

JUL 17 2024

Court of Appeal, Sixth Appellate District - No. H052073

Jorge Navarrete Clerk

S285129

Deputy

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

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In re RAFAEL ERNESTO GABRIEL on Habeas Corpus.

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The petition for review is denied.

**GUERRERO**

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*Chief Justice*

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Case No.: \_\_\_\_\_

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SUPREME COURT OF THE UNITED STATES

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Rafael Gabriel,

Petitioner.

VS.

State of California,

Respondent.

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APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERIORARI

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Rafael Gabriel, AK2509

POB-4000, B12-244

Vacaville Ca. 95696-4000

In Propria-Persona

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

In re RAFAEL GABRIEL on Habeas Corpus.

H052073

Monterey County Super. Ct. Nos. 24HC000015, 23HC000088, SS090745B

BY THE COURT:


The petition for writ of habeas corpus, which includes several claims, has been read and considered.

One of these claims is that petitioner is entitled to post-judgment relief under the Racial Justice Act of 2020. (Pen. Code, §§ 745, 1473, subd. (e).) However, petitioner does not provide any documentation, such as trial court transcripts, concerning the displays of racial bias, the use of racially discriminatory language, or the sentencing disparity that he alleges. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474 [a petition for writ of habeas corpus must include copies of reasonably available documentary evidence].) To the extent petitioner also claims he is “entitled to statistical data on the number of white defendants who receive: (1. An unauthorized sentence from Judge Butler; and (2. ‘objective unreasonable’ orders denying habeas relief from Judge Jefferson and Anderson,” there has been no good cause shown for such discovery. (Cf. Pen. Code, § 745, subd. (d); *Young v. Superior Court* (2022) 79 Cal.App.5th 138, 144.)

The remaining claims in the petition likewise fail on various grounds. The request for discovery under the Racial Justice Act and the petition for writ of habeas corpus are denied.

(Grover, Acting P.J., Danner, J., and Lie, J.  
participated in this decision.)

Date: 05/16/2024

 Acting P.J.

## TABLE OF AUTHORITY

04/20/2024	Declaration of Rafael Gabriel . . . . .	1
05/30/2024	Letter of the Monterey Clerk of the Court . . . . .	2
10/19/2011	Sentencing order of Judge Pamala Butler ( <u>People v. Gabriel</u> , SS90745B) . . . . .	3
09/05/2023	Habeas Order of Judge Jared Jefferson ( <u>People v. Gabriel</u> , 23HC00088) . . . . .	5
04/10/2024	Habeas Order of Judge Maria Anderson ( <u>People v. Gabriel</u> , 24HC00015) . . . . .	7
05/25/2018	Sentencing Order of Judge Pamala Butler ( <u>People v. Jiminez</u> , SS170063B) . . . . .	9
07/12/2023	Habeas Order of Judge Jared Jefferson ( <u>People v. Jiminez</u> , 23HC00069) . . . . .	13
05/16/2024	Order of the California Court of Appeal ( <u>People v. Gabriel</u> , H025073) . . . . .	16
07/17/2024	Order of the California Supreme Court ( <u>People v. Gabriel</u> , S285129) . . . . .	17

DECLARATION OF RAFAEL GABRIEL

I, Rafael Gabriel, declare as follows:

(1. I am the Petitioner in this habeas action, and the Defendant in the underlying criminal case (Case No.: SS090745B). I have personal knowledge of the facts set for in this declaration, and can competently testify thereto.

(2. On October 19, 2011, I was sentence by Judge Pamala Butler. I was a first-time youthful offender. Judge Butler stated on the record that the sole reason she was imposing the upper aggravating term (absent aggravating factors) was because of my Hispanic family members, who were not involved in the case in any manner. I have asked my family members to obtain a copy of my sentencing transcript, which I will lodge in this court upon receipt. However, if this Court were to grant informal re-view asking Respondent to produce it, it would probably be the quicker route as jail mail is extremely slow.


