Case No.

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IN THE SUPREME COURT OF THE UNITED STATES

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DOUGLAS CORNEJO,

Petitioner-Appellant,
v.

CHRISTIAN PFEIFFER, Warden,

Respondent -Appellee.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should a COA Have Been Granted to Decide If the Prosecutor's Failure to Disclose *Brady* Evidence Deprived Cornejo of His Right to Confront and Cross-Examine His Witnesses at His Preliminary Hearing?

2. Should a COA Have Been Granted to Decide If the Admission of Anaya's Preliminary Hearing Testimony at Trial Violated Cornejo's Right to Confront and Cross Examine Witnesses?

3. Should a COA Have Been Granted to Decide If the Trial Court Deprived Cornejo of Due Process, a Fair Trial, and the Right to Present a Defense by Excluding Anaya's Statements from His July 29, 2012 Police Interview?

4. Should a COA Have Been Granted to Decide If the Evidence Failed to Prove That the Gun Was Stolen and That Cornejo Committed the Crime to Benefit a Criminal Gang Enhancement?

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Petitioner, DOUGLAS CORNEJO, petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's Order denying Cornejo's request for a certificate of appealablity. (Appendix A)

## OPINION BELOW

On September 15, 2020, the Ninth Circuit Court of Appeals denied Cornejo's' request for a certificate of appealablity. (Appendix A)

## JURISDICTION

The jurisdiction of this Court is 28 U.S.C. § 2254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amends. V, VI, XIV; 28 U.S.C.§ 2254.

## STATEMENT OF THE CASE

On September 25, 2013, the jury found Cornejo and his co-defendants Adrian Barajas and Joseph Pacheco guilty of willful, deliberate and premeditated attempted murder (Cal. Penal Code §§ 664/187 (a)[1]) and kidnapping of Anaya. § 207(a)

The jury also found Cornejo guilty of carrying a concealed firearm. § 25400 (a)(2). The jury found that the offenses were committed to benefit a street gang (§ 186.22, (b)(1)(C)) and that Cornejo personally used a firearm. § 12022.53 (b).

The trial court sentenced Cornejo to 39 years to life in state prison.

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[1] All further statutory citations reference the Cal. Penal Code, unless otherwise stated.

On July 14, 2015, the California Court of Appeal (CCA) affirmed the judgment. Cornejo then petitioned for review in the California Supreme Court (CSC). On October 21, 2015, the CSC summarily denied the petition.

Cornejo filed a habeas petition in the federal district court. The federal district court denied the petition. (No. CV 16-00889-VBF (GJS).)

On September 15, 2020, the Ninth Circuit denied Cornejo's request of a certificate of Ability. (Appendix A)

## STATEMENT OF THE FACTS[2]

A. *The Prosecution Case*

> [Cornejo and his co-defendants] were members of the Rockwood criminal street gang. After obtaining information leading them to believe that a fellow gang member, Anaya, was an informant for law enforcement, [Cornejo and his co-defendants] kidnapped Anaya, took him to

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[2] The underlying case facts are taken from the CCA's opinion on direct review. Because Conejo has not challenged these factual findings, they are presumed to be correct. See *Crittenden v. Chappell*, 804 F.3d 998, 1011 (9th Cir. 2015) (finding that state court's factual findings are presumed correct unless "overcome . . . by clear and convincing evidence"); 28 U.S.C. § 2254(e)(1).

an alley, and shot him in the head. Anaya survived the shooting, and subsequently identified [Cornejo and his co-defendants] as his assailants.

1. *Anaya 's Preliminary Hearing Testimony*

Trial proceedings started August 30, 2013. After Anaya invoked his Fifth Amendment rights and declined to testify at trial, the trial court declared him unavailable. His October 16, 2012 preliminary hearing testimony was then read into the record. The testimony was as follows:

In 2012, Anaya had been a member of the Rockwood gang for several years. Appellants were fellow gang members.[3] On July 28, at about 8:00 p.m., Anaya went to Vargas's apartment to collect the money Vargas owed him for drugs. Appellants were the only occupants. Anaya had two or three guns on him. In exchange for $100, he gave appellants one of the guns -- a .357-caliber revolver.

When Anaya went to the bathroom, he left his cell phone in the apartment to charge. Vargas took Anaya's cell phone and looked through the contacts. Among the contacts was a sheriff deputy's number. Anaya had stored the deputy's phone number on his phone after the deputy had approached him in May 2012 to ask him some questions. At the preliminary hearing, Anaya admitted calling the deputy, but denied

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[3] Anaya did not know appellants' real names, but knew their gang monikers: Vargas was "Tico," Barajas was "Chubbs," Cornejo was "Little Man," and Pacheco was "Stamper."

agreeing to work for him.

When Anaya came out of the bathroom, Vargas told him to go back inside. Cornejo, who was armed with a gun, told Anaya to stay in the bathroom and locked him inside. After about an hour, Vargas entered and asked Anaya, "Who are you working for?" Anaya replied, "What? What are you talking about?" Vargas repeated: "Who are you working for?" He then said, "You fucked up," and stepped outside. Barajas entered, told Anaya that he had "fucked up," and struck him in the face. Cornejo and Pacheco then entered the bathroom separately and struck Anaya in the face.

Barajas came back and told Anaya to get in the tub. Vargas and Pacheco then entered. Vargas had the .357 gun and Pacheco was armed with a .45-caliber handgun. Vargas then injected Anaya with methamphetamine. Vargas tied Anaya's hands behind his back with shoelaces, placed a hooded sweatshirt over his head, and led him out of the apartment to a green truck parked outside. Vargas, Cornejo, and Anaya got into the truck. Anaya could not see the driver. Pacheco, who was wearing a Global Positioning System (GPS) tracking device as a condition of parole, stayed behind in the apartment.[4] Anaya did not know Barajas's location. When shown still pictures from a video surveillance of the building taken at the time, Anaya identified the men in the picture as Vargas, Pacheco, and

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[4] The location data from Pacheco's tracking device showed he entered the apartment at 7:05 p.m., and remained there until 6:39 a.m. the next morning.

Barajas.

After about an hour, the truck stopped near an alley. Cornejo exited, and Vargas pulled Anaya out of the vehicle. Vargas ordered Anaya to go to a corner of the alley, but Anaya started to run away. Vargas took out the .357 handgun and shot Anaya in the head. The bullet entered the left side of Anaya's head and exited the top. Cornejo took out his gun and attempted to shoot Anaya, but the gun jammed. Anaya fell to the ground and pretended to be dead. Vargas said, "He's gone." Vargas and Cornejo then re-entered the truck. Anaya, afraid the truck would run him over, got up to run away. The truck driver tried to run him down. The side of the truck's bumper struck Anaya, sending him flying into a trash can. Anaya got up and started running. He heard several gunshots and dropped to the ground. The truck drove away. Anaya went to a store and called 911 at 4:52 a.m. He was taken to a hospital, treated, and released.

Anaya was questioned by police officers, but he provided them with "different stories so I could just get them off my back." After Anaya was released from the hospital, he agreed to speak with Los Angeles Police Detective Carlos Carias. Detective Carias interviewed Anaya at the police station, and showed him photographs in a Rockwood gang photobook. Anaya identified Vargas's photograph and wrote: "This individual was the one who shot me in the head, number 3. Tico [Vargas] is the one who tied me down and escorted me to the vehicle. I was told by him to get on the floor. Once arriving . . . at the alley, I was dragged out and shot by Tico." He also identified photographs of Pacheco and Cornejo, writing: "Stomper [Pacheco] number 210, Little

Man [Cornejo] number 211 were involved in the crime of laying hands on me before I got shot in the head. I received a few blows from these individuals and had a gun pointing at my head. Little Man got -- Little Man's gun got jammed in the alley. So that's why I only got one shot in the head by Tico."

On August 4, 2012, Anaya identified Barajas's photograph and wrote: "This individual in photo six I know him as Chubbs from Rockwood for several years. Chubbs took me with Tico. And I got beat up. Later that night I was shot in the alley. Chubbs was the first one who said I fucked [up]."

Anaya also identified appellants as his assailants at the preliminary hearing.

2. *Other Trial Testimony*

At the trial, Los Angeles Police Officer John Boverie testified that at approximately 4:55 a.m. on July 28, he responded to a call of a shooting. Arriving at the scene, he observed Anaya sitting on a chair, holding a towel to his head. Anaya had a gunshot wound to the left portion of his head and a shoe string tied to his right wrist. He did not respond to Officer Boverie's inquiries about who had shot him. The paramedics then arrived and took Anaya to the hospital.

Los Angeles Police Officer Ramon Gracia testified that he also responded to Anaya's 911 call. When he arrived, he observed a male Hispanic bleeding profusely from his head. When questioned, Anaya was uncooperative and provided inconsistent explanations for his injuries. When Anaya was taken to the hospital,

Officer Gracia followed and interviewed him at the hospital. After providing several versions of the events, Anaya told Officer Gracia that he would tell him the truth. Anaya stated that he had gone with some of his "homies" to purchase beer. After they purchased the beer, they began driving to a different location. While in the car, one of his homies punched him and another overpowered him and tied his hands behind his back. The car eventually stopped at an alley, and one of his homies grabbed him and started to drag him into the alley. Another homie then drew a .357 and shot him. Anaya fell to the ground and pretended to be dead. After the men left him, he got up and began to run. As he was running, the car struck him. Anaya told Officer Gracia that he was an active gang member, and that he thought he was shot because his homies thought he was a "rat."

Detective Carias testified that he was assigned to investigate the shooting. He was informed that the victim had been checked into a hospital, and that the victim had identified himself as Rogelio Garcia. After determining that the victim's real name was Valentin Anaya, the detective interviewed Anaya at the police station. In addition to identifying appellants as his assailants, Anaya also provided information about the location of the shooting.

Detective Carias also testified that at one point, Anaya said he did not know the name of the driver of the green truck. At another point, Anaya said he knew the name of the driver, but would say only that the driver was a Rockwood gang member. Anaya also told the detective that as he was being taken from Vargas's apartment to the truck, he saw a Rockwood gang member

by the name of "Cricket."

After Anaya told Detective Carias that he was afraid for his safety and for his family's safety, the detective moved Anaya and his family to a "safe house." Detective Carias paid for the motel directly with emergency funds, and he gave Anaya additional money for food. In order to receive the money Anaya signed a form stating that he would not commit any crimes. Detective Carias testified that he gave Anaya $60 in cash on July 29, and $40 on July 30. On August 16th and September 16th, the detective gave Anaya $350 for food. On October 16th, he gave Anaya $350 for food and $300 for incidentals. On December 4th, he gave Anaya $1100 for food and $225 for incidentals. Finally, on January 4, 2013, he gave Anaya $1100 for food. The food allowance was for both Anaya and his family. In total, including the housing assistance, $7,750 was provided to Anaya and his family.

After Detective Carias interviewed Anaya, he visited Vargas's apartment building and looked at surveillance video taken at the time of the incident. The detective used his cell phone to capture the surveillance video and to take still photographs of the video. On August 8, Detective Carias showed the surveillance video to Los Angeles Police Detective Antonio Hernandez. Detective Hernandez recognized Vargas in the video from prior contacts with him.

The next day, while driving around Rockwood gang territory looking for the shooting suspects, Detective Hernandez and his partner, Officer Philip Zalba, saw Vargas. Vargas saw the officers and ran away, eventually entering a swap meet or flea market. When Vargas exited

the business, Detective Hernandez was waiting outside and apprehended him. The detective searched Vargas, and found a small bag of ammunition on his person, containing fifteen .357-caliber bullets. Inside a hole in the wall of the flea market, police officers recovered a loaded .357 revolver.

Immediately after Vargas was arrested, Detective Hernandez learned that Barajas was next door, inside a cell phone store. The officers arrested Barajas there.

Pacheco and Cornejo were arrested the following weeks. On August 14th, Los Angeles Police Officer Arthur Meza observed Pacheco and noticed he was wearing a GPS tracking device, indicating he was on parole. Officer Meza and his partner approached Pacheco to initiate a parole search. As the officers approached, Pacheco placed one of his arms into his waistband, and grabbed a woman, placing her between himself and the officers. Pacheco said, "I don't want to do this." The officers ordered him to let the woman go, but Pacheco refused. The officers sprayed Pacheco with pepper spray, but Pacheco attempted to hide his face in the woman's hair. Officer Meza's partner then tackled Pacheco and took him to the ground. As he fell, Pacheco released the woman. He resisted for about 15 seconds. After he was handcuffed, Pacheco indicated he was in possession of a firearm. The officers recovered a loaded .45-caliber semiautomatic handgun from Pacheco's front waistband.

On August 22, Detective Hernandez saw Cornejo walking in Rockwood gang territory. When Cornejo noticed the officer, he ran away in the opposite direction. As he was being chased,

Cornejo threw a revolver over his head. Cornejo was apprehended after tripping on the stairs. The handgun was recovered; it was a Smith and Wesson chrome .22-caliber revolver, loaded with six bullets.

Los Angeles Police Officer Michael Chang testified he interviewed Cornejo after his arrest. After waiving his *Miranda* rights,[5] Cornejo told the officer that he had stolen the .22-caliber handgun from another Rockwood gang member, whom he did not like. He had taken it from "some bushes." Cornejo stated that he needed the handgun for protection because he had been "jumped out of Rockwood Street [gang] and . . . had been in a fight in juvenile hall with some juvenile."

In February 2013, Anaya was arrested for possession of an assault rifle. He told Officer Joseph Villagran that he had purchased the rifle for protection against the Sinaloa Cartel. He explained that he had lost a pound of methamphetamine belonging to the Sinaloa Cartel, and that a "hit" had been placed on him. Several days later, Officer Bobby Romo interviewed Anaya. During this interview, Anaya provided a different explanation for his possession of the rifle. Anaya said that in July 2012, his fellow gang members had tried to kill him because they believed he was a "rat." He stated: "I bought myself a gun for protection after I was shot in the head by former gang members."

Detective Hernandez testified as the prosecution gang expert. Detective Hernandez

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[5] *Miranda v. Arizona,* 384 U.S. 436 (1966).

personally knew Vargas, Pacheco, and Cornejo to be members of the Rockwood gang; they had admitted to him that they were gang members. Vargas was known by the gang moniker, "Tico" or "Tiko." Pacheco was known by the gang monikers, "Stamper" and "Thumper." Cornejo was known by the gang monikers, "Clash" and "Baby Tiny." Although Detective Hernandez never had any personal contact with Barajas, Detective Hernandez opined that Barajas was a Rockwood gang member based on his gang tattoos and Anaya's statements.

Given a hypothetical fact pattern based on the facts of this case, Detective Hernandez opined that the kidnapping and attempted murder of a suspected gang informant was committed for the benefit of and in association with the Rockwood criminal street gang. The assailants were all gang members from the same gang, and the crimes would benefit the gang because they would discourage other gang members from working with law enforcement. Detective Hernandez also opined that when Cornejo was arrested on August 22, he possessed the .22-caliber handgun for the benefit of a criminal street gang, because having a gang member with a gun in gang territory would allow the gang to protect its territory from rival gangs. The detective also explained that a gang would have easily accessible and hidden places to store guns -- such as a bush -- for gang members to use. He also opined that only gang members would know these locations.

B. *The Defense Case.*

Appellants did not testify. Dr. Mitchell Eisen, a psychologist testified on behalf of Cornejo. Dr. Eisen testified about possible flaws in a witness's identification of suspects due to factors such as traumatic stress.

## REASONS FOR GRANTING CERTIORARI

### I. THE NINTH CIRCUIT SHOULD HAVE GRANTED A COA BECAUSE THE PROSECUTOR'S FAILURE TO DISCLOSE *BRADY* EVIDENCE DEPRIVED CORNEJO OF HIS RIGHT TO CONFRONT AND CROSS-EXAMINE HIS WITNESSES AT HIS PRELIMINARY HEARING

#### A. Introduction

The prosecution failed to disclose that, from July 29, 2012, to October 16, 2012, the day of the preliminary hearing, Detective Carias paid Anaya and his family $4,475 in witness-protection program benefits. The prosecutor violated *Brady v. Maryland,* 373 U.S. 83 (1963) by failing to disclose Anaya's witness protection benefits to the defense. The prosecutor's *Brady* violation deprived Cornejo of his right to cross-examine Anaya at his preliminary hearing.

#### B. The Prosecution Must Disclose *Brady* Evidence

"Evidence impeaching the testimony of a government witness falls within the *Brady* rule when the reliability of a witness may be determinative of a criminal defendant's guilt or innocence." *United States v. Brumel-Alvarez,* 991

F.2d 1452, 1458 (9th Cir. 1992), citing *Giglio v. United States,* 405 U.S. 150, 154 (1972) (Prosecution's failure to disclose promise not to prosecute in return for testimony violated *Brady*.) Impeachment material includes benefits conferred in exchange for information in the case. (Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice*, New York University Press (2009) at p. 58.)

### C. The Prosecution's Failure to Disclose Anaya's Monetary Benefits Before Cornejo's Preliminary Hearing Violated *Brady*

The prosecution paid Anaya $4,475 in monetary benefits totalling $4,475 before the preliminary hearing. But the prosecution failed to notify Cornejo about the monies. If the prosecution disclosed the monies it paid Anaya, Cornejo could have cross-examined Anaya to show that the Anaya tied his testimony to the benefits paid.

A preliminary examination is designed "to establish whether there exists probable cause to believe that the defendant has committed a felony." § 866 (b). The CCA

recognizes that the prosecutor's duty to turn over impeachment material applies to preliminary hearings. See, *People v. Gutierrez,* 214 Cal.App.4th 343, 348 (2013). But the CCA finds that impeachment material must be tailored to the purpose of the preliminary hearing. *Bridgeforth v. Superior Court,* 214 Cal.App.4th 1074, 1087 (2013); *People v. Harris,* 165 Cal.App.3d 1246, 1264 (1985). The CCA essentially holds that prosecutorial disclosure of impeachment and exculpatory evidence, at the preliminary hearing, extends only to that which would affect the magistrate's probable cause determination.

The CCA overlooks that, because the case rested on Anaya's credibility, Cornejo could have shown that the benefits motivated him to testify, not about the truth about what happened to him, but by a desire to satisfy his benefactor's expectations.

