

No. _____

(Court of Appeals, Ninth Circuit, No. 15-17131)

In the Supreme Court of the United States

October Term, 2017

TARVEY REGO,

Petitioner

v.

STU SHERMAN, Warden,

Respondent.

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

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Richard Such, declare:

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis.

Petitioner has previously been granted leave to proceed in forma pauperis in the following court(s): California Superior Court for Alameda County, California Court of Appeal for the First Appellate District, California Supreme Court, United States District Court for the Northern District of California, United States Court of Appeals for the Ninth Circuit.

Petitioner's affidavit or declaration is not attached because the court below appointed counsel in the current proceeding, and a copy of the order of appointment is appended.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 20, 2017

/s/ Richard Such

RICHARD SUCH
Attorney for
TARVEY REGO

FILED

UNITED STATES COURT OF APPEALS

FEB 16 2016

FOR THE NINTH CIRCUIT

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

TARVEY REGO,

Petitioner - Appellant,

v.

STU SHERMAN,

Respondent - Appellee.

No. 15-17131

D.C. No. 3:14-cv-00187-VC
Northern District of California,
San Francisco

ORDER

Before: Peter L. Shaw, Appellate Commissioner.

Appellant's January 8, 2016 motion for appointment of counsel in this appeal from the denial of a 28 U.S.C. § 2254 petition for writ of habeas corpus is granted. *See* 18 U.S.C. § 3006A(a)(2)(B); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983) (per curiam). Counsel will be appointed by separate order.

The Clerk shall electronically serve this order on the appointing authority for the United States District Court for the Northern District of California, who will locate appointed counsel. The appointing authority may wish to consider that counsel William Richard Such, Esq., who previously represented appellant in state court and in the district court, is willing to accept the appointment. The appointing authority shall send notification of the name, address, and telephone number of

KK/MOATT

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- _____
PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether, when a case was submitted to a jury on alternate theories of first degree murder (aiding and abetting a felony murder – attempted robbery-murder – and deliberate, premeditated murder), and the evidence of the first (felony-murder) theory was strong but the evidence of the second theory is weak, such that the jury probably found the petitioner guilty based on the strong theory, can he complain on habeas corpus in the federal courts that he was denied the effective assistance of counsel by the failure of his trial attorney (A) to object to the prosecutor’s erroneous felony-murder argument, (B) to object to the court’s misleading felony-murder instruction, (C) to view a videotape of a police interrogation of the key prosecution accomplice witness and to present evidence that it showed that he failed to identify the persons whom defendant allegedly aided and abetted, (D) to present the testimony of neutral observers that it was not those persons but the prosecution witness who committed the felony, and (E) to present evidence that the attempted robbery victims had left the scene before defendant arrived at it, showing that he could not possibly have aided and abetted the attempt?

2. Did the three-judge Ninth Circuit panel fail properly to adjudicate petitioner's foregoing contentions that he was denied the effective assistance of counsel, when it held (A) that counsel should have objected to the prosecutor's erroneous felony-murder argument, but the jury would not have been misled by it, (B) that the court's instruction was a correct statement of the law of robbery (but not of attempted robbery), (C) that the state courts could reasonably have concluded that counsel reasonably chose not to present the evidence that the prosecution witness, not the persons whom petitioner allegedly aided, attempted to commit robbery (where counsel could not have done so because he failed to make himself aware of such evidence), (D) counsel could reasonably chose not to present the testimony of neutral observers that it was the prosecution witness who attempted to commit the robbery because that evidence was "weak" and conflicted with the prosecution's evidence, and (E) that counsel did not present evidence that petitioner could not have done anything that aided the attempted robbery because the intended robbery victims had left the scene before he arrived at it (contrary to the California Court of Appeal's decision that "the robbery victims had not yet left the scene"), but he did argue the point (without any evidence to support it)?

Parties to the Proceedings

The parties to the proceedings in the California Court of Appeal included the State of California and petitioner TARVEY REGO.

The parties to the proceeding in the District Court and Court of Appeals are petitioner and STU SHERMAN, formerly the Warden of California State Prison, Corcoran, California, where petitioner was formerly confined. During the proceedings in the Court of Appeals, he was transferred to Pleasant Valley State Prison, where the Warden is SCOTT FRAUENHEIM.

There are no parties to the proceedings other than those named in the petition.

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- C. Order of the U.S. Court of Appeals for the Ninth Circuit, denying Petitions for Re-hearing and Re-hearing En Banc, filed August 23, 2017.
- D. Opinion of the California Court of Appeal, filed July 10, 2012, affirming judgment.
- E. Order of the California Court of Appeal, filed July 10, 2012, denying Petition for Writ of Habeas Corpus.
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PETITION FOR WRIT OF CERTIORARI

The petitioner, TARVEY REGO, respectfully petitions this Court for a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit, affirming the denial of a Petition for Writ of Habeas Corpus by the District Court for the Northern District of California.

Opinions Below

The Opinion of the California Court of Appeal, filed July 10, 2012, affirming the judgment, is attached below as Appendix (App.) A. The California Court of Appeal and Supreme Court denied petitioner's Petitions for Writ of Habeas Corpus without hearing or opinion. The Order of the District Court, denying Petition for Writ of Habeas Corpus, without hearing, is attached below as Appendix E. The Memorandum Opinion of the Court of Appeals for the Ninth Circuit, filed September 24, 2017, is attached as Appendix F.

Jurisdiction

The order of the Court of Appeals, denying Rehearing and Rehearing En Banc was filed on August 23, 2017. This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1257(a).

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part: "... nor shall any person ... be deprived of life, liberty, or property, without due process of law"

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

The Fourteenth Amendment provides: “No State shall . . .
deprive any person of life, liberty, or property, without due process of
law”

Statement of the Case

Appellant Tarvey Rego, born in 1972, was charged by Information No. H47496, which was filed in the Alameda County Superior Court on September 14, 2009, with the following offenses, to which he had been held to answer after a preliminary examination:

Count 1: Murder (Cal. Pen. Code, § 187, subd. (a)) of Manuel Camacho on October 7, 2007,

with use of a deadly and dangerous weapon, a knife (Pen. Code, §12022, subd. (b)(1)), and

for the benefit of, etc., a criminal street gang (Pen. Code, § 186.22, subd. (b)(1));

Count 2: Carrying a concealed dirk or dagger (Pen. Code, § 12020, subd. (a)(4)) on January 12, 2008;

Count 3: driving on a suspended license (Cal. Veh. Code, § 14601.1, subd. (a)), on January 13, 2008.

Appellant was also charged with a prior 1995 conviction of possession of a controlled substance (Cal. Health & Saf. Code, § 11350, subd. (a)). (ER 274-277) He had no other felony record. (ER 291)

Appellant moved to bifurcate the trial of (A) the gang enhancement allegation (ER 274), (B) counts 2 and 3 (ER 275), and (C) the allegation of a prior conviction. (ER 276) These motions were denied, except as to the prior conviction. Then appellant pleaded "no contest" to Count 2, and the court dismissed Count 3. (ER 277-283) Appellant waived a jury trial of the prior allegation, and the court bifurcated the trial of it. (ER 282)

Trial was by jury, selection of which began on June 30, 2010. (ER 284) A motion for judgment of acquittal of felony murder (Cal. Pen. Code, § 1181.1) was denied. (ER 285) On July 13, 2010, after about four hours of deliberation, which included two read-backs of testimony, the jury found appellant guilty of first degree murder, and found the use of a weapon and gang enhancement allegations to be true. (ER 288-289)

On October 5, 2010, the court sentenced appellant to 25 years to life for first degree murder and to an additional year for use of a weapon. (ER 290, 294)

Appellant appealed to the California Court of Appeal, which, in No. A130047, affirmed the judgment by a Decision filed July 10, 2012.

(Appendix D.) Appellant filed a Petition for Rehearing of the appeal, pointing out many false factual assumptions in the Decision on appeal which were rebutted by the documentary exhibits submitted in support of the habeas petition. (Exhibit K; ER 226-264) The petition for rehearing was summarily denied on August 2, 2012. (Exhibit L; ER 266)

Ancillary to the appeal in No. A130047, appellant filed a Petition for Writ of Habeas Corpus and a First Amended Petition for Writ of Habeas Corpus, No. A133029. The Court of Appeal requested and received informal opposition and a reply to the informal opposition to said Petition, but it did not consolidate it with the appeal. On July 10, 2012 – the same date as the date on which the court affirmed the judgment on appeal – it summarily denied the Petition without issuance of an order to show cause, an evidentiary hearing, or a statement of reasons. (Appendix E.)

On August 17, 2012, appellant filed an original Petition for Writ of Habeas Corpus in the California Supreme Court, No. S204751, which was essentially the same as the petition in the Court of Appeal, No. A133029. This petition was summarily denied without hearing

on October 17, 2012. (Appendix G.) The claims made in the Petition for Writ of Habeas Corpus included the following:

I. PETITIONER WAS DENIED HIS RIGHT UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY THE FAILURE OF HIS ATTORNEY TO PRESENT AVAILABLE EXONERATING EVIDENCE.

On August 20, 2012, in appeal No. A130047, appellant filed a Petition for Review of the Decision of the Court of Appeal by the California Supreme Court, No. S204811, which was summarily denied without hearing on October 17, 2012. (Appendix F.) The contentions raised in the Petition for Review included the following:

III. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT COMMITTED OR AIDED AND ABETTED THE COMMISSION OF ATTEMPTED ROBBERY, AND THEREFORE THE COURT ERRONEOUSLY INSTRUCTED, THE PROSECUTOR ERRONEOUSLY ARGUED, AND THE JURY UNREASONABLY FOUND THAT APPELLANT

COULD BE FOUND GUILTY OF FIRST DEGREE FELONY MURDER.

IV. THERE WAS INSUFFICIENT EVIDENCE OF DELIBERATION AND PREMEDITATION AND, THUS, IF APPELLANT WAS FOUND GUILTY OF FIRST DEGREE MURDER ON A THEORY OTHER THAN FELONY MURDER, HE WAS FOUND GUILTY IN VIOLATION OF DUE PROCESS.

On January 13, 2014, appellant filed a Petition for Writ of Habeas Corpus, No. 3:14-cv-00187 VC in the United States District Court for the Northern District of California. (ER 1-26) On January 17, 2014, the District Court judge issued an Order to Show Cause. On June 13, 2014, the California Attorney General filed a Response to the Order to Show Cause. On September 25, 2014, appellant filed a Traverse. (See ER 51)

An Order Denying Petition (ER 45-48) was filed and judgment was entered on September 24, 2015. (Appendix B) Appellant filed a timely Notice of Appeal on October 17, 2016. (ER 49) His Motion for

a Certificate of Appealability was granted by the District Court as to three issues on October 26, 2015. (ER 50.)

On September 24, 2017, a three-judge panel of the Court of Appeals for the Ninth Circuit (Judges Carlos Bea, N. Randy Smith, and Eduardo Robreno, the latter a senior judge of the U.S. District Court for the Eastern District of Pennsylvania) affirmed the decision of the District Court in a Memorandum Opinion. (Appendix A)

On August 23, 2017, said judges denied petitioner's Petition for Panel Rehearing and for Rehearing En Banc. (Appendix C)

Reasons for Granting the Writ

INTRODUCTION

The evidence presented at petitioner's trial gave a false and incomplete picture of the actual facts of the case, as revealed by the police investigation, in several very important respects. The actual facts, which a reasonably competent attorney would have presented, would have not merely raised a reasonable doubt as to whether petitioner aided and abetted an attempted robbery – and, therefore, whether he was guilty of first degree attempted-robbery felony murder – but would have shown that he did not do so. Petitioner's attorney's failure to present such facts was partly due to his failure to watch the DVD of the police interview with prosecution witness Darwin Ponce, the principal actor in the attempted robberies, as well as his failure to familiarize himself with the written reports of the police interviews, which resulted in his failure to cross-examine the victims of the attempted robberies and to call as witnesses other persons who gave statements to the police which were inconsistent with the prosecution's attempted-robbery-murder theory. The attorney also failed to object to irrelevant instructions by the court and what the Attorney General conceded on appeal and habeas corpus was the false and misleading argument by the prosecutor that petitioner could be guilty of attempted-robbery murder if he aided persons who had attempted *but failed* to commit robbery to escape the scene *without any stolen property*, contrary to the decisions of the California Supreme Court (e.g., People v. Cooper, 53 Cal.3d 1158, 1161

(1991)) that for felony-murder purposes robbery, but not attempted robbery, continues while the successful robber is fleeing the scene with the stolen property (i.e., while the asportation element of robbery is continuing) and until he reaches a place of temporary safety.

