No. _____

IN THE

Supreme Court of the United States

CHRIS ANTHONY GEORGE,

Petitioner,

v.

RAYMOND MADDEN, WARDEN,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APR 30 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRIS ANTHONY GEORGE, Petitioner-Appellant, v. RAYMOND MADDEN, Warden, Respondent-Appellee.	No. 18-55258 D.C. No. 5:16-cv-01016-RGK-AJW Central District of California, Riverside ORDER

Before: BOGGS,* WARDLAW, and BEA, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. Judge Wardlaw voted to deny the petition for rehearing en banc, and Judge Bea and Judge Boggs so recommend. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is denied.

* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Case: 18-55258, 02/21/2020, ID: 11604536, DktEntry: 59-1, Page 1 of 3

NOT FOR PUBLICATION

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRIS ANTHONY GEORGE, Petitioner-Appellant, v. RAYMOND MADDEN, Warden, Respondent-Appellee.	No. 18-55258 D.C. No. 5:16-cv-01016-RGK-AJW MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted December 12, 2019
Pasadena, California

Before: BOGGS,** WARDLAW, and BEA, Circuit Judges.

Chris George appeals the district court's denial of his habeas corpus petition challenging his California conviction and sentence for rape of an unconscious person, committing a lewd act with a child, and active participation in a criminal street gang. We review a district court's decision on a habeas corpus petition de

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

** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

novo. *Rodriguez v. McDonald*, 872 F.3d 908, 918 (9th Cir. 2017). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

George argues that his trial attorney provided ineffective assistance of counsel by advising George to reject a favorable plea deal. The state court rejected this claim on the merits on the ground that George failed to state a prima facie case for habeas relief. Because George's claim has been adjudicated on the merits in state court, 28 U.S.C. § 2254(d) bars relitigation of his ineffective assistance of counsel claim in federal court unless the state court decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or "based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding," *id.* § 2254(d)(2). *See Harrington v. Richter*, 562 U.S. 86, 98 (2011). Our "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."[1] *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Reviewing the state court record and accepting all nonconclusory allegations in his state habeas petition as true, *id.* at 188 n.12, we conclude that the state court's holding that George failed to state a prima facie case for habeas relief is not

[1] The state court record "includes both the allegations of [the] habeas corpus petition . . . and . . . any matter of record pertaining to the case." *Pinholster*, 563 U.S. at 188 n.12 (quoting *In re Hochberg*, 2 Cal. 3d 870, 874, n.2 (1970)) (internal quotation marks omitted).

unreasonable. In his state habeas petition, George alleged that his trial attorney's "misadvice" caused him to reject a favorable plea deal. George, however, did not allege sufficient facts regarding how his attorney had "misadvised" him. Thus, George failed to allege facts that made plausible his conclusory allegation that such "misadvice" caused him to reject the plea deal. Because George has not demonstrated that the state court's adjudication of his ineffective-assistance-of-counsel claim resulted in a decision "contrary to" or "involv[ing] an unreasonable application" of "clearly established" federal law, or was "based on an unreasonable determination of the facts," *Harrington*, 562 U.S. at 98, we are barred from considering any evidence George submitted in the district court that he contends additionally supports his claim.[2] *Pinholster*, 563 U.S. at 188 n.12.

AFFIRMED.

[2] George briefs additional uncertified issues. They do not meet the criteria for certification, *see Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (requiring a "substantial showing of the denial of a constitutional right"), and, construing the briefing as a motion to consider those issues, *see* 9th Cir. R. 22-1(e), we deny the motion.

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRIS ANTHONY GEORGE, Petitioner-Appellant, v. RAYMOND MADDEN, Warden, Respondent-Appellee.	No. 18-55258 D.C. No. 5:16-cv-01016-RGK-AJW Central District of California, Riverside ORDER

Before: BOGGS,* WARDLAW, and BEA, Circuit Judges.

At oral argument, the parties should be prepared to address the standard of review applicable to this case. *See* 28 U.S.C. § 2254(d)(1); *Amado v. Gonzalez*, 758 F.3d 1119, 1133 n. 9 (9th Cir. 2014).

* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

18-55258

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRIS ANTHONY GEORGE,

Petitioner-Appellant,

v.

RAYMOND MADDEN,

Respondent-Appellee.

On Appeal from the United States District Court
for the Central District of California

No. EDCV 16-1016 RGK (AJW)
The Honorable R. Gary Klausner, Judge

APPELLEE'S BRIEF REDACTED

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This appeal follows.

SUMMARY OF THE ARGUMENT

Trial counsel does not render ineffective assistance of counsel by presenting a favorable plea deal to a client, attempting to negotiate different terms for the deal at the client's request, and then, when the client refuses to accept the plea offer, explaining potential weaknesses in the prosecutor's case.

STANDARD OF REVIEW

This Court reviews a district court's denial of a habeas corpus petition de novo. *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). Findings of fact made by the district court are reviewed for clear error. *Moran v. McDaniel*, 80 F.3d 1261, 1268 (9th Cir. 1996) Further, this Court "may affirm on any ground supported by the record, 'even if it differs from the rationale of the district court.'" *McCormick v. Adams*, 621 F.3d 970, 975 (9th Cir. 2010), citing *Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004).

Because the district court determined that George overcame the relitigation bar of 28 U.S.C. § 2254(d), this Court reviews George claim under the de novo review standard. George nonetheless suggests that this Court can decide the issue by relying solely on the state court record and by

applying the additional deferential standard of review provided in § 2254(d). (AOB 34-37, 42-44.)

However, once a petitioner satisfies the requirements of § 2254(d), a federal court must then apply de novo review to determine whether a constitutional violation has occurred. *Butler v. Curry*, 528 F.3d 624, 641 (9th Cir 2008). Given that the district court found that the relitigation bar had been overcome, the deferential standard of review under § 2254(d) and the limitation to the state court record does not apply here. Consequently, the correct standard for this Court to apply in reviewing the district court's denial of George's habeas petition is the de novo standard with a review of the facts, including those developed in the district court, for clear error.

ARGUMENT

THE DISTRICT COURT PROPERLY CONCLUDED THAT GEORGE FAILED TO ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

George contends that he received ineffective assistance of counsel when his attorney, Sean Davitt, advised him to reject a favorable plea offer from the prosecution. (AOB 44-53.) The contention fails because the evidence fails to show that counsel offered such advice. Instead, the record establishes that George refused to accept any plea offer that included [redacted]. Counsel did the best he could to

Case: 18-55258, 08/30/2018, ID: 10995609, DktEntry: 5-1, Page 1 of 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

CHRIS ANTHONY GEORGE, Petitioner-Appellant, v. RAYMOND MADDEN, Warden, Respondent-Appellee.	No. 18-55258 D.C. No. 5:16-cv-01016-RGK-AJW Central District of California, Riverside ORDER

Before: FARRIS and LEAVY, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is granted with respect to the following issue: whether counsel was ineffective for advising appellant to reject a plea offer that would have resulted in a three-year prison term. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

The opening brief is due January 2, 2019; the answering brief is due February 1, 2019; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk shall serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

If Raymond Madden is no longer the appropriate appellee in this case, counsel for appellee shall notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	EDCV 16-01016 RGK (AJWx)	Date	March 27, 2018
Title	CHRIS ANTHONY GEORGE v. RAYMOND MADDEN		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) ORDER DENYING REQUEST FOR CERTIFICATE OF APPEALABILITY**

Petitioner, Chris Anthony George, in pro se, has filed a notice of appeal of this Court's February 9, 2018 Order denying Petitioner's Writ of Habeas Corpus Under § 2241 ("Order"). Before Petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253 (c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2).The certificate of appealability must "indicate which specific issue or issues satisfy" the requirement. 28 U.S.C. § 2253 (c)(3).

A certificate of appealability should be granted for any issue that petitioner can demonstrate is "debatable among jurists of reason," could be resolved differently by a different court, or is "'adequate to deserve encouragement to proceed further.'" *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

Upon review, the Court finds that the law is clear on the issue presented by Petitioner. There are no issues that are "debatable among jurists of reason" suggesting the denial of a constitutional right. Therefore an appeal will be futile.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	EDCV 16-01016 RGK (AJWx)	Date	March 27, 2018
Title	CHRIS ANTHONY GEORGE v. RAYMOND MADDEN		

It is therefore ordered that the request for issuance of a certificate of appealability is **DENIED**.

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHRIS ANTHONY GEORGE, Plaintiff(s), vs. RAYMOND MADDEN, Defendant(s).	Case No. 5:16-cv-01016-RGK-AJW JUDGMENT

Pursuant to the Order Re Petition for Writ of Habeas Corpus, IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

Dated: February 8, 2018

R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHRIS ANTHONY GEORGE, Plaintiff(s), vs. RAYMOND MADDEN, Defendant(s).	Case No. 5:16-cv-01016-RGK-AJW ORDER RE PETITION FOR WRIT OF HABEAS CORPUS

Petitioner seeks a writ of habeas corpus on the ground of ineffective assistance of counsel. Upon review of the parties' arguments, the Court DENIES the Petition for the following reasons: (1) the facts and evidence indicate that Petitioner made the decision to go to trial on his own volition; (2) Petitioner has failed to provide evidence showing that Attorney Davitt's advice was ungrounded or otherwise unreasonable; (3) Petitioner has failed to show that Attorney Davitt provided false, misleading, or otherwise inaccurate information to him. While in hindsight, Attorney Davitt's advice led to a negative outcome for Petitioner, this alone does not constitute adequate grounds for prevailing on a claim for ineffective assistance of counsel.

Dated: February 8, 2018

Gary Klausner

R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHRIS ANTHONY GEORGE, PETITIONER(s) v. RAYMOND MADDEN, RESPONDENT(s)	CASE NUMBER: EDCV16-1016-RGK(AJW) **NOTICE OF FILING OF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

TO: All Parties of Record

You are hereby notified that the Magistrate Judge's Report and Recommendation has been filed on November 27, 2017

Any party having Objections to the Report and Recommendation and/or order shall, not later than December 12, 2017 , file and serve a written statement of Objections with points and authorities in support thereof before the Honorable Andrew J. Wistrich, U.S. Magistrate Judge. A party may respond to another party's Objections within 14 days after being served with a copy of the Objections.

Failure to object within the time limit specified shall be deemed a consent to any proposed findings of fact. Upon receipt of Objections and any Response thereto, or upon expiration of the time for filing Objections or a Response, the case will be submitted to the District Judge for disposition. Following entry of Judgment and/or Order, all motions or other matters in the case will be considered and determined by the District Judge.

The Report and Recommendation of a Magistrate Judge is not a Final Appealable Order. A Notice of Appeal pursuant to Federal Rules of Appellate Procedure 4(a)(1) should not be filed until entry of a Judgment and/or Order by the District Judge.

CLERK, UNITED STATES DISTRICT COURT

Dated: November 27, 2017

By: Kerri Hays
Deputy Clerk

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

CHRIS ANTHONY GEORGE, **Petitioner,** **v.** **RAYMOND MADDEN,** **Respondent.**	**Case No. EDCV 16-1016-RGK(AJW)** **REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE**

Introduction

Petitioner and his two friends were accused of having sexual intercourse with an intoxicated girl in an abandoned house. Their situation was bleak. DNA found on the victim or on condoms left at the scene of the crime matched theirs. Each faced a potential prison sentence of more than twenty years.

Luckily for them, the prosecutor offered petitioner and his friends three-year sentences with half-time credits (meaning that they would be released after serving merely 18 months if they behaved themselves) in exchange for guilty pleas. Petitioner's friends jumped at the opportunity and pleaded guilty before the preliminary hearing. Although petitioner's counsel recognized that the offer was extremely

favorable (calling it "amazing," "incredible," and "too good to be true"), he inexplicably advised petitioner to reject it. Even though he believed that the case against petitioner "looked bad" and knew or should have known that petitioner had no plausible defense, petitioner's counsel never told petitioner so. Instead, he let petitioner believe that he could prevail. Relying upon his lawyer's appallingly bad advice, petitioner rejected the plea offer. Not surprisingly, he was convicted of all charges. As a result, petitioner is currently in state prison serving a sentence of twenty-one years and eight months – a term more than seven times as long as the one the prosecutor offered him. Because petitioner was deprived of the effective assistance of counsel, he is entitled to a writ of habeas corpus.

Facts[1]

Petitioner, Chaz MacFalling, and Ural Gamble were charged with having sexual intercourse with an intoxicated person and committing lewd acts with a person under the age of 14.[2] It was alleged that the three were active participants in a criminal street gang, and that the crimes were committed for the benefit of or at the direction of that criminal street gang. The charges carried a potential prison term of more than twenty years. [Clerk's Transcript ("CT") at 1-2]. See Cal. Penal Code §§ 261(a), 288(a), 186.22(a)].

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[1] The following factual summary is based upon the Court's independent review of the state court record and evidence presented during the evidentiary hearing held in this Court on July 18, 2017, including the demeanor of the witnesses while they testified in this Court. This summary, together with the Court's analysis of the merits of petitioner's claims, reflects the Court's findings of fact. See generally Johnson v. Finn, 665 F.3d 1063, 1066 (9th Cir. 2011).

[2] Petitioner was eighteen years old at the time of the crime.

On June 26, 2012, petitioner's family retained Sean Davitt to represent petitioner.[3] The initial retainer of $6,300 was limited to negotiating a settlement prior to the preliminary hearing. [Evidentiary Hearing Transcript ("EHT") at 77-78; Petitioner's Exhibit ("Ex.") 1]. An investigator from Davitt's law firm interviewed petitioner on June 26, 2012. The investigator learned that a used condom collected at the scene of the crime had been found to contain DNA from both petitioner and the victim. The investigator also learned that petitioner was a registered gang member. [Petitioner's Ex. 23 (Davitt's case file) at 4-5].

On August 9, 2012, Davitt visited petitioner in jail. In his case file, Davitt noted that the "case looks bad," and that he believed that petitioner had committed the crime. [Petitioner's Ex. 23 at 17; EHT 100]. During that visit, petitioner told Davitt that he was willing to serve three to five years in prison, but that he did not want to have to register as a sex offender. [Petitioner's Ex. 23 at 17; Docket No. ("Dkt.") 32-2 (Declaration of Chris George)[4] at 1-3]. Davitt visited petitioner again on September 10, 2012. Davitt's notes reflect that petitioner was "not happy," that the case "prob [sic] needs trial," but that petitioner's family "probably can't afford trial." [Petitioner's Ex. 23 at 16].

On approximately October 16, 2012, the prosecution made a plea offer.[5] The offer allowed petitioner and his co-defendants to plead

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[3] The retainer agreement was between petitioner and the law firm Earl Carter & Associates, Sean Davitt's employer.

[4] At the evidentiary hearing, direct testimony was presented by declaration.

[5] The notation in Davitt's case file refers to this as a "new offer," but there is no evidence of an earlier offer in the record.

guilty to a violation of California Penal Code 261(a)(3) in exchange for a three-year sentence. A conviction under section 261(a)(3) requires registration as a sex offender. [Petitioner's Ex. 23 at 16; Dkt. 32-2 at 1].

Before the offer was made, Davitt had been provided with a report reflecting the results of DNA tests. The report stated that DNA matching both petitioner and the victim was found on a condom left in the abandoned house. [See EHT 84-84, 86-87]. In addition, Davitt's file was replete with evidence that petitioner was a gang member, including the facts that petitioner "self-admitted" to being a gang member during a jail classification interview on February 9, 2011, and that he pleaded guilty to an offense that required him to register as a gang member on March 8, 2011. [Petitioner's Ex. 11 at 6; EHT 94-96]. Davitt also knew that petitioner did not have an alibi and that "a lot of evidence was pointing" to his guilt. [Petitioner's Ex. 23 at 17; EHT 98-100, 103-104]. Considering the severity of charges, the strength of the prosecution's evidence, the length of the potential sentence, and the absence of any apparently viable defense, the offer was extremely favorable to the defendants, including petitioner. [See EHT 42 (Graham Donath, co-defendant MacFalling's counsel, described the deal as "shockingly good"); EHT 120 (Davitt described the offer as "an amazing deal, unheard of in Riverside County with these charges"); EHT 131 (Davitt testified, "It was an amazing deal. Incredible.")]. In fact, in Davitt's opinion, the offer was so favorable that it caused him to suspect that there was a problem with the prosecution's case. [EHT 93 (Davitt testified that the offer was "too good to be true"); EHT 82 (Davitt testified "to have a case with these types of allegations, yet an offer of a non-strike, three-year deal, seemed, at

a minimum, very suspicious")].

Petitioner, who learned of the offer when he overheard MacFalling and Donath discussing it, asked Davitt about it. Davitt confirmed that there was "a three-year deal on the table." [Dkt. 32-2 at 1]. The offer included a sex offender registration requirement. Petitioner told Davitt that did not want to have to register as a sex offender. [Dkt. 31 at 12 (Declaration of Sean Davitt signed June 29, 2017 ("Davitt's June 29, 2017 Declaration")].

Davitt advised petitioner not to accept the offer, and told petitioner and petitioner's family members that he believed he could "beat the charges." [Dkt. 32-2 at 1; Dkt. 31 at 3 (Declaration of Carol King); Dkt. 31 at 6 (Declaration of Tashima George); Dkt. 31 at 8 (Declaration of Ural Gamble); Dkt. 32-2 at 1-3 (Declaration of Chris George); EHT 23-25, 70-71, 78-79].[6] Davitt explained that there was a

[6] The Court's finding of fact regarding Davitt's advice is based upon the credible and consistent testimony of petitioner, petitioner's mother (Carol King), petitioner's sister (Tashima George), and co-defendant Gamble. Among other things, Davitt told King and Tashima that the DNA was "contaminated." [Dkt. 31 at 3; Dkt. 31 at 6]. As Tashima put it: "Mr. Davitt feels like he has a strong enough case to win and that [petitioner] should go all the way and not take the deal." [Dkt. 31 at 6]. Their testimony is further corroborated by petitioner's October 2014 letter to Davitt, in which he asks Davitt for a declaration regarding his advice, and states, "you advised me not to take the deal, which ultimately led the court to give me 18 years, based on your professional advice." [Petitioner's Exs. 2-4; EHT 113]. Davitt never responded to petitioner's request. [EHT 113]. In April 2015, petitioner made a second request for a declaration stating that Davitt advised him "to go to trial", to which Davitt also did not respond. [Petitioner's Ex. 19]. Likewise, after the Court issued a report and recommendation based upon petitioner's then-uncontroverted sworn statement about Davitt's advice, Davitt signed two declarations responding to petitioner's claim. In his declarations, Davitt states that he read the report and recommendation and understood that the issue was whether he advised petitioner to reject the offer. Nevertheless, as he concedes, neither declaration disputed petitioner's allegation that Davitt advised petitioner to reject the offer. [EHT 104-105; Respondent's Ex. 100 (Declaration of Sean Davitt signed March 21, 2017); Dkt. 31 at 12-14 (Davitt's June 29, 2017 Declaration)]. It was not until the evidentiary hearing that Davitt for the first time disputed petitioner's assertion that he had advised

chance that petitioner could prevail at trial because (1) there was a potential "good issue" regarding "cross-contamination" of the DNA evidence and (2) the prosecution might be unable to produce the victim for trial. [EHT 71, 82-83, 94, 121].

So, on October 24, 2012, petitioner took his counsel's advice and proceeded to his preliminary hearing. Meanwhile, his co-defendants MacFalling and Gamble were in another courtroom pleading guilty and receiving three-year prison sentences. [Petitioner's Exs. 8 & 9; Dkt. 32-2 at 2; CT 12-13, 17, 115]. As expected, the prosecution prevailed at petitioner's preliminary hearing, and petitioner's case was scheduled for trial. [CT 12-13, 81-82, 89]. Immediately after the preliminary hearing, Davitt made a note in his file that he "need[ed] to get retained and get [petitioner] better than 3 w/ ½ + PC 290."[7] [Petitioner's Ex. 23 at 15; EHT 89]. Regarding the retainer, Davitt noted: "8k + 2k for DNA expert." [Petitioner's Ex. 23 at 15; EHT 89].

On November 8, 2012, petitioner's family retained Davitt for what he called "the second phase," by which he meant representation for the purpose of negotiations or trial after the preliminary hearing. [See Petitioner's Ex. 23 at 15; EHT 78]. After meeting with them, Davitt wrote a note in his file: "I need to deliver on this case. I want to repeat, there is a problem with the DA's case, and I need to figure out what it is." [Petitioner's Ex. 23 at 15; EHT 91].

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petitioner to reject the offer. Davitt's testimony is discussed later in this report.

[7] "With ½" refers to the availability of one-for-one credits, meaning that the sentence could be served in half the time. "PC 290" refers to California Penal Code section 290 ("Sex Offender Registration Act"), which requires persons convicted of specific offenses to register with the law enforcement agency in the jurisdiction in which the person resides.

The only other notation regarding a DNA expert was made on November 28, 2012, when Davitt wrote: "Let's see what a prelim analysis of a possible DNA match w/cost." [Petitioner's Ex. 23 at 14]. Davitt, however, never hired or consulted a DNA expert. [EHT 85].[8]

On December 21, 2012, Davitt filed a motion to suppress the condom with petitioner's DNA on it. He argued that the search was invalid because the officers had not obtained a warrant. [CT 92-97]. Davitt asserted that petitioner had standing to raise a Fourth Amendment claim because the home had belonged to a neighbor of petitioner's friend, and that after the neighbor was evicted by the bank, petitioner and his friend had used the home as a "crash pad and party house." [Reporter's Transcript on Appeal ("RT") 3]. Davitt also argued that petitioner had an expectation of privacy in the house because he had "left personal items there, including potentially condoms." [RT 5].

On April 2, 2013, the trial court denied the motion, explaining that petitioner had no expectation of privacy in the house. Petitioner did not live in the house, and he was not a guest of anyone who had a possessory interest in the house. Instead, the house was vacant and abandoned. There was a notice posted in front of the house informing persons to call a bank or real estate company with questions concerning the property. The fence was knocked down, the doors were unlocked, and the back sliding glass door was shattered, allowing access to anyone who wanted to enter. An inoperable windowless car was

[8] According to Davitt, he did not have authority to set the retainer fee. "They [whoever possessed such authority at his law firm] came back and said that the family could afford $10,000 and that's what we were charging them, so there wasn't any room for [a] DNA [expert]." [EHT 90-91, 132].

parked in the driveway. There was no answer when the officers knocked on the door. Inside, there was no furniture, clothing, beds, food, or mail. The trial court concluded that petitioner lacked standing to challenge the search of the house. [RT 1-23; CT 124-125].

On March 1, 2013, another attorney appeared for Davitt and obtained a continuance. [CT 103]. According to a notation in Davitt's file made by the other attorney on that date, petitioner said that he wanted "a deal" and did not want to go to trial. [Petitioner's Ex. 23 at 13]. As of that date, the prosecution's three-year offer remained open. [EHT 80-81; Petitioner's Ex. 23 at 13]. On March 7, 2013, Davitt wrote that he needed to visit petitioner in jail to explain the "options" – one of which was to accept the "three-year with half" offer. [Petitioner's Ex. 23 at 13]. There is no evidence – either in Davitt's file or elsewhere – that Davitt or any other lawyer visited petitioner after March 1, 2013. Further, nothing in the record – including Davitt's file – indicates that Davitt ever had any further discussion with petitioner about the offer.

Apparently, without any further discussion about the outstanding offer, petitioner proceeded to trial, where the following evidence was presented:

> On November 19, 2010, Jane Doe, age 13, went to a park to hang out and drink Alize, an alcoholic beverage, with some friends. Jane Doe drank an entire bottle of Alize. At some point, some African–American males met up with Jane Doe and her friends at the park. These males invited Jane Doe and her group to go to a house. Jane Doe was so intoxicated that she could not recall what happened at that house after she entered and sat on the floor. Her best estimate is that

the group went to the house at some time around or before midnight.

The next morning, Jane Doe woke up vomiting. She was upstairs in the house to which she had been taken the night before, but her shoes and pants had been removed. Jane Doe put her pants on and walked outside to look for help, although she could barely walk. She walked down the street and knocked on the door of a house. The occupant of the house to which Jane Doe went contacted the Riverside Sheriff's Office to report a possible rape. Jane Doe was transported to a county hospital.

At the hospital, Jane Doe was examined by a Sexual Assault Response Team (SART) nurse. The nurse noted dried secretions on Jane Doe's pants and that she complained of tenderness. Jane Doe also complained of tenderness to the right side of her head, explaining it felt like she had been hit. The nurse found an abrasion and a laceration at the six o'clock position of Jane Doe's vaginal opening. The nurse collected swabs from Jane Doe's external genitalia, as well as from secretions found in the vaginal vault. The nurse also took a blood sample.

Jane Doe's blood was tested by a criminalist at the Department of Justice (DOJ) and was found to contain 0.04 percent alcohol. Using the rate of elimination of alcohol, the criminalist determined that at midnight, Jane Doe's blood alcohol would have been 0.32 percent, and that 10:00 p.m., it would have been 0.36 percent. Some people have physical impairment or even lose consciousness at 0.23

percent. At 0.36 percent, a person would experience lack of motor control, vision issues, and some people have fallen into a coma at that level.

On November 23, 2010, Sergeant Flores and another detective from the sheriff's office interviewed Jane Doe at her residence. The detectives asked if they could take her down the street to a house. Jane Doe identified the residence where the rape occurred. The next day, Flores and another detective went back to the house. No one responded when the knocked at the door, so they entered the house, which was vacant. Inside, to the side of the door, the detectives saw a condom and searched the rest of the house. Upstairs, the detectives found a white tube sock and condom wrappers in the hallway, and in the southeast bedroom of the house, they found sneakers that matched the description of Jane Doe's shoes. In one bathroom, they found a used condom, and in the toilet tank in the master bedroom, they found two condoms and a condom wrapper.

The condoms found in the back of the toilet were taken as evidence and tested. The Riverside County Sheriff's Department forensic technician found the DNA of Ural Gamble in one of the condoms found in the back of the toilet tank, and found the DNA of Chaz MacFalling on the vulva swab taken during the SART examination of Jane Doe. A Department of Justice criminalist examined another condom and found DNA which matched a buccal swab taken from [petitioner], as well as DNA from Ural Gamble. The interior and exterior of the other condom taken from the toilet tank had female DNA

matching Jane Doe's, and male DNA matching [petitioner's]. [Lodged Document ("LD") 1 (Opinion of California Court of Appeal) at 19-21 (footnote omitted); see RT 47-65, 78-100, 108-120, 125-136, 161-197].

In addition, Deputy Sheriff Justin Hill, a gang expert, testified about two Moreno Valley gangs, the Edgemont Criminals and Dorner Block. The California Court of Appeal summarized the gang evidence as follows:

> Members of Edgemont–Dorner Block may have a tattoo of the letter "D" for the Detroit Tigers, the Cleveland Indian image, for the intersection of Dorner and Indian Streets in Moreno Valley that was a founding point of the Dorner Block gang, or the letter "A" with a halo, the icon of the Anaheim Angels, which stands for Adrian and Allies, another intersection in Moreno Valley. They may also have a tattoo of the letters "MOB," which stands for Mont or Block, two gangs.
>
> The expert testified that members of Edgemont–Dorner Block wear the color red and use three different hand signs, because the gang was an amalgamation of three different gangs. One hand sign signifies the letter "E" for Edgemont, another signifies the letter "D" for Dorner Block, and the third resembles the letter "Y" for the third gang that came together with Edgemont–Dorner Block. One photograph of [petitioner] showed him giving the "E" sign for Edgemont, while another photograph showed defendant with two other gang members flashing a "D" with his right hand, and an "E" with his left hand.

> The expert testified that [petitioner] admitted membership in the Edgemont–Dorner Block gang in 2007, 2008 and 2011. Petitioner was documented approximately 15 times in Edgemont's territory and had a tattoo of the Angel's "A" as well as "MOB." Ural Gamble was an admitted member of Edgemont–Dorner Block, and based on tattoos and an arrest while in the company of Gamble and another gang member, the expert formed the opinion that Chaz MacFalling was also a member of Edgemont–Dorner Block.
>
> In the expert's opinion, petitioner was an active gang member at the time of the rape. The expert was also of the opinion that the rape of an intoxicated girl by three gang members is a gang related crime, committed to promote the gang.

[LD 1 at 22-23; see RT at 203-255, 267-279].

Deputy Hill also testified that two Edgemont-Dorner gang members had been convicted of rape. He described a crime that occurred in 2000, in which three subjects were drinking in a park, and then took turns raping a female while her boyfriend watched. According to Deputy Hill, the suspects, who were identified as members of the Edgemont gang, "time[d] each other, giving each other three minutes[,] and while two of the subjects are holding down either arm, and the other one is committing the act, they're choking her and holding her arms down. And they're all doing it while the boyfriend is standing 15, 20 feet away watching." [RT 237]. Deputy Hill also described another rape that occurred in 2001, in which six members of the South Side Mafia, which he described as a gang "closely affiliated" with Dorner and Edgemont gangs, took turns raping a mentally handicapped 11-year-old

girl in a bathroom. One of the men was prosecuted and "he received 25 years, if I remember correctly." [RT 237-238]. Davitt did not contemporaneously object to this testimony. Later, however, Davitt objected on the ground that Deputy Hill's testimony about the rapes had "gone off script" because the prosecution had not previously disclosed those crimes. [RT 257-262]. He asserted that if he had known the content of Deputy Hill's testimony prior to trial, he "may have made different decisions in the case in terms of suggesting settlement or who knows what." [RT 262]. The trial court found Davitt's objection untimely and unmeritorious. [RT 261-263, 307-308].

After the prosecution rested, Davitt did not present a DNA expert or any other witness on petitioner's behalf. [RT 329; CT 146].

The jury convicted petitioner on all counts and found the gang allegations to be true. [CT 198-199, 202-206]. Petitioner initially was sentenced to state prison for a term of eighteen years and four months. [CT 247-248]. After the California Court of Appeal remanded the case to the trial court for re-sentencing, however, petitioner was sentenced to state prison for a term of twenty-one years. [Dkt. 4-3 at 13].

The California Court of Appeal affirmed petitioner's conviction on November 14, 2014. [LD 1]. Petitioner filed habeas corpus petitions in the California Superior Court, the California Court of Appeal, and the California Supreme Court, all of which were denied. [LDs 4, 6, 8].

Petitioner, proceeding without counsel, filed a petition for a writ of habeas corpus in this Court. The Court issued a report and recommendation recommending that the petition be granted. After respondent objected and argued that an evidentiary hearing should be conducted, the Court appointed counsel for petitioner and conducted an

evidentiary hearing. Subsequently, the parties filed post-hearing briefs. [Dkt. 48, 50, 56].[9]

Petitioner's Contentions

Petitioner alleges that Davitt provided ineffective assistance of counsel by advising petitioner to reject a plea offer that would have resulted in a three-year prison term.[10] [Dkt. 1 at 17-28].

Standard of Review

Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody unless the state court's adjudication of a claim was contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). This Court previously concluded that considering only the evidence before the sate court, its adjudication of petitioner's claim amounted to un unreasonable application of clearly established federal law – specifically, the holdings of Lafler v. Cooper, 566 U.S. 156 (2012) and Strickland v. Arizona, 466 U.S. 668 (1984). [See Dkt. 14 at 27, 29-30]. Respondent apparently concedes that the Court's determination was correct. [See Dkt. 50 at 1]. Accordingly, review of petitioner's claim is de novo, and the Court properly considers evidence presented for the first time in federal court. See Hurles v. Ryan, 752 F.3d 768, 778 (9th Cir.) ("If we determine, considering only the evidence before

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[9] Pursuant to a protective order issued with respect to certain attorney-client privileged information, portions of the record (such as Davitt's case file) have been designated confidential and filed under seal. [see Dkt. 35].

[10] Petitioner divides his allegations into four claims for relief. However, the first three claims are properly construed as presenting a single claim of ineffective assistance of counsel. The petition also raises a claim that petitioner was mentally incompetent. [Dkt. 1 at 28-30]. Because the Court concludes that petitioner is entitled to relief on the basis of his ineffective assistance of counsel claim, it does not reach petitioner's remaining claim.

the state court, that the adjudication of a claim on the merits resulted in a decision contrary to or involving an unreasonable application of clearly established federal law, or that the state court's decision was based on an unreasonable determination of the facts, we evaluate the claim de novo, and we may consider evidence properly presented for the first time in federal court."), cert. denied, 135 S.Ct. 710 (2014) (citing Cullen v. Pinholster, 563 U.S. 170, 185 (2011)).

Discussion

"[C]riminal justice today is for the most part a system of pleas, not a system of trials." Lafler, 566 U.S. at 170 ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). Thus, the Sixth Amendment right to the effective assistance of counsel applies with equal force to the plea bargain process. Lafler, 566 U.S. at 169-170; Missouri v. Frye, 566 U.S. 133, 143-144 (2012); Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). Accordingly, "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." Lafler, 566 U.S. at 168. A defendant is deprived of the effective assistance of counsel not only by affirmative misadvice, but also when his attorney fails in his "critical obligation" to "advise the client of 'the advantages and disadvantages of a plea agreement.'" Padilla v. Kentucky, 559 U.S. 356, 370 (2010) (quoting Libretti v. United States, 516 U.S. 29, 50-51 (1995)); see also Von Moltke v. Gillies, 332 U.S. 708, 721 (1948) ("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what

plea should be entered.").

Ineffective assistance of counsel claims in the plea bargain context, like other ineffective assistance claims, are governed by the two-part test set forth in Strickland. Frye, 566 U.S. at 140. First, petitioner must prove that his attorney's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-688. Second, petitioner must show that he was prejudiced by counsel's deficient performance. Strickland, 466 U.S. at 687.

