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FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUNG LINH HOANG, Petitioner-Appellant, v. RAYMOND MADDEN, Warden, Respondent-Appellee.	No. 20-56054 D.C. No. 8:17-cv-00495-RGK-KES Central District of California, Santa Ana ORDER

Before: BERZON and BADE, Circuit Judges.

The request for a certificate of appealability 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.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUNG LINH HOANG,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. 8:17-cv-00495-RGK-KES

ORDER DENYING CERTIFICATE OF APPEALABILITY

"Unless a circuit justice or judge issues a certificate of appealability ["COA"], an appeal may not be taken to the court of appeals from … the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.]" 28 U.S.C. § 2253(c)(1)(A). "[A] state prisoner who is proceeding under § 2241 must obtain a COA...." Wilson v. Belleque, 554 F.3d 816, 825 (9th Cir. 2009).

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides in relevant part:

(a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse

> to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
>
> (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Rule 11, Rules Governing 28 U.S.C. § 2254 Cases.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In Slack v. McDaniel, 529 U.S. 473 (2000), the United States Supreme Court held that, to obtain a COA under § 2253(c), a habeas petitioner must show that "reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Id. at 483-84 (citation omitted). "The COA inquiry … is not coextensive with a merits analysis." Buck v. Davis, 137 S. Ct. 759, 773 (2017). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003); see also Frost v. Gilbert, 835 F.3d 883, 888 (9th Cir. 2016) ("The standard for granting a certificate of appealability is low.").

In the present case, the Court finds that Petitioner has not made the foregoing showing with respect to any of the grounds for relief alleged in the Petition.

Specifically, he failed to make a substantial showing that counsel's performance at trial was constitutionally deficient or that he was prejudiced by any unprofessional errors. Accordingly, a COA is denied in this case.

DATED: 9/21/2020

R. Gary Klausner
UNITED STATES DISTRICT JUDGE

Presented by:

KAREN E. SCOTT
United States Magistrate Judge

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUNG LINH HOANG,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. 8:17-cv-00495-RGK-KES

JUDGMENT

Pursuant to the Court's Order Accepting Report and Recommendation of U.S. Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action dismissed with prejudice.

DATED: 9/21/2020

R. Gary Klausner
UNITED STATES DISTRICT JUDGE

O

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUNG LINH HOANG,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. 8:17-cv-00495-RGK-KES

ORDER ACCEPTING REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition (Dkt. 37), the other records on file herein, and the Report and Recommendation of the U.S. Magistrate Judge (Dkt. 76). Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections (Dkt. 79) have been made. The Court accepts the report, findings, and recommendations of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: 9/21/2020

Hon. R. Gary Klausner
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUNG LINH HOANG,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. 8:17-cv-00495-RGK-KES

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation ("R&R") is submitted to the Honorable R. Gary Klausner, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

Petitioner filed a Petition for Writ of Habeas Corpus by a person in state custody pursuant to 28 U.S.C. § 2254 challenging his 2004 conviction for attempted murder. (Dkt. 37 ["Pet."].) For the reasons discussed below, Petitioner's sole claim of ineffective assistance of counsel ("IAC") fails on the merits, and the Petition should be denied.

II.

FACTUAL BACKGROUND

The underlying facts are taken from the unpublished 2006 California Court of Appeal decision on Petitioner's direct appeal. (Lodged Document ["LD"] 10); People v. Hoang, G034779, 2006 Cal. App. Unpub. LEXIS 3725 (Apr. 28, 2006). Unless rebutted by clear and convincing evidence, these facts may be presumed correct. Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1).

I. PROSECUTION'S CASE

[Petitioner] was a member of and an active participant in the criminal street gang known as Dragon Family Junior/Nip Family Junior (DFJ/NFJ). At 7:00 p.m. on May 3, 2003, 17-year-old [Sean Scarbrough] was in his bedroom when he heard loud shouting in Vietnamese. [Scarbrough] lived with his mother in an apartment complex in Westminster. He looked out his sliding glass door to a parking area. Both [Petitioner] and a second man (the victim) were outside yelling.

[Scarbrough] saw [Petitioner] get out of a car and chase the victim around the car a couple of times. [Petitioner] was holding a gun in his right hand. [Scarbrough] heard [Petitioner] say in English, "fuck you. I'm going to fucking kill you." [Scarbrough] testified [Petitioner] sounded angry. [Petitioner] and the victim faced each other about eight feet apart when [Petitioner] pointed the gun at the victim. The victim "put his hands up to kind of like defend-not defend himself, but to shield him, shield his face, sort of." [Petitioner] pulled the trigger and [Scarbrough] "heard the hammer click." The gun did not fire. The victim jumped and looked shocked; [Petitioner] appeared to be angry. [Petitioner] opened the gun where the bullets are kept "to check to see if there were any bullets." He went back to the car, opened the door, and reached down by the side of or underneath the seat on the floorboard. [Scarbrough] never saw the victim with a weapon. After he saw [Petitioner] go back to his car, [Scarbrough] went into his mother's

bedroom to get a better view of what was happening. By the time he reached the window in his mother's bedroom, the victim had disappeared. [Scarbrough] saw a third man, later identified as Son Bui, approach [Petitioner], wrestle with him, and try to restrain him.

[Scarbrough] called 911. He saw police officers arrive and make contact with [Petitioner], Son Bui, and several other young men who were at the scene.

Officer Richard Mize was one of the officers who reported to the area that night after he received a report of a disturbance or a fight in a parking lot and an armed subject. In light of the information that one of the subjects was armed with a handgun, Mize and one other officer had their firearms drawn when they arrived on the scene. They ordered the individuals in the area, which included [Petitioner], Son Bui, Chuan Le, Hien Ngo and Tin Nguyen, to lie down on the ground. Mize asked if anyone was carrying a gun. Son Bui stated, "I have a gun." An officer removed a silver revolver from Son Bui's pants pocket; [Scarbrough] testified the gun looked like the same one he saw [Petitioner] holding. An officer also recovered a sock containing four bullets from Son Bui's pants pocket.

Mize took custody of the gun. He observed the hammer of the gun was cocked back and the gun was ready to fire. Mize opened the cylinder of the gun and found one live bullet that had not been fired. He observed a dimple on the casing, which resembled a "strike mark." Mize testified that a strike mark is a mark made when the trigger is pulled, the hammer strikes the casing, but the gun does not fire. Although the dimple was consistent with a strike mark caused by the misfire, Mize could not say for certain that was the cause for the mark. He testified it is not uncommon for a weapon to misfire. Mize later determined the gun had been reported stolen in 2002 during a residential burglary in Garden Grove.

That night, Mize spoke to DFJ/NFJ member Tin Nguyen at the scene. Nguyen appeared to be afraid and whispered when he talked to Mize. Mize testified Nguyen said he did not want to talk to Mize because he was afraid he

would be seen talking to a police officer. He told Mize that he heard some yelling and then saw [Petitioner] yelling and chasing another person; [Petitioner] had a gun in his hand. Nguyen stated he knew [Petitioner] as Ronnie and said he did know the other person, but "he was one of Ronnie's homies." A homie or homeboy is a fellow gang member. Nguyen later saw Son Bui standing by [Petitioner], trying to calm him down. Son Bui has a brother named Vu Bui known by his moniker "Voo Doo" who is a member of DFJ/NFJ.

At trial, Nguyen testified to a different version of events than what he had told Mize. He testified that on May 3, 2003, he saw "some guy chasing Ronnie around his car" and "Son Bui came down and took the gun away from the guy's hand." Nguyen identified "the guy" chasing [Petitioner] as Hong Tran. He stated Tran was a friend whom he has known for a year and thinks he was affiliated with DFJ/NFJ. When asked whether [Petitioner] was a fellow DFJ/NFJ member, Nguyen stated, "I'm not sure." Nguyen testified that it is not a good thing to rat on somebody who is a fellow gang member and that if you do, you either get killed or beat up-especially if you are in custody. Testifying in front of jurors could "cause somebody to get killed."

Mize also spoke with DFJ/NFJ member Le at the scene and later at the police station. At the scene, Le told Mize that [Petitioner] "told Son Bui that he wasn't his homie any more or home boy any more" and stated, "I'm tired of this shit." Le said he never saw anyone with a gun. At the police station, Le told Mize he had been lying and did not want to tell Mize what had happened while he was "out there in front of everyone else." Le told Mize that when he arrived that night, there was an argument going on in the parking lot. He saw [Petitioner] standing in the parking lot by the car, holding a silver handgun, and heard him yelling at Son Bui. [Petitioner] did not point the gun at Son Bui, but waved it around while yelling. Le heard [Petitioner] tell Son Bui "you're not my home boy any more. You shouldn't have done that" and "I'm tired of this."

At trial, Le described a different version of what happened that night. During direct examination, the prosecutor asked whether Le remembered an incident on May 3 and Le answered, "yes, sir." The prosecutor asked, "do you know which year I am going to ask you about?" and Le responded, "I say, he is innocent. I saw everything." Le testified he saw someone with a gun chase [Petitioner] around his car. Le denied telling the police he saw [Petitioner] with a gun in his hand. He denied telling the police that [Petitioner] told Son Bui, "you ain't my homie no more. What you did was wrong." Le added that he does not want to be involved, or to talk about anyone in a gang.

Detective Matthew Edinger of the gang unit for the Westminster Police Department testified that the primary activities of DFJ/NFJ, which he described as a "vicious" criminal street gang, are assault with a deadly weapon, attempted murder, murder, and residential burglary. Edinger testified that if someone is perceived to be a rat by, for example, providing information to the police, that "person has zero worth to the gang" and someone holding a gun on that person, injuring him or killing him would be viewed as a hero. Even if the victim is not perceived as a rat, violent conduct, such as pulling the trigger of a gun and intending to kill somebody, would benefit the gang and enhance the individual perpetrator's reputation because it strikes fear in gang rivals and also in the community.

Edinger testified that from March through May 2003, there were many DFJ/NFJ-related shootings. The police investigated multiple attempted murders which occurred in March 2003, which involved Voo Doo. [FN 1: [Petitioner] was not a charged defendant in connection with the March 2003 attempted murders in Garden Grove as of the time of trial.] Police officers successfully obtained information from members of the gang who would not ordinarily have been expected to be disloyal and give information to the police. Edinger testified that when word is out on the street that there are people from the gang giving

information to the police, "it's very dangerous to all the members of the gang. If the subject that's giving the information to [police] is not known, then all of the members of the gang are considered a rat. And it increases the distrust even within their own gang. And that's when we generally see assaults on one another within the gang." The police received information from a DFJ/NFJ member, which led to the arrest and prosecution of several individuals. Edinger testified the information he received from informants regarding the identity of the victim on May 3, 2003 was that [Petitioner] "had pointed the gun at a home boy." One informant said he or she believed the victim was Voo Doo.

II. DEFENSE CASE

On May 3, 2003, [Petitioner], an admitted member of DFJ/NFJ, testified he arrived at the parking area between the apartment complexes around 6:00 or 7:00 p.m. He went to that location to "jump" someone named "Hong" into the gang. [FN 2 omitted.] [Petitioner] testified he was not sure if he could remember Hong's last name and did not know his moniker. He testified he had the gang's gun and checked it to make sure it was empty because he was going to use the gun to test Hong and did not "want any accidents to happen." He chased Hong around the car while holding the gun. [Petitioner] stated he was not trying to kill Hong, but was testing him to see what he would do. [Petitioner] testified, "well, I chased him. And then, when he put his hands up, I just stopped. [P] And then I went to the car, you know. I pretended that I was going to put a bullet in. And then I put one in. And then Son [Bui] took away the gun." [Petitioner] stated he did not pull the trigger of the gun. [Petitioner] testified the other gang members who were present then jumped Hong into the gang by beating him up.

[Petitioner] testified he lied when he spoke to the police the night of May 3, 2003. He told the police then that he "didn't know anything" and that "the other guy had chased [him] with the gun." [Petitioner] told the police that he was with some friends when a guy named Hong, with whom he had been arguing, pulled a

gun on him; he said Son Bui took the gun from Hong and put it away. [Petitioner] told the police he did not know what he and Hong had been arguing about and he heard "the gun click at me." (LD 10 at 2-7.)

III.

PROCEDURAL HISTORY

A. Conviction and Direct Appeal.

In July 2004, Petitioner was convicted of attempted murder and street terrorism. (1 CT 188-93.)[1] He was sentenced to life in state prison, with the possibility of parole, plus a consecutive 10-year term. (1 CT 265-67.)

Petitioner appealed. The California Court of Appeal affirmed the judgment. (LD 10.) The California Supreme Court summarily denied review. (LD 11, 12.)