(3. My August 2023 habeas petition that only contained the Rodriguez claim was unsigned, undated and unverified, yet Judge Jefferson procedurally barred it anyway.

(4. My February 12, 2024 petition under the Racial Justice Act was virtually identical to this petition, and asked the court to look at the original sentence under the RJA, not just the undated, unsigned and unverified petition.

(5. I had no knowledge that my sentence was unlawful until just last year, and at that time I was only aware of the Rodriguez claim, not the Cunningham or PC-12022.5/1170.1(d) claim.

(6. I was quite shocked to learn that my maximum sentence that Judge Butler could have imposed was just 5 years, when she actually sentenced me to 25 years (two decades beyond my lawful release date).

I declare that the foregoing is true and correct under penalty of perjury. Executed this 20th day of April 2024 in Vacaville California.

  
\_\_\_\_\_  
Rafael Gabriel, Petitioner.



SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MONTEREY

240 Church Street • Salinas, California • 93901 • (831) 775-5400  
[www.monterey.courts.ca.gov](http://www.monterey.courts.ca.gov)

To: Rafael Gabriel Jr.

From: Veronica Green Court Services Coordinator

Date: 05.30.24

Subject: Transcript Request SS090745B

Your request cannot be completed for the following reason:

- 1) Pursuant to 69955(e) Reporting notes produced under subdivision (b) may be destroyed upon the order of the court after 10 years from the taking of the notes in criminal proceedings and after five years from the taking of the notes in all other proceedings, unless the notes report proceedings in capital felony cases including the preliminary hearing.

Sent to:

Rafael. E. Gabriel Jr.  
1338 Wiren St.  
Salinas, CA 93905

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY	
<b>The People of the State of California,</b>  vs.  <b>Gabriel, Rafael Ernesto,</b>	Plaintiff    Defendant
Hon. Pamela L. Butler Clerk: Abby Luzon CSR: Tina Deyerle- CSR#4286 Recording No.	
Minutes: <b>Sentencing and Report</b>  <b>October 19, 2011</b>	Case No. <b>SS090745B</b> <b>Courtroom 3</b>
<b>Charges.</b> 1: PC211 [Robbery] FEL. Conviction: Nolo Plea 1: PC12022.5(a) [Used Firearm:Commission Of Fel] ENH. Admitted 1: PC186.22(B)(1) [Street Gang Act:Conv Felony] ENH. Admitted 2: PC186.22(B)(1) [Street Gang Act:Conv Felony] ENH 2: PC211 [Robbery] FEL 2: PC12022.5(a) [Used Firearm:Commission Of Fel] ENH 3: PC211 [Robbery] FEL 3: PC12022.5(a) [Used Firearm:Commission Of Fel] ENH 3: PC186.22(B)(1) [Street Gang Act:Conv Felony] ENH 4: PC211 [Robbery] FEL 4: PC12022.5(a) [Used Firearm:Commission Of Fel] ENH 4: PC186.22(B)(1) [Street Gang Act:Conv Felony] ENH 5: VC10851(a) [Take Vehicle Without Owners Consent] FEL. Conviction: Nolo Plea 5: PC186.22(B)(1) [Street Gang Act:Conv Felony] ENH 6: PC186.22(a) [Street Gang Act] FEL	

Case regularly called for sentencing. Court has read and considered report and recommendation of Probation Officer, and Diagnostic Report if any.

Deputy District Attorney David Rabow appeared.

Probation Officer Elizabeth Baxter appeared.

Defendant appears and is in custody on this case.

Defendant appeared with Counsel Thomas Worthington.

Defendant waives formal arraignment for pronouncement of judgment.

Defendant states there is no legal cause why judgment should not be pronounced.

Additions and corrections made to Probation Officer's report.

Recommendations are made by respective parties.

Probation is denied.

As to count 1: imposed the upper term of 5 year(s), 0 month(s), 0 day(s).

