No. _____

In The
Supreme Court of the United States

CHRISTOPHER LUNDIN,

Petitioner,

v.

S. KERNARD (WARDEN),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM E. GILG
Attorney at Law
305 San Bruno Avenue West
San Bruno, CA 94066
(650) 871-8647
(650) 873-3168 (fax)
williamgilg@msn.com

Attorney for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED REGARDING GROUNDS #2 & #4 OF THE FEDERAL PETITION

1. Whether the admission of graffiti evidence, that ostensibly named Petitioner as the perpetrator of the charged crimes, including expert testimony about said graffiti which included the expert's opinion that Petitioner was indeed the perpetrator of said charged crimes, violated the Confrontation Clause and the Due Process Clause of the United States Constitution; and

2. Whether trial counsel rendered ineffective assistance under the Sixth Amendment to the United States Constitution by failing to object to the admission of this graffiti evidence and related expert testimony.

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PRAYER FOR RELIEF

Petitioner requests an order reversing the Ninth Circuit Court of Appeals' judgment affirming the denial of Petitioner's Petition for a Writ of Habeas Corpus by the United States District Court for the Central District of California (Western Division—Los Angeles) which challenged his state court criminal conviction. (See *Miller-El v. Cockrell* (2003), 537 U.S. 322, cert. den., 155 L.Ed.2d 194 [providing similar relief].)

OPINIONS BELOW

On July 17, 2014, the Ninth Circuit Court of Appeals entered judgment affirming the denial of Petitioner's Petition for a Writ of Habeas Corpus by the United States District Court for the Central District of California (Western Division—Los Angeles) which challenged his state court criminal conviction. (App. A.)

On July 25, 2011, the United States District Court for the Central District of California entered judgment denying Petitioner's Petition for a Writ of Habeas Corpus on the merits. (App. B, C.)

On July 30, 2008, the California Supreme Court denied Petitioner's state Petition for a Writ of Habeas Corpus. (App. H.)

On April 13, 2007, the California Court of Appeal denied Petitioner's state Petition for a Writ of Habeas Corpus. (App. G.)

On October 20, 2006, the Los Angeles County Superior Court denied Petitioner's state Petition for a Writ of Habeas Corpus. (App. F.)

On October 27, 2004 in an unpublished opinion of the California Court of Appeal, Second Appellate District, the appellate court affirmed Petitioner's Conviction. (App. E.)

GROUNDS FOR JURISDICTION

The Ninth Circuit Court of Appeals entered judgment affirming the denial of Petitioner's Petition for a Writ of Habeas Corpus by the United States District Court for the Central District of California (Western Division—Los Angeles) which challenged his state court criminal conviction on July 17, 2014. (App. A.) This Petition for Writ of Certiorari is filed within 90 days of the entry of that judgment.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254 on the ground that his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were violated.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

U.S. CONSTITUTION, AMENDMENT V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or

naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONSTITUTION, AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONSTITUTION, AMENDMENT XIV, §1:

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

deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

On September 15, 2003, following a jury trial in the Los Angeles County Superior Court, Petitioner

was convicted of one count of murder under California Penal Code §187(a) (count 1), for the August 16, 2000 drive-by killing of David Landon, and one count of attempted murder under California Penal Code §§664 and 187(a) (count 2), for the wounding of Landon's companion, Jeremy Moreno. The jury also found that these offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the intent to promote or assist the criminal conduct of gang members and that a principal personally and intentionally discharged a handgun in the commission of the crimes that caused great bodily in-jury to the victims. (See Cal. Pen. C. §§186.22(b)(1), 12022.53(d), (e).) (ER[1] 17-18.)

Petitioner was sentenced to 1-25 years to life, plus a consecutive ten-year term based on the gang enhancement finding and a consecutive term of 25 years to life based on the Penal Code §12022.53(d) and (e) finding.[2] (ER 18.)

The California Court of Appeal affirmed his conviction on appeal in an unpublished opinion dated October 27, 2004, although it also found that the gang enhancement sentence was improper and remanded

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[1] "ER" refers to the Excerpts of Record filed in the Ninth Circuit Court of Appeals.

[2] However, the jury specifically did not find true that petitioner personally and intentionally discharged a firearm. (CT 210-211.)

the matter to the trial court for re-sentencing. (See App. E; ER 18, 102-123.) Petitioner was thereafter re-sentenced to state prison for a term of 90 years to life. (ER 18-19.)

On January 12, 2005, the California Supreme Court denied Petitioner's petition for review without comment or citation to authority. (ER 18.)

On January 18, 2006, Petitioner filed a state habeas petition in the trial court, the Los Angeles County Superior Court. On October 20, 2006, the trial court denied the habeas petition in a two-page order. (See App. F; ER 19, 99-101.) On December 11, 2006, Petitioner filed a habeas petition in the California Court of Appeal. On April 13, 2007, the California Court of Appeal denied the habeas petition in a one-page order. (See App. G; ER 19, 97-98.) On April 30, 2007, Petitioner filed a habeas petition in the California Supreme Court. On July 30, 2008, the California Supreme Court denied the habeas petition without comment or citation to authority. (See App. H; ER 19, 95-96.)

On March 1, 2006, Petitioner filed this federal habeas petition pursuant to Title 28 of the United States Code, §2254 with the United States District Court for the Central District of California. (ER 16, 133-180.) On July 25, 2011, the District Court entered a judgment against Petitioner and dismissed his federal habeas petition with prejudice and denied him

a Certificate of Appealability. (See App. B, C; ER 6-11.)

Petitioner filed a timely notice of appeal on August 19, 2011 which was granted as to the two issues mentioned above. (ER 3-5, 124-127.) Nevertheless, on July 17, 2014 the Ninth Circuit Court of Appeals entered judgment affirming the denial of Petitioner's Petition for a Writ of Habeas Corpus by the United States District Court for the Central District of California (Western Division—Los Angeles) which challenged his state court criminal conviction. (App. A.)

STATEMENT OF FACTS

On August 16, 2000, at 5335 Huntington Drive North in Los Angeles, California, David Landon was killed in a drive-by shooting. His companion, Jeremy Moreno, was wounded. (ER 20-21.)

Jose De Jesus Nunez testified that he owned a white Chevy pickup truck, which was stolen in or about July, 2000. When the truck was stolen it had a camper shell on it. When this truck was returned to Nunez by the police about four months later, it still had the camper shell on it but the truck had been painted black. (ER 21.)

Linda Salaz testified that she lived at 5511 West Allan Street. In the early afternoon on August 5, 2000, she heard a crash. When she came out to the

street in front of her house, she discovered that a truck had hit her car. There were two men in the truck and she spoke to the driver, who refused to identify himself for Salaz. She called the police and gave them the truck's license number and described the truck as being white. Salaz testified that the truck came out of the driveway from across the street at 5510 Allan Street and that she was familiar with the neighbors who lived there. However, when asked if the Petitioner lived there she testified "Not that I know of." She also testified that she had not seen the driver of this truck before that accident. Salaz said the boys in the truck were young maybe between 17 and 20. Salaz could not identify the Petitioner as the driver of this truck. (ER 21-22.)

Ariel Posueloz testified that on August 16, 2000, the date of the shooting, he lived in the area where the two victims were shot. He was present when the police came to the scene that day. Posueloz had observed gang graffiti in that area around August 16, 2000. However, later in the day after the police arrived to investigate the shooting, he noticed that the graffiti had been "crossed out." He testified that he "may" have seen a white van or truck on August 16, 2000, and that he heard shooting about 10 or 15 minutes after he "may" have seen this white van or truck. He observed at least two people in this white van or truck that he "may" have seen. (ER 23.)