B. First Round of State Habeas Review.

Petitioner filed a counselled habeas petition in the California Court of Appeal, case G039413, claiming IAC because retained trial counsel "abrogated his Fifth Amendment right to remain silent and improperly encouraged false testimony." (LD 13 at 3 [Table of Contents III].)[2] Specifically, Petitioner argued that his attorney told him to take the stand and falsely testify that he pointed a gun at the victim but did so only as part of a gang initiation ritual with no intent to kill. (Id. at 22-23.) When Petitioner told counsel that he did not want to testify at all, counsel "became agitated and started to yell at Petitioner. He told Petitioner that if Petitioner did not trust him, he could fire him." (Id. at 23.)

On October 25, 2007, the court of appeal denied the petition without prejudice so that Petitioner could first file a habeas corpus petition in the trial court.

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[1] The Clerk's Transcript ("CT") can be found at Dkt. 49-5 and Dkt. 49-6.

[2] The Lodged Documents ("LDs") can be found at Dkt. 49. Except for citations to the Clerk's Transcript and Reporter's Transcript, all page citations to documents on the docket refer to the pagination imposed by the Court's electronic filing system.

(LD 14.) Petitioner filed a habeas corpus petition in the Orange County Superior Court ("OCSC"), case M11652, raising the same IAC claim. (LD 15.) The OCSC denied the petition as untimely. (LD 16.)

Petitioner then returned to the California Court of Appeal, case G040197, raising the same IAC claim. (LD 17.) The court denied the petition without comment. (LD 18.)

C. First Round of Federal Habeas Review.

In October 2010, Petitioner filed a pro se federal petition for writ of habeas corpus in the Central District of California, CV10-01588-RGK-RZ, claiming: (1) IAC for insisting that he testify and encouraging him to testify falsely that he had the gun; (2) double jeopardy; and (3) prosecutorial misconduct. (LD 19.) On January 3, 2011, the district court issued an amended report and recommendation finding the petition untimely. (LD 23.) The amended report and recommendation was adopted. (LD 25.)

D. Return to State Court.

Petitioner filed a counselled petition with the OCSC requesting that his conviction for street terrorism be reduced to a misdemeanor under a newly enacted California law. (LD 27 at 86.) The OCSC denied the petition, finding that the offense was ineligible for reduction. (Id. at 89.)

Petitioner appealed. His counsel filed a brief pursuant to People v. Wende, 25 Cal. 3d 436 (1979), requesting that the appellate court independently review the record for appealable issues. (LD 28.) The court granted Petitioner an opportunity to file a supplemental brief. (LD 29.) He did so, raising multiple claims. (LD 30.) The court issued an opinion rejecting all of his claims, because they were either addressed in the prior appeal or should have been raised then. (LD 32.)

Petitioner filed a pro se petition for review in the California Supreme Court, case S233311, claiming error in the refusal to reduce the street terrorism conviction to a misdemeanor. (LD 39.) The court denied the petition for review without

comment on April 27, 2016. (LD 40.)

E. Second Round of State Habeas Review.

While this second appeal was ongoing, Petitioner filed a counselled petition for writ of habeas corpus in the California Court of Appeal, case G052501, claiming that his street terrorism conviction should be vacated due to the decision in People v. Rodriguez, 55 Cal. 4th 1125 (2012). (LD 33.) The parties briefed the issue. (LD 37, 38, 43, 45.) In December 2016, the court granted relief by striking Petitioner's conviction on the street terrorism charge. (LD 48.) The appellate court directed the OCSC to "amend the abstract of judgment accordingly and to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation." (Id. at 11.)

F. Second Round of Federal Habeas Review.

On March 15, 2017, Petitioner filed a letter and a copy of the California Court of Appeal's decision striking the street terrorism conviction in the Eastern District of California. (LD 50.) After the filing was construed as a § 2254 habeas petition and transferred to the Central District (i.e., the district where Petitioner was convicted), the Court dismissed the petition as successive to the § 2254 petition he had filed in 2010. (LD 51.)

Petitioner appealed. The Ninth Circuit issued an order ruling that the letter should have been construed as a request for appointment of counsel, but that even if it were construed as a § 2254 petition, it would not be successive, because in March 2017, Petitioner was in custody pursuant to a new, amended judgment. (LD 55.)

After remand, the Court issued an order directing Petitioner to clarify his request for appointment of counsel, since it was unclear why Petitioner sought counsel. (LD 56.) After receiving Petitioner's explanation that wished to have counsel appointed to challenge the attempted murder conviction on the basis of newly-discovered evidence, the Court denied the request for appointment of counsel without prejudice and directed Petitioner to file a federal habeas corpus

petition. (LD 59.)

Instead, Petitioner filed a request for a stay. (LD 60.) Noting that Petitioner had still not filed a federal petition, the Court denied the request for a stay without prejudice. (LD 61.)

The Court appointed the Federal Public Defender's Office to represent Petitioner, which filed the instant federal habeas corpus petition claiming IAC. (Dkt. 37.) Petitioner's new counsel also requested a stay so that Petitioner could exhaust his IAC claim in the California Supreme Court. (Dkt. 38.) The Court granted the unopposed stay motion. (Dkt. 42.)

G. Exhaustion in the California Supreme Court.

On April 14, 2019, Petitioner filed a petition for writ of habeas corpus, case S255313, raising the same IAC claim as presented in the instant federal Petition. (LD 62-65.) On July 10, 2019, the California Supreme Court denied the petition as untimely and for failure to include sufficient supporting evidence, as follows:

> The petition for writ of habeas corpus is denied. (See In re Robbins (1998) 18 Cal.4th 770, 780 [courts will not entertain habeas corpus claims that are untimely]; People v. Duvall (1995) 9 Cal.4th 464, 474 [a petition for writ of habeas corpus must include copies of reasonably available documentary evidence].)

(LD 66.)

H. The Federal Motion to Dismiss.

On August 16, 2019, Respondent moved to dismiss the Petition, arguing that the California Supreme Court's state-law untimeliness finding was a procedural bar to federal habeas review and also arguing that the Petition was untimely under the federal one-year statute of limitations. (Dkt. 48.) Petitioner opposed the motion, arguing that (1) there was cause and prejudice to excuse any procedural default and (2) the Petition was timely under federal law due to the 2018 amended judgment. (Dkt. 52.) Upon considering these arguments, Respondent withdrew the motion.

(Dkt. 54.)

I. Subsequent Federal Proceedings.

On November 1, 2019, Respondent filed an Answer addressing the merits of the Petition and not asserting the defense of procedural default. (Dkt. 56-1.) Petitioner filed a Traverse. (Dkt. 59.)

In January 2020, the Court requested supplemental briefing addressing whether the California Supreme Court's cite to Duvall indicated a decision on the merits. (Dkt. 61.) Respondent argued that a free-standing Duvall citation indicates a failure to state a prima facie case, i.e., a decision on the merits. (Dkt. 64.) Petitioner countered that this Duvall citation indicated a procedural denial because of its pin cite and the parenthetical that "a petition for writ of habeas corpus must include copies of reasonably available documentary evidence." (Dkt. 68.)

In March 2020, the Court requested further supplemental briefing to address the consequences of a procedural denial. (Dkt. 69.) Respondent argued that a procedural denial would create a procedural bar that it had not waived. (Dkt. 72.) Petitioner countered that Respondent had waived the affirmative defense of a procedural bar. (Dkt. 74.) Petitioner further argued that Duvall does not embody an adequate and independent state procedural rule. (Id. at 7-8.)

IV.

CLAIM

Petitioner asserts one IAC claim: "Hoang's trial attorney Michael Molfetta was constitutionally ineffective because he coerced Hoang to testify falsely, thus prejudicing his defense." (Pet. at 17.) Specifically, Petitioner contends that counsel coerced him to testify falsely that, as part of a gang initiation, Petitioner pointed an unloaded gun at Hong and chased him. (Id. at 15.) In truth, Petitioner asserts, Hong chased Petitioner with a gun. (Id. at 14.)

The Court addresses the two parts of this claim separately, considering whether habeas relief is merited because (1) counsel *coerced* Petitioner to testify, or

(2) counsel coerced Petitioner to testify *falsely*.

V.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act ("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, 563 U.S. 170, 181 (2011).

Sometimes, state courts deny claims on procedural grounds instead of reaching the merits. This can affect the federal court's review of the denial. For example, the procedural default doctrine bars federal habeas review when a state court declines to address a prisoner's claims for failing to meet a state procedural requirement. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991).

Here, the state court decision subject to review is the California Supreme Court's denial on habeas review citing Robbins and Duvall. A citation to Robbins can be a procedural bar to federal habeas review. See Martin v. Walker, 562 U.S. 307 (2011). Respondent has waived any argument that the Robbins citation bars Petitioner from bringing his claims; as noted above, Respondent withdrew the motion to dismiss brought on these grounds. See Vang v. Nevada, 329 F.3d 1069, 1073 (9th Cir. 2003) (holding that unless respondent asserts procedural defense as a defense, defense is waived).

It is still an open question, however, whether the Duvall citation indicated a procedural denial and, if it did, what effect that has on this Court's review. In the Answer and supplemental briefing, Respondent urged the Court to treat the Duvall citation as a merits-based denial entitled to AEDPA deference. (Dkt. 56, 64, 72.) The Court is persuaded, however, that the California Supreme Court's citation to

Duvall indicated a procedural denial, meaning that the state court did not reach the merits of his claim.

Duvall establishes a procedural rule that California habeas petitions "include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." Duvall, 9 Cal. 4th at 474 (citations omitted). Federal courts view this as a procedural denial, not a decision on the merits. See, e.g., Gamez v. Curry, No. 09-1229 PJH PR, 2010 WL 330210, at *2 (N.D. Cal. Jan. 20, 2010). Here, the California Supreme Court included a parenthetical explicitly stating that it was applying this procedural rule. (LD 66.) Thus, the California Supreme Court did not reach the merits of Petitioner's claim. Compare Seeboth v. Allenby, 789 F.3d 1099, 1104 n.3 (9th Cir. 2015), cert. denied, 136 S. Ct. 1168 (2016) (holding that "freestanding citation to Duvall" without explanation was a decision on the merits, where petitioner brought only a facial challenge to a law which "would not require him to allege any facts about his situation beyond the undisputed and properly pleaded fact that he had been civilly committed as a [Sexually Violent Predator]"); see also Chambers v. McDaniel, 549 F.3d 1191, 1197 (9th Cir.2008) (noting that federal courts should construe state courts as relying on procedural bar where the state court expressly states as much).

Thus, no state court has ever reached the merits of Petitioner's IAC claim, and Respondent for the first time in its supplemental briefing asserts the affirmative defense of procedural bar under Duvall. (See Dkt. 72 at 3.) Respondent did not raise this defense either in its motion to dismiss or in its answer to the Petition. (See Dkt. 48-1, 56-1.) Furthermore, it is unclear whether Duvall is an adequate and independent state law rule that would support a procedural bar. See Kamfolt v. Lizarraga, No. 17-cv-00970-HSG, 2019 U.S. Dist. LEXIS 29705, at *14-15 (N.D. Cal. Feb. 25, 2019) (citing cases in which district courts have noted uncertainty about whether Duvall's procedural requirement of attaching reasonably available

documentary evidence gives rise to procedural default).[3] Given Respondent's failure to raise this defense earlier, the complexity of the procedural default issue, and that Petitioner's claims fail even under de novo review, the Court will analyze the merits of Petitioner's IAC claim de novo. See Lambrix v. Singletary, 520 U.S. 518, 525 (1997) (noting that, in the interest of judicial economy, courts may resolve easier matters where complicated procedural default issues exist).

VI.

DISCUSSION

A. Relevant Federal Law.

A petitioner claiming IAC must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 688-89. To show deficient performance, the petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Further, the petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The initial court considering the claim must then "determine whether, in light of

[3] In this case, the Duvall citation alone likely would not have been an "adequate" basis to deny Petitioner's IAC claim, because Petitioner could have amended his petition to add documentary evidence but for the additional finding that his petition was untimely. The Court also notes that Petitioner attached hundreds of pages of documentary evidence to his counseled state exhaustion petition, including transcripts and declarations. (LD 62-65.) To the extent the California Supreme Court intended to indicate that Petitioner was required to obtain a declaration from Molfetta, it is unclear why such a declaration would be considered "reasonably available." Retained counsel who are no longer being paid have no obligation to cooperate in providing evidence for post-conviction proceedings.

all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, the petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. A court deciding an IAC claim need not address both components of the inquiry if the petitioner makes an insufficient showing on one. Id. 697.

B. Summary of Petitioner's Arguments.

1. Deficient Performance.

Petitioner alleges that Molfetta "cajoled his teenaged client—against that client's express wishes—not only to testify, but to testify falsely." (Pet. at 18.) According to a sworn declaration from Petitioner, Molfetta told Petitioner that testifying truthfully would lead to life in prison, whereas testifying falsely would at most lead to a conviction for possessing and/or brandishing a gun and a sentence of time served. (Pet. Ex. 3, Dkt. 37-1 at 334-35.) Further, Petitioner claims that when he informed Molfetta of his desire not to testify, Molfetta responded by "yelling at [Petitioner] and tel[ling] [Petitioner] that if [Petitioner] did not trust [Molfetta], [Petitioner] could go ahead and fire [Molfetta]." (Id. at 335.) Petitioner also asserts that Molfetta applied pressure through Petitioner's father, and that the financial investment Petitioner's family made by hiring Molfetta added additional pressure to follow Molfetta's advice. (Pet. Ex. 18, Dkt. 37-3 at 86 ¶ 7; Pet. Ex. 3, Dkt. 37-1 at 335.)