Plus enhancement as to count 1 pursuant to PC12022.5(a) imposed the upper term of 10 year(s), 0 month(s), 0 day(s).

Plus enhancement as to count 1 pursuant to PC186.22(b)(1) of 10 year(s).

Total term as to count 1: 25 years(s).

As to count 5: imposed the middle term of 2 year(s), 0 month(s), 0 day(s).

Count 5 to be served concurrent with count 1.

Defendant committed to Department of Corrections and Rehabilitation for the total fixed term of 25 year(s), 0 month(s), 0 day(s).

Credit for time served of 983 days plus 147 days good and work time, for a total of 1,130 days.

Pay a restitution fine of \$5,000.00 to the State Restitution Fund. (PC 1202.4(b)).

Pay additional restitution fine in same amount assessed pursuant to PC 1202.4(b). This restitution fine shall be suspended unless parole is revoked (PC 1202.45).

Pay a court security fee of \$40.00 times the number of convictions for a total of \$80.00. (PC1465.8(a)(1))

Pay a Court Facilities Assessment fee of \$30.00 times the number of convictions for a total of \$60.00. (GC70373)

Pay an Emergency Medical Air Transportation penalty of \$4.00. (GC76000.10).

Pay a Crime Prevention Fund fine of \$10.00 (PC1202.5).

Pay victim restitution in an amount of \$1,547.29 to Nob Hill/Raley Foods, 500 W. Capitol Avenue, West Sacramento, CA 95605 through the California Department of Corrections and Rehabilitation (PC1202.4).

Pay victim restitution in an amount of \$2,526.94 to Super Maxx Foods, 1270 Merrit Street, Suite C, Castroville CA 95012 through the California Department of Corrections and Rehabilitation (PC1202.4).

Court retains jurisdiction for purposes of restitution.

You must register as a gang member pursuant to Penal Code § 186.30.

Provide all identifying information required by Section 296(a)(1) PC.

Defendant advised firearm prohibition is for life.

Upon motion of the District Attorney, all remaining charges, enhancements and/or special allegations are hereby ordered dismissed/stricken pursuant to PC 1385.

Defendant to remain In-Custody

Sheriff to deliver Defendant into custody of the Director of California Institution for Men at North Kern State Prison, Delano CA.

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Dated: \_\_\_\_\_

11/3/2011

  
Pamela L. Butler, Superior Court Judge



County of Monterey  
On 09/05/2023  
By Deputy: Jimenez, Teena

## THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

## COUNTY OF MONTEREY

In re

Rafael Gabriel,

Case No. 23HC000088  
[SS090745B]

On Habeas Corpus.

## ORDER DENYING PETITION

On August 24, 2023, petitioner Rafael Gabriel, an inmate, filed a petition for writ of habeas corpus asserting his sentence in Monterey County case number SS090745B was invalid because Penal Code section<sup>1</sup> 186.22 and section 12022.5 enhancements cannot be applied to the same crime (*People v. Rodriguez* (2009) 47 Cal.4th 501) but were in his case.

In SS090745B, petitioner was charged with seventeen counts, including thirteen robberies (§ 211), all including alleged enhancements for street terrorism (§ 186.22, subd. (b)(1)), seven enhanced for personal use of a firearm (§ 12022.5, subd. (a)), and the plea form notes that a section 12022.53, subdivision (b) enhancement could also be theoretically added to each and every robbery. The maximum possible sentence for each robbery is therefore at least 15 years, and the robberies alone exposed petitioner to 195 years and thirteen strikes.

On August 10, 2011, petitioner entered into a plea deal wherein he agreed to plead to one count of robbery, one count of unlawful taking of a vehicle (Veh. Code, § 10851), and to admit both street terrorism and firearm use enhancements appended to the robbery. Petitioner stipulated to 10 years for each enhancement, 8 months for the vehicle theft, and a term of three to five years for the robbery's base term. The total term therefore was to be determined by the court and to be between 23 years, 8 months and 25 years, 8 months.

