No. 21-

# In the United States Supreme Court

MICHAEL BURCIAGA,

*Petitioner,*

v.

RAYMOND MADDEN, Warden,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Under California law, premeditation requires more than just intent to kill; it requires "careful thought," as a "deliberate judgment or plan," carried on "coolly and steadily."

Here, Eddie Campbell stopped his SUV in the street outside the home of petitioner Michael Burciaga's father; called out to three men standing on the property (Burciaga among them) that he was unarmed; handed a gun to passenger Adrian Torres; then approached and conversed with Burciaga. But when conversation became argument, Burciaga shot Campbell, and when one of the other two yelled, "Get [Torres]," Burciaga shot "at the vehicle," hitting no one.

Against Burciaga's challenge under *Jackson v. Virginia,* 443 U.S. 307 (1979), the state court sustained jury findings that the shootings were premeditated attempts to murder Campbell and Torres, citing evidence that those involved were all members of the same gang. On federal habeas review under AEDPA,[1] the Ninth Circuit agreed.

Did the Ninth Circuit so clearly err as to call for summary reversal?

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[1] The Antiterrorism and Effective Death Penalty Act.

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## PETITION FOR WRIT OF CERTIORARI

The standard clearly established in *Jackson v. Virginia* nearly four decades ago "operates to give concrete substance to the presumption of innocence, [ensure] against unjust convictions, and [reduce] the risk of factual error in a criminal proceeding." 443 U.S. 307, 315 (1979). So its proper functioning is essential to the federal constitutional guarantee of due process.

But here its operation was nullified by the state court, which sustained jury findings of premeditation and deliberation based on an incoherent theory of motive, and virtually nothing else. Lacking even a mere modicum of support, the jury's findings fall well below the threshold of bare rationality that *Jackson* requires. *Coleman v. Johnson*, 566 U.S. 650, 656 (2012) (per curiam). In sustaining those findings, the state court unreasonably applied *Jackson*. 28 U.S.C. § 2254(d)(1). And in sustaining the state court's decision, the Ninth Circuit ignores this plain irrationality. The Court should summarily reverse.

## OPINIONS BELOW

The Ninth Circuit panel's memorandum disposition is reported at 827 F. App'x 676, and reproduced at App. 1–8. The unreported report and recommendation adopted by the district court is reproduced at App. 12–37. The state court of appeal's unreported opinion is reproduced at App. 39–55.

## JURISDICTION

The Ninth Circuit issued its memorandum disposition on September 17, 2020. (App. 1.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2254 provides in pertinent part:

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

## STATEMENT OF THE CASE

It was early Sunday evening, and Eddie Campbell wanted answers.[2] (Reporter's Transcript ("RT") 1054.) Campbell was an

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[2] The facts here about the shootings are based on the testimony of the only eyewitness at Burciaga's trial, Adrian Torres—who agreed to testify only after the state granted him immunity. (RT 1046–47.) Truthful or not, his testimony must be treated as if a rational juror could have found it credible. *Jackson*, 443 U.S. at 319. But it's only in that light that the facts and evidence are recounted here. *Id.* Burciaga does not concede he was present during the shootings.

"original" member of Perth Street (RT 1237, 1062–63), a "clique" or subset of a larger group known as Puente Trece (RT 1231). Just the day before, Campbell's acquaintance "Joker," also from Perth, had been fatally shot. (RT 965, 1220–21, 1238, 1050.) So now Campbell was on his way to the home of Matthew Burciaga, to "get some information" about the incident. (RT 967, 975–76, 1051.)

On his way there Campbell saw his protégé Adrian Torres walking out of a 7-Eleven. (RT 963–64.) Torres was a member of another Puente subset, the Ballistas. (RT 1063.) Campbell offered Torres a ride home. (RT 966.) Torres said all right, and got in. (RT 965, 966.) But they were going to Matthew Burciaga's first. (RT 966, 1066.)

When they got there, three people were outside the house by the garage: Matthew, Robert Valdivia, and a third person Torres didn't recognize, but would later identify from a photographic line-up as Michael Burciaga (RT 1038)—Matthew's brother, and the petitioner in this case. (RT 1066–67, 1069.) Matthew was seated in a wheelchair, the other two standing near by. (RT 976–77.)