Petitioner contends that Molfetta's conduct violated the "special duty of an attorney to prevent and disclose frauds upon the court." (Pet. at 18 [citing Nix v. Whiteside, 475 U.S. 157, 168-69 (1986)].) Such conduct, Petitioner argues, falls below an objective standard of reasonableness under prevailing professional norms.

Strickland, 466 U.S. at 687. Petitioner asserts that this duty to protect against perjury is so established and the violation here so egregious that it overcomes the "strong presumption" of reasonableness usually accorded counsel's decisions. Kimmelman v. Morrison, 477 U.S. 365, 383 (1986).

2. Prejudice.

Assessing prejudice under Strickland, Petitioner argues that "it's reasonably likely that but for the error, 'at least one juror would have harbored a reasonable doubt' about an essential fact." (Pet. at 20 [citing Buck v. Davis, --- U.S. ---, 137 S. Ct. 759, 776 (2017)].) Petitioner emphasizes he need only establish a reasonable probability, "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

First, Petitioner asserts that the perjured testimony coerced by Molfetta undermined Petitioner's credibility, because Petitioner had previously given audiotaped statements in police interviews which contradicted his sworn testimony on the stand. (Pet. at 18.)

Second, Petitioner contends the perjured testimony undercut the trial testimony of prosecution witnesses Nguyen and Le, which corroborated Petitioner's original statements to police. (Id. at 18-19.) While Petitioner recognizes that credibility is an issue for the jury, Petitioner points out that the Nguyen and Le were prosecution witnesses, and Nguyen risked losing a plea deal if he testified falsely. (Id. at 19.)

Third, Petitioner argues that the prosecution's other witness, Sean Scarbrough, had reliability problems such that "reasonable jurors would not likely have given his identification testimony great weight." (Id.)

Finally, Petitioner outlines the "relative implausibility" of the prosecution's theory of the crime and argues that Petitioner's false testimony gave credence to a theory that the jury might otherwise have doubted. (Id.) By testifying to a set of facts that matched certain aspects of the prosecution's theory, Petitioner argues,

Petitioner offered a "strong indicator that observable events actually tracked the theory." (Id. at 20.)

According to Petitioner, the combined effects of Molfetta's deficient performance were to undermine Petitioner's credibility, dispute favorable witness testimony, and offer support to the prosecution's theory of the case in a manner "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Had Petitioner testified truthfully or not testified at all, his argument goes, there is a reasonable probability that at least one juror would have had reasonable doubt about at least one essential fact of the case.

C. Coerced Testimony IAC Claim.

1. Relevant Trial Court Proceedings.

Petitioner had retained Molfetta to represent him by the time of his arraignment in October 2003. 1 CT 80. Molfetta represented him through trial which began in July 2004. 1 CT 90. After the jury verdicts but before sentencing, Petitioner retained new counsel, Peter Larkin, in August 2005. 1 CT 224.

Molfetta reserved the defense opening statement. 1 RT 41. As he began to cross-examine Scarbrough, Molfetta reassured him, "I don't think you're lying. Okay? I think you saw what you think you saw. Okay?" 1 RT 140.

After the prosecution rested, Molfetta delivered a brief opening statement mostly endorsing Scarbrough's version of events. He told the jury, "what Sean Scarbrough saw was, plain and simply, a guy being jumped into the gang. … It was all an act and a charade …. There was no intent to kill anybody. … And you will hear it from [Petitioner]." 2 RT 413-14.

Immediately after concluding his opening statement, Molfetta called Petitioner to the stand. 2 RT 415. Petitioner took an oath to tell the truth. Id. He then testified that he was a gang member. Id. He also testified that he pointed an unloaded gun at a friend named Hong and chased him around a car as part of jumping Hong into the gang. 2 RT 419-421. He admitted that he lied to the police

when he told them that "the other guy" had chased him with the gun. 2 RT 421-22.

In his closing argument, Molfetta argued that the prosecution had failed to prove what happened beyond a reasonable doubt. 3 RT 580. He told the jury, "Is Sean Scarbrough lying? No. He's a kid who got caught in a very traumatic moment," such that some of his recollections, like hearing Petitioner threaten to kill the man he was chasing with a gun, were not reliable. 3 RT 599-600.

The jurors retired to deliberate on July 13, 2004. 3 RT 694. After asking some questions about the evidence, they announced their guilty verdicts at about 12:00 p.m. on July 14, 2004. 1 CT 212-13.

In October 2005, Larkin moved for a new trial on Petitioner's behalf. 1 CT 225. In that motion, Larkin continued the defense strategy of not challenging Scarbrough's basic version of events, calling Scarbrough "the one credible witness to these events." 1 CT 228.

Nothing in the record suggests that Petitioner ever expressed reluctance to testify while at court.

2. Evidence of Coerced Testimony.

According to Petitioner's 2007 declaration, Molfetta visited him in jail in early 2004 and told him that if he testified to a version of events that was roughly consistent with Scarbrough's observations (i.e., Petitioner had the gun and chased the victim), but also testified that there was an innocent explanation (i.e., it was part of a gang initiation ritual), then at worst Petitioner would be convicted of "possession of and/or brandishing a gun." (Dkt. 37-1 at 334.) Molfetta also told him that if Petitioner testified consistent with his statements to the police (i.e., claiming that the other man had the gun and chased Petitioner), then he "would get life in prison." (Id. at 335.)

About a week before trial, Petitioner told Molfetta in a phone call that he did not wish to testify at all. (Id.) Molfetta "started yelling" at Petitioner and told him that if he did not "trust him," then he should "fire him." (Id.) Petitioner ultimately

decided to testify in part because he "trusted" Molfetta. (Id.)

Petitioner's father also signed a declaration in 2007. (Id. at 337.) He recalled having a conversation with Molfetta wherein Molfetta handed him "copies of one or more police reports" and said "something to the effect, 'Ronnie had the gun. Believe me. If you read that, you will see that Robbie had the gun.'" (Id.) Molfetta also said, "Leave the strategy to me." (Id.)

After the call in which Petitioner told Molfetta he did not want to testify, Molfetta asked Petitioner's father to help "convince" him to take the stand. (Id.) Molfetta advised that testifying was "the only chance" at an acquittal and that the family should "trust him" regarding strategy. (Id.)

Petitioner's father expanded on this testimony in 2019. (Dkt. 37-3 at 86.) In this later declaration, he explained that "Molfetta had been insistent with me that Ronnie had the gun at the scene but was falsely denying it." (Id.) Petitioner's father told him that he "agreed with Molfetta that the matter was important, and that if in fact Ronnie had the gun, he should get up on the stand and admit it." (Id.)

3. Analysis.

Even accepting the truth of the declarations submitted by Petitioner and his father, they do not establish that Molfetta performed deficiently by "coercing" Petitioner to testify. Rather, Molfetta had a clear, reasonable strategy that he expressed to Petitioner and Petitioner's father and ultimately presented at trial. He was convinced by the police reports he gave to Petitioner's father (which showed that Le and Nguyen had both told police that Petitioner had the gun) and consistent statements by Scarbrough (a witness with detailed recollections and no reason to lie) that no jury would ever believe that Petitioner had been the victim. Per their declarations, Molfetta told Petitioner and his father as much. Molfetta also advised that to defeat the attempted murder charge, Petitioner would need to testify to somehow explain to the jury why he pointed the gun at the victim and pulled the trigger (as Scarbrough saw and heard him do) if he did not intend to kill the victim.

Ultimately, Petitioner decided to testify because he "trusted" this strategy, and it could not be executed without his testimony. (Dkt. 37-1 at 335.)

Petitioner now argues that he is entitled to a new trial because he decided to take the stand and lie. Notably absent from Petitioner's declaration is any assertion that he ever told Molfetta or his father that the story he gave the police was true or that he could not testify as Molfetta had advised without lying. Instead, Petitioner decided to adopt his attorney's proposed strategy: attempt to explain away his witnessed actions (while disclaiming any intent to kill) and roll the dice. He would have happily accepted an acquittal based on what he now calls false testimony, but the jury disbelieved him and convicted him. "If Petitioner, as he asserts, did not testify truthfully and believes he would have obtained a more favorable result at trial if he had done so, he cannot attribute this regrettable decision to his trial counsel." Stauffer v. Vasquez, No. SACV 05-1281-GW (MAN), 2008 U.S. Dist. LEXIS 124411, at *46-47 (C.D. Cal. Oct. 6, 2008) (denying IAC claim based on allegation petitioner believed that defense counsel wanted him to lie). Petitioner has not established any "coercion" to testify, and he thus cannot establish IAC.

Furthermore, Petitioner has not demonstrated prejudice. He claims that his testimony on the stand undermined his credibility. His credibility was already undermined by Scarbrough's testimony and the statements Nguyen and Le made to the police, all of which had strong indicia of reliability and contradicted Petitioner's original version of events (i.e., the one he now claims was true). Petitioner contends that his trial testimony undermined Nguyen and Le's trial testimony, but again, their trial testimony was severely undercut by their original statements to the police. Petition argues that Scarbrough had "reliability" problems, but Scarbrough by far was the most reliable witness. He had no motive to lie and his story remained materially consistent and corroborated by other evidence. Last, Petitioner calls the prosecution's theory of the crime "implausible," but the prosecution's theory—combined with the evidence presented at trial—was far more plausible

than any of Petitioner's stories of what happened that night. Thus, Petitioner has not demonstrated that, without his testimony at trial (or with testimony more in line with his original story to police), the result of the proceeding would have been different.

D. False Testimony IAC Claim.

Petitioner also claims trial counsel provided IAC by encouraging him to testify *falsely* at trial. (Pet. at 17.) Petitioner argues that, in doing so, counsel failed to exercise the "special duty of an attorney to prevent and disclose frauds upon the court." Nix, 475 U.S. at 168-69. Because Petitioner fails to establish that Molfetta *knew* the testimony Petitioner gave at trial was false, Petitioner cannot show Molfetta provided counsel that "fell below an objective standard of reasonableness … under prevailing professional norms." Strickland, 466 U.S. at 687-88.

1. To Violate the Special Duty to Prevent Frauds Upon the Court, Counsel Must Know the Testimony to be False.

In Nix, the Supreme Court recognized the "special duty of an attorney to prevent and disclose frauds upon the court" and held that attorneys are "precluded from taking steps or in any way assisting the client in presenting false evidence …." Nix, 475 U.S. at 166. Thus, counsel's refusal to permit the defendant in Nix to testify falsely did not deprive him of his right to effective counsel. Id. at 173; see also Mann v. Ryan, 828 F.3d 1143 (9th Cir. 2016) (holding that an attorney who threatened to withdraw if the defendant insisted on testifying falsely did not perform deficiently because he could not assist the defendant in testifying in a manner counsel knew to be false).

Unlike the defendants in Nix and Mann, who claimed that their counsel erred by threatening to expose their proposed perjury, Petitioner claims the opposite: that his counsel performed deficiently by urging him to commit perjury. Even assuming that this would violate the ethical standards laid out in Nix and constitute deficient performance, inherent in the prohibition against suborning false testimony is the

requirement that an attorney know the testimony to be given is false. See Nix, 475 U.S. at 170 ("The suggestion sometimes made that 'a lawyer must believe his client, not judge him' in no sense means a lawyer can honorably … give aid to presenting *known* perjury." (emphasis added)); Mod. Rules Prof. Cond. § 3.3(a)(3) (an attorney may not "*knowingly* … offer evidence that the lawyer knows to be false") (emphasis added); In re Branch, 70 Cal. 2d 200, 210 (1969) ("[A]n attorney may not '*knowingly* allow a witness to testify falsely'" but "a person can only be said to 'allow' that which he has the power to prevent." (emphasis added; citation omitted)).

In Nix, the petitioner consistently stated to counsel that he had not seen a gun in the victim's hand before changing his proposed testimony to claim he had seen something "metallic" in the victim's hand. 475 U.S. at 161. Similarly, in Mann, the defendant consistently told counsel that the murders had been premeditated before insisting that he testify he committed the crimes in self-defense. 828 F.3d at 1152-53. Following Nix, the Ninth Circuit held that "[counsel] would have been suborning perjury if, *knowing the murders had been premeditated*, [counsel] had allowed [defendant] to testify in support of the theory of self-defense." Id. at 1153 (emphasis added).