In short, petitioner's habeas corpus petition was all about the facts – those that were and those that were not presented at his trial. It would require many pages to describe the material facts that were not presented, which were shown by the approximately 458 pages of police reports and by the video recording of the interrogation of Ponce. They were set forth in 54 pages of the Statement of Facts which accompanied the petition in the District Court.

The facts which were not presented at trial, due to the ineffective assistance of counsel, are set forth, contrasted with the misleading facts that were presented, and discussed under headings B.i - x, C, and D, on pages 14-31 below.

PETITIONER WAS DENIED HIS RIGHT UNDER THE UNITED STATES CONSTITUTION TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY THE FAILURE OF HIS ATTORNEY TO PRESENT AVAILABLE EXONERATING EVIDENCE.

A. Constitutional Right to Effective Assistance of Counsel.

A defendant in a criminal proceeding has the right under the United States and California Constitutions to the effective assistance of counsel – that is, a right to the assistance of a reasonably competent attorney, acting as a diligent, conscientious advocate. (Strickland v.

Washington, 466 U.S. 668, 687 (1984); Schell v. Witek, 218 F.3d 1017, 1028 (9th Cir. 2000).)

Under both state and federal law, a claim of ineffective assistance has two components, (1) defendant must show that counsel's performance was deficient (*id.* at p. 216) and (2) defendant must establish prejudice. To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Strickland, *supra*, 466 U.S. at pp. 693-694.) This does not mean that a defendant must show that counsel's deficient conduct "more likely than not altered the outcome in the case." (*Id.*, at p. 693.) That "preponderance of the evidence" standard presupposes that there was an "accurate and fair proceeding," whereas an ineffective-assistance claim asserts the absence of an element of a reliable proceeding. Therefore, "the appropriate standard of prejudice should be somewhat lower." (*Ibid.*) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

B. Failure of Attorney to Present Evidence that Darwin Ponce, not Gerald and Manuel Salas, Uttered the Gang Challenges and Attempted the Robberies.

The prosecution's theory, on which it obtained instruction on attempted-robbery felony murder, and its argument to the jury, on the basis of which the jury found petitioner guilty of first degree murder, was that petitioner aided and abetted his cousins, the Salas

brothers, to escape after they had attempted to commit robberies of Tijerina, Benavides, and Chivalan. (See pp. 12-13, supra, and ER 439-442) The prosecution's justification for introducing highly prejudicial evidence that petitioner was a member of a criminal street gang, that he had previously been to prison and had stabbed enemies of the gang, and that the gang had committed other atrocious crimes, was that the Salas brothers attempted to commit robbery for the benefit of a gang and that petitioner's assisting them to escape by stabbing Manuel Camacho was, therefore, also intended to benefit the gang.

The evidence summarized at ER 1006-1044, which was not presented at petitioner's trial, shows overwhelmingly that it was not Gerald or Manuel Salas who initiated the attempted robbery by trying to open Tijerina's door and attacking Chivalan and who uttered the gang challenges and demanded money but it was Darwin Ponce. Although, at the trial, no one identified the Salas brothers as involved in Ponce's fight with Chivalan, the other persons who joined the fight might have included them, or they may not have become involved until Soto intervened and pulled someone off Chivalan, whereupon they began to fight with Soto and Camacho. But whether they were aiding Ponce to attempt the robbery of Chivalan or aiding him to escape from that attempt was ambiguous. The evidence summarized above, which was not presented at trial, would have raised a doubt as to whether Gerald and Manuel were guilty of attempted robbery, and, thus, it would also have raised a reasonable doubt as to whether petitioner's assistance to them in escaping the scene by stabbing Camacho aided and abetted an attempted robbery and, therefore,

whether he was guilty of felony murder. A reasonably competent attorney would have presented it.

It is reasonably probable that, if such evidence had been presented, the jury – or at least one of the jurors – would have had a reasonable doubt about petitioner's guilt of first degree felony murder and that the result of the proceeding would have been more favorable to petitioner.

Therefore, petitioner was denied the effective assistance of counsel. The District Court failed to perform its duty to conduct an evidentiary hearing as to this claim.

More particularly, the evidence which trial counsel failed to present or even to make himself aware of fell in the following categories:

(i) Evidence that Darwin Ponce and two or three friends had a motive to rob guests at the party at 619 Shepherd, in the form of testimony of Isabel and Jazmin Guillen that they (mainly he) were causing trouble at the party, were thrown out by the hosts, and were hanging around outside, those witnesses' identification of him, and his statement that he was upset at being kicked out of the party (see ER 468-473, 480-483, 492).

There was no evidence that Gerald and Manuel Salas had any motive to rob the guests leaving the party at 619 Shepherd – certainly not the motive attributed to them by the prosecutor, that they intended to benefit a criminal street gang. There was plenty of evidence, however, that Darwin Ponce had a motive – to get even with the women at the party who had thrown him out for drunk and

disorderly behavior. In fact, Detective Matthews wrote in his report: "Ponce was upset over being kicked out of the party and the three of them devised a plan to rob guests from the party when either the police shut the party down or the residence [sic] shut it down." (Exhibit E, ER 99) But it is far from clear why Manuel and Gerald would care whether Ponce, a complete stranger, was upset or would want to help him to get even. On the other hand, Ponce was a member of a group of five men at the party, two others of whom were also thrown out. Those two were referred to as "S/2" and "S/3" and the former was described as short and stocky (5'4", 200 pounds), "wearing all red clothing" and having a thin goatee, and the latter as wearing a black (or red) puffy jacket and two diamond earrings. (Exhibit E, ER 119, 128, 148, 170) Ponce and two or three others of the group hung out at 637 Shepherd after they were thrown out, and, when Jazmin Guillen left the party to take a friend home, Ponce "ran up, acted like he was going to open the passenger's door and ultimately kicked her car when she stopped at the stop sign on Shepherd at Tyrrell." (Exhibit E, ER 134, 136, 149) It looks like Ponce already had in mind robbing persons as they left the party before he supposedly encountered Gerald and Manuel at the intersection and they supposedly proposed the idea to him. From this evidence, the jury could readily have disbelieved Ponce's claim that the idea was theirs. But no such evidence was presented by petitioner's attorney.

(ii) Evidence that Ponce and one of his friends were wearing Norteño gang colors (Ponce a hat with a red "A" on it and the friend "all red clothing"), in the form of the testimony of Isabel and Jazmin Guillen and of Sgt. J. Snell, who drove by 619 Shepherd shortly before the attempted robbery and homicide and saw a group of men standing outside, wearing red clothing (see ER 468-469) [see also statement of Vanessa Ochoa that two groups of men were standing in front of the residence, one of them "throwing up gang signs" (ER 472))].

Evidence that Ponce and his friends – all apparently attendees at the party at 619 Shepherd – were dressed and behaving like Norteño gang members would have raised a doubt about the prosecution's theory that the attempted robbery and stabbing were motivated by the Salas brothers' and/or petitioner's intent to benefit the Norteño gang in a rivalry with the Sureño gang, but it also showed that it was Ponce who confronted the attempted robbery victims by asking where they were from, claiming that they were on his "turf," and saying "Southside Hayward." The latter fact tended to show that it was not Gerald and Manuel Salas who were the perpetrators of the attempt, as the prosecutor claimed. (ER 441 ["Gerald Salas and Manuel Salas ... are the two perpetrators of the attempted robbery"]; 444 ["the perpetrators in this particular case are Gerald Salas and Manuel Salas"]; 450-451 ["they (Gerald and Manuel) walk up with Darwin Ponce and say, 'Where are you from? Give us your money.'"])

Petitioner's attorney failed to call the Guillen sisters and Sgt. Snell to testify to this important evidence.

(iii) Evidence that Ponce's friends may have been Fernando Santiago/aka Jose Osuna and Nateel Sharma, in the form of the testimony of a number of police witnesses and the descriptions given by Darwin Ponce of the two persons with whom he agreed to commit robbery (see ER 469 fn. 15, and 487 fn. 23).

The evidence that Darwin Ponce was located by the police, walking not far from the scene and not long after the attempted robbery, that he was seen talking to Fernando *aka* Jose Osuna's mother, that Osuna had called his mother to come and pick him up in that area, that he was a friend of Ponce, that Nateel Sharma was a friend of his with whom he spent the night, and that Ponce, when called upon to give a description of the persons with whom he had agreed to rob guests as they left the party from which he and his friends had been thrown out, gave a description which matched Osuna and Sharma (the latter possibly being of Indo-Fijian descent) but did not match Gerald and Manuel Salas (see ER 482 fn. 22) pointed to those persons as his accomplices and raised a doubt as to whether the persons with whom he agreed were the Salas brothers. Although there is little room for doubt that the brothers were involved in the fight with Soto and Camacho, after Soto had pulled Ponce off of Chivalan, the foregoing provided additional reason for doubting that the brothers – as opposed to those persons – were involved in the planning or execution of the attempted robberies. That evidence, in turn, raised a doubt as to whether petitioner, in helping Gerald to escape the scene, assisted an accomplice in the attempted robbery and was, therefore, liable under a felony-murder

theory, even under the prosecutor's distorted version of it. But petitioner's attorney failed to present this evidence that these third parties, not Gerald and Manuel, were Ponce's accomplices in the attempted robberies.

(iv) Evidence that it was Ponce and two men who had left the party who were hanging around outside and then were fighting with Arturo Chivalan, in the form of the testimony of Isabel Guillen (see ER 480-483).

According to Isabel Guillen's statements to the police, the persons who fought with Chivalan were Ponce (who, other evidence showed, first tried to open Tijerina's car door and tried to rob her and then attacked Chivalan and demanded money from him) and two men who had been hanging around outside her house after she had thrown Ponce out. One of those persons was probably the one who tried to open Benavides's door. Thus, Ponce and that person were the attempted robbers. They were unlikely to have been the Salas brothers, because there was no evidence that they attended the party or were hanging around outside. Instead, they were having dinner in Raquel Gomez's apartment. Also, according to Isabel Guillen, after Ponce was pulled off Chivalan, he and two accomplices walked off toward the corner of Tyrrell (i.e., in the direction of the location at which Ponce was later seen talking to Osuna's mother), whereas all the evidence was that the brothers ran into Gomez's apartment (see ¶ viii, infra), which was further evidence that the accomplices were not Gerald and Manuel.

(v) Evidence that it was Ponce who tried to open Ligia Tijerina's car door, uttered Norteño ("Southside Hayward") gang challenges, and demanded money from her, and attacked Arturo Chivalan, uttered such challenges to him, and demanded money from him, in the form of Ponce's statement to the police and the statements of Tijerina, Benavides, and Chivalan and their in-person and photo-line-up identifications of him (see ER 483-491).

Overwhelming evidence was obtained by the police that it was Darwin Ponce who attempted to rob Tijerina and Chivalan, in the form of the statements and identifications by those two victims of the attempt, as well as of Benavides and Ponce himself, who admitted (at trial, but denied to the police) attempting to open the door but claimed not to remember what he said. This was evidence not only that he was the main actor and the only person who used actual force against the victims or threatened them and demanded money from them but also that the role of other persons was limited to one person's unsuccessfully trying to open Benavides's locked door and one or more persons coming to Ponce's aid when Chivalan got the better of him. Since there was no evidence identifying Gerald or Manuel Salas as one of those persons, only as persons who later fought with Soto and Camacho, the evidence of Ponce's primary role rebutted the arguments of the prosecutor that the perpetrators of the attempted robberies were the Salas brothers. But petitioner's attorney failed to present all this evidence that Ponce was the perpetrator, which he could have brought out on cross-examination of Tijerina, Benavides, Chivalan, and Ponce. He did not ask any questions of these witnesses.