Campbell stopped his Ford Expedition in the street, his side (the driver's side) facing the house. (RT 972, 973, 974, 978.) He called out to the three: "I'm not armed. I just need to ask some questions." (RT 977.) Before getting out of the car, and in view of the three by the house, Campbell handed a gun to Torres, who put it in the center console. (RT 977–79.) Torres saw no other gun on Campbell. (RT 1069.)

Campbell approached the house and went through the gate onto the fenced property. (RT 980–81; App. 56 (trial exhibit).) As he reached

the halfway point along the walkway, Burciaga came to meet him.[3] (RT 981–82.) The two talked. (RT 982.)

Torres wasn't paying much attention to what was going on because he was chatting with a woman who'd been riding along in Campbell's SUV. (RT 1053.) But at some point, it caught Torres's notice that Campbell and Burciaga's conversation had turned into an argument. (RT 983.) Then he heard four or five gunshots. (RT 984–85.)

When he turned to look he saw Campbell, holding his stomach, turn away from Burciaga, walk the 30 feet back to the car, and jump back in. (RT 984–86; App. 56 (trial exhibit).) Torres saw none of the shots. (RT 984.) And Burciaga didn't fire any more at Campbell once he'd made his turn to return to the car. (RT 983, 984.)

Campbell told Torres to take him to the hospital. (RT 986.) By that point Torres had moved from the passenger seat to the driver seat. (RT 986–87.) As he was readying to drive off, he heard Valdivia say, "That's his nephew. Get him[.]"[4] (RT 988 (affirming prosecutor's leading question).) Burciaga then shot at least once (RT 989), "at the vehicle" (RT 1059). No one was hit. (RT 989.) Neither, as far as the record shows, was the SUV, still sitting in the street, idling in park. (RT 974, 989.)

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[3] It was only at trial, a year and a half after the shooting, that Torres first mentioned Burciaga's approaching Campbell; the fact had gone unmentioned during the two rounds of interrogation Torres went through with detectives, as well as during his testimony at Burciaga's preliminary hearing. (RT 1053–54.)

[4] Torres referred to the elder Campbell as his "uncle," though the two were not related.

Instead of driving off, Torres grabbed Campbell's gun from the center console and fired back. (RT 989.) But it jammed after the first shot. (*Id*.) So he put the car in drive and rushed Campbell to the hospital. (RT 990.) Police later arrested Torres near the hospital, and recovered the gun. (RT 999.) Torres identified Burciaga and Valdivia from a pair of "six packs." (RT 1000, 1006–08.) Burciaga was arrested about three days later.

Other than Torres, the prosecution's main trial witness was a gang officer named Carlos Gutierrez, who mainly investigated crimes by Puente Trece. (RT 1223–25, 1213, 1228.) His testimony would be used not only to support the gang enhancement allegations, but to supply a gang-related motive for the shootings.

He described Puente Trece as a group of about 800 members, organized into 16 "cliques" or subsets. (RT 1228–29). One subset was Perth Street (RT 1231), and Gutierrez opined that Campbell, Valdivia, and Michael and Matthew Burciaga were members of it (RT 1234–37, 1247–48). Gutierrez characterized Torres, on the other hand, as a member of the larger Puente group (RT 1238), though Torres himself claimed membership in a subset called Ballista. (RT 962.) Gutierrez never mentioned Ballista, or tried to explain its connection to Perth Street or to the larger Puente group.

Yet another subset entered the picture when the prosecution sought to substantiate the existence of the predicate "criminal street gang" presupposed by the gang enhancement provision. Cal. Penal Code § 186.22(b)(1). To do this, the prosecution had to prove a

preexisting "pattern of criminal gang activity," *id*. § 186.22(f), which could be established when two or more members of the identified group commit one of several enumerated offenses, *id*. § 186.22(e). To establish the pattern here, the prosecution supplied court records showing that two brothers, David and Josue Gonzalez, were convicted for an assault with a deadly weapon. (RT 1232–33.) There was no evidence the Gonzalez brothers knew Burciaga or the others present at the shooting, or vice versa.

The Gonzalez brothers, Gutierrez then opined, were Puente members (RT 1232, 1233–34), but from a "different" subset (RT 1249). Gutierrez didn't say which one, or whether its members ever had contacts with Perth Street's. Nor did he otherwise explain its connection to Perth or to the larger Puente outfit.

Gutierrez then opined that conflict had arisen within the larger Puente group due to a *fourth* subset, the Blackwood clique. (RT 1238.) According to Gutierrez, Blackwood wanted to separate off and become its own gang. (RT 1239.) This, he said, caused a lot of turmoil within the Puente group, and several shootings had been the result. (*Id*.)