Counsel's performance was deficient

Obviously, the offer given to petitioner was extremely favorable. If petitioner had accepted it, he would have received a three-year prison term in exchange for pleading guilty to a violation of California Penal Code § 261(a)(1). [Petitioner's Ex. 23 at 16; Petitioner's Exs. 8-9]. Further, petitioner would have been eligible to earn "half-time" credits, so he reasonably could have expected to serve merely eighteen months in prison. See Cal. Penal Code § 4019.[11]

On the other hand, if convicted after a trial, petitioner faced a prison term of more than twenty years, and would have been required to serve at least 85% of that term. See Cal. Penal Code § 2933.1.

Furthermore, petitioner had no viable defense. Donath, who

[11] In fact, petitioner reasonably could have expected to be released from prison in less than eighteen months because by the time of the offer in October, 2012, he already had served four months, and assuming good conduct, he would have accumulated an additional four months of sentence credits. [See Dkt. 1-1 at 20 (indicating that petitioner had been in custody since June 13, 2012); see also Dkt. 1 at 41-42 (indicating that at the time of sentencing, MacFalling was entitled to 133 days actual time served credit plus 132 days of good conduct credit); Dkt. 1 at 44-45 (indicating that Gamble was entitled to 207 days of actual time served credit plus 206 days of good conduct credit)]. By the time of trial, petitioner had been incarcerated for nearly ten months, so if he had accepted the offer then, he could have completed his sentence approximately eight months later.

represented petitioner's co-defendant MacFalling, accurately summed up the case as follows:

> [W]e had, you know, a young woman who woke up basically in an abandoned house, surrounded by used condoms. The case had little to no jury appeal in any way, shape or form, and absent a direct challenge to the science involved, it wasn't defensible, in my opinion.

[EHT 43].

Even Davitt recognized that the case "looked bad" and conceded that the odds were against petitioner. [EHT 122]. Nevertheless, Davitt advised petitioner to reject the offer and take his chances at trial.

Respondent argues that Davitt reasonably believed there was a chance of success because (a) "there were possible problems with the DNA evidence" because "cross-contamination could raise some doubt" and (b) there was some question about whether the victim would be available for trial. [Dkt. 50 at 6]. Neither of these considerations would have justified the risk to which Davitt subjected petitioner.

The DNA evidence strongly implicated petitioner, and Davitt, who had failed to consult an expert, had no legitimate basis for believing that "cross-contamination" was a plausible argument. Rather, Davitt's purported attack on the reliability of the prosecution's DNA evidence was both legally and factually unsupported.

Similarly, the possibility that the victim might not appear for trial was based upon little more than hope and conjecture. Davitt's "concern" that the victim might not appear to testify was based upon her absence at the preliminary hearing and on information that she was a runaway who had been living on the street and might have left the state. [EHT 129-130]. References to the victim being a "runaway,"

however, appeared in the initial rape investigation reports from November 2010 (and are found in statements made by the victim and her mother) while the more current reports revealed that the victim was available and cooperative with law enforcement. [See Petitioner's Ex. 23 at 352, 387, 425-442]. Although the victim's absence at the preliminary hearing might suggest that she had lost interest in prosecuting the case or was no longer in contact with the prosecution, her presence was not required.[12] Moreover, competent counsel would not advise a client to reject an extremely favorable offer based upon a hope that the victim would not testify, particularly when the prosecutor represented that the victim was staying in a group home and would appear for trial. [See Dkt. 31 at 12-13; EHT 84, 131]. Inexplicably, based upon his unfounded skepticism about the prosecutor's veracity, and without conducting any investigation or attempting to contact the victim [EHT 43], Davitt maintained his belief that the victim might not appear despite the prosecutor's assurances to the contrary. Thus, neither of the issues identified by respondent justified advising petitioner that there was a plausible path to acquittal.[13]

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[12] As Davitt acknowledged, California law permits consideration of hearsay evidence and relieves crime victims of their obligation to testify at a preliminary hearing. [EHT 129].

[13] In his answer, respondent argued that Davitt reasonably could have advised petitioner to reject the offer based upon a belief that his suppression motion would prevail. Since the evidentiary hearing, during which Davitt did not purport to rely upon the suppression motion as a reason for his choices about how to advise petitioner, respondent has not reiterated that argument. Nevertheless, and as discussed in the original report and recommendation, as the trial court found, petitioner had no right to be in the abandoned house, let alone a legitimate expectation of privacy in the house, so the motion was clearly unmeritorious. [See Dkt. 14 at 15-17; RT 1-2]. No lawyer who adequately researched the law would have expected the suppression motion to succeed. See, e.g., United States v. $40,955.00 in U.S. Currency, 554 F.3d 752, 757-758 (9th Cir.) (holding that a daughter who did not own the house or live in it at the

The absence of any potential defense to the sex offense charges is borne out by the record, which reveals that Davitt was unable to present an affirmative defense or point to anything that might constitute reasonable doubt. For example, Davitt waived opening statement and presented no evidence on behalf of petitioner. [See RT 324, 329]. He did not cross-examine most of the prosecution witnesses. [See, e.g., RT 45, 65, 102, 120, 141]. Other than obtaining a vague concession that DNA may "transfer" [see RT 201-202], Davitt elicited no favorable testimony from Meyers, the criminalist who testified about the DNA match, and he was unable to impeach Meyers's credibility or the reliability of her findings. Likewise, Davitt's closing argument with respect to the sex offense charges confirms the absence of any potentially meritorious defense. Davitt argued that the fact that petitioner's DNA was found on a condom in the back of toilet full of water was insufficient to show that petitioner had sex with the victim because the condom "had no date on it. It had no expiration. There's no evidence in the case of whether that condom was fresh, had just recently been used." [RT 368]. Davitt suggested that petitioner's DNA somehow could have been transferred to the condom from the toilet water. [RT 372-373]. If Davitt intended to argue that it was possible that the DNA of both petitioner and the victim could have ended up on a condom in the toilet at the scene of the crime even though petitioner had not engaged in sexual activity with the victim, he

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time of the search lacked an expectation of privacy and could not challenge the legality of the search of a bedroom in the house, even though she had free access and a key to the house, and purportedly stored in a bedroom safe items that were seized during the search), cert. denied, 558 U.S. 895 (2009); see generally People v. Thompson, 43 Cal. App. 4th 1265, 1269-1270 (1996) (discussing factors relevant to determining whether an individual has a legitimate expectation of privacy for purposes of the Fourth Amendment).

failed to explain how that could have occurred or to suggest why it was a realistic possibility. Simply put, there was no plausible innocent explanation for how petitioner's DNA could have been commingled with the victim's DNA, so testimony that DNA generally "transfers" could not have constituted a defense with any reasonable likelihood of success.

Last, respondent contends that there was a legitimate argument about the prosecutor's ability to prove the gang allegations. [Dkt. 50 at 6-7]. According to respondent, "the gang evidence was uncertain because the law was somewhat vague." [Dkt. 50 at 3; EHT 108 (Davitt's testimony that: "I didn't foresee that Mr. George would be found guilty of raping a girl for gang activity [sic]. I just didn't think that was going to happen.")].

However, contrary to respondent's argument, the law was clear: A gang expert's opinion that a rape committed by three gang members was committed for the benefit of the gang was sufficient to support a gang enhancement. See People v. Albillar, 51 Cal. 4th 47, 61-63 (2010) (holding that expert opinion that particular criminal conduct benefitted a gang by enhancing its reputation for viciousness is sufficient to support a finding that a rape was committed for the benefit of a criminal street gang). More importantly, even if there were some legal or factual weakness in the gang enhancement allegations, and even if Davitt had been able to secure an acquittal on those allegations, that would not have affected the sex offense charges, so petitioner still would have been sentenced to prison for a term longer than three years and also would have been required to register as a sex offender.

Whatever weaknesses the gang allegations might have possessed,

the detrimental effect of gang evidence on petitioner's case is indisputable. Reasonable defense counsel should have anticipated that proceeding to trial on the gang enhancement allegations entailed the additional disadvantage that the jury would be presented with potentially inflammatory evidence like Deputy Hill's expert testimony, during which he opined repeatedly and without qualification that the rape was at the direction of, for the benefit of, and in association with a criminal street gang. [See RT 235-238, 272-279; People v. Carter, 30 Cal.4th 1166, 1194 (2003) (recognizing that evidence of a defendant's gang membership, even when relevant to motive or identity, creates a risk the jury will improperly infer that the defendant has a criminal disposition and is therefore guilty of the charged offense)]. Davitt belatedly acknowledged the devastating impact of the gang evidence when he told the trial court that he might have advised petitioner differently about "settlement" if he had been aware of Deputy Hill's testimony. [See RT 262]. However, as Donath testified, Deputy Hill's testimony was typical of gang expert testimony [EHT 44-45], and should not have taken Davitt by surprise.

For all of these reasons, respondent's suggestion that Davitt's advice was reasonable is unpersuasive. To the contrary, competent counsel could not reasonably have advised petitioner to pass up the extremely favorable offer based upon a conclusion petitioner had a realistic chance of acquittal. Petitioner had everything to gain by accepting the offer and almost nothing to lose. The only way that petitioner could have done better than the three years with half-time and a sex registration requirement would have been if Davitt had secured an outright acquittal. The chances that the charges would be dropped after a successful motion to suppress were nil, the

possibility that the victim would not appear at trial was based upon speculation and flatly contradicted by the prosecutor, and the argument that the DNA evidence was not completely damning lacked any support in law or fact. Simply put, there was no reasonable likelihood that petitioner could have fared better by proceeding to trial than by accepting the offer.

Of course, review of counsel's performance is deferential, Strickland, 466 U.S. at 689, and "[a]n erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance." Lafler, 566 U.S. at 174; see Turner v. Calderon, 281 F.3d 851, 881 (9th Cir. 2002) (acknowledging that defense counsel is not required to accurately predict the outcome of a case). But this is not a case of mere erroneous prediction. Rather, in light of the record – the strength of the prosecution's case, the absence of any arguably meritorious defense, and the extreme disparity between the lengthy prison term petitioner faced if convicted and the eighteen months he would likely serve under the favorable offer – reasonably competent counsel could not have recommended that petitioner reject the offer and take his chances at trial. See, e.g., United States v. Soto-Lopez, 475 Fed. App'x 144, 146 (9th Cir. 2012) (finding that counsel's advice to reject a plea amounted to deficient performance where counsel "had little basis for recommending that Soto-Lopez reject the fast-track offer beyond a desire to persuade Soto-Lopez to retain his services in place of the Federal Defenders," noting that there was no evidence that trial counsel had any experience with persuading prosecutors to improve plea agreements, no indication that counsel knew of any legal defense that the defendant could present at trial, and no evidence that when he advised the defendant to reject

the plea offer trial counsel reasonably could have expected the government to make a more favorable plea offer).

Even crediting Davitt's testimony regarding his advice to petitioner, his performance was deficient. Davitt admitted that he never offered petitioner his independent judgment about the plea offer. Instead, Davitt testified that he simply informed petitioner about the terms of the offer and "what his max exposure was", and then told him, "if you take a deal, it's certain registration; if you don't take a deal, maybe there's a possibility that the case goes away for the number of reasons that I mentioned." [EHT 94, 121-122, 131]. Indeed, Davitt never advised petitioner that in his opinion the offer was an amazingly favorable deal achieving an outcome that he would almost certainly not receive at trial. He never advised petitioner that in his professional opinion, the odds were against petitioner prevailing on the sex offense charges at trial. He never told petitioner that although petitioner's desire to avoid sex offender registration was understandable, in his opinion, rejecting the plea based upon this insistence was not reasonable. [See EHT 122]. Instead, he merely relayed the offer to petitioner, pointed to potential "weaknesses" in the prosecution's case, and let petitioner believe that there was a real hope of prevailing at trial. While Davitt may have been responding to petitioner's desire to avoid sex offender registration, he utterly failed to inform petitioner of the likelihood that a trial would result in petitioner receiving a significantly longer prison sentence **and** petitioner would still be required to register as a sex offender.

Competent counsel would have told petitioner that he was risking a very substantial sentence for a very small chance at winning. See

Dkt. 31 at 9 (Donath's opinion that "this case did not seem like a 'triable case'" so "you would have to risk a very substantial sentence for a very small chance of winning", and that considering the nature of the case and the strength of the evidence, accepting the three-year offer was "the only route worth taking").

Therefore, even if the testimony of petitioner and his family was rejected, and Davitt's testimony was accepted, Davitt's lack of advice regarding the risks and benefits of the offer fell outside the range of reasonable professional assistance and deprived petitioner of the ability to make an informed choice. See United States v. Leonti, 326 F.3d 1111, 1117 (9th Cir. 2003)("If it is ineffective assistance to fail to inform a client of a plea bargain, it is equally ineffective to fail to advise a client to enter a plea bargain when it is clearly in the client's best interest."); Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002) ("A defendant has the right to make a reasonably informed decision whether to accept a plea offer."); Boria v. Keane, 99 F.3d 492, 498 (2d Cir. 1996) (stating that counsel is constitutionally obligated to provide professional advice about a plea offer, and finding that trial counsel provided ineffective assistance when he "never gave his client any advice or suggestion as to how to deal with the People's offered plea bargain"); United States v. Wilson, 719 F. Supp. 2d 1260, 1271 (D. Or. 2010) (finding that trial counsel provided ineffective assistance in the plea context where the evidence against the defendant was strong, there were no viable defenses, and the defendant was facing a much longer sentence than the six year term offered by the prosecution, yet trial counsel failed to recommend that he aggressively pursue a plea agreement); see also ABA Standards For Criminal Justice: Defense Function § 4-5.1 (in advising

the accused, it is proper for counsel to "use reasonable persuasion to guide the client to a sound decision")[14]; Anthony Amsterdam, 1 Trial Manual For the Defense of Criminal Cases 5, § 201 (5th ed. 1988) ("[O]ften counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client [to plead guilty]."); Steven Zeidman, To Plead or Not to Plead: Effective Assistance & Client-Centered Counseling, 39 B.C. L. Rev. 841, 891-892 & n. 320 (1998) (discussing Boria and defense counsel's obligation to engage in "reasonable persuasion"). [See EHT 50-52 (Donath's testimony that in his professional opinion, considering "the potential exposure versus what was being offered," recommending acceptance of the offer was the only reasonable tactic and that, in general, when a client is making an unreasonable decision to reject a plea, he often shows the client the prosecution's evidence so that he or she understands the strength of the case and the severity of the risk and can make a properly informed decision)].[15]

Thus, regardless of whether petitioner (and his family) or Davitt is believed, Davitt's performance with regard to the plea offer fell outside the range of reasonable professional assistance.

Petitioner was prejudiced

In order to demonstrate prejudice, petitioner must show that "the

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[14] ABA standards can be "important guides" in assessing counsel's performance. See Frye, 466 U.S. at 566 U.S. at 145.

[15] At the time he testified at the evidentiary hearing, Donath had practiced criminal law for approximately ten years, had represented thousands of criminal defendants, about forty of which had gone to trial. [EHT 37]. Therefore, his opinion regarding professional norms is admissible as expert testimony. See Wiggins v. Smith, 539 U.S. 510, 524 (2003) (discussing testimony of an attorney expert on the "professional standards that prevailed in Maryland in 1989"); Allison v. Ayers,2008 WL 5274580, at *1 (C.D. Cal. Dec. 17, 2008) (considering expert testimony regarding prevailing professional norms).

outcome of the plea process would have been different with competent advice." Lafler, 566 U.S. at 163. When a defendant rejects a plea offer based on counsel's deficient advice, prejudice is demonstrated by showing that: (1) a reasonable probability that he would have accepted the plea offer; (2) the plea would have been entered without the prosecutor canceling it or the trial court refusing to accept it; and (3) the plea offer contained a sentence more favorable than the sentence actually imposed. Lafler, 566 U.S. at 164; Frye, 566 U.S. at 147-148.

To the extent that respondent argues that petitioner was adamantly opposed to pleading guilty to any deal requiring sex offender registration, the Court finds to the contrary. Petitioner credibly testified that he did not want to have to register as a sex offender, but that if he had been told "how bad the evidence was," what sentence he was likely to receive after trial, and the probability that he would still have to register as a sex offender after trial, he would have accepted the offer. [Dkt. 32-2 at 2; EHT 69-71]. In light of the great disparity between the terms of the offer and the potential sentence after trial, the Court credits petitioner's testimony that he would have accepted the deal, as his two co-defendants did.[16] See Alvernaz v. Ratelle, 831 F. Supp. 790, 794 (S.D. Cal. 1993) (concluding that the petitioner's assertion that he would have accepted a plea offer if he had been adequately advised was credible because, among other things, a rational defendant would have

[16] During the evidentiary hearing, Davitt suggested that petitioner had a better chance of prevailing at trial than his co-defendants. [EHT 124]. Contrary to Davitt's testimony, the strength of the evidence against the three co-defendants was not distinguishable. For example, like petitioner, Gamble's DNA was found in a condom in the back of the toilet. [RT 142, 179], and like petitioner, the victim was unable to identify MacFalling. [Petitioner's Ex. 23 at 441].

accepted the offer if he had known the actual risk he faced by proceeding to trial).[17]

Petitioner was just 20 years old at the time he was offered the plea and he suffered from significant mental deficiencies. [Petitioner's Exs. 6-7].[18] Indeed, Davitt testified that petitioner had difficulty understanding what was happening in court. [Dkt. 31 at 14 ("it did appear to me that he acted somewhat immature and did not grasp all the leal concepts I presented to him during my representation. ... I often had to repeat myself or restate the concept in different terms. There were many times in court, after I had explained where we were procedurally in the case, where he would turn to me and ask what was happening as if I had not said anything at all to him.")]. These facts made it even more important than usual that he receive sound guidance from counsel. If Davitt had provided petitioner with reasonably competent advice, it is likely that petitioner would have followed it. See Bedolla Garcia v. Runnels, 2004 WL 1465696, at *4 (N.D. Cal. June 24, 2004) (granting habeas corpus relief based upon ineffective assistance in the plea context, and

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[17] As further evidence that he was amenable to pleading guilty in general, petitioner points out that he had done so in a previous felony case after his attorney in that case explained that it made sense to accept a plea offer. [Dkt. 32-2 at 3].

[18] The record reveals that petitioner, who was eighteen years old at the time of the charged offenses, had a documented history of significant cognitive disability. For example, tests performed by the Moreno Valley Unified School District and the Department of Corrections and Rehabilitation show that petitioner – who had been diagnosed with an auditory processing disorder and suffered from deficient visual-motor integration – possessed the reading and language skills of a first or second grader. [See Dkt. 1 at 49; Dkt. 1-2 at 9-19; Petitioner's Exs. 6-7; EHT 69]. By almost every measure – including listening comprehension, reading comprehension, auditory memory, and problem solving – petitioner functions in the bottom tenth percentile or in the "low," "deficient," or "extremely low range." [Dkt. 1-2 at 9-19].

noting "that petitioner was nineteen years-old at the time, and regardless of how strong-willed he was, it was critical for petitioner to receive counsel and advice at this stage of the litigation. Nonetheless, [counsel] did not give him the necessary advice and the information given was inaccurate."), aff'd, Garcia v. Runnels, 143 Fed. App'x 38 (9th Cir. 2005); see generally Sanchez v. Biter, 2016 WL 7638206, at *11 (C.D. Cal. Oct. 27, 2016) (noting that a 19-year old defendant "does not have the tools he needs to make an informed decision without some guidance from counsel"), report and recommendation adopted, 2017 WL 43917 (C.D. Cal. Jan. 4, 2017).

Further, in light of the fact that the trial court accepted the plea agreements in the cases of petitioner's co-defendants, who were equally culpable and otherwise indistinguishable from petitioner, there is no reason to believe that it would have refused to accept the same plea agreement in petitioner's case.

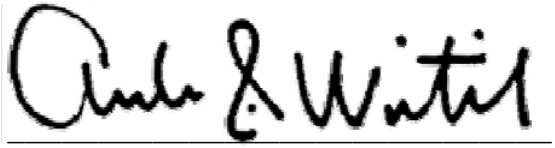
Finally, if petitioner had accepted the offer, his sentence would have been three years – eighteen years less than the sentence that was imposed. Instead, petitioner received a sentence seven times as long as those received by his similarly-situated co-defendants.

Therefore, petitioner was prejudiced by counsel's deficient advice. See Lafler, 566 U.S. at 166-168 (concluding that the petitioner was prejudiced by his counsel's deficient advice because he received a sentence three and one-half times more severe than he likely would have received by pleading guilty) and stating "the favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel).

Conclusion

It is recommended that the petition for a writ of habeas corpus be granted and that respondent be directed to release petitioner from custody and all adverse consequences of his conviction unless the State of California reinstates the three-year plea offer within sixty (60) days from the date of entry of judgment. See Lafler, 566 U.S. at 174 ("The correct remedy in these circumstances ... is to order the State to reoffer the plea agreement.").

Dated: November 20, 2017



Andrew J. Wistrich
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

CHRIS ANTHONY GEORGE, **Petitioner,** **v.** **RAYMOND MADDEN,** **Respondent.**	**Case No. CV 16-1016-RGK(AJW)** **[PROPOSED] JUDGMENT**

It is hereby adjudged that the petition for a writ of habeas corpus is **granted**. Respondent is directed to release petitioner from custody and all adverse consequences of his conviction unless the State of California reinstates the three-year plea offer within sixty (60) days from the date of entry of judgment.

Dated: _____

_____
R. Gary Klausner
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CHRIS ANTHONY GEORGE, Petitioner, **v.** **RAYMOND MADDEN,** Respondent.	EDCV 16-1016 RGK (AJW) **RESPONDENT'S CLOSING BRIEF** Judge: The Honorable Andrew J. Wistrich **REDACTED VERSION**

The Court held an evidentiary hearing in this matter on July 18, 2017. The hearing was ordered after the Court concluded that Petitioner Chris George had surmounted the relitigation bar in 28 U.S.C. § 2254(d) because he has shown that the California courts unreasonably denied George's claim of ineffective assistance of counsel. (Doc. 14 at 27.) Specifically, this Court concluded that George's allegations of counsel's performance, if taken as true, had pleaded in the California courts a prima facie case for relief. The Court properly has proceeded to determine the issues de novo, and the Court has ruled that George is entitled to an evidentiary hearing to test the truthfulness of his factual allegations.

The principal issue for factual determination is why George did not accept a favorable plea offer and, instead, proceeded to trial. At the hearing, the answer to that question was determined: [redacted]

George contends otherwise. He maintains that his lawyer [redacted]. On this critical issue, trial defense counsel is credible, and George is not.

The Court should rule that George has not met his burden of proving ineffective assistance of counsel and should recommend denial of relief.

BACKGROUND

George and two others took a young girl to an abandoned house. The girl consumed alcohol to the point of unconsciousness, after which George and the others had sex with her. When the girl awoke, she reported the crime. Evidence, including DNA, led the police to George and the others, and they were prosecuted. (Doc. 14 (R&R) at 2-9.)

George's accomplices did not go to trial, however. They entered into favorable plea agreements with the prosecution, limiting their imprisonment to a term of three years. (Doc. 14 (R&R) at 1.

else. But there are other indications. George strongly denies that Davitt [redacted] (EHRT 68, *see also* Doc. 32-1.) But that is nonsensical. It is clear that George and his family members had at least some idea: all viewed the case as "serious." (EHRT 11 (mother), 19 (sister), 58 (George).) Despite this, George states that he never "asked" Davitt specifically what he faced if found guilty (EHRT 75), because he "never thought of it." (EHRT 68.) But when pressed to explain this contradiction—that he knew the case was "serious" but had not idea of the maximum potential sentence—[redacted] (EHRT 73-74.) And, although only a minor point, George demonstrated some memory problems, in that he repeatedly mistakenly referred to "Davitt" as "Donavitt." (EHRT 65, 66, 72, 73.)

II. GEORGE HAS NOT SHOWN PREJUDICE.

To show prejudice, petitioner must show a reasonable probability that he would have pleaded differently, but for counsel's errors. *See Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985) (pleading guilty); *Turner v. Calderon*, 281 F.3d 851, 879 (9th Cir. 2002) (pleading not guilty).

Here the evidence is strong. George would not admit guilt, if it meant lifetime registration as a sex offender. The prosecutor would not agree to that condition. George has not shown that Davitt could have changed his mind.

III. THE COURT CORRECTLY CONDUCTED AN EVIDENTIARY HEARING.

Perhaps recognizing that the weight of the evidence upon conclusion of the hearing does not support George's claim, George gives priority in his argument to an alternative: the Court should decide the issue as if the hearing never took place. (Doc. 44 at 2-8.) His argument essentially is that because Respondent defended the decisions of the state court as reasonable in its Answer, and argued that no evidentiary hearing was needed to resolve the question of reasonableness, Respondent should be estopped from further development of the factual record,

once this Court had concluded that George had overcome the relitigation bar in 28 U.S.C. § 2254(d). But this view is mistaken.

A useful staring point for analysis comes from the opinion of Justice Breyer in *Cullen v. Pinhoster*, 563 U.S. 170 (2011). The Court in *Pinhoster* was addressing a circumstance in some ways similar to George's. That is, the petitioner sought habeas corpus relief in the state courts. His claim was denied, but the state courts had held no evidentiary hearing. Justice Breyer, addressing the central holding in *Pinholster* limiting the right to an evidentiary hearing, addressed a hypothetical and explained that even in habeas cases, a hearing can be called for. As he explained, if (as in George's case) a state court rejected a claim after "assuming" facts to be true, and if (also as in George's case) a federal court viewed that determination to be unreasonable (thus freeing the federal court from the strictures of 28 U.S.C. § 2254(d)), then an evidentiary hearing "might be needed [in the federal court] to determine whether the facts alleged were indeed true." *Id.* a 205 (Breyer, J., concurring and dissenting).

George's case fits within the hypothetical and warranted a hearing. Familiar guidelines explain why. First, this Court concluded that the standard in 28 U.S.C. § 2254(d) did not preclude relief for George. In such a case (i.e., where a petition is not summarily dismissed) the Court must decide whether a hearing is appropriate. Rule 8, Rules Governing Section 2254 Cases in the United States District Courts (as amended June 27, 2013). In making that decision, the Court "must review the answer, any transcripts and records of state-court proceedings, and any materials" expanding the record. *Id.* If a petitioner has pleaded a violation of constitutional rights, and if those materials are not adequate to resolve the question, and if a petitioner has not yet received a full and fair hearing on his claims, a hearing is mandatory. *Id.* (Advisory Committee Notes, 1976 Adoption (citing *Townsend v. Sain*, 372 U.S. 293, 319 (1963)).)

George, as this Court concluded, had pleaded a prima facie case for relief. And he had never had a hearing on his claim that counsel had advised him to reject a plea offer. But the materials described in Rule 8 (i.e., the state court records) could not resolve his claim, because George's factual allegations were not among those listed materials and had not been authoritatively established. So, a hearing was required, unless, possibly, the record could be expanded, as an alternative to a hearing, to encompass his factual claims.

Expansion of the record is addressed in Rule 7. The rule contemplates that "the judge" may direct expansion. Permissible materials include "letters predating the filing of the petition, documents, exhibits, and answers to written propounded under oath to written interrogatories propounded by the trial judge." *Id.* And affidavits "may also be submitted."

But, and here is the key provision, before the record may be so expanded, the "judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness." *Id.* And, where the issue becomes one of credibility, "affidavits can rarely be conclusive. . . ." *Id.* (Advisory Committee Notes, 1976 Adoption).

Thus, this Court had the authority to treat George's factual allegations in his pleadings as an expansion of the record but, before doing so, Respondent should have had the opportunity to admit or deny their correctness. And, up to that point, the "record" shed no light on whether George's allegations about counsel's advice was true. (*See* Doc. 14 at 13.)

As Respondent indicated before, the Court's determination that George had overcome the relitigation bar lifted the limitations on conducting a hearing discussed in *Pinholster*, but George's pleadings did not yet establish facts warranting relief. (*See* Doc. 16 (objections) at 5.) That required either expansion of the record to encompass those facts (a dubious proposition because the necessary

facts would require assessment of credibility), or, more appropriately, (2) the hearing this Court ordered.

Accordingly, the hearing was completely proper, and this Court may proceed towards decision on this now fully-developed record.

CONCLUSION.

After reviewing the record, the Court should find that Attorney Davitt was truthful in his testimony. With that finding, the Court should reject George's claim that his attorney was ineffective. Accordingly, the Court should dismiss the Petition and deny a certificate of appealability.

Dated: September 5, 2017

Respectfully submitted,

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Deputy Attorney General

/S/ KEVIN VIENNA
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Attorneys for Respondent General Fund - Legal/Case Work

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No. EDCV 16-1016-RGK (AJW) **Date: April 25, 2017**

Title: CHRIS ANTHONY GEORGE v. RAYMOND MADDEN

PRESENT: HON. ANDREW J. WISTRICH, MAGISTRATE JUDGE

Kerri Hays	n/a
Deputy Clerk	Court Reporter

ATTORNEYS FOR PETITIONER:	ATTORNEYS FOR RESPONDENT(S):
None Present	None Present

ORDER APPOINTING COUNSEL AND SETTING EVIDENTIARY HEARING

In this petition for a writ of habeas corpus, petitioner alleges that he rejected a plea offer based upon trial counsel's advice. As discussed in the report and recommendation issued on February 28, 2017, petitioner's allegations, if true, would entitle him to relief. Respondent filed objections to the report and recommendation, in which he (for the first time) disputes petitioner's allegations and provides a declaration from trial counsel which contradicts petitioner's version of events. [Dkt. 16].

The order requiring respondent to file a response to the petition in this case instructed respondent to comply with Rule 5(d) of the Rules Governing Section 2254 Cases (which requires respondent to address the allegations of the petition) and to "specifically address the necessity for an evidentiary hearing to resolve any issue." [Dkt. 4 at 2]. Respondent's answer addressed the merits of petitioner's claims, but respondent did not dispute petitioner's factual allegations and did not suggest that an evidentiary hearing was warranted. [Dkt. 10-1].

On February 28, 2017, a report and recommendation ("report") was issued recommending that the petition be granted based upon petitioner's ineffective assistance of counsel claim. [Dkt. 14]. After noting that respondent did not contest the truth of petitioner's allegations, that petitioner's allegations were made under penalty of perjury so they were the equivalent of an affidavit, and that petitioner's allegations were partly corroborated by the record, the Court found them to be credible. The Court consequently relied upon the allegations as undisputed facts in performing an analysis of the merits of petitioner's claim.

In his objections to the report, respondent for the first time disputes petitioner's allegations. Respondent argues that in light of the now-present factual dispute, the Court must conduct an evidentiary hearing before granting relief.

A district court may, but is not required, to consider evidence or claims presented for the first time in objections to a report and recommendation. See Brown v. Roe, 279 F.3d 742, 744-745 (9th Cir. 2002); United States v. Howell, 231 F.3d 615, 621-622 (9th Cir. 2000). In Howell, the Court of Appeal affirmed the district court's exercise of its discretion to decline to consider new evidence presented for the first time in objections to a magistrate judge's report and recommendation. The court explained that:

> To require a district court to consider evidence not previously presented to the magistrate judge would effectively nullify the magistrate judge's consideration of the matter and would not help to relieve the workload of the district court. "Systemic efficiencies would be frustrated and the magistrate judge's role reduced to that of a mere dress rehearser if a party were allowed to feint and weave at the initial hearing, and save its knockout punch for the second round."

Howell, 231 F.3d at 622 (quoting Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co., 840 F.2d 985, 991 (1st Cir. 1988). The appellate court went on to say:

> Equally important, requiring the district court to hear evidence not previously presented to the magistrate judge might encourage sandbagging. "[I]t would be fundamentally unfair to permit a litigant to set its case in motion before the magistrate, wait to see which way the wind was blowing, and - having received an unfavorable recommendation - shift gears before the district judge."

Howell, 231 F.3d at 622 (quoting Paterson-Leitch Co., 840 F.2d at 991).

Respondent obviously was on notice of petitioner's sworn allegations as well as the fact that nothing in the record suggested that his allegations were untrue. Nevertheless, respondent failed to dispute petitioner's version of events or otherwise alert the Court that a factual dispute existed before the merits of the petition and respondent's answer were

considered, the entire record was reviewed, and a thorough report addressing petitioner's claims and respondent's arguments was issued. Under these circumstances, it would be within the Court's discretion to decline to consider the new arguments and allegations respondent raises in his objections. See Pacheco v. Small, 2011 WL 1464379, at *2 (C.D. Cal. Apr. 14, 2011) (the district court exercised its discretion to decline to consider allegations made for the first time in objections where the facts were known to the objecting party but that party did not present them prior to the issuance of the magistrate judge's report and recommendation); Plantillas v. Cate, 2009 WL 890656, at *1 (C.D. Cal. March 31, 2009) (the district court declined to consider new evidence presented in objections to a report and recommendation, noting that "[s]uch a policy is reasonable since the referral mechanism is intended to help ease the heavy workloads of the district courts and to aid in the efficient resolution of disputes") (citation omitted).

Nevertheless, in the interest of justice, the Court orders as follows:

1. Petitioner's allegations, considered in light of the entire record, present a colorable claim for relief. In addition, the Court has determined that an evidentiary hearing is necessary to resolve the factual dispute. Therefore, appointment of counsel is warranted. See 28 U.S.C. § 2254(h); 18 U.S.C. § 3006A(a)(2)(B); Weygandt v. Look, 728 F.2d 952, 954 (9th Cir. 1983) ("In deciding whether to appoint counsel in a habeas proceeding, the district court must evaluate the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims pro se in light of the complexity of the legal issues involved."). Accordingly, the Office of the Federal Public Defender is appointed to represent petitioner.

2. The Clerk shall forward a copy of this order to the Federal Public Defender and make available to petitioner's counsel the file, as well as all records and documents lodged with the Court. Counsel shall consult with petitioner and become familiar with the record.

3. The parties shall appear for an evidentiary hearing at 10:00 a.m., **June 6, 2017,** in Courtroom 690 of the Roybal Federal Building, 255 E. Temple Street, Los Angeles, CA 90012. The parties shall be prepared to present evidence on petitioner's ineffective assistance of counsel claim as well as evidence relevant to determining whether the Court should exercise its discretion to consider the new arguments and evidence presented by respondent. With respect to the latter, respondent must be prepared to present evidence explaining why he failed to dispute petitioner's version of events prior to the issuance of the report. Respondent also must present evidence concerning any

efforts made to obtain the testimony of trial counsel before the report was issued.