(ER 343, 349, 357, 385) It was as if he was completely unaware of their statements to the police or of the need to show that it was Ponce, not the Salas brothers, who attempted to commit the robberies.

(vi) Evidence that the man who tried to open Benavides's door, as Ponce was trying to open Tijerina's, and who then fought with Chivalan was of average build, was wearing a puffy jacket and may have had diamond earrings in both ears, in the form of the statements of Benavides and Isabel and Jazmin Guillen (see ER 469, 472, 480-483, 485-486)

Although it could easily have been established that Ponce was the person who tried to rob Tijerina and Chivalan, Benavides's testimony was clear that it was a second person who tried to open her door and, inferentially, it was that person who went to Ponce's aid when Chivalan was getting the better of him, and that person could conceivably have been one of the Salas brothers. There was no identification of this person, but Benavides described him as a person of average height and weight (5'8" and 160 pounds) and Isabel Guillen described the accomplice of Ponce who was fighting with Chivalan as wearing a puffy jacket and having diamond earrings in both ears. (Exhibit E, ER 119, 128, 147-150, 178-181) There was no evidence that this description fit either Gerald or Manuel Salas, and it was inconsistent with the evidence that Gerald was tall and skinny. (Exhibit E, ER 79; 410.) Since Gerald was the only one that petitioner could be said to have aided by stabbing Camacho, evidence of the description of Ponce's accomplice would have tended to raise a doubt that Gerald was the accomplice. Further, Jazmin Guillen described the person with the puffy jacket as having puffy hair, but Manuel Salas

was described as having close-cut hair. (Excerpts, pp. 82, 134)

Petitioner's attorney failed to present this evidence.

(vii) Evidence of the nonexistence of evidence to support the prosecutor's argument to the jury that "We know that the perpetrators of the attempted robbery – or perpetrators – were Gerald and Manuel Salas", that "There's no question about that", and that they were the ones who uttered the gang challenges, in the form of the testimony of all the police investigators that there was no evidence identifying the Salas brothers as such perpetrators and that all the evidence was that it was Ponce alone who uttered gang challenges.

The prosecutor argued that the Salas brothers were the perpetrators of the attempted robbery and that they uttered the gang challenges, which was the prosecutor's main excuse (the other being the fact that Camacho was wearing a blue shirt) for alleging that the attempted robbery and killing were committed for the benefit of the Norteño gang and introducing all the inflammatory gang evidence. However, the entire police investigation failed to produce any evidence identifying the Salas brothers as the perpetrators and produced, instead, overwhelming evidence that it was Darwin Ponce who had the motive to commit the robberies, actually tried to rob Tijerina and Chivalan, demanding money from them, and who made the "gang challenges" by asking them where they were from, stating that they were on his turf, and invoking "Southside Hayward." Petitioner's attorney failed to present any of that evidence, which he could have done by asking the four witnesses whom he declined to cross-examine – Tijerina, Benavides, Chivalan, and Ponce – about Ponce's actions and their identification of him and by introducing his

admissions. The police officers who conducted the main part of the investigation, Detective Matthews and Inspectors Guimaraes and Coffey, could also have been asked whether they discovered any evidence that the Salas brothers did what the evidence showed that Ponce did.

(viii) Evidence that Ponce and two other men fought with Chivalan, that two other men who were with them did not fight with Chivalan, and that, after Chivalan drove away, Ponce and the two men who did fight Chivalan walked toward Tyrrell Avenue, in the form of the testimony of Isabel Guillen, from which it could be inferred that the two other men who fought with Chivalan were not the Salas brothers, whom all the other evidence showed did not walk toward Tyrrell but went into Raquel Gomez's apartment (see ER 314, 373, 469 fn. 14, 481-483.)

Isabel Guillen observed that Ponce was with four other men, that he and two of the men were involved in the fight with Chivalan (i.e., were arguably accomplices in Ponce's attempt to rob Chivalan), that the two other men were not involved in that fight, and that the two who were involved walked away with Ponce toward the corner of Shepherd and Tyrrell. (Exhibit E, ER 157, 181) The other two men, who were not involved in the fighting with Chivalan, presumably went elsewhere. Those two could have been the Salas brothers, who were involved, instead, in the fighting with Soto and Camacho. This evidence would have tended to exonerate the brothers from involvement in the attempted robberies and involvement only in the ensuing fighting and – more importantly for petitioner's purposes – to exonerate him from aiding and abetting the brothers in the attempted

robberies and to implicate him only in helping to extricate them from the fighting. Petitioner's attorney failed to present it.

(ix) Evidence that Inspector Robert Coffey showed to Ponce on the evening of October 8, 2007, photo line-ups which included photos of Gerald and Manuel Salas, and he was unable to identify them as the persons who he claimed recruited him to commit robbery (see ER 494-500 and Exhibit G, ER 196).

This is perhaps the most important new evidence that was presented on habeas corpus. It is new in the sense that it was not presented at trial and that the trial attorneys seem not to have been aware of it, although they should have been. At trial, Ponce testified that the police showed him photos and that he was not able to identify anyone, but there was no evidence that the photos included Gerald and Manuel Salas. In fact, their photos were included. (Exh. G, ER 196.) Petitioner's attorney failed to introduce evidence of that fact. From that failure, the jury could mistakenly infer that photos of the Salas brothers were not included, because, if they had been, petitioner's attorney would have brought out that fact. Thus, the jury had no reason to doubt the prosecutor's repeated assertions that Gerald and Manuel were the two persons who agreed with Ponce to rob party guests and that they were the "perpetrators" of the attempted robberies, who uttered the gang challenges. If the jury had known that Ponce – who was being relatively honest in other respects – was shown photos of the brothers but failed to identify them, it would probably have doubted that the brothers were involved in the planning and execution of the attempted robberies, have found only that they

became involved in the fighting with Soto and Camacho, and doubted that petitioner did anything to assist the attempted robberies and, therefore, that he was guilty of felony murder (even if assisting attempted robbers to escape were aiding and abetting attempted robbery, which, as shown below, pages 42-48, it was not).

There can be no conceivable reason for petitioner's attorney's failure to introduce evidence of the fact of Ponce's non-identification of the brothers other than that he was unaware of the content of the recording of Inspector Coffey's interview with him, during which the inspector showed him photo line-ups containing their photos and he failed to identify them. Mr. Byron's Declaration shows that he did not receive any reports about that interview and nonidentification and that he believed that he had not received any recording of it. (Declaration of David Byron, ¶ 4, pp. 2-3; ER 64-65.) His e-mail to petitioner's appellate attorney shows that, in fact, he had a video recording of the interview but was not able to open it during the trial. (Declaration of Richard Such, ¶ 9, p. 5; ER 59.) Obviously, he did not do what he should have done, which was to complain to the District Attorney that he could not open the video file and have sought technical assistance, which would have resulted in advice that he needed an appropriate codec player, such as VLC Media Player. (See Declaration of Richard Such, ¶ 11, p. 6; ER 60.) He thereby failed to perform as a reasonably competent attorney.

(x) Evidence that, according to Ponce, one of the two men who he claimed recruited him to commit a robbery and who was small (5'5" and 130 pounds) said that he was from "West Hayward" (i.e., not from the immediate area, which was where the Salas brothers lived), and that he did all the talking (from which it could be inferred that the other man did nothing to encourage Ponce to commit a robbery and, in the absence of evidence that he participated in the attempted robbery, that he was not guilty of attempted robbery, nor was anyone who helped him to escape from the scene guilty of aiding and abetting an attempted robbery) (see ER 492, 498).

During the video-recorded interview of Ponce by Inspector Coffey, Ponce described one of the persons whom he claimed to have met at the corner of Tyrrell and with whom he claimed to have agreed to rob party guests as 5'5" and 130 pounds. (Exhibit G, ER 196; 492, 498) He said that this person did all the talking and said that he was from "West Hayward." Ponce thought it was odd that a person from that neighborhood would be in the neighborhood where the discussion was taking place. This person was unlikely to have been Manuel Salas, because he lived right there on Shepherd in the apartment of his mother, Raquel Gomez. (Exhibit E, ER 81B) The person was unlikely to have been Gerald Salas, for the same reason and also because Gerald was described as 6'0" and thin. (ER 79, 81B; 410) Ponce described the second person (who did no talking) as taller and stockier, not as tall or stocky as Inspector Coffey, who appears to be about 6'0" tall and 200 pounds, but "getting there." (Exhibit G, ER 196; 498) But assuming that Manuel Salas was the shorter person who did the talking and Gerald Salas was the other person, who said

nothing, because of that fact there was a lack of evidence that Gerald did or said anything to aid and abet – in the sense of promoting, encouraging, or instigating (see CALCRIM Nos. 334, 401) – Ponce to commit robbery, and there was a lack of other evidence that he participated in the acts committed by Ponce which constituted attempted robbery. There was a second person who tried to open Benavides's car door and that person and perhaps a third aided Ponce in his struggle with Chivalan, but there was little or no evidence that Gerald was one of those persons. The only evidence of his involvement was that he was seen fighting with Camacho, who had entered the affray in the aid of Soto, after Soto had pulled Ponce off of Chivalan. The only evidence that petitioner aided anyone was that he stabbed Camacho as Camacho was fighting with Gerald. The lack of evidence that Gerald did anything that constituted attempting to commit robbery or aiding Ponce to attempt to commit robbery was also a lack of evidence that petitioner did anything to aid an attempted robber (even assuming that, contrary to California law, assisting an attempted robber to escape after the attempt had failed could constitute aiding and abetting an attempted robbery, as the prosecution argued). Therefore, it would have been helpful to petitioner to introduce evidence that Ponce told Coffey that the taller of the two persons with whom he agreed to commit robbery – if that were Gerald – did not say anything to encourage him to do so. Petitioner's attorney failed to introduce that evidence because he failed to view the video of Ponce's interview by Coffey.

The foregoing failures of petitioner's trial counsel were clearly failures to perform as a reasonably competent attorney, and there is much more than a "reasonable probability" that, if he had done so, the result of the proceeding would have been more favorable to petitioner (see Strickland, supra, 466 U.S. at p. 693 [" the appropriate standard of prejudice should be somewhat lower" than a "more likely than not" standard]) in that it is reasonably probable that the jury would have had a doubt about his guilt of felony murder.

C. Failure of Attorney to Present Evidence that the Attempted Robberies Were no Longer in Progress when Petitioner Helped Extricate his Cousins from the Fight.

The prosecution's theory that petitioner was guilty of first degree felony murder was based on the premise that, although he did not have anything directly to do with the attempted robbery, he knew about it and, by intervening in the fight that followed it and stabbing Manuel Camacho, he aided and abetted his cousins, Gerald and Manuel Salas, who were supposedly involved in the attempt (but see section B above), to escape the scene. (See pp. 4-5, *supra*.) As petitioner showed on his state court appeal, as the Attorney General conceded, and as the Court of Appeal agreed (Exhibit I, ER 221, pp. 18-19), this theory was legally incorrect, in that petitioner could not be guilty of aiding and abetting an attempted robbery by helping the would-be robbers to escape from the scene because, although a robbery continues while the robbers are leaving the scene with the stolen property, an attempted robbery does not, since there is no stolen property. (People v. Cooper, 53 Cal.3d 1158, 1161 (1991).)

However, if there were any possibility that the jury could have found that petitioner was guilty because he aided his cousins while they were still directly attempting to commit a robbery, then evidence that the attempt had failed when he performed any action that could constitute aiding them would rebut that possible theory of liability for felony murder. If there were some ambiguity in the evidence at trial as to whether, when petitioner stabbed Camacho, Gerald or Manuel were still trying to rob Arturo Chivalan – assuming that they had been doing so – then reasonably competent counsel would have presented all evidence that tended to show that, when petitioner performed that action, Chivalan had was no longer being attacked by anyone and had got back in Ligia Tijerina's car and was driving away.

