

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

IRVING MARCELO REYES, Petitioner

vs.

CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

SIXTH DISTRICT APPELLATE PROGRAM
in association with:

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Irving Marcelo Reyes

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF
THE UNITED STATES AND TO THE HONORABLE ASSOCIATE JUSTICES
OF THE COURT:

Pursuant to Rule 39 of the Rules of the Supreme Court of the United States,
petitioner, Irving Reyes, respectfully requests leave to file a petition for writ of
certiorari *in forma pauperis*. Petitioner proceeded *in forma pauperis* in state court
and has been represented by court appointed counsel in both the California Court of
Appeal and the California Supreme Court.

The facts in support of this motion are memorialized in the attached
declaration of counsel and in the attached appointment of counsel order from the
appellate court which includes my designation through the Sixth District Appellate
Program as counsel of record for this petitioner. (Appendix F.)

Dated: December 8, 2017

Respectfully submitted,

JA Dunger
Julie Ann Dunger
Attorney for Petitioner,
Irving Reyes

DECLARATION OF JULIE ANN DUNGER

I am an attorney licensed to practice in California. I am a member of the bar of this Court. I am the attorney of record for petitioner Irving Marcelo Reyes.

The facts stated in this declaration are within my personal and firsthand knowledge. If called as a witness in this action, I could and would testify competently under oath to the following facts.

On May 16, 2014, petitioner filed a notice of appeal which indicated he was indigent. On May 28, 2014, the California Court of Appeal appointed the Sixth District Appellate Program to represent petitioner. On June 12, 2014, in association with the Sixth District Appellate Program, I became counsel of record for petitioner and have so remained to this time. The documents memorializing my appointment are attached as Appendix F.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed: December 8, 2017, at Ben Lomond, California.

JA Dunger

Julie Ann Dunger

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Counsel of Record for Petitioner
Irving Marcelo Reyes

QUESTIONS PRESENTED FOR REVIEW

- I. Petitioner's right to Due Process and Confrontation under the Sixth and Fourteenth Amendments to the U.S. Constitution, as articulated in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), were trespassed when the trial court wrongly failed to instruct on the State's burden to disprove reasonable and unreasonable defense-of-another, and when it relegated the instruction on the State's burden to disprove voluntary manslaughter (unreasonable self-defense) to a separate instruction which it told the jury not to consider until after acquitting petitioner of attempted murder.
- II. Petitioner was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution, as articulated in *Vega v. Ryan* (9th Cir. 2013) 735 F.3d 1093,1095 applying *Rompilla v. Beard* (2005) 545 U.S. 374, 387- 389, when counsel failed to mention or pursue petitioner's strongest defense (attempted voluntary manslaughter, unreasonable defense-of-another), because she was unaware that discovery in her possession documented the factual basis for that defense.
- III. Petitioner was denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution when counsel failed to object to the introduction of petitioner's involuntary answers to booking questions about his jail safe-housing preferences which were inadmissible under *Harris v. New York* (1971) 401 U.S. 222, 224, 226, as proof of the charged gang enhancement.
- IV. Petitioner was denied his right to Due Process and Confrontation under the Sixth and Fourteenth Amendments to the U.S. Constitution, when the court permitted two-thirds of the trial to be dominated by testimonial and case-specific gang hearsay in violation of *Crawford v. Washington*, 541 U.S. 36 (2004); The appellate court confirmed that this error occurred, but found it harmless.
- V. The Court's Prejudicial Misinstruction on the Specific Intent Elements of Attempted Murder, Attempted Voluntary Manslaughter, and the Gang Enhancement Violated Appellant's Rights under the Sixth and Fourteenth Amendments of the United States Constitution; The appellate court confirmed that this error occurred, but found it harmless.
- VI. The Cumulative Effect of Trial Errors Requires Reversal.

LIST OF PARTIES

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

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Appendix B - California Court of Appeal’s order modifying its opinion, and denying rehearing.

Appendix C - June 1, 2017, order summarily denying the habeas petition “considered with” the direct appeal.

Appendix D - September 13, 2017, order of the California Supreme Court denying review of the affirmance of petitioner’s conviction on direct appeal.

Appendix E - September 13, 2017, order of the California Supreme Court denying review of the appellate court’s denial of petitioner’s habeas petition.

Appendix F - Order appointing Sixth District Appellate Program and recommendation of panel attorney Julie Dunger, counsel of record herein.

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OPINIONS BELOW

The unreported opinion of the California Court of Appeal, Sixth Appellate District, affirming the judgment appears as Appendix A. Its modification order and denial of rehearing, appears as Appendix B. Its summary denial of the companion habeas petition appears as Appendix C. The orders of the California Supreme Court denying the petitions for review appear as Appendix D (direct appeal), and as Appendix E (summary denial of the habeas petition).

JURISDICTIONAL STATEMENT

The judgment of the California Court of Appeal, Sixth Appellate District, was entered on June 1, 2017. Two timely petitions for review (direct appeal and habeas) were denied on September 13, 2017. The jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution states in pertinent part:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

Sixth Amendment to the United States Constitution states in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 7, 2013, an information was filed against petitioner alleging one count of attempted murder and three enhancements (gun discharge, great bodily injury, gang enhancement). (1CT 93.) The information also alleged that petitioner had served a prior prison term for “vehicle theft.” (1CT 94.)

On February 11, 2014, (2CT 185, 277), the jury rendered a guilty verdict on the attempted murder charge and true findings on the three enhancements. (7RT 621-622, 2CT 277, 321-326.) Appellant’s prison prior was found true at a court trial. (2CT 282.)

Petitioner was sentenced on May 15, 2014, to a total term of 25 years to life, consecutive to a seventeen year determinate sentence. (2CT 337, 9RT 651, 653, 654.) The court imposed a seven-year determinate, mid-term sentence for attempted murder, a 10-year term for the gang enhancement (9RT 653), and a 25 years to life indeterminate term for the gun use enhancement. (9RT 651.)

The court stayed the three-year great bodily injury enhancement and struck the one-year prison prior in the interest of justice. (9RT 653, 654.) A timely notice of appeal was filed on May 16, 2014. (2CT 338.)

The Sixth District Court of Appeal affirmed the conviction on June 1, 2017 (App. A, B), and on the same date, summarily denied the companion habeas petition. (App. C.) Although the court stated in the introduction of its opinion that it found no

errors, the court in fact did find three instructional errors (App. A, pp. 17-19, 23, 30 [omission of attempted voluntary manslaughter (unreasonable defense-of-another), substitution of general intent instruction for all specific intent elements, incomplete voluntary intoxication instruction]), and multiple errors in admitting categories of gang hearsay evidence. (App. A, 52-53.) It deemed all errors harmless. (App. A, p. 1-2.) On June 26, 2017, the appellate court issued an order denying rehearing but enumerated seven changes to its opinion. (App. B.) On September, 13, 2017, the California Supreme Court denied petitions for review as to the direct appeal (App. D) and as to the habeas petition. (App. E.)

STATEMENT OF FACTS

A. Prosecution's Case, Eye-Witness Evidence.

On the evening of March 2, 2012, Luis Estrada (hereinafter "Estrada"), was working security at the front door of the El Tarasco Bar in San Jose, California. (4RT 165, 166.) Estrada had been twice convicted for domestic violence. (4RT 216-217.) Estrada was required to check patrons' identification and to pat search them for weapons before entry. (4RT 166.)

At about 8:15 p.m., Estrada met with petitioner who was part of a group of "four or five" people. (4RT 168.) Petitioner arrived at the bar with Luis Urbina and Oscar Jimenez. (5RT 266, 267, Exh. 4, ["Cam. 7," 8:11:29].) Marco Soto, a regular bar patron, and his friend, referred to only as the "older one," had arrived at the bar much earlier (5RT 264-265, 4RT 187), and came outside to join petitioner at the door soon after he arrived with Urbina and Jimenez. (4RT 187, 174, 5RT 267-268, Peo.