4. The parties shall file and serve a declaration from each witness to be presented at the evidentiary hearing and those declarations may serve as direct testimony. The declarations shall be filed and served no later than fourteen (14) days before the date of the hearing. The parties also shall file a joint witness list, joint exhibit list, and joint notebook containing all proposed exhibits no later than fourteen (14) days before the date of the hearing.

5. If petitioner wishes to testify in person, respondent is directed to ensure his presence at the evidentiary hearing.

IT IS SO ORDERED.

cc: Parties

MINUTES FORM 11
CIVIL-GEN

Initials of Deputy Clerk klh

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CHRIS ANTHONY GEORGE, Petitioner, **v.** **RAYMOND MADDEN,** Respondent.	EDCV 16-1016 RGK (AJW) **OBJECTIONS TO REPORT AND RECOMMENDATION** Judge: The Honorable Andrew J. Wistrich

INTRODUCTION.

Respondent objects to the Report and Recommendation (Doc. 14 (R&R)), which recommends overturning a criminal conviction after concluding that, based on the Petitioner Chris George's allegations, trial defense counsel provided ineffective assistance in the plea bargaining process, when George did not accept an offered plea bargain. In reaching this conclusion, the R&R "presumes" that the factual assertions in the Petition are correct. This presumption may be sufficient to overcome the litigation bar applicable to petitions filed by state prisoners, but it is not sufficient to support a grant of relief.

Of critical importance are two facts: the procedural posture of this case, both in the state courts and in this Court, has never provided the defense counsel an opportunity to be heard, before labeling him as incompetent, nor have George's allegations been adversarially tested. Because counsel will dispute George's factual allegations, he should have that chance. (*See* Attachment 1 (declaration of Sean A. Davitt).) Indeed, George's counsel will explain that the reason no plea offer was accepted was because George refused to plead guilty to any charge that would result in lifetime registration as a sex offender. (*Id.*) George's allegations may warrant a hearing to examine their truth, but until he proves the facts he alleges, he has not shown that he is in custody in violation of the law.

The R&R concludes that the rejections by the California courts of George's IAC claim were unreasonable. But that merely lifts the application of AEDPA's deferential standard, leaving this Court to determine, under de novo review, whether George is entitled to relief. To make that determination, this Court must address George's factual claims, for which no hearing has ever occurred in the California courts or in this Court.

If the Court agrees with the R&R that, based on the record before the state courts, they unreasonably denied a claim of counsel ineffectiveness, then this Court should proceed to examine George's claims de novo. In that case, federal law provides that George is entitled to a hearing to prove his allegations. At that hearing, Respondent can also develop the record further, including the testimony of Mr. Davitt. With the record fully developed, the court can properly determine the facts and rule on George's claim.

A. Background.

The R&R thoroughly describes the facts of the case and the procedural history. (Doc. 1 at 2-9.) George and two fellow gang members took a thirteen-year-old girl to an abandoned house, plied her with alcohol to the point of unconsciousness, and had sex with her. George was charged with and, following

jury trial, convicted for the sex crimes. He is serving a prison sentence of twenty-one years, in significant part because the jury also determined that the crimes were committed for the benefit of a criminal street gang.

George's appeal was unsuccessful, after which he pursued one full round of collateral challenges in the California courts. (Lodgment 3, 5, 7.) In these petitions, George contended that his trial defense attorney essentially talked him out of accepting an offer from the prosecutor to plead guilty in return for a three-year prison sentence. All three of these petitions were denied, but none of the denials included a reasoned opinion. Under California law, such summary denials occur when a court determines that a petitioner has failed to state a prima facie case for relief. *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). That is, a California court addressing a habeas corpus petition first considers whether the a prima facie case for relief has been pleaded. *Id.* at 474-75. In making this determination, the court generally will assume to be true the factual allegations made by the petitioner. *People v. Romero*, 8 Cal. 4th 728, 737 (1994) (explaining state habeas procedure, including presumption that alleged facts are true in making determination of whether a prima facie case has been pleaded). If a prima facie case is presented, the state court will issue an order to show cause, which may lead to an evidentiary hearing. Absent a prima facie case, the state court will, as in George's case, issue summary denials. *Duvall*, 9 Cal. 4th at 474-75.

George filed the current Petition, using the § 2254 form for petitioners in state custody, on May 17, 2016. (Doc. 4-1 at 1.) That Petition, like his state petitions, alleged that counsel was ineffective in the plea bargaining process by discouraging a plea agreement and promising to beat the deal offered.

Respondent filed an answer. Pursuant to Rule 5 of the Rules Governing § 2254 Cases in the United States District Courts, Respondent lodged records from the state trial, appeal, and collateral cases. (Lodgments 1-15.) The Court has not "direct[ed] the parties to expand the record further" such as by submitting

affidavits. *See* Rule 7 of the Rules Governing § 2254 Cases. The Answer contended that the state courts could reasonably have denied the claims. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011) (when there is no reasoned state decision on the merits of a claim, a federal court must examine whether a theory exists supporting the result on which fair minded judges could agree). The Answer, however, included a general denial that George was entitled to relief (Doc. 11 at 1), and highlighted that George's factual allegations "have never been reliably established." (R&R at 13: 1; Doc. 10-1 at 9-10.)

Nevertheless, the R&R treated these allegations as established facts. (R&R at 12 (the allegations "are presumed to be true").) In particular, the R&R's analysis of the question of deficient counsel performance clearly treats as an established fact George's claim that counsel advised George "we will not take the [three-year] deal" because Davitt believed he could "beat the charges." The R&R's detailed analysis of counsel's performance proceeds on this basis, concluding that counsel's performance was deficient, and the state court could not reasonably have concluded otherwise. (R&R at 13-27.)

B. Discussion

The R&R correctly viewed as the first step in its analysis a determination of whether, based on the record that was before the state court, its resolution of George's claim was reasonable. (R&R at 9-10.) And, because the California courts, in evaluating whether George had stated a prima facie case for relief, presumed that his factual allegations were true, *see Duvall*, 9 Cal. 4th at 474, it was appropriate for this Court to consider them as well for its determination of "reasonableness." That is, in deciding whether the state court reasonably issued a summary denial, without requiring further development of the record, this Court could accept as true—for that limited purpose—the factual allegations in George's petition.

But that was only a first step. If a federal court determines that the state decision is unreasonable on law or facts, then the federal court must resolve the constitutional claim without AEDPA deference. The court must then apply a de novo standard of review in determining whether a constitutional violation has occurred. *Butler v. Curry*, 528 F.3d 624, 641 (9th Cir. 2008). The R&R errs in failing to proceed beyond the first step.

Once the relitigation bar of the AEDPA have been overcome, the Court then must determine whether a factual basis for the petitioner's claim exists in the record. *See* Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts (stating that in the event the federal petition challenging the state court judgment is not dismissed, "the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted"). Additionally, a court should also consider whether the petitioner's allegations amount to a colorable claim—if the allegations were *proved*, the petitioner would be entitled to relief. *See Insyxiengmay v. Morgan*, 403 F.3d 657, 670 (9th Cir. 2005) (if the AEDPA does not bar a hearing, a court should consider under established pre-AEDPA law whether a hearing is appropriate). An evidentiary hearing is appropriate, for example, (1) if, as here, the merits of a factual matter were not resolved in a state hearing, *Townsend v. Sain*, 372 U.S. 293, 313 (1999), and (2) the petitioner's allegations, *if proved*, would entitle him to relief. *Insyxiengmay*, 403 F.3d at 670.

The R&R, however, treated George's claim as *already proved*. That was error. There was no fact-finding in the state courts, because those courts issued summary denials. *Duvall*, 9 Cal. 4th at 474. Although the R&R explains at length why it views George as having made allegations that, *if proved*, would entitled him to relief, it never puts him to his proof. That also was error. *See Johnson v. Finn*, 665 F.3d 1063, 1069 n.1 (9th Cir. 2011) (once Magistrate Judge determined that the state court's resolution of a *Batson* claim was unreasonable, "it was both lawful and

necessary . . . to conduct an evidentiary hearing in order to resolve the *Batson* claim by addressing the issues that the state court (as a result of its erroneous analysis) failed to reach).

The R&R's error appears to derive from two sources. First, it over relied on the Ninth Circuit's memorandum decision in *Fuentez v. Brown*, 256 Fed. Appx. 966, 967 (9th Cir. 2007), for the proposition that "the facts alleged in the petition should be presumed to be true . . . ." (R&R at 12.) That opinion, of course, includes the quoted statement, but the R&R's analysis of *Fuentez* is incomplete. In *Fuentez*, the Ninth Circuit observed, the IAC claim was subject to de novo review. The District Court had dismissed the petition without holding a hearing. The Ninth Circuit ruled, however, that the District Court could not properly dismiss without further development of the record, because, at that stage, it was required to treat Fuentez's factual allegations of deficient performance to be true. But, and this important point was missed in the R&R, the decision of the District Court was reversed and remanded "for further development of Fuentez's ineffective assistance of counsel claims." *Id.*

That is, just like in the current case, under de novo review, where the allegations of the petitioner, taken as true, set out a colorable basis for relief, the district court should hold a hearing to permit the petitioner to prove those allegations, if possible.

The R&R also seemed to require Respondent, at the pleading stage, to attempt to prove that George's allegations were untrue. Although the R&R acknowledges that Respondent argued that George's allegations "have never been reliably established," the R&R adds that "respondent does not directly dispute petitioner's version of the facts or point to anything in the record suggesting that petitioner's allegations are not true." (R&R at 13: 1-4.) The R&R is correct in noting that Respondent relied on the existing record, but that is appropriate. *See* Rules 5 of the Rules Governing Section 2254 Cases (describing the record); *but see* Rule 7

(permitting expansion of the record, when ordered by the Court); *see also Cullen v Pinholster*, 563 U.S. 170, 182 (2011) (AEDPA reasonableness determination limited to existing record). Respondent's general denial in the Answer (Doc. 11 at 1), specific statement that George's factual claims had not been proved, and reliance on established case law that (1) placed the burden of proof on a petitioner, *Lambert v. Blodgett*, 393 F. 3d 943, 970 n.16 (9th Cir. 2004), and (2) as discussed above, would lead to an evidentiary hearing if the Court determined that the state determinations were unreasonable, thus lifting the limitations of the AEDPA, all demonstrate that the R&R's overextended reliance on *Fuentes v. Brown's* limited presumption is incorrect and improper.

California law discounts the uncorroborated allegations of a convicted defendant regarding counsel's performance. *In re Alvernaz*, 2 Cal. 4th 924, 938-39 (1992) (citing *Turner v. State of Tennessee*, 858 F.2d 1201, 1206 (6th Cir. 1989)). The corroboration of George's factual allegation extends only so far: (1) the plea offer appeared to exist, based on what happened to his codefendants, and (2) that George never accepted a plea bargain and, instead, went to trial. But there simply is no corroboration for his claim that counsel talked him out of accepting an offer. Indeed, counsel now denies that happened. (*See* Attachment 1.)

The lack of corroboration of the essential portion of George's factual allegations, combined with the strong presumption of counsel competence, *Bell v. Cone*, 535 U.S. 685, 698 (2002), and in the absence of any declaration from counsel, s*ee Gentry v. Sinclair*, 705 F.3d 884, 899-900 (9th Cir. 2013) (rejecting ineffective assistance of counsel claim where petitioner failed to provide declaration or affidavit from trial defense counsel), *cert. den.* 134 S. Ct. 102 (Jan. 23, 2014), explained how the California courts could reasonably have concluded that George had failed to plead a prima facie case.

But if this Court disagrees, the result should not be the recommended grant of relief. Instead, this Court should direct an evidentiary hearing at which George can seek to prove his allegations regarding counsel performance.

Dated: March 23, 2017

Respectfully submitted,

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/S/ KEVIN VIENNA
KEVIN VIENNA
Deputy Attorney General
Attorneys for Respondent

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ATTACHMENT 1

DECLARATION OF SEAN A. DAVITT

I, Sean A. Davitt, declare as follows:

1. I am an active member of the California State Bar, bar number 144374. I have no record of discipline.

2. I am in active practice as a criminal defense attorney with Earl Carter & Associates in Riverside, California. I have been in practice for over twenty-six years. During that time, I have represented defendants in over 1000 cases.

3. I was retained in 2012 by the George family to represent Chis Anthony George in the proceedings through preliminary hearing. When the case did not resolve during that phase, the family hired me for trial in 2013 in the Riverside County Superior Court, case number RIF1203066.

4. Recently, I was contacted by California Deputy Attorney General Kevin Vienna regarding Mr. George's case. He advised me that Mr. George currently has pending a habeas corpus petition in the United States District Court for the Central District of California, case number EDCV 16-1016. Mr. Vienna provided to me a copy of the Report and Recommendation of Magistrate Judge in that matter. I have reviewed that document.

5. Only very recently did I learn that Mr. George has been challenging his criminal conviction and sentence based on a claim that I provided ineffective assistance of counsel. The Report and Recommendation indicates that Mr. George previously filed habeas corpus petitions in the superior court, the California Court of Appeal, and the California Supreme Court. I had never been advised of those proceedings or asked to provide any input.

6. Mr. Vienna asked me for any comments I might have regarding the Report and Recommendation. After some discussion, he has asked me to prepare this declaration.

7. I recall Mr. George as my client and the events leading up to his trial. I have also reviewed my client file in his matter.

8. Having reviewed the Report and Recommendation, it appears that the main issue is whether I insisted Mr. George go to trial rather than take the plea deal of 3 years. Over the course of my representation (July 26, 2012 through March 2013, before trial in April 2013), Mr. George and I spoke often about whether to settle or proceed to trial in his case. At no time did he express a willingness to take the 3-year deal, without condition. He maintained that he would accept a plea on the condition that the Deputy District Attorney remove the requirement of life-time registration as a sex offender. I negotiated for many months with the Deputy District Attorney to have the charge changed to a non-registerable offense, but to no avail. At one point in the negotiations, Mr. George gave me authority to increase the prison term to 5 years, if I could remove the PC 290 requirement. Right before trial, he told an associate of mine that he would accept a one-year plea deal, but there is no mention as to whether he would accept that with PC 290 reg. I was unsuccessful in obtaining a one-year plea deal and all offers included life-time registration.

9. In my almost 27 years in practice, I have never advised a client that I could beat a case (not language that I use), nor ever guaranteed results. During the course of representing Mr. George, I did have concerns about whether the Deputy District Attorney would be able to produce the victim for trial and also whether the DNA evidence would be admissible and be a match, without question. I shared those concerns with Mr. George along the way and he continued to insist that he was innocent and would only take a deal if he didn't have to register as a sex offender. During the course of my representation, Mr. George and his family provided me with potential alibi evidence. I tracked down every possible scenario that would

put Mr. George at a location other than the crime scene location on the evening in question, but to no avail.

10. I knew Mr. George was young, but I never had a doubt he understood what was going on. Although youthful, he had a certain level of street-wise intelligence and seemed to understand everything we talked about.

11. I believe that I gave Mr. George competent legal advice regarding his choice to plead guilty or go to trial.

12. I would be happy to provide to the District Court any additional information it might desire, including as a witness, under oath, at any hearing the Court might order.

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

DATED: March 21, 2017, Riverside California

SEAN A. DAVITT

SD2016102309
71299473.doc

CERTIFICATE OF SERVICE

Case Name: **Chris George v. Raymond Madden** No. **EDCV 16-1016 RGK (AJW)**

I hereby certify that on March 23, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

OBJECTIONS TO REPORT AND RECOMMENDATION

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On March 23, 2017, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Chris Anthony George
AP6839
Centinela State Prison
P.O. Box 931
Imperial, CA 92251
In Pro Se

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 23, 2017, at San Diego, California.

Bonnie Peak
Declarant

Bonnie Peak
Signature

SD2016102309
71301090.doc

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 06/13/2016 10:25 AM

Docket (Register of Actions)

GEORGE (CHRIS ANTHONY) ON H.C.
Case Number S229888

Date	Description	Notes
10/13/2015	Petition for writ of habeas corpus filed	Petitioner: Chris Anthony George Pro Per
10/13/2015	Exhibit(s) lodged	One volume (Exhibits 1 - 10)
01/27/2016	Petition for writ of habeas corpus denied	

Click here to request automatic e-mail notifications about this case.

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER

In re CHRIS ANTHONY GEORGE

E064220

on Habeas Corpus.

(Super.Ct.Nos. RIC1507325 & ~~RIF1203066~~)

The County of Riverside

THE COURT

The petition for writ of habeas corpus is DENIED.

KING
Acting P. J.

Panel: King
Miller
McKinster

cc: See attached list

MAILING LIST FOR CASE: E064220
In re Chris Anthony George on Habeas Corpus

Superior Court Clerk
Riverside County
P.O. Box 431 - Appeals
Riverside, CA 92502

Chris Anthony George
CDC #: AP6839
Centinela State Prison
P.O. Box 931 (D1-144)
Imperial, CA 92251

Office of the State Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

District Attorney
County of Riverside
3960 Orange Street, #100
Riverside, CA 92501

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

In the Matter of the Petition of

CHRIS ANTHONY GEORGE

For Writ of Habeas Corpus

Habeas Case #: RIC1507325

Criminal Case #:

ORDER RE PETITION FOR WRIT OF HABEAS CORPUS

The Court, having read and considered the Petition for Writ of Habeas Corpus filed on 06/16/15, hereby (denies / grants/ transfers / other) as follows:

A. DENIALS

1. ✓ The petition is denied because the petition fails to state a prima facie factual case supporting the petitioner's release. (Cal. Rules of Court, rule 4.551 (c).) The petition makes assertions regarding the applicable law that are contrary to established California case decisions.

2. ✓ The petition is denied because the petition fails to state a prima facie factual case supporting the petitioner's release. (Cal. Rules of Court, rule 4.551 (c).) While the petition states a number of factual conclusions, these broad conclusions are not backed up with specific details, and/or are not supported by the record in the case.

3. _____ The petition is denied with prejudice because the issues raised in the petition were raised and considered in a prior appeal. "[I]ssues resolved on appeal will not be reconsidered on habeas corpus..." (*In re Clark* (1993) 5 Cal.4th 750, 765.)

4. _____ The petition is denied because the petition fails to raise any new issue that has not previously been addressed in an earlier writ petition. "[A]bsent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected." (*In re Clark* (1993) 5 Cal. 4th 750, 767.)

5. _____ The petition is denied because the issues raised in the petition could have been but were not raised in an appeal, and no excuse for failing to do so has been demonstrated. "[I]n the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." (*In re Clark* (1993) 5 Cal. 4th 750, 765.)

6. _____ The petition is denied because the petitioner has delayed the petition long after the facts occurred that allegedly justify relief, and he has failed to adequately explain the reason for the delay. A petitioner must justify any substantial delay in presenting a claim by, inter alia, stating when he became aware of the legal and factual bases for his claims, and explaining the reason for any delay since that time. (*In re Clark* (1993) 5 Cal. 4th 750, 783, 786-787.)

7. _____ The petition is denied without prejudice because the petitioner has brought prior petitions arising from the same detention or restraint but the current petition fails to describe the nature and disposition of the claims made in those prior petitions. (Pen. Code 1475.)

Petitioner's name: CHRIS ANTHONY GEORGE	Case number: RIC1507325

8. _____ The Petition is denied without prejudice because the petitioner is represented by counsel.

9. _____ The petition is denied because the petition fails to establish that the petitioner has exhausted available administrative remedies.

10. _____ The petition is denied because the petition is now moot due to changed conditions, e.g., no longer in custody.

11. _____ The petition is denied because the petition is incomplete, unintelligible, and/or unclear.

12. _____ The petition is denied without prejudice because it is not made on Judicial Council form MC-275, and ther is not showing of good cause for failing to do so. (Cal. Rules of Court, rule 4.551 (a)(1)&(2).)

13. _____ No order to show cause having been issued, the request for appointment of counsel is denied. (Cal. Rule of Court, rule 4.551 (c)(2).)

14. _____ Other: _____

_____

_____

B. GRANTS:

1. _____ Pursuant to California Rules of Court, rule 4.551 (b), the Court invites the respondent, _____, to submit an informal response to the petition within 15 days. Should an informal response be submitted, it shall be served on the petitioner. The petitioner shall have an additional 15 days after service of the informal response in which to file a reply. Unless the court orders otherwise, the matter will be deemed submitted upon the filing of the petitioner's reply or when the time for submitting a reply has expired.

2. _____ Pursuant to California Rules of Court, rule 4.551 (c), the court finds that the petition states a prima facie basis for relief. The respondent, _____ is ordered to show cause why the petition should not be granted. The respondent is ordered to submit a return to the petitior within 30 days. Unless the Court orders otherwise, the matter will be deemed submitted upon the filing of the petitioner's denial or when the time for submittting a denial has expired.

3. _____ An order to show cause having been issued, the request for appointment of counsel is granted. (Cal. Rul of Court, rule 4.551 (c)(2)). The Court appoints _____ to represent petitioner. The court further orders that payment therefore shall be from the County Treasur (Cal. Pen. Code Sections 987.2, 987.8(g)(2)(B); Charlton v. Superior Court (1979) 93 Cal.App.3d 858, 86

4. _____ Other: _____

_____

_____

Petitioner's name: CHRIS ANTHONY GEORGE	Case Number: RIC1507325

C. TRANSFERS

1. _____ The petition challenges the terms of a judgment. Without determining whether a prima facie case for reli exists, the Court transfers the petition to the Superior Court for the County of _____, the county in which the judgment was entered. (Cal. Rules o Court, rule 4.552(b)(2)(A).)

2. _____ The petition challenges the conditions of the inmate's confinement. Without determining whether a prima facie case for relief exists, the Court transfers the petition to the Superior Court for the County of _____, the county in which the petitioner is confined. (Cal. Rules of Court, rule 4.552(b)(2)(B).)

3. _____ The petition challenges the denial of parole or the petitioner's suitability for parole. Without determining whether a prima facie case for relief exists, the Court transfers the petition to the Superior Court for the County of _____, the county in which the underlying judgment was rendered. (Cal. Rules of Court, rule 4.552(c).)

4. _____ Other: _____

_____

_____

D. OTHER ORDERS:

Other Orders: _____

_____

DATE/SIGNATURE

Date: 6-23-15 Time: 4pm

DAVID A. GUNN

Print
Judge of the Superior Court

Signature
Judge of the Superior Court

MC-275

Name: CHRIS ANTHONY GEORGE
Address: P.O. Box 931 /D1-144
IMPERIAL, CA 92251

CDC or ID Number: AP6839

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
JUN 16 2015
EGUZMAN

BMV Jul 21 2015 R

SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
(Court)

CHRIS ANTHONY GEORGE
Petitioner
vs.
THE STATE OF CALIFORNIA
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. RIC1507325
(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

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

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

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

This petition concerns:

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

1. Your name: CHRIS ANTHONY GEORGE
2. Where are you incarcerated? CENTINELA STATE PRISON
3. Why are you in custody? [X] Criminal conviction [ ] Civil commitment

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

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").
RAPE, LEWD ACT AND PARTICIPATION IN A CRIMINAL STREET GANG

b. Penal or other code sections: 261(a)(3), 288 (a) AND 186.22 (a)

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

d. Case number: RIF 1203066

e. Date convicted or committed:

f. Date sentenced: JUNE 28 2013

g. Length of sentence: 21 YEARS 8 MONTHS

h. When do you expect to be released? 19 YEARS

i. Were you represented by counsel in the trial court? [X] Yes [ ] No *If yes, state the attorney's name and address:*
SEAN A DAUTT ATTORNEY AT LAW - 4333 ORANGE STREET, SUITE 102 RIVERSIDE CA 92501

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

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

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

SEE ATTACHED PAGE

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

SEE ATTACHED PAGE

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

SEE ATTACHED PAGE

CHRIS ANTHONY GEORGE
P.O. BOX 931
IMPERIAL, CA 92251
IN PRO PER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

IN RE	NO.
CHRIS ANTHONY GEORGE	PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF
ON HABEAS CORPUS	

INTRODUCTION

1. PETITIONER CONTENDS THAT INEFFECTIVE REPRESENTATION AT THE PRETRIAL STAGE OF HIS CRIMINAL PROCEEDING CAUSED HIM TO PROCEED TO TRIAL RATHER THAN TO ACCEPT AN OFFER OF A PLEA BARGAIN THAT WOULD HAVE BEEN APPROVED BY THE COURT. PETITIONER HAS BEEN DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY U.S. CONST., 6TH AMEND.; CAL. CONST., ART. I, § 15, EVEN IF PETITIONER THEREAFTER RECEIVES A FAIR TRIAL.

II.

PARTIES

2. PETITIONER CHRIS ANTHONY GEORGE, IS A PRISONER OF THE STATE OF CALIFORNIA INCARCERATED AT CENTINELA STATE PRISON.

3. RAYMOND MADDEN IS THE WARDEN OF CENTINELA STATE PRISON AND THE CUSTODIAN OF PETITIONER.

4. JEFFREY BEARD IS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION AND IS RESPONSIBLE FOR THE OPERATION OF EACH OF ITS STATE PRISONS INCLUDING THE OPERATION OF CENTINELA PRISON.

III.

STATEMENT OF THE CASE.

PURSUANT TO AN INFORMATION, FILED NOVEMBER 20, 2012, BY THE RIVERSIDE COUNTY DISTRICT ATTORNEY, PETITIONER, CHRIS ANTHONY GEORGE WAS CHARGED AS FOLLOWS: CAUT 1, RAPE BY INTOXICATION § 261, SUBD.(a)(3)), WITH A GANG ENHANCEMENT ALLEGATION

§ 186.22, SUBD.(b)(1)(B)); COUNT 2, LEWD ACT WITH A MINOR UNDER THE AGE OF 14 § 288, Subd.(a)), WITH GANG ENHANCEMENT § 186.22 Subd.(b)(1)(C)). AND SUBSTANTIAL SEXUAL CONDUCT § 1203.066, Subd.(a)(8)) ALLEGATIONS; AND COUNT 3, STREET TERRORISM § 186.22 Subd.(a))

FOLLOWING A JURY TRIAL PETITIONER WAS FOUND GUILTY AS CHARGED WITH TRUE FINDINGS RETURNED ON THE GANG ENHANCEMENTS.

STATEMENT OF FACTS

1. ON OCTOBER 17, 2012 DURING PRETRIAL PROCEEDINGS OF CASE RIF1203066 PETITIONER ALONG WITH CO-DEFENDANTS URAL KEONTAE GAMBLE AND CHAZ JAMAR MACFALLING WERE CALLED INTO COURT (DEPT. 63) WAITING TO GO BEFORE THE HONORABLE JUDGE HELIOS J. HERNANDEZ. PETITIONER AND HIS TWO CO-DEFENDANTS SAT NEXT TO EACH OTHER.

2. WHILE PETITIONER WAS WAITING FOR HIS ATTORNEY SEAN A. DAVITT TO APPEAR FOR THE OCTOBER 17, 2012 COURT SESSION. PETITIONER HEARS THE CONVERSATION BETWEEN HIS CO-DEFENDANT MR. MACFALLING AND MACFALLING ATTORNEY (GRAHAM DONATH) PETITIONER ASKED ATTORNEY GRAHAM DONATH ABOUT THE 3 YEAR DEAL THAT HE WAS EXPLAINING TO

MR. MACFALLING PETITIONER ALSO ASKED THE ATTORNEY DID THE 3 YEAR DEAL REQUIRED THE DEFENDANTS TO REGISTER AS SEX OFFENDERS. THE ATTORNEY ANSWERED YES. AND ADVISED PETITIONER TO TALK TO HIS ATTORNEY WHEN HIS ATTORNEY APPEARS.

3. A SHORT TIME LATER PETITIONER'S RETAINED ATTORNEY SEAN A. DAVITT APPEARED IN COURT (DEPT 63.) PETITIONER ASKED MR. DAVITT ABOUT THE 3 YEAR DEAL OFFERED BY THE DISTRICT ATTY. MR. DAVITT EXPLAINED TO PETITIONER THAT THERE WAS NO 3 YEAR DEAL THAT WAS OFFERED BY THE DISTRICT ATTORNEY.

4. PETITIONER AGAIN EXPLAINED TO MR. DAVITT WITH BOTH OF HIS CO-DEFENDANTS (MACFALLING AND GAMBLE) PAYING ATTENTION THAT A 3 YEAR DEAL WAS OFFERED BY THE DISTRICT ATTORNEY. MR. DAVITT STATED HE WAS NOT AWARE OF ANY 3 YEAR DEAL AND WHERE WAS THAT INFO (3 YR DEAL) COMING FROM.

5. PETITIONER EXPLAINED TO MR DAVITT THAT HE WAS SITTING RIGHT NEXT TO HIS CO-DEFENDANTS WHEN MACFALLING ATTORNEY TOLD MACFALLING ABOUT THE 3 YEARS THAT WAS OFFERED PETITIONER THEN ASKED MR. DAVITT TO CHECK WITH HIS CO-DEFENDANTS ATTORNEYS DUE TO THE FACT THE ATTORNEYS ARE AWARE OF THE 3 YEAR DEAL OFFERED BY THE DISTRICT ATTORNEY.

6. PETITIONER'S ATTORNEY THEN STATED HE WOULD LOOK INTO THE 3 YEAR DEAL AND WALKED AWAY. MR. DAVITT RETURNED AND EXPLAINED TO PETITIONER THERE IS INFACT A 3 YEAR DEAL ON THE TABLE HOWEVER, I DONT WANT YOU TO MESS UP YOUR LIFE LIKE BOTH OF YOUR CO DEFENDANTS THEREFORE WE WILL NOT TAKE THE DEAL. I CAN "BEAT THE CHARGES"

7. ALL PARTIES WENT BEFORE THE HON. JUDGE HELIOS J. HERNANDEZ (10-17-12) MOTION TO CONTINUE PURSUANT TO 1050 PC WAS GRANTED AND THE HEARING CONTINUED TO OCTOBER 24, 2012 AT 8:30 DEPT. 63 PETITIONER WAIVES TIME FOR PRELIMINARY HEARING PLUS 5 DAYS PLEASE SEE EXHIBIT-1

8. AFTER THE COURT SESSION ON OCTOBER 17, 2012 PETITIONER EXPLAINED TO MR DAVITT THAT HE THINKS HE SHOULD TAKE THE 3 YEAR DEAL BECAUSE HIS TWO CO-DEFENDANTS MACFALLING AND GAMBLE ARE GOING TO TAKE THE DEAL. WHICH WILL BE THE BEST THING TO DO. MR DAVITT EXPLAINED TO PETITIONER " YOUR FAMILY HIRED ME TO LOOK OUT FOR YOUR BEST INTREST SO STOP LISTENING TO JAIL HOUSE LAWYERS" MR. DAVITT EXPLAINED THAT THEY WILL TALK ABOUT IT LATER BEFORE THE NEXT COURT DATE (10-24-12).