There was abundant such evidence in the statements that various witnesses gave to the police, as shown at ER 502-504. This evidence established that, when Chivalan downed Darwin Ponce, the friends and possible accomplices of Ponce jumped on him, and Roberto Soto pulled them off, allowing him to get in the car and drive away. Camacho may have been entering the fray at this point, but none of the witnesses observed petitioner doing so. Yesenia Benavides saw a man who may have been him run into the street, but that was when she, Tijerina, and Chivalan were driving away. (ER 124; see 504)

It is reasonably probable that, had this evidence, which drew a clear line between Chivalan and the women's exit and any possible action by petitioner, been presented, the jury would have had a reasonable doubt that he in any way aided the attempt to rob them.

Thus, petitioner's attorney's failure to present this evidence denied him his right to the effective assistance of counsel.

D. Failure of Attorney to Present Evidence that Darwin Ponce Uttered the Gang Challenges and was Affiliated with a Norteño Gang at a Hearing on Admissibility of the Gang Evidence.

The prosecution succeeded in introducing highly prejudicial evidence that petitioner had been to prison, where he joined the Nuestra Familia gang and stabbed a couple of other prisoners for the "benefit" of the gang, that he belonged to the 38th Street Locos Norteño gang, and that other such gangs had committed serious, violent crimes, by claiming that the killing of Camacho was committed to "benefit" such gang, somehow. (ER 462-467; see Cal. Pen. Code, § 186.22, subd. (b)(1).) One argument for the claim was the fact that Camacho was wearing a blue shirt, but the idea that whatever gang petitioner was supposed to belong to would somehow "benefit" from the killing of a blue-shirted individual had slight plausibility, because petitioner obviously did not choose to stab Camacho because of the color of his clothing but because of his being in a fight with his cousin Gerald Salas and possibly impeding Gerald's extrication from the scene of the fight. The other argument in favor of the claim was that the attempted robbery, which petitioner supposedly aided and abetted, was intended to further the aims of some gang, as indicated by the fact that one of the would-be robbers asked the victims where they were from, said he represented "Southside Hayward," and claimed the Shepherd Avenue area as its territory. This argument depended on the assumption that Gerald and Manuel Salas were

members of a gang, of the same gang as petitioner, and that they were the persons who, while attempting to commit robbery, made these gang challenges to the intended robbery victims. That assumption was inconsistent with the attempt and the challenges having actually been made by Darwin Ponce.

The statements by the witnesses to the police, as contained in the police reports (Exhibit E, ER 74-192) and the notations made by Officer Perryman on page 292 thereof (ER 161), make it abundantly clear that it was Darwin Ponce who instigated the attempted robberies and uttered the gang challenges and indicate that the reason he did so was because of his own gang connections. (See ER 473- 475) If this evidence had been presented to the trial judge, he would have been able to see that it was unlikely that petitioner's actions were motivated by an intent to benefit a gang – as opposed to benefitting his cousins – and that it was likely that the only intent to benefit a gang, if any, was formed by Darwin Ponce. In fact, it would have been rather obvious that Ponce's drunken challenges were probably intended to benefit himself by intimidation of the potential victims and to get even with the people who had thrown him out of the party – i.e., that there was no real gang motivation at all.

A reasonably competent attorney would have presented, in support of an in limine motion to bifurcate the gang enhancement allegation and to exclude the prejudicial gang evidence at the trial of petitioner's guilt of the murder charge, all this evidence that the gang motivation, if any, was Ponce's. It is reasonably probable that, if

petitioner's attorney had done so, the court would have granted bifurcation and excluded the gang evidence at the guilt trial, and petitioner would not have been prejudiced by it. His failure to do so denied petitioner his right to the effective assistance of counsel.

E. Failure of Attorney to Object to False and Misleading Evidence.

As was shown in Claim 2 of petitioner's Petition for Writ of Habeas Corpus (ER 17-18, and accompanying Memorandum), the prosecution presented false and misleading evidence, to which a reasonably competent attorney would have objected.

F. Failure of Attorney to Object to Prosecutor's Fallacious Theory

Petitioner's attorney failed to object to false and misleading argument by the prosecutor that petitioner could be guilty of felony murder on a theory of aiding and abetting an attempted robbery if he aided an attempted robber to escape the scene of the attempted robbery, even though the attempted robber was not in possession of stolen property.

There was insufficient evidence that petitioner was guilty of attempted-robbery felony murder by aiding the Salas brothers to escape the scene of the attempted robbery, the court's instructions which implied that an attempted robbery continued while the attempted robbers were escaping to a place of temporary safety were misleading (ER 27-34), and the prosecutor's arguments that petitioner was guilty of attempted-robbery murder because he aided the brothers

to do so (ER 35-44, 438-446, 450) were downright false, because a robbery continues while the robber is escaping with the stolen property – i.e., during the "asportation" element of robbery – but an attempted robbery does not continue during the escape since there is no asportation element of it. (People v. Cooper, supra, 53 Cal.3d 1158, 1161.) Thus, petitioner, who concededly did nothing to aid the attempts to rob Tijerina, Benavides, and Chivalan (ER 445) but only aided Gerald Salas (assuming he somehow encouraged or participated in the attempts) to escape from the scene of the attempts, could not be guilty of attempted-robbery murder.

Assuming, however, that on some theory there was sufficient evidence of such felony murder, nevertheless there is a likelihood that the jury found petitioner guilty of felony murder, based on the misleading instructions and the prosecutor's erroneous argument that an attempted robbery continues while the attempted robber is escaping. Therefore, a reasonably competent attorney would have objected to the misleading instructions and the legally false argument, and it is reasonably probable that, if petitioner's attorney had done so, and cited the relevant authority, the court would not have given those instructions and would have precluded the prosecutor from making those arguments, and, as a result, the jury would not have found petitioner guilty of first degree murder.

The District Court should have ordered an evidentiary hearing on these factual issues, and the Court of Appeals should have reversed with directions to do so.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to remedy the violation of his rights to due process of law and the effective assistance of counsel, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Dated: November 17, 2017

Respectfully submitted,

/s/ Richard Such

RICHARD SUCH
Attorney for Petitioner

APPENDICES

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 24 2017

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

TARVEY REGO,

Petitioner-Appellant,

v.

STU SHERMAN,

Respondent-Appellee.

No. 15-17131

D.C. No. 3:14-cv-00187-VC

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Vince G. Chhabria, District Judge, Presiding

Argued and Submitted July 13, 2017
San Francisco, California

Before: BEA and N.R. SMITH, Circuit Judges, and ROBRENO,** District Judge.

Tarvey Rego appeals the district court's dismissal of his 28 U.S.C. § 2254 habeas petition. We have jurisdiction to hear this appeal, 28 U.S.C. § 2253, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX A

1. Section 2254(d) “bars relief unless the underlying state court proceedings either (1) ‘resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,’ or (2) ‘resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’” *Castellanos v. Small*, 766 F.3d 1137, 1145 (9th Cir. 2014) (quoting 28 U.S.C. § 2254). This deferential standard applies when the state court has adjudicated a claim in a “reasoned decision.” *Reis-Campos v. Biter*, 832 F.3d 968, 974 (9th Cir. 2016). The California Court of Appeal rejected Rego’s challenge to the sufficiency of evidence presented at trial in a reasoned decision on direct appeal. Thus, we apply this deferential standard to Rego’s claim that there was insufficient evidence presented to convict him.

a. To prove Rego guilty of first-degree murder under a felony-murder theory, the government was required to establish that (1) Rego committed or attempted to commit robbery; (2) Rego intended to commit robbery; and (3) while committing or attempting to commit robbery, Rego caused the death of another person. *See* Judicial Council Of California Criminal Jury Instruction (“Cal. Crim.”) 540A Felony Murder; *see also* *People v. Cavitt*, 91 P.3d 222, 227–28 (Cal. 2004). The government was also required to prove that “the felony and murder

were part of one continuous transaction.” *People v. Wilkins*, 295 P.3d 903, 907 (Cal. 2013), *as modified* (May 1, 2013) (quoting *People v. Young*, 105 P.3d 487, 502 (Cal. 2005)). The California Court of Appeal concluded that there was sufficient evidence for a jury to find the felony and the murder were part of one continuous transaction, because the government presented evidence that showed the fight started as part of the robbery attempt and the robbery was still ongoing—in part because the robbery victims had not yet left the scene—when Rego stabbed his victim, Manuel Camacho. The Court of Appeal also concluded there was sufficient evidence to find Rego intended to participate in the robbery and attempted to participate in the robbery, because the undisputed evidence showed Rego stated he was going to “back up” Gerald and Manuel Salas in what he knew was a robbery attempt as he left Raquel Gomez’s apartment. We must affirm the dismissal of Rego’s petition on this point, because Rego has not established that the Court of Appeal’s conclusions were (1) “contrary to, or . . . an unreasonable application of, clearly established Federal law,” or (2) were “based on an unreasonable determination of the facts in light of the evidence presented” at trial. *See Castellanos*, 766 F.3d at 1145 (quoting 28 U.S.C. § 2254).

b. To prove Rego guilty of first-degree murder under a premeditation theory the government was required to establish that (1) Rego committed an act that

caused the death of another person; (2) when Rego acted he had a state of mind called malice aforethought; and (3) he killed without lawful excuse or justification. Cal. Crim. 520; *People v. Navarette*, 208 Cal. Rptr. 3d 757, 768 (Cal. Ct. App. 2016). The government was also required to prove that Rego “acted willfully, deliberately, and with premeditation.” Cal. Crim. 521. Rego argues only that there was insufficient evidence to show he acted deliberately and with premeditation. The California Court of Appeal concluded that there was sufficient evidence to find Rego acted deliberately and with premeditation because, after hearing the commotion in the street, he returned to the apartment, ascended a flight of stairs to retrieve a steak knife and then descended to the street level, and he ignored his fiancée’s warnings not to get involved. He went out into the street and waited until Gerald Salas pinned Camacho’s hands behind his back; then he stabbed Camacho, who appeared to be a member of a rival gang, near his vital organs. Although these events occurred in quick succession, they are not inconsistent with a finding of premeditation under California law, which has made clear that a “cold, calculated judgment may be arrived at quickly.” *People v. Solomon*, 234 P.3d 501, 518 (Cal. 2010) (citation omitted). Again, we must affirm the dismissal of Rego’s petition on this issue, because he has not shown the Court of Appeal’s conclusions were (1) “contrary to, or . . . an unreasonable application of, clearly established

Federal law,” or (2) were “based on an unreasonable determination of the facts in light of the evidence presented” at trial. *See Castellanos*, 766 F.3d at 1145 (quoting 28 U.S.C. § 2254).

2. When a state court has not issued a “reasoned decision on a particular claim”—for example if the state court issued a summary denial—“a petitioner must show that ‘there was no reasonable basis for the state court to deny relief.’” *Reis-Campos*, 832 F.3d at 974 (quoting *Harrington v. Richter*, 562 U.S. 86, 98 (2011)); *Castellanos*, 766 F.3d at 1145. The California Court of Appeal and the California Supreme Court summarily denied Rego’s state habeas petitions, which had raised his ineffective assistance of counsel claims. Therefore, we must deny the ineffective assistance of counsel claims if there was any “reasonable basis for the state court to deny relief.” *Reis-Campos v. Biter*, 832 F.3d at 974. To succeed on an ineffective assistance of counsel claim, a petitioner must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, petitioner must show (1) that his counsel’s performance was deficient by showing his “counsel’s representation fell below an objective standard of reasonableness,” and (2) that he suffered prejudiced by demonstrating “that there is a reasonable probability that, but for counsel’s [ineffective assistance], the result of the proceeding would have been different.” *Id.* at 688, 694.

a. The California courts had a reasonable basis for rejecting Rego's claims that defense counsel was constitutionally ineffective for failing to present certain "exonerating" evidence. These claims do not meet either of the *Strickland* prongs. All of the "exonerating" evidence Rego identified is relevant, if at all, to the question of whether Gerald and Manuel Salas participated in, or were the main perpetrators of, the robbery attempt.

