21-7963

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Steven Strong Bear Stevenson — PETITIONER
(Your Name) CDCR# BJ4596

vs.

People of the State of California — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of the State of California
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Steve Strong Bear Stevenson CDCR# BJ4596
(Your Name)

PBSP, P.O. Box 7500
(Address)

Crescent City, CA. 95532
(City, State, Zip Code)

N/A
(Phone Number)

VII

QUESTION(S) PRESENTED

When 4 prospective jurors bring up concerns of participating in a gang related case, openly during voir-dire, can it be determined that this cause no more concerns. in a domino effect to the other prospective jurors and thus caused bias and prejudice in the jury chosen to deliberate?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Steven Strong Bear Stevenson
PBSP, P.O. Box 7500
Crescent City, CA 95532

District Attorney (Hopper)
County of Sutter
446 Second Street
Yuba City CA 95991

RELATED CASES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Appellate Court court Does not appears ~~at Appendix ___ to the petition and is~~ As it is unavailable.

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts**:

The date on which the highest state court decided my case was Nov. 23, 21. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A. — one was not filed.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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STATEMENT OF THE CASE

On July 21, 2017, the Sutter County District Attorney filed an information charging appellant Steven Strong Bear Stevenson with attempted murder of a peace officer (Pen. Code,[1] §§ 664, subd. (a)/187; count 1); assault on a police officer with a deadly weapon (§ 245, subd. (c); count 2); obstructing or resisting an executive officer in the performance of his duties (§ 69; count 3); active participation in a criminal street gang (§ 186.22, subd. (a); count 4); driving a vehicle under the influence of alcohol (Veh. Code, §§ 23152, subds. (a), (b); counts 5 & 6); and leaving the scene of an accident (Veh. Code, § 20002, subd. (a); count 7). Counts 1, 2, and 3 further alleged that appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)) and the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). (1 CT 256-261.)

Appellant was arraigned on the information on July 24, 2017. He entered pleas of not guilty and denied the special allegations. (1 CT 262.)

Appellant was tried by a jury. (2 CT 358.) On October 25, 2018, the jury returned a finding of not true on the premeditation and deliberation allegation attached to the attempted murder charge and otherwise found appellant guilty as charged and made true findings on all the remaining special allegations. (2 CT 503-516.)

On May 13, 2019, appellant was sentenced to three years plus 15 years to life for the attempted murder in count 1. Sentence on the remaining counts was imposed and stayed or imposed and ordered to run concurrent with the primary term. (2 CT 525-531.)

Appellant filed a notice of appeal on July 1, 2019. (2 CT 532.)

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[1] Further unspecified statutory references are to the Penal Code.

REASONS FOR GRANTING THE PETITION

I

THE TRIAL COURT ABUSED ITS DISCRETION AND INFRINGED APPELLANTS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO A FAIR AND IMPARTIAL JURY BY DENYING HIS MOTION TO DISMISS THE JURY PANEL.

A. Appellants Contention and Background.

Appellant contends the trial Court abused its discretion and infringed his constitutional rights to a fair and impartial jury by denying his motion to dismiss the jury panel.

Appellant's contention is based on the following circumstances which occur during voir dire.

During defense counsel's questioning of prospective jurors seated in the box, defense counsel asked if anyone had been affected by gang violence, gang activity, or gang related events (Aug. RT 260) Three prospective jurors, Ms. G., Mr. C., and Mr. L., primarily responded. Three other prospective jurors noted their concerns.

Prospective juror Ms. G. was the first to respond to defense counsel's question. She said a commercial property she owned had been tagged with graffiti. She did not know if it was gang related (Aug. RT 261-262)

Prospective juror Mr. C. then took up the gauntlet. He said he had lived in Pinole, where they had problems with gangs in his neighborhood. He and wife would wake up in the middle of the....

"

"

night due to police officers moving up and down the street looking for people. To get away from the gang situation, he and his wife moved to Yuba City "because of the gang issues we had in the area that was infested with them." He indicated both were concerned about the fact he was sitting on a jury in a gang-related case. (Aug. RT 262-263.)

When defense counsel completed his inquiry, the prosecutor asked if anyone would have any hesitation in finding appellant guilty if he proved his case beyond a reasonable doubt. (Aug. RT 280.) Mr. C. responded. He said he had only one hesitation:

> "I don't want to be in a situation where I find a defendant guilty who is part of a gang and then later on I find that I have to move out of the city and go to another city because I was on a jury that found somebody else guilty and the gangs came after me." (Aug. RT 280.)

Mr. C. then went on to state:

> "Id like to find out what this Court is going to do as far as protecting us jurors in regard to that and our names are already out there. Okay?" (Aug. RT 281.)
>
> . . . . . .
>
> "I don't know if that's some of the concern of the other people but it is a concern to me." (Aug. RT 281.)

Wanting to "talk about that a little bit," the prosecutor tried to explore Mr. C.'s concerns about finding someone guilty based on the evidence. Mr. C. replied:

> "I wouldn't have hesitation finding them guilty based on the evidence, no. I have been involved in a drug case before in Contra Costa County. We found the person guilty." (Aug RT 281.)
>
> . . . . . .

> But it wasn't gang related. Okay. When it becomes gang related and these people can come after you personally and especially when they know your name as on this jury, then I get a little concerned. Like I said, one of the reasons we moved out of the Bay Area [was] because of the gang situation." (Aug. RT 281.)

The trial court then interceded and advised the panel that juror personal identifying information was going to be sealed. (Aug. RT 281-282.) Mr. C. found that information somewhat reassuring. (Aug. RT 282.) However, when the prosecutor resumed his inquiry and asked Mr. C. if he could be fair and impartial, Mr. C. replied:

> "Well, like I said, my only concern is my own personal safety and my wife's safety. Like I said, we had to move out of the Bay Area because of the gang situation and I don't really want to have to move out of Yuba City . . . because of the same situation." (Aug. RT 282.)

Upon further questioning, Mr. C. thought he could be fair and impartial. (Aug. RT 283.)