Exh. 4 [Cam. 7], 8:14:46.) Estrada had never seen petitioner at the bar before. (4RT 168, 172.)

Estrada's brother Cristoval Estrada ("Cristoval"), was visiting Estrada at the bar that night and witnessed everything that occurred. (4RT 167, 5RT 243.)

Estrada asked to see appellant's identification because he looked young. (4RT 173.) Petitioner had just turned 21 less than two weeks earlier. (6RT 428.) At first petitioner said that he did not have identification, but later handed Estrada identification belonging to someone else in his group. (4RT 173, 181-182.)

According to Estrada, Soto told Estrada "the second guy will come inside" the bar "because they belong to a really huge gang called Clanton or something like that." (4RT 169, 184.) When Soto made his statement about "Clanton," Soto grabbed appellant's arm and pushed petitioner toward the doorway. (4RT 185, 187-188.) Estrada stopped them from entering.

Estrada was impeached with his original statement to police that Soto "whispered in his ear [']You sure you really want to go there? You know who I am?[']." (5RT 346.) Estrada was also impeached by the prosecution with a different statement documented by the gang expert/designated investigating officer, that Soto had said: "*We're* going to fuck you up," "*we're* from Clanton," and "*we're* Surenos." (4RT 189, emphasis added.) Estrada was further impeached when his brother Cristoval testified that no gang threats were made and that the argument was over petitioner's lack of identification. (5RT 250.)

Estrada described that after Soto had tried to push petitioner inside the bar, Soto “started to push” Estrada (4RT 187), and then the “older one” from appellant’s group “moved [Soto] away from the door” and “was telling him to calm down” (4RT 187-188.) Estrada testified that Soto was still yelling at Estrada but did not say anything else about “Clanton” because “he had said it earlier.” (4RT 188.)

Soto re-approached Estrada and hugged him around the neck with his face close to Estrada’s ear. (4RT 193.) Estrada admitted that he and Soto mutually shoved each other and then Urbina “tried to hit [him].” (4RT 192, 193.) Estrada did not want any trouble. (4RT 195.) He testified that he pulled out his baton “after” both Soto and Urbina “started swinging” at him. (4RT 211-212.)

Estrada recalled that petitioner “walk[ed] toward [him]” and shot him while Soto and Urbina were “beating [him] up” and while he was “fighting with them.” (4RT 195, 196.) Estrada said that Soto and Urbina caused the problems that night and before the shooting “petitioner never became aggressive,” never said anything threatening, and “was just trying to show me another ID.” (4RT 208, 185.)

Cristoval took the gun from petitioner and after being contacted by police, he delivered it to them three or four days later. (4RT 109, 5RT 253, 270, 265.) Cristoval testified under a grant of use immunity because he had used the gun to shoot at the departing suspects. (5RT 242.)

B. Video Surveillance Evidence.

The prosecution introduced two surveillance digital videos which captured the events in front of the bar before and after the shooting. (5RT 267-268, 4RT 174

[People’s Exh. No. 4, “Cam, 7,” “8:11:20 - 8:18:16”], and 4RT 197 [People’s Exh. No. 5, “Cam. 5,” “8:11:20 - 8:18:16”].)

The video shows that Soto’s juvenile act of grabbing appellant’s arm and trying to shove him into the bar past Estrada (4RT 185, Peo. Exh. 4, 8:16:08), occurred immediately after Estrada permitted another party to enter the bar without checking their identification or pat searching them. (Peo. Exh. 4, 8:15:55.)

The surveillance footage shows details never mentioned by the defense at trial. It documented that Estrada was incorrect in his recollection that he was being “beaten” by “them” when he was shot. (4RT 195, 196.) The surveillance video shows that after Soto and Estrada mutually shoved each other and Soto was physically separated from Estrada by the “older one” to calm him down (Peo. Exh. 4, 8:17:07), it was Urbina alone who approached Estrada. (Peo. Exh. 4, 8:17:08.) When Urbina approached Estrada, the “older one” prevented Urbina from making contact with Estrada by physically holding him back by his clothing. (Peo. Exh. 4, 8:17:08-8:17:11.) Soto had moved away by then and was the person *farthest* away from Estrada when Urbina approached. (Peo. Exh. 4, 8:17:11.)¹

The video evidence further showed everyone in front of the bar, including Cristoval, [Estrada’s brother] followed the impending fight between Urbina and Estrada as it moved down the sidewalk and that Cristoval remained closer to the fight than anyone in appellant’s group. (Peo. Exh. 4, 8:16:11-8:17:17.) It shows that

¹ Please Note: Upon rehearing, the Court of Appeal corrected its opinion in three places to reflect the true fact that Estrada was never fighting with two people. (App. B., p. 74, ¶¶ 3, 4, 5.)

petitioner stepped *backwards* and away from the fight to stand closer to the wall of the building while watching. (Peo. Exh. 4, 8:17:12.)

When Urbina finally broke free of the “older one’s” grip and ran toward Estrada, Estrada hit the unarmed Urbina with his baton. (Peo. Exh. 4, 8:17:14.) Finally, it shows the critical detail that petitioner only began moving away from the wall *after* Estrada hit the unarmed and obviously intoxicated Urbina hard with his baton a second time. (Peo. Exh. 4, 8:17:15.) The video establishes that the time between when petitioner started to move away from the wall, pulled the gun from his waistband, and fired, was under two seconds. (Peo. Exh. 4, 8:17:15-8:17:17.)

It further documented details which corroborated appellant’s testimony that when he was initially refused entry, he was prepared to leave. Along with two other members of his group, the “older one” put on the jacket he had been carrying (Peo. Exh. 4, 8:15:29), petitioner withdrew the winter gloves and knit hat from his jacket pocket which he was previously seen taking off as he originally approached the bar (Peo. Exh. 4, 8:15:30 compare to Peo. Exh. 4, 8:11:30 and 8:11:40), and Jimenez flipped his hoodie back over his head. (Peo. Exh. 4, 8:15:37.) As discussed below, the video also documents physical symptoms of intoxication which corroborated appellant’s description of his intoxication level and holes in his memory of the events before the shooting. These facts were also not mentioned at trial.

The video documents all of the young men talking, flirting with girls, and a sloppy attempt by Urbina to hug a girl in front of the bar. (Peo. Exh. 4, 8:15:15 - 8:15:27 [petitioner], Peo. Exh. 4, 8:15:15 - 8:15:33 [Soto], Peo. Exh. 4, 8:15:03,

8:15:17, 8:15:27 [Urbina].) It does not show involvement in a gang conspiracy to assault Estrada as the prosecution insisted.

C. Gang Evidence.

Deputy Ashe, testified as both the investigating officer and the gang expert. (4RT 109.) Two thirds of the evidence in this case consisted of testimonial and case-specific gang hearsay (2CT 201, 209, 208, 2CT 212, 214, 4RT 109-164, 5RT 264-363, 6RT 487-488 [gang evidence], 4RT 164-219, 5RT 241 - 264 [shooting evidence].) The appellate court found that most of it should not have been admitted. (App. A, pp. 52 - 53.)

Ashe testified that each of appellant's three companions belonged to a different specific gang subset from different San Jose neighborhoods, which Ashe opined were all subordinate gangs under the "Sureno umbrella." (4RT 157, 161.) Ashe supported his opinion that petitioner and his companions were gang members by detailing 20 prior incidents, investigations, police suspicions, and rumors which he opined were connected to one of the young men, and then further broadly opined that each scary incident was gang-related. (5RT 282 - 286, 340, 341, 1ACT 101-106 [petitioner], 5RT 295-297, 1ACT 108-109 [Urbina], 5RT 299 - 300, 1ACT 113- 116 [Jimenez], (5RT 302-305, 1ACT 121 - 126 [Soto].)

