No. _____

IN THE

Supreme Court of the United States

FERNANDO DELGADO,

Petitioner,

v.

RAYMOND MADDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Ninth Circuit's prejudice analysis in conflict with this Court's decisions in *Chapman v. California*, 386 U.S. 18 (1967), *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), and *Neder v. United States*, 527 U.S. 1 (1999)?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed were Petitioner, Fernando Delgado, and Respondent, Raymond Madden, the former warden at California State Prison, Centinela, the facility at which Delgado was previously imprisoned. The current warden of Kern Valley State Prison, the facility at which Delgado is currently imprisoned, is Patwin Horn. There are no associated stock ticker symbols.

LIST OF PRIOR PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit

- *Delgado v. Madden*, No. 20-56029 (9th Cir. Aug. 7, 2026).

U.S. District Court for the Central District of California

- *Delgado v. Madden*, No. 2:18-cv-02699-FMO-MAA (Aug. 21, 2020).

California Supreme Court

- On habeas review
    - *In re Delgado*, No. S291638; denied November 12, 2025.
    - *In re Delgado*, No. S267341; denied May 12, 2021.
- On direct review
    - *People v. Delgado*, No. S238620; petition for review denied January 18, 2017.

California Court of Appeal

- *In re Delgado*, No. B331545; petition for writ of habeas corpus denied March 18, 2025.
- *In re Delgado*, No. B310035; petition for writ of habeas corpus denied January 29, 2021.
- *People v. Delgado*, No. B260431 (Oct. 28, 2016) (unpublished).

Los Angeles Superior Court

- *In re Delgado*, No. BA406196; petition for writ of habeas corpus denied June 14, 2023.
- *In re Delgado*, No. BA406196; petition for writ of habeas corpus denied November 13, 2020.
- *People v. Delgado*, No. BA406196; judgment entered October 2, 2014.

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

Petitioner Fernando Delgado respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in *Delgado v. Madden*, No. 20-56029.

OPINIONS BELOW

The Ninth Circuit affirmed the district court's denial of habeas relief in an unpublished memorandum. (Petitioner's Appendix (Pet. App. A) *Delgado v. Madden*, No. 20-56029, 2026 WL 2280612 (Aug. 7, 2026). The district court denied habeas relief and entered judgment against Delgado on August 21, 2020. (Pet. App. B.)

The last reasoned state-court decision on the claims at issue is the California Court of Appeal's unpublished opinion on direct appeal, *People v. Delgado*, No. B260431, 2016 WL 6311628 (Oct. 28, 2016). The California Supreme Court denied review. *People v. Delgado*, No. S238620 (Jan. 18, 2017.)

JURISDICTION

Delgado is in state custody at Kern Valley State Prison in Delano, California. He filed a habeas corpus petition under 28 U.S.C. § 2254. On August 7, 2026, the Ninth Circuit affirmed the district court's denial of habeas relief. The current petition is timely. *See* Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment to the U.S. Constitution

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2254 (a), (d)

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

. . . .

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–

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

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

STATEMENT OF THE CASE

A. November 3, 2012 Encounter and Shooting

On November 3, 2012, Alicia Barajas, her four children, including Christopher Ruiz, and her boyfriend, Larry Guillen, were living together in

the back house of a duplex on Arizona Avenue in Los Angeles. (Pet. App. F - 52.)

That evening, Alicia[1] and Larry were walking home from the market when they saw a man in their driveway looking into their house as if he were looking for someone. Larry asked the man who he was looking for, and the man then revealed a gun, told them to get back, and left on foot. (Pet. App. F - 52, RT[2] 410.) During this time, Ruiz was inside the house watching television. He testified that Alicia came in, told him about the man with the gun, and asked if someone was trying to steal his car for his sound system. (RT 359-60.)[3] Alicia called the police, who responded shortly after 7:30 p.m. and took a report. (Pet. App. F - 55.) Ruiz and Larry left the house to try to find the person with the gun, but they were unable to find him. (Pet. App. F - 52-53.)

After Ruiz returned from looking for the person with the gun, he went out to pick up his friend, Andrew Guillen, and then stopped back at home. (Pet. App. F - 53.) Ruiz parked his car in front of the driveway, halfway out

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[1] Some witnesses have identical surnames. These witnesses are referenced by their first names where necessary to avoid confusion.