2. Petitioner Fails to Establish Molfetta Knew the Testimony was False.

To succeed in establishing that Molfetta suborned perjury, Petitioner must establish that Molfetta knew the testimony Petitioner gave was false. See Nix, 475 U.S. at 161; Mann, 828 F.3d at 1153. Petitioner bears the burden to overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; Cheney v. Washington, 614 F.3d 987, 994 (9th Cir. 2010). Absent specific facts showing Molfetta knew that Petitioner's testimony was false, Petitioner is not entitled to relief. See generally James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory

allegations which are not supported by a statement of specific facts do not warrant habeas relief").

Petitioner fails to show that Molfetta knew the testimony Petitioner gave on the stand was false. In fact, according to Petitioner, he only "declared that what he'd first told the police was the truth" in a declaration made after the trial in 2007. (Pet. at 14; Pet. Ex. 3, Dkt. 37-1 at 334 [the declaration].) Unlike the attorneys in Nix and Mann, Petitioner does not allege that he consistently told Molfetta his original statement to the police was true. See Nix, 475 U.S. at 161; Mann, 828 F.3d at 1153. Petitioner does not even allege that he told Molfetta the testimony would be false when Molfetta was allegedly coercing him to testify falsely. (Pet. at 14-15; Pet. Ex. 3, Dkt. 37-1 at 334-35.) He only alleges that he told Molfetta "that he did not wish to testify at all"; he does not assert that he explained to Molfetta why he did not wish to testify. (Pet. at 15; Pet. Ex. 3, Dkt. 37-1 at 335.) In fact, in conversations with Petitioner's father, Molfetta made clear he believed Petitioner was in possession of the gun and that statements to the contrary would be false. According to the 2007 declaration from Petitioner's father, Molfetta "handed [the father] copies of one or more police reports generated in connection with" the case and "said something to the effect, '[Petitioner] had the gun. Believe me. If you read that, you will see that [Petitioner] had the gun.'" (Pet. Ex. 4, Dkt. 37-1 at 337.) The 2019 declaration from Petitioner's father similarly states, "Molfetta had been insistent with me that [Petitioner] had the gun at the scene but was falsely denying it. ... So when I spoke to [Petitioner] about it, I told him that I agree with Molfetta ... that if in fact [Petitioner] had the gun, he should get up on the stand and admit it." (Pet. Ex. 18, Dkt. 37-3 at 86.)

Petitioner's declaration does contain language which, read in a light favorable to Petitioner, could imply Molfetta knew the testimony to be false. According to Petitioner, "Mr. Molfetta told me if I testified to what really happened, consistent with my statements to the police … that I would get life in

prison." (Pet. Ex. 3 at 335.) This could be read to show that Molfetta knew "what really happened" to be "consistent with [Petitioners] statements to police." Id. This reading does not pass scrutiny because Petitioner made multiple, contradicting statements to the police. When first confronted at the scene of the incident, Petitioner told a police officer "that he was not involved with what happened, that he just walked up smoking a cigarette." (Pet. Ex. 5, Dkt. 37-2 at 6.) In his follow-up interviews at the station, Petitioner changed his story, claiming that Hong had the gun and was chasing Petitioner, rather than the other way around (i.e., the same story that Petitioner's friends testified to at trial). (Id. at 5-6.) These statements to police contradict each other, and Petitioner does not allege which of the statements Molfetta knew to be true, or how Molfetta knew the statement to be true. Compare Nix, 475 U.S. at 161 (counsel's knowledge established by defendant consistently telling counsel he did not see gun); Mann, 828 F.3d at 1153 (counsel's beliefs established by defendant consistently telling counsel murder was premeditated). Further, Petitioner provides no evidence, such as a declaration from Molfetta or any other witness, that Molfetta knew one of the original statements to be true or the testimony given at trial to be false. See James, 24 F.3d at 26; Morales v. Holland, 155 F.Supp.3d 1048, 1053 (9th Cir. 2015) (finding lack of corroborating evidence indicative of cursory claim); Esparza v. Lizarraga, No. 2:17-CV-03168-AB-MAA, 2019 WL 320030 at *15, 2019 U.S. Dist. LEXIS 128173 at *42 (C.D. Cal. Mar. 1, 2019), report and recommendation adopted, 2019 WL 5589040, 2019 U.S. Dist. LEXIS 188434 (C.D. Cal. Oct. 28, 2019) (finding factual predicate lacking absent additional evidence). Absent more, such conclusory and unsupported allegations do not warrant habeas relief.

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VII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this R&R; and (2) directing that Judgment be entered denying the petition and dismissing this action with prejudice.

DATED: August 14, 2020

Karen E. Scott

KAREN E. SCOTT
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file Objections as provided in the Federal Rules of Civil Procedure and the instructions attached to this Report. This Report and any Objections will be reviewed by the District Judge whose initials appear in the case docket number.

S255313

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re HUNG LINH HOANG on Habeas Corpus.

The petition for writ of habeas corpus is denied. (See *In re Robbins* (1998) 18 Cal.4th 770, 780 [courts will not entertain habeas corpus claims that are untimely]; *People v. Duvall* (1995) 9 Cal.4th 464, 474 [a petition for writ of habeas corpus must include copies of reasonably available documentary evidence].)

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

CANTIL-SAKAUYE

Chief Justice

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

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Court data last updated: 07/11/2019 09:32 AM

Disposition

HOANG (HUNG LINH) ON H.C.
Division SF
Case Number S255313

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation: **none**

Date	Description
07/10/2019	Petition for writ of H.C. denied

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

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

Office of the County Clerk
Central Justice Center
700 Civic Center Drive
Santa Ana, CA 92702-1138

THE PEOPLE,
Plaintiff and Respondent,

v.

HUNG LINH HOANG,
Defendant and Appellant.

G034779

Sup. Ct. No. 03WF1095

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* * REMITTITUR * *

I, Stephen M. Kelly, Clerk/Administrator of the Court of Appeal of the State of California, for the Fourth Appellate District, Division III, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on April 28, 2006 and that this opinion has now become final.

___Appellant ___Respondent to recover costs
___Each party to bear own costs
XX___Costs are not awarded in this proceeding
___See decision for costs determination

Witness my hand and the Seal of the Court affixed at my office this July 26, 2006.

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
STATE OF CALIFORNIA

Stephen M. Kelly
Clerk/Administrator

By: Denise Massey
Deputy Clerk

cc: All Counsel (copy of remittitur only, Cal. Rules of Court, Rule 26(d).)

G034779
The People v. Hoang

Superior Court of Orange County

Appellate Defender's, Inc.
District Attorney
Department of Corrections

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HUNG LINH HOANG, Defendant and Appellant.	G034779 (Super. Ct. No. 03WF1095) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

A.M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia, Deana L. Bohenek and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

A jury found defendant Hung Linh Hoang guilty of street terrorism and of willful, deliberate and premeditated attempted murder committed for the benefit of, at the direction of, and in association with a criminal street gang. We affirm.

We reject each of defendant's contentions of error. First, neither the offense of street terrorism nor the offense of attempted murder as pleaded is a lesser included offense of the other. This is so even if we consider the gang enhancement under Penal Code section 186.22, subdivision (b)(1) as alleged in the information. (All further statutory references are to the Penal Code.) Second, the prosecutor did not engage in misconduct. Finally, substantial evidence showed defendant specifically intended to kill the victim and he acted with deliberation and premeditation.

BACKGROUND

I.

PROSECUTION'S CASE

Defendant was a member of and an active participant in the criminal street gang known as Dragon Family Junior/Nip Family Junior (DFJ/NFJ). At 7:00 p.m. on May 3, 2003, 17-year-old S. was in his bedroom when he heard loud shouting in Vietnamese. S. lived with his mother in an apartment complex in Westminster. He looked out his sliding glass door to a parking area. Both defendant and a second man (the victim) were outside yelling.

S. saw defendant get out of a car and chase the victim around the car a couple of times. Defendant was holding a gun in his right hand. S. heard defendant say in English, "[f]uck you. I'm going to fucking kill you." S. testified defendant sounded angry. Defendant and the victim faced each other about eight feet apart when defendant pointed the gun at the victim. The victim "put his hands up to kind of like defend—not defend himself, but to shield him, shield his face, sort of." Defendant pulled the trigger

and S. "heard the hammer click." The gun did not fire. The victim jumped and looked shocked; defendant appeared to be angry. Defendant opened the gun where the bullets are kept "to check to see if there w[ere] any bullets." He went back to the car, opened the door, and reached down by the side of or underneath the seat on the floorboard. S. never saw the victim with a weapon. After he saw defendant go back to his car, S. went into his mother's bedroom to get a better view of what was happening. By the time he reached the window in his mother's bedroom, the victim had disappeared. S. saw a third man, later identified as Son Bui, approach defendant, wrestle with him, and try to restrain him.

S. called 911. He saw police officers arrive and make contact with defendant, Son Bui, and several other young men who were at the scene.

Officer Richard Mize was one of the officers who reported to the area that night after he received a report of a disturbance or a fight in a parking lot and an armed subject. In light of the information that one of the subjects was armed with a handgun, Mize and one other officer had their firearms drawn when they arrived on the scene. They ordered the individuals in the area, which included defendant, Son Bui, Chuan Le, Hien Ngo and Tin Nguyen, to lie down on the ground. Mize asked if anyone was carrying a gun. Son Bui stated, "I have a gun." An officer removed a silver revolver from Son Bui's pants pocket; S. testified the gun looked like the same one he saw defendant holding. An officer also recovered a sock containing four bullets from Son Bui's pants pocket.

Mize took custody of the gun. He observed the hammer of the gun was cocked back and the gun was ready to fire. Mize opened the cylinder of the gun and found one live bullet that had not been fired. He observed a dimple on the casing, which resembled a "strike mark." Mize testified that a strike mark is a mark made when the trigger is pulled, the hammer strikes the casing, but the gun does not fire. Although the dimple was consistent with a strike mark caused by the misfire, Mize could not say for certain that was the cause for the mark. He testified it is not uncommon for a weapon to

misfire. Mize later determined the gun had been reported stolen in 2002 during a residential burglary in Garden Grove.

That night, Mize spoke to DFJ/NFJ member Tin Nguyen at the scene. Nguyen appeared to be afraid and whispered when he talked to Mize. Mize testified Nguyen said he did not want to talk to Mize because he was afraid he would be seen talking to a police officer. He told Mize that he heard some yelling and then saw defendant yelling and chasing another person; defendant had a gun in his hand. Nguyen stated he knew defendant as Ronnie and said he did know the other person, but "he was one of Ronnie's homies." A homie or homeboy is a fellow gang member. Nguyen later saw Son Bui standing by defendant, trying to calm him down. Son Bui has a brother named Vu Bui known by his moniker "Voo Doo" who is a member of DFJ/NFJ.

At trial, Nguyen testified to a different version of events than what he had told Mize. He testified that on May 3, 2003, he saw "some guy chasing Ronnie around his car" and "Son Bui came down and took the gun away from the guy's hand." Nguyen identified "the guy" chasing defendant as Hong Tran. He stated Tran was a friend whom he has known for a year and thinks he was affiliated with DFJ/NFJ. When asked whether defendant was a fellow DFJ/NFJ member, Nguyen stated, "I'm not sure." Nguyen testified that it is not a good thing to rat on somebody who is a fellow gang member and that if you do, you either get killed or beat up—especially if you are in custody. Testifying in front of jurors could "cause somebody to get killed."

Mize also spoke with DFJ/NFJ member Le at the scene and later at the police station. At the scene, Le told Mize that defendant "told Son Bui that he wasn't his homie any more or home boy any more" and stated "I'm tired of this shit." Le said he never saw anyone with a gun. At the police station, Le told Mize he had been lying and did not want to tell Mize what had happened while he was "out there in front of everyone else." Le told Mize that when he arrived that night, there was an argument going on in the parking lot. He saw defendant standing in the parking lot by the car, holding a silver

handgun, and heard him yelling at Son Bui. Defendant did not point the gun at Son Bui, but waved it around while yelling. Le heard defendant tell Son Bui "you're not my home boy any more. You shouldn't have done that" and "I'm tired of this."

At trial, Le described a different version of what happened that night. During direct examination, the prosecutor asked whether Le remembered an incident on May 3 and Le answered, "[y]es, sir." The prosecutor asked, "do you know which year I am going to ask you about?" and Le responded, "I say, he is innocent. I saw everything." Le testified he saw someone with a gun chase defendant around his car. Le denied telling the police he saw defendant with a gun in his hand. He denied telling the police that defendant told Son Bui, "you ain't my homie no more. What you did was wrong." Le added that he does not want to be involved, or to talk about anyone in a gang.

Detective Matthew Edinger of the gang unit for the Westminster Police Department testified that the primary activities of DFJ/NFJ, which he described as a "vicious" criminal street gang, are assault with a deadly weapon, attempted murder, murder, and residential burglary. Edinger testified that if someone is perceived to be a rat by, for example, providing information to the police, that "person has zero worth to the gang" and someone holding a gun on that person, injuring him or killing him would be viewed as a hero. Even if the victim is not perceived as a rat, violent conduct, such as pulling the trigger of a gun and intending to kill somebody, would benefit the gang and enhance the individual perpetrator's reputation because it strikes fear in gang rivals and also in the community.