<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

1 On November 7, 2011, petitioner was duly sentenced. The court imposed the upper term  
2 for the robbery, but ordered the vehicle theft term concurrent, so petitioner's total term was 25  
3 years, within the agreed-upon range. Remaining allegations were dismissed.

4 Habeas is not a substitute for appeal. (*In re Kirchner* (2017) 2 Cal.5th 1040, 1052.)  
5 Moreover, substantial delay in filing warrants denial. (*In re Robbins* (1998) 18 Cal.4th 770, 780.)  
6 Here, petitioner has not justified failing to appeal or waiting more than ten years to file his  
7 petition. The court therefore does not need to consider the substantive allegations.

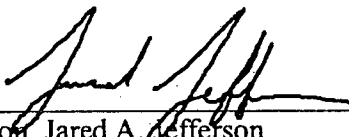
8 Moreover, where a defendant gains the benefit of a plea bargain, that defendant may not  
9 thereafter challenge the plea bargain. (*People v. Couch* (1996) 48 Cal.App.4th 1053, 1056-58.)  
10 Petitioner faced approximately two hundred years and thirteen strikes, and an agreement for 23  
11 to 25 years and one strike was clearly to his benefit. Petitioner therefore may not now challenge  
12 the alleged illegality of a sentence from which he benefitted tremendously.

13 For the foregoing reasons, the petition is DENIED. The clerk is instructed to file a copy  
14 of this order in case numbered SS090745B.

15 IT IS SO ORDERED.

16  
17 Dated: 9/1/2023



18   
Hon. Jared A. Jefferson  
Judge of the Superior Court

## 1 THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 COUNTY OF MONTEREY

ELECTRONICALLY FILED BY  
Superior Court of California,  
County of Monterey  
On 04/10/2024  
By Deputy: Jimenez, Teena3  
4  
5 In re

6 Rafael Gabriel,

7 On Habeas Corpus.

Case No. 24HC000015  
[SS090745B]

8 ORDER DENYING PETITION

9 On February 15, 2024, petitioner Rafael Gabriel, an inmate, filed a petition for writ of  
10 habeas corpus asserting his sentence in Monterey County case number SS090745B was invalid  
11 for various reasons which he previously asserted less than six months ago in petition numbered  
12 23HC000088. The petition then further asserts violations of the Racial Justice Act ("RJA," Pen.  
13 Code, § 745) inasmuch as (t) the judge who sentenced petitioner was white, and petitioner is  
14 Hispanic and (2) the judge who denied 23HC000088 was white, and petitioner is Hispanic.

15 First, regarding all allegations other than the RJA allegations, piecemeal and duplicative  
16 filings warrant denial. (*In re Clark* (1993) 5 Cal.4th 750, 767.) Those allegations are therefore  
17 denied as duplicative.

18 Second, turning to the RJA allegation, the RJA does not provide a basis for challenging  
19 denial of a habeas petition; rather, it provides various bases for challenging a conviction. There is  
20 therefore no need to analyze the allegation that 23HC000088 was denied in violation of the RJA.

21 Third, petitioner fails to make a substantive claim of an RJA violation for either his  
22 conviction or denial of his habeas petition. The RJA requires a showing of bias, use of biased  
23 language, overcharging, or disproportionate sentencing. (RJA, subd. (a).) The mere fact that a  
24 judge is a different race from a defendant, imposes a sentence agreed upon in a plea bargain, or  
25


1 denies a habeas petition challenging the bargained-for sentence, is insufficient to establish an  
2 RJA violation.

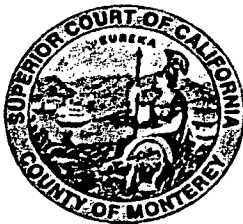
3 For the foregoing reasons, the petition is DENIED. The clerk is instructed to file a copy  
4 of this order in case numbered SS090745B.

