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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
(Pet. App. A - F)

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NOT FOR PUBLICATION

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERNANDO DELGADO, Petitioner-Appellant, v. RAYMOND MADDEN, Warden, Respondent-Appellee.	No. 20-56029 D.C. No. 2:18-cv-02699-FMO-MAA MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Fernando M. Olguin, District Judge, Presiding

Submitted August 5, 2026**
Pasadena, California

Before: GRABER, KOH, and H.A. THOMAS, Circuit Judges.

Petitioner Fernando Delgado appeals the district court's denial of his petition for a writ of habeas corpus under the Antiterrorism and Effective Death Penalty

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

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Act ("AEDPA"), 28 U.S.C. § 2254.[1] Petitioner was convicted of four counts of premeditated attempted murder for shooting a firearm at four individuals. The jury found that those offenses were "committed for the benefit of, at the direction of, or in association with a criminal street gang," for which Petitioner received an enhanced sentence. Reviewing de novo the district court's denial of the petition, Sanchez v. Davis, 994 F.3d 1129, 1138 (9th Cir. 2021), we affirm.

1. The California Court of Appeal's determination that a Confrontation Clause violation was harmless beyond a reasonable doubt, see Chapman v. California, 386 U.S. 18, 24 (1967), was not unreasonable, see Brown v. Davenport, 596 U.S. 118, 135 (2022) (explaining that a state court's application of Chapman receives deference under AEDPA); Parle v. Runnels, 505 F.3d 922, 926 (9th Cir. 2007) (looking to the California Court of Appeal's decision under AEDPA where, as here, the California Supreme Court denied discretionary review). The trial court permitted Detective Guillen, a gang expert with knowledge of the gang in question, to testify about his out-of-court conversation with the brother of one of the victims. According to Guillen, the brother stated that he "beat" a member of Petitioner's gang in a fight and "that was the cause of this whole shooting." We assume, without deciding, that allowing Guillen to repeat the brother's statements violated

[1] Petitioner's notice of appeal was postmarked after the thirty-day deadline, but he delivered the notice to prison officials for mailing before the deadline, and the subsequent delay was beyond his control. See Fed. R. App. P. 4(c).

Crawford v. Washington, 541 U.S. 36 (2004). Petitioner contends that the brother's statements "were the prosecutor's key evidence" that the shooting was gang-related. But the Court of Appeal determined that the brother's statements were cumulative of other testimony about the fight, its connection to the shooting, and the gang-related nature of the crimes. That determination was not unreasonable. See 28 U.S.C. § 2254(d)(2).

Nor was the court's determination contrary to, or an unreasonable application of, Chapman. See id. § 2254(d)(1). Whether a Confrontation Clause error is harmless depends on 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." Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Accordingly, the court did not apply Chapman unreasonably by evaluating the relative strength of the other evidence.

2. The Court of Appeal's determination that any error in the trial court's jury instruction on the "kill zone" theory was harmless was not unreasonable. We assume, without deciding, that the instruction violated federal due process by allowing the jury to convict Petitioner of premeditated attempted murder without requiring the prosecution to prove beyond a reasonable doubt that Petitioner

intended to kill each of the four victims.[2] See Middleton v. McNeil, 541 U.S. 433, 437 (2004) (per curiam) (discussing the due process standard). Where, as here, a challenged instruction affects only one element of an offense, harmless-error review applies. Byrd v. Lewis, 566 F.3d 855, 863 (9th Cir. 2009).

The Court of Appeal determined that the undisputed evidence "demonstrated an intent to kill everyone in the group." The court found that Petitioner shot "at fairly close range" at the "four individuals standing near to one another, hitting three of them." The fourth victim dove to the ground after gunfire began, but he "was plainly in the line of fire prior to taking cover." Petitioner fired enough times to kill all four individuals. The court did not determine those facts unreasonably.

And the court's determination was not contrary to, or an unreasonable application of, Chapman. Under California law, "purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with" intent to kill. People v. Smith, 124 P.3d 730, 736 (Cal. 2005). 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

[2] To the extent that Petitioner argues that the "kill zone" theory was inapplicable to this case, that claim does not afford a ground for relief because "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67–68 (1991).

respect to" intent. Neder v. United States, 527 U.S. 1, 19 (1999); see id. at 18 (explaining that, where a jury instruction errs by omitting an element, the error is harmless if that element "is supported by uncontroverted evidence").

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FERNANDO DELGADO,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. 2:18-cv-02699-FMO-MAA

JUDGMENT

Pursuant to the Order Accepting Report and Recommendation of the United States Magistrate Judge,

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

DATED: August 21, 2020

/s/

FERNANDO M. OLGUIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FERNANDO DELGADO, Petitioner, v. RAYMOND MADDEN, Warden, Respondent.	Case No. 2:18-cv-02699-FMO-MAA **ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge.

The Court also has reviewed Petitioner's objections to the Report and Recommendation, which the Court received and filed on June 18, 2020 ("Objections"). (Objs., ECF No. 22.) As required by Federal Rule of Civil Procedure 72(b)(3), the Court has engaged in de novo review of the portions of the Report and Recommendation to which Petitioner specifically has objected.

I. Ground One

As to Ground One of the First Amended Petition, Petitioner argues in his Objections that the Magistrate Judge erred in concluding that the state court's

harmless error analysis was not objectively unreasonable. (Objs., at 2–5.) Specifically, Petitioner argues that because Detective Guillen is a law enforcement officer, his testimony likely was accorded greater weight than the other evidence regarding Augustine's encounter with the Mariana Maravilla gang members. (*Id.*) Thus, according to Petitioner, the admission of Detective Guillen's testimony regarding Augustine's statements was not harmless. (*Id.*)

The Court has conducted an independent review of the state court's decision, which held that the trial court's admission of Detective Guillen's testimony regarding Augustine's statements was harmless error under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967). (Lodged Document ("LD") No. 8, ECF No. 13-13, at 15–17.) The Court concurs with the Magistrate Judge's conclusion that the state court's decision is not objectively unreasonable. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) ("[A] a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.") As the state court and Magistrate Judge reasoned, Detective Guillen's opinion that Petitioner acted on behalf of the Mariana Maravilla gang was also supported by his professional experience and knowledge of the Mariana Maravilla gang's activities, as well as testimony from Alicia and Petitioner regarding the incident between Augustine and the gang members. (*See* R&R, ECF No. 21, at 25; LD 8, at 17).

The Court also concurs with the Magistrate Judge's conclusion that Petitioner has failed to show that the introduction of Augustine's statements had a "substantial and injurious effect or influence in determining the jury's verdict"—the harmless error standard that applies on collateral review. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Petitioner's arguments that the jury would not have credited Alicia's testimony, and that he would not have testified about the incident with

Augustine but for Detective Guillen's testimony, are too speculative to warrant relief. *See Morales v. Woodford*, 388 F.3d 1159, 1173 (9th Cir. 2003) ("Mere speculation is insufficient to grant the writ under *Brecht* . . . .").

II. Ground Two

As to Ground Two, Petitioner argues in his Objections that the Magistrate Judge overlooked the California Supreme Court's recent decision in *People v. Canizales*, 7 Cal. 5th 591 (2019), which limits the use of the "kill zone" theory jury instruction. (Objs., at 6.) He argues that under *Canizales*, the use of the "kill zone" instruction in his case was prejudicial; and therefore, the state court's harmless error analysis was objectively unreasonable. (*Id.*, at 5–9.)

The Magistrate Judge acknowledged *Canizales* and thus declined to reach Respondent's argument that the "kill zone" instruction was proper in this case. (R&R, at 32–33). Although *Canizales* held that the use of a "kill zone" instruction in that case was prejudicial, this state court decision does not affect the federal harmless error standard, which is governed by *Chapman*. In light of the evidence presented at trial—Christopher and Alicia's testimony that Petitioner shot at everyone in the group and that Christopher was directly in the line of fire before successfully taking cover (*see* 2 Reporter's Transcript ("RT") 334–35, 373–76, 427–28, 431), and the evidence of Petitioner's gang-related motive for killing everyone in the group (*see* 2 RT 450–53, 485–88; 3 RT 710–12; 4 RT 1040, 1052–55), this Court concurs with the Magistrate Judge's conclusion that the state court's harmless error analysis was not an objectively unreasonable application of *Chapman*.

In sum, the Court concurs with and accepts the findings, conclusions, and recommendations of the United States Magistrate Judge, and overrules the Objections.

IT THEREFORE IS ORDERED that (1) the Report and Recommendation of the Magistrate Judge is accepted; and (2) Judgment shall be entered denying the Petition and dismissing this action with prejudice.

DATED: August 21, 2020

/s/
FERNANDO M. OLGUIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FERNANDO DELGADO, Petitioner, v. RAYMOND MADDEN, Warden, Respondent.	Case No. 2:18-cv-02699-FMO-MAA **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

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

I. INTRODUCTION

On April 3, 2018, Petitioner initiated this action by filing a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. ("Petition," ECF No. 1.) On July 3, 2018, Respondent filed an Answer. ("Answer," ECF Nos. 12.) On October 15, 2018, Petitioner filed a Reply. ("Reply," ECF No. 18). The matter is ready for decision.

As discussed below, the Court recommends that the Petition be denied and that this action be dismissed with prejudice.

II. PROCEDURAL SUMMARY

In Los Angeles County Superior Court, a jury convicted Petitioner of four counts of attempted premeditated murder (Cal. Penal Code §§ 187(a), 664). (2 CT 343-49.)[1] The jury found true special allegations that Petitioner personally and intentionally used and discharged a firearm (Cal. Penal Code § 12022.53(b)-(d)) and that the crimes were committed for the benefit of a criminal street gang (Cal. Penal Code § 186.22). (*Id.*) The trial court sentenced Petitioner to state prison for one hundred years to life, plus forty years. (2 CT 399-400.)

Petitioner appealed his judgment of conviction to the California Court of Appeal. (*See* 2 CT 401; LD 4.) The Court of Appeal affirmed the judgment in full in a reasoned decision. *People v. Delgado*, No. B260431, 2016 Cal. App. Unpub. LEXIS 7791, 2016 WL 6311628 (Cal. Ct. App. Oct. 28, 2016). (LD 8.) The California Supreme Court summarily denied Petitioner's petition for review. *People v. Delgado*, No. S238620, 2017 Cal. LEXIS 179 (Cal. Jan. 18, 2017). (LD 9; LD 10.)

Petitioner initiated this action by filing the Petition on April 3, 2018. Respondent filed the Answer on July 3, 2018. Petitioner filed the Answer on October 15, 2018.