Edinger testified that from March through May 2003, there were many DFJ/NFJ-related shootings. The police investigated multiple attempted murders which occurred in March 2003, which involved Voo Doo.[1] Police officers successfully obtained information from members of the gang who would not ordinarily have been expected to

[1] Defendant was not a charged defendant in connection with the March 2003 attempted murders in Garden Grove as of the time of trial.

be disloyal and give information to the police. Edinger testified that when word is out on the street that there are people from the gang giving information to the police, "[i]t's very dangerous to all the members of the gang. If the subject that's giving the information to [police] is not known, then all of the members of the gang are considered a rat. And it increases the distrust even within their own gang. And that's when we generally see assaults on one another within the gang." The police received information from a DFJ/NFJ member, which led to the arrest and prosecution of several individuals. Edinger testified the information he received from informants regarding the identity of the victim on May 3, 2003 was that defendant "had pointed the gun at a home boy." One informant said he or she believed the victim was Voo Doo.

II.

DEFENSE CASE

On May 3, 2003, defendant, an admitted member of DFJ/NFJ, testified he arrived at the parking area between the apartment complexes around 6:00 or 7:00 p.m. He went to that location to "jump" someone named "Hong" into the gang.[2] Defendant testified he was not sure if he could remember Hong's last name and did not know his moniker. He testified he had the gang's gun and checked it to make sure it was empty because he was going to use the gun to test Hong and did not "want any accidents to happen." He chased Hong around the car while holding the gun. Defendant stated he was not trying to kill Hong, but was testing him to see what he would do. Defendant testified, "[w]ell, I chased him. And then, when he put his hands up, I just stopped. [¶] And then I went to the car, you know. I pretended that I was going to put a bullet in. And then I put one in. And then Son [Bui] took away the gun." Defendant stated he did

[2] One way to join a gang is to be "jumped," which involves several members of the gang beating, punching and kicking the candidate for about 30 seconds. Generally, no weapons are involved. The object is for the candidate to fight back and show the gang that he or she is tough enough to take a beating as well as to "give one" when attacked by several individuals.

not pull the trigger of the gun. Defendant testified the other gang members who were present then jumped Hong into the gang by beating him up.

Defendant testified he lied when he spoke to the police the night of May 3, 2003. He told the police then that he "didn't know anything" and that "the other guy had chased [him] with the gun." Defendant told the police that he was with some friends when a guy named Hong, with whom he had been arguing, pulled a gun on him; he said Son Bui took the gun from Hong and put it away. Defendant told the police he did not know what he and Hong had been arguing about and he heard "the gun click at me."

III.

PROCEDURAL HISTORY

Defendant was charged in an information with attempted murder in violation of sections 664 and 187, subdivision (a), alleging he did so willfully, deliberately, and with premeditation within the meaning of section 664, subdivision (a) (count 1); and street terrorism in violation of section 186.22, subdivision (a) (count 2). With regard to count 1, the information alleged, inter alia, the following enhancement: "[P]ursuant to Penal Code Section 186.22[, subdivision] (b)(1), the above offense(s) was/were committed for the benefit of, at the direction of, and in association with a criminal street gang, to wit: DRAGON FAMILY JR./NIP FAMILY JR., with the specific intent to promote, further and assist in criminal conduct by gang members."

A jury found defendant guilty on both counts and found the enhancement allegation to be true. Defendant was sentenced to a total term of life in state prison, with the possibility of parole, plus a consecutive 10-year term. Defendant appealed.

DISCUSSION

I.

DEFENDANT'S CONVICTIONS FOR ATTEMPTED MURDER AND STREET TERRORISM DID NOT VIOLATE EITHER SECTION 654 OR THE FEDERAL CONSTITUTIONAL PROTECTIONS AGAINST DOUBLE JEOPARDY.

In his opening brief, defendant argues the attempted murder offense, as alleged in the information as incorporating the enhancement under section 186.22, subdivision (b)(1) (the gang enhancement), is a lesser included offense of street terrorism. He argues his convictions for both attempted murder and street terrorism as alleged violate section 654 and the federal constitutional protections against double jeopardy.

In his reply brief and in a supplemental brief, defendant makes the opposite argument—contending street terrorism is a lesser included offense of attempted murder with the gang enhancement as alleged in the information. Both of defendant's arguments are without merit.[3]

"We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.] A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, '"that is, evidence that a reasonable jury could find persuasive"' [citation], which, if accepted, '"would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser*' [citation]." (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.) "The definition of a lesser necessarily included offense is technical and relatively clear. Under California law, a lesser offense is necessarily included in a greater offense if

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[3] Citing *People v. Burgener* (2003) 29 Cal.4th 833, 887, the Attorney General contends defendant waived the argument his convictions for attempted murder and street terrorism violate the federal constitutional guarantees against double jeopardy for failure to raise the issue in the trial court. To the extent defendant is barred from challenging his convictions due to waiver, he argues he was denied effective assistance of counsel. Although it appears that at least defendant's federal double jeopardy argument is waived, "we . . . consider it through the lens of ineffective assistance of counsel." (*Ibid.*)

either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.)

The information alleged defendant committed the offense of attempted murder, as follows: "COUNT 1: On or about May 3, 2003, [defendant], in violation of Section 664 [and] 187[, subdivision] (a) of the Penal Code (ATTEMPTED MURDER), a FELONY, did willfully, unlawfully and with malice aforethought attempt to murder JOHN DOE, a human being." The information also alleged "that on Count(s) 1, and pursuant to Penal Code Section 186.22 [, subdivision] (b)(1), the above offense(s) was/were committed for the benefit of, at the direction of, and in association with a criminal street gang, to wit: DRAGON FAMILY JR./NIP FAMILY JR., with the specific intent to promote, further and assist in criminal conduct by gang members." The information alleged defendant's street terrorism offense, as follows: "COUNT 2: On or about May 3, 2003, [defendant], in violation of Section 186.22 [, subdivision] (a) of the Penal Code (STREET TERRORISM), a FELONY, did willfully, unlawfully and actively participate in a criminal street gang, to wit: DRAGON FAMILY JR./NIP FAMILY JR., with knowledge that its members engage in and have engaged in a pattern of criminal gang activity and did willfully promote, further and assist in Felony criminal conduct by gang members."

Defendant does not contend attempted murder is a lesser included offense of street terrorism, or vice versa, based on the statutory elements test. Instead, defendant argues that in determining under the accusatory pleading test whether attempted murder is a lesser included offense of street terrorism, or vice versa, the gang enhancement allegation under section 186.22, subdivision (b)(1) must be considered. The issue whether enhancement allegations should be considered in determining lesser included offenses under the accusatory pleading test is currently before the California Supreme

Court. (See *People v. Sloan*, review granted June 8, 2005, S132605; *People v. Izaguirre*, review granted June 8, 2005, S132980.) We do not need to reach this issue in this case because neither offense is a lesser included offense of the other, even if we were to factor the gang enhancement into our analysis.

First, the attempted murder offense, even if considered in combination with the gang enhancement alleging the offense was committed "for the benefit of, at the direction of, and in association with a criminal street gang . . . with the specific intent to promote, further and assist in criminal conduct by gang members," is not a lesser included offense of street terrorism. One can commit the crime of street terrorism as pleaded by willfully, unlawfully and actively participating in a criminal street gang with knowledge that its members engage in "and" have engaged in a pattern of criminal gang activity and by willfully promoting, furthering and assisting in felony criminal conduct by the gang members. The offense of street terrorism does not require felony criminal conduct in the form of attempted murder. (See *People v. Birks, supra,* 19 Cal.4th at p. 117 [offense is not a lesser included offense unless "the facts actually alleged in the accusatory pleading . . . include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser"].)

Defendant also argues the attempted murder is a lesser included offense of street terrorism in this case because "[t]he prosecutor in argument made it clear that the same acts formed the basis for counts 1 and 2." A similar argument was rejected by a panel of this court in *People v. Burnell* (2005) 132 Cal.App.4th 938, 945-946, in which this court stated the defendant "bases his argument on events occurring at trial, viz., the court's instructions to the jury, and the prosecutor's arguments, both of which referenced these five offenses as satisfying the necessary felonious conduct under the street terrorism charge. But the pleadings test does not permit the use of events at trial to add to the language of the information. [Citation.] 'There are several practical reasons for not considering the evidence adduced at trial in determining whether one offense is

necessarily included within another. Limiting consideration to the elements of the offenses and the language of the accusatory pleading informs a defendant, prior to trial, of what included offenses he or she must be prepared to defend against. If the foregoing determination were to be based upon the evidence adduced at trial, a defendant would not know for certain, until each party had rested its respective case, the full range of offenses of which the defendant might be convicted. Basing the determination of whether an offense is necessarily included within another offense solely upon the elements of the offenses and the language of the accusatory pleading promotes consistency in application of the rule precluding multiple convictions of necessarily included offenses, and eases the burden on both the trial courts and the reviewing courts in applying that rule.' [Citation.] Limiting our review to the face of the information, as directed by [*People v.*] *Ortega* [(1998) 19 Cal.4th 686, 698], compels us to conclude the offenses of attempted murder, robbery, vehicle theft, receiving stolen property, and mayhem are not necessarily included in the offense of street terrorism under either the statutory test or the pleading test."

Neither is the crime of street terrorism a lesser included offense of attempted murder combined with the gang enhancement. The crime of street terrorism under section 186.22, subdivision (a) requires proof of at least one element which is not required to prove the gang enhancement under section 186.22, subdivision (b), namely, "knowledge that its members engage in or have engaged in a pattern of criminal gang activity." Our interpretation of section 186.22, subdivision (b)(1) is consistent with the appellate court's statement in *People v. Bautista* (2005) 125 Cal.App.4th 646, 656, footnote 5 that section 186.22, subdivision (a) "requires proof of two elements which are not part of the gang enhancement: active participation in any criminal street gang and 'knowledge that its members engage in or have engaged in a pattern of criminal gang activity.'" (See also *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467 & fns. 11, 12.) The element of section 186.22, subdivision (a) requiring knowledge that the members of

the criminal street gang "engage in or have engaged in a pattern of criminal gang activity" is also not part of the crime of attempted murder. Therefore, the street terrorism offense does not constitute a lesser included offense of attempted murder even when the latter is committed in combination with the allegation of the gang enhancement because the offense of street terrorism was not automatically committed upon the commission of attempted murder with the gang enhancement as alleged in the information.

Citing *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103, defendant argues "[o]ne cannot logically entertain a specific intent to facilitate or promote other criminal activity of the gang," as required in the gang enhancement, "without the knowledge that the gang's members are engaging in or have engaged in a pattern of criminal gang activity." The phrase "pattern of criminal gang activity," as used in section 186.22, subdivision (a), is defined in subdivision (e) of section 186.22: "As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." Section 186.22, subdivision (e) goes on to list 30 specific offenses; however, subdivision (j) specifies that "[a] pattern of gang activity may be shown by the commission of one or more of the offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), and the commission of one or more of the offenses enumerated in paragraphs (1) to (25), inclusive of subdivision (e). A pattern of gang activity cannot be established solely by proof of commission of offenses enumerated in paragraphs (26) to (30), inclusive, of subdivision (e), alone." Therefore, it is possible for an individual to specifically intend to "promote, further, or assist in *any* criminal conduct by gang members" (§ 186.22, subd. (b)(1), italics added) as required by the gang enhancement, and not satisfy the requirement of section 186.22, subdivision (a)

that the individual have knowledge the gang's members "engage in or have engaged in a pattern of criminal gang activity" as defined in subdivision (e).

II.

THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT.

Defendant argues the prosecutor engaged in misconduct during his examination of Detective Edinger by insinuating without evidentiary support (1) the gun involved in this case was the same gun used in an attempted murder in March 2003, and (2) Voo Doo was the victim in this case because he had provided information to the police. Defendant contends the prosecutor also engaged in misconduct during his cross-examination of defendant by insinuating, without evidentiary support, that defendant had attempted to obtain access to Voo Doo while defendant was in custody in order to retaliate against Voo Doo for providing information to the police. Defendant argues the prosecutor further engaged in misconduct by later arguing these "facts" before the jury. Defendant further contends that the trial court abused its discretion by denying defendant's motions for mistrial based on these insinuations and argument, and that the trial court's error violated various state and federal constitutional rights, including his right to due process, to present an effective defense, and to a fundamentally fair trial.

A prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct, even if such action does not render the trial fundamentally unfair. (*People v. Frye* (1998) 18 Cal.4th 894, 969.) "The rule is well established the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.' [Citations.]" (*People v. Wagner* (1975) 13 Cal.3d 612, 619-620.) A prosecutor may also commit misconduct by arguing facts not in evidence. (*People v. Kirkes* (1952) 39 Cal.2d 719, 724.)