9. THE NEXT COURT DATE FOR CASE RIF1203066 (10-24-12) PETITIONER WAS NOT BOUGHT TO COURT WITH HIS TWO CO-DEFENDANTS MACFALLING AND GAMBLE NOR DID PETITIONER EVER SEE MACFALLING OR GAMBLE ALTHOUGH PETITIONER KNEW ALL DEFENDANTS OF CASE RIF1203066 WERE ORDERED TO APPEAR IN COURT ON OCTOBER 24, 2012 IN DEPT. 63 HOWEVER, PETITIONER WAS TAKEN TO ANOTHER COURTROOM (DEPT. 31) BEFORE THE HON. JUDGE MARK E. JOHNSON SEE EXHIBIT-2

10. PETITIONER LATER LEARNED THAT ON OCTOBER 24, 2012 WHILE HE WAS TAKEN TO COURTROOM-DEPT. 31 HIS CO-DEFENDANTS MR. GAMBLE AND MR. MACFALLING DID INFACT TAKE THE 3 YEAR PLEA DEAL OFFERED BY THE D.A. IN DEPT. 63 BEFORE THE HON. JUDGE HELIOS J. HERNANDEZ ON THE ADVISE OF THEIR ATTORNEYS MR. DONATH GRAHAM AND JHON DORR. WHILE PETITIONER WAS ADVISED BY ATTORNEY SEAN DAVITT ON 10-17-12 NOT TO TAKE THE 3 YEAR DEAL. MR. DAVITT THEN SEPERATED PETITIONER FROM HIS CO-DEFENDANTS BY HAVING PETITIONER IN ANOTHER COURTROOM (DEPT 31) TO MAKE SURE PETITIONER WOULD NOT BE PERSUADED OR INFLUENCED BY MR. GAMBLE AND MR. MACFALLING TO PLEAD GUILTY. SO WHILE PETITIONER WAS IN DEPT. 31 HIS CO-

DEFENDANTS WERE IN DEPT 63 PLEADING GUILTY SEE **EXHIBITS -3 AND 4**

11. PETITIONER CONTENDS THAT AFTER TALKING TO HIS FAMILY IT WAS DISCOVERED THAT THE LAWYER MR. SEAN DAVITT MISADVISED PETITIONER WHEN MR. DAVITT ADVISED PETITIONER ON 10-17-12 (AFTER PETITIONER TOLD MR. DAVITT THERE WAS A 3 YR DEAL) NOT TO ACCEPT THE DEAL BECAUSE HE COULD "BEAT THE CHARGES" THE MISADVICE GIVEN TO PETITIONER ON 10-17-12 WAS SOLELY FOR ATTORNEY SEAN DAVITT MONETARY GAIN BY TAKING PETITIONER TO THE PRELIMINARY HEARING AND TO TRIAL. IF PETITIONER WOULD HAVE ACCEPTED THE 3 YEAR DEAL ATTORNEY SEAN DAVITT WOULD NOT HAVE RECEIVED THE LARGE SUM OF MONEY FROM PETITIONER'S FAMILY. PETITIONER EXPLAINED THIS TO THE PROBATION DEPT. SEE EXHIBIT-5 PG 11 LINE 19 THROUGH 31

12. THE NOTARIZE DECLARATION OF CAROL A. KING (PETITIONER'S MOTHER) WHICH EXPLAINS THE AGREEMENT TO REPRESENT PETITIONER BY SEAN A. DAVITT. NOW MARKED AS **EXHIBIT-6**

13. DURING THE JUNE 28, 2013 SENTENCING HEARING OF PETITIONER EXHIBIT-7 PG 420 LINE 26-28 AND PG 421 LINE 6 THROUGH 9 THE HON. MICHAEL B. DONNER TALKS ABOUT THE FINDINGS

OF THE PROBATION REPORT. THE JUDGE GOES ON TO SAY THERE IS A COMPLETE DENIAL OF RESPONSIBILITY BY PETITIONER AND HOW PETITIONER IS BLAMING HIS ATTORNEY FOR MISADVISING HIM ABOUT PLEA DEAL (SEE EXHUBIT 5 PG 11 LINE 19-31)

14. PETITIONER CONTENDS THAT EXHIBIT-7 PAGE 421 LINE 10 THROUGH 28. THE HON. MICHAEL B. DONNER TELLS PETITIONER THAT- HE HAVEN'T SEARCHED THE RECORD BUT GENERALLY, WHEN I HEAR A PERSON IS OFFERED A DEAL, AND IT'S A DEAL THAT IS SO DIFFERENT THAN WHAT THE POTENTIAL PUNISHMENT IS, I TALK TO THE DEFENDANT AND TELL THEM THAT THEY SHOULD SERIOUSLY CONSIDER AND TALK TO THEIR ATTORNEY. ULTIMATELY THE JUDGE TELLS PETITIONER THERE'S ONLY ONE PERSON WHO MAKES THE CHOICE TO GO TO JAIL AND THATS YOU SEE EXHUBIT-7 PG 421 LINE 10-28

15. THE TRIAL RECORD FOR CASE RIF1203066 IS DEVOID THE COURT TELLING PETITIONER HE SHALD SERIOUSLY CONSIDER AND TALK TO HIS ATTORNEY ABOUT THE 3 YEAR DEAL OFFERED BY THE PROSECUTION. THE RECORD IS ALSO COMPLETELY WITHOUT ATTORNEY SEAN A. DAVITT MAKING ANY TYPE OF RECORD DURING THE PRETRIAL STAGES (DEPT. 63 AND DEPT. 31)

OR DURING TRIAL PROCEEDINGS WHERE MR. DAVITT EXPLAINS TO THE COURT ON RECORD THAT HE ADVISED PETITIONER TO TAKE THE 3 YEAR PLEA DEAL AND PETITIONER WISHES TO PROCEED TO TRIAL. HOWEVER, MR. DAVITT MADE NO RECORD WHATSOEVER. THE RECORD WILL SHOW THE TRIAL STARTED APRIL 2, 2013 WITHOUT ANY DISCUSSION ABOUT ANY PLEA DEAL BY MR. DAVITT OR THE COURT. SEE **EXHIBIT-8**

16. AFTER THE PRONOUNCEMENT OF JUDGMENT TO HIDE THE FACT THAT PETITIONER STATED IN THE PROBATION REPORT HE DID NOT ACCEPT THE 3 YEAR DEAL BECAUSE HIS LAWYER ADVISED HE COULD "BEAT THE CHARGES" (SEE EXHIBIT-5 PAGE 11 LINE 19-31) AND THAT MR. DAVITT MISADVISED HIM — THE PROBATION REPORT FILED 6/28/2013: 8:30 AM WAS REMOVED AND SEALED. HOWEVER, PETITIONER'S FAMILY WAS ABLE TO OBTAIN A COPY FROM THE PROBATION DEPT. FULL PROBATION REPORT IS NOW MARKED AS (EXHIBIT-5 PG 11 LINE 19-31) EVIDENCE THAT PROBATION REPORT WAS REMOVED AND SEALED SEE **EXHIBIT-9** FROM THE RECORD.

17. LASTLY PETITIONER CONTENDS HIS LEVEL OF COMPREHENSION AND COMMUNICATION DISABLED

PETITIONER MENTALLY THE STATE OF CALIFORNIA / CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION HAS TESTED PETITIONER AND HAS DETERMINED PETITIONER HAS DISABILITIES - EFFECTIVE COMMUNICATION REQUIREMENTS WITH TEST RESULTS SCORES OF 0.0 AND OVERALL SCORE OF 1.9. THE TEST SCORES AND CALIFORNIA DEPT. OF CORRECTIONS AND REHABILITATION CLASSIFICATION COMMITTEE CHRONO ATTEST TO THESE FACTS WHICH ARE NOW MARKED AS EXHIBIT 10. WHICH INCLUDES CONFIDENTIAL SPECIAL EDUCATION REPORT. MOREOVER, IN LIGHT OF PETITIONER'S MENTAL DISABILITIES PETITIONER'S ATTORNEY WAS INEFFECTIVE TO ADVISE PETITIONER TO REJECT PLEA OFFER OF 3 YEARS AND FOR NOT QUESTIONING PETITIONER'S MENTAL COMPETENCE.

SEE EXHIBITS 1 - THROUGH - 10 ATTACHED BEHIND THIS PAGE

EXHIBIT 1

Superior Court of California, County of Riverside,
www.riverside.courts.ca.gov RC
4100 MAIN ST.
Riverside, CA 92501

People of the State of California
Vs.
CHRIS ANTHONY GEORGE

CASE NO. RIF1203066

MINUTE ORDER

Preliminary Hearing
Date: 10/17/12 Time: 12:00 AM Dept/Div: 63

Charges: 1) 261(A)(3) PC, 1) 261(A)(3) PC, 2) 288(A) PC, 2) 288(A) PC 3) 186.22(A) PC, 3) 186.22(A) PC

Honorable Judge Helios J. Hernandez Presiding.
Courtroom Assistant: JAM-J. Martin
Court Reporter: DO-D. OLeary
People represented by Deputy District Attorney: Elan Zektser by Luigi Monteleone.
Defendant Represented By Pvt Sean Davitt by Steve Allen.
Defendant Present.
At 14:15, the following proceedings were held:
Stipulated motion to continue pursuant to 1050 PC is granted. Hearing continued to 10/24/2012 at 8:30, Dept. 63
Pursuant to 1050(d) PC, the court finds good cause has been shown to grant the continuance.
Reason for continuance: OT-Other
Deft Waives Time for Preliminary Hrg plus 5 Court days.
Defendant ordered to return on any and all future hearing dates.
- - Custody Status/Information - -
Bail To Remain as fixed.
Remains remanded to custody of Riverside Sheriff..
Minute Order printed to Robert Presley Detention Center.

EXHIBIT 2

Superior Court of California, County of Riverside,
www.riverside.courts.ca.gov RC
4100 MAIN ST.
Riverside, CA 92501

People of the State of California
Vs.
CHRIS ANTHONY GEORGE

CASE NO. RIF1203066

MINUTE ORDER

==========

Preliminary Hearing
Date: 10/24/12 Time: 12:00 AM Dept/Div: 31

==========

Charges: 1) 261(A)(3) PC, 1) 261(A)(3) PC, 2) 288(A) PC, 2) 288(A) PC
3) 186.22(A) PC, 3) 186.22(A) PC

Honorable Judge Mark E Johnson Presiding.
Courtroom Assistant: KL1-K. Larson
Court Reporter: DF-D. Fringer
People represented by Deputy District Attorney: Elan Zektser.
Defendant Represented By Pvt Sean Davitt.
Defendant Present.
At 11:16, the following proceedings were held:
All parties announce ready for preliminary hearing.
Robert Stites Designated as Investigating Officer.
Motion to Exclude all Witnesses is granted.
People's Exhibit 1-stipulation is/are Marked for identification only.
Oral Motion By People regarding Victim referred to as Jane Doe is called for hearing.
Motion Granted
People's Witness, Daniel Flores is Sworn and testifies.
People's Witness, John Reinbloz is Sworn and testifies.
People's Witness, Robert Stites is Sworn and testifies.
People's Witness, Justin Hill is Sworn and testifies.
People's Exhibit 2-certified court documents RIF10004334 is/are Marked for identification only.
People's Exhibit 3-certified court documents RIF151243 is/are Marked for identification only.
People's Exhibit 4-certified court documents RIF10001589 is/are Marked for identification only.
People's Exhibit 5-court minutes co-deft Gamble is/are Marked for identification only.
People's Exhibit 6-court minutes co-deft Macfalling is/are Marked for identification only.
Court takes judicial notice as to co-defendants guilty plea today in Department 63.
Save Minute Order to case.
People's Exhibit(s) 1-6 is/are Admitted into evidence.
People rest.
No defense at this time.
Court finds sufficient cause to hold the defendant to answer on all

charges.
Court reporter ordered to prepare transcript of Preliminary Hearing at County Treasury expense.
Defendant waives time for information arriagnment and filing of the information by the People.
Information arraignment set for 11/28/2012 at 8:30 in Department 63.
Defendant ordered to return on any and all future hearing dates.
- - Custody Status/Information - -
Bail To Remain as fixed.
Remains remanded to custody of Riverside Sheriff.
Minute Order printed to Robert Presley Detention Center.
Save Minute Order to case.

EXHIBIT 3

CR-290

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE

[NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED]

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: Riverside		FILED SUPERIOR COURT OF CALIFORNIA COUNTY OF RIVERSIDE NOV 19 2012 A. Nunez
PEOPLE OF THE STATE OF CALIFORNIA vs. DOB: 07/11/1990 DEFENDANT: CHAZ JAMAR MACFALLING AKA: CHAZ JAMAK MACFALLING CII#: A27829403 BOOKING #: ☐ NOT PRESENT	RIF1203066 -A -B -C	
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT ☐ AMENDED ABSTRACT	-D	
DATE OF HEARING 11/16/2012 / DEPT. NO. 63	JUDGE Helios J. Hernandez	
CLERK J Martin / REPORTER D O'Leary	PROBATION NO. OR PROBATION OFFICER ☐ IMMEDIATE SENTENCING	
COUNSEL FOR PEOPLE Elan Zektser	COUNSEL FOR DEFENDANT VMB Graham Donath ☐ APPTD	

NOV 20 2012

1. Defendant was convicted of the commission of the following felonies:
   ☐ Additional counts are listed on attachment
   _____(number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO/DAY/YR)	CONVICTED BY: JURY	CONVICTED BY: COURT	CONVICTED BY: PLEA	TERM (L,M,U)	CONCURRENT	CONSECUTIVE 1/3 VIOLENT	CONSECUTIVE 1/3 NON-VIOLENT	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCE (refer to item 5)	654 STAY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED: YRS.	PRINCIPAL OR CONSECUTIVE TIME IMPOSED: MOS.
3	PC	261(A)(1)	RAPE/SEXUAL INTE	10	10/24/12			X	L							3	

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

COUNT	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL	

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL	

4. ☐ Defendant was sentenced per ☐ PC 667(b)-(i) or PC 1170.12 (two-strikes)
   ☐ PC 1170(a)(3). Pre-confinement credits equal or exceed time imposed (Paper Commitment). Deft. ordered to report to local Parole Office upon release.

5. INCOMPLETED SENTENCE(S) CONSECUTIVE

COUNTY	CASE NUMBER

6. TOTAL TIME ON ATTACHED PAGES:
7. ☐ Additional indeterminate term (see CR-292).
8. TOTAL TIME EXCLUDING COUNTY JAIL TERM: 3

This form is prescribed under PC 1213.5 to satisfy the requirements of PC1213 for determinate sentences. Attachments may be used but must be referred to in this document.

Form Adopted for Mandatory Use
Judicial Council of California
CR-290 (Rev. July 1, 2009)

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE
[NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED]

Penal Code 1213, 1213.5

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT:	CHAZ JAMAR MACFALLING		
RIF1203066* -A	-B	-C	-D

9. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):

a. Restitution Fine(s):

Case A: $ 240.00 per PC 1202.4(b) forthwith per PC 2085.5; $ 240.00 per PC 1202.45(b) suspended unless parole is revoked
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case B: $ _____ per PC 1202.4(b) forthwith per PC 2085.5; $ _____ per PC 1202.45(b) suspended unless parole is revoked
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case C: $ _____ per PC 1202.4(b) forthwith per PC 2085.5; $ _____ per PC 1202.45(b) suspended unless parole is revoked
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case D: $ _____ per PC 1202.4(b) forthwith per PC 2085.5; $ _____ per PC 1202.45(b) suspended unless parole is revoked
$ _____ per PC 1202.44 is now due, probation having been revoked.

b. Restitution per PC 1202.4(f):

Case A: $ _____ ☐ Amount to be determined to ☒ victim(s)* ☐ Restitution Fund
Case B: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case C: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case D: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund

☐ * Victim names(s), if known, and amount breakdown in item 11, below ☐ * Victim names(s) in probation officer's report.

c. Fine(s):

Case A: $ _____ per PC 1202.5. $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ Includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case B: $ _____ per PC 1202.5. $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ Includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case C: $ _____ per PC 1202.5. $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ Includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case D: $ _____ per PC 1202.5. $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ Includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

d. Court Security Fee: $ 40.00 per PC 1465.8 e. Criminal Conviction Assessment: $ 30.00 per GC 70373

10. TESTING a. ☐ Compliance with PC 296 verified b. ☒ AIDS pursuant to PC 1202.1 c. ☐ other *(specify)*:

11. Other orders *(specify)*:

Pay booking fees of $450.34; Payable to Division of Adult Institutions (GC 29550)

12. IMMEDIATE SENTENCING:

☐ Probation to prepare and submit post-sentence report to CDCR per PC 1203c.
Defendant's race/national origin: Black

13. EXECUTION OF SENTENCE IMPOSED

a. ☒ at initial sentencing hearing
b. ☐ at resentencing per decision on appeal
c. ☐ after revocation of probation
d. ☐ at resentencing per recall of commitment (PC 1170(d).)
e. ☐ Other *(specify)*:

14. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
A	265	133	132 [X] 4019 [ ] 2933.1
B			[ ] 4019 [ ] 2933.1
C			[ ] 4019 [ ] 2933.1
D			[ ] 4019 [ ] 2933.1

Date Sentenced Pronounced:	Time Served in State Institution:
11/16/12	[ ] DMH [ ] CDCR [ ] CRC

15. The defendant is remanded to the custody of the sheriff ☒ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to ☒ the reception center designated by the director of the California Department of Corrections.
☐ other *(specify)*:

SUPERIOR COURT OF CALIFORNIA COUNTY OF RIVERSIDE

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action

DEPUTY'S SIGNATURE	DATE
	11/19/2012

EXHIBIT 4

CR-290

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE

[NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED]

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: Riverside

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
NOV 19 2012
A. Nuñez

NOV 20 2012

PEOPLE OF THE STATE OF CALIFORNIA vs. DOB: 12/03/1993
DEFENDANT: URAL KEONTAE GAMBLE
AKA:
CII#: A28772467
BOOKING #: ☐ NOT PRESENT

RIF1203066 -A
-B
-C
-D

☐ COMMITMENT TO STATE PRISON
☐ ABSTRACT OF JUDGMENT ☐ AMENDED ABSTRACT

DATE OF HEARING: 11/16/2012
DEPT. NO.: 63
JUDGE: Helios J. Hernandez
CLERK:
REPORTER:
PROBATION NO. OR PROBATION OFFICER:
☐ IMMEDIATE SENTENCING
COUNSEL FOR PEOPLE: Elan Zektser
COUNSEL FOR DEFENDANT: VMB John Dorr ☐ APPTD

1. Defendant was convicted of the commission of the following felonies:
☐ Additional counts are listed on attachment
_____(number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO/DAY/YR)	CONVICTED BY: JURY	CONVICTED BY: COURT	CONVICTED BY: PLEA	TERM (L,M,U)	CONCURRENT	CONSECUTIVE 1/3 VIOLENT	CONSECUTIVE 1/3 NON-VIOLENT	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCE (refer to Item 4)	654 STAY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED: YRS.	PRINCIPAL OR CONSECUTIVE TIME IMPOSED: MOS.
1	PC	261(A)(3)	RAPE-WHILE INTOX	10	10/24/12			X	L							3	

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

COUNT	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL	

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL	

4. ☐ Defendant was sentenced per ☐ PC 667(b)-(i) or PC 1170.12 (two-strikes)
☐ PC 1170(a)(3). Pre-confinement credits equal or exceed time imposed (Paper Commitment). Deft. ordered to report to local Parole Office upon release.

5. INCOMPLETED SENTENCE(S) CONSECUTIVE

COUNTY	CASE NUMBER

6. TOTAL TIME ON ATTACHED PAGES:
7. ☐ Additional indeterminate term (see CR-292).
8. TOTAL TIME EXCLUDING COUNTY JAIL TERM: 3

This form is prescribed under PC 1213.5 to satisfy the requirements of PC1213 for determinate sentences. Attachments may be used but must be referred to in this document.

Form Adopted for Mandatory Use
Judicial Council of California
CR-290 (Rev. July 1, 2009)

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE
[NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED]

Penal Code 1213, 1213.5

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: URAL KEONTAE GAMBLE			
RIF1208066 -A	-B	-C	-D

9. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):

a. Restitution Fine(s):

Case A: $ 240.00 per PC 1202.4(b) forthwith per PC 2085.5; $ 240.00 per PC 1202.45(b) suspended unless parole is revoked
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case B: $ _____ per PC 1202.4(b) forthwith per PC 2085.5; $ _____ per PC 1202.45(b) suspended unless parole is revoked
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case C: $ _____ per PC 1202.4(b) forthwith per PC 2085.5; $ _____ per PC 1202.45(b) suspended unless parole is revoked
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case D: $ _____ per PC 1202.4(b) forthwith per PC 2085.5; $ _____ per PC 1202.45(b) suspended unless parole is revoked
$ _____ per PC 1202.44 is now due, probation having been revoked.

b. Restitution per PC 1202.4(f):

Case A: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case B: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case C: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case D: $ _____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund

☐ * Victim names(s), if known, and amount breakdown in item 11, below ☐ * Victim names(s) in probation officer's report

c. Fine(s):

Case A: $ _____ per PC 1202.5. $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case B: $ _____ per PC 1202.5. $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case C: $ _____ per PC 1202.5. $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case D: $ _____ per PC 1202.5. $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense.

d. Court Security Fee: $ 40.00 per PC 1465.8 e. Criminal Conviction Assessment: $ 30.00 per GC 70373

10. TESTING a. ☐ Compliance with PC 296 verified b. ☒ AIDS pursuant to PC 1202.1 c. ☐ other *(specify)*:

11. Other orders *(specify)*:

Case to run Concurrent with any: other matter.
Pay booking fees of $450.34; Payable to Division of Adult Institutions (GC 29550)

12. IMMEDIATE SENTENCING:

☐ Probation to prepare and submit post-sentence report to CDCR per PC 1203c.
Defendant's race/national origin: Black

13. EXECUTION OF SENTENCE IMPOSED

a. ☒ at initial sentencing hearing
b. ☐ at resentencing per decision on appeal
c. ☐ after revocation of probation
d. ☐ at resentencing per recall of commitment (PC 1170(d).)
e. ☐ Other *(specify)*:

14. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
A	413	207	206 [X] 4019 [ ] 2933.1
B			[ ] 4019 [ ] 2933.1
C			[ ] 4019 [ ] 2933.1
D			[ ] 4019 [ ] 2933.1

Date Sentenced Pronounced:	Time Served in State Institution:
11/16/12	[ ] DMH [ ] CDCR [ ] CRC

15. The defendant is remanded to the custody of the sheriff ☒ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to ☒ the reception center designated by the director of the California Department of Corrections.
☐ other *(specify)*:

I hereby certify the foregoing to be a correct abstract of the judgment made in this action

CLERK OF THE COURT

DEPUTY'S SIGNATURE	DATE
	11/19/2012

EXHIBIT 5

SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
PROBATION OFFICER'S REPORT

THE PEOPLE OF THE STATE OF CALIFORNIA VS CHRIS ANTHONY GEORGE	DEPT. & JUDGE 62 - DONNER
	HEARING DATE 06/28/2013; 8:30 A.M.
	COURT NUMBER RIF1203066
	PROBATION NUMBER A466558
	TYPE OF REPORT R&S
	PROBATION OFFICER EVELYN BRICEÑO
	ATTORNEYS E. ZEKSTER (DDA) S. DAVITT (PVT)
	CUSTODY STATUS IN CUSTODY

DATE OFFENSE(s)	DATE INFORMATION FILED	DATE CONVICTED	HOW CONVICTED
11/19/2010	11/20/2012	04/12/2013	JURY TRIAL

COUNTS CONVICTED:

1: 261(a)(3) PC (Rape While Person is Intoxicated or Under Influence), a felony.

Enhancement as to Count 1:
186.22(b)(1)(B) (Serious Felony Committed to Benefit a Criminal Street Gang)

(Continued on Page 1a)

ENHANCEMENT PENDING:

Enhancement as to Count 2:
1203.066(a)(8) PC (Substantial Sexual Conduct With a Person Under the Age of 14 Years)

SPECIFICATION OF PLEA:

None.

RECOMMENDATION:

1) Probation Denied.
2) State Prison.

COURT STATUS: (Continued from Page 1)

Counts Convicted:

2: 288(a) PC (Lewd and Lascivious Act With a Child Under the Age of 14 Years), a felony.

Enhancement as to Count 2:
186.22(b)(1)(C) (Violent Felony Committed to Benefit a Criminal Street Gang)

3: 186.22(a) PC (Offense Committed to Benefit a Criminal Street Gang; to wit: Edgemont Criminals), a felony.

ADULT SOCIAL HISTORY

IDENTIFICATION

CLIENT#: 542973 DOB: 12/16/1991 CDC#: N/A DJJ#: N/A
NAME: (last) George (first) Chris (middle) Anthony
KNOWN ADDRESS: 23992 Bay Ave. Apt. #110, Moreno Valley, CA 92353
MAILING ADDR.: N/A
RACE: Black SEX: M HT.: 5'5" WT.: 160 HAIR: Black EYES: Brown
POB COUNTY/COUNTRY: Virgin Islands POB STATE: N/A CITIZEN: Y
YEAR IN US: 1991 YEAR IN CA: 1992 YEAR IN COUNTY: 1992
ID CHARS: Tattoos: Chest - Detroit "D", Cleveland Indian Image, Tazmanian Devil, and "Leanaka"; Left Arm - Angel; "A", prayer hands, "Kunoriya," and "Blood"; Right Arm - Skulls, Eyeball, and "Carol," and "Tasheema", Rt. Wrist - Flames
GANG AFF: Defendant denied affiliation during interview; however, he has self-admitted membership to Edgemont Criminals/Dorner Blood (EMCG/DB) in the past, and he has several gang-related tattoos.
HOME PHONE: N/A WORK PHONE: N/A MSG PHONE: (951)221-7125

FAMILY DATA

MARITAL STATUS: S MARRIAGE DATE: N/A PREV MARRIAGES: 0
SPOUSE: N/A OCC: N/A
ADDRESS: N/A
NUMBER OF CHILDREN: 0 AGE RANGE: N/A IN DEFENDANT'S CUSTODY?: N SUPPORT?: N
FATHER: Alden George AGE: Unknown OCC: Mechanic
ADDRESS: Unknown Address in the Virgin Islands
MOTHER: Carol Ann King AGE: 51 OCC: Elder Care
ADDRESS: 23992 Bay Ave. #110, Moreno Valley, CA 92553

EMPLOYMENT RECORD

PRESENT EMPLOYER: Defendant has never been employed.
ADDR: N/A WORK TYPE: N/A
PHONE: N/A SALARY: N/A DATE BGN: N/A END: N/A

MONTHLY FINANCIAL RECORD

DEFENDANT'S INCOME: N/A SPOUSE'S INCOME: N/A OTHER N/A
WELFARE (AFDC): N/A SINCE: N/A FOOD STAMPS: N/A
COMMENT: Defendant does not have any income, as he has never been employed.

EDUCATION

HIGHEST GRADE: 11 GRAD?: N YEAR: 0
DEGREE/CERTIFICATE: N/A
COMMENT: Defendant discontinued his education following the 11th grade.

HEALTH

PHYSICAL HEALTH: Good MENTAL HEALTH: Good HANDICAP: None
AILMENT: None TREATMENT: MEDICATION: None

SUBSTANCE ABUSE

		AMOUNT USED/WHEN			AMOUNT USED/WHEN
ALCOHOL	Y	4 Drinks / Month	AMPHETAMINE	N	
MARIJUANA	Y	3 Blunts / Daily	PCP	N	
HEROIN	N		HALLUCINOGENS	N	
COCAINE	N		OTHER	N	

EVER TREATED: N WHEN: ALCOHOLIC: N
EVER ADDICTED: N DAILY COST: $0 EVER INJECTED: N

ADDITIONAL INFORMATION: Defendant denied the use or experimentation of any other illegal drug.

CIRCUMSTANCES OF THE OFFENSE:

Source: Riverside County Sheriff Report #MV103230029 and Supplemental Reports

The Court, having heard the evidence and testimony in trial, is familiar with the circumstances surrounding the offense. The following is a brief synopsis of the available reports and may not accurately reflect the evidence and testimony presented during trial.

On November 20, 2010, approximately 0659 hours, deputies were notified of an alleged sexual assault. They responded to the address of the reporting party, Gloria, who advised the victim, Jane Doe (DOB 01/13/97), who was unknown to her, approached her home and relayed she was raped the previous evening.

Deputies spoke with Doe, who, initially, provided several conflicting versions of the events. Doe later told deputies she went to Jack in the Box restaurant, in the city of Moreno Valley, on November 19, 2010, after school with two friends, Kiara and a friend she knew only as "Bear." As they left the restaurant, Doe was asked to go to Victoriano Park with Kiara, Bear, and four of Bear's friends. While Bear went to a grocery store, the remainder of them went to the park. Bear later arrived to the park in possession of an alcoholic beverage, Alize, which they all shared. Doe estimated they remained at the park approximately one hour.

Doe, Kiara, and Bear left the park and walked to McDonalds. Approximately 30 minutes later, Kiara went home and left Doe and Bear to talk amongst themselves. Three of Bear's friends, one of whom was named Ricky, joined them, and they left the restaurant. All five of them went to a grocery store to obtain another bottle of Alize

and returned to McDonalds to look for [illegible]ra, who had advised she would return. They saw Ricky's brother, later identified as co-defendant Ural Keontae Gamble, who offered to drive them to another store to obtain additional alcoholic beverages. After going to another grocery store, they sat in Gamble's vehicle consuming the alcoholic beverages. Gamble then drove them to a vacant home, located on Parsley Avenue in the City of Moreno Valley, County of Riverside.

Doe told deputies she was the only female amongst the group, and she felt very drunk, as that was the first time she had ever consumed an alcoholic beverage. She estimated she consumed one half of a bottle of Alize. Once they were inside of the house, Gamble left. Doe, Bear, Ricky and a friend of Ricky went to an upstairs bedroom. Her head began to hurt, so she sat in a corner of the room. Her last memory was making an attempt to stand up. She woke up several times throughout the course of the evening, and each of the times she was in a different location of the house. The last time she woke up, she was at the top of the stairs, and her pants, underwear, shoes, and socks had been removed. She walked into the bathroom and discovered several condoms on the floor. Doe staggered out of the house barefoot and walked along the street until she encountered Gloria at her residence.

Doe told deputies she did not recall engaging in sexual intercourse with anyone, and she did not recall giving anyone consent to engage in sexual intercourse with her. She also advised she was not in the "right mind" to give consent. Doe was transported to Riverside County Regional Medical Center (RCRMC) for medical attention and a Sexual Assault Response Team (SART) examination. Deputies were advised medical

personnel reported finding tenderness to Doe's hymen, as well as dried secretions matted into her hair and pants. Fluids and abrasions were also located on Doe's body, along with marks consistent with condom usage. The sexual assault kit was subsequently sent to the California Department of Justice (DOJ) for processing and analysis.

Deputies spoke with Doe's mother, Sherrice, who had reported Doe as a runaway, since she did not return home from school the previous day. Sherrice was made aware of the situation her daughter endured, and she said she has experienced problems with Doe bringing boys into the house when she is not home, in addition to the problems Doe recently began to have at school. Sherrice was surprised to learn Doe consumed alcoholic beverages, since she did not believe she drank or used illegal drugs. She also told deputies Doe is "always lying to cover up a lie," which attributed to the conflicting accounts of the incident she provided deputies.

Officers responded to the location of the assault and found the front door was unlocked. They entered the house and noticed there was not any furniture within the home. They discovered numerous condom wrappers and used condoms throughout the house and saw a pair of tennis shoes in the upstairs bedroom, where the victim stated she left them. Neighbors confirmed the house had been vacant approximately six months. Deputies collected the condoms and condom wrappers as evidence and sent them to DOJ for processing and analysis.

On April 30, 2012, deputies received information three of the four deoxyribonucleic acid (DNA) profiles, which were entered into the Combined DNA Index

System (CODIS) had been matched to the defendant, Chris Anthony George, and co-defendants Gamble and Chaz Jamar MacFalling. On May 29, 2012, Doe participated in a photographic line-up, in which she positively identified Gamble as the person who drove them to the house.

On June 6, 2012, search warrants were obtained to collect DNA samples from both the defendant and Gamble. Deputies contacted Gamble at the Southwest Detention Center, as he was detained on unrelated charges. After advising him of his Miranda Rights, Gamble agreed to speak with deputies. Gamble denied knowledge of Doe, but recalled the residence where the incident occurred, because he used to smoke marijuana inside of the house. He stated he did not recognize Doe and denied engaging in any sexual contact with her even though he was advised his DNA was found at the crime scene. A DNA sample was obtained.

On June 13, 2012, the defendant was arrested, transported to Robert Presley Detention Center, and booked into custody. A DNA sample was obtained from the defendant at that time.

On July 11, 2012, a search warrant to obtain a DNA sample from MacFalling was signed. The sample was obtained at the Larry Smith Correctional Facility, as MacFalling was previously detained during a traffic violation stop. Although MacFalling was willing to provide a statement, deputies were unable to obtain it, as MacFalling had already been arraigned on the matter.

According to a supplemental report to confirm gang membership of the suspects involved in this case, a deputy with the Moreno Valley Police Department Special

Enforcement Team-Gang Unit indicated the criminal street gang, "Edgemont Criminals (EMCG)/Dorner Blocc (DB)," originated at Moreno Valley High School and is composed of black males. The Edgemont Criminals and Dorner Blocc were, initially, two separate criminal street gangs; however, in 2003, they allied with each other and have acted as one large criminal street gang without any clear distinction between them. The sole purpose of any gang is to obtain respect, which is understood by gang members to represent fear. Gang members will typically obtain this fear/respect by committing crimes that instill fear within the community. The more a gang member is feared, the more that member is respected.

On March 13, 2007, deputies contacted the defendant, who has a moniker of "Lil Scrap," at a liquor store and he admitted he was an active member of Dorner Blocc. Over the years, the defendant has been contacted by law enforcement on numerous occasions while in the company of known and admitted EMCG/DB gang members. On February 9, 2011, the defendant was interviewed during a jail classification interview at Larry Smith Correctional Facility and self-admitted to being a member of EMCG/DB. Additionally, on March 7, 2012, the defendant was contacted in Moreno Valley during a birthday celebration of a deceased fellow gang member, along with numerous other gang members.

On September 20, 2011, deputies contacted Gamble at a known EMCG/DB "hang out" residence, and he self-admitted to being a member of the gang. During the contact, deputies noticed Gamble had the Los Angeles Angels symbol, "A," cut into his hair, which is used to symbolize the intersection of Adrienne and Allies, known as the "A

Line." On April 17, 2012, following an arrest, a video was located on Gamble's telephone which depicts numerous fellow gang members, including the defendant, drinking in a car garage. During the video, Gamble says, "Fuck a fag! A fag could die tonight! That's how I feel." The term "fag" is used as a derogatory term for a member of the rival criminal street gang, "Sex, Cash, Money."

Although MacFalling does not have any documented gang contacts, he is believed to be an active member of EMCG/DB, as he was identified in May of 2010 as a suspect in a residential burglary alongside Gamble. During the interview, MacFalling stated the burglary was committed by "Little Dice," Gamble, and "Scrappy," referring to the defendant.

CRIMINAL RECORD:

CII: A27083391 FBI: 102776LC9 SSN: 580-27-1206 OLN: F1353259 (CA-SUSP/REV)

Source: CII, FBI, DMV, Riverside County Juvenile Probation Records, Riverside, San Bernardino, San Diego, and Orange County Superior Court Records

JUVENILE:

Petition Date	Adjudicated Offense(s)	Court/#/Disposition
02/05/2007	12101(a) PC (F)	Superior Court of California, County of Riverside Juvenile/#RIJ113740 02/22/07: Declared Ward, 20/40 Days Juvenile Hall.
12/20/2007	777 WIC	02/19/08: Continued Ward, 14/28 Days Juvenile Hall.
12/27/2007	11357(e) H&S (M)	04/29/08: Continued Ward, Ordered Placed, Released 02/18/09.
04/14/2008	777 WIC	06/03/09: Continued Ward, 14/28 Days Juvenile Hall.
05/06/2009	777 WIC	

(Continued on Page 9)

07/30/2009	459 PC (F)	08/14/09: Continued Ward, Ordered Placed. 04/14/10: Wardship Terminated.

ADULT:

Conviction Date	Convicted Offense(s)	Court/#/Disposition
03/18/2011	459 PC (F) 186.22(b) PC (F) 1214.1(a) PC (I)	Superior Court of California, County of Riverside/#RIF1101451 36 Months Formal Probation, 365 Days Jail, Fine.

DMV PENDING:

Violation Date	Offense(s)	Court/#/Status
06/08/2012	14601.1(a) VC (M)	Superior Court of California, County of Riverside/#SWM1204742 06/28/13: Arraignment Hearing in Department 62 at 8:30 a.m.