The prosecutor asked whether anyone else had similar concerns. (Aug. RT 283.) Prospective Juror Mr. L. responded:

> "I just think it's two separate issues. One issue being able to look at what's going on and divert and another issue is like what he's saying safety. He's already written your name down. That's it. If that's your fear, he knows you already." (Aug RT 283.)
>
> . . . . . .
>
> When it comes time -- is it going to be a collective like the jury finds, you know, guilty or not guilty or do they say one by one?" (Aug. RT 283.)

The trial court responded and explained the procedure for return of the verdicts and the possible polling of individual jury members. (Aug. RT 283.) Following this explanation, Mr. C. stated:

> "Back to [Mr. L.'s] point. The defendant knows us by name. The defendant['s] counsel already knows us by name. You guys are assuming they've written down their names on those pieces of yellow paper in front of you. So even if you seal it now, they still know who we are." (Aug. RT 283-284.)

When the prosecutor proceeded to ask Mr. C. if he could be "a fair and impartial juror, consider the evidence and whether or not there would be hesitation to find [appellant] guilty based on the fear of [his] own personal safety," Mr. C. said, "I would answer yes." (Aug. RT 284.) In response to the prosecutor's follow-up question, Mr. C. answered that he might find [appellant] not guilty based on the concerns he had voiced. (Aug. RT 284.)

Following Mr. C.'s response, the prosecutor asked if anyone else shared similar feelings. Ms. G. responded. She stated,

> "I do. It's kind of I realize that you're going to seal our record but it's after the fact." (Aug. RT 284.)

The prosecutor explained the concept of a fair trial for both sides and asked whether any other prospective juror had similar feelings. (Aug. RT 285.) Prospective Juror Ms. S. said it crossed her mind but she thought she would be able to put it aside. (Aug. RT 285.) Prospective Juror No. 598246 said it had crossed his mind as well, but was not asked, and did not say, he could put the matter aside. (Aug. RT 285.) Mr. L. then stated:

> "I still think we're talking about two separate things and protecting one's identify falls on the Court after the fact. I think to enable you or either side to say, "Oh, well, let's line you up and see. Let's see how each one of you voted," to make us say that in open court I don't see why it's necessary." (Aug. RT 285-286.)

The prosecutor asked Mr. L. if he would feel, as did Mr. C., the need to find appellant not guilty based on his concerns. (Aug. RT 286.) Mr. L. replied:

> "I think -- I have no idea what level of gang we're talking about. And if it comes out like let's say he's some high level person that can call shots and stuff like that, that's different. Or is he just some kid caught up in [a] street gang or something. I think maybe that would play a factor in the gang." (Aug. RT 286.)
>
> . . . . . .
>
> So like I said, it still falls on the Court to try and do a better job to protect us." (Aug. RT 286.)

The prosecutor again asked if anyone else shared the feelings of Mr. C. and Ms. G.. (Aug. RT 286.) Prospective Juror No. 586276 said it had crossed her mind but she could be impartial. No. 586276 then stated: "I am curious is there an option for us to vote confidentially? I feel like that would put things in a different ball game." (Aug. RT 286.) The trial court interjected itself at that point and answered the question in the negative and explained that trials are open to the public. (Aug. RT 286-287.)

The jury was excused at that point and the trial court took up the matter of challenges for cause. The parties stipulated to the excusal of Mr. C. and Ms. G. for cause. (Aug. RT 288-289.) Over the prosecutor's objection, the trial court granted a defense challenge to Mr. L. for cause. (Aug RT 294.)

Defense counsel then opined that Mr. C.'s statements "dominoed" through the jury and tainted the panel. (Aug. RT 290-291.) Defense counsel argued it was not possible for appellant to get a fair trial. (Aug. RT 291.) Based on defense counsel's voir dire

questions, very few prospective jurors had any experience with gangs. (Aug. RT 290.) However, once Mr. C. made his statements, it had a domino effect that resulted in at least five other people expressing concerns for their safety. This caused the jury to consider appellant a gang member and exposed a preformed bias against appellant. (Aug. RT 289-290.)

The prosecutor disagreed. He argued that Mr. C.'s opinion was limited to him and Ms. G., making it apparent Mr. C.'s comments did not infect the rest of the panel. (Aug. RT 292.) The prosecutor also noted that the other prospective jurors who expressed concerns indicated they could put them aside and be fair and impartial. (Aug. RT 291.) The prosecutor went on to argue any issue of bias was resolved by the court's excusal of the biased individuals from the jury. (Aug. RT 291.)

The trial court agreed with the prosecution. It found that Mr. C.'s comments did not taint the entire panel. The trial court believed it was "normal" for jurors to be concerned about their safety in a gang case. It also found that the jurors who voiced their concerns were not prejudging the gang allegations or appellant's involvement in gang activity. They were merely asking if they should be concerned for their safety if appellant were to be found guilty. (Aug. RT 295-296.) The trial court also believed the removal of Mr. C., Ms. G., and Mr. L. was the "proper course of action" and did not believe the comments had imposed a bias or taint on the remaining panel members. (Aug. RT 196.)

Based on the trial court's ruling, defense counsel asked the trial court to give the venire a curative instruction relative to reasonable doubt and the presumption of innocence. (Aug. RT 297.) The court did so. (Aug. RT 299-300.)

Thereafter, defense counsel exercised a peremptory challenge to excuse Ms. S.. (Aug. RT 300.) Both sides then passed and the 12 prospective jurors in the box were sworn to try the case. (Aug. RT 301.)

B. Standard of review

The denial of a defendant's motion to dismiss a jury panel because of group bias is reviewed under the deferential abuse of discretion standard. (*People v. Martinez* (1991) 228 Cal.App.3d 1456, 1466-1467 (*Martinez*); *People v. Nguyen* (1994) 23 Cal.App.4th 32, 41.)

When the right to a fair and impartial jury has been infringed, the conviction must be set aside regardless of the sufficiency of the evidence. (*Martinez, supra*, 228 Cal.App.3d at p. 1460, citing *People v. Wheeler* (1978) 22 Cal.3d 258, 283.)