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[1] Pinpoint citations of briefs and Lodged Documents 4 through 10 ("LD," ECF Nos. 13-9 to -15) in this Report and Recommendation refer to the page numbers appearing in the ECF-generated headers. Pinpoint citations of the Clerk's Transcript ("CT," ECF No. 13-1 to -2) and Reporter's Transcript ("RT," ECF No. 13-3 to -7) refer to the transcripts' own volume- and page-numbering schemes.

III. FACTUAL SUMMARY

Pursuant to 28 U.S.C. § 2254(e)(1), a factual summary from a state appellate court's opinion is entitled to a presumption of correctness that may be rebutted only by clear and convincing evidence that the facts were otherwise. *See Hedlund v. Ryan*, 854 F.3d 557, 563 (9th Cir. 2017). Petitioner does not challenge the factual summary set out in the California Court of Appeal's decision of Petitioner's direct appeal. (*See* Petition at 9-17 (reciting the Court of Appeal's factual summary).)[2] The Court of Appeal described the relevant proceedings as follows:

> The charges arose from a shooting on November 3, 2012. The trial testimony revealed the following facts material to our discussion.
>
> In November 2012, Alicia lived in a duplex on South Arizona Avenue in east Los Angeles with her boyfriend, Larry, her four children, including her eldest son, Christopher, and her brother Augustine. Their home was located in an area claimed by a gang known as Mariana Maravilla. Alicia had lived in the neighborhood her whole life, and knew some people in the area were Mariana gang members, including someone she went to school with called "Bam Bam." However, none of her children were involved with gangs. Her boyfriend was a member of a gang known as the Santa Fe Locos, but he was no longer "active" in the gang. Larry did not hang out or talk to other members of his former gang who were from a different neighborhood.

///

[2] In the Reply, Petitioner argues that he "has rebutted the state court decision with 'clear and convincing evidence.'" (Reply at 3 (citing *Murdaugh v. Ryan*, 724 F.3d 1104, 1106 n.1 (9th Cir. 2013)).) Even if true as to the state court's *legal conclusions*, Petitioner has not challenged the state court's *factual summary* of evidence presented at trial, having incorporated it into his own Petition.

On November 3, Alicia and Larry came home from the store and found a Hispanic male in their driveway, attempting to peer into their home. Larry told the man to leave. The man pointed a gun at them and told them to "[g]et back." Alicia recognized the man was defendant, but did not immediately tell Larry she knew who it was. Defendant left and Alicia went to her neighbor's home (the other home in the duplex) to borrow a phone to call 911.

While Alicia waited for the police, Larry and her son Christopher left in Larry's car to drive around the neighborhood to see if they could find the man. When the police arrived, Alicia told them the man with the gun was a heavyset Hispanic male, with glasses, wearing a dark shirt with the word "Cali" printed on it, and a black baseball cap. Larry and Christopher returned about 15 to 20 minutes later without having found anyone who looked like the man with the gun. The police took Alicia's report and left.

Christopher then left in his car to pick up his friend Andrew, who lived a couple of blocks away, because they planned to go to a friend's party that evening. Christopher and Andrew returned a few minutes later and Christopher parked his car in front of the house. Alicia and Larry were still standing outside as Christopher and Andrew got out of the car. Alicia and Larry were close to the house, but still on the driveway. Christopher was in front of his car, and Andrew was standing near him, but more on the passenger side of the car. As they stood talking, a car drove by.

Andrew told Christopher the people in the car were looking at them as they drove by. The car then reappeared and pulled in behind Christopher's car. The front passenger door opened. Defendant stepped out and immediately started firing his gun. Christopher saw

the muzzle flash and dove to the ground in front of his car to try to avoid being shot. Alicia heard "more than five shots" and saw Larry fall to the ground, bleeding. Alicia did not realize she had also been shot. She started to run to her neighbor's house to call the police to come back, when Christopher and Andrew told her she had blood on her back. She noticed that Andrew was bleeding as well. Alicia yelled for her neighbor to call the police.

The police and paramedics arrived. Alicia recognized one of the deputies as the same one who had responded to her earlier 911 call. She told the deputy that the shooter was same man who had been at their house earlier and pointed a gun at them. Larry, Andrew and Alicia were transported to the hospital to be treated for gunshot wounds.

Alicia later identified the person who shot them as defendant, whom she knew as "Tank." She knew defendant from the neighborhood and because his brother had been a friend of her husband's before he passed away. She had no doubt that defendant was the shooter. She said she had not told anyone earlier that she knew who the shooter was because she was scared. Christopher also recognized the shooter as defendant. He recalled that defendant had "hit [him] up" at school one time, meaning that he had asked him if he was in a gang. On the night of the shooting, he did not tell the police he recognized defendant from the neighborhood because he was scared. Christopher knew that bad things could happen if he "snitched" on a gang member. He described the shooter as having been dressed in all black, with a mustache and glasses. When Christopher later identified defendant in a photographic lineup, he was "very certain" he was the shooter.

Alicia testified that sometime before November 3, she had been at home when her younger brother Jesus came over. "He was pumped up, kind of like sweating, like—like he had just went through something." Jesus appeared to be worried and was "pacing" back and forth in her house. He told Alicia that Augustine, their older brother, had "got him into some shit with the guys from Mariana." He said they got into a fight with members of the Mariana gang at Mina's Market, which was just a couple of blocks from her home. Jesus said that because Augustine talks loud, the gang members thought he was disrespecting them. During the conversation, Jesus started to cry and asked her what he should do.

At the time of the fight, Augustine was living with their mother, about a block from Alicia's home. A couple of days after Jesus told Alicia about the fight, Alicia saw tagging by the Mariana gang (two M's) on her mother's front gate. Alicia had never seen any kind of tagging on her mother's home before. Her brother Augustine then came to live with her, and was still living with her in November 2012.

Deputy Rubin Rosas testified that he responded twice to the residence on South Arizona Avenue the night of the shooting. The first time he responded was just after 7:30 p.m. Alicia told him that she and her boyfriend had come home from the store and found a man crouching in their driveway and peering into their house. When they confronted the man, he pulled a handgun from the waistband of his pants and told them to "get the f—k back," and then he walked away. Alicia told him that her boyfriend and son had gone looking for the man. Deputy Rosas obtained a suspect description from Alicia, and he and his partner patrolled the neighborhood to see if they could find anyone matching that description.

Deputy Rosas returned to Alicia's home at 8:27 p.m. and found her crying "hysterically" on the driveway and two other males nearby bleeding from apparent gunshot wounds. Alicia told Deputy Rosas that the shooter was the same man with the gun who had been at their home less than an hour before.

Deputy Rosas also spoke to Christopher, who was not injured during the shooting. Christopher reported that a newer model Toyota Camry drove by their house slowly while they were all standing outside on the driveway. Christopher said it then pulled up behind his car and a man got out of the front passenger seat and immediately began shooting. Several shots were fired in his direction, so he dove for cover in front of his car. After the shooting stopped and he saw the car pull away, he saw that his mother, Larry and his friend Andrew were all bleeding. Christopher's description of the shooter was substantially the same as his mother's from earlier in the evening.

The jury heard and read a transcript of a jailhouse telephone call between defendant, his mother, and an unidentified female in which defendant said in Spanish "*the people from over there on Arizona*" should "*get lost*." He said if they did not get lost, he would "*get back at them fools*."

Detective Antonio Guillen, a 22-year veteran of the Los Angeles County Sheriff's Department and a gang detective, testified as the prosecution's gang expert. Part of Detective Guillen's assignment as a gang detective in east Los Angeles is monitoring the Mariana Maravilla gang. Detective Guillen was also the lead detective investigating the shootings on November 3, 2012.

Detective Guillen explained his background, training and investigation of numerous gang-related crimes. He explained gang

culture generally and identified the common tagging and names associated with the Mariana gang, including the letters "MM" and "MMV." Detective Guillen said there were 140 documented members of the gang, but that several of the members had claimed the actual number was closer to 250. He said the gang's primary activities were vandalism, narcotics sales, thefts, shootings, extortion and murder. He attested to two predicate offenses committed by Mariana gang members in which he was the investigating detective.

Detective Guillen was familiar with defendant as a known Mariana gang member with the moniker Tank. Detective Guillen considered him to be one of the active members, along with individuals known as Bam Bam, "Husky," and "Boy," who were all members of the same clique. Detective Guillen authenticated various photographs depicting defendant's gang-related tattoos, including the words "Mariana Maravilla," the letters "MM" and the letters "MMV."

After Detective Guillen initially arrested defendant, he heard a phone call made by defendant to a family member. Detective Guillen had not specifically told defendant he had been arrested for the shootings at Alicia's home on Arizona Avenue, but during the phone call, defendant said he had been arrested and mentioned the "people on Arizona."

During the course of the investigation, Detective Guillen learned that, a few months before the shooting, there had been a fight between Alicia's brother Augustine and members of the Mariana gang, including Bam Bam. He spoke with Augustine over the telephone and Augustine confirmed there had been a fight and he had beaten up Bam Bam. Detective Guillen tried to arrange to meet with Augustine, but was unable to do so. He could not locate Augustine, despite multiple

efforts. Detective Guillen opined that generally there would be a response to a gang member getting beaten up in a fight, particularly a member with status like Bam Bam. It is important to the gang to respond in order to maintain respect.

During the investigation, Detective Guillen also learned that the "talk" in the neighborhood was that "Mariana" was responsible for the shootings. Detective Guillen was unable to convince Andrew, one of the victims, to comply with the subpoena to come to court because Andrew and his family were afraid of retaliation if he testified.

Detective Guillen said Alicia identified defendant in a photographic lineup and was "scared" and "crying" when she did so. She did not mention, at that time, that she knew defendant's name. When he later learned that Alicia knew the shooter was someone from her neighborhood known as Tank, he asked her why she had withheld that information. Alicia told him she was scared of retaliation by the gang against her and her family but she changed her mind and decided to speak up because the father of her children had been gunned down and no one was ever prosecuted because no witness would come forward.

Detective Guillen answered a hypothetical based on the facts of the shootings and stated his opinion that the shootings were carried out in a fashion that demonstrated they were were committed in association with and for the benefit of a gang.

Detective Guillen escorted Alicia and her family for court appearances to make them feel more comfortable. He explained that at the preliminary hearing, he saw defendant's brother, Antonio Delgado, approach Christopher, Alicia and Larry in the courthouse hallway. Detective Guillen walked up to the group and told Mr. Delgado he had

to leave. Detective Guillen warned Mr. Delgado not to speak to witnesses. Mr. Delgado said he was just saying hello because he knew the family. After Mr. Delgado walked away, Christopher told Detective Guillen that Mr. Delgado had given him a business card and told him that if he did not say anything, Mr. Delgado would buy him a car.