There were two eye-witnesses who testified at Petitioner's trial. However their testimony was suspect at best.

Lanisha Henderson (hereinafter "Henderson") testified that just before the shots were fired, she had been talking to the victim, David Landon, in front of an apartment building at 5335 Huntington Drive North when a white pickup truck, with three occupants, approached. Landon looked at the truck's occupants and said either "Lowell Street" or "Locke Street," a reference to a gang. Henderson lived in the neighborhood and knew that "Lowell Street," "Locke Street," and "El Sereno" were gangs acting in the neighborhood, along with the "Lott Dogs," a graffiti tagging crew. When she heard Landon mention "Lowell Street" or "Locke Street" she took off running because she suspected that gang violence was about to occur. She ran inside the apartment building and heard up to ten shots being fired outside. (ER 24.)

At trial Henderson identified a picture of the white truck during her testimony. The middle one of the truck's three occupants had an "El Sereno" tattoo on his neck. Henderson had never seen the person sitting in the truck's passenger seat before. Nevertheless, at trial, Henderson identified Petitioner as the person she saw in the passenger seat of the truck, and as the person she eventually identified in a photographic six-pack some months after the shooting. She could not remember whether Petitioner had a gun at the time of the shooting. (ER 24-25.)

On September 20, 2000, a month after the shooting, the police showed Henderson four six-pack photograph displays of potential suspects. Petitioner's photo was among these four six-pack photographic displays. Henderson was unable to identify the Petitioner or anyone else. (ER 26.)

In February of 2001, six months after the shooting, the police showed Henderson another *single* six-pack photographic display of potential suspects. This single six-pack photographic display contained a photo of the Petitioner. Henderson then identified Petitioner as the person sitting in the passenger side of the white pickup truck. She did so because the Petitioner "look[ed] so familiar to me." Henderson then identified the Petitioner in court as the same person in this six-pack. On cross-examination Henderson had trouble recounting how or why she reacted as she did to the six-packs shown to her, and in particular why she had not identified the Petitioner in the six-pack photo display shown to her on September 20, 2000, barely a month after the shooting. She testified that she had been scared but that she had moved as her rent had been paid by government authorities before she testified. (ER 26-27.)

Armida Estrella (hereinafter "Estrella") also testified at trial regarding the events of August 16, 2000. Estrella was at her home near the shooting that day and saw a white truck going back and forth in front of her home on Huntington Drive. She saw three people in the truck. This truck pulled into her

driveway and a man got out of the passenger side and addressed several people sitting in front of her home. This man said words to the effect "Where you from?" and "Where do Lott Dogs live?" Estrella recognized that these questions could be gang-related and began yelling at this man, "What do you want?" Estrella had never seen this man before. (ER 25.)

About an hour later, Estrella saw this white truck again on the same street as she was being driven to a service station by a friend. Estrella testified that as she was being driven the white truck passed in the opposite direction. She testified that she saw the same man in the passenger seat and this time he was holding a gun out of the truck window.[3] When she saw the gun, she panicked and said to her friend that the guy has a gun and that they should get out of there. She identified photographs of the white truck at trial, but by then it had been painted black. (ER 25-26.)

On November 13, 2000, three months after the shooting, Estrella was also shown two and possibly three six-pack photo displays, one of which included a photo of the Petitioner. She was not able to identify

[3] Estrella's testimony at this point is highly suspect. She claims to have seen this passenger holding a gun outside the truck window as the truck passed by the vehicle in which she was riding, in the opposite direction. How could she have seen this passenger, sitting on the right side furthest away from her visual vantage point, holding a gun out of his right-side passenger window? Her vision would have been blocked.

anyone. Nevertheless on June 6, 2001, ten months after the shooting, Estrella was shown another six-pack photo display that included the Petitioner's photo. This time Estrella identified the Petitioner as the person in the passenger seat in the white truck that day holding a gun outside of the truck door. Estrella testified that at first she wasn't too sure because on August 16, 2000 the Petitioner had long hair and a baseball cap on. (RT 406, 413-416.) While Henderson had described Petitioner as hatless and bald. (RT 463, 467-468.) In fact, Petitioner had short hair at that time. (See CT 155, 158 [line-up photos of petitioner/appellant circa. 2000].) But she eventually decided that "Yeah, he looks like him." (ER 28.)

The defense introduced the testimony of their eyewitness identification expert, Dr. Kathy Pezdak. She testified to the general factors that relate to the accuracy of memory and eyewitness identifications and opined that high levels of stress and police suggestion can make eyewitness identifications unreliable. She also testified that a live line-up would have been a more accurate and reliable identification method than the photo six-packs that the police showed Henderson and Estrella. (ER 32-33.)

The prosecution offered the testimony of Detective William Eagleson (hereinafter "Eagleson") as its gang expert. Eagleson identified the Petitioner as a member of the "El Serenos," a violent neighborhood gang that had committed numerous "predicate" gang crimes. He testified that the "Lowell Street" gang members were rivals of the "El Sereno" gang. He

testified that the Petitioner's moniker in the El Sereno gang was "Chico." (ER 28-29, 189-195.) Eagleson testified that the victim, David Landon, was a member of the tagging crew of the "Lott Dogs" gang who were "middle of the road" but answered more to the "Lowell Street" gang. (ER 28-29.)

Eagleson also testified that in his expert opinion the victims were shot in retaliation for the crossing out of El Sereno graffiti by the Lott Dogs tagging crew. He was not able to testify with certainty whether the El Sereno graffiti was in place before the date of the shooting, August 16, 2000, and was "crossed out" by a rival gang group before the shooting on August 16, 2000. However, he testified that it was likely that the drive-by shooting was "in furtherance of the Locke Street gang to revenge the disrespect that was shown to them earlier . . . in the marking off of the graffiti." (ER 29-30.)

Eagleson also, without any objection from defense counsel, testified as an expert concerning the graffiti at issue here. Sometime after the shooting graffiti was painted that read: "187 T-Bone. Where's Chico? Sleepy, Rest in Peace." Henderson testified that her nickname was "T-Bone." Eagleson testified that Petitioner's nickname was "Chico" and that the victim, David Landon's nickname was "Sleepy." Eagleson also testified that "187" referred to Penal Code §187, the code section for homicide. Henderson testified that she felt threatened by this graffiti. (ER 30, 188, 194-195, 201-203, 207.)

Eagleson then testified as to his expert opinion on the meaning of this graffiti, again without any objection from defense counsel. He testified that such gang graffiti tells a story, that when a new gang homicide occurs that the police investigate the recent graffiti for clues as to who is responsible for said homicide. Regarding this instant graffiti, "T-Bone" referred to Henderson, "187" referred to the murder, and that they wanted their homeboy "Sleepy" to rest in peace. As far as "where is Chico," Eagleson testified that the tagger is saying "Where's Chico," that this graffiti is "concerning Chico *that killed their homeboy.*" That is the tagger is saying: "Like where is Chico, *we know he is the one that did it*." Eagleson dismissed the notion that the tagger could just be writing graffiti because he was angry at some one: "No, that's specific graffiti," not just "random spray paint." "It was someone that has knowledge of exactly, in their opinion, what happened, who might have witnessed something and they know they are looking for this individual concerning the killing of their homeboy." Eagleson also dismissed the notion that this graffiti was directed at "T-Bone," that is Henderson, as being threatening towards her. "It's directed at her because the word was she saw it and *they know that the person that did the shooting was Chico*. 'Where is Chico', okay? And concerning the homeboy, Sleepy, may he rest in peace." (ER 206-211.)