[2] The Reporter's Transcript ("RT") and Clerk's Transcript ("CT") are cited in this Petition. If merits review is granted, Petitioner will lodge the full record in the joint appendix.

[3] Alicia denied asking Ruiz about his car. (RT 467-68.)

onto the street. (RT 332.) Alicia and Larry stood outside on the driveway. (Pet. App. F - 53.) Ruiz talked to Alicia in the driveway and a car passed by—Andrew noted that the occupants were looking at them. (Pet. App. F - 53.) As Ruiz looked down the street, the car returned and stopped right behind Ruiz's car. (Pet. App. F - 53.) The passenger stepped out and started firing a gun immediately. (Pet. App. F - 53.) Christopher dropped down after seeing a flash and heard about four to five shots. (Pet. App. F - 68; RT 376.) Alicia heard over five shots. (Pet. App. F - 53.) Larry was shot twice, and Alicia and Andrew were each shot once. (RT 440, 512, 728.) Ruiz was not shot. (Pet. App. F - 68.)

The shooter was approximately 22 to 23 feet away from Ruiz. (RT 335.) Ruiz and Andrew were both standing by the passenger side of Ruiz's car, by the hood, and Andrew was standing closer to the street than the house. (Pet. App. F - 53; RT 353.) Alicia was in the driveway closing the gate. (RT 475.) Larry was found lying near the gate and wall on the right after he was shot. (RT 663.)

Alicia ran towards the neighbor's house, who called the police. (Pet. App. F - 53.) The police responded and arrived at 8:27 p.m. (Pet. App. F - 55.)

B. Eyewitness Identifications

Alicia and Ruiz both testified Delgado was the shooter. (Pet. App. F - 54.) Alicia testified that she was certain Delgado was both the shooter and

the person with the gun who had come to her home earlier in the evening. (Pet. App. F - 53-54; RT 453-54.)

Although Alicia and Ruiz testified they recognized Delgado from the neighborhood, neither identified Delgado on the night of the shooting, nor did they mention to anyone that they recognized the shooter. (Pet. App. F - 54, 58.) Ruiz testified he remembered seeing Delgado in high school. (Pet. App. F - 54.) Alicia testified she had known Delgado for many years and saw him multiple times a week in the neighborhood. (Pet. App. F - 54, 58; RT 398-400.) However, immediately after the earlier encounter, Alicia asked Ruiz if "someone" was after the stereo in his car. (RT 360.)

Alicia also did not identify Delgado or mention she knew the shooter when the police spoke with her days after the shooting or during the photo lineup. (RT 733-743.) She told Detective Guillen she did not know why anyone would commit the shooting. (RT 490.) Alicia stayed with Larry at the hospital for three weeks; while she was away, Alicia did not warn her family that Delgado was the shooter. When Alicia was shown the photo lineup, she stated, "It looked like him. I think that was him," before circling Delgado's photo, stating, "It's No. 2. That's the guy who shot me." (RT 943.) When Ruiz was shown the photo lineup, he made a tentative identification, writing "Looks a lot like the passenger who shot" and circling Delgado's photo. (RT 341-342.) Alicia did not tell law enforcement she knew the shooter until her

testimony at the preliminary hearing in April 2013. (RT 940.) Alicia testified she was scared when she selected Delgado's photo because she knew he lived down the street from her mom. (RT 448.)

Alicia and Ruiz both described the shooter as a Hispanic male, with a mustache, wearing black clothing, a black hat, and prescription glasses, and having a chubby or stocky build. (Pet. App. F - 52-53, 56.) Ruiz described the shooter as 25 to 30 years old; Alicia said he was 20 to 25 years old. (RT 672-73; RT 939-941.) Ruiz and Alicia discussed the case often, including the shooter's description. (RT 383.)

C. Delgado's Alibi

Delgado testified that he was at his childhood friend, Christina Ledesma's home on the evening of the shooting, from about 7 p.m. until after 10 p.m., only leaving twice briefly to go to the store with Ledesma's boyfriend. (Pet. App. F - 60.) Ledesma's testimony corroborated Delgado's alibi; she testified that Delgado was with her and her boyfriend from about 6 or 7 p.m. until about 11 p.m., and he left twice for a few minutes to go with her boyfriend to the store. (Pet. App. F - 61.)

D. Gang Evidence and Earlier Fight

The prosecution called Detective Antonio Guillen, the lead investigator on the case, who testified both as a fact witness and as a gang expert at trial to prove the gang allegation. He testified as to his familiarity with Mariana

Maravilla, his gang expertise and training, and gang culture, including retaliation and instilling fear and respect in the community. (Pet. App. F - 56-57.)