But again, Gutierrez didn't tie this background into the events and the people present during the shootings here: He didn't say whether any of them were affiliated with members of Blackwood. Or in conflict with them. Or had ever met them. Or had ever even heard of them.[5] Nor did Gutierrez opine or provide any other reason to suppose that Joker's killing the day before had anything to do with Blackwood.

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[5] Torres, for one, did not list it among the cliques he'd heard of. (RT 960.)

In any event, Gutierrez opined that the shootings were both a "benefit" to the "Puente Trece criminal street gang" and involved "association" with it. (RT 1241.) There was a gang benefit, he said, because "by [shooting] a member of their own clique, [members] are promoting or benefitting the gang's reputation of being violent." (*Id.*) This deters people in the community from reporting the crime, fearing reprisal. (RT 1241–42.) There was also an "association factor" in that you had "two individuals hanging out, associating with one another," with one person "pretty much direct[ing] the other" during the shooting. (RT 1241.)

After an overnight break (Clerk's Transcript ("CT") 181, 233), the jury found Burciaga guilty on all counts, and all allegations true (CT 222–28). He was sentenced to 83 years to life. (App. 13.)

On direct appeal, Burciaga challenged the sufficiency of the evidence to sustain the premeditation and gang enhancement findings, but the state court reversed the jury's gang enhancement finding as to the Campbell shooting only, remanded to the trial court to correct sentencing errors, and otherwise affirmed. (App. 40.) There's more detail about the court of appeal's sufficiency analysis still to come. *See infra* pp. 15–16. But in broad strokes, the court found sufficient evidence of premeditation and deliberation by dint of the "gang related motive" supplied by Gutierrez's opinion testimony, along with Burciaga's having armed himself, having brutally shot one gang member at close range, and having shot at another after being encouraged to do so by a fellow gang member. (App. 44–46.) The state

supreme court summarily denied review. (App. 38.) Burciaga then pursued a full round of postconviction review in state court, on claims not relevant here, to no avail. (App. 13.)

The U.S. District Court then dismissed Burciaga's pro se federal habeas petition (which raised all claims he'd raised in state court) with prejudice, but granted a certificate of appealability as to the sufficiency of the evidence of premeditation and deliberation in the attempted murder of Torres. (App. 10–11.) The Ninth Circuit certified his remaining sufficiency challenges to the premeditation and gang findings, but affirmed. (App. 5, 8.)

This petition follows.

## REASONS FOR GRANTING THE WRIT

### The Ninth Circuit's decision tolerates so clearly unreasonable an application of *Jackson* as to call for summary reversal.

Review should be granted because the Ninth Circuit's unreported summary disposition ignores the incoherent theory that stood in for evidence of premeditation and deliberation at Burciaga's trial: the idea that a gang benefits when its own members kill each other—an idea that "obviously makes no sense." *People v. Ramirez*, 244 Cal. App. 4th 800, 819 (2016).

Though this nonsensical theory has successfully leveraged pro-prosecution findings from California juries, *id.*, it objectively lacks "any tendency" to make the existence of an element even "slightly more probable" than it would be without it. *Jackson*, 443 U.S. at 320. Much

less could it "seriously" be thought to support a rational finding the element is true "beyond a reasonable doubt." *Id*.

As the Ninth Circuit's unpublished memorandum nowhere confronts the state court's tacit, unreasonable reliance on this incoherent theory and serially misconstrues the California precedent it cites along the way, summary reversal is appropriate.

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"Premeditated" and "deliberate" attempted murder requires "substantially more reflection" than a "mere … intent to kill." *People v. Banks*, 59 Cal. 4th 1113, 1153 (2014), *abrogated on other grounds by People v. Scott*, 61 Cal. 4th 363 (2015). Attempted murder is "premeditated" only when the intent to kill was "formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation." CALJIC 8.20. *See People v. Millwee*, 18 Cal. 4th 96, 135 n.13 (1998) (holding that CALJIC 8.20 correctly states standard). And it's "deliberate" only when it resulted from "careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design." *People v. Bunyard*, 45 Cal. 3d 1189, 1214 (1988), *abrogated on other grounds by People v. Diaz*, 60 Cal. 4th 1176 (2015).