C. Applicable law and analysis

It is well settled that a defendant has the constitutional right to a fair and impartial jury. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 6 L.Ed.2d 751]; *People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Wheeler, supra*, 22 Cal.3d at p. 265.) "'Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' . . ." (*People v. Nesler, supra*, 16 Cal.4th at p. 578.) In other words, "[t]he failure to accord an accused a fair hearing violates even the minimal standards of due process. . . ." (*Irvin v. Dowd, supra*, 366 U.S. at p. 722.)

A trial court possesses broad discretion to determine whether or not possible bias or prejudice against a defendant has contaminated the entire venire so as to require its discharge. (*People v. Medina* (1990) 51 Cal.3d 870, 889.) Discharging an entire venire is a remedy that is reserved for "the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons [is] insufficient protection for the defendant." (*Id.* at p. 888.) The propriety of the trial court's decision whether to dismiss an entire venire turns on "the totality of the circumstances surrounding jury selection." (*People v. Martinez* (1991) 228 Cal.App.3d 1456.)

Applying these general precepts, the Ninth Circuit, in *Mach v. Stewart* (9th Cir. 1998) 137 F.3d 630 (*Mach*), reviewed the totality of the circumstances of jury selection and reversed a defendant's conviction based on bias that contaminated the entire venire.[2] In *Mach*, the defendant was charged with sexual conduct with a minor. One of the prospective jurors was a social worker who worked with sexual assault cases. The prospective juror said that sexual assault had been confirmed in every case in which a client reported such abuse. She also stated that no child had lied about sexual assault in all the cases she had seen. The social worker also had taken psychology courses and worked with psychologists and psychiatrists. (*Id.* at p. 632-633.) The trial court excused the potential juror for cause but refused to grant a defense motion for mistrial. (*Ibid.*)

Following his conviction, Mach ultimately filed a federal writ of habeas corpus. He contended the jury pool was tainted by the social worker's statements regarding the veracity of children in sexual assault cases and the trial court's failure to grant a mistrial constituted structural error requiring reversal. (*Mach, supra*, 137 F.3d at p. 632.) The Ninth Circuit agreed. "Given the nature of the social worker's statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times they were repeated, we presume that at least one juror was tainted . . ." (*Id.* at p. 633.) Because the case was a credibility battle between the child and Mach, it found the error prejudicial because "[t]he extrinsic evidence was highly inflammatory and directly connected to Mach's guilt." (*Id.* at p. 634.)

Appellant realizes that *Mach* may be distinguished from the

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[2]Decisions of the Ninth Circuit interpreting federal law, although persuasive, are not binding on California courts. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352.)

instant. The instant does not involve child sexual abuse and does not involve a prospective juror making statements based on education, experience, and work with experts in the field.

However, like *Mach*, appellant's case involves equally inflammatory subject matter -- gangs. Evidence of gang membership has long been held to have a "highly inflammatory impact" on a jury. (*People v. Montes* (2014) 58 Cal.4th 809, 859; *People v. Cox* (1991) 53 Cal.3d 618, 660, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Evidence of gang membership also has been held to "create[] a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Montes, supra*, 58 Cal.4th at p. 859; *People v. Carter* (2003) 30 Cal.4th 1166, 1194.) The same is true of gang-related evidence regarding criminal activities because of its inflammatory nature and tendency to imply criminal disposition or actual culpability. (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.)

Analogous to *Mach*, Mr. C. delivered his statements with certainty based on some unknown years of experience with ongoing gang activity in Pinole. (Aug. RT 262-263.) The statements were not isolated; they were repeated more than once. (Aug. RT 281-282.) They implicitly referenced gang violence and the concept of gang retaliation. (Aug. RT 262-263, 281, 283-284.) While Mr. C. might not have had the expertise of the social worker in *Mach*, the certainty with which he made the statements demonstrated he had more knowledge of the subject matter than the average jury person.

In fact, Mr. C.'s statements struck a chord with Mr. L., who had some knowledge of gangs (i.e., shot callers versus line members (Aug. RT 286)) and became concerned about gang retaliation as a result of his name and the names of the other prospective jurors being disclosed to appellant. (Aug. RT 283-286.) Ms. G. voice to a similar privacy/safety concern. (Aug. RT 284.) Even one of the jurors who believed she could set aside her concerns (Prospective

Juror No. 586276) wanted to know if the jurors could vote confidentially. (Aug. RT 286.)

Based on the responses occasioned by Mr. C.'s statements, Mr. C.'s statements had the effect of being viewed by other prospective jurors as expert-like in nature. Obviously, Mr. C. did not say he believed appellant was a gang member or that appellant was engaging in gang activity. However, Mr. C. gave definition to the enhancement language given to the venire before questioning commenced. (Aug. RT 13-14, 32-36.) Mr. C.'s statements effectively communicated gang behavior (i.e., violence and retaliation) and the effects of gangs on the community (i.e., instilling fear in the community in order to act with impunity). These were extrinsic facts regarding the alleged crimes and information that was similar to the expert gang testimony presented at trial. (35 RT 731-732, 756-757.)

Hence, akin to *Mach*, the dissemination of Mr. C.'s and the other responding prospective jurors' views on gangs tainted the entire venire and, like *Mach*, it must be presumed that "at least one juror was tainted and entered into jury deliberations with the conviction" that the gang allegation had to be true. (*Mach, supra*, 137 F.3d at p. 633.)

Appellant realizes that no California case has found a taint sufficient to reverse a defendant's conviction. For example, in *People v. Medina, supra*, 51 Cal.3d at p. 888 (*Medina*), a triple murder case with two felony-murder and one multiple murder special circumstance, prospective jurors made statements to the effect that the defendant's own lawyers thought he was guilty and the defendant should be brought in, tried, and hung "frontier justice style." (*Id.* at p. 888.) The California Supreme Court upheld the trial court's refusal to discharge the entire venire on the grounds only a few prospective jurors made inflammatory remarks and removal of the offending venirepersons was sufficient. (*Id.* at p. 889.)