5 IT IS SO ORDERED.

6  
7 Dated: 4/2/2024



8   
9 Hon. **Maria O. Anderson**  
10 Judge of the Superior Court  
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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MONTEREY  
240 CHURCH STREET  
SALINAS, CA 93901  
831-775-5400

**\*AMENDED MINUTE ORDER\***

Case Number: SS170063B

People of the State of California vs. Daniel Alexis Jimenez

Honorable: Pamela L. Butler  
Courtroom Reporter: Sue Just, CSR6838

Courtroom Clerk: Abigail Luzon  
Location: Department 3

Date: 5/25/2018

Time: 8:45 AM

Hearing: Sentencing

**Charges:**

001	PC664-187a-Attempted Murder	Felony
001	PC186.22(b)(1)-Street Gang Act:Conv Felony	Allegation
001	PC186.22(b)(5)-Special Allegation-Street Gang Activity	Allegation
001	PC12022.53b-Used Firearm	Allegation
001	PC12022.53c-Fire Firearm	Allegation
001	PC12022.53e-Principal in the Commission of an Offense	Allegation
001	PC12022.5(a)-Enh-Used Firearm:Commission Of Fel	Enhancement
002	PC12022.53e-Principal in the Commission of an Offense	Allegation
002	PC12022.53b-Used Firearm	Allegation
002	PC12022.53c-Fire Firearm	Allegation
002	PC664-187a-Attempted Murder	Felony
002	PC186.22(b)(1)-Street Gang Act:Conv Felony	Allegation
002	PC186.22(b)(5)-Special Allegation-Street Gang Activity	Allegation
003	PC186.22(b)(1)-Street Gang Act:Conv Felony	Allegation
003	PC186.22(b)(4)-Street Gang Act:Fel W/Life Sen	Allegation
003	PC246-Shoot At Inhabited Dwelling/Vehicle/Etc.	Felony
003	PC12022.53b-Used Firearm	Allegation
003	PC12022.53c-Fire Firearm	Allegation
003	PC12022.53e-Principal in the Commission of an Offense	Allegation
004	PC186.22(b)(1)-Street Gang Act:Conv Felony	Allegation
004	PC12022.5(a)-Enh-Used Firearm:Commission Of Fel	Enhancement
004	PC245b-Assault With Semiautomatic Rifle On Person	Felony
005	PC245b-Assault With Semiautomatic Rifle On Person	Felony
005	PC186.22(b)(1)-Street Gang Act:Conv Felony	Allegation
005	PC12022.5(a)-Enh-Used Firearm:Commission Of Fel	Enhancement
010	PC25850(c)(6)-Alleg-Carry Loaded Firearm-not registered owner	Allegation
010	PC186.22(b)(1)-Street Gang Act:Conv Felony	Allegation
010	PC25400a1-Carry Concealed Weapon In Vehicle	Felony
010	PC25400(c)(3)-Enh-CCW:Active Street Gang	Enhancement

010	PC186.22(b)(1)(A)-Street Gang Act:Conv Felony	Allegation
010	PC25850(a)-Carry Loaded Firearm In Public Place	Felony
010	PC25850(c)(3)-Enh-Carry Loaded Firearm-Criminal Street Gang	Enhancement
011	PC25850(c)(6)-Enh-Carry Loaded Firearm-not registered owner	Enhancement
011	PC186.22(b)(1)-Street Gang Act:Conv Felony	Allegation
011	PC25850(a)-Carry Loaded Firearm In Public Place	Felony
011	PC25850(c)(3)-Enh-Carry Loaded Firearm-Criminal Street Gang	Enhancement
012	PC186.22a-Street Gang Act: Felony	Felony
014	PC245(a)(4)-Assault: Likely GBI not firearm	Felony
015	PC245(a)(2)-Fel-Assault With Firearm On Person	Felony

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Nature of proceedings: Sentencing.

Deputy District Attorney James Laughlin is present.

Defendant appears in custody.