Defendant testified in his own defense. Defendant said he grew up in the Maravilla neighborhood of east Los Angeles and was "jumped in" to the Mariana Maravilla gang when he was 16 or 17 years old. Defendant admitted he had several prior convictions, including possession of narcotics with a firearm and two firearm possession charges. He pled guilty to those crimes and served his time because he was guilty of those offenses, but he denied shooting at Alicia and her family.

Defendant knew Alicia and her brother Augustine from the neighborhood. Alicia's mother's house was located only about a block away from his mother's home. Defendant also knew Alicia's husband before he passed away. He never had any trouble with the family and denied ever threatening them.

Defendant was aware that Augustine got into a fight with two Mariana gang members, Bam Bam and "Mousy," sometime around July 2012. They apparently got "whipped" by Augustine and they all sort of "laughed about it." Defendant said he teased and "ribbed" them about it because Augustine was not a gang member or someone important. He was a friend they all knew from the neighborhood. It did not make him want to get revenge on Augustine. He said that if a Mariana gang member felt they had been disrespected, then the member would take care of the situation himself, and would not wait

months to do it. If a member was disrespected and did not handle it, the gang would see him as a coward. Defendant said he would not "ever take up" another Mariana member's fight because it is not his business. He denied that gang members "back up" their fellow gang members in order to maintain respect for the gang as a whole. Defendant said he was not aware of anyone in the gang that was worried or bothered by the fight. By November, it was a "dead issue." Defendant also said the gang would never retaliate against the wife or sister of someone who had disrespected them.

Defendant said he did not "hit up" Christopher at school or anywhere. He also never asked his brother to talk to or bribe any witness.

Defendant testified that on November 3, 2012, he went to a barbeque at his friend Manny's house. Manny's moniker is Bam Bam. Defendant said he left Manny's house around 7:00 p.m. to visit his friend Christina Ledesma and her boyfriend. Christina lived about three or four miles from where the shooting occurred. Defendant stayed at Christina's house until around 10:00 p.m., and only left briefly a couple of times with Christina's boyfriend to buy beer at the liquor store down the block. While he was at Christina's, he received a couple of phone calls telling him about the shooting in his neighborhood.

Defendant acknowledged the recording of the phone conversation between him and his mother while he was in jail. He denied the translation of the Spanish portion of the recording, including the word *mochen*, meant that he told his mother the people living on Arizona should "*get lost*" or he would get back at "*them fools*." He said the Spanish phrase he used was slang for "break

bread." He said the Spanish translator was "way off." He was telling his mother he wanted her to get people to contribute money to help pay for an attorney for him and he had a lot of friends that lived on Arizona Avenue and that is what he was referring to in the call.

On cross-examination, defendant admitted he used to sell Christina and her boyfriend drugs and that, at the time he was arrested for the shootings, they owed him money. The jury heard and read the transcript of a jailhouse phone call in which defendant said in a derogatory way that Christina's boyfriend was still paying his drug debt by paying money to defendant's mother.

Defendant's brother, Antonio Delgado, testified he knew Alicia because they had gone to school together. He also knew her family and particularly her husband, who had passed away. Mr. Delgado admitted he approached Christopher in the hallway of the courthouse during the preliminary hearing. He said he did so only to express his sympathies to the family for what they had gone through and to ask Christopher if he really felt that his brother had shot at them because he believed his brother was innocent. Mr. Delgado denied threatening Christopher about testifying. He said he gave Christopher a business card to be a professional. He said the detective then came up to him and told him not to talk to the witnesses. Mr. Delgado said he ran into Christopher a few days later at the gym and asked him again whether he was sure the shooter had been his brother. He again said he was not trying to make any threat to Christopher. Mr. Delgado knew his brother was a member of the Mariana gang and he did not approve it.

Christina also testified for the defense. She said that she and defendant had been good friends since they were both about 13 years old, and defendant would often come over and "hang out" with her and

her boyfriend. On November 3, 2012, defendant came over to visit with them around 6:00 or 7:00 p.m. He did not leave until around 11:00 p.m., except for two quick trips to the store with her boyfriend. Each time they were only gone a few minutes as they just walked down the block to the store. She remembered the evening because defendant got a phone call at some point which seemed to upset him, so the night was memorable. Defendant also called her after he was arrested and told her he had been arrested for a shooting. Christina said she had been putting money "on the books" for defendant while he was in jail because of their friendship. Christina was aware that defendant was a member of the Mariana gang with the moniker Tank.

The prosecution called Detective Guillen back to the stand for rebuttal. He testified he was fluent in Spanish and that the Spanish word *mochen* used by defendant in the phone call with his mother meant to "sever ties," to "get lost," to "get out of here." He had never heard it to mean or refer to "breaking bread."

(LD 8, at 3-13 (errors preserved).)

IV. PETITIONER'S CONTENTIONS

Petitioner asserts two grounds for habeas relief:

In Ground One, Petitioner asserts that the trial court erroneously admitted hearsay statements from Augustine introduced by Detective Guillen. He argues that the state appellate court's decision was objectively unreasonable because it erroneously concluded that any error was harmless. (Petition at 20-22.) In the Reply, Petitioner characterizes the admission of these statements as an evidentiary error that deprived him of his right to due process. (Reply at 4.)

In Ground Two, Petitioner contends that a jury instruction on the kill zone theory of attempted murder misled the jury to convict on the fourth count,

attempted murder of victim Christopher. He alleges that no fairminded jurist could disagree that the state appellate court's decision finding any instructional error harmless beyond a reasonable doubt was objectively unreasonable. (Petition at 23-25.)

V. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 2254(d) ("Section 2254(d)"), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> 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.

Pursuant to AEDPA, the "clearly established Federal law" that controls federal habeas review of state-court decisions consists of the holdings, as opposed to the dicta, of Supreme Court decisions "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

Although a state-court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. *See id.* at 391, 412-13. A state-court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts binding governing Supreme Court law or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam); *see also Woods v. Donald*, 135 S. Ct.

1372, 1377 (2015) ("[I]f the circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings in those cases."). When a state-court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." *See Williams*, 529 U.S. at 406.

State-court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review "only if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law, or based on 'an *unreasonable* determination of the facts.'" *Packer*, 537 U.S. at 11 (quoting Section 2254(d)). A state-court decision that correctly identifies the governing legal rule may be rejected if it unreasonably applies the rule to the facts of a particular case. *See Williams*, 529 U.S. at 406 (providing, as an example, that a decision may state the *Strickland* standard correctly but apply it unreasonably). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." *Woodford v. Viscotti*, 537 U.S. 19, 27 (2002) (per curiam). An objectively unreasonable application is "not merely wrong; even 'clear error' will not suffice." *White v. Woodall*, 572 U.S. 415, 419 (2014) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003)). Instead, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The same standard of objective unreasonableness applies where the petitioner is challenging the state court's factual findings pursuant to Section 2254(d)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding . . . .").

Presented with both grounds for relief in the Petition, the California Court of Appeal rejected Petitioner's claims in a reasoned decision on direct appeal. (LD 8.) The California Supreme Court denied discretionary review of the Court of Appeal's decision without comment or citation of authority. (LD 10.) For the purpose of AEDPA review, the California Court of Appeal's decision is the relevant state-court adjudication with respect to Petitioner's claims. *See Berghuis v. Thompkins*, 560 U.S 370, 380 (2010) (where a state supreme court denies discretionary review of a decision on direct appeal, the decision on direct appeal is the relevant state-court decision); *see also, e.g.*, *Lucero v. Holland*, 902 F.3d 979, 986 (9th Cir. 2018) (focusing on reasoned opinion of California Court of Appeal on direct appeal of criminal conviction where California Supreme Court summarily denied petition for review).

VI. DISCUSSION

A. Ground One

Petitioner argues that Detective Guillen's account of what Augustine told him in a telephone conversation about the incident was inadmissible hearsay, and that Petitioner was deprived of his right to confront Augustine. (Petition at 20-22.) He asserts that the Court of Appeal, which held that this was error pursuant to state law and *Crawford v. Washington*, 541 U.S. 36 (2004), unreasonably concluded that the error was harmless. (*Id.*) Respondent argues that this claim is a disguised attack on an evidentiary ruling of state law, which is not a cognizable ground for federal habeas relief. (Answer at 15-17.) Respondent asserts that no *Crawford* error occurred. (*Id.* at 17-19.) Finally, Respondent contends that any federal constitutional error was harmless. (*Id.* at 19-23.) In the Reply, Petitioner rebuts Respondent's arguments and further alleges that any evidentiary error in the admission of Augustine's statements violated his due process right to a fair trial. (Reply at 3-7.)

1. Background

The prosecution sought to admit evidence through the testimony of Detective Guillen, a gang expert, in support of a theory that the attempted murders were gang motivated. (1 CT 224-26.) The government sought to introduce Detective Guillen's testimony regarding his telephone conversation with Augustine. (*See* 1 CT 225.) Defense counsel objected on the basis that admitting the testimony would violate Petitioner's constitutional right to confront witnesses. (2 RT D-2.) The trial court overruled the objection. (2 RT D-2 to -3.)

At trial, Detective Guillen testified before the jury regarding the content of the call he had with Augustine, during which Augustine recalled a physical altercation with Mariana Maravilla gang member Bam Bam and another unnamed gang member that took place before the shooting. (4 RT 908-09, 945-47.) Detective Guillen attempted to meet with Augustine in person, but the detective was unable to maintain contact with him. (4 RT 909, 912-13, 948-50.)

Augustine did not testify at trial. Nevertheless, Detective Guillen was not the only person who testified on the topic of Augustine's encounter with Bam Bam—both Augustine's sister Alicia (*see* 2 RT 450-53, 485-88) and Petitioner himself (*see* 4 RT 1052-55) testified regarding the altercation.

Petitioner presented a confrontation claim regarding Augustine's statements on direct appeal. (LD 4, at 16-24.) The Court of Appeal rejected the claim, reasoning:

> Defendant contends it was error for the court to allow Detective Guillen to testify about his telephone conversation with Alicia's brother, Augustine, regarding the fight he had with Mariana gang members before the shooting. Defendant objected to the admission of such evidence as testimonial hearsay that violated his Sixth Amendment right to confront and cross-examine witnesses. The court ruled the evidence was permissible motive evidence that could be

admitted through the prosecution's gang expert without offending the Constitution.

While this appeal was pending, our Supreme Court decided *People v. Sanchez* (2016) 63 Cal. 4th 665 (*Sanchez*) which concluded that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, at p. 686, fn. omitted.)

In so holding, the court explained that "[o]ur decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and, as noted, testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise. Our conclusion restores the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Sanchez*, *supra*, 63 Cal. 4th at p. 685.)

Rather, "[w]hat an expert cannot do is relate as true case-specific facts asserted in hearsay statements, unless they are independently

proven by competent evidence or are covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal. 4th at p. 686.)