ALIASES:

1) Christopher Anthony George
2) Christopher George
3) Chris George
4) Chris A. George

MONIKER:

1) Lil Scrap

ADDITIONAL DATE OF BIRTH:

1) 12/16/1992

DEFENDANT'S STATEMENT:

The defendant was interviewed on June 11, 2013, at Larry Smith Correctional Facility in Banning. After he was advised of his Miranda Rights, the defendant declined to speak of the instant offense but agreed to discuss his social and criminal histories.

The defendant was born on December 16, 1991, in the Virgin Islands, and he is one of six children. When he was an infant, his family, with the exception of his father,

relocated to California, because his uncle was ill. Although his father was not a constant presence in his life, he maintained contact and a good relationship with him, since they communicated often and saw each other as often as they could. His mother is saddened by his situation, but she has remained supportive of him and visits him often. She would like the defendant to change his lifestyle when he is released from custody, and she is desirous of him developing new and positive friendships. The defendant has three sisters and two brothers, who have also remained supportive of him; as they know he is "not that type of person" to have committed this crime.

The defendant discontinued his education following the 11th grade, because he was "hanging around the wrong crowd," and he found it more enjoyable to skip school and spend the day with his friends. His friends belonged to a criminal street gang, and although he associated with them often, he was not affiliated with any gang, as he was never "jumped" in. He has never held employment; however, during the time he was in a private placement facility, he assisted a pet store with clean up and maintenance for approximately one month, where he earned $40.00 per week.

The defendant reported good physical and mental health. He has not been prescribed any medications, and he does not suffer from any ailments. In regard to substance abuse, he began to consume alcoholic beverages at the age of 17. He consumed approximately four drinks per month, and he did not recall the last time he consumed a drink. At the age of 13, he began to smoke marijuana and, typically, smoked two or three "blunts" on a daily basis. The last time he smoke marijuana was

on the day of his arrest. The defendant denied the use or experimentation of any other illegal substance.

As a juvenile, the defendant was detained in Riverside Juvenile Hall on several occasions. In 2007, he was adjudicated for a weapons offense after he was found in possession of a gun, which he stated was for protection. He obtained the gun after he stole it in a residential burglary. He denied he was ever adjudicated for a drug offense, as is listed in his criminal history record. The burglaries which occurred in 2009 and 2011 were accomplished on random houses for the purpose of stealing items to sell.

The defendant is upset the charges for which he has been convicted require him to register as a sex offender. He believes he "got played," because he was offered a deal prior to the trial and he did not accept it, because his lawyer advised he could "beat the charges" if he went through a trial. His family wasted money on his attorney, because he did not do anything for him. The defendant is hopeful he will not be sentenced to a substantial period of imprisonment.

VICTIM'S STATEMENT:

[X] RESTITUTION [ ] INSURED [X] LETTER SENT [X] NO REPLY
[X] ATTEMPTED PHONE CONTACT AMOUNT: To Be Determined

On April 26, 2013, a Victim Impact/Statement of Loss letter was mailed to the victim advising her of the date, time, and location of sentencing and of her right to appear in and address the Court. She was asked to submit any requests for restitution.

On June 14, 2013, this officer contacted the victim's mother in order to obtain permission to speak with the victim. Doe's mother advised she was at her place of employment and would return the telephone call at a later time. As of the dictation date, the victim's mother has not contacted this officer.

COLLATERAL INFORMATION:

Source: Deputy District Attorney, Elan Zekster
Private Counsel, Sean Davitt

On April 25, 2013, electronic messages inviting comment were sent to both Mr. Zekster and Mr. Davitt. As of the dictation date, Mr. Davitt has not responded with a comment to include in the report, and Mr. Zekster wishes to reserve comment for sentencing.

STATIC 99R:

Accurate prediction of the risk of re-offense requires use of a risk assessment instrument based on research studies which followed released sex offenders and identified factors associated with those who re-offended. Predictions of which sex offenders will reoffend are improved significantly when validated actuarial instruments are used to estimate risk. An actuarial instrument is a list of risk factors that when present increase the risk of sexual re-offense. Each item is statistically weighted for its contribution to overall risk. A total score, level of risk and probabilities of risk for offenders five and ten years after release can be determined. The Static-99R is the most widely used such instrument. Many research studies have proven its predictive accuracy. Research shows that the opinion of a professional after interviewing an offender (known as unstructured clinical judgment) is not an accurate way to predict whether a sex offender will reoffend.

There have been a large number of studies examining the sexual recidivism rates associated with Static-99 scores. Helmus, Hanson & Thornton (2009) summarized the results of 23 samples of sexual offenders (number of offenders in studies = 8,139)

drawn from different countries including Canada, the United States, New Zealand, United Kingdom and Western Europe. Sexual re-offense on the Static-99R should be considered a measure of reconviction. These recent studies found that the ability of Static-99R to rank relative risk is reasonably consistent across samples and settings, but the observed recidivism rates vary across samples. Specifically, the average recidivism rates associated with each score are lower in contemporary samples (1990's and more recent) than in the samples used in the development of Static-99, which involved offenders who were primarily released during the 1970's and 1980's. Consequently, the developers of the Static-99 recommended that the original norms be replaced by new norms based on samples that are more recent, more representative, and larger than the original samples. This was completed in a 2009 update of the recidivism rates that now applies to scores from 0 to 10+.

The defendant, Mr. George, was scored on the Static-99R, which is an actuarial measure of risk for sexual offense recidivism. This instrument has been shown to be a moderate predictor of sexual re-offense potential. The defendant received a total score of 3, which places him in the Low-Moderate Risk Category for being convicted of another sexual offense, if he is released on probation. His risk on release from a prison sentence cannot be calculated until his age on release on parole is known, so the risk score stated herein is predictive of risk based on his age on the date of this pre-sentencing report. If the defendant has a prior conviction for a registrable sex offense, his risk score was calculated based on his age at release on the most recent registrable sex offense, or his age today if he had no prior registrable sex offense. There was a

2009 update of the recidivism rates that now applies to scores from 0 to 10+. The defendant scored a **3** on the Static-99R. The estimated risk for this score on the Static-99R is **Low-Moderate** over five years. Risk factors which are not measured by the Static-99R can raise or lower risk. These include things like substance abuse, personality disorder, deviant sexual interests, emotional identification with children, and self-regulation problems. A sex offender in a mandated treatment program will be assessed by a certified treatment provider using dynamic and violence risk assessment instruments designated by the SARATSO Committee. The combined risk will be used to determine appropriate levels of supervision and treatment.

DISPOSITION OF CO-DEFENDANT(S):

Ural Keontae Gamble:

On October 24, 2012, Mr. Gamble pled guilty to Count 1: 261(a)(3) PC (Rape While Person Is Intoxicated or Under Influence), a felony. On November 16, 2012, Mr. Gamble was sentenced to a state prison term of three years.

Chaz Jamar MacFalling:

On October 24, 2012, Mr. MacFalling pled guilty to Count 3: 261(a)(1) PC (Rape While Person Is Incapable of Giving Legal Consent), a felony. On November 16, 2012, Mr. MacFalling was sentenced to a state prison term of three years.

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CRITERIA AFFECTING PROBATION:

PROBATION ELIGIBILITY – JUDICIAL COUNCIL RULE 4.413:

Rule 4.413(a): Statutory provisions limiting or prohibiting a grant of probation in this matter do not exist. However, pursuant to Penal Code Section 1203.067(a), notwithstanding any other law, before probation may be granted to any person convicted of a felony specified in Sections 261 and 288 PC, the Court shall do all of the following: (1) Order the defendant evaluated pursuant to Section 1203.3 PC, or similar evaluation by the County Probation Department. (2) Conduct a hearing at the time of sentencing to determine if probation of the defendant would pose a threat to the victim. The victim shall be notified of the hearing by the prosecuting attorney and given an opportunity to address the Court. (3) Order a psychiatrist or psychologist appointed by the Court pursuant to Section 288.1 PC to include a consideration of the threat to the victim, and the defendant's potential for positive response to treatment in making his or her report to the Court.

Should the Court find the pending allegation of 1203.066(a)(8) PC true, the defendant would be absolutely ineligible for probation; in that, it was pled and proved he engaged in substantial sexual conduct with a victim who was under the age of 14 years.

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PROBATION SUITABILITY – JUDICIAL COUNCIL RULE 4.414:

Judicial Council Rules Supporting a Grant of Probation:

Rule 4.414(a): Facts relating to the crime include:

There are no judicial council rules supporting a grant of probation.

Rule 4.414(b): Facts relating to the defendant include:

Rule 4.414(b)(3): The defendant is willing to comply with the conditions of probation.

Judicial Council Rules Supporting a Denial of Probation:

Rule 4.414(a): Facts relating to the crime include:

Rule 4.414(a)(1): The nature and circumstances of the crime are serious compared to other instances of the same crime.

Rule 4.414(a)(3): The victim was vulnerable.

Rule 4.414(a)(6): The defendant was an active participant in the commission of the crime.

Rule 4.414(b): Facts relating to the defendant include:

Rule 4.414(b)(1): The prior record of criminal conduct, whether as an adult or juvenile, indicates a pattern of regular or increasingly serious criminal conduct.

Rule 4.414(b)(2): The prior performance on probation or parole was not satisfactory and, the defendant is presently on probation or parole.

Rule 4.414(b)(7): The defendant is not remorseful.

Rule 4.414(b)(8): It is likely that if released, the defendant will be a danger to others.

SENTENCING DATA:

Circumstances in Aggravation (Rule 4.421):

Rule 4.421(a): Factors relating to the crime, whether or not charged or chargeable as enhancements include that:

Rule 4.421(a)(1): The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

Rule 4.421(a)(3): The victim was particularly vulnerable.

Rule 4.421(b): Factors relating to the defendant include that:

Rule 4.421(b)(1): The defendant has engaged in violent conduct that indicates a serious danger to society.

Rule 4.421(b)(5): The defendant's prior performance on probation or parole was unsatisfactory.

Circumstances in Mitigation (Rule 4.423):

Rule 4.423(a): Factors relating to the crime include that:

There are no circumstances in mitigation.

Rule 4.423(b): Factors relating to the defendant include that:

There are no circumstances in mitigation.

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PENAL CODE SECTION 654:

Penal Code Section 654 prohibits multiple punishments for an act or omission that violates multiple statutes. Relevant case law has extended that protection for multiple acts that arise out of the same set of operative facts and circumstances, when the violations serve the same intent and objective. With regard to Counts 1-2, since the act giving rise to the lewd and lascivious conduct (Count 2) does not necessarily include of the act of sexual intercourse, it appears the defendant could have ceased his behavior following the lewd and lascivious conduct. He had the opportunity to acknowledge the victim was intoxicated and incapable of providing consent to any sexual conduct prior to committing the act of rape (Count 1). Therefore, it does not appear sentencing limitations pursuant to Penal Code Section 654 apply in this matter.

PENAL CODE SECTION 1170(h):

As the offense in Counts 1-2 are serious (1192.7 PC), violent (667.5 PC), and registerable (290 PC), the defendant is ineligible to serve any period of incarceration in the county jail, should the Court choose to deny probation and impose and execute a sentence.

PUNISHMENT:

Count 1:

Count 1 is punishable by three years, six years, or eight years in state prison. Count 1 is considered a Subordinate Count and would normally be sentenced by one-third of the middle term of imprisonment; however, pursuant to Penal Code Section 667.6(d), a full, separate, and consecutive term shall be imposed for each violation of

Penal Code Section 261(a)(3). In considering the aforementioned aggravating and mitigating factors, it appears the middle term of six years would be warranted if the defendant is sentenced to state prison.

Enhancement 186.22(b)(1)(B) PC:

This Penal Code Section dictates the imposition of five years to be served additionally and consecutively to the punishment prescribed for the felony of which he has been convicted. As this enhancement is attached to a Subordinate Count, the punishment should be sentenced by one-third of the term, for a total of one year and eight months

Count 2: (Principal)

Count 2 is considered the Principal Count and is originally punishable by three years, six years, or eight years in the state prison. In considering the aforementioned aggravating and mitigating factors, it appears the middle term of six years would be warranted if the defendant is sentenced to state prison.

Enhancement 186.22(b)(1)(C) PC:

This Penal Code Section dictates the imposition of 10 years to be served additionally and consecutively to the punishment prescribed for the felony of which he has been convicted.

Count 3:

Count 3 is originally punishable by 16 months, 2 years, or 3 years. Count 3 is considered a Subordinate Count and should be sentenced by one-third of the middle term of punishment, for a total of 8 months.

CONCLUSION:

The total period of incarceration is 24 years and 4 months.

PROBATION OFFICER'S STATEMENT:

Before the Court is the defendant, Chris Anthony George, a 21-year-old male. The defendant has been found guilty of one felony count of rape while the victim was intoxicated, one felony count of lewd and lascivious acts with a child under the age of 14, and one felony count of committing a crime to benefit a criminal street gang. Enhancements for committing a serious and violent felony to benefit a criminal street gang were also found true.

In the instant matter, the defendant, along with two other EMCG/DB gang members, engaged in sexual intercourse with the 13-year-old victim after she became intoxicated and passed out. The defendant demonstrated callous behavior in taking advantage of the victim who was extremely vulnerable at the time, since she was unconscious and not in any state to provide consent to engage in any kind of sexual conduct.

As previously mentioned, pursuant to Penal Code Section 1203.067(a), statutory provision limiting or prohibiting a grant of probation in this matter do not exist. However, before probation may be granted, the defendant must first be evaluated, pursuant to Penal Code Section 1203.3 PC, a hearing at the time of sentencing must be conducted to determine if probation of the defendant would pose a threat to the victim, and a psychiatrist or psychologist must be appointed by the Court, pursuant to Penal Code Section 288.1, to include a consideration of the threat to the victim and the

defendant's potential for positive response to treatment.

The defendant's criminal history began at the age of 15 when he was adjudicated for being in possession of a firearm. Since that time, the defendant was provided several opportunities, via grants of probation and placement services, to rehabilitate and rectify his unlawful behavior; however, he has failed to do so. He violated the conditions of his probation on numerous occasions by continuing to disobey the law and just seven months after his juvenile warship was terminated, the defendant committed the instant offense. Additionally, the defendant has continued to violate the law since he was convicted of burglary and criminal street gang activity in 2011 and was placed on 36 months formal probation.

Since the defendant declined to speak of the instant matter during the probation interview, this officer was unable to obtain his account of the incident or gauge his level of remorse; however, the defendant's demeanor did not seem to be one of guilt, since it appeared his sole concern was the amount of time to which he would be sentenced. The defendant did not seem to accept culpability for his actions and, instead, placed blame on defense counsel for convincing him to take his case to trial instead of accepting the plea he was initially offered. Furthermore, the defendant provided less than sincere responses during the interview, as he claimed he was not affiliated with any criminal street gangs, yet self-admitted to being a member in 2011 when he was booked into custody for the burglary offense. When questioned why he had a Los Angeles Angels "A" and a Detroit "D" tattoos on his body, which this officer knows to represent EMCG/DB criminal street gang, he did not have a response. It is this officer's

opinion the defendant does not seem to have a desire to refrain from participating in a criminal street gang, which then leaves the door open for additional violent crimes to be committed.

The defendant's behavior indicates he poses a serious risk to society if he is released. His willingness to participate in the instant offense is disturbing, since it indicates the lengths to which he is willing to go to satisfy his sexual urges. His actions have forever altered the life of a 13-year-old girl, and he should be punished for unacceptable behavior. He has not been a productive member of society, thus far, and he should not be released into the community to continue to spread the ignorance that is of the mentality of criminal street gangs. The defendant's actions have warranted a state prison sentence, and it is anticipated the sentence will allow time him to reflect upon the decisions he has made and hopefully, develop a positive plan for his future. Therefore, it is respectfully recommended the defendant be sentenced to state prison. Since he admitted to daily marijuana use, substance abuse counseling will also be included in the conditions. In addition, as the defendant was convicted of a sex offense and criminal street gang activity, he should also be ordered to register as a sex offender, pursuant to 290 PC, and a criminal street gang member, pursuant to 186.30 PC, following his release from custody.

Pursuant to Penal Code Section 290.3(2010), the defendant should also be punished by a fine of $300.00 for the first conviction, and $500.00 for each subsequent conviction for specified sex offenses. Based on the number of counts, the total calculated amount would be $800.00 with the penalty assessments. Additionally,

pursuant to Penal Code Section 264(b), a fine not to exceed $70.00 may be assessed against any person who violates Penal Code Section 261. It is noted the Court has the discretion to waive both fines based on the defendant's ability to pay.

CREDIT FOR TIME SERVED:

Local Time	381	days
PC 4019 Time		days
PC 2933.1 Time	57	days
Total Time Credited	438	days

Date(s) of Arrest	Date(s) of Release	Booking #(s)
06/13/2012	06/28/2013 (Sentencing)	201225435

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RECOMMENDATION:

It is respectfully recommended that for Counts 1-3, CHRIS ANTHONY GEORGE, RIF1203066, be denied probation and sentenced to state prison.

Submit to HIV/AIDS test by Division of Adult Institutions; forward results to Court for distribution. [1202.1/1202.6 PC] (TZA2)

Submit necessary thumb and palm prints, blood and saliva specimens to Division of Adult Institutions. [296(a) PC] (TZA3)

Pay fine of $800.00; payable to Division of Adult Institutions. [290.3 PC] (TZB3)

Pay a fine of $70.00; payable to the Division of Adult Institutions. [264(b) PC) (TZB7)

Pay victim restitution in amount determined by Probation. Division of Adult Institutions to collect obligation. Any disputes as to amount to be resolved in court hearing. Enhanced Collections Division to forward findings to Division of Adult Institutions. Pay interest on restitution of 10% per annum. [1202.4(f) PC, 1202.4(f)(3)(G) PC & 2085.5 PC) (TZC1A/TCQ)

Pay restitution to the Restitution Fund to the extent the victim received assistance from California Victims Compensation and Government Claims Board; Division of Adult Institutions authorized to collect obligation; disputes to be resolved in court hearing; findings to be forwarded to Enhanced Collection Division to Division of Adult Institutions. [1202.4(f)(2) PC & 2085.5 PC] (TZC4A)

Pay restitution fine in the amount of $5,040.00; Division of Adult Institutions to collect obligation. [1202.4PC & 2085.5 PC] (TZD)

Pay additional parole revocation restitution fine in the amount of $5,040.00; fine is suspended unless parole is revoked. [1202.45 PC] (TZE)

Defendant to participate in a counseling or educational program having a substance abuse component through the Division of Adult Institutions. [1203.096 PC] (TZP)

Pay criminal conviction assessment fee of $90.00 [$30.00 per convicted charge]; payable to Division of Adult Institutions [70373 GC] (TZW)

Pay Court Operations Assessment fee of $120.00 [$40.00 per convicted charge] Division of Adult Institutions to collect & transfer to Trial Court Fund [1465.8(a)(1) PC] (TZX)

Register with local law enforcement within 5 days from today or within 5 days upon release from custody and thereafter as required by law as to your place of residence. [290 PC] (THK1)

Register with local law enforcement within 5 days from today or within 5 days upon release from custody and thereafter as required by law as to your place of residence. [186.30 PC] (THK4)

Do not knowingly own, possess or have control of any firearm, deadly weapon or ammunition. (TXB)

DATED THIS 17TH DAY OF JUNE 2013.
EB/eb

Respectfully Submitted,

MARK A. HAKE
INTERIM CHIEF PROBATION OFFICER

I HAVE REVIEWED THE ABOVE REPORT.

BY: _____
BETH L. TAYLOR
SUPERVISOR
(951)358-7620

BY: _____
EVELYN BRICENO
DEPUTY PROBATION OFFICER II
(951)358-7593

I hereby certify that I have read and considered the Probation Officer's report.

_____
JUDGE OF THE SUPERIOR COURT

(Rev. 02/05)

EXHIBIT 6

Declaration of Carol Ann King in Support of Petition for Writ of Habeas Corpus

I Carol Ann King, declare as of follows:

1. I am the mother of Chris Anthony George I hired attorney Sean A Davitt, esquire to represent my son Chris Anthony George for the criminal matter in the case entitled: People v. Chris Anthony George, Riverside County Superior Court case No. RIF1203066.
2. Mr. Sean A Davitt explained the fee of $6,300.00 would cover the cost of representation up until preliminary examination of case No. RIF1203066 as well as an additional $10,000.00 for trial. I paid Mr. Sean A Davitt the sum of $4,600.00 prior to preliminary examination of case No. RIF1023066. Thereafter I paid Mr. Sean A Davitt the sum of $8,300.00 owing a balance of $5,400.00.
3. During the court process I learned from my son (Chris Anthony George) instead of Mr. Sean Davitt that Mr. Gamble and Mr. Macfalling who were co-defendants re: case No. RIF1203066 were going to accept a plea deal of 3 year.
4. I was highly disappointed to learn about the plea deal from Chris instead of the attorney (Mr. Sean Davitt). I hired him to represent my son. And so I communicate to attorney Sean A Davitt. I explained to him that Chris co-defendants told Chris a 3 year plea agreement was offered to him. Mr. Sean A Davitt insisted that Chris George go to trial because Mr. Davitt did not want him to mess his life up. Mr. Sean Davitt also stated that Chris Anthony George will have a better chance at trial due to the fact that the co-defendants were taking the plea deal and Chris George would be tried separate from Mr. Gamble and Mr. Macfalling.
5. After learning about the 3 year plea deal I then explained to Mr. Davitt that my family and I were in agreement that it would be best if Chris takes the same deal of his co-defendants. He insisted once again that he has a good chance of fighting the case. Never once was I told if he's found guilty Chris Anthony George will be facing 23 years in prison.
6. I also explained to Mr. Davitt that my eldest son said he did not want his brother Chris Anthony George to risk going to trial, losing and ending up with a lot of prison time. Mr. Davitt explained to me it would be best that Chris go to trial because he did not want Chris to mess up his life by taking a plea deal.
7. It certainly disturbs me to learn that attorney Sean A Davitt advise my son to go to trial especially when the co-defendants (Mr. Gamble and Mr. Macfalling) accepted the plea deal plus the fact that the co-defendants attorneys advise them to take the plea deal. However, attorney Sean A Davitt took my son to trial instead of advising Chris Anthony George to take the plea deal as the co-defendants attorneys advise their clients to take the plea.
8. Mr. Sean Davitt was in control of the legal representation of my son Chris Anthony George. The court only acknowledge the lawyers not defendants. The attorneys speaks for the defendants and Mr. Davitt spoke for my son and led him to trial as if he had some evidence. Mr. Sean A Davitt was ineffective.
9. I sincerely believe in my heart that Mr. Sean A Davitt took my son Chris Anthony George to trial due to the fact that I owed him a balance of $5,400.00 in legal fees. Any reasonable attorney would have advise their client to accept the 3 year plea deal. Why else would Mr. Davitt take my son to trial and did not tell my son about the plea deal.

I declare under the penalty of perjury under the law of the United Sates of California. The forgoing is true and correct and that this declaration was executed on March 10, 2015 at Riverside California.

Carol King

CALIFORNIA JURAT WITH AFFIANT STATEMENT

GOVERNMENT CODE § 8202

☑ See Attached Document (Notary to cross out lines 1–6 below)
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State of California
County of Riverside

CARL W. JECH
Commission # 1965176
Notary Public - California
Riverside County
My Comm. Expires Dec 30, 2015

Subscribed and sworn to (or affirmed) before me on this 10 day of March, 2016,
Date *Month* *Year*
by
(1) Carol King
(and (2) _____),
Name(s) of Signer(s)

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Signature _____
Signature of Notary Public

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EXHIBIT 7

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION II

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. CHRIS ANTHONY GEORGE, Defendant/Appellant.	DCA No. E059313 Case No. RIF1203066 Volume 3 of 3 Pages 418 - 427

REPORTERS' TRANSCRIPT OF ORAL PROCEEDINGS

BEFORE THE HONORABLE MICHAEL B. DONNER

June 28, 2013

APPEARANCES:

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For the Defendant and Appellant:	APPELLATE DEFENDERS, INC. 555 West Beech Street, Suite 300 San Diego, California 92101
Reported by:	CHRISTINA M. FOSTER, CSR No. 11982

SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. CHRIS ANTHONY GEORGE, Defendant.	Case No. RIF1203066 Volume 3 of 3

REPORTERS' TRANSCRIPT OF ORAL PROCEEDINGS

BEFORE THE HONORABLE MICHAEL B. DONNER

June 28, 2013

APPEARANCES:

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Reported by: CHRISTINA M. FOSTER, CSR No. 11982

JUNE 28, 2013; RIVERSIDE, CALIFORNIA

THE COURT: All right. Let's go on the record in the matter of the People of the State versus George; RIF1203066.

Counsel, would you state your appearances, please?

MR. DAVITT: Of course. Good morning, your Honor. Sean Davitt, Law Offices of Earl Carter & Associates, with Mr. George, who is present in custody at counsel table.

THE COURT: Good morning to both of you.

MR. ZEKTSER: Elan Zekster for the People.

THE COURT: We're here for imposition of sentence today. Do you waive formal arraignment?

MR. DAVITT: Yes.

THE COURT: Any legal cause?

MR. DAVITT: No.

THE COURT: Mr. Zekster, are the victims going to address the Court?

MR. ZEKTSER: No, your Honor. But Marsy's Law has been complied with.

THE COURT: A11 right. Mr. Davitt, anybody wish to address the Court? I have reviewed and considered the probation report, and the record will reflect I've received nothing else.

MR. DAVITT: Very well.

(Discussion was held off the record.)

MR. DAVITT: No statements.

THE COURT: Okay. All right. First and foremost, the Court finds that the sexual conduct that was alleged in this case was indeed -- because the defendant was found guilty was indeed conducted with a minor under the age of 14. So the

1203.066(a)(8) allegation is indeed true in this case, and the Court finds it to be such.

The defendant was convicted of a violation of Penal Code Section 261(a)(3), with an enhancement of a violation of Penal Code Section 186.22(b)(1)(b).

Count 2 was a conviction for a violation of Penal Code Section 288(a), with the enhancement of a violation of Penal Code Section 176.22(b)(1)(c).

The enhancement of 1203.066(a)(a), which effects probation, was found to be true.

And then Count 3, the defendant was convicted of a violation of Penal Code Section 186.22(a).

With respect to probation, because I found the enhancement, the violation of Penal Code Section 1203.066(a)(a) to be true, sexual conduct with a person under the age of 14, the defendant is statutorily ineligible for probation. And this is definitely not an 1170h case.

With respect to sentencing, the Court looked at Rules of Court 4.421 et seq. With respect to the crime, the crime evidenced great violence, great bodily harm and acts disclosing a high degree of cruelty, viciousness and callousness. The victim in this case was extremely vulnerable. She was passed out drunk, had been drunk by the time she got to the abandoned home in which she was raped by multiple individuals.

With respect to the defendant, the defendant's conduct indicates that he is absolutely a serious danger to society. He is a member of a criminal street gang. And despite his protestations to the contrary to the probation officer saying

that he is not, the evidence in the trial revealed that, in fact, he was a member of a criminal street gang.

In fact, it surprised the Court that to the probation officer, Mr. George indicated that he was not associated with Edgemont Dorner. According to testimony in trial, the defendant has admitted he self-admitted in March of 2007 to the -- to Corporal Duckett. In March of 2008 and 2011 he admitted gang membership to deputies. And the last time he was classified at jail, he self-admitted as having been a member of the Edgemont Dorner criminal street gang.

I found no mitigating factors whatsoever in this case.

The evidence in a nut shell showed that this young girl, although unwisely, she did go to a house that was abandoned. She was raped there by multiple parties, two of the codefendants have pled guilty to the crimes that the defendant was accused of in this case and have been sentenced, and left in the home by herself, unclothed from the waist down. And the evidence showed that she had to go to neighbors' houses to seek help.

Looked at the defendant's history. Criminal history. He has a prior conviction in 2011, very shortly -- of a short time ago. He was convicted of a first-degree -- I'm sorry -- a violation of Penal Code Section 459. It's not indicated what degree it was. And again, gang membership in the involvement of a weapon.

The probation report reflects that the defendant has never worked until he was put in a private placement facility. Static 99 test that was given to the defendant indicating -- is

an indicator of whether or not he could be potentially finding himself in another case like this, and it was scored as a three of low to moderate rate, which means, as he grows older, he could still do the exact kind of things that he's accused of in this case.

And then, the last thing that the Court took into consideration was the fact that there's a complete denial of responsibility by Mr. George, and he's blaming his attorney for the situation that he finds himself in.

I haven't searched the record, Mr. George, but generally, when I hear a person is offered a deal, and it's a deal that is so different than what the potential punishment is, I talk to the defendant and tell them that they should seriously consider and talk to their attorney. And the fact is, is that there's only one person who makes the choice to go to jail, and that's you. You're the one who makes the choice, and that's a very profound decision. I mean, it's just profound.

I can understand having regret for a decision you made, but there's no one in this room that -- in this court that, at least in this Court's opinion, forced you to go to trial in this case; particularly when your other codefendants you knew pled. It would seem to the Court that that would have weighed heavily to the decision.

But this Court is obligated to accept whatever decision you make. In other words, the Court can't step in and say, he's not the sharpest thing in this world, and I'm not going to let you do that. Because you're a grown man, and that's the decision you decided to make.

With respect to this case, I find Count 2 to be the principal count. And I'm going to sentence you to the low term of three years in state prison. The reason I'm choosing the low term is your relative youthful age. The fact that you're getting serious state prison time and not having been to state prison before, it's the hopes that the seriousness of this, coupled with the fact that you will get out of state prison the sooner you behave yourself, in time to turn your life around and be a productive citizen and live a law abiding life; that this is going to give you a real solid wake-up call to change your life. And I want to give you that opportunity.

The Court has three sentences that it can consider, low term, midterm and high term. And it's three years, six years or eight years. And because I'm hoping that this impresses upon you to change your ways, get out of the gang life and to do something different, I'm going to give you the chance to demonstrate that to your loved ones who are seated here in the courtroom and give you the low term in state prison, instead of the midterm or upper term.

And as to the conviction for 186.22(b)(1)(c), the sentence is mandatory, ten years in state prison, to run fully and consecutively with that. So as to Count 2, the sentence is 13 years in state prison. The ten years is the sentence the statute imposes. There's no choice in terms of the number. It is a ten-year enhancement. So it's not the sentence where I can choose out of three different options.

As to Count 1, I'm sentencing you to the low term in state prison. Three years to run fully and consecutively with

the sentences imposed in Count 2.

As to the gang enhancement that you were convicted of in Count 1, the 186.22(b)(1)(b), I'm sentencing you to one-third of the five years that is statutorily prescribed to be imposed, for an aggregate sentence in Count 1 of four -- I'm sorry -- four years, eight months in state prison.

So that's one-third of the five years added to the three years. That's to run fully and consecutively with the sentence imposed for Count 2.

As to Count 3, I'm giving you one-third of the midterm, that being two years. One-third would be eight months. So eight months for Count 3, to run fully and consecutively with Counts 2 and Count 1, for an aggregate sentence in state prison for 18 years, four months.

You have credit for 392 local time 68, 2933.1 time, for total of 460 days credit. I'm going to order that you submit to and immediately be tested for the HIV virus with the results to be forwarded on to this court for distribution.

I'm ordering that you provide thumb and palm prints to law enforcement immediately upon demand, as well as a DNA sample. Under Penal Code Section 290.3, I'm fining you $800. Under Penal Code 264(b), I'm fining you $70.

I'm ordering that you pay victim restitution in an amount to be determined by probation. Should anyone seek restitution from you in the future, you have a right to object to it. You have a right to demand a court hearing and to be represented by an attorney at that hearing at no expense to you.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If restitution is ultimately ordered, I'm going to order that you pay an additional administrative fee equal to 15 percent of the total restitution ordered pursuant to Penal Code Section 12029.1L. I'm ordering restitution fine of $5040 pursuant 1202.4.

MR. DAVITT: May I be heard?

THE COURT: And 2085.5. Counsel?

MR. DAVITT: I'm not sure exactly what probation's reason is for this, but it's common for them to pick a number near the 10,000 mark for restitution when it's common in all of our cases to order $280. I'm not making an argument that the Court should stick with our normal $280, but there's no justification for an order of $5040. Although the fine could be up to 10,000, I'm making a pitch that the Court consider what our normal practice is, and the D.A. can weigh in. It's normally $280 for restitution.

THE COURT: Mr. Zekster?

MR. ZEKTSER: That's true.

THE COURT: Well, given the age of the defendant, given the fact that he's going to state prison for a significant period of time, I'll grant that request and make the restitution fine $280, pursuant to Penal Code Section 1202.4 and 2085.5.

MR. DAVITT: And then that --

THE COURT: As to the parole revocation fine, that also will be $280, pursuant to Penal Code Section 1202.45. That will be stayed pending successful completion of parole. And I don't know if I said probation, but it should be parole restitution.

Parole revocation restitution fine.

I'm going to order a $90 court conviction fee, $30 per convicted count. Court security fee of $120, $40 per convicted count. Booking fee of $434.08. I'm ordering that you comply with Penal Code Section 290. You're ordered to register as a sex offender for life. You're ordered to register within five days of your release and thereafter as required by law.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: That means within five days of your birthday every year, you have to register. And it depends on where you live, so you need to make yourself aware of those responsibilities, because that registration, if it's not complied with, can subject you to further criminal penalties.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: It's a very important item. And then you're ordered not to knowingly own or possess of any eye really or any firearm, deadly ammunition for life.

Do you understand all those terms and conditions?

THE DEFENDANT: Yes.

THE COURT: Following your release from state prison, you're going to be placed on parole. That parole period may be a period of five years. Should you violate any of the terms of your parole during those five years, you may be sent back to state prison for up to a year for each violation, plus additional time for any underlying crime. That includes any crimes that you commit while you're in prison.

Also, Count 1 and Count 2 are strike offenses. So you're -- you're a two-striker. If you pick up another felony, 25 years to life is a potential sentence for you.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, Mr. George, I don't know how old you are, but you're sure young to me. Actually, you're 21, right?