Detective Guillen also testified as to an earlier fight he learned about through an undocumented phone conversation with Augustine Barajas. (Pet App. F - 57.) Detective Guillen testified that Augustine told him over the phone that Augustine "was in a fight with two Mariana Maravilla gang members, one of which he named as 'Bam Bam' from Mariana. And [Augustine], in his words, . . . beat their ass, he beat Bam Bam's ass, and that was the cause of this whole shooting." (RT 908.) Detective Guillen opined that the shooting was gang related: a Mariana Maravilla member committed the shooting to retaliate against Augustine Barajas, Alicia's brother, for beating up Delgado's fellow gang member, Manuel Solis ("Bam Bam"), in a fight. (RT 703-708, 911-19.) Detective Guillen stated that, given what he heard from Augustine, the earlier fight would require Mariana Maravilla to respond. (RT 911.) Detective Guillen explained that the Solis's defeat would require Mariana Maravilla to respond because Augustine was not in good standing and the gang would lose status if it did not respond and show dominance. (Pet. App. F - 57.) After the phone conversation with Augustine, Detective Guillen attempted to meet with him in person, but lost contact with him. (Pet. App. F - 57.) Augustine did not testify at trial.

Alicia testified that she learned of the earlier fight from her younger brother, Jesus Barajas, who came to her house crying and told her that their brother Augustine had gotten into a fight with Mariana Maravilla members at Mina's Market. (Pet. App. F - 65.) Alicia did not recall exactly how long before the shooting the fight occurred, estimating "a couple of months," or "within the year." (RT 452, 485-87.) Alicia did not witness the earlier fight, did not identify any Mariana Maravilla participant by name, or describe who had won the fight. A couple days after the fight, Mariana tagging appeared on their mother's gate, and Augustine stayed with Alicia for a couple of weeks. Augustine moved out of Alicia's home on Arizona Avenue a few months before the shooting. (RT 488-89.) When the prosecutor tried to question Alicia about the fight and why Augustine moved in with her, the trial court sustained a speculation objection and told the prosecutor at sidebar: "[I]t explains why the brother moved. This would be speculation no matter who it came from. You have to bring in Augustine. You are not going to get it from this witness." (RT 403.)

Delgado was in prison when the earlier fight occurred, and he only learned of it after his release. (RT 1052-53.) After his release, his friend told him that Augustine beat up "Bam Bam" and "Mousy" in a fight at least a few months before July 2012. (Pet. App. F - 59.) Delgado laughed about the fight when he heard about it; it did not make him want revenge. (Pet. App. F - 59.)

E. Kill Zone Instruction

The prosecutor set forth two theories for the attempted murder of Ruiz: (1) Delgado intentionally attempted to kill him as Augustine's family member and (2) Augustine was the primary target, and Ruiz was within the kill zone. (RT 1223.) She gave examples, including "shoot[ing] into a car full of people because you suspect it might have somebody you want to kill . . . the nature and scope of the attack is such that you've shown that you don't care if you kill everybody in that car so long as you kill your intended victim." (RT 1222.)

The trial court instructed the jury on the kill zone with former CALJIC No. 8.66.1:

> A person who primarily intends to kill one person, may also concurrently intend to kill other persons with in a particular zone of risk. This zone of risk is termed "the kill zone." The intent is concurrent when the nature and scope of the attack, while directed at the primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a kill zone is an issue to be decided by you.

(Pet. App. F - 66-67.)

F. Recorded Jail Call

A recording of a jail call in Spanish between Delgado and his mother was played for the jury. The prosecution relied on Detective Guillen's testimony that use of the word "mochen" translated to the people on Arizona

should "get lost, get out of here." (Pet. App. F - 62.) Delgado testified that his use of the word "mochen" meant the people on Arizona should contribute money toward a lawyer. (Pet. App. F - 60.)

G. Verdict and Sentence

The jury found Delgado guilty of four counts of willful, deliberate, and premeditated attempted murder and found true the firearm enhancements and gang allegations. Delgado was sentenced to four consecutive terms of life imprisonment with the possibility of parole, plus four consecutive terms of 25 years to life for the firearm enhancements, plus four consecutive terms of 10 years for the gang allegations. (CT 399.)