In reality, only Jiminez had previously suffered *one* conviction with a gang enhancement. (5RT 300.) Soto had suffered *one* conviction without a gang enhancement (5RT 302), petitioner had suffered *one* prior conviction for an auto

theft/auto burglary without a gang enhancement (6RT 417, 421), and Urbina had suffered *no* prior convictions of any sort. (5RT 295-297, 1ACT 108-109.)

When pressed about petitioner, Ashe conceded that he lacked all three of the “most important” indicators of gang affiliation; He had no gang tattoos (4RT 145, 5RT 295), did not own gang clothing (5RT 343, 348), and did not commit a crime in a gang “area.” (5RT 313.) During Ashe’s pre-trial research of the official gang material at the San Jose police department, he found that petitioner had *not* been mentioned once. (5RT 340, 341.) Ashe testified that the Sureno gang allowed “hang around type” people who were not involved in committing crimes or in the daily operation of the gang. (4RT 123-124, 142-143.)

Even though Ashe gave his opinion that everyone was from a different gang subset and the crime at issue was “a gang-related type incident” (5RT 290), Ashe twice refused to agree with the prosecution’s assertion that petitioner adopted Soto’s purported “We are Clanton,” statement by failing to speak up and disagree. (5RT 289, 293, 341, 4RT 113.) Ashe had never heard of any gang case where anyone spoke up to deny another person’s gang claim. (5RT 289, 293.) Ashe repeated in court that after co-defendant Soto was arrested, Soto told Ashe that petitioner “affiliates” with the San Jose gang subset Varios Mexicanos Locos. (5RT 294, 293.) Soto did not testify, but the court instructed on adoptive admissions anyway which authorized the jury to treat Soto’s gang declaration as if petitioner had also claimed Clanton gang affiliation.

Ashe explained that when gang members get drunk, they are considered to be “slipping,” which is a departure from the behavior expected of gang members because it means they are *not* “prepared” for an assault. (4RT 134 - 135.)

D. Defense Case.

Appellant’s mother testified that petitioner in general was “good boy” and a “good man” at home and he was not a gang member like his two younger brothers who lived at home. (6RT 384, 391.) The prosecution showed her the surveillance footage of the shooting for the first time in the presence of the jury which “surprised” her and made her “very sad.” (6RT 401-402.)

Irving Reyes testified on his own behalf. He was born in San Jose and dropped out of school after the ninth or tenth grade. (6RT 404, 411.) He was nervous to testify because he had never spoken in front of a group of people before. (6RT 614.)

At the time of his arrest, petitioner lived in a two bedroom apartment with his mother, his three brothers, his sister, and his daughter. (6RT 405.) He does not have any tattoos, he never wears gang colors or sports jerseys and does not like to fight. (6RT 616-617.)

Petitioner knew the people Deputy Ashe mentioned when Ashe asserted that petitioner was seen in the company of gang members in 2008 and 2010 and explained that these were people from his neighborhood. (6RT 419-420.) None were gang members during the years about which Ashe testified. (6RT 419.)

Petitioner met Soto and Urbina when he was 15 or 16 years old and they lived in the same apartment complex. (6RT 407, 408.) He knew Soto was a gang member

because of the three dots on his hand (6RT 407), but Urbina had only non-gang tattoos visible. (6RT 410-411.)

Petitioner had been to prison for auto burglary and vehicle theft. (6RT 417, 421.) While there, he was housed in the general population with people who do not claim gang membership. (6RT 421-422.) Petitioner explained that he claimed to be a “Southerner” when he was booked into the San Jose jail because his close family resemblance to his two gang member brothers had caused previous problems at school when he had been mistaken for one of them and he did not want to get hurt in jail. (6RT 413, 420.)

On March 2, 2012, the night of this incident, he drank two, 40 oz. Miller High Life beers (6RT 426), with Urbina at about 2:00 - 3:00 p.m. (6RT 423, 425.) He drank two more 40 oz. beers (6RT 428, 429), around 5:00 - 6:00 p.m. (6RT 430.)

Petitioner broke into a car and stole a stereo system and a gun he found in the trunk. (6RT 431, 462.) He tucked the gun into his waistband intending to sell it later. (6RT 431, 432.) Soto called and asked petitioner to join him at the El Tarasco Bar. (6RT 433.) Urbina came too. (6RT 434.) They went to pick up Jimenez, one of Urbina’s friends, on the way to the bar. (6RT 434.)

Petitioner did not remember how he got from his own truck which he had driven earlier in the night while committing the car burglary, to the vehicle he saw himself arrive in on the surveillance video. (6RT 435, 434.) Petitioner explained that he had lost count of the total number of beers he had consumed because there was a twelve-pack of “regular-size” cans of beer in Jimenez’s car and he knows he drank

some of those beers. (6RT 437.) Petitioner did not know at the time that Jimenez's car was stolen. (6RT 466.)

He said that he was "drunk" and his memory was affected. (6RT 437, 447.) Petitioner viewed the video for the first time in court during his trial and said that it was different than his memory of that night. (6RT 335, 440, 443, 447-448.) He does remember that he went inside the bar initially and told both Soto and the security guard that he had left his identification in his truck. (6RT 437, 438, 439, Peo. Exh. 4, 8:13:28 - 8:14:15.) From the video, petitioner saw himself talking with a girl, but he does not "remember that girl being there." (6RT 440.) He also did not remember Cristoval being present that night. (6RT 441.)

When he was refused entry, petitioner decided he "was going to" just "give up" and "leave" (6RT 466, 439), but Soto started arguing with Estrada. (6RT 439, 440.) Petitioner did not hear Soto say anything about "Clanton" or about gangs to Estrada (6RT 443), but remembers that there was yelling and a physical fight started. (6RT 441.)

It was "dark" when this occurred. (6RT 442.) Appellant's memory is that it was Soto who fought with the security guard (6RT 467, 442), although the video shows that it was Urbina. (Peo. Exh. 4, 8:17:08 - 8:17:11.) Petitioner remembered that when "they were fighting," he "started walking toward them." (6RT 441, 447.) Next "everybody was just moving around" and petitioner saw "[Estrada] pull something black, that's - - that's when I took out the gun and fire once." (6RT 441, 442.) He "[didn't] know what it was," but thought it was a "metal object." (6RT 447, 446.)

Petitioner said he feared that he might get hit (6RT 447, 446), but he “[does not] remember” what caused him to “move forward.” (6RT 447.) He remembered being closer to Estrada when he fired than how it appeared to him when he finally saw the video in court. (6RT 447.)

Petitioner said that he knows what he did was wrong and he just “[doesn’t] know how to explain it.” (6RT 450.) He did not aim the gun or intend to hit Estrada when he fired. (6RT 444.) He just “didn’t know how to react” because he had “never been in a situation like that.” (6RT 448.) He did not tell his companions that he had a gun (6RT 447), and did not shoot to help gang members (6RT 448), or to “get respect.” (6RT 450.)

E. The Prosecution’s Rebuttal Case - Booking Evidence.

The prosecution introduced appellant’s jail booking statement into evidence asking for housing with “South Siders,” to rebut appellant’s denial that he was a Sureno gang member. (6RT 480-481.)

SUMMARY OF THE ARGUMENT

Defense counsel failed to defend petitioner in any meaningful sense against this attempted murder prosecution charged with a gang enhancement. Counsel did not mention or secure instruction on her client’s two strongest defenses - reasonable defense-of-another, and attempted voluntary manslaughter (unreasonable defense-of-another), because she did not know how to view the digital surveillance video of the shooting in slow motion. She never reviewed that video with petitioner before trial, even though she knew his memory of this night was spotty due to intoxication.