Anaya's credibility was "vital to the prosecution's case." *Singh v. Prunty*, 142 F.3d 1157, 1161-1162 (9th Cir. 1997) (case reversed because prosecutor failed to disclose

uncontradicted evidence that a key prosecution witness had received substantial benefits from the government) *Id.* at 1162-1163. Cornejo could have impeached Anaya by showing that Anaya developed his story, which progressed from complete lack of cooperation at the hospital (4RT 2411-2413; 5RT 2731, 2738-2739, 2746), to his identification of Cornejo and the co-defendants.

A COA should have been granted.

## II. THE NINTH CIRCUIT SHOULD HAVE GRANTED A COA BECAUSE THE ADMISSION OF ANAYA'S PRELIMINARY HEARING TESTIMONY AT TRIAL VIOLATED CORNEJO'S RIGHT TO CONFRONT AND CROSS EXAMINE WITNESSES

### A. Introduction

Although the prosecution withheld critical information that the police paid money to Anaya, over defense objection (2RT 932-934, 1201-1205), the trial court declared Anaya unavailable as a witness (2RT 1201-1205). By admitting Anaya's preliminary hearing testimony at trial, despite the prosecution's *Brady* violation, the trial court deprived

Cornejo of due process, a fair trial and the right to confront the witnesses against him. U.S. Const. amends. V, VI, XIV; *Davis v. Alaska,* 415 U.S. 308, 315 (1974); *Pointer v. Texas,* 380 U.S. 400, 403 (1965); see also *Crawford v. Washington,* 541 U.S. 36, 57, 68 (2004).

### B. A Criminal Defendant Has the Right to Confront and Cross-Examine Witnesses

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *California v. Green,* 399 U.S. 149, 157 (1970). The right to have a trial free of testimonial hearsay evidence is of federal constitutional dimension. *Crawford v. Washington,* 541 U.S. at 53 (the primary object of the Sixth Amendment is testimonial hearsay.) Testimony given at a preliminary hearing is "testimonial" and so, is admissible at trial only if the witness is unavailable and "the defendant had an adequate opportunity to cross-examine the witness." *Id.* at 57.

". . . [A]n accused has the right to cross-examine

prosecution witnesses to impeach the credibility or establish motive or prejudice of the witness." *State v. Spurlock,* 874 S.W.2d 602, 617 (Tenn. 1993). "This includes the right to cross-examine a prosecution witness regarding any promises of leniency, promises to help the witness, or any other favorable treatment offered to the witness." *Id.* The majority opinion in *Crawford* expressly rejected the notion that the Confrontation Clause must bow to the rules of evidence. *Crawford v. Washington*, 541 U.S. at 50-51 ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.")

### C. Admission of the Preliminary Hearing Transcript in Lieu of Anaya's Testimony Deprived Cornejo of His Right to Confront and Cross-examine Witnesses

The trial court admitted Anaya's preliminary hearing testimony in lieu of his live testimony under Cal. Evid. Code § 1291 which provided in part: (a) Evidence of former

testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant *with an interest and motive similar* to that which he has at the hearing. (Italics added.)

"The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face-to-face, and of subjecting him to the *ordeal* of a cross-examination." *Mattox v. United States,* 156 U.S. 237, 244 (1895). (Italics added.) Where the declarant is unavailable at trial, and the chair is empty, admission of his prior statements that were not made "under circumstances affording [the defendant] through counsel an adequate opportunity" of cross-examination, violates the Confrontation Clause. *Pointer v. Texas,* 380 U.S. at 407.

The CCA finds that the admission of Anaya's

preliminary hearing testimony met the requirements of Cal. Evid. Code § 1291. The CCA also finds Cornejo's cross-examination constitutionally adequate even though Cornejo could not cross-examine Anaya at the preliminary hearing about witness relocation. The CCA finds Anaya identified Cornejo prior to any offer of relocation assistance. The COA also finds Cornejo cross-examined Detective Carias at trial about his payments to Anaya as part of the witness relocation program.

Cornejo disagrees. Cornejo could not adequately cross-examine Anaya at the preliminary hearing. Cornejo could not cross-examine Anaya about his motives and interest because the prosecutor failed to disclose that the prosecution paid Anaya, the key witness, monies. If Cornejo could have questioned Anaya about how he changed his story to match the timing of the payments he received, Cornejo could have destroyed Anaya's credibility.

A COA should have been granted.

## III. THE NINTH CIRCUIT SHOULD HAVE GRANTED A COA BECAUSE THE TRIAL COURT DEPRIVED CORNEJO OF DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO PRESENT A DEFENSE BY EXCLUDING ANAYA'S STATEMENTS FROM HIS JULY 29, 2012 POLICE INTERVIEW

The trial court found Anaya unavailable to testify as a witness at trial and allowed the prosecution to read his preliminary hearing testimony to the jury. (2CT 338, 344; 4RT 2474-2571;5RT 2710-2742.) Anaya's preliminary hearing testimony did not include statements Anaya made to Officer Carias during a July 29, 2012 interview. (5RT 2773.)

During the July 29, 2012 interview Anaya implied that during the shooting in the alley, the person he called Little Man shot himself and screamed. Anaya said, "And then, when Little Man shot, that's –oh, I don't know if – I don't know if he shot himself because the gun - he was having problems with the gun. So he shot. He goes, Oh." Anaya also said, "So I think, like, in my head, after all the incident when I was just in the hospital thinking like – this

fool fucking shoot himself or what? That's the first . . . You know, because he was having trouble. He was having trouble with the gun." (5RT 2772)

Trial counsel wanted the jury to know that when Cornejo was arrested a few weeks later, there was no evidence of any gunshot wound or injuries. (5RT 2774.) Trial counsel also wanted the trial court to admit Anaya's adoptive admission that Anaya "heard Little Man kind of screaming . . . " (5RT 2776-2777)

Although the statements should have been admitted under California's rule of completeness,[6] the trial court denied trial counsel's request. (7RT 3702-3703) The trial court's ruling violated federal law because domestic rules of evidence may not be invoked to preclude a criminal

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[6] Cal. Evid. Code § 356 provides in part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party . . . and when a detached act . . . is given in evidence, any other act . . . which is necessary to make it understood may also be given in evidence. "

defendant from proving he had been denied a fair trial. See *Washington v. Texas,* 388 U.S. 14, 19 (1967).

The CCA finds no error because the statements " . . . did not resolve any ambiguity, clarify or otherwise explain Anaya's testimony, and . . . they were unnecessary to understand the testimony." The CCA finds any error would be harmless because Anaya identified Cornejo as one of his assailants and Anaya never said he saw Cornejo shoot nor heard anyone say that Cornejo had been shot.

Cornejo disagrees. The evidence would have cast some doubt upon Anaya's identification of Cornejo as Little Man. If Little Man had actually shot himself in the early morning hours of July 28, 2012, and Cornejo was really Little Man, when Cornejo was arrested three weeks later, the police would have seen evidence that he had been shot.

A COA should have been granted because the exclusion of Anaya's statements violated Cornejo's federal rights to due process, a fair trial and to present a defense. U.S. Const. amends. V, VI, XIV; *Crane v. Kentucky,* 476

U.S. 683, 690 (1986).

## IV. THE NINTH CIRCUIT SHOULD HAVE GRANTED A COA BECAUSE THE EVIDENCE FAILED TO PROVE THAT THE GUN WAS STOLEN AND THAT CORNEJO COMMITTED THE CRIME TO BENEFIT A CRIMINAL GANG ENHANCEMENT

### A. The Concealed Gun Charge

The jury convicted Cornejo of carrying a concealed weapon. § 25400 (a).[7] Officer Chang, who interviewed Cornejo after Cornejo's arrest, told Cornejo that the arresting officers saw him throw a gun. Cornejo admitted he had a gun for protection because he had been jumped out of Rockwood and he had been in a fight in juvenile hall. Cornejo said he "stole [the gun] from one of the guys [a.k.a. "Rage"] from Rockwood," that he did not like him, and he

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[7] Section 25400(a)(2) provides in part:¶ (a) A person is guilty of carrying a concealed firearm when the person does any of the following: ¶ (2) Carries concealed upon the person any pistol, revolver, or other firearm capable of being concealed upon the person. . . . (c) ¶ Carrying a concealed firearm in violation of this section is punishable as follows: ¶ (2) If the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.

stole the gun from the bushes where it had been hidden. (5RT 2707-2708.)

### B. The Gang Enhancement

Detective Hernandez opined that it would benefit the gang if, during a police pursuit, a Rockwood gang member threw a gun into a bush and later told the police that he stole the gun from a bush where that gang member hid the gun. (7RT 3740.) The gang officer testified that the gang would benefit because gangs put guns in accessible places to avoid being caught with a gun and that only gang members know where they put these guns.

### C. The Evidence Failed to Prove the Gun Charge and Gang Enhancements

No proof, other than Cornejo's statement, supported the notion that Cornejo stole the gun. The gun could not have been stolen because Hernandez testified that a gang member hid the gun in a place easily and readily accessible to other gang members.

Hernandez' opinion alone supported the gang

enhancement based on the stolen gun. The prosecution theorized that Cornejo stole and concealed the stolen gun to benefit the gang. But Cornejo said he had been jumped out of the gang. Cornejo's statement about why he carried a concealed firearm conflicted with the notion that he carried the concealed stolen firearm to benefit the gang. If Cornejo was jumped out of the gang, then he could not have stolen the gang gun to use for protection against the gang.

The CCA finds that nothing required the jury to believe Cornejo's statement that he had been jumped out of the gang. The CCA finds that Hernandez opined that only gang members would know the locations where a gang would hide firearms, that nothing precludes animosity between members of the same gang, and that Cornejo could have stolen the handgun from another gang member for many reasons and that the Rockwood gang benefitted from having a member armed in gang territory to defend it from rival gangs.

A COA should have been granted

## CONCLUSION

Cornejo respectfully requests that Certiorari be granted issued because ". . . reasonable jurists could debate whether (or, . . . agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473 (quoting *Barefoot v. Estelle,* 463 U.S. at 893 and n. 4.)

DATED: November 11, 2020

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s Fay Arfa

_____

Fay Arfa, Attorney for Petitioner

# APPENDIX

FILED

SEP 15 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| DOUGLAS CORNEJO,<br><br>Petitioner-Appellant,<br><br>v.<br><br>CHRISTIAN PFEIFFER, Warden,<br><br>Respondent-Appellee. | No. 19-55644<br><br>D.C. No. 2:16-cv-00889-VBF-GJS<br>Central District of California,<br>Los Angeles<br><br>ORDER |

Before: RAWLINSON and BRESS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 13) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

**DENIED.**

APPENDIX A

JS-6

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

**DOUGLAS CORNEJO,**
**Petitioner,**
**v.**
**CHRISTIAN PFEIFFER (Warden),**
**Respondent.**

**NO. LA CV 16-00889-VBF-GJS**

**FINAL JUDGMENT**

Final judgment is hereby entered in favor of the respondent warden and against petitioner Douglas Cornejo.

IT IS SO ADJUDGED.

Dated: May 20, 2019

Valerie Baker Fairbank

VALERIE BAKER FAIRBANK
Senior United States District Judge

APPENDIX B

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**WESTERN DIVISION**

| | |
|---|---|
| DOUGLAS CORNEJO,<br><br>Petitioner,<br><br>v.<br><br>CHRISTINE PFEIFFER (Warden),<br><br>Respondent. | **No. LA CV 16-00889-VBF-GJS**<br><br>**ORDER**<br>Overruling Petitioner's Objections;<br>Adopting the Report & Recommendation;<br>Denying the Habeas Corpus Petition;<br><br>Directing Entry of Separate Judgment;<br>Dismissing the Action With Prejudice;<br>Terminating and Closing Action (JS-6) |

The Court has reviewed the records in this case and the applicable law. As required by Fed. R. Civ. P. 72(b)(3), the Court has engaged in de novo review of the portions of the R&R to which petitioner has specifically objected and finds no defect of law, fact, or logic in the R&R. The Court finds discussion of the objections to be unnecessary on this record. "The Magistrates Act 'merely requires the district judge to make a de novo determination of those portions of the report or specified proposed findings or recommendation to which objection is made.'" It does not require a written explanation of the reasons for rejecting objections, s*ee MacKenzie v. Calif. AG*, 2016 WL 5339566, *1 (C.D. Cal. Sept. 21, 2016) (citation omitted), "particularly . . . where, as here, the objections are plainly unavailing", *Smith v. Calif. Jud. Council*, 2016 WL 6069179, *2 (C.D. Cal. Oct. 17, 2016). Accordingly, the Court will accept the Magistrate Judge's factual findings and legal conclusions and

implement her recommendations.

ORDER

Petitioner Cornejo's objection **[Doc # 21] is OVERRULED.**

The Report and Recommendation **[Doc # 18] is ADOPTED.**

The 28 U.S.C. section 2254 petition for a writ of habeas corpus **[Doc # 1] is DENIED.**

Final judgment consistent with this order will be entered separately as required by Fed. R. Civ. P. 58(a). *See Jayne v. Sherman*, 706 F.3d 994, 1009 (9th Cir. 2013).

The Court will rule on a certificate of appealability by separate order.

**This action is DISMISSED with prejudice.**

**The case SHALL BE TERMINATED and closed (JS-6)**.

IT IS SO ORDERED.

Dated: May 20, 2019

Valerie Baker Fairbank

Hon. Valerie Baker Fairbank

Senior United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| DOUGLAS CORNEJO,<br>Petitioner<br>v.<br>CHRISTIAN PFEIFFER,<br>Respondent. | Case No. CV 16-00889-VBF (GJS)<br><br>**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** |

This Report and Recommendation is submitted to United States District Judge Valerie Baker Fairbank, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California.

## INTRODUCTION

On February 9, 2016, Petitioner, a prisoner in state custody, filed a habeas petition pursuant to 28 U.S.C. § 2254 ("Petition"). Respondent filed an Answer to the Petition and lodged the relevant portions of the state record ("Lodg"). Thereafter, Petitioner filed a Reply.

The matter, thus, is submitted and ready for decision. For the reasons set forth below, the Court recommends that the District Judge deny the Petition.

# APPENDIX B

## PRIOR STATE PROCEEDINGS

Petitioner was tried in Los Angeles County Superior Court with three co-defendants – Adrian Barajas, Douglas Cornejo, and Joseph Pacheco. On September 25, 2013, the jury found Petitioner guilty of: attempted murder that was willful, deliberate and premeditated; kidnapping; and having a concealed firearm on his person. The jury also found true various firearm and gang enhancement allegations, including that Petitioner personally used a firearm. (Lodg. P, Clerk's Transcript ("CT") 495-99.) Petitioner was sentenced to a total of 39 years to life in state prison. (CT 538-41, 553-54.)

Petitioner appealed, raising the claims alleged as Grounds One and Two in the instant Petition and "adopting by reference" certain *Brady*[1] and Confrontation Clause arguments raised by co-defendant Vargas in his opening appeal brief. (Lodg. A, F.) On July 14, 2015, the California Court of Appeal issued a written, reasoned decision affirming the judgment. (Lodg. J.) Petitioner then filed a petition for review in the California Supreme Court, again raising Grounds One and Two but this time, "adopting by reference" a Confrontation Clause claim raised by co-defendant Barajas in his petition for review and the *Brady* claim previously raised by co-defendant Vargas. (Lodg. K.) On October 21, 2015, the California Supreme Court denied the petition for review without comment or citation to authority. (Lodg. O.)

## THE UNDERLYING CRIMES

As briefly summarized by the California Court of Appeal:

> [Petitioner and his co-defendants] were members of the Rockwood criminal street gang. After obtaining information leading them to believe that a fellow gang member, [Valentin] Anaya, was an informant for law enforcement, [Petitioner and his co-defendants]

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).



APPENDIX B

> kidnapped Anaya, took him to an alley, and shot him in the head. Anaya survived the shooting, and subsequently identified [Petitioner and his co-defendants] as his assailants.

(Lodg. J at 4.) The salient portions of the state court record will be discussed in detail below in connection with Petitioner's claims.[2]

**PETITIONER'S HABEAS CLAIMS**

*Ground One:* The trial court erroneously precluded Petitioner from introducing two statements made by victim Anaya in his police interview, thereby violating Petitioner's right to present a defense and to due process and a fair trial. (Petition at 5; Petition Attachment ("Att.") A.)

*Ground Two:* The evidence was insufficient to support the jury's true findings that the gun was stolen and on the gang enhancement. (Petition at 5; Att. B.)

*Ground Three:* (a) the admission of victim Anaya's preliminary hearing testimony violated Petitioner's rights under the Confrontation Clause; and (b) the prosecution violated its *Brady* obligations by failing to disclose – prior to the preliminary hearing – that Anaya and his family had received relocation payments. (Petition at 6; Att. C.)[3]

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[2] In Ground Two, Petitioner has raised a limited sufficiency of the evidence challenge, namely, to the sufficiency of the evidence supporting the jury's findings on the above two issues. As Petitioner does not challenge the sufficiency of the evidence as a whole to support his convictions, the Court has not engaged in a recitation of all of the evidence of record. Rather, as part of its Ground Two analysis, the Court will describe the trial evidence relevant to the limited challenge raised through Ground Two.

[3] As discussed *infra*, in the state courts, Petitioner generally purported to adopt by reference all claims made by his co-defendants but then qualified his generic incorporation statement by "specifically" identifying these two claims as the only additional claims he wished to raise.



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## STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996, as amended ("AEDPA"), Petitioner is entitled to habeas relief only if the state court's decision on the merits "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011); *see also Harrington v. Richter*, 131 S. Ct. 770, 784 (2011) ("By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)."). Petitioner's claims are governed by the Section 2254(d)(1) standard of review, because the state courts resolved the claims on their merits.[4]

The claims presented through the instant Petition were raised on direct appeal and the California Court of Appeal rejected them on their merits in a reasoned decision. (Lodg. J.) The California Supreme Court thereafter denied review without comment. (Lodg. O.) To resolve these claims, the Court looks to the last reasoned decision on the merits – the California Court of Appeal's decision on direct appeal. *See Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259 (2010) (when claims were raised on appeal and denied by state court of appeal on their merits in a reasoned decision, and the state supreme court denied discretionary review, the "relevant state-court decision" under Section 2254(d) was the state court of appeal decision); *Cannedy v. Adams*, 706 F.3d 1148, 1158-59 (9th Cir.) (the "look through" practice continues to apply on AEDPA review when the California Supreme Court has summarily denied either direct or collateral review of a claim previously adjudicated by a lower court), *amended by* 733 F.3d 794 (9th Cir. 2013); *see also*

[4] None of the claims raised by the Petition implicate Section 2254(d)(2).