First, Rego has not overcome his "heavy burden of proving that counsel's assistance was neither reasonable nor the result of sound trial strategy." *Matylinsky v. Budge*, 577 F.3d 1083, 1091 (9th Cir. 2009). It was reasonable for defense counsel not to present this evidence. For the most part, this evidence carried very little probative value. Instead of presenting this weak evidence, defense counsel focused on the minimal case set out by the government, attacked the timeline of the felony-murder theory, and suggested that the jury find Rego guilty of voluntary manslaughter instead of murder. This was a reasonable trial strategy. *See Harrington*, 562 U.S. at 111 ("When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict.").

Second, Rego has not established prejudice, because the government presented clear evidence that Gerald and Manuel participated in the attempted

robbery: (1) Darwin Ponce testified that he met two men outside of the party that he did not know—and thus were not his friends—and the three of them agreed to commit a robbery; (2) Vanessa Hernandez and Krystal Hanson (Manuel Salas’s girlfriend) unequivocally testified that Gerald and Manuel discussed robbing people at the party and then explicitly left Gomez’s apartment with the intent to commit robbery; and (3) shortly after they left, Gerald and Manuel were seen fighting with individuals who had come to the aid of the attempted robbery victims. In light of this evidence, the outcome of the trial would not have been any different if defense counsel had presented the largely unprobative “exonerating” evidence.

b. Rego has waived his claim that his defense counsel was constitutionally ineffective for failing to object to false and misleading evidence, because he did not present any argument or citations to support this claim in his briefs. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. La. Hydrolec*, 854 F.2d 1538, 1548 (9th Cir. 1988) (per curiam); Ninth Circuit Rule 28-1(b); Fed. R. App. P. 28(a)(8)(A).

c. The California courts had a reasonable basis for rejecting Rego’s argument that his defense counsel was constitutionally ineffective for failing to object to the prosecutor’s comments in closing arguments about aiding and

abetting robbery. Although defense counsel probably should have objected to the comments (because they could be interpreted to misstate the law), the comments were not prejudicial and therefore do not meet the second *Strickland* prong. 466 U.S. at 694. It was unlikely that the jury was misled by the comments in light of the jury instructions and the other statements made during closing arguments. First, the jury was properly instructed on the law, and we must presume that the jury followed those instructions. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Second, defense counsel did argue at length that the attempted robbery had already ended before Rego entered upon the scene. Finally, the arguments of the prosecution and defense counsel, considered as a whole, focused the jury on the proper inquiry, that is, whether the fight occurred as part of the robbery attempt, or whether the attempt had already ended by the time Rego arrived. If the jury was not misled, then the California courts had a reasonable basis for concluding the outcome of the trial would not have been any different had defense counsel objected to the prosecutor's statements.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TARVEY REGO,

Petitioner,

v.

STU SHERMAN,

Respondent.

Case No. 14-cv-00187-VC

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS AND
MOTION FOR EVIDENTIARY
HEARING**

Re: Dkt. Nos. 1, 21

Rego brings this habeas petition to challenge his first-degree murder conviction. Because none of Rego's claims warrants habeas relief, the petition is denied. Rego's motion for an evidentiary hearing is also denied.

Ineffective Assistance of Counsel

To grant habeas relief based on ineffective assistance, this Court must be convinced that any reasonable judge would be compelled to conclude that the performance of Rego's trial counsel was deficient and that Rego was prejudiced as a result. *See Harrington v. Richter*, 562 U.S. 86, 102-03 (2011).

Rego contends he received ineffective assistance of counsel in a number of ways. First, he asserts his lawyer failed to present evidence suggesting that he wasn't aiding the Salas brothers in a robbery attempt when he killed Camacho. For example, Rego contends his lawyer should have presented evidence suggesting that the two men who started the robbery attempt with Ponce were not the Salas brothers. But as discussed in the opinion of the California Court of Appeal on direct review, there was also a good deal of evidence that the robbers were indeed the Salas brothers. *People v. Rego*, No. A130047, 2012 WL 2785223, at *1, 10 (Cal. Ct. App. July 10, 2012) (unpublished). In light of that, the state courts could reasonably have concluded that the decision by Rego's lawyer to focus on imperfect self-defense, rather than focusing on the less credible

APPENDIX B

1 argument that someone other than the Salas brothers initiated the robbery attempt, was a tactical
2 decision within the wide range of reasonableness. *See Strickland v. Washington*, 466 U.S. 668,
3 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential.").

4 Rego also cites evidence his lawyer could have presented to show that the robbery attempt
5 ended before Rego appeared on the scene and killed Camacho. However, such evidence was in
6 fact presented, similar in kind to the evidence Rego now contends was omitted. And Rego's
7 lawyer relied on the evidence that was presented when arguing to the jury that Rego was not guilty
8 of felony murder. But as the California Court of Appeal explained on direct appeal, there was
9 sufficient evidence to support the jury's conclusion that the robbery attempt was not over (and that
10 Rego therefore killed Camacho in furtherance of it). *See Rego*, 2012 WL 2785223, at *12. This
11 Court cannot conclude that any reasonable judge would be compelled to find a Sixth Amendment
12 violation in trial counsel's failure to present additional evidence on this point. *See Harrington*, 562
13 U.S. at 102-03.¹

14 Rego also contends his trial counsel was ineffective for failing to request an instruction on
15 "heat of passion" and "provocation," but the contrary conclusion by the California Court of Appeal
16 on direct review was not unreasonable, for the reasons stated by that court. *See Rego*, 2012 WL
17 2785223, at *9. Relatedly, it was not unreasonable for the state courts to reject Rego's argument
18 that his lawyer was ineffective for failing to object to the prosecutor's statements about the law
19 during closing arguments, given that the jury was correctly instructed. *See United States v.*
20 *Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993).

21 Prosecutorial Misconduct

22 Rego contends the prosecutor engaged in misconduct by presenting misleading evidence
23 and argument that the attempted robbery was committed by the Salas brothers and that the party
24 guests were connected with a rival gang. But as discussed in the Court of Appeal's opinion on
25 direct review, there was sufficient evidence that the Salas brothers initiated the robbery attempt.
26

27 ¹ The same is true of defense counsel's failure to present video evidence of Ponce's failure to
28 identify the Salas brothers in a lineup, because the jury was already aware that Ponce did not
identify them as his accomplices in the attempted robbery.

United States District Court
Northern District of California

1 *See Rego*, 2012 WL 2785223, at *1, 10. And as the Court of Appeal noted with respect to the
2 gang enhancement, what mattered is not whether the party guests actually were members of a rival
3 gang, but whether Rego perceived Camacho to be a member of a rival gang. *Id.* at *3 n.6. There
4 was ample evidence of the latter. Therefore, the state courts could reasonably have concluded that
5 Rego has not shown that testimony heard by the jury was actually false, or that the prosecutor
6 knew or should have known it was false, or that the allegedly false testimony was material. *See*
7 *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Hein v. Sullivan*, 601 F.3d 897, 908 (9th Cir. 2010).

8 Denial of Motion to Bifurcate and Allowing in Gang Evidence

9 Rego contends the trial court's denial of his motion to bifurcate the trial for purposes of
10 considering the gang enhancement under Cal. Penal Code § 186.22, which resulted in the
11 admission of prejudicial gang evidence, violated his due process right to a fair trial. But the Court
12 of Appeal's conclusion on direct review that the trial court did not err is not unreasonable. *See*
13 *Rego*, 2012 WL 2785223, at *4-5. Rego certainly has not shown that any reasonable judge would
14 be compelled to conclude that the admission of the gang evidence "was arbitrary or so prejudicial
15 that it rendered the trial fundamentally unfair." *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir.
16 1995).

17 Failure to Instruct Jury on Heat of Passion and Provocation

18 For the reasons stated by the California Court of Appeal on direct review, the trial court's
19 failure to instruct the jury *sua sponte* on "heat of passion" and "provocation" likely did not
20 constitute reversible error. *See Rego*, 2012 WL 2785223, at *6-9. Certainly Rego has not shown
21 that any reasonable judge would be compelled to conclude otherwise. Furthermore, that an
22 instruction may have been incorrect under state law typically provides no basis for habeas relief.
23 *See Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991).

24 Insufficiency of the Evidence

25 Claims based on insufficiency of the evidence "face a high bar in federal habeas
26 proceedings." *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (per curiam). Rego asserts there
27 was insufficient evidence to support a conviction for felony murder, arguing that the attempted
28 robbery was complete before he killed Camacho. But as the California Court of Appeal explained

United States District Court
Northern District of California

1 on direct review, there was evidence to the contrary. *Rego*, 2012 WL 2785223, at *12. Rego also
2 contends there was insufficient evidence to support a conclusion that his stabbing of Camacho was
3 premeditated, but again the California Court of Appeal explained to the contrary on direct review.
4 *Id.* In particular, the Court of Appeal discussed the evidence that Rego went into the kitchen to get
5 a knife and went downstairs even though his girlfriend urged him not to. *Id.* It was not
6 objectively unreasonable for the Court of Appeal to conclude that the evidence was sufficient to
7 support a conclusion that Rego was guilty of felony murder and premeditated murder.

8 Court of Appeal's Opinion

9 Rego argues he was denied his right to a fair appeal by the California Court of Appeal's
10 misreading of the record, distortion of facts, and assumptions. This claim, however, repeats many
11 of the same arguments rejected above. The state court decision rejecting this claim was not
12 objectively unreasonable.

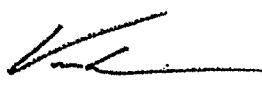
13 Motion for Evidentiary Hearing

14 Rego requests an evidentiary hearing. But he fails to indicate what evidence he would
15 present at such a hearing and how his allegations, if proven, would entitle him to relief. *See*
16 *Williams v. Calderon*, 52 F.3d 1465, 1484 (9th Cir. 1995). His motion is therefore denied.

17 The Clerk shall enter judgment in favor of the respondent.

18 **IT IS SO ORDERED.**

19 Dated: September 24, 2015

20 
21 _____
22 VINCE CHHABRIA
23 United States District Judge
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25
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27
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FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUG 23 2017

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

TARVEY REGO,

Petitioner-Appellant,

v.

STU SHERMAN,

Respondent-Appellee.

No. 15-17131

D.C. No. 3:14-cv-00187-VC
Northern District of California,
San Francisco

ORDER

Before: BEA and N.R. SMITH, Circuit Judges, and ROBRENO,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Bea and Judge N.R. Smith have voted to deny the petition for panel rehearing en banc, and Judge Robreno has so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are
DENIED.

* The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TARVEY REGO,

Defendant and Appellant.

A130047

(Alameda County
Super. Ct. No. H47496)

Defendant Tarvey Rego appeals from a first degree murder conviction (Pen. Code, § 187)¹ which the prosecution theorized was related to gang rivalry between the Norteños and Sureños street gangs. The prosecution presented evidence suggesting the victim was killed because he was wearing a blue shirt in Norteños territory. (Cf. *People v. Williams* (1997) 16 Cal.4th 153, 193-194.) Defendant raises claims on appeal relating to a request to bifurcate the gang-evidence from the rest of the trial, as well as claimed instructional error and insufficiency of the evidence to support a first degree murder conviction. We reject his arguments and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of October 6 and into the early morning hours of October 7, 2007, defendant and his girlfriend, Vanessa Hernandez, were winding up the evening at a friend's apartment in Hayward with a group of other people. Among the group were two

¹ Further statutory references, unless otherwise designated, are to the Penal Code.

brothers, Manuel and Gerald Salas, who were sons of defendant's cousin,² and their girlfriends. There was a party going on in the house next door.

As the night wore on the Salas brothers began to talk about robbing people who were at the party next door. Defendant was present during that conversation but expressed no intention to join in the robbery.

The Salas brothers left the apartment, followed by their girlfriends. Defendant and Hernandez also left, but sat down on the landing, where they could not see down to street level.

