SUPREME COURT OF THE UNITED STATES

BRYAN SANCHEZ,	)	
	)	NO.____________
Petitioner,	)	
	)	MOTION FOR LEAVE TO PROCEED
v.	)	IN FORMA PAUPERIS
	)	
RAYMOND MADDEN, Warden,	)	
	)	
	)	
Respondent.	)	
______________________________	)	

The petitioner, Bryan Sanchez, asks leave to file the attached Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeal, No. 15-56742, without prepayment of costs and to proceed in forma pauperis under Rules 12.2 and 39 of the U.S. Supreme Court Rules and 28 U.S.C. § 1915(a).

Petitioner has previously been granted leave to proceed in forma pauperis in the following courts: The United States District Court for the Central District of California, No. 2:13-cv-07810-PA-MRW; The United States Court of Appeals for the Ninth Circuit, No. 15-56742.

On February 12, 2016, petitioner's undersigned counsel was appointed to represent petitioner in those proceedings pursuant to The Criminal Justice Act, 18 U.S.C. 3006A. Accordingly, no affidavit of the petitioner is attached. U.S. Sup. Ct. R. 39.

Dated:____________.

Respectfully submitted,

____

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No.

IN THE SUPREME COURT OF THE UNITED STATES

BRYAN SANCHEZ,

Petitioner

v.

RAYMOND MADDEN, Warden,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The California Court of Appeal held that Sanchez's trial counsel was professionally unreasonable when counsel falsely impeached Sanchez's primary alibi witness at his murder trial, and when counsel failed to move to sever Sanchez's trial from that of one of his co-defendants.

When the Court of Appeal evaluated the prejudice arising from trial counsel's deficiencies, it held that Sanchez was required to show that his trial was unreliable or fundamentally unfair. Under the clearly established rule in *Strickland v. Washingon*, 466 U.S. 668 (1984), Sanchez was required to show only a reasonable probability of a different result. The question presented is:

Did the California Court of Appeal unreasonably apply *Strickland* when it held that Sanchez was required to show that his trial was unreliable or fundamentally unfair?

No.________________

IN THE SUPREME COURT OF THE UNITED STATES

BRYAN SANCHEZ,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Bryan Sanchez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed the district court's denial of habeas corpus relief in an unpublished memorandum decision and an unpublished order denying appellant's petition for rehearing and suggestion for rehearing en banc. App. 1, 2.[1] The order

[1] "App" refers to the Appendix attached to this petition. "ER" refers to the Appellant's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit. "RT" refers to the reporter's transcript of the state Court of Appeal proceedings and "CT" refers to the Clerk's Transcript.

and judgment of the district court denying petitioner's habeas petition are unreported. App. 4, 5.

The California Court of Appeal affirmed Sanchez's conviction and sentence and denied his petition for a writ of habeas corpus in unpublished decisions. App. 26, 54. The California Supreme Court denied review and denied Sanchez's petition for a writ of habeas corpus in unpublished orders. App. 25, 53.

JURISDICTION

The final judgment of the Ninth Circuit Court of Appeals was entered on November 17, 2017. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law." Additionally, the Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

A. State Court Proceedings

By an amended Information, the Los Angeles County District Attorney charged Rafael Fuentes ("Fuentes") with the murder of Juan Monsivias (Cal. Penal Code § 187) and the attempted premeditated murder of Manuel De La Rosa, both of which occurred on September 6, 2003. (Cal. Penal Code §§ 664, 187)(Count 2)(5 CT 1246-47.)

Charged as co-defendants were petitioner-appellant Bryan Sanchez ("Sanchez"), Edgar Flores ("Flores"), Jazmin Rossier ("Rossier"), and Norberto Pacheco ("Pacheco"). The Information also alleged that Fuentes and/or a principal personally used a firearm causing death or great bodily injury. (Cal. Penal Code §12022.53). 5 CT 1246-1247. [1] The prosecutor's theory was that Fuentes personally shot Monsivias and Delarosa and that Sanchez, Rossier and Flores were in the blue van from which the shots were fired. The prosecutor's theory was that appellant Sanchez was the driver of the van. 3 ER 424-425.

On October 25, 2003, Pacheco entered a guilty plea to voluntary manslaughter in exchange for a provisional agreement that he would be sentenced to seventeen years in state prison. In consideration, Pacheco agreed to testify against his remaining co-defendants. 10 RT 3640-41; 3665-66.

Fuentes was convicted of first degree murder. The jury found Sanchez and co-defendants Rossier and Flores not guilty of first degree murder but guilty of second degree murder. The jury found true the special allegation that the murder was committed by way of shots fired from a motor vehicle. Supp. CT 103-114. The jury also found

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[1] Sanchez, Fuentes and Aguilar were also charged with conspiracy to commit murder based on a separate incident. 5 CT 1247. Because Sanchez's conspiracy conviction was reversed by the California Court of Appeal, the details of the conspiracy charge are omitted here.

Sanchez, Rossier Fuentes and Flores guilty of premeditated attempted murder. It found all of the associated firearm allegations against Sanchez not true and the gang allegation true. Supp. CT 104, 106, 107. The California Court of Appeal affirmed Sanchez's murder and attempted murder convictions in an opinion filed on July 19, 2010. 1 ER 51. The Court of Appeal reversed Sanchez's conspiracy conviction and he was re-sentenced to a term of 35 years to life on the remaining counts. 1 ER 24, fn 1. Sanchez's petitionfor review in his direct appeal was denied by the California Supreme Court on November 10, 2010. 1 ER 50.

Concurrent with his direct appeal,Sanchez filed a petition for a writ of habeas corpus in the California Court of Appeal. On September 27, 2010, the Court of Appeal issued an Order to Show Cause, finding that Sanchez had made a prima facie showing that he was entitled to relief and remanding the matter to the Los Angeles County Superior Court for an evidentiary hearing. I ER 49.

The Los Angeles County Superior Court appointed The Honorable Ronald S. Coen as referee. Judge Coen conducted an evidentiary hearing as to Sanchez's ineffective assistance of counsel claims. 2 ER 126. On October 18, 2011, Judge Coen issued a report concluding that the performance of Sanchez's trial counsel, William Graysen, had been professionally unreasonable but that his errors were not prejudicial. Id. On July 23, 2012, the Court of Appeal issued an Opinion and Order likewise concluding that Graysen had been ineffective for (1) entering into a false stipulation and (b) failing to move to sever

Sanchez's trial from that of co-defendant Jazmin Rossier. The Court of Appeal also held that the errors were harmless. 1 ER 23.

B. Federal Court Proceedings

On October 22, 2013, Sanchez filed the instant petition in the federal district court and simultaneously moved to stay the proceedings so that he could exhaust additional claims. On April 2, 2014, the district court granted the motion to stay.

On August 4, 2014, the magistrate judge issued an order lifting the stay. On August 11, 2015, the magistrate judge issued a report and recommendation that the petition be denied. 1 ER 4. On October 19, 2015, the district court adopted the magistrate judge's findings and recommendations and denied the petition. 1 ER 1, 2. On October 22, 2015, the district court issued a certificate of appealability. 2 ER 124.

STATEMENT OF FACTS

A. The Murder and Attempted Murder

On September 6, 2003, at about 10:25 p.m., Manuel De La Rosa was standing in front of a house on Bellevue Avenue in Los Angeles with his cousins Juan Monsivais, Jose Mora and Albert Hernandez. De La Rosa had been a gang member but he was not involved with a gang at the time. 5 RT 2177. Hernandez was a member of the Temple Street gang. 5 RT 2218-19. Without warning, De La Rosa and Monsivais were shot. 5 RT 2177-2182, 2209. Monsivais died from a single gunshot wound. 9 RT 3305-06. De La Rosa was hospitalized and recovered from his injuries. 5 RT 2184-85.

Hernandez told police that the shots were fired from a blue Toyota van occupied by two Hispanic males. 5 RT 2216-17; 2251-2252. Hernandez could not identify the shooters. 5 RT 2226-28.

At the time of the charged incident, Sanchez was seventeen years old and a senior at Marshall High School. 21 RT 6922. He was also a member of the Red Shield subset of the 18th Street gang. 21 RT 6935. The prosecutor's argument that Sanchez was driving the van at the time of the shooting was based on the testimony of three uncharged accomplice witnesses who claimed they were inside the blue van at the time of the shooting: Santos and David Kuk and Dorma Pedro Mendez. The prosecutor also called a fourth accomplice, Norberto Pacheco, who testified that he and his mother supplied the guns used during the drive by shooting.

B. Testimony of The Accomplice Witnesses

Prosecution witnesses Santos Kuk ("Little Kartoon") and his older brother David Kuk ("Big Kartoon") had been members of the Grandview subset of the 18th Street gang. Santos Kuk was also an admitted crack dealer. 5 RT 2264-65. At the time of the shootings, the Kuk brothers lived on the same block of Bellevue Avenue where the shootings occurred. 5RT 2268, 2270-2271; 7RT 2870. The Kuks had conflicts with the Temple Street gang, which was the gang that controlled their neighborhood and which was connected to the victims of the drive by shooting. 6 RT 2496-2500, 2504. Santos and

David Kuk admitted that they had repeatedly lied to the police about the charged events. 7 RT 2767-2788; 2794-95; 8 RT 3055-57; 8 RT 3055-57.

The Kuk brothers received relocation benefits ($1800 for rent and a deposit for housing) in exchange for their testimony. They also were not prosecuted for their role in the shootings. RT 2484-2485.

Prosecution witness Norberto Pacheco, who faced a potential life term for his participation in the shootings, was permitted to plead guilty to manslaughter and received a seventeen year determinate sentence in exchange for his testimony. RT 3960-3963; 4RT 1843; 9RT 3375; 3665-367. Pacheco admitted that he disliked Sanchez due to previous disputes. 9 RT 3505; 10 RT 3638-39, 3654, 3742-43, 3693-94; 11 RT 3943-44, 3984. During an interview, Pacheco had said he “hated” Sanchez. 10 RT 3654. Pacheco also acknowledged that he had falsely told police that Sanchez had shot a man named Val Rangel. 10 RT 3692. Pacheco admitted lying to the police numerous times during the course of his interrogations about the charged incident. 10 RT 3634, 3692.

Prosecution witness Dorma Pedro Mendez received relocation benefits but claimed at trial that she could not recall how much money she received. 12 RT 4279-4280. Mendez also testified that she had been assured she would not be prosecuted for her role in the shooting incident. 12 RT 4289-4290. She admitted she had repeatedly lied to the police about the details of the shooting. 12 RT 4283, 4344. She also admitted that she had handled a bag of ammunition in the van knowing that the group intended to shoot a rival gang member. 12 RT 4295-96.

According to the accomplice witnesses, on September 6, 2003, the Kuk brothers were at 10th Street and Albany with fellow gang members including appellant Bryan Sanchez ("Smiley"), Sanchez's then girlfriend and co-defendant Jazmin Rossier ("Giggles"), co-defendants Rafael Fuentes ("Sniper"), Edgar Flores ("Mosco") and Eric Vasquez ("Trieste") and Norberto Pacheco. RT . The group drank beer and smoked marijuana. 5 RT 2277-79.

According to Pacheco, Sanchez proposed that they all go on a mission or a "jale," which the others understood as finding some enemies to shoot. 9 RT 3435. The Kuk brothers said they knew there were some enemies from the Temple Street gang. 9 RT 3436. The Kuks lived in Temple Street gang territory and Santos Kuk had been beaten and shot at by Temple Street gang members. 5 RT 2500, 2504, 2529.

The Kuk brothers got into a stolen blue van with Flores, Fuentes, Rossier, Vasquez, Mendez and Sanchez. According to the Kuk brothers and Dorma Mendez, Sanchez was driving. 5 RT 2295-2302, 12 RT 4233. The group intended to spray paint graffiti for the Red Shield clique. 6 RT 2622. They met up with Pacheco, who gave Fuentes two guns and ammunition in a laundry bag. 6 RT 2412-15; 7 RT 2907-08; 9 RT 3442-43; 12 RT 4239.

Pacheco's mother had assisted Pacheco in obtaining the guns from their house and transporting them to the group in the van. 9 RT 3439-41, 3639-40. Pacheco testified that he had previously obtained the guns and the ammunition from Sanchez. 9 RT 3420, 10 RT 3967-68. Pacheco told the group there was an enemy gang member (a "piston") nearby and proposed that they kill him. 6 RT 2416-17, 6420-21; 12 RT 4247-48, 4297; 9 RT 3457-58; 11 RT 4018-19. At trial, Pacheco admitted he had told detectives "I lied about Bryan Sanchez because I was not afraid of him." RT 3953. He testified that, during the investigation, he said "anything that came up to my head" about Sanchez because he was not afraid that Sanchez would retaliate. RT 3954. When asked if he hated Sanchez "that much," Pacheco replied "I do." Id.

Santos Kuk testified that Sanchez and Fuentes agreed that they should kill the "piston." 6 RT 2419; 7 RT 2720. Fuentes took a rifle and moved to the front passenger seat. Flores, who was armed with a shotgun, sat next to Rossier in the middle of the van. 6 RT 2421-25; 7 RT 2720-23, 2427-29, 2447-49.

When the group found their intended victim, Sanchez told them not to shoot because he was standing near a woman and child. 6 RT 2434-35; 12 RT 4248, 4249, 4250-5 1. The group eventually found Monsevais, Mora and Hernandez, who were standing outside, drinking. Fuentes shouted an obscenity and fired from the front passenger window. 6 RT 2452-53; 12 RT 4257. Flores tried to shoot but the shotgun jammed. Rossier unsuccessfully tried to help Flores fire the gun. RT 3456-3457. After the shooting, Sanchez dropped off all of his passengers except Rossier and Fuentes. 6 RT 2460-61.

C. Sanchez's Arrest

Sanchez was arrested two days after the Bellevue shooting, in connection with a separate gang related incident. According to prosecution witness Carlos ("Sneaky") Marroquin, Sanchez was a leader of a subset of the 18th Street gang at Marshall High School, which included Marroquin and prosecution witness Norberto Pacheco. According to Marroquin, Sanchez was upset that a rival gang called White Fence controlled Marshall. Sanchez also wanted to send a "message" to White Fence before he went to Mexico with his family. 13 RT 4567-71.

On September 8, 2006, Sanchez told Marroquin that he wanted to pick up some "homies" and bring them back to Marshall. Sanchez said he wanted to do "a big shit" (a shooting) before he left for Mexico. 13 RT 4572-73, 4575-77, 4670-71.

Sanchez and Marroquin took a taxi to the same stolen blue van that had been used for the Bellevue Avenue shooting. 13 RT 4582-84. The taxi driver testified that during the drive, he overheard Sanchez on a cell phone telling someone to "get ready." Sanchez and Marroquin seemed furious, like they wanted to "get even." 11 RT 4027-4030, 4056-57.

Sanchez and Marroquin left in the blue van with Sanchez driving. Sanchez told Marroquin that there were guns in a laundry bag in the back of the van. 13 RT 4584-4586.

They picked up Pedro Aguilar. Sanchez said they were going to pick up Fuentes ("Sniper") and another gang member named Shorty who also had a gun. Sanchez said that they would do some "shit" to White Fence at Marshall. Marroquin removed the guns from the bag. 13 RT 4595-4601. The group saw gang member and government informant James Felix ("Wicked") and told him that they were going to do a "jale."13 RT 4604-4606, 4832, 4841-43, 4954-55.

At about 1:30 p.m., Los Angeles police officers stopped the blue van for a stop sign violation. 15 RT 5130-31. The officers found a shotgun and a rifle in the van. Sanchez had eight rounds of 22 caliber bullets in his pockets. 15 RT 5181, 5238-40. In the van were also boxes of ammunition including shotgun shells and three 22 caliber bullet casings. 15 RT 5137-41, 5149-51. The shotgun in the van was the weapon used to kill Monsivais. 15 RT 5241. The bullet casings found in the blue van had also been fired from the shotgun. Id.

A recording of a conversation between Sanchez and Aguilar (taken in the back of a police car as they were driven to the station) was played for the jury. On the recording, the two discussed what they should say to police and worried that others would think they were "ratting." Sanchez suggested they should "blame it on somebody." He acknowledged his fingerprints were on the guns and proposed they tell police that they agreed to move the guns as a favor for another gang member. Aguilar said they should instead say that someone asked them to move the van and did not tell them about the guns. Sanchez agreed to do that but was concerned that his fingerprints were on the guns. 6 CT 1576-1588.

Pacheco testified that when he and Sanchez were in custody, Sanchez suggested harming Vasquez and a woman named Roxana Ramos because they were potential witnesses who might “rat” on them. 9 RT 3482-83, 3484-86.

D. Fingerprint Evidence

Sanchez’s fingerprints were found on the outside of the driver’s side window of the blue van. 9 RT 3331-33. Aguilar’s fingerprint was found on the front passenger side window. Fuentes’ fingerprint was found on the van’s sliding door. 9 RT 3336-3342. No fingerprints were recovered from the guns or the bullet casings found in the van. 9 RT 3345, 3353. Police recovered eight fingerprints from the vehicle that were not identified. 9 RT 3349-3350.

E. Cell Phone Evidence

A cellular service representative testified about calls to a cell phone recovered from the blue van that had voice mail service for Sanchez and Rossier. The cellular service subscriber for that account was Rossier’s father.17 RT 5728-29, 5737; 16 RT 5453-54. At about 10:28 p.m. on September 3, 2003, which was about three minutes after the shooting, there was an incoming call to the phone routed through a cellular service tower that was about one half mile from the location of the shooting. About an hour later, a call was routed through a tower that was close to where Fuentes lived. 17 RT 5736-5252.

F. The Vendome Street Incident

Over defense objections, the prosecution presented evidence of another shooting that took place about four days before the charged incident, offered to prove motive, identity, knowledge and plan. 3 RT 330. On August 29, 2003, Sanchez, Rossier, Fuentes, Pacheco and fifteen year old Roxana Ramos went to a meeting called by Sanchez at the apartment of another gang member known as "Little G." 4 RT 1875-77, 1880-84, 9 RT 3380, 3410-13. They talked about tagging the Silver Lake area to expand their territory. Sanchez had a handgun. 4 RT 1899-1900.

Ramos testified that after the meeting, she went to Silver Lake in a stolen van with Sanchez, Fuentes, and Rossier. They parked near Vendome Street and spray painted 18th Street gang graffiti over that of the rival Silver Lake gang. 4 RT 1900-1904, 1923-1924.

Val Rangel, the leader of the Silver Lake gang, approached the group and asked Sanchez for his gang affiliation. When Sanchez replied that he was from "Wicked Side 18th Street," Rangel pointed a gun at him and told him to prepare for his funeral. Sanchez signaled Rossier to call Fuentes, who shot Rangel with a handgun before Rangel had an opportunity to fire. 4 RT 1938-40, 2023, 2025; 21 RT 6989-90. Police later discovered the stolen white van close to the area where Rangel was shot. 5 RT 2166-67. The van contained cans of black spray paint. 5 RT 2167. Sanchez's fingerprints were later found on the van. 9 RT 3318-20.

G. Gang Expert Evidence

A police gang expert testified concerning the history and activities of the 18th Street gang and its subsets. 18 RT 6013-6035. The parties stipulated that Sanchez, Aguilar, Flores, and Fuentes were all members of the 18th Street gang. 18 RT 6052, 6061-62.

The expert testified that the Vendome Street shooting and the Bellevue Avenue Shooting both benefitted the 18th Street gang by demonstrating the gang's willingness to commit acts of violence on behalf of the gang. 18 RT 6117-6123.

H. Defense Alibi Evidence

Sanchez's father, Fidel Sanchez, testified that he worked as a host and manager at the Palermo restaurant. 3 ER 573. Fidel testified that Sanchez regularly came to the Palermo to work with him on Saturdays. 3 ER 581. On the date of the shootings, Saturday September 6, 2003, Sanchez had arrived at the Palermo restaurant with Fidel at about 11 a.m. 3 ER 565. Sanchez made pizzas and cleaned the restaurant until around 4:30 p.m. 3 ER 566. Sanchez came back to the restaurant with his girlfriend, co-defendant Jazmin Rossier, at about 7:30 p.m. 3 ER 585. They had dinner and then went to a movie theater adjacent to the restaurant. After the movie, they returned to the restaurant. Between 10:30

and 11:00 p.m., Fidel drove Jazmin home and then he and Sanchez drove home. 3 ER 569.

Fidel acknowledged there were security video cameras in the restaurant. 3 ER 596. However, he was not in charge of the video camera system and did not know how long the video tapes were maintained before they were destroyed. 3 ER 606. He did not remove the video tapes from the night of the shooting. 3 ER 596.

Fidel admitted that he had told police that Sanchez was with him on September 7, 2003, which was the night of a home invasion robbery. Sanchez later entered a guilty plea to that robbery charge. 3 ER 570; 19 RT 6378; 6483-87.

Rigoberto Mendez Quinillo testified that he worked as a pizza maker at the Palermo restaurant. According to Quinillo, Sanchez regularly worked at the Palermo on Saturdays, although Mendez did not remember whether Sanchez was at the restaurant on the night of September 6, 2003. Mendez testified that Sanchez was “always” at the restaurant on Saturdays and that “he would always leave with his Dad.” 3 ER 614.

Larry Mendez testified that he worked as a cook at the Palermo restaurant. In 2003, around the time of the charged shooting incident, Sanchez would sometimes work at the restaurant and take showers at Mendez’s home, which was around the corner from the Palermo. 3 ER 618-619. Because so much time had passed, Mendez did not have a specific recollection of the night of the shootings. However he usually saw Sanchez at the

Palermo on Saturdays and sometimes saw Sanchez and Rossier eat dinner there. They often left with Sanchez's father Fidel. 3 ER 616-634.

Sanchez testified that he had joined the 18th Street gang after running away from home in March, 2003. 19 RT 6473-75. He later moved back in with his family. 19 RT 6475-6476. Sanchez denied that he was a leader of the Red Shield clique at Marshall High School or that he had any authority in the 18th Street gang, as he had only recently joined. 21 RT 6976. Sanchez said that he and Rossier had been dating since he was fifteen years old. 21 RT 6923, 6933-6934. They were married at the time of trial. 21 RT 6923.

Sanchez described the Vendome Street incident where he, Rossier and others were joyriding in a stolen van and "tagging" in the Silver Lake neighborhood. 21 RT 6961-6970. That night, Fuentes had shot Val Rangel after Rangel had pointed a gun at Sanchez and threatened to kill him. 21 RT 6987-6991. Sanchez admitted he had initially told detectives in a recorded interview that he knew about the shooting but would not discuss it because he could not "rat." 21 RT 6998-6999.

As for the charged Bellevue Avenue shooting, Sanchez denied that he was present during those events. 19 RT 6508-09, 7006. Sanchez testified that he had worked at the Palermo restaurant with his father from 11:00 a.m. on September 6, 2003, until about 4:30 p.m. 19 RT 6478-6482, 7006. He then showered at Larry Mendez's house and met Rossier at the Palermo at about 7 p.m. They went to a movie together and went back to the restaurant at about 10 p.m. After dropping Rossier off at her home, Sanchez and his father went back to their home at about 11 p.m. 19RT 6481-6483; 21RT 6914, 7006-7009.

The first time he had met the Kuk brothers was on the date of his arrest, two days after the Bellevue Avenue shootings. 21 RT 6946. On that date, Sanchez admitted he was driving the stolen blue van. Norberto Pacheco had told him that his cousin “Lobo” had stolen the van the night before. Sanchez wanted to use the van to pick up some additional gang members to help them with a gang dispute at Marshall High School. 19RT 6497-6499; 21RT 7042.

James Felix (a Hoover Street gang member and government informant), told Sanchez that he would get some other gang members to back him up if Sanchez would drop off some guns for him. 19RT 6502-6504; 21RT 6908-6909; 22RT 7222-7232. The Kuk brothers brought the guns in a duffle bag and put them in the blue van. 22RT 7222-7232. They gave Sanchez some bullets which he put in his pocket. 19 RT 6507. Sanchez drove away in the van and was stopped by police shortly afterward. 19RT 6507-6508.

Sanchez admitted lying to police and speaking with Aguilar about making up a story to tell the officers. 21RT 6907; 7040-7041, 7092-7095. Sanchez said he did that because the van was stolen and it was against gang rules to “snitch.”. 21RT 6907, 7040-7041, 7092-7093.

I. Trial Counsel's False Stipulation About Fidel Sanchez's Alibi Testimony

Trial counsel's stipulation, which he personally read to the jury, was "The parties stipulate that William Graysen was hired to be Bryan Sanchez' (sic) attorney on December 6, 2005. The first time Fidel Sanchez spoke with Mr. Graysen about being with Bryan on the night of September 6, 2003, was on or shortly after March 1, 2008." 3 ER 559-560. The stipulation was marked as defense Exhibit H. Id. On cross examination at trial, Fidel Sanchez denied that the stipulation was true and insisted that he had told Graysen about his alibi testimony "long" before trial. 3 ER 559-560; 590, 597-599.

J. Character Evidence

Defense counsel called Jack Klein, Sanchez's former history teacher and football coach at Marshall High School, to testify to Sanchez's honesty and good character. 19 RT 6360-6384. Defense counsel also called Victoria Montes, who had been Sanchez's English teacher and his mentor for a service program at Marshall. 19 RT 6405-6420. According to Montes, Sanchez was not capable of committing the charged offenses. She acknowledged that he was a gang member but testified that he may have had to associate with a gang in order to survive in the neighborhood. 19 RT 6425.

K. The Evidentiary Hearing Concerning Trial Counsel's Conduct

Concurrent with his direct appeal, Sanchez filed a petition for a writ of habeas corpus in the California Court of Appeal, arguing that he was denied effective assistance of counsel at trial because counsel: (1) entered into a false stipulation concerning Fidel Sanchez's alibi testimony and; (2) failed to move to sever Sanchez's trial from his wife Jazmin Rossier's on grounds that her defense was antagonistic to Sanchez's. Sanchez's petition also contended that the cumulative effect of counsel's omissions denied Sanchez a fair trial. The Court of Appeal denied Sanchez's direct appeal on July 19, 2010. 1 ER 51. As to his petition for a writ of habeas corpus, on September 27, 2010, the Court of Appeal issued an Order to Show Cause (1 ER 49)and remanded the petition to the trial court for an evidentiary hearing. 2 ER 126.

L. The Referee Concluded That Trial Counsel's Performance Was Professionally Unreasonable

Graysen passed away before the evidentiary hearing. II ER 129. After hearing the testimony of witnesses concerning Sanchez's habeas corpus claims, the trial court referee concluded that Graysen's stipulation about Fidel Sanchez's alibi testimony was false. Specifically, the referee concluded that Fidel Sanchez told Graysen about Sanchez's alibi at the latest, on January or February, 2007. The referee found that Fidel Sanchez had spoken to Graysen's associate, attorney David Piper, prior to that date:

Per the testimonies of Joanne Sanchez and Fidel Sanchez, Attorney Graysen was told [about the alibi] during the initial meeting between Fidel Sanchez and Attorney Graysen on September 20, 2005. Mr. Piper joined attorney Graysen's firm June, 2006 (RT, p. 72) and first started working on petitioner's case in January or February, 2007

(RT p. 79.) It is reasonable to conclude, and the Court so finds, that Fidel Sanchez informed attorney Graysen of the above mentioned statements before January, 2007. I ER 44.

Citing the same testimony, the referee concluded that Fidel Sanchez "indicated a willingness to testify well before the trial date in this case." I ER 45. The referee also found that Fidel "never indicated a refusal to testify." Id. The referee concluded that Fidel "repeatedly mentioned petitioner's alibi and his part in the alibi" and that those communications with Graysen occurred at the latest and most likely before January, 2007. I ER 46 (emphasis in original).

The referee further found that Graysen did not tell the district attorney (Valerie Salkin) about Fidel Sanchez's alibi testimony until either the end of the state's case or after the state rested. I ER 46. When Salkin complained about Graysen's discovery violation, Graysen claimed that there was no violation because he had not had the information earlier, i.e., he told Salkin, that Fidel had just told him that Sanchez was with him at the time of the drive by shooting. Salkin had then threatened to call Graysen as a prosecution witness if Fidel Sanchez testified that he told Graysen about his alibi testimony long before trial. Accordingly, the false stipulation between Graysen and Salkin was "a compromise to resolve the late discovery issue." 1 ER 31.

The referee concluded that it was "inconceivable" that Graysen had been unaware of Fidel's testimony until after the start of trial on March 1, 2008. However, due to

Graysen's death and the lack of other evidence on that point, the referee did not make a finding of fact concerning that question. I ER 46.

After the trial court referee also concluded that Rossier's attorney, Kirt Hopson, told Sanchez's attorney [Graysen] prior to trial that Jazmin Rossier would not join in Sanchez's alibi defense. I ER 46-47. That point was "discussed and debated" among counsel for all trial co-defendants. I ER 47. Because Graysen wasdeceased, there was insufficient evidence for the referee to make any further factual findings as to Graysen's failure to seek severance of Sanchez's trial from Rossier's prior to trial. Id.

Ultimately, as to *Strickland's* performance prong, the referee concluded that Graysen's decision to enter into a false stipulation concerning Fidel Sanchez's alibi testimony and his failure to seek severance of Sanchez's trial from Rossier's "fell below an objective standard of reasonableness." I ER 47-48. The referee, relying on his own 27 years of experience as a trial judge and 11 years of experience as a prosecutor, found that Graysen "had no rational tactical purpose" for his "incompetent act and failure to act." I ER 47-48. The referee concluded that Sanchez had established the first element (the performance prong) of the two part Strickland test. Id.

N. The Referee Found That Sanchez's Defense Was Not Prejudiced

As to the *Strickland* prejudice prong, the referee relied on the Court of Appeal Opinion to conclude that the trial evidence against Sanchez was "extremely strong." I ER 48. Moreover, the referee found that "the stipulation concerning Fidel Sanchez was not such that it eviscerated petitioner's case." The referee cited the testimony of accomplices connecting Sanchez to the crime, the fact that he was arrested two days later in the van connected to the crime, and that the van contained the rifle that was used during the shooting, along with shells fired by the same weapon. Id.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS CONCERNING THE STANDARD FOR DETERMINING PREJUDICE DUE TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

A. The State Court of Appeal's Analysis Conflicts With And Unreasonably Applied *Strickland* When It Held That Sanchez Was Required to Show That He Had An Unreliable or Fundamentally Unfair Trial Due To His Counsel's Errors

This Court should grant certiorari because the memorandum decision conflicts with *Strickland*, which holds that a petitioner must show only that there was a "reasonable possibility" of a different result at trial absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

The Ninth Circuit Court of Appeal's decision acknowledges that the state court "initially indicated that Sanchez needed to prove he received an unreliable or fundamentally unfair trial" and also acknowledge that is a "higher hurdle" than this Court's decision in *Strickland* imposed. App. 2. The Ninth Circuit's decision conflicts with Strickland when it holds that the state court "applied" the correct standard when the state court opinion plainly states that it is applying a standard that is incorrect and more demanding than the correct “reasonable probability” standard.