Petitioner did not testify. (ER 32.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the "compelling reason" to protect the rights of criminal defendants charged with alleged gang-related crimes, from expert testimony of gang experts who are able to express their expert opinions as to the guilt of said criminal defendants. Whether this expert opinion as to the guilt of the accused is derived from gang-related graffiti, as in this case, or from some other source, the result is a blatant violation of the Confrontation Clause and the Due Process Clause of the Federal Constitution. An expert who is able to express his opinion on the guilt of a criminal defendant usurps the jury's function to make that determination. Only a jury is entitled to make that determination, to express their opinion on the guilt or innocence of the accused. To allow an expert to testify as to his opinion on the guilt of a criminal defendant based upon his interpretation of gang-related graffiti, as is what occurred in this case, is trial by graffiti. If the Ninth Circuit Court of Appeals' judgment is allowed to stand, none of us are safe. This is a "compelling reason" for granting certiorari under this Court's Rule 10(a), in that the lower courts in making their determinations against the Petitioner, have "so far departed from the accepted and usual course of judicial proceedings, . . . , as to call for an exercise of this Court's supervisory power."

Additionally, and just as compelling on the issue of the granting of certiorari by this Court, is the fact that the Ninth Circuit Court of Appeal's judgment,

sanctioning the gang-expert's testimony that expressed the opinion that the author of the graffiti knew who committed the crime, that is the murder of a gang member, and that the Petitioner was the one who did it, "conflict[s] with the decision[s] of another United States Court of Appeals on the same important matter," that is the issue of an expert expressing his opinion on the guilt of the accused. (See Rule 10(a).)

A. Conflicting United States Court of Appeals' Decisions Establish a Compelling Reason for Granting Certiorari in this Case.

Existing Federal Court of Appeals precedent bearing on gang-expert testimony in no way supports the notion that a gang-expert can give an opinion on the question of the identity of the perpetrator. He is limited to stating an opinion as to whether the crime was gang-related. (E.g., *U.S. v. Harber* (9th Cir. 1995), 53 F.3d 236, 238, 240-241 [presuming prejudice when law enforcement officer's report, which included statements that officer thought defendant guilty, was mistakenly given to the jury and was read by them]; *Moses v. Payne* (9th Cir. 2008), 543 F.3d 1090, 1105 [a witness, expert or otherwise, is not permitted to give a direct opinion about the defendant's guilt or innocence]; *Hernandez v. McGrath* (E.D. Cal. 2008), 595 F.Supp.2d 1111, 1127-1132 [prejudicial error for gang expert to testify to his opinion that the defendant had a motive to commit the crime; defendant's motive was not the proper subject of expert testimony].) California

state law is in accord. (See *People v. Killebrew* (2002), 103 Cal.App.4th 644, 650-652, 658 [prejudicial error to let gang expert testify as to his opinion of the subjective intent and knowledge of gang members; gang expert testified that when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and constructively possesses it]; *People v. Torres* (1995), 33 Cal.App.4th 37, 46-47 ["A consistent line of authority in California as well as other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence of the defendant."]; *People v. Brown* (1981), 116 Cal.App.3d 820, 829 [same]; *People v. Clay* (1964), 227 Cal.App.2d 87, 98-99 [same].)

> As explained in *Brown* and *Clay* the reason for employing this rule is not because guilt is the 'ultimate issue of fact' to be decided by the jury. Opinion testimony often goes to the ultimate issue in the case. [citation omitted] Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.

(*People v. Torres*, 33 Cal.App.4th at 47.)

In Petitioner's matter, the gang expert was able to testify as to his opinion of the meaning of the graffiti at issue. That is that said author of the graffiti knew who was responsible for this homicide and that

it was the Petitioner who was responsible. The above-referenced federal and state authorities confirm that such an opinion as to the guilt of the accused is inadmissible and the introduction of same violates the Confrontation and Due Process Clauses of the Federal Constitution. This authority conflicts with the Ninth Circuit Court of Appeals' judgment in this matter. Hence this is a compelling reason for this Court to grant certiorari in this case to establish United States Supreme Court precedent on this issue.

B. Allowing an Expert to Give his Opinion as to the Guilt of a Criminal Defendant Violates the Confrontation and Due Process Clauses and is a Compelling Reason for Granting Certiorari in this Case.

The Confrontation Clause.

The Sixth Amendment to the United States Constitution made applicable to the State of California by the Fourteenth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." This language is known as the Confrontation Clause. The Confrontation Clause forbids "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." (*Crawford v. Washington* (2004), 541 U.S. 36, 53-54.)

The Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (*Coy v. Iowa* (1988), 487 U.S. 1012, 1016.) "[T]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." (*Delaware v. Van Arsdall* (1986), 475 U.S. 673, 678.)

> A fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.

(*Coy*, 487 U.S. at 1017.) It is the "literal right to confront the witnesses at the time of trial" as forming "the core of the values furthered by the Confrontation Clause." (*Ibid*.)

> The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution."

(*Ibid.*; *Pointer v. Texas* (1965), 380 U.S. 400, 404.)

The Confrontation Clause applies to "witnesses" against the accused, in other words against those who "bear testimony." (*Crawford*, 541 U.S. at 51.) "Testimony" in turn is typically "[a] solemn declaration or affirmation made for the purposes of establishing or proving some fact." (*Ibid*.) An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement. "Testimonial" statements include ex parte in-court testimony or its functional equivalent, that is material such as affidavits, custodial examinations, prior testimony that the defendant was not able to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. This includes statements elicited pursuant to police interrogation. (*Id*., at 51-52.)

The *Crawford* Court explained that it was using "the term 'interrogation' in its colloquial, rather than technical legal, sense." "Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case." (*Id*., at 53, fn. 4.)

At Petitioner's trial, the prosecution was allowed to introduce the following testimony about graffiti found near the scene of the shooting after the shooting, that directly implicated the Petitioner as the

person responsible. Defense counsel offered no objection to the introduction of this evidence. Henderson, who was the witness at the scene of the shooting and whose nickname was "T-Bone," testified that on a neighborhood wall she saw this graffiti: "187 T-Bone—Rest in Peace, Sleepy—Where is Chico?" Henderson informed the jury that "Sleepy" was the dead victim's moniker. (ER 202-203.) The jury learned from other witnesses that Petitioner was known by his friends and associates as "Chico." (ER 194-195.) As for the term "187," the jury was informed that it was a shorthand for the word "murder" or "kill." (ER 207.)

Detective Eagleson, the government's gang expert was asked on re-direct to interpret the graffiti that had so frightened Henderson:

> Q. So it can assist an investigation to immediately go and see what graffiti appears in the area where the murder occurred?
>
> A. Yes, absolutely.
>
> Q. What is the story that [Henderson's] observation of graffiti would tell, '187 T-Bone, Where's Chico; Sleepy, rest in peace'?
>
> A. Well, 187—T-Bone is referring to the young lady [i.e. Henderson]. And the 187, like this about the murder, T-Bone, concerning Chico, May our homeboy rest in peace, Sleepy.
>
> Q. And, 'where is Chico'.

