions (b), (c), and (d) therefore, is supported by substantial evidence. (*People v. Rayford, supra,* 9 Cal.4th at p. 23.)

D. Premeditation and deliberation is supported by substantial evidence.

Cervantes contends the evidence was insufficient to show the shooting was premeditated and deliberated. To determine premeditation and deliberation, three factors are typically considered, including (1) a defendant's prior planning, (2) the manner of the attack, and (3) the motive for the attack. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; *People v. Thomas* (1992) 2 Cal.4th 489, 516-517 [factors provide a reasonable framework for determining premeditation and deliberation, but are not exhaustive].)

Applying the *Anderson* factors, the record supports the jury's finding of premeditation and deliberation. First, evidence that Cervantes carried a gun to the scene of the shooting supports the inference of planning. (*People v. Alcala* (1984) 36 Cal.3d 604, 626 [defendant's possession of a weapon in advance of the killing supports an inference of planning activity].) Additionally, the shooting was evidently gang-related. Officer Garde's opinion that gang members commit violent crimes to enhance their own reputation as well as that of their gang is consistent with the inference that Cervantes planned the shooting in an effort to strengthen his gang's reputation and his own reputation as a gang member. Second, the manner of the shooting resembled a planned gang attack. The victims recalled hearing the words, "Where are you from" and, "You

can't be here" shouted from the SUV and the hatchback just before the shooting. These words are typically used by gang members prior to an attack that seeks to protect gang territory. The manner of the shooting, therefore, indicates it was a planned gang attack. Third, Cervantes' motive also can be inferred from the fact that the shooting was evidently gang-related. According to Garde, gang members commit crimes to protect their gang's territory and to assert their gang's status. Thus, Cervantes' motive for the shooting can be inferred from his desire to further his gang's reputation.

The record, therefore, provides sufficient evidence to support the finding that the shooting was premeditated and deliberated. (*People v. Rayford, supra,* 9 Cal.4th at p. 23.)

VI. Imposition of consecutive sentences did not violate due process.

Citing *Blakely v. Washington* (2004) 124 S.Ct. 2531 (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), appellant contends the trail court's reliance upon facts not found by the jury in order to impose consecutive terms for counts one through three violated his right to a jury trial.

Apprendi essentially requires any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be charged, submitted to a jury, and proved beyond a reasonable doubt. (*Apprendi*, 530 U.S. at p. 490.) *Blakely* clarified that the relevant "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely*, 124 S.Ct. at p. 2537, original italics.) The key inquiry is whether the court was authorized to impose the particular sentence in question without finding any additional facts or only upon making some additional factual finding. (*Id.* at p. 2538.) If any additional factual finding is required, *Apprendi* applies. (*Ibid.*)

In contrast to the statutory presumption in favor of the middle term as the sentence for an offense (Pen. Code, § 1170, subd. (b)), no comparable statutory presumption exists in favor of concurrent rather than consecutive sentences. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) Instead, Penal Code section 669 [2] simply directs the trial court to determine whether the sentences on multiple offenses are to be consecutive or concurrent. If the court fails to make the determination, section 669 states that the terms are to be concurrent. The statute therefore sets a default, but not a presumption. California Rules of Court, rule 4.425 sets forth "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences." Although rule 4.406 (b)(5) includes the imposition of consecutive sentences as a sentencing choice that generally requires the trial court to state its reasons, no statute or rule of court requires the court to make an additional factual finding, above and beyond the mere fact of conviction of multiple current offenses, in

---

[2] Penal Code section 669 provides, in pertinent part, as follows: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction. . . .

"In the event that the court at the time of pronouncing the second or other judgment upon that person had no knowledge of a prior existing judgment or judgments, or having knowledge, fails to determine how the terms of imprisonment shall run in relation to each other, then, upon that failure to determine, or upon that prior judgment or judgments being brought to the attention of the court at any time prior to the expiration of 60 days from and after the actual commencement of imprisonment upon the second or other subsequent judgments, the court shall, in the absence of the defendant and within 60 days of the notice, determine how the term of imprisonment upon the second or other subsequent judgment shall run with reference to the prior incompleted term or terms of imprisonment. Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently."

order to impose consecutive terms. The court has the authority to impose consecutive terms without finding any additional facts. Accordingly, we conclude *Apprendi* and *Blakely* do not apply to the imposition of consecutive sentences.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BOLAND, J.

We concur:

COOPER, P. J.

RUBIN, J.