The appeal addressed 43 trial errors. The appellate court agreed that four errors were committed: (1) The trial court inserted *all* of the language of the general intent instruction into the template for the specific intent instruction which applied to all charges and enhancements. (App. A, pp. 17 - 19); (2) The trial court omitted an attempted voluntary manslaughter (unreasonable defense-of-another) instruction which was warranted based on the surveillance video. (App. A, p. 23); (3) The trial court gave an incomplete involuntary intoxication instruction. (App. A, p. 30); and (4) The trial court failed to exclude broad categories of case specific and testimonial hearsay gang evidence. (App. A, pp. 51, 52 - 53.)

The trial court's interrelated errors and counsel's deficient representation were prejudicial under federal standards. The prosecution was forced to concede that there was "significant testimony" casting doubt on the idea that petitioner was a gang member. (7RT 569-570, 579.) At sentencing, the trial court expressed misgivings about its "default" obligation to impose the gang enhancement, due to doubts about whether petitioner was a gang member. (9RT 652, 653.)

This court told us forty-two years ago that the State's burden to disprove heat of passion manslaughter beyond a reasonable doubt, as an element of murder, is no different from its burden to disprove self-defense as an element of murder. (*Mullaney v. Wilbur*, 421 U.S. 684, 701 - 702 (1975).) The trial court's failure to give an attempted voluntary manslaughter instruction (unreasonable defense-of-another), which the appellate court found was supported by substantial evidence and should

have been given, was a failure to hold the State to its burden to prove all mental state elements of attempted murder. (*Ibid.*)

The court's second failure to hold the State to its burden to prove the elements of attempted murder, by disproving unreasonable self-defense, occurred when it included the elements of attempted voluntary manslaughter (unreasonable self-defense) only in an instruction which it also admonished the jury orally and in writing not to "get to" or "consider" until after it had acquitted petitioner of attempted murder. (2CT 269, 7RT 612 - 613.)

Counsel's failure to seek and secure exclusion of petitioner's involuntary booking admission to being a "South Sider," made only to gain violence-free housing in jail, violated petitioner's federal Fifth, Sixth, and Fourteenth Amendment rights. (*Pennsylvania v. Muniz*, 496 U.S. 582, 601-603 (1990).)

The court's failure to exclude all lurid, case-specific and testimonial gang hearsay, violated petitioner's Sixth and Fourteenth Amendment rights under *Crawford v. Washington*, 541 U.S. 36 (2004), and allowed the State to incite a generalized, intense fear of gangs and then use that fear to compensate for the lack of evidence that this petitioner's crime had anything to do with gangs. (*Old Chief v. United States*, 519 U.S. 172, 181 (1997).)

The combined effect of misinstruction, the wrongful admission of a tidal wave of testimonial gang hearsay and of petitioner's involuntary booking statement, and counsel's failure to prepare and present petitioner's two strongest defenses, allowed the prosecution to create a fictionalized version of gang terrorism which trespassed

petitioner's Fifth, Sixth, and Fourteenth Amendment rights. (*Chambers v. Mississippi*, 410 U.S. 284, 298 (1973).)

ARGUMENT

I. Petitioner Was Denied His Right to the Effective Assistance of Counsel under the Sixth and Fourteenth Amendments to the United States Constitution Because Counsel Failed to Defend Petitioner's Case with Evidence Plainly Visible During Careful Viewing of the Surveillance Video and with Evidence Contained in Police Reports.

A. Procedural Background and Applicable Principles.

The Sixth Amendment of the United States Constitution guarantee a criminal defendant the right to effective assistance of counsel.” (*Powell v. Alabama*, 287 U.S. 45, 68 (1932).) Effective assistance of counsel means assistance that meets an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington*, 466 U.S. 668, 688 (1984).)

Reviewing courts will reverse for inadequate counsel only if the record discloses that counsel had no rational tactical purpose for his act or omission or where there simply could be no satisfactory explanation therefor. (*Id.* at p. 699.) A defendant must show that there was a reasonable probability that but for counsel's errors, the result of the proceeding would have been more favorable. (*Id.* at pp. 693-695.)

Professionally competent representation includes the duty to “confer[] with the client,” to “investigate carefully all defenses of fact and of law that may be available to the defendant,” to raise “crucial or potentially meritorious defense[s]” (*Strickland, supra*, 466 U.S. at p. 688 [duty to “consult with the defendant”]), to be familiar with the exculpatory evidence, including impeachment evidence, inside of his or her own

case file (*Vega v. Ryan*, 735 F.3d 1093, 1095 (9th Cir. 2013); to make “deliberate informed choices” (*Brubaker v. Dickson*, 310 F.2d 30, 38 (9th Cir. 1962); *People v. Ibarra*, 60 Cal.2d 460, 465 (1963)), and to request jury instructions “to support the core of the defense.” (*People v. Hussain*, 231 Cal.App.4th 261, 271 (2014).)

Where the “defense actually tendered” was “insubstantial in relation to [a defense] not offered,” it “cast[s] doubt upon the hypothesis that trial counsel made a deliberate informed choice.” (*Brubaker v. Dickson*, *supra*, 310 F.2d at p. 38; *Ibarra*, *supra*, 60 Cal.2d at p. 465.) “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” (*Strickland*, *supra*, 466 U.S. at p. 686.)

Counsel’s failure to know about or present reasonable or unreasonable defense-of-another defenses in petitioner’s case, which would have been evident through “reasonable inquiry,” “constitute[ed] a total failure to present the cause of the accused in any fundamental respect.” (*Ibarra*, *supra*, 60 Cal.2d at p. 465, quoting *Brubaker v. Dickson*, *supra*, 310 F.2d at 37-39.) Counsel failed to “bring to bear such skill and knowledge” as was necessary to execute counsel’s “overarching duty to advocate the defendant’s cause.” (*Strickland*, *supra*, 466 U.S. at p. 688.)

Counsel never knew what was documented on the digital video because, as counsel admitted, she did not know the videos could be viewed slowly. (Exh. A, p. 2, ¶ 6.) Counsel knew that petitioner was too intoxicated to remember and to accurately

recall important facts about that evening, including the reason he stepped forward to shoot, because she elicited these facts at trial . (6RT 437, 440, 447.)

Counsel’s failure to review the video evidence slowly by depressing the “+” and “-” keys on her computer keyboard, and her lack of familiarity with the police reports in her own case file, resulted in the following professional deficiencies in representation:

(1) Counsel failed to impeach Estrada with the fact there was no moment in time when he was fighting with both Soto and Urbina. (4RT 195, 196, Peo. Exh. 4, 8:17:01-8:17:17.) The appellate court corrected its initial erroneous opinion to state that Estrada was only fighting with one unarmed individual, not two, when he was shot. (App. B., p. 74, ¶¶ 3, 4, 5.)

(2) Counsel failed to impeach Ashe with the fact that there was no moment in time when his description of “multiple individuals” attacking Estrada in “an overwhelming show of force” (5RT 291), was true. This was important to counter his assertion that this was a “gang-related type incident.” (5RT 290.)

(3) Counsel failed to “confer[] with the client” to explore whether it was possible to refresh his recollection by showing him the video evidence before trial (6RT 435, 447), a point counsel admitted during closing argument. (7RT 585.)

(4) Counsel failed to question her client about the surveillance evidence or argue to the jury that the reason petitioner finally stepped forward to shoot, even if he did not remember the reason due to his evident intoxication, was in response to seeing Urbina get hit with a baton. (6RT 446, 447, Peo. Exh. 4, 8:17:17.)

(5) Counsel failed to request instruction on perfect and imperfect defense-of-others.