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*Wilson v. Sellers*, 138 S. Ct. 1188, 1193-96 (2018) (when a state high court issues a summary denial of relief following a reasoned decision by a lower state court denying relief, the federal habeas court looks through the summary denial to the lower court's reasoned decision for purposes of AEDPA review, because it is presumed the state high court's decision rests on the grounds articulated by the lower state court).

For purposes of Section 2254(d)(1), the relevant "clearly established Federal law" consists of Supreme Court holdings (not dicta), applied in the same context to which the petitioner seeks to apply it, existing at the time of the relevant state court decision. *See Lopez v. Smith*, 135 S. Ct. 1, 2, 4 (2014) (*per curiam*); *Premo v. Moore*, 131 S. Ct. 733, 743 (2011); *see also Greene v. Fisher*, 132 S. Ct. 38, 43, 45 (2011) ("clearly established Federal law" under Section 2254(d)(1) is the law that exists at the time of the state court adjudication on the merits). A state court acts "contrary to" clearly established Federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts. *Price v. Vincent*, 123 S. Ct. 1848, 1853 (2003). A state court "unreasonably appli[es]" clearly established Federal law if it engages in an "objectively unreasonable" application of the correct governing legal rule to the facts at hand; however, Section 2254(d)(1) "does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 134 S. Ct. 1697, 1705-07 (2014). "And an 'unreasonable application of' [the Supreme Court's] holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Id.* at 1702 (citation omitted). "The question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable — a substantially higher threshold." *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939 (2007).

Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's]

precedents." *Richter*, 131 S. Ct. at 786; *see also id.* at 786-87 (as "a condition for obtaining habeas relief," a petitioner "must show that" the state decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"). "[T]his standard is 'difficult to meet,'" *Metrish v. Lancaster*, 133 S. Ct. 1781, 1786 (2013) (citation omitted), as even a "strong case for relief does not mean the state court's contrary conclusion was unreasonable," *Richter*, 131 S. Ct. at 786. "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief is precluded by Section 2254(d). *Id.* (citation omitted). "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' . . . and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010) (citations omitted).

## DISCUSSION

### I. Ground One

As discussed in connection with Ground Three, victim Anaya did not testify at trial and, after finding Anaya to be unavailable, the trial court allowed his preliminary hearing testimony to be read into the record. In his first claim, Petitioner complains that the trial court erred in ruling that certain statements Anaya made during his police interview – which Petitioner's counsel had argued were inconsistent with Anaya's preliminary hearing testimony – could not be introduced into evidence. Petitioner contends principally that the trial court's ruling was contrary to California law, and secondarily that the ruling also violated his federal constitutional rights.

#### A. Background

On direct appeal, the California Court of Appeal made brief factual findings relevant to Ground One. On habeas review, "a determination of a factual issue

made by a State court shall be presumed to be correct" unless rebutted by the petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Landrigan*, 127 S. Ct. at 1939-40 ("AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'") (citing Section 2254(e)(1)); *Pollard v. Galaza*, 290 F.3d 1030, 1033, 1035 (9th Cir. 2002) (statutory presumption of correctness applies to findings by both trial courts and appellate courts). Petitioner does not challenge the state appellate court's factual findings, and thus, the Section 2254(e)(1) presumption has not been overcome. Therefore, in accordance with the deference required by AEDPA, the Court quotes those findings below:

> At the preliminary hearing, Anaya testified that when he was dragged into the alley, Vargas shot him in the head. Anaya also testified that "Little Man" ([Petitioner]) drew a handgun and tried to shoot him, but the gun jammed. Vargas and [Petitioner] then reentered the truck. As Anaya began running away, two shots were fired from the vehicle.
>
> At trial, the court precluded [Petitioner's] counsel from introducing two statements Anaya made to Detective Carias, stating that "Little Man" was screaming after the shots were fired from the vehicle and speculating that [Petitioner] might have shot himself in the foot.[5] Defense counsel had sought to introduce the statements to show that [Petitioner] was not "Little Man,"

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[5] [Footnote 7 in original: Anaya told Detective Carias: "And then, boom. Then ... the Expedition went in reverse. Then they left again. And . . . at that time, I heard Little Man, that he got off. Because the fool said, get out, get out. He told him, get out, fool. So fucking—I could hear Tico's voice. You know, I recognized him. And then, when Little Man shot, that's—oh I don't know if—I don't know if he shot himself because the gun—he was having problems with the gun. So he shot. He goes, oh." Detective Carias asked, "So you heard him?" Anaya replied: "I heard him. You know, I don't know why he was going to scream, you know." Anaya further stated, "So I think, like, in my head, after all the incident when I was just in the hospital thinking like—this fool fucking shoot himself, or what?" Later the detective asked Anaya if he had heard Little Man screaming, and Anaya answered in the affirmative.]



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> because when arrested a few weeks later, [Petitioner] showed no sign of injury. The trial court determined that the two statements were not inconsistent with Anaya's preliminary hearing testimony: "There was some kind of scream after they were in the car. There's no testimony about it. And there's no way of knowing whether he was screaming because he was frustrated at his gun or he was screaming because Mr. Anaya had gotten back up or they were driving away or—you know, it's total speculation that he was screaming because he shot himself." The court excluded the statements as hearsay, and also under Evidence Code section 352, as being more prejudicial than probative.

(Lodg. J at 21-22.) (*See also* Lodg. Q, Reporter's Transcript ("RT") 2773-78.)

The California Court of Appeal denied Petitioner's claim that the trial court erred in excluding the interview statements made by Anaya. The state appellate court rejected Petitioner's contention that admitting the statements was necessary because they contradicted Anaya's preliminary hearing testimony, finding that "there was no preliminary hearing testimony whatsoever about [Petitioner] screaming," and "[t]hus, there is no inconsistency between Anaya's preliminary hearing testimony and the two hearsay statements defense counsel sought to introduce." (Lodg. J at 22.) The state appellate court also rejected Petitioner's contention that, under state law, the statements were required to be admitted because they were part of the "same subject matter of the shooting incident" and were necessary to render Anaya's testimony understandable. The state appellate court concluded that the interview statements "did not resolve any ambiguity, clarify or otherwise explain Anaya's testimony, and the record reflects they were unnecessary to understand the testimony." (Lodg. J at 22-23.)

Finally, the California Court of Appeal determined that, even if there was any error in not admitting the interview statements, any such error was harmless, reasoning:

> Anaya identified [Petitioner] as one of his assailants. The statements indicated that [Petitioner] had screamed after the shots were fired at Anaya from the truck. Anaya never stated that he observed [Petitioner] shoot himself in



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> the foot, or heard anyone say that [Petitioner] had been shot. Although Anaya speculated that [Petitioner] may have screamed because he shot himself in the foot, it is just as likely that [Petitioner] screamed because the shots had missed Anaya. Thus, even had the statements been admitted, it is not reasonably probable that the jury would have reached a different result.

(Lodg. J at 23.)

**B. The Clearly Established Federal Law That Governs Ground One**

The bulk of Petitioner's Ground One argument is devoted to his contention that the Anaya police interview statements in question ("Anaya Statements") were admissible under various California Evidence Code provisions, and thus, the trial court committed California law error in excluding their admission. (*See* Petition Att. A at 7-14.) This contention, however, is one of state law only and is not cognizable on federal habeas review.

Federal habeas writs may not issue on the basis of a perceived error of state law interpretation or application. *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991) (the question of whether evidence was "'incorrectly admitted . . . pursuant to California law'" "is no part of a federal court's habeas review of a state conviction," because "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); *see also Swarthout v. Cooke*, 131 S. Ct. 859, 861 (2011) (*per curiam*) ("'We have stated many times that federal habeas corpus relief does not lie for errors of state law.'") (citation omitted); *Wilson v. Corcoran*, 131 S. Ct. 13, 16 (2010) ("it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts") (*per curiam*); *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1997) ("alleged errors in the application of state law are not cognizable in federal habeas corpus" proceedings). A Section 2254 petition may not transform a state law issue into a federal one simply by labeling it a due process violation. *Id.* A federal court "'cannot treat a mere error of state law, if one occurred, as a denial of due process;



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otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.'" *Little v. Crawford*, 449 F.3d 1075, 1083 n.6 (9th Cir. 2006) (citation omitted). Petitioner's attempt to obtain federal habeas relief based upon purported state law error by the trial court in excluding the Anaya Statements from evidence is not cognizable.

Ground One is cognizable only to the extent that it asserts that the exclusion of the Anaya Statements rose to the level of a federal constitutional violation. *See, e.g., Estelle v. McGuire*, 112 S. Ct. at 480; *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). An evidentiary decision "does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) (internal quotation marks and citation omitted); *see also Larson v. Palmateer*, 515 F.3d 1057, 1065 (9th Cir. 2008) (for purposes of federal habeas review, it is irrelevant whether an evidentiary ruling is correct or not under state law; the only question is whether the ruling rendered the trial so fundamentally unfair as to violate due process). A habeas petitioner "bears a heavy burden in showing a due process violation based on an evidentiary decision." *Boyde v. Brown*, 404 F.3d 1159, 1172 (9th Cir. 2005).

With respect to Petitioner's contention that he was deprived of his right to present a defense by the exclusion of the Anaya Statements, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 106 S. Ct. 2142, 2146 (1986) (citations omitted). It is well-established that the Constitution guarantees a criminal defendant a meaningful opportunity to present *relevant* evidence in his own defense at trial. *See, e.g., Taylor v. Illinois*, 108 S. Ct. 646, 652 (1988). However, "the right to present relevant testimony is not without limitation. This constitutional right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal



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trial process.'" *Rock v. Arkansas*, 107 S. Ct. 2704, 2711 (1987) (citation omitted). A criminal defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 93 S. Ct. 1038, 1049 (1973). "[A]ny number of familiar and unquestionably constitutional evidentiary rules authorize the exclusion of relevant evidence." *Montana v. Egelhoff*, 116 S. Ct. 2013, 2017 (1996) (plurality opinion). The states have "broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 118 S. Ct. 1261, 1264 (1998) (citation omitted). For example, the Constitution permits trial judges "wide latitude" to exclude evidence that poses an undue risk of confusion or is "only marginally relevant." *Crane*, 106 S. Ct. at 2146; *see also Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1435 (1986). Thus, a rule such as that set forth in California Evidence Code § 352, on which the trial court relied in Petitioner's case, may be applied, consistently with the Constitution, to exclude relevant evidence sought to be introduced as part of the defense case. *See Egelhoff*, 116 S. Ct. at 2017 (addressing Section 352's federal counterpart, Rule 403 of the Federal Rules of Evidence).

To serve as a basis for habeas relief on the ground that a defendant's right to present a defense was violated by the exclusion of evidence, a trial court's exclusion of evidence pursuant to a state rule must be so fundamentally unfair as to violate the defendant's right to due process. *Spivey v. Rocha*, 194 F.3d 971, 977-78 (9th Cir. 1999). As explained by the Supreme Court, the exclusion of evidence pursuant to a state rule does not violate a defendant's right to present a defense unless doing so "significantly undermined fundamental elements of the accused's defense." *Scheffer*, 118 S. Ct. at 1267-68.



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**C. The Court Must Defer To The State Court's Decision.**

Ground One fails for three reasons, any one of which forecloses federal habeas relief.

First and foremost, Petitioner has not shown that the state court's denial of Ground One was an objectively unreasonable application of any clearly established Supreme Court precedent. The trial court concluded that: under state evidentiary law, the Anaya Statements were not inconsistent with Anaya's preliminary hearing testimony and, thus, were inadmissible hearsay and not relevant; and in any event, the Anaya Statements should be excluded under California Evidence Code § 352, because they were more prejudicial than probative. (RT 2775-78.) As set forth above, it is clearly established federal law that state courts have significant latitude in applying their own rules to exclude the admission of evidence that is confusing or only marginally relevant. *Crane*, 106 S. Ct. at 2146; *Van Arsdall*, 106 S. Ct. at 1435. As discussed below, the Anaya Statements were far from probative. There was nothing constitutionally impermissible in the trial court's exercise of its discretion under California Evidence Code § 352 to preclude their admission. *See Egelhoff*, 116 S. Ct. at 2017. The state court's rejection of Ground One fails under Section 2254(d)(1), because there is no clearly established federal law that the state court's decision contravenes or unreasonably applies. *See Moses v. Payne*, 555 F.3d 742, 758-59 (9th Cir. 2009) (reviewing Supreme Court precedent, concluding that the cases do not "squarely address" or clearly establish a controlling legal standard for the exercise of discretion to exclude evidence under state rules like Section 352, and finding that federal habeas relief therefore is precluded in such instances, because a state appellate court's finding that a trial court's exercise of its discretion was not constitutionally impermissible "cannot be contrary to or an unreasonable application of clearly established Supreme Court precedent").

Second, even if Section 2254(d)(1) did not preclude relief, Ground One necessarily would fail, because there is no basis for finding that the absence of the

Anaya Statements rendered Petitioner's trial fundamentally unfair. The Anaya Statements were of little to no evidentiary value; as the state court reasonably found, they were not inconsistent with any testimony Anaya gave at the preliminary hearing and, thus, lacked any impeachment value. Moreover, as the California Court of Appeal observed, the Anaya Statements did not add anything to or explain or otherwise clarify any of Anaya's preliminary hearing admitted at trial; Petitioner has not shown otherwise. In addition, Petitioner's counsel sought to capitalize on nothing more than rank speculation by using the Anaya Statements to argue that Petitioner could not have been the shooter because he had no bullet wound when arrested, given that there was nothing to support Anaya's speculation that perhaps Petitioner had shot himself in the foot in light of his scream. It was not unreasonable to conclude, as the state courts did, that allowing such speculative evidence – bereft of support – could confuse the jury and be more prejudicial than probative. As the Anaya Statements were not relevant and their desired defense usage rested on speculation, their exclusion did not implicate Petitioner's right to present a defense or confront adverse witnesses, much less render his trial fundamentally unfair. There is no basis for finding a federal constitutional violation.

Third and finally, even if there was any arguable basis for this Court to find that federal constitutional error occurred in excluding the Anaya Statements, the California Court of Appeal's finding of harmless error was not objectively unreasonable. Habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice'" under *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), *i.e.*, an error "had substantial and injurious effect or influence in determining the jury's verdict." *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015); *Brecht*, 113 S. Ct. 1722 (internal quotation omitted). If a state court has determined that a trial error was harmless, then "'a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable.'" *Ayala*, 135 S. Ct. at 2197 (quoting *Fry v. Pliler*, 127 S. Ct. 2321,



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2326 (2007)). And the Supreme Court made clear in *Ayala* that the stringent rules governing Section 2254(d) review govern when the state decision under review is one based on harmless error, namely, that "a state-court decision is not unreasonable if fairminded jurists could disagree on [its] correctness" and a petitioner therefore must show that the state court's decision to reject his claim based on harmless error "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 2199 (citation and internal quotation marks omitted).

As the California Court of Appeal observed, Anaya identified Petitioner as one of his assailants. According to Anaya, Petitioner and the others attacked him in co-defendant Vargas's apartment, beat him, and locked him in a bathroom. Petitioner specifically threatened Anaya with a gun. (RT 2482-89, 2542, 2715.) Petitioner and two of the others then drove Anaya around for an hour with is hands tied, the truck stopped in an alley, and Petitioner and Vargas made Anaya get out of the truck (RT 2504-09.) Petitioner had a gun in his hand but appeared to be having trouble getting it to fire. Vargas pushed Anaya while Petitioner stood about five feet away, then Vargas shot Anaya in the head and he fell to the ground. Petitioner and Vargas then drove away, and Anaya heard two shots as it drove away. (RT 2511-15, 2526-28.) Neither Petitioner nor his co-defendants testified, and Anaya's testimony implicating Petitioner therefore was uncontradicted.

The evidence of Petitioner's guilt was ample regardless of what evidence could have been presented regarding subsequent events, including the additional shots Anaya heard as the truck drove away. Even had the jurors heard the wholly speculative statements that Anaya made in his police interview, there is no reasonable likelihood the jury would have acquitted Petitioner. The state court's finding that it is not reasonably probable the jury would have reached a different result had it learned of the Anaya Statements was objectively reasonable; at a minimum, fairminded jurists could disagree. Accordingly, the state court's harmless



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error finding does not warrant relief under Section 2254(d)(1).

For all the foregoing reasons, Ground One does not provide any basis for issuing federal habeas relief. The first claim, therefore, should be denied.

## II. Ground Two

In Ground Two, Petitioner contends that the jury lacked sufficient evidence to support both his Count 7 conviction (for varying a concealed gun that was stolen) and the related gang enhancement found to be true, *i.e.*, the finding that he committed the Count 7 offense for the benefit of his gang.[6]

### A. Background

On August 22, 2012, after a short pursuit, Petitioner was arrested. During that pursuit, as Petitioner ran, he threw a loaded .22 revolver away, which police recovered. (RT 1928-37.) When he was interviewed, Petitioner told Officer Chang that he had stolen the gun from a Rockwood gang member who he did not like and that he needed it for protection, because he had been "jumped out" of the Rockwood gang and, while in Juvenile Hall, had gotten into a fight with a juvenile. Petitioner stated that he had taken the gun from some bushes approximately four to five days earlier. (RT 2705-08.)

Based on the gun, Petitioner was charged with having a concealed firearm on his person, in violation of California Penal Code § 25400(a)(2), and it was alleged that

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[6] In his Reply discussion of Ground Two (pp. 8-9), Petitioner cursorily asserts a new, additional claim, *to wit*, that the trial court illegally imposed multiple enhancements in connection with the Count 7 conviction. Petitioner did not raise any such claim in the state courts, and thus, this newly-asserted multiple enhancement claim in unexhausted. 28 U.S.C. § 2254(b)(1). As this new claim is unexhausted and was improperly raised for the first time in the Reply, it is not properly before the Court and will not be considered. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (claim raised for first time in traverse may be disregarded).