The record simply does not show the prosecutor interrogated Edinger or defendant for the purpose of getting before the jury facts inferred by the questions without regard to the answers which might be given to those questions. Furthermore, the prosecutor did not argue facts not in evidence. We find no error.

A.

The Prosecutor Did Not Insinuate Facts Without Evidentiary Support During the Direct and Redirect Examination of Edinger.

In order to give context to defendant's prosecutorial misconduct argument as it pertains to the testimony of Edinger, we review relevant portions of that testimony. During the direct examination of Edinger, the prosecutor asked Edinger about gang loyalty. Edinger testified, "[a] rat is the worst thing that you can be in a gang. There is no lower form to a gang member. [¶] If you snitch on another member, even if it's a rival, you are seen as a rat. Nobody will associate with you. [¶] And if you are seen by any gang member, you are usually seriously injured, be it stabbed, struck over the head with something that will split your head open. And the attempt is generally to kill you. [¶] The more violent you get attacked, the more praise that person or persons that did it receives." Defense counsel did not object to the prosecutor's questions or Edinger's answers.

The prosecutor asked Edinger about the criminal activities of DFJ/NFJ, and in particular about the police investigation of multiple attempted murders that occurred in March 2003 involving Voo Doo and other gang members. The prosecutor later asked Edinger whether various members of the gang were contacted by police and detained in March 2003 regarding those attempted murders. Edinger testified some individuals from the gang provided information to the police between March and April 2003. Defense counsel did not object to the prosecutor's line of questioning or Edinger's responses.

During the cross-examination of Edinger, defense counsel delved deeper into the issues of informants within DFJ/NFJ.

"Q. . . . [Y]ou said, between March and April, some individuals were getting—from within the gang were providing information to the police; correct?

"A. Yes.

"Q. And then you were asked the question, well, the statement 'no longer my home boy' that was attributed to [defendant]—and we'll get into that statement in a minute—was indicative of somebody saying, you are no longer one of my buddies in this gang; correct?

"A. Yes.

"Q. Because, perhaps you are no longer one of my buddies in the gang because you are snitching on us; correct?

"A. Yes."

Defense counsel further asked Edinger how he went about trying to find out who the victim in this case was.

"Q. Did you go to your list of known snitches and just go down the list and call them up and say, hey, did [defendant] point a gun at you the other day back in the parking lot? Did you do that?

"A. No, I didn't ask them if they had a gun pointed at them.

"Q. Were you the guy that [defendant] pointed the gun at? Anything along those lines to find out if one of these snitches was, in fact, the victim of that incident?

"A. No. I just asked them if they heard about it, had any information on it. But I didn't ask them if they were—had a gun pointed at them.

"Q. And you got nowhere from that; correct?

"A. No, that's not true.

"Q. What did you get? Who's the victim? Who was the guy?

"A. For one hundred percent sure, I don't know. But the information that I received was that, several of them said that [defendant] had pointed the gun at a home boy. And one even said that they believed it was Voo Doo."

Defense counsel also asked Edinger about the gun.

"Q. Now, let's talk about the gang gun that you talked about. [¶] Essentially, it's fair to say that a gang of 25 to 30 or whatever the numbers are, they won't necessarily all have a gun. But they will all have access to some weapons; correct?

"A. Yes.

"Q. How does that gun float around?

"A. It can be passed around from member to member. And it can even go as far as extending into the TRG, Tiny Rascal Gang, since they align themselves very closely with NFJ and DFJ.

"Q. . . . [¶] A lot of these guns are the result of robberies and home invasion robberies and things of this nature; correct?

"A. Correct.

"Q. They are stolen?

"A. Yes.

"Q. This one is stolen; correct?

"A. Yes."

Defense counsel also asked Edinger whether if members of the gang "think you are a snitch or they think you did something to disrespect the gang, as far as that gang is concerned, you're done; right?" Edinger responded, "[a]bsolutely."

On redirect, the prosecutor questioned Edinger as follows.

"Q. . . . [¶] Voo Doo was involved in that attempted murder that happened in Garden Grove; correct?

"A. Yes, he was.

"Q. And Voo Doo was contacted on March 16th of 2003, when that three attempted murders took place; correct?

"A. Yes.

"Q. By the way, that attempted murder, a gun was recovered; correct?

"A. Yes.

"Q. A sock was recovered; correct?

"A. Yes. [¶] . . . [¶]

"Q. What is the relationship between the gun that was recovered and the Voo Doo attempted murder on March 16, 2003, and the gun we have here in People's exhibit 3?"

Defense counsel objected based on relevance. The trial court sustained the objection.

The prosecutor elicited, without objection, Edinger's testimony that several DFJ/NFJ members were charged with attempted murder, including Voo Doo who was charged on April 17, 2003 and was the only one released from custody that same day. Voo Doo was not again arrested and charged with that attempted murder until the end of 2003.

The prosecutor stated that he had asked all of his questions of Edinger. Defense counsel stated he needed to approach the bench before recross. Defense counsel stated the defense was moving for a mistrial because the prosecutor initially asked about the relationship between the gun in the March 2003 shooting and the gun used in this case and then intimated that defendant "somehow was acting in the present case out of retaliation for something that occurred in that other attempted murder." Defense counsel stated, "[c]ouple that with the question about the gun being somehow related, this jury is now left with the indelible impression that [defendant] is involved in that other murder, which is irrelevant." Defense counsel argued, "[t]his jury now thinks that [defendant] is out there involved with other attempted murders."

The prosecutor explained that he intended to elicit testimony that both guns had been stolen from the same victim—not to show or suggest the same gun was used in both the March 2003 attempted murders and the charged offenses in this case. In light of the trial court's ruling, sustaining the defense objection on relevancy grounds to the prosecutor's question regarding the connection between the guns, the prosecutor did not have the opportunity to develop evidence the guns had both been stolen from the same victim and to dispel any suggestion from his question that defendant had been involved in the March 2003 attempted murders. In any event, to assuage defense counsel's fear that the jury might think defendant was involved in the March 2003 attempted murders, the trial court told the jury defendant "is not a charged defendant in connection with the March, 2003, attempted murder in Garden Grove"; thus, this record does not show the prosecutor attempted to improperly convey facts to the jury that would not have been conveyed by the answers to the prosecutor's intended questions about the guns.

Defendant also contends the prosecutor's insinuations that Voo Doo was the victim in this case because he was perceived as a snitch constituted misconduct because they were without evidentiary support. Defense counsel did not object to any of the prosecutor's questions of Edinger on the ground they assumed facts not in evidence. Defense counsel waited until after the prosecutor had completed his questioning to raise that issue. Not only did defense counsel never object to the line of questioning regarding the identity of the victim and the possibility he was a victim because he was perceived to be a snitch, defense counsel himself further developed that same line of questioning during his cross-examination of Edinger.

In any event, the prosecutor's suggestion Voo Doo was the victim in this case is not without evidentiary support. Edinger specifically testified during cross-examination that he was informed by informants inside DFJ/NFJ that the victim was a fellow gang member and one informant told him that he believed the victim was Voo Doo.

The suggestion defendant might have been motivated, at least in part, to commit the charged offenses against the victim because the victim was a snitch is also supported by evidence in the record. Edinger testified several DFJ/NFJ members were talking to police in the March/April 2003 time frame after the March 2003 attempted murders which occurred in Garden Grove. Edinger testified the information received by one of those members in particular led to the arrest and prosecution of several DFJ/NFJ gang members for those attempted murders. He explained the reaction to a gang member providing information to police is severe—he or she would often be severely injured or killed by other members of the gang. Voo Doo was charged along with other DFJ/NFJ members with the March 2003 attempted murders in April 2003, but alone was released that same day. Voo Doo's brother, Son Bui, was the one who intervened and took the gun away from defendant. Defendant was heard saying to Son Bui that he was not his homeboy anymore and that he was "tired of this shit." In light of Edinger's testimony, the prosecutor did not commit misconduct by suggesting Voo Doo was the victim on May 3, 2003 because he had cooperated with the police.

Because the prosecutor's insinuations did not constitute misconduct as they were sufficiently based on evidence in the record, the prosecutor's arguing those same insinuations before the jury at the close of trial similarly did not constitute misconduct. If anything, the prosecutor's argument downplayed his theory that Voo Doo was the victim. The prosecutor argued: "Who is the victim in this case? [¶] The judge is going to read you this instruction. It's going to say at the bottom the name of the victim. [¶] It's going to say what? [¶] 'John Doe.' [¶] The identity of the victim is not relevant. He is a human being. That's the only thing that is relevant about it. [¶] Who is the victim in this case? [¶] Let's talk about that. Let's talk about what you heard and the evidence that you heard. [¶] You heard a lot of talk about Voo Doo, Vu Bui; didn't you? [¶] You heard something very interesting. Who was it that got in between the gun in the hand of the defendant and the victim? Who was it that came down to get the gun from the hand of

the defendant? [¶] Vu Bui's brother. [¶] Okay. What is it that you know about what was going on with that gang during that period of time? [¶] Law enforcement were doing their job. They were getting them off the streets. And they were having people talk to the police. [¶] And the defendant did not like that. [¶] Now, what does that mean? [¶] [Prosecutor], are you telling us that you have proven to us beyond a reasonable doubt that the victim is Vu Bui? [¶] I am not. I am not telling you that for a second. If that was the case, when I filed this case, when the case was filed, I would have put under the name of the victim, Vu Bui. [¶] What I'm telling you, ladies and gentlemen, is to use your common sense in evaluating the evidence." The prosecutor further stated, "[d]o you have to conclude that the victim is Vu Bui in order for you to find the defendant guilty? [¶] Absolutely not. Absolutely not. [¶] Am I standing right here in front of you and telling you, the victim in this case was Vu Bui? [¶] Absolutely not. It's Mr. X, a human being. [¶] And this defendant took a gun, put it to his head, and pulled the trigger. [¶] So, use your common sense."

We further conclude the prosecutor did not err in the portion of his argument discussing premeditation and deliberation: "'You are no longer my homie. I am tired of this shit.' [¶] Now, there is a dispute about the evidence. Who did he say it to? [¶] He said, I never said that to Son Bui. We heard testimony that he was heard saying it. [¶] I submit to you that the shit that he is tired of is that people, they are ratting on the gang. That's what he's tired of. [¶] Why one bullet? Why one bullet? [¶] He wasn't about to shoot somebody who was a complete stranger. He only put [in] one bullet because, I submit to you, ladies and gentlemen, one bullet is enough when you are shooting somebody from eight feet away." As discussed above, the prosecutor's theory that defendant committed the charged offenses to retaliate against Voo Doo for cooperating with the police had an evidentiary basis. The prosecutor did not engage in misconduct.

B.

The Prosecutor Did Not Commit Misconduct During the Cross-examination of Defendant.

Defendant contends the prosecutor engaged in misconduct during his cross-examination of defendant regarding a letter he wrote to David Nguyen when both were in custody. During cross-examination, defendant tacitly admitted that in December 2003, he wanted to know where Voo Doo was. Defendant testified it was because he grew up with Voo Doo. The prosecutor asked, "[i]sn't it true, one of the reasons why you want to, either you, yourself, have access to Voo Doo or see if David Nguyen will have access to Voo Doo, is because you wanted to put a green light on Voo Doo?" (Edinger had testified that green lighting a fellow gang member means that the leaders of the gang have determined that it is okay to kill that person or to beat him severely.) Defendant responded, "[n]o sir" before defense counsel objected that the question was argumentative. The trial court sustained the objection.

Outside the presence of the jury, defense counsel moved for a mistrial on the ground the letter referred to by the prosecutor did not support the prosecutor's theory that defendant wanted to put out a hit on Voo Doo. The prosecutor's offer of proof was the following language from defendant's letter: "It sucks. But we knew it couldn't be fun forever. [¶] . . . [¶] That nothing will ever deprive us of our friendship. But now things took a U-turn. Do you feel me? Damned, if I was still at O.C.J., I would have been with Thuy's bro. Don't trip. I'm paranoid with all the rats in this place also. They are everywhere." Defendant had testified that Voo Doo is "Thuy's brother." The trial court denied defendant's motion for a mistrial. Defense counsel then asked that the letter be published to the jury. The prosecutor decided to jettison the letter, and stated he was not going to ask any questions about the letter or otherwise refer to it. The court confirmed the prosecutor had not gotten into any specific portions of the letter in front of

the jury. The court stated, "I am not going to limit in any way [defense counsel's] ability to go into it on redirect if that is your desire, [defense counsel]."

The prosecutor did not ask anything further about any letter by defendant during the remainder of the cross-examination of defendant. On redirect, defense counsel quoted a portion of the letter defendant wrote to David Nguyen and asked defendant questions about what he wrote. On recross, without objection, the prosecutor read a portion of the letter defendant wrote to Nguyen, including the portion the prosecutor quoted when he made his offer of proof to the court. On redirect, defense counsel quoted yet another portion of the letter. The trial court overruled the prosecutor's objections to the latest quoted portion of the letter on hearsay and relevancy grounds. Defense counsel completed redirect by asking defendant, "[a]nd anywhere in here, are you trying to hint at trying to find out how you can get to Vu Bui, so you can finish what you started on May 3rd?" Defendant answered, "[n]o."