In *People v. Nguyen* (1994) 23 Cal.App.4th 32 (*Nguyen*), the trial court told the jury panel that the defendant and many of the witnesses were Vietnamese. (*Id.* at p. 40.) One of the prospective jurors, also Vietnamese, stated that he might fear retaliation because he was part of the Vietnamese community, but thought he could be fair and impartial. (*Id.* at p. 42.) The reviewing court upheld the trial court's decision not to dismiss the entire jury panel. (*Ibid.*)

In *People v. Martinez, supra*, 228 Cal.App.3d at pp. 1465-1468 (*Martinez*), some prospective jurors made remarks indicating the defendant, charged with a drug offense, was not an upstanding citizen because he did not speak English. The trial court's refusal to dismiss the panel was upheld on appeal. (*Ibid.*)

Appellant's case is distinguishable from *Martinez, Medina* and *Nguyen*. To begin with, none of the three cases involved gangs, a particularly inflammatory subject matter. While *Nguyen* touched on the subject of retaliation in Vietnamese culture, the statement by the prospective juror in *Nguyen* did not have the snowball effect that Mr. C.'s statements did herein. While the *Medina* case involved some prospective jurors' "hang-'em-high" attitudes towards the criminal justice system and that defendant, nothing in the case suggested that any of the prospective jurors were afraid for their personal safety or the safety of their families should they sit on the jury. The same is true of *Martinez*, which involved more of a question of attitudes towards immigrants rather than any fear of the defendant. Hence, neither *Martinez, Medina*, nor *Nguyen* govern herein.

Appellant's conclusion is not changed by the fact that Mr. C., Ms. G., and Mr. L. were excused and did not sit on appellant's jury. While similar excusals in *Martinez, Medina* and *Nguyen* were sufficient to purge any potential taint, no juror herein could help but recall and reflect back on Mr. C.'s statements after hearing the gang evidence in the case. In fact, at least one or more jurors, despite having agreed to be fair and impartial, likely had second thoughts

about that agreement once the expert testified about the gang's primary activities and the general nature and purpose of gang activity. Hence, the excusal of Mr. C., Ms. G. and Mr. L. was not sufficient to purge any taint.

Nor is appellant's conclusion changed by the fact defense counsel did not exhaust all his peremptory challenges and theoretically cannot be heard to complain. As the *Medina* court stated with regard to this subject, "[w]e question the application of the foregoing rule to situations in which the defendant complains of a failure to discharge an entire venire, for we could not expect the defendant to expend his peremptory challenges in a vain attempt to exclude every member of the venire." (*Medina, supra*, 51 Cal.3d at p. 889.) Similarly, here, appellant's claim cannot be denied merely because he did not proceed to exhaust every challenge.

Finally, the trial court's admonition and instructions to decide the case based on the law and the evidence were not sufficient to resolve the matter. Appellant realizes his counsel requested a curative admonition and the trial court reinstructed the jury on its duty and reasonable doubt. (Aug. RT 297, 299-300.) While, in most cases, such admonitions and instructions are sufficient (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101-102 [jury is presumed to follow court's instructions]), the instant is a case where the bell could not be unrung. Once the venire heard about gang retribution and retaliation, and individual and family safety came into play, at least one, if not more, jurors likely were unable to erase those concepts from their minds. To the extent the information was compartmentalized, the compartmentalization likely failed once the gang expert effectively confirmed Mr. C.'s and Mr. L.'s gang remarks during voir dire. Thus, the admonition and instructions were insufficient protection of appellant's right to a fair and impartial jury.

In sum, the totality of the circumstances surrounding jury selection indicate the instant is that rare case that involved such a

serious occasion of demonstrated bias or prejudice so as to have required discharge of the entire venire. (*Medina, supra*, 51 Cal.3d at p. 888.) Consequently, the trial court abused its discretion in refusing to discharge the panel and reversal is required. (*Martinez, supra*, 228 Cal.App.3d at p. 1460, citing *People v. Wheeler, supra*, 22 Cal.3d at p. 283.)

II. THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING MORENO'S STATEMENT TO OFFICER GWINNUP DURING TRANSPORT FROM THE SCENE TO THE POLICE DEPARTMENT ON THE GROUNDS THE STATEMENT WAS IRRELEVANT AND, IF RELEVANT, MORE PREJUDICIAL THAN PROBATIVE, RESULTING IN A DENIAL OF APPELLANT'S FAIR TRIAL DUE PROCESS RIGHTS

A. Background

During the course of the People's case-in-chief, the prosecutor advised the trial court it intended to call Yuba City Police Department Officer Michael Gwinnup to testify regarding a post-arrest statement made by Moreno during the course of transport to the police department. (32 RT 459-460.)

It is the trial court's admission of the statement that gives rise to appellant's claim of error, based on the following:

Before calling Gwinnup, the prosecutor advised the trial court Gwinnup would testify that Moreno said, "When I get out of these cuffs, I'm going to kill you. I'm a Norteno." (32 RT 461.) The prosecutor said the statement was a statement against penal interest in conjunction with Moreno's admission to gang membership. (32 RT 461.) He further asserted the statement was relevant to the gang's view of law enforcement and their lack of fear of law enforcement, which went directly to the expert opinion. (32 RT 461.) The prosecutor went on to argue the statement was relevant to prove

the charge of active participation in a criminal street gang (§ 186.22, subd. (a)) and to prove the association prong of the criminal street gang enhancement (§ 186.22, subd. (b)). (32 RT 459-460.)

Defense counsel objected. (32 RT 459-462.) Defense counsel contended the statement was made after arrest and appellant had no relationship to the statement. (32 RT 459.) Defense counsel also argued the statement was "incredibly prejudicial to the issue of intent." (32 RT 460.) He argued appellant had to intend to benefit the gang and his act had to be intentional for there to be specific intent. (32 RT 460.) Moreno's statement had nothing to do with appellant's intent at the time the crime was committed. (32 RT 461.)

The trial court agreed with the prosecution. It concluded the evidence was highly probative to the charge of active participation in a criminal street gang and to the gang enhancement. (32 RT 462.) Although it recognized the statement occurred after the incident, it was immediately following the incident. (32 RT 462.) It also found the statement was a declaration against penal interest, an exception to the hearsay rule. (32 RT 466.)