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he committed the offense for the benefit of a criminal street gang (California Penal Code § 186.22(b)(1)(C)). At trial, a gang expert (Detective Hernandez) was presented with a hypothetical based on the facts surrounding Petitioner's arrest. Specifically, the hypothetical included the following facts: a Rockwood gang member is observed by police on the street in Rockwood gang territory; he runs away and there is a brief pursuit; during the pursuit, officers see something in the gang member's hand, which he throws; officers retrieve the object and determine it is a firearm; when interviewed by the police, the gang member admits he had the gun and claimed he had it for protection and he just got jumped out of the Rockwood gang; he stole the gun from a fellow gang member; and he took the gun from some bushes in which the other gang member would hide it. (RT 3737-38.) The gang expert opined that, under these facts, the gang member's possession of the gun benefitted the Rockwood gang, because the gang member walking in the neighborhood while armed would be able to protect the neighborhood from rival gang members. The gang expert further opined that it was significant that the gun was stored in a bush, because this rendered it readily accessible to other gang members, who could avoid always having to carry a gun on their persons and being caught by law enforcement in possession of a gun. (RT 3738-40.)

The jury found Petitioner guilty of the charged Section 25400(a)(2) offense and found true the related gang enhancement allegation. It also found true the allegations that the firearm was stolen and Petitioner knew or reasonably should have known that it was stolen. (CT 495-99.)

On direct appeal, the California Court of Appeal rejected Petitioner's contention that the evidence was insufficient to support the Section 25400(a)(2) conviction, because there was no evidence the gun was stolen, and to support the related gang enhancement. As to the latter, the state appellate court found that the gang expert's testimony was sufficient under California law to prove the elements of the gang enhancement. (Lodg. J at 25.) With respect to the former, as the state appellate



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court observed, Petitioner "himself told Officer Change that he had stolen the handgun." (*Id.*)

The California Court of Appeal also rejected Petitioner's argument that "it would be inconsistent for him to possess a concealed firearm to benefit the Rockwood gang when he had been 'jumped out' of the gang and had stolen it from a Rockwood gang member." The state appellate court reasoned:

> First, the jury was not required to believe [Petitioner's] statement that he had been jumped out of the gang. Indeed, Detective Hernandez opined that only gang members would know the hidden locations where a gang would store firearms. Second, nothing precludes animosity between members of the same gang. [Petitioner] could have stolen the handgun from another gang member for myriad reasons, none of which would negate the fact that the Rockwood gang benefitted from having a member armed in gang territory to defend it from rival gangs. Stated differently, the gang would benefit if [Petitioner] were willing to defend its interests despite any personal animosity toward a specific gang member. In short, a reasonable jury could have made both findings, and there was substantial record in the evidence to support them.

(Lodg J at 25.)

**B. The Clearly Established Federal Law That Governs Ground Two**

The Fourteenth Amendment's Due Process Clause guarantees that a criminal defendant may be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 90 S. Ct. 1068, 1073 (1970). The federal standard for determining the sufficiency of the evidence to support a jury finding is set forth in *Jackson v. Virginia*, 99 S. Ct. 2781 (1979). Under *Jackson*, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 2789 (emphasis in original); *see also Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011)

(*per curiam*) (a habeas court "may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury"). "Put another way, the dispositive question under *Jackson* is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" *Chein v. Shumsky*, 373 F.3d 978, 982-83 (9th Cir. 2004) (*en banc*) (quoting *Jackson*); see also *Drayden v. White*, 232 F.3d 704, 709-10 (9th Cir. 2000) (explaining that the evidence may be sufficient to support a jury's finding even if it does not "compel" that finding).

"'Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction.'" *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted). The reviewing court need not decide whether it would have found the trial evidence sufficient or scrutinize "the reasoning process actually used by the fact-finder." *Jackson*, 99 S. Ct. at 2788-89 & n.13. *Jackson* also does not require that the prosecutor affirmatively "'rule out every hypothesis except that of guilt.'" *Wright v. West*, 112 S. Ct. 2482, 2492 (1992) (citation omitted). When the factual record supports conflicting inferences, the federal court must presume – even if it does not affirmatively appear on the record – that the trier of fact resolved any such conflicts in favor of the prosecution and defer to that resolution. *Jackson*, 99 S. Ct. at 2793. "*Jackson* leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial," and it requires only that they draw "'reasonable inferences from basic facts to ultimate facts.'" *Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012) (*per curiam*) (citation omitted).

Finally, "federal courts must look to state law for 'the substantive elements of the criminal offense,' [*Jackson*,] 99 S. Ct. [at 2792 n.16], but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Johnson*, 132 S. Ct. at 2064.

In addition, when, as here, a case is governed by Section 2254(d)(1), the federal habeas court must "apply the standards of *Jackson* with an additional layer of



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deference." *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005); *see also Johnson*, 132 S. Ct. at 2062 ("We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference.") This doubly deferential standard limits the federal habeas court's inquiry to whether the state court's rejection of a sufficiency of the evidence challenge was an objectively unreasonable application of *Jackson*. *Emery v. Clark*, 643 F.3d 1210, 1214 (9th Cir. 2011); *see also Johnson*, 132 S. Ct. at 2062.

**C. The State Court Decision Is Entitled To Deference**

Ground Two rests on Plaintiff's contention that it was fundamentally inconsistent for the jury to find that he was carrying a concealed stolen gun on his person in violation of California Penal Code § 25400(a)(2) yet to also find that he committed the offense to benefit the Rockwood street gang, and thus, neither finding is supported by sufficient evidence. Petitioner argues that the jury could not logically have reached both conclusions given his statement to the police that he had been "jumped out" of the gang, reasoning that his act of stealing and carrying the gun of a gang member could not have benefitted the gang if he was no longer a member.

Petitioner's arguments misapprehend the manner in which the *Jackson* standard operates, including the requirement that the evidence be viewed in the light most favorable to the prosecution. His Ground Two theory rests on the premise that the jury was obligated to believe that, in fact, Petitioner had been "jumped out" of the gang simply because he had so told the police. Petitioner, however, did not testify at trial, and no evidence was presented that he somehow no longer was a gang member. It was an objectively reasonable application of the *Jackson* standard for the California Court of Appeal to conclude that the jury was not required to believe Petitioner's self-serving statement to the police in this respect.

Similarly, the jury was not required to believe Petitioner's statement to the police about why he stole the gun from its hiding place – a hiding place that would have



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been known only to other members of the gang. It was wholly reasonable for the state court to find that Petitioner could have stolen the gun from another gang member for a variety of reasons, which could have included personal animosity toward that gang member or a desire on Petitioner's part to be armed for whatever reason. All of those possible motivations would not have been inconsistent with a finding that his possession of the gun while in Rockwood territory provided a benefit to the gang, for the reasons the gang expert explained without contradiction.

Petitioner's Ground Two "sufficiency of the evidence" challenge is not so much an actual challenge to the *sufficiency* of the evidence presented to support the Section 25400(a)(2) charge and the gang enhancement allegation but, rather, a contention that the jury should have adhered to what Petitioner told the police and thereby rendered different findings. This challenge fails, because there was ample evidence to support both jury findings.[7] Petitioner simply argues that the jury should have reached *different* findings based on his self-serving view of what the evidence meant. A court applying the *Jackson* standard, however, does not so conduct its review, and Petitioner's Ground Two theory runs afoul of the *Jackson* test. *See United States v. Nevils*, 598 F.3d 1158, 1164, 1167 (9th Cir. 2010) (en banc) (under *Jackson*, a federal court "may not ask whether a finder of fact could have construed the evidence produced at trial to support acquittal," and it is error to "construe the evidence in a manner favoring innocence rather than in a manner favoring the prosecution"). And a federal habeas court applying the deferential Section 2254(d) standard is even more constrained. Even if, hypothetically, there is a fairminded jurist who might find Petitioner's contradiction argument to be persuasive, plainly, other fairminded jurists could find exactly as the California Court of Appeal did and that a reasonable jury could have made both findings at

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[7] Critically, Petitioner does not challenge the propriety or adequacy of the gang expert's testimony regarding why a gang member's possession of a gun stolen from another gang member under the circumstances at issue here would benefit the gang.



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issue. There is no basis for finding the Section 2254(d) threshold to be surmounted as to Ground Two, and thus, the claim necessarily fails.

## III. Ground Three

For Ground Three, Petitioner states only that he "adopts by reference and joins Arguments of Co-Appellants' Petition" and then directs the Court to "see" Attachment C to the Petition. (Petition at 6.) The brief statement set forth in the Petition on its own is much too vague to set forth any cognizable federal habeas claim, as it fails to identify the nature and substance, along with the factual underpinnings, of any claim that Petitioner actually intends to raise. That said, Attachment C adds some clarity.

In Attachment 3, Petitioner states that he "[s]pecifically" "incorporates by reference" the following two claims raised by co-defendants Barajas and Vargas in their state high court petitions for review: (1) given that Anaya did not testify at trial, was it prejudicial error to admit his preliminary hearing testimony when potential impeachment evidence related to Anaya was not disclosed until after the preliminary hearing?; and (2) did the prosecutor violate his *Brady* obligation by failing to disclose the same potential impeachment evidence (witness relocation assistance payments made to Anaya and his family) until trial? The Court will deem these two claims to constitute Petitioner's Ground Three claim.[8] As so construed,

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[8] The Court's construction of Ground Three disposes of Respondent's argument (Answer at 18-19) that any other claims possibly raised through Ground Three may be unexhausted.

In his Reply (at 10), perhaps in response to Respondent's above argument, Petitioner states that due to the "prematureness" of his co-defendants' "case," he wishes to "temporar[i]ly withdraw" Ground Three and then have the Court "re-entertain" the claim when its "has become 'ripe.'" There is nothing in the record that renders Ground Three – as so construed herein – to be premature or unripe. As no factual basis for Petitioner's request exists, the Court declines to allow him to withdraw the claim with the condition that he be allowed to re-raise it later. Either the claim is to be considered and resolved now, or not at all, given that it plainly

Ground Three challenges the constitutional validity of: the prosecutor's failure to disclose possible impeachment evidence related to Anaya until after he had testified at the preliminary hearing; and the trial court's decision to allow Anaya's preliminary hearing testimony to be presented into evidence at trial after Anaya became unavailable to testify at trial.

**A. The Relevant State Court Proceedings**

Anaya testified for the prosecution at the October 16, 2012 preliminary hearing. (CT 4-51, 104-09, 113-14.) He also was cross-examined by counsel for Petitioner and his co-defendants. (CT 51-71, 109-11 (Vargas); CT 72-86, 111-12 (Petitioner); CT 87-98 (Pacheco); and CT 98-103, 112-13 (Barajas).) The California Court of Appeal summarized Anaya's preliminary hearing testimony as follows:

> In 2012, Anaya had been a member of the Rockwood gang for several years. [Petitioner and his co-defendants] were fellow gang members.[9] On July 28, at about 8:00 p.m., Anaya went to Vargas's apartment to collect the money Vargas owed him for drugs. [Petitioner and his co-defendants] were the only occupants. Anaya had two or three guns on him. In exchange for $100, he gave [Petitioner and his co-defendants] one of the guns – a .357-caliber revolver.
>
> When Anaya went to the bathroom, he left his cell phone in the apartment to charge. Vargas took Anaya's cell phone and looked through the contacts. Among the contacts was a sheriff deputy's number. Anaya had stored the deputy's phone number on his phone after the deputy had approached him in May 2012 to ask him some questions. At the preliminary hearing, Anaya admitted

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could not satisfy the 28 U.S.C. § 2244(b) requirements should it be re-raised later on through a second or successive habeas petition. The Court presumes that Petitioner would prefer to have the claim considered rather than lose the right to have it considered and so will proceed with its analysis of Ground Three.

9 [Footnote 2 in original: "Anaya did not know [Petitioner's and his co-defendants'] real names, but knew their gang monikers: Vargas was 'Tico,' Barajas was 'Chubbs,' [Petitioner] was 'Little Man,' and Pacheco was 'Stomper.'"]



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calling the deputy, but denied agreeing to work for him.

When Anaya came out of the bathroom, Vargas told him to go back inside. [Petitioner], who was armed with a gun, told Anaya to stay in the bathroom and locked him inside. After about an hour, Vargas entered and asked Anaya, "Who are you working for?" Anaya replied, "What? What are you talking about?" Vargas repeated: "Who are you working for?" He then said, "You fucked up," and stepped outside. Barajas entered, told Anaya that he had "fucked up," and struck him in the face. [Petitioner] and Pacheco then entered the bathroom separately and struck Anaya in the face.

Barajas came back and told Anaya to get in the tub. Vargas and Pacheco then entered. Vargas had the .357 gun and Pacheco was armed with a .45-caliber handgun. Vargas then injected Anaya with methamphetamine. Vargas tied Anaya's hands behind his back with shoelaces, placed a hooded sweatshirt over his head, and led him out of the apartment to a green truck parked outside. Vargas, [Petitioner], and Anaya got into the truck. Anaya could not see the driver. Pacheco, who was wearing a Global Positioning System (GPS) tracking device as a condition of parole, stayed behind in the apartment.[10] Anaya did not know Barajas's location. When shown still pictures from a video surveillance of the building taken at the time, Anaya identified the men in the picture as Vargas, Pacheco, and Barajas.

After about an hour, the truck stopped near an alley. [Petitioner] exited, and Vargas pulled Anaya out of the vehicle. Vargas ordered Anaya to go to a corner of the alley, but Anaya started to run away. Vargas took out the .357 handgun and shot Anaya in the head. The bullet entered the left side of Anaya's head and exited the top. [Petitioner] took out his gun and attempted to shoot Anaya, but the gun jammed. Anaya fell to the ground and pretended to be dead. Vargas said, "He's gone." Vargas and [Petitioner] then re-entered the truck. Anaya, afraid the truck would run him over, got up to run away. The truck driver tried to run him down. The side of the

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[10] [Footnote 3 in original: "The location data from Pacheco's tracking device showed he entered the apartment at 7:05 p.m., and remained there until 6:39 a.m. the next morning."]



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> truck's bumper struck Anaya, sending him flying into a trash can. Anaya got up and started running. He heard several gunshots and dropped to the ground. The truck drove away. Anaya went to a store and called 911 at 4:52 a.m. He was taken to a hospital, treated, and released.
>
> Anaya was questioned by police officers, but he provided them with "different stories so I could just get them off my back." After Anaya was released from the hospital, he agreed to speak with Los Angeles Police Detective Carlos Carias. Detective Carias interviewed Anaya at the police station, and showed him photographs in a Rockwood gang photobook. Anaya identified Vargas's photograph and wrote: "This individual was the one who shot me in the head, number 3. Tico [Vargas] is the one who tied me down and escorted me to the vehicle. I was told by him to get on the floor. Once arriving ... at the alley, I was dragged out and shot by Tico." He also identified photographs of Pacheco and [Petitioner], writing: "Stomper [Pacheco] number 210, Little Man [Petitioner] number 211 were involved in the crime of laying hands on me before I got shot in the head. I received a few blows from these individuals and had a gun pointing at my head. Little Man got – Little Man's gun got jammed in the alley. So that's why I only got one shot in the head by Tico."
>
> On August 4, 2012, Anaya identified Barajas's photograph and wrote: "This individual in photo six I know him as Chubbs from Rockwood for several years. Chubbs took me with Tico. And I got beat up. Later that night I was shot in the alley. Chubbs was the first one who said I fucked [up]."
>
> Anaya also identified [Petitioner and his co-defendants] as his assailants at the preliminary hearing.

(Lodg. J at 4-6.)

After the preliminary hearing but before trial, defense counsel were informed by a detective that Anaya had received relocation assistance from the police. (Lodg. Q, Reporter's Transcript ("RT") 2569; *see also* Lodg. E at 13.)

On September 4, 2013, during jury selection, a question arose about whether Anaya would invoke his Fifth Amendment right to remain silent and would not



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testify at trial. (RT 904, 911, 916.) Anaya was called to testify pursuant to California Evidence Code § 402. Anaya declined to answer questions, invoking his Fifth Amendment privilege, and the trial court found that he had made a valid invocation of the privilege. (RT 920-24; CT 340.) Counsel for all parties stipulated that Anaya was unavailable for purposes of testifying at trial, and the trial court so found. (RT 935-36.)

On September 6, 2013, the trial court held a hearing on whether the transcript of Anaya's preliminary hearing testimony should be allowed into evidence at trial in light of his unavailability. The trial court concluded that the prosecutor would be allowed to use the transcript. (RT 1201-08.)

On September 12-13, 2013, Anaya's preliminary hearing testimony was read into the trial record. (RT 2474-568, 2710-42.)

During the middle of the reading of Anaya's preliminary hearing testimony into the record, the prosecution provided the trial court with documentation regarding the relocation assistance provided to Anaya, for the trial court's *in camera* review. (RT 2569-70, 2701.) The next morning, before the remainder of Anaya's testimony was read, the trial court stated that the only potentially relevant information was an itemization of how much was paid to Anaya and his family and the dates of payment, and ordered the prosecutor to provide this information to the defense. (RT 2701-02.) That day, the prosecutor prepared a document detailing this information and provided it to defense counsel. (RT 2766-67.) Vargas's counsel asked whether Anaya had signed anything in connection with receiving the relocation assistance or had signed anything agreeing to work for law enforcement. (RT 2767.) The prosecutor responded in the negative as to the latter but advised that Anaya had signed something in connection with receiving the assistance and a copy was included in the documents provided. (RT 2767-68.)

Subsequently, Officer Carias testified that Anaya expressed fear for his safety and for his family's safety and, as a result, Anaya and his family received relocation



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assistance. (RT 3435, 3642, 3674, 3694-95.) Carias was questioned by defense counsel at trial about the relocation assistance provided to Anaya and his family, including his parents. Carias described cash payments for food and incidentals of $60 and $40 (July 2012), $293 and $350 (August 2012), $350 (September 2012), $350 and $300 (October 2012), $225 and $1,100 (December 2012), and $1,100 (January 2013), when the agreement ended. (RT 3670-72, 3682-85.) In addition, in December 2012, and January 2013, law enforcement paid $1,500 each month to the landlord for the family's rent. (RT 3686-87.) In total, Anaya and his family received $8,250 in assistance.[11] (RT 3691.) After the family received threats, additional funds were authorized but were not expended. (RT 3703-04.)