The decision in this case conflicts with the Ninth Circuit’s published decisions that have repeatedly held that when a state court decision applies an incorrect constitutional standard, AEDPA deference does not apply and review of the state court decision is de novo. *Wade v Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000); *Weeden v. Johnson*, 854 F.3d 1063, 1072 (9th Cir. 2017)(no AEDPA deference due where state court found that the jury “might have” reached the same result despite defense counsel’s omission.)

The *Strickland* prejudice standard is also clearly established. In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court Court reaffirmed that the prejudice standard for ineffective assistance of counsel claims is the “reasonable probability” test in Strickland. In Williams, the Court held that the Virginia Supreme Court erred in holding, like the state court in this case, that the petitioner must show that his trial counsel’s errors made his trial fundamentally unfair. Williams, at p. 391. The Virginia Supreme Court had held that the Strickland prejudice prong was not satisfied based “ ‘on mere outcome determination,’ ” but also required a showing that the result was fundamentally unfair. Id. at 371.

The state court’s own factual findings in this case demonstrate that Sanchez met this Court’s reasonable probability test. The state court concluded that trial counsel’s error in entering into a false stipulation at trial “significantly undermined” and “devastated”

Fidel Sanchez's credibility. It also concluded that trial counsel's failure to move to sever Sanchez's trial from that of his co-defendant Jazmin Rossier had "surely weakened" Sanchez's defense. I ER 36-38.

The case against Sanchez was weak, as it was wholly dependent on the testimony of accomplices who admitted they bought their own freedom or reduced charges with their trial testimony. If the state court had actually applied the Strickland reasonable probability standard, it should have concluded that Sanchez was prejudiced by trial counsel's errors. Because the memorandum decision is in conflict with this Court's decisions in *Strickland* and *Williams*, certiorari should be granted.

B. The State Courts Concluded Correctly That Trial Counsel's Conduct Was Professionally Unreasonable When He Undermined Sanchez's Alibi With a False Stipulation and When He Failed to Move to Sever Sanchez's Trial From That Of His Wife, Jazmin Rossier

When a defendant alleges ineffective assistance of counsel, two elements must be proved: (1) counsel's performance was objectively unreasonable and (2) but for counsel's errors there is a "reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

1. The Court of Appeal Opinion

On July 23, 2012, the California Court of Appeal denied Sanchez's habeas corpus claim of ineffective assistance of trial counsel in a reasoned decision. The Court of Appeal agreed with the referee that trial counsel's failure to move for severance and his decision to enter into a false stipulation concerning Fidel Sanchez's testimony fell below an objective standard of professional reasonableness. 1 ER 36-37.

The Court of Appeal quoted from the prosecutor's remarks during closing argument where she emphasized that Graysen had stipulated that Fidel Sanchez "never told Mr. Graysen he was part of this alibi until during the last month. You heard a stipulation Mr. Graysen had this case for like two years." 1 ER 36. The prosecutor had also argued that Fidel was "just coming in and trying to create an alibi." For all of those reasons, the Court of Appeal concluded that the false stipulation had "significantly undermined" Fidel Sanchez's alibi testimony. 1 ER 36.

As to trial counsel's failure to seek severance of Sanchez's trial from that of his wife, Jazmin Rossier, the Court of Appeal acknowledged that Rossier's lawyer had presented a defense that undermined Sanchez's alibi testimony and agreed with the trial court referee's conclusion that Graysen's failure to move to sever Sanchez's trial from Rossier's was professionally unreasonable. 1 ER 39.

The Court of Appeal also found that there was a reasonable probability that a motion to sever Sanchez's trial from Rossier's would have been granted.

The Court of Appeal reasoned:

> Here, in his closing argument, Hopson [Rossier's counsel] failed to even mention Sanchez's alibi defense, which would have exonerated Rossier as well – a conspicuous silence that surely weakened whatever persuasive force Sanchez and his father's testimony may otherwise have had.

1 ER 38.

The Court of Appeal also concluded that a motion to sever Sanchez's trial would have been "well within the trial court's discretion" and would have complemented Rossier's motion to sever her trial from that of the remaining co-defendants. 1 ER 39. However, the Court of Appeal found that Hopson had not conceded that Rossier was in the van during the shooting. Hopson argued only "that the People's accomplice witnesses, whose credibility he vigorously attacked, testified only that Rossier had accompanied Sanchez that evening without any prior knowledge that a shooting had been planned: Rossier was just "with her boyfriend." 1 ER 38. The Court of Appeal concluded that Rossier's defense was not antagonistic to nor irreconciliable with Sanchez's defense. Id.

The Court of Appeal also concluded that Sanchez's defense was not prejudiced by trial counsel's conduct:

> To be sure, Graysen's deficient lawyering compromised Sanchez's alibi defense. Had he timely identified Fidel Sanchez as a witness and successfully moved for a severance of Sanchez's trial from Rossier's (a possible but by no means inevitable result) the jury would not have heard the stipulation that devastated Fidel Sanchez's credibility or been exposed to Rossier's implicit denial of her role in Sanchez's proffered alibi. But we are persuaded that a somewhat stronger alibi would not have had any impact on the outcome of this trial and counsel's errors do not undermine our confidence in the outcome.

1 ER 39-40. Ultimately, the Court of Appeal concluded that Sanchez had not shown prejudice because his trial was "fundamentally fair" and his convictions were "reliable." 1 ER 41.

2. This Court Should Review *Strickland's* Prejudice Prong *De Novo*, Because The Court of Appeal Unreasonably Applied *Strickland* When It Required Sanchez to Prove That His Trial Was Unreliable" or "Fundamentally Unfair"

When a habeas corpus petition alleges ineffective assistance of counsel, the court must apply *Strickland's* prejudice standard and should not engage in a separate *Brecht* analysis. [1] Prejudice exists if "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, supra* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*; *Hardy v. Chappell*, 832 F.3d 1128 (9th Cir. 2016);*Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015).

When a state court unreasonably applies clearly established constitutional law or applies a standard that is contrary to the Supreme Court's constitutional decisions, the federal court must then resolve the [constitutional] claim without the deference AEDPA otherwise requires." 28 U.S.C. § 2254 (d)(1);*Panetti v. Quarterman*, 551 U.S. 930, 948 (2007); *Deck v. Jenkins*, 768 F.3d 1015, 1024 (9th Cir. 2014).

Here, citing *Strickland* and state law, the Court of Appeal held that to establish prejudice due to trial counsel's deficiencies, Sanchez was required to prove that he received a trial that was "unreliable" or "fundamentally unfair." 1 ER 39 (citing *Strickland* and *In re Visciotti* (1996) 14 Cal. 4th 325, 352; *In re Harris* (1993) 5 Cal.4th

[1] *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)

813, 833.) The Court of Appeal's decision is contrary to *Strickland*'s prejudice prong, because the "unreliable or fundamentally unfair" standard is much higher standard than *Strickland*'s "reasonable probability" of a different result.

This case is comparable to *Hardy v. Chappell*, *supra*, where the California Supreme Court "employed a standard of review which was significantly harsher than the clearly established test from *Strickland*." *Hardy*, 832 F.3d at p. 1137. In *Hardy*, the California Supreme Court recited the *Strickland* prejudice standard correctly but then in its application "abandoned it – replacing it with a substantial evidence standard." *Id*. Because the California Supreme Court applied an erroneous substantial evidence standard when it reviewed the prejudice arising from trial counsel's errors, this Court reviewed Hardy's constitutional claim de novo. *Id*.

In this case, the California Court of Appeal made the same error as the California Supreme Court in *Hardy*. Although the Court of Appeal cited to *Strickland*, it placed an additional burden on Sanchez, specifically, one that required him to demonstrate not only a reasonable probability of a different outcome, but that the result of counsel's errors rendered his trial unreliable or fundamentally unfair. 1 ER 39; *See Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir.2006) (state court applied an incorrect prejudice analysis where "it reasoned that Goodman failed to show that his second trial was fundamentally unfair or unreliable ").

Moreover, the Court of Appeal's application of the prejudice test in this case, as in *Hardy*, erroneously focused on whether there was substantial evidence supporting Sanchez's conviction. 1 ER 39-41. *Hardy* emphasizes that the substantial evidence test employed by the California courts is contrary to *Strickland*'s "reasonable probability" standard. *Hardy*, at p. 1137.

For example, in this case the Court of Appeal held that the evidence that Sanchez participated in the drive by shooting was "extremely strong" and that his alibi was "unconvincing" even absent counsel's errors. 1 ER 41. The Court of Appeal relied on the testimony of various accomplice witnesses and on Sanchez's arrest two days after the shooting, when he was found in the blue van with the murder weapon in the vehicle. 1 ER 41. That analysis is focused on the sufficiency of the evidence supporting the convictions and fails to address whether there was a reasonable probability of a different result.

For all of these reasons, the Court of Appeal applied an incorrect legal standard when it focused on the sufficiency of the evidence supporting the conviction and whether the trial was reliable or fundamentally fair. This Court should review the issue of prejudice de novo under the *Strickland* reasonable probability standard. As set forth in more detail below, the Court of Appeal's findings of fact concerning the damaging effects of trial counsel's errors demonstrate that Sanchez was prejudiced under a correct application of the *Strickland* prejudice standard.

3. The Court of Appeal Unreasonably Determined The Facts When It Held That Sanchez's Defense Was Not Prejudiced By Trial Counsel's Errors

The AEDPA does not bar habeas corpus relief if the last reasoned state court decision unreasonably determined the facts relevant to the petitioner's claim. 28 U.S.C. § 2254(d)(2). *Bruce v. Terhune*, 376 F.3d 950, 954 (9th Cir.2004); *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir.2004). "[S]uch a challenge may be based on the claim that the finding is unsupported by sufficient evidence, that the process employed by the state court is defective, or that no finding was made by the state court at all." *Taylor*, 366 F.3d at 999 (internal citations omitted).

A fact finding may be objectively unreasonable when the state courts "plainly misapprehend or misstate the record in making their findings" as to material facts or where the state court "has before it, yet apparently ignores, evidence that supports petitioner's claim." *Taylor*, 366 F.3d at 1000-01.

Here, in addition to the Court of Appeal's failure to correctly recite and apply the *Strickland* prejudice standard, the Court of Appeal unreasonably determined the facts when it held that Sanchez suffered no prejudice due to trial counsel's errors. The Court of Appeal's ultimate conclusion contradicted its own findings of fact concerning the prejudicial impact of trial counsel's deficient performance. For example, the Court of Appeal's conclusion that trial counsel's errors were harmless is contrary to its statements that trial counsel's false stipulation had "significantly undermined" and "devastated " Fidel Sanchez's credibility. 1 ER 36, 39.

Given those conclusions, the Court of Appeal should have found that the false stipulation was prejudicial. Instead, the Court of Appeal relied on the lack of "physical evidence" supporting Sanchez's alibi that he was working with his father at the Palermo restaurant and attending a movie with Rossier on the night of the shootings, i.e., the Court of Appeal suggested that Sanchez's alibi was weak because there was no evidence of a time card or paycheck from the Palermo restaurant and no movie ticket stubs or security videotapes, "even though the restaurant had security cameras." 1 ER 40.

The Court of Appeal's emphasis on the lack of physical evidence supporting Sanchez's alibi was objectively unreasonable. First, Sanchez worked at the restaurant on Saturdays informally. 3 ER 581, 583, 612, 614. Fidel testified that Sanchez was not an employee of the restaurant and that he paid his son from his own earnings. 3 ER 565. As a result, it was unreasonable to conclude that Sanchez's alibi was false because he could not produce a timecard or paycheck from the restaurant. 1 ER 40.

Moreover, the testimony concerning security video cameras at the Palermo did not undermine Sanchez's alibi because there was no evidence that the cameras where in a position where they would have captured images of Sanchez working in the restaurant, making pizza and sweeping floors. 3 ER 596.

It was also objectively unreasonable to conclude that Sanchez's alibi was weak because he did not produce ticket stubs for the movie he attended with Rossier on the night of the shootings. Film ticket stubs are generally useless after the film is over. There was no evidence that Sanchez knew that he would be required to account for his activities that night or that he had any other reason to have retained the ticket stubs for the film he attended with Rossier.

The Court of Appeal also found that Fidel Sanchez's alibi testimony was "highly suspect" because he did not initially tell police officers that his son was with him on the day of the murder and because he had also provided an alibi for a home invasion robbery that his son had committed the day after the drive by shooting. 1 ER 40. Because Sanchez subsequently plead guilty to the robbery offense, the Court of Appeal found that there was "serious doubt" as to Fidel Sanchez's veracity.1 ER 40.

The Court of Appeal's analysis is flawed because Fidel Sanchez's testimony that his son worked with him at the Palermo on Saturdays was corroborated by the testimony of an unbiased witness, Rigoberto Mendez Quinillo. 3 ER 612-614. Quinillo testified that he had been employed as a pizza maker at the Palermo since 1989. He did not recall the precise night in question, but he verified that Sanchez always worked at the Palermo on Saturday evenings with his father Fidel. When pressed by the prosecutor, Quinillo said [Sanchez] was always there on Saturdays with his Dad." 3 ER 613. Quinillo later reiterated “I work all Saturdays and I always saw [Sanchez] there.” 3 ER 614. Quinillo also testified that “his Dad would drive him” on those days. 3 ER 614.

There was no evidence that Quinillo had any reason to lie to assist Sanchez. As a result, even if Fidel Sanchez’s testimony was suspect, Sanchez’s alibi defense was viable because it was corroborated by the testimony of an unbiased witness.

In applying the erroneous sufficiency of the evidence standard, the Court of Appeal also reasoned that Sanchez was not prejudiced because the jury had accepted the testimony of accomplice witnesses (the Kuk brothers, Dorma Pedro Mendez and Norberto Pacheco) even though their credibility was vigorously challenged and the trial court had instructed the jury to consider the testimony of accomplice witnesses with caution. 1 ER 40-41. The Court of Appeal’s analysis on that point is objectively unreasonable.

First, the weakness of the accomplice witness testimony should have weighed in favor of Sanchez’s argument that he was prejudiced by counsel’s errors. *Strickland*, 466 U.S. at 695–96 (a “verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support”.) The prosecutor’s argument that Sanchez was driving the van from which the shots were fired was wholly dependent on the word of witnesses who admitted that they had lied repeatedly and sometimes under oath concerning the same incident. For example, Pacheco initially told police that Sanchez had given him bullets, then reversed himself and admitted that was a lie. RT 3951. Pacheco testified at trial that he had falsely accused

Sanchez because he (Pacheco) wasn’t afraid of him. RT 3953-54. Santos Kuk admitted that he “lied about everything” and “told a lot of lies” when first interviewed by the police about the Bellevue Street shooting. RT 2501, 2512, 2767. Dorma Pedro Mendez admitted that she had lied when she testified about the case at a previous hearing. RT 4283, 4285-4286.

Moreover, all of the accomplice witnesses conceded that they had received benefits from the prosecution in exchange for their testimony. Norberto Pacheco, who admitted he faced the possibility of a life term for supplying the guns used in the drive by shootings was permitted to plead guilty to manslaughter and received a 17 year determinate term. RT 3640-3641. Pacheco’s mother, who had assisted Pacheco in supplying the guns used in the shootings was not prosecuted. RT 3640. Dorma Pedro Mendez was not prosecuted for her role in the shootings and she received $1800 to relocate. Santos Kuk admitted he feared prosecution for his presence in the van during the shootings. RT 2480-2481, 2483. He and his brother David were not prosecuted and they received relocation benefits in exchange for their inculpatory testimony. RT 2262; 2484; 2488-2489.

In addition to their admitted lies, the accomplice witnesses were often prompted by the prosecutor concerning the details of their testimony The trial judge repeatedly sustained defense objections when the prosecutor elicited their testimony by way of leading questions. E.g. RT 2429, 2475, 2477, 2487, 2490, 2805, 2896, 2906, 2913.

Defense counsel also protested that the prosecutor was signaling her approval and disapproval of the accomplice's testimony by shaking and nodding her head at them while they were testifying. The trial court admonished the prosecutor for that behavior and asked her to "stop it." RT 3729.

The Court of Appeal turned the *Strickland* prejudice rule on its head when it held that, because the jury ultimately accepted the testimony of biased and unreliable witnesses, trial counsel's errors had no effect on the verdict. 1 ER 40-41. The evidence that the prosecution witnesses were dishonest and motivated by their own interest in avoiding prosecution should have weighed in Sanchez's favor.

Finally, the Court of Appeal concluded that forensic evidence, while "certainly not conclusive did link Sanchez to the Bellevue Avenue drive by shootings." 1 ER 41. The Court of Appeal reasoned that Sanchez was arrested two days later in the stolen van used in the shootings with the murder weapon still inside the vehicle. Moreover the cell phone in Sanchez's possession at that time (which belonged to Rossier's father) had been in the vicinity of the shootings when they occurred. 1 ER 41-42. The Court of Appeal conceded that the records did not establish who had the phone at that time or who placed the calls, it reasoned that the inference that it was either Sanchez or Rossier was strong and that either scenario eviscerated Sanchez's defense. 1 ER 41.

The Court of Appeal's analysis of those facts was, again, focused not on *Strickland's* reasonable probability standard but on a sufficiency of the evidence standard that is inapplicable. The forensic evidence did not contradict Sanchez's alibi and as the Court of Appeal conceded, it could not have conclusively established his guilt. I ER 41.

4. Because There Was a Reasonable Probability of a Different Result Absent Counsel's Errors, Sanchez Should Receive a New Trial

A reviewing court must consider the cumulative prejudicial effect of multiple trial errors in determining whether habeas relief is warranted. *Phillips v. Woodford*, 267 F.3d 966, 985 (9th Cir. 2001). In this case, the Court of Appeal failed to adequately weigh the cumulative impact of counsel's false stipulation combined with counsel's failure to move to sever Sanchez's trial from Rossier's. By personally reading the false stipulation to the jury, trial counsel stepped out of his role as Sanchez's lawyer, essentially testified for the prosecution and impeached his client's primary alibi witness. The jury could not have possibly credited any of the alibi testimony after trial counsel himself contradicted the witness's sworn testimony.

The prejudice from trial counsel's malfeasance was compounded by Rossier's implicit denial of Sanchez's testimony. Their joint trial unfairly undermined Sanchez's alibi because the jury knew that Sanchez and Rossier were married by the time of trial. Because Sanchez's alibi testimony was implicitly denied by his wife and falsely impeached by his trial lawyer, the jury could not have given fair consideration to Sanchez's alibi defense.

Ultimately, there were flaws in the case presented by both the prosecution and the defense. However, there is at least a reasonable likelihood of a different result had Fidel

Sanchez's testimony not been impeached by Sanchez's lawyer and had Rossier not implicitly denied that she was with Sanchez at the time of the shootings.

In summary, the Court of Appeal's holding that Sanchez suffered no prejudice from his trial counsel's deficient performance should be reversed. The deferential AEDPA standard should not apply because the Court of Appeal relied on a fundamental fairness and sufficiency of the evidence standard instead of determining whether there was a "reasonable probability" of a different result due to counsel's errors. Moreover, the Court of Appeal unreasonably determined the facts when it held that the jury's ultimate acceptance of the biased and inconsistent testimony of admittedly dishonest accomplice witnesses somehow established that counsel's errors were harmless. Under *Strickland*, the weaknesses in the prosecution's case weigh in favor of a finding that counsel's errors were prejudicial.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari and grant the writ.

Dated:

Respectfully submitted,

____

Stephanie M. Adraktas
CJA Appointed Attorney for Petitioner
Bryan Sanchez

No.

IN THE SUPREME COURT OF THE UNITED STATES

BRYAN SANCHEZ,

Petitioner

v.

RAYMOND MADDEN, Warden,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRYAN SANCHEZ, Petitioner-Appellant, v. RAYMOND MADDEN, Respondent-Appellee.	No. 15-56742 D.C. No. 2:13-cv-07810-PA-MRW Central District of California, Los Angeles ORDER

Before: REINHARDT, KOZINSKI, and CHRISTEN, Circuit Judges.

The panel has unanimously voted to deny Petitioner-Appellant Bryan Sanchez's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of Petitioner-Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

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

FILED

OCT 04 2017

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRYAN SANCHEZ, Petitioner-Appellant, v. RAYMOND MADDEN, Respondent-Appellee.	No. 15-56742 D.C. No. 2:13-cv-07810-PA-MRW MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted August 7, 2017
Pasadena, California

Before: REINHARDT, KOZINSKI, and CHRISTEN, Circuit Judges.

1. The California Court of Appeal's decision was not contrary to *Strickland v. Washington*, 466 U.S. 668 (1984). Although the state court initially indicated that Sanchez needed to "prove he received an unreliable or fundamentally unfair trial"—a higher hurdle than *Strickland*'s prejudice standard imposes—the court

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

correctly applied *Strickland* in its analysis. "[I]t is the application, not the recitation of a standard that matters for § 2254(d) purposes." *Hardy v. Chappell*, 849 F.3d 803, 819 (9th Cir. 2016).

2. The state court did not unreasonably conclude that Sanchez was not prejudiced by his lawyer's deficient performance. Given the evidence that contradicted Sanchez's father's alibi testimony, we cannot say that all fairminded jurists would conclude that the state court's prejudice decision was wrong. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.").

3. Sanchez alternatively characterizes the state court's decision as being based on an unreasonable determination of the facts. The state court reviewed the evidence presented at Sanchez's trial and concluded that "a somewhat stronger alibi would not have had any impact on the outcome." That determination was not unreasonable for the reason discussed above.

AFFIRMED.

JS-6

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRYAN SANCHEZ, Petitioner, v. W. MONTGOMERY, Warden, Respondent.	Case No. CV 13-7810 PA (MRW) JUDGMENT

Pursuant to the Order Accepting Findings and Recommendations of the United States Magistrate Judge,

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

DATE: October 19, 2015

HON. PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRYAN SANCHEZ,

Petitioner,

v.

W. MONTGOMERY, Warden,

Respondent.

Case No. CV 13-7810 PA (MRW)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court reviewed the petition, the records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court engaged in a de novo review of those portions of the Report to which Petitioner objected. The Court accepts the findings and recommendation of the Magistrate Judge.

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

DATE: October 19, 2015

HON. PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRYAN SANCHEZ, Petitioner, v. W. MONTGOMERY, Warden, Respondent.	Case No. CV 13-7810 PA (MRW) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Percy Anderson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY OF RECOMMENDATION

Petitioner was convicted for his role in a gang-related shooting. The state appellate court concluded that Petitioner's lawyer provided deficient performance at trial. However, the court further concluded that Petitioner was not prejudiced as a result of the lawyer's conduct. The state courts subsequently rejected Petitioner's other claims of attorney, evidentiary, and instructional error at trial.

On federal habeas review, the Court concludes that the state court decisions were not contrary to, nor unreasonably applied, clearly established federal law. Accordingly, the Court recommends that the Petition be denied.

II. FACTS AND PROCEDURAL HISTORY

Petitioner was a member of the 18th Street gang in Los Angeles. This criminal case arose from a bloody week in which several gang members – including Petitioner – participated in the following series of violent events:

- A shooting at Vendome Street during which a rival gang member was killed. Petitioner was present at the scene of the killing, but was not criminally charged.
- A drive-by incident at Bellevue Avenue during which several opposing gang members were shot. Petitioner was convicted of murder and attempted murder for acting as the driver of the vehicle. These convictions are the subject of this habeas action.[1]
- The arrest of Petitioner and other armed 18th Street gang members who were on their way to Marshall High School to attack opposing gang members. Petitioner was convicted of conspiracy to commit murder; the state court vacated this conviction on appeal.

A. Trial and Direct Appeal

Petitioner and four gang colleagues were tried jointly. In a lengthy trial, the jury heard testimony from several cooperators, other gang members, victims, and other witnesses. The jury convicted Petitioner for his role in the Bellevue Avenue

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[1] The Court previously denied habeas relief for one of Petitioner's co-defendants (the shooter in the Bellevue Avenue incident). Fuentes v. McDonald, CV 11-1912 PA (MRW) (C.D. Cal.). Petitioner's specific claims do not overlap with those that Fuentes raised on federal habeas review.

and Marshall High School incidents. The trial court sentenced Petitioner to an aggregate term of sixty years to life.

Petitioner and his co-defendants jointly appealed. In a 71-page reasoned decision, the California Court of Appeal vacated Petitioner's conviction as to the Marshall High School offense. (Lodgment # 1.) The appellate court affirmed Petitioner's convictions regarding the Bellevue Avenue murder. (Id. at 2-3, 70-71.) The California Supreme Court summarily denied review of decision. (Lodgment # 6.)

B. Habeas Proceedings

Concurrent with his direct appeal, Petitioner filed a habeas petition with the California Court of Appeal alleging ineffective assistance by his trial lawyer. (Lodgment # 7.) The appellate court ordered the trial court to hold an evidentiary hearing on several issues. (Lodgment # 18.)

Petitioner's trial attorney died before the hearing began. Nevertheless, a Superior Court judge heard testimony from the prosecutor, several other defense lawyers, and members of Petitioner's family. The trial court concluded that Petitioner's lawyer provided deficient performance by (a) entering into a stipulation with the prosecution and (b) failing to seek severance of Petitioner's case, both of which served to undermine Petitioner's alibi defense (discussed below). (Lodgment # 20.)

The appellate court accepted the trial court's factual conclusions. Even so, the court denied habeas relief in a reasoned decision. (Lodgment # 24.) The state supreme court subsequently denied habeas review without comment. (Lodgment # 26.)

Petitioner filed this federal action. He simultaneously sought and received a stay of the action to exhaust additional claims in state court. (Docket # 1, 3, 18.)

The state appellate and supreme courts denied habeas relief on those new claims without comment. (Lodgment # 31, 33.)

III. DISCUSSION

A. Standard of Review Under AEDPA

Petitioner's claims are subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (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.

28 U.S.C. § 2254(d).

In a habeas action, this Court generally reviews the reasonableness of the state court's last reasoned decision on a prisoner's claims. Murray v. Schriro, 746 F.3d 418, 441 (9th Cir. 2014). Here, the California Court of Appeal's opinion on direct appeal (Lodgment # 1) is the last reasoned decision for the evidentiary and jury instruction claims raised in Grounds Seven and Eight. The appellate court's opinion on state habeas review (Lodgment # 24) is the last reasoned decision on the alibi-related ineffective assistance claims raised in Grounds Four and Five. Those decisions will be reviewed for reasonableness. Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991).

Petitioner's remaining claims of ineffective assistance (Grounds One, Two, and Three) are subject to a different analysis.[2] The state supreme court denied

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[2] So too is Petitioner's claim of cumulative error based on the various assertions of ineffective assistance (Ground 6). Petitioner did not present or exhaust that claim in state court. However, a federal court may consider and deny an unexhausted claim where the claim is not colorable. See 28 U.S.C. § 2254(b)(2); Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005). When

those claims without explanation. (Lodgment # 33.) The Court presumes that decision was on the merits "in the absence of any indication or state-law principles to the contrary." Harrington v. Richter, 562 U.S. 86, 99 (2011). Because the state court's decision was "unaccompanied by an explanation" of its reasoning, AEDPA requires the Court to perform an "independent review of the record" to determine "whether the state court's decision was objectively unreasonable." Id. at 98. When the state court does not explain the basis for its rejection of a prisoner's claim, a federal habeas court "must determine what arguments or theories [ ] could have supported the state court's decision" in evaluating its reasonableness. Id. at 102.

Overall, AEDPA presents "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Burt v. Titlow, ___ U.S. ___, 134 S. Ct. 10, 16 (2013). The federal statute presents "a difficult to meet [ ] and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, ___ U.S.___, 131 S. Ct. 1388, 1398 (2011) (quotations omitted). On habeas review, AEDPA places on a prisoner the burden to show that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103.

Put another way, a state court determination that a claim lacks merit "precludes federal habeas relief so long as fairminded jurists could disagree" on the correctness of that ruling. Id. at 101. Federal habeas corpus review therefore

employing this procedure, the federal habeas court reviews such unexhausted claims de novo, rather than applying AEDPA's deferential standard of review. Lewis v. Mayle, 391 F.3d 989, 996 (9th Cir. 2004); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

serves as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Id. at 102.

B. Ineffective Assistance of Counsel (Grounds 1-5)

Petitioner contends that his trial lawyer was ineffective based on the lawyer's handling of Petitioner's alibi defense and the alleged failure to investigate and present exculpatory evidence.

1. Facts

The prosecution's theory of the case was that Petitioner drove his fellow gang members to the Bellevue Avenue shooting. The prosecution also sought to prove that Petitioner's girlfriend (co-defendant Rossier) was in the vehicle at the time. Evidence supporting this theory included testimony from several cooperating gang members in the van, cell phone records, fingerprint evidence, and Petitioner's post-arrest admissions. (5RT at 2277-2302; 7RT at 2884-85; 12RT at 4232-33; 9RT at 3318-24, 3336-42.)

a) The Alibi Testimony and Stipulation

Petitioner contends that his trial lawyer was ineffective in asserting an alibi defense for Petitioner. Petitioner testified in his own defense. On the evening of the shooting, Petitioner claimed that he worked at a restaurant with his father, went to the movies with his girlfriend, and then drove home with his father. (Lodgment #24 at 6.) Petitioner's father provided similar testimony at trial to corroborate Petitioner's alibi.

The prosecutor protested that the defense did not properly disclose this evidence regarding Petitioner's alibi. As a remedy for this apparent discovery violation, the prosecution and Petitioner's attorney stipulated that the father waited until the eve of trial to come forward with his statement regarding Petitioner's actions on the night of the killing. (Id. at 6-7.)

In fact, as the trial court determined in a post-conviction evidentiary hearing, the father provided this information to the defense lawyer long before trial began. (Lodgment # 20 at 4.) The trial court determined that Petitioner's attorney had "no rational tactical purpose" for stipulating with the prosecution about the alleged lateness of the father's version of events. The court acknowledged that the lawyer's stipulation considerably undercut Petitioner's testimony about his alibi.

b) <u>The Severance Motion</u>

The court also found that Petitioner's lawyer provided deficient performance by failing to join a motion to sever the girlfriend's trial in the joint case to advance his alibi defense.

Petitioner's defense to the shooting was his contention that he was not at the scene, but was elsewhere with the girlfriend. The girlfriend's defense was different, though. Although the girlfriend did not testify, her attorney did not dispute that the girlfriend <u>was</u> present in the van during the shooting. However, the lawyer contended that the girlfriend was a passive passenger who did not participate knowingly in the offense. (Lodgment # 19, 1RT at 16.)