THE DEFENDANT: Yes.

THE COURT: 21 years old. You will get out in time to make your family proud. You made some extremely bad choices, and I'm not here to understand why you made those choices. I'm here to tell you that you'll have a chance to turn your life around.

It's my personal opinion, the only way that you'll turn your life around is to disassociate yourself from people who want you to continue to commit crimes. You need to move to an area where you can live a crime-free life. You need to learn the value of work, because I would believe that flipping burgers in McDonalds is a better life than spending it in state prison.

Now, there are people that may disagree with me, but that's just my personal opinion. So you do have a chance to turn your life around, and I hope that you take an opportunity to do so. If you don't, then you will end up like so many other people that find themselves hanging out with people like you associate with, and that is, you do life on the installment plan. And this would be your first installment.

And so you have a chance to change that, but it's going to take a great degree of will power and courage to do that.

It's not going to be something that's easily done by you. So you need to make some hard decisions about your life.

I'm going to order that the California Department of Corrections be allowed to withhold any amount from your prison wages that's necessary to pay off any fines, penalties or assessments.

We have another case here, Mr. Zekster. It is SWF1204742. It's driving on a suspended license. Do you have a motion?

MR. ZEKTSER: So moved. I move to dismiss that case in the interest of justice.

THE COURT: It will be dismissed. Thank you very much.

Anything else that either of you wish to place on the record? I have one more thing to say to Mr. George, and that is, you have a right to appeal anything that happened during the trial or during sentencing. In order to do so, you must file a notice of appeal with the clerk of the appellate court within 30 days, excuse me, 60 days from today's date. And your attorney can help you with that process. Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Good luck to you, Mr. George. Really hope not to see you here again. You will have a chance, because you're so young. Okay?

THE DEFENDANT: Yes.

THE COURT: All right. Thank you. Ordering you to be transported to the California Department of Prisons to begin serving the sentence just imposed.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. CHRIS ANTHONY GEORGE, Defendant.	)	Case No. RIF1203066

I, CHRISTINA M. FOSTER, Certified Shorthand Reporter No. 11982, do hereby certify:

That on April 2, 9, 10, 11 & 12, 2013 and June 28, 2013, in the County of Riverside, State of California, I took in shorthand a true and correct report of the testimony given and proceedings had in the above-entitled cause, and that the foregoing transcript, pages 1 through 27 & pages 122 through 403 & pages 418 through 427, is a true and accurate transcription of my shorthand notes, taken as aforesaid, and is the whole thereof.

DATED: Riverside, California, October 11, 2013

CHRISTINA M. FOSTER, CSR No. 11982

REPORTER'S CERTIFICATE

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs. Case No. RIF1203066
CHRIS ANTHONY GEORGE,
Defendant.

I, MARY JANE CASSLE, C.S.R., Certified Shorthand Reporter, No. 10586, do hereby certify:

On April 12, 2013, in the county of Riverside, state of California, I took in stenotype a true and correct report of the testimony given and proceedings had in the above-entitled case, pages 404 to 417, and that the foregoing is a true and accurate transcription of my stenotype notes and is the whole thereof.

DATED: Riverside, California, 7th day of October 2013.

Mary Jane Cassle, CSR No. 10586

MARY J. CASSLE, CSR

REPORTER'S CERTIFICATE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	)	
vs.	)	No. RIF-1203066
CHRIS ANTHONY GEORGE Defendants.	)	

I, ADELE C. FRAZIER, C.S.R., Official Reporter of the above-entitled court, No. 9690, do hereby certify:

That I am a Certified Shorthand Reporter of the State of California, duly licensed to practice; that I did report in Stenotype oral proceedings had upon hearing of the aforementioned cause at the time and place herein before set forth; that the foregoing pages numbered 28 through 121, inclusive, constitutes to the best of my knowledge and belief a full, true, and correct transcription from my shorthand notes so taken for the date of April 8, 2013.

Dated at Riverside, California, this 7th of October, 2013.

Adele C. Frazier

ADELE C. FRAZIER, CRR, RMR, CSR 9690

Official Court Reporter

EXHIBIT 8

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION II

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. CHRIS ANTHONY GEORGE, Defendant/Appellant.	DCA No. E059313 Case No. RIF1203066 Volume 1 of 3 Pages 1 - 121

REPORTERS' TRANSCRIPT OF ORAL PROCEEDINGS

BEFORE THE HONORABLE MICHAEL B. DONNER

April 2 & 8, 2013

APPEARANCES:

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For the Defendant and Appellant:	APPELLATE DEFENDERS, INC. 555 West Beech Street, Suite 300 San Diego, California 92101
Reported by:	CHRISTINA M. FOSTER, CSR No. 11982 ADELE FRAZIER, CSR No. 9690

SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. CHRIS ANTHONY GEORGE, Defendant.	Case No. RIF1203066 Volume 1 of 3

REPORTERS' TRANSCRIPT OF ORAL PROCEEDINGS

BEFORE THE HONORABLE MICHAEL B. DONNER

April 2 & 8, 2013

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ADELE FRAZIER, CSR No. 9690

APRIL 2, 2013; RIVERSIDE, CALIFORNIA

BEFORE THE HONORABLE MICHAEL B. DONNER

THE COURT: Let's go on the record in the matter of the People of the State versus Chris Anthony George; RIF1203066. Both attorneys, as well as the defendant are present. The defendant is not dressed out; however -- despite my previous order, to the Sheriff's Department. But I understand that he's going to be dressed out by 11:00 or so.

Is that correct?

MR. DAVITT: That's correct.

THE COURT: Okay. I have reviewed the following material: The People's witness list, the People's trial brief and motions, the defense's Motion to Suppress, and the People's reply brief to the Motion to Suppress.

With respect to the Motion to Suppress, let me, as is always the case, give you my tentative ruling, and I'll let you argue. I'm not committed to a tentative ruling beyond it being a tentative. And if you can change my mind, or if you think I've missed something, I'm happy to reconsider. But I did spend some time looking at this.

My tentative ruling is to deny the Motion to Suppress. I don't see that the defendant had a reasonable expectation of privacy predicated upon what I read in the briefs.

There was no evidence presented whatsoever that the defendant had expectation of privacy. There was no indicia of ownership of the home that was served. No indicia of residency, either illegally or legally. There was no habits attributable to the defendant reflecting expectation. There was no indicia

of any type of possessory interest whatsoever. There's no evidence that the defendant was a guest in this case. This was a home that was pointed out to the officers as being the location of an alleged sexual assault.

The officers went to the home, and it appeared, with the alleged rape victim. It was noted that there was unattended landscaping; that a fence was knocked down. There was trash on the side of the house. There was an inoperable car without windows in the driveway. The house was unlocked. The back slider was shattered, giving anyone who wanted to complete access to the house. There was no furniture. There was trash on the floor, in the sinks, in the toilet. There was no mail. There was no clothing attributable to anyone other than the victim. There were no beds.

When they went in, there were condoms noted to be strewn about the house, in the bathroom, in the toilet tank. And for all intents and purposes, this house appeared to be abandoned.

And it seems as if, at least to this Court, that the officers had a very, very good faith basis for the belief that this was an abandoned home, and that's the basis for my ruling. It's an objective standard. And I set forth those objective items that have been pointed out in the prosecutor's brief relative to the status of the home.

Do you care to argue, Mr. Davitt? Go ahead, please.

MR. DAVITT: Thank you very much, your Honor.

THE COURT: Sure.

MR. DAVITT: We did not present evidence in the brief

of my client's history in this home primarily because I wanted to make it clear that any evidence or issues relative to the motion, I would like to be specific to the motion. In other words, I wouldn't want evidence that we brought to this motion to then be used against my client in court in the trial. So we left it out.

THE COURT: Okay.

MR. DAVITT: But, hypothetically speaking, my client could testify in a 402 relative to this hearing, or just a 1538.5 hearing, that this home is the home of his good friend's next-door neighbor. They were kicked out by the bank in a foreclosure, and they oftentimes used this home as a crash pad and party house once the friend's family had been kicked out.

The friend, my client's friend who lived next door, was good friends with this neighbor and had often been in that house when the family lived in it.

So that would be evidence to show that we have spent some time in that home and partied in that home. And so that addresses whether we have standing or not, since we've stayed in this home before and recently.

THE COURT: Okay.

MR. DAVITT: The issue as to abandonment, I think, is somewhat misguided, and I'll address it in this fashion: I just sort of went chronologically through the People's reply brief, and just for the record, they note 1368, which has to do with deciding whether someone is mentally incompetent to stand trial. I'm sure the district attorney meant a 1538.5, so just to note that for the Court's record.

THE COURT: I've --

MR. DAVITT: You got that, but the body is clearly on point.

THE COURT: Clearly.

MR. DAVITT: Right. So if I just go chronologically, the People are presenting evidence that the investigators approached the house and noticed a number of things. Well, my position, and I think the undisputed evidence will be, they got a story already, they got an address, and they were there to search that address to see if they could find any evidence to support the story.

So this whole idea that they just came upon this house and noticed all these things so they presumed it was abandoned, is really a false -- a false story. They went there to search.

Officers don't have a right to search someone else's property without a search warrant unless there's no exception. And the People are arguing a number of different exceptions, including the officer's belief that the house was abandoned. But there's a -- there's a sign right on the front -- I don't know if it's the front window or exactly where it's located in the front of the house -- that says you're not allowed to enter this home. Please contact the bank.

They made no efforts to contact the bank to get consent. They had plenty of time. This is several days after they heard the story about the rape. They had plenty of time to obtain a search warrant. They didn't.

They go up to this abandoned home. They say -- and they knock like -- like they're expecting someone to answer.

They knew -- they already knew the story that no one was living at this residence. So they don't have an excuse for not getting a search warrant; although they are trying to create one by saying that once we got in there, we saw condoms, like that would be some sort of plain view exception. But they didn't see anything relative to evidence in the case until they opened the front door.

And they also, at the very end of this brief factual pattern, say that once they got in there, they realized that the house had broken windows in the back, and gosh, maybe somebody could -- could be robbing the place. So it's clear the house or whatever their theory was. But all that was fully known to them before they went in.

They could have easily got a search warrant, and then I would not have this issue. So my client has standing based on the fact that he stayed there before and stayed there recently; left personal items there, including potentially condoms. And the police had absolutely no basis to search that home without a search warrant, and no excuse given in this brief as to why they didn't bother to take the hour or two hours that would be necessary to obtain one.

So it's that basis that I say they didn't show this Court any good faith basis to not go get a search warrant, and I'll submit on that.

THE COURT: All right. Thank you.

Mr. Zekster.

MR. ZEKTSER: Thank you, your Honor. I do note that it's defense's burden -- and I appreciate him pointing out the

1368 error.

I'm not really sure what to discuss since Mr. Davitt basically was testifying for his client in his argument. We don't have a signed affidavit. We don't have any testimony from Mr. George. We have nothing. But even assuming, even assuming that everything Mr. Davitt said on behalf of Mr. George today was true, it's not even close to standing. To say, oh, I partied in that house a couple times, even partied in that house recently, doesn't give someone standing; doesn't give someone the right to expect privacy in that house.

There's no -- the courts are clear on what lower courts are supposed to look at. Here, we don't have anything that indicates Mr. George lived there. Nothing that indicates he even stayed there, except for a used condom. No clothes in the closet, anywhere in the house. No beds, as the Court commented, not even a pillow. No furniture. No food in the cupboards. Nothing. Absolutely nothing in this house.

We have -- what we have is, apparently, Mr. George knows his friend knows the neighbor or something of the sorts. That doesn't give someone standing to make an argument. And on top of that, officers or deputies came to the house. They knocked. There was no answer. They opened the door, and they see plain view -- and I brought the detective here today as expected that he may testify -- broken glass. They see an entire door -- and I marked it as an exhibit -- shattered.

The detectives would testify, or officers would testify that there's been a number of burglaries, including copper wire thefts, including other things. And so they made a search

through the house, a safety sweep, which is common and which is their practice.

It was established that there -- this was an abandoned house, as Mr. Davitt pointed out, from the foreclosure notice on the top. And if the detective was to testify, as he is here today, he would say that they tried to make contact to see who owned the home, but they were unsuccessful. In all accounts, this house was an abandoned house.

Mr. George had no right to privacy whatsoever. And there is no standing for him to argue that the cops, or that the police should not have been able to search that house once they entered it. He has no ties whatsoever.

Assuming that the Court finds standing based on the fact that Mr. George's friend knows the neighbor and has partied in that house a couple times, well, the officers and deputies, they had a good faith exception. They had a good faith belief that Mr. George was not living there. What indicates anything that someone's living there? There's a lock on the front door. There's a foreclosure notice on the front. The fence is torn down on one side. There's a car in the parking lot with a broken window and a plastic bag covering it. There is absolutely nothing. There's condoms on the floor showing that someone actually lives at that house.

So upon that, your Honor, and if the Court wants, I can put the detective up. I would submit.

THE COURT: All right.

Anything else, Mr. Davitt?

MR. DAVITT: Just the Court should probably view

Defense A.

THE COURT: Was there an objection to it?

MR. ZEKTSER: No. No objection to foundation. Mr. Davitt asked me to bring my detective and my officers to do the motion, so we would have had foundation to that.

THE COURT: Okay.

MR. DAVITT: And what that purports to be, we keep loosely talking about foreclosure notice, but that's not actually what that is. That's a sign posted saying that entry by unauthorized persons is prohibited. And it lists a phone number to call in emergencies and references someone to contact local real estate authorities for additional information.

My offer of proof to the Court would be that the police officers -- that was in plain view, more plain sight than opening the door and looking inside, and the police officers did not do anything relative to that notice.

THE COURT: I have no problem taking some testimony from the officer --

MR. DAVITT: Right.

THE COURT: -- with respect to that sign, but I need you to focus on the issue of standing a little bit more than you have.

MR. DAVITT: Okay.

THE COURT: But I've already heard what you had to say. So if you'd like to put the officer on, that's fine.

MR. ZEKTSER: Sure. Thank you.

THE COURT: All right.

MR. ZEKTSER: People call Detective Reinbolz.

THE CLERK: Do you solemnly state that the testimony you shall give in the matter now pending before this Court will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Thank you. Please be seated.

Please state your name for the record, spelling your first and last name.

THE WITNESS: It's John Reinbolz, J-o-h-n, R-e-i-n-b-o-l-z.

THE COURT: Good morning.

THE WITNESS: Good morning.

THE COURT: Go ahead.

MR. ZEKTSER: Good morning.

JOHN REINBOLZ,

called as a witness by the plaintiff, was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. ZEKTSER:

Q. Good morning, sir. Can you tell the Court what you do for a living?

A. I'm a sergeant with the Riverside County Sheriff's Department.

Q. All right. How long have you been an officer?

A. For 20 years.

MR. ZEKTSER: If I could just have one moment?

(Short pause in the proceeding.)

Q. BY MR. ZEKTSER: Were you working on 1-24 of 2010?

EXHIBIT 9

Case No. RIF1203066
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION II

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/ Respondent VS CHRIS ANTHONY GEORGE Defendant/ Appellant	DCA No. E059313

CLERK'S TRANSCRIPT ON APPEAL

Appeal from the Superior Court of California, County of Riverside

HONORABLE MICHAEL B. DONNER, JUDGE

APPEARANCES:

For Plaintiff/ Respondent:

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
110 West "A" Street, Ste 1100
San Diego, CA 92101

For Defendant/ Appellant:

APPELLATE DEFENDERS, INC.
555 West Beech Street, Ste 300
San Diego, CA 92101

RIF1203066

CHRIS ANTHONY GEORGE

Probation Department Report Filed.

FILED 06/28/13

PAGES 217 - 246

REMOVED AND SEALED

EXHIBIT 10

CDC-128-B (Rev.8/96)

NUMBER and NAME: AP6839 GEORGE C HOUSING

Test Date: 6/16/2014

Tabe Test Results

Reading	Score	GPL	0.0
Math	Score	GPL	3.2
Language	Score	GPL	2.0
Total Battery	Score	GPL	1.5

Level / Form:

E9

Issued by: R. Monfort

Examiner/Teacher: MONFORT,R LIT

Inmate copy

CENTINELA STATE PRISON-CEN

TABE

DATE: 6/17/2014

GENERAL CHRONO

CTB McGraw-Hill

Individual Report for GEORGE C

Report Identification Information

Student ID: AP 6839
Test Date: 06/16/14
Report Date: 06/17/14
Page No: 26

Test Group: MONFORT 06-16-14
Test Name: TABE 9/10 Basic Ed
Examiner: MONFORT,R LIT
Site Name 16
Tag Group: Entire Group

Skill Area	L/F	NC	NA	SS	GE	NP	NS	OM
Reading	E9	11	47	175	0.0	1	1	0
Mathematics Computation	E9	31	40	440	4.1	21	3	80
Applied Mathematics	E9	19	50	388	2.4	10	2	0
Language	E9	19	55	397	2.0	10	2	0
Total Mathematics		50	90	414	3.2	14	3	
Total Battery		80	192	328	1.5	2	1	

L/F=Test Level & Form
NC=Number Correct
NA=Number Attempted

SS=Scale Score
GE=Grade Equivalent
NP=National Percentile

NS=National Stanine
OM=% Objectives Mastered

NRS Levels

Content Area	Level	Description
Reading	1	Begining ABE Literacy
Language	2	Begining Basic Education
Total Mathematics	2	Begining Basic Education

Objectives	Score	Mastery Level	Percent Correct
Reading			
E01 Intrp Graph	1/ 8	Non-Mastery	12
E02 Wd In Contx	1/ 4	Non-Mastery	25
E03 Recall Info	5/15	Non-Mastery	33
E04 Const Mean	3/16	Non-Mastery	18
E05 Eval/Ex Mng	1/ 7	Non-Mastery	14
Subtest Average			22
Mathematics Computation			
E11 Add Whl Num	8/ 9	Mastery	88
E12 Sub Whl Num	6/ 8	Mastery	75
E13 Mul Whl Num	8/ 8	Mastery	100
E14 Div Whl Num	2/ 8	Non-Mastery	25
E15 Decimals	7/ 7	Mastery	100
Subtest Average			78
Applied Mathematics			
E21 Num Operatn	5/10	Partial Mastery	50
E22 Comp Contxt	3/ 6	Partial Mastery	50
E23 Estimation	0/ 5	Non-Mastery	0
E24 Measurement	1/ 5	Non-Mastery	20
E25 Geometry	2/ 5	Non-Mastery	40
E26 Data Analy	4/ 7	Partial Mastery	57
E27 Stat/Prob	1/ 4	Non-Mastery	25
E28 Pre-Alg/Alg	2/ 4	Partial Mastery	50
E29 Prob Solvg	1/ 4	Non-Mastery	25
Subtest Average			38

Objectives	Score	Mastery Level	Percent Correct
Language			
E30 Usage	6/13	Non-Mastery	46
E31 Sent Forma	1/ 9	Non-Mastery	11
E32 Para Devel	3/ 8	Non-Mastery	37
E33 Capitaliz	2/ 8	Non-Mastery	25
E34 Punctuation	4/10	Non-Mastery	40
E35 Writg Conv	3/ 7	Non-Mastery	42
Subtest Average			35
Total Average			41

CALIFORNIA DEPARTMENT of
Corrections and Rehabilitation

CLASSIFICATION COMMITTEE CHRONO

Inmate Name: GEORGE, CHRIS A. **Date:** 01/23/2015

CDC#: AP6839 **Date of Birth:** 12/16/1991

Hearing Date: 01/23/2015 **Hearing Type:** Program; Other (See Committee Action Comments)

Committee Type: Institution Cls. Committee (UCC) **Correctional Counselor:** F. Salgado

STATIC CASE FACTORS

CRITICAL CASE FACTORS

CLINICIAN COMMENTS

COMMITTEE ACTION SUMMARY

PROGRAM REVIEW/6 MONTH REVEIW: (ABSENTIA) INCREASE PS TO 55, MED A R CUSTODY, WG/PG A1A, EFFECTIVE 07/05/14, CPP, NFHC, DOUBLE CELL APPROVED, IHC-RE, NON-CONTACT VISITS WITH MINORS.

COMMITTEE COMMENTS

Inmate GEORGE was reviewed before Facility-D (SNY) UCC on this date for the purpose of his Program Review/ 6 Month Review to address new case factors due to legal documents being available. S is currently endorsed to CEN-III SNY as of 03/14/14. On 12/03/14 S returned from an out to court appearance regarding a sentencing error. S sentence went from 18 years 4 months to 21 years 8 months and is reflected on an amended abstract of judgment located in ERMS. A new score sheet was generated covering a 6 month review period causing S points to increase by two. George had favorable points during the qualifying period for no disciplinary and work performance, was assigned to D1 building porter and is currently assigned to ABE I effective 01/23/15.

S is committed to CDC for PC 261 Rape Person Unable to Resist/ PC288 L&L Child Under 14 Years. This offense is an automatic SEX/VIO Administrative Determinant, permanently excluded from MSF. Per CCR Title 15 section 3173.1(b) Visiting Restrictions with Minors are limited to non-contact due to S non-controlling offense of PC288(a) and are being implemented through this committee action as well. POR was not available on any prior committee actions due to it being scanned on 12/24/14. S was made aware of the change in his visiting status and did not agree with it.

PROGRAM REVIEW/6 MONTH REVEIW: (ABSENTIA) INCREASE PS TO 55, MED A R CUSTODY, WG/PG A1A, EFFECTIVE 07/05/14, CPP, NFHC, DOUBLE CELL APPROVED, IHC-RE, NON-CONTACT VISITS WITH MINORS.

Offender Separation Alerts are clear. Confidential Offender Separation Alerts are clear. Confidential file has been reviewed and is clear.

S disciplinary history/ERMS file was screened for single cell housing needs (i.e. history of in-cell violence/assaultive or predatory behavior toward a cell partner or in-cell victimization concerns) and does not meet the criteria. "S" is double cell approved.

"S" DECS, TABE, MCC documents have been reviewed. S has a TABE score of 0.0. During the pre-committee interview I explained all case factor changes that would occur due to the committee action. I asked S if he understood and he stated yes. MHSDS/DDP/DPP: Clear

Committee notes "S" will be informed of the Committee's decision and of appeal rights via Classification Chrono. During pre-committee interview S agreed with recommendations. Classification procedural safeguards have been complied with.

RECORDER

F. Salgado 01/23/2015

Date

CHAIRPERSON

R. Arias

01/23/2015

Date

CDCR SOMS ICCT162 - Classification Committee Chrono

D1. 1110

CALIFORNIA DEPARTMENT of
Corrections and Rehabilitation

CLASSIFICATION COMMITTEE CHRONO

Inmate Name: GEORGE, CHRIS A. **Date:** 05/08/2015

CDC#: AP6839 **Date of Birth:** 12/16/1991

Hearing Date: 05/08/2015 **Hearing Type:** Program; OTC/Return

Committee Type: Institution Cls. Committee (UCC) **Correctional Counselor:** I. Black

STATIC CASE FACTORS

CRITICAL CASE FACTORS

CLINICIAN COMMENTS

COMMITTEE ACTION SUMMARY

OTC-RTN/PROGRAM REVIEW: (IN ABSENTIA) RELEASE TO FACILITY-D (SNY), PS REMAINS 55, CONTINUE MEDAR CUSTODY, WG/PG A1A, EFFECTIVE 7/8/14, P/O SS & ABE-I W/L, FHC, IHC: R/E, TABE: 1.9. DOUBLE CELL APPROVED. EFFECTIVE COMMUNICATION ESTABLISHED DURING PRE-COMMITTEE INTERVIEW.

COMMITTEE COMMENTS

Inmate George's case was reviewed in absentia by Facility D SNY UCC on this date for the purpose of his OTC-RTN/Program Review. Upon review of ERMS/SOMS, "S" has a disabilities or Effective Communication requirements noted based on TABE: 1.9. Effective Communication was established during the pre-Committee interview by speaking simple English slowly and clearly. "S" reiterated what was explained in his own words, provided appropriate, substantive responses to questions asked indicating he understood. Moreover, "S" verbally stated he did not require a Staff Assistant.

"S" is currently endorsed to CEN-III SNY as of 03/14/14 and was seen for his Initial Review on 4/15/14. "S" arrived from a Felony court appearance in RIVERSIDE County (case # RIF1203066) as the defendant on 4/28/15. The transfer was not adverse. "S" is committed to CDC for PC 261 Rape Person Unable to Resist/ PC288 L&L Child Under 14 Years. This offense is an automatic SEX/VIO Administrative Determinant, permanently excluded from MSF.

Committee notes, on 4/3/15 "S" was sent Out-to-Court for an appearance at the Riverside County Superior Court, Case #RIF1203066 for a Resentencing Hearing scheduled on 4/10/15. Legal documents are available in ERMS at this time (refer to Jail Minute Order dated 4/10/15). "S" is now re-sentenced to Prison from 21 years/8 Months to 21 years. TERM points are current and remain appropriate.

Committee notes all case factors have been reviewed and after careful consideration, Committee elects to RELEASE TO FACILITY-D (SNY), PS REMAINS 55, CONTINUE MEDAR CUSTODY, WG/PG A1A, EFFECTIVE 7/8/14, P/O SS & ABE-I W/L, FHC, DOUBLE CELL APPROVED. EFFECTIVE COMMUNICATION ESTABLISHED.

"S" has no active Hold/Warrants/Detainers noted that impact placement. Case factors are noted on a Classification Chrono CDC128G dated 4/15/14 with the following updates: ARSON/ESCAPE/COMPUTER CRIMES: NONE NOTED. S" Does not have a Restraining order noted. "S" has the current Visiting Restrictions: Per CCR Title 15 section 3173.1(b) Visiting Restrictions with Minors are limited to non-contact. "S" has no verified GED/HSD noted.

Offender Separation Alerts are clear. Confidential Offender Separation Alerts are clear. Confidential file has been reviewed and is clear.

Special Programs have been evaluated and programs that are eligible/non-eligible are noted on this Classification Chrono in the Special Programs Screening section. "S" disciplinary history/ERMS file was screened for single cell housing needs (i.e. history of in-cell violence/assaultive or predatory behavior toward a cell partner or in-cell victimization concerns) and does not meet the criteria. "S" is approved for double cell.

"S" DECS and CDC128C3 dated 3/14/14 (Full Duty/Low Risk) documents have been reviewed. MHSDS/DDP/DPP: Clear. "S" medical case factors are noted in SOMS and have migrated onto his Classification Chrono in the Health Care Factors section. MCC for SOMS was requested on 5/4/15.

During pre-committee interview, "S" agreed with actions to be presented in committee and was advised of his right and the method to appeal this Committees decision. Classification procedural safeguards have been complied with.

ADDITIONAL COMMITTEE MEMBERS: EDUCATION NOT AVAILABLE

RECORDER

L. Santana

Moreno Valley Unified School District
Special Education Local Plan Area
Multidisciplinary Report

CONFIDENTIAL

Student Name:	Chris George	**School:**	Vista Del Lago High
Date of Birth:	12/16/1991	**Current Grade:**	11
Sex:	Male	**Primary Lang.:**	English
Current Age:	17-3	**Psychologist:**	Mark Paschal
Ethnicity:	African American	**Testing Dates:**	4/16/09

TEAM MEMBERS

Psychologist	X
Resource Specialist	X
Student Study Team	
Speech/Language	
Nurse	X
Adaptive P.E.	

REASON FOR REFERRAL

Triennial Evaluation	
Parent/Guardian Request	
Student Study Team	
Initial Assessment	X

Background Information:

Family

Chris is an African American 17 year-old young man in the 11th grade. He reported that lives in Moreno Valley with his mother, step father, two brothers, and three sisters. There is a history of learning problems in the family on file. Chris's brother participates in Special Day Class (SDC) services here at Vista Del Lago. English is the language spoken at home.

Health and Developmental History

The most recent vision and hearing screenings was conducted as part of this initial assessment by Cindy Hebert the school nurse.

Per nurse's report: Vision screening: Rt. eye: 20/30 Lt eye: 20/20

Hearing screening: passed both ears within normal limits.

See Developmental and Health History on file for more information.

Educational
Chris is currently enrolled in general education here at Vista del Lago High School. Chris enrolled here at Vista Del Lago on 2/24/09. He reported that he attended a placement school in Apple Valley where he did not receive special education services. Mother referred Chris for special education testing for possible placement back in the program. Chris's attendance has been irregular. He has a history of excessive absences here at Vista Del Lago. Chris also has a history of discipline infraction while here at Vista Del Lago due to defiance of authority.
Chris was initially tested for special education on 5/00. Chris was placed in RSP his first year for 49% of his day. Chris displayed auditory and sensory motor processing deficits. On 12/00, Chris was placed in LH/SDC. Chris has attended Moreno Valley schools since kindergarten. Chris had a history of excessive absences within school.

Student Interview
When interviewed, Chris reported that he is unsure of what he would like to do when he graduates from high school. Chris expressed that he enjoys hanging out with his friends after school.

Previous Assessments:

Chris was last assessed by Nancy Schrier at Mountain View Middle School. Cognitive ability suggested falling in the Deficient range. Processing deficits were evident in sensory motor skills. A severe discrepancy existed between Chris ability and achievement in the areas of basic reading skills, written expression, math calculation and math reasoning.

Please refer to confidential file for previous assessment report.

Observations/Behavior:

Chris came to the testing environment willingly and eagerly. Rapport was easily established and maintained. Chris appears to be a friendly, yet quiet student. His eye contact was appropriate. Speech and language was spontaneous. Attention was not difficult to sustain. Chris appeared to give thought before responding to questions given by the examiner.

Current Assessments:

Test Administered

Naglieri Nonverbal Ability Test (NNAT)
Wechsler Individual Achievement Test-II (WIAT-II)
Developmental Test of Visual-Motor Integration (VMI)
Test of Visual Perceptual Skills (TVPS-3)
Test of Auditory Perceptual Skills - 3 (TAPS-3)
Sentence Completion
Behavior Assesment System for Children, Second Edition (BASC-II)-Teacher Report
Student Interview
Observation
Record Review

Cognitive Functioning/Adaptive Behavior:

The Naglieri Nonverbal Ability Test (NNAT) was administered. It is a nonverbal measure of general ability that is predictive of academic success. The items contain common shapes and designs. Chris received a standard score of 81 which falls in the Low Average range.

Naglieri Nonverbal Ability Test

Standard Score	10
81	*Percentile*

Speech/Language Skills:

This was not an area of concern. Chris demonstrates age appropriate receptive and expressive language skills.

Academic Skills:

Chris was administered the WIAT-II.
Scores are as follows:

Summary of WIAT-II Subtest, Composite and Total Scores

	SS	95% CONF INTERVAL	percentile	Age Equiv	Grade Equiv
READING					
Word Reading	40				
Reading Comprehension	63				
Pseudoword Decoding	73				
MATHEMATICS					
Numerical Operations	66				
Math Reasoning	66				
WRITTEN LANGUAGE					
Spelling	48				
Written Expression	41				
ORAL LANGUAGE					
Listening Comp	69				
Oral Expression	--				
Total Composite Score	--				

Chris was willing and cooperative as he participated in the testing process. It appeared that he was engaged during testing. Chris had great difficulty with reading, writing and mathematics. It appears that Chris' poor attendance may be the contributing factor to his low academic standard scores.

Reading - Chris had a very poor performance in Word Reading SS=40, extremely low range. Reading Comprehension SS=63, extremely low range. Pseudoword Decoding SS=73, borderline. I had to go back to the 2nd grade level for Chris to be able to participate in this subset test. He

didn't refer to the text to answer his questions until I suggested that he use the text as reference. He doesn't recognize words readily; implied cause and effect or implied detail, identifying main ideas, sequencing, recognizing cause/effect, and sequencing are also areas of difficulty.

Math - Chris had a poor performance with his Numerical Operations subtest, acquiring a SS=66, extremely low range; Math Reasoning subtest, SS=66, extremely low range. Much difficulty was found with comparing and ordering fractions, recall of multiplication and division, subtraction with regrouping. He used paper and pencil and his fingers to calculate most equations.

Written Language - Chris's writing assignment was very poorly written, contained errors in spelling, punctuation and grammar. He wrote one, two sentence paragraph with 23 words and 11 spelling errors.

Word Reading- Student identifies the letters of the alphabet, beginning and ending sounds of words, and rhyming words, or reads quickly as possible from a list of words.

Pseudoword Decoding- Student uses his/her phonic skills to sound out nonsense or unfamiliar words.

Reading Comprehension- Student reads sentences and short passages and then answers questions about the main idea, specific details, order of events, make inferences, draw conclusions, or define unfamiliar words by using context clues.

Numerical Operations- Student solves written math problems requiring addition, subtraction, multiplication, and division using whole numbers, fractions, and decimals.

Math Reasoning- Student solves a word problem requiring single or multiple steps related to time, money, measurement, geometry, probability, and reading and interpreting graphs.

Spelling- Student spells a target word based on its meaning as it is used in a sentence.

Written Expression- Student writes words, sentences and either a paragraph or short essay in response to a topic.

Listening Comprehension- Student listens to a word or sentence and matches it to a picture or looks at a picture and responds with the corresponding word.

Oral Expression- The student lists words that match a topic, repeats a sentence, tells a story based on a series of pictured events, or describes the step s required to complete a task.

Please refer to Resource Specialist's report for detailed academic results.

Processing Assessment Results:

The **Developmental Test of Visual-Motor Integration (VMI)** was administered. Chris's score of 61 on the VMI falls within the Deficient range. Instruments in this area measure how well an individual coordinates or integrates their visual perception and motor (finger and hand movement) abilities. This test requires the student to reproduce geometric shapes with a pencil. This process is seen in any academic activity requiring written work. Low performance on tests of visual motor ability may result from misperception (faulty fine motor response output), or

integrative/central processing difficulties (faulty memory storage or retrieval systems).