A. Well, that's what he [the tagger] is saying: 'Where's Chico'. In other words they are saying 'where's Chico?', addressing her involving the 187, and it's almost to the point where there is intimidation on her, because we have to know—or we know that you saw who did this. And that's where it's pretty well, '187 T-Bone; where's Chico'.

Q. Could it mean that T-Bone may be 187, or murdered?

A. Absolutely. Well, it could go either way, depending on if she is harboring this individual—they want her—which is doubtful. But again, they know that she was out there or that she saw something *and that it's concerning Chico that killed their homeboy*. (emphasis added)

Q. And, 'where is Chico', meaning you don't know where Chico is, you better keep an eye out because he may be coming to get you.

A. Well, not necessarily. You could put it that way, or 'where's Chico', like we are looking for him in a broader sense. *Like where is Chico, we know he is the one that did it*. (emphasis added)

Q. And we may want to take care of him?

A. Right.

Q. And, 'Sleepy, rest in peace'. Sleepy was David Landon.

A. Well, yeah, exactly. That's his moniker, and that's a respectful way of just acknowledging that this is what it's in regards to.

Q. Thank you. No further questions. (ER 206-209.)

The re-cross examination included:

Q. Okay. All right. And so if she didn't know who the person was that is allegedly being associated with this graffiti, could it be some[one] out there who is just writing graffiti because they are angry at someone; is that correct?

A. No, *that's specific graffiti*. Under the circumstances, not just what you call a random spray paint. That happens to coincidentally put something that just occurred that's so specific in nature as that. It was someone that has knowledge of *exactly*, in their opinion, what happened, who might have witnessed something *and they know they are looking for this individual concerning the killing of their homeboy*. (emphasis added)

Q. Okay. But you say it was directed . . . at T-Bone and it's not directed at her?

A. It's not directed at her where it's threatening. It's directed at her because the word was she saw it *and they know that the person that did the shooting was Chico*. 'Where is Chico', okay? And concerning the homeboy, Sleepy, may he

> rest in peace. (emphasis added) (ER 209-210.)

On cross-examination of the defense's gang expert, Clayton Hollopeter, the prosecutor returned to the "187 T-Bone; Rest in Peace, Sleepy; Where's Chico?" graffiti. This spectacular endorsement of Detective Eagleson's testimony on the probative value of the 'where's Chico' graffiti ensued:

> Q. Now, we heard from one homicide detective that's been doing gang suppression for many years that *they go out to look at graffiti after a homicide occurred in order to get clues*. *Is that something that you understand as well*? (emphasis added)
>
> A. *Oh, yes*. *The graffiti is really a newspaper of the gangs that's on the walls, and if you read it you can really find a great deal of information about what's happened in the community*. (emphasis added) (ER 214, 216-217.)

Hence in these testimony excerpts, Detective Eagleson, the prosecution's gang expert, gave his expert opinion that graffiti is a valuable tool for the investigation of gang related crimes, including homicides, and that after a homicide the police actively investigate and seek clues from the new graffiti in the neighborhoods where the crime was committed and where the suspected gangs that are involved are located. (ER 30, 206-207.) The defense gang expert,

Clayton Hollopeter, agreed that the police go look at graffiti for clues to gang related crimes and called graffiti the "newspaper of the gangs that's on the walls." (ER 33, 214, 216-217.)

Consequently, since gang graffiti is regularly investigated and relied on by police for clues as to who is responsible in their investigation of gang related crimes, particularly homicides, it should be considered "testimonial" as a product of police investigation/interrogation. It is well established that statements made in the absence of any interrogation are *not* necessarily non-testimonial. "The Framers [of the constitution] were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. In any event, in the final analysis it is the declarant's statements, not the police questioning, that the Confrontation Clause requires the courts to evaluate." (*Davis v. Washington* (2006), 547 U.S. 813, 822-823, fn. 1.) The Confrontation Clause "also reaches the use of technically informal statements when used to evade the formalized process." (*Id*., at 838 [J. Thomas concurring and dissenting opinion].)

> That is, even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation.

(*Ibid.* [citing *Coy v. Iowa* (1988), 487 U.S. 1012].)

Consequently, this gang graffiti was testimonial evidence that told the jury that the tagger knew who killed their homeboy, "Sleepy," and that person was "Chico," who was the Petitioner. The prosecution used these out-of-court statements as a means of circumventing the literal right of confrontation. (*Ibid*.) The admission of this evidence without proof that the tagger was unavailable as a witness and without the Petitioner being given an opportunity to cross-examine the tagger violates the Confrontation Clause. (*Crawford*, 541 U.S. at 68.)

Nevertheless the lower courts and the Ninth Circuit Court of Appeals were of the mind that this graffiti evidence was relevant and admissible because an expert passing on the question of whether the crime was gang-related is entitled to explain the basis for his opinion. (App. A, D 2; ER 61-62, 66-67.) However, the fact that the State's gang expert relied, in part, on the existence of the graffiti to support his conclusion that the shooting was gang-related, actually has no bearing here. Petitioner/Appellant's Confrontation Clause argument is focused entirely on the wrong done by the admission of only the 'where is Chico' portion of the graffiti, and related expert testimony and argument.

Detective Eagleson told the jury that the statement "where is Chico?" indicated that "they [i.e., the gang community] know *he is the one that did it*" and they "want to take care of him." (emphasis added) (ER 208.) The detective opined that this was "specific graffiti . . . not . . . random spray paint." "It was

someone that has knowledge of *exactly* what happened." (emphasis added) (ER 209-210.) Detective Eagleson flatly told the jury, "*they know the person that did the shooting was Chico*." (emphasis added) (ER 210.)

How were any of those assertions relevant to prove this crime was gang-related? Petitioner grants that the existence of post-crime 'gang-land' style graffiti can plausibly serve as partial support for a gang-expert's belief that a shooting was gang-related. However, here the jury was told about a particular snippet of graffiti that purportedly named the Petitioner as the shooter. This snippet was manifestly severable, and its suppression would not have removed anything relevant to the 'gang-related-shooting' opinion of the detective.

Federal and California law bearing on gang-expert testimony in no way supports the notion that a gang-expert can give an opinion on the question of the identity of the perpetrator. He is limited to stating an opinion as to whether the crime was gang-related. (See cited authorities in Section A, supra.)

Thus the lower courts and the Ninth Circuit Court of Appeals' analysis approving the introduction of this graffiti evidence because it was used to show the crime was gang-related is flawed. The nature of the direct examination of Detective Eagleson belies the assertion that his testimony about the snippet of graffiti in question was a response to questions about his capstone 'gang-related-crime' opinion. The fact of

the matter is that the graffiti evidence was never cited by Detective Eagleson as a basis for his 'gang-related' finding. Instead, his testimony on the subject was prompted by testimony from Lanisha Henderson bearing on her state of mind. (ER 201-211.)

This Confrontation Clause issue is a compelling reason for this Court to grant certiorari in this case. The reader should put himself or herself in Petitioner's shoes. Would the reader like to be convicted of murder and be sentenced to 90 years to life in prison because an unidentified 'tagger' wrote on a concrete wall with spray paint that the reader was the perpetrator of the charged crime? Petitioner thinks not. Certiorari should be granted in this case.

The Due Process Clause.

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The Fourteenth Amendment to the United States Constitution provides that: "No state shall . . . deprive any person of life, liberty, or property without due process of law. . . ." These two Amendments contain the Due Process Clause of the United States Constitution.

If the action complained of violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions . . . and which define the community's sense of fair play and decency," then the action violates the Due Process Clause.