That defense clearly conflicted with and undermined Petitioner's alibi. The trial court found no reasonable basis as to why Petitioner's lawyer did not seek to sever the trials of defendants asserting these incompatible defenses (a motion that the court concluded that the trial judge had the discretion to grant).

c) <u>The Shooter's Declaration</u>

The jury convicted co-defendant Fuentes at trial as the shooter in the Bellevue Avenue killing. The trial occurred in 2008. In 2013, co-defendant Fuentes provided an exculpatory declaration for Petitioner. (Docket # 2-1 at 6.) Fuentes signed the declaration well after his conviction was affirmed on appeal and this Court denied him habeas relief.

In the 2013 declaration, Fuentes stated that neither Petitioner nor the girlfriend were in the van at the time of the shooting. Fuentes contended that another gang member (Gomez) was the actual driver of the van. Further, Fuentes claimed that he, not Petitioner, possessed the cell phone that led to proof that Petitioner was present at the scene of the crime.

Fuentes stated in his declaration that he had been “available and willing to cooperate” with Petitioner and “cover” him by “taking the stand at trial” to testify in Petitioner’s defense. (Id. at 6-7.) In the post-conviction evidentiary hearing, Fuentes’s lawyer stated that he told Petitioner’s lawyer that “we can just put on” Fuentes to testify “and that would cover” Petitioner. (Lodgment # 19, 2RT at 203.) Fuentes did not testify at the trial, though, and maintained his “not guilty” plea until he was convicted.

d) **Additional Claims**

Petitioner contends that his trial lawyer failed to adequately investigate whether, as the co-defendant claimed, Gomez was the actual driver of the vehicle. Petitioner offers no information or evidence to establish what proof the lawyer might have uncovered (other than the fact that Gomez’s fingerprints were found in the van with Petitioner’s).

Additionally, Petitioner argues that the trial lawyer improperly failed to impeach several cooperators with a police interview report. (Docket # 2-1 at 43.) That report shows that the witnesses were in a different location several hours before the shooting than the one that they testified about. However, both witnesses were extensively impeached and cross-examined over the course of four trial days regarding their: gang membership; past criminal conduct; personal drug use; benefits received from the prosecution; lies made to the police; alleged inconsistencies in their recollections; refusal to appear at a preliminary hearing;

and, as to one of the witnesses, his involuntary incarceration as a material witness. (Lodgment # 8, 5RT-8RT.)

2. State Court Decisions

On state habeas review, Petitioner raised his ineffective assistance claims regarding the alibi stipulation and the failure to pursue severance. The appellate court ordered the trial court to conduct an evidentiary hearing and to answer several specific questions regarding the recently deceased lawyer's conduct. After that proceeding, the appellate court ruled on the merits of the petition, citing Strickland v. Washington, 466 U.S. 668 (1984), and its state law progeny.

The court concluded that Petitioner's lawyer engaged in conduct that "fell below an objective standard of reasonableness." (Lodgment # 24 at 17.) The court found that the lawyer failed to properly disclose the identity of the alibi witness (Petitioner's father) to the prosecution, and entered into a "factually inaccurate stipulation" about the witness that "significantly undermined" his testimony and the alibi defense. (Id. at 14.) Further, the appellate court found "no conceivable tactical benefit" to the defense to fail to request severance of Petitioner's case because his alibi-based defense was "negative[ly] impact[ed]" by the girlfriend's divergent defense. (Id. at 16-17.)

However, the appellate court expressly found no prejudice resulted from these errors. The court determined that the alibi defense was a non-starter. The alibi was backed by no evidence other than the testimony of Petitioner's father, and the court found that there was "serious doubt as to the father's veracity." (Id. at 18.) The father failed to inform the police about his son's alleged alibi when interviewed shortly after the crime. Further, the father provided a similar alibi for his son regarding another serious criminal event (a home invasion robbery) that occurred the day after the drive-by – but Petitioner pled guilty to that robbery. (17RT at 5804-05; 19RT at 6378.) The appellate court concluded that this was proof "plainly supporting the prosecutor's argument [that the father] was prepared to lie to protect his son." (Lodgment # 24 at 18.) That dovetailed with the finding of the judge who conducted the post-conviction evidentiary hearing; the father "was not credible" in his testimony, and the judge "specifically disbelieved" him when the father's testimony conflicted with that of other witnesses. (Lodgment # 20 at 1-2.)

The state court then considered the ample evidence establishing Petitioner's role in the killing. The court summarized the testimonial and forensic evidence linking Petitioner to the crime, including the fact that the jury was properly instructed to view the cooperators' testimony with caution. (Id. at 19.) The court concluded that the jury's sub silentio credibility judgments "were amply justified by the record." (Id.) Given the "unconvincing" nature of the alibi and the evidence supporting Petitioner's guilt (which, the court concluded, "eviscerate[d]" Petitioner's defense), the appellate court ruled that Petitioner "received a fundamentally fair trial and his convictions for murder and attempted murder are reliable." (Id.)

Petitioner raised his additional ineffective assistance claims in a later habeas proceeding. The state courts did not issue a reasoned decision in denying relief.

3. Relevant Federal Law

To establish an ineffective assistance of counsel claim under Strickland, "a defendant must show both deficient performance by counsel and prejudice." Knowles v. Mirzayance, 556 U.S. 111, 112 (2009). A criminal defendant "bears the burden of overcoming the strong presumption" that a lawyer provided adequate representation. Cheney v. Washington, 614 F.3d 987, 994 (9th Cir. 2010). "Failure to satisfy either prong of the Strickland test obviates the need to consider the other." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002).

Deficient performance is defined as representation that falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. However, a trial lawyer is "strongly presumed to have rendered adequate assistance," and should not have a reviewing court "second-guess counsel's assistance." Pinholster, 131 S. Ct. at 1403. As to prejudice, a challenger must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Padilla v. Kentucky, 599 U.S. 356, 366 (2010) (quotation omitted).

The failure to interview or elicit trial testimony from a key witness may lead to a finding of ineffective assistance. Howard v. Clark, 608 F.3d 563, 571 (9th Cir. 2010). However, a criminal defense attorney is entitled to balance limited resources with effective trial strategies. Pinholster, 131 S. Ct. at 1403, 1408 ("There comes a point where a defense attorney will reasonably decide that another strategy is in order.").

A "cursory and vague claim" of ineffective assistance regarding potential witnesses that is "not supported by a statement of specific facts" cannot warrant habeas relief. Greenway v. Schriro, 653 F.3d 790, 804 (9th Cir. 2011) (quoting James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994)). Rather, a prisoner must generally provide an affidavit from a potential witness showing that the witness would have provided testimony helpful to the defense. Dows v. Wood, 211 F.3d 480, 486-87 (9th Cir. 2000); Gentry v. Sinclair, 705 F.3d 884, 900 (9th Cir. 2013) (prisoner presented "no evidence to indicate why the failure" of lawyer to take action was unreasonable). "Speculation" about what a witness "could have said is not enough" to establish that an attorney provided ineffective assistance or that a defendant was prejudiced. Grisby v. Blidgett, 130 F.3d 365, 373 (9th Cir. 1997); Boutte v. Biter, 556 F. App'x 623, 625 (9th Cir. 2014) (defendant "cannot rely on speculation about what possible, unnamed witnesses might have said").

"Surmounting Strickland's high bar is never an easy task." Padilla, 559 U.S. at 371. Establishing that a state court's application of Strickland was unreasonable under AEDPA "is all the more difficult." Richter, 562 U.S. at 105. The standards created by Strickland and Section 2254(d) are both "highly deferential"; when the two apply in tandem, "review is doubly so." Id. (quotation omitted). Under such a review, a habeas court must determine (i) "what arguments or theories actually supported" the state court's decision (if explained in a reasoned decision) (Sully v. Ayers, 725 F.3d 1057, 1075 n.6 (9th Cir. 2013)); or (ii) those arguments or theories that "could have supported [ ] the state court's decision" (in the absence of a reasoned opinion) to reject the ineffective assistance of counsel claim. Richter, 562 U.S. at 102.

4. Analysis

On doubly deferential review, the Court finds no basis for habeas relief. The state appellate court ordered an evidentiary hearing and issued a lengthy reasoned opinion rejecting Petitioner's claims regarding the lawyer's mishandling of the alibi defense (Grounds 4 and 5). In doing so, the state court identified and applied the correct constitutional standard (Strickland's two-factor analysis) to Petitioner's claims.

The court also ruled in Petitioner's favor regarding the lawyer's deficient performance. Knowles, 556 U.S. at 112. The court agreed that the lawyer improperly undermined Petitioner's alibi argument by falsely stipulating about the late disclosure of the father's testimony and failing to present a colorable severance claim.

What remains as to those claims, then, is whether the state court reasonably concluded that Petitioner was not prejudiced by the lawyer's misconduct. Padilla, 599 U.S. at 366. The court listed in detail the considerable evidence identifying Petitioner as an active participant in the drive-by shooting. Against that, the appellate court weighed the paltry and discredited evidence that Petitioner was elsewhere – with his father and his girlfriend – at the time of the crime. The court expressly evaluated the uncontested proof that the father: (a) failed to tell the police about Petitioner's alleged alibi when interviewed about the killing; and (b) gave a similar alibi for another of his son's crimes that was exposed as false when Petitioner pled guilty to that offense.

The state court concluded that the jury's verdict likely would not have been influenced in the absence of the lawyer's stipulation and the girlfriend's assertion that she was present at the scene. Padilla, 599 U.S. at 366. Fairminded judges would not uniformly conclude that the state court's analysis was unreasonable. Richter, 562 U.S. at 105. To the contrary, the state court's treatment of Petitioner's claim – remand for a lengthy evidentiary hearing, and a detailed decision on the merits of the more-than-colorable claims – reflect the serious consideration that Petitioner received on habeas review. On deferential federal review, the Court cannot find constitutional error with the state court's diligent analysis here.

Petitioner's remaining claims of ineffective assistance fare no better. The state courts denied those claims on their merits, but without a statement as to why. However, on this Court's independent review, ample reasons could plausibly support those rejections. Richter, 562 U.S. at 102.

Petitioner claims that his lawyer failed to investigate whether the triggerman Fuentes would have testified in support of Petitioner's alibi defense (Ground 1). The state court could well have concluded that this factual scenario was entirely implausible and unknowable at the time of the trial. Grisby, 130 F.3d at 373. Notably, Fuentes's declaration in support of his co-defendant and fellow gang member did not surface until after Fuentes's own conviction became final on federal review. There is no proof (save what the state court could have considered to be a half-hearted, unenforceable, and uncorroborated mid-trial statement by

Fuentes's lawyer to Petitioner's) that Fuentes actually was likely to testify on Petitioner's behalf – and thereby incriminate himself in the killing. The state court could easily have rejected the sincerity of the Fuentes's offer after a multi-week trial and extended appellate proceedings during which Fuentes and his co-defendants denied culpability. As a result, the state court could fairly have concluded that Petitioner's lawyer was not ineffective in declining to spend time trying to flip Fuentes on his client's behalf. Pinholster, 131 S. Ct. at 1403.

The state court could have been even less inclined to find ineffective assistance regarding Petitioner's bare claim that another gang member was the actual driver of the vehicle (Ground 2). Petitioner offers no reason why his lawyer should have pursued a theory of pointing the finger at a different member of Petitioner's gang in an effort to acquit Petitioner. Petitioner offers no evidence that the lawyer reasonably could have discovered had he sought to accuse Gomez for driving the vehicle instead of Petitioner. Dows, 211 F.3d at 486-87; Gentry, 705 F.3d at 900. The state court may have properly concluded that this claim was far too cursory to lead to a finding of deficient performance or prejudice.

Similarly, the state court could have had numerous bases for rejecting Petitioner's claim of ineffective assistance of counsel regarding the impeachment of the cooperating witnesses with a statement contained in the police report (Ground 3). Was Petitioner's lawyer deficient in overlooking this specific line of questioning regarding the witnesses' location on the day of the shooting? If so, then all of the defense lawyers in this five-defendant trial missed something important. All had the same interest in attacking the believability of the witnesses, yet none found or used this alleged smoking gun evidence. Far more likely, the state court could properly have found that Petitioner's lawyer (like the others) made a rational strategic decision to forego this area of cross-examination in favor of other, more meaningful topics during the multi-day questioning of their fellow gang members. Pinholster, 131 S. Ct. at 1403.

But, even assuming that Petitioner's lawyer (and the others) improperly failed to augment the lengthy cross-examination in this way, Petitioner fails to demonstrate why the state court could not have found any resulting prejudice to have been, at most, marginal. The main cooperators at issue here were impeached – by the various defense attorneys, and the prosecutor who fronted much of the witnesses' negative baggage during their direct examinations – in a thorough and comprehensive manner. Any additional attack on their credibility based on an inconsistency derived from the police report was surely cumulative here. The state court could easily have determined that the jury would have reached the same verdict regardless of the introduction of this material at trial. Padilla, 599 U.S. at 366.

* * *

The Court recognizes the eye-catching nature of aspects of Petitioner's ineffective assistance claims here. The state courts did too – that led to the remand of the matter to the trial court for an evidentiary hearing and a set of rulings critical of the performance of Petitioner's lawyer. However, the appellate court reasonably explained why those errors did not affect the outcome of the criminal trial. Beyond that, Petitioner's other claims of attorney misconduct were too sparse and immaterial to violate the Constitution. On limited federal habeas review, the Court finds no "extreme malfunction" of the state criminal justice system that should lead to habeas relief. Richter, 562 U.S. at 102; Burt, 134 S. Ct. at 16.

C. Cumulative Error Claim (Ground 6)

Petitioner argues that the combined effect of his attorney's errors infected the trial with unfairness so as to violate his constitutional rights. Even on de novo review (far more favorable to Petitioner than AEDPA's layers of deference to the state court proceedings), the Court concludes that this unexhausted claim is not colorable.

The "combined effect of multiple trial errors may give rise to a due process violation" if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284 (1973), and Montana v. Egelhoff, 518 U.S. 37, 53 (1996)). In cases where there are "a number of errors at trial, a balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial against the defendant." Alcala v. Woodford, 334 F.3d 862, 883 (9th Cir. 2003). Further, in the specific context of ineffective assistance of counsel, prejudice can result from the cumulative effect of multiple errors committed by a trial attorney. Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995).

However, the minimal impact of the admittedly poor conduct of Petitioner's lawyer (on the alibi-related issues) and the extremely thin allegations of further error do not provide a compelling basis for a cumulative prejudice claim here. The Attorney General and the state court convincingly demonstrate that Petitioner's alibi defense was frivolous; even his girlfriend didn't go along with Petitioner's claim that they were at the movies on the night of the killing. The unsupported additional claims discussed above also do not demonstrate that Petitioner's trial was fundamentally unfair. Given the strength of the case against Petitioner, there is no reasonable probability that, absent the trial attorney's errors, the outcome at trial would have been different. Strickland, 466 U.S. at 694. Whether taken separately or cumulatively, the Court does not find that Petitioner is entitled to habeas relief based on his trial lawyer's alleged misconduct.

D. Evidence of Uncharged Conduct (Grounds 7 and 8)

Petitioner contends that he was prejudiced by the admission of evidence of the Vendome Street gang shooting in connection with his conviction for the Bellevue Avenue crimes. On appeal, the appellate court affirmed the trial court's determination that evidence of this uncharged criminal conduct was admissible under the state evidence code to establish Petitioner's intent, motive, and common plan in participating in the later gang-related crime. (Lodgment # 1 at 19-21.)

The Court summarily recommends that this claim be denied. The admission of evidence at trial generally does not present a federal question on habeas review. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Rhoades v. Henry, 638 F.3d 1027, 1034 n.5 (9th Cir. 2011) (state evidentiary ruling cannot form an independent basis for federal habeas relief). Admission of evidence is a state law issue; "[s]imple errors of state law do not warrant federal habeas relief." Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009).

Moreover, the U.S. Supreme Court has "not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant" habeas relief. Id. As a result, although a court should grant a habeas petition "when constitutional errors have rendered the trial fundamentally unfair," a federal court is "without power" to do so based solely on the admission of evidence. Id.; Greel v. Martel, 472 F. App'x 503, 504 (9th Cir. 2012) ("no clearly established federal law that admitting prejudicial evidence violates due process"; in absence of Supreme Court ruling, "we may not issue the writ" on evidentiary grounds); Hale v. Cate, 530 F. App'x 636, 637-38 (9th Cir. 2013) (same); Munoz v. Gonzales, 596 F. App'x 588 (9th Cir. 2015) (same).

Petitioner is unable to convincingly demonstrate that the state court unreasonably applied clearly established federal law on this issue; there is none. Holley, 568, F.3d at 1101. Indeed, federal courts themselves regularly admit proof of a defendant's prior crimes or bad acts under a provision of the Federal Rules of Evidence that parallels the state evidentiary code. See Fed. R. Evid. 404(b); United States v. Hardrick, 766 F.3d 1051, 1055 (9th Cir. 2014) (proof of defendant's possession of uncharged images of child pornography admissible at trial). Further, the trial judge gave a detailed instruction to the jury that limited the use of the Vendome Street shooting evidence.[3] (6CT at 1650-52.) The Court must assume that the jury followed that instruction and did not consider the Vendome Street evidence for any improper purpose. Richardson v. Marsh, 481 U.S. 200, 206 (1987). Accordingly, Petitioner failed to advance a claim of federal constitutional error. Habeas relief is not warranted.

IV. CONCLUSION

IT IS THEREFORE RECOMMENDED that the District Judge issue an order: (1) accepting the findings and recommendations in this Report; (2) directing that judgment be entered denying the Petition; and (3) dismissing the action with prejudice.

Dated: August 11, 2015

HON. MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

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[3] Petitioner's derivative claim of constitutional error regarding that limiting instruction (Ground 8) is untenable and cannot lead to relief for the same reasons set forth in this section.

S218472 **SWANIGAN (DAMON EDWARD) ON H.C.**

The petition for writ of habeas corpus is denied. (See *In re Robbins* (1998) 18 Cal.4th 770, 780; *In re Clark* (1993) 5 Cal.4th 750, 767-769.)

S218473 **GORDON (SHATOYA LYN) ON H.C.**

Petition for writ of habeas corpus denied

S218476 **SANCHEZ (BRYAN) ON H.C.**

Petition for writ of habeas corpus denied

S218478 **AHMED (SALIM DANIEL) ON H.C.**

The petition for writ of habeas corpus is denied on the merits. (See *Harrington v. Richter* (2011) 562 U.S. __ [131 S.Ct. 770, 785], citing *Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803.)

S218482 **NUNEZ (JOSE LUIS) ON H.C.**

Petition for writ of habeas corpus denied

S218483 **TAPIA (GERARDO LUCIANO) ON H.C.**

Petition for writ of habeas corpus denied

S218498 **SKIDMORE (CARL) ON H.C.**

Petition for writ of habeas corpus denied

S218685 **LAWS (ANTHONY) ON H.C.**

Petition for writ of habeas corpus denied

S218687 **COMPTON (JAMES) ON H.C.**

Petition for writ of habeas corpus denied

CV 13-07810 PA (MRW)
LODGED DOCUMENT NO. 24

Filed 7/23/12 In re Sanchez CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re BRYAN SANCHEZ, on Habeas Corpus.	B218637 (Los Angeles County Super. Ct. No. BA272661)

ORIGINAL PROCEEDING on petition for writ of habeas corpus. Michael E. Pastor, Judge. Petition denied.

Donald R. Tickle for Petitioner.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey, Lawrence M. Daniels and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Following a lengthy joint jury trial, Bryan Sanchez, Jasmin Rossier and two other codefendants were found guilty of the murder of Juan Monsivais and the attempted premeditated murder of Manuel De La Rosa in a gang-related drive-by shooting on September 6, 2003. On direct appeal this court affirmed those convictions. (See *People v. Flores* (July 19, 2010, B211207) [nonpub].)[1]

During the pendency of his direct appeal Sanchez filed a verified petition for writ of habeas corpus in this court, contending he was denied the effective assistance of counsel with respect to the murder and attempted premeditated murder charges because (1) his trial counsel, William L. Graysen, entered into a false stipulation with the prosecutor, read to the jury, that Sanchez's father had not informed counsel of Sanchez's alibi defense for the evening of September 6, 2003 until after the trial had started; and (2) trial counsel failed to seek severance of Sanchez's trial from that of Rossier, who purportedly asserted an antagonistic defense with respect to the drive-by shooting. We issued an order to show cause.[2]

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[1] Sanchez, Rossier and Edgar Javier Flores were each found guilty of second degree murder in connection with the shooting death of Monsivais; Rafael R. Fuentes, the shooter, was found guilty of first degree murder. The jury found as to all defendants the offenses were committed to benefit a criminal street gang. Sanchez and Pedro Aguilar were also found guilty of conspiracy to commit murder arising from a gang-related incident two days later involving Marshall High School. We reversed Sanchez and Aguilar's conspiracy convictions and remanded for a new trial on that charge because the trial court had failed to instruct the jury conspiracy to commit assault with a firearm was a lesser included offense of conspiracy to commit murder as alleged in the accusatory pleading.

Sanchez was sentenced to an aggregate indeterminate state prison term of 35 years to life for the murder of Monsivais and the attempted murder of De La Rosa with the associated criminal street gang enhancements.

[2] We initially issued an order to show cause on July 19, 2010, concurrently with the filing of our opinion in Sanchez's direct appeal, returnable before the Los Angeles Superior Court. In our order we directed the superior court to conduct an evidentiary hearing on the material factual conflicts apparent from the declarations concerning Graysen's performance submitted in support of Sanchez's petition and Graysen's contradictory declaration, filed with the Attorney General's informal response. We

After considering the return filed by the Attorney General on behalf of respondent Secretary of the Department of Corrections and Rehabilitation and Sanchez's traverse, as well as the declarations filed in this court under penalty of perjury and the record in Sanchez's direct appeal, we concluded there was a reasonable likelihood Sanchez may be entitled to relief on his claim of ineffective assistance of counsel, but his entitlement to relief depended on the resolution of disputed issues of fact. Accordingly, we directed the Presiding Judge of the Los Angeles Superior Court to select a judge of that court to sit as referee in this proceeding to conduct an evidentiary hearing and to make recommended findings of fact on nine specific questions relating to Graysen's decision to enter into the stipulation with the prosecutor concerning Fidel Sanchez's testimony and his failure to move to sever Sanchez's trial from Rossier's:

"1. When did Fidel Sanchez first tell William Graysen his son Bryan Sanchez was with him in the evening of September 6, 2003? What did he say?

"2. On the first occasion that Fidel Sanchez spoke to Graysen about the alibi defense, did he indicate either a willingness to testify or a refusal to testify for his son?

"3. Did Fidel Sanchez speak to Graysen about Sanchez's alibi defense on more than one occasion prior to the start of trial? If so, when and what did he say on each occasion?

"4. When did Fidel Sanchez first indicate a willingness to testify at trial?

"5. What, if anything, did Graysen disclose to the People before trial concerning Sanchez's alibi defense and witnesses who could support or corroborate that defense?

"6. Prior to entering into the stipulation with the prosecutor concerning Fidel Sanchez's testimony, did Graysen review any files or conduct any investigation to confirm the timing of Fidel Sanchez's statements to him?

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reissued the order on September 27, 2010 pursuant to the Supreme Court's order on transfer (S185503, filed Sept. 22, 2010), returnable in this court, to permit the People to file a formal return to the petition before deciding whether an evidentiary hearing was necessary.

"7. What, if anything, did Graysen do to investigate whether Rossier's defense would be supportive of, or inconsistent with, Sanchez's alibi defense for the Bellevue Avenue drive-by shooting?

"8. What tactical considerations did Graysen evaluate in deciding not to file a motion to sever Sanchez's trial from Rossier's?

"9. If Graysen's representation of Sanchez fell below an objective standard of reasonableness under prevailing professional norms with respect to his decision to enter into the stipulation concerning Fidel Sanchez or his decision not to move to sever his client's trial from Rossier's or both, did his deficient performance prejudice Sanchez?"

Hon. Ronald S. Coen of the Los Angeles Superior Court was appointed referee and presided at the evidentiary hearing. Nine witnesses testified over two days. Neither Sanchez nor Graysen, his trial counsel (who had died by the time the evidentiary hearing was held), testified. The referee has submitted to this court a six-page statement of his findings, including findings that Graysen's stipulation concerning Sanchez's father and his decision not to move for a severance fell below an objective standard of reasonableness, but, in view of the extremely strong evidence of Sanchez's guilt, Graysen's deficiencies did not prejudice Sanchez.

In response to our invitation both Sanchez and the Attorney General have submitted exceptions to the referee's findings. After our review of the record and the referee's report, as well as consideration of the parties' exceptions and oral argument, we conclude Sanchez is not entitled to habeas corpus relief.

FACTUAL BACKGROUND

1. *The Trial*

The evidence supporting Sanchez's convictions for murder and attempted premeditated murder is set forth at length in *People v. Flores, supra*, B211207. We summarize the key elements.

Sanchez, his girlfriend Rossier and Rafael Fuentes were members of the Red Shield clique of the 18th Street gang, the largest Hispanic criminal street gang in the

United States. Edgar Flores was a member of the Grandview clique of the 18th Street gang. The two cliques were known to socialize together and cooperate in joint gang activities. Sanchez was considered the leader of the younger members of Red Shield. The 18th Street gang's rivals include the Temple Street gang.

The principal trial witnesses regarding the September 6, 2003 drive-by shooting were Norberto Pacheco (also known as Mousey), a member of the Red Shield clique, Santos and David Kuk, members of the Grandview clique, and Dorma Pedro Mendez, the girlfriend of Eric Vasquez, another 18th Street gang member. The Kuk brothers and Mendez were inside the minivan when the shooting occurred but were not charged with the murder or attempted murder of the victims. According to their testimony, Sanchez drove the minivan, which had been stolen several days earlier; Rossier initially sat next to Sanchez in the front passenger seat. Flores, Fuentes and Vasquez were also inside the vehicle. The group traveled to a commercial location near Silver Lake Boulevard where Pacheco provided them with a laundry bag containing two guns and several boxes of ammunition. According to Santos Kuk, Rossier held the bag while Fuentes removed the guns. Flores took the shotgun, and Fuentes the rifle. Fuentes passed the bullets around before loading the guns. At this point Fuentes moved to the front passenger seat; Flores sat in the middle row by the minivan's sliding door.

On Bellevue Avenue the group saw a rival gang member who had been identified as a target by Pacheco, but Sanchez said not to shoot because there was a woman with a baby nearby. Sanchez continued to drive in the neighborhood for several hours looking for "enemies" to shoot. As the minivan drove past the Kuk brothers' home, several Temple Street gang members were seen drinking across the street. After some discussion inside the minivan, Fuentes pulled out the rifle, shouted a derogatory comment and fired repeatedly out the front passenger side window. Flores tried but was unable to get the shotgun to fire out the window of the minivan's side door. Sanchez then drove the minivan to the northbound Hollywood Freeway entrance, which was only a short distance away. Pacheco testified that Sanchez, Rossier, Flores and Fuentes all spoke to him after the incident and acknowledged their participation in the shooting.[3]

None of the men who had survived the shooting was able to identify the assailants. A small caliber bullet recovered from Monsivais's body was matched to a rifle recovered from the stolen minivan two days after the shooting. Ten of 12 shell casings recovered at the Bellevue Avenue crime scene were determined to have been fired from the rifle, and shell casings recovered from the front passenger seat of the minivan were also fired from the rifle.

Sanchez, the only defendant to testify in his or her own defense, denied being in the stolen minivan and presented an alibi defense for the night of September 6, 2003. Sanchez testified he spent most of the day at the restaurant managed by his father; around 4:00 or 4:30 p.m. he went to the home of Larry Mendez, another employee of the restaurant, to shower and get ready to go out with Rossier; he met Rossier back at the restaurant around 7:00 p.m., where they ate dinner and then went to a nearby movie; he and Rossier returned to the restaurant around 10:00 p.m., at which time his father and he gave Rossier a ride home. Sanchez and his father returned to their home around 11:00 p.m.—which was approximately 30 minutes after the time of the drive-by shooting.

Sanchez's father testified for the defense and corroborated Sanchez's description and basic timeline of the events of September 6, 2003.[4] During cross-examination the prosecutor asked him, "Isn't it true that the first time that you have talked to Mr. Graysen, for example, about where your son was on the night of September 6, is during this trial?" Fidel Sanchez insisted he had discussed this information with Graysen before the trial

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[3] Pacheco pleaded guilty to voluntary manslaughter for his role in the shooting with a provisional sentence of 17 years subject to his agreement to testify truthfully against the remaining defendants.

[4] Mendez and another restaurant employee testified Sanchez frequently worked at the restaurant on Saturdays and would leave around 10:30 p.m. with his father, although neither could remember whether Sanchez was at the restaurant on September 6, 2003. Mendez also testified he lived near the restaurant and Sanchez would sometimes take showers at his home.

began although he could not remember when those discussions occurred, only that "it was before." (Fidel Sanchez acknowledged he had not told the police his son was with him during the time of the drive-by shooting.) After Fidel Sanchez's testimony, the jury was read (by Graysen) a stipulation between Graysen on behalf of his client and the People: "The parties stipulate that William Grays[e]n was hired to be Bryan Sanchez'[s] attorney on December 6, 2005. Further, the first time Fidel Sanchez spoke with Mr. Grays[e]n about being with Bryan on the night of September 6, 2003, was on or shortly after March 1, 2008 [that is, the day before the beginning of jury selection]." After directing the written stipulation be marked as a defense exhibit, the judge instructed the jury that it was to consider the stipulated facts "are proven."

Although Sanchez's testimony provided Rossier with an alibi defense, in his closing argument Rossier's counsel, Kirt J. Hopson, did not mention that testimony. Instead, Hopson focused on the People's evidence and argued it showed, at most, that Rossier was in the stolen minivan during the drive-by shooting because she had gone along with her boyfriend, Sanchez, to watch or engage in tagging. Rossier, he insisted, was no different from Mendez, who had admitted being in the van with her boyfriend during the drive-by shooting but was not charged with the crimes.[5]

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[5] The Attorney General insists this summary of Hopson's closing argument, which was included in both our order to show cause and order directing selection and appointment of a referee, is incorrect and suggests we have confused the September 6, 2003 Bellevue Avenue drive-by shooting of the Temple Street gang members and the August 29, 2003 tagging incident and shooting of a Silver Lake gang member, which involved several of the same individuals, including Sanchez and Rossier. We are confident our reading of the record is correct.