As a framework for reviewing findings of premeditation and deliberation for sufficiency, California courts look to evidence of (1) planning, (2) motive, and (3) a "[m]anner" of killing "so particular and exacting" that the defendant must have had a "preconceived design"

the jury could rationally infer from either motive or planning. *People v. Anderson*, 70 Cal. 2d 15, 26–27 (1968). Such verdicts are typically sustained "when there is evidence of all three types"; otherwise, there must be "at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." *Id.* at 27.

Beyond the *Anderson* factors, courts have found evidence of premeditation and deliberation sufficient when a defendant's relevant "post-offense statements provide substantial insight into [his] thought processes" before the act. *People v. Sandoval*, 62 Cal. 4th 394, 424–25 (2015). And in cases that involve alleged gang members, evidence has been held sufficient where the defendant confessed to killing the victim to help a fellow gang member, *id.*, sought to elevate his own status in the gang by "killing a member of a rival gang," *People v. Romero*, 44 Cal. 4th 386, 401 (2008), or committed the crime in circumstances that reflect "a calculated plan on behalf of the [gang]," *People v. Gomez*, 6 Cal. 5th 243, 298 (2018), *reh'g denied* (Feb. 13, 2019).

None of these factors was present in either shooting here.

To start with planning—"the most important of the *Anderson* factors," *People v. Edwards*, 54 Cal. 3d 787, 814 (1991)—there was no evidence that Burciaga planned anything. Illustrative of planning are acts like carrying the weapon to a rendezvous with a prospective victim; a "surreptitious approach" toward the victim; simultaneous action by two shooters; or transportation of the victim to a secluded place. Wayne R. LaFave, *Substantive Criminal Law* § 14.7(a) (3d ed. Oct. 2018 update) ("LaFave"). *See*, *e.g.*, *People v. Casares*, 62 Cal. 4th

808, 825 (2016) (defendant prepared weapon before taking it to drug transaction with victim);[6] *People v. Cage*, 62 Cal. 4th 256, 276 (2015) (defendant dressed in dark clothing and hid shotgun in laundry basket before taking it with him to victim's house); *Romero*, 44 Cal. 4th at 401 (defendant brought gun with him to rival gang member's workplace).

The only person with a plan here was Campbell—the man who drove to the house armed with at least one gun, parked in the middle of the street (RT 1049–50), and after making a show of handing a gun to passenger Torres as if disarming himself, approached the three men in front of the house to get some answers from *Matthew* Burciaga.

There is no evidence that *Michael* Burciaga even knew who Campbell or Torres were. Or that that they were coming. Or what either of them wanted.

Nor is there evidence that Burciaga armed himself before the encounter. (*Cf.* App. 6.) All we know is that after Campbell approached Burciaga, Burciaga wound up with a gun. No one saw where the gun came from. And though Torres didn't *see* a gun on Campbell (RT 1069), he didn't see one on Burciaga, either. So for all Torres could have known, Burciaga could well have wrested a reserve weapon that Campbell pulled as part of a planned "drive-by" (RT 1250–51)—consistent with his decision to leave the SUV running and ready for a quick escape (RT 973). Whatever else one might speculate about the encounter, Campbell is the only person known for a fact to have come to the scene armed.

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[6] *Disapproved of on other grounds by People v. Dalton*, 7 Cal. 5th 166 (2019).

But even if Burciaga had armed himself beforehand, there was no evidence that his purpose had anything to do with Campbell and Torres's unannounced arrival. *Cf. Casares*, *Cage* & *Romero*, *supra* pp. 10–11; *People v. Miller*, 50 Cal. 3d 954, 993 (1990) (defendant took pipe with him to four separate crime scenes and then used it to kill victims); *People v. Miranda*, 44 Cal. 3d 57, 87 (1987) (defendant brought gun with him to store, then used it to kill unarmed victim);[7] *People v. Alcala*, 36 Cal. 3d 604, 626 (1984) (defendant brought gun along while he asported victim to isolated location). And even if it had, again, it would *still* be unreasonable to find that such preparation would permit a rational inference of an intent to kill someone "without provocation." *Juan H. v. Allen*, 408 F.3d 1262, 1266, 1278 (9th Cir. 2005).

As for Torres, the prosecution's only eyewitness, even he described the shot as fired not at him, but "at the vehicle." (RT 1059.) And the idea that Burciaga planned *this* shooting is affirmatively undone by the evidence: Since he didn't shoot at the car until Valdivia yelled out to "get him," it wasn't until after that moment that even a bare intent to shoot could have formed—with no evidence that his doing so was other than immediate and impulsive. (*See* RT 988–89 (describing sequence).)