(*Dowling v. U.S.* (1990), 493 U.S. 342, 352-353; other citations omitted.) Any action that "offends some principal of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," violates the Due Process Clause. (*Patterson v. New York* (1977), 432 U.S. 197, 201-202; *Speiser v. Randall* (1958), 357 U.S. 513, 523.)

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. It is not within the province of a state legislature to declare an individual guilty or presumptively guilty of a crime by enacting legislation shifting the burden of proof in criminal cases. (*Patterson*, 432 U.S. at 210; *Estelle v. McGuire* (1991), 502 U.S. 62, 69.) That is, a state legislature cannot command that the finding of "proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." (*Patterson*, 432 U.S. at 210.)

> [A] State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Since shifting the burden of persuasion with respect to a fact which the state deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

(*Id.*, at 215.)

Thus for a prosecution gang expert to be able to testify as to his opinion of what gang related graffiti means, that it means that the gang tagger has identified the Petitioner as the one who killed his homeboy, this testimony would relieve the prosecution of the burden of proof on that element of the crime, the identity of the perpetrator. This testimony would shift the burden of persuasion to the Petitioner to prove that he was not the perpetrator as opposed to the prosecution bearing the burden of proof as it is constitutionally required to do so by the Due Process Clause.

Thus, even if this graffiti is not considered to be a "testimonial" out-of-court statement to constitute a Confrontation Clause violation, it offends traditional notions of Due Process and therefore violates the Due Process Clause. That is the introduction of an expert opinion regarding the interpretation of the meaning of this graffiti, that is that the Petitioner was responsible for this homicide, violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions . . . and which define the community's sense of fair play and decency." (*Dowling v. U.S.* (1990), 493 U.S. 342, 352-353; other citations omitted.) This testimony alleviated the prosecution's constitutional burden to prove all the elements of this criminal offense beyond a reasonable doubt. (*Estelle v. McGuire* (1991), 502 U.S. 62, 69.)

As such, the introduction of this graffiti and expert opinion directly inculpating the Petitioner violates the Due Process Clause. Again, this is a compelling reason for the granting of certiorari in this case.

The Sub-Issue of the Lower Federal Court's Appropriate Standard of Review.

The Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter the "AEDPA") employs a "highly deferential standard for evaluating state court rulings." (*Lindh v. Murphy* (1997), 521 U.S. 320, 333, fn. 7.) Title 28 of the United States Code, §2254(d) governs federal review of state court judgments. It provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a 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.

However, this AEDPA standard of review applies only if the federal claims at issue were actually "adjudicated on the merits in State court proceedings." (28 U.S.C. §2254(d)). If the federal claims at issue were not "adjudicated on the merits," then a federal court may use its independent de novo review of said claims without any of the AEDPA's deference requirements. That is de novo review is required where the state court system's denial of a claim rests on procedural grounds which are not independent and adequate under federal law. (*Pirtle v. Morgan* (9th Cir. 2002), 313 F.3d 1160, 1168, cert. den., 539 U.S. 916 (2003).) In assessing the basis for the California Judiciary's rejection of a federal claim, only the last reasoned denial of the claim is relevant. (*Barker v. Fleming* (9th Cir. 2005), 423 F.3d 1085, 1091-1092; *Williams v. Rhoades* (9th Cir. 2004), 354 F.3d 1101, 1006.) The last "reasoned decision" of the California judiciary with respect to Petitioner's federal claims was the April 13, 2007 order of the California Court of Appeal, to wit:

> The petition for writ of habeas corpus has been read and considered. The petition is denied. (See, *People v. Duvall* (1995) 9 Cal.4th 464, 474-475; see also *In re Clark* (1993) 5 Cal.4th 750, 765 ["it is . . . the general rule that issues resolved on appeal will not be reconsidered on habeas corpus . . . "].)

(App. G; ER 97-98.) This was not a "summar[y]" denial, but an obviously reasoned denial. "Unexplained" denials

are the focal point of the "look through" methodology of *Ylst v. Nunnemaker* (1991), 501 U.S. 797, 803-804. There is no basis to apply that methodology when the denial in question is explained, as was the April 13, 2007 denial of the Court of Appeal.

The Court of Appeal did not say that it was citing *Duvall* to explain its denial of the State precursors to these federal claims, nor did the Court of Appeal indicate that it was addressing the citation of *In re Clark* to Ground #3 in petitioner/appellant's federal petition which is not at issue here, the insufficiency of the evidence claim. Moreover, with respect to *Duvall*, it is not entirely clear what aspect of the procedural rule discussed at pages 474-475 of that case was involved. (ER 97-98.)

What this means here is that if either procedural rule is not independent and adequate, a federal court must reach all of the claims on the merits. (*Ylst v. Nunnemaker* (1991), 501 U.S. 797, 804, fn. 3; *Hill v. Roe* (9th Cir. 2003), 321 F.3d 787, 789.)

As for the citation to the passage in *Duvall*, it is also inadequate to bar de novo review, even if it is considered alone. (See *Kim v. Villalobos* (9th Cir. 1986), 799 F.2d 1317, 1319-1320 [directing District Courts to review the State pleadings to determine whether facts were cited with sufficient "particularity" when assessing the California Judiciary's invocation of a procedural bar (i.e., *In re Swain* (1949), 34 Cal.2d 300, 304) regarding the sufficiency of facts pled]; and compare *People v. Duvall* (1995), 9 Cal.4th at 464,

474, citing the rule of *In re Swain*.) In addition, *Duvall* at page 474 describes a procedural rule requiring petitioner to attach "reasonably available documentary evidence." Perhaps the Court of Appeal was invoking that rule. We have no way of knowing.

An ambiguous State order or one citing multiple procedural rules will be deemed inadequate to support a finding of procedural default in federal court if any of those procedural rules are inadequate. (*Washington v. Cambra* (9th Cir. 2000), 208 F.3d 832, 834.) A similar result obtains when it is unclear from the face of a state order whether the denial was predicated on procedural grounds *or* substantive ones. (*Deberry v. Portuondo* (2d Cir. 2005), 403 F.3d 57, 61, 67 [holding the AEDPA did not apply to claims rejected by a State court as "either unpreserved for appellate review . . . or . . . without merit" because the order did not "reveal which of the four claims were not reached for procedural reasons . . . [and] which claims were adjudicated on the merits. Therefore, we cannot hold any one of petitioner/appellant's claims at issue here to have been adjudicated on the merits."]; *Miranda v. Bennett* (2d Cir. 2003), 322 F.3d 171, 178 [same]; *Coleman v. Thompson* (1991), 501 U.S. 722, 733, 736 [citing *Harris v. Reed* (1989), 489 U.S. 255, 263, for the proposition that a State must "clearly and expressly" invoke a procedural bar]; see also *Bennett v. Mueller* (9th Cir. 2003), 322 F.3d 573, 584-585

[invocation must be proven by a preponderance of the evidence].)

In sum, when we "look through" the truly unexplained order of the California Supreme Court denying Petitioner's state habeas petition (App. H), we run into the explained and "reasoned" denial of the California Court of Appeal. (App. G.) Since that order cites two reasons, both of which are either clearly or arguably procedural, and since that order does not make clear which rule is to be considered the basis for the denial of any given claim, with neither rule being independent and adequate, review of the federal claims in question must be *de novo*.

This standard of review issue is another compelling reason for this Court to grant certiorari.

Prejudice Analysis.

