

No. _____

IN THE
Supreme Court of the United States

BENJAMIN ESPINOZA,

Petitioner,

v.

JOSEPH L. MCGRATH, WARDEN,

Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 29 2017

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

BENJAMIN ESPINOZA,

Petitioner-Appellant,

v.

JOSEPH L. MCGRATH,

Respondent-Appellee.

No. 17-55496

D.C. No.

8:02-cv-00358-SJO-PJW

Central District of California,
Santa Ana

ORDER

Before: LEAVY and TALLMAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENJAMIN ESPINOZA,	)	CASE NO. SA CV 02-358-SJO (PJW)
	)	
Petitioner,	)	ORDER ACCEPTING REPORT AND
	)	ADOPTING FINDINGS, CONCLUSIONS,
v.	)	AND RECOMMENDATIONS OF UNITED
	)	STATES MAGISTRATE JUDGE, AND
JOSEPH L. MCGRATH, WARDEN,	)	DENYING CERTIFICATE OF
	)	APPEALABILITY
Respondent.	)	

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the Petition, records on file, and the Final Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report to which Petitioner has objected. The Court accepts the Report and adopts the findings, conclusions, and recommendations of the Magistrate Judge.

Further, for the reasons stated in the Final Report and Recommendation, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right and therefore, a certificate of appealability is denied. See 28 U.S.C.

1 § 2253(c)(2); Fed. R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S.
2 322, 336 (2003).

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4 DATED: March 24, 2017.

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S. JAMES OTERO
8 UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENJAMIN ESPINOZA,	)	CASE NO. SA CV 02-358-SJO (PJW)
Petitioner,	)	FINAL REPORT AND RECOMMENDATION
v.	)	OF UNITED STATES MAGISTRATE JUDGE
JOSEPH L. MCGRATH, Warden,	)	
Respondent.	)	

This Final Report and Recommendation is submitted to the Hon. S. James Otero, 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. For the reasons discussed below, it is recommended that the Petition be denied and the action be dismissed with prejudice.¹

¹ This Final Report and Recommendation has been issued to address Petitioner's Objections to the Original Report and Recommendation regarding the Court's denial of Grounds Two and Three, as well as to discuss a recently issued decision from the California Supreme Court that is relevant to Ground Two and part of Ground Three. (See *infra*, sections V.B.3 and V.C.4.)

I.

SUMMARY OF PROCEEDINGS

A. State Court Proceedings

In August 1997, Petitioner was convicted by a jury in Orange County Superior Court of three counts of second degree robbery, four counts of false imprisonment, possession of a firearm in a school zone, assault with a firearm, receiving stolen property, and street terrorism. The jury also found that Petitioner personally used a firearm during the robberies and assault and that he committed all the crimes, except for street terrorism and receiving stolen property, for the benefit of a gang. (Clerk's Transcript ("CT") at 318-34.) On September 10, 1997, the court sentenced him to thirty-four years and four months in prison. (CT at 339-41.)

Petitioner appealed to the California Court of Appeal, which affirmed his conviction and sentence. (Lodged Doc. Nos. 3 and 5.) He then filed a petition for review in the California Supreme Court, which was summarily denied. (Lodged Doc. Nos. 6 and 7.)

In December 2000, Petitioner filed a petition for writ of habeas corpus in the Orange County Superior Court, which was denied in January 2001. (Lodged Doc. No. 9.) Petitioner then filed habeas petitions in the California Court of Appeal and the California Supreme Court, which were denied in 2001 and 2002. (Lodged Doc. No. 10-15 and 18.)

B. Federal Court Proceedings

In April 2002, Petitioner, proceeding *pro se*, filed a Habeas Corpus Petition in this court, pursuant to 28 U.S.C. § 2254, arguing:

1. His sentence violated due process, the Eighth Amendment, and the Sixth Amendment.

2. There was insufficient evidence to support the gang enhancements.

3. Trial counsel violated Petitioner's Sixth Amendment right to effective assistance of counsel by committing the following errors:

a. Counsel improperly stipulated to the "pattern of criminal gang activity" element of the gang enhancement;

b. Counsel failed to request an instruction on California Penal Code section 12022(a)(1) (armed with a firearm) as a "lesser included enhancement" of California Penal Code section 12022.5(a) (personally using a firearm); and

c. Counsel failed to object to the gang expert's testimony regarding Petitioner's "STEP" warnings.

4. Appellate counsel violated Petitioner's Sixth Amendment right to effective assistance of counsel by failing to raise Claims One and Two on direct appeal.

(Petition at 5-6.²)

II.

STATEMENT OF FACTS

The California Court of Appeal summarized the evidence at trial as follows:

[Petitioner] and two accomplices robbed a market.

Armed with a knife, a handgun and a rifle, they took money

² Since 2002, the parties have filed numerous briefs addressing various issues. In March 2006, the Court appointed counsel in anticipation of an evidentiary hearing that was never held.

1 from a cash box and forced the employees to open a safe in a
2 back office. They forced two of the victims into a freezer
3 and restrained two others while they gathered their loot.
4 The victims gave conflicting testimony about which of the
5 perpetrators wielded firearms during the robberies.

6 The robbers fled in a stolen car. A police officer,
7 responding to a silent alarm, gave chase which ended in a
8 dead end street. [Petitioner] jumped out of the car with
9 money in one hand and a rifle in the other. As he exited
10 the vehicle, the pursuing officer ordered him to stop and
11 drop the weapon, whereupon [Petitioner] pointed the rifle at
12 the officer. The officer fired her revolver, striking
13 [Petitioner] in the leg.

14 Testifying on his own behalf, [Petitioner] admitted
15 planning the robbery, taking part in it, and falsely
16 imprisoning the victims. However, he denied personally
17 using a firearm during the robbery. He also denied aiming
18 the rifle at the officer and being a member of a street
19 gang.

20 (Lodged Doc. No. 5 at 2-3.)

21 III.

22 STANDARD OF REVIEW

23 The standard of review in this case is set forth in 28 U.S.C.
24 § 2254:

25 An application for a writ of habeas corpus on behalf of a
26 person in custody pursuant to the judgment of a State court
27 shall not be granted with respect to any claim that was
28

1 adjudicated on the merits in State court proceedings unless the
2 adjudication of the claim--

3 (1) resulted in a decision that was contrary to, or
4 involved an unreasonable application of, clearly established
5 Federal law, as determined by the Supreme Court of the
6 United States; or

7 (2) resulted in a decision that was based on an
8 unreasonable determination of the facts in light of the
9 evidence presented in the State court proceeding.

10 28 U.S.C. § 2254(d).

11 A state court decision is "contrary to" clearly established
12 federal law if it applies a rule that contradicts Supreme Court case
13 law or if it reaches a conclusion different from the Supreme Court's
14 in a case that involves facts that are materially indistinguishable.
15 *Bell v. Cone*, 535 U.S. 685, 694 (2002). To establish that the state
16 court unreasonably applied federal law, a petitioner must show that
17 the state court's application of Supreme Court precedent to the facts
18 of his case was not only incorrect but objectively unreasonable.
19 *Renico v. Lett*, 559 U.S. 766, 773 (2010). Where no decision of the
20 Supreme Court has squarely decided an issue, a state court's
21 adjudication of that issue cannot be contrary to, or an unreasonable
22 application of, Supreme Court precedent. See *Harrington v. Richter*,
23 562 U.S. 86, 101 (2011).

24 Petitioner raised all of his claims in his habeas petitions in
25 the California Court of Appeal and the California Supreme Court, but
26 neither court explained its reasons for denying them. (Lodged Doc.
27 Nos. 15, 18.) The Orange County Superior Court, however, did (Lodged
28 Doc. No. 9), which this Court presumes is the basis for the state

1 supreme court's subsequent decision denying the claims. In this
2 situation, the Court looks to the superior court's reasoning and will
3 not disturb it unless it concludes that "fairminded jurists" would all
4 agree that the state court's decision was wrong. *Richter*, 562 U.S. at
5 102; *Johnson v. Williams*, 133 S. Ct. 1088, 1094 n.1 (2013) (approving
6 reviewing court's "look through" state supreme court's silent denial
7 to last reasoned state-court decision).

8 IV.

9 DISCUSSION

10 A. Sentencing Claims

11 In Ground One, Petitioner contends that his sentence violated due
12 process, the Eighth Amendment, and the Sixth Amendment under *Apprendi*
13 *v. New Jersey*, 530 U.S. 466 (2000). (Petition at 5.)

14 1. Background

15 The trial court sentenced Petitioner to the upper term of five
16 years on Count One (robbery) based on the following factors in
17 aggravation: (1) the crime was carried out in a manner that indicated
18 planning and sophistication, and (2) the crime involved the taking of
19 a large sum of cash. As to the Count One personal firearm use
20 enhancement and the gang enhancement, the trial court sentenced
21 Petitioner to the upper terms of ten years and three years
22 respectively based on Petitioner's violent conduct and his prior
23 convictions for weapons possession. The trial court found no
24 mitigating factors. The aggregate sentence on Count one was eighteen
25 years. (Reporter's Transcript ("RT") at 578-79.)

26 As to Counts Two (robbery), Four (robbery), and Nine (assault),
27 the trial court imposed consecutive sentences of one year (one-third
28 of the middle term) for each count. As to the personal firearm use

1 enhancement, the trial court sentenced Petitioner to consecutive
2 sentences of three years and four months (one-third of the upper term)
3 for each count. The court noted that (1) each victim was threatened
4 by Petitioner's weapon and conduct, (2) Petitioner was on probation
5 when the crimes were committed, and (3) his prior performance on
6 probation was unsatisfactory. The aggregate sentences on Counts Two,
7 Four, and Nine were four years and four months each. (RT at 579.)

8 On Counts Three (false imprisonment), Five (false imprisonment),
9 Seven (false imprisonment), Ten (receiving stolen property), and
10 Eleven (street terrorism), the court imposed consecutive sentences of
11 eight months each (one-third of the middle term).³ (RT at 579-80.)

12 The trial court further explained its sentencing decision as
13 follows:

14 The sentences are consecutive, as separate acts of
15 violence were perpetrated on the different victims, and the
16 crime in Count 9 was committed at a different time and
17 place.

18 The court notes the favorable reports, comments of
19 [Petitioner's] friends and relatives in court, and the
20 comments of the letters, but notes and agrees with the
21 comments of the probation officer that the crime and the
22 behavior displayed by [Petitioner] completely belie any
23 characteristic of himself as a compassionate or sensitive
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26
27 ³ Pursuant to California Penal Code Section 654, the trial court
28 stayed the sentences for the gang enhancements on Counts Two through
Nine and the sentence for Count Eight (possession of a firearm in a
school zone). (RT at 579-80.)

1 individual. His actions were brutal and terrorizing to the
2 victims in this matter.

3 (RT at 580.)

4 In all, Petitioner was sentenced to thirty-four years and four
5 months in state prison. (RT at 581.)

6 2. Dual Use of Facts

7 Petitioner contends that the trial court's use of the same
8 conduct to impose the upper term and consecutive sentences violates
9 his rights under state law and his federal due process rights.

10 (Petitioner's Memorandum of Points and Authorities ("Pet. Mem.") at 1-
11 2.) He raised this claim in his habeas petition in the Orange County
12 Superior Court, but that court denied the claim as follows:

13 On the merits, petitioner does not establish a prima
14 facie case for relief. The trial court imposed the upper
15 ten year term on the firearms enhancement due to
16 petitioner's violent conduct *and* his prior convictions for
17 weapons possession. (See Cal. Rules of Court, Rule
18 421(b)(1) and (2).) The trial court also imposed
19 consecutive subordinate terms citing the independent nature
20 of the crimes and their objectives as well as the fact they
21 each constituted separate acts of violence. (See Cal. Rules
22 of Court, Rule 425(a)(1) and (2).) The trial court further
23 based its decision to impose consecutive terms on the fact
24 that petitioner was on probation when the crime was
25 committed and his prior performance on probation was
26 unsatisfactory. (See Cal. Rules of Court, Rule 421(b)(4)

1 and (5).) The record does not indicate an improper dual use of
2 facts by the trial court in sentencing.
3 (Lodged Doc. No. 9 at 2 (emphasis in original).)

4 A state prisoner is entitled to federal habeas corpus relief only
5 if he is held in custody in violation of the Constitution, laws, or
6 treaties of the United States. See 28 U.S.C. § 2254(a); *Estelle v.*
7 *McGuire*, 502 U.S. 62, 67-68 (1991). Absent a showing of fundamental
8 unfairness, habeas relief is unavailable for errors in the
9 interpretation or application of state sentencing law. See, e.g.,
10 *Christian v. Rhode*, 41 F.3d 461, 469 (9th Cir. 1994); *Miller v.*
11 *Vasquez*, 868 F.2d 1116, 1118-19 (9th Cir. 1989). Therefore, to the
12 extent that Petitioner alleges a violation or misapplication of
13 California's "dual use" proscription, his claim is not cognizable on
14 federal habeas corpus review. See *Hurtado v. Runnels*, 428 Fed. Appx.
15 704, 706 (9th Cir. 2011) (misapplication of California's "dual use
16 proscription" involved error under state law which did not merit
17 habeas relief); see also *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507
18 (9th Cir. 1994) ("The decision whether to impose sentences
19 concurrently or consecutively is a matter of state criminal procedure
20 and is not within the purview of federal habeas corpus.").

21 Even were the Court empowered to address the issue, it would
22 conclude that the trial court had not erred here. Under California
23 law, a trial court "is prohibited to some extent . . . from using the
24 same factor to support more than one sentencing choice." *People v.*
25 *Scott*, 9 Cal. 4th 331, 350 & n.12 (1994). The same factor cannot
26 support both imposition of the upper term and consecutive sentences
27 for separate offenses. *Id.* Nor can the same fact be used to impose
28

1 the high term on more than one enhancement. *People v. Flores*, 115
 2 Cal. App. 3d 67, 79-80 (1981).

3 The trial court imposed upper terms on the firearm and gang
 4 enhancements based on Petitioner's violent conduct and his prior
 5 convictions for weapons possessions. (RT at 578-79.) The court cited
 6 several different factors for imposing consecutive sentences, i.e.,
 7 that the crimes involved multiple victims, the crime in Count 9 (the
 8 assault) was committed at a different time and place, Petitioner was
 9 on probation when the crimes were committed, and his prior performance
 10 on probation was unsatisfactory.⁴ (RT at 579-80.) Accordingly, as
 11 the state superior court concluded, "the record does not indicate an
 12 improper dual use of facts by the trial court in sentencing." (Lodged
 13 Doc. No. 9 at 2.) As such, this claim does not warrant relief.⁵

14 3. Apprendi Claim

15 Petitioner argues that the multiple, upper-term and consecutive
 16 sentences imposed on the gun enhancements violated the rule set forth
 17 in *Apprendi* because it amounted to a sentence exceeding the statutory

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 19 ⁴ A single aggravating factor is enough to impose consecutive
 20 sentences. *People v. Osband*, 13 Cal. 4th 622, 728-29 (1996);
 21 see also *Scott*, 9 Cal. 4th at 350 & n.12 ("[O]ne relevant and
 22 sustainable fact may explain a series of consecutive sentences.").
 23 Therefore, the trial court could impose consecutive sentences based
 24 solely on the fact that those counts involved different victims. See,
 25 e.g., *People v. Calhoun*, 40 Cal. 4th 398, 408 (2007) (A trial court
 26 has discretion to impose consecutive sentences where a defendant has
 27 committed crimes against multiple victims.); *People v. Valenzuela*, 40
 28 Cal. App. 4th 358, 363-65 (1995) (trial court may use multiple-victims
 factor to impose consecutive sentences when crimes are so related in
 time and place that they constitute one criminal transaction).

25 ⁵ In the Petition, Petitioner contends that he was subjected to
 26 "multiple punishments for the same act" in violation of the Eighth
 27 Amendment, but he fails to set forth the basis for the claim. (Pet.
 28 Mem. at 1.) In any event, the superior court's determination that,
 under state law, Petitioner was properly sentenced would preclude any
 corresponding Eighth Amendment claim based on any alleged error of
 state law.

1 maximum based on facts not found by the jury. [Pet. Mem. at 1-2;
2 Traverse at 13.]

3 In *Apprendi*, the Supreme Court held that the Sixth Amendment
4 requires that "[o]ther than the fact of a prior conviction, any fact
5 that increases the penalty for a crime beyond the prescribed statutory
6 maximum must be submitted to a jury, and proved beyond a reasonable
7 doubt." *Apprendi*, 530 U.S. at 490. "[T]he 'statutory maximum' for
8 *Apprendi* purposes is the maximum sentence a judge may impose *solely on*
9 *the basis of the facts reflected in the jury verdict or admitted by*
10 *the defendant*. In other words, the relevant 'statutory maximum' is
11 not the maximum sentence a judge may impose after finding additional
12 facts, but the maximum he may impose *without* any additional findings."
13 *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (citations omitted)
14 (emphasis in original); see also *United States v. Booker*, 543 U.S.
15 220, 232 (2005).

16 Here, Petitioner cannot rely on *Apprendi* because it was not
17 decided until June 26, 2000, after Petitioner's conviction became
18 final. *Apprendi* does not apply retroactively to cases that were on
19 collateral review or already final at the time the decision was
20 rendered by the United States Supreme Court.⁶ See, e.g., *Hughes v.*
21 *United States*, 770 F.3d 814, 818 (9th Cir. 2014). Accordingly,
22 Petitioner is not entitled to habeas relief on this claim.

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26 ⁶ Petitioner's conviction became final on January 18, 2000,
27 ninety days after the denial of his petition for review to the
28 California Supreme Court. See *Bowen v. Roe*, 188 F.3d 1157, 1158-59
(9th Cir. 1999) (state court judgment becomes final after expiration
of ninety-day period for petitioning United States Supreme Court for
certiorari).

1 B. Insufficiency of Evidence

2 In Ground Two, Petitioner contends that there was insufficient
3 evidence to support the gang enhancements. (Pet. Mem. at 3-5.)
4 Petitioner raised this claim in his habeas petition in the state
5 superior court which ruled:

6 [P]etitioner does not adequately establish that there
7 was insufficient evidence to support the jury's finding of a
8 gang enhancement. . . . [T]here was evidence at trial
9 probative of petitioner's association with the Hard Times
10 gang. Petitioner committed the offenses with a known Hard
11 Times gang member as well as a known associate of the gang.
12 Petitioner's apparent gang moniker was "Mr. Lucky." Even if
13 the evidence on this issue were conflicting, habeas corpus
14 is not available to re-weigh the evidence supporting the
15 judgment of conviction.

16 (Lodged Doc. No. 9 at 3.)

17 Under *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court must
18 reject an insufficiency claim if, "after viewing the evidence in the
19 light most favorable to the prosecution, any rational trier of fact
20 could have found the essential elements of the crime beyond a
21 reasonable doubt." *Jackson*, 443 U.S. at 319; see also *Coleman v.*
22 *Johnson*, 132 S. Ct. 2060, 2065 (2012) (per curiam) ("[T]he only
23 question under *Jackson* is whether [the jury's] finding was so
24 insupportable as to fall below the threshold of bare rationality.").
25 In analyzing an insufficiency claim, the Court is doubly deferential
26 to the state court's findings. *Juan H. v. Allen*, 408 F.3d 1262, 1274
27 (9th Cir. 2005)(citing 28 U.S.C. § 2254(d)); see also *Cavazos v.*
28 *Smith*, 132 S. Ct. 2, 4 (2011) (per curiam) ("[A] federal court may not

1 overturn a state court decision rejecting a sufficiency of the
 2 evidence challenge simply because the federal court disagrees with the
 3 state court. The federal court instead may do so only if the state
 4 court decision was 'objectively unreasonable.'" (citations omitted)).
 5 If the record supports conflicting inferences, the Court "'must
 6 presume - even if it does not affirmatively appear in the record -
 7 that the trier of fact resolved any such conflicts in favor of the
 8 prosecution, and must defer to that resolution.'" *McDaniel v. Brown*,
 9 558 U.S. 120, 133 (2010) (per curiam) (quoting *Jackson*, 443 U.S. at
 10 326); see also *Juan H.*, 408 F.3d at 1275 ("In conducting our inquiry,
 11 we are mindful of 'the deference owed to the trier of fact and,
 12 correspondingly, the sharply limited nature of constitutional
 13 sufficiency review.'" (citation omitted)).

14 In applying the *Jackson* standard, the Court looks to state law
 15 for the substantive elements of the crimes charged. *Coleman*, 132 S.
 16 Ct. at 2064 (quoting *Jackson*, 443 U.S. at 324 n.16). Under California
 17 law, a gang enhancement is warranted if the defendant commits a crime
 18 (1) "for the benefit of, at the direction of, or in association with
 19 any criminal street gang" (2) "with the specific intent to promote,
 20 further, or assist in any criminal conduct by gang members." Cal.
 21 Penal Code § 186.22(b)(1) (1997).

22 Petitioner appears to be challenging the sufficiency of evidence
 23 only with respect to the showing that the crime was committed "in
 24 association with" a gang. Petitioner contends that he was not a gang
 25 member when he committed the crimes and that the only evidence he waas
 26 was that "he lived in the area which the gang . . . claimed as [its]
 27 territory." (Pet. Mem. at 4.)

1 The record includes evidence that Petitioner was a known
2 associate of the Hard Times gang and went by the moniker "Mr. Lucky."
3 (RT at 343-45, 347.) He committed the crimes with Zapata, a Hard
4 Times gang member who went by the moniker of "Little Psycho," and
5 Tovar, an associate of the same gang. (RT at 340-41, 347, 431-32.)
6 The crimes occurred in the Hard Times gang's territory. (RT at 349-
7 51, 356.) At trial, the gang expert testified that the Hard Times
8 gang's primary activities were assaults on rival gang members and
9 robberies. (RT at 345-46.) In the expert's opinion, Petitioner was
10 an active participant in the Hard Times gang. (RT at 358.) Further,
11 according to Petitioner's own trial testimony, after he and Tovar
12 planned the robberies the night prior to their commission, Hard Times
13 gang member Zapata "was brought into it." (RT at 405.)