(6) Counsel failed to demonstrate to the jury that the surveillance tape corroborated petitioner's testimony explaining that he was ready to leave after being refused admittance. (Peo. Exh. 4, 8:15:29-37.)

(7) Counsel failed to argue that the surveillance tape showed that three of five people in petitioner's group, including petitioner, displayed varying objective physical symptoms of intoxication. (Peo. Exh. 4, 8:15:15-8:15:27 [petitioner], 8:15:03, 8:15:17, 8:15:27, 8:16:31, 8:16:51 [Urbina], 8:15:15-8:15:27, 8:16:42-8:16:48, 8:17:03 [Soto].)

(8) Counsel failed to use the video evidence to show that most of the facts that petitioner forgot, like the presence of the girl he talked to, the presence of Cristoval, that it was Urbina and not Soto who eventually fought with Estrada, and that he stepped forward to shoot immediately upon seeing Urbina get hit twice with a metal baton, were facts which would have helped his case and facts which he had no self-serving reason to forget. (6RT 440, 441, 442, 446, 447, 467, Peo. Exh. 4, 8:17:08-8:17:15.)

(9) Counsel failed to carefully read the police reports showing that Soto drank six beers, used cocaine and possessed methamphetamine on the night of the shooting. (Exh. A, pp. 6-7 ¶¶21 A-D.) Counsel failed to cross-examine the gang expert with these facts which would have provided additional support for her position that intoxication played a role in the events leading up to the shooting (7RT 581, 585, 589,

591-592, 594, 597, 600), that the crime was not a gang crime (7RT 597, 592 - 596), and would have explained Soto's odd behavior documented on the video. As a legal matter, proof through police witnesses that Soto was at the bar drinking and using multiple drugs, would have provided strong circumstantial evidence that this group of inebriated young men were not participating in a gang conspiracy.

(10) Finally, counsel failed to vigorously dispute the gang expert's inadmissible hearsay assertion, based on reading another officer's report, that petitioner possessed "gang indicia" in his home. In reality, as documented in police reports in defense counsel's possession, other police officers found 14 scraps of paper with names and phone numbers in different people's handwriting, in the kitchen drawer shared by the six family members, and not in appellant's locked bedroom which he shared with his girlfriend and daughter. (Habeas Exh. A, pp. 7-8, ¶ 24 A-C.) Cross examining the gang expert with evidence that police found nothing gang related when they broke down the door of petitioner's locked bedroom and showing the jury exactly what the gang expert was labeling "gang indicia," would have resulted in the jury's conclusion that these scraps of paper were the family's phone book, not "gang indicia," and would have disproved his assertion that these papers were connected to petitioner in any way.

Counsel attempted to justify her multiple professional errors by stating that she presented the case consistently with petitioner's memory (Exh. A, p. 2, ¶ 7), and that is why she defended the charges by arguing that petitioner shot only because he was afraid for himself when Estrada started swinging a black metal object. (6RT 447,

446.) This cannot be considered a reasonable tactical explanation for failing to learn how to view the digital video, for failing to carefully review the video herself, review it with petitioner, research the law, defend petitioner's case with the best evidence in her case file, and request instruction on her client's two strongest defenses. She alone carried the burden to determine which legal defenses needed to be raised. (*Brubaker v. Dickson*, *supra*, 310 F.2d at p. 38; *Strickland*, *supra*, 466 U.S. at p. 688; *Ibarra*, *supra*, 60 Cal.2d at p. 465.)

B. Prejudice.

Counsel's failure to mention or present petitioner's two strongest defenses (i.e. reasonable and unreasonable defense-of-others), was not harmless error. Prejudice is measured by comparing the fruits of a proper investigation against the case actually presented. (*Rompilla v. Beard*, 545 U.S. 374, 389–393 (2005); *In re Thomas*, 37 Cal.4th 1249, 1264-1265, 1277 (2006).) Here, the case actually tried looked nothing like the case which should have been tried if counsel had carefully reviewed and used the video evidence, and had shown some awareness of the additional exculpatory facts in police reports. (Exh. A, pp.6-7 ¶ 21, A-D, p. 7, ¶ 23.)

Even the Attorney General characterized Urbina's lame actions directed at Estrada as "flail[ing] his arms in punching motions" which prompted "Estrada [to] hit him once or twice on the arms with the baton." (RB 22, citing 4 RT 194, 200, 207, 211-212.) The videos show Estrada taking two full swings of his metal baton at the unarmed Urbina, and not just "on the arms," before petitioner moved forward to shoot. (Peo. Exh. 4, Cam. 7, 8:17:15-16.)

Although the appellate court said that it saw no signs that any of the co-defendants were intoxicated (App. A., p. 27), the Attorney General (RB 70 - 71, 23), and the District Attorney who tried the case (7RT 562), both acknowledged that Urbina *did* appear drunk in the video based on his odd act of walking away from the group, walking in circles and doing high kicks into the air. (Peo. Exh. 5, 8:16:51.)

The Attorney General even concedes that the video provided evidence that Soto was also intoxicated, and shows petitioner dropping an item on the ground and fishing around for it at Estrada's feet. (RB 70.) Fumbling with identification, such as a driver's license, is a widely recognized symptom of alcohol intoxication. (See e.g. *Manai v. Valenzuela*, 2015 U.S. Dist. LEXIS 57633 (2015); *People v. Sudduth*, 65 Cal.2d 543, 545 (1966).) The effects of alcohol consumption on humans is a matter of such common knowledge that courts have taken judicial notice of those effects. (See e.g. *Cristmat, Inc. v. County of Los Angeles*, 15 Cal.App.3d 590, 599 (1971).)

Again, the effects of alcohol on petitioner's specific intent, malice, and whether he was participating in a gang conspiracy with others who were under the influence of alcohol and drugs, was an important question which should have been, but was not submitted to the jury. The evidence available to defense counsel which she did not mention at trial supported a finding of lesser culpability than attempted murder. (*People v. Humphrey*, 13 Cal.4th 1073, 1082-1083 (1996) [a reasonable belief encompasses a reasonably apparent belief in the need to use force.]) The available evidence also refuted the foundational elements of the prosecution's theory that this was an uncharged conspiracy to commit misdemeanor assault (6RT 504,

510), and undermined the suggestion that this was a gang-related crime. (*Vega v. Ryan*, *supra*, 735 F.3d at p. 1095.)

Under U.S. Supreme Court Rules, rule 10(c), certiorari should be granted to declare that effective assistance of counsel under *Strickland*, *supra*, 466 U.S. at pp. 693-695, includes, at a minimum, the ability to learn how to use digital technology, and when the failure to do so results in a failure to know about and present a client's strongest defenses, it is reversibly prejudicial under *Strickland*, *supra*, 466 U.S. at pp. 693-695.

These repeated lapses in representation "constitute[] a total failure to present the cause of the accused in any fundamental respect." (*Brubaker v. Dickson*, *supra*, 310 F.2d 30, 37-39.) Petitioner has shown that but for counsel's failure to defend petitioner with the available exculpatory facts, there was a reasonable probability that the outcome at trial would have been more favorable. (*Strickland*, *supra*, 466 U.S. at pp. 693-695.)