Thereafter, over a renewed defense objection, Gwinnup testified that Moreno said something like, "Just wait until I get these cuffs off, Nigger, I'm going to kill you or fuck you up." (32 RT 466.) Moreno also said, "I'm a Norteno." (32 RT 466.)

B. Appellant's contention

Appellant contends the trial court prejudicially erred in admitting Moreno's statement to Gwinnup. The statement was not relevant or, if relevant, was more prejudicial than probative, resulting in a denial of appellant's fair trial due process rights.

C. Standard of review: abuse of discretion

Rulings regarding relevancy and Evidence Code section 352 are reviewed under the abuse of discretion standard. (*People v. Lee* (2011) 51 Cal.4th 620, 643.)

D. Applicable law and analysis

Evidence is relevant if it tends logically, naturally, and by

reasonable inference to prove a disputed fact that is of consequence to the determination of the action. (*People v. Lee, supra*, 51 Cal.4th at p. 942; Evid.Code, § 210.) Even if relevant, evidence may be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Lee, supra*, 51 Cal.4th at p. 643, quoting Evid.Code, § 352.)

Here, Moreno's statement to Gwinnup was not relevant to any disputed fact of consequence to the action involving appellant. The statement occurred after the incident was over and followed Moreno's arrest. As a result, it was too attenuated for admission.

The People's claim that the statement was admissible to prove Moreno's gang membership and his active participation in a criminal street gang (32 RT 459-460) does not change the result. To prove the charge of active participation in a criminal street gang, the People must show (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 56.)

Here, absent Moreno's statement, the evidence showed the elements of the offense. Moreno self-admitted gang membership at the time of the incident. (31 RT 307-308; 33 RT 563, 565.) The expert relied on Moreno's admission and opined that Moreno was a gang member and an active participant in the gang. (35 RT 746, 755.) Since the offenses were committed with appellant, whom the expert also opined was a gang member (35 RT 753), in an area known for the gang's activities, both the second and third elements of the crime were satisfied without Moreno's post-arrest statement.

The People's claim the post-arrest statement was relevant to prove the association prong of the street gang enhancement similarly fails. (32 RT 460.) The People must establish two elements to prove the street gang enhancement: (1) that the defendant committed a felony (a) for the benefit of, (b) at the direction of, or (c) in association with a criminal street gang; and (2) that in connection with the felony, the defendant harbored the specific intent to (a) promote, (b) further, or (c) assist in any criminal conduct by gang members." (*People v. Albillar, supra*, 51 Cal.4th at pp. 59-68.)

Here, Moreno's post-arrest statement said nothing about appellant and nothing about association with other gang members. Hence, on its face, Moreno's statement was irrelevant to prove the association prong of the enhancement. To the extent the statement is construed otherwise, due to Moreno's admission of gang affiliation, the gang expert opined that the crime was committed in association with gang members given the fact appellant, a gang member, and Moreno, a gang member, committed the crimes together. (35 RT 752.) Thus, contrary to the trial court's conclusion otherwise (32 RT 462) Moreno's post-arrest statement was not highly probative of the street gang enhancement in light of the expert evidence and Moreno's admission at the time of the offense.

Even assuming Moreno's post-arrest statement was relevant, its relevance was outweighed by the substantial danger of undue prejudice, its cumulative nature, and its tendency to mislead the jury. (Evid.Code, § 352.) As noted, Moreno admitted gang membership at the time of the offense (31 RT 307-308; 33 RT 563, 565) and the gang expert testified that Moreno admitted gang membership at the time of the offense and, in the expert's opinion, was an active member of the gang. The expert also testified regarding the primary activities of the gang, and opined that the commission of a crime by two gang members acting together constituted commission of a crime "in association" with gang members for the purposes of the gang enhancement. (35 RT 752-

755.) Thus, Moreno's post-arrest statement was cumulative of other properly admitted evidence.

Moreover, admission of Moreno's post-arrest statement was misleading and unduly prejudicial. As the California Supreme Court has long recognized, evidence of gang membership has long been held to have a "highly inflammatory impact" on a jury. (*People v. Montes, supra,* 58 Cal.4th at p. 859.) Such evidence creates a risk a jury will improperly infer the defendant has a criminal disposition and is guilty of the offense charged (*Ibid.*) Evidence regarding criminal activities of gangs also is considered highly inflammatory because of its tendency to imply criminal disposition or actual culpability. (*People v. Bojorquez, supra,* 104 Cal.App.4th at p. 345.)

While nothing bars gang evidence directly relevant to a material issue in a case (*People v. Montes, supra,* 48 Cal.4th at p. 859), the vice in the admission of Moreno's post-arrest statement -- and consequently, its undue prejudice and misleading tendency -- is that it allowed Moreno's expression of intent to kill Singh and Moreno's expressed intent to kill Gwinnup to be ascribed to appellant. This was particularly egregious since Moreno's post-arrest statement was physically and temporally removed from the incident and it was made to an unrelated party (i.e., Gwinnup) for a reason completely separate from the incident (i.e., being upset at being handcuffed). No juror would have been immune from Moreno's expressions of intent and his apparent criminal disposition to kill police officers. From this, the jury could not help but conclude, by virtue of association, that appellant similarly was predisposed to kill police officers. (Cf. *People v. Sam* (1969) 71 Cal.2d 194, 206.) The effect of the statement, then, was to foreclose any jury question as to appellant's mental state, as the erroneous admission of Moreno's post-arrest statement more than likely led the jury to conclude that if Moreno had an intent to kill, appellant shared the same intent, and thus was guilty of attempted murder.

The evidentiary error was not merely harmless under either California or federal law. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) By allowing the jury to conclude, unfettered, that appellant shared Moreno's intent to kill police officers, the trial court trampled on appellant's fair trial due process right to a defense of lack of intent to kill. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636]; *Chambers v. Mississippi* (1973) 401 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297].)