14 Viewing this evidence in a light most favorable to the
15 prosecution, a jury could reasonably conclude that Petitioner
16 committed the charged offenses "in association with" the Hard Times
17 gang. See, e.g., *People v. Albillar*, 51 Cal. 4th 47, 61-62 (2010)
18 (substantial evidence supported finding that defendants committed
19 crime in association with a criminal street gang when they "came
20 together as gang members" to commit the crime); *People v. Leon*, 161
21 Cal. App. 4th 149, 163 (2008) ("In this case, the People presented
22 evidence that Leon [burglarized a car and committed other crimes] in
23 association with Rodriguez, a fellow gang member. Thus, the People
24 presented evidence that Leon committed the offenses 'in association
25 with any criminal street gang.'"). Accordingly, the state court's
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1 denial of Petitioner's sufficiency of evidence claim with respect to
2 the gang enhancement is denied.⁷

3 In his Objections, Petitioner contends that the Court failed to
4 address Petitioner's challenge to the constitutionality of the gang
5 enhancement conviction on grounds that it violated the Confrontation
6 Clause. (Objections at 16.) According to Petitioner, the jury's
7 finding was based solely on the gang expert's testimony regarding
8 Petitioner's two "Street Terrorism Enforcement and Prevention" (STEP)
9 notices, which Petitioner contends were inadmissible hearsay.
10 (Objections at 16.) Here, again, the Court disagrees. There was
11 other evidence, as outlined above, to show that Petitioner committed
12 the crimes in association with the gang.

13 Further, to the extent that the finding was based on the STEP
14 testimony, Petitioner is still not entitled to relief. In 2016, the
15 California Supreme Court held that "case-specific out-of-court
16 statements" made by a prosecution's gang expert regarding a
17 defendant's association or membership in a gang may constitute
18 inadmissible hearsay where the expert presents them as true statements
19

20 ⁷ The jury could also have determined that the crimes were gang
21 related because they were committed for the benefit of the Hard Times
22 gang as the gang expert had testified. The expert noted that the
23 crimes were committed within the gang's territory and that they would
24 cause people in the area to be intimidated by the gang, thereby
25 increasing the gang's control over the area. (RT at 349.) This
26 evidence is sufficient to support the conclusion that the crimes were
27 done to benefit the gang. See, e.g., *Albillar*, 51 Cal. 4th at 63
28 ("Expert opinion that particular criminal conduct benefitted a gang by
enhancing its reputation . . . can be sufficient to raise the
inference that the conduct was 'committed for the benefit of . . . a
[] criminal street gang' within the meaning of section 186.22(b)(1).")
(citations omitted); *People v. Miranda*, 192 Cal. App. 4th 398, 412-13
(2011) (sufficient evidence supported gang enhancement on robbery
charge where robbery was committed in gang's claimed territory and
expert witness testified robbery was committed to instill fear in the
community).

1 of fact without independent proof by competent evidence. *People v.*
2 *Sanchez*, 63 Cal. 4th 665, 686 (2016). It determined that such
3 statements violate the Confrontation Clause if the hearsay is
4 testimonial, unless there is a showing of unavailability and the
5 defendant had a prior opportunity for cross-examination or forfeited
6 that right by wrongdoing. *Id.* Under the facts of that case, the
7 court concluded that the gang expert's testimony regarding the police
8 reports and STEP notice constituted case-specific testimonial hearsay
9 that was prohibited by the Confrontation Clause and reversed the
10 criminal street gang conviction. *Id.* at 694-98.

11 Nevertheless, the California Supreme Court's 2016 ruling in
12 *Sanchez* did not establish a right to federal habeas relief in this
13 case. First and foremost, the California Supreme Court's
14 determination of federal constitutional law does not constitute
15 "clearly established Federal law, as determined by the Supreme Court
16 of the United States" and is not binding on this Court. See *Casey v.*
17 *Moore*, 386 F.3d 896, 907 (9th Cir. 2004) ("Although lower federal
18 court and state court precedent may be relevant when that precedent
19 illuminates the application of clearly established federal law as
20 determined by the United States Supreme Court, if it does not do so,
21 it is of no moment."); *Hernandez v. Small*, 282 F.3d 1132, 1140 (9th
22 Cir. 2002) ("[D]ecisions of [the United States Supreme] Court are the
23 only ones that can form the basis justifying habeas relief . . .").
24 As such, the *Sanchez* decision is not determinative.

25 Second, the *Sanchez* holding was premised on the United States
26 Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124
27 S. Ct. 1354 (2004). See *Sanchez*, 63 Cal. 4th at 687-94 (discussing
28 the "evolution" of the "*Crawford* doctrine"); *People v. Meraz*, 2016 WL

1 7388320, at *7 (Cal. App. Dec. 21, 2016) ("In *Sanchez*, our high court
2 considered the extent to which *Crawford v. Washington* . . . limits an
3 expert witness from relating case-specific hearsay in explaining the
4 basis for an opinion, and it clarified the application of state
5 hearsay rules to that kind of expert testimony.").

6 *Crawford*, however, was decided in 2004, more than four years
7 after Petitioner's conviction became final on direct appeal. In
8 *Whorton v. Bockting*, 549 U.S. 406, 421 (2007), the United States
9 Supreme Court held that "*Crawford* announced a 'new rule' of criminal
10 procedure," and was thus not to be applied retroactively to cases on
11 collateral review. Because holdings of the United States Supreme
12 Court at the time of the state court decision are the sole determinant
13 of clearly established federal law, see *Williams v. Taylor*, 529 U.S.
14 362, 412 (2000), Petitioner cannot rely upon *Crawford* or its progeny
15 in challenging the denial of his claim.

16 Finally, Petitioner's reliance on *Douglas v. Alabama*, 380 U.S.
17 415 (1965), *Ohio v. Roberts*, 448 U.S. 56 (1980), *Dutton v. Evans*, 400
18 U.S. 74 (1970), and *NAACP v. Alabama*, 377 U.S. 288 (1964), is
19 misplaced. None of these cases clearly establish that a gang expert's
20 testimony based in part on hearsay violates the Confrontation Clause.
21 In the absence of any clearly established federal law on the issue in
22 2002, the state courts' rejection of that claim does not warrant
23 habeas relief. See *Carey v. Musladin*, 549 U.S. 70, 77 (2006) ("Given
24 the lack of holdings from this Court regarding the . . . [relevant
25 issue], it cannot be said that the state court 'unreasonabl[y]
26 appli[ed] clearly established Federal law.'" (citing 28 U.S.C.
27 § 2254(d)(1))).

1 C. Ineffective Assistance of Trial Counsel

2 In Ground Three, Petitioner claims that trial counsel violated
 3 his Sixth Amendment right to effective assistance of counsel by:
 4 (1) entering into a stipulation regarding the "pattern" element of the
 5 gang charge; (2) failing to request a jury instruction on California
 6 Penal Code § 12022(a)(1) (armed with a firearm) as a "lesser included
 7 enhancement" of California Penal Code section 12022.5(a) (personally
 8 using a firearm); and (3) failing to object to the gang expert's
 9 testimony regarding Petitioner's "STEP" warnings. (Pet. Mem. at 5-8.)

10 To establish a claim of ineffective assistance of counsel, a
 11 petitioner must show that counsel's representation fell below an
 12 objective standard of reasonableness and that the deficient
 13 performance prejudiced the defense. *See Strickland v. Washington*, 466
 14 U.S. 668, 687 (1984); *see also Knowles v. Mirzayance*, 556 U.S. 111,
 15 122 (2009). The Court examines the reasonableness of counsel's
 16 conduct under all the circumstances, including the facts of the case
 17 as viewed by counsel at that time, granting counsel great deference.
 18 *Strickland*, 466 U.S. at 689. To prove prejudice, a petitioner must
 19 show a "reasonable probability," sufficient to undermine confidence in
 20 the outcome, that, "but for counsel's unprofessional errors, the
 21 result of the proceeding would have been different." *Strickland*, 466
 22 U.S. at 694; *see also Richter*, 562 U.S. at 112 ("The likelihood of a
 23 different result must be substantial, not just conceivable.").

24 Where, as here, an ineffective assistance of counsel claim has
 25 previously been adjudicated in state court, the Court's review is
 26 doubly deferential. *Richter*, 562 U.S. at 105 ("The standards created
 27 by *Strickland* and § 2254(d) are both 'highly deferential,' and when
 28 the two apply in tandem, review is 'doubly' so." (quoting *Knowles*, 556

U.S. at 123)); *Richter*, 562 U.S. at 101, 105 ("The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable"; because "[t]he *Strickland* standard is a general one, [the range of reasonable applications is substantial.]") (citation omitted); see also *Cannedy v. Adams*, 706 F.3d 1148, 1157 (9th Cir. 2013) ("If the state court reasonably concluded that Petitioner failed to establish either prong of the *Strickland* test, then we cannot grant relief." (internal footnote omitted)).⁸

1. The Stipulation Regarding Gang Crime

Petitioner's trial counsel stipulated that "Hard Times is a criminal street gang, and that members of that gang have engaged in a pattern of criminal gang activity." (RT at 379.) The record establishes that counsel discussed the matter with the prosecutor before entering into the stipulation and agreed to the stipulation so that the prosecution would not be able to introduce evidence regarding the gang's prior crimes. (RT at 291.) Obviously, this was a tactical decision by counsel and clearly well within the realm of reasonableness. Thus, Petitioner's claim fails.

Further, even if counsel's decision was unreasonable, Petitioner cannot prevail because he cannot establish prejudice. There is

⁸ Because an ineffective assistance of counsel claim will fail if it is determined that counsel's representation was either not deficient or not prejudicial, the Court can deny such claims without reaching a decision on the merits regarding both prongs of the required showing under *Strickland*. See, e.g., *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the *Strickland* test obviates the need to consider the other." (citation omitted)). When a state court has denied an ineffective assistance claim in this manner, § 2254(d) does not apply as to the *Strickland* prong which the state court did not reach and federal habeas review on that issue is de novo. See *Porter v. McCollum*, 558 U.S. 30, 39 (2009) ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim de novo." (citing *Rompilla v. Beard*, 545 U.S. 374, 390 (2005))).

1 nothing before the Court to suggest that the prosecutor could not have
 2 proven that Petitioner's gang engaged in a pattern of crime on behalf
 3 of the gang or that Petitioner would not have been convicted had the
 4 prosecution been put to that burden. Accordingly, Petitioner shows
 5 neither deficient performance nor prejudice, and this claim fails.

6 2. The "Lesser Included Enhancement" Instruction

7 Petitioner contends that his trial counsel was ineffective for
 8 failing to request an instruction on California Penal Code § 12022(a)
 9 (armed with a firearm) as a "lesser included enhancement" of
 10 California Penal Code § 12022.5(a) (personally using a firearm).⁹
 11 (Pet. Mem. at 6; Amended Traverse at 6-17; Motion for Summary
 12 Adjudication at 4-10.) The jury found that Petitioner personally used
 13 a firearm (California Penal Code § 12022.5(a)) during the robberies
 14 and assault. (RT at 550-52, 555.) These findings resulted in a
 15 consecutive ten-year term on Count One (robbery) and a consecutive
 16 three year and four month terms on Counts Two (robbery), Four
 17 (robbery), and Nine (assault). (RT at 578-79.) The jury was not
 18 instructed on § 12022(a)(1), which applies to any person "who is a
 19 principal in the commission of a felony . . . if one or more of the
 20 principals is armed with a firearm, whether or not the person is
 21 personally armed with a firearm," and carries a one-year consecutive
 22 term. Cal. Penal Code § 12022(a)(1). Petitioner argues that an
 23 instruction pursuant to § 12022(a)(1) would have been appropriate in
 24 this case because it was supported by the evidence presented at trial,
 25 and, given the option, the jury might have found true that Petitioner
 26

27 ⁹ The parties briefed the issue of whether an evidentiary
 28 hearing was required on this claim. (Docket Nos. 33, 34, 37, 38.)
 The Court determined that an evidentiary hearing was not warranted.

1 was responsible as a principal under § 12022(a)(1) enhancement as
 2 opposed to finding that he personally used a firearm under
 3 § 12022.5(a). Petitioner contends that he was prejudiced by his
 4 attorney's failure to request the instruction because the jury was
 5 presented with an "all or nothing" choice of either convicting
 6 Petitioner of personally using the firearm or acquitting him of
 7 firearm use altogether.¹⁰ (Pet. Mem. at 6; Amended Traverse at 6-17;
 8 Motion for Summary Adjudication at 4-10.)

9 Petitioner raised the claim in his habeas petition in superior
 10 court. That court denied the claim as follows:

11 [Petitioner] does not establish that a more favorable
 12 outcome was reasonably probable but for trial counsel's
 13 alleged failure to request a jury instruction on the lesser
 14 enhancement of being "armed" with a firearm as defined by
 15 Penal Code § 12022(a)(1). At trial, there was conflicting
 16 evidence as to which of the three perpetrators had wielded
 17 the firearm during the commission of the offense. In view
 18 of such evidence, there is no basis by which to conclude
 19 that a jury would have probably found [Petitioner] guilty of
 20 the lesser enhancement. Habeas corpus is not available to
 21 relitigate determinations of fact made upon conflicting
 22 evidence after a fair trial. (See *In re Dixon* 41 Cal.2d
 23 756, 760 (1953).)

24 Petitioner has not established his claim of ineffective
 25 assistance by trial counsel. For ineffective assistance of

26
 27 ¹⁰ At trial, Petitioner admitted that a firearm was used during
 28 the robberies. The defense strategy was aimed at challenging the
 evidence that Petitioner was the one who used it. (RT at 382-87, 485,
 489.)

1 counsel to appear, counsel's acts or omissions must result in the
 2 withdrawal of a potentially meritorious defense, or, due to acts
 3 or omissions of counsel, not amounting to the withdrawal of a
 4 defense, it is reasonably probable that a determination more
 5 favorable to the defendant would have resulted in the absence of
 6 counsel's failings.

7 (Lodged Doc. No. 9 at 3-4 (citations omitted).)

8 The state court's rejection of this claim based on the absence of
 9 a showing of prejudice was neither an unreasonable application of, nor
 10 contrary to, clearly established federal law under *Strickland*.
 11 Moreover, even apart from the deference due to the state court's
 12 decision, Petitioner's claim independently fails on the deficient
 13 performance prong of *Strickland* as well.¹¹

14 As discussed above, Petitioner claims he was prejudiced by trial
 15 counsel's failure to request an instruction on the lesser "principal
 16 armed with a firearm" enhancement. According to Petitioner, if the
 17 jury had been given the option, it would have found him guilty of the
 18 lesser firearm enhancement and acquitted him of personally using the
 19 rifle. (Pet. Mem. at 6; Amended Traverse at 6-17; Motion for Summary
 20 Adjudication at 4-10.) However, Petitioner has failed to show a
 21 "reasonable probability," sufficient to undermine confidence in the
 22 outcome, that, "but for counsel's unprofessional errors, the result of
 23

24 ¹¹ Petitioner contends that the superior court applied the wrong
 25 standard in deciding the prejudice prong and, therefore, this Court
 26 must decide the issue de novo. (Motion for Summary Adjudication at
 27 16-18.) This argument is unpersuasive. The state court properly
 28 concluded that, in light of the evidence of Petitioner's personal gun
 use, it was not reasonably probable that the jury would have found
 Petitioner guilty of the lesser enhancement. (Lodged Doc. No. 9 at
 3-4.) Moreover, under the circumstances here, even under a de novo
 standard, the Court would find that there was no prejudice.

1 the proceeding would have been different." *Strickland*, 466 U.S. at
2 694.

3 Petitioner's authority in support of this argument is
4 distinguishable because the cases cited by him concern lesser included
5 offenses, not enhancements.¹² As the California Supreme Court
6 explained in *People v. Majors*, 18 Cal.4th 385 (1998), lesser included
7 offenses are distinguishable "from so-called 'lesser included
8 enhancements.'" *Id.* at 410-11. The court explained:

9 One of the primary reasons for requiring instructions
10 on lesser included offenses is "'to eliminate the distortion
11 of the factfinding process that is created when the jury is
12 forced into an all-or-nothing choice between [guilt] and
13 innocence'" - that is, to eliminate "'the risk that the jury
14 will convict . . . simply to avoid setting the defendant
15 free.'" (*Schad v. Arizona*, 501 U.S. 624, 646-47 (1991).)
16 This risk is wholly absent with respect to enhancements,
17 which a jury does not even consider unless it has already
18 convicted defendant of the underlying substantive offenses.
19 See generally *People v. Wims*, 10 Cal.4th 293, 307 (1995)
20 ("[A] sentence enhancement is not equivalent to a

21
22 ¹² Petitioner primarily relies on *Breakiron v. Horn*, 642 F.3d
23 126 (3rd Cir. 2011), in which the Third Circuit granted habeas relief
24 based on trial counsel's failure to request an instruction on theft as
25 a lesser included offense to robbery. 642 F.3d at 136-41. The other
26 cases cited by Petitioner also involve lesser included offenses. See
27 *Keeble v. United States*, 412 U.S. 205 (1973) (finding trial court
28 erred by refusing to give lesser included offense instruction);
Richards v. Quarterman, 566 F.3d 553, 568-69 (5th Cir. 2009)
(involving counsel failing to request instruction on aggravated
assault as a lesser included offense in the charge of murder). The
only case cited by Petitioner which involved lesser included
enhancements is *People v. Turner*, 145 Cal. App. 3d 658 (1983), but
that case was overruled in relevant part by the California Supreme
Court in *People v. Majors*, 18 Cal. 4th 385 (1998).

1 substantive offense, because a defendant is not at risk for
 2 punishment under an enhancement allegation until convicted
 3 of a related substantive offense. [Citation.] At that
 4 time, a defendant's liberty interest 'has been substantially
 5 diminished by a guilty verdict.' (Citation.) The
 6 Legislature, moreover, has in various ways expressed its
 7 intention that enhancements *not* be treated as substantive
 8 offenses.").

9 *Id.*

10 The jury in this case had already convicted Petitioner of the
 11 underlying robberies prior to considering the firearm enhancement.
 12 Accordingly, contrary to Petitioner's argument, failure to instruct
 13 the jury on the principal-armed enhancement under § 12022(a)(1) did
 14 not cause the jury to be faced with an "all-or-nothing choice" between
 15 conviction and acquittal and there was no "risk" it would find
 16 Petitioner guilty of the personal use enhancement "simply to avoid
 17 setting [Petitioner] free." *Majors*, 18 Cal. 4th at 410-11.

18 There was very substantial evidence introduced at trial that
 19 Petitioner used the rifle in all of the offenses. First, with respect
 20 to the assault conviction, there is no dispute that Petitioner had the
 21 rifle when he was confronted by police, he simply claims that he did
 22 not point it at her. Thus, the jury would undoubtedly have convicted
 23 Petitioner of the greater "use" enhancement whether or not counsel
 24 requested the lesser enhancement.¹³

25 ¹³ The assault conviction was based on the following facts:
 26 After the robberies, Petitioner, Tovar, and Zapata attempted to escape
 27 by car. Officer Salvatierra pursued them down a dead end street.
 28 Petitioner exited the car holding the rifle. He turned towards
 Officer Salvatierra and began to lower the barrel of the rifle in her
 (continued...)

1 With respect to the robberies, Petitioner claims that he was the
 2 robber with a knife and Zapata was the one with the rifle. He points
 3 to the fact that a knife was found in the backseat of the getaway car,
 4 where Petitioner was sitting. (Amended Traverse at 14-17; Motion for
 5 Summary Adjudication at 5-6; RT at 309.) A second knife, however, was
 6 also found between where the getaway car was abandoned and the
 7 building in which Tovar and Zapata were later arrested. (RT at 305-
 8 06.) That knife had Zapata's fingerprints on it (RT at 378-79, 401),
 9 and it matched victim Jose Ochoa's description of the knife used
 10 during the robberies (RT at 79-81, 377-78).

11 Further, Petitioner testified at trial that Zapata used a knife
 12 during the robberies. (RT at 384, 390.) According to Petitioner,
 13 Zapata first had the rifle and then passed it to Tovar and used a
 14 knife to threaten Josephine Ochoa. (RT at 390.) Petitioner
 15 maintained that, in addition to Zapata, he also was armed with a
 16 knife. (RT at 387, 390-91.) However, this testimony strains
 17 credulity. Although the witnesses' testimonies were inconsistent in
 18 certain regards, none of them stated that more than one of the robbers
 19 was armed with a knife, or that the robbers exchanged weapons.¹⁴ (RT
 20 at 67-76, 88-89, 106, 109-12, 117, 138.)

21 Moreover, the evidence presented at trial strongly suggests that
 22 Petitioner, not Zapata, had control of the rifle. Petitioner provided

24 ¹³ (...continued)
 25 direction. At that point, Officer Salvatierra shot and apprehended
 him. (RT at 194-202.)

26 ¹⁴ Although no witness saw two knives, several of the witnesses
 27 stated that they saw a rifle and a handgun. (RT at 88-90, 93, 148,
 28 376-78.) Additionally, many of the witnesses stated that the robber
 with the rifle was taller than the one with a knife. (RT at 107, 124,
 148, 376-78.) Petitioner is taller than Zapata. (RT at 379, 472.)