Under *Sanchez*, we find it was *Crawford* error to allow Detective Guillen to testify about his out-of-court conversation with Augustine in which Augustine told him that, before the shootings occurred, he had gotten into a fight and beaten up Bam Bam, a Mariana gang member. Respondent does not contend that Augustine was unavailable to testify. Defendant had no opportunity to cross-examine Augustine, and did not forfeit the confrontation clause objection. The evidence was case-specific and admitted for its truth as it formed part of the basis for Detective Guillen's opinion about the gang-related motive for the shootings.

The question then becomes whether the admission of such evidence was prejudicial. Crawford error is analyzed under the federal harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Geier* (2007) 41 Cal. 4th 555, 608.) Reviewing the whole record in accordance with this standard, we conclude the error was harmless beyond a reasonable doubt.

The record here demonstrates that even without Detective Guillen's testimony about Augustine's hearsay statement, the evidence of defendant's guilt and the gang-related nature of the crimes was substantial. First, the evidence of defendant's identity as the shooter was strong. Defendant was well known to Alicia and Christopher from the neighborhood and both expressed certainty about identifying defendant in photographic lineups. Further, the evidence was undisputed that defendant was a self-admitted member of the Mariana gang and friends with Bam Bam, another active member of the gang.

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Defendant's alibi defense was significantly impeached by the prosecution.

Further, before Detective Guillen testified, the jury heard from Alicia. She explained how her family had lived in the neighborhood for years and that the neighborhood was known to be territory claimed by the Mariana gang. She knew Bam Bam from the neighborhood and that he was a member of Mariana. She said that before the shootings occurred in November 2012, her family had never had any trouble with the gang. Then, sometime before the shootings, Alicia explained that her brother Jesus came over to her house, agitated and upset, and told her that their older brother Augustine had gotten him into "some shit with the guys from Mariana." He was sweating, pacing and started to cry as he explained they had fought with Mariana members at a nearby market.

Alicia said that at the time of the fight, Augustine was living with their mother, about a block from Alicia's home. A couple of days after Jesus told Alicia about the fight, Alicia saw tagging by the Mariana gang on her mother's front gate. Alicia had never seen any Mariana tagging on her mother's home before the fight. Augustine then came to live with her, and he was still living with her in November 2012 when the shootings occurred outside her home.

Thus, Detective Guillen's testimony about his conversation with Augustine was cumulative of Alicia's testimony. The admission of hearsay evidence that is merely cumulative of other direct evidence will ordinarily be deemed harmless. (*People v. Houston* (2005) 130 Cal. App. 4th 279, 296; see also *People v. Jenkins* (2000) 22 Cal. 4th 900, 1016.) Alicia's testimony was far more detailed and emotional about the fight and its impact on her family, including her younger

> brother Jesus's extreme distress, and the tagging at her mother's home. There was also strong circumstantial evidence that defendant was the shooter. In a jailhouse phone call, defendant said in Spanish "*the people from over there on Arizona*" should "*get lost*," and if they did not get lost, he would "*get back at them fools*." Also, defendant's brother twice tried to persuade Christopher not to testify, in the courthouse and later at the gym.
>
> Detective Guillen was on the witness stand for the better part of two days, and the testimony about his conversation with Augustine was relatively brief. The balance of Detective Guillen's testimony, including his expert gang opinions, rested on his extensive personal knowledge of defendant's activities and the activities of his gang and fellow gang members.
>
> Alicia's testimony was sufficient to show a gang motive and Detective Guillen's extensive testimony, based on his own personal knowledge and experience, about gang culture, defendant's gang involvement, and Mariana's activities as a known street gang was substantial evidence supporting the gang enhancement. It was not dependent on the cumulative testimony about Augustine's fight with Bam Bam; a fight which even defendant acknowledged had occurred a few months before the shootings but which he downplayed as insignificant and something the gang members laughed about.

(LD 8, at 13-17 (footnotes omitted) (errors preserved).) Presented with the claim in a petition for review (LD 9, at 7-9), the California Supreme Court summarily denied discretionary review. (LD 10.)

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2. Legal Standards

a. *Confrontation Clause Error*

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). The Confrontation Clause applies only to "'witnesses' against the accused—in other words, those who 'bear testimony.'" *Id.* at 51 (citation omitted). That is, "only *testimonial* statements are excluded by the Confrontation Clause." *Giles v. California*, 554 U.S. 353, 376 (2008); *accord Davis v. Washington*, 547 U.S. 813, 822 (2006) ("It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.").

b. *Evidentiary Error*

A state court's evidentiary errors are not cognizable on federal habeas review without a showing that the errors violated federal law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Rhoades v. Henry*, 638 F.3d 1027, 1034 n.5 (9th Cir. 2011) ("[E]videntiary rulings based on state law cannot form an independent basis for habeas relief."). "The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). "A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." *Boyde v. Brown*, 404 F.3d 1159, 1172 (9th Cir. 2005). "[A]dmission of evidence [is] an issue of state law," and "[s]imple errors of state law do not warrant federal habeas relief." *Holley*, 568 F.3d at 1101 (citing *Estelle*, 502 U.S. at 67). The United States Supreme Court "has not yet made a clear ruling that admission of

irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Id.*

3. Analysis

For the purpose of this analysis, the undersigned assumes without deciding that, as the Court of Appeal found, the admission of Augustine's statements constituted error under both *Sanchez* and *Crawford*. Given this assumption, the Court declines to address Respondent's arguments that there was no *Crawford* error, and that any state evidentiary error under *Sanchez* is not cognizable on federal habeas review. (Answer at 15-19.)

a. *The Court of Appeal's Decision of This Claim Was Not Objectively Unreasonable.*

Confrontation Clause violations are subject to a harmless-error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). On direct appeal, courts ask whether a constitutional error was "harmless beyond a reasonable doubt." *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). In contrast, in a collateral proceeding such as this one, the petitioner must establish that the error resulted in "actual prejudice"—in other words, relief is only appropriate if the court has "grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 2197-98 (citations and quotation marks omitted); *see also Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). When a state-court decision afforded AEDPA deference concludes under *Chapman* that an error was harmless beyond a reasonable doubt, "a federal court may not award habeas relief . . . unless the harmlessness determination itself was unreasonable." *Ayala*, 135 S. Ct. at 2199 (citation and quotation marks omitted). Thus, "if a fairminded jurist could agree" with the state court's *Chapman* analysis, "a petitioner necessarily cannot satisfy the

requirement of showing that he was actually prejudiced by the state court's error." *Sifuentes v. Brazelton*, 825 F.3d 506, 535 (9th Cir. 2016) (citation and quotation marks omitted); *see also Ayala*, 135 S. Ct. at 2199 ("[T]he *Brecht* test subsumes the limitations imposed by AEDPA.").

Federal habeas relief is not warranted because the Court of Appeal did not unreasonably apply *Chapman* in concluding that, "even without Detective Guillen's testimony about Augustine's hearsay statement, the evidence of defendant's guilt and the gang-related nature of the crimes was substantial." (LD 8, at 15.) The Court of Appeal referred at length to other evidence in the record establishing that Petitioner was the shooter and that the motive for the shooting was gang-related, as well as substantial other evidence undergirding Detective Guillen's expert opinion. (*See id.* at 15-17.)

Petitioner asserts that the confrontation error was not harmless because Detective Guillen "relied almost entirely on Augustine's statements to opine that Petitioner's motive and intent was for gang retaliation." (Petition at 21.) Petitioner also argues that Detective Guillen's testimony "took on a singularly persuasive weight" given that juries "generally attribute[] considerable credibility to law enforcement." (*Id.* at 22.) Petitioner posits that "a reasonable juror could have viewed evidence of Augustine's statement based entirely on Guillen's opinion testimony as a basis for motive, its finding [of] the enhancement [that the crime] was gang related, and as evidence of Petitioner's specific intent." (*Id.*) Petitioner's arguments lack merit.

The Court of Appeal did not unreasonably conclude that, even if Detective Guillen's testimony regarding his call with Augustine were excised, there was substantial evidence of Petitioner's guilt and the gang-related nature of the crimes. (LD 8, at 15.) As noted by the state appellate court (*id.* at 15-16), two victims positively identified Petitioner as the shooter (2 RT 342-45, 445-46, 453), Petitioner admitted he was a member of the Mariana Maravilla gang and associated with Bam

Bam (4 RT 1040, 1054-55), and the prosecution significantly impeached Petitioner's alibi defense (5 RT 1016-17, 1024-27, 1073-76, 1093-94).

Further, as Petitioner acknowledges (Petition at 22), and as the Court of Appeal reasoned (LD 8, at 16-17), Augustine's hearsay statements were not the only sources of evidence presented at trial about Augustine's altercation with Mariana Maravilla gang members before the shooting. (*See* 2 RT 450-53, 485-88; 4 RT 1052-55). Thus, the evidence supporting Detective Guillen's opinion easily could be derived from other admissible sources. Petitioner overstates the centrality of Augustine's statements in the formation of Detective Guillen's opinion, which instead largely derived from the detective's personal knowledge and experience, and his knowledge of Petitioner and his gang's activities. (*See, e.g.*, 3 RT 694-99 (providing overview of Mariana Maravilla gang); 3 RT 710-16 (discussing methods a gang member gains respect with a gang).)

In short, a fairminded jurist could agree with the state court that Detective Guillen's opinion "was not dependent on the cumulative testimony about Augustine's fight with Bam Bam." (LD 8, at 17.) *See, e.g.*, *Aguilar v. Sullivan*, No. SACV 19-0539-JPR, 2020 U.S. Dist. LEXIS 8536, at *24-26, 2020 WL 263645, at *9 (C.D. Cal. Jan. 17, 2020) (habeas relief not warranted despite *Sanchez* error where evidence in presented in testimonial hearsay otherwise was "established by compelling independent evidence"); *Meeks v. Gonzalez*, No. CV 10-9249 ODW (MRW), 2016 U.S. Dist. LEXIS 180631, at *12, 2016 WL 7645418, at *5 (C.D. Cal. Dec. 5, 2016) ("Cumulative or duplicative evidence fits well within the concept of harmless error."), *adopted*, 2017 U.S. Dist. LEXIS 370, 2017 WL 57763 (C.D. Cal. Jan. 3, 2017).

Because a fairminded jurist could agree with the state court's harmlessness determination, the Court necessarily must conclude that Petitioner does not show that the purported error had a substantial and injurious effect or influence on the jury's verdict. *See Sifuentes*, 825 F.3d at 535; *see also, e.g.*, *Padilla v. Terhune*,

309 F.3d 614, 622 (9th Cir. 2002) (concluding that "merely cumulative" evidence "could not have had a 'substantial and injurious effect or influence in determining the jury verdict'").[3]

b. *The Claim of Evidentiary Error Lacks Merit.*

For the first time in the Reply, Petitioner characterizes his claim for relief as a claim that the admission of Augustine's statements through Detective Guillen was an evidentiary error amounting to a violation of his right to due process. (Reply at 4.) This legal theory appears to be distinct from Petitioner's Confrontation Clause theory. In any event, it lacks merit.