H. Appellate and Postconviction Proceedings

On direct appeal, the California Court of Appeal agreed that the admission of Detective Guillen's testimony about his out-of-court conversation with Augustine violated the Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36 (2004).[4] (Pet. App. F - 64.) However, the CCA concluded that the admission of the statements was harmless. (Pet. App. F - 66.) With respect to the kill-zone instruction, the CCA concluded that the claimed error was harmless beyond a reasonable doubt. (Pet. App. F - 68.) The CCA affirmed Delgado's conviction in an unpublished decision on

[4] The CCA also relied on a state court opinion, *People v. Sanchez*, 63 Cal. 4th 665 (2016) to find error.

October 28, 2016. (Pet. App. F.) The California Supreme Court denied review on January 18, 2017. (Pet. App. E.)

Delgado filed a *pro se* petition in the district court, raising the *Crawford* claim and kill zone instructional error claim. On August 21, 2020, the district court denied the federal habeas corpus petition and certified both claims for review. (Pet. App. B; Pet. App. C.)

On May 24, 2023, Delgado moved to stay the appeal so that he could file a habeas petition presenting his kill zone instructional error claim in state court based on the California Supreme Court's decision *People v. Canizales*, 7 Cal. 5th 591 (2019), which narrowed the application of the kill zone theory and was made retroactive to final cases. The Ninth Circuit granted the stay on June 12, 2023. On December 9, 2025, Delgado notified the Ninth Circuit that the California Supreme Court denied his state petition and moved the Ninth Circuit to reopen the case. The case was reopened on February 18, 2026.

The Ninth Circuit affirmed the district court's denial of Delgado's petition in an unpublished memorandum opinion issued without oral argument on August 7, 2026. (Pet. App. A.) The Ninth Circuit denied both claims solely on prejudice grounds.

As to the Confrontation Clause claim, the Ninth Circuit assumed, without deciding, that allowing Detective Guillen to repeat Augustine's

statements violated *Crawford*. It found that the CCA's determination that Augustine's statements were cumulative of other testimony was not unreasonable. The Ninth Circuit also held that the CCA did not unreasonably apply *Chapman v. California*, 386 U.S. 18 (1967), by evaluating the relative strength of other evidence, citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). (Pet. App. A - 2-3.)

As to the kill zone instructional error claim, the Ninth Circuit assumed, without deciding, that the instruction violated due process by allowing the jury to convict Delgado of the premeditated attempted murder of Ruiz without requiring the prosecution to prove beyond a reasonable doubt that Delgado intended to kill Ruiz. It held that the CCA did not determine facts that demonstrated an intent to kill everyone in the group unreasonably. It also held that the CCA's determination that evidence supporting intent to kill was "undisputed" was not contrary to, or an unreasonable application of *Chapman*, citing *Neder v. United States*, 527 U.S. 1, 19 (1999). (Pet. App. A - 3-5.)

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted because the Ninth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

In *Chapman v. California*, 386 U.S. 18, 24 (1967), this Court set forth the harmless error test for federal constitutional errors—to be harmless, the beneficiary of a constitutional error must prove it was "harmless beyond a reasonable doubt." This means that the State must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 23. In fashioning a "harmless-constitutional-error rule," this Court distinguished the California courts' approach of putting an "emphasis, and perhaps overemphasis, upon the court's view of 'overwhelming evidence.'" *Id.* at 22-23. Instead, it adopted the question from *Fahy v. State of Connecticut*, 375 U.S. 85 (1963): "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman* 386 U.S. at 23 (quoting *Fahy*, 375 U.S. at 86-87); *Yates v. Evatt*, 500 U.S. 391, 403 (1991) ("To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."). Applying this standard, this Court reversed the convictions because it was "completely impossible for [the Court] to say that the State [ ] demonstrated, beyond a reasonable doubt, that the prosecutor's comments and trial judge's instruction did not contribute to petitioners' convictions," despite that there was "a reasonably strong 'circumstantial web of evidence' against petitioners." *Chapman*, 386 U.S. at 25-26.

Prejudice review under *Chapman* is not a review for sufficiency of the evidence. "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); *see also Fahy*, 375 U.S. at 86-87 ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted of without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.").

The Ninth Circuit applied an approach that was contrary to the *Chapman* test, as to both the Confrontation Clause claim and kill zone instructional error claim. In its prejudice determination for each of these claims, the Ninth Circuit focused on the strength of the prosecution's case and did not consider whether the prosecution met its burden of showing that there was no reasonable possibility the errors contributed to finding on the gang allegations and attempted murder of Ruiz.