1 the rifle, which belonged to his brother. (RT at 392.) The rifle was
2 in the backseat of the getaway car with Petitioner, while Zapata and
3 Tovar sat in the front. (RT at 384-85, 392.) Petitioner got out of
4 the car with the rifle and pointed it at Officer Salvatierra. (RT at
5 194-202.) Additionally, Petitioner is older than both Zapata and
6 Tovar; at the time of the crimes, he was 21 or 22, while they were 18
7 and 17. (RT at 379, 430.) Petitioner and Tovar masterminded the
8 robberies, not Zapata. According to Petitioner's trial testimony,
9 Petitioner did not know Zapata well and Zapata was "brought into it"
10 by Tovar only after Petitioner and Tovar planned the crimes. (RT at
11 405, 431.) This evidence of Petitioner's possession and control of
12 the rifle at various times and his leadership role in the robberies
13 points to the conclusion that it was Petitioner, and not Zapata, who
14 wielded the rifle during the robberies.¹⁵

15 In sum, it is not reasonably probable that, but for counsel's
16 failure to request the lesser principal-armed enhancement instruction,
17 the result of the proceeding would have been different. See
18 *Strickland*, 466 U.S. at 694; see also *Richter*, 562 U.S. at 112 ("The
19 likelihood of a different result must be substantial, not just
20
21
22
23
24

25 ¹⁵ Significantly, the jury's finding that Petitioner assaulted
26 Officer Salvatierra with the rifle indicates that it did not find
27 Petitioner to be a credible witness. Petitioner testified that he did
28 not point the rifle at Officer Salvatierra. (RT at 401.) He also
testified that he was unfamiliar with the rifle and, therefore, gave
it to Zapata to use during the robberies. In convicting Petitioner of
assault, the jury evidently rejected this testimony. (RT at 418.)

conceivable."). Accordingly, the state superior court's finding that there was an absence of prejudice will not be disturbed.¹⁶

As to Petitioner's argument that counsel's performance was deficient, he fares no better. There is no affirmative evidence that counsel was uninformed as to the firearm enhancement issues or that he failed to reasonably consider a principal-armed enhancement instruction under § 12022(a)(1). In the absence of such evidence, Petitioner cannot overcome the presumption that counsel made a tactical decision not to request the instruction and exercised reasonable professional judgment in doing so.¹⁷ See *Burt*, 134 S. Ct.

¹⁶ Petitioner contends that the length of the jury's deliberations shows that the jury had a "difficult time deciding on the verdict" and is evidence of prejudice. (Motion for Summary Adjudication at 13-14.) This argument is rejected. The record indicates that the jury had difficulty with only one count. (RT at 538; CT at 235.) Further, despite this difficulty, the jury took only one day to reach a verdict. (RT at 538-547; CT at 234-35, 316-17.)

¹⁷ In fact, although counsel's decision not to request an instruction under § 12022(a)(1) was not explicitly stated on the record, the record indicates that counsel performed knowledgeably and diligently with respect to defending Petitioner against the charged enhancements. Petitioner and his co-defendants were initially charged with enhancements under § 12022(a)(1) (principal armed with a firearm), § 12022.5(a) (personal use of a firearm), and § 12022(b)(1) (personal use of a knife) with respect to the robberies, false imprisonments, and assault. After the preliminary hearing, Petitioner's prior counsel successfully moved to dismiss the § 12022.5(a) enhancement with respect to the false imprisonment counts. Petitioner's co-defendants then reached plea agreements with the government. (RT at 35.) With only Petitioner remaining in the case, the prosecution made a tactical decision to drop the § 12022(a)(1) and § 12022(b)(1) enhancements with respect to the robberies, false imprisonments, and the assault, and pursue only the personal use enhancement under § 12022.5(a) with respect to the robberies and assault. (RT at 49.) The prosecutor also amended the assault charge from Penal Code § 245(d)(1) (assault with a firearm upon a peace officer) to § 245(a)(2) (assault with a firearm upon the person of another). The prosecution apparently made this amendment in order to obtain an additional personal use enhancement on the assault charge. (RT at 38-39.) Under California law at the time of Petitioner's trial, a personal use enhancement under § 12022.5(a)

(continued...)

1 at 17 ("It should go without saying that the absence of evidence
 2 cannot overcome the 'strong presumption that counsel's conduct [fell]
 3 within the wide range of reasonable professional assistance.'" (quoting *Strickland*, 466 U.S. at 689)); *Murtishaw*, 255 F.3d at 952
 4 (presuming, contrary to defendant's allegations, that counsel notified
 5 defendant that submitting to examination would waive privilege against
 6 self-incrimination, where the record contained "no supportable
 7 allegations to the contrary").¹⁸

8
 9 As a presumptively informed strategic choice, Petitioner's
 10 counsel's decision is "virtually unchallengeable" absent extraordinary
 11 circumstances. See *Raley v. Ylst*, 470 F.3d 792, 799 (9th Cir. 2006)
 12 (citing *Strickland*, 466 U.S. at 690). Here, where an objectively
 13 reasonable basis for counsel's actions can be ascertained,
 14 Petitioner's challenge falls short of this exacting standard. It
 15 would not have been unreasonable for counsel to consider that, if the
 16 jury had been instructed on § 12022(a)(1), it would inevitably have
 17 found that enhancement to be true as to all of the robbery charges,
 18 based on Petitioner's admission that a co-defendant was armed with a

19
 20 ¹⁷ (...continued)
 21 could be imposed in cases of assault with a firearm under § 245(a)(2),
 22 but not necessarily in cases of assault under § 245(d)(1). See Cal.
 23 Penal Code § 12022.5(d) (1997) ("The additional term provided by this
 24 section may be imposed in cases of assault with a firearm under
 25 paragraph (2) of subdivision (a) of Section 245 . . ."). Defense
 26 counsel objected to the amendment of the assault charge, but did not
 27 object to the dismissal of the § 12022(a)(1) enhancement. (RT at 39-
 40.") This strongly suggests that counsel was aware of and considered
 the issues with respect to that possible lesser enhancement. Indeed,
 during the discussion on jury instructions, the trial court asked
 defense counsel if he was requesting any lesser included offence
 instructions. Counsel requested one such instruction - brandishing a
 weapon as a lesser included offense of assault - but stated that he
 did not want any others. (RT at 447-48, 456.)

28 ¹⁸ In the absence of a state court finding, this court considers
 the *Strickland* performance prong de novo. See *Porter*, 558 U.S. at 39.

1 firearm. (RT at 391.) On the other hand, by only instructing the
 2 jury as to personal use of a firearm, there was a possibility that
 3 Petitioner would be spared an enhancement altogether if the jury
 4 believed Petitioner's testimony. While this decision undeniably
 5 involved risk, in the context of the overall risks facing Petitioner
 6 given the nature of the charges and the evidence against him, it was a
 7 reasonable one. See, e.g., *Cunningham v. Marshall*, 2010 WL 3420635,
 8 at *22 (S.D. Cal. May 25, 2010) ("If the jury had been instructed on
 9 section 12022(a) it would surely have found the enhancement to be
 10 true, based on Cunningham's own admissions. By only instructing the
 11 jury as to 'use' of a firearm, there was a possibility that Cunningham
 12 would be spared an enhancement altogether. Thus defense counsel's
 13 decision not to request an instruction under section 12022(a) was not
 14 unreasonable."). Habeas relief, therefore, is not warranted on this
 15 claim.¹⁹

16 4. "STEP" Warnings

17 Finally, Petitioner contends that counsel was ineffective because
 18 he failed to object to the gang expert's testimony regarding
 19 Petitioner's "STEP" warnings. (Pet. Mem. at 7-8 (citing RT at 342-
 20 43).) At the time of Petitioner's trial, California law allowed an
 21 expert witness to offer an opinion based on material that was not
 22

23 ¹⁹ See also *Miller v. Nooth*, 403 Fed. Appx. 291, 292 (9th Cir.
 24 2010) (counsel's strategic decision to pursue an "all-or-nothing"
 25 approach to obtain outright acquittal was "compatible with the law and
 26 the evidence presented at trial" and petitioner was "not denied
 27 effective assistance of counsel"); cf. *Crace v. Herzog*, 798 F.3d 840,
 28 852-53 (9th Cir. 2015) (noting that, in certain circumstances, "it
 might be reasonable for a defense attorney to opt for an 'all-or-
 nothing' strategy," but finding counsel's performance deficient where
 counsel's strategy not to request lesser included instruction was
 "clearly inappropriate" in light of a possible third strike conviction
 and "decades of prison time").

otherwise admissible, including hearsay, as long as the material was a type that was reasonably relied on by experts in the particular field in forming their opinions. See *People v. Gardeley*, 14 Cal. 4th 605, 619 (1996), *disapproved in part by Sanchez*, 63 Cal. 4th at 686 n.13. Prior to *Sanchez*, the type of hearsay considered in this matter (i.e., the STEP notices) was the type reasonably relied on by gang experts and routinely admitted at trial. See, e.g., *People v. Sanchez*, 223 Cal. App. 4th 1, 20 (2014) (affirming trial court's ruling that gang expert's testimony regarding STEP notice containing hearsay was properly admitted), *overruled by Sanchez*, 63 Cal. 4th 665. As such, any objection by counsel at Petitioner's trial in 1997 would have been fruitless. Nor was counsel deficient for failing to anticipate that the law would change many years later. See *Sophanthavong v. Palmateer*, 378 F.3d 859, 870 (9th Cir. 2004) ("*Strickland* does not mandate prescience, only objectively reasonable advice under prevailing professional norms."); see also *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). In light of the fact that the existing law would not have supported counsel's objection to the gang expert's testimony regarding Petitioner's "STEP" warnings, counsel's failure to do raise an objection on this ground was not ineffective assistance under the Constitution.

D. Ineffective Assistance of Appellate Counsel

In Ground Four, Petitioner contends that his appellate counsel was ineffective for not raising Petitioner's claims in Grounds One and

1 Two on direct appeal. (Petition at 6.) There is no merit to this
2 claim.

3 The Sixth Amendment right to the effective assistance of counsel
4 extends to appeals. *Smith v. Robbins*, 528 U.S. 259, 285 (2000);
5 *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985) (holding Due Process
6 Clause guarantees a criminal defendant effective assistance of counsel
7 on his first appeal as of right). That being said, however, appellate
8 counsel is not required to raise every nonfrivolous issue requested by
9 a defendant. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). Rather,
10 appellate counsel is called upon to select from among many potential
11 issues the one or ones that stand the best chance of winning. *Id.*;
12 see also *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting
13 "weeding out of weaker issues is widely recognized as one of the
14 hallmarks of effective appellate advocacy").

15 Petitioner has failed to meet his burden on either of
16 *Strickland*'s prongs. He has not established that appellate counsel
17 failed to consider these claims, or that counsel failed to make a
18 reasoned judgment regarding their merit, or lack thereof of them.
19 Furthermore, as discussed above, he has not demonstrated actual
20 prejudice because he has not shown that he would have prevailed on his
21 appeal had any of the omitted claims been presented. See *Smith*, 528
22 U.S. at 285-88; *Strickland*, 466 U.S. at 694; *Jones*, 463 U.S. at 751-
23 54. Accordingly, this claim is denied.

24 V.

25 RECOMMENDATION

26 For these reasons, IT IS RECOMMENDED that the Court issue an
27 Order (1) accepting this Final Report and Recommendation and
28

(2) directing that Judgment be entered denying the Petition and dismissing the case with prejudice.²⁰

DATED: February 10, 2017.



PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

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²⁰ The Court is not inclined to issue a certificate of appealability in this case. See Rule 11, Federal Rules Governing Section 2254 Cases ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). If Petitioner believes a certificate should issue, he should explain why in his Objections.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENJAMIN ESPINOZA,) CASE NO. SA CV 02-358-SJO (PJW)
)
Petitioner,)
) J U D G M E N T
v.)
)
JOSEPH L. MCGRATH, WARDEN,)
)
Respondent.)
_____)

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

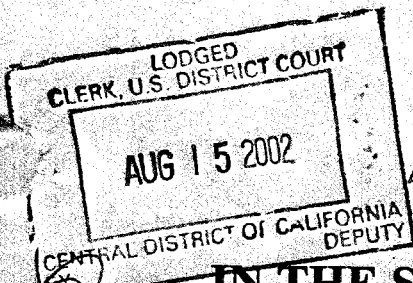
IT IS ADJUDGED that the Petition is denied and this action is
dismissed with prejudice.

DATED: March 28, 2017.



S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

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S101426

DEPUTY

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re BENJAMIN ESPINOZA on Habeas Corpus

Petition for writ of habeas corpus is DENIED.
Chin, J., was absent and did not participate.

GEORGE C. J.

Chief Justice

COURT OF APPEAL
FIL

AUG 15 2001

Entered by NA
Date Rec'd 8-17-01

Deputy Clerk _____

LOGGED
CLERK, U.S. DISTRICT COURT
AUG 15 2002
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

In re BENJAMIN ESPINOZA
on Habeas Corpus.

G028739

(Super. Ct. No. M9150)

ORDER

THE COURT:*

The petition for a writ of habeas corpus is DENIED.

BEDSWORTH, J.

BEDSWORTH, ACTING P. J.

* Before Bedsworth, Acting P. J., O'Leary, J., and Moore, J.

COPY

SUPERIOR COURT OF THE STATE OF
MINUT

ESPINOZA V. MCGRAITH
SACV 02-0358-DDP (CW)
LODGMNT 9

Case Number M-9150 X A

People Vs Espinoza, Benjamin

Report Request Criteria

1. Docket Date Range : Date filter
2. Sequence Number Range : Sequence filter
3. Docket Category : Category filter

Docket Dt Seq Text

1/26/2001

LODGED

ERK. U.S. DISTRICT COURT

AUG 15 2002

CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

5

Hearing held on 01/26/2001 at 09:00:00 AM , in Department C5 for
Chambers Work .

Officiating Judge: Ronald P. Kreber , Judge

Clerk: D. Desimone

Petition for Writ of Habeas Corpus is denied for the reasons stated in the
order denying writ filed 12/29/2000 .

A copy of this minute order mailed to Petitioner at Pelican State Prison,
P.O. Box 7500 Crescent City, CA 95532 and forwarded to the Orange
County District Attorney's Office today .

THIS INSTRUMENT IS A CORRECT COPY OF
THE ORIGINAL ON FILE IN THIS OFFICE

ATTEST: (DATE)

MAY 15 2002

ALAN SLATER, EXECUTIVE OFFICER AND CLERK
OF THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE COUNTY OF ORANGE

BY

Superior Deputy

DEPUTY



FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

JAN 26 2001

AN SLATER, Clerk of the Court

D. DeSimone
BY D. DESIMONE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

In re BENJAMIN ESPINOZA,	)	Orange County Superior Court
	)	Case Nos.: M-9150
Petitioner,	)	(96WF1776)
	)	
	)	
	)	ORDER DENYING
ON HABEAS CORPUS	)	HABEAS CORPUS
	)	
	)	

TO THE OFFICE OF THE ORANGE COUNTY DISTRICT ATTORNEY AND THE PETITIONER:

HAVING RECEIVED THE ABOVE CAPTIONED PETITION FOR WRIT OF HABEAS CORPUS, THE COURT MAKES THE FOLLOWING FINDINGS AND ORDER:

On August 20, 1997, petitioner was convicted of four counts of false imprisonment [Penal Code § 236], three counts of second degree robbery [Penal Code §§ 211/212.5(b)/213(a)(2)], one count of possession of a firearm on school grounds [Penal Code § 626.9(b)], one count of assault with a firearm [Penal Code § 245(a)(2)], one count of receiving stolen property [Penal Code § 496(a)], and one count of street terrorism [Penal Code § 186.22(a)]. Petitioner was further found to have personally used a firearm during the commission of the robberies and assault [Penal Code § 12022.5(a)]. Petitioner was also found to have committed the robberies, false imprisonment, assault, and possession of a firearm on school grounds for the benefit of a criminal street gang [Penal Code § 186.22(b)]. On September 10, 1997, petitioner was sentenced to 34 years and 4 months in prison.

Now petitioner seeks habeas corpus relief alleging that:

1. The trial court improperly imposed firearm and gang sentencing enhancements in violation of petitioner's right to due process, the Eighth Amendment and corresponding provisions of California's constitution and statutory law.
2. The jury's finding that the offenses were committed for the benefit of a criminal street gang was not supported by the evidence and was made in violation of

petitioner's First Amendment right to freedom of association, Sixth Amendment rights to confrontation and a jury trial, and corresponding state constitutional guarantees.

3. Petitioner was rendered ineffective assistance by both trial counsel, who did not request a jury instruction concerning the lesser enhancement of being "armed" with a firearm, and appellate counsel who failed to assert the claims at issue on appeal.

Petitioner fails to justify the over three year delay in presenting his claims for relief. A petitioner must explain and justify any significant delay in seeking habeas corpus relief. (In re Clark (1993) 5 Cal.4th 750, 765.) If he fails to explain and has shown a lack of diligence, his petition may be dismissed. (See, In re Ronald E. (1977) 19 Cal.3d 315, 322.)

Petitioner contends that he is not a gang member nor is he associated with a gang. The trial court stated on the record its reasons for sentencing petitioner in the manner that it did. These circumstances, which form the basis for petitioner's first two claims on habeas corpus, should have been within petitioner's knowledge since at least late 1997. Appellate counsel's failure to raise these issues on appeal does not excuse petitioner's lack of diligence. A petitioner not represented by counsel need not "develop" the legal theory on which a claim is based, but must fully and fairly state the facts which underlie the claim for relief. (In re Clark, 5 Cal.4th at 779.)

Petitioner's contention that he did not discover these claims until hiring a "post-conviction" specialist in August of 2000 is not supported by a specific factual basis and is insufficient to justify the delay. Conclusory allegations are insufficient to warrant the issuance of a writ. (See, In re Swain (1949) 34 Cal.2d 300.)

On the merits, petitioner does not establish a prima facie case for relief. The trial court imposed the upper ten year term on the firearms enhancement due to petitioner's violent conduct and his prior convictions for weapons possession. (See, Cal. Rules of Court, Rule 421(b)(1) and (2).) The trial court also imposed consecutive subordinate terms citing the independent nature of the crimes and their objectives as well as the fact they each constituted separate acts of violence. (See, Cal. Rules of Court, Rule 425(a)(1) and (2).) The trial court further based its decision to impose consecutive terms on the fact that petitioner was on probation when the crime was committed and his prior performance on probation was unsatisfactory. (See, Cal. Rules of Court, Rule 421(b)(4) and (5).) The record does not indicate an improper dual use of facts by the trial court in sentencing.

Likewise, the record also does not support petitioner's claim that he was sentenced to five consecutive eight month terms for multiple gang enhancements. The five consecutive eight month subordinate terms imposed were for petitioner's

convictions for second degree robbery, false imprisonment, assault with a firearm, receiving stolen property, and street terrorism. The specific gang enhancements added to the subordinate terms were stayed. Petitioner does not assert that the imposition of said terms was improper.

With reference to his second claim, petitioner does not adequately establish that there was insufficient evidence to support the jury's finding of a gang enhancement. Petitioner contends that the prosecution's gang expert only testified to one of the predicate offenses required to establish the gang enhancement pursuant to Penal Code § 186.22(b). However, petitioner does not allege that such a requirement was not met by other evidence or testimony adduced from other witnesses at trial. Without such a showing, petitioner has not fully stated with particularity the facts upon which habeas corpus relief is sought. (See, People v. Duvall (1995) 9 Cal.4th 464, 474.)

Moreover, there was evidence at trial probative of petitioner's association with the Hard Times gang. Petitioner committed the offenses with a known Hard Times gang member as well as a known associate of the gang. Petitioner's apparent gang moniker was "Mr. Lucky." Even if the evidence on this issue were conflicting, habeas corpus is not available to re-weigh the evidence supporting the judgment of conviction. (See, In re La Due (1911) 161 Cal. 632, 635-636.)

As to the reference at trial, by the prosecution's gang expert, to petitioner's two STEP warnings, petitioner does not adequately demonstrate that such reference was impermissible hearsay. (See, Evidence Code § 1280.) Without such a showing, petitioner does not establish an improper infringement upon his constitutional right to confrontation.

In reference to petitioner's final claim for relief, petitioner does not establish that a more favorable outcome was reasonably probable but for trial counsel's alleged failure to request a jury instruction on the lesser enhancement of being "armed" with a firearm as defined by Penal Code § 12022(a)(1). At trial, there was conflicting evidence as to which of the three perpetrators had wielded the firearm during the commission of the offenses. In view of such evidence, there is no basis by which to conclude that a jury would have probably found petitioner guilty of the lesser enhancement. Habeas corpus is not available to relitigate determinations of fact made upon conflicting evidence after a fair trial. (See, In re Dixon (1953) 41 Cal.2d 756, 760.)

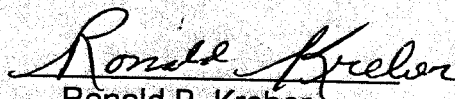
Petitioner has not established his claim of ineffective assistance by trial counsel. For ineffective assistance of counsel to appear, counsel's acts or omissions must result in the withdrawal of a potentially meritorious defense, or, due to acts or omissions of counsel, not amounting to the withdrawal of a defense, it is reasonably probable that a determination more favorable to the defendant would have resulted in the absence of

counsel's failings. (See, People v. Pope (1979) 23 Cal.3d 412; People v. Fosselman, 33 Cal.3d at 584.)

Considering that petitioner has not raised a meritorious claim for relief on habeas corpus, his claim of ineffective assistance by appellate counsel must also fail. The duties which appointed counsel must fulfill to meet his or her obligations as a competent advocate include the duty to argue all issues that are arguable. For an issue to be arguable, it 1) must be deemed meritorious by appellate counsel and 2) if the issue has a reasonable potential for success, then it must result in either a reversal or modification of the judgment. It is not the duty of appellate counsel to contrive arguable issues. (In re Spears (1984) 157 Cal.App.3d 1203, 1210, 1211.)

No prima facie case for relief has been established. An order to show cause will issue only if petitioner has established a prima facie case for relief on habeas corpus. (See, People v. Romero (1994) 8 Cal.4th 728, 737; In re Clark, 5 Cal.4th at 769, fn. 9.) The petition for writ of habeas corpus is denied.