Soon after they left the house the Salas Brothers recruited at least one more man, Darwin Ponce, to join in their robbery scheme. Ponce had been at the party next-door but was thrown out because he had become too drunk. As he was leaving the party, he met two men he did not know and agreed to help them commit a robbery. The Salas group then approached a car that pulled up to go to the party next door.

Ligia Tijerina was driving the car, with two passengers, Arturo Chivalan and Yesenia Benavides. Tijerina described being approached by at least three men, apparently just after she had parked the car and Chivalan had alighted. Chivalan's own car was parked just behind Tijerina's, and he went into it to grab a pack of cigarettes. Tijerina, Benavides, and Chivalan all heard someone in the Salas group ask where the newly arriving guests were from, and he then said words to the effect, "This is our turf" or "South Hayward territory."

A man, apparently Ponce, then began to open the driver's door and asked Tijerina for money. Tijerina was able to pull the door closed again before he got it fully open. She then restrained Benavides from leaving the car because a fight had broken out outside the car. Benavides locked her door as the men approached. She thought there were more than five of them.

² The apartment belonged to Raquel Gomez, mother of the Salas brothers. The brothers' father was defendant's cousin.

Chivalan, too, thought there were about six men in the Salas group. Hearing the commotion near Tijerina's car, he began to return to it when someone, probably Ponce, punched him. Benavides heard the man first ask Chivalan for money. Chivalan fought back with the man and knocked him to the ground. Other men then jumped on him and dragged him into the middle of the street, saying "South Hayward" or "Southside Hayward."

Chivalan called out for help from a friend he saw nearby, Roberto Soto. When Soto and another man whom Chivalan knew, Manuel Camacho, came to intervene on Chivalan's behalf, the men let Chivalan go and began fighting with his would-be rescuers.³ Chivalan jumped back into Tijerina's car, and Tijerina called 911 as she was driving to a nearby 7-Eleven store.

As the fighting erupted other people joined in, with estimates running from ten to forty people being involved. The Salas brothers' girlfriends yelled upstairs to defendant to come and help his cousins.⁴ Defendant then ran back into the apartment to get a steak knife, saying he had to "back up his nephews." He emerged with a knife and ran downstairs. Hernandez told him not to go, but he went anyway.

Upon first approach he waved the knife in the air and shouted, "Back the fuck off!" The fighting continued. Gerald, according to Hernandez, was "getting his ass beat," while Manuel was getting the better of whomever he was fighting. Defendant was near Gerald when Gerald managed to free himself and grabbed Camacho. Camacho was about to jump into the fight with Gerald, or had already started fighting, but Gerald was able to pin both his arms behind his back. According to Hernandez, defendant then thrust

³ Sadly, Camacho had been a good friend of Ponce's since fourth grade.

⁴ We refer to the Salas brothers as defendant's "cousins," as does defendant in his briefs. The Salas brothers referred to defendant as "Uncle Dirk", and the Attorney General refers to them as "nephews." The exact nature of the relationship is immaterial, and Hernandez seemed to use both terms interchangeably.

the knife twice into Camacho's chest, stabbing him in the heart and killing him.⁵ Gerald exclaimed, "What the fuck are you doing?"

Defendant then ran back into his friend's apartment, as did the other members of his group. He changed his clothes and put his bloody clothes into a bag with some bleach and left them on the patio. With Hernandez's help he cleaned the blood off his shoes and rinsed off the knife. He admitted to his friends he had stabbed Camacho.

When he was first interviewed by the police several days later defendant claimed he was not involved in the fracas and said he never left his friend's apartment that night. He said he did not see Manuel Salas at all that night. He described the clothes he had been wearing very differently from the clothes Hernandez said he had been wearing.

After the stabbing and before his arrest, defendant threatened Hernandez that he would hurt her family (she had five children) if she told anyone about the killing. When the police threatened her with the possibility of being arrested and being separated from her children, however, she agreed to turn over to them the bloody clothes and the knife defendant had used. DNA from the blood on the clothes matched Camacho's DNA.

Defendant was not apprehended until more than three months after the offense, when he was arrested after the car he was driving was stopped for a traffic violation. Hernandez was with him at the time. He said to her, "I love you, baby. I'm going to get years, baby. They're going to give me years." The arresting officer heard him say, "I'm done. I'm going away for 20 years." He told the officer, "You better put me in the hole or I am going to start slashing people."

Camacho was wearing a blue shirt when he was stabbed. It was the prosecution's theory that the stabbing was gang-related in that defendant was a Norteño and blue is a

⁵ Camacho's friend took him to the same 7-Eleven where Chivalan's group had gone. He fell out of the car bleeding from his ribcage. Paramedics responded and took him away; he died a few hours later. The stipulation regarding his death suggests he was stabbed only once.

Sureño color. (Cf. *People v. Williams*, *supra*, 16 Cal.4th at pp. 193-194.) There was no evidence, however, that Camacho was a Sureño or that he belonged to any other gang.⁶

The gang evidence came from several sources. First there were, of course, the "South Hayward" and "turf" comments by the would-be robbers during the incident. This testimony came from Chivalan, Tijerina, and Benavides.

Hernandez, who was engaged to marry defendant at the time of the offense, testified defendant was a member of 38th Street Locos, a Norteño gang; she knew he was a gang member because he had gang tattoos "blasted all over his hands." His nickname was "Dirt," which is also gang slang for committing a violent crime (i.e., "doing dirt"). Hernandez had also been in a gang in the past, and she testified about the frequently violent animosity between Norteños and Sureños. She further testified that sometime after the stabbing defendant had called Camacho a "scrap," which is a very derogatory term Norteños use to refer to a Sureño.

In addition, defendant told a police inspector he had been a member of the Nuestra Familia prison gang while previously incarcerated. He had two stars tattooed on his hand, which he said he had earned in that gang by stabbing two people in prison. Defendant claimed he had dropped out of the gang.

While the investigation was ongoing defendant asked the same inspector whether he had "thrown [defendant's] name out on the street," because defendant had heard the Border Brothers, another gang, were out to get him.⁷ He told the officer he had started

⁶ Defendant goes to some length to argue that Camacho was not a Sureño, not only because the police could find no evidence of such gang affiliation, but because defendant's group, which was aligned with the Norteños, had been invited to the party, and it is unlikely that Sureños and Norteños would have been socializing together at the same party. The key fact, however, is not whether Camacho was actually a Sureño, but whether defendant perceived him to be. (See *People v. Williams*, *supra*, 16 Cal.4th at p. 194.)

⁷ The parties dispute whether the Border Brothers were Sureños or a gang of its own opposed to both Sureños and Norteños. We find resolution of that dispute unnecessary to our decision. To the extent, however, the Attorney General suggests

carrying a "bone-crusher"—i.e., a screwdriver sharpened to a point—with him for protection.

A gang expert testified that "Nortefio" means "northerner." There are separate Nortefio gangs, but they all are "sort of a united group" because they are all subordinate to Nuestra Familia, a prison gang. Nortefios claim the number 14, since N is the 14th letter of the alphabet, standing for "Nuestra Familia." "Surefio" means "southerner"; that group identifies with the Mexican Mafia, a rival prison gang, and attaches significance to the number 13 for M, the 13th letter of the alphabet. Nortefios and Surefios are enemies and often commit violent crimes against one another. Nortefios claim red and Surefios claim blue. A Surefio found by himself in a Nortefio neighborhood would likely be assaulted. "Southside Hayward" is an umbrella name for several local Nortefio gangs.

Defendant was charged with first degree murder (§ 187), including personal weapon use (§ 12022, subd. (b)(1)) and a gang enhancement (§ 186.22, subd. (b)(1)).⁸ The case went to jury trial. Defendant claimed at trial, as on appeal, that he was only trying to help his cousins escape from their predicament and had no intent to assist in the attempted robbery. The jury was instructed on actual and imperfect defense of others but not on heat of passion manslaughter. It was instructed on first degree felony murder based on robbery and attempted robbery and was also instructed on premeditated, deliberate first degree murder. The verdict was first degree murder, with true findings on the weapon use and gang enhancements. Defendant was sentenced to 25-years to life in prison, plus one year for the weapon use.

defendant was expecting an attack by the Border Brothers at the time of the offense, we agree with defendant that the evidence is not reasonably open to that interpretation.

⁸ He was also charged with possession of a dirk or dagger (§ 12020, subd. (a)(4)) at the time of his arrest and driving on a suspended license (Veh. Code, § 14601.1). He entered a no contest plea to the weapon offense, and the Vehicle Code violation was dismissed on the court's own motion in the interests of justice (§ 1385) before trial on the murder charge. An alleged prison prior (§ 667.5) was struck on the court's own motion after the jury returned its verdict. The charge of illegal weapon possession was also dismissed after the murder verdict.

DISCUSSION

Defendant raises four alleged errors on appeal: (1) failure to bifurcate the gang enhancement allegation; (2) failure to instruct on heat-of-passion voluntary manslaughter and on provocation as reducing first degree murder to second degree; (3) insufficient evidence that defendant aided and abetted an attempted robbery to support a felony murder theory of first degree murder; and (4) insufficient evidence of premeditation and deliberation to support a first degree murder conviction on that theory.

I. Bifurcation of gang enhancement—

Defendant moved in limine to bifurcate the trial of the gang enhancement, as well as to exclude individual items of evidence relating to gangs. The motions were denied.

The courts are authorized to bifurcate trial of gang evidence in appropriate cases. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050 (*Hernandez*).) We review the trial court's decision on that issue for abuse of discretion only. (*Id.* at pp. 1048, 1050-1051.), and find no abuse of discretion here.

Since there was a gang enhancement alleged, the trial court's discretion to deny bifurcation was broader than its discretion to admit gang evidence when a gang enhancement is not charged. (*Hernandez, supra*, 33 Cal.4th at p. 1050.) Moreover, the reason for allowing gang testimony in this case was in part to prove the motive for the vicious stabbing. Bifurcating the trial would have deprived the People of the opportunity to prove that motive. Defendant points out that the prosecution was not required to prove motive. That is beside the point. By proving motive the prosecution also strengthened its case on intent, which it contended, at least under one theory, was the premeditated intent to kill due to gang rivalry. In such circumstances it was not an abuse of discretion to hold a unified trial on both the murder charge and the gang enhancement.

The cases relied upon by defendant are unpersuasive. Defendant admits " '[g]ang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang-related.' " (*People v. Memory* (2010) 182 Cal.App.4th 835, 858.) That is the case here. Defendant's cited authorities are plainly distinguishable in that they involved no gang enhancement or other gang allegation. (*Id.* at pp. 858-859)

[evidence that defendant was in a motorcycle gang held more prejudicial than probative where no gang enhancement alleged]; *People v. Bojórquez* (2002) 104 Cal.App.4th 335, 343 [gang evidence admissible to show defense witness's bias even where other evidence of friendship with defendant was available, but relevance of gang testimony about gang behavior was "minimal, if not nonexistent"].) Both cases discussed admissibility of gang evidence in non-gang offenses. As noted above, the court has broader discretion in the bifurcation context.

In *People v. Albarran* (2007) 149 Cal.App.4th 214—not incidentally, an appeal following a new trial motion, not a bifurcation case—a gang enhancement was charged, but the trial court on the new trial motion ruled the evidence was insufficient to support the enhancement. (*Id.* at p. 222.) The new trial motion was granted as to the enhancement, and that allegation was dismissed without prejudice, but the motion was denied on the substantive offense. (*Ibid.*) The Court of Appeal reversed, noting there was no evidence of "any known or relevant gang rivalries" (*id.* at p. 227) and concluding, "the prosecution did not prove that this gang evidence had a bearing on the issues of intent and motive. We thus discern 'no permissible inferences' that could be drawn by the jury from this evidence." (*Id.* at p. 230.) There was "nothing inherent in the facts of the shooting to suggest any specific gang motive." (*Id.* at p. 227.)