As he reviewed Mendez's testimony for the jury, Hopson argued, "She [(Mendez)] stated she didn't know there was going to be a shooting that day even after hearing the word 'jale.' She never said, if you remember, when it was said, who was around when it was said, whether my client [Rossier] heard it, or whether anybody else heard it. . . . There is no evidence that my client [(Rossier)] knew anything about this. There is no evidence that it was anything more than my client going with her boyfriend to watch the tagging, maybe to do tagging, maybe to go to this new clique. But no evidence she knew anything about this shooting being talked about by all the individuals. . . . She

2. *Pretrial Motions*

Rossier's pretrial motion for severance of the charges against her on the ground the strong evidence of her codefendants' guilt would impermissibly taint her was denied by the trial court. Sanchez did not move to sever his case from Rossier's.

3. *The Reference Hearing*

Nine witnesses testified at the evidentiary hearing. Sanchez called Hopson; Joanne Sanchez, Bryan Sanchez's sister; Manuel Covarrubias, an employee at the restaurant managed by Sanchez's father; Fidel Sanchez; David Piper, an attorney who worked with Graysen during his representation of Sanchez; Donald Tickle, Sanchez's appellate counsel; and Mark Shapiro, codefendant Rafael Fuentes's trial counsel. Respondent called Valerie Salkin, the trial prosecutor, and Larry Mendez, another restaurant employee. At the outset of the hearing the parties stipulated Graysen had died, which Judge Coen reported hampered his ability to respond to our questions since he did not have the benefit of Graysen's explanation for his actions and omissions. Judge Coen also expressly found Fidel and Joanne Sanchez's credibility "suspect." To the extent their testimony conflicted with parts of Piper's testimony, Judge Coen "specifically believed Mr. David Piper and specifically disbelieved Ms. Joanne Sanchez and Mr. Fidel Sanchez."

[(Mendez)] went back with her boyfriend [(to the Red Clique meeting area)] the next day after the Temple shooting. She testified to that. She is with her boyfriend. The same as my client [Rossier] was with her boyfriend."

As we explained in our opinion on the direct appeal, the suggestion that the 18th Street gang members go on a mission or a "jale" occurred on September 6, 2003, not on August 29, 2003; and Hopson's argument Rossier and Mendez were both simply accompanying their boyfriends plainly referred to the drive-by shooting, not the tagging incident.

a. *Findings relating to Fidel Sanchez's willingness to corroborate the alibi defense and Graysen's stipulation*

Piper began working on Sanchez's case in early 2007. Based on his testimony, Judge Coen found Fidel Sanchez informed Graysen his son had worked at his restaurant on the evening of the murder and, after finishing work, had gone to the movies with Rossier and then returned to the restaurant with her around the time of the shooting, "at the latest [in] January or February, 2007." Judge Coen further found Fidel Sanchez had advised Graysen of his ability to corroborate Sanchez's alibi before January 2007, perhaps as early as their first meeting in September 2005 and again in late October or early November 2005, although Judge Coen concluded Joanne Sanchez's testimony her father would repeat there was an alibi defense every time he spoke to an attorney was not credible. Judge Coen also found Fidel Sanchez indicated a willingness to testify well before the trial date and never indicated a refusal to testify. Specifically, he found "Fidel Sanchez first indicated a willingness to testify at the latest, and most likely before, January or February, 2007."

Prior to trial former deputy district attorney (now Judge) Valerie Salkin was aware Sanchez might present an alibi defense. However, Graysen did not inform her Fidel Sanchez would be an alibi witness until the end of the People's case. When Salkin complained about the late revelation of the witness and the apparent serious discovery violation,[6] Graysen explained it was not a discovery violation at all because he did not have the information earlier—that is, he advised Salkin that Fidel Sanchez had just told him Sanchez was with him at the time of the drive-by shooting. Salkin then said, if the witness testified that he had given the information to Graysen at some point long before trial, "I was going to call Mr. Graysen to testify to what I just said, which is to testify that Fidel had just told him this." The stipulation between Graysen and Salkin was a compromise to resolve the late discovery issue.

[6] Salkin testified she also told Graysen his belated disclosure of the witness was unethical.

Because of Graysen's death, Judge Coen was unable to make any findings regarding what, if any, investigation or review of his files Graysen conducted before entering into the stipulation with Salkin concerning Fidel Sanchez's testimony. However, Judge Coen noted "it is inconceivable that Attorney Graysen was unaware of Fidel Sanchez's statements until after the start of the trial, i.e., March 1, 2008."

b. *Findings relating to Graysen's knowledge of Rossier's inconsistent defense and the decision not to move to sever Sanchez's trial*

Based on Hopson's unrebutted testimony, Judge Coen found Graysen had informed Hopson of Sanchez's alibi defense, including Rossier's involvement in it, 60 days prior to trial. A month to six weeks thereafter, Hopson told Graysen Rossier would not join in that defense. Judge Coen was unable to make any findings regarding the tactical considerations evaluated by Graysen in deciding not to file a motion to sever Sanchez's trial.

c. *Findings relating to Graysen's deficient performance*

Noting his own experience of almost 27 years as a criminal trial judge and 11 years as a criminal trial prosecutor, Judge Coen found Graysen's stipulation concerning Fidel Sanchez and his decision not to move for severance "fell below an objective standard of reasonableness. . . . Although this Court did not have the benefit of an explanation for Attorney Graysen's actions and omissions, the record before the Court shows that Attorney Graysen had no rational tactical purpose for his incompetent act and failure to act."

With respect to prejudice, Judge Coen concluded, based on our opinion on the direct appeal, the evidence of Sanchez's guilt was extremely strong. In addition to the testimony of his accomplices connecting him to the drive-by shooting, Sanchez had been arrested two days after the murder in the stolen minivan used in the crime, his fingerprints were found on the vehicle and forensic tests confirmed a rifle recovered from the minivan at the time of Sanchez's arrest was the murder weapon. On the other hand, Judge Coen found the stipulation concerning Fidel Sanchez did not eviscerate Sanchez's case and the independent evidence of Sanchez's guilt was sufficient to uphold denial of severance even if Sanchez and Rossier presented antagonistic defenses. Accordingly, Judge Coen found "Graysen's deficiencies on both areas of concern did not prejudice defendant."

4. *Sanchez's Exceptions to the Referee's Findings*

Judge Coen found Graysen had informed Rossier's counsel of Sanchez's alibi defense 60 days prior to trial and Hopson told Graysen Rossier would not join in that defense a month to six weeks later (that is, approximately 15 to 30 days before trial). In his exception to the referee's findings, Sanchez quotes Hopson's testimony that he advised Graysen he was not joining in his defense a month or six weeks prior to trial. Other than this detail, Sanchez's exceptions challenge only the referee's finding that Graysen's deficient performance as trial counsel did not prejudice Sanchez.

5. *The Attorney General's Exceptions to the Referee's Findings*

The Attorney General's principal objection to the referee's report is that Judge Coen did not consider, let alone credit, Graysen's personal declaration dated September 18, 2009 (submitted with the Attorney General's informal response to Sanchez's petition for writ of habeas corpus). In that declaration Graysen averred he did not know about Fidel Sanchez's confirmation of Sanchez's alibi defense and his willingness to testify until on or after March 1, 2008. Accordingly, the stipulation he entered with the prosecutor was accurate and was necessary to blunt her objection to the identification of the witness at such a late date.

The Attorney General also argues Judge Coen ignored Graysen's explanation of his tactical reasons for failing to file a severance motion (basically his evaluation "that the [trial judge] had correctly analyzed the severance issue" when he denied the other parties' motions) and contends "as a matter of law" the trial court could not have granted a severance motion on the ground of antagonistic defenses had one been made by

Graysen.[7] Accordingly, Graysen could not have provided ineffective assistance by failing to file the motion.

DISCUSSION

1. *Adoption of the Referee's Factual Findings*

We have compared the referee's report to the transcript of the evidentiary hearing. The factual discussion and record citations are accurate and reliable. The report, including its credibility discussion, is thorough and convincing and is fully responsive to our questions.

As discussed, the only significant challenge to the referee's findings is the Attorney General's objection that Judge Coen ignored Graysen's personal declaration, which had been filed with the respondent's initial, informal response to the habeas petition. The Attorney General's exception to the findings on this ground is misplaced. A reference hearing following issuance of an order to show cause is subject to the same rules of evidence as a criminal trial. (*In re Miranda* (2008) 43 Cal.4th 541, 574-575; *In re Fields* (1990) 51 Cal.3d 1063, 1070.) An out-of-court declaration is hearsay and, unless subject to some exception permitting it to be admitted, is properly excluded from the hearing upon timely and proper objection. (Evid. Code, § 1200; see *In re Miranda*, at p. 575; *In re Scott* (2003) 29 Cal.4th 783, 822-823.) Indeed, in this case respondent did not even attempt to introduce Graysen's declaration into evidence at the reference hearing; and Judge Coen correctly ruled, in response to an inquiry from Sanchez's counsel, that testimony concerning statements made by Graysen was hearsay.

Accordingly, we adopt the referee's factual findings on questions 1 through 8. However, the significance of those findings to the legal issues raised by Sanchez's petition—whether Graysen's representation fell below an objective standard of

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[7] The Attorney General also takes issue with the referee's finding that Graysen knew a month or so before trial that Rossier's counsel intended to present a defense that was inconsistent with Sanchez's alibi. This exception is based on selected excerpts from Hopson's testimony at the evidentiary hearing and the assertion Graysen could not foresee Rossier's defense counsel's closing argument prior to trial.

reasonableness under prevailing professional norms and, if so, whether his deficient performance was prejudicial, matters embraced within our question 9—is for us to determine. (See *In re Scott*, *supra*, 29 Cal.4th at p. 824 [referee's credibility determinations and resolution of disputed facts are entitled to great weight; "[t]he significance of those findings to the legal issues is for us to determine"]; *People v. Ledesma* (1987) 43 Cal.3d 171, 219 [where the referee's factual findings are supported by ample, credible evidence, they are entitled to great weight; but legal conclusions and resolution of mixed law-fact questions are subject to independent review].)

2. *Governing Legal Principles*

a. *Habeas corpus*

""""For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended."""" (*In re Avena* (1996) 12 Cal.4th 694, 710.) "'Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them.' [Citation.] The petitioner 'must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus.'" (*In re Price* (2011) 51 Cal.4th 547, 559.)

b. *Ineffective assistance of counsel*

"'To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant.'" (*In re Roberts* (2003) 29 Cal.4th 726, 744-745; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma, supra,* 43 Cal.3d at p. 217.) With respect to the requisite showing of prejudice in a habeas corpus proceeding alleging trial counsel was incompetent, "'the petitioner must show us what the trial would have been like, had he been competently represented, so we can compare that with the trial that actually occurred and determine whether it is reasonably probable that the result would have been different.' [Citation.] After weighing the available evidence, its strength and the strength of the evidence the prosecution presented at trial [citation], can we conclude petitioner has shown prejudice? That is, has he shown a probability of prejudice 'sufficient to undermine confidence in the outcome?'" (*In re Hardy* (2007) 41 Cal.4th 977, 1025.)

3. *Trial Counsel's Conduct*

a. *The stipulation*

There can be no question the value of Fidel Sanchez's testimony corroborating Sanchez's alibi defense was significantly undermined by the stipulation between Graysen and the prosecutor that the first time Fidel Sanchez spoke with Graysen about being with Sanchez on the night of September 6, 2003 was on, or shortly after, March 1, 2008. Indeed, in closing argument the People asserted Fidel Sanchez had "never told anybody that his son was at Palermo's the night of the murder. That included his attorney. We stipulated to that. He never even told—Mr. Fidel Sanchez never told Mr. Graysen he was part of this alibi until during the last month. You heard a stipulation Mr. Graysen had this case for like two years. He is just coming in and trying to create an alibi because the evidence against his son is overwhelming."

As established by the evidence at the reference hearing and found by Judge Coen, Graysen knew Fidel Sanchez could corroborate his son's alibi defense at least a year prior to the commencement of the trial. Moreover, Fidel Sanchez indicated a willingness to testify well before the trial date. There was no rational tactical reason for Graysen not to timely notify the People Fidel Sanchez would be a defense witness. We fully agree with Judge Coen's conclusion that Graysen's failure to do so and his subsequent entry into the factually inaccurate stipulation in an effort to salvage Fidel Sanchez's testimony constituted deficient performance by trial counsel that fell below an objective standard of reasonableness under prevailing professional norms. (See *Strickland v. Washington, supra*, 466 U.S. at p. 694; *People v. Gamache* (2010) 48 Cal.4th 347, 381.)[8]

b. *The omitted motion to sever*

The issue of Graysen's failure to move to sever Sanchez's trial from Rossier's is not as straightforward. Granting such a motion, although not required under the facts as known to the parties and the trial court, would have been within the court's broad discretion. Because there is a reasonable probability a motion to sever would have been granted, Graysen's performance was deficient in this regard as well.

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly unless the court orders separate trials." (Pen. Code, § 1098; see *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40 ["[j]oint trials are favored because they 'promote [economy and] efficiency' and "'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts"'"].) Thus, there is a legislative (and judicial) preference for joint trials when authorized. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150.) Nonetheless, the trial court retains discretion to order separate trials if necessary to avoid undue prejudice to one of the defendants. (*Ibid.* ["'the court may, in its discretion, order separate trials "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony"'"]; accord, *People v. Box* (2000) 23 Cal.4th 1153, 1195, disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10; see *People v. Lewis* (2008) 43 Cal.4th 415, 452 ["[t]he court may, in its discretion, order separate trials

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[8] Although the Attorney General disputes the referee's factual findings regarding the circumstances leading up to Graysen's entry into the stipulation (because he failed to accord any weight to Graysen's inadmissible declaration), there is no challenge to Judge Coen's assessment, based on those findings, that Graysen's performance in this regard was "incompetent."

if, among other reasons, there is an incriminating confession by one defendant that implicates a codefendant, or if the defendants will present conflicting defenses"].)

"Antagonistic defenses alone do not compel severance." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.) "[A] trial court, in denying severance, abuses its discretion only when the conflict between the defendants *alone* will demonstrate to the jury that they are guilty. If, instead, 'there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance.'" (*People v. Letner and Tobin, supra*, 50 Cal.4th at p. 150.)[9]

Here, in his closing argument Hopson failed to even mention Sanchez's alibi defense, which would have exonerated Rossier as well—a conspicuous silence that surely weakened whatever persuasive force Sanchez and his father's testimony may otherwise have had. Yet, as the Attorney General has emphasized, Rossier did not testify she was in the stolen minivan with Sanchez during the Bellevue Avenue drive-by shooting (she did not testify at all), nor did Hopson concede that fact in his argument. Rather, he argued the People's accomplice witnesses, whose credibility he vigorously attacked, testified only that Rossier had accompanied Sanchez that evening without any prior knowledge a shooting had been planned: Rossier was just "with her boyfriend." Although not affirmatively supportive of Sanchez's alibi, Rossier's trial strategy was neither antagonistic to, nor irreconcilable with, Sanchez's defense.

Under these circumstances denial of a motion to sever, if Graysen had made one, would not have been reversible error—that is, an abuse of the trial court's considerable discretion. (See *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 41 [court's denial of a motion for severance is reviewed for an abuse of discretion, "judged on the facts as they appeared at the time of ruling"]; *People v. Balderas* (1985) 41 Cal.3d 144,

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9 "'[M]utual antagonism' only exists where the acceptance of one party's defense will preclude the acquittal of the other." (*People v. Hardy* (1992) 2 Cal.4th 86, 168.)

171 [appellate court reviews trial court's denial of pretrial severance motion based on the facts known and the showing made at the time of the motion itself].)

However, the Attorney General misstates the law in contending the trial court "could not have granted a severance" to Sanchez and, therefore, Graysen could not have provided ineffective assistance by failing to request it. Based on the information Graysen had in advance of trial concerning Rossier's defense strategy, as found by the referee, granting a motion to sever would have been well within the trial court's discretion. Moreover, a motion to sever from Sanchez would have complemented Rossier's own motion for a severance, which was based on the joinder of charges involving the September 6, 2003 drive-by shooting with charges relating to August 29, 2003 and September 8, 2003, which named her codefendants but not Rossier.

In sum, a motion to sever Sanchez's and Rossier's trials *might* have been granted. If it had, the negative impact of Rossier's failure to adopt Sanchez's alibi defense would have been avoided. Conversely, there was no conceivable tactical benefit to Sanchez in failing to request severance. Accordingly, we agree with Judge Coen's evaluation that Graysen's decision not to move for severance fell below an objective standard of reasonableness.

4. *Prejudice*

To establish prejudice, Sanchez must prove he received an unreliable or fundamentally unfair trial as a result of his trial counsel's failures. (*In re Visciotti* (1996) 14 Cal.4th 325, 352; see also *Strickland v. Washington, supra*, 466 U.S. at p. 686; *In re Harris* (1993) 5 Cal.4th 813, 833.) He has failed to carry that burden.

To be sure, Graysen's deficient lawyering compromised Sanchez's alibi defense. Had he timely identified Fidel Sanchez as a witness and successfully moved for a severance of Sanchez's trial from Rossier's (a possible, but by no means inevitable, result), the jury would not have heard the stipulation that devastated Fidel Sanchez's credibility or been exposed to Rossier's implicit denial of her role in Sanchez's proffered alibi. But we are persuaded a somewhat stronger alibi would not have had any impact on the outcome of this trial, and counsel's errors do not undermine our confidence in that outcome. (See *Porter v. McCollum* (2009) 558 U.S. ___ [130 S.Ct. 447, 455-456, 175 L.Ed.2d 398] [defendant not required to show that counsel's deficient conduct "more likely than not altered the outcome," but rather that he establish "'a probability sufficient to undermine confidence in [that] outcome'"].)

With respect to the alibi defense itself, as the Attorney General notes, there was no physical evidence supporting Sanchez's claim he worked at his father's restaurant and then went to a movie and dinner with Rossier: no timecard, paycheck, ticket stubs or security videotapes, even though the restaurant had security cameras.[10] In addition, Fidel Sanchez's testimony was highly suspect even without the additional problems created by Graysen's incompetence. He did not tell police officers when initially interviewed that his son had been with him throughout the day and evening of the murder. Moreover, Fidel Sanchez had also provided an alibi for his son for an unrelated home invasion robbery committed the day after the drive-by shooting. Although Fidel Sanchez insisted to police his son was at home with him when the robbery occurred, Sanchez subsequently pleaded guilty to the offense, casting serious doubt as to the father's veracity and plainly supporting the prosecutor's argument he was prepared to lie to protect his son.

Sanchez's active role in the Bellevue Avenue shooting as the driver of the stolen minivan was established by three witnesses who were inside the vehicle (David Kuk, Santos Kuk and Dorma Pedro Mendez), as well as Norbeto Pacheco, who provided the weapons used in the incident. Further incriminating evidence was furnished by James Felix, a government informant who was a member of the Hoovers clique of the 18th Street gang. The Kuk brothers also described the planning that preceded the crime, including Sanchez's participation in the discussion of a mission or "jale," at the Red Shield clique's gathering spot at 10th Place and Albany Street earlier that day. Counsel

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[10] As discussed, neither of the restaurant employees who generally confirmed Sanchez's and his father's testimony that Sanchez often worked at the restaurant on Saturdays was able to remember whether he had been there at all on September 6, 2003, let alone corroborate Sanchez's presence at specific times critical to the alibi defense.

for the various codefendants at the joint trial vigorously challenged the credibility of these witnesses. The jury was cautioned that Pacheco was an accomplice as a matter of law and that several other witnesses may be accomplices, whose testimony was therefore to be viewed with caution. Nonetheless, the jury believed these gang members' description of the evening's events, including not only Sanchez's role but also Rossier's. The jury's credibility judgments were amply justified by the record.

Finally, the forensic evidence that was introduced at trial, although certainly not conclusive, did link Sanchez to the Bellevue Avenue drive-by shooting. Two days after the offense, on September 8, 2003, Sanchez was arrested in the stolen minivan that had been used in the crimes. The murder weapon (a .22 caliber rifle) was still inside the vehicle. In addition, cell phone records established the phone Sanchez had in his possession when arrested, which was registered to Rossier's father, had been used to make calls on the evening of September 6, 2003 utilizing transmission towers in proximity to the location of the shootings. Although those records do not establish who, in fact, placed the calls, the inference it was either Sanchez himself or Rossier is strong; either scenario eviscerates Sanchez's defense.

In sum, the evidence of Sanchez's participation in the drive-by shooting was extremely strong, and his alibi defense unconvincing even without regard to the harmful effects of Graysen's errors. Sanchez was constitutionally entitled to a better defense; but we are nevertheless convinced, based on our thorough review of the trial record, he received a fundamentally fair trial and his convictions for murder and attempted murder are reliable.

DISPOSITION

The petition for writ of habeas corpus is denied.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

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COUNTY OF LOS ANGELES

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SUPERIOR COURT OF T HE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

In re

BRYAN SANCHEZ,

On Habeas Corpus.

Case No. B218637

(Los Angeles County Superior Court No. BA272661)

FINDINGS OF REFEREE

INTRODUCTION

By order of the Court of Appeal, Second Appellate District, Division Seven, this Court has been appointed to sit as a referee to conduct an evidentiary hearing in the above-entitled case.

Such hearing was held on October 12 and 13, 2011. Transcripts of all testimony are attached.

This report does not describe in detail the evidence presented at the reference hearing. The report contains the Court's findings of fact on the submitted reference questions and a summary supporting those findings. (In re Bolden (2009) 46 Cal.4th 216)

The requested responses were hampered by the fact that the focus of the reference hearing, Attorney William Graysen, is deceased. (RT, p.1).

In addition, this Court has determined that the credibility of witnesses Joanne Sanchez and Fidel Sanchez is suspect. The testimony of Joanne Sanchez that her father, Fidel Sanchez, would repeat that there was an alibi defense every time he spoke to an attorney was not credible. The testimony of Fidel Sanchez that he was "confused," during trial, with the cross-examination questions, interpreted in Spanish by a court-certified interpreter (but, apparently, he was not confused by the same interpretation during direct examination), and was also "confused" by questions, in Spanish, asked by the investigating detective, was not credible. Both witnesses' testimony conflicted with parts of the testimony of Attorney David Piper. As to those areas of conflict, this Court specifically believed Mr. David Piper and specifically disbelieved Ms. Joanne Sanchez and Mr. Fidel Sanchez.

QUESTIONS AND FINDINGS

1. When did Fidel Sanchez first tell William Graysen his son Bryan Sanchez was with him in the evening of September 6, 2003? What did he say?

Fidel Sanchez told Attorney David Piper, Attorney Graysen's associate, that petitioner had been working at the restaurant where Fidel Sanchez worked on the evening of the murder. Also, Fidel Sanchez told Mr. Piper that petitioner and his girlfriend, former co-defendant Rossier, went to a movie afterwards and returned back to the restaurant. (testimony of David Piper, RT, p. 75). Mr. Piper mentioned this conversation to Attorney Graysen in January or February, 2007. (RT, p. 79). Thus, Fidel Sanchez told Attorney Graysen re petitioner's alibi, via Mr. Piper, <u>at the latest</u>, January or February, 2007.

Per testimonies of Joanne Sanchez and Fidel Sanchez, Attorney Graysen was told the above during the initial meeting between Fidel Sanchez and Attorney Graysen on September 20, 2005. Mr. Piper joined Attorney Graysen's firm June, 2006 (RT, p. 72) and first started working on petitioner's case in January or February, 2007 (RT, p. 79). It is reasonable to conclude, and the Court so finds, that Fidel Sanchez informed Attorney Graysen of the above-mentioned statements before January, 2007.

2. On the first occasion that Fidel Sanchez spoke to Graysen about the alibi defense, did he

indicate either a willingness to testify or a refusal to testify for his son?

Per testimonies of Joanne Sanchez and Fidel Sanchez, Fidel Sanchez told Attorney Graysen that Fidel Sanchez was willing to testify since the initial meeting of September 20, 2005. Per their testimonies, as well as the testimony of Attorney David Piper, Fidel Sanchez never indicated a refusal to testify on behalf of petitioner. It is the Court's finding that Fidel indicated a willingness to testify well before the trial date in this case. Further, it is the Court's finding that Fidel Sanchez never indicated a refusal to testify.

3. Did Fidel Sanchez speak to Graysen about Sanchez's alibi defense on more than one occasion prior to the start of trial? If so, when and what did he say on each occasion?

Per testimonies of Joanne Sanchez and Fidel Sanchez, Fidel Sanchez told Attorney Graysen that petitioner was working in a restaurant with Fidel Sanchez on the date of the crime. Further, petitioner left at approximately 4:30 p.m. and returned at approximately 6:30 p.m. He again left. Petitioner returned at 10:00 or 10:30 p.m. with former co-defendant Rossier and Fidel Sanchez returned to his residence with petitioner. These statements were told to Attorney Graysen by Fidel Sanchez, via interpretation by Joanne Sanchez, on September 20, 2005, late October or early November, 2005, and December 6, 2005. Fidel Sanchez further testified that he related the above statements to Attorney Graysen several times, but he remembered eight. (RT, p.62)

Per Attorney Piper, each Friday afternoon, he and Attorney Graysen would meet and discuss their various cases, including the instant case. (RT, p.76) Attorney Piper would "repeatedly" discuss the alibi defense. (Id.)

It is the Court's finding that Fidel Sanchez gave the above statement to Attorney Graysen, either personally or via Attorney Piper, on more than one occasion, starting at the latest, January or February, 2007 and most likely before. (see Findings, Question 1, supra).

4. When did Fidel Sanchez first indicate a willingness to testify at trial?

Per the testimonies of Joanne Sanchez and Fidel Sanchez, Fidel Sanchez indicated his willingness to testify at the initial meeting with Attorney Graysen, September 20, 2005. Per the testimony of Attorney Piper, he met with Fidel Sanchez shortly after taking over the case in January or February, 2007. Further, Attorney Piper and Fidel Sanchez discussed petitioner's alibi numerous times. (RT, p. 81)

It can be reasonably inferred, and the Court so finds, that, as Fidel Sanchez repeatedly mentioned petitioner's alibi and his part in the alibi and never indicated a refusal to testify, that he indicated a willingness to testify. The Court further finds that Fidel Sanchez first indicated a willingness to testify at the latest, and most likely before, January or February, 2007.

5. What, if anything, did Graysen disclose to the People before trial concerning Sanchez's alibi defense and witnesses who could support or corroborate that defense?

Per the testimony of Judge Valerie Salkin, the former deputy district attorney who represented the People, she was assigned the case approximately three or four weeks prior to trial. (RT, p.210) In the file, there were various items of defense discovery (Exhibit I). A district attorney investigator interviewed various defense witnesses that were presented to the People during discovery. (RT, p.217) From a review of Exhibit I, it appears that alibi was a possible defense. However, a review of Exhibit I shows that there was no concrete evidence of petitioner's alibi for the date of the crime. Judge Salkin testified, and the Court so finds, that it was not until near the end of the People's case, or after the People rested, that Attorney Graysen informed the prosecutor that Fidel Sanchez would be an alibi witness.

6. Prior to entering into the stipulation with the prosecutor concerning Fidel Sanchez's testimony, did Graysen review any files or conduct any investigation to confirm the timing of Fidel Sanchez's statements to him?

Due to the death of Attorney Graysen, no evidence was presented to answer this question. Based on the Court's prior findings (supra), it is inconceivable that Attorney Graysen was unaware of Fidel Sanchez's statements until after the start of the trial; i.e., March 1, 2008. However, there was insufficient evidence presented for the Court to make any findings as to this question.

7. What, if anything, did Graysen do to investigate whether Rossier's defense would be supportive of, or inconsistent with, Sanchez's alibi defense for the Bellevue Avenue drive-by shooting?

Attorney Kirt Hopson, counsel for former co-defendant Rossier, testified that he was informed by Attorney Graysen of petitioner's alibi defense, which involved former co-defendant Rossier, sixty days prior to trial. (RT, p.9) A month to six weeks thereafter, Attorney Hopson told Attorney

Graysen that former co-defendant Rossier would not join in that defense. (RT, p.10) Apparently, this was discussed and debated among counsel for all trial defendants (RT, p. 201-202) Attorney Piper, Attorney Graysen's associate, was not familiar with former co-defendant Rossier's defense. (RT, p. 77)

The Court adopts, as findings, the events as described in the preceding paragraph. Due to the death of Attorney Graysen, the Court cannot make any further findings.

8. What tactical considerations did Graysen evaluate in deciding not to file a motion to sever Sanchez's trial from Rossier's?

Due to the death of Attorney Graysen, no evidence was presented regarding this question. The Court cannot make any finding based on the evidence presented.

9. If Graysen's representation of Sanchez fell below an objective standard of reasonableness under prevailing professional norms with respect to his decision to enter into the stipulation concerning Fidel Sanchez or his decision not to move to sever his client's trial from Rossier's or both, did his deficient performance prejudice Sanchez?

To show that an attorney was not "reasonably effective" petitioner must prove that counsel's errors were so serious as to deprive defendant of a fair trial in that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different (Strickland v. Washington (1984) 466 U.S. 668).

Thus, there are two components to a claim of defective performance of counsel: 1) petitioner must show that counsel's performance was deficient, i.e., counsel's representation fell below an objective standard of reasonableness; and 2) defendant must show prejudice resulting from counsel's deficiencies, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. "Reasonable probability" is defined as one that undermines confidence in the verdict. (In re Marquez (1992) 1 Cal.4th 584)

As to the first part of the Strickland test, the Court finds that Attorney Graysen's stipulation concerning Fidel Sanchez and his decision not to move, per Penal Code §1098, for severance fell below an objective standard of reasonableness. Although this Court relied on the testimony of Attorney Donald Tickle, petitioner's appellate and habeas counsel, it was apparent that Attorney

Tickle harbored a bias and was not basing his opinion on objective reasonableness. However, this Court is also relying on its own experience of almost 27 years as a criminal trial judge, 11 years as a criminal trial prosecutor, as well as being a Certified Specialist in Criminal Law. Although this Court did not have the benefit of an explanation for Attorney Graysen's actions and omissions, the record before the Court shows that Attorney Graysen had no rational tactical purpose for his incompetent act and failure to act. Consequently, this Court finds that the petitioner has shown, by a preponderance of the evidence, the first prong of the Strickland test.

As to the second prong of the Strickland test, i.e., prejudice, the Court has the benefit of the appellate opinion in this matter, B211207. It is apparent, from the opinion in this case, that evidence of petitioner's guilt was extremely strong. Independent evidence of guilt against a party seeking severance due to antagonistic defenses (or, arguably, a party who should have sought severance due to antagonistic defenses) is sufficient to uphold a denial of severance. It is not the conflict alone that demonstrates guilt. (People v. Tafoya (2007) 42 Cal.4th 147; in accord, People v. Carasi (2008) 44 Cal.4th 415). If the conflict between co-defendants, alone, demonstrates to the jury that they are guilty, then there is prejudice. If, instead, there exists sufficient independent evidence against the party who moved (or should have moved) for severance, it is not antagonistic defenses that caused the prejudice. (People v. Letner & Tobin (2010) 50 Cal.4th 99)

The stipulation concerning Fidel Sanchez was not such that it eviscerated the petitioner's case.