II. Petitioner's Rights under the Sixth and Fourteenth Amendments of the U.S. Constitution Were Violated by the Court's Misinstruction Authorizing the Jury to Convict Petitioner of Attempted Murder Without Requiring the State to Disprove that Petitioner Acted Under the Reasonable or Unreasonable Belief in the Need to Use Force to Defend Himself or Someone Else as Required By *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

A. Background and Applicable Law.

Mullaney v. Wilbur held that the State's burden of proof includes the requirement to prove the absence of heat of passion/provocation as an essential element of the crime of murder. (*Mullaney v. Wilbur*, *supra*, 421 U.S. at pp. 701 -

702.) Under the state’s power to define the elements of crimes (See, e.g., *Montana v. Egelhoff* (1996) 518 U.S. 37, 53 - 55), the California Supreme Court has imposed on the prosecution the same Due Process and burden of proof requirement of disproving imperfect self-defense as a component of its proof of the crime of murder. (*People v. Martinez* (2003) 31 Cal.4th 673, 707, citing *Mullaney v. Wilbur*, *supra*, 421 U.S. at 704, and *Walker v. Endell*, 850 F.2d 470, 472 (9th Cir. 1988).) The Court explained:

[I]t is the prosecution, not the defense, that has the burden of proof on the issue of imperfect self-defense. . . . To sustain a conviction for murder under California law, the prosecution must prove malice and, in so doing, must prove the absence of imperfect self-defense. Accordingly, the absence of imperfect self-defense is an element, or an essential component of an element, of the offense of murder.

(*Martinez*, *supra*, 31 Cal.4th at p.707.)

“[M]isdescriptions and omissions” in jury instructions on the elements of the charged offense violate the Sixth Amendment’s jury trial guarantee and due process under the Fourteenth Amendment because “the erroneous instruction precludes the jury from making a finding on the *actual* element of the offense.” (*Neder v. United States*, 527 U.S. 1, 12, 10, (1999), emphasis in original; *Francis v. Franklin*, 471 U.S. 307, 322, 325 (1985).)

Petitioner’s claim of federal constitutional error is predicated on misinstruction about the State’s burden to disprove that petitioner acted with: (1) the *unreasonable* but honest belief in the need to use force to defend himself (i.e. attempted voluntary manslaughter, unreasonable self-defense theory), (2) the *unreasonable* but honest belief in the need to use force to protect someone else (i.e. attempted voluntary manslaughter, unreasonable defense-of-another theory), and (3)

the objectively *reasonable* need to use to use force to defend someone else. (*Mullaney v. Wilbur*, *supra*, 421 U.S. at p. 704; *Neder*, *supra*, 527 U.S. at pp. 7 - 10.)

These three instructional errors will hereinafter be referred to collectively whenever possible as the burden to disprove the “three pertinent mental state elements.”

The court eliminated the state’s burden to disprove the three pertinent mental state elements of attempted murder when it omitted instructions on both perfect and imperfect defense-of-another. Although it gave an instruction on imperfect self-defense attempted voluntary manslaughter, it instructed the jury not to consider that crime until after acquitting petitioner of attempted murder. As instructed on unreasonable self-defense, the jury was not required to hold the State to its burden of disproving that mental state.

The trial court gave the jury a lengthy explanation of the order in which it was to deliberate *and* wrote even more directions on the face of the attempted murder verdict form *and* deleted the usual admonition which instructs that the jury is free to deliberate in any order it chooses. (7RT 612 - 613, 2CT 269.) These legally significant facts were omitted from the appellate court’s opinion. (App. A, p. 20.)

When instructing the jury, the court called the juror’s attention to the additional “instruction” it had added “at the bottom” of the attempted murder verdict form (7RT 522-523), and explained the required sequence of deliberation as follows:

At the bottom is a little bit of instruction. And it says if the jury finds the defendant guilty of Count 1 [attempted murder], it should consider the three allegations set forth below, ***but not the lesser included offense***. If the jury finds the defendant ***not guilty of Count 1***, it should

not consider the three allegations concerning count 1 ***but instead should consider the lesser included offense*** and their related allegations. So after Count 1, we have the three allegations [¶] Then we get to the lesser included offense, and again, ***you only get to this if you find the defendant not guilty of Count 1.... [¶] So it's a little bit of a logic issue here of if/then***, but I think the instructions will make that clear.

(7RT 612 - 613 emphasis added.)

The written instruction the trial court added to the verdict form told the jury it “should only consider the lesser included offense” after it “[found] the defendant not guilty of Count 1 [attempted murder].” (2CT 269.) The court’s additional oral explanation reinforced that the lesser offense was to be “consider[ed]” only as an alternative - - using the word “instead” - - of attempted murder, and only after finding the defendant not guilty of attempted murder. (7RT 612 - 613, 2CT 269.) The prosecution emphasized these errors by arguing: “If you find [petitioner] not guilty of attempted murder, you consider this, attempted voluntary manslaughter.” (7RT 566.)

The court’s oral and written explanation went beyond directions on how to correctly fill out the verdict forms. It directed the sequential consideration of the crimes, in exactly the words prohibited under binding California state law (*People v. Dennis*, 17 Cal.4th 468, 536 (1998)), and rose to a federal violation because the State was not held to its burden to disprove unreasonable but honest belief in the need to use force as an element of murder. (*Mullaney v. Wilbur*, *supra*, 421 U.S. at p. 704.) The only instruction laying out the State’s burden to disprove unreasonable self-defense was the instruction the jury was told by the court and by the prosecution not to “get to” or “consider” as a matter of “if/then” logic. (7RT 612 - 613.)

Here, a jury which diligently followed the court's instructions had no idea that it was required to decide whether the state had disproved attempted voluntary manslaughter on an unreasonable *self*-defense theory because it was misdirected by the court's express admonishment not to consider the crime defined in that instruction. No juror hearing that admonition would believe he had a choice in the matter. (*Francis v. Franklin, supra*, 471 U.S. at pp. 315 - 317.) Since the jury received no instruction at all on attempted voluntary manslaughter (unreasonable *defense-of-another*), or on perfect defense-of-another, it unquestionably never determined that the state had disproved those pertinent mental state elements of murder either. (*Mullaney, supra*, 421 U.S. at 704; *Neder, supra*, 527 U.S. at pp. 7-10.)

Although the appellate court agreed that omitting instruction on unreasonable defense-of-another was error because that lesser crime was supported by substantial evidence (App. A, p. 23), the court rejected appellant's claim of prejudicial misinstruction and, alternatively, of ineffective assistance of counsel for failing to object to the court's error-ridden instructions. (App. A, pp. 21 - 25.) The court reasoned that when petitioner testified that he shot due to subjective fear for himself, neither the court or defense counsel bore the responsibility to ensure instruction on any other theory, including unreasonable defense-of-another. (Exh. A., p. 23.)

This conclusion ignores the court's duty not to misdirect the jury with its instructions because to do so undermines confidence that the jury found the "actual elements" of the charged crime proven beyond a reasonable doubt. (*Neder, supra*, 527 U.S. at pp. 7 - 10.) Alternatively, deficient legal representation has been shown.

Counsel's failure to investigate the facts and the law, and then her failure to object to this much serious misinstruction on the key mental state issues presented by the facts, permitted her client to be convicted without the jury hearing one word about her client's two strongest defenses and without holding the State to its burden to disprove the three pertinent mental state elements. (*Brubaker v. Dickson, supra*, 310 F.2d at p. 38; *Ibarra, supra*, 60 Cal.2d at p. 465; *Strickland, supra*, 466 U.S. at p. 688.)

Petitioner testified that due to intoxication, he was "kind of blacked [] out" about some details of that night. (6RT 426, 428-429, 437, 447.) Many of those forgotten details visible on the video were not self-serving and would have helped him defend himself by greatly bolstering the credibility of his testimony about his mental impairment and his denials that this was a gang conspiracy. (6RT 440, 441 467, 442, Peo. Exh. 4, 8:17:08.)

The responsibility for defending this 21 year old rested with defense counsel. The responsibility for guaranteeing Due Process of law and correct instruction on the State's burden of proof rested with the court. There is no mechanism for shifting these responsibilities to this defendant, as reflected in the appellate court's opinion. (App. A., p. 23.) When the court and counsel permitted petitioner to be tried under a set of facts which included no mention of what occurred just before petitioner stepped forward to shoot, and under a set of jury instructions which bypassed all consideration of his strongest defense, reversible error is shown under any standard. (*Strickland, supra*, 466 U.S. at p. 688; *Neder, supra*, 527 U.S. at pp. 7 - 10.)