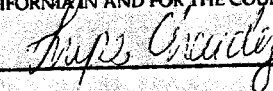
Dated: 1-23-01


Ronald P. Kreber
Judge of the Superior Court

THIS INSTRUMENT IS A CORRECT COPY OF
THE ORIGINAL ON FILE IN THIS OFFICE

ATTEST: (DATE) MAY 15 2002

ALAN SLATER, EXECUTIVE OFFICER AND CLERK
OF THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE COUNTY OF ORANGE

BY  DEPUTY



Entered by DA
Date Rec'd 8/4/99

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT COURT OF APPEAL-4TH DIST., DIV. 3
FILED

DIVISION THREE

AUG 02 1999

Stephen M. Kelly, Clerk

Deputy Clerk

THE PEOPLE,

Plaintiff and Respondent,

v.

BENJAMIN ESPINOZA,

Defendant and Appellant.

G022360

(Super. Ct. No. 96WF1776)

OPINION

Appeal from a judgment of the Superior Court of California, County of Orange, Richard L. Weatherspoon, Judge. Affirmed.

George L. Mertens, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson and David P. Druliner, Chief Assistant Attorneys General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster and Matthew Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Benjamin Espinoza of three counts of second degree burglary (Pen. Code, §§ 211, 212.5, subd. (b), & 213, subd. (a)(2); all further statutory references are to this code), four counts of false imprisonment (§ 236), possession of a firearm in a school zone (§ 626.9, subd. (b)), assault with a firearm (§ 245, subd. (a)(2)), receiving stolen property (§ 496, subd. (a)), and street terrorism (§ 186.22, subd. (a)). The jury also found that defendant had personally used a firearm (§ 12022.5, subd. (a)) and that he had committed all the crimes, except street terrorism and receiving stolen property, for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). He claims some of the CALJIC instructions given did not fully reflect the law as applied to this case. He also claims his counsel was ineffective in failing to request an instruction on a lesser enhancement. Finally, he contends the trial court improperly instructed the jurors after they asked what would happen if they were unable to reach a verdict on one of the counts. We affirm.

FACTS

Defendant and two accomplices robbed a market. Armed with a knife, a handgun and a rifle, they took money from a cash box and forced the employees to open a safe in a back office. They forced two of the victims into a freezer and restrained two others while they gathered their loot. The victims gave conflicting testimony about which of the perpetrators wielded firearms during the robberies.

The robbers fled in a stolen car. A police officer, responding to a silent alarm, gave chase which ended in a dead end street. Defendant jumped out of the car with money in one hand and a rifle in the other. As he exited the vehicle, the pursuing officer ordered him to stop and drop the weapon, whereupon defendant pointed the rifle at the officer. The officer fired her revolver, striking defendant in the leg.

Testifying on his own behalf, defendant admitted planning the robbery, taking part in it, and falsely imprisoning the victims. However, he denied personally using a firearm during the robbery. He also denied aiming the rifle at the officer and being a member of a street gang.

While discussing jury instructions with the court, defense counsel stated he was satisfied with the instructions except for one which is not the basis of this appeal. During deliberations, the jury asked the court, "What happens if we do not come to a guilty or not guilty decision?" The trial court responded, "The court would be compelled to declare a mistrial," whereupon the jury wrote back, "We are referring to one count in particular!" After discussing the matter with counsel and over defendant's objection, the court read an instruction to the jury which stated that if the jury was unable to reach a verdict as to any one count, the case would "in all probability" be retried as to that one count, based on essentially the same evidence and instructions. The trial court further explained that it preferred the jury reach a verdict on all counts, but should not feel it was required to do so.

DISCUSSION

Jury Instructions

Defendant contends the trial court erred by giving certain CALJIC instructions because they did not fully reflect the law as applied to the facts of this case. In particular, he claims that although CALJIC Nos. 2.01 (Sufficiency of Circumstantial Evidence—Generally), 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State), 2.11 (Production of All Available Evidence Not Required), 2.20 (Believability of Witness), 2.27 (Sufficiency of Testimony of One Witness), and 9.00 (Assault—Defined) accurately state the law, they should have been modified to fit the

facts of this particular case. At trial, however, defendant neither objected to these instructions nor requested any modifications.

Generally, instructions given may be challenged on appeal even in the absence of an objection in the trial court. (§§ 1176, 1259.) However, such review is appropriate only when the substantial rights of a defendant are affected. Here, defendant does not claim that any of the challenged instructions were improper; instead, he contends the instructions should have been amplified or modified. Under such circumstances, a failure to object or to request a modification of the instructions constitutes a waiver of the issue.

As our Supreme Court noted in *People v. Anderson* (1966) 64 Cal.2d 633, 639: "Defendant's contention essentially is that the instructions given needed amplification or explanation; but since he did not request such amplification or explanation, error cannot now be predicated upon the trial court's failure to give them on its own motion. [Citations.]" The failure of a defendant to request a modification to an instruction at trial bars the litigant from raising the issue on appeal.

The trial court is not obligated to instruct sua sponte on specific points developed at trial. "While the court has the obligation to instruct on general legal principles so central to the determination of guilt or innocence that to ensure a fair trial they must be explained to the jury [citation], it is not incumbent upon the trial court to instruct on specific points developed at trial. . . . [¶] In sum, defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions." (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

Ineffective Assistance of Counsel

Defendant testified he did not personally use a gun during the robberies, claiming his accomplice had done so. He claims he did not receive the constitutionally

mandated effective assistance of counsel because his lawyer failed to request CALJIC No. 17.15 (Defendant Armed in Commission of Crime). This instruction would have permitted the jury to find he was vicariously armed with a firearm, a "lesser enhancement" to being personally so armed.

In *People v. Majors* (1998) 18 Cal.4th 385, our Supreme Court noted that the trial court is not under a sua sponte duty to give an instruction on lesser included enhancements. "[W]e decline defendant's invitation to extend a trial court's sua sponte obligation to instruct on lesser included offenses to so-called 'lesser included enhancements.'" (*Id.* at p. 410.) This does not mean, however, that a defendant is not entitled to such an instruction upon request.

Here, given the option, the jury might have found that defendant was "armed with a firearm" under section 12022 as opposed to "personally armed with a firearm" under section 12022.5, subdivision (a). However, defendant may have made a tactical decision not to request such an instruction. We cannot decide this issue on appeal. "[C]laims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.) This issue should be presented in the appropriate context and on the basis of a more complete record.

Deliberations

During deliberations, the jurors asked the trial court what would happen if they were unable to reach a verdict. Defendant claims the trial court misled the jurors by instructing them that "'in all probability' another trial would be held should they not be able to reach a verdict as to one count." (Emphasis added.) He also contends the instruction amounted to an *Allen* charge (*Allen v. United States* (1896) 164 U.S. 492) and improperly coerced the jury into reaching a verdict.

First of all, this is not precisely what the trial court said. The court advised the jurors, "[I]n all probability we will need to try this case again as to that *count*." (Emphasis added.) There is a big difference between retrying the whole case and retrying only one count. More importantly, the instruction given was not prejudicially infirm.

The trial court advised the jurors that in a retrial on the count, the second jury would hear substantially the same evidence which they had heard and would be given essentially the same instructions. The court further advised the jury that it did not intend to pressure or coerce any individual to change his or her mind but that all the jurors should keep an open mind. Finally, the court noted that, while it preferred the jurors reach a verdict, they should not feel they were required to do so.

The issue of whether a particular instruction is coercive is to be determined in light of the totality of the circumstances. (*Jenkins v. United States* (1965) 380 U.S. 445, 446.) "In gauging the coercive, prejudicial effects of such an instruction we are guided by considerations of the nature of the instructions, the timing of when it is given, the number of times it is given and the compounding influence if given along with other mini-*Allen* charges [citation]." (*People v. Peters* (1982) 128 Cal.App.3d 75, 91.) Here, the jury asked the questions about its inability to reach a verdict a few hours after it had commenced deliberating. The jurors continued to deliberate after the questioned instruction had been read. The jury even had testimony read back. Although the court erred by telling the jury "in all probability" the one count would be retried if the jury was unable to reach a verdict, the error was not prejudicially coercive.

DISPOSITION

The judgment is affirmed.

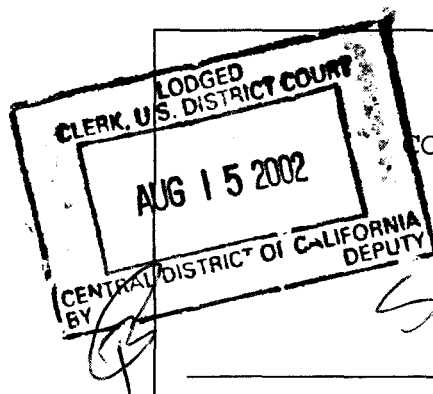
RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.

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COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF AND RESPONDENT,

VS.

BENJAMIN ESPINOZA,

DEFENDANT AND APPELLANT.

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

HONORABLE RICHARD L. WEATHERSPOON, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

AUGUST 18, 19, 20, OCTOBER 3, 1997

A P P E A R A N C E S

FOR PLAINTIFF & RESPONDENT: ATTORNEY GENERAL
110 WEST "A" STREET
SUITE 700
SAN DIEGO, CA 92101

FOR DEFENDANT & APPELLANT: APPELLATE DEFENDERS
233 "A" STREET
SUITE 1200
SAN DIEGO, CA 92101

VOLUME II OF II
PAGES 291 - 582, INCLUSIVE, ROBERT J. SULLIVAN, CSR NO. 5646
OFFICIAL COURT REPORTER

1 MR. VON DER AHE, YOU MAY PRESENT YOUR ARGUMENT.

2 MR. VON DER AHE: THANK YOU, YOUR HONOR.

3 GOOD MORNING, LADIES AND GENTLEMEN. AS YOU KNOW,
4 THE OPENING STATEMENT AND CLOSING ARGUMENT ARE JUST THAT,
5 THEY ARE ARGUMENTS BY THE ATTORNEYS. IT IS NOT EVIDENCE.
6 AND SOMETIMES DURING THE COURSE OF A CLOSING ARGUMENT AN
7 ATTORNEY MIGHT GET EXCITED AND SOMETIMES MISSTATE EVIDENCE.
8 THAT IS USUALLY NOT DONE INTENTIONALLY, IT IS JUST SOMEWHAT
9 DUE TO THE HEAT OF THE MOMENT.

10 SO IF I DO IT OR IF MR. CAMBER DOES IT, AGAIN I
11 DON'T THINK THAT IT IS DONE INTENTIONALLY, AND REMEMBER WHAT
12 GOVERNS IS YOUR RECOLLECTION OF WHAT THE WITNESSES SAID AND
13 WHAT THE EXHIBITS ARE.

14 BEFORE I GET INTO THE CLOSING ARGUMENT, I WOULD
15 JUST LIKE TO TAKE THIS ONE LAST OPPORTUNITY TO THANK EACH
16 AND EVERY ONE OF YOU FOR TAKING THE TIME TO SIT ON A JURY.
17 WITHOUT YOU DOING THAT, THIS SYSTEM SIMPLY DOESN'T WORK.
18 AND I KNOW THAT YOU TOOK TIME AWAY FROM YOUR LIVES, FROM
19 YOUR JOBS, FROM YOUR FAMILIES, IN ORDER TO HELP OUR CRIMINAL
20 JUSTICE SYSTEM WORK. AND I WOULD JUST LIKE TO THANK YOU FOR
21 THAT.

22 WHAT I THOUGHT I WOULD DO IN THIS CASE, AND
23 ALTHOUGH YOU HAVE HEARD THE TERMS ROBBERY, FALSE
24 IMPRISONMENT, GUN IN A SCHOOL ZONE, I THOUGHT I WOULD JUST
25 TAKE A FEW MOMENTS JUST TO GO OVER WITH YOU THE ELEMENTS OF
26 EACH ONE OF THOSE CRIMES BEFORE WE ACTUALLY GET INTO THE

1 ARGUMENT.

2 YOU ARE GOING TO LEARN FROM THIS CASE THAT
3 ROBBERY HAS -- AND YOU ARE GOING TO BE GIVEN A PACKET OF
4 INSTRUCTIONS, BUT ROBBERY HAS A LIST OF ELEMENTS, AND I AM
5 JUST GOING TO READ THEM TO YOU REAL FAST, BECAUSE I DON'T
6 THINK ANY OF THEM ARE GOING TO BE IN ISSUE IN THIS CASE.

7 THAT A PERSON HAD POSSESSION OF PROPERTY OF SOME
8 VALUE, HOWEVER SLIGHT. THAT THE PROPERTY WAS TAKEN FROM
9 THAT PERSON OR FROM HIS OR HER IMMEDIATE PRESENCE. THAT THE
10 PROPERTY WAS TAKEN AGAINST THE WILL OF THAT PERSON. THAT
11 THE TAKING WAS ACCOMPLISHED EITHER BY FORCE OR FEAR. AND
12 THAT THE PROPERTY WAS TAKEN WITH THE SPECIFIC INTENT TO
13 PERMANENTLY DEPRIVE THE PERSON OF THAT PROPERTY.

14 ALL RIGHT, I DON'T THINK THERE IS ANY ISSUE IN
15 THIS CASE WHEN JOSEPHINA WAS AT THE CASH REGISTER THE
16 PROPERTY WAS TAKEN FROM HER IMMEDIATE PRESENCE. I DON'T
17 THINK THERE IS ANY QUESTION THAT WHEN ABIMAE CUEVAS WAS
18 WALKING INTO THE EL FARO MARKET THAT THE PROPERTY WAS TAKEN
19 FROM HIS POSSESSION. AND I DON'T THINK THERE IS ANY
20 ARGUMENT THAT WHEN JOSEPHINA OCHOA WAS FORCED TO TAKE THE
21 KEYS TO THE BACK, THAT THAT WAS TAKEN FROM HIS PRESENCE. I
22 DON'T THINK THAT IS GOING TO BE IN ISSUE HERE, BUT, AGAIN,
23 THOSE ARE GOING TO BE THE ELEMENTS.

24 LET ME JUST READ TO YOU THE ELEMENTS OF FALSE
25 IMPRISONMENT BY VIOLENCE, THAT IS SECTION 236 OF THE PENAL
26 CODE.

1 A PERSON UNLAWFULLY RESTRAINED, DETAINED OR
2 CONTAINED ANOTHER PERSON, COMPELLING HIM OR HER TO STAY OR
3 GO SOMEWHERE. THAT THE PERSON DID NOT CONSENT TO THE
4 RESTRAINT, THE CONFINEMENT OR THE DETENTION. AND THAT THE
5 RESTRAINT, CONFINEMENT OR DETENTION WAS ACCOMPLISHED BY
6 VIOLENCE OR MENACE.

7 AS YOU KNOW IN THIS CASE THERE ARE FOUR COUNTS OF
8 236, WHICH IS FALSE IMPRISONMENT BY VIOLENCE. YOU HAVE
9 ABIMAEL CUEVAS, WHO WAS BROUGHT INTO THE MARKET, AND THEN
10 PUT IN THE FREEZER.

11 YOU HAVE GUSTAVO DURAN, WHO IS IN THE BACK WHO IS
12 WASHING, I THINK THE TRAY THAT HE INDICATED IN THE BACK, HE
13 IS ALSO PUT INTO THE FREEZER.

14 YOU HAVE ROMERO AMEZCUA -- ALEJANDRO AMEZCUA, HE
15 IS THE PERSON THAT WAS KNOCKED DOWN AT THE MEAT COUNTER,
16 FORCED TO LIE AT THE GROUND THERE.

17 AND THEN YOU HAD JOSEPHINA OCHOA, THE LADY AT THE
18 CASH REGISTER, WHO WAS TAKEN FROM THE CASH REGISTER AND
19 WALKED BACK TO THE OFFICE. AND SHE WAS MADE TO LIE OR STAY
20 IN THE BACK OFFICE AREA.

21 THAT OBVIOUSLY WAS AGAINST THE WILL OF EACH AND
22 EVERY ONE OF THOSE PERSONS. I DON'T THINK YOU ARE GOING TO
23 HEAR MUCH ISSUE FROM MR. CAMBER ON ANY ONE OF THOSE.

24 POSSESSION OF STOLEN PROPERTY, I AM GOING TO READ
25 TO YOU THE ELEMENTS OF THAT. SIMPLY PUT, POSSESSION OF
26 STOLEN PROPERTY IS BEING IN POSSESSION OF PROPERTY, KNOWING

1 THAT IT IS STOLEN, AND POSSESSING IT IN SOME WAY. THOSE ARE
2 IN SIMPLISTIC FORM, THOSE ARE THE ELEMENTS OF THE CRIME OF
3 RECEIVING STOLEN PROPERTY.

4 IN THIS CASE WE KNOW THAT MR. LOPEZ' CAR WAS
5 STOLEN THE NIGHT BEFORE THIS ROBBERY, THAT IT WAS STOLEN
6 FROM THE VICINITY NEAR MR. ESPINOZA' HOUSE. MR. ESPINOZA,
7 EVEN WHEN HE WAS UP TESTIFYING, ADMITTED THAT HE KNEW THAT
8 THE CAR WAS STOLEN, AND THE OBVIOUS PURPOSE FOR WHY THE CAR
9 WAS STOLEN WAS IT WAS GOING TO BE USED AS THE CAR TO BE USED
10 IN THE ROBBERY.

11 REMEMBER, MR. ESPINOZA HAD HIS CAR PARKED ACROSS
12 THE DOIG INTERMEDIATE SCHOOL YARD, AND THAT CAR WAS GOING TO
13 BE USED IN THE ROBBERY THAT THEY WERE GOING TO DRIVE TO
14 MR. ESPINOZA' CAR.

15 OBVIOUSLY THE ELEMENTS OF THAT PARTICULAR CRIME
16 HAVE BEEN MET.

17 THERE IS ALSO A COUNT OF A GUN ON A SCHOOL YARD
18 OR NEAR A SCHOOL ZONE. AND LET ME JUST TELL YOU WHAT THE
19 ELEMENTS OF THAT ARE, IT IS VERY SIMPLE. ALTHOUGH THIS WAS
20 A SATURDAY IN THE SUMMER, IT DOESN'T REQUIRE THAT THE SCHOOL
21 BE IN SESSION. ALL THAT IS REQUIRED IS THAT A PERSON
22 WILLFULLY AND KNOWINGLY POSSESSED A FIREARM. OBVIOUSLY
23 MR. ESPINOZA IS STANDING RIGHT AT THE GATE TO THE SCHOOL
24 YARD THERE. AND THAT THE PERSON KNEW OR REASONABLY SHOULD
25 HAVE KNOWN THAT THE PLACE WAS A SCHOOL ZONE.

26 THIS IS HOW THEY DEFINE A SCHOOL ZONE, AN AREA IN

1 OR AROUND A PRIVATE OR PUBLIC SCHOOL PROVIDING INSTRUCTIONS
2 IN KINDERGARTEN OR GRADES ONE THROUGH 12 INCLUSIVE, AND
3 WITHIN A DISTANCE OF 1,000 FEET FROM THE GROUNDS OF THE
4 PUBLIC OR PRIVATE SCHOOL.

5 OKAY. SO HE IS RIGHT THERE AT THE GATE.
6 OBVIOUSLY THEY KNOW IT IS A SCHOOL, THEY PARKED THE GETAWAY
7 CAR THERE.

8 THE REASON I SPEND SOME TIME WITH YOU WITH THE
9 ELEMENTS IN THIS PARTICULAR CASE, IS TO UNDERSTAND THE
10 LIABILITY FOR A CRIME THAT PEOPLE DO OUT THERE, YOU HAVE TO
11 NUMBER ONE UNDERSTAND THE ELEMENTS.

12 BUT, NUMBER TWO, YOU ARE GOING TO FIND IN THE
13 JUDGE'S INSTRUCTIONS THAT HE IS GOING TO INSTRUCT YOU ON
14 PEOPLE THAT ARE RESPONSIBLE FOR CRIMES.

15 AND THE TERM THAT IS GOING TO BE DESIGNATED AS TO
16 THE PERSONS THAT ARE RESPONSIBLE FOR CRIMES, IS THIS TERM OF
17 PRINCIPAL. THEY LABEL THE PERSONS RESPONSIBLE AS A
18 PRINCIPAL. AND A PRINCIPAL IS A PERSON THAT ACTUALLY DOES
19 THE CRIME, OR A PRINCIPAL IS A PERSON THAT AIDS AND ABETS IN
20 THE COMMISSION OF A CRIME.

21 OKAY. AND LET ME JUST READ TO YOU QUICKLY THE
22 DEFINITION OF AIDING AND ABETTING, SO THAT YOU WILL
23 UNDERSTAND IT.

24 "A PERSON AIDS AND ABETS THE COMMISSION OF A
25 CRIME WHEN HE OR SHE WITH KNOWLEDGE OF THE UNLAWFUL
26 PURPOSE OF THE PERPETRATOR, AND WITH THE INTENT OR

1 PURPOSE OF COMMITTING OR ENCOURAGING OR FACILITATING
2 THE COMMISSION OF A CRIME, BY ACT OR ADVICE, PROMOTES,
3 ENCOURAGES OR INSTIGATES THE COMMISSION OF THE CRIME."

4 OKAY. WHAT THAT BASICALLY SAYS IS YOU CAN HAVE
5 PERSON "A" BE THE PLANNER OF THE ROBBERY, PERSON "B" OR "C"
6 BEING DESIGNATED AS THE PERSONS TO GO DO THE ROBBERY, BUT
7 UNDER THE LAW OF AIDING AND ABETTING THE PERSON THAT PLANS
8 THE ROBBERY IS AS LIABLE FOR THAT ROBBERY AS THE TWO PEOPLE
9 THAT GO AND DO IT.

10 AND THE REASON THAT I BRING THAT UP TO YOU IS
11 BECAUSE THE JUDGE IS GOING TO INSTRUCT YOU THAT PEOPLE THAT
12 AID AND ABET IN THE COMMISSION OF A CRIME ARE ALL
13 RESPONSIBLE FOR THE NATURAL AND PROBABLE CONSEQUENCES OF
14 THAT CRIME.