Here, besides evidence of petitioner's accomplices connecting him to the crime, there was evidence that petitioner was arrested two days after the instant crime in the same vehicle used in the crime. Petitioner's fingerprints were found on the vehicle and forensic tests confirmed that the fatal bullet had been fired from a rifle recovered from the vehicle at the time of petitioner's arrest. Also, shell casings found at the crime scene matched the rifle found in the vehicle.

It is the finding of this Court that Attorney Graysen's deficiencies on both areas of concern did not prejudice defendant.

Date: 10-18-11

Respectfully submitted,

Ronald S. Coen
Judge of the Superior Court (sitting as Referee)

CV 13-07810 PA (MRW)
LODGED DOCUMENT NO. 15

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

COURT OF APPEAL - SECOND DIST.
FILED
SEP 27 2010
JOSEPH A. LANE Clerk
D. LEE Deputy Clerk

In re BRYAN SANCHEZ

on Habeas Corpus.

B218637

(Los Angeles County
Super. Ct. No. BA272661)

ORDER TO SHOW CAUSE

TO THE SECRETARY OF THE DEPARTMENT OF CORRECTIONS AND REHABILITATION:

Pursuant to the Supreme Court's order on transfer (S185503, filed September 22, 2010), this court's order to show cause returnable before the superior court, filed on July 19, 2010, is vacated.

Good cause appearing therefor, you are hereby ordered to show cause before this court, in its courtroom at 300 South Spring Street, Los Angeles, California when ordered on the court's calendar, why you should not be compelled to grant the relief prayed for in the captioned petition.

The written return shall be served and filed on or before October 18, 2010. A traverse may be served and filed by petitioner within 15 days after the filing of the written return.

PERLUSS, P. J. WOODS, J. ZELON, J.

CV 13-07810-PA (MRW)
LODGED DOCUMENT NO. 6

Court of Appeal, Second Appellate District, Division Seven - No. B21120

S185113

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

EDGAR JAVIER FLORES et al., Defendants and Appellants.

The petitions for review are denied.

SUPREME COURT
FILED

NOV 1 0 2010

Frederick K. Ohlrich Clerk

Deputy

GEORGE
Chief Justice

CV 13-07810 PA (MRW)
LODGED DOCUMENT NO. 1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. EDGAR FLORES et al., Defendants and Appellants.	B211207 (Los Angeles County Super. Ct. No. BA272661)

COURT OF APPEAL - SECOND DIS
FILED
JUL 19 2010
JOSEPH A. LANE Clerk
Deputy Clerk

APPEALS from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Reversed in part and affirmed in part.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant, Edgar Flores.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant, Rafael R. Fuentes.

Donald R. Tickle, under appointment by the Court of Appeal, for Defendant and Appellant, Bryan Sanchez.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant, Jazmin Rossier.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant, Pedro Aguilar.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Joseph P. Lee, and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Following a lengthy joint jury trial, Rafael R. Fuentes was found guilty of the first degree murder of Juan Monsivais and the attempted premeditated murder of Manuel De La Rosa in a gang-related, drive-by shooting on September 6, 2003. Edgar Javier Flores, Bryan Sanchez and Jasmin Rossier were each found guilty of second degree murder and attempted premeditated murder in connection with the shooting. Sanchez and Pedro Aguilar were found guilty, but Fuentes was acquitted, of conspiracy to commit murder in connection with an incident two days later involving Marshall High School; and Fuentes was convicted of unlawfully carrying a loaded firearm as the result of another shooting that had occurred on August 29, 2003, several days before the drive-by shooting. Gang enhancement allegations were found true for each of the crimes; and some, but not all, firearm-use enhancement allegations were also found true. The issues on appeal primarily concern the trial court's denial of various motions to sever counts and/or defendants and the court's ruling that evidence of the August 29, 2003 shooting was admissible under Evidence Code section 1101, subdivision (b), to prove a fact other than disposition to commit the September 6, 2003 shooting. The appellants also contend the trial court committed other evidentiary, instructional and sentencing errors.[1]

We reverse Sanchez's and Aguilar's convictions for conspiracy to commit murder and remand for a new trial on that count because the trial court failed to instruct the jury that conspiracy to commit assault with a firearm was a lesser included offense of

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[1] Pursuant to California Rules of Court, rule 8.200(a)(5) each appellant has joined in the others' arguments to the extent they are helpful to his or her appeal. For clarity, although mindful of the joinders, we identify the individual who has raised a specific claim in our discussion of the issues.

conspiracy to commit murder as alleged in the accusatory pleading. We modify the judgment as to Flores to correct a sentencing error, acknowledged by the Attorney General, and order corrections in the abstracts of judgment for Flores and Rossier. In all other respects, the judgments are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The 18th Street Gang*

The 18th Street gang is the largest Hispanic criminal street gang in the United States with, at the time of trial, as many as 30,000 members located in a number of different geographic cliques or subsets. Red Shield, Grandview and Hoover Locos are three such cliques of the 18th Street gang with adjacent territories in Los Angeles. Each clique had approximately 50 to 100 members. Fuentes (sometimes known as Sniper), Flores (Mosca or Little Mosca), Sanchez (Smiley), Rossier (Giggles) and Aguilar (Bouncer) were all 18th Street gang members. Fuentes, Sanchez and Rossier belonged to the Red Shield clique. Sanchez was considered to be the leader of the younger members of that clique; Payaso (a Spanish word for clown) was an adult leader of the clique. Flores was a member of the Grandview clique; Aguilar a member of Hoover Locos.

The three 18th Street cliques got along with each other, and their members were known to socialize together and cooperate in joint gang activities. The 18th Street gang's rivals include Temple Street, Silver Lake 13, White Fence and Mara Salvatrucha.

2. *The Vendome Street Tagging and Shooting*[2]

The Red Shield clique was centered near West 10th Place and Albany Street, just west of the Harbor Freeway, close to downtown Los Angeles. In the summer of 2003 members of the Red Shield clique (and perhaps other members of the 18th Street gang) wanted to expand the Red Shield territory into the Echo Park-Silver Lake area of Los

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[2] Our general description of events, including the offenses charged and the roles of the various defendants and witnesses, is based on the evidence presented at trial, viewing the whole record in the light most favorable to the judgment. (Cf. *People v. Zamudio* (2008) 43 Cal.4th 327, 357.) Where material to our resolution of an issue raised on appeal, we identify any substantial conflicts in the evidence.

Angeles. Payaso participated in the discussions with other Red Shield clique members, who specifically targeted an adjacent neighborhood in territory claimed by the Silver Lake gang.

On August 29, 2003 Sanchez called a meeting near the home of another Red Shield member. Sanchez, Fuentes, Rossier, Norberto Pacheco (also known as Mousey) and several others were present at the meeting. The group talked about being present and "tagging" (signing the name of the gang or a gang member in a public place with spray paint or a thick marker) more in the Silver Lake area, and Sanchez told the group they were going out to do some tagging that day.

After the meeting Sanchez and Rossier, who were in a dating relationship, together with Fuentes and Roxana Ramos (Nena), who were also in a dating relationship, left the meeting with Jamie Gutierrez in a white minivan stolen by Gutierrez. (Ramos testified that Gutierrez had used Rossier's keys to steal the minivan; how Rossier's keys were used is not clear from the record.) Before any tagging occurred, however, Gutierrez left the group; and Fuentes joined the others in the minivan. Sanchez, who was carrying a handgun, drove the minivan to the Vendome neighborhood in Silver Lake, parking the minivan on Silver Lake Boulevard near Vendome Street. Sanchez then used spray paint to cross out Silver Lake gang graffiti and to overwrite it with an 18th Street, Red Shield identifier.

The tagging was interrupted by the sound of a police siren. The gang members hid in the minivan and then drove a short distance and parked in a driveway off Vendome Street. Sanchez and Ramos walked down the driveway to the street while Rossier and Fuentes remained in the parked minivan. A car drove up; and Val Rangel, a Silver Lake gang member got out. Rangel confronted Sanchez and asked him for his gang affiliation. Sanchez replied, "Wicked Side 18th Street." Rangel laughed and pointed a gun at Sanchez, saying something about a funeral (perhaps "this is your funeral" or "prepare for your funeral"). Sanchez whistled to Rossier. She walked down the driveway, then ran back to the minivan. Rossier returned with Fuentes, who shot Rangel with a handgun.

(The trial court issued a limiting instruction that the jury was not to be told Rangel was killed by the gunshot.)

After the shooting Rossier and Ramos ran back up the driveway in an unsuccessful effort to get into one of the nearby apartments. They then went to Gutierrez's home, which was located in the same neighborhood as the shooting. Fuentes and Sanchez left in the minivan, but shortly thereafter also went to Gutierrez's home. Fuentes made an effort to wash the gun powder from his hands. Following the Rangel shooting, Pacheco retrieved two guns (a rifle and a shotgun) from Sanchez's house and took them to his apartment, where they were kept in a laundry bag.

3. *The September 6, 2003 Drive-by Shooting*

Brothers Santos and David Kuk, members of the Grandview clique of the 18th Street gang, lived on Bellevue Avenue near North Coronado Street, immediately north of the Hollywood Freeway in Temple Street gang territory. On the morning of Saturday, September 6, 2003 the Kuk brothers went to a Grandview meeting area, where they were joined by Flores and another 18th Street gang member, Eric Vasquez, and Vasquez's girlfriend, Dorma Pedro Mendez, who did not belong to the gang.

After some time the group walked to the Red Shield clique's territory at 10th Place and Albany Street. There they met Fuentes, Sanchez, Rossier, Pacheco and other gang members, including Benjamin Flores. The two groups spent most of the day together, drinking beer and smoking marijuana. In the evening, according to Santos Kuk, someone (Fuentes, Sanchez or Rossier) said Red Clique was trying to expand its territory to include a street in Silver Lake. It was then suggested (by Sanchez, according to Pacheco) that the group go on a mission or a "jale."[3] The Kuk brothers said they knew where to find some members of the Temple Street gang, which controlled the street where they lived and had previously assaulted Santos Kuk because he belonged to 18th Street.

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[3] "Jalar" is the Spanish verb meaning to pull; and the word "jale" is commonly used as a noun to describe work or a workplace. Testimony at trial indicated as used by Hispanic gang members "jale" has the same meaning as "a mission" and "putting in work" and connotes "to do something on the street, kill or do something."

Sanchez said he had access to a van. Fuentes, Sanchez and Pacheco apparently spoke to Payaso to let him know they were going on a jale. Rossier was close to the others during the conversation with Payaso, but did not actively participate in it.

The two Kuk brothers, Flores, Fuentes, Rossier, Vasquez, Mendez and Sanchez all got into a stolen blue minivan. Sanchez drove; Rossier was next to him in the front passenger seat. Sanchez drove the minivan to a business site off Silver Lake Boulevard where Pacheco, who had a family commitment and did not join the group in the minivan, gave them the laundry bag with the two guns and several boxes of ammunition previously kept at his home. Pacheco said there was a member of a rival African-American gang (the P-Stones) a couple of blocks away on Bellevue Avenue and told the gang members in the minivan they should kill him. According to Santos Kuk, Rossier held the bag while Fuentes removed the guns; Flores took the shotgun; Fuentes the rifle. Fuentes passed the bullets around inside the minivan before loading the guns. At this point Fuentes moved to the front passenger seat; Flores sat in the middle row by the minivan's sliding door.

Sanchez drove to Bellevue Avenue. They saw the rival gang member mentioned by Pacheco, but Sanchez said not to shoot because there was a woman with a baby nearby. Sanchez continued to drive in the neighborhood for a couple of hours, looking for "enemies" to shoot, and ended up once again on Bellevue Avenue. As the minivan drove past the Kuk brothers' home, several Temple Street gang members were seen drinking across the street. There was some discussion inside the minivan about shooting the Temple Street gang members. Sanchez drove up the street, turned around in a parking lot and returned to the Temple Street gang members. Fuentes pulled out the rifle, shouted a derogatory comment and fired repeatedly out the front passenger side window. Flores tried but was unable to get the shotgun to fire out the window of the minivan's side door. Sanchez then drove the minivan to the northbound Hollywood Freeway entrance, which was only a short distance away. While driving, there was some discussion about going to shoot members of the Mara Salvatrucha gang, but the evening eventually ended without more violence.

Juan Monsivais, who had been drinking outside his home on Bellevue Avenue with several of his cousins and a friend (at least one of whom was a Temple Street gang member) was shot and killed by a single gunshot wound to the back. Manuel De La Rosa was hit by bullets in the chest and hand and spent several days in the hospital after the shooting. Albert Hernandez told police officers immediately after the shooting that he had seen two male Hispanics in a blue Toyota van and heard someone yell at the group on the street; the front passenger had then fired 6 to 10 gunshots from what sounded to Hernandez like a small caliber semiautomatic firearm.

That night Fuentes called Pacheco and told him they had "gone to the hood of Temple Street" and "they had shot at them." Fuentes told Pacheco he had used the rifle. According to Pacheco, the following day Sanchez reported that the shotgun had jammed and said he would ask Payaso to check it. Rossier and Flores also both told Pacheco the shotgun had not worked on the mission, and Rossier said she had tried to help Flores unjam it. Payaso and Pacheco subsequently tested the shotgun, which Pacheco retrieved from the blue minivan parked near Sanchez's house, and were able to fire it without any problems.[4]

A small caliber bullet recovered from Monsivais's body was matched to the rifle recovered from the stolen blue minivan two days after the shooting. Similarly, 10 of 12 shell casings recovered at the Bellevue Avenue crime scene were determined to have been fired from the rifle. Shell casings recovered from the front passenger seat of the minivan were also fired from the rifle.

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[4] Additional evidence about the September 6, 2003 Bellevue Avenue shooting was provided by James Felix, a government informant who was a member of the Hoovers clique of the 18th Street gang.

4. *The Marshall High School Incident*

Beginning several months before September 2003, Carlos Marroquin, an 18th Street gang member associated with the Red Shield clique who attended John Marshall High School, had conversations with Sanchez about ensuring respect for the gang in the neighborhood and at the high school. During the first week of September 2003 members of the White Fence gang had come to Marshall High looking for 18th Street gang members and claiming White Fence's dominance of the school. This angered Sanchez, who also attended Marshall High and wanted the 18th Street gang to control the school. (According to Marroquin, there had previously been several hostile encounters between Marroquin and Sanchez, on the one hand, and members of White Fence, on the other hand.) Sanchez intended to do something to send a message and to earn respect for his gang and told Pacheco he was going to "bust a jale" at the school.

At lunchtime on Monday, September 8, 2003 Sanchez told Marroquin to come with him "to go get the homies" because after school "we are going on a jale to Marshall." Marroquin and Sanchez left school together. Sanchez called a taxi on his cell phone and had the driver take them to Echo Park. While riding in the taxi, Sanchez made several cell phone calls. Sanchez and Marroquin were dropped off by the taxi about two blocks from Sanchez's home, near where Sanchez had parked the blue minivan used in the September 6, 2003 drive-by shooting. Sanchez told Marroquin the minivan was stolen and had weapons inside it. Marroquin opened the laundry bag and saw the rifle and shotgun.

Sanchez used his cell phone again, apparently calling Aguilar, and then drove to Aguilar's home. Marroquin subsequently told the police Sanchez had told Aguilar on the phone he was going to "do some shit to White Fence at Marshall and to come down." Aguilar got in the minivan, and Sanchez told him they were going to "pick up some homies." Sanchez then told Marroquin to take the guns out of the bag. On the way back to Marshall, Sanchez saw James Felix, a member of the Hoovers clique of the 18th Street gang. Sanchez stopped and told Felix, "we are going to do a jale." Aguilar added that they were going to Marshall to find "the fools from MS, Mierdas [derogatory names for the Mara Salvatrucha gang, a rival of 18th Street]," that they were "gonna go hit the Mierdas" and that they had an assault rifle and a shotgun. Felix declined the invitation to join them.

Shortly thereafter two Los Angeles police officers stopped the minivan after it ran through a stop sign. A computer check disclosed the minivan had been stolen. The rifle, shotgun and ammunition were found inside the vehicle. Officers also recovered a cell phone, which Sanchez said belonged to his girlfriend. When the phone was activated, the words "Bryan and Jazmin" appeared on the screen. It was later determined that Rossier's father was the subscriber for the cell phone.

Sanchez, Aguilar and Marroquin were immediately arrested and handcuffed. After a backup unit arrived at the scene, Sanchez and Aguilar were placed in the back of a police car; and their conversation was recorded. Sanchez asked Aguilar, "What do we say fool?" and suggested "we gotta blame it on somebody . . . . Like say some names or something." However, both Sanchez and Aguilar were concerned that they not be perceived as informing on other gang members. Aguilar responded that Sanchez could tell the police another "homie" had given him the weapons without identifying the individual. Aguilar also suggested that Sanchez could say he had been asked to deliver the minivan to someone and was not told about the guns. Sanchez agreed he could do this but was worried that his fingerprints were on "the straps [guns]."

5. *The Charges*

In a second amended information Fuentes, Flores, Sanchez, Rossier and Pacheco were charged with one count of first degree murder (Pen. Code, § 187, subd. (a))[5] (count 1) and one count of attempted willful, deliberate premeditated murder (§§ 664, 187, subd. (a)) (count 2) for the September 6, 2003 drive-by shooting. The information specially alleged with respect to these two counts that Fuentes personally and intentionally discharged a firearm causing death or great bodily injury (§ 12022.53,

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[5] Statutory references are to the Penal Code unless otherwise indicated.

subds. (b)-(d)) and that a principal personally discharged a firearm within the meaning of this section. (§ 12022.53, subds. (b)-(e).) Fuentes, Sanchez and Aguilar were charged with conspiracy to commit murder (§ 182, subd. (a)(1)) (count 3) in connection with the September 8, 2003 Marshall High incident; five overt acts were alleged.[6] The second amended information also charged Fuentes with carrying a concealed firearm (§ 12025, subd. (a)(2)) (count 4) and carrying a loaded firearm in a public place (§ 12031, subd. (a)(1)) (count 5) arising out of the August 29, 2003 Vendome Street episode. It was specially alleged as to all counts that each of the defendants had committed the offenses to benefit a criminal street gang. (§ 186, subd. (b)(1).) The information also specially alleged that Sanchez and Aguilar each had suffered one prior serious or violent felony conviction within the meaning of the "Three Strikes" law. (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d).)

All defendants initially pleaded not guilty and denied the special allegations. Pursuant to a negotiated agreement, prior to trial Pacheco pleaded guilty to voluntary manslaughter with a provisional sentence of 17 years in state prison, subject to his agreement to testify truthfully against the remaining defendants. Also prior to trial the court granted Fuentes's motion to dismiss count 4 (carrying a concealed firearm), and the parties stipulated count 5 (carrying a loaded firearm in a public place) would be renumbered as count 4.[7]

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[6] Pacheco was also charged with conspiracy to commit murder in count 3 of the first amended information, but his motion to dismiss pursuant to section 995 was granted by the court.

[7] Marroquin was not charged with Sanchez and Aguilar in the second amended information for conspiracy to commit murder. Pursuant to a negotiated agreement, he pleaded guilty to being in a stolen car. He spent approximately one month in custody (in a juvenile facility) and was then placed on probation.

6. *Pretrial Motions*

a. *Motions to sever*

Rossier and Aguilar each moved to sever his or her trial from that of the other codefendants. The court acknowledged its discretion pursuant to section 1098 to determine whether, in the interest of justice, there is good cause for severance: "The court recognizes the statutory reasons for joinder, but also recognizes that, in a given case, there may be justification based upon prejudice and extraneous factors to order severance." Nonetheless, the motions were denied.

As to Rossier, who argued she would be unduly prejudiced by a joint trial because of her limited, passive role during the Bellevue Avenue drive-by shooting, the court stated, "As far as I'm concerned, this is an overriding case which justifies maintaining joinder. The evidence in this case goes directly to Ms. Rossier as it relates to actions and activities of codefendants. Ms. Rossier's mental state and specific intent and knowledge are directly at issue in view of the charges in this case . . . . I do take seriously any claim that a defendant jointly charged with other defendants may be prejudic[ed] because it may cast the individual defendant in an unfair light in view of the overwhelming evidence as to other defendants. That is not the case here."

As to Aguilar, who was charged only with conspiracy to commit murder in connection with the Marshall High incident (count 3) and was not named in any count of the second amended information with either Flores or Rossier, the court explained, "I am of the opinion that we are dealing here with [a] crime in count 3 and series of crimes in [the] other counts which are all part and parcel of a single transaction within the meaning of [the cases concerning proper joinder when the defendant seeking severance is not joined in at least one count of the accusatory pleading with all other defendants with whom he or she will be tried[8]]. Certainly, there are different charges, but one has to look

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[8] In *People v. Ortiz* (1978) 22 Cal.3d 38, 43, the Supreme Court construed section 1098 to mean "a defendant may not be tried with others who are charged with different crimes than those of which he is accused unless he is included in at least one count of the

at the contextual fabric of all of these charges, and what is happening here, and the theory of the People's case which I think is borne out by the evidence that it is all part and parcel of a single transaction of conspiracy . . . . I think it is appropriate that Mr. Aguilar remain joined with the other defendants in this case because of the fact that there is a single transaction of conspiracy in this case. And if there are going to be limiting instructions, that is, as far as I'm concerned, an appropriate way to deal with it."

b. *Evidence of uncharged crimes (the Vendome Street shooting)*

On November 29, 2006 the People moved to admit uncharged crimes evidence relating to the August 29, 2003 Vendome Street shooting against Fuentes (charged in counts 4 and 5 with firearm offenses arising from that shooting), Sanchez and Rossier pursuant to Evidence Code section 1101, subdivision (b). Oppositions to the motion were filed, and Fuentes subsequently moved to exclude all Evidence Code section 1101, subdivision (b), evidence relating to that incident or, alternatively, to sever counts 4 and 5 from the trial of the other charges.

At the hearing on the motions the People argued the evidence of the shooting, arising out of the tagging mission on August 29, 2003, was admissible to show Fuentes's, Sanchez's and Rossier's knowledge and intent with respect to the murder and attempted murder on September 6, 2003 (and, of course, relevant to the gun charge against Fuentes). The court refused to exclude the August 29, 2003 evidence, explaining, "The incident of August 29 is inextricably intertwined with the charges in this case. . . . [T]he fact that a loaded firearm was involved, and a matter of days later, there is another violent type encounter. I believe that under 1101(b) of the Evidence Code, the actions of

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accusatory pleading with all other defendants with who he is tried." Subsequent appellate decisions, however, have not read *Ortiz* to require separate trials unless multiple defendants are all charged in at least one count, provided the offenses to be jointly tried arose from the same set of circumstances. (See *People v. Wickliffe* (1986) 183 Cal.App.3d 37, 40-41 [defendants charged with offenses that "arose from a single set of circumstances against the same victim during the same time and in the same place"]; *People v. Hernandez* (1983) 143 Cal.App.3d 936, 939, 941 [defendants "charged with a crime or series of crimes committed as part of a single transaction"].)

Mr. Fuentes and Ms. Rossier . . . set the stage for what happened afterwards and are relevant to any knowledge that Ms. Rossier may have had, any intent she may have had as an aider and abettor or co-conspirator, any motivation she may have had, her allegiance to Mr. Fuentes, her opportunity to be along as an aider and abettor, and go to her co-conspirator liability. They are relevant as to the liability of Mr. Fuentes and Mr. Sanchez as well. . . . [D]efense counsel may dispute the theory to expand the territory of 18th Street, but I think that theory has legs and it has legs, because on later dates the charged offenses demonstrate what can be characterized as co-conspirator liability. . . . I think that the evidence relates to the actions of the defendants in this case and relates to facts, including, but certainly not necessarily limited to, intent, motive, opportunity, preparation, plan, knowledge, identity, and are highly relevant to the underlying circumstances of the charged offenses. Under Evidence Code section 352 . . . the prejudicial impact does not substantially outweigh the probative value . . . ." The court stated, however, it would upon request give limiting instructions both as to the purpose for which the evidence could be considered and against whom it was admitted. The court also ruled the shooting of Rangel could not be referred to as "a murder." Fuentes's motion to sever was denied.[9]

c. *Other pretrial evidentiary issues*

In addition to his unsuccessful challenge to a joint trial with the other defendants, Aguilar moved for an order excluding as to him the tape recording of his conversation with Sanchez in the police car following their arrest on September 8, 2003. The court denied the motion, finding the tape recording highly relevant and ruling its relevance was not substantially outweighed by its prejudicial impact under Evidence Code section 352: "I don't see any constitutional or statutory impediment. And as far as I'm concerned, it is admissible under [Evidence Code] section 1223 [admission of co-conspirator], under

[9] With respect to Fuentes's motion to sever trial of counts 4 and 5—the firearms charges arising from the Vendome Street incident—from trial of the other charges, the court stated, "I evaluate this under [section] 1098 of the Penal Code and under [Evidence Code section] 352, and I am of the opinion that it [joinder] is appropriate in this case."

adoptive admissions, under admissions, and under case and statutory law . . . [and] under 352, as well."

Also prior to trial the prosecutor and counsel for Rossier discussed the admissibility of several letters written by Rossier while she was in jail following her arrest. In the letters, which were discovered during a search of Fuentes's and Sanchez's residences, Rossier identified herself as a gang member, indicated her willingness to use violence against members of rival gangs, complained that Ramos had "ratted her out," but requested that her fellow gang members do nothing to Ramos at that time. According to the prosecutor the purpose of the letters, which would be introduced only as to Rossier, was to demonstrate her knowledge, intent and participation in the 18th Street gang in general and the September 6, 2003 drive-by shooting in particular. The court declined to exclude the letters under Evidence Code section 352. Addressing Rossier's counsel the court explained, "Mr. Hobson, you point out, well, this may be the scribbling of an immature, naive young lady. Well, they may be. They also may be the writings of a committed gangbanger who persists in identifying herself as that and uses language that may be characterized as indicative of violence and dissuading witnesses and threatening behavior and sophistication in the system. That is for the fact finder to decide. But under 352, I don't find this material substantially more prejudicial than probative. Quite the contrary."

7. *Testimony at Trial*

Norberto Pacheco and Roxana Ramos provided the primary testimony for the People concerning the August 29, 2003 Vendome Street shooting. Los Angeles Police Detective James Erwin, who investigated the shooting, also testified for the People.

Evidence of the September 6, 2003 drive-by shooting was presented through the testimony of David and Santos Kuk and Dorma Mendez, who had been inside the stolen minivan when the shooting occurred, Pacheco and informant/gang member Felix. Manuel De La Rosa, the surviving victim of the shooting, and Albert Hernandez, who had been with De La Rosa and the decedent, Monsivais, also testified, as did the Los

Angeles Police Department officers who had investigated the murder and attempted murder, including Detective Jeff Breuer.

Carlos Marroquin testified about the events of September 8, 2003 involving Marshall High School and Sanchez's intended mission or jale. Felix testified about his conversations that day with Sanchez and Aguilar. The police officers involved in the traffic stop of the stolen minivan and the subsequent arrest of Sanchez and Aguilar were also witnesses for the People. Two members of the Krazies gang testified—one for the defense and one as a prosecution rebuttal witness—concerning possible gang activities, including a threatened fist fight involving Marroquin, at Marshall High School on September 8, 2003.

Forensic evidence (concerning fingerprints and ballistic matches) was presented, as was testimony from a telephone company engineer regarding cell phone transmissions on September 6 and 8, 2003. Los Angeles Police Detective Magdaleno Gomez testified as a gang expert concerning the 18th Street gang.

Bryan Sanchez testified and presented an alibi defense for the night of September 6, 2003, as well as an explanation for his activities on September 8, 2003. None of the other defendants testified. Several additional witnesses, including Sanchez's father, testified to support Sanchez's alibi defense and to attest to his good character.

8. *The Verdicts and Sentencing*

The jury convicted Fuentes of first degree murder (count 1), attempted willful, deliberate and premeditated murder (count 2) and carrying a loaded firearm in a public place (count 4) and found true the allegations he had personally discharged a firearm causing death or great bodily injury as to both counts 1 and 2. In addition, the jury found true the allegation all three offenses had been committed for the benefit of a criminal street gang. Fuentes was found not guilty of conspiracy to commit murder (count 3). After the court denied Fuentes's motion for a new trial, he was sentenced to an aggregate state prison term of 90 years to life.

The jury found Flores not guilty of first degree murder but convicted him of second degree murder (count 1) and found true the allegation the offense had been committed by shooting a firearm from a vehicle within the meaning of section 190, subdivision (d). The jury also convicted Flores of attempted willful, deliberate and premeditated murder (count 2). The jury found both offenses had been committed for the benefit of a criminal street gang and also found true the allegation a principal had personally used a firearm in committing both offenses, but found not true the additional firearm-use allegations that a principal had intentionally and personally discharged a firearm and that the intentional discharge of a firearm by a principal had caused death or great bodily injury. Flores was sentenced to an aggregate state prison term of 55 years to life.

The jury found Sanchez not guilty of first degree murder but convicted him of second degree murder (count 1) and found the crime had been committed by shooting a firearm from a vehicle within the meaning of section 190, subdivision (d). The jury also convicted Sanchez of attempted willful, deliberate and premeditated murder (count 2) and conspiracy to commit murder (count 3). The jury found all three offenses had been committed for the benefit of a criminal street gang, but found not true the various firearm-use allegations. After denying Sanchez's motion for a new trial, the court sentenced him to an aggregate state prison term of 60 years to life.

The jury found Rossier not guilty of first degree murder but convicted her of second degree murder (count 1) and found the crime had been committed by shooting a firearm from a vehicle within the meaning of section 190, subdivision (d). The jury also convicted Rossier of attempted willful, deliberate and premeditated murder (count 2). The jury found both offenses had been committed for the benefit of a criminal street gang, but found not true the various firearm-use allegations. After denying Rossier's motion for a new trial, the court sentenced her to an aggregate state prison term of 20 years to life.

The jury convicted Aguilar of conspiracy to commit murder (count 3) and found true the special allegation the conspiracy was for the benefit of a criminal street gang. Aguilar's new trial motion was denied. He was sentenced to an indeterminate state prison term of 25 years to life with a 15-year minimum parole eligibility date.