B. Prejudice.

The *Chapman v. California*, 386 U.S. 18, 24 (1967) standard of prejudice applies to errors in instructing on the state's burden of proof and misdirection on the actual elements of attempted murder. (*Neder, supra*, 527 U.S. at pp. 7 - 10; *Mullaney v. Wilbur, supra*, 421 U.S. at p. 704.) The video surveillance evidence provided ample, compelling evidence that petitioner finally stepped away from the wall and shot his gun only after seeing Estrada hit unarmed, flailing Urbina twice with his metal baton. (Peo. Exh. 4, 8:17:14-8:17:15.) It demonstrated that petitioner lacked the specific intent to kill or to benefit gang members. It disproves Estrada's testimony that he remembered petitioner firing at him while two men were "beating [him] up" (4RT 195, 196, Peo. Exh. 4, 8:17:01 - 8:17:17), and it supports a finding that appellant's fear and his lack of specific intent were genuine. (6RT 447, 446, Peo. Exh. 4, 8:17:14.)

Regardless of appellant's inability to fully describe the basis of his fear, the video supports a finding that petitioner either acted under the objectively reasonable or unreasonable belief in the need to use force to defend Urbina or with an objectively unreasonable, but honest, belief in the need to defend himself, as he tried to explain at trial. (6RT 447, 446, Peo. Exh. 4, 8:17:11-8:17:17.)

The state's difficulty in portraying petitioner as the same type of street terrorist described by the expert and depicted in the prosecution's PowerPoint slides, is consistent with the video evidence which shows the opposite of what the gang expert told the jury would be expected of gang members acting together to commit an

assault. (4RT 130, 134, 5RT 293.) The video shows a group of five young men who were not dressed as gang members. (5RT 266 [Soto], 5RT 266 [Urbina], 5RT 267 [Jimenez].) Contrary to the gang expert's opinion of a coordinated gang attack, the video supports appellant's testimony that he was ready to leave the bar when he was refused entry before any fighting started. (6RT 466, 439, Peo. Exh. 4, 8:15:29 ["older one"], 8:15:30 [petitioner], 8:15:37 [Jimenez].)

The video shows that all of the members of this group were not closely paying attention to one another. (Peo. Exh. 4, 8:16:33 - 41.) It shows the "older one," did everything he could to keep the peace by calming Soto and at different times restraining both Soto and Urbina. (4RT 187, Peo. Exh. 4, 8:16:33 [calming Soto], Peo. Exh. 4, 8:17:08 - 8:17:11 [restraining Urbina].)

All of this conduct is the opposite of the hyper-vigilant, gang-aggrandizing behavior described by the gang expert. This is because "[n]ot every crime committed by gang members is related to a gang" (*People v. Albillar*, 51 Cal.4th 47, 60 (2010)), and even "a general practice of supporting one another in fights, which is one of the ordinary characteristics of gangs" is "insufficient as a matter of law" to prove a conspiracy to assault a specific person. (*United States v. Garcia*, 151 F.3d 1243, 1247 (9th Cir. 1998).)

The trial court's oral and written misdirection on the required order of the jury's deliberation, including the instruction not to "get to" or "consider" the attempted voluntary manslaughter instruction, its complete omission of instructions on perfect and on unreasonable defense-of-others, cannot be found harmless beyond a

reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; *Neder, supra*, 527 U.S. at p. 8; *Mullaney v. Wilbur, supra*, 421 U.S. at p. 704.) Alternatively, petitioner has also shown that there was a “reasonable probability” that a correctly instructed jury would have reached a more favorable verdict. (*Strickland, supra*, 466 U.S. at pp. 688, 693-695; *Mullaney v. Wilbur, supra*, 421 U.S. at p. 704.)

Under U.S. Supreme Court Rules, rule 10(c), certiorari should be granted because the state court’s dismissal of these serious instructional errors conflict with this Court’s decisions in *Strickland, supra*, 466 U.S. at pp. 688, 693-695, *Neder, supra*, 527 U.S. at pp. 7 - 10, *Francis v. Franklin, supra*, 471 U.S. at pp. 315 - 317, and *Mullaney v. Wilbur, supra*, 421 U.S. at p. 704.

III. The Court’s Misinstruction on Specific Intent Lowered The State’s Burden of Proof in Violation of the Sixth and Fourteenth Amendments to the U.S. Constitution Because it Authorized the Jury to Convict Petitioner Based On His “Prohibited Act.”

A. Background and Applicable Law.

The court substituted the general intent instruction for every specific intent element in every charge, lesser charge, and enhancement plead in this case. (2CT 238.) Without objection, the trial court completely deleted the specific intent language from the standard jury California instruction, CALCRIM No. 251 [“union of act and intent: specific intent or mental state”], and inserted the general intent language taken from CALCRIM No. 250 [union of act and general intent]. (2CT 238.) As edited, the jury was given the contradictory instruction that “[t]he specific intent required for the crime of attempted murder and attempted voluntary manslaughter is the intent to kill,” but that the State could prove the required “wrongful intent” by proving only that

petitioner committed a “prohibited act” without intending to “break the law.” (2CT 238.) The Attorney General conceded that giving a general intent instruction in a homicide case was error. (RB 37.) The appellate court also agreed, but found it harmless. (App. A, p. 19.)

The insertion of the general intent language telling the jury that “wrongful intent” could be equated with a “prohibited act,” mislead the jury as to the State’s burden of proof, precluded the jury’s correct understanding of any of the specific intent elements at issue in the case, and did not ensure that the jury found that element proven beyond a reasonable doubt in violation of the Sixth and Fourteenth Amendments. (*Francis v. Franklin*, *supra*, 471 U.S. at pp. 313 - 316, 322, 325; *Neder*, *supra*, 527 U.S. at p. 8, 10.)

CALCRIM No. 251 was the only instruction telling the jury how to test the evidence to correctly find the specific intent and “mental state” elements contained in other instruction. (2CT 238.) Without correct instruction the jury had no way to know that it was necessary to move beyond a finding that petitioner was the shooter (i.e. the “act”), and consider petitioner’s defense that he acted rashly and fearfully while intoxicated, rather than with the specific intent to kill Estrada and of committing a gang-related crime against Estrada to benefit a specific gang. (*Neder*, *supra*, 527 U.S. at pp. 12, 10; *Francis v. Franklin*, *supra*, 471 U.S. at pp. 313, 322, 325.)

B. Prejudice.

The prejudice discussion from Issue II, C, is reincorporated here. Only a jury which was correctly instructed on the specific intent elements could have decided

which type of homicide crime was committed. Under these instructions, the jury was authorized to convict and to find the gang enhancement true based on petitioner's wrongful act alone. If the jury had a reasonable doubt about petitioner's specific intent to kill and to aid gang members, it had nowhere to plug in that factual determination under the multiple, highly flawed instructions it was given on the required intent elements and on the state's burden to prove them.

Judged as an error of constitutional dimension, the court's transformation of the specific intent instruction into a general intent instruction, cannot be found harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; *Neder, supra*, 527 U.S. at p. 8; *Mullaney v. Wilbur, supra*, 421 U.S. at p. 704.) Under U.S. Supreme Court Rules, rule 10(c), certiorari should be granted because the state court has decided the federal question presented in a way that conflicts with *Neder, supra*, 527 U.S. at p. 8 and *Mullaney v. Wilbur, supra*, 421 U.S. at p. 704.