Defendant appears with Attorney Eric Dumars.

Probation Officer Elizabeth Baxter is present.

The Defendant is prohibited from owning, purchasing, receiving, possessing, or having under his or her custody any firearms, ammunition, and ammunition feeding devices, including but not limited to magazines, and shall relinquish all firearms pursuant to PC 29810.

The Court finds as follows:

Defendant has completed a Prohibited Persons Relinquishment Form.

Defendant has no reportable firearms per the probation officer's report.

The Court has read and considered the report and recommendation of the Probation Officer, any letters submitted on behalf of the Defendant, and any diagnostic report.

Defendant waives formal arraignment for pronouncement of judgment.

Defendant states there is no legal cause why judgment should not be pronounced.

Additions and corrections made to Probation Officer's report.

Recommendations are made by respective parties.

Probation is denied.

Term imposed pursuant to stipulation.

As to count 1: imposed the upper term of 9 year(s), 0 month(s), 0 day(s).

Plus enhancement as to count 1 pursuant to PC12022.5(a) imposed the upper term of 10 year(s).

Plus enhancement as to count 1 pursuant to PC186.22(b)(1) of 10 year(s).

\*\*\*\*\*Amended by order of court on Tuesday, May 29, 2018, Chris Ruhl, Court Executive Officer, by Abby Luzon, Deputy.\*\*\*\*\*

As to count 1: total of 29 years.

As to count 14: imposed the middle term of 3 year(s), 0 month(s), 0 day(s), concurrent.

As to count 15: imposed 1/3 the middle term of 1 year(s), 0 month(s), 0 day(s), consecutive.

Defendant committed to Department of Corrections and Rehabilitation for the total fixed term of 30 year(s), 0 month(s), 0 day(s).

Credit for time served of 453 days plus 67 days good and work time, for a total of 520 days. Conduct/work credits calculated at 15%.

Pay restitution fine of \$2,000.00 for the State Restitution Fund (PC 1202.4(b)).

Pay additional restitution fine in same amount assessed pursuant to PC 1202.4(b). This restitution fine shall be suspended unless parole is revoked (PC 1202.45).

Pay a Court Operations Assessment of \$40.00 times the number of convictions for a total of \$120.00. (PC 1465.8(a)(1))

Pay a Court Facilities Assessment of \$30.00 times the number of convictions for a total of \$90.00. (GC70373)

Pay victim restitution to John Doe in the amount of \$10,842.73 and in an amount to be determined by Probation, and in a manner to be determined by the California Department of Corrections and Rehabilitation, jointly and severally with Gerardo Laso and Ricardo Alfaro (PC1202.4).

\*\*\*\*\*Amended by order of court on Tuesday, May 29, 2018, Chris Ruhl, Court Executive Officer, by Abby Luzon, Deputy.\*\*\*\*\*

Pay victim restitution to Jane Doe in the amount of \$5,903.51 and in an amount to be determined by Probation, and in a manner to be determined by the California Department of Corrections and Rehabilitation, jointly and severally with Gerardo Laso and Ricardo Alfaro (PC1202.4).

Pay victim restitution to the California Victim Compensation & Government Claims Board (Cal-VCB) in the amount of \$987.74 as it relates to Jane Doe – claim A17-6265524, in a manner to be determined by the California Department of Corrections and Rehabilitation, jointly and severally with Gerardo Laso and Ricardo Alfaro (PC1202.4).

Provide all identifying information required by Section 296(a)(1) PC.

Defendant to register as a gang member pursuant to Penal Code § 186.30.

All remaining charges, enhancements and/or special allegations are hereby ordered dismissed/stricken pursuant to PC 1385.

Defendant is remanded to the custody of the California Department of Corrections and Rehabilitation. The Sheriff shall deliver the Defendant into the custody of the Director of the California Institution for Men at North Kern State Prison, Delano, CA.