DISCUSSION

1. *Evidence of Uncharged Misconduct; the Vendome Street Incident*

a. *Governing law*

California law has long precluded use of evidence of a person's character (a predisposition or propensity to engage in a particular type of behavior) as a basis for an inference that he or she acted in conformity with that character on a particular occasion. Evidence Code section 1101, subdivision (a), "prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*).)[10]

Evidence Code section 1101, subdivision (b), clarifies, however, that this rule "does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*Ewoldt, supra,* 7 Cal.4th at p. 393, see *People v. Falsetta* (1999) 21 Cal.4th 903, 914 [historically "the rule against admitting evidence of the defendant's other bad acts to prove his present conduct was subject to far-ranging exceptions"].) "'[E]vidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes . . . if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan,

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[10] Evidence Code section 1101, subdivision (a), states, "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

or intent. . . .'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1147.) "As Evidence Code section 1101, subdivision (b) recognizes, that a defendant previously committed a similar crime can be circumstantial evidence tending to prove his identity, intent, and motive in the present crime. Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence *vel non* of some other rule requiring exclusion." (*People v. Roldan* (2005) 35 Cal.4th 646, 705, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Walker* (2006) 139 Cal.App.4th 782, 796; Simons, Cal. Evid. Manual (2008-2009) § 6.10, p. 449.)

In addition to its relevance to an issue other than predisposition or propensity, to be admissible under Evidence Code section 1101, subdivision (b), the probative value of the evidence of uncharged crimes "must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Kipp* (1998) 18 Cal.4th 349, 371; *People v. Carter, supra*, 36 Cal.4th at p. 1149.) A trial court's determination of the admissibility of evidence of uncharged offenses is generally reviewed for an abuse of discretion. (*Kipp*, at p. 369 ["[o]n appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion"]; *Carter*, at p. 1149.)[11]

b. *The trial court did not abuse its discretion in failing to exclude evidence of the Vendome Street shooting*

Testimony that Fuentes possessed a loaded firearm during the Vendome Street tagging and shooting incident was, of course, directly relevant to count 4, which charged Fuentes with carrying a loaded firearm in a public place (§ 12031, subd. (a)(1)). Additional evidence of conduct not charged in the case—that Fuentes may have engaged

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[11] An abuse of discretion will not be found unless the trial court has exceeded the bounds of reason by exercising its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

in tagging and that Sanchez and Rosser may have been present during the Vendome Street incident, as well as details of discussions preceding the event, the confrontation with Rangel and the participants' actions after the shooting—was also admitted, subject to a limiting instruction that it could be considered, if proved, only to decide whether Fuentes, Sanchez or Rossier had acted with the required specific intent to commit any of the charged or lesser included crimes or enhancement allegations, whether Fuentes had a motive to commit the charged or lesser included crimes or allegations and whether Sanchez or Rossier had acted with knowledge of the charged or lesser included crimes and allegations. The jury was additionally instructed not to consider this evidence of particular behavior of Fuentes, Sanchez and Rossier against any other defendant (that is, against Flores or Aguilar) and not to infer from the evidence that Fuentes, Sanchez or Rossier has a bad character or is disposed to commit crime.

Emphasizing what they insist are the significant differences between the tagging episode on Vendome Street and the drive-by shooting on Bellevue Avenue, Fuentes, Sanchez and Rossier each contend the trial court erred in determining that the evidence of the Vendome Street shooting was relevant to the issue of intent/motive/knowledge and that its probative value was not outweighed by the probability its admission would create a serious danger of undue prejudice.[12] Yet as the prosecutor argued and the trial court found, this evidence was relevant to prove there was an overall plan by members of the 18th Street gang, including Fuentes, Sanchez and Rossier, to expand into Silver Lake gang territory and the charged crimes were part of that single conspiracy. To the extent

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12 We do not separately address Fuentes, Sanchez and Rossier's contention their due process rights were violated by the limited admission of evidence of the Vendome Street incident because that argument presumes the evidence was inadmissible under some state rule of evidence (see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175 [misapplication of state law constitutes deprivation of liberty interest in violation of due process clause]) and because no objection was made on this ground in the trial court. (See *People v. Partida* (2005) 37 Cal.4th 428, 436 ["[t]o the extent, if any, that defendant may be understood to argue that due process required exclusion of the evidence for a reason different from his trial objection, that claim is forfeited"].)

the prosecution was able to persuade the jury of the existence of this common plan, the evidence of the circumstances of the tagging and shooting on Vendome Street also tended to prove Fuentes's , Sanchez's and Rossier's motive for and intent with respect to the drive-by shooting that occurred one week later. (See *Ewoldt, supra*, 7 Cal.4th at p. 401.)

To be sure, the evidence indicated the shooting on Vendome Street was prompted by the aggressive confrontation initiated by the victim Rangel, not by Sanchez or Fuentes, which is markedly different from the drive-by shooting on Bellevue Avenue the following week. However, both incidents were preceded by a meeting and discussion of expanding the 18th Street gang's influence or territory. In each incident a stolen minivan was driven by Sanchez to the ultimate crime scene. At least one of the 18th Street gang members was armed during each incident, and on each occasion the stolen vehicle was abandoned and the weapons hidden following the shooting. While the shooting of Rangel at Vendome Street may not have been planned, it was reasonable for the People to contend that those present at that incident, who were fully aware of what had occurred during the tagging episode but nonetheless embarked on another "jale" on September 6, 2003, not only reasonably knew, but also specifically intended that another shooting would occur.

"To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . [I]t need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Ewoldt, supra*, 7 Cal.4th at p. 403.) Moreover, the evidence need not demonstrate a "single, continuing conception or plot" of which the charged crimes are a part. (*Id.* at p. 401.) Rather, "such evidence is admissible to establish a common design or plan if the uncharged misconduct 'shares sufficient common features with the charged offenses to support the inference that both the uncharged misconduct and the charged offenses are manifestations of a common design or plan.'" (*People v. Balcom* (1994) 7 Cal.4th 414, 418.) Even less similarity between the prior acts of misconduct and the charged offenses is needed for the evidence to be admissible to prove intent and knowledge. (*Ewoldt, supra,* 7 Cal.4th at p. 402; see *People v. Carter, supra*, 36 Cal.4th at p. 1147 [conduct need only be sufficiently similar to support a rational inference of intent]; *People v. Stitely* (2005) 35 Cal.4th 514, 532 ["the degree of similarity required to prove *mental state* is far less exacting" than required to provide identity].)

Considering the similarities as well as the differences between the August 29, 2003 Vendome Street tagging/shooting incident involving 18th Street gang members and the September 6, 2003 Bellevue Avenue drive-by shooting involving those same gang members, we cannot say the trial court abused its discretion in concluding Evidence Code section 1100 did not require the exclusion of the evidence of uncharged misconduct.

We similarly conclude the trial court did not abuse its discretion under Evidence Code section 352 in finding the evidence of the Vendome Street incident, accompanied by appropriate limiting instructions, would not be unduly prejudicial. "'Undue prejudice' refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis: 'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.'"'" (*People v. Walker, supra,* 139 Cal.App.4th at p. 806.)

The probative value of the evidence of the Vendome Street incident with respect to the Red Shield clique's plan to expand its territory was substantial. On the other side of the scale, the evidence of the uncharged conduct was neither stronger nor more inflammatory than the evidence of the charged offenses; to the contrary, although the evidence included testimony that Fuentes had shot Rangel, the jury also learned that this shooting, in marked contrast to the subsequent drive-by shootings, was in response to Rangel's threat to kill Sanchez. (See *Ewoldt, supra*, 7 Cal.4th at p. 405 [describing circumstances that decrease potential for prejudice].) On this record we cannot say the trial court abused its discretion in determining the substantial probative value of the evidence was not outweighed by the risk of undue prejudice. (*People v. Carter, supra*, 36 Cal.4th at p. 1149.)

2. *Joinder of Charges and Defendants; the Motions To Sever*

Section 954 permits two or more offenses of the same class or connected together in their commission to be consolidated for trial against a single defendant. "[B]ecause consolidation or joinder of charged offenses ordinarily promotes efficiency, that is the course of action preferred by law." (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.)[13] Similarly, "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly unless the court orders separate trials." (§ 1098; see *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40 ["[j]oint trials are favored because they 'promote [economy and] efficiency' and "'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts"'"].)

When a joint trial is authorized under sections 954 and 1098, the trial court retains discretion to order separate trials "'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.'" (*People v. Turner* (1984) 37 Cal.3d 302, 312, overruled on another ground in *People v. Anderson* (1987) 43 Cal.3d 1104, 1115; accord, *People v.*

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[13] The efficiency and benefits of a joint trial were described in *People v. Bean* (1988) 46 Cal.3d 919, 939-940: "A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process." (Accord, *People v. Soper* (2009) 45 Cal.4th 759, 772; see *People v. Ochoa* (1998) 19 Cal.4th 353, 409 [joinder "'ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were to be tried in two or more separate trials [citation], and in several respects separate trials would result in the same factual issues being presented in both trials'"].)

Box (2000) 23 Cal.4th 1153, 1195; see also *People v. Carter, supra,* 36 Cal.4th at p. 1153 ["'[r]efusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case'"]; *People v. Memro* (1995) 11 Cal.4th 786, 851 [same].)

A court's denial of a motion for severance is reviewed for an abuse of discretion, "judged on the facts as they appeared at the time of ruling." (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 41; see *People v. Balderas* (1985) 41 Cal.3d 144, 171 [appellate court reviews trial court's denial of pretrial severance motion based on the facts known and the showing made at the time of the motion itself].) "Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial." (*Coffman and Marlow,* at p. 41.)[14]

Fuentes, who was named as a defendant in all four counts actually tried, contends the trial court erred in denying his motion to sever the firearm charge (count 4) arising from the Vendome Street tagging incident from the murder and attempted murder charges based on the Bellevue Avenue drive-by shooting and the Marshall High School murder conspiracy charge. He argues the inflammatory nature of the facts surrounding the Vendome Street incident, the lack of cross-admissibility of the evidence and the association of that weaker charge with the stronger ones supported severance.

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[14] Although the trial court's ruling on the motion to sever was proper when made, a reviewing court "'may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such to deprive the defendant of a fair trial or due process of law.'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 726; accord, *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 998.)

Rossier, who was present at the Vendome Street tagging/shooting but not charged in connection with the incident, and who was not charged with conspiracy to commit murder relating to the Marshall High School episode, similarly argues the trial court erred in denying her motion for severance, contending the court should have recognized that the strong evidence of her codefendants' guilt, which was largely inadmissible as to her, would inevitably (and impermissibly) spill over and create an unfounded impression in the jury that she, too, was guilty of murder and attempted murder during the drive-by shooting.

As just discussed, the evidence of the Vendome Street incident, directly relevant to the firearm possession charge against Fuentes, was also properly admitted pursuant to Evidence Code section 1101, subdivision (b), as to both Fuentes and Rossier with respect to the drive-by shootings on Bellevue Avenue as part of a common design or plan, as well as on the issues of the defendants' mental state (intent, knowledge and motive). The cross-admissibility of the evidence is itself sufficient to justify the joinder of the counts and the defendants involved. (*People v. New* (2008) 163 Cal.App.4th 442, 470; see *People v. Balderas, supra,* 41 Cal.3d at pp. 171-172 ["any inference of prejudice [from joinder] is dispelled" if evidence on each of the joined charges would have been admissible in separate trials].) Moreover, there was no incriminating confession, conflicting defenses[15] or possibility that at a separate trial a codefendant would give

[15] In a petition for writ of habeas corpus filed in this court during the pendency of his direct appeal, but not in his appeal itself, Sanchez argues he was deprived of the effective assistance of counsel because his trial counsel failed to move to sever his trial from Rossier on the grounds of antagonistic defenses. As discussed, Sanchez testified and presented an alibi defense for the September 6, 2003 drive-by shooting: He claimed he was at a movie and dinner with Rossier at the time of the incident. Rossier did not testify; but in closing argument her counsel insisted, although the People's evidence indicated Rossier was in the minivan at the time of the drive-by shooting, there was no evidence she knew a shooting was going to occur or that she had any greater involvement in the events other than going with her boyfriend to participate in tagging. In a separate order, filed concurrently with this opinion, we issue an order to show cause returnable in the superior court for the purpose of conducting an evidentiary hearing on Sanchez's

exonerating testimony weighing in favor of separate trials. In addition, if one were to characterize the evidence of the three incidents presented to the jury, the drive-by murder of Monsivais and the attempted murder of De La Rosa would appear far more "inflammatory" than the tagging incident on Vendome Street, even though the jury also heard that Fuentes shot Rangel in response to Rangel's threat to kill Sanchez while pointing a gun at him.

At bottom, Fuentes's and Rossier's argument is that a joint trial of crimes committed on three different dates was inherently unfair because the jury inevitably cumulated the evidence to find them guilty of the specific crimes with which they were charged. Rossier also complains of her prejudicial association with her assertedly more culpable codefendants. The relationship of the events of the Vendome Street tagging/shooting, the Bellevue Avenue drive-by shootings and the Marshall High School conspiracy, however, was central to the prosecution's case and was based on admissible evidence of the Red Shield clique's goal of expanding its territory and of a conspiracy among the defendants (and others) to do so. Moreover, the court gave appropriate limiting instructions concerning the proper use of evidence of uncharged misconduct and its applicability only to the defendant(s) as to whom it was admitted and specifically instructed the jury regarding its obligation to consider each count separately, as well as to determine whether each defendant charged was guilty of a specific crime. (See *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 40 ["less drastic measures than severance, such as limiting instructions, often will suffice to cure any risk of prejudice"].)

Finally, the jury's finding that Fuentes was not guilty of conspiracy to commit murder in connection with the Marshall High School events belies Rossier's claim that severance was necessary to prevent the jury from inappropriately cumulating the evidence of all the crimes and responding to the totality of the evidence presented without

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petition for writ of habeas corpus claiming ineffective assistance of counsel with respect to his convictions for second degree murder (count 1) and attempted premeditated murder (count 2).

separately assessing the individual culpability of each defendant. There simply was no spillover effect from the evidence presented against Fuentes, Sanchez and Aguilar on count 3, even if it would not have been admissible in a separate trial of Rossier alone.

In sum, whether viewed from the point at which the court ruled on the severance motions or based on our assessment of what in fact occurred at trial, joinder was proper and did not result in a gross unfairness amounting to a denial of due process for either Fuentes or Rossier. (See *People v. Arias* (1996) 13 Cal.4th 92, 127; see also *People v. Sapp* (2003) 31 Cal.4th 240, 259-260.)[16]

3. *Other Evidentiary Issues*

a. *Fuentes's statements to Pacheco about the drive-by shooting*

Rossier contends the trial court committed prejudicial error when it allowed the People to introduce against her (and not only against Fuentes, Flores and Sanchez) Pacheco's account of his telephone call with Fuentes on the night of September 6, 2003 shooting and a conversation with Fuentes the following day at school during which Fuentes told Pacheco, "we hit the guys from Temple Street," and stated Sanchez had used the rifle, but the shotgun had jammed during the incident. Overruling the defendants'

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16 Aguilar also asserts the trial court erred in denying his motion to sever, arguing not only that the court abused its discretion in evaluating the factors to be considered in determining whether severance was appropriate, but also that joinder of the single count in which he was charged with conspiracy to commit murder with the other three counts against his four codefendants violated section 1098 as construed by the Supreme Court in *People v. Ortiz, supra,* 22 Cal.3d at page 43, because he was not included in at least one count with all other defendants with whom he was tried (specifically, he was not named in any count with either Flores or Rossier) and the offenses to be jointly tried did not occur as part of a single transaction or arise from the same set of circumstances. Because we reverse Aguilar's conviction for conspiracy to commit murder based on the court's failure to instruct on the lesser included offense and remand for a new trial on that count, we need not address Aguilar's severance arguments.

hearsay objections, the court admitted the testimony as an admission of a coconspirator in furtherance of the conspiracy's objective under Evidence Code section 1223.[17]

Emphasizing the prosecution theory that the discussion between Pacheco and Flores concerning the fact that the shotgun had jammed was related to Sanchez's intent to use the shotgun two days later in his planned attack at Marshall High School, Rossier argues the evidence should not have been admitted against her because it was never charged that she was part of the conspiracy to commit murder at Marshall High. As to her, Fuentes's statements to Pacheco about the September 6 shooting simply narrated past events and thus were not made in furtherance of a conspiracy. (See, e.g., *People v. Hardy* (1992) 2 Cal.4th 86, 146-147 [statements that merely narrate past events are not to be deemed "in furtherance" of conspiracy].)

The People's theory of the case, consistently reiterated before and during trial, including in closing argument, and supported by testimony regarding discussions among the gang members, was that an ongoing conspiracy existed during the summer of 2003 to expand the territory and enhance the reputation of the 18th Street gang, and particularly the Red Shield clique, which included the Vendome Street tagging and shooting incident, the Bellevue Avenue drive-by shooting and the plans to shoot individuals at Marshall High. Although a more limited version of the conspiracy was charged in count 3, the conspiracy itself need not be charged for Evidence Code section 1223's hearsay exception to apply to statements by coconspirators. (*See People v. Rodrigues* (1994) 8 Cal.4th 1060, 1133-1134; *People v. Jourdain* (1980) 111 Cal.App.3d 396, 404.) For the statements of an alleged coconspirator to be admitted, moreover, the People only need to

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17 Evidence Code section 1223 provides, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and [¶] (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivision (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

present prima facie evidence of the conspiracy—that is, evidence (independent of the statements themselves) sufficient to permit the jury to find a conspiracy exited. (*Rodrigues*, at p. 1134; *People v. Herrera* (2000) 83 Cal.App.4th 46, 58-64.) Ultimately it is up to the jury to decide whether the conspiracy was sufficiently proved, and the offered statements made in furtherance of it. (See *Herrera*, at pp. 65-66.) Here, the jury was in fact properly instructed in accordance with CALCRIM No. 418 that it was not to consider the statement of a coconspirator unless it found, independent of the statement, that a conspiracy existed at the time the statement was made.

The trial court did not abuse its discretion in determining there was sufficient evidence of an ongoing conspiracy to permit introduction of Pacheco's description of his conversations with Fuentes on September 6 and 7, 2003. (See *People v. Griffin* (2004) 33 Cal.4th 536, 577 [trial court's determination of admissibility of evidence generally reviewed for abuse of discretion]; see also *People v. Hovarter* (2008) 44 Cal.4th 983, 1004 [under the abuse of discretion standard, "'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice'"].) To be sure, portions of Fuentes's statements were descriptive of the events that had already taken place during the drive-by shooting; but other aspects of the conversations, including those directed to finding out what went wrong with the shotgun, were sufficiently linked to the testimony about the gang members' intent to expand the territory of Red Shield to permit the conclusion the statements were in furtherance of the conspiracy. (See *People v. Herrera, supra*, 83 Cal.App.4th at p. 62 ["The question becomes whether there is sufficient evidence which, if believed by the jury, would support the finding of a conspiracy. 'The court should exclude the proffered evidence only if the "showing of preliminary facts is too weak to support a favorable determination by the jury."'"]; cf. *People v. Noguera* (1992) 4 Cal.4th 599, 626.)[18]

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[18] Rossier's additional argument that admission of Pacheco's description of his conversations with Fuentes violated her Sixth Amendment right to confront witnesses

b. *Rossier's letters while in custody*

Rossier also argues the trial court committed prejudicial error by permitting the People to introduce, over her objections that the material was irrelevant and constituted improper Evidence Code section 1101 evidence, four letters (exhibits 20-23) she wrote about unrelated events while in custody following the Bellevue Avenue drive-by shooting. In the letters, found at Sanchez's and Fuentes's residences, Rossier identified herself as a gang member and appeared to direct fellow gang members with respect to the use of violence against enemies or rivals. In particular, in exhibit 20, found at Fuentes's home, Rossier wrote, ""Fool, Nena [Roxana Ramos] did rat me out. Make sure that you only tell Shorty [Benjamin Flores] and Payaso. Don't tell nobody else. The lawyer told me she is gonna have to go to court and testi[fy] against me. If anything happens to her right now, they will link it to me. I'll let you know when the time is right. Fool, what kind of shit is that? Ratting out your own homie. That shit don't go, fool. I'll let you know when and what to do to her."[19]

When the court and counsel initially discussed the admissibility of Exhibit 20, it was believed by all parties the letter referred to the September 6, 2003 incident. In fact, the letter concerned a fight at Hollywood High School that led to Rossier's placement in a juvenile camp for assault. Further argument concerning the admissibility of the letter

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under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] is totally devoid of merit. The Confrontation Clause applies only to "testimonial statements." (*Id.* at p. 51.) "It is the testimonial character of that statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Davis v. Washington* (2006) 547 U.S. 813, 821 [126 S.Ct. 2266, 165 L.Ed.2d 224].) Statements made by a coconspirator in furtherance of the conspiracy are by their very nature not testimonial. (*Crawford,* at p. 55; see *Bourjaily v. United States* (1987) 483 U.S. 171, 183 [107 S.Ct. 2775, 97 L.Ed.2d 144].)

19 One of Rossier's other letters described her desire to ride around with a machine gun, drink beer and shoot members of the rival Mara Salvatrucha gang. Another directed the recipient to "put in work"—that is, to commit crimes to benefit the gang—in their neighborhood.

and the adequacy of a proposed limiting instruction—together with a defense motion for a mistrial—took place once it became apparent the letter did not directly involve the drive-by shooting. Notwithstanding its different subject, the People argued the letter, based on its content and the fact it was sent to Fuentes, was admissible as circumstantial evidence of Rossier's intent to promote, and her knowledge and participation in, the 18th Street gang. The court agreed, confirmed its prior ruling the letter—as well as the three others written by Rossier—was admissible and denied the mistrial motion. The court ultimately instructed the jury that exhibit 20 and the other letters could only be considered against Rossier; that counsel had stipulated exhibit 20 did not refer to any alleged incident in the case being tried, but rather to an unrelated incident; and that the letters could be considered as circumstantial evidence only for the limited purpose of deciding whether Rossier acted with knowledge of the charged offense and/or with the specific intent required to commit those crimes or the enhancements alleged against her.

That can be little doubt the letters, in which Rossier readily acknowledged her gang affiliation and directly linked her to Fuentes and Sanchez in terms of potentially violent gang activity, were relevant—that is, had some tendency to prove she was an active participant in the September 6, 2003 drive-by shooting, and not simply a naive teen innocently cruising in the stolen minivan, as urged by her defense counsel.[20] (See *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518 [evidence of gang affiliation properly introduced to prove intent]; *People v. Burns* (1987) 196 Cal.App.3d 1440, 1455-1456 [reference in letter to gang membership relevant where gang affiliation had been integral factor in apparent plan to execute intended victims; "[t]his evidence supported an inference that appellant was not merely a passive companion with no knowledge of what [his confederates] planned to do but was rather a fellow gang member and close associate of the two perpetrators and intimately involved in a joint criminal retaliatory endeavor"].)

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[20] Evidence Code section 210 defines "relevant evidence" to include evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

Although, as Rossier's counsel argues on appeal, the prosecutor may have used these letters to "devastatingly prejudicial" effect by portraying Rossier as a "hardcore gangbanger," the trial court properly balanced the letters' probative value against the potential for prejudice and determined they were admissible, provided adequate limiting instructions were given. (See *People v. Williams* (1997) 16 Cal.4th 153, 193 ["in a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect"].) That decision was not an abuse of discretion. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1118 ["[w]hen a trial court overrules a defendant's objections that evidence is . . . unduly prejudicial . . . , we review the rulings for abuse of discretion"]; see also *People v. Sassounian* (1986) 182 Cal.App.3d 361, 402 [trial court should not exclude highly probative evidence unless the undue prejudice is unusually great].)[21]

4. *Challenges to the Trial Court's Instructions to the Jury*

a. *The accomplice instructions*

i. *Governing law*

Section 1111 prohibits conviction on the testimony of an accomplice—defined by the statute as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given"—unless the testimony is "corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." The reason for the corroboration requirement is apparent: An accomplice is likely to implicate the defendant in order to shift the blame and minimize his or her own culpability. (*People v. Tobias* (2001) 25 Cal.4th 327, 331; *People v. Hayes* (1999) 21 Cal.4th 1211, 1271.)

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[21] We must presume the jury understood and followed the court's limiting instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139 ["we and others have described the presumption that jurors understand and follow instructions as '[t]he crucial assumption underlying our constitutional system of trial by jury'"]; accord, *People v. Young* (2005) 34 Cal.4th 1149, 1214.)

To be "chargeable with an identical offense" and thus considered an accomplice within the meaning of section 1111, a witness must be found to be a principal under section 31. (*People v. Lewis* (2001) 26 Cal.4th 334, 368; *People v. Williams* (2008) 43 Cal.4th 584, 636; see also § 31 [defining principal as "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission"].) If the evidence establishes as a matter of law the witness was an accomplice, the court must so inform the jury and instruct it on the corroboration requirement. (*Lewis,* at p. 369 [when """facts with respect to the participation of a witness in the crime for which the accused is on trial are clear and not disputed, it is for the court to determine whether he is an accomplice"""]; *People v. Hayes, supra,* 21 Cal.4th at p. 1271.) Likewise, if there is sufficient evidence from which a reasonable juror could find the witness to be an accomplice, the trial court must instruct the jury with the definition of accomplice contained in section 1111 and inform the jury, if it finds by a preponderance of the evidence a witness is an accomplice in accordance with the legal definition, the witness's testimony implicating the defendant must be independently corroborated before it may be considered. (*Lewis,* at p. 369; *People v. Zapien* (1993) 4 Cal.4th 929, 982.) In either situation the jury must also be instructed the testimony of an accomplice witness is to be viewed with distrust. (*Zapien,* at p. 982.)

ii. *The challenged instructions*

The trial court instructed the jury, using CALCRIM No. 335, that Pacheco was an accomplice as a matter of law and, as a result, his testimony could be used to convict a defendant only if it was supported by other, independent credible evidence. However, the court declined to instruct that the Kuk brothers or Dorma Mendez, who were in the stolen minivan on September 6, 2003 during the Bellevue Avenue drive-by shooting, were accomplices as a matter of law, instead instructing, pursuant to CALCRIM No. 334, that before it could consider any statement or testimony from those three witness, or from

Angelina Rakitina[22] and Carlos Marroquin, as evidence against any of the defendants, the jury first had to decide whether they were accomplices to the crimes charged. As to the statements or testimony of any of those witnesses who was found to be an accomplice, the court instructed, independent supporting evidence was required. The court also specifically instructed the evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice.

Fuentes argues it was error not to instruct that the Kuk brothers and Mendez were accomplices as a matter of law. He does not contend any other aspect of CALCRIM Nos. 334 and 335, including the definition of an accomplice or explanation of the nature of supporting evidence necessary to corroborate the accomplice's testimony, was defective.

iii. *In light of the independent corroborating evidence, any error in the accomplice instructions was harmless*

A trial court's failure to instruct on accomplice liability is harmless if there is adequate corroborating evidence in the record. (*People v. Williams, supra,* 43 Cal.4th at p. 638; *People v. Lewis, supra,* 26 Cal.4th at p. 370; *People v. Fauber* (1992) 2 Cal.4th 792, 834.) "'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]' [Citation.] The evidence 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.'" (*Lewis,* at p. 370; accord, *People v. Brown* (2003) 31 Cal.4th 518, 556.)

There was sufficient corroborating evidence at trial to support the veracity of the testimony of the Kuk brothers and Mendez. Although defense counsel vigorously contested the credibility of gang member and government informant James Felix, Felix told the police Fuentes had bragged to him that he (Fuentes) had shot two Temple Street

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[22] Rakitina, an 18th Street gang member, was in the car with Payaso and other gang members when Payaso retrieved the reportedly jammed shotgun after the Bellevue Avenue drive-by shooting and confirmed it could be fired.

gang members. Felix also reported to the police that Flores had described his role in the drive-by shooting to him, claiming that the shotgun he used had jammed and did not fire, but that "his other homeboy" shot two Temple Street gang members. No more independent corroboration of Fuentes's and Flores's participation in the drive-by shooting was necessary. (Cf. *People v. Young* (2005) 34 Cal.4th 1149, 1181 [testimony of witness may be accepted by jury unless it is physically impossible or inherently improbable].)

As to Sanchez, he was arrested on September 8, 2003 in the stolen blue minivan, and his fingerprints were found on the minivan. Forensic tests confirmed the bullet removed from Monsivais's body had been fired from the rifle recovered from the minivan at the time of Sanchez's arrest. In addition, shell casings found at the crime scene on September 6 were matched to that rifle. These connections among Sanchez, the minivan and the murder weapon are sufficient corroboration of the testimony of any of the witnesses who might also be accomplices. (See *People v. Brown*, *supra*, 31 Cal.4th at p. 556.)

Finally, as to Rossier the requisite corroborating evidence was presented by a senior electrical engineer from AT&T who testified about two calls shortly before and after 10:30 p.m. on September 6, 2003 that were made to and from the cell phone recovered from the stolen minivan two days later. (As discussed, Rossier's father is the phone's subscriber; and, when he was arrested with the phone in the minivan on September 8, 2003, Sanchez identified it as belonging to his girlfriend.) Data from the cell towers indicated at the time of the two calls—which was also the time of the drive-by shooting—the phone was at a location very near the murder scene. Although undoubtedly "slight," this evidence is sufficient to permit the jury to consider the testimony and statements of the other prosecution witnesses against Rossier, even if they all were accomplices subject to the corroboration requirement of section 1111.

b. *Conspiracy to commit assault with a firearm as a lesser included offense of conspiracy to commit murder*

i. *Governing law*

A trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) 36 Cal.4th 686, 745), that is, """"those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."""" (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) This obligation includes the duty to instruct on a lesser included offense if the evidence raises a question as to whether the elements of the lesser included offense, but not the greater offense, are present. (*Ibid.*; *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Birks* (1998) 19 Cal.4th 108, 118.) However, the existence of "'*any* evidence, no matter how weak'" will not justify instructions on a lesser included offense. There must be "'evidence that a reasonable jury could find persuasive.'" (*Breverman,* at p. 162.)

A particular offense is considered a "lesser included offense" and, therefore, subject to the duty to instruct if it satisfies one of two tests. The "elements" test is satisfied if the statutory elements of the greater offense include all the elements of the lesser, so that the greater cannot be committed without committing the lesser; the "accusatory pleading" test is satisfied if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense, such that the greater offense charged cannot be committed without committing the lesser offense. (*People v. Sloan* (2007) 42 Cal.4th 110, 117; accord, *People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.)