Any way you look at it, the record is simply bereft of any evidence of planning.

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[7] *Abrogated on other grounds by People v. Marshall*, 50 Cal. 3d 907, 933 n.4 (1990).

There is likewise a complete absence of evidence of motive, usually shown through some "prior relationship and/or conduct with the victim" from which motive could be reasonably inferred. *Anderson*, 70 Cal. 2d at 27. There is no evidence that Michael Burciaga even knew who Campbell, Torres, or Valdivia were. Michael didn't live at the house, but miles away. (RT 1083–84.) The only person Campbell went to the house to see was Matthew. Torres testified that *he* didn't know Michael. (RT 1067.) And Michael and Valdivia left the house separately—the latter on foot, instead of getting a ride with his supposed fellow gang member. (RT 1216.)

Nor does the evidence that Campbell, Valdivia, and Burciaga were members of Perth change matters. As gang officer Gutierrez himself acknowledged, "not everyone [in the gang he purported to identify] knows each other." (RT 1249.) "Missing [too] was all evidence typical of crimes committed for the benefit of the gang[]—gang colors, gang clothing, gang accruements, gang signs, gang epithets, help by other gang members." *People v. Perez*, 18 Cal. App. 5th 598, 613–14 (2017). There was thus no way Burciaga himself could have inferred anyone's membership from the circumstances. *Cf. People v. Villalobos*, 145 Cal. App. 4th 310, 322 (2006).

Nor is gang officer Gutierrez's "purely conclusory and factually unsupported" conclusion that this was a gang-related shooting entitled to any weight by jurors. *Perez*, 18 Cal. App. 5th at 608. Again, the generic theory he invoked—that the gang benefits whenever its members kill each other (RT 1240–41)—"obviously makes no sense."

*Ramirez*, 244 Cal. App. 4th at 819; *accord Perez*, 18 Cal. App. 5th at 610 (noting that similarly "sweeping" logic leads to the unsustainable view that "essentially any shooting by a gang member [in gang territory is] gang related").

As for the troubles the Blackwood subset of the unproven "gang" had caused (App. 45), these were a complete red herring—a gimmick the prosecutor used to focus jurors' attention on the "specter of gang violence" (RT 902) rather than on the substance of the evidence. Nothing about this shooting—nothing—was linked to Blackwood. There was no evidence that the shooting of Joker the day before had anything to do with Blackwood. Or that anyone present during this shooting had ever affiliated with anyone in Blackwood. Or had met them. Or even *heard* of them.

In short, there was not a whit of evidence of motive.

The same goes, finally, with the manner of both shootings, which suggests at most a random, indiscriminate attack. What's usually required on this score is evidence that the wounds were "deliberately placed" at "vital areas" of the body." LaFave § 14.7(a). *See*, *e.g.*, *Casares*, 62 Cal. 4th at 825 (single gunshot to back of victim's head); *Romero*, 44 Cal. 4th at 393 (same).

Torres's vague testimony about Campbell's wound or wounds rules out any rational inference that they were deliberately placed. *Cf. Casares* & *Romero*, *supra*. While Campbell was of course seriously injured, that's what you'd expect of an intentional shooting at near-point blank range. And it was Campbell who approached the men

standing on the Burciaga family property, not vice versa. So given how close they were, the only salient fact about the injuries is that despite four to five shots—at point-blank range—Campbell appears to have been hit only once or (maybe) twice.[8]

Most salient of all, though, is that once Campbell turned, badly wounded, and made his way back to the SUV, some 20 or 30 feet away (*see* App. 56 (trial exhibit)), Burciaga fired no shots at all. Given the subsequent shot or shots at the SUV, there must have been bullets left in the gun. So Burciaga could have taken another shot at Campbell if he'd wanted to kill him. Instead, he let Campbell lamely walk away. That is affirmative *disproof* of any cool, calculated intent to kill.

As for the manner of the shooting at Torres, we don't even know whether the fired bullet hit the side of the stationary, full-size SUV Torres was in, much less that it was fired in "so particular and exacting" a manner that Burciaga must have had a "preconceived design" to kill Torres. *Anderson*, 70 Cal. 2d at 27.