A Confrontation Clause violation as well as a Due Process Clause violation are trial errors as opposed to structural errors and do not automatically justify habeas relief. Habeas relief is available for such trial errors if the Petitioner was actually prejudiced by a constitutional error that "had a substantial and injurious effect or influence in determining the jury's verdict." (*Brecht v. Abrahamson* (1993), 507 U.S. 619, 623.) "[W]hen a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." (*O'Neil v. McAninch* (1995), 513 U.S. 432, 445.) When a court is "in virtual equipoise as to the harmlessness of the error under

the *Brecht* standard, the court should treat the error as if it affected the verdict." (*Fry v. Phler* (2007), 551 U.S. 112, 121, fn. 3.)

In general, the inquiry into whether the constitutionally erroneous introduction of a piece of evidence or testimony had a substantial and injurious effect is guided by several factors: "the importance of the testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony, the extent of cross-examination permitted, and the overall strength of the prosecution's case." (*Whelchel v. Washington* (9th Cir. 2000), 232 F.3d 1197, 1206 [citing *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 684].) Each of these facts will be evaluated as to the case against the Petitioner.

How important was the introduction of the graffiti evidence and the expert opinion evidence interpreting same to identify Petitioner as the guilty party? The identity issue was the key battleground in this case. (See *Chambers v. McDaniel* (9th Cir. 2008), 549 F.3d 1191, 1200.) This graffiti evidence placed before the jury a *wholly uncontested* proof of identity—one actually endorsed by the defense gang expert. Moreover, this unsworn and anonymous accuser was in the unique context of this case, the most substantial and reliable evidence 'fingering' Petitioner. Under the guiding interpretation of the gang experts, the graffiti was said to correctly identify Henderson as a percipient witness to the crime; correctly supplied the victim's moniker; and correctly remarked on Petitioner's

post-crime absence. Thus, there were several reasons, rooted in the text of the graffiti itself—in addition to the endorsement of the two gang-experts—that justified reliance upon its supposed identification of Petitioner as the shooter. It provided the prosecution with a positive identification from someone in the gang community who presumably knew what the conflict was about, knew what happened, and knew who was responsible, the Petitioner. Moreover, the prosecutor in his closing and rebuttal arguments, relied on this identity evidence and emphasized it to the jury. In his primary summation, the prosecutor remarked: "and we already can see that there are patterns and meaning and significance to graffiti, especially if you grow up in a neighborhood." (ER 222-223.)

This identity evidence was not cumulative. It was the *only* evidence on identity. The prosecution did introduce eyewitness testimony from two witnesses, Henderson and Estrella. However neither witness saw Petitioner actually commit the crime. They both only testified that he was in a white truck that was somehow involved in the shooting. Additionally, both of these witnesses had severe credibility problems and failed to pick Petitioner out of a photo line-up one month after the shooting. However, six months later for Henderson and ten months later for Estrella, they both picked out Petitioner when his photo was again shown to them in a photo six-pack.

There was no evidence corroborating this graffiti identity evidence except for these two so-called eye witnesses, Henderson and Estrella. Again, neither of these witnesses saw Petitioner commit the crime. Their testimony was that he was in a white truck at or near the scene of the crime.

The overall strength of the prosecution's case was weak. There was no physical evidence at all connecting the Petitioner to the crime, except that he was supposedly seen in a white truck in Los Angeles. How many white trucks are there in Los Angeles? Probably a hundred thousand at least. The flight evidence was likewise worthless. Petitioner was driving a stolen car at the time the California Highway Patrol pulled him over for speeding. Hence he had plenty of motive aside from the underlying crime to seek to avoid arrest. The remaining evidence consists of the testimony of Henderson and Estrella, who supposedly saw the Petitioner in a white truck cruising the area the day of the shooting. Estrella described the Petitioner as having "longish," "maybe like shoulder length hair," with a baseball cap on. (RT 406, 413-416.) While Henderson described Petitioner as hatless and bald. (RT 463, 467-468.) In fact, Petitioner had short hair at that time. (See CT 155, 158 [line-up photos of Petitioner circa. 2000].) Estrella's testimony of seeing Petitioner holding a gun outside the passenger door of the white truck as it passed by the vehicle in which Estrella was a passenger in oncoming traffic, was an impossibility. Her viewpoint as a right-side passenger in her vehicle flying by the white truck in oncoming

traffic would have to have been blocked from seeing what the right-side passenger in the white truck had in his hand outside the right passenger door. Both Estrella and Henderson were unable to identify Petitioner in a six-pack photo line-up a month after the shooting. However, when showed Petitioner's photo again six months later for Henderson and ten months later for Estrella, both said that Petitioner looked familiar and picked him out of the line-up. He looked familiar because his picture was in the photo line-up shown to them a month after the shootings, when neither one of them picked Petitioner out as a suspect.

It seems more likely that Estrella and Henderson settled on Petitioner's photograph, not because he was the perpetrator, but because they had been familiarized with his face through the initial photo line-up. Put another way, the feeling that they experienced of having seen him before was rooted in the fact that they had, i.e., during their exposure to his face during the first photo line-up. Thereafter, by the process described as "confabulation" by the defense eyewitness identification expert, Dr. Kathy Pezdak, (RT 584-585), the witnesses over-wrote their actual memories of the crime with his face. That's how it happened. That's how a clever detective goes from two "eyewitnesses" who either identified no one (as in the case of Estrella) or identified other people (as in the case of Henderson), to two witnesses who identified Petitioner, by repeatedly exposing the witnesses to pictures of Petitioner and counting on them to be

unable to trace their developing feelings of familiarity with his face to this exposure to his face in photo line-ups shown them months before. The defense expert explained how very susceptible memory is to such investigatory tradecraft. It is not a memory of Petitioner as the perpetrator that these witnesses had in common, it is rather that they, having been subjected to the same suggestive methodology, became host to the same confabulated misimpression. (RT 584-585 [Dr. Pezdak discussing studies documenting this phenomenon].)

Thus the impact of the introduction of this graffiti identity evidence was devastating for the Petitioner. The overall strength of the prosecution's case against Petitioner was far from overwhelming. From the analysis of the Confrontation Clause violation and the Due Process violation, as well as this instant prejudice analysis, a federal reviewing court should have "grave doubt" that without this graffiti identity evidence the result would still have been a conviction. (See *O'Neil*, 513 U.S. at 435.) When a court is "in virtual equipoise as to the harmlessness of the error under the *Brecht* standard, the court should treat the error as if it affected the verdict." (*Fry*, 551 U.S. at 121, fn. 3.)

This Court should do the same and grant certiorari.

Ineffective Assistance of Counsel.

Trial counsel offered no objection to the introduction of this graffiti evidence. Trial counsel offered no objection to the prosecution's gang expert offering his expert opinion on the interpretation of this graffiti, that is that said graffiti identified his client, the Petitioner, as the person responsible for this gang killing. As the above-referenced Confrontation Clause and Due Process arguments explain, the introduction of this evidence violated both clauses. Hence trial counsel's failure to offer any objection to this evidence constituted deficient performance and thus violated the Sixth Amendment's guarantee of the effective assistance of trial counsel. (*Strickland v. Washington* (1984), 466 U.S. 668, 687-689 [performance prong].)

As for the appropriate prejudice analysis under *Strickland*, Petitioner must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." (*Id*., at 694.) Petitioner has shown that "reasonable probability."

Certiorari should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant Certiorari.