The scope of the sua sponte duty to instruct is determined from the charges and facts actually alleged in the accusatory pleading: "[T]he rule ensures that the jury will be exposed to the full range of verdict options which, by operation of law and with full notice to both parties, are presented *in the accusatory pleading itself* and are thus closely and openly connected to the case. In this context, the rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither 'harsher [n]or more lenient than the evidence merits.'" (*People v. Birks, supra*, 19 Cal. 4th at p. 119.)

ii. *Forfeiture and invited error*

Sanchez, Fuentes and Aguilar were charged in count 3 with conspiracy to commit murder relating to the September 8, 2003 Marshall High episode. The court properly instructed the jury on the elements of that offense. The jury acquitted Fuentes, but found both Sanchez and Aguilar guilty. Sanchez, joined by Aguilar, now argues the court erred in failing to instruct the jury it could convict the defendants of conspiracy to commit an assault with a firearm, as a lesser included offense of the charged conspiracy to commit murder, based on the overt act allegations in the second amended information and the evidence introduced at trial.[23]

The Attorney General's argument that Sanchez and Aguilar have forfeited this issue on appeal because neither requested a lesser included instruction on count 3 is difficult to understand. The question is whether the trial court in this case had a sua sponte duty to instruct on conspiracy to commit assault with a firearm as a lesser included offense of conspiracy to commit murder. Necessarily that issue only arises when no instruction has been requested. Indeed, the court has an obligation to instruct sua sponte on lesser included offenses even if defense counsel does not want such an instruction. (*People v. Breverman, supra*, 19 Cal.4th at p. 162 ["the sua sponte duty to instruct on lesser included offenses, unlike the duty to instruct on mere defenses, arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued"]; accord, *People v. Barton* (1995) 12 Cal.4th 186, 195.)

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[23] Notwithstanding Sanchez's argument the trial court's failure to instruct on conspiracy to commit assault with a firearm violated his federal constitutional right to due process, error in failing to instruct sua sponte on a lesser included offense in a noncapital case is "an error of California law alone, and is thus subject only to state standards of reversibility." (*People v. Breverman, supra*, 19 Cal.4th at p. 165.)

Moreover, the reporter's transcript reveals Sanchez's counsel did inquire about a lesser included instruction on count 3 and expressly "made a record" on the point. When discussing whether it was necessary to give CALCRIM No. 3517, the instruction on completing verdict forms when lesser included offenses and greater crimes (other than homicides) are not separately charged, the trial court stated, "3517, lesser included's. And we really don't have any because that covers the nonhomicide lesser included's." Sanchez's counsel responded, "Your Honor, why don't we have a lesser included for the conspiracy to commit murder?" Fuentes counsel joined the discussion, saying, "There is no such thing." Sanchez's counsel replied, "I am alleging there is another crime." And the court answered, "I thought you were. And I thought we discussed the matter, and that is—I think the case is *Finnabak* [*People v. Fenenbock* (1996) 46 Cal.App.4th 1688], you know. It would be one thing if the People have alleged in their actual allegation conspiracy to commit murder by assaulting with a firearm. But you don't look at the lesser included based upon, for instance, overt acts. You look at it based upon the pleading. . . ." Sanchez's counsel concluded the discussion by stating, "Thank you, Your Honor. I only brought it up because I wanted to make a record."

The exchange just quoted also belies the Attorney General's argument that any failure to instruct on a lesser included offense of conspiracy to commit assault with a firearm is invited error as to either Sanchez, whose attorney expressly sought the instruction, or Aguilar, whose attorney was silent during the discussion of instructions but joins Sanchez's argument on appeal. To be sure, if defense counsel intentionally caused the trial court to err, acting for tactical reasons and not out of mistake, the claim is barred on appeal as invited error. (*People v. Williams*, *supra*, 43 Cal.4th at p. 629; *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 49.) The invited error doctrine extends to a deliberate choice by a defendant and his or her counsel to utilize an all-or-nothing strategy and to request that the court not instruct on lesser included offenses. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1234-1236.) It may well be that Fuentes, whose lawyer argued there was no lesser included offense—and who thereafter was found not guilty of the greater offense charged—could be found to have invited any error in failing to instruct on conspiracy to commit assault with a firearm as a lesser included offense. But the record simply does not support the Attorney General's claim of forfeiture by invited error as to Sanchez or Aguilar.[24]

iii. *Sanchez and Aguilar were entitled to an instruction that conspiracy to commit assault with a firearm is a lesser included offense of conspiracy to commit murder*

A conspiracy to commit murder, like the crime of murder itself, does not require use of a firearm. Accordingly, under the elements test conspiracy to commit assault with a firearm is not a lesser included offense of conspiracy to commit murder. (See *People v. Birks, supra*, 19 Cal.4th at p. 117.)

However, in *People v. Cook* (2001) 91 Cal.App.4th 910, the Court of Appeal affirmed a conviction for conspiracy to commit assault by means of a firearm as a lesser included offense of conspiracy to commit murder, holding the trial court properly looks to the overt acts pleaded in a charge of conspiracy to determine whether it includes lesser included target offenses under the accusatory pleading test. (*Id.* at pp. 920-921.) The court explained, "[P]rinciples of due process require that the overt acts be pleaded with particularity in order to give defendants notice of the nature and cause of the charge so that defendant may defend against that charge. [Citations.] It cannot be said then that an accusatory pleading charging conspiracy fails as a matter of law to give sufficient notice of the charged offense and any lesser included offense. [¶] To the extent an accusatory pleading fails to allege overt acts sufficient to give notice of a lesser included offense, the trial court may not rely on the pleading as a basis to instruct on lesser included offenses

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[24] We need not decide under what, if any, circumstances "implicitly agreeing or acquiescing at trial to the procedure objected to on appeal," rather than explicitly agreeing or requesting the procedure, forfeits an issue on appeal in a criminal case. (See *People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1408 [civil proceeding involving petition for unconditional release of a sexually violent predator].) Plainly, silence cannot constitute a forfeiture of an argument the trial court violated its sua sponte obligation to instruct on a lesser included offense—that is the very meaning of sua sponte.

not included in the allegations of that pleading. Nevertheless, the possibility that some pleadings charging conspiracy may fail to give sufficient notice of lesser included offenses is not cause to hold, as a matter of law, that no pleading charging conspiracy gives sufficient notice of lesser included offenses." (*Id.* at p. 921.)

In affirming the conviction for conspiracy to commit assault by means of a firearm, the court in *Cook* expressly disagreed with *People v. Fenenbock, supra,* 46 Cal.App.4th 1688—the case referred to by the trial court in declining to give a lesser included instruction in connection with count 3—which had held the trial court was not obligated to instruct sua sponte on lesser included target offenses (assault, battery or mayhem) based on allegations of overt acts committed in furtherance of the alleged conspiracy. The *Fenenbock* court reasoned overt act allegations "do not provide notice of lesser included target offenses." (*Id.* at p. 1708.) "Because overt acts need not be criminal offenses or even acts committed by the defendant, the description of the overt act in the accusatory pleading does not provide notice of lesser offenses necessarily committed by the defendant. Moreover, inasmuch as overt acts may be lawful acts, the overt acts do not necessarily reveal the criminal objective of the conspiracy." (*Id.* at p. 1709, fn. omitted.)

We agree with the analysis and conclusion in *Cook*: The allegations of overt acts in an accusatory pleading charging defendants with conspiracy to commit murder may identify lesser included target offenses with sufficient clarity to trigger the trial court's sua sponte duty to instruct on the lesser included offense(s). The *Fenenbock* court's per se rule limiting analysis to the specific charging allegations and disregarding the overt acts alleged to have been committed in furtherance of the conspiracy—followed in this case by the trial court—conflicts with the very purpose of the lesser-included-offense doctrine and its accusatory pleading test, which comes into play only when the elements test is not satisfied. As explained in *People v. Birks, supra,* 19 Cal.4th 108, the issue is whether an information or indictment adequately notifies the defendant, for due process purposes, that he or she must be prepared to defend against any lesser offenses necessarily included in the greater offense expressly charged based on "the facts actually alleged in the accusatory pleading." (*Id.* at pp. 117-118.) If the defendant is on notice, the instructional rule ensures that neither the prosecutor nor the defendant may force the jury to confront an all-or-nothing choice. For this salutary purpose—which benefits both the prosecution and the defense (*People v. Barton, supra,* 12 Cal.4th at p. 196; *Birks*, at p. 119)—it can make no difference whether the facts actually alleged are that the defendants conspired to commit murder by means of assault with a firearm or conspired to commit murder with an overt act allegation that they obtained firearms in furtherance of the conspiracy.[25]

Whether the trial court's instructional duty exists in a particular case, as the *Cook* court held (see *People v. Cook, supra,* 91 Cal.App.4th at p. 921), requires analysis of the information itself. Here, count 3 of the second amended information alleged Fuentes, Sanchez and Aguilar "did unlawfully conspire together and with another person and persons whose identity is unknown to commit the crime of MURDER" and alleged five overt acts in furtherance of that conspiracy:

- "Co-conspirators discussed their intent to shoot rival 'White Fence' gang members, and other rival criminal street gang members."
- "Co-Conspirators drove to where a van was parked, retrieved a shotgun that was concealed within the van, and fired one shotgun round."
- "Co-Conspirators took a taxi to the Echo Park Hills and retrieved a van which concealed a .22 caliber rifle and a shotgun."

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[25] The bench notes to CALCRIM No. 415, Conspiracy (Pen. Code, § 182), under the heading "Lesser Included Offenses," although identifying the contrary holding in *People v. Fenenbock, supra*, 46 Cal.App.4th 1688, advise "the court may look to the overt acts in the accusatory pleadings to determine if it has a duty to instruct on any lesser included offenses to the charged conspiracy," citing *People v. Cook, supra*, 91 Cal.App.4th at pages 919 through 920 and 922. CALCRIM No. 563, Conspiracy to Commit Murder (Pen. Code, § 182), which was used by the trial court here, does not contain a comparable bench note.

- "Co-Conspirators returned to '18th' Street gang territory in the van with a .22 caliber rifle, a shotgun and ammunition for both weapons."
- "Co-Conspirators solicited the assistance of other 18th Street gang members in shooting rival 'White Fence' gang members and other rival criminal street gang members."

Although, as the trial court observed, the actual charge of conspiracy to commit murder did not include the words "murder by assaulting with a firearm," there can be no doubt that "shooting" the rival gang members, most probably by using the rifle and shotgun retrieved by the alleged coconspirators, was central to the conspiracy as actually alleged in the second amended information (and as portrayed by the evidence at trial).

The evidence at trial, presented primarily through the testimony of Pacheco and Marroquin, was that about one week before Sanchez, Aguilar and Marroquin were arrested in the stolen minivan, members of the White Fence gang had come to Marshall High School looking for 18th Street gang members. When Marroquin told Sanchez about this, Sanchez responded that he wanted to do something to send a message and to earn respect for the18th Street gang. On September 8, 2003, the day of the arrest itself, Sanchez spoke to Marroquin about getting some "homies" and doing a jale at Marshall High. The two young men then left the school and retrieved the stolen minivan. Marroquin went into the back of the vehicle and opened up the laundry bag containing the rifle and the shotgun, as well as some bullets. After they picked up Aguilar, Sanchez again talked about doing "some shit" to White Fence at Marshall High School. Pacheco similarly testified that Sanchez said he was planning on returning to the school to "bust a jale" before going to Mexico. According to Felix, when the stolen minivan stopped by him, Aguilar said they were going to Marshall to find "the fools" from Mara Salvatrucha and "go hit the Mierdas." Sanchez, however, testified he did not intend to commit a murder at Marshall High School that afternoon (or to shoot anyone); rather, when the police stopped the stolen minivan, he was returning to Marshall to back up Marroquin in an after-school fight with members of the Krazys criminal street gang.

Although this evidence appears sufficient to support Sanchez's and Aguilar's convictions for conspiracy to commit murder—an issue we need not decide[26]—it is also fully consistent with a verdict of conspiracy to commit assault with a firearm, either because the jury believed that Sanchez and Aguilar did not intend to fire the rifle or the shotgun, but merely to display the loaded firearms in a threatening manner (see *People v. Rodriguez* (1999) 20 Cal.4th 1, 10-11 & fn. 3 [pointing loaded gun in threatening manner sufficient proof of assault with a firearm, which requires present ability to inflict a violent injury]) or because the jury concluded the intent to shoot at rival gang members did not include an intent to kill one or more of them, a required element of conspiracy to commit murder. (See *People v. Swain* (1996) 12 Cal.4th 593, 607 [conspiracy to commit murder requires a finding of intent to kill and "cannot be based on a theory of implied malice"].) In light of these possible differing interpretations of the evidence (particularly since no precise definition of "jale" was provided by the witnesses), there was substantial evidence to support an instruction on the lesser included offense of conspiracy to commit an assault with a firearm. (See *People v. Baker* (1999) 74 Cal.App.4th 243, 252-253 [evidence of defendants' statements could be interpreted as indicating either intent to commit a simple assault or to commit an assault with a deadly weapon or with deadly force; because a rational jury could have concluded only the lesser offense was intended, the jury should have been instructed on a conspiracy to commit the lesser offense].)

iv. *Failure to instruct on the lesser included offense of conspiracy to commit an assault with a firearm was prejudicial*

As the Attorney General argues, the erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Sakarias* (2000) 22 Cal.4th 596, 621; *People v. Breverman, supra*, 19 Cal.4th at p. 176.) Thus, reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or

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[26] Neither Sanchez nor Aguilar argues on appeal that this evidence is insufficient to support their convictions for conspiracy to commit murder.

errors committed by the trial court. (*Watson*, at pp. 836-837; see *People v. Prince* (2007) 40 Cal.4th 1179, 1267.) Under this standard, "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

The Attorney General misinterprets this standard for determining prejudicial error, however, arguing the jury's finding that Sanchez and Aguilar were guilty of conspiracy to commit murder necessarily included a finding they had an express intent to kill a rival gang member, thus demonstrating the failure to instruct on the lesser included offense was harmless. That, of course, cannot be correct; for in every case in which an appellate court finds the failure to give a lesser included offense instruction constituted error, the defendant has been convicted of the greater offense, and the jury necessarily found the elements of that greater offense had been proved. Rather, in assessing whether the failure to instruct on a lesser included offense was harmless, the reviewing court properly looks to the jury's findings with respect to other charges or enhancements alleged against the defendant.

For example, in *People v. Lewis, supra*, 25 Cal.4th at page 646, in an appeal from a conviction for first degree felony murder with true findings on special allegations of robbery murder and burglary murder (as well as for robbery and burglary), the defendant contended he had mistakenly entered the victim's apartment while under the influence of drugs and alcohol, believing it was that of an acquaintance, and then stabbed the victim because he was afraid he was going to be attacked. The Supreme Court held any error in failing to instruct on involuntary manslaughter and voluntary manslaughter based on imperfect self-defense was harmless. The Court explained, "Here, the trial court instructed the jury on first degree felony murder and the crimes of robbery and burglary. In addition, the court instructed the jury on theft as a lesser included offense of robbery and burglary, an instruction emphasizing that if defendant formed the intent to steal only after he had entered the Rumseys' apartment and assaulted them, he was guilty of the lesser crime of theft. The jury found defendant guilty of robbery and burglary, and it found true the special circumstance allegations that defendant killed James Rumsey in the commission of robbery and burglary. [Citations.] To render these verdicts, the jury had to find that defendant had already formed the intent to steal when he entered the Rumseys' apartment and assaulted them, thus necessarily rejecting the defendant's version of the events." Thus, it was the jury's finding that the defendant had committed robbery, not theft, that permitted the finding of harmless error with respect to the lesser-included offenses of murder, not the conviction for murder itself.

Similarly, in *People v. Sakarias, supra*, 22 Cal.4th 596, the Supreme Court found harmless any error in failing to instruct on theft as a lesser included offense of robbery in a case in which the defendant had been convicted of first degree murder with special circumstances of murder in the commission of robbery and burglary and of separate counts of robbery and burglary. The defendant argued substantial evidence supported a finding his intent to take property from the victim's person arose only after the killing, which would be theft, not robbery. After concluding the evidence of after-formed intent was insufficient to justify an instruction on theft (*id.* at p. 620), the Court held, even if the trial court erred in not instructing on theft, the error was harmless: "The jury, moreover, necessarily rejected that factual theory in finding true the robbery-murder special circumstance, which they were instructed was not established if 'the robbery was merely incidental to the commission of the murder.' Thus, the question whether [the victim] was killed with the intent to take property from her, or whether the taking was merely an afterthought to the killing, was clearly presented to and resolved by the jury." (*Id.* at p. 621; accord, *People v. Turner* (1990) 50 Cal.3d 668, 690-691 [jury resolved after-intent inference against defendant when it found true special circumstance allegation that murder was committed while defendant was engaged in robbery].)

Here, in contrast to *Lewis* and *Sakarias*, the evidence was sufficient to permit a reasonable jury to conclude Sanchez and Aguilar planned to commit an assault with a firearm at Marshall High School on September 8, 2003, rather than to commit a murder using a firearm; and no other jury finding resolved that issue of their intent adversely to them. It is reasonably probable under these circumstances a properly instructed jury would have convicted them of the lesser included offense, rather than the greater offense of conspiracy to commit murder. Retrial of count 3 is required.

c. *Defense of others*

The trial court's obligation to instruct on the general principles of law applicable to the case includes the duty to instruct on an asserted defense, including self defense or defense of others, if there is sufficient evidence from which a reasonable juror could find the defense applicable. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1046; *People v. Breverman, supra*, 19 Cal.4th at p. 154.) When a trial court refuses a proposed instruction for lack of evidence, we review the record de novo to determine whether the record contains substantial evidence to warrant the instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584; *People v. Cruz* (2008) 44 Cal.4th 636, 664.)[27]

Fuentes was convicted in count 4 of carrying a loaded firearm in a public place in violation of section 12031, subdivision (a)(1), in connection with the tagging/shooting incident on Vendome Street on August 29, 2003. Subdivision (j)(1) of section 12031 provides, "Nothing in this section is intended to preclude the carrying of any loaded firearm under circumstances where it would otherwise be lawful, by a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." Asserting substantial evidence indicated Fuentes came toward Rangel and Sanchez with a gun only after Rangel had threatened to shoot Sanchez, Fuentes contends the trial court erred in failing sua sponte to instruct the jury, in addition to the elements of the offense charged in count 4, on protection of others as a defense to the charge—that is, that he did not unlawfully possess a loaded firearm if

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[27] In this context, "substantial evidence" means ""'evidence from which a jury composed of reasonable [persons] could . . . conclude'"" that the particular facts underlying the instruction did exist. (*People v. Cruz, supra,* 44 Cal.4th at pp. 636, 664.)

he only carried it when he reasonably believed it was necessary to use it to defend Sanchez's life.

A prerequisite for the defense-of-others defense under section 12031, subdivision (j)(1), however, is that it would "otherwise be lawful" for the defendant to possess or carry the firearm. Fuentes failed to satisfy that requirement: As of August 29, 2003, Fuentes was 17 years old—a minor. Subject to certain exceptions not relevant to the instant case, section 12101, subdivision (a)(1), makes it unlawful for a minor to possess "a pistol, revolver, or other firearm capable of being concealed upon the person." There is no dispute the loaded firearm used by Fuentes to shoot Rangel—the subject of the count 4 conviction—was, in fact, *capable* of being concealed on Fuentes's person, although in dismissing the additional charge under section 12025, subdivision (a), the trial court concluded the evidence was insufficient that Fuentes had actually concealed it on his person prior to shooting Rangel. Accordingly, quite apart from the issues of constructive or actual possession before or after the brief confrontation with Rangel, which are addressed by the Attorney General, the trial court was not required to instruct on defense of others.

d. *CALCRIM Nos. 220 and 226*

Fuentes challenges the trial court's use of CALCRIM Nos. 220 and 226, contending CALCRIM No. 220 impermissibly precluded the jury from considering lack of evidence on the issue of proof beyond a reasonable doubt and CALCRIM No. 226 improperly invited jurors to consider matters outside the record. Neither argument has merit.

As to CALCRIM No. 220,[28] Fuentes argues the portion of the instruction that told the jury it "must impartially compare and consider all the evidence that was received

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[28] The trial court instructed pursuant to CALCRIM No. 220, "The fact that a criminal charge had been filed against the defendants is not evidence that the charge is true. You must not be biased against the defendants just because they have been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a

throughout the entire trial" in determining whether the prosecution had proved its case beyond a reasonable doubt limited the jury's determination of reasonable doubt to the evidence received at trial, thus precluding the jury from considering the lack of evidence in making its decision, and effectively reduced the prosecution's burden of proof. Identical challenges to this portion of CALCRIM NO. 220 have consistently been rejected by the appellate courts. (*People v. Zavala* (2008) 168 Cal.App.4th 772, 781; *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1117-1119; *People v. Stone* (2008) 160 Cal.App.4th 323, 330-332; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1237-1238; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267-1269; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-1093; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1508-1510; *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1156-1157.)

As those opinions explain, the instruction expressly directs jurors that, unless the evidence proves a defendant guilty beyond a reasonable doubt, the defendant is entitled to an acquittal. The only plausible understanding of this language is that a "lack of evidence" is ground for a reasonable doubt; nothing in the instruction itself (or elsewhere in the CALCRIM instructions given in this case) suggests jurors may not consider any perceived lack of evidence in deciding whether proof beyond a reasonable doubt is lacking. (See, e.g., *People v. Guerrero, supra*, 155 Cal.App.4th at pp. 1268-1269 ["[i]f the government presents no evidence, then proof beyond a reasonable doubt is lacking, and a reasonable juror applying this instruction would acquit the defendant"]; *People v. Campos, supra,* 156 Cal.App.4th at p. 1238 ["[t]he only reasonable understanding of the

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reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt, unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves a particular defendant guilty beyond a reasonable doubt, that defendant is entitled to an acquittal and you must find that defendant not guilty."

language, '[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty,' is that a lack of evidence could lead to reasonable doubt"].)

CALCRIM No. 226, which advises jurors to use their common sense and experience when evaluating the credibility of witnesses,[29] is similarly a proper statement of the law that does not invite jurors to consider extrajudicial evidence or to employ a standard less than proof beyond a reasonable doubt when determining whether a defendant is guilty of the crimes charged. Our colleagues in Division Two of this court rejected the same challenge to CALCRIM No. 226 in *People v. Campos, supra,* 156 Cal.App.4th at pages 1239 to 1240, holding, "To tell a juror to use common sense and experience is little more than telling the juror to do what the juror cannot help but do. In approaching any issue, a juror's background, experience and reasoning must necessarily provide the backdrop for the juror's decisionmaking, whether instructed or not. CALCRIM No. 226 does not tell jurors to consider evidence outside of the record, but merely tells them that the prism through which witnesses' credibility should be evaluated is common sense and experience. . . . CALCRIM No. 226 does not instruct jurors to use their common sense and experience in finding reasonable doubt, which could potentially conflict with the beyond a reasonable doubt standard, but only in assessing a witnesses' credibility."

The *Campos* court further explained, "[O]ther instructions given to jurors make clear that the term 'common sense and experience' is not a license to consider matters outside of the evidence. Jurors were instructed that they must decide the facts based on the evidence presented (CALCRIM No. 200), that they were not to conduct research or

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[29] The trial court instructed, in part, pursuant to CALCRIM No. 226, "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's disability, gender, race, religion, ethnicity, sexual orientation, gender identity, age, national origin, or socioeconomic status. You may believe all, part, or none of any witness's testimony."

investigate the crime (CALCRIM No. 201), that their determination of guilt had to be based on evidence received at trial (CALCRIM No. 220), that they were only to consider evidence (sworn testimony and exhibits) presented in the courtroom (CALCRIM No. 222), that they had to decide whether facts have been proved based on 'all the evidence' (CALCRIM No. 223), that they should review all the evidence before concluding that the testimony of one witness proves a fact (CALCRIM No. 301) and other instructions emphasizing the exclusive significance of the evidence. (CALCRIM No. 302.)" (*People v. Campos, supra,* 156 Cal.App.4th at p. 1240.)

The trial court here used the same instructions as did the trial court in *People v. Campos, supra,* 156 Cal.App.4th 1228. Fuentes has provided no persuasive reason for us to depart from Division Two's analysis upholding the use of CALCRIM No. 226.

e. *CALCRIM No. 375*

Using a modified form of CALCRIM No. 375 the trial court instructed the jury concerning the limited purposes for which certain evidence was admitted and could properly be considered by it (specifically, evidence of the Vendome Street tagging/shooting incident and Rossier's post-arrest letters). Sanchez argues the instruction was improper as to him because, as a factual and legal matter, his presence at the Vendome Street shooting could not be considered as proof that he had acted with knowledge of any of the charged crimes or with the requisite intent to commit any of those crimes.[30]

In light of our holding that evidence concerning the Vendome Street tagging/shooting incident was properly admitted pursuant to Evidence Code section 1101, subdivision (b), as evidence of Fuentes, Sanchez and Rossier's intent with respect

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30 The court instructed, in part, "If you conclude that defendants Sanchez or Rossier were 'present at the Vendome shooting,' you may but are not required to consider their presence for the limited purpose of deciding whether or not: [¶] (a) Defendant Sanchez and/or defendant Rossier acted with knowledge of the charged or lesser included crimes and allegations with which they are charged; and/or [¶] (b) Defendants Sanchez and/or Rossier acted with the required specific intent to commit the charged or lesser included crimes and allegations with which they are charged."

to the Bellevue Avenue drive-by shooting, Sanchez's argument regarding CALCRIM No. 375 necessarily fails. The instruction is a correct statement of the law. (Cf. *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016 [upholding analogous CALJIC jury instruction]; *People v. Carpenter* (1997) 15 Cal.4th 312, 380-382.) As modified to reflect the evidence actually admitted in this case, it properly summarized the material facts and applicable legal principles. To the extent Sanchez simply contends, yet again, that knowledge and criminal intent for the charged crimes are not reasonably inferred from his participation in the Vendome Street incident because of the differences between the shooting that occurred on August 29, 2003 and the drive-by murder on September 6, 2003, the jury was expressly instructed it was for it to decide what weight, if any, to give to that evidence. The jury is presumed to have followed the trial court's instructions, and there is no indication it did not. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

5. *Sufficiency of the Evidence*

a. *Standard of review*

To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

b. *Substantial evidence supports Rossier's convictions for second degree murder and attempted premeditated murder*

Rossier correctly identifies "the crucial issue" as to her culpability for the drive-by shooting as dependent on whether the evidence established she knew and shared the intent of "the actual perpetrators"—Fuentes, who used the rifle to shoot and kill Monsivais and to wound Manuel De La Rosa;[31] Flores, who tried to fire the shotgun; and Sanchez, who drove the stolen minivan. Rossier contends the evidence at trial was insufficient to prove she was an aider and abettor, that is, that she knew of the perpetrators' unlawful purpose and specifically intended to, and did in fact, aid, facilitate or encourage the commission of the drive-by shooting. (See *People v. Beeman* (1984) 35 Cal.3d 547, 561; see also CALCRIM No. 401 [aiding and abetting: intended crimes].) Rossier's argument is little more than an invitation to this court to reweigh the evidence and substitute our own evaluation for that of the jury, a request we necessarily decline. (See, e.g., *People v. Culver* (1973) 10 Cal.3d 542, 548; *People v Felix* (2009) 172 Cal.App.4th 1618, 1624.)

Contrary to Rossier's contention, there was far more evidence upon which the jury could base its finding she had aided and abetted the Bellevue Avenue drive-by shooting than simply her gang membership, her presence in the stolen minivan and "her rambling,

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[31] Fuentes also argues there was insufficient evidence to support his convictions on the murder and attempted murder charges, contending, apart from the testimony of the accomplices, Pacheco, Mendez and the Kuk brothers, the People failed to prove he shot Monsivais and De La Rosa or aided and abetted the individual who did. However, as we discussed in finding any error in the accomplice instructions harmless because there was adequate, independent corroborating evidence in the record, the accomplice testimony was properly considered by the jury. Accepting, as we must, that the jury found this testimony to be credible, there is ample evidence to support Fuentes's convictions for these crimes. (See *People v. Zamudio, supra,* 43 Cal.4th at p. 357 [in assessing claim of insufficient evidence we presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence].)

angry letters." Testimony at trial indicated Rossier was originally seated next to Sanchez, her boyfriend, while he drove the minivan on September 6, 2003. Once Pacheco had handed the laundry bag containing the guns and ammunition to someone inside the minivan, Rossier held the bag while Fuentes removed the shotgun and rifle. Rossier then changed places, allowing Fuentes to occupy the front passenger's seat, the position from which he fired the lethal shots. Moreover, according to Pacheco, Rossier was present when the purportedly more culpable men discussed driving to Silver Lake gang territory and "busting a jale" prior to the shooting; and Rossier told him afterward that she had tried to help Flores unjam the shotgun during the shooting spree. That evidence, together with Rossier's membership in the Red Shield clique of the 18th Street criminal street gang and her participation in the events that preceded the drive-by shooting, constitute ample circumstantial evidence of her knowledge of Fuentes's and Flores's unlawful purpose and her specific intent to assist them in shooting victims they believed were members of a rival gang.

Rossier's challenge to the sufficiency of this evidence, in effect, is that none of the People's witnesses who described her activities on the evening of September 6, 2003 was credible. Without doubt, the various gang members who testified for the prosecution—in particular, Pacheco, the Kuk brothers and Felix—faced their own legal difficulties and had strong incentives to lie and deflect blame from themselves. At various times, as Rossier argues, they gave conflicting versions of the central events surrounding the shootings. But those issues of witness credibility were all presented to the jury, which apparently decided to believe the witnesses, at least in substantial part. That is the jury's function, not ours. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio, supra,* 43 Cal.4th at p. 357.)

c. *Inconsistent verdicts; selective prosecution*

Under the brief heading directed to the sufficiency of the evidence, Rossier also argues her convictions are improper because the jury's verdicts were inconsistent (she could not have simultaneously aided and abetted an attempted premeditated murder of

De La Rosa, but only a second degree murder of Monsivais during the same shooting spree; the guilty findings on the substantive charges cannot be reconciled with the not true findings as to her on the firearm-use enhancement allegations) and she was the victim of selective prosecution.[32]

"As a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.] . . . Although '"error," in the sense that the jury has not followed the court's instructions, most certainly has occurred,' in such situations, 'it is unclear whose ox has been gored.' [Citation.] It is possible that the jury arrived at an inconsistent conclusion through 'mistake, compromise, or lenity.' [Citation.] Thus, if a defendant is given the benefit of an acquittal on the count on which he was acquitted, 'it is neither irrational nor illogical' to require him [or her] to accept the burden of conviction on the count on which the jury convicted." (*People v. Avila* (2006) 38 Cal.4th 491, 600.) Here, it is likely that the jury thought it unnecessary to convict Rossier of the more serious murder charge and the firearm enhancements since she was not one of the actual shooters. Although not technically correct in terms of the law's imposition of responsibility for her role as an aider and abettor, she was plainly not prejudiced by any inconsistency in the verdicts reached.