Absent Moreno's post-arrest statement, the evidence indicated appellant was under the influence of alcohol, likely dazed by the traffic accident, initially passive with Singh, and did not mouth off to Singh. (31 RT 314, 337-339; 32 RT 421, 452, 473-474; 33 RT 561-562, 564; 35 RT 690.) While he ultimately impacted Singh's head on the ground, he did not do so hard enough to cause a skull fracture. In fact, appellant's acts were determined to have caused nothing more than a mild concussion. (32 RT 483, 488, 492.) Hence, absent Moreno's post-arrest statement, one or more reasonable jurors easily could have concluded that appellant acted under the influence of alcohol, and without intent to kill Singh. (*People v. Soojian* (2010) 190 Cal.App.4th 491, 519-522 [hung jury more favorable result].) However, with Moreno's post-arrest statement, appellant's fate was sealed. He had no chance of convincing the jury he acted without intent to kill. This is sufficient to demonstrate the evidentiary error was not harmless under either the *Watson* (reasonable probability the error of which appellant complains affected the result) or the *Chapman* (no prejudice beyond a reasonable doubt) test.

The attempted murder conviction should be reversed.

III.

APPELLANT'S TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO REQUEST INSTRUCTION ON VOLUNTARY INTOXICATION AND ITS EFFECT ON THE SPECIFIC INTENT NECESSARY FOR PROOF OF ATTEMPTED MURDER AND THE CRIMINAL STREET GANG ENHANCEMENTS

A. Appellant's contention

Appellant contends his trial counsel was prejudicially ineffective for failing to request a jury instruction on voluntary intoxication.

B. Applicable law and analysis

A criminal defendant is constitutionally entitled to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal.Const., art. I, § 15.) To establish ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) but for counsel's acts or omissions there is a reasonable probability the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 691-692 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

While the decisions of trial counsel are accorded great deference upon review, deferential scrutiny "must never be used to insulate counsel's performance from meaningful scrutiny and,

thereby, automatically validate challenged acts or omissions." (*In re Cordero* (1988) 46 Cal.3d 161, 180.) Because "'[r]epresentation of an accused [attempted] murderer is a mammoth responsibility,'" the "'seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance." (*In re Jones* (1996) 13 Cal.4th 552, 566, quoting *In re Hall* (1981) 30 Cal.3d 408, 434 and *Proffitt v. Wainwright* (11th Cir. 1982) 685 F.2d 1227, 1247; internal citations omitted.)

Under California law, "[e]vidence of voluntary intoxication is admissible solely on the question of whether or not the defendant actually formed a required specific intent."[3] (§ 29.4, subd. (b); *People*

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[3]CALCRIM No. 3426 tells the jury:

> "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted [or failed to do an act] with _____ <insert specific intent or mental stated required . . .>.
>
> A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.
>
> In connection with the charge of ____ <insert first charged offense requiring specific intent or mental state> the People have the burden of proving beyond a

v. Mendoza (1998) 18 Cal.4th 1114, 1133-1134.) Attempted murder requires a specific intent to kill. (*People v. Lee* (1987) 43 Cal.3d 666, 670.) The criminal street gang enhancement requires the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Hill* (2006) 142 Cal.App.4th 770, 774.) "A defendant is entitled to [a voluntary intoxication] instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'action formation of specific intent.'" (*People v. Williams* (1997) 16 Cal.4th 635, 677; *People v. Roldan* (2003) 35 Cal.4th 646, 715.)

In the instant, appellant's case met the standards for entitlement to the instruction. First, there was substantial evidence of appellant's intoxication. The evidence showed that appellant was driving erratically down Queens Avenue; he struck a car parked on

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> reasonable doubt that the defendant acted [or failed to act] with ____ <insert specific intent or mental state required . . . .. If the People have not met this burden, you must find the defendant not guilty of ____ <insert first charged offense requiring specific intent or mental state>.
>
> . . . . . .
>
> You may not consider evidence of voluntary intoxication for any other purpose. [Voluntary intoxication is not a defense to _____ <insert general intent offense[s].>.]

the street and then struck a car parked in a driveway. (31 RT 336-337; 32 RT 452. 474; 35 RT 691.) He had to be helped out of the vehicle and had to be helped to walk away. (31 RT 339; 32 RT 473.) When Singh first neared appellant, he noticed an odor of alcohol about appellant's person. (31 RT 306; 32 RT 420.) His blood alcohol later was determined to be .15 percent. (35 RT 600.)

Secondly, there was evidence that appellant's intoxication actually affected appellant's ability to form the specific intent required for attempted murder and the specific intent required for the street gang enhancement. Knapp, the People's expert on alcohol and its effects on the body testified that awareness problems develop at levels lower than appellant's blood alcohol level. (33 RT 636.) Knapp also testified that alcohol lowers inhibitions and can result in behavioral changes. (33 RT 637.) More importantly, Knapp testified that brain function becomes progressively depressed with more alcohol in the body. (33 RT 636.) This testimony alone would have permitted a reasonable jury to conclude that appellant was not in possession of all his faculties and unable to, and did not, form the specific intent to kill Singh and did not form the specific intent required for the street gang enhancement. Combining the expert evidence with the evidence of appellant's behavior, such as appellant's initial slowed response to Singh, was sufficient to permit the jury to conclude appellant's intoxication level affected his ability to actually form specific intent. (31 RT 306; 32 RT 420.) Hence, had defense counsel requested the instruction, appellant would have been entitled to it. (*People v. Myles* (2012) 53 Cal.4th 1181, 1217

[absent a defense request, a trial court has no duty to instruct on voluntary intoxication]; *People v. Saille* (1991) 54 Cal.3d 1103, 1120.)

Appellant's trial counsel had an obligation to thoroughly investigate the applicable law and defenses (*In re Neely* (1993) 6 Cal.4th 901, 919; *People v. Plager* (1987) 196 Cal.App.3d 1537, 1543), and consequently was chargeable with knowing voluntary intoxication was a defense to a specific intent crime or allegation and knowing voluntary intoxication was a pinpoint instruction given only upon request. Given the clear evidence of appellant's intoxicated state and the ability of such evidence to show appellant did not form the specific intent to kill Singh or the specific intent required for the gang enhancement, no "plausible tactical explanation can be conceived" for trial counsel's failure to request instruction on intoxication. (*People v. Zimmerman* (1980) 102 Cal.App.3d 647, 657.)