The prosecutor was justified in asking defendant whether he wanted to know Voo Doo's whereabouts to put a green light on him. Defendant had admitted during cross-examination that he wanted to know where Voo Doo was in December 2003; defendant's letter to Nguyen, which was cited by the prosecutor in making his offer of proof and quoted on recross-examination of defendant, stated in part, "[d]amned, if I was still at O.C.J., I would have been with Thuy's bro. Don't trip. I'm paranoid with all the rats in this place *also*. They are everywhere." (Italics added.) Edinger had testified that in gang culture, one deemed a rat by the gang is subject to attack or green lighting.

Defendant cites the following argument as emphasizing the prosecutor's insinuations were not supported by evidence: "And the thing about Thuy's brother—and [defense counsel] read the letter to you. I want to read it to you, too. Use your common sense. Listen to what he's saying. Listen to how he's mentioning Thuy's brother in the same sentence when he's talking about rats and how he's paranoid of rats. [¶] 'I guess that's just the way life is going to be, though. It sucks. But we knew it couldn't be fun

forever. I thought we were unstoppable, that nothing would ever deprive of us our friendship. But now things took a U-turn. Do you feel me? Damn. If I was still at O.C.J., I would have been with Thuy's bro. Don't trip. I'm paranoid with all the rats in this place, also. They are everywhere.' [¶] You heard the testimony about Thuy's brother, Voo Doo, when he was arrested, when he was released. [¶] Use your common sense. Use your common sense in evaluating the evidence. [¶] And when [defense counsel] talks about, now he is communicating with friends of his, and he is praying for him, here is how this defendant ends the letter. [¶] 'We chose this life. And there is no turning back now, unless we get free. Love you, man. Don't forget, [defendant].'"

In light of the evidence discussed above, which supports the prosecutor's theory, we conclude the prosecutor did not engage in misconduct by making this argument to the jury. The California Supreme Court's statement in *People v. Brown* (2003) 31 Cal.4th 518, 554, applies here: "We often have explained that a prosecutor may engage in vigorous argument before the jury, drawing reasonable deductions from the evidence. [Citation.] The prosecutor here did no more than this."

III.

SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S FINDINGS THAT DEFENDANT HAD A SPECIFIC INTENT TO KILL AND THAT DEFENDANT ACTED WITH DELIBERATION AND PREMEDITATION.

The jury found that defendant did "willfully, unlawfully and with malice aforethought attempt to murder JOHN DOE," as alleged in count 1 of the information, and found true the attempted murder was committed willfully, deliberately and with premeditation within the meaning of section 664, subdivision (a). Defendant contends substantial evidence does not support the jury's findings he specifically intended to kill and he acted with premeditation and deliberation.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is

reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "Although the evidence was far from overwhelming, we need not be convinced beyond a reasonable doubt that defendant premeditated the murders. The relevant inquiry on appeal is whether "'*any* rational trier of fact"' could have been so persuaded." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020.)

In *People v. Bolin, supra,* 18 Cal.4th 297, the California Supreme Court stated, "[i]n *People* [*v.*] *Anderson* [(1968)] 70 Cal.2d [15,] . . . 26-27, we identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. However, as later explained in *People* [*v.*] *Pride* (1992) 3 Cal.4th 195, 247 . . . : '*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]' Thus, while premeditation and deliberation must result from "'careful thought and weighing of considerations"' [citation], we continue to the apply the principle that '[t]he process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ." [Citations.]' [Citation.]" (*Id.* at pp. 331-332.) "Evidence of all three elements is not essential . . . to sustain a conviction." (*People v. Edwards* (1991) 54 Cal.3d 787, 813.) "[T]he method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder." (*People v. Memro* (1995) 11 Cal.4th 786, 863-864.)

Viewing the record in its entirety and in the light most favorable to the judgment, substantial evidence showed: (1) on May 3, 2003, defendant, an admitted criminal gang member, and the victim were yelling at each other in a parking area; (2) defendant, holding a gun, chased the victim a couple of times around a parked car; (3) while defendant was chasing the victim, defendant said, "Fuck you. I'm going to fucking kill you"; (4) defendant and the victim stood facing each other about eight feet apart when defendant pointed the gun at the victim and pulled the trigger; (5) the hammer of the gun clicked, but the gun did not fire; (6) after the gun did not fire, defendant opened the gun to check the bullets, and then went back to his car; (7) officer Mize later recovered the gun from Son Bui, inspected it, and found inside it one live bullet that was not fired; (8) the casing of that bullet had a dimple on it which was consistent with a strike mark implicating the gun had misfired; and (9) the violent conduct of pulling the trigger of a gun and intending to kill somebody would benefit the gang and enhance the individual perpetrator's reputation because it strikes fear into rivals of the gang and the community. There was no evidence the victim was armed.

The jury could reasonably conclude defendant specifically intended to kill the victim based on his statement, "I'm going to fucking kill you," followed by his action of pulling the trigger of a loaded gun at the victim. Substantial evidence supported the finding the gun was loaded—defendant seemed angry when the gun apparently misfired, and a bullet with a strike mark was found in the gun when it was recovered by the police. Evidence that violent acts enhance the reputation of the individual perpetrator and of the perpetrator's gang supported defendant's motive. In addition, evidence suggesting Voo Doo was the victim because he had provided information to the police further supported defendant's motive. Defendant planned to kill the victim by obtaining the gang's gun, and chasing the victim around a car a couple times before getting a clear shot and pulling the trigger. Finally, the evidence showed premeditation and deliberation by the manner

of killing—defendant aimed a loaded firearm at the victim from a distance of eight feet and pulled the trigger.

Defendant's argument that substantial evidence did not support specific intent, premeditation and deliberation by pointing to conflicting testimony by other DFJ/NFJ members improperly asks this court to reweigh the evidence and make credibility determinations. We find no error.

IV.

DEFENDANT'S ARGUMENT THE AWARD OF PRESENTENCING CREDITS WAS UNDERCOUNTED BY ONE DAY IS MOOT.

In part IV of his opening brief, defendant argues the trial court erred by awarding 545 days of actual sentencing credit instead of 546 days, and by awarding a total of 626 days in combined actual and conduct credits instead of 627 days. On March 23, 2005, defendant's counsel filed a letter stating, "[c]ounsel for appellant has just received notification that on March 15, 2005, the Superior Court granted appellant's motion to correct the pre-sentencing credit calculation. A true and correct copy of the Superior Court's certified minute order of March 15, 2005, is attached as Exhibit A and is incorporated by reference. Appellant withdraws argument IV of the Appellant's Opening Brief, which has been mooted by the Superior Court's order of March 15, 2005." The attached copy of the March 15, 2005 minute order states the trial court granted defendant's motion for credit correction under section 1237.1, vacated the October 2004 state prison sentence credit order, and ordered the credit for time served to be 546 actual days, which combined with 81 conduct credits, provided defendant a total credit of 627 days. The trial court ordered the clerk to forward to the Department of Corrections an amended abstract of judgment reflecting the correction of credit for time served.

As defendant's argument on this point is now moot, we do not further address it.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.

G034779
The People v. Hoang

Superior Court of Orange County

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People's 5(a)

PEOPLE V. HOANG
CASE # 03WF1095

AUDIOTAPED 911 CALL: SEAN SCARBOROUGH AND W.P.D. DIPATCH

DATE: 05/03/03

W.P.D. DISPATCH: 911 Emergency. Do you need police or paramedics?

MR. SCARBOROUGH: Yeah. We got these -- excuse me. What did you say? Police?

W.P.D. DISPATCH: Do you need police or paramedics?

MR. SCARBOROUGH: Just police.

W.P.D. DISPATCH: All right. How can I help you, please?

MR. SCARBOROUGH: These two guys got a gun pulled on another guy right -- right now.

W.P.D. DISPATCH: Where is this at?

MR. SCARBOROUGH: It's on 718 -- or 7833 10th Street. I don't know.

W.P.D. DISPATCH: 7832 10th Street?

MR. SCARBOROUGH: No. That's -- that's my number. But these guys are fighting right now. There's like five of them and the guy who got in the car -- there's a black Solara --

W.P.D. DISPATCH: Has it been pointing at anybody?

MR. SCARBOROUGH: What?

W.P.D. DISPATCH: Has the gun been pointed at anybody?

MR. SCARBOROUGH: Yeah.

W.P.D. DISPATCH: Are they brandishing it now? Are they showing it now?

MR. SCARBOROUGH: Yeah. They put it away.

W.P.D. DISPATCH: So there's five people out there fighting now?

MR. SCARBOROUGH: Yeah. It's a -- it's a silver-plated, like a .357 probably. That's what it looks like.

W.P.D. DISPATCH: Where's the -- where -- where's the gun now?

MR. SCARBOROUGH: It's in the car. It's a black Solara.

W.P.D. DISPATCH: Okay. And who -- and how many people are -- do you see any other weapons out there? -- I'm sorry.

MR. SCARBOROUGH: No. I think -- I think he tried shooting it, but it didn't have any bullets because I heard the -- I heard the hammer click.

W.P.D. DISPATCH: Okay. And your name?

MR. SCARBOROUGH: Do I have to tell you?

W.P.D. DISPATCH: Yes, please.

MR. SCARBOROUGH: Okay. Sean Scarborough.

W.P.D. DISPATCH: Sean?

MR. SCARBOROUGH: Yeah.

W.P.D. DISPATCH: S-c-a-r-b-r-o?

MR. SCARBOROUGH: Yeah.

W.P.D. DISPATCH: And the phone number you're calling from

is from Apartment -- it is Apartment D. Is that where you live?

MR. SCARBOROUGH: Yes.

W.P.D. DISPATCH: And do you know who these people are?

MR. SCARBOROUGH: I have no idea.

W.P.D. DISPATCH: Okay. Can you describe any of them to me, what they look like?

MR. SCARBOROUGH: Asian guys, slicked-back hair, black pants, white shirt; all -- another guy wearing all black --

W.P.D. DISPATCH: Hold on just a second. Slicked-back hair, black pants, and what else?

MR. SCARBOROUGH: Black pants, white shirt; two guys in all black; they got slicked-back hair. There's one guy in a blue shirt.

W.P.D. DISPATCH: Hold on just a second, please. I'm typing just as fast as I can, but -- shh -- not you. All black, Any -- you said -- said one of them has a blue shirt on?

MR. SCARBOROUGH: Yes. Yeah. The guy that pulled out the gun, I believe, is wearing a black jacket with a white shirt, and he is sitting in the car right now. I'm trying to -- I'm trying to stay at my curtain (inaudible), you know.

W.P.D. DISPATCH: And he's sitting in the vehicle at this time?

MR. SCARBOROUGH: Yes.

W.P.D. DISPATCH: And you said he's got what kind of shirt

on?

MR. SCARBOROUGH: I believe it's a white shirt with a black jacket on.

W.P.D. DISPATCH: Okay. Can you get the -- did you by chance get a license plate on the -- on the car by chance?

MR. SCARBOROUGH: Nah, it's just like right out of my view.

W.P.D. DISPATCH: Oh, okay. Okay. And how far down is he from -- from where you're looking?

MR. SCARBOROUGH: He's like probably 20, 30 feet.

W.P.D. DISPATCH: Okay. And which way is his car pointed?

MR. SCARBOROUGH: Towards 10th Street.

W.P.D. DISPATCH: It's pointed towards 10th Street?

MR. SCARBOROUGH: Yes.

W.P.D. DISPATCH: Where's it parked at then?

MR. SCARBOROUGH: It's like in between the apartment buildings because there's apartments on the Hazard side and the 10th Street side.

W.P.D. DISPATCH: Okay. Okay. And how far back is he, or is he like right in the middle or what?

MR. SCARBOROUGH: Right in the middle.

W.P.D. DISPATCH: Right in the middle of the --

MR. SCARBOROUGH: Probably closer to the 10th Street side.

W.P.D. DISPATCH: Probably closer to the 10th Street?

MR. SCARBOROUGH: Yeah. But there's probably like eight

people down there.

W.P.D. DISPATCH: There's like eight people down there now?

MR. SCARBOROUGH: Yeah, yeah, maybe. It is one, two, three, four, five, six --

W.P.D. DISPATCH: Are they still fighting?

MR. SCARBOROUGH: No.

W.P.D. DISPATCH: They are no longer fighting?

MR. SCARBOROUGH: No. They're all standing around the car.

W.P.D. DISPATCH: Who did he point the gun at?

MR. SCARBOROUGH: I think that guy has left. I don't know where they all went. (Inaudible.) But they started -- like he's pointed the gun at him. I'm pretty sure he pulled the trigger and like there was no bullets. And he was going in the car to probably get bullets or something, and his friend came out, and he took it away from him. Then this guy just started fighting each other. So then -- then -- then -- then -- so one guy left, but the guy with the gun is still there.