I. THE NINTH CIRCUIT'S HARMLESS ERROR ANALYSIS OF THE CONFRONTATION CLAUSE ERROR CONFLICTS WITH *CHAPMAN* AND *VAN ARSDALL*.

The Confrontation Clause guarantees that a defendant has the right to confront those "who 'bear testimony' against [them]." *Crawford v.*

Washington, 41 U.S. 36, 51 (2004). Therefore, a person's statement is inadmissible unless they appear at trial, or if the person is unavailable, the defendant had a prior opportunity for cross-examination. *Id.* at 54.

In *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), this Court reaffirmed that Confrontation Clause errors are subject to *Chapman* harmless-error analysis and noted that the reviewing court should assume that the "damaging potential of the cross-examination [is] fully realized." *Van Arsdall* lists the factors courts should consider: the importance of the testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination permitted, and the overall strength of the prosecution's case. *Id.* The reviewing court decides "whether the not-fully-impeached evidence might have affected the reliability of the factfinding process at trial," *id.*, and can only uphold the conviction if it "may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt," *id.* at 681.

First, the Ninth Cicuit's opinion conflicts with *Chapman* and *Van Arsdall* because it effectively replaced the *Chapman* question with consideration of just one of the *Van Arsdall* factors, strength of the prosecution's case. It reasoned that whether a Confrontation Clause error is harmless depends on numerous factors, including the testimony's importance,

the existence of cumulative testimony, the presence of corroborating or contradicting evidence, and the overall strength of the prosecution's case, citing *Van Arsdall*, and held the CCA "did not apply *Chapman* unreasonably by evaluating the relative strength of the other evidence." (Pet. App. A - 3.) However, although the Ninth Circuit listed all the *Van Arsdall* factors, it approved of the CCA's evaluation of only one of those factors—the strength of the prosecution's case. (Pet. App. A - 3.) Its harmlessness analysis did not analyze the impact of Augustine's out-of-court statement on the jury's findings, although the majority of the *Van Arsdall* factors focus on the hearsay testimony itself. *See Van Arsdall*, 475 U.S. at 684.

Applying the *Van Arsdall* factors, and assuming that "the damaging potential of cross-examination were fully realized," 475 U.S. at 684, the State cannot show beyond a reasonable doubt that Augustine's statement did not contribute to the jury's finding on the gang allegations. The case on the gang enhancement came down to tying the shooting to the prior fight in order to provide motive and connection to a gang. Augustine's statement was essential because it was the most persuasive piece of information that Detective Guillen relied on to opine that the earlier fight between Augustine and Mariana Maravilla members was the motive for the shooting. The prosecutor relied heavily on Detective Guillen's testimony that Augustine told him he beat Bam Bam and that was the cause of the shooting in its case

on the gang enhancement. (*See, e.g.*, RT 1203-04 ("As we have all heard over and over again, there is some fight that occurred with her brother Augustine, her brother Jesus, and these two Mariana gang members . . . . So who would have a motive to shoot her given those circumstances. Well, a member of Mariana."); RT 1282 ("Detective Guillen testified he talked to Augustine about this fight that started all this chain of events."); RT 1264 ("Folks, we are not talking about Augustine beating them in arm wrestling or winning a bet, this is a beat-down. That's how it's been described. A beat-down. A beat-down that caused Augustine to go into hiding.").) Moreover, Augustine's statement was not cumulative of other testimony. Alicia's testimony regarding the fight did not connect the fight to the shooting. In fact, the trial court ruled that Alicia could not testify as to why Augustine moved in with her, and Alicia testified that Augustine moved out months before the shooting. (RT 402-403, 488-89.) Since Augustine was not cross examined, nothing tested his account. Assuming, as *Van Arsdall* requires, 475 U.S. at 684, that cross examination would have fully discredited Augustine's account, the jury would not have had any direct participant's account of the fight and its connection to the shooting, rendering Detective Guillen's opinion that the fight was the motive for the shooting highly speculative.