**B. The Clearly Established Federal Law That Governs This Case**

Through Ground Three as construed herein, Petitioner raises both a *Brady* claim and a Sixth Amendment Confrontation Clause claim. With respect to the former, under *Brady v. Maryland*, 83 S. Ct. 1194 (1963), the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. *Smith v. Cain*, 132 S. Ct. 627, 630 (2012). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*,

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[11] In his California Court of Appeal opening brief, Vargas asserted that Anaya has received $4,475 in relocation assistance by the time he testified at the preliminary hearing (Lodg. B at 37), but this assertion was based on a misapprehension of the record. Vargas back-pedaled from it in his reply brief (Lodg. G) and omitted it entirely from his petition for review filed with the California Supreme Court (Lodg. L). As Officer Carias explained, although the amount of $4,775 for assistance initially was authorized as a ceiling, a further amount was authorized after the family received threats. In any event, the amounts paid to Anaya before the preliminary hearing came to a total of approximately $1,850. (RT 3670-72, 3683, 3703-04.)



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119 S. Ct. 1936, 1948 (1999). "The terms 'material' and 'prejudicial' are frequently used interchangeably to describe the final requirement of a *Brady* violation." *Bailey v. Rae*, 339 F.3d 1101, 1115 n.6 (9th Cir. 2003).

Evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 115 S. Ct. 1555, 1565 (1995) (quoting *United States v. Bagley*, 105 S. Ct. 3375, 3383 (1985)). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith*, 132 S. Ct. at 630 (quoting *Kyles*, 115 S. Ct. at 1566).

With respect to Petitioner's Sixth Amendment claim, the Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." A defendant has the right to cross-examine adverse witnesses so that the jury may evaluate general credibility, as well as appraise the biases and motivations of a witness. *Olden v. Kentucky*, 109 S. Ct. 480, 483 (1988); *Van Arsdall*, 106 S. Ct. at 1435; *Evans v. Lewis*, 855 F.2d 631, 634 (9th Cir. 1988). However, the Confrontation Clause guarantees only "an *opportunity* for effective cross-examination not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Van Arsdall*, 106 S. Ct. at 1435 (citation and internal quotations omitted). In addition, the Supreme Court has "never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant" and, instead, has "repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial." *Maryland v. Craig*, 110 S. Ct. 3157, 3164 (1990).

In *Crawford v. Washington*, 124 S. Ct. 1354 (2004), the Supreme Court revisited some of its prior precedent and held that the Sixth Amendment bars the admission of



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"testimonial" statements of a witness who does not appear at trial, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Id.* at 1365. Under *Crawford*, prior testimony at a preliminary hearing is "testimonial" for Confrontation Clause purposes. *Id.* at 1374. *Crawford*, thus, recognized the possibility that the prior preliminary hearing testimony of a witness now unavailable for trial may serve as trial evidence without violating the Confrontation Clause, depending on the prior opportunity to cross-examine. Indeed, prior to *Crawford*, the Supreme Court held that, when a witness is unavailable to testify at trial, the admission of his prior preliminary hearing testimony will not violate the Confrontation Clause as long as the defendant was represented at the preliminary hearing by counsel who had the opportunity to conduct an effective cross-examination. *California v. Green*, 90 S. Ct. 1930, 1938-39 (1970); *see also Ohio v. Roberts*, 100 S. Ct. 2531, 2542-43 (1980) (finding no Confrontation Clause violation in use of witness's preliminary hearing testimony at trial when defense counsel had an adequate opportunity to cross-examine her at the preliminary hearing and did so; and further holding that, absent an "extraordinary" case (such as when counsel already has been found to have performed ineffectively at the preliminary hearing), "no inquiry into" the "effectiveness" of counsel's questioning at the preliminary hearing is required), *abrogated on other grounds by Crawford*.

Unquestionably, Anaya's preliminary hearing testimony read at Petitioner's trial was "testimonial" under the Confrontation Clause. As there is no issue here (or raised in the state courts) as to Anaya's unavailability, the Confrontation Clause issue in this case turns on the prior opportunity for cross-examination prong. To establish a Confrontation Clause violation on this basis, a petitioner must show "that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness" and that a "reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense] counsel been permitted to pursue his proposed



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line of cross-examination." *Van Arsdall*, 106 S. Ct. at 1436.

Finally, even when there is a Confrontation Clause violation, it is subject to harmless error analysis. *Van Arsdall*, 106 S. Ct. at 1438; *Sully v. Ayers*, 725 F.3d 1057, 1074 (9th Cir. 2013).

### C. The State Court Decision

At the outset of its analyses of the above *Brady* and Confrontation Clause claims, the California Court of Appeal noted the standards of review governing each claim. The state appellate court's description of these standards was consistent with the foregoing clearly established Supreme Court precedent. (*See* Lodg. J at 12, 17.)

The California Court of Appeal turned first to the *Brady* claim, *i.e.*, that the prosecution violated *Brady* when it failed to disclose, before the preliminary hearing, that Anaya had received witness relocation assistance payments. Citing California decisions, the state appellate court opined that: (1) "[t]he prosecution's *Brady* obligation extends to the preliminary stage of criminal proceedings"; and (2) "for preliminary hearings, 'the standard of materiality is whether there is a reasonable probability that disclosure of the exculpatory or impeaching evidence would have altered the magistrate's probable cause determination with respect to any charge or allegation.'" (Lodg. J at 12-13; citations omitted.)

Turning to the merits of Petitioner's *Brady* claim, the California Court of Appeal first observed that "it is unclear whether evidence of witness relocation assistance is favorable" within the meaning of the *Brady* obligation. (Lodg. J at 14.) Assuming that the fact that Anaya received relocation assistance did constitute impeachment evidence, the state appellate court concluded that there was no showing that the evidence was material under *Brady* or had been suppressed at trial. (*Id.*)

> As discussed above, for preliminary hearings, evidence is material if "there is a reasonable probability that disclosure of the exculpatory or impeaching evidence would have altered the magistrate's probable cause determination with respect to any charge or allegation."...



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> Here, it is undisputed that Anaya was shot in the head. He identified appellants as his assailants to Detective Carias, and the record shows that his identification was made before any offer of assistance. In addition, Vargas, Pacheco, and Barajas were identified from still photographs taken from video surveillance at the time of the incident. Finally, the relocation assistance was not offered in exchange for testimony and was not dependent on Anaya's testifying at trial…. In short, appellants have not shown there was a reasonable probability that the evidence of witness relocation assistance would have altered the magistrate's probable cause determination. Thus, no *Brady* violation occurred at the preliminary hearing stage.
>
> Similarly, appellants have not shown a *Brady* violation at the trial stage. There was no suppression of evidence because the jury heard about the relocation assistance provided to Anaya…. After considering the evidence, the jury found Anaya's identification of appellants credible and convicted them. On this record, appellants cannot show a *Brady* violation.

(Lodg. J at 15; citations omitted.)

The California Court of Appeal then turned to the Confrontation Clause claim, *i.e.*, the argument that the admission of Anaya's preliminary hearing testimony violated the defendants' right to confront him, because defense counsel did not have an adequate opportunity for cross-examination. The state appellate court found no constitutional error.

> Appellants' inability to cross-examine Anaya about witness relocation assistance at the preliminary hearing did not render their cross-examination constitutionally inadequate. Anaya identified appellants as his assailants prior to any offer of relocation assistance. Additionally, at trial, appellants were able to cross-examine Detective Carias about his payments to Anaya as part of the witness relocation program. Thus, the jury was able to consider the relocation assistance in determining Anaya's credibility. On this record, they failed to demonstrate any confrontation clause violation.

(Lodg. J at 18.)



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**D. The State Court Decision Is Entitled To Deference.**

For the following reasons, the Court concludes that federal habeas relief is foreclosed with respect to both the *Brady* and Confrontation Clause claims asserted through Ground Three.

1. **The *Brady* Claim**

As noted earlier, under Section 2254(d)(1), federal habeas relief is foreclosed unless the state court's decision rejecting a claim was either contrary to, or an unreasonable application of, clearly established Supreme Court precedent. Section 2254(d)(1) is not satisfied when there is no Supreme Court precedent to support a federal habeas right to relief. "[I]n the absence of a Supreme Court decision that 'squarely addresses the issue' in the case before the state court . . ., or establishes an applicable general principle that 'clearly extends' to the case," it cannot be said that clearly established federal law exists for purposes of either prong of Section 2254(d)(1), and a federal court must defer to the state court decision. *Moses*, 555 F.3d at 760 (*citing, inter alia, Wright v. Van Patten*, 128 S. Ct. 743, 745-47 (2008) (*per curiam*), and *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006)); *see also Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009) (under Supreme Court precedent, it is not an unreasonable application of clearly established federal law "for a state court to decline to apply a specific legal rule that has not been squarely established by" the Supreme Court); *Holley*, 568 F.3d at 1097-98 ("[w]hen there is no clearly established federal law on an issue, a state court cannot be said to have unreasonably applied the law as to that issue").

In resolving the *Brady* claim raised by Petitioner's co-appellants, the California Court of Appeal relied on state law decisions in concluding that a prosecutor's *Brady* obligation extends to the preliminary hearing stage of a criminal case. (Lodg. J at 12.) The cases cited by the state appellate court (and, in turn, the decisions on which those cases relied) rested on California law, not clearly established Supreme Court precedent. Petitioner has not cited, and the Court is not aware of, any



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Supreme Court authority holding that due process is violated by a prosecutor's failure to disclose impeachment or exculpatory information prior to the preliminary hearing. *See Jaffe v. Brown*, 473 Fed. Appx. 557, 559 (9th Cir. 2012) ("existing Supreme Court case law does not clearly establish that the prosecution was required to disclose the impeachment information about [a police officer who testified at the preliminary hearing] before, rather than after, [the petitioner's] preliminary hearing," and thus, the state courts did not unreasonably apply Supreme Court precedent in rejecting a *Brady* claim such as Petitioner brings here); *Jordan v. Cano*, No. CV 16-04975-JVS (AS), 2017 WL 1074364, at *25 (C.D. Cal. Feb. 15, 2017) (rejecting *Brady* claim based on prosecutor's failure, before the preliminary hearing, to disclose letter to prosecution witness offering a plea bargain, because no Supreme Court authority holds that a prosecutor commits misconduct by failing to disclose *Brady* evidence prior to a preliminary hearing), *adopted by* 2017 WL 1054180 (March 20, 2017); *Dvorak v. Figueroa*, No. CV-12-5303 JFW (FFM), 2014 WL 4627382, at *7 (C.D. Cal. April 2, 2014) (rejecting *Brady* claim premised on prosecutor's failure to turn over various items of exculpatory evidence prior to the preliminary hearing given that it was not supported by clearly established Supreme Court precedent), *adopted by* 2014 WL 4639389 (Sept. 15, 2014). For this reason alone, Petitioner's *Brady* claim fails under Section 2254(d)(1).

Even if, however, it could be said that the general principle established in *Brady* "clearly extends" to the preliminary hearing context, and thus, there is clearly established federal law within the meaning of Section 2254(d)(1) that underlies Petitioner's *Brady* claim, the claim nonetheless fails for the reasons noted by the state court when it addressed the claim on its merits. "The critical issue in any *Brady* claim" is whether the undisclosed or belatedly disclosed information was "material" to the outcome of the case, that is, whether the State's failure to disclose the information earlier resulted in prejudice under *Brady*. *Bailey*, 339 F.3d at 1115. With respect to materiality, the California Court of Appeal first looked to the



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materiality standard outlined in an earlier California decision, namely, whether there is a reasonable probability that the disclosure of the evidence at issue would have altered the magistrate judge's probable cause determination. (Lodg. J at 12.) Petitioner argues that this was a "diluted" standard under *Brady* and, thus, was improper.

As noted earlier, the clearly established federal test for *Brady* materiality is whether there is a reasonable probability that, had the evidence been disclosed ahead of time, the result of the proceeding would have differed, which in turn requires showing that the likelihood of a different result is great enough to undermine confidence in the outcome of the proceeding. The Supreme Court has not articulated any differing test for preliminary hearings, presumably because it never has held that *Brady* requires pre-preliminary hearing disclosure. In this vacuum, the California Court of Appeal applied the test found applicable by another state appellate court. Under that standard, for Petitioner to state a *Brady* claim at all (much less establish a right to relief), he necessarily must contend that, had the prosecutor told his counsel – ahead of the preliminary hearing – that Anaya and his family had received approximately $1,850 in witness relocation assistance as of the preliminary hearing date, his counsel would have been able to use that information to yield a beneficial result at the preliminary hearing. Put otherwise, under this materiality test, Petitioner must show that, if the magistrate had before him or her evidence that Anaya and his family had received these funds, there is a reasonable probability that the magistrate would not have found probable cause to hold Petitioner for trial. Petitioner has not shown this and cannot do so.

At the preliminary hearing, Anaya clearly and unequivocally identified Petitioner and each of his co-defendants, including by their gang monikers, as his assailants. Anaya described the scenario noted earlier, *i.e.*, of being kept in the bathroom, assaulted, kidnapped, and shot in the head by the four men, including Petitioner. (CT 5-51.) Moreover, and critically, although Officer Carias had given Anaya a few



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small cash amounts for food at the conclusion of interviews conducted shortly after the incident, Anaya *already* had identified Petitioner and two of his co-defendants as his assailants *before* he received any of those small amounts and well before he received the more substantial amounts of relocation assistance funds in response to his expressed concern for his safety and that of his family.[12] Significantly, the jury – which heard the same Anaya testimony heard by the magistrate – found Petitioner guilty under the beyond a reasonable doubt standard even though the jury actually knew of all of the various payments made to Anaya. Thus, it is not reasonably probable that the magistrate would have declined to find probable cause – a lower standard than beyond a reasonable doubt – had the magistrate possessed this same information regarding Anaya's receipt of $1,850 in witness relocation assistance before the preliminary hearing.

As noted earlier, the California Court of Appeal so found, reasoning that: no dispute existed that Anaya had been shot in the head; Anaya had identified Petitioner and two of the co-defendants before he received any offer of assistance; Vargas, Barajas, and Pacheco had been identified from a surveillance video showing Anaya's abduction; and the relocation assistance had not been offered in exchange

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[12] After Anaya had been released from the hospital, Officer Carias interviewed him on July 29, 2012. Anaya identified photographs of Pacheco and Petitioner as two of the people who assaulted him (after identifying his assailants using their gang monikers) and stated that he had been shot in the head by "Tico" (Vargas's gang moniker). (RT 2526-28, 2741-42, 2803-14, 3619-25, 3635-40.) The next day, Anaya identified a photograph of Vargas and stated that Vargas had tied him down, escorted him to the vehicle, told him to get on the floor, and dragged him out and shot him. (RT 2519-24, 2836-38.) On August 2, 2012, Anaya identified a photograph of Barajas and described his role. (RT 2524-25, 2838-43.)

Anaya did not receive any relocation assistance funds until August 16, 2012, although Officer Carias gave him small amounts of cash for food on July 29, July 30, and August 2, 2012, and had paid for a motel room. The record shows that Anaya did not receive any funds at all (including these small payments) until *after* he already had identified Petitioner and co-defendants by their gang monikers and had selected Petitioner's photograph. (RT 3670-72, 3683.) The preliminary hearing did not occur until October 16, 2012. (CT 1.)



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for testimony and was not contingent on Anaya testifying at trial. (Lodg. J at 15.) This conclusion was objectively reasonable.

Critically, even if the regular *Brady* standard for trials is applied – namely, whether there is a reasonable probability that, had the evidence been disclosed ahead of time, the result of the trial would have differed – relief is not warranted. The California Court of Appeal further concluded that Petitioner had "not shown a *Brady* violation at the trial stage," because the jury heard about the relocation assistance payments made to Anaya and nonetheless found his identification of Petitioner and his co-defendants to be credible and convicted them. (Lodg. J at 15.) That conclusion also was objectively reasonable.

"*Brady* does not necessarily require that the prosecution turn over exculpatory material before trial. To escape the *Brady* sanction, disclosure must be made at a time when [the] disclosure would be of value to the accused." *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) (citation and internal punctuation omitted; emphasis in original). The due process violation "may be cured, however, by belated disclosure of evidence, so long as the disclosure occurs at a time when disclosure would be of value to the accused." *United States v. Gamez-Orduño*, 235 F.3d 453, 461 (9th Cir. 2000) (citation and internal punctuation omitted). The test is whether "the lateness of the disclosure so prejudiced [the defendant's] preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial." *United States v. Miller*, 529 F.2d 1125, 1128 (9th Cir. 1976) (emphasis in original). Due process requires only that disclosure be made in sufficient time to permit the defendant to make effective use of the evidence disclosed. *LaMere v. Risley*, 827 F.2d 622, 625 (9th Cir. 1987).

There is no question that: prior to trial, Petitioner's counsel learned Anaya had received witness relocation assistance; during trial, counsel learned of the amounts of the payments made; and the jury thereafter was provided with evidence of such payments through Officer Carias's testimony described above. In short, the defense



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was able to make use at trial of the belatedly disclosed material. The question, of course, is whether the defense was able to make *effective* use of this material despite the delay in its disclosure.

Again, Petitioner was not the party who raised this *Brady* claim in the state courts. Co-defendant Vargas was the appellant who raised it in the most substantial manner, and thus, it is Vargas's arguments that are pertinent here. Vargas complained therein that he was not able to effectively use the witness relocation assistance evidence, because he had not been able to impeach Anaya directly with such evidence at the preliminary hearing. Vargas speculated that, because Anaya had a deputy sheriff's phone number stored in his cell phone, Anaya "may have been working with law enforcement as an informant," and then asserted that had the witness relocation assistance information been disclosed before the preliminary hearing, Vargas's counsel could have questioned Anaya "about the links between the monetary benefits and the law enforcement contacts."