15 NOW IN THIS PARTICULAR CASE YOU KNOW THAT THERE
16 ARE THREE MASKED MEN THAT GO INTO THAT STORE. ALL RIGHT.
17 AND YOU HEARD FROM THE WITNESSES VARYING ACCOUNTS AS TO
18 WHICH ONE OF THOSE INDIVIDUALS DID WHAT TO HIM OR HER.
19 OKAY.

20 AND FOR PURPOSES OF THIS CASE, I AM JUST GOING TO
21 TELL YOU AS FAR AS ALL OF THOSE ROBBERY COUNTS ARE
22 CONCERNED, AS FAR AS ALL OF THOSE FALSE IMPRISONMENT BY
23 VIOLENCE COUNTS ARE CONCERNED, IT DOESN'T MATTER WHICH
24 PERSON ACTUALLY TOOK THE MONEY FROM A GIVEN INDIVIDUAL, AND
25 IT DOESN'T MATTER WHICH PERSON ACTUALLY KNOCKED THE PERSON
26 TO THE GROUND OR PUSHED THE ONE PERSON OR THE OTHER PERSON

1 INTO THE FREEZER.

2 SEE, UNDER THE LAW OF AIDING AND ABETTING, THEY
3 ARE ALL DOING IT TOGETHER FOR THE COMMON PURPOSE OF THE TAKE
4 OVER ROBBERY. AND UNDER THE LAW OF THIS LAND, UNDER THE LAW
5 OF CALIFORNIA, THEY ARE ALL LIABLE FOR THE NATURAL AND
6 PROBABLE CONSEQUENCES OF THE CONSPIRACY OF THE TAKE OVER
7 ROBBERY, THAT'S THE LAW OF AIDING AND ABETTING.

8 AND YOU NEED TO KNOW THAT, BECAUSE WHEN
9 MR. ESPINOZA GOT UP THERE AND TESTIFIED, HE WASN'T TELLING
10 YOU SOMETHING YOU DIDN'T ALREADY KNOW. ALL RIGHT. WHEN
11 THAT POLICE OFFICER'S BULLET TOOK HIM TO THE GROUND, WHEN HE
12 IS SITTING THERE HOLDING THE RIFLE, WEARING THE GLOVES,
13 HOLDING THE MONEY, IN THE STOLEN CAR WITH HIS CAR PARKED
14 ACROSS THE SCHOOL YARD THERE FOR THE ULTIMATE GETAWAY WITH
15 THE SKI MASK AND ALL THAT IN HAND, HE WASN'T TELLING YOU
16 SOMETHING YOU ALREADY DIDN'T HAVE. HE IS SAYING, YEAH, I
17 WAS A PART OF THIS ROBBERY.

18 WELL, WHAT HE IS TELLING YOU IS, YEAH, I AM A
19 PART OF THIS ROBBERY, BUT YOU ALREADY KNEW THAT. ALL RIGHT.
20 SO WHEN YOU LOOK AT MR. ESPINOZA'S CREDIBILITY, DO THAT WITH
21 THAT NOTION IN MIND, HE IS TELLING YOU SOMETHING THAT YOU
22 ALREADY KNEW. HE IS NOT GIVING YOU ANYTHING THAT YOU
23 ALREADY DIDN'T HAVE.

24 HE WAS ALREADY LIABLE FOR EACH AND EVERY ONE OF
25 THOSE CRIMES, ALL OF THOSE FALSE IMPRISONMENTS, ALL OF THOSE
26 ROBBERIES, BY THE TIME THAT POLICE OFFICER'S BULLET TOOK HIM

1 TO THE GROUND, HE HAD NO WAY OUT OF ANY OF THOSE ROBBERIES.

2 BUT WHAT I NOTICED IN HIS EXPLANATION TO YOU WAS
3 HOW HE STARTED TO MINIMIZE HIS INVOLVEMENT. YOU MIGHT
4 RECALL WHEN WE STARTED TALKING ABOUT THE GUN, FOR INSTANCE,
5 HERE'S AN EXAMPLE OF HIS MINIMIZATION.

6 SIR, WHO WERE THOSE BULLETS, REMEMBER THE SIZE OF
7 THOSE BULLETS, WHO WERE THOSE BULLETS FOR? REMEMBER THAT
8 LINE OF QUESTIONING? REMEMBER WHAT HE SAID? I DIDN'T
9 REALLY PAY TOO MUCH ATTENTION, THE GUN WAS LOADED, BUT I
10 DIDN'T REALLY CARE ABOUT THAT.

11 OKAY. NOW, AGAIN, USE YOUR COMMON SENSE AND
12 JUDGE HIS CREDIBILITY WHEN YOU WEIGH WHAT HE IS TELLING YOU.
13 ALL RIGHT. HERE IS A MAN THAT HAS GONE TO THE EXTREME OF
14 GETTING TWO OTHERS TO PARTICIPATE WITH HIM IN A ROBBERY. HE
15 HAS GOT A MASK. HE HAS GONE TO THE EXTENT OF GETTING
16 GLOVES. HE HAS GONE TO THE EXTENT OF PROCURING A STOLEN
17 CAR. HE HAS GONE TO THE NEXT EXTENT OF PARKING HIS CAR AWAY
18 FROM THE SCENE SO IT CAN BE DRIVEN.

19 OKAY, LOOK AT HOW HE MINIMIZES THAT.

20 ANOTHER THING HE MINIMIZES, WHEN I WAS SITTING
21 HERE LISTENING TO HIM TESTIFY ABOUT HOW HE DID THIS ROBBERY
22 FOR HIS SISTER-IN-LAW, IT STARTED TO SOUND LIKE ROBIN HOOD.
23 THAT HE WAS PLAYING ROBIN HOOD. REMEMBER THAT? IT WAS
24 MR. ESPINOZA TELLING YOU THAT HE WAS DOING THIS ROBBERY FOR
25 HIS SISTER-IN-LAW. AND YOU GOT THIS CONCEPT OF, OH, WELL,
26 HE DID A ROBBERY, BUT MAYBE HIS INTENT OR THE REASON WHY HE

1 WAS DOING IT, MAYBE THAT WAS A GOOD CAUSE.

2 WELL, LET'S GO BACK TO WHAT THEY DID TO THE
3 PEOPLE IN THERE. REMEMBER? GUSTAVO DURAN HAD A GUN PUT UP
4 TO HIS TEMPLE.

5 JOSEPHINA OCHOA HAD THIS KNIFE (INDICATING)
6 DRAPED AROUND HER NECK.

7 GUSTAVO DURAN IS KNOCKED TO THE FLOOR, "DON'T
8 MOVE, ASSHOLE," SOMETHING LIKE THAT.

9 THAT'S NOT ROBIN HOOD, LADIES AND GENTLEMEN, THIS
10 IS A VIOLENT TAKE OVER ROBBERY. THESE ARE WEAPONS THAT,
11 LOOK AT THIS KNIFE (INDICATING), LOOK AT THE GRIP IN THIS
12 KNIFE (INDICATING), THIS IS MEANT TO HURT. OKAY, THIS IS
13 NOT YOUR AVERAGE STEAK KNIFE.

14 LOOK AT THAT GUN. IT IS FULLY LOADED. THAT GUN
15 IS COCKED. IT HAS GOT TO BE COCKED TO HAVE THAT SIXTH
16 BULLET IN. AND BY "COCKED," I MEAN THAT IT HAS GOT A ROUND
17 IN THE CHAMBER.

18 LOOK AT HOW HE MINIMIZES THAT. LOOK AT HOW HE
19 TRIES TO MINIMIZE THE FACT THAT THE GUN IS IN THE BACK SEAT.
20 ALL RIGHT. REMEMBER OFFICER CAROL SALVATIERRA SAYS, I GOT
21 THE CAR AND I PICKED UP THE SUBARU STATION WAGON AS IT WAS
22 COMING OUT OF THE PARKING LOT.

23 ALL RIGHT. WHAT'S MR. ESPINOZA EXPLANATION FOR
24 WHY THE GUN IS IN THE BACK SEAT? WHAT DOES HE TELL YOU? I
25 AM CONCERNED THAT SOMEBODY IS GOING TO GET SHOT, THAT THERE
26 IS NO ROOM IN THE FRONT, SO WE PLACED THE GUN IN THE BACK,

1 BECAUSE WE DON'T WANT THE BARREL POINT AT ANYBODY. REMEMBER
2 THAT EXPLANATION?

3 GO BACK TO YOUR COMMON SENSE. HERE IS A VIOLENT
4 TAKE OVER OF A ROBBERY, YOU ARE TRYING TO GET IN, YOU ARE
5 TRYING TO GET OUT, YOU ARE TRYING TO TAKE THE PROPERTY AS
6 FAST AS YOU CAN. REMEMBER THESE GUYS COME FLYING OUT OF
7 THAT STORE INTO THAT PARTICULAR CAR, AND THEY ARE ONLY GOING
8 TO BE IN THAT CAR, WHEN YOU LOOK AT PEOPLE'S NUMBER 17, THE
9 PLAN IS ONLY TO BE IN THAT CAR A RELATIVELY SHORT DISTANCE.

10 LOOK AT THIS (INDICATING), THE MARKET IS HERE
11 (INDICATING), THE SCHOOL YARD IS HERE (INDICATING), AND THE
12 GETAWAY CAR IS OVER THERE AT THE CHURCH (INDICATING). THEY
13 ARE ONLY PLANNING ON BEING IN THAT CAR FOR SEVERAL BLOCKS.

14 ALL RIGHT. I DON'T THINK AT THAT POINT IN TIME
15 THAT MR. ESPINOZA IS BEING CREDIBLE WITH YOU WHEN HE TELLS
16 YOU, WE WERE WORRIED ABOUT HOW THAT GUN WAS POINTING. ALL
17 RIGHT. THOSE GUYS ARE SO EXCITED WHEN THEY GET INTO THAT
18 CAR, AND YOU CAN SEE IT BECAUSE THERE IS MONEY ALL OVER THAT
19 CAR, THEY ARE RIPPING INTO THE MONEY, THEY ARE PULLING OFF
20 THEIR MASKS AND TAKING OFF THEIR GLOVES. THEY ARE EXCITED
21 ABOUT IT. THEY ARE NOT WORRIED ABOUT WHERE THAT GUN IS
22 POINTED.

23 AND THEN AGAIN WHEN YOU LOOK AT MR. ESPINOZA'S
24 CREDIBILITY, REMEMBER THE ENCOUNTER THAT HE HAD WITH CAROL
25 SALVATIERRA, WHERE HE MINIMIZES HIS INVOLVEMENT IN THAT.
26 ANYTHING THAT POINTS TO MR. ESPINOZA, HE MINIMIZES. HE

1 SAYS, YOU KNOW, WE ARE AWARE THAT THERE WAS A POLICE CAR
2 BEHIND US, BUT WE DIDN'T KNOW HOW MANY PEOPLE WERE IN THAT
3 POLICE CAR.

4 LADIES AND GENTLEMEN, WHEN YOU LOOK AT PICTURES
5 OF THAT SUBARU, YOU ARE GOING TO SEE REAR-VIEW MIRRORS IN
6 THE DASHBOARD AND ON THE SIDES OF THAT CAR. AND I EXPECT
7 THAT ALL OF YOU DRIVE OR HAVE DRIVEN A CAR, AND YOU KNOW
8 THAT YOU CAN LOOK IN YOUR REAR-VIEW MIRROR.

9 BUT REMEMBER WHAT CAROL SALVATIERRA SAID. SHE
10 SAID, I PULLED THAT CAR OVER, WE STOPPED, I ACTUALLY OPENED
11 MY DOOR AND GOT OUT. DO YOU REALLY BELIEVE MR. ESPINOZA
12 WHEN HE TELLS YOU WE HAD NO IDEA HOW MANY POLICE OFFICERS
13 WERE THERE? WE DIDN'T KNOW IF IT WAS A MAN OR WOMAN? DO
14 ANY OF YOU TRULY BELIEVE THAT? IS HE BEING HONEST WITH YOU
15 THERE?

16 THEN AS THEY GO DOWN THE STREET, CAROL
17 SALVATIERRA TELLS YOU SHE IS ONLY TWO OR THREE CAR LENGTHS
18 BEHIND THAT CAR AS IT GOES DOWN ROXY AND TURNS RIGHT.

19 AGAIN, YOU SEE HIM MINIMIZE IT. AND THE REASON
20 THAT MR. ESPINOZA MINIMIZES HIS INVOLVEMENT WITH CAROL
21 SALVATIERRA IS, AND I DON'T MEAN THIS IN A BAD WAY, BUT
22 THERE USED TO BE A T.V. SHOW PROBABLY 10, 15 YEARS AGO,
23 TITLED, "WHAT'S MY LINE"? I DON'T KNOW IF ANY OF YOU EVER
24 SAW IT, BUT IT WAS A PANEL OF THREE MOVIE STARS OR T.V.
25 STARS, AND THEY WOULD SIT THERE, AND THEN FOR THE SHOW THEY
26 WOULD BRING IN A PERSON DRESSED UP, AND YOU HAD 20 QUESTIONS

1 TO FIGURE OUT WHAT THAT PERSON DID FOR AN OCCUPATION.

2 WHEN YOU SAW CAROL SALVATIERRA WALK INTO THIS
3 COURTROOM, SHE IS NOT THE MOST OVERPOWERING LOOKING TYPE
4 PERSON. AND I WOULD BE WILLING TO BET WITH EACH AND EVERY
5 ONE OF YOU IN YOUR FIRST FIVE GUESSES IF YOU WERE GUESSING
6 HER OCCUPATION, YOU WOULDN'T SAY POLICE OFFICER.

7 NOW, THAT'S THE SAME PERSON THAT MR. ESPINOZA
8 SEES OUT THERE AT THE TIME THAT HIS TWO BUDDIES ARE GETTING
9 AWAY, AND THAT'S THE SAME PERSON THAT STANDS BETWEEN HIM AND
10 \$38,000.

11 OKAY, SO I ASK YOU TO JUDGE THE CREDIBILITY WHEN
12 MR. ESPINOZA MINIMIZES HIS INVOLVEMENT.

13 WHEN YOU GO OVER THE ROBBERY ITSELF, OKAY, AND WE
14 WENT THROUGH THIS, BUT THERE ARE STIPULATIONS THAT YOU CAN
15 REFER TO, ALL OF THE PEOPLE IN THE STORE, IF YOU RECALL,
16 WERE GIVING VARYING SIZE DESCRIPTIONS AND COLOR OF WHAT THE
17 INDIVIDUALS WERE WEARING. AND THEY WEREN'T DOING THAT
18 INTENTIONALLY, THEY WEREN'T DOING THAT DISHONESTLY. WHAT
19 THEY WERE DOING THEY WERE CONFRONTED WITH A LIFE OR DEATH
20 SITUATION, PEOPLE POKING GUNS, HOLDING KNIVES, KNOCKING THEM
21 TO THE GROUND, THEY ARE CATCHING BITS AND PIECES, AND AS
22 THEY RECOLLECT IT THEY START INTERCHANGING WHAT THE VARIOUS
23 ASSAILANTS WERE WEARING. OKAY.

24 AND LAST NIGHT I JUST TOOK A NOTE, AND I JOTTED
25 DOWN WHAT THESE PEOPLE SAID IN THEIR DESCRIPTIONS AS FAR AS
26 THE INDIVIDUAL WITH THE RIFLE.

1 ABIMAEAL CUEVAS SAYS THAT HE STOOD FIVE FOOT
2 EIGHT, WORE A BLACK AND WHITE SKI MASK.

3 GUSTAVO DURAN SAYS THE PERSON STOOD FIVE-SEVEN,
4 BLACK SKI MASK, LONG SLEEVE SHIRT, BAGGY PANTS, BLACK
5 GLOVES.

6 ALEJANDRO AMEZCUA SAYS FIVE FOOT EIGHT, SKI MASK,
7 BLACK AND WHITE FLANNEL SHIRT, BLUE JEANS.

8 JOSEPHINA OCHOA SAYS FIVE FOOT FOUR, DARK SKI
9 MASK, BLUE SWEATER.

10 JOSE OCHOA, FIVE FOOT TEN, BROWN SKI MASK, LONG
11 SLEEVE SHIRT, BROWN BAGGY PANTS.

12 YOU CAN HUNT THROUGHOUT ALL OF THOSE DESCRIPTIONS
13 AND TRY TO COME UP WITH THE INDIVIDUAL THAT WAS HOLDING THE
14 RIFLE. SOMEBODY IS RIGHT, THE OTHERS ARE WRONG. MAYBE THAT
15 PERSON THAT IS RIGHT HAS INTERCHANGED MAYBE THE COLOR OF A
16 MASK.

17 IF YOU ARE INTENT ON ADOPTING WHAT ONE OF THOSE
18 PERSONS SAYS AS THE PERSON WITH THE RIFLE, THEN I WOULD
19 ENCOURAGE YOU TO CHOOSE JOSE OCHOA. JOSE OCHOA SAYS FIVE
20 FOOT TEN. MR. ESPINOZA IS FIVE FOOT NINE. HE SAYS BROWN
21 SKI MASK. THERE IS A BROWN SKI MASK IN THE CAR, THERE IS
22 THE BLUE SKI MASK IN THE BACK FOOT AREA, BUT WHEN YOU LOOK
23 AT THE CAR THERE IS ALSO A BROWN SKI MASK IN THERE. LONG
24 SLEEVE SHIRT, BROWN BAGGY PANTS. MR. ESPINOZA IS THE ONLY
25 PERSON THAT IS WEARING BROWN PANTS. OFFICER SALVATIERRA, AS
26 THE OTHER TWO ARE RUNNING ACROSS THE SCHOOL YARD, IS ON HER

1 RADIO DISPATCHING THAT THOSE TWO ARE IN BLUE.

2 ONE THING THAT JOSE OCHOA ALSO SAYS IS HE WAS
3 ASKED TO DESCRIBE THE KNIFE. HE SAYS THE KNIFE IS ABOUT A
4 FOOT LONG. IT HAS GOT A BLACK HANDLE. AND IT HAS LIKE
5 THREE OR FOUR OPENINGS, I BELIEVE IS WHAT HE SAYS.

6 THIS IS THE KNIFE HE WAS DESCRIBING (INDICATING),
7 THIS IS THE KNIFE THAT HE WAS LOOKING AT BEING HELD TO
8 JOSEPHINA OCHOA'S THROAT AS HE STOOD FIVE FEET AWAY.
9 NOTHING IS EVER REALLY DONE TO JOSE OCHOA, HE IS STANDING
10 THERE WATCHING WHAT IS HAPPENING TO JOSEPHINA OCHOA, HE IS
11 THE INDIVIDUAL THAT HAS TO GIVE UP THE KEYS.

12 BUT LOOK AT THIS KNIFE (INDICATING) HERE ARE YOUR
13 OPENINGS, AND HERE IS THE BLACK HANDLE (INDICATING).

14 IF YOU WANTED TO ADOPT WHAT ONE OF THOSE PEOPLE
15 SAYS AS THE PERSON WITH THE RIFLE, GO AHEAD, I WOULD
16 ENCOURAGE YOU TO ADOPT WHAT JOSE OCHOA SAYS. BUT
17 INDEPENDENT OF THAT, I WOULD JUST ASK YOU AGAIN TO LOOK AT
18 THE COMMON SENSE AS TO THE PERSON THAT WOULD HAVE THE RIFLE
19 IN THIS THING.

20 ALL RIGHT. WHAT DO WE KNOW FROM THE WHOLE
21 PICTURE? WHOSE IDEA WAS IT TO DO THE ROBBERY? IT IS
22 BENJAMIN ESPINOZA'S. WHOSE IDEA IN DOING THE ROBBERY KNOWS
23 THE LAYOUT OF THE STORE, KNOWS WHERE THE TIN BOX IS KEPT?
24 WHO HAS BEEN TO THE BACK OFFICE, AND THE OWNER OF THE STORE
25 HAS PULLED OUT MONEY TO GIVE TO HIM TO GIVE TO HIS MOTHER?

26 WHO LIVES NEAREST THE STORE WHEN IT IS ROBBED?

1 WHEN YOU GO BACK AND LOOK AT PEOPLE'S NUMBER 17 FOR
2 IDENTIFICATION, REMEMBER THE LOCATIONS OF WHERE EVERYBODY
3 LIVES. HERE IS MR. ESPINOZA (INDICATING), HERE IS THE STORE
4 (INDICATING).

5 WHO IS NEAREST THE LOCATION WHERE THE CAR IS
6 STOLEN FROM? HERE IS WHERE THE CAR IS STOLEN FROM DOWN HERE
7 ON MORNINGSIDE (INDICATING), WHO IS CLOSEST TO THAT? ZAPATA
8 IS WAY OVER HERE (INDICATING), TOVAR IS OVER HERE
9 (INDICATING).

10 ALL RIGHT. WHOSE CAR IS GOING TO BE USED AS THE
11 GETAWAY ONCE THEY MAKE THEIR FLIGHT ACROSS THE DOIG
12 INTERMEDIATE SCHOOL? THE CAR SITTING OVER IN THAT CHURCH
13 PARKING LOT BELONGS TO BENJAMIN ESPINOZA.

14 WHO SUPPLIES THE RIFLE? WHOSE RIFLE? IT IS
15 MR. ESPINOZA'S.

16 WHO IS THE OLDEST? MR. ESPINOZA IS 22, MR. TOVAR
17 IS 17, MR. ZAPATA IS 18.

18 AND THEN, FINALLY, LOOK TO WHAT THE WITNESSES
19 TELL YOU. THAT THERE WERE THREE INTRUDERS, AND THAT THERE
20 WERE THREE WEAPONS, RIFLE, HANDGUN AND KNIFE. ALL RIGHT.
21 NOW, GO BACK TO MR. ESPINOZA TRYING TO MINIMIZE HIS
22 INVOLVEMENT AGAIN, REMEMBER HE SAYS, WELL, THERE WERE REALLY
23 TWO OF US USING THE KNIFE. THOSE WITNESSES, THEY GOT IT
24 WRONG WHEN THEY TELL YOU THEY SAW A HANDGUN, THERE WAS NO
25 HANDGUN.