The state court's contrary decision rested almost entirely on the observation in *People v. Sanchez*, 26 Cal. 4th 834 (2001), that premeditation "can" be established in the context of a "gang shooting" even when "the time between the sighting of the victim and the actual shooting is very brief." (App. 46 (quoting *Sanchez*, *supra*, at 849).) No doubt it "can." But *Sanchez* itself shows why here it doesn't: The *Sanchez* shooting was between "members of rival gangs," who "had

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[8] Torres testified that he'd held his hand over Campbell's stomach while on the way to the hospital. (RT 987.) But he also mentioned that after the shooting, Campbell had one hand over his stomach and the other over his chest. (RT 986.)

armed themselves and premeditated and deliberated the attempted murder of one another." 26 Cal. 4th at 849. Both shooters *admitted* that they'd committed the shootings "for the benefit of their street gangs." *Id*. at 850. It was given those facts, and given the members' "mutual planning of one another's murder," that the *Sanchez* court held that a rational juror could find premeditation *despite* the "spontaneous" manner of the shooting itself. *Id*.

By ignoring the actual circumstances that gave rise to a rational inference of deliberation in *Sanchez*, the state court treated the rubric "gang shooting" here as if it absolved the state of its burden to prove premeditation and deliberation. A mere label like that does not, and could not, do so—not reasonably consistent with *Jackson*, it couldn't. Nothing in the evidence here suggests the "studied hatred and enmity," *id*.—the "*preplanned,* purposeful resolve to shoot anyone in a certain neighborhood wearing a certain color," *id*.—expressly under consideration when the *Sanchez* court held what it did about premeditation and deliberation in the context of gang shootings. By treating the "gang shooting" label as a substitute for premeditation and deliberation, then, the state court unreasonably applied *Jackson*.

The Ninth Circuit panel's decision not only skirts these points, but repeatedly elides the key context from the record and from the state court precedent it cites as ostensible support:

- The idea that Burciaga's shooting Campbell "in the stomach at point-blank range[] further demonstrat[es] premeditation and deliberation" as in *People v. Koontz*, 27 Cal. 4th 1041, 1082

(2002) (App. 6) ignores the "active steps" the defendant in *Koontz* took "to prevent [his victim] from summoning medical care," 27 Cal. 4th at 1082, not to mention the unmistakable contrast here—Burciaga's passivity while Campbell made his way back to his car. *See supra* p. 15.

- The idea that "[p]otential gang rivalries" supports an inference of a "*preplanned*" resolve to shoot as in *Sanchez*, 26 Cal. 4th at 834 (App. 4) ignores that Burciaga neither traveled to any rival's house, nor "t[ook] up a shooter's position," much less did he "admit[]" that the shooting was "for the benefit of [his] street gang." *Cf. id*.
- The idea that "Burciaga approached the unarmed Campbell with a gun and a plan to shoot him" as in *People v. Romero*, 44 Cal. 4th 386 (2008) (App. 6) ignores that there is no evidence that Burciaga was the one who brought the gun to the encounter, much less that he used it in a way comparable to the *Romero* defendant. *See supra* p. 11; *cf. Romero*, 44 Cal. 4th at 401 ("Defendant brought a gun to the video store where, without any warning or apparent awareness of the impending attack, [he shot the victim] in the back of the head.").
- The idea that despite the complete failure of proof of any relevant gang rivalry here, Burciaga "may still have considered [his victim] a gang rival" as in *People v. Rand*, 37 Cal. App. 4th 999 (1995) (App. 4) ignores that the defendant in *Rand*

"admitted" he "believed" those he shot at "were rival gang members." *Id*. at 1002.

- Finally, the idea that Valdivia's shouted remark was evidence that the two "came to an agreement" as in *People v. Bolin*, 18 Cal. 4th 297, 332 (1998) (App. 3) simply assumes what it would prove, because there's no evidence that Valdivia's outburst itself was other than impulsive, and no evidence that Valdivia's instantaneous reaction to it was other than pure reflex in the charged moments following the encounter with Campbell.

In sum, no rational juror would have found premeditation and deliberation from facts like these—on any standard of proof, much less beyond a reasonable doubt. And no fairminded jurist would disagree. The Ninth Circuit panel's contrary ruling is so clearly erroneous as to merit summary reversal.

## CONCLUSION

For all these reasons, the Court should summarily reverse the Ninth Circuit's decision as to Burciaga's *Jackson* challenge to the jury's premeditation findings.

Respectfully submitted,

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