There is no evidence of record – nor is there any reason to suspect any exists – indicating a possibility that Anaya was an informant and that the witness relocation payments he received were disguised informant payoffs. Vargas's argument rested entirely on two simple facts: (1) before the crime occurred, Anaya's cell phone contained the phone number of a deputy sheriff; and (2) after the crime occurred and Anaya had expressed concerns about safety, he received witness relocation assistance. Not only did Vargas (and by incorporation Petitioner) make too great an inferential leap from these bare facts, but he ignored the fact that Vargas's counsel *did* cross-examine Anaya at the preliminary hearing about this alleged informant theory.

At the preliminary hearing, on direct examination, Anaya testified briefly that he had taken the telephone number off a card provided by the deputy sheriff and stored it several months earlier, because he knew the deputy sheriff wanted to ask him some questions. (CT 19.) Vargas's counsel thereafter cross-examined Anaya about



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this issue, and Anaya explained that: the deputy sheriff had gone to a location looking for Anaya, indicating he wished to ask him some questions, and left his business card; a friend gave the card to Anaya; and Anaya stored the number in his cell phone and later called the deputy sheriff. (CT 55-56.) On further questioning by Vargas's counsel, Anaya explained in more detail that: previously, he had been in a car with a friend named Blackie; a deputy sheriff pulled the car over and found something illegal in it that belonged to Blackie; because Blackie had two strikes, he asked Anaya to tell the deputy that the item belonged to him; Anaya did so and admitted to counsel he had lied to law enforcement in doing so; Anaya was arrested and later released from jail; the deputy sheriff thereafter left the card at the home of a girl with whom Anaya was staying; and Anaya called the deputy sheriff back and told him he did not have anything to discuss with him about anything and declined to meet with him in person. (CT 57-59.) Vargas's counsel asked Anaya if he had agreed to work for the deputy sheriff and Anaya responded, "No." (CT 59.)

In short, Vargas (and by extension Petitioner) had the same motive at the preliminary hearing as he would have had at trial to cross-examine Anaya about whether he was an informant for law enforcement, and Vargas actually did so at the preliminary hearing. The jury heard that cross-examination testimony. (RT 2536-41; *see* also RT 2491.) The record shows that there was no written agreement between Anaya and law enforcement conditioning the witness relocation assistance payments on serving as an informant or testifying at the trial of Petitioner and his co-defendants; rather, Anaya agreed only to commit no further crimes. (Lodg. J at 13-14; RT 2767-68.) Critically, in all of his briefing in the state courts and here, Vargas (and by extension Petitioner) never identified any additional questions that he could have asked at the preliminary hearing – had he known of the witness relocation payments made up to that date – which would have been likely to have any impeaching effect. Given that Anaya had proffered a credible explanation for why he had a deputy sheriff's phone number in his cell phone and had denied being



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an informant, it defies belief that, had he been questioned about the witness relocation assistance, Anaya would have "done a 180" and testified that, well yes, he had been lying earlier and actually was an informant and the witness relocation payments made by Officer Carias actually were his informant payments.

There simply is no tenable basis for concluding that, if any defense counsel had known of the witness relocation payments at the time of the preliminary hearing, the cross-examination of Anaya at that time could have yielded any evidence of impeaching or exculpatory value. Indeed, the fact that Anaya was receiving witness relocation because he was afraid for his safety and that of his family was not a fact that aided the defense, and many a reasonable defense attorney would have concluded that the fact of such payments was an evidentiary avenue best left untouched. Vargas's counsel chose otherwise and presented this evidence to the jury, and the jury nonetheless convicted him and the three co-defendants, including Petitioner. There is no reasonable probability that any questioning on the topic at the preliminary hearing likely would have generated a different result at trial. In particular, there is no reasonable basis for finding that the inability of Petitioner or any of his co-defendants to cross-examine Anaya at the preliminary hearing about the witness relocation assistance he had received at that time undermines confidence in the jury's verdict. Accordingly, no *Brady* violation occurred.

The state court's decision on the *Brady* claim alleged in the Petition was an objectively reasonable one, under the clearly established federal law and the evidence of record. Accordingly, Section 2254(d)(1) precludes federal habeas relief based on the Ground Three *Brady* claim.

**2. The Confrontation Clause Claim**

As raised by Petitioner's co-defendants in the state courts, Ground Three presents a claim that, due to the prosecutor's failure to disclose that Anaya had received approximately $1,850 in witness relocation assistance prior to the



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preliminary hearing, it was "impossible" for defense counsel to cross-examine Anaya about the changes in his story following the crime as they may have occurred in conjunction with payments he received from the police. Vargas argued that, therefore, he "was not given an adequate opportunity to cross-examine Anaya with a motive and interest similar to that at trial" and, thus, was deprived of his federal right of confrontation. Presumably, Petitioner makes the same argument. (*See* Petition Attachment C, arguing that the failure to disclose the witness relocation assistance information prior to the preliminary hearing deprived Petitioner of the opportunity to cross-examine Anaya and cast doubt on his version of events and identification of Petitioner.)

Unquestionably, Petitioner's counsel was unable to cross-examine Anaya at the preliminary hearing on the topic of the witness relocation assistance payments he received and any possible effect they had on his statements to police and his preliminary hearing testimony, because counsel did not know that such payments had occurred. This fact alone, however, is insufficient to show that Petitioner was deprived of an opportunity to cross-examine Anaya effectively for Sixth Amendment purposes.

As a result of the reading of Anaya's preliminary hearing testimony into the record and the direct and cross-examination of various police officer witnesses, the jury at Petitioner's trial learned of the following events:

The assault and shooting of Anaya occurred in the early morning hours of July 28, 2012. The first responding officer obtained Anaya's name, address, and date of birth but no other information before the paramedics took him to the hospital. (RT 2405-07, 2411-12.) Another officer at the scene tried to interview Anaya but found Anaya to be uncooperative; he failed to give any clear answers. When the same officer again attempted to interview Anaya at the hospital, Anaya made only inconsistent, varying statements. (RT 2746-49.) Among other things, Anaya told the officer that he had been with his "homies" and three of the men attacked him



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(including punching him, tying him up, dragging him to an alley, and shooting him), and he provided descriptions for the three men. (RT 2756-64.) At the preliminary hearing, on both direct and cross-examination, Anaya conceded that: he had refused to talk to the police officers who first showed up at the hospital, because he did not want to cooperate due to a fear of being killed by gang members; he gave them a phony name and false information about the shooting; and he "lied" to the officers. (RT 2731-32, 2737-39.)

Officer Carias was assigned to investigate the shooting and, on July 29, 2012, went to the hospital and confirmed that Anaya was there. Carias transported Anaya to the Rampart Station and interviewed him. (RT 2801-03.) To identify his assailants, Anaya provided the gang monikers of Petitioner and his co-defendants, and when Carias provided Anaya with the "gang book" (containing photographs of gang members), Anaya identified photographs of Petitioner and co-defendant Pacheco. However, Anaya said that he did not see a photograph of "Tico" (Vargas's gang moniker), although noted that he was "sleepy." Vargas's photograph was contained in the gang book (in two spots), as was a photograph of co-defendant Barajas. (RT 2804-14, 3619-30, 3634-40, 3643.) Anaya also told Carias where the shooting occurred. (RT 2832.) Carias decided to put Anaya into a motel and requested funds. Carias obtained a couple hundred dollars, paid the motel directly, and gave Anaya $60 for food. Anaya signed an agreement in which he agreed not to commit crimes. (RT 3650-53, 3670-71.)

The next day, July 30, 2012, Carias spoke with two departmental gang experts about the "Tico" moniker Anaya had provided the day before, and they gave him Vargas's name. Carias prepared a photographic six-pack containing Vargas's photograph, and Anaya identified Vargas's picture. (RT 2835-38.) Anaya testified that he wrote down that the man in the photograph was the one who tied him down, took him to the car, dragged him out of the car, and shot him in the head. (RT 2519-24, 2825.) Carias gave Anaya $40 that day. (RT 3671.)



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Carias subsequently learned of co-defendant Barajas's name. On August 2, 2012, Carias again interviewed Anaya and Anaya identified a photograph of Barajas. (RT 2838-43.) Anaya testified about the identification and what he told Carias about Barajas's actions. (RT 2524-25.) Carias subsequently gave Anaya $293 that day. (RT 3672.)

The jury, thus, had before it – through Anaya's testimony and that of Carias – evidence that although Anaya initially declined to identify his assailants, when interviewed by Carias the next day at the police station, Anaya identified all four perpetrators (including Petitioner) by their gang monikers as well as specifically selected the photographs of Petitioner and a co-defendant. This identification of Petitioner occurred ***before*** Anaya had received any payment of any kind. This undisputed piece of evidence alone renders the Confrontation Clause argument raised through Ground Three toothless as to Petitioner and dooms the claim.

Critically, Petitioner has never contended that the prosecution suppressed evidence of Anaya's varying statements to law enforcement officers following his shooting. Not only is there is no evidence that such evidence was suppressed, the questioning that occurred at the preliminary hearing shows that it was known to defense counsel. Given that Anaya was the sole percipient witness against Petitioner at the preliminary hearing, Petitioner possessed the same motive at that time to question him thoroughly as he would have had at trial, namely, to attack his credibility to a degree that the magistrate judge would not deem Anaya's testimony sufficient to support a probable cause finding (or a guilty verdict in the instance of a trial). As the evidence of Anaya's varying statements *was* available to Petitioner's counsel before the preliminary hearing, he could have questioned Anaya effectively at the preliminary hearing about any changes in his statements to police from the date of the shooting through and up until the date of the preliminary hearing and,



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critically, asked Anaya *why* his statements varied, but did not so do.[13] In fact, Vargas's counsel did begin questioning Anaya about the various police officers he spoke to and what he said to each, and Anaya conceded he had told "different stories" to various officers prior to speaking to Carias (CT 66-70); however, after a hearing break, counsel opted to not ask any further questions at all (CT 72). Given the evidence available to Petitioner's counsel prior to the preliminary hearing and Anaya's concession at the hearing that his "stories" had varied over time, Petitioner plainly had the motive and opportunity to cross-examine Anaya effectively at the preliminary hearing about the variances in Anaya's statements to police and the reasons for such discrepancies, but simply failed to do so. The Confrontation Clause, however, requires only a prior opportunity for an effective cross-examination, not that the defendant have made prudent use of it.

The fundamental defect in the Confrontation Clause argument proffered through Ground Three is that it rests on the proposition that it was "impossible" for Petitioner to cross-examine Anaya about why his statements to police varied over time. For the reasons noted above, that premise is factually unsound. Anaya admittedly gave police officers at the scene and at the hospital varying stories – indeed, he conceded he "lied" to them – because he was afraid of gang retaliation and did not want to cooperate. When Anaya was released from the hospital the next day and then interviewed at the police station, he gave Carias the gang monikers of all four assailants and identified Petitioner's photograph, and this happened **before** Carias decided to and thereafter requested "emergency funds" and provided any payment to Anaya. (RT 3650-53) Providing those gang monikers as well as selecting Petitioner's photograph was tantamount to identifying his attackers by

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[13] Petitioner's counsel cross-examined Anaya at length about his selection of Petitioner's photograph and advice to Carias of Petitioner's "Little Man" gang moniker, as well as questioned him more briefly about the events of the night in question leading up to the shooting of Anaya. (CT 72-87, 111-12.)



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name, as Carias readily ascertained the names of Petitioner and his co-defendants based on the monikers Anaya had provided, yet Anaya did so without having been promised payment.

Under these circumstances, it was not objectively unreasonable for the state court to find that no Confrontation Clause violation occurred. The jury had before it the inconsistent statements made by Anaya, the dates on which they were made, and the dates on which he received payments. The jury was positioned to consider the effect of such payments on Anaya's credibility. "Whatever pro-prosecution bias might flow from that fact alone was plainly revealed" to the jury. *Hayes v. Ayers*, 632 F.3d 500, 518 (9th Cir. 2011) (no Confrontation Clause violation in preclusion of testimony by prosecution witness's attorney regarding the witness's immunity deal and whether she had actively sought immunity, notwithstanding petitioner's contention that the evidence would have exposed the witness's bias and motive to deliver testimony favorable to the prosecution, because the jury was well aware the witness had immunity and the "fact of having immunity at all provided most of the reason that jurors might view [her] testimony skeptically").

For all these reasons, the Court concludes that the state court's rejection of Petitioner's Confrontation Clause claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent. As a result, Section 2254(d) forecloses federal habeas relief. But even if, *arguendo*, fairminded jurists would conclude otherwise – namely, would agree that the state court's decision was so lacking in justification that there could be no fairminded disagreement and all would find "an error well understood and comprehended in existing law," *Richter*, 131 S. Ct. at 786-87 – any finding of a Confrontation Clause violation remains subject to harmless error analysis. "[I]n § 2254 proceedings a court must assess the prejudicial impact of constitutional error" under the *Brecht* standard. *Fry*, 127 S. Ct. at 2328 (*citing Brecht, supra*). Thus, any Confrontation Clause error in admitting Anaya's preliminary hearing testimony will be deemed harmless unless the



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admission had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht*, 113 S. Ct. at 1722. In the Ninth Circuit, when considering whether a Confrontation Clause error was harmless, some courts have looked to factors enunciated by the Supreme Court in *Van Arsdall, supra* – which include the importance of the testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony, the extent of cross-examination permitted, and the overall strength of the prosecution's case – and others have not and simply have performed a more generalized *Brecht* analysis.[14] Whatever mode of harmless error analysis is performed here, any error was harmless under *Brecht*.

Regardless of Anaya's preliminary hearing testimony, the jury had before it ample evidence upon which to find Petitioner guilty. As the California Court of Appeal observed, there is no dispute that Anaya was shot in the head and called 911, after which police arrived and Anaya was taken to a hospital and treated. As described earlier, Officer Carias testified that he interviewed Anaya after his release from the hospital, before any offer of relocation assistance had been made, and Anaya said that Little Man (Petitioner's gang moniker) was one of his assailants and also selected Petitioner's photograph. Carias testified that Anaya told him where the shooting had occurred and took him there. (RT 2832-37.) Officers testified that Petitioner attempted to flee, and tossed away a loaded gun, when the officers sought to stop and arrest him. (RT 1928-38, 3708-10.) The jurors were instructed that a

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[14] S*ee Van Arsdall*, 106 S. Ct. at 1438 (setting forth factors that may be considered). *Van Arsdall* predates AEDPA and, moreover, noted these factors in the direct appeal, rather than habeas, context while applying the *Chapman v. California*, 87 S. Ct. 824 (1967) standard for assessing harmless error on direct appeal. Since then, the Supreme Court repeatedly had made clear that, in federal habeas review, harmless error is assessed under the *Brecht* standard. *See, e.g., Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015). The Ninth Circuit, however, has opined that "there is nothing in the opinion or logic of *Van Arsdall* that limits the use of these factors to direct review." *Whelchel v. Washington*, 232 F.3d 1197, 1206 (9th Cir. 2000).



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defendant's flight may show consciousness of guilt. (CT 462.) Finally, Petitioner did not testify nor did he present any defense witnesses and, thus, did not rebut the above evidence of his guilt of the charged crimes.

In short, the evidence – independent of Anaya's preliminary hearing testimony – was sufficient for the jury to find Petitioner guilty. In light of such evidence of Petitioner's guilt, the admission of Anaya's preliminary hearing testimony did not have a substantial or injurious effect or influence on the jury's verdict. Accordingly, even if it was constitutional error to admit Anaya's preliminary hearing testimony at trial (and the Court does not believe it was), the error was harmless under *Brecht* and, therefore, cannot serve as a basis for federal habeas relief.

**RECOMMENDATION**

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting this Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: November 19, 2018

GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE

**NOTICE**

Reports and Recommendations are not appealable to the United States Court of Appeals for the Ninth Circuit, but may be subject to the right of any party to file objections as provided in the Local Civil Rules for the United States District Court for the Central District of California and review by the United States District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until the District Court enters judgment.



# APPENDIX B

Court of Appeal, Second Appellate District, Division Four - No. B252948

**S228219**

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

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THE PEOPLE, Plaintiff and Respondent,

v.

CARLOS VARGAS et al., Defendants and Appellants.

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The petitions for review are denied.



CANTIL-SAKAUYE

*Chief Justice*

APPENDIX C

Filed 7/14/15 P. v. Vargas CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CARLOS VARGAS et al.,<br><br>Defendant and Appellant. | B252948<br><br>(Los Angeles County<br>Super. Ct. No. BA401305) |

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant, Carlos Vargas.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant, Adrian Barajas.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant, Joseph A. Pacheco.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant, Douglas Cornejo.

# APPENDIX C

Kamala D. Harris, Attorney General, Gerard A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Appellants Carlos Vargas, Adrian Barajas, Joseph A. Pacheco, and Douglas Cornejo appeal from judgments and sentences following their convictions for kidnapping and attempted murder. They contend the trial court erred in admitting the preliminary hearing testimony of the victim, on the grounds (1) that the prosecution violated its obligations under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by failing to disclose impeachment evidence until after the preliminary hearing, and (2) that the admission of the preliminary hearing testimony violated their rights to confront and cross-examine the witness. They also contend the trial court erred in denying a defense request for a delayed discovery instruction. Cornejo separately contends that the trial court abused its discretion in excluding two exculpatory statements on the basis of hearsay. Finally, Cornejo and Pacheco contend there was insufficient evidence to support certain convictions and sentencing enhancements. Finding no reversible error, we affirm.

## PROCEDURAL HISTORY

Appellants were each charged in an amended information with attempted willful, deliberate, and premeditated murder of Valentin Anaya (Pen. Code,

§§ 664/187, subd. (a); count 1),[1] and kidnapping Anaya (§ 207, subd. (a); count 3). As part of a separate incident, Cornejo was charged with having a concealed firearm on his person (§ 25400, subd. (a)(2); count 7). It was alleged the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). It was further alleged that Vargas personally and intentionally discharged a firearm which caused great bodily injury (§ 12022.53, subds. (b), (c), & (d)); that a principal personally and intentionally discharged a firearm (§ 12022.53, subds. (b), (c), (d) & (e)(1)); and that Cornejo personally used a firearm (§ 12022.53, subd. (b)).