Dated: December 26, 2014

Respectfully submitted,

WILLIAM E. GILG
Attorney at Law
305 San Bruno Avenue West
San Bruno, CA 94066
(650) 871-8647
(650) 873-3168 (fax)
williamgilg@msn.com

Attorney for Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER LUNDIN, Petitioner-Appellant, v. S. KERNAN, Warden, Respondent-Appellee.	No. 11-56425 D.C. No. 2:06-cv-01271-ABC-MAN MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Submitted July 8, 2014**
Pasadena, California

Before: SILVERMAN, TALLMAN, and RAWLINSON, Circuit Judges.

Christopher Lundin appeals from the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Lundin argues that his Confrontation Clause and due process rights were violated when the state trial court admitted evidence of

* This disposition is not appropriate for publication and is not precedent except as provided by 9th 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).

gang graffiti linking him to the crime and permitted expert testimony regarding the graffiti. He also contends that his trial counsel was ineffective for failing to object to the graffiti evidence. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253, and we affirm.

Our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996, which prescribes a highly deferential standard preventing a federal court from granting relief to a person in custody pursuant to a state court judgment "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." 28 U.S.C. § 2254(d). In considering a habeas petition, "we review the last reasoned decision from the state court, which means that when the final state court decision contains no reasoning, we may look to the last decision from the state court that provides a reasoned explanation of the issue." *Murray v. Schriro,* 746 F.3d 418, 441 (9th Cir. 2014) (internal quotation marks omitted). In this case, the last reasoned decision is the October 20, 2006, decision of the Los Angeles County Superior Court.

The state court's denial of Lundin's claims was not contrary to or an unreasonable application of clearly established federal law. The graffiti evidence and related testimony do not implicate the Confrontation Clause because the graffiti is non-testimonial. *See Crawford v. Washington,* 541 U.S. 36, 51-52, 59 (2004).

Nor did the admission of the graffiti evidence violate Lundin's due process rights. There were permissible inferences to be drawn from that evidence, such as that the crimes were gang-related. *See Jammal v. Van de Kamp,* 926 F.2d 918, 920 (9th Cir. 1991). The evidence did not render the trial "fundamentally unfair." *Drayden v. White,* 232 F.3d 704, 710 (9th Cir. 2000).

Further, Lundin has not shown that his lawyer's performance fell "below an objective standard of reasonableness" when he failed to object to the graffiti evidence which, as we already said, was admissible and not unconstitutional. *See Strickland v. Washington,* 466 U.S. 668, 687-88 (1984).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHRISTOPHER LUNDIN, Petitioner, v. S. KERNAN, WARDEN, Respondent.	NO. CV 06-1271-ABC (MAN) ORDER DENYING CERTIFICATE OF APPEALABILITY

By separate Order and Judgment filed concurrently, the Court has determined that habeas relief should be denied and this 28 U.S.C. § 2254 action should be dismissed with prejudice. Under 28 U.S.C. § 2253(c)(1)(A), an appeal may not be taken from a "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court" unless the appellant first obtains a certificate of appealability ("COA"). Petitioner has filed Objections to the United States Magistrate's Report and Recommendation, but he has of not asked that he be issued a COA. The Court now addresses the COA question pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel,* 529 U.S. 473, 120

S. Ct. 1595 (2000), the Supreme Court clarified the showing required to satisfy Section 2253(c)(2) when, as here, a habeas petition has been denied on the merits:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot* [*Barefoot v. Estelle,* 463 U.S. 880, 103 S. Ct. 3383 (1983)], includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that issues were "'adequate to deserve encouragement to proceed further.'" [cit. om.]
>
> Where a district court has rejected the constitutional claim on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

529 U.S. at 403-84, 120 S. Ct. at 1603-04. *See also Miller-El v. Cockrell,* 537 U.S. 322, 327, 123 S. Ct. 1025, 1034 (2003) (a petitioner satisfies Section 2253(c)(2) "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further").

In her Report and Recommendation, the Magistrate Judge concluded that federal habeas relief was not warranted. After carefully considering the record, the Court has accepted the Magistrate Judge's findings and recommendations in a concurrently-filed Order. The Court has further concluded that: reasonable jurists would not find its resolution of the Petition to be "debatable or wrong"; and the issues raised by Petitioner are not "adequate to deserve encouragement to proceed further." *Slack,* 525 U.S. at 484, 120 S. Ct. at 1603. Accordingly, issuance of a certificate of appealability is not warranted.

IT IS SO ORDERED.

DATED: July 25, 2011

/s/ Audrey B. Collins
AUDREY B. COLLINS
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHRISTOPHER LUNDIN, Petitioner, v. S. KERNAN, WARDEN, Respondent.	NO. CV 06-1271-ABC (MAN) JUDGMENT

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

IT IS ADJUDGED that this action is dismissed with prejudice.

DATED: July 25, 2011

/s/ Audrey B. Collins
AUDREY B. COLLINS
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHRISTOPHER LUNDIN, Petitioner, v. S. KERNAN, WARDEN, Respondent.	NO. CV 06-1271-ABC (MAN) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Apr. 15, 2011)

This Report and Recommendation is submitted to the Honorable Audrey B. Collins, Chief United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On March 1, 2006, Petitioner filed a habeas petition pursuant to 28 U.S.C. § 2254 ("Petition"). Petitioner conceded that only one of the five claims alleged in the Petition was exhausted. At Petitioner's request, this action was stayed for two and a half years while he exhausted his remaining claims.

After the stay of this action was lifted, Respondent filed an Answer to the Petition and lodged pertinent portions of the state record ("Lodg."). Petitioner thereafter filed a Traverse.

Briefing in this action is complete. Thus, the matter is under submission to the Court for decision.

PRIOR PROCEEDINGS

On September 15, 2003, following a jury trial in the Los Angeles County Superior Court, Petitioner was convicted of one count of murder (California Penal Code ["P.C."] § 187(a), count 1) for the August 16, 2000 drive-by killing of David Landon,[1] and one count of attempted murder (P.C. §§ 664 and 187(a), count 2) for the wounding of Landon's companion, Jeremy Moreno. (*See* Petition at 2; Lodg. No. 3, Ex. D at 2.)[2] The jury found the attempted murder of Moreno to have been committed willfully, deliberately, and with premeditation (P.C. § 664(a)). (Lodg. No. 3, Ex. D at 2; Lodg. No. 1, Clerk's Transcript ("CT") 211.) The jury also found certain enhancement allegations true as to both counts, namely that: the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the intent to promote or assist the criminal conduct of

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[1] The victim's last name is alternately spelled "Landon" or "Landin" throughout the state record, and it is unclear which spelling is correct. Because the California Court of Appeal referred to "Landon" in its reasoned opinion in Petitioner's direct appeal (*see* Lodg. No. 3, Ex. D), this Court will utilize that same spelling.

[2] Petitioner lodged various documents with the Petition ("Pet. Lodg"). Unless otherwise specifically noted, this Court's references to lodged documents refer to the documents lodged by Respondent.

gang members (P.C. § 186.22(b)(1)); and a principal personally and intentionally discharged a handgun in the commission of the crimes that caused great bodily injury to the victims (P.C. § 12022.53(d) and (e)). (*See* Lodg. No. 3, Ex. D at 2; CT 210-11.)