The claim, presented for the first time in a reply brief, is not properly before the Court. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) ("A [reply] is not the proper pleading to raise additional grounds for relief."). Nor is it well developed. Though Petitioner argued before the California Supreme Court that he was deprived of his "due process and right to a fair trial" because "the state did not meet its burden of proving beyond a reasonable doubt the [confrontation] error did not contribute to the verdict," the claim presented to the high state court

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[3] Even if Petitioner could show the state court's decision was unreasonable, he does not adduce any convincing evidence or argument demonstrating that the introduction of Augustine's statements had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637 (citation and quotation marks omitted). Petitioner merely argues that the jury "*could have viewed* evidence of Augustine's statement" as a basis for its finding on motive, the gang enhancement, and specific intent. (Petition at 22 (emphasis added).) Petitioner also summarily asserts that, but for the introduction of Augustine's statements, he would not have testified about the fight, or his testimony "would not have had the impact it had without the improper gang opinion." (Reply at 6.) But mere speculation about what the jury possibly could have decided, or how Petitioner's testimony possibly could have been received by the jury had Augustine's statements not been admitted, is not enough to justify federal habeas relief. *See Morales v. Woodford*, 388 F.3d 1159, 1173 (9th Cir. 2003) ("Mere speculation is insufficient to grant the writ under *Brecht* . . . .").

was limited to the confrontation issue. (LD 9, at 7-9.) Accordingly, the Court doubts the evidentiary error claim asserted in the Reply properly was exhausted in state court. Regardless, the Court may address the claim because it clearly is not colorable. *Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005).

First, the admission of relevant evidence does not violate due process. *See Boyde v. Brown*, 404 F.3d 1159, 1172 (9th Cir. 2005) ("Admission of evidence violates due process 'only if there are *no* permissible inferences the jury may draw' from it." (citation and quotation marks omitted)). Setting aside the confrontation issue, admitting Augustine's statements to Detective Guillen regarding his altercation with Mariana Maravilla gang members could not have violated Petitioner's right to due process because it was relevant, at the least, to the intent element of attempted murder, and to the gang allegations.

Second, even assuming Petitioner could prove that admitting Augustine's statements violated Petitioner's right to due process, the claim would fail because Petitioner has not established actual prejudice for the same reasons discussed *supra*. *See Plascencia v. Alameida*, 467 F.3d 1190, 1203 (9th Cir. 2006) (applying *Brecht* analysis to claim of erroneous admission of evidence).

To the extent Petitioner asserts that he is entitled to federal habeas relief because the admission of Augustine's statements violated his right to due process independent of any confrontation issue, Petitioner's claim must fail.

* * *

Ground One does not merit federal habeas relief.

B. Ground Two

Petitioner claims that his conviction on the fourth count must be reversed because a jury instruction regarding the kill zone theory of attempted murder, CALJIC No. 8.66.1, misled the jury into finding Petitioner guilty of attempted premeditated murder as to Christopher. (Petition at 23-25.) He argues that the

Court of Appeal's decision rejecting the claim was objectively unreasonable. (*Id.* at 25.) Respondent argues that the claim is not cognizable on federal habeas review, that the claim is meritless under de novo review, and that any constitutional error is harmless. (Answer at 23-31.) Petitioner disagrees. (Reply at 7-10.)

1. Background

During closing argument, the prosecution presented a traditional theory of attempted murder by arguing that the evidence demonstrated that Petitioner intended to kill all four victims when he stopped at the driveway in front of Alicia's house. (5 RT 1223-25.) The prosecutor contended that Petitioner's intent was evident in how he separately targeted and fired at each victim. (5 RT 1224-25.) The prosecutor also presented, in the alternative, a kill zone theory. (5 RT 1221-22.) The prosecutor argued:

> [W]e know that the defendant went up to that driveway that day intending one of two things: one, to try and kill [Alicia] and anybody in her family who was there for what had happened with [Augustine]; or two, he saw a group of males there, . . . and without caring to look, check and see, . . . shot into the crowd and didn't care who he killed in that group. . . . [¶] . . . [W]hether you believe he shot at them because he thought one of the males in the group that night in the driveway was [Augustine], or he was going to take revenge on [Alicia] and her family because of what happened with [Augustine], under either of those theories he would be guilty of attempted murder.

(5 RT 1223.)

The jury instructions included CALJIC No. 8.66, which provides the elements of attempted murder, one of which is "a specific intent to kill unlawfully another human being." (2 CT 316; *accord* 5 RT 1305.) The jury instructions also

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included CALJIC No. 8.66.1, which presents the kill zone theory of attempted murder. (2 CT 317.) The instruction reads:

> A person who primarily intends to kill one person, may also concurrently intend to kill other persons within 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 a 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.

(*Id.*; *accord* 5 RT 1305-06.) Defense counsel did not object to this instruction. (4 RT 1111.)

Petitioner presented a claim of error as to the kill zone instruction on direct appeal. (LD 4, at 25-35.) The Court of Appeal rejected the claim, reasoning:

> Defendant contends the instruction misled the jury as to the intent element for attempted murder. He argues the instruction erroneously allowed the jury to convict defendant on count 4 for the attempted murder of Christopher who was not the intended target simply because he was in an undefined zone of risk, without finding, as the law requires, that he had a specific intent to kill Christopher. Defendant did not object to the instruction, nor did he ask for a clarifying or amplifying instruction to correct any alleged ambiguities.
>
> Respondent therefore argues the contention on appeal has been forfeited. Defendant had a duty to request a clarifying instruction if he felt the language of the instruction as proposed necessitated it. (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) Defendant urges us not to find

forfeiture because the erroneous instruction affected his substantial rights. (Pen. Code, § 1259; *People v. Smithey* (1999) 20 Cal. 4th 936, 976, fn. 7.)

The appropriate language for instructing a jury on the kill zone theory of attempted murder is currently under review by our Supreme Court in *People v. Canizales* (S221958; rev. granted Nov. 19, 2014). We need not resolve whether there is any error in the language of CALJIC No. 8.66.1, because the claimed error was harmless beyond a reasonable doubt.

The evidence demonstrated that the four victims were standing fairly close together in a group, talking to one another, on the driveway of Alicia's home. Christopher testified he saw defendant get out of the car, point his gun directly at them, and immediately start to fire. Christopher said he saw the flash of the gun before he dove in front of his car, trying to protect himself. He was plainly in the line of fire prior to taking cover. Alicia testified she heard at least four to five shots, enough shots to kill four individuals standing close together. The fact Christopher ultimately escaped injury when the three other victims were all hit does not establish that defendant lacked the requisite intent to kill Christopher. (*See, e.g.*, *People v. Chinchilla* (1997) 52 Cal. App. 4th 683, 690 ["the fact that the victim may have escaped death because of the shooter's poor marksmanship" does not establish "a less culpable state of mind"].) The evidence was undisputed that defendant shot multiple times at fairly close range at a group of four individuals standing near to one another, hitting three of them. The method of the shooting demonstrated an intent to kill everyone in the group.

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> Moreover, the prosecutor did not mislead the jury with her argument. She argued defendant intended to kill each victim, and also argued a kill zone theory in the alternative. In so doing, she did not misstate the law regarding the requisite intent. She explained that attempted murder requires the specific intent to kill. She also argued that with a kill zone theory of attempted murder, intent to kill may be established when defendant's conduct evinces an intent to kill everyone in a group in order to reach the intended target.
>
> Finally, the jury found true the allegations that each of the four attempted murders was committed willfully, deliberately and with premeditation. The jury, by their verdicts, therefore expressly found that defendant harbored the intent to kill each of the victims.

(LD 8, at 18-20.) Presented with the claim in a petition for review (LD 9, at 10-12), the California Supreme Court summarily denied discretionary review. (LD 10.)

2. Legal Standard

[I]nstructions that contain errors of state law may not form the basis for federal habeas relief." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993); *accord Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991) ("[T]he fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief."); *Menendez v. Terhune*, 422 F.3d 1012, 1029 (9th Cir. 2005) ("Any error in the state court's determination of whether state law allowed for an instruction . . . cannot form the basis for federal habeas relief."). On federal habeas review, the only cognizable issue is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)); *accord Waddington v. Sarausad*, 555 U.S. 179, 191 (2009); *see also Middleton v. McNeil*, 541 U.S. 433, 437 (2004) ("In a

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criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement.").

An instruction that does not render a petitioner's trial fundamentally unfair does not violate due process. *See Karis v. Calderon*, 283 F.3d 1117, 1132 (9th Cir. 2002); *see also Middleton*, 541 U.S. at 437 ("[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation."). The court must evaluate the alleged instructional error in light of the overall charge to the jury. *See Middleton*, 541 U.S. at 437 ("If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (citation and quotation marks omitted)). The relevant question is not whether a jury "*could have*" "applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," but rather "whether there is a reasonable likelihood it *did*." *Rhoades v. Henry*, 638 F.3d 1027, 1042 (9th Cir. 2011) (citation and quotation marks omitted); *see also Weeks v. Angelone*, 528 U.S. 225, 236 (2000) (declining to grant relief where the petitioner had shown only a "slight possibility" that the jury misapplied an instruction). Courts should not engage in a "technical parsing" of the challenged instruction, but instead should consider the instruction as the jury would, "with a commonsense understanding of the instructions in the light of all that has taken place at trial." *Id.* at 1042-43 (quoting *Johnson v. Texas*, 509 U.S. 350, 357 (1993)).