Developmental Test of Visual-Motor Integration -VMI

Standard Score	Scaled Score	Percentile
61	2	9

Chris was given the **Test of Auditory Processing Skills – 3 (TAPS-3)** Auditory processing refers to the following: immediate and/or long term recall of auditory stimuli (memory), the ability to distinguish one sound from another (discrimination), the ability to integrate stored information with new information received through the auditory channel, and the ability to relate spoken words in a meaningful way (association and comprehension). Auditory processing involves perception and the use of auditory stimuli through memory, discrimination, association, comprehension, and sequencing. These processes are involved in all areas of academics involving verbal explanation, directions, and memory. Chris's overall Auditory Memory scaled score of 64 falls in the Deficient range while his overall Auditory Cohesion scaled score of 80 falls in the Low Average range. Chris showed relative strength in the area of Auditory Comprehension while showing relative weakness in the areas of Number Forward, Number Reversed, Word Memory, Sentence Memory and Auditory Reasoning skills.

Memory:
Auditory Memory consists of 4 subtests which include: Number Memory Forward, Number Memory Reversed, Word Memory, and Sentence Memory.
Number Memory Forward is designed t show how well the student can retain simple sequences of auditory information.
Number Memory Reversed is designed to show how well the student can retain and manipulate simple sequences of auditory information.
Word Memory is designed to show how well the student can retain and manipulate simple sequences of auditory information.
Sentence Memory is designed to show how well the student can retain details in sentences of increasing length and grammatical complexity.

Cohesion:
Auditory Cohesion consists of 2 subtests which include: Auditory Comprehension and Auditory Reasoning.
Auditory Comprehension is designed to show how well the student understands spoken information.
Auditory Reasoning: The auditory cohesion skills for this subtest reflect higher-order linguistic processing, and are related to understanding jokes, riddles, inferences and abstractions. These items are intended to determine if the student can understand implied meaning, make inferences, or come to logical conclusions given the information in the sentence/s presented.

Test of Auditory Processing Skills-3 (TAPS-3)

	Raw Scores	Scaled Scores			
Phonological Segmentation					
Phonological Blending					
Number Memory Forward	14	2	2		
Number Memory Reversed	8	4	4		
Word Memory	14	4	4		
Sentence Memory	14	1	1		

Auditory Comprehension	21	8		8	
Auditory Reasoning	7	4		4	
Sum of Scaled Scores			11	12	
Index Standard Scores			64	80	
		Overall	Memory	Cohesion	

Social/Emotional Functioning:

Sentence Completion was administered to Chris. Sentence completion exercises require students to give open-ended responses to prompts. The first purpose of this is to describe the method of sentence completion to assess student's attitudes and beliefs about aging. The second purpose is to describe the patterns of characteristics that children associate with aging. Chris did not appear to put forth much effort or thought to questions provided by examiner.

The Behavior Assessment System for Children-Second Edition (BASC-II) was administered to Chris. The (BASC) is an integrated system designed to facilitate the differential diagnosis and classification of a variety of emotional and behavioral disorders of children.

Any score in the Clinically Significant range suggests a high level of maladjustment. Scores in the At-Risk range identify either a significant problem that may not be severe enough to require formal treatment or a potential of developing a problem that needs careful monitoring.

This section of the report is based on the Teacher's rating of Chris.

Externalizing Problems- Clinically Significant
Hyperactivity- Clinically Significant- Teacher reports that Chris engages in an unusually high number of behaviors that are adversely affecting other children in the classroom.
Aggression- Teacher reports that Chris displays an unusually high number of aggressive behaviors and may be reported as being argumentative, defiant and/or threatening to others.
Conduct Problems- Clinically Significant- Teacher reports that Chris often engages in rule breaking behavior, such as cheating, deception, and/or stealing.

Internalizing Problems- At-Risk
Depression- At-Risk- Teacher reports that Chris is at times withdrawn, pessimistic, and/or sad.

School Problems- Clinically Significant
Attention Problems- Clinically Significant- Teacher reports that Chris has significant difficulty maintaining necessary levels of attention at school.
Learning Problems- Clinically Significant- Teacher reports that Chris has unusual difficulty comprehending and completing schoolwork in a variety of academic areas.

Behavioral Symptoms Index- Clinically Significant
Atypicality- At-Risk- Teacher reports that Chris sometimes engages in behaviors that are considered strange or odd, and he at times seems disconnected from his surroundings.
Withdrawal- At-Risk- Teacher reports that Chris is seemingly alone, has difficulty making friends, and/or is sometimes unwilling to join group activities.

Adaptive Skills- Clinically Significant
Adaptability- Clinically Significant- Teacher reports that Chris has extreme difficulty adapting to changing situations, and takes much longer to recover from difficult situations than most others

his age.
Social Skills- At-Risk- Teacher reports that Chris has difficulty complimenting others and making suggestions for improvement in a tactful and socially acceptable manner.
Leadership- Teacher reports that Chris sometimes has difficulty making decisions, lacks creativity, and/or has trouble getting others to work together effectively.
Study Skills- Clinically Significant- Teacher reports that Chris demonstrates weak study skills, is poorly organized, and has difficulty turning in assignments on time.
Functional Communication- At-Risk- Teacher reports that Chris demonstrates poor expressive and receptive communication skills.

The Connors Rating Scale Revised (S) was completed by the teacher. An instrument that uses observer ratings and self-report ratings to help assess attention deficit/hyperactivity disorder (ADHD) and evaluate problem behavior in children and adolescents. Results indicate all areas falling in the Clinically Significant range specifically under the categories of Oppositional, Cognitive Problems/Inattention, Hyperactivity and Conners' ADHD Index.

Oppositional - Individuals scoring high on this scale are likely to brake rules, have problems with persons in authority and are more easily annoyed and angered than most individuals their own age.
Cognitive Problems/Inattention- High scores may be inattentive. They may have more academic difficulties than most individuals their age, have problems organizing their work, have difficulty completing tasks or schoolwork, and appear to have trouble concentrating on task that require sustained mental effort.
Hyperactivity- High scores have difficulty sitting still, feel more restless and impulsive than most individuals their own age and have the need to always be on the go.
Conners' ADHD Index- Identifies children/adolescents "at risk" for ADHD.

Assessment:

The assessment instruments were validated for the purposes for which they were used unless otherwise specified. The assessment results represent a valid and reliable estimate of current functioning. Testing was conducted in an appropriate environment.

Eligibility Consideration:

Chris currently appears to meet the eligibility criteria for Special Education (Title 5, 3030) services as defined in the federal and state regulations under the category of:
Specific Learning Disability

There is evidence of a severe discrepancy between ability and achievement which is not correctable without special education and related services.

Yes X No

The student's academic area of discrepancy is:

/X/ listening comprehension
/_/ oral expression
/X/ basic reading skills
/X/ reading comprehension

/X/ written expression
/X/ math calculation
/X/ math problem solving
/ / reading fluency skills

A discrepancy is present which is not the result of the effects of environmental, cultural, or economic disadvantage, poor attendance, limited school experience, visual, hearing or motor disabilities, emotional disturbance or non familiarity with the English Language. (E.C. 56327)

Yes X No

A psychological processing disorder has been assessed in the areas of:

/ / attention
/ / visual processing
/X/ auditory processing
/X/ sensory motor skills

Cognitive abilities of:

/_/ association
/ / conceptualization
/ / expression

Chris's eligibility for special education services will be based on whether he meets the criteria for those services. The determination will be made by the IEP team.

Recommendations/Summary:

In summary, Chris is an African American year-old 11th grader whose cognitive ability falls in the Low Average range. Processing deficits appear to be evident in the areas of sensory motor and auditory skills. Per academic testing, Chris's overall reading, math and writing skills fall in the Deficient range. Chris does not achieve adequately for his age or to meet State-approved grade level standard in one or more of following areas, when provide with learning experiences and instruction appropriate for his age or State approved grade-level standards in the areas of listening comprehension, basic reading skills, reading comprehension, written expression, math calculation, and math problems skills. The team may consider that Chris's low academic scores at this time may be due to his lack of school experience and excessive absences. Teacher feedback includes that when Chris does attend class he is easily distracted and off task. Teacher feedback also includes that he needs redirection from peers and adults. Chris is currently not making progress towards his goals at this time.

An auditory processing disorder interferes with an individual's ability to analyze or make sense of information taken in through the ears. It is not a hearing test. Difficulties with auditory processing do not affect what is heard by the ear, but rather how the information is interpreted, or processed by the brain. An auditory processing deficit can interfere directly with speech and language, but can affect all areas of learning including reading and spelling. The processing disorder may be as specific as difficulty in discriminating vowel sounds for reading and spelling, or blending sounds

for reading decoding. These children may also have confusion in accurately hearing and understanding things said (particularly in a noisy classroom). Other symptoms include: inability to note beginning sounds in words, difficulties with word sequencing, inability to hear the differences between letter sounds, confusing similar sounding words, and inability to rhyme. Overall recommendations include seating the child closer to the teacher, teach the child to look and listen thereby using visual information, cue the student by saying "listen" or "ready" before giving assignments, restate important information. When repeating, try phrasing the information in a different way. Teach listening skills: have the student wait until all instructions have been given before beginning, give the child enough time to think and to respond. Allow a buddy-system so that the child can double-check with a classmate.

Recommendations:
Have eye-contact with the student before speaking to them. Simplify and/or give one-step directions, slow the rate of speech, minimize distractions, have the child repeat what you asked, and have the child put what you said into their "own words". You may also try to seat the student closest to the teacher, and away from distractions such as a window. Other suggestions may include: emphasizing key words when speaking or writing especially when presenting new information, use gestures that will clarify information, vary loudness to increase attention, encourage the child to ask questions for further clarification, avoid having the student listen and write and the same time, and have a buddy take notes, or use a tape recorder.

Auditory discrimination: These children have difficulty recognizing the differences in sounds. This includes the ability to identify words and sounds that are similar and those which are different. This child may seem as if they do not understand. They seem to hear but not to listen.

Recommendations:
Talk at a slower pace, enunciate clearly, have the child say the word or words back to you, and give one task at a time.

Auditory memory: These children have difficulty storing and recalling information which is given verbally. This child may have trouble recalling information from a story read aloud, may have difficulty with spelling, may have difficulty remembering people's names, recalling their phone number, follow multi-step directions, recall stories they've been told or remember lines from songs.

Recommendations:
Provide written instructions, provide basic outlines of what is being presented, allow the child to take notes, and have the child practice memorization of items heard (works best at home with parent or guardian starting with small chunks of two or three items to large chunks of five to seven items).

Auditory sequencing: These children have difficulty remembering or reconstructing the order of items in a list or the order of sounds in a word or syllable. They may also have difficulty with lists or multi-step directions. An example may be saying or writing "ephelant" for "elephant" or hearing "ninety-four" instead of "forty-nine".

<u>Auditory Processing Deficits</u>

- Provide written instructions as reinforcement of oral instruction. Use of visuals with lectures.
- Provide written instruction to look on back on. Don't penalize spelling; rather

just correct it. Provide basic outline of what is being presented.

- Sit student near teacher.
- Talk at a slow pace. Give one task at a time.
- Pre-teach new information and vocabulary.
- Repeat and rephrase instructions as often as possible.

Visual Motor Deficits

- Chris would benefit from allowing use of computer or word processor
- Chris would benefit from allowing use of a tape recorder for lectures.
- Chris would benefit from allowing tests and reports to be done orally.
- Provide individual written outlines so there are fewer steps in the process.
- Provide notes or outlines to reduce the amount of writing required.
- Provide a "Note Buddy" and/or have a "Note Check".

/1/ Chris would benefit from a multisensory instructional approach.

/2/ Reinforce Chris's on-task behavior to help eliminate tendency to be inattentive or distractible.

/3/ Classroom teachers should practice using a cueing system, such as placing a hand on student's shoulder to encourage on-task behavior.

/4/ Classroom teachers may provide visual aids where possible as a way to provide concreteness to abstract concepts and facilitate associative thinking and reasoning.

/5/ Consideration should be given by the parent to explore medical intervention to address Chris's attention difficulties.

/6/ On-site counseling may be considered as a measure to improve behavior and motivation issues.

/7/ Explore PL2726 services if Chris's behavioral and emotional concerns continue to be an issue for parents and school personnel.

Mark Paschal
School Psychologist
Moreno Valley Unified School District

Moreno Valley USD

INDIVIDUALIZED EDUCATION PROGRAM - TRANSITION PLAN

STUDENT'S LAST NAME	FIRST NAME	M.I.	BIRTH DATE	AGE	GENDER	STUDENT ID
George	Chris		12/16/1991	18	Male	80039028

IEP MEETING DATE: 4/30/2010

STUDENT INFORMATION/COURSE OF STUDY

Projected Graduation Status: ☒ Diploma ☐ Certificate

Course of Study : College Bound

Current G.P. A. : 0.00 Credit Check Reviewed: ☒ Yes ☐ No Credits Completed

9th	10th	11th	12th
15	55	75	75

Projected Graduation Culmination Date: 2009 - 2010

High School Exit Exam: Mathematics: Date Passed 11/4/2008 English/Language Arts: Date Passed _____

Algebra: Date Passed 11/4/2008

Functional Vocational Evaluation ☒ Not Needed ☐ Needed Date Administered: _____

Type of Assessment: ☐ Situational ☐ Observation ☐ Formal Measures ☐ Record Review ☐ Interview

How Student Participated in Transition Planning Process

☒ Interview ☐ Transition Questions ☐ Functional Vocational Assessment

☐ Pre IEP Planning Activities ☐ IEP Team Meeting Attendance ☐ Other: _____

Measurable Post Secondary Transition Goal	Upon Completion of High School,	From Annual Goal Page designed to support progress towards this goal
Training/Education	I will Attend: Job corp or apprenticeship program.	Goals 2 and 3
Employment	I will Participate: Full Time Employment	Goals 2 and 3
Independent Living Skills (if Appropriate)	I will Investigate: would like to obtain driver's license.	Goals 2 and 3
Other: _____		

Moreno Valley USD

INDIVIDUALIZED EDUCATION PROGRAM

STUDENT'S LAST NAME	FIRST NAME	M.I.	BIRTH DATE	AGE	GENDER	STUDENT ID
George	Chris		12/16/1991	18	Male	80039028

ETHNICITY	STUDENT LANGUAGE	HOME LANGUAGE	GRADE
African American	English	English	12

SCHOOL OF ATTENDANCE	DISTRICT OF ATTENDANCE	SCHOOL OF RESIDENCE
Vista del Lago High School	Moreno Valley USD	Vista del Lago High School

PARENT/GUARDIAN	PARENT/GUARDIAN
Carol King	
ADDRESS ☐ STUDENT'S PRIMARY RESIDENCE	ADDRESS ☐ STUDENT'S PRIMARY RESIDENCE
14167 Flamingo Bay Ln	
CITY STATE, ZIP	CITY STATE, ZIP
Moreno Valley CA 92553	

HOME PHONE	WORK PHONE	CELL PHONE	HOME PHONE	WORK PHONE	CELL PHONE
(951) 208-1339		(951) 208-1339			
EMAIL			EMAIL		

ADDITIONAL DEMOGRAPHICS

MIGRANT EDUCATION	☐ YES	☒ NO
ENGLISH LANGUAGE LEARNER	☐ YES	☒ NO
INTERPRETER REQUIRED	☐ YES	☒ NO
TRANSLATION OF IEP REQUIRED	☐ YES	☒ NO

LANGUAGE:

IEP DATES

THIS IEP: 4/30/2010 REVIEW DATE: 4/29/2011

INITIAL PLACEMENT IN SPECIAL EDUCATION: 3/19/2010

LAST ELIGIBILITY: 5/14/2009

NEXT TRIENNIAL: 5/12/2012

PURPOSE OF MEETING

Annual Review

RESIDENCE STATUS

Parent or legal guardian

DISTRICT OF RESIDENCE

Moreno Valley USD

AGENCY SERVICES

☐ CA CHILD SERVICES (CCS) ☐ NONE
☐ DEPT OF REHABILITATION ☐ OTHER:
☐ COUNTY MENTAL HEALTH
☐ REGIONAL CENTER
☐ DEPT OF SOCIAL SERVICES

FOSTER HOME: FOSTER HOME LICENSE #:

ELIGIBILITY

IS THE STUDENT ELIGIBLE? ☒ YES ☐ NO

PRIMARY DISABILITY: Specific Learning Disability (SLD)

SECONDARY DISABILITY:

OTHER PROGRAM INFORMATION

EXTENDED SCHOOL YEAR: ☐ YES ☒ NO

ESY SERVICES:

PRESCHOOL TRANSITION TO KINDERGARTEN: ☐ YES ☒ NO

TRANSPORTATION: ☐ YES ☒ NO REASON:

PARTICIPATING IN WORKABILITY: ☒ YES ☐ NO PHYSICAL EDUCATION: General PE

DID THE SCHOOL FACILITATE PARENT INVOLVEMENT AS A MEANS OF IMPROVING SERVICES AND RESULTS FOR YOUR CHILD? ☐ YES ☐ NO ☒ NO RESPONSE GIVEN

Moreno Valley USD

INDIVIDUALIZED EDUCATION PROGRAM

STUDENT'S LAST NAME	FIRST NAME	M.I.	BIRTH DATE	AGE	GENDER	STUDENT ID
George	Chris		12/16/1991	18	Male	80039028

IEP MEETING DATE: 4/30/2010

SPECIAL EDUCATION SERVICES *

PRIMARY SERVICE	START DATE	END DATE	NUMBER OF SESSIONS	MINUTES PER	FREQUENCY	ENVIRONMENT MAJORITY OF TIME
Specialized Academic Instruction	4/30/2010	4/29/2011	5	57	Daily	Separate classroom in public integrated facility
SERVICE	**START DATE**	**END DATE**	**NUMBER OF SESSIONS**	**MINUTES PER**	**FREQUENCY**	**ENVIRONMENT MAJORITY OF TIME**
Other Transition Service	4/30/2010	4/29/2011	7	57	Yearly	Separate classroom in public integrated facility

** EXCLUDING NON-STUDENT DAYS PER SCHOOL CALENDAR*

GENERAL EDUCATION PARTICIPATION PERCENTAGE

OUTSIDE GENERAL EDUCATION CLASSROOM FOR SPECIAL EDUCATION SERVICES (K-12) 68 %

IN GENERAL EDUCATION CLASSROOM FOR SPECIAL EDUCATION SERVICES (K-12) _____ %

INSIDE GENERAL EDUCATION CLASSROOM (K-12) 32 %

THIS PERCENTAGE IS BASED ON A DISTRICT WIDE AVERAGE OF INSTRUCTIONAL MINUTES FOR GRADES K-12, WHICH MEETS OR EXCEEDS THE STATE REQUIREMENT FOR INSTRUCTIONAL MINUTES PER DAY FOR 180 SCHOOL DAYS (EXCLUDING EXTENDED SCHOOL YEAR).

TOTAL HOURS IN SCHOOL PER INSTRUCTIONAL WEEK: _____

SETTING (FEDERAL PROGRAM): Regular classroom/Public day school

IV.

CONTENTIONS

I. PLEA BARGAINING IS A CRUCIAL STAGE OF THE CRIMINAL PROCESS IN WHICH THE PETITIONER IS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL IN RE ALVERNAZ (1992) 2 C4TH 924, 935

II. RECORDING PLEA BARGAIN PEOPLE V. CABOOZA (1984) 161 CA3d. 40.

III. REMEDY FOR I.A.C. THAT RESULTED IN RESECTION OF OFFERED PLEA BARGAIN LAFLER V. COOPER (2012) — US —, 132 S Ct 1376, 1391.

IV. MENTALLY INCOMPETENT PERSONS; TRIAL OR PUNISHMENT PROHIBITED PENAL CODE SECTIONS 1367, AND 1368.

V.

PRAYER FOR RELIEF

PETITIONER IS WITHOUT REMEDY SAVE BY WRIT OF HABEAS CORPUS WHEREFORE, PETITIONER PRAY THE COURT:

1. ISSUE A WRIT OF HABEAS CORPUS;

2. DECLARE THE RIGHTS OF THE PARTIES;

3. APPOINT COUNSEL, AWARD REASONABLE FEES; AND

4. GRANT ANY OTHER AND FURTHER RELIEF THE COURT DEEMS PROPER

DATED: 6-14-2015

RESPECTFULLY SUBMITTED

CHRIS G

CHRIS ANTHONY GEORGE

VERIFICATION

I CHIRS ANTHONY GEORGE, STATE:

I AM THE PETITIONER IN THIS ACTION. I HAVE READ THE FOREGOING PETITION FOR WRIT OF HABEAS CORPUS AND THE FACTS STATED THEREIN ARE TRUE OF MY OWN KNOWLEDGE, EXCEPT AS TO MATTERS THAT ARE THEREIN STATED ON MY OWN INFORMATION AND BELIEF, AND AS TO THOSE MATTERS I BELIEVE THEM TO BE TRUE.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS DECLARATION WAS EXECUTED AT IMPERIAL, CALIFORNIA ON JUNE 14, 2015

PETITIONER

AP6839

CDCR NUMBER

MEMORANDUM OF POINTS AND AUTHORITIES.

I. PLEA BARGAINING IS A CRUCIAL STAGE OF THE CRIMINAL PROCESS IN WHICH THE PETITIONER IS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL IN RE ALVERNAZ (1992) 2 C4TH 924, 935.

THE SUPREME COURT HELD (IN RE ALVERNAZ) THAT WHEN A DEFENDANT DEMONSTRATES THAT INEFFECTIVE REPRESENTATION AT THE PRETRIAL STAGE OF A CRIMINAL PROCEEDING CAUSED HIM OR HER TO PROCEED TO TRIAL RATHER THAN TO ACCEPT AN OFFER OF A PLEA BARGAIN THAT WOULD HAVE BEEN APPROVED BY THE COURT, THE DEFENDANT HAS BEEN DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY U.S. CONST., 6TH AMEND, AND CAL. CONST., ART. I, § 15, EVEN IF THE DEFENDANT THEREAFTER RECEIVES A FAIR TRIAL.

IN THIS CASE PETITIONER'S RETAINED ATTORNEY (SEAN DAVITT) WAS NOT AWARE OF THE 3 YEAR PLEA DEAL OFFERED BY THE DISTRICT ATTORNEY. IT WAS PETITIONER WHO DID INFORM MR. DAVITT ABOUT THE PLEA OFFER BY SITTING NEXT TO HIS CO-DEFENDANTS (MACFALLING AND GAMBLE) AS HIS CO-DEFENDANTS ATTORNEY EXPLAINED THE 3 YEAR PLEA DEAL WHICH THE DISTRICT ATTORNEY HAD OFFERED. MR. DAVITT STATED HE WAS UN-AWARE OF ANY PLEA DEAL WHICH IS AN INDICATION SEAN DAVITT DID NOT COMMUNICATE WITH

THE DISTRICT ATTORNEY OR THE OTHER TWO ATTORNEYS REGARDING PETITIONER'S CASE, OTHERWISE ATTORNEY SEAN DAVITT WOULD HAVE KNEW ABOUT THE 3 YEAR PLEA DEAL. AFTER LEARNING ABOUT THE PLEA DEAL PETITIONER'S ATTORNEY ADVISED PETITIONER NOT TO TAKE THE DEAL BECAUSE IT WOULD MESS UP PETITIONER'S LIFE AND HE CAN "BEAT THE CHARGES."

CALIFORNIA SUPREME COURT ALSO HELD THAT TO ESTABLISH A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE CONTEXT OF THE REJECTION OF A PROFERRED PLEA BARGAIN, A DEFENDANT MUST SHOW DEFICIENT PERFORMANCE PLUS THE REASONABLE PROBABILITY THAT HE OR SHE WOULD HAVE ACCEPTED THE OFFERED PLEA BARGAIN AND THAT IT WOULD HAVE BEEN APPROVED BY THE COURT.

A CLAIM OF DEFICIENT PERFORMANCE DEPENDS ON WHETHER THE ADVICE AND OTHER COMMUNICATIONS REGARDING THE OFFERED PLEA BARGAIN WERE WITHIN THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES.

PETITIONER CONTENDS COUNSEL MUST PROMPTLY COMMUNICATE TO CLIENTS ALL PLEA NEGOTIATION OFFERS, WHETHER WRITTEN OR ORAL PURSUANT TO CAL. RULES OF PROF COND 3-510; ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION 4-6.2.

BEFORE PRESENTING A PLEA BARGAIN TO DEFENDANT, COUNSEL SHOULD HAVE INTERVIEWED THE CLIENT,

OBTAINED DISCOVERY, AND INVESTIGATED THE CASE SUFFICIENTLY TO BE AWARE OF ALL POTENTIAL DEFENSES OF LAW AND FACT. SEE PEOPLE V. POPE (1979) 23 C3d 412, 424.

COUNSEL SHOULD TELL THE CLIENT WHETHER THE CLIENT'S FACTUAL VERSION PROVIDES A LEGAL OR FACTUAL DEFENSE TO THE CRIME CHARGED.

COUNSEL SHOULD INFORM THE DEFENDANT OF THE PROSECUTION AND DEFENSE EVIDENCE AND ASSES ITS VALUE AT TRIAL. COUNSEL SHOULD ALSO EVALUATE THE PLEA BARGAIN FOR ITS RELATIVE FAIRNESS IN THAT COURT AND IN THAT COUNTY, AND FOR THE RISKS AND PROBABLE OUTCOME OF TRIAL.

COUNSEL SHOULD TELL THE CLIENT THE POSSIBLE EFFECTS OF THE PLEA BARGAIN AND OF BEING FOUND GUILTY AS CHARGED AFTER TRIAL SEE PEOPLE V. HUYNH (1991) 229 CA3d 1067 (MISADVICE REGARDING EFFECT OF GUILTY PLEA); IN RE ALVERNAZ (1992) 2 C4TH 924, 937 N6. (DEFENSE COUNSEL MUST ACCURATELY ADVISE DEFENDANT OF THE SENTENCE OFFERED BY PROSECUTOR AND OF POSSIBLE EXPOSURE IF DEFENDANT GOES TO TRIAL.)

PETITIONER CONTENDS ATTORNEY SEAN DAVITT FAIL TO COMMUNICATE ANY OR ALL PLEA NEGOTIATION OFFERS PURSUANT TO CAL. RULES OF PROF COND 3-510; ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION 4-6.2. LISTED ABOVE. DUE TO THE FACT ATTORNEY SEAN DAVITT HAD NOT COMMUNICATED WITH THE DISTRICT ATTORNEY OR THE OTHER ATTORNEYS ON THE CASE AND

DID NOT KNOW OR LEARN ABOUT THE 3 YEAR PLEA DEAL OFFERRED BY THE PROSECUTION UNTILL THE PETITIONER INFORMED MR. DAVITT ABOUT THE PLEA DEAL WHEN MR. DAVITT APPEARED IN COURT ON 10-17-2012 (DIV/DEPT. 63) THEREFORE MAKING IT IMPOSSIBLE FOR MR. DAVITT TO ADHERE TO CAL RULES OF PROF COND 3-510; ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION 4-6.2. LISTED ABOVE. ONCE MR. DAVITT DID CONFIRM ON 10-17-12 THAT THERE WAS INFACT A 3 YEAR PLEA DEAL OFFERRED BY THE PROSECUTION MR. DAVITT ADVISED PETITIONER TO REJECT THE PLEA DEAL" BY SAYING-"I DONT WANT YOU TO MESS UP YOUR LIFE LIKE BOTH OF YOUR CO-DEFENDANTS AND I COULD BEAT THE CHARGES" YET MR. DAVITT DID NOT ADHERE TO CAL RULES OF PROF COND 3-510; ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION 4-6.2 LISTED ABOVE BEFORE REJECTING THE PLEA DEAL OFFERED BY THE D.A. ON 10-17-12 IN DIV/DEPT. 63. WHICH MADE MR. DAVITT PERFORMANCE DEFICIENT DURING THE PLEA BARGAINING WHICH IS A CRUCIAL STAGE OF THE CRIMINAL PROCESS IN WHICH THE DEFENDANT IS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL. SEE IN RE ALVERNAZ (1992) 2 C4TH 924, 935

TO SHOW PREJUDICE, THE DEFENDANT MUST ESTABLISH A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S DEFICIENT PERFORMANCE, HE OR SHE WOULD HAVE

ACCEPTED THE OFFERED PLEA BARGAIN AND THAT IT WOULD HAVE BEEN APPROVED BY THE COURT.

IN DETERMINING WHETHER THE DEFENDANT, WITH EFFECTIVE ASSISTANCE, WOULD HAVE ACCEPTED THE OFFER, PERTINENT FACTORS INCLUDE: WHETHER COUNSEL ACTUALLY AND ACCURATELY COMMUNICATED THE OFFER TO THE DEFENDANT; THE ADVICE, IF ANY, GIVEN BY COUNSEL; THE DISPARITY BETWEEN THE TERMS OF THE PROPOSED PLEA BARGAIN AND THE PROBABLE CONSEQUENCES OF PROCEEDING TO TRIAL, AS VIEWED AT THE TIME OF THE OFFER; AND WHETHER THE DEFENDANT INDICATED HE OR SHE WAS AMENABLE TO NEGOTIATING A PLEA BARGAIN.

TO DEMONSTRATE THAT A CRIMINAL DEFENDANT HAS RECEIVED CONSTITUTIONALLY INADEQUATE REPRESENTATION BY COUNSEL, THE DEFENDANT MUST SHOW THAT (1) COUNSEL'S REPRESENTATION WAS DEFICIENT, I.E., IT FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS UNDER PREVAILING PROFESSIONAL NORMS, AND (2) THAT COUNSEL'S DEFICIENT PERFORMANCE SUBJECTED THE DEFENDANT TO PREJUDICE, I.E., THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S FAILINGS, THE RESULT WOULD HAVE BEEN MORE FAVORABLE TO THE DEFENDANT.

PETITIONER CONTENDS THROUGH THE EXHIBITS THAT ARE ATTACHED TO THIS PETITION DEMONSTRATE

THAT MR. DAVITT WAS DEFICIENT AND SUBJECTED PETITIONER TO PREJUDICE PLEASE SEE EXHIBITS 1 THROUGH 10.

II. RECORDING PLEA BARGAIN
PEOPLE V. CARDOZA (1984)
161 CA3d 40

TO DISCOURAGE SUCH CLAIMS THE SUPREME COURT OF CALIFORNIA ENCOURAGE THE PARTIES TO MEMORIALIZE IN SOME FASHION PRIOR TO TRIAL (1) THE FACT THAT A PLEA BARGAIN OFFER WAS MADE, AND (2) THAT THE DEFENDANT WAS ADVISED OF THE OFFER, ITS PRECISE TERMS, AND THE MAXIMUM AND MINIMUM PUNISHMENT THE DEFENDANT WOULD FACE IF THE PLEA BARGAIN OFFER WERE ACCEPTED OR, ALTERNATIVELY, IF IT WERE RESECTED AND THE CASE PROCEEDED TO TRIAL, AND (3) THE DEFENDANT'S RESPONSE TO THE PLEA BARGAIN OFFER. (IN RE ALVERNAZ)

IN THIS CASE THE RECORD IS DEVOID THAT COUNSEL ADVISED PETITIONER OF ANYTHING REGARDING THE PLEA LISTED AS (1) (2) AND (3). EVERY ASPECT OF A NEGOTIATED SETTLEMENT APPROVED BY THE COURT SHOULD BE PUT ON THE RECORD. THIS PROCEDURE PROTECTS THE COURT, THE DEFENDANT, THE DEFENSE ATTORNEY AND THE PROSECUTOR PEOPLE V. CARDOZA (1984) 161 CA3d 40 AND IS ESSENTIAL FOR MEANINGFUL APPELLATE REVIEW.