IV. Petitioner Was Denied His Right to the Effective Assistance of Counsel under the Sixth and Fourteenth Amendments to the United States Constitution Because Counsel Failed to Object to the Introduction of Appellant's Involuntary Booking Statement.

A. Background and Applicable Law.

The answers to booking questions are subject to exclusion in the same manner as any other involuntary custodial interrogation. (See *Pennsylvania v. Muniz, supra*, 496 U.S. at 601-103.) Deputy Kilmer, himself a gang expert in other cases, decided to accompany petitioner through the booking process because he wanted to report anything petitioner might say about gangs during booking to the investigator assigned to petitioner's case. (6RT 478, 481, 5RT 350.) In response to questions from jail

intake staff, petitioner responded that he was a “South-Sider.” (6RT 480-481.)

Petitioner and two police witnesses testified that when gang-affiliated inmates are incorrectly housed, they face potentially serious physical harm. (6RT 488 [Deputy Kilmer], 5RT 333 [Deputy Ashe], 6RT 413, 420 [Petitioner].)

Although appellant’s booking statements were excluded from the state’s case-in-chief, they should have been excluded for all purposes, even impeachment, as involuntary under the totality of the circumstances. (*Michigan v. Harvey*, 494 U.S. 344, 351 (1990); *Harris v. New York*, 401 U.S. 222, 224, 226 (1971); see also *Washington v. DeLoen, et al*, 185 Wn.2d 478, 487-488 (2016).)

While Washington state’s highest court had decided that using booking statements about gang preference or affiliation for any purpose in a gang case violates the Fifth Amendment (*DeLoen, et al, supra*, 185 Wn.2d at 487-488), the appellate court noted that the California Supreme Court had not yet weighed in. (App. A, p. 37.) The appellate court concluded that appellant’s request for housing with South Siders was not “extracted by any threats” or “promises.” (App. A, p. 38.)

This analysis overlooks the reality that police placed petitioner in a situation where he was forced to say something about his preference for housing or risk serious physical harm. It was well known to every police witness that the booking process would provide circumstances “reasonably likely to elicit an incriminating response.” (*People v. Williams*, 56 Cal.4th 165, 186-187 (2013), quoting *Rhode Island v. Innis*, 446 US 291, 301-302 (1980).)

California courts, including the Supreme Court have recognized that the purpose for asking these questions is to prevent institutional violence and to keep the prisoners safe from the foreseeable harm which would result from incorrect housing. (*People v Elizalde*, 61 Cal.4th 523, 541 (2015); *People v. Gomez*, 192 Cal.App.4th 609, 626 (2011).) Deputy Kilmer was aware of this fact when he decided to listen in on the booking process. (6RT 488.)

To avoid the developing conflict and the inevitable conflict among the states now facing this issue, as set forth in U.S. Supreme Court Rules, rule 10(b), and 10(c), this court should grant certiorari and declare that any purported gang admission made to jail staff to obtain safe housing is involuntary and cannot be used as evidence in court. (*DeLoen, et al, supra*, 185 Wn.2d at 487-488; *People v. Neal*, 31 Cal.4th 63, 79 (2003); *Arizona v. Fulminante*, 499 U.S. 279, 289, 295 - 302 (1990).)

B. Prejudice.

Self-incrimination is “the most probative and damaging evidence that can be admitted against [a defendant].” (*Arizona v. Fulminante, supra*, 499 U.S. at p. 296.) The admission of appellant’s booking statement was highly prejudicial since it was the only party admission in the record that the State could rely upon to attempt to prove its theory that petitioner was a Sureno in contrast to the gang expert’s testimony that he lacked all of the “most important” indicators of gang membership. (4RT 145.) The booking admission, alongside the other inflammatory gang hearsay, undoubtedly spilled over into the jury’s decision-making about his motive and his specific intent at the time of the shooting. (*Old Chief, supra*, 519 U.S. at 181.)

Given that the video surveillance evidence largely discredited both the State's gang conspiracy theory and the idea that petitioner acted with the specific intent to kill, petitioner has demonstrated that but for counsel's error of failing to ensure that the court excluded this involuntary booking admission, a more favorable outcome was a "reasonable probability." (*Strickland, supra*, 466 U.S. at 693-695.) Under U.S. Supreme Court Rules, rule 10(c), the state court's ruling cannot be reconciled with *Strickland, supra*, 466 U.S. at 693-695, *Michigan v. Harvey, supra*, 494 U.S. at 351, and *Harris v. New York, supra*, 401 U.S. at pp.224, 226.

V. The Cumulative Effect of the Errors Requires Reversal.

The Due Process Clause of the Federal Constitution entitles each criminal defendant to a fair trial. (*Estes v. Texas*, 381 U.S. 532 (1965).) The cumulative effect of trial errors can so prejudice a case that reversal is required. (See *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973).) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, 386 U.S. 18, 24 (1967).)

Petitioner had no chance for his trial to be a fair trial. The prosecution walked in the door prepared to shoe-horn as much inflammatory, testimonial and case-specific hearsay about gang violence into the trial as possible, because this was the rapidly expanding custom and practice in trials like this one which shortly pre-dated the California Supreme Court's efforts to curtail those practices in *People v. Prunty*, 62 Cal.4th 59 (2015) and *People v. Sanchez*, 63 Cal.4th 665 (2016).

The appellate court found the admission of most of the gang hearsay in this case to have been error. (App. A. pp. 51, 52-53.) The trial court eventually agreed with the defense that the gang evidence had become “excessive,” and “just too much for the jury [] under Evidence Code section 352,” the code section requiring exclusion of evidence which is substantially more prejudicial than probative. (5RT 317-318, 320, 322 - 323.)

Defense counsel’s repeated failures to challenge the prosecution’s version of events with the contents of the surveillance video and the facts available to her in police reports allowed the prosecution to create a fictionalized version of the truth in the juror’s minds. The prosecution set out to paint a picture of a “classic gang assault” (7RT 577), by remorseless gang terrorists trying to take over all of San Jose (5RT 313, 4RT 161), regardless of the facts of this case and the facts about petitioner’s own lack of gang ties, which contradicted that hypothesis. “There can be no conviction for guilt by association.” (*United States v. Garcia, supra*, 151 F.3d at p. 1246.)

The true facts would have supported the jury’s finding that Estrada’s actions created the appearance of a need to act to prevent great bodily harm to drunk, flailing, unarmed, Urbina. (*Humphrey, supra*, 13 Cal.4th at 1082-1083.) The focus of this trial should have been whether petitioner’s belief in the need to act was reasonable or unreasonable and should have also focused on determining the effect of alcohol on specific intent and malice.

The jury was never in a position to make these determinations because the jury (1) did not receive correct instruction on specific intent, (2) received no instruction on

unreasonable defense-of-another; (3) received no instruction on reasonable defense-of-another; (4) was wrongly instructed not to consider unreasonable self-defense (5) did not receive correct instruction on voluntary intoxication, and (6) did get inundated with a tidal wave of frightening gang hearsay admitted in stereo through the gang expert and simultaneously through nearly 100 PowerPoint slides. (4RT 93, 82 - 83, 1ACT 37 - 128.)

There is no room in this record to find these errors harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) “[W]here the combined effect of individually harmless errors renders a criminal defense ‘far less persuasive than it might [otherwise] have been,’ the resulting conviction violates due process.” (*Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007), citing *Chambers*, 410 U.S. at 294, 302-03.) Under U.S. Supreme Court Rules, rule 10(c), certiorari should be granted because the state court’s rejection of this petitioner’s cumulative error claim cannot be justified under *Chambers v. Mississippi, supra*, 410 U.S. at p. 298.

CONCLUSION

For the reasons expressed above, the petition for certiorari should be granted to review the judgment of the California Court of Appeal in this case.

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Respectfully submitted,

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