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF MONTEREY

ELECTRONICALLY FILED BY  
Superior Court of California,  
County of Monterey  
On 07/12/2023  
By Deputy: Sanchez, Cynthia

In re

Daniel Jimenez,

On Habeas Corpus.

Case No. 23HC000069  
[SS170063B]

ORDER DENYING PETITION

On June 29, 2023, Daniel Jimenez, an inmate, filed a petition for writ of habeas corpus asserting his conviction in Monterey County case number SS1700763B was invalid for the following reasons: ineffective assistance of counsel, prosecutorial misconduct, and an illegal sentence. The core assertion of the petition is the illegal sentence: the petition correctly notes that Penal Code section<sup>1</sup> 186.22 and section 12022.5 enhancements cannot be applied to the same crime. (*People v. Rodriguez* (2009) 47 Cal.4th 501.) The petition then argues that counsel was ineffective for “bullying” petitioner into the plea deal and the prosecution committed misconduct by agreeing to the deal. The petition also asserts that petitioner “called a *Marsden* hearing to replace ineffective counsel” but the court “held the request was untimely” thereby denying petitioner’s right to his chosen and retained counsel. Finally, the petition asserts that petitioner was a “youthful offender” and should have been sentenced to a lower term.

In SS170063B, on January 11, 2017, the prosecution filed a complaint that petitioner had committed the following crimes: Two counts of attempted first-degree murder (§§ 664/187/189), each enhanced for gang membership (§ 186.22, subd. (b)(1)) and personal discharge of a firearm (§ 12022.53, subds. (b), (c), (e)); one count of shooting at an occupied motor vehicle (§ 246), with the same enhancements; two counts of assault with a semi-automatic firearm (§ 245, subd.

<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

1 (b), each enhanced for gang membership (§ 186.22, subd. (b)(1)) and personal use of a firearm (§  
2 12022.5, subd. (a)); two counts of carrying a loaded firearm (§ 25850, subd. (a)); and one count  
3 of street terrorism (§ 186.22, subd. (a)).

4 On January 17, 2018, with trial calendar call set for January 31, 2018, the court denied a  
5 motion for substitution of counsel because proposed counsel asserted she would need to continue  
6 the trial to be adequately prepared. There is no record of a *Marsden* hearing.

7 On January 31, 2018, the trial was continued because defense counsel was obligated to  
8 appear at another trial. On March 9, 2018, defense counsel filed a trial brief, including motions in  
9 limine and proposed jury instructions.

10 However, on March 12, 2018, petitioner entered into a plea deal. Petitioner pleaded to  
11 one count of second-degree attempted murder (§ 664/187), admitting enhancements for firearm  
12 use (§ 12022.5) and gang membership (§ 186.22, subd. (b)(1)), one count of assault likely to  
13 cause great bodily injury not involving a firearm (§ 245, subd. (a)(4)), and one count of assault  
14 with a firearm (§ 245, subd. (a)(2)). Petitioner agreed to a sentence of thirty years: nine years (the  
15 upper term) for the attempted murder, plus ten years for each of the two enhancements, followed  
16 by a single year for the charge of assault with a firearm, and a concurrent sentence for the  
17 remaining charge.

18 On May 24, 2018, counsel filed a sentencing memorandum calling attention to the  
19 "youth-related factors" affecting petitioner. On May 25, 2018, petitioner was sentenced to the  
20 agreed-upon term and the remaining counts and enhancements were dismissed. Petitioner never  
21 filed an appeal.

22 Habeas is not a substitute for appeal. (*In re Kirchner* (2017) 2 Cal.5th 1040, 1052.)  
23 Moreover, substantial delay in filing warrants denial. (*In re Robbins* (1998) 18 Cal.4th 770, 780.)  
24 Here, petitioner has not justified failing to appeal or waiting five years to file his petition. The  
25 court therefore does not need to consider the substantive allegations.