3. Analysis

As a preliminary note, the undersigned declines to address Respondent's argument that the kill zone instruction was proper. (Answer at 27-29.) After the state-court proceedings concluded, and after the parties completed briefing on the Petition, the California Supreme Court decided *People v. Canizales*, 7 Cal. 5th 591 (2019), which discusses the kill zone instruction and its application at length. The

Court of Appeal acknowledged that the instruction was under review in *Canizales* at the time of its decision. (LD 8, at 19.) Because the parties did not brief the issue with the benefit of the California Supreme Court's guidance, and because Petitioner's claim may be denied on other grounds, the undersigned declines to opine on the propriety of the instruction here.

a. *The Claim Is Not Cognizable on Federal Habeas Review.*

Petitioner's claim is predicated on an argument that the kill zone instruction misstates or mischaracterizes California law on the specific intent requirement of attempted murder. (*See* Petition at 23-24 (arguing that the instruction "failed to clarify that the defendant must kill or intend to kill *each* victim" to constitute attempted murder under California law); Reply at 8 (claiming that the instruction "misdescribes the intent-to-kill element").) The claim does not present a cognizable ground for federal habeas relief to the extent Petitioner seeks relief in Ground Two on the basis that the kill zone instruction derogates from state law. *Gilmore*, 508 U.S. at 342; *Estelle*, 502 U.S. at 71-72; *Menendez*, 422 F.3d at 1029; *see, e.g.*, *Summers v. Pfeiffer*, No. CV 16-3588-GW (JPR), 2017 U.S. Dist. LEXIS 187341, at *44-45, 2017 WL 5440544, at *15 (C.D. Cal. June 28, 2017) (rejecting claim predicated on a similar kill zone instruction, CALCRIM No. 600, because the claim of instructional error presented "entirely state-law issues premised on the state court's application of California law"), *adopted*, 2017 U.S. Dist. LEXIS 187328, 2017 WL 5310678 (C.D. Cal. Nov. 10, 2017).

b. *The Court of Appeal's Decision of This Claim Was Not Objectively Unreasonable.*

The Court applies the standard for analyzing state-court harmless-error determinations under *Chapman*, as set forth *supra* in Part VI.A.3.a. *See, e.g.*,

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Rademaker v. Paramo, 835 F.3d 1018, 1020 (9th Cir. 2016) (applying standard where state court applied *Chapman* to claim of instructional error).

Assuming Ground Two presents a claim implicating Petitioner's federal right to due process, and assuming that right was violated by administering an erroneous kill zone instruction, the Court concludes that the California Court of Appeal did not unreasonably apply *Chapman* in determining that any error was harmless beyond a reasonable doubt. Reviewing the trial record, the Court of Appeal reasoned that the method of the shooting demonstrated an intent to kill all four victims; that the prosecutor did not misstate the law in reviewing the kill zone instruction in closing argument; and that the jury found true allegations that the fourth count was committed willfully, deliberately, and with premeditation. (LD 8, at 19-20.)

Petitioner argues the state court's decision was objectively unreasonable because the kill zone instruction misled the jury on the intent element. (Petition at 24-25.) Petitioner takes umbrage with the Court of Appeal's conclusion that the method of the shooting demonstrated a specific intent to kill all four victims, pointing to evidence that Christopher successfully hid behind a car to avoid being shot. (*See id.* at 24; Reply at 9-10.) He argues that the only way the jury could have convicted on the fourth count in light of this evidence was through the erroneous application of the kill zone instruction. (Reply at 10.)

But Petitioner fails to show that the Court of Appeal unreasonably applied *Chapman*. The Court of Appeal, addressing Petitioner's argument, opined that even though Christopher ultimately escaped injury by taking cover, "[h]e was plainly in the line of fire prior to taking cover." (LD 8, at 19.) Despite Petitioner's arguments to the contrary (Reply at 9-10), the evidence presented at trial is consistent with this conclusion. Petitioner fired multiple shots from a short distance at the group of four individuals, including Christopher. (*See, e.g.*, 2 RT 334-35, 373-76 (Christopher testifying that he saw the shooter raise his arm, saw a flash

before he dove in front of his car, and heard the shooter shoot four to five times from less than 25 feet away); 2 RT 427-28, 431 (Alicia testifying that the shooter pointed a gun at the group, and that she heard more than five shots).) Evidence presented at trial showed that Petitioner had a gang-related motive for killing the group, including Christopher. (*See, e.g.*, 2 RT 450-53, 485-88; 3 RT 710-12; 4 RT 1040, 1052-55.) The undersigned cannot conclude from the record that it was objectively unreasonable for the Court of Appeal to determine that the circumstances of the shooting demonstrated an intent to kill everyone in the group. (LD 8, at 19.) *See, e.g.*, *Dorado v. Muniz*, No. CV 15-2251-BRO (KES), 2016 U.S. Dist. LEXIS 125893, at *28-30, 2016 WL 4951120, at *11 (C.D. Cal. Aug. 8, 2016) (concluding, despite uncertainty as to propriety of CALJIC No. 8.66.1 instruction while *Canizales* was under review, that any error caused by the instruction was harmless where "[t]he evidence showed that Petitioner intended to kill each of the three [victims]"), *adopted*, 2016 U.S. Dist. LEXIS 125875, 2016 WL 4967642 (C.D. Cal. Sept. 14, 2016); *Barajas v. Lewis*, No. 5:10-CV-02974-LHK, 2012 U.S. Dist. LEXIS 106848, at *22, 2012 WL 3126822, at *7 (N.D. Cal. July 30, 2012) (applying *Brecht* to reject claim of kill zone instructional error where evidence showed petitioner fired shots at close range, observing that "[i]n California, the act of firing toward a victim at close range in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill." (citing *People v. Smith*, 37 Cal. 4th 733, 741 (2005))).

Petitioner also takes issue with the other two lines of reasoning the Court of Appeal gave for finding any instructional error harmless (*see* Reply at 9), but he does not convincingly explain how the state court unreasonably applied *Chapman*. The Court of Appeal did not unreasonably conclude that the jury was not misled on the intent element, as Petitioner asserts, given that the prosecutor correctly stated in her closing argument that the crime requires a specific intent to kill with respect to each victim (5 RT 1221-22), and given that the jury returned a verdict confirming

its finding that Petitioner committed the attempted murder "willfully, deliberately and with premeditation" as to Christopher specifically (2 CT 343). *See, e.g.*, *Phipps v. Diaz*, No. CV 13-855-PA (OP), 2014 U.S. Dist. LEXIS 87364, at *31, 2014 WL 2890137, at *11 (C.D. Cal. May 6, 2014) (jury finding that petitioner committed attempted murder "willfully, and with deliberation and premeditation," meant that jury found petitioner "intended to kill" victim and "weighed the consequences of that choice" beforehand, which left "no doubt that the jury actually found that Petitioner acted with the intent to kill [the nontarget victim] in addition to [the target victim]"), *adopted*, 2014 U.S. Dist. LEXIS 87296, 2014 WL 2890137 (C.D. Cal. June 20, 2014); *Barajas*, 2012 U.S. Dist. LEXIS 106848, at *20-21, 2012 WL 3126822, at *7 ("[T]he jury's separate finding of willfulness makes it unlikely that the 'kill-zone' instruction had a 'substantial or injurious' influence in determining the jury's guilty verdict on the charge of attempted murder.").

Accordingly, the Court is unable to conclude that the Court of Appeal's harmlessness determination "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Davis*, 135 S. Ct. at 2199 (quoting *Richter*, 562 U.S. at 103). It follows that Petitioner has not shown that the alleged instructional error had a substantial and injurious effect or influence on the jury's verdict. *See Sifuentes*, 825 F.3d at 535.

* * *

Ground Two does not merit federal habeas relief.

VII. REQUEST FOR DISCOVERY AND EVIDENTIARY HEARING

In the Petition, Petitioner requested discovery and an evidentiary hearing "on any unresolved factual disputes that are critical to the resolution of the case." (Petition at 25.)

"Habeas is an important safeguard whose goal is to correct real and obvious wrongs. It was never meant to be a fishing expedition for habeas petitioners to explore their case in search of its existence." *Rich v. Calderon*, 187 F.3d 1064, 1067 (9th Cir. 1999) (citation and quotation marks omitted). For claims subject to the AEDPA standard of review, this Court "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). "[W]hen the state-court record precludes habeas relief under the limitations of § 2254(d), a district court is not required to hold an evidentiary hearing." *Id.* at 183 (citation and quotation marks omitted). Further, an evidentiary hearing is not warranted where "the record refutes the applicant's factual allegations or otherwise precludes habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). "It is axiomatic that when issues can be resolved by reference to the state court record, an evidentiary hearing becomes nothing more than a futile exercise." *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998).

As discussed, Petitioner's claims are precluded by Section 2254(d) or resolvable solely by reference to the state-court record. Therefore, his request for an evidentiary hearing should be denied.

Because Petitioner is not entitled to an evidentiary hearing, obtaining discovery would be futile. *See Kemp v. Ryan*, 638 F.3d 1245, 1260 (9th Cir. 2011). Petitioner's request for discovery also should be denied.

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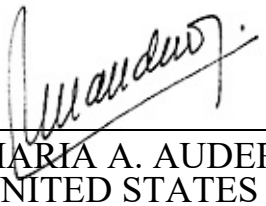
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VIII. RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation, and (2) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: May 4, 2020



MARIA A. AUDERO
UNITED STATES MAGISTRATE JUDGE

Court of Appeal, Second Appellate District, Division Eight - No. B260431

S238620

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

FERNANDO DELGADO, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED

JAN 18 2017

Jorge Navarrete Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

CV-18-02699-R-MAA
Lodged Doc. No. 8_Opinion

Filed 10/28/16

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

COURT OF APPEAL – SECOND DIST.
FILED
Oct 28, 2016
JOSEPH A. LANE, Clerk
Sina Lui Deputy Clerk

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO DELGADO, Defendant and Appellant.	B260431 (Los Angeles County Super. Ct. No. BA406196)

APPEAL from the judgment of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

A jury found defendant and appellant Fernando Delgado guilty of four counts of premeditated, attempted murder. The jury also found true special allegations regarding firearm use, infliction of great bodily injury, and that the attempted murders were committed for the benefit of, at the direction of, or in association with a criminal street gang. Defendant was sentenced to a state prison term of 100 years to life, plus 40 years.

Defendant raises two contentions on appeal. He contends the trial court committed prejudicial error in violation of his Sixth Amendment rights by allowing the prosecution's gang expert to base his opinion in part on testimonial hearsay. He also contends his conviction on count 4 must be reversed because the court prejudicially instructed the jury with CALJIC No. 8.66.1 regarding the kill zone theory of liability.

We conclude any errors in the admission of the testimonial hearsay and instructing the jury with CALJIC No. 8.66.1 were harmless beyond a reasonable doubt. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by information with four counts of premeditated attempted murder (Pen. Code, § 187, subd. (a), § 664; count 1—Andrew G., count 2—Alicia B., count 3—Larry G., count 4—Christopher R.).[1] As to counts 1, 2 and 3, it was alleged that defendant caused great bodily injury to the victims. (§ 12022.53, subd. (d).) As to all counts, it was further alleged that defendant personally used and discharged a firearm and committed the offenses for the benefit of, at the direction of, or in

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[1] We identify the parties by their first names only to protect their privacy.

association with a criminal street gang. (§ 12022.53, subds. (b)&(c), § 186.22.)

The charges arose from a shooting on November 3, 2012. The trial testimony revealed the following facts material to our discussion.