Pacheco and Vargas were also charged with possession of a firearm by a felon (§ 29800, subd. (a)(1); counts 5 & 9). Vargas was alleged to have suffered one prior conviction within the meaning of the "Three Strikes Law" (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and three prior convictions for which he served a term in state prison (§ 667.5, subd. (b)). Finally, Pacheco was alleged to have suffered two prior convictions for which he served a prison term (§ 667.5, subd. (b)).

A jury found appellants guilty as charged, and found true the firearm and gang allegations. Vargas admitted the prior strike allegation and serving two prior prison terms. Pacheco admitted one prior prison term, and the court struck the other prior.

The trial court sentenced Vargas to a total term of 68 years to life in state prison; Barajas to a total term of 32 years to life; Cornejo to a total term of 39 years to life; and Pacheco to a total term of 36 years to life.

Appellants each filed a notice of appeal.

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

## FACTUAL BACKGROUND

A. *The Prosecution Case*

According to the prosecution, appellants were members of the Rockwood criminal street gang. After obtaining information leading them to believe that a fellow gang member, Anaya, was an informant for law enforcement, appellants kidnapped Anaya, took him to an alley, and shot him in the head. Anaya survived the shooting, and subsequently identified appellants as his assailants.

1. *Anaya's Preliminary Hearing Testimony*

Trial proceedings started August 30, 2013. After Anaya invoked his Fifth Amendment rights and declined to testify at trial, the trial court declared him unavailable. His October 16, 2012 preliminary hearing testimony was then read into the record. The testimony was as follows:

In 2012, Anaya had been a member of the Rockwood gang for several years. Appellants were fellow gang members.[2] On July 28, at about 8:00 p.m., Anaya went to Vargas's apartment to collect the money Vargas owed him for drugs. Appellants were the only occupants. Anaya had two or three guns on him. In exchange for $100, he gave appellants one of the guns -- a .357-caliber revolver.

When Anaya went to the bathroom, he left his cell phone in the apartment to charge. Vargas took Anaya's cell phone and looked through the contacts. Among the contacts was a sheriff deputy's number. Anaya had stored the deputy's phone number on his phone after the deputy had approached him in May 2012 to ask him some questions. At the preliminary hearing, Anaya admitted calling the deputy, but denied agreeing to work for him.

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[2] Anaya did not know appellants' real names, but knew their gang monikers: Vargas was "Tico," Barajas was "Chubbs," Cornejo was "Little Man," and Pacheco was "Stomper."

When Anaya came out of the bathroom, Vargas told him to go back inside. Cornejo, who was armed with a gun, told Anaya to stay in the bathroom and locked him inside. After about an hour, Vargas entered and asked Anaya, "Who are you working for?" Anaya replied, "What? What are you talking about?" Vargas repeated: "Who are you working for?" He then said, "You fucked up," and stepped outside. Barajas entered, told Anaya that he had "fucked up," and struck him in the face. Cornejo and Pacheco then entered the bathroom separately and struck Anaya in the face.

Barajas came back and told Anaya to get in the tub. Vargas and Pacheco then entered. Vargas had the .357 gun and Pacheco was armed with a .45-caliber handgun. Vargas then injected Anaya with methamphetamine. Vargas tied Anaya's hands behind his back with shoelaces, placed a hooded sweatshirt over his head, and led him out of the apartment to a green truck parked outside. Vargas, Cornejo, and Anaya got into the truck. Anaya could not see the driver. Pacheco, who was wearing a Global Positioning System (GPS) tracking device as a condition of parole, stayed behind in the apartment.[3] Anaya did not know Barajas's location. When shown still pictures from a video surveillance of the building taken at the time, Anaya identified the men in the picture as Vargas, Pacheco, and Barajas.

After about an hour, the truck stopped near an alley. Cornejo exited, and Vargas pulled Anaya out of the vehicle. Vargas ordered Anaya to go to a corner of the alley, but Anaya started to run away. Vargas took out the .357 handgun and shot Anaya in the head. The bullet entered the left side of Anaya's head and exited the top. Cornejo took out his gun and attempted to shoot Anaya, but the gun

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[3] The location data from Pacheco's tracking device showed he entered the apartment at 7:05 p.m., and remained there until 6:39 a.m. the next morning.



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jammed. Anaya fell to the ground and pretended to be dead. Vargas said, "He's gone." Vargas and Cornejo then re-entered the truck. Anaya, afraid the truck would run him over, got up to run away. The truck driver tried to run him down. The side of the truck's bumper struck Anaya, sending him flying into a trash can. Anaya got up and started running. He heard several gunshots and dropped to the ground. The truck drove away. Anaya went to a store and called 911 at 4:52 a.m. He was taken to a hospital, treated, and released.

Anaya was questioned by police officers, but he provided them with "different stories so I could just get them off my back." After Anaya was released from the hospital, he agreed to speak with Los Angeles Police Detective Carlos Carias. Detective Carias interviewed Anaya at the police station, and showed him photographs in a Rockwood gang photobook. Anaya identified Vargas's photograph and wrote: "This individual was the one who shot me in the head, number 3. Tico [Vargas] is the one who tied me down and escorted me to the vehicle. I was told by him to get on the floor. Once arriving . . . at the alley, I was dragged out and shot by Tico." He also identified photographs of Pacheco and Cornejo, writing: "Stomper [Pacheco] number 210, Little Man [Cornejo] number 211 were involved in the crime of laying hands on me before I got shot in the head. I received a few blows from these individuals and had a gun pointing at my head. Little Man got -- Little Man's gun got jammed in the alley. So that's why I only got one shot in the head by Tico."

On August 4, 2012, Anaya identified Barajas's photograph and wrote: "This individual in photo six I know him as Chubbs from Rockwood for several years. Chubbs took me with Tico. And I got beat up. Later that night I was shot in the alley. Chubbs was the first one who said I fucked [up]."

Anaya also identified appellants as his assailants at the preliminary hearing.



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2. *Other Trial Testimony*

At the trial, Los Angeles Police Officer John Boverie testified that at approximately 4:55 a.m. on July 28, he responded to a call of a shooting. Arriving at the scene, he observed Anaya sitting on a chair, holding a towel to his head. Anaya had a gunshot wound to the left portion of his head and a shoe string tied to his right wrist. He did not respond to Officer Boverie's inquiries about who had shot him. The paramedics then arrived and took Anaya to the hospital.

Los Angeles Police Officer Ramon Gracia testified that he also responded to Anaya's 911 call. When he arrived, he observed a male Hispanic bleeding profusely from his head. When questioned, Anaya was uncooperative and provided inconsistent explanations for his injuries. When Anaya was taken to the hospital, Officer Gracia followed and interviewed him at the hospital. After providing several versions of the events, Anaya told Officer Gracia that he would tell him the truth. Anaya stated that he had gone with some of his "homies" to purchase beer. After they purchased the beer, they began driving to a different location. While in the car, one of his homies punched him and another overpowered him and tied his hands behind his back. The car eventually stopped at an alley, and one of his homies grabbed him and started to drag him into the alley. Another homie then drew a .357 and shot him. Anaya fell to the ground and pretended to be dead. After the men left him, he got up and began to run. As he was running, the car struck him. Anaya told Officer Gracia that he was an active gang member, and that he thought he was shot because his homies thought he was a "rat."

Detective Carias testified that he was assigned to investigate the shooting. He was informed that the victim had been checked into a hospital, and that the victim had identified himself as Rogelio Garcia. After determining that the



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victim's real name was Valentin Anaya, the detective interviewed Anaya at the police station. In addition to identifying appellants as his assailants, Anaya also provided information about the location of the shooting.

Detective Carias also testified that at one point, Anaya said he did not know the name of the driver of the green truck. At another point, Anaya said he knew the name of the driver, but would say only that the driver was a Rockwood gang member. Anaya also told the detective that as he was being taken from Vargas's apartment to the truck, he saw a Rockwood gang member by the name of "Cricket."

After Anaya told Detective Carias that he was afraid for his safety and for his family's safety, the detective moved Anaya and his family to a "safe house." Detective Carias paid for the motel directly with emergency funds, and he gave Anaya additional money for food. In order to receive the money, Anaya signed a form stating that he would not commit any crimes. Detective Carias testified that he gave Anaya $60 in cash on July 29, and $40 on July 30. On August 16th and September 16th, the detective gave Anaya $350 for food. On October 16th, he gave Anaya $350 for food and $300 for incidentals. On December 4th, he gave Anaya $1100 for food and $225 for incidentals. Finally, on January 4, 2013, he gave Anaya $1100 for food. The food allowance was for both Anaya and his family. In total, including the housing assistance, $7,750 was provided to Anaya and his family.

After Detective Carias interviewed Anaya, he visited Vargas's apartment building and looked at surveillance video taken at the time of the incident. The detective used his cell phone to capture the surveillance video and to take still photographs of the video. On August 8, Detective Carias showed the surveillance



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video to Los Angeles Police Detective Antonio Hernandez. Detective Hernandez recognized Vargas in the video from prior contacts with him.

The next day, while driving around Rockwood gang territory looking for the shooting suspects, Detective Hernandez and his partner, Officer Philip Zalba, saw Vargas. Vargas saw the officers and ran away, eventually entering a swap meet or flea market. When Vargas exited the business, Detective Hernandez was waiting outside and apprehended him. The detective searched Vargas, and found a small bag of ammunition on his person, containing fifteen .357-caliber bullets. Inside a hole in the wall of the flea market, police officers recovered a loaded .357 revolver.

Immediately after Vargas was arrested, Detective Hernandez learned that Barajas was next door, inside a cell phone store. The officers arrested Barajas there.

Pacheco and Cornejo were arrested the following weeks. On August 14th, Los Angeles Police Officer Arthur Meza observed Pacheco and noticed he was wearing a GPS tracking device, indicating he was on parole. Officer Meza and his partner approached Pacheco to initiate a parole search. As the officers approached, Pacheco placed one of his arms into his waistband, and grabbed a woman, placing her between himself and the officers. Pacheco said, "I don't want to do this." The officers ordered him to let the woman go, but Pacheco refused. The officers sprayed Pacheco with pepper spray, but Pacheco attempted to hide his face in the woman's hair. Officer Meza's partner then tackled Pacheco and took him to the ground. As he fell, Pacheco released the woman. He resisted for about 15 seconds. After he was handcuffed, Pacheco indicated he was in possession of a firearm. The officers recovered a loaded .45-caliber semiautomatic handgun from Pacheco's front waistband.



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On August 22, Detective Hernandez saw Cornejo walking in Rockwood gang territory. When Cornejo noticed the officer, he ran away in the opposite direction. As he was being chased, Cornejo threw a revolver over his head. Cornejo was apprehended after tripping on the stairs. The handgun was recovered; it was a Smith and Wesson chrome .22-caliber revolver, loaded with six bullets.

Los Angeles Police Officer Michael Chang testified he interviewed Cornejo after his arrest. After waiving his *Miranda* rights,[4] Cornejo told the officer that he had stolen the .22-caliber handgun from another Rockwood gang member, whom he did not like. He had taken it from "some bushes." Cornejo stated that he needed the handgun for protection because he had been "jumped out of Rockwood Street [gang] and . . . had been in a fight in juvenile hall with some juvenile."

In February 2013, Anaya was arrested for possession of an assault rifle. He told Officer Joseph Villagran that he had purchased the rifle for protection against the Sinaloa Cartel. He explained that he had lost a pound of methamphetamine belonging to the Sinaloa Cartel, and that a "hit" had been placed on him. Several days later, Officer Bobby Romo interviewed Anaya. During this interview, Anaya provided a different explanation for his possession of the rifle. Anaya said that in July 2012, his fellow gang members had tried to kill him because they believed he was a "rat." He stated: "I bought myself a gun for protection after I was shot in the head by former gang members."

Detective Hernandez testified as the prosecution gang expert. Detective Hernandez personally knew Vargas, Pacheco, and Cornejo to be members of the Rockwood gang; they had admitted to him that they were gang members. Vargas was known by the gang moniker, "Tico" or "Tiko." Pacheco was known by the gang monikers, "Stomper" and "Thumper." Cornejo was known by the gang

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436.



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monikers, "Clash" and "Baby Tiny." Although Detective Hernandez never had any personal contact with Barajas, Detective Hernandez opined that Barajas was a Rockwood gang member based on his gang tattoos and Anaya's statements.

Given a hypothetical fact pattern based on the facts of this case, Detective Hernandez opined that the kidnapping and attempted murder of a suspected gang informant was committed for the benefit of and in association with the Rockwood criminal street gang. The assailants were all gang members from the same gang, and the crimes would benefit the gang because they would discourage other gang members from working with law enforcement. Detective Hernandez also opined that when Cornejo was arrested on August 22, he possessed the .22-caliber handgun for the benefit of a criminal street gang, because having a gang member with a gun in gang territory would allow the gang to protect its territory from rival gangs. The detective also explained that a gang would have easily accessible and hidden places to store guns -- such as a bush -- for gang members to use. He also opined that only gang members would know these locations.

B. *The Defense Case*

Appellants did not testify. Dr. Mitchell Eisen, a psychologist, testified on behalf of Cornejo. Dr. Eisen testified about possible flaws in a witness's identification of suspects due to factors such as traumatic stress.

## DISCUSSION

Appellants contend they were denied a fair trial because (1) the prosecution committed various *Brady* violations; (2) they were denied their right to confront and cross-examine Anaya about witness relocation assistance and his fear of the Sinaloa drug cartel; and (3) the trial court erred in denying their request for an instruction on the delayed disclosure of *Brady* evidence.



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Pacheco separately contends there was insufficient evidence to support the jury's finding that he aided and abetted in the kidnapping and attempted murder of Anaya. Cornejo separately contends there was insufficient evidence to support the jury's findings that he stole the .22 handgun from a Rockwood gang member and at the same time that he possessed the handgun to benefit the Rockwood gang. Cornejo also contends that the trial court abused its discretion by excluding two hearsay statements of Anaya that he saw another gang member -- with the moniker Cricket -- when he was being kidnapped.

A. *Purported Brady Violations*

Suppression of favorable evidence that is material, either to guilt or punishment, violates due process. (*Brady*, *supra*, 373 U.S. at p. 87; accord, *Strickler v. Greene* (1999) 527 U.S. 263, 281-282.) Evidence is "favorable" to the defense "if it helps the defense or hurts the prosecution, [such] as by impeaching a prosecution witness." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "Evidence is material if there is a reasonable probability its disclosure would have altered the trial result." (*People v. Zambrano, supra*, at p. 1132.) No *Brady* violation occurs if the previously suppressed evidence is presented at trial. (*People v. Verdugo* (2010) 50 Cal.4th 263, 281.)

The prosecution's *Brady* obligation extends to the preliminary stage of criminal proceedings. (*People v. Gutierrez* (2013) 214 Cal.App.4th 343, 348.) However, for preliminary hearings, "the standard of materiality is whether there is a reasonable probability that disclosure of the exculpatory or impeaching evidence would have altered the magistrate's probable cause determination with respect to any charge or allegation." (*Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th



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1074, 1087.) "In addition, . . . the duty of preprelimiary hearing disclosure extends only to matters within the possession or control of the prosecution team before the conclusion of the preliminary hearing." (*Ibid*.) "We independently review the question whether a *Brady* violation has occurred, but give great weight to any trial court findings of fact that are supported by substantial evidence." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176.)

1. *Witness Relocation Assistance*

Appellants contend the prosecution violated *Brady* when it failed to disclose that Anaya had received witness relocation assistance until after the preliminary hearing.

a. *Relevant Factual Background*

After the October 16, 2012 preliminary hearing but before trial, defense counsel were informed that Anaya had received relocation assistance. The prosecution did not provide the actual documentation of the assistance until after Anaya's prior testimony had been read to the jury. After reviewing the documentation, the trial court concluded that "the only thing that is relevant and the only thing that's potentially exculpatory or otherwise relevant is an itemization of how much was paid." The court ordered the prosecutor to turn over to the defense a copy of the documents under seal and an itemization of the amounts and dates of the relocation assistance.[5]

[5] Appellants have requested that this court independently review the sealed exhibits for any exculpatory or impeachment evidence. Although the sealed exhibits could not be located, the record indicates that defense counsel received a copy of "exactly what the [trial] court reviewed." The prosecution and defense counsel then redacted the exhibits to provide them to the jury.

When the documents were provided to defense counsel, Vargas's counsel asked whether Anaya had signed any documents, either to receive the money or to work as an informant. The prosecutor responded that Anaya had to sign an agreement to receive the money, but that he was unaware of any agreement showing Anaya was an informant for any law enforcement agency. Defense counsel asked the court to review the signed agreement, and suggested that the agreement may have required Anaya to commit no further crimes. The court agreed, but stated its belief that an agreement to commit no further crimes would not be exculpatory.

As detailed above, defense counsel elicited trial testimony from Detective Carias about the relocation assistance provided to Anaya. Specifically, Detective Carias testified that Anaya signed a document agreeing to commit no further crimes in exchange for the assistance, and that a total amount of $7,750 was provided to Anaya and his family. In addition, during closing, Vargas's counsel argued that although Anaya may have been a trustworthy witness because he was afraid of his fellow gang members, "[i]t's just as likely he was a con man and knew the system, and tried to rip the system off of $8,000."

b. *Analysis*

In order to demonstrate that the prosecution violated its *Brady* obligations, appellants must show a suppression of evidence that was both favorable and material. Here, it is unclear whether evidence of witness relocation assistance is favorable. (Compare *United States v. Davis* (5th Cir. 2010) 609 F.3d 663, 696 [information that witness was offered witness protection not favorable to defendant because jury may have assumed that witness needed protection from defendant] with *United States v. Talley* (6th Cir. 1999) 164 F.3d 989, 1003 [noting that relocation benefit for key government's witness should be disclosed as



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impeachment evidence].) Even assuming that evidence that Anaya received relocation assistance constituted impeachment evidence, appellants have failed to show that the evidence was material, or that it was suppressed at trial.