Defense counsel's opening argument did not advance a theory inconsistent with intoxication. In fact, defense counsel told the jury the evidence would show Singh smelled alcohol on appellant's person. (Aug. RT 342.) Defense counsel also told the jury appellant may have been unconscious shortly before the interaction with Singh. (Aug. RT 343.) He further told the jury that there was no excuse for driving under the influence. (Aug. RT 343.) Thus, defense counsel previewed appellant's intoxication, making it apparent that appellant's intoxication affected his actions.

Appellant realizes defense counsel, in closing argument, took the primary position that appellant's actions were the product of

perfect or imperfect self-defense. (37 RT 913-922.) Appellant also realizes that voluntary intoxication is inadmissible on the question of whether a defendant believed it necessary to act in self-defense. (*People v. Soto* (2018) 4 Cal.5th 968, 970.)

Had defense counsel entirely relied on self-defense and imperfect self-defense, appellant might have no claim of error. However, defense counsel also told the jury to carefully think about appellant's state of mind in light of the evidence of intoxication. (33 RT 922.) He argued that appellant was involved in an accident related to his blood alcohol level and it was likely he was injured and dazed by the force of the final impact in the driveway. (33 RT 922-923.) From this argument, one or more reasonable jurors could have concluded appellant lacked the mental wherewithal to form the specific intent to kill. As to the gang enhancement, defense counsel argued that appellant was merely standing next to Moreno, not taking any action when Moreno mouthed a gang challenge at Singh and set the events in motion. (33 RT 925-926.) From this, a reasonable juror easily could have concluded that appellant, as a result of his intoxicated state, was mentally and physically disengaged from Moreno and Moreno's interaction with Singh. Hence, defense counsel's argument did not render the voluntary intoxication instruction inconsistent with his defense. (Cf. *People v. Sedeno* (1974) 10 Cal.3d 703, 716-717, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 178, fn. 26 [instructions on inconsistent theories are not prohibited].) As such, the instruction was wholly warranted under the state of the evidence. Defense

counsel's failure to request it constituted deficient performance within the first prong of *Strickland*. (See also *People v. Fosselman* (1983) 33 Cal.3d 572, 583-584 [technical acts or omissions which seriously prejudice a defendant's case may constitute the withdrawal of a potentially meritorious defense].)

Moreover, defense counsel's failure to request the voluntary intoxication instruction was prejudicial within the second prong of *Strickland*. Despite the People's exhortations to the jury to return a true finding on premeditation and deliberation as to attempted murder (37 RT 855-858), the jury found the attempted murder was not willful, deliberate and premeditated (37 RT 942; 2 CT 503). An attempted killing is willful, premeditated and deliberate if it occurred as a result of preexisting thought and reflection rather than unconsidered or rash impulse. (*People v. Houston* (2012) 54 Cal.4th 1186, 1216; *People v. Solomon* (2010) 49 Cal.4th 792, 812.) "The true test is not the duration of time as much as it is the extent of the reflection." (*People v. Bolin* (1998) 18 Cal.4th 297, 332.) Given the definition of the aggravant, the jury's negative finding indicates, among other things, that appellant did not, or was not able to, carefully weigh his actions, or did not, or was not able to, decide to kill. Had the jury additionally been given direction on the effect of appellant's intoxication on his ability to form the specific intent to kill, one or more reasonable jurors easily could have concluded appellant acted willfully (i.e., with general intent), but was unable to, and did not, form the specific intent to kill. (*People v. Soojian, supra*, 190 Cal.App.4th at pp. 519-522.) This means it cannot be said

beyond a reasonable doubt that the result of the proceeding would not have been different. (*Strickland, supra*, 466 U.S. at pp. 691-692; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

The same is true of the criminal street gang allegation. In order to find the allegation true, the jury was required to find that appellant had the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Hill, supra*, 142 Cal.App.4th at p. 774.) Necessarily, then, appellant had to know exactly what Moreno was doing at the outset when Moreno challenged Singh and had to act with the intent to aid and abet Moreno. Absent the jury's ability to analyze appellant's actions through the lens of an intoxication instruction, the jury had no reason to return anything other than a true finding on the gang enhancement. However, had the jury been instructed on intoxication, one or more reasonable jurors could have determined that appellant was so inebriated that he did not know exactly what Moreno was doing and responded only in a drunken stupor and not with gang-related intent. (*People v. Soojian, supra*, 190 Cal.App.4th at pp. 519-522.) Just as with the charge of attempted murder, the reasonable possibility that one or more members of the jury would have made a not true finding on the gang allegation means it cannot be said beyond a reasonable doubt that the result of the proceeding would not have been different. (*Strickland, supra*, 466 U.S. at pp. 691-692; *Chapman v. California, supra*, 386 U.S. at p. 24.)

Accordingly, defense counsel's failure to request instruction on voluntary intoxication was prejudicial and the attempted murder verdict and the true findings on the gang allegation should be vacated.

V.

THERE WAS NO EVIDENCE OF INTENT TO KILL SUFFICIENT TO SUPPORT THE ATTEMPTED MURDER VERDICT

A. Appellant's contention

Appellant contends there was no evidence of intent to kill sufficient to support the verdict of attempted murder.

B. Standard of review: substantial evidence

In determining whether the evidence was sufficient to sustain a verdict, a reviewing court must review the entire record in the light most favorable to the judgment to determine whether the essential elements of the offense was supported by evidence of reasonable, credible, and solid value such that any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Johnson* (2015) 60 Cal.4th 966, 988; *People v. Rowland* (1992) 4 Cal.4th 238, 269; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) The same standard of review applies to cases wherein the prosecution relied primarily on circumstantial evidence. (*People v. Brown* (2014) 59 Cal.4th 86, 106.)