1 In any case, the substantive allegations lack merit. A court may deny a continuance where  
2 no good cause exists, such as on the eve of a trial which had been pending for about a year. (Cal.  
3 Const. art. I, § 29 [prosecution has a right to speedy trial]; Pen. Code, § 1050, subd. (a)  
4 [preference against continuances]; *People v. Snow* (2003) 30 Cal.4th 43, 75 [permissible to deny  
5 last-minute continuance of long-pending case].) Therefore the court was within its discretion to  
6 deny the last-minute substitution request. Petitioner was not denied counsel, as his counsel went  
7 on to file trial and sentencing briefs.

8 Finally, where a defendant gains the benefit of a plea bargain, that defendant may not  
9 thereafter challenge the plea bargain. (*People v. Couch* (1996) 48 Cal.App.4th 1053, 1056-58.)  
10 Petitioner faced life without the possibility of parole for each of his two attempted first-degree  
11 murder charges (§§ 664/187/189) and an agreement for 30 years was clearly to his benefit.  
12 Petitioner therefore may not now challenge the alleged illegality of a sentence from which he  
13 benefitted tremendously.

14 Counsel was not ineffective for negotiating such a favorable disposition. The prosecution  
15 committed no misconduct in agreeing to a deal, which though facially unlawful, resulted in a  
16 significant, but reduced, sentence, appropriate for the charges alleged. And the court was aware  
17 of petitioner's status as a youthful offender, but petitioner was sentenced to the upper term for  
18 the attempted murder because he agreed to that sentence.

19 For the foregoing reasons, the petition is DENIED. The clerk is instructed to file a copy  
20 of this order in case numbered SS170063B.

21 IT IS SO ORDERED.

22  
23 Dated: 7/12/2023



24  
25 

Hon. Jared A. Jefferson  
Judge of the Superior Court

PROOF OF SERVICE BY MAIL OF PRO-PER PRISONER

I hereby certify that I am over the age of 18 years of age, that I am representing myself, and that I am a prisoner. My prison address is:

California State Prison-Salano

Housing: B12-244

POB-4000

Vacaville Ca. 95696-4000

On the "date" specified below, I served the following document(s) on the parties listed below, by delivering them the document(s) in an envelope to prison authorities to deposit in the United States mail pursuant to prison rules:

Case Name: Gabriel v. State of California

Case No.: \_\_\_\_\_

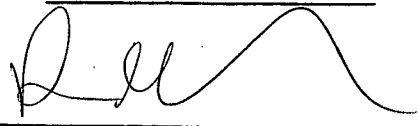
The Document(s) Served:

Appendix in Support of Petition for Writ of Certiorari

The envelope with postage prepaid or with prison Trust Account Withdrawal Form (attached pursuant to prison regulations) was addressed as follows:

Brady Baldwin  
Deputy Attorney General  
455 Golden Gate Avenue, Suite-11000  
San Francisco Ca. 94102-1234

I declare under penalty of perjury the foregoing is true and correct. Executed this 9 day of August 2024 in Vacaville California.

  
\_\_\_\_\_  
Rafael Gabriel, Petitioner

PROOF OF SERVICE BY MAIL OF PRO-PER PRISONER

I hereby certify that I am over the age of 18 years of age, that I am representing myself, and that I am a prisoner. My prison address is:

California State Prison-Salano

Housing: B12244

POB-4000

Vacaville Ca. 95696-4000

On the "date" specified below, I served the following document(s) on the parties listed below, by delivering them the document(s) in an envelope to prison authorities to deposit in the United States mail pursuant to prison rules:

Case Name: Gabriel v. State of California

Case No.: \_\_\_\_\_

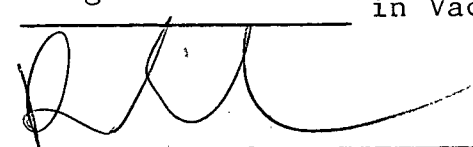
The Document(s) Served:

Petition for Writ of Certiorari

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\_\_\_\_\_  
Rafael Gabriel, Petitioner