Rossier's selective prosecution claim is similarly without merit. Indeed, although presenting the argument, Rossier concedes she cannot meet the strict criteria for establishing that she was singled out for prosecution on the basis of some invidious purpose or due to a prohibited classification. (See *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 832-833 ['"[t]o establish the defense [of discriminatory enforcement], the defendant must prove: (1) "that he [or she] has been deliberately singled out for prosecution on the basis of some invidious criterion"; and (2) that "the prosecution would

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32 Rossier's appellate counsel asserts with rhetorical flourish, "It is not at all clear why the prosecutor went after Rossier with such a vengeance when the male defendants were obviously the real culprits and at the same time letting others, including the woman who actually supplied the guns and the other passengers in the van on Bellevue, go uncharged."

not have been pursued except for the discriminatory design of the prosecuting authorities'""]; accord, *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 298 [same].)

6. *The Prosecutor Did Not Commit Prejudicial Misconduct*

a. *Governing law*

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution only when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'"'" (*People v. Navarette* (2003) 30 Cal.4th 458, 506; accord, *People v. Morales* (2001) 25 Cal.4th 34, 44.)

b. *Mischaracterization of premeditation and deliberation*

During her initial closing argument the prosecutor discussed the concept of premeditation and deliberation, explaining premeditation could occur during a relatively short period of time, "You look to the extent of the consideration, not the length of time." She gave as an example driving to court: "[L]et's say you are coming on the 110 freeway coming south from Pasadena, and you have to turn off to get off in downtown. You are driving along. You go, 'I better get over,' so you get in the correct lane. You look in your mirror, look behind you, see it is clear to go. You move over a couple of lanes. Well, right there you have deliberated and premeditated. It is an innocent thing but you do it every day. You have planned it. It wasn't an accident. You moved over there. You thought about it. . . ." Fuentes contends the changing-lanes example given by the prosecutor misstated the law and improperly trivialized the proof required to find him guilty of first degree murder.

In support of his argument Fuentes mistakenly relies upon two cases in which everyday decisionmaking was equated to the reasonable doubt standard of proof, rather than to explain the concept of premeditation or deliberation as an element of first degree murder. Thus, in *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36, the Court of Appeal strongly disapproved a prosecutor's argument "suggesting the reasonable doubt standard is used in daily life to decide such questions as whether to change lanes or marry," before concluding any error was harmless because the jury was correctly instructed by the court on the standard. (*Id.* at pp. 36-37.) In explaining its disapproval of the argument, the *Nguyen* court quoted *People v. Brannon* (1873) 47 Cal. 96, 97: "'The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. Juries are permitted and instructed to apply the same rule to the determination of civil actions involving rights of property only. But in the decision of a criminal case involving life or liberty, something further is required. . . . There must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence.'" (*Nguyen*, at p. 36.)

Relying on *Nguyen*, in *People v. Johnson* (2004) 115 Cal.App.4th 1169 our colleagues in Division One of this court reversed the judgment of conviction because the trial court amplified the approved reasonable doubt instruction by analogizing it to decisions made by people in their daily lives such as planning a vacation or buying a home. "We are not prepared to say that people planning vacations or scheduling flights engage in a deliberative process to the depth required of jurors or that such people finalize their plans only after persuading themselves that they have an abiding conviction of the wisdom of the endeavor." (*Johnson*, at p. 1172.)

There is, of course, a significant difference between giving examples of decisionmaking from everyday life to illustrate, as here, the meaning of "deliberate" or "premeditated" and using such examples to define the concept of proof beyond a reasonable doubt. The prosecutor properly argued to the jury "there [was] ample evidence that the defendants considered and thought about and planned what they were going to do before they actually did it" and correctly explained that neither deliberation nor premeditation requires thought over an extended period. (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 419 [true test of deliberation and premeditation is not the duration of time but the extent of the reflection].) The changing-lanes illustration did not significantly misstate the definition of either term. (See *People v. Williams, supra*, 16 Cal.4th at pp. 223-224 [reviewing transcript of prosecutor's actual remarks belies contention "deliberation" was misdefined].) Moreover, the trial court fully instructed the jury on that element of deliberate, premeditated murder and attempted premeditated murder and further instructed the jury pursuant to CALCRIM No. 200, "If you believe that any attorney's comments on the law conflict with my instructions, you must follow my instructions." There was no prejudicial misconduct.[33]

c. *Vouching for the credibility of witnesses*

During her final closing argument, while discussing Marroquin's testimony concerning the September 8, 2003 Marshall High events, the prosecutor asked rhetorically, "Why would he lie? What's he lying about? It doesn't make any sense. I mean, he implicated himself." Responding to defense counsel's assertion of Marroquin's motive to lie, she continued, "Counsel kept talking about his motivation to lie, but what did they think he's lying about. Specifically? They haven't told you what they think he's lying about because his story, his statement makes sense. He told the police the truth. He told the police what he knew." Then referring more generally to the Kuk brothers and Felix, as well as Marroquin, the prosecutor said, "This is a serious case. This is a case that's been complicated. You heard a lot of evidence. You've heard a lot

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[33] Fuentes's counsel did not object to the prosecutor's allegedly improper comment, nor did he request an admonition or curative instruction. Accordingly, this argument is forfeited on appeal. (*People v. Jones* (2003) 29 Cal.4th 1229, 1262; *People v. Box*, *supra*, 23 Cal.4th at p. 1207.) Contrary to Fuentes's assertion, nothing in the record suggests a timely objection would have been futile or ineffective to cure any purported harm. (*People v. Dykes* (2009) 46 Cal.4th 731, 757.) We nonetheless consider and reject Fuentes's claim on the merits because, as an alternative to his claim of prosecutorial misconduct, Fuentes urge us to hold his counsel's failure to object to the changing-lanes illustration constituted ineffective assistance of counsel.

of testimony. And you've got witnesses who definitely are gang members, drug dealers, all the rest of it. But in some ways, those admissions to their gang membership and drug dealership really gives them additional credibility."

After making these comments the prosecutor concluded her summation, advising the jurors they were not to speculate why other individuals who had been in the stolen minivan on September 6, 2003 were not on trial, and asking the jury to return guilty verdicts. Only then did defense counsel object that the prosecutor had been vouching for the credibility of the People's witnesses. After noting the objection was "a tad late," the court immediately instructed the jury, "Any reference to any party in this case vouching or believing the testimony of an individual witness is simply inappropriate and not evidence as it applies to any party in this case. The jurors decide the believability of any witness and make up your own independent mind about that. Once again, any statements of any attorney in this case and the argument and in the opening statement phase and anything that's not contained within the stipulation is simply not evidence in this case." That admonition was subsequently echoed by the standard instruction, given by the court here pursuant to CALCRIM No. 222, that "[n]othing the attorneys say is evidence . . . . Their remarks are not evidence."

Aguilar[34] argues the prosecutor committed misconduct by vouching for or bolstering the credibility of Marroquin and Felix. Although a prosecutor may not vouch for the credibility of a witness based on personal belief or by referring to evidence outside the record (*People v. Martinez* (2010) 47 Cal.4th 911, 958; *People v. Sully* (1991) 53 Cal.3d 1195, 1235), none of the challenged statements can fairly be characterized as improper: "A prosecutor may comment upon the credibility of witnesses based on facts contained in the record, and any reasonable inferences that can be drawn from them." (*Martinez*, at p. 958.) Moreover, in light of the trial court's immediate admonition, as

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[34] We consider Aguilar's claim of prosecutorial misconduct notwithstanding our reversal of his conviction because all appellants have properly joined in each other's argument. (See fn. 1, above.)

well as its standard instruction that comments by the attorneys are not evidence, no reasonable likelihood exists that the jury applied those comments in an objectionable fashion. (See *People v. Morales*, *supra,* 25 Cal.4th at p. 44 [when a claim of prosecutorial misconduct relates to comments made before the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion"].)

d. *Denigrating defense counsel*

While Sanchez was testifying in his defense, the prosecutor, noting an event that had occurred during the previous court day, asked Sanchez if Fuentes's counsel had come over to talk to him. Sanchez responded, "Yeah, he always does." The prosecutor then asked if Sanchez's own counsel was present at the time, and Sanchez said he did not remember. The prosecutor then asked, "What did [Fuentes's counsel] want to talk to you about?" There were immediate objections by counsel for Fuentes and Rossier; and, after a brief sidebar conference, the objections were sustained.

As later disclosed on the record, the prosecutor apparently believed Fuentes's counsel had suggested to Sanchez that he look at the jury when testifying. She subsequently asked Sanchez if anyone had advised him to do that (after informing the court she intended to ask that question). The court overruled a defense objection, and Sanchez answered, "Nobody ever told me anything like that."

Fuentes and Rossier contend the question to Sanchez about Fuentes's counsel constituted a personal attack, which impugned the integrity of defense counsel by suggesting he had improperly coached the witness. (See *People v. Welch* (1999) 20 Cal.4th 701, 753 ["It is misconduct when a prosecutor in closing 'denigrates counsel instead of the evidence. Personal attacks on opposing counsel are improper and irrelevant to the issues.'"].) As the trial court remarked at the time, the record simply does not support the argument that the prosecutor was in any way denigrating defense counsel, nor is it reasonably likely the jury's attention was diverted from the evidence to any purported impropriety by defense counsel. (See *People v. Sandoval* (1992) 4 Cal.4th

155, 183-184; cf. *People v. Taylor* (2001) 26 Cal.4th 1155, 1167 [referring to defense "tricks" or "moves" did not constitution improper personal attack].) Moreover, any possible prejudice from the question itself—and it is difficult for us to conceive of any—was fully dissipated both by Sanchez's unequivocal denial that he had been advised how to testify by anyone, as well as by the trial court's instruction that the attorneys' questions are not evidence and are to be considered only to the extent they help in understanding the witness's answer. (CALCRIM No. 222.)

e. *Smirking and other purported misconduct*

Noting several points in the record where the trial court admonished the prosecutor not to be so animated with her facial expressions and body language (both positive and negative) or to refrain from possible nonverbal communication (shaking her head) with one of her witnesses (Pacheco), Rossier argues a smirking prosecutor who coached her witnesses deprived her of a fair trial. It does appear the prosecutor, perhaps unintentionally and in her zeal, on occasion during this lengthy trial lapsed into unprofessional, nonverbal, but nonetheless communicative behavior. When noticed by the court or brought to its attention by defense counsel, she was corrected. Although we certainly do not condone smirking, sneering or gestures that convey positive or negative messages to witnesses or the jury, whether considered separately or collectively, it is not likely this conduct misled the jury or affected its evaluation of the evidence. (See *People v. Espinoza* (1992) 3 Cal.4th 806, 820-821 ["it is not reasonably probable that the prosecutor's occasional intemperate behavior [using facial expressions or gestures to express dismay or disbelief] affected the jury's evaluation of the evidence or the rendering of its verdict"]; *People v. Stewart* (2004) 33 Cal.4th 425, 503 [same].)

Finally, Rossier argues the prosecutor deliberately elicited inadmissible evidence from Los Angeles Police Detective Jeff Breuer, the investigating officer in the case, concerning telephone calls to and from Rossier's cell phone. Specifically, in addition to extensive questioning about calls on September 8, 2003, the prosecutor asked Detective Breuer if, during the course of his investigation, he had determined calls had been made to Pacheco's father from Rossier's phone. A defense objection that the question was based on uncertified telephone records (hearsay), which had not been disclosed during discovery, was sustained. (The prosecutor asserted the records had been provided to defense counsel; the court sustained the objection only on the hearsay ground.) The court also stated the answer to the question would be stricken and directed the jury to disregard it. In fact, no answer had yet been given to the question; and Detective Breuer never testified that a call had gone from Rossier's phone to Pacheco's father—on September 6, 2003 or any other date.[35]

Even if we were to accept Rossier's somewhat dubious contention the question was not asked in good faith, in light of the trial court's immediate decision to sustain the defense objection, asking that question does not constitute prejudicial prosecutorial misconduct. (See *People v. Bennett* (2009) 45 Cal.4th 577, 595 ["[w]hen a trial court sustains defense objections and admonishes the jury to disregard the comments, we assume the jury followed the admonition and that prejudice was therefore avoided"].) To be sure, it is misconduct for a prosecutor to intentionally elicit inadmissible and prejudicial testimony. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 961; *People v. Bell* (1989) 49 Cal.3d 502, 532.) Here, however, no evidence was elicited in response to the improper question. Moreover, asking this single question did not amount to an "egregious pattern of conduct that rendered the trial fundamentally unfair"; nor in the context of this lengthy, generally well-conducted, although contentious, trial, can we say there is a reasonable likelihood the jury was misled by it, particularly since the court gave a curative admonition to disregard any answer and further instructed the jury not to assume the truth of anything suggested by a question asked a witness. (See *Smithey*, at p. 961 ["[w]e presume the jury followed the court's detailed instructions regarding this

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[35] Immediately before the question at issue, Detective Breuer only said the police had attempted to identify the subscribers for each of the numbers recorded on the phone. The trial court specifically ruled that such a general inquiry into what the police had done with regard to records for Rossier's cell phone was proper, and there has been no challenge to that ruling on appeal.

matter and conclude that, in light of the instructions, there is no reasonable likelihood the jury was misled by the prosecutor's improper question"].)

7. *Section 12031, Subdivision (a)'s Prohibition Against Carrying a Loaded Firearm in a Public Place Is Not Unconstitutional*

Relying on *District of Columbia v. Heller* (2008) 554 U.S. ___ [128 S.Ct. 2783, 171 L.Ed.2d 637], which invalidated under the Second Amendment to the United States Constitution the District of Columbia's ban on the possession of all firearms, including possession of handguns in the home,[36] Fuentes argues his conviction for carrying a loaded firearm in a public place (§ 12031, subd. (a)) must be reversed because it is based on an unconstitutional statute. An identical challenge to a conviction under section 12031, subdivision (a), was rejected by our colleagues in Division One of the Fourth Appellate District in *People v. Flores* (2008) 169 Cal.App.4th 568, 576: "[W]e believe section 12031 is so far removed from the blanket restrictions at issue in *Heller* that its constitutional validity remains undisturbed by the Supreme Court's opinion." (Accord, *People v. Villa* (2009) 178 Cal.App.4th 443, 450.)

The *Flores* court explained why *Heller* did not undermine the constitutionality of a conviction for carrying a loaded firearm in a public place: "Section 12031 prohibits a person from 'carr[ying] a loaded firearm on his or her person . . . while in any public place or on any public street.' (§ 12031, subd. (a)(1).) The statute contains numerous exceptions. There are exceptions for security guards (*id.*, subd. (d)), police officers and

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36 The United States Supreme Court in *Heller* did not address whether the Second Amendment is incorporated in the due process clause of the Fourteenth Amendment and thus applies to the states. (See *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 312, fn. 3; *People v. Villa* (2009) 178 Cal.App.4th 443, 447, fn. 1.) On June 28, 2010 the Supreme Court in *McDonald v. City of Chicago* (2010) 561 U.S. ___ held the Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States. The *McDonald* decision, however, did not otherwise rule on the constitutional validity of the municipal ordinances at issue in the case, instead remanding the matter to the Seventh Circuit Court of Appeals for further proceedings. The right to bear arms is not recognized as one of the individual rights enumerated in the California Constitution. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481; *Yarbrough*, at p. 312, fn. 3.)

retired police officers (*id.*, subd. (b)(1), (2)), private investigators (*id.*, subd. (d)(3)), members of the military (*id.*, subd. (b)(4)), hunters (*id.*, subd. (i)), target shooters (*id.*, subd. (b)(5)), persons engaged in 'lawful business' who possess a loaded firearm on business premises and persons who possess a loaded firearm on their own private property (*id.*, subd. (h)). A person otherwise authorized to carry a firearm is also permitted to carry a loaded firearm in a public place if the person 'reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property.' (*Id.*, subd. (j)(1).) Another exception is made for a person who 'reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety.' (*Id.*, subd. (j)(2).) Finally, the statute makes clear that '[n]othing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite.' (*Id.*, subd. (*l*).) [¶] This wealth of exceptions creates a stark contrast between section 12031 and the District of Columbia statutes at issue in *Heller*. In particular, given the exceptions for self-defense (both inside and outside the home), there can be no claim that section 12031 in any way precludes the use 'of handguns held and used for self-defense in the home.' (*Heller, supra*, 554 U.S. at p. ___ [128 S.Ct. at p. 2822].) Instead, section 12031 is narrowly tailored to reduce the incidence of unlawful public shootings, while at the same time respecting the need for persons to have access to firearms for lawful purposes, including self-defense. [Citation.] Consequently, section 12031 does not burden the core Second Amendment right announced in *Heller*—'"the right of law-abiding, responsible citizens to use arms in defense of hearth and home"'—to any significant degree. [Citation.] We, therefore, conclude that *Heller* does not require reversal of Flores's section 12031 conviction." (*People v. Flores, supra*, 169 Cal.App.4th at p. 577, fn. omitted.)

We find fully persuasive the *Flores* court's analysis of the significant differences between the District of Columbia statutes invalidated in *Heller* and section 12031. Fuentes does not address any of these distinctions and presents no compelling reason for us not to follow *Flores* and uphold the constitutionality of section 12031, subdivision (a).[37]

8. *Ineffective Assistance of Counsel*

A defendant claiming ineffective assistance of counsel in violation of his Sixth Amendment right to counsel must show not only that his or her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms but also that it is reasonably probable, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *In re Jones* (1996) 13 Cal.4th 552, 561.) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.)

In considering a claim of ineffective assistance of counsel, it is not necessary to determine "'whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland v. Washington, supra,* 466 U.S. at p. 697.) It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a "reasonable probability" that absent

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[37] To the extent Fuentes advances an as-applied, rather than a facial, challenge to section 12031, subdivision (a), arguing his conviction infringes his constitutional right to possess a firearm for self defense, that contention fails for same reasons as his argument that the trial court erred in failing to instruct the jury on the defense of others as a defense to the firearm possession charge, discussed in section 4.c., above.

the errors the result would have been different. (*People v. Williams, supra*, 16 Cal.4th at p. 215; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.)

As discussed, in permitting the prosecution to introduce evidence of the Vendome Street incident, the trial court directed that the shooting would not be characterized as a homicide and neither counsel nor any witness was to disclose that Rangel had been killed. Nonetheless, during opening statements Fuentes's trial counsel informed the jury that Rangel had been killed during the shooting incident on Vendome Street, a comment that Fuentes now argues constituted constitutionally ineffective assistance of counsel.

The challenged statement itself was brief. Fuentes's lawyer was elaborating on his theme that the prosecutor in her opening statement had omitted "a great deal of the truth . . . . I'm going to tell you what counsel [the prosecutor] didn't tell you." Fuentes counsel then explained, "They also left out other interesting facts in regard to this shooting on August 29. . . . Mr. Rangel did not hold his gun down at his side. Mr. Rangel picked it up and pointed it directly at Bryan Sanchez and said, 'this is your funeral,' over some spray paint. They know that. They also know that Mr. Rangel had almost twice the legal limit of alcohol in his body and two different kinds of cocaine. . . . He was a hardcore gang member. That is why the evidence will show you there is no charge about —"

At this point the prosecutor objected on the ground the statement was improper argument; the trial court sustained the objection. Trial counsel continued, "The evidence will show you there is no charge of murder as to that count because —" The prosecutor again objected. The trial court sustained the objection, stating, "We know what the charge is to that count." Undeterred, Fuentes's counsel continued, "The evidence will show you it was self-defense. That Rafael Fuentes —" Another objection by the prosecutor was sustained, and the court called all counsel forward for a sidebar conference.

During that conference outside the jury's presence, Fuentes's counsel explained he wanted to emphasize that there was no grand conspiracy, as the People contended, and that the Vendome Street incident and the Bellevue Avenue drive-by shooting were not related. The defendants were simply spray painting, and Fuentes used the firearm only in defense of Sanchez, not as part of an effort to expand the Red Shield clique's territory. "This is a totally unrelated offense. It is a totally unrelated incident." In response to the court's reminder that it was defense counsel who wanted to preclude the jury from learning that Rangel had died, Fuentes's counsel stated he believed the entire Vendome Street tagging and shooting episode should be excluded; but since the court had ruled it admissible, he wanted to the jury to understand the two shootings were quite different in how they had occurred.

The court reiterated its prior ruling (based on requests from other defense counsel) that the jury was not to learn that Rangel had died, but told Fuentes's lawyer, "I think you can indicate what the individual [Rangel] did and your client's reaction to it, and indicate that it has nothing to do with any kind of conspiracy. It happened at the moment."

Although Fuentes's counsel's reference to the absence of a charge of murder arising from the Vendome Street incident unquestionably violated the court's pretrial ruling, the statement was the product of a deliberate decision to explain why Fuentes—being tried for carrying a loaded firearm in a public place on August 29, 2003, as well as for murder and a conspiracy to commit murder on subsequent days—had used a gun on the earlier date. While we certainly do not condone a deliberate violation of a court order, we cannot conclude the decision to do so had no rational tactical purpose. (See *People v. Lucas* (1995) 12 Cal.4th 415, 442 [on a direct appeal a conviction will only be reversed for ineffective assistance of counsel where the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission].)[38]

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[38] Fuentes may be correct, as the trial court suggested during the sidebar conference, that his lawyer could have told the jury the evidence would show the two incidents were fundamentally different without adding that Rangel had been killed; but it was not unreasonable for counsel to believe that emphasizing no additional murder charge had been filed against his client, who was charged with murder and attempted murder based

Moreover, in light of the essentially undisputed evidence that Fuentes fired at Rangel in an effort to defend Sanchez, whom Rangel had threatened with his own gun, while Fuentes, Sanchez, Rossier and Ramos were engaged in tagging in Silver Lake gang territory, we can conceive of no possible prejudice to Fuentes from his counsel's statement to the jury that Rangel was killed *and* no murder charge had been filed. That is, Fuentes has failed to meet his burden of showing a reasonable probability he would have obtained a better result at trial had the statements not been made. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.)[39]

9. *Sentencing Issues*

a. *Flores's counts 1 and 2 firearm-use enhancements*

Section 12022.53, subdivision (b), provides a 10-year enhancement for "any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm . . . ." Subdivision (e)(1) extends this enhancement to "any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b) . . . ."

Flores was sentenced on count 1, second degree murder perpetrated by shooting a firearm from a vehicle, to a term of 20 years to life in state prison. (§ 190, subd. (d).)[40]

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on the Bellevue Avenue drive-by shooting and conspiracy to commit murder at Marshall High School, made the point in a more dramatic and persuasive fashion.

39 Sanchez and Rossier also argue due process requires reversal because of the cumulative effect of the trial errors. Whether considered individually, as discussed, or cumulatively, other than the instructional error as to count 3, none of the asserted errors deprived either Sanchez or Rossier of a fair trial. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1009 [defendant is "entitled to a fair trial but not a perfect one"]; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1382 [no cumulative error where court "rejected nearly all of defendant's assignments of error"].)

40 Although section 190, subdivision (d), provides the punishment for second degree murder perpetrated by shooting a firearm from a vehicle is an indeterminate term of 20 years to life in state prison, the court also specified there was a minimum parole

The court also imposed the 10-year firearm-use enhancement on count 1 pursuant to section 12022.53, subdivisions (b) and (e)(1). On count 2 Flores was sentenced to an indeterminate life term with the possibility of parole for attempted premeditated murder (§ 664, subd. (a)), with a 15 year minimum parole eligibility date pursuant to section 186.22, subdivision (b)(5), because the offense was committed to benefit a criminal street gang and a 10-year firearm-use enhancement pursuant to section 12022.53, subdivisions (b) and (e)(1).

Contending the term "principal" as used in section 12022.53, subdivision (e)(1), does not include individuals who did not personally use a firearm and are only liable for one of the offenses enumerated in section 12022.53, subdivision (a), under the natural and probable consequences doctrine, Flores asserts the trial court improperly imposed the 10-year firearm-use enhancements on counts 1 and 2. According to Flores's argument, the People proceeded against him at trial under alternate legal theories—Flores either directly aided and abetted the murder of Monsivais and the attempted murder of De La Rosa or he aided and abetted an assault with a firearm, which is not an offense specified in section 12022.53, subdivision (a), and was liable for the more serious offenses under the natural and probable consequences doctrine. Because it cannot be determined from the general verdict form on which theory the jury in fact relied, Flores argues, the firearm-use enhancements must be reversed.

The premise for Flores's argument is flawed. Section 30 classifies the parties to crimes as either "principals" or "accessories." As discussed, section 31 expressly defines

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eligibility date of 15 years on this count pursuant to section 186.22, subdivision (b)(5), because the offense was committed to benefit a criminal street gang. Although the 15-year minimum may have little practical effect, "[t]he true finding under section 186.22(b)(5), which provides for a lower minimum term [than section 190], 'is a factor that may be considered by the Board of Prison Terms when determining defendant's release date, even if it does not extend the minimum parole date per se.'" (*People v. Lopez* (2005) 34 Cal.4th 1002, 1009.)

a principal to include a person who aids and abets the commission of a crime.[41] Section 32 defines an accessory to a crime as one who, after a felony has been committed, assists a principal in the felony with the intent to help the principal avoid arrest or conviction.[42] Thus, under these statutory definitions, "[a] defendant in a criminal action . . . is convicted as a principal or accessory or not at all." (*People v. Talbott* (1944) 65 Cal.App.2d 654, 660.) Yet a defendant who is guilty of an offense by way of the natural and probable consequences doctrine is clearly not an accessory to the offense—his or her guilt is not predicated on acts perpetrated after the felony was committed. Rather, the defendant who is an aider and abettor remains just that, an aider and abettor (that is, a "principal"). The doctrine simply extends the scope of criminal liability to include all crimes committed by the direct perpetrator that are the natural and probable consequence of the target crime.

Indeed, Flores's argument to the contrary notwithstanding, it has been understood for centuries an aider and abettor is liable not only for the crime he or she intended to aid and abet but also for any crime that is the natural and probable consequence of the target crime. (See Sayre, *Criminal Responsibility For The Acts Of Another* (1930) 43 Harv. L.Rev. 689, 696-699.) Thus, whether the term aid and abet is considered to have an

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41 Section 31 provides, "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed."

42 Section 32 provides, "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony."

"approved usage" or to have acquired over the centuries a "peculiar and appropriate meaning," when the Legislature declared aiders and abettors to be "principals," it included within that term aiders and abettors liable for the commission of crimes that are the natural and probable consequences of the crimes they intended to aid and abet. (§ 7, subd. 16 ["[w]ords and phrases [in the Penal Code] must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning"].) If the Legislature had intended to give the term "principal" a different meaning in section 12022.53, subdivision (e)(1), it would have said so. (See *People v. Acosta* (2002) 29 Cal.4th 105, 114 ["[a]s a matter of statutory construction, 'a word or phrase repeated in a statute should be given the same meaning throughout'"].)

b. *Imposition of both firearm-use and gang enhancements on Flores*

As discussed, in sentencing Flores the trial court not only imposed a 10-year firearm-use enhancement on both counts 1 and 2 but also specified a 15-year minimum parole eligibility date on each count pursuant to section 186.22, subdivision (b)(5). Because Flores did not personally use or discharge a firearm in committing the offenses, however, pursuant to section 12022.53, subdivision (e)(2),[43] he was not subject to "[a]n enhancement for participation in a criminal street gang . . . in addition to an enhancement imposed pursuant to" section 12022.53. (*People v. Brookfield* (2009) 47 Cal.4th 583, 591; see *People v. Gonzalez* (2010) 180 Cal.App.4th 1420, 1427; *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282 [§ 12022.53, subd. (e)(2), prevents imposition of the 15-year minimum term specified in § 186.22, subd. (b)(5), as well as expanded liability under § 12022.53, subd. (e)(1), unless defendant personally used the firearm].)

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[43] Section 12022.53, subdivision (e)(2), states: "An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."

The Attorney General concedes the trial court erred in this regard. The judgment as to Flores must be modified to stay imposition of the 15-year minimum parole eligibility term set forth in section 186.22, subdivision (b)(5). (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129; *People v. Sinclair* (2008) 166 Cal.App.4th 848, 854; see generally Cal. Rules of Court, rule 4.447 ["[n]o finding of an enhancement may be stricken or dismissed because imposition of the term either is prohibited by law or exceeds limitations on the imposition of multiple enhancements"; sentencing judge must "stay execution of so much of the term as is prohibited or exceeds the applicable limit"].)

c. *Joint and several liability for direct victim restitution*

At sentencing the trial court ordered direct victim restitution for economic losses for the shooting victim Manuel De La Rosa and the family of decedent Juan Monsivais. (§ 1202.4, subd. (f).) Fuentes, Flores, Sanchez and Rossier—that is, each of the defendants convicted of the murder of Monsivais and the attempted murder of De La Rosa—were ordered to pay restitution, but the obligation was denominated "joint and several." The abstracts of judgment for Flores and Rossier, however, do not state the liability is joint and several. (The abstracts of judgment for Fuentes and Sanchez do contain that notation.) The Attorney General concedes this error and acknowledges our power to order a correction in the abstracts of judgment but suggests it would be in the interest of judicial economy to require Flores and Rossier to first present their request for clerical correction in the trial court.

The matter is before us. The error has been identified. We order it corrected.

DISPOSITION

As to Pedro Aguilar the judgment is reversed, and the matter remanded for a new trial consistent with the views expressed in this opinion. As to Bryan Sanchez the judgment is reversed as to count 3 only, and the matter remanded for a new trial on that count consistent with the views expressed in this opinion; in all other respects the judgment is affirmed. As to Edgar Javier Flores the judgment is modified to reflect the 15-year minimum parole eligibility terms (§ 186.22, subd. (b)(5)) imposed as to counts 1 and 2 are stayed; in all other respects the judgment is affirmed. As to Rafael R. Fuentes and Jasmin Rossier the judgments are affirmed.

The abstracts of judgment for Flores and Rossier are ordered corrected (1) to indicate as to Flores the 15-year minimum parole eligibility terms on counts 1 and 2 are stayed; and (2) to reflect as to Flores and Rossier that the liability for direct victim restitution is joint and several with the obligation of each other and of Fuentes and Sanchez. The superior court is directed to prepare corrected abstracts of judgment and to forward them to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

SUPREME COURT OF THE UNITED STATES

BRYAN SANCHEZ	)	
	)	NO._________________
Petitioner,	)	
	)	CERTIFICATE OF SERVICE
v.	)	
	)	
RAYMOND MADDEN,	)	
Warden	)	
	)	
Respondent.	)	
_________________________	)	

I hereby certify that I was appointed to represent the petitioner under the Criminal Justice Act, 18 U.S.C. 3006A and that I have on this date served copies of the petitioner's Petition for Writ of Certiorari by depositing them in the U.S. Mail, first class postage prepaid, at Berkeley, California and addressed to:

Mr. Bryan Sanchez
CDC V31727
Centinela State Prison
C - 1 - 112u
PO Box 921
Imperial, CA 92251
PETITIONER

Attn: Jonathan Krauss
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
RESPONDENT

Dated: ______, 2018.

____
Stephanie M. Adraktas
Attorney for Petitioner