As discussed above, for preliminary hearings, evidence is material if "there is a reasonable probability that disclosure of the exculpatory or impeaching evidence would have altered the magistrate's probable cause determination with respect to any charge or allegation." (*Bridgeforth v. Superior Court*, *supra*, 214 Cal.App.4th at p. 1087.) Here, it is undisputed that Anaya was shot in the head. He identified appellants as his assailants to Detective Carias, and the record shows that his identification was made before any offer of assistance. In addition, Vargas, Pacheco, and Barajas were identified from still photographs taken from video surveillance at the time of the incident. Finally, the relocation assistance was not offered in exchange for testimony and was not dependent on Anaya's testifying at trial. (Cf. *People v. Westmoreland* (1976) 58 Cal.App.3d 32, 44-46 [leniency offered in exchange for testimony].) In short, appellants have not shown there was a reasonable probability that the evidence of witness relocation assistance would have altered the magistrate's probable cause determination. Thus, no *Brady* violation occurred at the preliminary hearing stage.

Similarly, appellants have not shown a *Brady* violation at the trial stage. There was no suppression of evidence because the jury heard about the relocation assistance provided to Anaya. (See *People v. Verdugo*, *supra*, 50 Cal.4th at p. 281 ["'[E]vidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery.' [Citation.]"].) After considering the evidence, the jury found Anaya's identification of appellants credible and convicted them. On this record, appellants cannot show a *Brady* violation.



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2. *Anaya's Statements to Detective Carias About Gang Member "Cricket"*

At trial, Detective Carias testified that Anaya told him he knew the driver of the green truck, but would not disclose any information about the driver other than the fact that he was a Rockwood gang member. Anaya also told the detective that when he was being taken to the truck, he saw a Rockwood gang member named Cricket. Barajas contends the failure to disclose the transcript of this interview prior to the preliminary hearing was a violation of the prosecution's obligations under *Brady*. We disagree.

First, as appellant Barajas concedes, trial counsel failed to object to the late disclosure of the transcript on *Brady* grounds. Thus, this argument has been forfeited. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1174.) Even were we to consider this issue, we would find no *Brady* violation. As appellant's counsel admitted in the trial court, prior to the preliminary hearing, he had a copy of the recording of the interview, although "a lot of it was in Spanish, translations pending." Moreover, appellant's counsel had a copy of the transcript at the preliminary hearing. Although counsel asserted he did not have the opportunity or time to read the entire interview transcript, he never requested a continuance. In addition, at trial, Vargas's counsel elicited testimony about Cricket from Detective Carias, and in closing argument suggested the police should have investigated whether Cricket had been involved in the crimes. On this record, appellant Barajas has not shown that evidence of Anaya's statements about Cricket was suppressed by the prosecution, either at the preliminary hearing stage or at trial. Thus, he has failed to demonstrate a *Brady* violation. (See *People v. Verdugo, supra*, 50 Cal.4th at p. 281.)



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B. *Whether Admission of the Preliminary Hearing Testimony Violated the Confrontation Clause.*

"A criminal defendant has a constitutionally guaranteed right to confront and cross-examine the witnesses against him or her. [Citations.] The right of confrontation is not absolute, however, and may 'in appropriate cases' bow to other legitimate interests in the criminal trial process. [Citations.] An exception to the confrontation requirement exists where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant. [Citations.] Further, the federal Constitution guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer. [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1172.) This exception is codified in the California Evidence Code at section 1291. Section 1291 provides, in relevant part, that "[e]vidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and . . . [¶] . . . [¶] [t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." When the requirements of Evidence Code section 1291 are met, "the preliminary hearing testimony of an unavailable witness may be admitted at trial without violating a defendant's confrontation right." (*People v. Herrera* (2010) 49 Cal.4th 613, 621.)

Appellants contend the admission of Anaya's preliminary hearing testimony violated their constitutional right to confront him, because they did not have an adequate opportunity to cross-examine him about (a) the witness relocation



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assistance, (b) his statements relating to Cricket, and (c) his fear of the Sinaloa drug cartel. We conclude there was no reversible error.

Here, the requirements of Evidence Code section 1291 were met. Anaya was unavailable to testify at trial because he invoked his Fifth Amendment right to remain silent. Anaya was cross-examined by appellants' counsel at the preliminary hearing, including on his identification of appellants as his assailants. Appellants' interest and motive in cross-examining Anaya at the preliminary hearing were closely similar, if not identical to, their objectives at trial -- namely, to attempt to discredit the prosecution's theory that they kidnapped and attempted to kill Anaya. (See *People v. Carter*, *supra*, 36 Cal.4th at p. 1172 [defendant's interest and motive in cross-examining adverse witness -- to discredit prosecution's theory of the case -- were sufficiently similar at the preliminary hearing and at trial to satisfy requirements of Evidence Code section 1291].)

Appellants' inability to cross-examine Anaya about witness relocation assistance at the preliminary hearing did not render their cross-examination constitutionally inadequate. Anaya identified appellants as his assailants prior to any offer of relocation assistance. Additionally, at trial, appellants were able to cross-examine Detective Carias about his payments to Anaya as part of the witness relocation program. Thus, the jury was able to consider the relocation assistance in determining Anaya's credibility. On this record, they failed to demonstrate any confrontation clause violation.

As to Anaya's statements relating to Cricket, appellant Barajas has failed to demonstrate that he lacked an adequate opportunity to cross-examine Anaya about those statements. As detailed above, Barajas's counsel had a copy of the recording of the interview before the preliminary hearing and a copy of the interview transcript at the preliminary hearing. Thus, he had an opportunity to cross-



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examine Anaya about the statements he had made relating to Cricket in that interview. As Barajas's counsel had the opportunity for cross-examination, the admission of the preliminary testimony under Evidence Code section 1291 did not violate the confrontation clause. (*People v. Carter*, *supra*, 36 Cal.4th at pp. 1172 & 1174 [confrontation clause guarantees an opportunity for cross-examination, not a particular form of cross-examination].) Moreover, the jury heard about the presence of Cricket outside the apartment on the night Anaya was shot, and was urged in closing argument to consider whether Cricket may have been involved. On this record, Barajas has failed to demonstrate a confrontation clause violation.

As to Anaya's fear of the Sinaloa drug cartel, his statements concerning the drug cartel were made on February 15, 2013, four months after the preliminary hearing. Those statements were not inconsistent with any of Anaya's statements at the preliminary hearing. Moreover, the statements were presented to the jury through the trial testimony of Officer Villagran. In short, the admission of Anaya's preliminary hearing testimony did not violate appellants' confrontation rights.[6]

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[6] Appellants also contend they received ineffective assistance of counsel when trial counsel failed to move to strike Anaya's preliminary testimony on the basis that the prosecution had violated *Brady* and the confrontation clause. In order to prevail on a claim of ineffective assistance of counsel, appellant must show (1) that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that but for counsel's unprofessional errors, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Gray* (2005) 37 Cal.4th 168, 206-207; *People v. Kelly* (1992) 1 Cal.4th 495, 519-520.) We conclude that appellants have failed to show either prong. First, Barajas's counsel objected to the admission of Anaya's preliminary testimony on the ground his client's right to confront and cross-examine Anaya during the hearing was "hampered," and Vargas's counsel made a *Brady* objection. In light of these evidentiary objections, other trial counsel need not raise the same objections on behalf of their clients. When the trial court overruled the objections,



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C. *Jury Instruction on Delayed Disclosure of Evidence*

Appellants next contend the trial court abused its discretion in denying a defense request to instruct the jury with CALCRIM No. 306, as a sanction for the prosecution's failure to disclose the witness relocation assistance. CALCRIM No. 306 generally informs the jury that a party has failed to disclose relevant evidence, that the failure may deny the other side an opportunity to receive a fair trial, and that the late disclosure may be considered when evaluating the evidence. The trial court denied the request on the ground that evidence of the relocation assistance had been presented to the jury. We discern no abuse of discretion.

As discussed, the prosecution has an obligation under *Brady* to disclose favorable evidence. In addition, "[s]ection 1054.1 (the reciprocal-discovery statute) 'independently requires the prosecution to disclose to the defense . . . certain categories of evidence "in the possession of the prosecuting attorney or [known by] the prosecuting attorney . . . to be in the possession of the investigating agencies."' [Citation.] Evidence subject to disclosure includes . . . '[a]ny exculpatory evidence' [citation]. 'Absent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.)' [Citation.] [¶] Upon a showing both that the defense complied with the informal discovery procedures provided by the statute, and that the prosecutor has not complied with section 1054.1, a trial court . . . may . . . 'advise the jury of any failure or refusal to disclose and of any untimely disclosure.' [Citation.] A violation of section 1054.1 is subject to the

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trial counsel were not unprofessional for failing to move specifically to strike the testimony on the same grounds. Moreover, as we have determined that there was no *Brady* violation and that the admission of the preliminary hearing testimony did not violate appellants' confrontation clause rights, appellants cannot show prejudice.



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harmless-error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. [Citation.]" (*People v. Verdugo*, *supra*, 50 Cal.4th at pp. 279-280.)

Here, appellants were not prejudiced because the information was presented to the jury through the cross-examination of Detective Carias. (See *People v. Verdugo*, *supra*, 50 Cal.4th at p. 281 [no *Brady* violation where previously undisclosed evidence was presented at trial; no prejudice from violation of section 1054.1 where defense counsel had time to prepare for cross-examination on previously undisclosed evidence].) As a result, no instruction regarding delayed disclosure was required. Moreover, for the reasons stated above, any error in failing to instruct the jury regarding delayed discovery was harmless under any standard of reversible error. (*Chapman v. California* (1967) 386 U.S. 18, 22; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

D. *Whether the Trial Court Abused its Discretion in Excluding Certain Statements Anaya had Made to Detective Carias Regarding Cornejo.*

At the preliminary hearing, Anaya testified that when he was dragged into the alley, Vargas shot him in the head. Anaya also testified that "Little Man" (Cornejo) drew a handgun and tried to shoot him, but the gun jammed. Vargas and Cornejo then reentered the truck. As Anaya began running away, two shots were fired from the vehicle.

At trial, the court precluded Cornejo's counsel from introducing two statements Anaya made to Detective Carias, stating that "Little Man" was screaming after the shots were fired from the vehicle and speculating that Cornejo might have shot himself in the foot.[7] Defense counsel had sought to introduce the

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[7] Anaya told Detective Carias: "And then, boom. Then . . . the Expedition went in reverse. Then they left again. And . . . at that time, I heard Little Man, that



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statements to show that Cornejo was not "Little Man," because when arrested a few weeks later, Cornejo showed no sign of injury. The trial court determined that the two statements were not inconsistent with Anaya's preliminary hearing testimony: "There was some kind of scream after they were in the car. There's no testimony about it. And there's no way of knowing whether he was screaming because he was frustrated at his gun or he was screaming because Mr. Anaya had gotten back up or they were driving away or -- you know, it's total speculation that he was screaming because he shot himself." The court excluded the statements as hearsay, and also under Evidence Code section 352, as being more prejudicial than probative. On appeal, Cornejo contends the trial court abused its discretion in excluding the statements. We disagree.

Evidence Code section 1235 provides that "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing . . . ." Here, there was no preliminary hearing testimony whatsoever about Cornejo screaming. Thus, there is no inconsistency between Anaya's preliminary hearing testimony and the two hearsay statements defense counsel sought to introduce.

Cornejo contends in the alternative that the statements were admissible under Evidence Code section 356, which provides: "Where part of an act,

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he got off. Because the fool said, get out, get out. He told him, get out, fool. So fucking -- I could hear Tico's voice. You know, I recognized him. And then, when Little Man shot, that's -- oh I don't know if -- I don't know if he shot himself because the gun -- he was having problems with the gun. So he shot. He goes, oh." Detective Carias asked, "So you heard him?" Anaya replied: "I heard him. You know, I don't know why he was going to scream, you know." Anaya further stated, " So I think, like, in my head, after all the incident when I was just in the hospital thinking like -- this fool fucking shoot himself, or what?" Later the detective asked Anaya if he had heard Little Man screaming, and Anaya answered in the affirmative.



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declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing *which is necessary to make it understood* may also be given in evidence." (Italics added.) He contends the two statements were part of the "same subject matter of the entire shooting incident." We discern no error in the trial court's exclusion of the statements. They did not resolve any ambiguity, clarify or otherwise explain Anaya's testimony, and the record reflects they were unnecessary to understand the testimony.

Moreover, even had the court erred, any error would be harmless. (*People v. Garcia* (1984) 160 Cal.App.3d 82, 93, fn. 12 [evidentiary errors are tested under harmless error standard of *People v. Watson, supra,* 46 Cal.2d at p. 836].) Anaya identified Cornejo as one of his assailants. The statements indicated that Cornejo had screamed after the shots were fired at Anaya from the truck. Anaya never stated that he observed Cornejo shoot himself in the foot, or heard anyone say that Cornejo had been shot. Although Anaya speculated that Cornejo may have screamed because he shot himself in the foot, it is just as likely that Cornejo screamed because the shots had missed Anaya. Thus, even had the statements been admitted, it is not reasonably probable that the jury would have reached a different result.

E. *Sufficiency of the Evidence*

Cornejo and Pacheco challenge the sufficiency of the evidence to support certain of their convictions and sentencing enhancements. "In determining whether the evidence is sufficient to support a conviction or an enhancement, 'the relevant question is whether, after viewing the evidence in the light most favorable



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to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] Under this standard, 'an appellate court in a criminal case . . . does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Rather, the reviewing court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224, italics omitted.)

1. *Cornejo's Conviction for Carrying a Concealed Firearm that was Stolen*

As detailed above, on August 22, 2012, Detective Hernandez arrested Cornejo after a short pursuit. During the pursuit, Cornejo had thrown a loaded .22 handgun away. When he was interviewed, Cornejo told Officer Chang that he had stolen the gun from a Rockwood gang member and that he needed it for protection because he had been "jumped out" of the Rockwood gang and had gotten into a fight with a juvenile.

As a result of this incident, Cornejo was charged with having a concealed firearm on his person, in violation of section 25400, subdivision (a)(2). It also was alleged that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The jury found Cornejo guilty as charged and found true the gang enhancement allegation. It also found true that the firearm was stolen, and that Cornejo knew or reasonably should have known that it was stolen. The latter finding is significant because it elevates the offense from a misdemeanor



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to a felony. (See § 25400, subd. (c)(2).) The trial court sentenced Cornejo to three years on count 7, plus four years for the gang enhancement.

Appellant contends the evidence was insufficient to support the jury's findings that the firearm was stolen and that he committed the offense for the benefit of the Rockwood street gang. We disagree. As to the gang enhancement allegation, the gang expert's testimony was sufficient to prove the elements of that allegation. (See, e.g., *People v. Williams* (2009) 170 Cal.App.4th 587, 621; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332-1333.) As to whether the handgun was stolen, appellant himself told Officer Chang he had stolen the handgun.

Appellant contends it would be inconsistent for him to possess a concealed firearm to benefit the Rockwood gang when he had been "jumped out" of the gang and had stolen it from a Rockwood gang member. We disagree. First, the jury was not required to believe Cornejo's statement that he had been jumped out of the gang. Indeed, Detective Hernandez opined that only gang members would know the hidden locations where a gang would store firearms. Second, nothing precludes animosity between members of the same gang. Appellant could have stolen the handgun from another gang member for myriad reasons, none of which would negate the fact that the Rockwood gang benefitted from having a member armed in gang territory to defend it from rival gangs. Stated differently, the gang would benefit if Cornejo were willing to defend its interests despite any personal animosity toward a specific gang member. In short, a reasonable jury could have made both findings, and there was substantial record in the evidence to support them.



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2. *Pacheco's Convictions as an Aider and Abettor in the Kidnapping and Attempted Murder of Anaya*

As detailed above, Anaya testified that Pacheco, armed with a .45-caliber handgun, was present in the apartment and participated in assaulting Anaya in the bathroom. Anaya also testified that Pacheco remained in the apartment when Anaya was taken to the green truck, driven to the alley, and shot. Pacheco's GPS tracking device showed that Pacheco remained in the apartment. In closing argument, the prosecutor stated it did not matter that Pacheco remained behind because he aided and abetted in the kidnapping and murder. The jury convicted Pacheco on all counts.[8]

Pacheco contends there was insufficient evidence to support the jury's finding that he aided and abetted in the kidnapping and attempted murder of Anaya. We disagree. "[P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus -- a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea -- knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus -- conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.)

Here, the prosecution proved that the other defendants -- the direct perpetrators -- kidnapped and attempted to murder Anaya. As to Pacheco's mens rea and actus reus, the jury heard the following: Pacheco was present when Anaya gave Vargas the .357 handgun, when Vargas asked Anaya whether Anaya was an

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[8] The jury was instructed on direct aider and abettor liability. The prosecution declined to proceed on a natural and probable consequences or uncharged conspiracy theory.

informant, when Vargas told Anaya to remain in the bathroom, and when Cornejo threatened Anaya with a gun. Pacheco participated in beating up Anaya, and he was present and armed with a .45-caliber handgun when Vargas injected Anaya with methamphetamine. Pacheco was also present when Vargas placed a sweater over Anaya's head and took him out of the apartment. On this record, a reasonable jury could infer that Pacheco knew that his fellow gang members, who were armed with handguns, would take Anaya, who was suspected of being an informant, to another location and shoot him. (Cf. *People v. Moore* (1953) 120 Cal.App.2d 303, 306 ["'The presence of one at the commission of a felony by another is evidence to be considered in determining whether or not he was guilty of aiding and abetting; and it has also been held that presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred'"].) Pacheco aided the offenses by participating in beating Anaya and provided an armed presence when Vargas was injecting him with methamphetamine, both acts that rendered Anaya more malleable and less likely to resist the kidnapping and shooting. Moreover, a reasonable jury could have inferred that the only reason Pacheco, who was armed, did not accompany the other appellants as they kidnapped and shot Anaya was because he had a GPS tracking device on his person. In short, there was substantial evidence in the record to support Pacheco's convictions.

F. *Cumulative Error*

Finally, appellants contend that, even if harmless individually, the cumulative effect of these claimed trial errors mandates reversal of their convictions. Because we have found no error, their claim of cumulative error fails.



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(See *People v. Seaton* (2001) 26 Cal.4th 598, 639; *People v. Bolin* (1998) 18 Cal.4th 297, 335.)

**DISPOSITION**

The judgments are affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.



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