26 ALL RIGHT. I WAS USING THE KNIFE AND MR. ZAPATA

1 WAS USING THE KNIFE. DO YOU KNOW WHY HE SAYS THAT
2 MR. ZAPATA AND HE WERE BOTH USING THE KNIFE? BECAUSE HE HAS
3 TO EXPLAIN THE FINGERPRINT THAT IS FOUND ON THIS KNIFE
4 (INDICATING), OKAY. IT IS ZAPATA'S FINGERPRINT. ZAPATA
5 THROWS THE KNIFE OR ABANDONS THE KNIFE DURING HIS FLIGHT
6 ACROSS THE SCHOOL. AND THE REASON THAT THE PRINT IS
7 IMPORTANT MEANS THAT IT IS ZAPATA WHO IS IN POSSESSION OF
8 THE KNIFE. ESPINOZA'S FINGERPRINTS ARE NOT ON THIS KNIFE
9 (INDICATING).

10 AND THEN GO TO YOUR COMMON SENSE, YOU HAVE GOT
11 THREE PEOPLE DOING A ROBBERY, THREE WITH WEAPONS. THEY ARE
12 NOT GOING TO BE INTERCHANGING THEIR WEAPONS. THEY ARE GOING
13 TO GO IN, THEY ARE GOING TO GET THE MONEY, THEY ARE GOING TO
14 GO OUT. AND AS THEY GO OUT OF THE CAR WHEN CAROL
15 SALVATIERRA TRIES TO STOP THEM THERE ON SALINAS DRIVE, THEY
16 EACH TAKE THEIR RESPECTIVE WEAPONS. TOVAR TAKES HIS
17 HANDGUN, ZAPATA TAKES HIS KNIFE, AND ESPINOZA TAKES HIS
18 RIFLE. ALL RIGHT, COMMON SENSE TELLS YOU THAT.

19 NOW, I WOULD JUST LIKE TO SPEND A LITTLE TIME
20 WITH YOU ON THE ASSAULT WITH A DEADLY WEAPON ON THE OFFICER.
21 THE JUDGE IS GOING TO INSTRUCT YOU ON 245(A)(2), WHICH IS
22 ASSAULT WITH A FIREARM, AND HE IS GOING TO READ TO YOU TWO
23 INSTRUCTIONS THAT DEAL WITH THAT. AND THERE ARE SEVERAL
24 ELEMENTS THAT DEAL WITH ASSAULT WITH A DEADLY WEAPON, IN
25 THIS CASE A FIREARM.

26 THE FIRST FACTOR IS THAT A PERSON WAS ASSAULTED.

1 AND THAT THE ASSAULT WAS COMMITTED WITH A FIREARM.

2 AND WHEN YOU ARE TALKING ABOUT AN ASSAULT, YOU
3 ARE GOING TO BE GIVEN THE DEFINITION OF WHAT AN ASSAULT IS.
4 AND BASICALLY I WILL JUST READ IT REAL QUICK TO YOU.

5 "THAT A PERSON WILLFULLY COMMITTED AN ACT WHICH
6 BY ITS NATURE WOULD PROBABLY AND DIRECTLY RESULT IN THE
7 APPLICATION OF PHYSICAL FORCE ON ANOTHER, AND AT THE
8 TIME THAT THE ACT WAS COMMITTED, THE PERSON HAD THE
9 PRESENT ABILITY TO APPLY THE PHYSICAL FORCE TO THE
10 PERSON OF ANOTHER."

11 AND, AGAIN, WHEN YOU LOOK AT THE CREDIBILITY
12 BETWEEN OFFICER CAROL SALVATIERRA AND MR. ESPINOZA, I JUST
13 WANT TO ASK YOU TO DRAW ON WHAT THEY ARE TELLING YOU AND WHY
14 THEY ARE TELLING IT TO YOU.

15 YOU KNOW, YOU JUST CAN'T GET UP IN THAT WITNESS
16 STAND AND SAY WHATEVER YOU WANT. I MEAN PEOPLE OFTEN DO,
17 BUT IT HAS TO MAKE SENSE, IT HAS TO MAKE COMMON SENSE. AND
18 IT HAS TO BE TRUE.

19 MR. ESPINOZA, AND I TOUCHED ON THIS A LITTLE BIT
20 BEFORE, AND I WON'T SPEND A LOT OF TIME, TELLS YOU I HAVE NO
21 IDEA WHO IS BEHIND ME, I DON'T KNOW HOW MANY POLICE OFFICERS
22 THEY ARE, AND I NEVER SAW OFFICER SALVATIERRA. HE NEVER SAW
23 HER.

24 REMEMBER, LADIES AND GENTLEMEN, WHEN THAT
25 SITUATION TAKES PLACE, THE GRAND DISTANCE BETWEEN THE TWO OF
26 THEM IS MAYBE 10 OR 15 FEET.

1 AGAIN, WE WOULD ARGUE TO YOU THAT HE IS TRYING TO
2 MINIMIZE HIS INVOLVEMENT HOLDING THE GUN THERE AT THE FENCE.

3 NOW, WHEN CAROL SALVATIERRA PULLS OVER, OR PULLS
4 TO THE STOP THERE, SHE TELLS YOU THAT SHE MAKES IMMEDIATE
5 EYE CONTACT WITH MR. ESPINOZA. WHEN YOU LOOK AT THE
6 PHOTOGRAPHS OF HER POLICE VEHICLE, THERE IS NOTHING BLOCKING
7 THE VIEW INSIDE THAT POLICE VEHICLE OF THE DRIVER'S SEAT.

8 AND I JUST ASK YOU TO DRAW ON YOUR OWN
9 IMAGINATION A PICTURE OF CAROL SALVATIERRA SITTING IN THAT
10 DRIVER'S SEAT IN A VERY VULNERABLE SITUATION, VERY
11 VULNERABLE. MR. ESPINOZA HAS A FULLY LOADED 30/30 RIFLE.
12 HE HAS GOT IT IN HIS HANDS. AND THAT LADY STANDS BETWEEN
13 HIM AND THE \$38,000.

14 SHE PULLS UP AND HE MAKES A CAREER DECISION AT
15 THAT POINT IN TIME. IF HE GIVES UP, HE GIVES UP THE MONEY,
16 AND HE GIVES UP ON THE ROBBERY. ALL RIGHT. WHEN YOU LOOK
17 AT THOSE BULLETS AND WHEN YOU UNDERSTAND WHAT THE BULLETS IN
18 A GUN ARE FOR DURING A ROBBERY, THEY ARE FOR ONE OF TWO
19 PEOPLE. THEY ARE EITHER FOR THE VICTIM INSIDE THAT STORE,
20 OR THEY ARE FOR ANYBODY THAT COMES IN THE PATH OF TRYING TO
21 STOP OR PREVENT THE PERSON THAT IS DOING THE ROBBERIES
22 ESCAPE. THAT'S WHY THE BULLETS ARE IN THAT GUN.

23 AND THEN IT IS SOMETHING THAT MR. ESPINOZA KNEW,
24 AND SOMETHING THAT HE WOULD HAVE CHECKED LONG BEFORE HE WENT
25 INTO THAT STORE, SINCE HE MADE ALL THE OTHER PROVISIONS,
26 MAKE SURE THAT HE HAD A CLEAN GETAWAY AND HIS IDENTITY WAS

1 WITHHELD.

2 CAROL SALVATIERRA TELLS YOU THAT I LOOKED VERY --
3 I MADE EYE CONTACT WITH HIM, THAT HE HAD A VERY, VERY
4 SERIOUS LOOK ON HIS FACE, THAT HE DIDN'T PUT THE WEAPON
5 DOWN. THAT THE WEAPON WAS FULLY LOADED, AND WE KNOW FROM
6 THE PHOTOGRAPHS THAT THE WEAPON IS ACTUALLY COCKED, OKAY,
7 THAT MEANS THE HAMMER IS PULLED BACK.

8 AND WHEN YOU LOOK AT HOW SHE DESCRIBED HOW THAT
9 SHOOTING WENT DOWN, REMEMBER IT IS NOT THAT SHE HAS TIME TO
10 TRAIN HER GUN ON THE INDIVIDUAL, WHAT SHE HAS TIME TO DO IS
11 PULL THAT GUN OUT, PUT IT IN THE OPENING OF THE DOOR, AND
12 WHEN MR. ESPINOZA LOWERS THAT RIFLE AND STARTS TO AIM THAT
13 RIFLE AT THE POLICE OFFICER, SHE BAILS DOWN AND OUT, FIRING
14 AS SHE GOES.

15 THIS IS SOMETHING THAT HAPPENS VERY FAST. AND
16 FORTUNATELY FOR HER SHE IS VERY LUCKY THAT SHE HIT
17 MR. ESPINOZA. VERY LUCKY.

18 MR. ESPINOZA, WHEN HE BROUGHT THE BARREL OF THAT
19 WEAPON DOWN, COMMITTED THE ASSAULT WITH A FIREARM ON POLICE
20 OFFICER CAROL SALVATIERRA. THERE IS NOTHING IN THE LAW THAT
21 REQUIRES THAT THE GUN ACTUALLY BE DISCHARGED AT HER. WHAT
22 IS REQUIRED IS THAT HE MAKE THAT ATTEMPT TO APPLY THE
23 PHYSICAL FORCE.

24 WHAT WE ARE ARGUING TO YOU HERE AND NOW IS THAT
25 WHEN HE LOWERED THAT BARREL OF THAT GUN AT HER, WHEN SHE
26 TOLD YOU HE WAS GOING TO SHOOT ME SO I SHOT HIM FIRST,

1 THAT'S AN ASSAULT WITH A DEADLY WEAPON, A FIREARM. THAT'S
2 ALL THAT NEEDS TO BE PROVED.

3 ALL RIGHT. THAT DEALS WITH THE ASSAULT WITH A
4 DEADLY WEAPON ON THE POLICE OFFICER.

5 NOW WE GET TO THE LAST COUNT, WHICH IS COUNT 11,
6 186.22 (A) OF THE PENAL CODE, WHICH IS THE GANG COUNT. I
7 WILL READ TO YOU BASICALLY THE INSTRUCTION.

8 "EVERY PERSON WHO ACTIVELY PARTICIPATES IN ANY
9 CRIMINAL STREET GANG, KNOWING THAT MEMBERS HAVE ENGAGED
10 IN CRIMINAL ACTIVITY, AND ASSISTS IN FELONIOUS CONDUCT
11 BY MEMBERS OF THAT GANG, VIOLATES SECTION 186.22 (A) ."

12 SO YOU ARE GOING TO HAVE A COUPLE OF ELEMENTS.
13 NUMBER ONE, THAT SOMEBODY ACTIVELY PARTICIPATES, ALL RIGHT.
14 GOING BACK TO JULY 27TH, 1996, YOU HAVE MR. ESPINOZA WITH
15 TWO OTHER GANG MEMBERS FROM THE HARD TIMES GANG. YOU HAVE
16 CARLOS TOVAR AND JESUS ZAPATA. OKAY. I AM NOT ASKING YOU
17 TO SAY, WELL, SINCE HE WAS WITH THEM ON THAT ONE OCCASION
18 THAT HE ACTIVELY PARTICIPATES WITH THE HARD TIMES GANG. NO.
19 IF YOU RECALL FROM THE TESTIMONY WHEN WE HAD OFFICER FISCHER
20 UP THERE, WE TALKED ABOUT THE STEP ACT NOTIFICATION.

21 REMEMBER THAT? IN 1993 THE POLICE WERE TELLING
22 MR. ESPINOZA YOU ARE ASSOCIATING WITH THIS HARD TIMES GANG.
23 IN 1995 THEY AGAIN NOTIFIED HIM, YOU ARE ACTIVELY
24 PARTICIPATING WITH THIS GANG. ALL RIGHT. IT IS ACTIVE
25 PARTICIPATION.

26 WHEN MR. ESPINOZA GOT UP THERE AND TALKED, HE

1 TALKED ABOUT THE VARIOUS GANG NAMES, HE TALKED ABOUT THE
2 PEOPLE IN THE NEIGHBORHOOD THAT HE ASSOCIATES WITH THAT ARE
3 GANG MEMBERS, HARD TIME GANG MEMBERS. REMEMBER HE TALKED TO
4 YOU ABOUT ALBERT AND ZAPATA. AND HE KNEW THEIR GANG
5 MONIKERS. AND THE POLICE KNOW MR. ESPINOZA AS MR. LUCKY.

6 WHETHER YOU SAY HE IS A GANG MEMBER OR HE IS AN
7 ASSOCIATE, YOU ARE REALLY PLAYING WITH SEMANTICS THERE, ALL
8 RIGHT, BECAUSE YOU KNOW FROM THE DEFINITION THAT MR. FISCHER
9 GAVE YOU THAT AN ASSOCIATE AT ONE TIME CAN BE PART OF THE
10 GANG FOR HIS OR HER OWN PERSONAL GAIN, AND THEN AT THE NEXT
11 TIME -- EXCUSE ME, THEN AT THE NEXT TIME BACK OUT OF THE
12 GANG, NOT DO ANYTHING FOR A WHILE, AND THEN JOIN IT UP
13 LATER.

14 HE IS ASSOCIATING. AND HE KNEW THE TYPE OF
15 INDIVIDUALS TO GET THEM TO GO DO THIS ROBBERY AT THIS STORE.

16 HE TELLS YOU I THOUGHT ABOUT DOING THIS ROBBERY
17 THE DAY BEFORE. RIGHT AT THE PARK. REMEMBER THAT? LOOK
18 HOW QUICKLY HE HAS GOT TWO MEN TO GO IN THERE AND DO THIS.
19 LOOK HOW QUICKLY THEY ARM UP. LOOK HOW QUICKLY THE PLAN IS
20 MADE TO COVER THE FACES AND COVER THE HANDS. AND HOW IT IS
21 THOUGHT OUT.

22 WHEN MR. ESPINOZA WAS UP ON THE WITNESS STAND HE
23 TRIED TO MINIMIZE IT SAYING, WELL, WE REALLY DIDN'T THINK IT
24 OUT TOO WELL. WELL, LADIES AND GENTLEMEN, HE THOUGHT THIS
25 ROBBERY OUT VERY WELL, AND IF IT WASN'T JUST FOR PURE OLD
26 LUCK THAT OFFICER SALVATIERRA HAPPENED TO BE WITHIN 100

1 YARDS OF THAT STORE WHEN THE CAR WENT OUT, VERSUS BEING A
2 MILE AWAY AT ANOTHER LOCATION, THESE GUYS WOULD HAVE BEEN
3 LONG GONE WITH ALMOST \$40,000 CASH.

4 IT WAS VERY WELL THOUGHT OUT. THEY GET A STOLEN
5 CAR. THEY WEAR MASKS. THEY THEY HAVE GOT GLOVES. THEY
6 HAVE WEAPONS. THEY TERRORIZE THESE PEOPLE. THEY GET A TON
7 OF MONEY. THEY ARE ON THEIR WAY OUT CELEBRATING, AND ALL OF
8 A SUDDEN MR. LUCKY IS NO LONGER MR. LUCKY. LUCK GOES BAD.
9 THERE JUST HAPPENED TO BE A POLICE OFFICER COMING DOWN THE
10 STREET. PURE LUCK. THE LUCK THAT WENT AGAINST
11 MR. ESPINOZA.

12 IN THIS CASE OFFICER FISCHER TESTIFIED BASED ON
13 POLICE CONTACTS WITH MR. ESPINOZA, HE IS AN ACTIVE
14 PARTICIPANT OF HARD TIMES. AND AGAIN YOU KNOW THAT HE HAS
15 BEEN TWICE ACTUALLY FORMALLY NOTIFIED IN WRITING BY THE
16 POLICE THAT HE IS AN ACTIVE PARTICIPANT.

17 THAT MR. ESPINOZA WHEN HE IS ON THE STAND TOLD
18 YOU, I KNOW HARD TIMES IS A CRIMINAL STREET GANG. AND HE
19 EVEN TOLD YOU THAT I KNOW JESUS ZAPATA IS A HARD TIME GANG
20 MEMBER. REMEMBER, HE IS THE GUY THAT IS KNOWN AS LITTLE
21 PSYCHO. MR. ESPINOZA KNOWS ALL THAT.

22 LADIES AND GENTLEMEN, THAT IS WHAT IS REQUIRED
23 THAT BE PROVED TO YOU IN 186.22(A). WE ARE NOT MAKING IT
24 UP. HE IS AN ACTIVE PARTICIPANT IN HARD TIMES, HARD TIMES
25 IS A CRIMINAL STREET GANG, AND THEY TERRORIZE THE COMMUNITY
26 IN WHICH THEY LIVE.

1 NOW, IN ADDITION TO ALL OF THE COUNTS, COUNTS 1
2 THROUGH 11, THERE ARE ALSO TWO ENHANCEMENTS. OKAY. THE
3 FIRST ENHANCEMENT DEALS WITH PERSONALLY USING A GUN. AND
4 YOU ARE GOING TO FIND WHEN YOU GO BACK THERE AND DO THE
5 VERDICT FORMS ON THIS, THAT THERE IS GOING TO BE FOUR
6 ENHANCEMENTS, OR FOUR VERDICT FORMS FOR PERSONALLY USING A
7 GUN.

8 AND IN THIS CASE WHAT WE ARE SAYING IS THAT
9 MR. ESPINOZA PERSONALLY USED THE RIFLE IN THE ROBBERY OF
10 JOSEPHINA OCHOA, JOSE OCHOA AND ABIMAEEL CUEVAS. OKAY. HE
11 HAD A GUN OUT AT THE TIME THOSE INDIVIDUALS WERE ROBBED.
12 THAT'S WHAT WE ARE SAYING. AND I AM GOING TO TAKE IT ONE
13 STEP FURTHER AND SAY THAT HE IS THE PERSON THAT HAD THE
14 RIFLE.

15 OKAY. THE SECOND ENHANCEMENT THAT YOU ARE GOING
16 TO DEAL WITH, AND YOU HEARD THE EXPERT TESTIFY A LITTLE BIT
17 ABOUT IT, WAS THIS CRIME DONE TO BENEFIT OR PROMOTE THE
18 STREET GANG HARD TIMES. OKAY. IN THAT ENHANCEMENT YOU ARE
19 GOING TO FIND, AND YOU DON'T EVEN HAVE TO REALLY BE AN
20 ASSOCIATE OR A GANG MEMBER OF THE GANG, WAS THIS CRIME DONE
21 IN THE ASSOCIATION OF GANG MEMBERS FOR THE BENEFIT OF HARD
22 TIMES.

23 AND ALL I CAN DO IN THAT RESPECT IS ASK YOU TO
24 LISTEN TO YEARS OF EXPERIENCE, YEARS OF EDUCATION, AND A
25 POLICE OFFICER THAT IS OUT THERE DEALING WITH HARD TIMERS
26 ALL THE TIME.

1 THE FACT THAT THEY WORE MASKS AND GLOVES, IT IS
2 TRUE THEY WANTED TO CONCEAL THEIR PERSONAL IDENTITY. BUT
3 LATER ON IF THE CRIME HAD BEEN SUCCESSFUL, WORD DOES GO BACK
4 INTO THE COMMUNITY THAT HARD TIMES DID THAT CRIME.

5 AND WHAT THAT DOES TO THE PEOPLE THAT LIVE IN
6 THAT COMMUNITY, IT BRINGS FEAR. AND WHAT HARD TIMES DOES,
7 AND WHAT THIS GANG PHILOSOPHY IS ALL ABOUT, IS RESPECT. AND
8 WHAT RESPECT IS, IT IS NOT THE RESPECT THAT A DOTING FATHER
9 OR MOTHER HAS FOR A SON OR DAUGHTER, RESPECT IS CONTROL OF
10 AN AREA, CONTROL OF A TERRITORY, AND RESPECT IS FEAR AND
11 INTIMIDATION IN THE GANG WORLD, BECAUSE WHEN YOU HAVE FEAR
12 AND INTIMIDATION OF THE COMMUNITY IN WHICH THAT GANG EXISTS,
13 THE GANG IS IN CONTROL.

14 THAT'S WHAT THE STREET -- THAT'S WHAT THE STEP
15 ACT IS ALL ABOUT, IS TO FIGHT AGAINST THAT. SO THAT PEOPLE
16 IN THEIR BUSINESSES AND IN THEIR COMMUNITY ARE SAFE FROM
17 THAT.

18 THEY DIDN'T GET AWAY WITH THIS CRIME BECAUSE
19 OFFICER SALVATIERRA SHOT MR. ESPINOZA. BUT IMAGINE IF THEY
20 HAD, JUST FOR AN INSTANCE. IMAGINE A WEEK LATER WHEN THEY
21 ARE ALL SITTING AROUND AT THE PARK TALKING ABOUT IT, AND THE
22 HIGH-FIVING GOING ON WHEN WORD GOES OUT THAT ESPINOZA, TOVAR
23 AND ZAPATA TOOK THE STORE ACROSS THE STREET FOR \$38,000.

24 AND IMAGINE HOW MR. ESPINOZA'S STANDING WITHIN
25 THAT GROUP WILL BE ENHANCED WHEN HE IS, I AM THE PERSON THAT
26 PLANNED IT, I LED THESE GUYS INTO IT, AND THINK OF HOW THOSE

1 GANG MEMBERS WILL LOOK TO HIM IN TERMS OF RESPECT. HE MOVES
2 UP ON THE UPPER ECHELON.

3 OKAY. THOSE ARE THE COUNTS, THOSE ARE THE
4 ENHANCEMENTS. AT THIS POINT I AM GOING TO SIT DOWN. SINCE
5 IT IS THE PEOPLE'S BURDEN TO PROVE THIS CASE BEYOND A
6 REASONABLE DOUBT, AFTER MR. CAMBER GETS UP TO HERE TO SPEAK
7 TO YOU, THE PEOPLE WILL HAVE A CHANCE TO GIVE A SHORT
8 REBUTTAL. IT WILL BE VERY SHORT.