In November 2012, Alicia lived in a duplex on South Arizona Avenue in east Los Angeles with her boyfriend, Larry, her four children, including her eldest son, Christopher, and her brother Augustine. Their home was located in an area claimed by a gang known as Mariana Maravilla. Alicia had lived in the neighborhood her whole life, and knew some people in the area were Mariana gang members, including someone she went to school with called "Bam Bam." However, none of her children were involved with gangs. Her boyfriend was a member of a gang known as the Santa Fe Locos, but he was no longer "active" in the gang. Larry did not hang out or talk to other members of his former gang who were from a different neighborhood.

On November 3, Alicia and Larry came home from the store and found a Hispanic male in their driveway, attempting to peer into their home. Larry told the man to leave. The man pointed a gun at them and told them to "[g]et back." Alicia recognized the man was defendant, but did not immediately tell Larry she knew who it was. Defendant left and Alicia went to her neighbor's home (the other home in the duplex) to borrow a phone to call 911.

While Alicia waited for the police, Larry and her son Christopher left in Larry's car to drive around the neighborhood to see if they could find the man. When the police arrived, Alicia told them the man with the gun was a heavyset Hispanic male, with glasses, wearing a dark shirt with the word "Cali" printed

on it, and a black baseball cap. Larry and Christopher returned about 15 to 20 minutes later without having found anyone who looked like the man with the gun. The police took Alicia's report and left.

Christopher then left in his car to pick up his friend Andrew, who lived a couple of blocks away, because they planned to go to a friend's party that evening. Christopher and Andrew returned a few minutes later and Christopher parked his car in front of the house. Alicia and Larry were still standing outside as Christopher and Andrew got out of the car. Alicia and Larry were close to the house, but still on the driveway. Christopher was in front of his car, and Andrew was standing near him, but more on the passenger side of the car. As they stood talking, a car drove by.

Andrew told Christopher the people in the car were looking at them as they drove by. The car then reappeared and pulled in behind Christopher's car. The front passenger door opened. Defendant stepped out and immediately started firing his gun. Christopher saw the muzzle flash and dove to the ground in front of his car to try to avoid being shot. Alicia heard "more than five shots" and saw Larry fall to the ground, bleeding. Alicia did not realize she had also been shot. She started to run to her neighbor's house to call the police to come back, when Christopher and Andrew told her she had blood on her back. She noticed that Andrew was bleeding as well. Alicia yelled for her neighbor to call the police.

The police and paramedics arrived. Alicia recognized one of the deputies as the same one who had responded to her earlier 911 call. She told the deputy that the shooter was same man who had been at their house earlier and pointed a gun at them.

Larry, Andrew and Alicia were transported to the hospital to be treated for gunshot wounds.

Alicia later identified the person who shot them as defendant, whom she knew as "Tank." She knew defendant from the neighborhood and because his brother had been a friend of her husband's before he passed away. She had no doubt that defendant was the shooter. She said she had not told anyone earlier that she knew who the shooter was because she was scared. Christopher also recognized the shooter as defendant. He recalled that defendant had "hit [him] up" at school one time, meaning that he had asked him if he was in a gang. On the night of the shooting, he did not tell the police he recognized defendant from the neighborhood because he was scared. Christopher knew that bad things could happen if he "snitched" on a gang member. He described the shooter as having been dressed in all black, with a mustache and glasses. When Christopher later identified defendant in a photographic lineup, he was "very certain" he was the shooter.

Alicia testified that sometime before November 3, she had been at home when her younger brother Jesus came over. "He was pumped up, kind of like sweating, like – like he had just went through something." Jesus appeared to be worried and was "pacing" back and forth in her house. He told Alicia that Augustine, their older brother, had "got him into some shit with the guys from Mariana." He said they got into a fight with members of the Mariana gang at Mina's Market, which was just a couple of blocks from her home. Jesus said that because Augustine talks loud, the gang members thought he was disrespecting them. During the conversation, Jesus started to cry and asked her what he should do.

At the time of the fight, Augustine was living with their mother, about a block from Alicia's home. A couple of days after Jesus told Alicia about the fight, Alicia saw tagging by the Mariana gang (two M's) on her mother's front gate. Alicia had never seen any kind of tagging on her mother's home before. Her brother Augustine then came to live with her, and was still living with her in November 2012.

Deputy Rubin Rosas testified that he responded twice to the residence on South Arizona Avenue the night of the shooting. The first time he responded was just after 7:30 p.m. Alicia told him that she and her boyfriend had come home from the store and found a man crouching in their driveway and peering into their house. When they confronted the man, he pulled a handgun from the waistband of his pants and told them to "get the f--k back," and then he walked away. Alicia told him that her boyfriend and son had gone looking for the man. Deputy Rosas obtained a suspect description from Alicia, and he and his partner patrolled the neighborhood to see if they could find anyone matching that description.

Deputy Rosas returned to Alicia's home at 8:27 p.m. and found her crying "hysterically" on the driveway and two other males nearby bleeding from apparent gunshot wounds. Alicia told Deputy Rosas that the shooter was the same man with the gun who had been at their home less than an hour before.

Deputy Rosas also spoke to Christopher, who was not injured during the shooting. Christopher reported that a newer model Toyota Camry drove by their house slowly while they were all standing outside on the driveway. Christopher said it then pulled up behind his car and a man got out of the front passenger seat and immediately began shooting. Several shots were fired in

his direction, so he dove for cover in front of his car. After the shooting stopped and he saw the car pull away, he saw that his mother, Larry and his friend Andrew were all bleeding. Christopher's description of the shooter was substantially the same as his mother's from earlier in the evening.

The jury heard and read a transcript of a jailhouse telephone call between defendant, his mother, and an unidentified female in which defendant said in Spanish "*the people from over there on Arizona*" should "*get lost.*" He said if they did not get lost, he would "*get back at them fools.*"

Detective Antonio Guillen, a 22-year veteran of the Los Angeles County Sheriff's Department and a gang detective, testified as the prosecution's gang expert. Part of Detective Guillen's assignment as a gang detective in east Los Angeles is monitoring the Mariana Maravilla gang. Detective Guillen was also the lead detective investigating the shootings on November 3, 2012.

Detective Guillen explained his background, training and investigation of numerous gang-related crimes. He explained gang culture generally and identified the common tagging and names associated with the Mariana gang, including the letters "MM" and "MMV." Detective Guillen said there were 140 documented members of the gang, but that several of the members had claimed the actual number was closer to 250. He said the gang's primary activities were vandalism, narcotics sales, thefts, shootings, extortion and murder. He attested to two predicate offenses committed by Mariana gang members in which he was the investigating detective.

Detective Guillen was familiar with defendant as a known Mariana gang member with the moniker Tank. Detective Guillen

considered him to be one of the active members, along with individuals known as Bam Bam, "Husky," and "Boy," who were all members of the same clique. Detective Guillen authenticated various photographs depicting defendant's gang-related tattoos, including the words "Mariana Maravilla," the letters "MM" and the letters "MMV."

After Detective Guillen initially arrested defendant, he heard a phone call made by defendant to a family member. Detective Guillen had not specifically told defendant he had been arrested for the shootings at Alicia's home on Arizona Avenue, but during the phone call, defendant said he had been arrested and mentioned the "people on Arizona."

During the course of the investigation, Detective Guillen learned that, a few months before the shooting, there had been a fight between Alicia's brother Augustine and members of the Mariana gang, including Bam Bam. He spoke with Augustine over the telephone and Augustine confirmed there had been a fight and he had beaten up Bam Bam. Detective Guillen tried to arrange to meet with Augustine, but was unable to do so. He could not locate Augustine, despite multiple efforts. Detective Guillen opined that generally there would be a response to a gang member getting beaten up in a fight, particularly a member with status like Bam Bam. It is important to the gang to respond in order to maintain respect.

During the investigation, Detective Guillen also learned that the "talk" in the neighborhood was that "Mariana" was responsible for the shootings. Detective Guillen was unable to convince Andrew, one of the victims, to comply with the subpoena to come to court because Andrew and his family were afraid of retaliation if he testified.

Detective Guillen said Alicia identified defendant in a photographic lineup and was "scared" and "crying" when she did so. She did not mention, at that time, that she knew defendant's name. When he later learned that Alicia knew the shooter was someone from her neighborhood known as Tank, he asked her why she had withheld that information. Alicia told him she was scared of retaliation by the gang against her and her family but she changed her mind and decided to speak up because the father of her children had been gunned down and no one was ever prosecuted because no witness would come forward.

Detective Guillen answered a hypothetical based on the facts of the shootings and stated his opinion that the shootings were carried out in a fashion that demonstrated they were were committed in association with and for the benefit of a gang.

Detective Guillen escorted Alicia and her family for court appearances to make them feel more comfortable. He explained that at the preliminary hearing, he saw defendant's brother, Antonio Delgado, approach Christopher, Alicia and Larry in the courthouse hallway. Detective Guillen walked up to the group and told Mr. Delgado he had to leave. Detective Guillen warned Mr. Delgado not to speak to witnesses. Mr. Delgado said he was just saying hello because he knew the family. After Mr. Delgado walked away, Christopher told Detective Guillen that Mr. Delgado had given him a business card and told him that if he did not say anything, Mr. Delgado would buy him a car.

Defendant testified in his own defense. Defendant said he grew up in the Maravilla neighborhood of east Los Angeles and was "jumped in" to the Mariana Maravilla gang when he was 16 or 17 years old. Defendant admitted he had several prior convictions, including possession of narcotics with a firearm and

two firearm possession charges. He pled guilty to those crimes and served his time because he was guilty of those offenses, but he denied shooting at Alicia and her family.

Defendant knew Alicia and her brother Augustine from the neighborhood. Alicia's mother's house was located only about a block away from his mother's home. Defendant also knew Alicia's husband before he passed away. He never had any trouble with the family and denied ever threatening them.

Defendant was aware that Augustine got into a fight with two Mariana gang members, Bam Bam and "Mousy," sometime around July 2012. They apparently got "whipped" by Augustine and they all sort of "laughed about it." Defendant said he teased and "ribbed" them about it because Augustine was not a gang member or someone important. He was a friend they all knew from the neighborhood. It did not make him want to get revenge on Augustine. He said that if a Mariana gang member felt they had been disrespected, then the member would take care of the situation himself, and would not wait months to do it. If a member was disrespected and did not handle it, the gang would see him as a coward. Defendant said he would not "ever take up" another Mariana member's fight because it is not his business. He denied that gang members "back up" their fellow gang members in order to maintain respect for the gang as a whole. Defendant said he was not aware of anyone in the gang that was worried or bothered by the fight. By November, it was a "dead issue." Defendant also said the gang would never retaliate against the wife or sister of someone who had disrespected them.

Defendant said he did not "hit up" Christopher at school or anywhere. He also never asked his brother to talk to or bribe any witness.