Second, the Ninth Circuit endorsed the CCA's review, which was, in substance, a sufficiency of the evidence review. (Pet. App. A - 2-3.) The CCA

acknowledged the *Chapman* standard after it determined the admission of Augustine's statement was a violation of the Confrontation Clause, but considered whether there was "strong" (i.e., sufficient) evidence to support the jury's finding on the gang enhancement in its prejudice analysis. (Pet. App. F - 64-66.) The Ninth Circuit approved of this approach, although it inappropriately shifted the burden from the prosecution to Delgado. The question under *Chapman* is not whether the jury could have found the gang allegations true without Augustine's hearsay statement. Rather, it is whether the jury's findings on the gang allegations were "surely unattributable to the error." *Sullivan*, 508 U.S. at 279. Given the prosecutor's heavy reliance on Augustine's statement as discussed above, the State cannot show that his statement did not contribute to the findings on the gang allegations.

II. THE NINTH CIRCUIT'S HARMLESS ERROR ANALYSIS OF THE KILL ZONE ERROR CONFLICTS WITH *CHAPMAN* AND *NEDER*.

The kill zone instruction used lowered the prosecutor's burden of proof regarding intent to kill Ruiz. It allowed the jury to find intent if it was one reasonable inference that "the perpetrator intended to kill the primary victim by killing everyone in the victim's vicinity," even if other reasonable inferences existed. (CT 317.) In its analysis, the CCA reviewed for sufficiency of the evidence. (Pet. App. F - 68-69.) The Ninth Circuit assumed that the instruction violated due process and conducted harmless error review that is

in conflict with *Chapman*. (Pet. App. A - 3-5.) It substituted sufficiency of the evidence analysis for review under *Chapman*, looking only at whether evidence could support the verdict. (Pet. App. A - 4-5 ("It was not unreasonable for the court to determine that the evidence supporting intent was 'undisputed' or, put differently, that there was no evidence 'that could rationally lead to a contrary finding with respect to' intent." (quoting *Neder v. United States*, 527 U.S. 1, 19 (1999).)

Neder does not support the CCA and Ninth Circuit's approach. In *Neder*, this Court applied the *Chapman* test to determine whether the omission of an element was harmless error. *Neder*, 527 U.S. at 15. The evidence supporting the omitted element at issue—materiality—was "so overwhelming" that the petitioner did not argue to the jury or to the Ninth Circuit that his false statements could be found immaterial. *Id.* at 16. The Court directed that a reviewing court should ask "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.* at 19.

The Ninth Circuit's reliance on *Neder* is misplaced because, here, intent to kill was not uncontested, nor was it supported by overwhelming evidence. The Ninth Circuit cited California law, which explained that purposely firing a gun at another person at close range "generally gives rise to an inference that the shooter acted with" intent to kill. (Pet. App. A - 4.) However, an

inference is not overwhelming evidence. Even if the shooter intended to kill the person he shot at, that does not establish the shooter also intended to kill everyone else in the kill zone in order to kill the target. The record also contained evidence that could lead to a contrary finding: the weapon was a handgun, shots were fired over a brief time period, and the shooter was at least 22 feet away from Ruiz.

Nor does the jury's premeditation finding mean that the jury found intent to kill. Premeditated attempted murder requires intent to kill (Pet. App. F - 69), but the kill zone instruction allowed the jury to find intent based on "a reasonable inference" rather than the "only reasonable inference." The premeditation finding, therefore, relies on the instructional error at issue.

The prosecutor's argument compounded the error because she misstated the law, suggesting that not caring whether an individual around the primary target got hurt was sufficient to meet the intent requirement. (RT 1222 ("Even if I'm wrong, if I shoot into that group in this way, in a way that if I do it, I'm likely to hit and kill everyone in that group, but I don't care because I have of [sic] a specific target, you can currently intend to kill, under the law, anyone in that group.").) Thus, under the correct *Chapman* test, the State cannot show beyond a reasonable doubt that the kill-zone instruction did not contribute to the verdict obtained.

It is imperative that courts correctly apply the proper standard to determine whether there was prejudice arising from a constitutional error in habeas cases. This Court should grant this writ to reinforce to courts that the prejudice question under *Chapman* is whether a constitutional error contributed to the conviction, not the strength of the State's case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: 11/2/26

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No. _____

IN THE

Supreme Court of the United States

FERNANDO DELGADO,

Petitioner,

v.

RAYMOND MADDEN,

Respondent.

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

CERTIFICATE PURSUANT TO RULE 33

Pursuant to Rule 33.2, I hereby certify that this petition is less than 40 pages, and therefore complies with the page limit set out in Rule 33. This brief was prepared in 13-point Century Schoolbook font.

Respectfully submitted,

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