Our case is clearly different. One of the prosecution's chief theories was that defendant stabbed Camacho because he was wearing a blue shirt in Norteños territory, a not unheard of circumstance. (See *People v. Williams, supra*, 16 Cal.4th at pp. 193-194.) As the Attorney General notes "the probative effect of the [gang] evidence was weighty, persuasive and, as to the motivation of the slaying, indispensable."

Indeed, the trial court opined it would be "just plain foolish to separate the two" trials. We agree. Despite defendant's protestations to the contrary, a unified proceeding did result in significant trial efficiencies. Had the issues been bifurcated, presumably the gang expert would not have testified at the murder trial. The other witnesses about gang involvement, however, i.e., Hernandez, Chivalan, Tijerina, Benavides, and the police inspector, would have testified on the murder charge. It would have been wasteful of

judicial resources, as well as witnesses' and jurors' time, to bifurcate the trial. (Cf. *People v. Williams* (2009) 170 Cal.App.4th 587, 611 ["state has a strong interest in prompt and efficient trials," including consideration of "burden on jurors and the court itself"].)

II. Instructional issues

A. *Heat of Passion Voluntary Manslaughter*

The defense pursued at trial was defense of others or honest but unreasonable belief in the need to defend others. Trial counsel argued at length that defendant was only trying to help his cousins from being beaten when he entered the fray, and that the robbery attempt had already ended. The court instructed the jury on defense of others as a complete defense, as well as on imperfect defense of others as reducing the crime from murder to manslaughter.

Defendant claims the court erred in failing to also instruct sua sponte on voluntary manslaughter under heat of passion. (§ 192, subd. (a).) We review de novo whether the instruction was required. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

A trial court is required to instruct the jury sua sponte "on general principles of law that are 'closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case.' [Citation.]" (*People v. Moye* (2009) 47 Cal.4th 537, 554 (*Moye*)). This includes the duty to instruct sua sponte on any lesser included offenses, such as voluntary manslaughter, supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162 (*Breverman*); *People v. Barton* (1995) 12 Cal.4th 186, 194-195.) The converse of this rule is that the court is not required to instruct on theories the jury could not reasonably find to be true. (*Breverman, supra*, 19 Cal.4th at p. 154; *People v. Wickersham* (1982) 32 Cal.3d 307, 324-325, overruled on other grounds in *People v. Barton, supra*, 12 Cal.4th at p. 201.)...

Substantial evidence is defined as " 'evidence from which a jury composed of reasonable [persons] could . . . conclude[]' " that the lesser offense, but not the greater, was committed." (*Breverman, supra*, 19 Cal.4th at p. 162.) It is evidence of

“ ‘ponderable legal significance . . . reasonable in nature, credible, and of solid value.’ ” (*People v. Campbell* (1994) 25 Cal.App.4th 402, 408.) “The trial court need not give instructions based solely on conjecture and speculation.” (*People v. Young* (2005) 34 Cal.4th 1149, 1200.) The Supreme Court has repeatedly emphasized that the requirement of substantial evidence is not met by the existence of “ ‘any evidence, no matter how weak’ ” of circumstances that might lead to an impassioned response. (*Moye, supra*, 47 Cal.4th at p. 553; *People v. Barton, supra*, 12 Cal.4th at p. 195, fn. 4.) Likewise, a heat of passion instruction is properly refused where the testimony shows the defendant responded to a perceived threat in a rational defensive manner, not in a passion-inflamed fury. (*Moye, supra*, 47 Cal.4th at pp. 546, 553-554.)

We begin by noting that the court considered and rejected the possibility of instructing on this theory. Defense counsel at trial agreed such an instruction was not supported by the evidence.

The factor that distinguishes the heat of passion form of voluntary manslaughter from murder is provocation by the victim. (*Moye, supra*, 47 Cal.4th at p. 549.) The underlying theory is that the defendant was so overwhelmed by the victim’s provocation that his reason was temporarily obscured. (*Id.* at p. 550; *Breverman, supra*, 19 Cal.4th at pp. 163-164.) The killing therefore is not treated as the product of his voluntary choice, but rather is reduced to voluntary manslaughter.

A heat of passion theory includes both objective and subjective elements. To satisfy the objective or “reasonable person” element of this form of voluntary manslaughter, the victim’s conduct must have been “ ‘sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.’ ” (*Moye, supra*, 47 Cal.4th at p. 550.) The subjective element requires the defendant “to have killed while under ‘the actual influence of a strong passion’ induced by such provocation,” without an opportunity to regain control of his emotions. (*Ibid.*)

Stripped of its details, the killing here was the stabbing of an unarmed man while his arms were restrained behind him. And although Camacho’s friend told police he had

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been actively throwing punches before he was restrained, no witness testified to seeing with whom he might have been fighting. Hernandez testified that Camacho was merely getting ready to jump into the fight with Gerald when Gerald grabbed him and pinned his arms behind him. Even if Camacho were preparing to jump into or had jumped into the fight involving Manuel Salas, Gerald apparently disabled him before he could inflict any injury.⁹

Indeed, defendant does not appear to claim that Camacho himself provoked the attack. Rather, his argument is that the brawl that ensued after the Salas group unsuccessfully demanded money from the victims was such a provocative occurrence that it triggered an emotional reaction of fear or anger on defendant's part, which he suggests was consistent with that of a reasonable person in like circumstances. Or at least he claims the evidence is open to such an interpretation and that sua sponte instruction was required.

We disagree. First, there was no substantial evidence to suggest that Camacho himself engaged in any kind of provocative behavior that would reduce murder to manslaughter. *People v. Lee* (1999) 20 Cal.4th 47, 59, reiterates that "[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.]"

Even if Camacho were involved in the brawl and in fact exchanged punches with Gerald or someone else, that simply does not rise to the level of provocation that would override the judgment of a reasonable person in defendant's position. Even evidence of a provocative initial attack by the decedent does not alone justify a heat of passion instruction. Nothing in the case law "suggests an instruction on heat of passion is required in every case in which the *only* evidence of unreasonable self-defense is the

⁹ Hernandez may have initially told the inspector that Camacho was about to jump into the fight with Manuel, but she testified at trial he was about to jump into the fight with Gerald.

circumstance that a defendant is attacked and consequently fears for his life." (*Moye, supra*, 47 Cal.4th at p. 555.) And here defendant himself was not attacked at all.

By all accounts, the original aggressors were the Salas brothers or those associated with them. There is no evidence that Camacho did anything beyond trying to foil the robbery attempt or that Chivalan did anything further than necessary to try to escape from the robbers. There was no evidence that the crowd was surging toward defendant, or even that Gerald or Manuel was presently in trouble when defendant intervened. Manuel was winning his fight and Gerald had extricated himself from the fight with one man and had then pinned Camacho's hands behind his back. Exactly who else joined the fracas on whose side is unclear. This is not evidence of provocation to which a reasonable person would respond with uncontrolled passion.

Moreover, and as noted, at the time defendant stabbed Camacho, Gerald had restrained him with his hands behind his back. Thus rendered helpless, Camacho was not engaging in any sort of provocative behavior when defendant stabbed him to death. Even in a case of mutual combat, a killer may not take "undue advantage" of his opponent and still have his crime reduced to manslaughter. (*People v. Lee, supra*, 20 Cal.4th at p. 60, fn. 6.) Here there was unquestionably undue advantage.

Defendant compares his case to *Breverman, supra*, 19 Cal.4th at pp. 163-164, where the Supreme Court held the jury should have been instructed on voluntary manslaughter because a group of angry men converged on defendant's home, vandalized his car in the driveway, and were surging toward his home. The man Breverman killed was part of the assaulting crowd. (*Id.* at p. 148.) As the Attorney General points out, the case involved trespass upon Breverman's property, whereas the fighting in this case occurred on a public street.

It is equally important that the mob in *Breverman* appeared to be acting in concert and of one mind in targeting the defendant; here the evidence suggests only a wild-free-for-all without any backing for Camacho in particular and without any clear target. Nor did the crowd appear to be closing in on the Salas brothers or defendant himself, perhaps in part because he was waving a knife and, as far as the evidence discloses, was

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the only armed man on the scene. Defendant cannot use the chaotic scene in general to claim he was provoked to violence. The lack of imminent threat is reflected in Gerald's remark after the stabbing: "What the fuck are you doing?"

Defendant's other cases are equally unpersuasive. He cites *People v. Ramirez* (2010) 189 Cal.App.4th 1483, which involved a gang-related confrontation. In that case, however, there was evidence that the killer himself was punched during a heated confrontation about gang territory. (*Id.* at p. 1486.) And while it is true that the court held there should have been a sua sponte voluntary manslaughter instruction, the portion of the opinion discussing the need for such instruction was not published. (*Id.* at p. 1487.) Moreover, the fact that the defendant himself was attacked, as well as the fact that the homicide victim was his assailant, distinguishes that case from ours.

On the subjective element of heat of passion manslaughter *Moye* had this to say: "In *Breverman* there was affirmative evidence that the defendant panicked in the face of an attack on his car and home by a mob of angry men and had come out shooting, and continued shooting, even after the group had turned and ran. 'At one point in his police statement, defendant suggested that he acted in one continuous, *chaotic response* to the riotous events outside his door.' [Citation.]." (*Moye, supra*, 47 Cal.4th at p. 555.) Without similar evidence, a heat of passion instruction was properly denied in *Moye*. (*Id.* at pp. 555-558.) *Moye's* own description of his reaction showed it was rational and defensive, not a panic-inspired attack.

Similarly, the fact that defendant retrieved a weapon before entering the fracas strongly suggests he was not acting in heat of passion. (*People v. Butler* (2005) 127 Cal.App.4th 49 [defendant who retrieved gun before confronting group at bus stop was not entitled to voluntary manslaughter instruction].) There was also the fact that Hernandez urged him not to get involved, which predictably would have triggered an examination by him of the reasonableness of his response and would have snapped him out of any sort of panic reaction he might otherwise have been experiencing. And defendant himself said he was going to "back up" the Salas brothers, which suggests reasoning, not panic or a mental state in which reason has been obscured.

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The evidence shows defendant remained in control during his initial entry to the fighting, waving the knife and ordering the crowd to "back off." His homicidal rage was evidently fueled by seeing Camacho wearing blue, the color of his sworn enemies, the Sureños. That, however, is not something that would provoke a reasonable person to uncontrollable passion. Yet the jury's true finding on the gang allegation suggests it believed this was the motive for the attack.

Nor was there any evidence that defendant was or appeared to be in a panic state when he delivered the fatal wounds. Hernandez saw him simply "go up to [Camacho] and stab him." This was a well-aimed lethal stabbing of an unresisting victim, not a wild panic-driven slashing.

For the foregoing reasons, neither the objective nor subjective aspects of heat of passion manslaughter were supported by the evidence.

B. Provocation as Reducing First Degree Murder to Second Degree Murder

Defendant also claims the court erred in failing to give CALCRIM No. 522, which would have instructed the jury, "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.] [¶] [Provocation does not apply to a prosecution under a theory of felony murder.]"

The Attorney General points out, however, that the Supreme Court has specifically held this instruction is a "pinpoint" instruction, as to which no sua sponte duty exists. (*People v. Rogers* (2006) 39 Cal.4th 826, 877-878; accord, *People v. Middleton* (1997) 52 Cal.App.4th 19, 31-33, overruled on another ground in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752-753, fn. 3.) Defendant's appellate counsel admits he overlooked this authority in preparing the opening brief. This forecloses any argument that the court erred in failing to instruct sua sponte. In any event, for the reasons indicated above, a theory of provocation was not reasonably raised by the evidence.

C. *Ineffective Assistance of Counsel*

Defendant's fallback position, of course, is that defense counsel was ineffective in failing to request CALCRIM No. 522. We cannot conclude based on the record before us that defense counsel's performance fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) It is possible the attorney had tactical reasons for wanting to stake his bets on a voluntary manslaughter conviction by imperfect defense of others, arguing defendant was only trying to help protect his cousins when he entered into the fighting. That is essentially his same argument on appeal, but now he tries to call it heat of passion.