W.P.D. DISPATCH: Okay. Okay. Can you describe to me, what -- who -- what this person that got the gun pointed at him looked like?

MR. SCARBOROUGH: I think a white shirt, black pants with slicked-back hair.

W.P.D. DISPATCH: Male Asian again?

MR. SCARBOROUGH: Yes.

W.P.D. DISPATCH: How old?

MR. SCARBOROUGH: I'd say these guys probably were from eighteen to twenty-two years old maybe, young guys.

W.P.D. DISPATCH: So there's nothing distinctive about him?

MR. SCARBOROUGH: What was that?

W.P.D. DISPATCH: Nothing distinctive about the -- the victim, the person that got the gun pointed at him?

MR. SCARBOROUGH: No. They're -- they're all -- they're all gang members I'm pretty sure.

MR. SCARBOROUGH: Now, will I have the police be coming to my house?

W.P.D. DISPATCH: No, not at this time. But I am going to tell them that you are the one that called.

MR. SCARBOROUGH: Okay. Because I don't -- you know, I don't want any confrontation with these guys because --

W.P.D. DISPATCH: Unfortunately, I understand that -- I understand --

MR. SCARBOROUGH: Uh-huh.

W.P.D. DISPATCH: -- but if we -- we don't know that we -- we don't know that we have a victim in regards to this.

MR. SCARBOROUGH: Yeah.

W.P.D. DISPATCH: So -- and if they're no longer fighting, that's the problem.

MR. SCARBOROUGH: License plate number -- wait. It doesn't have the license plate.

W.P.D. DISPATCH: No front license plate?

MR. SCARBOROUGH: No. It's backing up and parking, and they're just all down there.

W.P.D. DISPATCH: Are they still around the vehicle that is backing up?

MR. SCARBOROUGH: Yeah.

W.P.D. DISPATCH: Towards which direction?

MR. SCARBOROUGH: I -- he just parked against the -- toward the apartment building.

W.P.D. DISPATCH: Okay. Are they still gathered around the vehicle though?

MR. SCARBOROUGH: Yeah.

W.P.D. DISPATCH: Okay.

MR. SCARBOROUGH: There's one, two, three, four, five, six, seven people.

W.P.D. DISPATCH: Around the vehicle and one in the car?

MR. SCARBOROUGH: Nobody's in the car. They're just all standing around by the vehicle right now.

W.P.D. DISPATCH: I'm sorry. He -- the driver exited the car?

MR. SCARBOROUGH: Yeah.

W.P.D. DISPATCH: So he's among the seven people that are now around the car?

MR. SCARBOROUGH: Yeah.

W.P.D. DISPATCH: Okay. And can you give me a better description of him.

MR. SCARBOROUGH: Okay. I could see him. He's wearing shorts --

W.P.D. DISPATCH: Okay. He's a male Asian, and I understand that. How old would you say he is?

MR. SCARBOROUGH: Probably nineteen, twenty. He's wearing shorts with these white pulled-up socks.

W.P.D. DISPATCH: Okay. But wearing shorts, what color of shorts?

MR. SCARBOROUGH: Black.

W.P.D. DISPATCH: With what?

MR. SCARBOROUGH: With white socks pulled all the way up, a black shirt with like a white undershirt.

W.P.D. DISPATCH: Okay. And this is 7832 10th Street; right?

MR. SCARBOROUGH: It's on -- the apartment next to mine.

W.P.D. DISPATCH: (Inaudible.)

MR. SCARBOROUGH: Like on the -- it's on the other side of my apartment, it's the next row of apartment buildings.

W.P.D. DISPATCH: Oh, now, you've got me confused. The next apartment -- row of apartments -- are you facing them or not?

MR. SCARBOROUGH: Yeah. (Inaudible.)

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W.P.D. DISPATCH: Are you looking out your front window at them?

MR. SCARBOROUGH: I'm looking out my back window.

W.P.D. DISPATCH: You're looking out your back window at them?

MR. SCARBOROUGH: Yeah. I -- it's hard to explain. It's the only apartment that you can drive through.

W.P.D. DISPATCH: It's the only apartment complex that you can drive through?

MR. SCARBOROUGH: Yeah, from Westmin -- from Hazard to 10th Street.

W.P.D. DISPATCH: From Hazard to 10th Street?

MR. SCARBOROUGH: Yeah, you can see straight through, like through both sides of the street, whichever side you're on. You understand?

W.P.D. DISPATCH: Okay. So is -- are you -- so you're looking -- if you -- so you're looking out your back window, you're looking towards Beach; correct?

MR. SCARBOROUGH: Yeah.

W.P.D. DISPATCH: Okay. So it's -- the apartment complex to the -- behind you?

MR. SCARBOROUGH: Yes. Sorry I confused you.

W.P.D. DISPATCH: Yeah, you did. Okay. Hold on for me a second for me. All right?

MR. SCARBOROUGH: All right.

W.P.D. DISPATCH: Sean?

MR. SCARBOROUGH: Yes.

W.P.D. DISPATCH: Do you see any officers? Any of the officers?

MR. SCARBOROUGH: Yeah. They're -- yeah, I see them right now.

W.P.D. DISPATCH: Okay. Where are they at to you?

MR. SCARBOROUGH: Right in front of me to the left, the guys don't know they're there.

W.P.D. DISPATCH: Okay.

MR. SCARBOROUGH: They're (inaudible) them, they got their guns out.

W.P.D. DISPATCH: Okay. Okay. Slow down for me.

MR. SCARBOROUGH: Oh, there they go.

W.P.D. DISPATCH: Okay. So you can see them. So they're to the -- you -- you -- you can see them. Then look to the west of you, is that what you said?

MR. SCARBOROUGH: They're right -- they're right behind -- they -- they got them right now.

W.P.D. DISPATCH: They got the subjects right now. Okay.

MR. SCARBOROUGH: Yeah. They got them down on the ground.

W.P.D. DISPATCH: Okay.

MR. SCARBOROUGH: All right.

W.P.D. DISPATCH: Okay. All right. Now -- now --

MR. SCARBOROUGH: (Inaudible.) Yeah. He's got -- he's

got the gun (inaudible).

W.P.D. DISPATCH: You remember when you said (inaudible) they were pointing at (inaudible) etcetera, etcetera, etcetera, then we got to do what we got to do.

MR. SCARBOROUGH: Ah.

W.P.D. DISPATCH: Okay. So -- I mean -- you know, we're trying to figure out what we got going on here. Now, that's the other thing.

MR. SCARBOROUGH: Looks like you got five officers on there.

W.P.D. DISPATCH: Yeah. There's -- probably about right. And you got probably a couple of more coming. Okay? All right.

Do you -- do -- and -- and the gentlemen that was -- that actually -- actually pointed at the gun on him is not there; correct?

MR. SCARBOROUGH: No. No. No.

W.P.D. DISPATCH: Okay.

MR. SCARBOROUGH: (Inaudible.)

W.P.D. DISPATCH: Okay. All right. And you're in Apartment D; correct?

MR. SCARBOROUGH: Yeah.

W.P.D. DISPATCH: All right. The officers may -- may need to ask you some questions. We can tell them that you prefer not to have contact, but I can't guarantee that.

MR. SCARBOROUGH: I mean --

W.P.D. DISPATCH: Okay?

MR. SCARBOROUGH: No contact -- you know, I don't want anybody seeing because from where they live at --

W.P.D. DISPATCH: Uh-huh.

MR. SCARBOROUGH: It's -- they can, you know, see my house.

W.P.D. DISPATCH: Right.

MR. SCARBOROUGH: And --

W.P.D. DISPATCH: I understand.

MR. SCARBOROUGH: Yeah. So if they've got members and, you know, whatnot, so I don't like want to be getting shot myself.

W.P.D. DISPATCH: No, I understand. I understand.

MR. SCARBOROUGH: (Inaudible.) Ah, that was scaring the hell out of me. Okay. So I thought this guys was going to blast him.

W.P.D. DISPATCH: You thought he was going to blast him?

MR. SCARBOROUGH: Yeah. I thought -- I heard him pull the -- you know, I heard the hammer hit the --

W.P.D. DISPATCH: You actually heard the hammer hit?

MR. SCARBOROUGH: Yeah.

W.P.D. DISPATCH: (Inaudible) then he like -- he -- he took out the -- it was a -- a --

W.P.D. DISPATCH: Do you know where the other person came

from that shooed the other person away?

MR. SCARBOROUGH: I couldn't tell you.

W.P.D. DISPATCH: Okay. All right. Well, Sean, if they need you, they'll be contacting you. Okay?

MR. SCARBOROUGH: Okay. Thank you very much.

W.P.D. DISPATCH: Thank you. Bye-bye.

(Conclusion of recorded material.)

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DECLARATION OF HUNG LINH HOANG, a.k.a "Ronnie" Hoang
In support of Petition for Writ of Habeas Corpus
Re: Orange County Superior Court Case No. 03F1095

I, HUNG LINH HOANG, am the defendant in *People v. Hoang*, Orange County Superior Court Case No. 03WF1095. In September, 2003, I was charged with attempted murder and street terrorism, in violation of sections 187 and 186.22, subdivision (a) of the California Penal Code, respectively. I understood that if I was convicted on these counts, I was facing a life sentence in state prison.

Prior to trial in this matter, in early 2004, my trial counsel, Michael Molfetta, visited me in jail for the purpose of discussing strategy in my case. At that time, he told me that if I was serious about my case, then I would have to do exactly as he told me. To the best of my recollection, I believe this conversation took place sometime between January and June of 2004.

Mr. Molfetta told me it would have been impossible for the prosecution's eyewitness, Sean Scarborough, to have heard anything that happened during the subject incident. This was so because Scarborough, who was inside his apartment at the time of the subject incident, was on the phone with his girlfriend and the windows and sliding glass door of the apartment were shut.

Mr. Molfetta told me to testify that I pointed the gun at the alleged victim, but did not pull the trigger, and then afterward, I participated in beating the alleged victim up as part of a gang initiation ritual. He told me to testify that I had lied to the police in my statements to them immediately following the incident. I had told the officers that I had actually been the victim during the incident, and someone else had actually pointed a gun at me.

Mr. Molfetta explained that if I testified in this manner, I would have a better chance of going home because all I could be convicted of, under these circumstances, would be possession of and/or brandishing a gun. He further indicated I would just get time served. Mr.

Molfetta told me if I testified as to what really happened, consistent with my statements to the police, i.e., that I was the actual victim of a firearms assault, that I would get life in prison.

Later, approximately one week prior to the time I was to testify at trial, I had a phone conversation with Mr. Molfetta in which I told him I did not wish to testify at all. He started yelling at me and told me that if I did not trust him, I could go ahead and fire him. To the best of my recollection, I believe this conversation took place sometime between July 5, 2004 and July 12, 2004. Feeling pressured because my family had already paid Mr. Molfetta a lot of money, and because I trusted him, I was sworn in and testified at my trial on July 12, 2004.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and as to those matters stated on information and belief, I believe them to be correct.

Executed on 7/10, 2007, at Susanville, California.

By: _____
HUNG LINH HOANG, a.k.a. "Ronnie" Hoang

000282

DECLARATION OF LOUIS HOANG
In support of Petition for Writ of Habeas Corpus
Re: Orange County Superior Court Case No. 03F1095

I, LOUIS HOANG, am the father of Hung Linh Hoang, a.k.a. "Ronnie" Hoang, the defendant in *People v. Hoang*, Orange County Superior Court Case No. 03WF1095. In September, 2003, my son was charged with attempted murder and street terrorism, in violation of sections 187 and 186.22, subdivision (a) of the California Penal Code, respectively. I understood that if he was convicted on these counts, he was facing a life sentence in state prison. My son retained Michael Molfetta to represent him in connection with the aforementioned criminal case, and I paid Mr. Molfetta for his services.

On or about the first day of trial in this matter, I spoke to Mr. Molfetta, who handed me copies of one or more police reports generated in connection with my son's case. Mr. Molfetta said something to the effect, "Ronnie had the gun. Believe me. If you read that, you will see that Ronnie had the gun." He also told me, "Leave the strategy to me." To the best of my recollection, this conversation took place on or about July 8, 2004, as I am informed and believe trial commenced on that date.

A few days prior to the time my son was to testify at his trial, I had a phone conversation with Mr. Molfetta during which Mr. Molfetta asked me to convince my son to take the stand and testify. Mr. Molfetta told me this was the only chance for my son to go home and that I would have to trust him regarding the strategy in my son's case. To the best of my recollection, I believe this conversation

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took place sometime between July 5, 2004 and July 12, 2004. I am informed and believe my son was sworn in and testified in his case on July 12, 2004.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and as to those matters stated on information and belief, I believe them to be correct.

Executed on July 18th, 2007, at Orange County, California.

By: Louis Hoang
Louis Hoang

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