HERE THE INEFFECTIVE ADVICE LED NOT TO AN

OFFER'S ACCEPTANCE BUT TO ITS REJECTION). HAVING TO STAND TRIAL, NOT CHOOSING TO WAIVE IT, IS THE PREJUDICE. IN THESE CIRCUMSTANCES A DEFENDANT MUST SHOW THAT BUT FOR THE INEFFECTIVE ADVICE OF COUNSEL THERE IS A REASONABLE PROBABILITY THAT THE PLEA OFFER WOULD HAVE BEEN PRESENTED TO THE COURT (i.e., THAT THE DEFENDANT WOULD HAVE ACCEPTED THE PLEA AND THE PROSECUTION WOULD NOT HAVE WITHDRAWN IT IN LIGHT OF INTERVENING CIRCUMSTANCES), THAT THE COURT WOULD HAVE ACCEPTED ITS TERMS, AND THAT THE CONVICTION OR SENTENCE, OR BOTH UNDER THE OFFER'S TERMS WOULD HAVE BEEN LESS SEVERE THAN UNDER THE JUDGMENT AND SENTENCE THAT IN FACT WERE IMPOSED. IN LAFLER V. COOPER (2012) — US —, 132 S.Ct 1376; 182 L.Ed 2d 398 THE COURT OF APPEALS AGREED WITH THAT TEST FOR STRICKLAND PREJUDICE IN THE CONTEXT OF A REJECTED PLEA BARGAIN IS CONSISTENT WITH THE TEST ADOPTED AND APPLIED BY OTHER APPELLATE COURTS WITHOUT DEMONSTRATED DIFFICULTIES OR SYSTEMIC DISRUPTIONS SEE 376 FED APPX., AT 571-573; SEE ALSO, e.g., UNITED STATES V. RODRIGUEZ RODRIGUEZ, 929 F. 2d 747, 753, n. 1 (CA1 1991) (PER CURIAM); UNITED STATES V. GORDON, 156 F. 3d 376, 380-381 (CA2 1998) (PER CURIAM); UNITED STATES V. DAY, 969 F. 2d 39, 43-45 (CA3 1992); BECKHAM V. WAINWRIGHT, 639 F. 2d

262, 267 (C.A 5 1981); JULIAN V. BARTLEY, 495 F. 3d 487, 488-500 (CA7 2007); WANATEE V. AULT, 259 F. 3d 700, 703-704 (CA8 2001); NUNES V. MUELLER, 350 F. 3d 1045, 1052-1053 (CA 9 2003); (PER CURIAM); WILLIAMS V. JONES, 571 F. 3d 1086, 1094-1095 (CA 10 2009) (PER CURIAM); UNITED STATES V. GAVIRIA, 116 F. 3d 1498, 1512-1514, 325 U.S. APP D.C. 322 (CADC 1997)(PER CURIAM)

PETITIONER AS THE INJURED CLIENT SEEKS RELIEF FROM COUNSEL'S FAILURE TO MEET A VALID LEGAL STANDARD, NOT FROM COUNSEL'S REFUSAL TO VIOLATE IT. PETITIONER CONTENDS THAT, ABSENT INEFFECTIVE COUNSEL, HE WOULD HAVE ACCEPTED A PLEA OFFER FOR A SENTENCE THE PROSECUTION EVIDENTLY DEEMED CONSISTENT WITH THE SOUND ADMINISTRATION OF CRIMINAL JUSTICE. THE FAVORABLE SENTENCE THAT ELUDED THE DEFENDANT IN THE CRIMINAL PROCEEDINGS APPEARS TO BE THE SENTENCE HE OR OTHERS IN HIS POSITION WOULD HAVE RECEIVED IN THE ORDINARY COURSE. SEE EXHIBITS 3 AND 4 OF THIS PETITION

IF A PLEA BARGAIN HAS BEEN OFFERED A DEFENDANT HAS THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN CONSIDERING WHETHER TO ACCEPT IT. IF THAT RIGHT IS DENIED,

PREJUDICE CAN BE SHOWN IF LOSS OF THE PLEA OPPORTUNITY LED TO A TRIAL RESULTING IN A CONVICTION ON MORE SERIOUS CHARGES OR THE IMPOSITION OF A MORE SEVERE SENTENCE. IT IS, OF COURSE, TRUE THAT DEFENDANTS HAVE "NO RIGHT TO BE OFFERED A PLEA ... NOR A FEDERAL RIGHT THAT THE JUDGE ACCEPT IT." FRYE, ANTE, AT ___, 132 S. Ct 1399, 182 L. Ed. 2d 379. PETITIONER HAVE A SIXTH AMEND RIGHT TO COUNSEL, A RIGHT THAT EXTENDS TO THE PLEA-BARGAINING PROCESS. DURING PLEA NEGOTIATIONS DEFENDANTS ARE ENTITLED TO THE EFFECTIVE ASSISTANCE OF COMPETENT COUNSEL. PETITIONER WAS NOT AFFORDED THAT RIGHT. AND PETITIONER HAS SHOWN PREJDICE. SEE EXHIBITS 1 THROUGH 10.

III. REMEDY FOR I A C THAT RESULTED IN REJECTION OF OFFERED PLEA BARGAIN

THE APPROPRIATE REMEDY FOR INEFFECTIVE ASSISTANCE OF COUNSEL (IAC) THAT RESULTS IN A DEFENDANTS DECISION TO REJECT AN OFFERED PLEA BARGAIN AND PROCEED TO TRIAL IS FOR THE DISTRICT ATTORNEY TO REOFFER THE PLEA AGREEMENT. IF THE DEFENDANT ACCEPTS THE OFFER, THE TRIAL

COURT THEN HAS DISCRETION TO APPROVE OR DISAPPROVE THE PLEA BARGAIN SEE LAFLER V. COOPER (2012) — US —, 132 S. Ct 1376, 1391.

IV. MENTALLY INCOMPETENT PERSONS; TRIAL OR PUNISHMENT PROHIBITED PURSUANT TO PENAL CODE SECTIONS 1367 AND 1368.

A PERSON CANNOT BE TRIED OR ADJUDGED TO PUNISHMENT WHILE THAT PERSON IS MENTALLY INCOMPETENT. A DEFENDANT IS MENTALLY — INCOMPETENT FOR PURPOSES OF THIS CHAPTER IF, AS A RESULT OF MENTAL DISORDER OR DEVELOPMENTAL DISABILITY, THE DEFENDANT IS UNABLE TO UNDERSTAND THE NATURE OF THE CRIMINAL PROCEEDINGS OR TO ASSIST COUNSEL IN THE CONDUCT OF A DEFENSE IN A RATIONAL MANNER. - IN THIS CASE THE COURT GAVE AN INDICATION ON THE RECORD (EXHIBIT-7 PG 421) DURING THE SENTENCING HEARING THAT, SOMETHING WAS WRONG WITH PETITIONER WHEN THE COURT MADE THE FOLLOWING COMMENTS:

" BUT THIS COURT IS OBLIGATED TO ACCEPT WHATEVER DECISION YOU MAKE. IN OTHER WORDS, THE COURT CAN'T STEP IN AND SAY, HE'S NOT

THE SHARPEST THING IN THE WORLD, AND I'M NOT GOING TO LET YOU DO THAT, BECAUSE YOU'RE A GROWN MAN, AND THAT'S THE DECISION YOU DECIDED TO MAKE. SEE EXHIBIT-7 PAGE 421 LINE 24-28, THE COURTS COMMENTS TO PETITIONER IS CONTRARY TO PENAL CODE SECTIONS 1367 AND 1368.

MOST CRIMINAL DEFENDANTS ARE FACED WITH THE CRUCIAL DECISION WHETHER TO PLEAD GUILTY PURSUANT TO A PLEA BARGAIN OR INSTEAD PROCEED TO TRIAL. ALTHOUGH THIS DECISION ULTIMATELY IS ONE MADE BY THE DEFENDANT, IT IS THE ATTORNEY, NOT THE CLIENT, WHO IS PARTICULARLY QUALIFIED TO MAKE AN INFORMED EVALUATION OF A PROFFERED PLEA BARGAIN. THE DEFENDANT CAN BE EXPECTED TO RELY ON COUNSEL'S INDEPENDANT EVALUATION OF THE CHARGES, APPLICABLE LAW, AND EVIDENCE, AND OF THE RISK AND PROBABLE OUTCOME OF TRIAL (SEE PEOPLE V. STANWORTH (1974) 11 CAL.3d 588, 611-612 [114 CAL. RPTR. 250, 522 P. 2d 1058]; IN RE WILLIAMS (1969) 1 CAL.3d 168 174-175 [81 CAL RPTR. 784, 460 P. 2d 984]; PEOPLE V. BROWN (1986) 177 CAL. APP. 3d 537 544-545 [223 CAL RPTR. 66] 1 AMSTERDAM (1984) TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 201, P. 1-229.)

CONCLUSION

FOR THE ABOVE - STATED REASONS, THE RELIEF SOUGHT IN THE PETITION SHALL GRANTED

DATED:

RESPECTFULLY SUBMITTED

CHIRS ANTHONY GEORGE

7. Ground 2 or Ground _____ *(if applicable)*:

a. Supporting facts:

b. Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment? ☑ Yes ☐ No If yes, give the following information:
   a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"): COURT OF APPEAL FOURTH APPELLATE DISTRICT
   b. Result: DENIED c. Date of decision:
   d. Case number or citation of opinion, if known: DONT KNOW
   e. Issues raised: (1)
      (2)
      (3)
   f. Were you represented by counsel on appeal? ☑ Yes ☐ No If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court? ☑ Yes ☐ No If yes, give the following information:
   a. Result: b. Date of decision:
   c. Case number or citation of opinion, if known:
   d. Issues raised: (1) INSUFFICIENT EVIDENCE FOR GANG ENHANCEMENTS
      (2) INSUFFICIENT EVIDENCE FOR PARTICIPATION OFFENSE
      (3) CONSECUTIVE TERM ON COUNT 2 WAS BARRED BY PC 654

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:
BECAUSE APPELLATE ATTORNEY WOULD NOT RAISE IT

11. Administrative review:
   a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500.) Explain what administrative review you sought or explain why you did not seek such review:
   b. Did you seek the highest level of administrative review available? ☐ Yes ☐ No
      Attach documents that show you have exhausted your administrative remedies.

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

13. a. (1) Name of court: CALIFORNIA SUPREME COURT

(2) Nature of proceeding (for example, "habeas corpus petition"): PETITION OF REVIEW

(3) Issues raised: (a) SAME AS ON APPEAL

(b)

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

(5) Date of decision:

b. (1) Name of court:

(2) Nature of proceeding:

(3) Issues raised: (a)

(b)

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

(5) Date of decision:

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

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

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

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

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

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

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

Date: 6-14-2015

▶ _____
(SIGNATURE OF PETITIONER)

PROOF OF SERVICE BY UNITED STATES MAIL

I, CHRIS A. GEORGE, am over the age of eighteen years, a resident and prisoner of the State of California with a present mailing address of: CENTINELA STATE PRISON, P.O. BOX 931, IMPERIAL, CA 92251. 92233-5007.

On JUNE 14, 2015, I served the following document(s):

PETITION FOR WRIT OF HABEAS CORPUS

by placing the document(s) in a sealed envelope(s), with First Class postage having been placed thereon. Delivered the envelope(s) to a Correctional Officer who then signed & dated the back of the envelope and s/he then deposited such envelope(s) in the prisons internal legal mail system for processing and delivery to the United States Postal Service, for delivery to the addressee(s):

RIVERSIDE COUNTY
SUPERIOR COURT
4100 MAIN STREET
RIVERSIDE CA, 92501

OFFICE OF THE ATTORNEY
GENERAL
110 WEST A STREET
P.O. BOX 85266
SAN DIEGO, CA 92186-5266

I declare that there has been regular U.S. mail pick-up by the Correctional Officers at the prison where I posted the envelope(s) and regular communication by mail between the place of mailing and the place(s) so addressed.

I declare under penalty of perjury under the laws of the State of California and the United States that the forgoing is true and correct and the this declaration was executed on JUNE 14, 2015, at Imperial County, the city of Imperial, California.

Declarant

NOTE: Pursuant to the holdings in Houston v. Lack (1988) 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245; and, In re Jordan (1992) 4 Cal.4th 116, 13 Cal.Rptr.2d 878, 840 P.2d 983, (inmate legal documents are deemed filed on the date they are delivered to prison staff for processing and mailing via the institutions internal legal mail procedures).

Court of Appeal, Fourth Appellate District, Division Two - No. E059313

S223157

S220138006757

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SUPREME COURT
FILED

JAN 21 2015

Frank A. McGuire Clerk

Deputy

THE PEOPLE, Plaintiff and Respondent,

v.

CHRIS ANTHONY GEORGE, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Filed 11/14/14 P. v. George CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRIS ANTHONY GEORGE, Defendant and Appellant.	E059313 (Super.Ct.No. RIF1203066) OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed as modified.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Jane Doe,[2] age 13, after drinking with friends, went to an abandoned house where she passed out, and awoke the next morning with her pants and underwear removed. A sexual assault examination revealed she had been raped, and subsequent investigation of the abandoned house led to the discovery of used condoms containing the DNA from Jane Doe and three perpetrators, one of whom was Chris George, the defendant. Defendant was charged and convicted of rape of an unconscious person (Pen. Code, § 261, subd. (a)(3), count 1),[3] lewd act with a child under 14 (§ 288, subd. (a), count 2), and active participation in a criminal street gang (§ 186.22, subd. (a), count 3). The jury also made true findings as to enhancements to the rape and lewd act convictions that the crimes were committed for the benefit of a criminal street gang. Defendant was sentenced to an aggregate term of 18 years, 4 months and appealed.

On appeal, defendant argues (1) the evidence is insufficient to support the true findings on the gang enhancements to counts 1 and 2; (2) the evidence is insufficient to support the conviction for active participation in a criminal street gang (count 3); (3) imposition of a consecutive term on count 1 violated the prohibition against multiple punishment (§ 654); and

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[2] Although the victim's first name was used at the trial, for reasons of protective nondisclosure, we will refer to her as Jane Doe.

[3] All further statutory references are to the Penal Code unless otherwise indicated.

(4) imposition of a consecutive term for count 3 violated the prohibition against multiple punishment (§ 654). We affirm the true findings but modify the sentence to stay the term for count 3, and remand for resentencing on counts 1 and 2.

BACKGROUND

On November 19, 2010, Jane Doe, age 13, went to a park to hang out and drink Alize, an alcoholic beverage, with some friends. Jane Doe drank an entire bottle of Alize.[4] At some point, some African-American males met up with Jane Doe and her friends at the park. These males invited Jane Doe and her group to go to a house. Jane Doe was so intoxicated that she could not recall what happened at that house after she entered and sat on the floor. Her best estimate is that the group went to the house at some time around or before midnight.

The next morning, Jane Doe woke up vomiting. She was upstairs in the house to which she had been taken the night before, but her shoes and pants had been removed. Jane Doe put her pants on and walked outside to look for help, although she could barely walk. She walked down the street and knocked on the door of a house. The occupant of the house to which

[4] Jane Doe testified that the members of her group drank "Alize" but it appears she was referring to Alizé, a cognac-based fruit-flavored line of alcoholic beverages. (See, http://www.alize.ch/ as of September 30, 2014.)

Jane Doe went contacted the Riverside Sheriff's Office to report a possible rape. Jane Doe was transported to a county hospital.

At the hospital, Jane Doe was examined by a Sexual Assault Response Team (SART) nurse. The nurse noted dried secretions on Jane Doe's pants and that she complained of tenderness. Jane Doe also complained of tenderness to the right side of her head, explaining it felt like she had been hit. The nurse found an abrasion and a laceration at the six o'clock position of Jane Doe's vaginal opening. The nurse collected swabs from Jane Doe's external genitalia, as well as from secretions found in the vaginal vault. The nurse also took a blood sample.

Jane Doe's blood was tested by a criminalist at the Department of Justice (DOJ) and was found to contain 0.04 percent alcohol. Using the rate of elimination of alcohol, the criminalist determined that at midnight, Jane Doe's blood alcohol would have been 0.32 percent, and that 10:00 p.m., it would have been 0.36 percent. Some people have physical impairment or even lose consciousness at 0.23 percent. At 0.36 percent, a person would experience lack of motor control, vision issues, and some people have fallen into a coma at that level.

On November 23, 2010, Sergeant Flores and another detective from the sheriff's office interviewed Jane Doe at her residence. The detectives asked if they could take her down the street to a house. Jane Doe identified

the residence where the rape occurred. The next day, Flores and another detective went back to the house. No one responded when the knocked at the door, so they entered the house, which was vacant. Inside, to the side of the door, the detectives saw a condom and searched the rest of the house. Upstairs, the detectives found a white tube sock and condom wrappers in the hallway, and in the southeast bedroom of the house, they found sneakers that matched the description of Jane Doe's shoes. In one bathroom, they found a used condom, and in the toilet tank in the master bedroom, they found two condoms and a condom wrapper.

The condoms found in the back of the toilet were taken as evidence and tested. The Riverside County Sheriff's Department forensic technician found the DNA of Ural Gamble[5] in one of the condoms found in the back of the toilet tank, and found the DNA of Chaz MacFalling on the vulva swab taken during the SART examination of Jane Doe. A Department of Justice criminalist examined another condom and found DNA which matched a buccal swab taken from the defendant, as well as DNA from Ural Gamble. The interior and exterior of the other condom taken from the toilet tank had female DNA matching Jane Doe's, and male DNA matching defendant.

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[5] Ural Gamble and Chaz MacFalling were originally charged in this case along with defendant, but they pled guilty prior to defendant's trial. Gamble is also referred to as "Earl" in some places.

Defendant was charged with rape of an intoxicated person (§ 261, subd. (a)(3), count 1), and lewd acts with a person under the age of 14 (§ 288, subd. (a), count 2). It was further alleged in connection with both counts 1 and 2 that the crimes were committed for the benefit or at the direction of a criminal street gang (§ 186.22, subds. (b)(1)(B) [count 1], and (b)(1)(C) [count 2]). Defendant was also charged with active participation in a criminal street gang (§ 186.22, subd. (a), count 3). Defendant was tried by a jury.

During trial, a gang detective testified as an expert on two Moreno Valley gangs, the Edgemont Criminals and Dorner Block. Members of Edgemont-Dorner Block may have a tattoo of the letter "D" for the Detroit Tigers, the Cleveland Indian image, for the intersection of Dorner and Indian Streets in Moreno Valley that was a founding point of the Dorner Block gang, or the letter "A" with a halo, the icon of the Anaheim Angels, which stands for Adrian and Allies, another intersection in Moreno Valley. They may also have a tattoo of the letters "MOB," which stands for Mont or Block, two gangs.

The expert testified that members of Edgemont-Dorner Block wear the color red and use three different hand signs, because the gang was an amalgamation of three different gangs. One hand sign signifies the letter "E" for Edgemont, another signifies the letter "D" for Dorner Block, and

the third resembles the letter "Y" for the third gang that came together with Edgemont-Dorner Block. One photograph of defendant showed him giving the "E" sign for Edgemont, while another photograph showed defendant with two other gang members flashing a "D" with his right hand, and an "E" with his left hand.

The expert testified that defendant admitted membership in the Edgemont-Dorner Block gang in 2007, 2008 and 2011. Defendant was documented approximately 15 times in Edgemont's territory and had a tattoo of the Angel's "A" as well as "MOB." Ural Gamble was an admitted member of Edgemont-Dorner Block, and based on tattoos and an arrest while in the company of Gamble and another gang member, the expert formed the opinion that Chaz MacFalling was also a member of Edgemont-Dorner Block.

In the expert's opinion, defendant was an active gang member at the time of the rape. The expert was also of the opinion that the rape of an intoxicated girl by three gang members is a gang related crime, committed to promote the gang.

The jury convicted defendant of all counts, and found true all special allegations. The court sentenced defendant as follows: for count 2, the principal term, the court imposed the low term of 3 years, with a 10 year consecutive term for the gang enhancement. The low term of 3 years was

for count 1 was ordered to run consecutive to count 2, at full strength, plus one-third the midterm enhancement (5 years) for a consecutive term of 1 year, 8 months. For count 3, the court imposed a consecutive term of 8 months, one-third the midterm. Defendant appealed.

DISCUSSION

1. *There is Substantial Evidence to Support the Jury's Findings as to the Gang Enhancements.*

Defendant argues the evidence was insufficient to support the jury's true findings on the gang enhancements alleged respecting counts 1 and 2. Specifically, he argues that there was insufficient evidence that (1) the crime was committed for the benefit of a street gang because the victim did not know the defendant and his associates were gang members and did not know what had been done to her, and (2) defendant had specific intent to promote, further or assist criminal conduct by gang members. We disagree.

We assess the sufficiency of evidence by reviewing the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also, *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320 [99 S.Ct. 2781, 61 L.Ed.2d 560].) If the verdict is supported by substantial evidence, we are bound to give due

deference to the trier of fact and not retry the case ourselves. (*People v. Veale* (2008) 160 Cal.App.4th 40, 46, [Fourth Dist., Div. Two], citing *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806; see also, *People v. Albillar* (2010) 51 Cal.4th 47, 59-60 [gang enhancement] (*Albillar*).)

Section 186.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang. Count 1 alleged an enhancement pursuant to subdivision (b)(1)(B) of section 186.22, which provides for additional punishment by a term of five years. Count 2 alleged an enhancement pursuant to subdivision (b)(1)(C), which provides for additional punishment of 10 years.

To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang

activity. (§ 186.22, subd. (f); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 319-320; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1399-1400.)

The gang enhancement comprises two prongs: The first prong requires proof that the charged offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang. Expert opinion that particular criminal conduct benefited a gang is admissible, and can be sufficient to support the gang enhancement. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048-1049.) The second prong requires evidence that the charged sex offense offenses were committed with the specific intent to promote, further, or assist other criminal conduct by members of the gang. (*Albillar, supra,* 51 Cal.4th at p. 51.)

As to the first prong, the court in *Albillar* acknowledged that not every crime committed by gang members is related to a gang, but held that in the case before it the crimes were gang-related in two ways: they were committed in association with the gang, and they were committed for the benefit of a gang. (*Albillar, supra,* 51 Cal.4th at p. 60.) There, the expert's opinion that the criminal conduct benefited the gang by enhancing its reputation by establishing that the defendants came together *as gang members* to attack the victim and was sufficient to provide they committed the crimes in association with the gang. (*Id.* at p. 62.) Additionally, relying on the gang expert's opinion that particular criminal conduct benefitted the

gang by enhancing its reputation for viciousness was sufficient to show that the defendant's criminal attack benefitted the gang. (*Id.* at pp. 63-64.)

In *Albillar,* three defendants, all gang members, raped a 15-year old girl by force, in concert. The three defendants appealed, challenging the sufficiency of the evidence to support the substantive gang offense, as well as the gang enhancements. The California Supreme Court held that the testimony of the gang expert that the commission of a rape in concert by three gang members satisfied the first prong of section 186.22, subdivision (b)(1).

Contrary to defendant's assertion, the same is true in the present case, where the expert testified that the crime was gang-related because defendant committed it in association with other gang members, and because the crime enhanced the gang's reputation. The fact that Jane Doe was unconscious at the time does not affect this determination as there is no requirement that a particular victim be consciously aware that she is the victim of a gang-related crime to support the enhancement.

As to the second "prong" of the gang enhancement, relating to the defendant's specific intent to promote, further, or assist in any criminal conduct by gang members, the commission of a crime in concert with other gang members is substantial evidence supporting the inference that the defendant acted with the specific intent to promote, further or assist gang

members in the commission of the crime. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322, citing *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

The Supreme Court agreed with this reasoning in *Albillar, supra*, 51 Cal.4th at page 66. In *Albillar,* the court concluded that the scienter requirement of section 186.22, subdivision (b)(1) applies to *any* criminal conduct, without a further requirement that the conduct be "apart from" the criminal conduct underlying the offense of conviction sought to be enhanced. (*Albillar*, at p. 66.) The court also concluded that there is no requirement that the defendant act with the specific intent to promote, further, or assist a *gang*; there is only a requirement that the defendant have specific intent to promote, further, or assist criminal conduct by *gang members*. (*Id.*, at p. 67.) As to the defendants in that case, the Supreme Court concluded that if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members. (*Id.,* at p. 68.)

The present case is similar to *Albillar*, involving the rape of a 13-year old victim by three gang members. As to the second prong, the fact that the defendant committed the crime with known members of the gang

(Gamble and MacFalling) supported the jury's finding that the defendant had the specific intent to promote, further, or assist the criminal conduct of those other gang members involved in the rape, satisfying the element of scienter necessary to prove the enhancement.

The fact that Jane Doe had no specific knowledge of what happened to her or who did them is irrelevant: there was ample circumstantial evidence (DNA from both Jane Doe and the three men found on and in used condoms is fairly convincing circumstantial evidence) that three men penetrated her vagina wearing condoms. This evidence supported the jury's verdict that the crimes of rape and lewd conduct were committed by defendant, and that he committed the crimes in association with and for the benefit of a criminal street gang, with the specific intent of promoting, furthering, or assisting the sexual offenses of the other two gang members involved in Jane Doe's assault.

2. *There is Substantial Evidence to Support the Conviction for Active Participation in a Criminal Street Gang.*

Defendant argues there is insufficient evidence to support the conviction for active participation in a criminal street gang, pursuant to section 186.22, subdivision (a). Specifically, defendant argues that there is insufficient evidence he was acting in concert with other members of Edgemont Criminals at the time of the offenses. We disagree.

Section 186.22, subdivision (a), provides that any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished as a felony or misdemeanor. Thus, the elements of the crime are (1) active participation in a criminal street gang, that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*); see also, *People v. Lamas* (2007) 42 Cal.4th 516, 523.)

To establish that a defendant actively participated in a criminal street gang, it is not necessary to prove that a defendant had a specific intent to further or promote the gang, only knowledge of the gang's pattern of criminal activity. (*Albillar, supra,* 51 Cal.4th at p. 56.) Further, section 186.22, subdivision (a) does not require that the underlying felony be gang related. (*Albillar, supra,* at p. 55.) However, the crime of active participation under section 186.22, subdivision (a) punishes persons who acted in concert with other gang members in committing a felony, regardless of whether such felony was gang related. (*Rodriguez, supra*, 55

Cal.4th at p. 1138.) In other words, the statute punishes active participants for commission of criminal acts done *collectively* with gang members. (*Id.*, at p. 1139.)

The first element (active participation) is shown if the defendant had more than nominal or passive involvement with the gang at or near the time he was charged with the offense of active gang participation. (*Rodriguez, supra,* 55 Cal.4th at p. 1134; *People v. Castenada* (2000) 23 Cal.4th 743, 747.) The second element (knowledge that the gang's members engage in a pattern of criminal gang activity) can be established by evidence of defendant's gang paraphernalia (*People v. Jasso* (2012) 211 Cal.App.4th 1354, 1377-1378), or by expert testimony that information about a gang's current activities is available only to other active gang members. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1502.) Defendant does not direct his challenge to either of these elements, so we do not need to address them.

Instead, defendant challenges the third element, arguing that the evidence failed to establish that he was acting "in concert" with other Edgemont Criminals. Defendant reads the third element too narrowly: the element requires a defendant to "promote, further, or assist" members of the gang (*Rodriguez, supra,* 55 Cal.4th at p. 1131), and does not include a requirement that he act "in concert" with gang members. Although this

element is not satisfied where the defendant acts alone, it is satisfied where the defendant acts *collectively* with gang members. (*Id.*, at p. 1139.)

The evidence in the present case demonstrated that defendant, along with two others, took Jane Doe to the abandoned house, where, Jane Doe later discovered, she was raped by three individuals while unconscious. This conclusion is supported by the fact one gang member's DNA was found in Jane Doe's vagina, while the DNA of Jane Doe and each of the other two gang members was found in used condoms in the house where the rape took place. All three individuals were documented members of the Edgemont Criminals-Dorner Block collective gang. Insofar as the evidence showed Jane Doe was taken to the abandoned house with three African-Americans on but one occasion, the jury properly found defendant acted collectively with two other gang members in the commission of the crime, furthering, assisting, or promoting the criminal acts of the other gang members.

The evidence is sufficient to support the conviction for active participation in a criminal street gang.

3. *Consecutive Terms for Counts 1 and 2 Were Authorized, But a Consecutive Term for Count 3 Was Barred by Section 654.*

The trial court selected count 2 as the principal term, imposing an aggregate term of 13 years for that count with the gang enhancement. It then imposed a fully consecutive aggregate term of 4 years 8 months for count 1. The court did not state the reasons for its decision to impose fully consecutive terms on the two counts. Defendant argues that the trial court should have stayed the sentence on count 1 pursuant to section 654, because counts 1 and 2 arose from a single act. In addition, multiple terms for the gang enhancement and the substantive active participation in a criminal street gang were improper. We conclude the sentences for counts 1 and 2 must be remanded because the trial court failed to state reasons for its decision to sentence, ostensibly, pursuant to section 667.6, and we reverse the term for count 3 and direct that it be stayed pursuant to section 654.

Section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The section bars multiple convictions and sentences based on a single act against a single victim. (*People v. Gonzalez* (2012) 211

Cal.App.4th 405, 415-416; *People v. Blevins* (1984) 158 Cal.App.3d 64, 68.)

Whether a course of conduct is a divisible transaction depends on the intent and objective of the actor: "If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006 (*Alvarez*).) The section applies when there is a course of conduct which violates more than one statute but constitutes an indivisible transaction. (*Ibid.*, citing *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

a. Full Consecutive Terms for Counts 1 and 2.

In sex crime cases, even where the defendant has but one objective—sexual gratification—section 654 will not apply unless the crimes were either incidental to or the means by which another crime was accomplished. (*Alvarez, supra,* 178 Cal.App.4th at p. 1006.) The statute (§ 654) literally applies only where multiple punishment arises out of multiple statutory violations produced by the "same act or omission." (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Thus, if a person rapes a 13-year-old, he can be convicted of both rape and lewd conduct with a child on the basis of that single act, but he cannot be punished for both offenses. (*People v. Siko* (1988) 45 Cal.3d 820, 823.)

However, if the convictions arise from multiple acts committed against the same victim, on the same or on multiple occasions, consecutive sentences are proper. (§ 667.6, subd. (c).) A person who commits separate, factually distinct crimes, even with only one ultimate intent and objective, is more culpable than the person who commits only one crime in the pursuit of the same intent and objective. (*People v. Correa* (2012) 54 Cal.4th 331, 341, citing *People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) Thus, where a defendant broke into the victim's home and committed three separate acts of digital penetration with a short span of time, section 654 did not bar separate punishment for each separate assault. (*People v. Harrison* (1989) 48 Cal.3d 321, 336 (*Harrison*).)

Here, the People argued to the jury that the presence of both defendant's and Jane Doe's DNA on the inside and the outside of the condom showed that he penetrated her once without the condom, then put the condom on and penetrated her again. This constitutes two acts, which may be punished separately pursuant to section 667.6, subdivision (c), even though they were committed in quick succession. (*Harrison, supra,* 48 Cal.3d at p. 336; see also, *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006.)

Section 667.6, subdivision (c), permits the court, in its discretion, to impose fully consecutive terms for multiple sex offenses committed against

a single victim on a single occasion. (*People v. Pelayo* (1999) 69 Cal.App.4th 115, 123 (*Pelayo*).) However, the court must provide a statement of reasons for the sentencing choice.[6] (*People v. Belmontes* (1983) 34 Cal.3d 335, 346-347; *People v. Pena* (1992) 7 Cal.App.4th 1294, 1317; *People v. Reeder* (1984) 152 Cal.App.3d 900, 912, 919, fn. 8.) In the alternative, the court may impose the more lenient sentencing provisions of section 1170.1. (*Pelayo, supra*, 69 Cal.App.4th at pp. 123-124, citing *People v. Jones* (1988) 46 Cal.3d 585, 593; *People v. Belmontes* (1983) 34 Cal.3d 335, 346.)

Here, the convictions on both counts 1 and 2 supports an inference that the jury agreed with the People's theory that defendant penetrated Jane Doe more than once. This interpretation gave the court authority to make a sentencing choice to impose an aggregate sentence pursuant to section 1170.1, or to impose fully consecutive terms pursuant to section 667.6, subdivision (c). The court failed to state that it was exercising its discretion to sentence under section 667.6, and neglected to state its reasons for choosing the sentencing option. We must therefore remand the matter to the superior court for resentencing. At that time, the court may exercise its

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[6] Section 667.6, subdivision (d), mandates the imposition of fully consecutive sentences for multiple sex offenses committed against a single victim if the offenses were committed on separate occasions. That situation is not present here, so any authority to impose fully consecutive terms comes from subdivision (c) of section 667.6.

discretion to sentence defendant under either section 1170.1 or 667.6, but must state reasons if it chooses the latter.

b. The Consecutive Term for Count 3 (Active Participation in a Criminal Street Gang) Violated Section 654.

Both counts 1 and 2 were enhanced by consecutive terms based upon the jury's finding that those crimes were committed for the benefit of a criminal street gang. The sexual offenses against Jane Doe constituted the felonious acts which transformed mere gang membership, itself not criminal, into the crime of active participation in a criminal street gang. The court also imposed a consecutive term for count 3, alleging defendant's active participation in a criminal street gang. Defendant claims the term for count 3 violated section 654 and we agree.

To be guilty of active participation in a street gang, the defendant must have promoted, furthered, or assisted in felonious conduct by members of the gang. (§ 186.22, subd. (a).) Section 186.22, subdivision (a) requires that a person commit an underlying felony with at least one other gang member. (*Rodriguez, supra,* 55 Cal.4th at p. 1134.) One may promote, further, or assist in any felonious criminal conduct by members of the gang by either aiding and abetting other gang members in committing a felony *or* by directly committing a felony with other gang members. (*Id.,* at p. 1136, italics added.)

Here, the underlying felonies that formed the basis for the conviction for being an active participant in a criminal street gang were counts 1 and 2, each of which carried a gang enhancement allegation (§ 186.22, subd. (b)(1)), found true by the jury. Section 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have willfully promoted, furthered, or assisted in any felonious conduct by members of the gang, and (2) the underlying felony that is used to satisfy this element of gang participation. (*People v. Mesa* (2012) 54 Cal.4th 191, 197, relying on *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1315 [overruled on a different point in *Rodriguez, supra,* 55 Cal.4th at p.1137]; *People v. Lopez* (2012) 208 Cal.App.4th 1049, 1061-1062.)

Because section 654 requires the imposition of the longest possible term, the

sentence for count 3 should be stayed, in light of the longer term imposed on count 2.

DISPOSITION

We modify the sentence to stay the terms imposed for count 3, and we remand for resentencing on counts 1 and 2. Except as modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.

CERTIFICATE OF COMPLIANCE
WITH CALIFORNIA RULES OF COURT, RULE 8.504(d)(1)

Case Name: People v. George Court of Appeal No. E059313

I, SUSAN S. BAUGUESS, certify that the foregoing Petition for Review contains 2,258 words.

Dated: December 11, 2014

SUSAN S. BAUGUESS
Attorney for Appellant/Petitioner
State Bar No 059120

PROOF OF SERVICE BY MAIL
(C.C.P., Sections 1031a, 2015.5)

STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO:

I am a resident of the county aforesaid; I am over the age of 18 years and not a party to the within action. My business address is: P. O. Box 2381, Running Springs, California 92382.

On December 11, 2014, I served the within PETITION FOR REVIEW on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at Running Springs, California, addressed as follows:

Office of the District Attorney
3960 Orange Street
Riverside, California 92501
Attn: Elan Zekster, Deputy District Attorney

Honorable Michael B. Donner
c/o Clerk, Superior Court
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Riverside, California 92501

Mr. Chris Anthony George
(Address on file)

Sean A. Davitt, Esquire
Law Offices of Earl Carter & Associates
4333 Orange Street, Suite 102
Riverside, California 92501

I further declare that I electronically served a copy of the above document from the electronic notification address of bauguess059120@gmail.com on December 11, 2014 to the electronic notification addresses for the Office of the Attorney General at ADIEService@doj.ca.gov, Appellate Defenders, Inc. at eservice-criminal@adi.sandiego.com and the Court of Appeal, Fourth Appellate District, Division Two at www.courts.ca.gov/15318.htm.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 11th day of December, 2014, at Running Springs, California.

SUSAN S. BAUGUESS