For purposes of review, an appellate court's focus is not limited to review of the evidence supporting guilt. Although a reviewing court considers the evidence in the light most favorable to the prosecution, an insufficiency claim must be resolved based on the whole record as opposed to isolated bits of evidence or "some" evidence supporting a finding, and the reviewing court must judge

whether the evidence of each of the essential elements of the offense is substantial. (*People v. Johnson, supra*, 26 Cal.3d at p. 577; *People v. Bassett* (1968) 69 Cal.2d 122, 139; *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1262 (*Boatman*).) This thoroughness is required by federal and State constitutional guarantees. "A state court conviction that is not supported by sufficient evidence violates the due process clause of the Fourteenth Amendment and is invalid for that reason." (*People v. Rowland, supra*, 4 Cal.4th at p. 269; *Jackson v. Virginia, supra*, 443 U.S. at pp. 313-324.)

C. Insufficiency of evidence of intent to kill

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. . . ." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) A defendant's specific intent may be inferred from the defendant's acts and the overall circumstances of the crime. (*People v. Smith* (2005) 37 Cal.4th 733, 741.) Although not an element of the offense, evidence of motive may be probative of intent to kill. (*Ibid.*)

Here, apart from the injury to Singh, there was no evidence of appellant's intent to kill. (Cf. *People v. Avila* (2009) 46 Cal.4th 680, 702 [injury probative of intent but not dispositive].) The evidence showed that appellant collided with a vehicle parked in a driveway and had to be helped from the vehicle. (31 RT 337-339; 32 RT 452, 473-474.) After walking a short distance with Moreno's help, Singh ordered Moreno and appellant to stop. When the two men finally did so, appellant turned around and faced Singh. Moreno did not. (31 RT 304, 343-344; 32 RT 409, 418.) Moreno ultimately turned

around and challenged Singh (31 RT 307-308; 33 RT 563), who took action to disable Moreno (31 RT 314; 32 RT 421; 33 RT 561-562, 564). Again, appellant did not help Moreno and took no action against Singh. (*Ibid.*) After that, the exact details of what occurred between Singh and Moreno lack some clarity. Whatever happened, appellant, according to Medina, eventually became involved in the altercation and, according to Castner, Moreno was not involved when Castner pulled appellant off Singh to stop him from striking Singh's head on the ground. (31 RT 351, 353, 355; 32 RT 425, 427-428.) Singh suffered a mild traumatic head injury as a result of appellant's actions. (32 RT 483, 488, 492.)

The totality of the foregoing circumstances demonstrates no intent to kill by appellant. Obviously, appellant realizes that impacting a head against a sidewalk or cement surface can have fatal consequences. (Cf. *People v. Efstathiou* (1941) 47 Cal.App.2d 441, 443.) However, in the instant, appellant's actions fell short of causing any skull fracture. That suggests, despite the nature of the surface, that appellant did not use force consistent with an intent to kill. Moreover, appellant manifested no desire to kill Singh. Appellant did not provoke the incident. Moreno did. Appellant did not initiate physical contact with Singh. Moreno did. Unlike, for example, the cases of *People v. Bolden* (2002) 29 Cal.4th 515, 561 and *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552, where there could be no intent other than to kill where the defendants stabbed unsuspecting and defenseless victims, here the evidence demonstrated otherwise. In fact, the evidence indicated only that

appellant intervened in an effort to stop the contact between Singh and appellant. He had no lethal weapon. He did not surreptitiously approach Singh. He made no effort to use Singh's own baton or Singh's firearm against Singh. Nor was Singh particularly vulnerable. Singh described himself as six feet tall with a weight of 185 pounds. (31 RT 308, 313.) Appellant, on the other hand, was described as approximately 5'7" tall and 130 to 140 pounds. (31 RT 304; 32 RT 409.) Hence, the size and weight differences favored Singh, who, as a police officer, undoubtedly underwent training in the art of self-defense.

To the extent motive may be probative of intent to kill (*People v. Smith, supra,* 37 Cal.4th at p. 741), appellant realizes the gang expert testified that the XIV Bonds prohibit acts of cowardice towards law enforcement officers and gang members are expected to retaliate against perceived acts of disrespect by an officer. (35 RT 721.) In the context of this case, that means appellant's motive was to avoid being viewed as a coward in the fact of the contact with Singh. Such a motive does not equate to intent to kill.

Appellant also realizes the gang expert testified that assaults and attempted murders are some of the primary activities of the gang. (35 RT 731-732.) However, appellant's actions, likely fueled by his inebriation, lacked the harbingers of a specific intent to kill in light of his failure to use Singh's baton or Singh's firearm and his infliction of a mild concussion.

Appellant's conclusion is not changed by the fact the gang expert also testified that gang members are expected to come to the

aid of a fellow gang members. (35 RT 760, 762.) Appellant may have done exactly that, but going to the assistance of Moreno did not, ipso facto, transmute his response into a specific intent to kill. Rather, at the most, and consistent with gang culture, appellant committed an aggravated assault designed to disable Singh and end the confrontation with Moreno.

Under these circumstances, it cannot be said the offense of attempted murder was supported by evidence of reasonable, credible, and solid value such that any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia, supra*, 443 U.S. at p. 319.

The attempted murder verdict should be vacated.

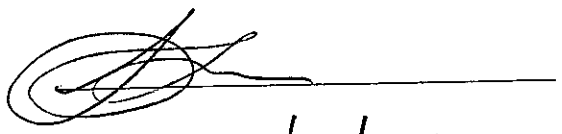
CONCLUSION

The infiammatory remarks by more than one prospective juror regarding gangs and, implicitly, gang violence and safety concerns related to gang violence, required the trial court to excuse the entire venire. The trial court's refusal to do so violated appellant's federal and state constitutional rights to a fair and impartial jury. Should this contention be rejected, appellant alternatively contends the trial court committed prejudicial evidentiary error in admitting the codefendant's post-arrest statement regarding his gang affiliation and his desire to kill his transport officer. He further contends his trial counsel was ineffective in failing to request instruction on voluntary intoxication. In addition, he contends the evidence was insufficient to support the jury's verdict on attempted murder.

DATED: ~~February 28, 2022~~ The petition for a writ of certiorari should be granted.

May 10, 2022

Respectfully submitted,



Date: 5/10/22