9 AND AGAIN I THANK YOU FOR YOUR PATIENCE AND THE
10 ATTENTION YOU HAVE SHOWN THROUGHOUT THIS TRIAL. THANK YOU.

11 THE COURT: THANK YOU, COUNSEL.

12 MR. CAMBER?

13 MR. CAMBER: THANK YOU, YOUR HONOR.

14 GOOD MORNING, LADIES AND GENTLEMEN. YOU KNOW
15 AFTER I HEAR MR. VON DER AHE, I WISH I COULD STAND UP HERE
16 AND SAY I HAVE ALL THIS EVIDENCE AND ALL THESE WONDERFUL
17 THINGS I COULD TELL YOU. BUT I DON'T. I WILL TELL YOU YOUR
18 JOB IS A DIFFICULT ONE, AND I WILL TELL YOU WHY.

19 MR. VON DER AHE POINTED TO A LOT OF EMOTIONAL
20 THINGS THAT YOU NEED TO THINK ABOUT. THE FACT THAT
21 MR. ESPINOZA IS NOT A ROBIN HOOD. HE DID THESE TERRIBLE
22 THINGS. THE POOR POLICE OFFICER, WHICH I AGREE, SHE DID
23 NOTHING WRONG.

24 THE HARDEST THINK ABOUT BEING A JURY IS YOU HAVE
25 TO THROW THE EMOTION OUT THE WINDOW. EMOTION IS NOT
26 SOMETHING YOU CONSIDER. ONE OF THE INSTRUCTIONS THAT THE

1 JUDGE WILL READ TO YOU IS THAT YOU CANNOT CONSIDER
2 PUNISHMENT.

3 THE MAN DESERVES TO BE PUNISHED. I AGREE WITH
4 YOU. I WOULD RAISE MY HAND AND SAY HE DESERVES TO BE
5 PUNISHED. HE DID VERY MANY BAD THINGS. OKAY.

6 HE DID THE ROBBERIES. HE PLANNED THESE THINGS.
7 HE WENT INTO A MARKET WITH HIS TWO OTHER INDIVIDUALS, THEY
8 WORE MASKS, THEY HAD GLOVES AND THEY HAD WEAPONS. PEOPLE IN
9 THE MARKET DIDN'T DO ANYTHING WRONG. THEY DIDN'T DESERVE
10 FOR HIM TO GO IN THERE AND DO THAT.

11 BUT HE DID IT. HE GOT UP THERE AND TOLD YOU HE
12 DID IT. GRANTED, HE GOT SHOT IN THE LEG, WHAT IS HE GOING
13 TO DO, SAY IT WASN'T HIM? BUT THE HARDEST JOB THAT YOU HAVE
14 IS THE FACT YOU DON'T LIKE MR. ESPINOZA, YOU DON'T LIKE WHAT
15 HE DID, DOESN'T MATTER. YOU HAVE TO DECIDE WHETHER OR NOT
16 HE DID THE THINGS THAT ARE LISTED IN THE INFORMATION THAT
17 YOU GET, EVERY SINGLE ONE OF THEM.

18 AND HERE IS THE HARDEST THING YOU HAVE TO DO.
19 MR. ESPINOZA, DESPITE THE FACT THAT HE DID ALL THOSE
20 TERRIBLE THINGS, GETS THE BENEFIT OF THE DOUBT. OKAY. IF
21 YOU HAVE A DOUBT IN YOUR MIND THAT IS REASONABLE AS TO
22 ANYTHING, IT GOES TO HIM. IT DOESN'T GO TO MR. VON DER AHE,
23 WHO IS CLEARLY DESERVING, PUT ON A NICE CASE. NICE
24 WITNESSES. OFFICERS WERE NICE. EVERYBODY FROM THE
25 SHERIFF'S DEPARTMENT SEEMED TO BE DOING THEIR JOB. YOU
26 CAN'T FAULT ANY OF THOSE PEOPLE.

1 BUT HE DOESN'T GET THE BENEFIT OF THE DOUBT.
2 THIS GENTLEMAN OVER HERE DOES (INDICATING). MAYBE HE
3 DOESN'T DESERVE IT. YOU MIGHT NOT WANT TO LOOK AT HIM. HE
4 DOESN'T DESERVE THAT YOU SHOULD JUST CONVICT HIM OF
5 EVERYTHING. UNFORTUNATELY THAT'S NOT YOUR JOB.

6 WHEN YOU TOOK THE OATH, YOU PROMISED TO FOLLOW
7 THE LAW. THE LAW IS IF YOU HAVE A DOUBT BASED ON REASON AS
8 TO ANYTHING, YOU HAVE TO COME BACK NOT GUILTY. AND THAT MAY
9 ANGER YOU, THAT MAY MAKE YOU THINK THAT'S NOT RIGHT. BUT
10 THAT'S WHAT IT IS. EVERYTHING THAT YOU DO WHEN YOU GO BACK
11 THERE, OR WHEN YOU GO OVER HERE (INDICATING), HAS TO BE
12 COLORED BY THAT THOUGHT. HE GETS THE DOUBT, NOT
13 MR. VON DER AHE, HE DOES (INDICATING). HE MAY NOT DESERVE
14 IT, HE MAY NOT BE ENTITLED TO IT, BUT IT IS STILL HIS.

15 NOW, WHEN YOU LOOK AT THE EVIDENCE THAT WAS
16 PRESENTED TO YOU IN THAT FASHION, HERE IS WHAT YOU SEE.
17 THERE WERE SIX WITNESSES TO THAT ROBBERY. AND I THINK YOU
18 PROBABLY HEARD 12 DIFFERENT STORIES, BECAUSE THERE WAS ONE
19 VERSION WHEN THEY TALKED TO THE OFFICERS AT THE SCENE, THERE
20 WAS ANOTHER VERSION WHEN THEY TESTIFIED IN COURT, AND A FEW
21 OF THOSE PEOPLE TALKED TO MORE THAN ONE OFFICER.

22 I THINK IT WOULD BE WONDERFUL IF I COULD POINT TO
23 ONE INDIVIDUAL, THIS IS THE PERSON YOU SHOULD LISTEN TO.
24 MR. VON DER AHE DID THAT, BECAUSE THAT PERSON MOST CLOSELY
25 RESEMBLES THE DESCRIPTION OF MR. ESPINOZA. BUT THAT'S ONE
26 WITNESS. THERE WERE SIX WITNESSES HE PUT IN. HE DOESN'T

1 NEED TO PUT ON SIX WITNESSES, BUT HE DID. AND YOU HAVE TO
2 CONSIDER EVERYTHING THEY SAID.

3 CAN ANY ONE OF YOU TELL ME WHO HAD THE RIFLE, WHO
4 HAD THE KNIFE, AND WHO HAD THIS PHANTOM HANDGUN, ASSUMING
5 THERE WAS ONE, WHAT THEY WERE WEARING AND WHAT THEIR SKI
6 MASKS WERE? CAN YOU DO THAT BACK IN THAT ROOM, BASED ON THE
7 EVIDENCE YOU HEARD? I DON'T THINK YOU CAN DO THAT.

8 EVERY SINGLE PERSON WHO TESTIFIED HAD A DIFFERENT
9 VERSION OF THE COLOR OF THE SKI MASKS, THE COLOR OF THE
10 PANTS, WHETHER IT WAS A KNIFE, WHETHER IT WAS A GUN, WHETHER
11 IT WAS A HANDGUN, HOW TALL THEY WERE, HOW MUCH THEY WEIGHED,
12 HOW OLD THEY WERE, WHETHER THIS WAS TWO OR WHETHER THERE WAS
13 THREE.

14 AND MR. VON DER AHE CORRECTLY INDICATED THAT IN A
15 SITUATION LIKE THAT, IT IS A SCARY SITUATION, THESE PEOPLE
16 HAVE NEVER BEEN IN IT BEFORE, IT HAPPENED REAL FAST, WHO
17 KNOWS WHO WAS WHO?

18 BUT IF YOU CAN'T SAY THAT THIS WAS THE MAN WITH
19 THE RIFLE, THEN THE ENTIRE TIME IN THE MARKET YOU CAN'T FIND
20 THAT HE PERSONALLY USED A FIREARM. THAT DOESN'T MEAN YOU
21 CAN'T CONVICT HIM OF A ROBBERY, HE IS GUILTY OF A ROBBERY,
22 HE GOT UP THERE AND TOLD YOU THAT. HE IS GUILTY OF THE
23 ROBBERIES, AND HE IS GUILTY OF THE FALSE IMPRISONMENTS. HE
24 EVEN ADMITTED HE KNEW THE CAR WAS STOLEN. HE DIDN'T HAVE TO
25 DO THAT, IF HE WANTED TO LIE TO YOU HE COULD HAVE GOT UP AND
26 SAID, I DIDN'T KNOW THE CAR WAS STOLEN.

1 IF YOU RECALL, ONE OF THE THINGS I ASKED ABOUT
2 WAS WHETHER OR NOT THE IGNITION KEY WAS THERE OR WHETHER IT
3 WAS PUNCHED. PUNCHED IGNITION MEANS SOMEBODY TURNED THE CAR
4 ON WITHOUT THE KEYS. IF YOU SEE THAT IN A CAR, YOU KNOW THE
5 CAR IS STOLEN.

6 IF YOU LOOK AT THE PHOTOGRAPHS, YOU WILL SEE
7 THEM, THE KEYS WERE IN THE IGNITION. DESPITE THE FACT THE
8 KEYS WERE IN THE IGNITION AND MR. ESPINOZA COULD HAVE TOLD
9 YOU, I DIDN'T KNOW THE CAR WAS STOLEN, HE ADMITTED IT.

10 HE ADMITTED THE ROBBERIES. ADMITTED THE FALSE
11 IMPRISONMENT, ALTHOUGH HE SAYS HE IS NOT THE ONE THAT PUSHED
12 THESE PEOPLE IN, HE TOOK THE BLAME FOR IT. ALSO SAID HE
13 KNEW THE CAR WAS STOLEN. IT IS NATURAL TO MINIMIZE WHAT YOU
14 DID, IT IS HUMAN NATURE. THE FACT OF THE MATTER IS HE DID
15 THAT WHEN HE TESTIFIED. BUT HE ALSO ADMITTED TO ALL THOSE
16 OFFENSES.

17 NOW, MR. VON DER AHE WANTED YOU TO LOOK TO
18 MR. OCHOA AS THE MAN YOU SHOULD FOLLOW WHEN YOU GO BACK
19 THERE. I WOULD ASK YOU TO LOOK AT SOME OTHER PEOPLE AS
20 WELL. SPECIFICALLY JOSEPHINA OCHOA, WHO SAID IT WASN'T THE
21 PERSON WITH THE RIFLE, IT WAS THE OTHER PERSON WHO KNEW
22 WHERE THE MONEY BOX WAS.

23 THERE WAS A BIG POINT MADE THAT MR. ESPINOZA HAD
24 BEEN IN THE STORE BEFORE. IT MAKES SENSE TO ME, AGAIN YOU
25 ARE THE JURY, NOT ME, THAT HE WOULD KNOW WHERE THE MONEY BOX
26 WAS. AND LOW AND BEHOLD HE IS IN THE BACK SEAT OF THE CAR,

1 NO DISPUTE THERE, THE OFFICER TESTIFIED THAT'S WHERE HE GOT
2 OUT, AND WHERE WAS THE MONEY BOX? IN THE BACK SEAT WHERE HE
3 WAS.

4 BY THE WAY, THERE IS A KNIFE BACK THERE TOO. IT
5 IS NICE TO SAY HE MUST HAVE TAKEN THE RIFLE OUT BECAUSE IT
6 WAS IN THE BACK SEAT, BUT YOU SAW THE RIFLE, IT DOESN'T FIT
7 IN THE FRONT. YOU CAN SEE IT HAS TO BE IN THE BACK SEAT TO
8 BE HIDDEN. HE HAD HIS KNIFE IN THE BACK, BECAUSE THAT'S
9 WHAT HE TOOK IN THE STORE.

10 BUT AGAIN, JUST AS HE CAN'T SAY BEYOND A
11 REASONABLE DOUBT THAT MR. ESPINOZA HAD THE RIFLE, I CAN'T DO
12 THAT EITHER. I CAN'T SAY BEYOND A REASONABLE DOUBT THAT HE
13 DIDN'T HAVE THE RIFLE. BUT I DON'T HAVE TO DO THAT. HE HAS
14 TO (INDICATING). I DON'T HAVE TO PROVE INNOCENCE TO YOU. I
15 WISH THAT I COULD, BUT YOU HEARD THE WITNESSES, THEY ARE ALL
16 OVER THE MAP.

17 YOU CANNOT FIND THAT HE PERSONALLY USED A RIFLE
18 IN THAT STORE. YOU CAN FIND THE OTHER THINGS, BUT YOU CAN'T
19 MAKE THAT FINDING. THERE IS TOO MANY DIFFERENT STORIES.

20 BY THE WAY, ONE OTHER POINT ON THE PERSONALLY
21 USED A FIREARM, AND I WILL MOVE ON, ON AIDING AND ABETTING
22 THERE WAS MORE THAN ONE VICTIM, THERE IS MORE THAN ONE
23 ROBBERY, HE IS GUILTY OF AIDING AND ABETTING ALL OF THOSE
24 ROBBERIES, BUT WHEN IT COMES TO PERSONAL USE, THERE IS NO
25 AIDING AND ABETTING, YOU EITHER PERSONALLY USE IT OR YOU
26 DON'T, THE FACT THAT SOMEBODY ELSE USES IT DOESN'T MEAN YOU

1 ARE LIABLE.

2 BEFORE I GO TO THE ASSAULT, I WANT TO TALK TO YOU
3 ABOUT THE GANG CRIMES A LITTLE BIT.

4 IT IS EASY TO KIND OF LUMP EVERYTHING TOGETHER
5 WHEN IT COMES TO THE GANG STUFF. MOST OF WHAT YOU HEAR IN
6 THE NEWS IS SHOOTING, ONE GANG SHOOTING ANOTHER GANG.
7 THAT'S A GANG CRIME.

8 WHEN THE EXPERT TESTIFIED YESTERDAY, DESPITE HIS
9 BEST EFFORTS TO QUALIFY EVERYTHING HE SAID, WHAT SEEMED TO
10 COME THROUGH TO ME, AND AGAIN YOU ARE THE-ONES WHO HEARD IT
11 AND NOT ME, GANG MEMBERS COMMIT CRIMES IN THE AREAS THAT
12 THEY ARE INVOLVED IN, AND THEY DO IT IN A BRAZEN WAY. THEY
13 DON'T WEAR MASKS, BECAUSE THEY ARE NOT AFRAID OF GETTING
14 CAUGHT, BECAUSE THEY FIGURE IF YOU KNOW I AM IN A GANG, YOU
15 ARE NOT GOING TO REPORT THIS OFFENSE.

16 THAT'S NOT WHAT WE HAVE HERE. WE HAVE
17 INDIVIDUALS THAT WEAR MASKS, INDIVIDUALS THAT WERE CONCERNED
18 ON HAVING THEIR IDENTITIES HIDDEN.

19 ONE OF THE ENHANCEMENTS YOU WILL GET IS THE GANG
20 ENHANCEMENT. AND WHAT IT SAYS IS THAT YOU HAVE TO HAVE THE
21 SPECIFIC INTENT TO BENEFIT THE GANG. MR. ESPINOZA AND THE
22 TWO INDIVIDUALS THAT WERE WITH HIM, THEIR SPECIFIC INTENT
23 WAS TO BENEFIT THEMSELVES. NOT THE GANG.

24 NOW, THE REASON THAT THE EVIDENCE CAME IN ABOUT
25 WHY MR. ESPINOZA NEEDED THE MONEY ISN'T IMPORTANT OTHER THAN
26 HE HAS TO DEMONSTRATE TO YOU THAT IT WAS TO BENEFIT THE

1 GANG, AND MR. ESPINOZA TESTIFIED WHAT HE NEEDED THE MONEY
2 FOR.

3 IT WAS A STUPID THING TO DO, MAYBE IT WAS A GOOD
4 REASON TO DO IT, MAYBE NOT, I DON'T THINK SO. BUT THE
5 QUESTION IS, WAS IT DONE TO BENEFIT THE GANG OR TO BENEFIT
6 MR. ESPINOZA? IF IT WAS DONE TO BENEFIT MR. ESPINOZA, IT
7 WASN'T DONE TO BENEFIT THE GANG, YOU CAN'T FIND ANY
8 ENHANCEMENTS. THINK ABOUT THAT WHEN YOU ARE LOOKING AT THAT
9 ONE.

10 THE OTHER GANG ENHANCEMENT TALKS ABOUT ACTIVE
11 PARTICIPATION IN A CRIMINAL STREET GANG.

12 AND THE JUDGE IS GOING TO READ YOU AN
13 INSTRUCTION. INCLUDED IN THAT INSTRUCTION IS THE DEFINITION
14 OF ACTIVE PARTICIPATION. AND I AM JUST GOING TO READ IT TO
15 YOU QUICKLY.

16 "DEFENDANT, IN ORDER TO BE AN ACTIVE PARTICIPANT
17 IN A CRIMINAL STREET GANG, MUST HAVE MORE THAN A
18 NOMINAL, PASSIVE, INACTIVE OR PURELY TECHNICAL
19 RELATIONSHIP WITH THE GANG. AND THE PERSON MUST
20 DEVOTE ALL OR A SUBSTANTIAL PART OF HIS TIME AND
21 EFFORTS TO THE CRIMINAL STREET GANG."

22 NOW, ALL WE HEAR ABOUT IS THIS ROBBERY AND A
23 COUPLE OF OTHER CONTACTS WITH THE POLICE, ONE IN '93 AND ONE
24 IN '95. IN ORDER FOR YOU TO FIND HIM GUILTY OF THAT COUNT,
25 YOU HAVE TO FIND THAT THAT EVIDENCE IS ENOUGH TO CONVINCE
26 YOU BEYOND A REASONABLE DOUBT THAT HE SPENT A SUBSTANTIAL

1 AMOUNT OF HIS TIME WITH A CRIMINAL STREET GANG, DEVOTED HIS
2 TIME TO IT.

3 AND I DON'T THINK YOU HEARD THAT. YOU HEARD
4 ASSOCIATION. YOU DIDN'T HEAR MEMBERSHIP. HE DOESN'T HAVE A
5 TATTOO. HE DOESN'T HAVE THE GANG CLOTHING. HE HAS NEVER
6 CLAIMED MEMBERSHIP. MEMBERS ALWAYS CLAIM MEMBERSHIP.
7 MR. ESPINOZA NEVER DID. THERE IS NO EVIDENCE TO THAT
8 EFFECT.

9 THE PROBLEM WITH THESE GANG ALLEGATIONS IS ONCE
10 YOU HEAR THE GANG STUFF, IT COLORS EVERYTHING THAT YOU DO.
11 IT IS ANOTHER EMOTIONAL ASPECT, KIND OF A BUTTON FOR YOU TO
12 PUSH TO CONVICT HIM ON EVERYTHING. I AM ASKING YOU TO
13 CONVICT HIM ON THE ROBBERY AND THE FALSE IMPRISONMENT, BUT
14 WHAT I AM ASKING YOU TO DO IS NOT CONVICT HIM ON THE THINGS
15 HE IS NOT GOOD FOR, THE THINGS HE GOT UP THERE AND TESTIFIED
16 ABOUT.

17 THERE IS ONLY ONE THING LEFT TO DO, AND I WILL
18 TALK TO YOU ABOUT THE ASSAULT.

19 YOU MAY NOT LIKE WHAT I HAVE TO SAY, YOU MAY NOT
20 WANT TO HEAR IT, BUT I AM GOING TO SAY IT ANYWAY. ARE YOU
21 CONVINCED BEYOND A REASONABLE DOUBT THAT HE ASSAULTED THE
22 POLICE OFFICER? I MEAN SHE TESTIFIED TO THAT, IS THAT
23 ENOUGH?

24 IT IS YOUR CALL, NOT HERS, NOT MINE, NOT
25 MR. VON DER AHE'S. IT IS NOT MY POSITION THAT SHE DID
26 ANYTHING WRONG. ANYONE IN HER POSITION WHO SEES A RIFLE,

1 ESPECIALLY WHEN SHE IS BY HERSELF, SHE SAID THE VEST SHE HAD
2 ON WASN'T GOING TO STOP THE BULLET, AND SHE DIDN'T THINK
3 THAT MR. ESPINOZA WAS RESPONDING TO HER, WOULD REACT IN THE
4 SAME WAY.

5 IT IS NOT MY INTENTION TO BLAME HER FOR WHAT SHE
6 DID. MR. ESPINOZA IS LUCKY THAT SHE DIDN'T SHOOT HIM
7 ANYWHERE ELSE. BUT LET'S THINK ABOUT THE OTHER SIDE OF
8 THAT. THE FACT THAT SHE DIDN'T DO ANYTHING WRONG DOESN'T
9 MEAN THAT MR. ESPINOZA ASSAULTED HER.

10 NOW, MR. VON DER AHE CONTINUES TO SAY THAT THE
11 OFFICER WAS THE ONLY THING THAT IS STOPPING MR. ESPINOZA
12 FROM \$38,000. WELL, ACTUALLY THE BULLET IS WHAT STOPPED
13 HIM. ALL HE HAD TO DO WAS GET TO THAT GATE. YOU CAN LOOK
14 AT THE PHOTOGRAPHS, ALL HE HAD TO DO WAS RUN TO THAT GATE.
15 THE POLICE CAR WAS BACK A LITTLE BIT, SHE HADN'T EVEN GOTTEN
16 OUT OF THE CAR YET.