It is also entirely possible the attorney simply did not believe there was substantial evidence of provocation or heat of passion. As discussed above, we share that view.

D. *Prejudice*

But even if the court erred in failing to give a heat of passion manslaughter instruction, there is no reasonable probability the result would have been more advantageous to defendant. (*Breverman, supra*, 19 Cal.4th at p. 165.) The first degree murder finding alone might not rebut any suggestion of prejudice, but that finding combined with the gang enhancement and the rejection of imperfect defense of others makes it most improbable that the jury would have convicted defendant of voluntary manslaughter on a heat of passion theory, even if it had been instructed on that theory.

III. Sufficiency of Evidence of Attempted-Robbery Felony Murder

The prosecution's theory was, in part, that defendant was guilty of first degree murder because the killing occurred in the course of a robbery or attempted robbery. Defendant claims, however, there was no actual robbery because no property was taken, and the failed robbery attempt was completed before defendant became involved. Therefore, he suggests, there was insufficient evidence to convict him of felony murder. He further argues that the instructions given on robbery and attempted robbery, combined with the prosecutor's argument, may have so confused the jury that some members may have convicted him of first degree murder on the faulty theory that he was guilty of

attempted robbery when they really believed he was only trying to help his cousins escape after their failed robbery attempt ended.

The Attorney General argues the instructions were correct and any misstatement by the prosecutor was waived by the failure to object at trial. She basically agrees with defendant that, in order to be found guilty of felony murder, he would have had to join in the attempted robbery before it ended. Whether the attempt had already failed when defendant entered the fracas or was continuing was a factual question for the jury. The evidence was not insufficient to support a felony-murder verdict based on attempted robbery.

A. Instructions on Robbery and Attempted Robbery

At the close of evidence, defense counsel made a motion under section 1118.1, arguing there was insufficient evidence to place the attempted robbery felony-murder theory before the jury. The prosecutor disagreed and noted that Manuel and Gerald became involved in a fight immediately after they came downstairs to commit the robbery. “[K]nowing full well that *the robbery was ongoing*—and certainly, legally, the robbery had not come to a close and that the *force was still ongoing* as far as the attempted robbery was concerned—the defendant armed himself, went down the stairs and ended up stabbing somebody.” Defense counsel disagreed, but acknowledged that “[i]f it were shown that the defendant was aware that that fight was connected to the robbery attempt, I think that would make it a lot stronger.”

The court ruled in favor of the prosecution, finding that “almost immediately” after the Salas brothers went downstairs “there’s some kind of a fracas, and . . . the defendant goes down to join them.” The court concluded there was evidence the robbery was “still ongoing.”

The court instructed the jury on the elements of both robbery and attempted robbery for purposes of the felony-murder rule.¹⁰ The instructions included the rule that

¹⁰ Even though there was no evidence that the Salas brothers actually obtained any of their victims’ property, the court noted that it needed to instruct on the elements of robbery because the allegation was that the murder occurred during the course of an

"[t]o be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid and abet the commission of the robbery before or while a perpetrator carried away the property to a place of temporary safety." The instructions on attempted robbery were separate from the instructions on robbery and contained a requirement that "defendant intended to commit robbery," with no mention of asportation.

The court also instructed the jury on the "one continuous transaction" rule, limiting the instruction to robbery, not attempted robbery. Defendant complains that the instruction told the jury it could consider "whether the fatal act occurred while the perpetrators were fleeing from the scene of the felony or otherwise trying to prevent the discovery or reporting of the crime" He contends the instruction "implied" that the "fleeing the scene" factor applied to attempted robbery, but in fact the instruction was specifically limited to robbery.

We perceive no error in the instructions. Indeed, in his reply brief defendant acknowledges he "does not contend the instructions were incorrect." We take him at his word.

Nor do we think the instructions were so ambiguous as to have misled the jury. Defendant admits in his reply brief that he does not claim the instructions were legally erroneous, but that they were not justified by the evidence. He claims; in fact, that "the court should not have instructed as to robbery, attempted robbery, aiding and abetting, or felony murder at all, because those instructions misled the jury to believe that it could find appellant guilty of first degree murder on a felony-murder theory."

This argument is unavailing. Certainly there was sufficient evidence of an ongoing felony for defendant to be tried on a felony-murder theory. The instructions required defendant himself to have harbored the intent to commit a robbery before he could be found guilty of attempted robbery felony murder. The evidence of the robbery attempt and the ensuing brawl left open the question whether the Salas brothers were

attempted robbery. We believe the jury could be trusted to reject a theory of a completed robbery, and no prejudice ensued. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126, 1130.)

APPENDIX D

continuing to try to get money from whomever they could overpower. Defendant's theory of the evidence—that he was simply trying to help his cousins escape after a failed robbery attempt—was implicitly rejected by the jury under the instructions as given. There was no evidence to support a finding that he intended to commit some other robbery if the Salas brothers' attempted robbery was over when he entered the fracas.

Defendant argues a robbery instruction was superfluous, but *People v. Guiton*, *supra*, 4 Cal.4th at p. 1126 held if in fact there was insufficient evidence of one factual theory of the crime but sufficient evidence of another, the jury could be trusted to have so determined. No reversible error could accrue on the purported misinstruction. (*Id.* at pp. 1124-1129.) There was sufficient evidence to support the attempted robbery theory submitted to the jury and to support the verdict.

B. Prosecutor's Argument on Attempted Robbery

We do find problematic some of the prosecutor's remarks during his summation. For instance, he said, "But the robbery is ongoing, essentially, until the robbers or attempted robbers reach a place of safety." In his closing argument he referred to CALCRIM No. 1603 and said, "That instruction specifically addresses a completed robbery. 'Carried the property to a place of temporary safety.' 'A perpetrator has reached a place of temporary safety with the property if he or she has successfully escaped from the scene.' [¶] How does that relate to what we have here, an attempted robbery? The same language applies. The attempted robbery continues until the person attempting the robbery has reached a place of safety. Successfully escaped from the scene."

As we read the Attorney General's brief, she contends this was a correct statement of the law of felony murder, but not of aiding and abetting.¹¹ We tend to agree with

¹¹ The Attorney General argues that the duration of an attempted robbery "for purposes of felony murder is broader than for aiding and abetting liability." She cites *People v. Cooper* (1991) 53 Cal.3d 1158, 1161. While her statement may be true it is somewhat beside the point. The Attorney General also admits "if appellant was not liable for attempted robbery, he could not be liable for felony murder." Thus, defendant would be correct that if the evidence were insufficient to support a finding that he aided or

defendant that the prosecutor's comments could have been interpreted to misstate the law, but any claim of misconduct was forfeited by failure to object at trial. (*People v. Brown* (2003) 31 Cal.4th 518, 553.) Moreover, considering the comments in context, we think it unlikely that the jury was misled.

Defense counsel argued at length that the attempted robbery had already ended before defendant entered upon the scene: "And to argue that what [defendant] did down there was for the purpose of assisting Manuel and Gerald escape of [*sic*] the robbery assumes that whatever they were then involved in when [defendant] went down there had to do with the robber. [¶] . . . [¶] . . . And the evidence does not support that from the testimony—the evidence doesn't support that [defendant] went on down there to get involved in this robbery."

The prosecutor, on the other hand, argued, "It's a completely unreasonable argument that Gerald and Manuel are involved in this fight, not for the robbery, because the robbery is ongoing." His position was that the fighting with Chivalan and others was part of the force element of the robbery attempt.

Thus, the arguments of counsel, considered as a whole, focused the jury on the proper inquiry (i.e., whether the *mêlée* occurred as part of the robbery attempt, or whether the attempt had already ended by the time defendant joined in). Moreover, the jury was instructed that the actual instructions given by the court must be followed to the extent the arguments of the attorneys were inconsistent. "We presume the jurors followed those instructions. (*People v. Williams, supra*, 170 Cal.App.4th at p. 613.) Any possible misinterpretation was forfeited by failure to object.

C. *Sufficiency of Evidence of Attempted Robbery*

Defendant claims he "came upon the scene well after the [robbery] attempt had failed, the intended robbery victims had left the scene, and a fight was going on between

abetted the attempted robbery it would also be insufficient to support a felony-murder finding.

the would-be robbers and persons who were not involved in the attempt." But the evidence was not nearly so clear or so one-sided.

Though the Salas brothers initially targeted Tijerina and Benavides, they also appear to have been after Chivalan's money when they physically assaulted him. Chivalan testified that he was attacked by one of the would-be robbers as he was returning to Tijerina's car. Benavides testified the men demanded money from Chivalan before the attack. Thus, at least the initial fisticuffs erupted as part of the robbery attempt, not a wholly separate incident. Whether the attempt was ongoing at the time defendant joined in was a question of fact for the jury.

Defendant argues repeatedly that the robbery attempt had already ended because the targeted victims had left the scene in Tijerina's car before defendant emerged with the knife. This argument is faulty because the exact chronology of events is not clear from the testimony. This was an ambiguous area left to the jury's determination.

Moreover, when defendant grabbed the knife and headed downstairs he said he was going to "back up" his cousins, not that he was going to rescue them from an attack. It was for the jury to decide whether the Salas brothers and their allies had abandoned the robbery attempt before defendant joined in on their behalf. The verdict necessarily incorporated a finding that defendant intended to commit a robbery. This shows the jury believed the robbery attempt was ongoing when defendant descended the stairs to assist his cousins. That verdict was supported by substantial evidence.

IV. Sufficiency of Evidence of Premeditation and Deliberation

Defendant's final argument is that there was insufficient evidence of premeditation and deliberation, so that he was improperly convicted of first degree murder. He further argues that because both theories of first degree murder were supported by insufficient evidence, double jeopardy bars his retrial on both first degree murder theories. We must, he suggests, not only reverse the conviction, but order a new trial limited to second degree murder or manslaughter.

These arguments fail. Defendant's forethought in returning to the kitchen to grab a knife suggests premeditation about what he might intend or be willing to do with such a

weapon. That Hernandez urged him not to go downstairs supports a finding of deliberation. Her warning—and defendant's rejection of it—shows he must have considered what he might be getting himself into and went forward nonetheless. That he waited for his cousin to disable what he perceived to be a "scrap" before using his weapon further suggests forethought. Even the brief time which he had to deliberate was sufficient under the law. (CALCRIM No. 521.) The intentional delivery of wounds to the vital area of the heart suggests willful intent to kill. We find no reversible error.¹²

DISPOSITION

The judgment is affirmed.

Richman, J.

We concur:

Kline, P.J.

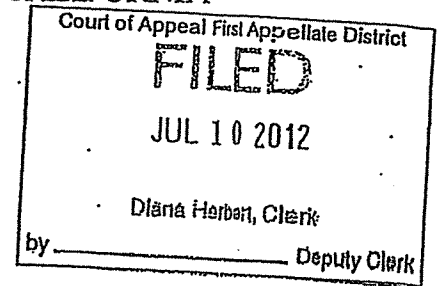
Lambden, J.

¹² We deny by separate order defendant's first amended petition for writ of habeas corpus in case No. A133929.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO



In re TARVEY REGO,
on Habeas Corpus.

A133929

(Alameda County
Super. Ct. No. H47496)

BY THE COURT:

The petition for writ of habeas corpus is denied.

Dated:

JUL 10 2012

Kline, P.J.

Kline, P.J.

APPENDIX E

Court of Appeal, First Appellate District, Division Two - No. A130047

S204811

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

TARVEY REGO, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED

OCT 17 2012

Frank A. McGuire Clerk

Deputy

RECEIVED
OCT 18 2012
FIRST DISTRICT APPELLATE PROJECT

CANTIL-SAKAUYE

Chief Justice

APPENDIX F

S204751

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re TARVEY REGO on Habeas Corpus.

The petition for writ of habeas corpus is denied.

SUPREME COURT
FILED

OCT 17 2012

Frank A. McGuire Clerk

Deputy

RECEIVED
OCT 18 2012
FIRST DISTRICT APPELLATE PROJECT

CANTIL-SAKAUYE

Chief Justice

APPENDIX G