Defendant testified that on November 3, 2012, he went to a barbeque at his friend Manny's house. Manny's moniker is Bam Bam. Defendant said he left Manny's house around 7:00 p.m. to visit his friend Christina Ledesma and her boyfriend. Christina lived about three or four miles from where the shooting occurred. Defendant stayed at Christina's house until around 10:00 p.m., and only left briefly a couple of times with Christina's boyfriend to buy beer at the liquor store down the block. While he was at Christina's, he received a couple of phone calls telling him about the shooting in his neighborhood.

Defendant acknowledged the recording of the phone conversation between him and his mother while he was in jail. He denied the translation of the Spanish portion of the recording, including the word *mochen*, meant that he told his mother the people living on Arizona should "*get lost*" or he would get back at "*them fools*." He said the Spanish phrase he used was slang for "break bread." He said the Spanish translator was "way off." He was telling his mother he wanted her to get people to contribute money to help pay for an attorney for him and he had a lot of friends that lived on Arizona Avenue and that is what he was referring to in the call.

On cross-examination, defendant admitted he used to sell Christina and her boyfriend drugs and that, at the time he was arrested for the shootings, they owed him money. The jury heard and read the transcript of a jailhouse phone call in which defendant said in a derogatory way that Christina's boyfriend was still paying his drug debt by paying money to defendant's mother.

Defendant's brother, Antonio Delgado, testified he knew Alicia because they had gone to school together. He also knew

her family and particularly her husband, who had passed away. Mr. Delgado admitted he approached Christopher in the hallway of the courthouse during the preliminary hearing. He said he did so only to express his sympathies to the family for what they had gone through and to ask Christopher if he really felt that his brother had shot at them because he believed his brother was innocent. Mr. Delgado denied threatening Christopher about testifying. He said he gave Christopher a business card to be a professional. He said the detective then came up to him and told him not to talk to the witnesses. Mr. Delgado said he ran into Christopher a few days later at the gym and asked him again whether he was sure the shooter had been his brother. He again said he was not trying to make any threat to Christopher. Mr. Delgado knew his brother was a member of the Mariana gang and he did not approve it.

Christina also testified for the defense. She said that she and defendant had been good friends since they were both about 13 years old, and defendant would often come over and "hang out" with her and her boyfriend. On November 3, 2012, defendant came over to visit with them around 6:00 or 7:00 p.m. He did not leave until around 11:00 p.m., except for two quick trips to the store with her boyfriend. Each time they were only gone a few minutes as they just walked down the block to the store. She remembered the evening because defendant got a phone call at some point which seemed to upset him, so the night was memorable. Defendant also called her after he was arrested and told her he had been arrested for a shooting. Christina said she had been putting money "on the books" for defendant while he was in jail because of their friendship. Christina was aware

that defendant was a member of the Mariana gang with the moniker Tank.

The prosecution called Detective Guillen back to the stand for rebuttal. He testified he was fluent in Spanish and that the Spanish word *mochen* used by defendant in the phone call with his mother meant to "sever ties," to "get lost," to "get out of here." He had never heard it to mean or refer to "breaking bread."

The jury found defendant guilty on all four counts, as charged, and found the special allegations true. The court sentenced defendant to a state prison term of 100 years to life, plus 40 years.

This appeal followed.

DISCUSSION

1. The Admission of Augustine's Statement to Detective Guillen

Defendant contends it was error for the court to allow Detective Guillen to testify about his telephone conversation with Alicia's brother, Augustine, regarding the fight he had with Mariana gang members before the shooting. Defendant objected to the admission of such evidence as testimonial hearsay that violated his Sixth Amendment right to confront and cross-examine witnesses. The court ruled the evidence was permissible motive evidence that could be admitted through the prosecution's gang expert without offending the Constitution.

While this appeal was pending, our Supreme Court decided *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*)[2] which concluded that "[w]hen any expert relates to the jury case-specific

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[2] Defendant submitted a supplemental letter brief regarding *Sanchez*.

out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, at p. 686, fn. omitted.)

In so holding, the court explained that "[o]ur decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and, as noted, testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise. Our conclusion restores the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Sanchez, supra*, 63 Cal.4th at p. 685.)

Rather, "[w]hat an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez, supra*, 63 Cal.4th at p. 686.)

Under *Sanchez*, we find it was *Crawford*[3] error to allow Detective Guillen to testify about his out-of-court conversation with Augustine in which Augustine told him that, before the shootings occurred, he had gotten into a fight and beaten up Bam Bam, a Mariana gang member. Respondent does not contend that Augustine was unavailable to testify. Defendant had no opportunity to cross-examine Augustine, and did not forfeit the confrontation clause objection. The evidence was case-specific and admitted for its truth as it formed part of the basis for Detective Guillen's opinion about the gang-related motive for the shootings.

The question then becomes whether the admission of such evidence was prejudicial. *Crawford* error is analyzed under the federal harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Geier* (2007) 41 Cal.4th 555, 608.) Reviewing the whole record in accordance with this standard, we conclude the error was harmless beyond a reasonable doubt.

The record here demonstrates that even without Detective Guillen's testimony about Augustine's hearsay statement, the evidence of defendant's guilt and the gang-related nature of the crimes was substantial. First, the evidence of defendant's identity as the shooter was strong. Defendant was well known to Alicia and Christopher from the neighborhood and both expressed certainty about identifying defendant in photographic lineups. Further, the evidence was undisputed that defendant was a self-admitted member of the Mariana gang and friends

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3 *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

with Bam Bam, another active member of the gang. Defendant's alibi defense was significantly impeached by the prosecution.

Further, before Detective Guillen testified, the jury heard from Alicia. She explained how her family had lived in the neighborhood for years and that the neighborhood was known to be territory claimed by the Mariana gang. She knew Bam Bam from the neighborhood and that he was a member of Mariana. She said that before the shootings occurred in November 2012, her family had never had any trouble with the gang. Then, sometime before the shootings, Alicia explained that her brother Jesus came over to her house, agitated and upset, and told her that their older brother Augustine had gotten him into "some shit with the guys from Mariana." He was sweating, pacing and started to cry as he explained they had fought with Mariana members at a nearby market.

Alicia said that at the time of the fight, Augustine was living with their mother, about a block from Alicia's home. A couple of days after Jesus told Alicia about the fight, Alicia saw tagging by the Mariana gang on her mother's front gate. Alicia had never seen any Mariana tagging on her mother's home before the fight. Augustine then came to live with her, and he was still living with her in November 2012 when the shootings occurred outside her home.

Thus, Detective Guillen's testimony about his conversation with Augustine was cumulative of Alicia's testimony. The admission of hearsay evidence that is merely cumulative of other direct evidence will ordinarily be deemed harmless. (*People v. Houston* (2005) 130 Cal.App.4th 279, 296; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1016.) Alicia's testimony was far more detailed and emotional about the fight and its impact on

her family, including her younger brother Jesus's extreme distress, and the tagging at her mother's home. There was also strong circumstantial evidence that defendant was the shooter. In a jailhouse phone call, defendant said in Spanish "*the people from over there on Arizona*" should "*get lost*," and if they did not get lost, he would "*get back at them fools*." Also, defendant's brother twice tried to persuade Christopher not to testify, in the courthouse and later at the gym.

Detective Guillen was on the witness stand for the better part of two days, and the testimony about his conversation with Augustine was relatively brief. The balance of Detective Guillen's testimony, including his expert gang opinions, rested on his extensive personal knowledge of defendant's activities and the activities of his gang and fellow gang members.

Alicia's testimony was sufficient to show a gang motive and Detective Guillen's extensive testimony, based on his own personal knowledge and experience, about gang culture, defendant's gang involvement, and Mariana's activities as a known street gang was substantial evidence supporting the gang enhancement. It was not dependent on the cumulative testimony about Augustine's fight with Bam Bam; a fight which even defendant acknowledged had occurred a few months before the shootings but which he downplayed as insignificant and something the gang members laughed about.

2. The Kill Zone Instruction

Defendant argues the court erred by giving CALJIC No. 8.66.1 regarding the prosecution's kill zone theory of liability with respect to the attempted murder of Christopher, the only victim who was not wounded (count 4).

We review claims of instructional error de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

The jury was instructed with CALJIC No. 8.66.1 as follows: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within 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 a 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."

Defendant contends the instruction misled the jury as to the intent element for attempted murder. He argues the instruction erroneously allowed the jury to convict defendant on count 4 for the attempted murder of Christopher who was not the intended target simply because he was in an undefined zone of risk, without finding, as the law requires, that he had a specific intent to kill Christopher. Defendant did not object to the instruction, nor did he ask for a clarifying or amplifying instruction to correct any alleged ambiguities.

Respondent therefore argues the contention on appeal has been forfeited. Defendant had a duty to request a clarifying instruction if he felt the language of the instruction as proposed necessitated it. (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) Defendant urges us not to find forfeiture because the erroneous instruction affected his substantial rights. (Pen. Code, § 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)

The appropriate language for instructing a jury on the kill zone theory of attempted murder is currently under review by our Supreme Court in *People v. Canizales* (S221958; rev. granted Nov. 19, 2014). We need not resolve whether there is any error in the language of CALJIC No. 8.66.1, because the claimed error was harmless beyond a reasonable doubt.

The evidence demonstrated that the four victims were standing fairly close together in a group, talking to one another, on the driveway of Alicia's home. Christopher testified he saw defendant get out of the car, point his gun directly at them, and immediately start to fire. Christopher said he saw the flash of the gun before he dove in front of his car, trying to protect himself. He was plainly in the line of fire prior to taking cover. Alicia testified she heard at least four to five shots, enough shots to kill four individuals standing close together. The fact Christopher ultimately escaped injury when the three other victims were all hit does not establish that defendant lacked the requisite intent to kill Christopher. (See, e.g., *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690 ["the fact that the victim may have escaped death because of the shooter's poor marksmanship" does not establish "a less culpable state of mind"].) The evidence was undisputed that defendant shot multiple times at fairly close range at a group of four individuals standing near to one another, hitting three of them. The method of the shooting demonstrated an intent to kill everyone in the group.

Moreover, the prosecutor did not mislead the jury with her argument. She argued defendant intended to kill each victim, and also argued a kill zone theory in the alternative. In so doing, she did not misstate the law regarding the requisite intent. She

explained that attempted murder requires the specific intent to kill. She also argued that with a kill zone theory of attempted murder, intent to kill may be established when defendant's conduct evinces an intent to kill everyone in a group in order to reach the intended target.

Finally, the jury found true the allegations that each of the four attempted murders was committed willfully, deliberately and with premeditation. The jury, by their verdicts, therefore expressly found that defendant harbored the intent to kill each of the victims.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.