17 SO I WOULD DISPUTE THE FACT THAT THE ONLY WAY HE
18 IS GOING TO GET AWAY IS TURN AROUND AND SHOOT THE POLICE
19 OFFICER. NOW, YOU HAVE SEEN IT ON T.V., OFFICERS DON'T
20 SHOOT UNLESS SOMEBODY CONFRONTS THEM, AT LEAST THAT'S THE
21 WAY IT IS SUPPOSED TO BE. IF HE KEEPS RUNNING AND GETS AWAY
22 FROM THIS ONE WOMAN, HE IS GONE, NO REASON TO SHOOT HER.
23 BUT LET'S PUT THAT ASIDE FOR A SECOND.

24 THE KEY POINT THAT YOU NEED TO FOCUS ON, IF YOU
25 WOULD PLEASE, IS WHETHER OR NOT HE HEARD, "DROP IT."
26 BECAUSE THE REASON THAT SHE FIRED IS BECAUSE SHE SAID, "DROP

1 IT," AT LEAST THAT'S WHAT SHE RECALLS SAYING, AND HE DIDN'T
2 RESPOND.

3 LET'S THINK ABOUT THAT. SHE DIDN'T USE HER
4 PUBLIC ADDRESS SYSTEM. SHE WAS INSIDE THE CAR. SHE SAYS
5 SHE ONLY SAID IT ONCE. MR. ESPINOZA SAID HE DIDN'T HEAR IT.

6 WHAT IF HE DIDN'T HEAR IT? WHAT IF HE DIDN'T
7 HEAR, "DROP IT"? HE SEES THE CAR, HE SEES THE DOOR OPENING,
8 AND HE STARTS TO TURN AND RUN. WHAT DOES THE OFFICER SEE?
9 SHE SEES SOMEBODY THAT DOESN'T SEEM TO RESPOND TO HIS
10 COMMAND -- HER COMMAND, EXCUSE ME. AND SHE ALSO SAYS THE
11 MUZZLE IS STARTING TO COME DOWN. WELL, THAT'S TRUE, THE
12 MUZZLE DID START TO COME DOWN, BECAUSE HE STARTED TO RUN
13 AWAY.

14 SO SHE SEES SOMEBODY THAT IS NOT OBEYING HER AND
15 IS STARTING TO GO LIKE THIS (INDICATING) AND IS BRINGING
16 THIS HANDLE OVER HERE, SO SHE ASSUMES THIS IS COMING
17 (INDICATING). BUT IT NEVER CAME. AND SHE DIDN'T SEE IT,
18 BECAUSE SHE DIVED BEHIND THE DOOR. BUT SHE ASSUMED THAT'S
19 WHAT HAPPENED, BECAUSE SHE SHOT THIS GUY.

20 NOW, IF YOU ARE CONVINCED BEYOND A REASONABLE
21 DOUBT THAT SHE TURNED -- THAT HE TURNED AND BROUGHT THE GUN
22 DOWN AND BEGAN TO POINT IT AT HER, BECAUSE SHE HAD TO DO
23 WHAT SHE HAD TO DO, THEN YOU CAN CONVICT HIM OF ASSAULT.
24 BUT IF THERE'S A CHANCE THAT HE STARTS TO BRING THE GUN
25 DOWN, LIKE HE SAID, TO RUN AWAY, AND THE OTHER ARM COMES UP
26 WITH THE MONEY STILL IN IT, DID HE ATTEMPT TO POINT THE GUN

1 AT HER? THAT IS THE DECISION YOU ARE GOING TO HAVE TO MAKE.

2 AND THINK ABOUT A COUPLE OF OTHER THINGS. NEVER
3 DROPPED THE MONEY THAT HE HAD IN HIS HAND. GRANTED, IF HE
4 DROPS THE MONEY, MAYBE HE DOESN'T GET IT. BUT IF
5 MR. VON DER AHE SAYS THE INTENTION WAS TO SHOOT THE OFFICER
6 AND THEN GET AWAY, HOW IS HE GOING TO FIRE THE GUN IF HE HAS
7 GOT THE MONEY IN HIS HAND? YOU DROP THE MONEY, FIRE THE
8 GUN, AND PICK UP THE MONEY AND GO. THAT'S NOT WHAT HAPPENED
9 HERE.

10 THINK ABOUT SOMETHING ELSE. IF HE WAS GOING TO
11 FIRE THE GUN, WHY DIDN'T HE RELEASE THE SAFETY? THE SAFETY
12 WAS ON THE ENTIRE TIME. IF HE WAS GOING TO FIRE THE GUN,
13 WHY DIDN'T HE FIRE THE GUN AFTER HE WENT DOWN? IF THERE IS
14 STILL ONLY ONE OFFICER THERE, THERE WAS NOTHING PREVENTING
15 HIM FROM SHOOTING. AS SOON AS HE GOES DOWN AND SHE SAYS,
16 "PUT YOUR HANDS ON YOUR HEAD," THAT'S WHAT HE DID, HE
17 DROPPED THE GUN AND DID THAT.

18 IN ORDER FOR YOU TO FIND HIM GUILTY BEYOND A
19 REASONABLE DOUBT, YOU HAVE TO BE CONVINCED BEYOND A
20 REASONABLE DOUBT THAT HE ATTEMPTED TO SHOOT HER. NOT THAT
21 HE WAS ATTEMPTING TO RUN AWAY, BUT THAT HE ATTEMPTED TO
22 SHOOT HER.

23 WHAT SHE PERCEIVED IS NOT THE IMPORTANT THING.
24 THE IMPORTANT THING IS ALL THE FACTS YOU HEAR. THE FACT SHE
25 SHOT, HE WAS GOING TO SHOOT HER IS ONE REASONABLE INFERENCE,
26 BUT THERE IS ANOTHER ONE, HE DIDN'T HEAR HER SAY, "DROP IT,"

1 AND HE BEGAN TO RUN TO THE GATE.

2 AND IT IS ENTIRELY CONSISTENT WITH WHAT HAPPENED.
3 HE DOESN'T REACT WHEN SHE SAYS, "DROP IT," IF SHE SAID IT.
4 HE STARTS TO BRING THE MUZZLE DOWN BECAUSE HE IS RUNNING.
5 WHEN YOU RUN, YOU DON'T RUN LIKE THIS (INDICATING), YOU RUN
6 LIKE THIS (INDICATING). THAT'S WHAT HE STARTED TO DO WHEN
7 HE GOT HIT.

8 MR. ESPINOZA DOESN'T HAVE TO TESTIFY. HE COULD
9 HAVE SAT WHERE HE IS NOW. BUT HE GOT UP THERE AND HE
10 ADMITTED MANY THINGS THAT HE DIDN'T HAVE TO ADMIT. GRANTED,
11 THE EVIDENCE WAS STRONG ON THOSE COUNTS, BUT HE STILL DIDN'T
12 HAVE TO DO THAT.

13 HE COULD HAVE SAID HE WAS IN THE CAR, YOU HEARD
14 ALL THE DIFFERENT VERSIONS, NEVER WENT IN THE STORE, DIDN'T
15 KNOW WHAT WAS GOING ON. HE DIDN'T DO THAT. HE TOLD YOU
16 WHAT HE DID. HE ALSO TOLD YOU WHAT HE DIDN'T DO. AND AGAIN
17 YOU HAVE TO GO BACK TO WHAT I SAID WHEN I STARTED, MAYBE IT
18 HAPPENED THE WAY THE OFFICER SAID OR MAYBE IT DIDN'T. AND
19 UNLESS YOU ARE CONVINCED BEYOND A REASONABLE DOUBT, YOU
20 CAN'T FIND HIM GUILTY. YOU MAY NOT BE COMFORTABLE WITH
21 THAT, GRANTED, HE DID MANY TERRIBLE THINGS, BUT THAT'S THE
22 WAY YOU HAVE TO GO.

23 WHEN YOU GO BACK IN THE JURY BOX, WHAT I WOULD
24 ASK YOU TO DO IS SET ASIDE HOW YOU FEEL ABOUT THIS CASE, AND
25 JUST LOOK AT IT IN A RATIONAL BASIS AND WEIGH THE EVIDENCE.
26 ONCE YOU HAVE DONE THAT, IF YOU CAN SAY BEYOND A REASONABLE

1 DOUBT HE WAS THE MAN WITH THE RIFLE IN THE STORE, AND HE
2 INTENDED TO POINT THE RIFLE AT THE OFFICER, AND HE ACTIVELY
3 PARTICIPATED IN THE STREET GANG AND HAD THE SPECIFIC INTENT
4 TO BENEFIT THE GANG, VOTE GUILTY. BUT IF YOU CAN'T SAY
5 THOSE THINGS BEYOND A REASONABLE DOUBT, YOU MUST VOTE NOT
6 GUILTY. THANK YOU.

7 THE COURT: THANK YOU, COUNSEL.

8 MR. VON DER AHE, YOU MAY OFFER BRIEF REBUTTAL.

9 MR. VON DER AHE: THANK YOU. I TOLD YOU I WOULD BE
10 SHORT, AND I AM GOING TO TRY TO STICK TO THAT PROMISE. YOU
11 ARE GOING TO GET, WHEN YOU GO BACK THERE YOU ARE GOING TO
12 GET A BUNCH OF VERDICT FORMS. YOU ARE GOING TO GET A
13 GUILTY/NOT GUILTY ON COUNTS 1, 2, 3, ALL THE WAY THROUGH 11,
14 AND YOU ARE GOING TO GET FOUR GUN USE FORMS, AND THEN YOU
15 ARE GOING TO GET A FORM DEALING WITH THE ENHANCEMENT WHETHER
16 THIS CRIME WAS DONE FOR THE BENEFIT OF THE GANG.

17 IN FILLING OUT THE FORMS, WHICHEVER COUNT YOU
18 DECIDE, IF YOU DECIDE THAT MR. ESPINOZA IS GUILTY ON THIS
19 COUNT AND NOT GUILTY ON THIS COUNT, YOU SIGN THE FORM WHICH
20 IS YOUR FINDING, AND YOU LEAVE THE OTHER ONE BLANK.

21 WHEN YOU GET TO THE ROBBERY COUNTS IF YOU FIND
22 THAT MR. GUILT -- THAT MR. ESPINOZA IS GUILTY OF THE ROBBERY
23 COUNTS, THEN YOU ARE GOING TO HAVE TO GO TO THE GUN USE
24 FORM, WHETHER HE USED IT, AND YOU ARE GOING TO HAVE TO
25 DECIDE THAT.

26 SO WHATEVER WAY YOU GO AND THE FINDING THAT YOU

1 MAKE, YOU ONLY SIGN THE FORM, OR THE FOREPERSON ONLY SIGNS
2 THE FORM THAT IS THE JURY'S VERDICT AS TO THAT COUNT OR THAT
3 ENHANCEMENT. SOMETIMES THAT'S CONFUSING, SO I HOPE THAT
4 THAT HELPS YOU.

5 YOU KNOW, THIS CASE ISN'T ABOUT CHARGING AS MANY
6 COUNTS AS POSSIBLE. OKAY. WHAT EACH OF THESE COUNTS IS
7 CHARGED FOR, AND IF YOU WILL LOOK AT IT, IT ADDRESSES A
8 SITUATION BACK ON THE DATE OF JULY 27TH. CERTAIN PEOPLE
9 WERE ROBBED. CERTAIN PEOPLE WERE FALSELY IMPRISONED. OKAY.
10 EACH OF THOSE PEOPLE THAT THAT HAPPENS TO HAVE A RIGHT TO BE
11 PROTECTED, HAVE A RIGHT NOT TO HAVE THAT HAPPEN TO THEM.

12 SO THIS CASE ISN'T A CASE OF, GEE, WE ARE GOING
13 TO CONVICT MR. ESPINOZA ON ALL THESE ROBBERY COUNTS AND ALL
14 THESE FALSE IMPRISONMENT COUNTS, SO THEREFORE WE SHOULD LET
15 HIM GO ON THESE GANG COUNTS AND ON THE ASSAULT WITH A DEADLY
16 WEAPON. THAT IS NOT IT, AND THAT IS NOT WHAT YOU ARE GOING
17 TO BE INSTRUCTED TO DO. EACH OF YOU HAVE TO DELIBERATE ON
18 EACH AND EVERY ONE OF THOSE COUNTS.

19 AND THE REASON THAT IS IMPORTANT, AND THE REASON
20 THAT THE ASSAULT WITH A DEADLY WEAPON IS IMPORTANT, IS
21 BECAUSE THAT'S SOMETHING ELSE THAT MR. ESPINOZA DOES THAT IS
22 AFTER THIS ROBBERY. THAT'S SOMETHING THAT HE DOES TO CAROL
23 SALVATIERRA, OKAY, WHO WAS JUST DOING HER JOB, TRYING TO
24 KEEP THE COMMUNITY SAFE. THAT'S SOMETHING THAT HE DID.
25 THAT'S SOMETHING THAT HE CHOSE TO DO.

26 SO, PLEASE, WHEN MR. CAMBER GETS UP HERE AND

1 SAYS, YEAH, WE DID ALL THOSE COUNTS, THAT THE PEOPLE OR THE
2 D.A. IS STRETCHING IT BY FILING THESE ADDITIONAL COUNTS, YOU
3 KNOW, HE IS NOT GOOD FOR THOSE, WAIT A MINUTE, FOLKS, HE IS
4 VERY GOOD FOR THOSE, AND THAT'S FOR WHAT HE DID TO PEOPLE
5 OTHER THAN AT THAT ROBBERY SCENE, TO CAROL SALVATIERRA.

6 AND AS FAR AS THE GANG ENHANCEMENTS, OKAY, THAT
7 IS FOR HIM JOINING THIS ASSOCIATION. THAT IS FOR HIM BEING
8 A MEMBER OF HARD TIMES AND WREAKING HAVOC ON THE AREA OF
9 BUENA CLINTON. THAT'S WHAT HARD TIMES DOES. OKAY. THAT
10 COUNT IS FOR THE COMMUNITY THERE IN BUENA CLINTON. THAT
11 COUNT IS FOR THE PEOPLE THAT LIVE THERE. OKAY. EACH OF
12 THOSE ADDRESSES SEPARATE VICTIMS.

13 AND WHEN YOU GO THROUGH THIS I WOULD ASK YOU THAT
14 YOU JUST DON'T SAY, WELL, WE GAVE THE PROSECUTION COUNTS 1
15 THROUGH 9, WHICH ARE ROBBERIES AND THE FALSE IMPRISONMENTS
16 AND THE STOLEN CAR, THERE ARE STILL THINGS OUT THERE THAT
17 MR. ESPINOZA DOES AND THAT THIS HARD TIME GANG DOES THAT
18 STILL HAS TO BE ADDRESSED.

19 WHEN MR. CAMBER TELLS YOU THAT THE ROBBERY CAN'T
20 BENEFIT MR. ESPINOZA, AND IT CAN'T BENEFIT HARD TIMES GANG
21 BOTH AT THE SAME TIME, HE IS MISTAKEN. IT CAN BENEFIT THEM.
22 HE CAN GET THE MONEY FOR IT, AND IT CAN BENEFIT HARD TIMES.

23 THAT'S WHAT HAPPENS WHEN GANG MEMBERS DO A CRIME.
24 IT BENEFITS THEIR GANG BY THEIR STANDING IN THE COMMUNITY,
25 AND THEY ALSO GET THE PERSONAL REWARDS FROM THAT CRIME, THE
26 MONEY OR THE ASSAULT OR WHATEVER IT IS, THEY GET THE

1 PERSONAL SATISFACTION FROM IT. SO YOU CAN DO BOTH.

2 AND AS FAR AS THE SAFETY BEING ON THAT GUN,
3 REMEMBER WHEN WE HAVE MS. -- THE LADY FROM THE SHERIFF'S
4 DEPARTMENT UP THERE AND WE TALKED ABOUT THE SAFETY, IT IS
5 THAT LITTLE BUTTON UNDERNEATH THE TRIGGER THERE, THAT HAMMER
6 FALLS EITHER WAY, OKAY, AND OTHER THAN LOOKING AT THAT
7 SAFETY AND SEEING A LITTLE RED MARK ON THE LEFT-HAND SIDE
8 WHICH I BELIEVE INDICATES, AND I HAVE EVEN FORGOTTEN AT THIS
9 TIME WHETHER TO THE LEFT THE SAFETY IS ON OR WHETHER TO THE
10 RIGHT THE SAFETY IS ON, EITHER WAY THAT HAMMER FALLS. THE
11 ONLY DIFFERENCE IS THE SAFETY SOMEHOW PUTS A MECHANISM UP
12 THAT PREVENTS THE FIRST -- THE HAMMER FROM STRIKING THE
13 BULLET AND FIRING IT.

14 BUT TO THE PERSON THAT IS HOLDING THE GUN, THERE
15 IS NO WAY TO TELL BY JUST LOOKING AT IT, UNLESS HE IS
16 INTIMATELY FAMILIAR. AND REMEMBER IN THIS PARTICULAR CASE
17 THERE ARE A FEW COBWEBS AND A LITTLE RUST IN THAT BARREL.
18 THAT GUN HADN'T BEEN SHOT RECENTLY. AND MR. ESPINOZA,
19 ALTHOUGH -- WELL, I WILL LEAVE THAT.

20 THE REASON MR. ESPINOZA GOT HIT BY THE BULLET WAS
21 BECAUSE HE POINTED THE GUN AT OFFICER SALVATIERRA. THERE IS
22 A MILLION DIFFERENT ANGLES THAT GUN COULD HAVE BEEN POINTED
23 AT. AND YOU HEARD OFFICER SALVATIERRA TELL YOU SHE ONLY
24 FIRED WHEN THE GUN WAS BEING POINTED AT HER. IF YOU WANT TO
25 RUN FROM A POLICE OFFICER, YOU DON'T NEED TO POINT THE GUN
26 AT THEM. OKAY. AGAIN, MR. ESPINOZA MINIMIZING WHAT HE DID.

1 THANK YOU VERY MUCH.

2 THE COURT: THANK YOU, COUNSEL. WE ARE GOING TO TAKE A
3 RECESS UNTIL 10 MINUTES AFTER 11:00. DURING THIS PERIOD OF
4 RECESS, THE ADMONITION THAT I HAVE GIVEN TO YOU REMAINS IN
5 FULL FORCE AND EFFECT. BE BACK IN FRONT OF THE DEPARTMENT
6 AT 11:10. AT THAT TIME I WILL READ YOU THE INSTRUCTIONS, WE
7 WILL SEND YOU TO LUNCH, AND YOU WILL BE DELIBERATING AT
8 1:30.

9 (RECESS TAKEN.)

10 (THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN
11 COURT, OUT OF THE PRESENCE OF THE JURY:)

12 THE COURT: BRING THEM IN.

13 (THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN
14 COURT, IN THE PRESENCE OF THE JURY:)

15 THE COURT: "MEMBERS OF THE JURY, YOU
16 HAVE HEARD THE EVIDENCE, AND NOW IT IS MY
17 DUTY TO INSTRUCT YOU ON THE LAW THAT APPLIES
18 TO THIS CASE. THE LAW REQUIRES THAT I READ
19 THE INSTRUCTIONS TO YOU.

20 "YOU WILL HAVE THESE INSTRUCTIONS IN
21 WRITTEN FORM IN THE JURY ROOM TO REFER TO
22 DURING YOUR DELIBERATIONS.

23 "YOU MUST BASE YOUR DECISION ON THE
24 FACTS AND THE LAW.

25 "YOU HAVE TWO DUTIES TO PERFORM.
26 FIRST, YOU MUST DETERMINE WHAT FACTS HAVE

No. G022360

LOGGED
CLERK, U.S. DISTRICT COURT
AUG 15 2002
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY
BY

**COURT OF APPEAL — CENTRAL DISTRICT
DIVISION THREE
STATE OF CALIFORNIA**

PEOPLE OF THE STATE OF CALIFORNIA

vs.

NO. 96WF 1776

ESPINOZA, BENJAMIN

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

HONORABLE RICHARD L. WEATHERSPOON

JUDGE/COMMISSIONER

CLERK'S TRANSCRIPT

APPEARANCES

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VOLUME I OF II

PERSONAL USE OF FIREARM

(Pen. Code, §§ 667.5, subd. (c)(8), 1203.06,
subd. (a)(1), 12022.5, subd. (a))

17.19

It is alleged [in Count[s] 1, 2, 4 & 9] that the defendant [REDACTED] personally used
a firearm during the commission of the crime[s] charged.

If you find the defendant [REDACTED] guilty of [one or more] of the crime[s] charged
[REDACTED] or a lesser and included felony offense], you
must determine whether the defendant [REDACTED] personally used a firearm in the
commission of [that] ^{or} [those] [REDACTED] felonies].

The word "firearm" includes [a RIFLE [REDACTED]
[REDACTED]
[REDACTED] The "firearm" need not be operable.]

PERSONAL USE OF FIREARM

(Pen. Code, §§ 667.5, subd. (c)(8), 1203.06,

subd. (a)(1), 12022.5, subd. (a))

17.19

The term "personally used a firearm," as used in this instruction, means that the defendant must have intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it.

The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

Include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

Print Date: 11/96

Requested by Plaintiff	☒
Requested by Defendant	☐
Requested by	☐
Given on	☐
Given as requested	☒
Given as Modified	☐
Refused	☐
Withdrawn	☐

Paul L. Sheth Judge

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA,)

Plaintiff,)

Case No. 96WF1776

vs.)

BENJAMIN ESPINOZA)

FINDING

Defendant.)

We the Jury in the above-entitled action, FIND IT TO BE TRUE that the defendant, BENJAMIN ESPINOZA, personally used a firearm during the commission of the offense alleged in COUNT 1 of the SECOND AMENDED Information.

VICTIM: JOSEPHINE OCHOA

Date: 8/20, 1997

(S) Juror #5