Petitioner moved for a new trial, and that motion was denied. (*See* CT 226-37.) Petitioner was sentenced on count 1 to 25 years to life, plus ten consecutive years based on the gang enhancement finding and a consecutive term of 25 years to life based on the P.C. § 12022.53(d) and (e) finding. (*See* Lodg. No. 3, Ex. D at 17, 20; Lodg. No. 2, Reporter's Transcript ("RT"), Volume 8,[3] at 1013.) On count 2, Petitioner was sentenced to 15 years to life, plus a consecutive term of 25 years to life based on the P.C. § 12022.53(d) and (e) finding. (Lodg. No. 3, Ex. D at 17, 20; RT8 1013-14.) Pursuant to P.C. § 654, the trial court stayed imposition of another sentence enhancement found to be true (P.C. § 12022.53(c) and (e)). (*See* Lodg. No. 3, Ex. D at 17, 20; RT8 1014.)

Petitioner appealed. (Lodg. No. 3, Ex. A and Ex. D at 2.) On October 27 2004, the California Court of Appeal affirmed the convictions in a reasoned, unpublished opinion. (Lodg. No. 3, Ex. D; *see also People v. Lundin,* 2004 WL 2397276 (Cal. App. 2 Dist. 2004)). However, the state appellate court found that the trial court's imposition of P.C. § 186.22(b) gang

[3] The eight individual volumes of the Reporter's Transcript are referenced herein as "RT1," "RT2," etc.

enhancements for both counts was improper and remanded the case to the trial court for re-sentencing. (*See* Lodg. No. 3, Ex. D at 20.) Petitioner thereafter was re-sentenced to state prison for a total term of 90 years to life. (CT 79-82, 210-11, 237-44.)

On December 2, 2004, Petitioner filed a petition for review in the California Supreme Court. (Lodg. No. 3, Ex. E.) On January 12, 2005, the California Supreme Court denied the petition for review without comment or citation to authority. (Lodg. No. 3, Ex. F.)

On January 18, 2006, petitioner filed a habeas petition in the trial court. (Pet. Lodg. No. 3.) On October 20, 2006, the trial court denied the habeas petition in a reasoned, two-page Order. (Lodg. No. 3, Ex. G.) On December 11, 2006, petitioner filed a habeas petition in the California Court of Appeal. (Lodg. No. 3, Ex. H.) On April 13, 2007, the California Court of Appeal denied the habeas petition summarily.[4] (Lodg. No. 3, Ex. I.) On April 30, 2007, petitioner filed a habeas petition in the California Supreme Court. (Lodg. No. 3, Ex. J.) On July 30, 2008, the

[4] The California Court of Appeal cited *People v. Duvall,* 9 Cal. 4th 464, 474-75 (1995), for the proposition that even if the petition's allegations were assumed to be true, Petitioner was not entitled to relief as to Ground One, Two, Four, and Five. The state appellate court's order also cited *In re Clark,* 5 Cal. 4th 750, 765 (1993), for "the general rule that issues resolved on appeal will not be reconsidered on habeas corpus," because Petitioner had realleged Ground Three in his habeas petition, even though the claim already had been raised and resolved on its merits in his direct appeal. (Lodg. No. 3, Ex. I.)

California Supreme Court denied the habeas petition without comment or citation to authority. (Lodg. No. 3, Ex. M.)

SUMMARY OF THE EVIDENCE AT TRIAL

The relevant evidence underlying Petitioner's conviction is summarized below and will be discussed in more detail *infra* as necessary to address Petitioner's habeas claims.[5]

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[5] In affirming the judgment against Petitioner, the California Court of Appeal discussed and summarized the evidence presented at trial in a section entitled "Sufficiency of the Evidence of Identity." (Lodg. No. 3, Ex. D at 3-7.) On federal habeas review, "a determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Schriro v. Landrigan,* 550 U.S. 465, 473-74, 127 S. Ct. 1933, 1939-40 (2007) ("AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.' ") (*citing* Section 2254(e)(1)); *Pollard v. Galaza,* 290 F.3d 1030, 1033, 1035 (9th Cir. 2002) (statutory presumption of correctness applies to findings by both trial courts and appellate courts).

The Section 2254(e)(1) presumption has not been shown to be inapplicable to the state appellate court's description of the evidence presented at Petitioner's trial. Nevertheless, given Petitioner's Ground Three sufficiency of the evidence claim, the Court has set forth below its own summary of the trial evidence. However, to the extent that the state courts' recitation of the facts has not been shown to be erroneous, those facts are entitled to deference. *See Vasquez v. Kirkland,* 572 F.3d 1029, 1031 n.1 (9th Cir. 2009) (relying on and presuming the correctness of the state appellate court's summary of the evidence at

(Continued on following page)

On August 16, 2000, at 5335 Huntington Drive North in Los Angeles, California, Landon was killed in a drive-by shooting. His companion, Moreno, was wounded. (*See, e.g.,* RT4 285, 319-27, 338-40; RT5 455-57.)

Petitioner and a co-defendant, Michael Ortega, were initially charged in an Information with the murder of "David Landin" and the attempted murder of Moreno. (CT 79-82.) However, by the time the trial began, for reasons not apparent from the record, Petitioner was the sole remaining defendant in the case. (*See, e.g.,* RT3 226-28.)

In his opening remarks, the prosecutor stated that "the evidence will . . . show that Jeremy Moreno won't be here to testify. He died for reasons not related to this case, and you need not concern yourself with that." (RT3 229.)[6] The prosecution thereafter elicited the following testimony from several witnesses about events that occurred shortly before the shootings.

Jose De Jesus Nunez ("Nunez") testified that he owned a white Chevy pickup truck, which was stolen

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trial, when such findings had not been shown to be erroneous under Section 2254(e)(1)); *Moses v. Payne,* 555 F.3d 742, 746 n.1 (9th Cir. 2009) (same).

[6] The prosecution, in its "Motion in Limine to Exclude So-Called Eyewitness Identification Expert Testimony [etc.]," stated that "shortly after this incident [*i.e.,* the August 16, 2000 shooting], Jeremy Moreno committed suicide." (CT 147.)

in or about July 2000. (RT4 267-70.) Nunez testified that when the truck was stolen, it had a camper shell on it. When the truck was returned to Nunez about four months later, it still had the camper shell on it; however, the truck had been painted black. (*See id.*) LAPD Officer Craig McLaren testified that the truck was recovered and impounded on August 31, 2000, before it was returned to Nunez. (RT4 360-62.)

Linda Salaz ("Salaz") testified that she lived at 5511 West Allan Street. (RT4 271.) In the early afternoon on August 5, 2000, she heard a crash; when she came out to the street in front of her house, she discovered that a truck had hit her car. (RT4 270-74.) There were two men in the truck, and Salaz spoke with the young man who was the driver. (RT4 273-74.) The driver of the truck refused to reveal his identity to Salaz. (RT4 274.) Salaz called the police, and she eventually gave the police a slip of paper that had the truck's license plate number on it and described the truck that hit her car as white. (RT4 274-76.) Salaz testified that the truck "came out of the driveway" from across the street at 5510 Allan Street, and she was familiar with the neighbors who lived there. (RT4 277.) When asked if Petitioner lived across the street from her, Salaz testified "Not that I know of." (RT 277-78.) When asked at trial whether she had seen the young man driving the truck before the accident, Salaz replied "No, not really." (RT4 274.) Salaz testified that she "left a note for the lady that lived there [across the street], and [that lady] contacted us right away and we made arrangements and

she paid for all the damages." (RT4 278.) Salaz told the police that the "boys" in the truck were "young," "maybe between 17 and 20." (RT4 280.) Salaz testified at trial that she could not identify Petitioner as the driver of the truck. (RT4 278-82.)

Police Officer Howard Jackson testified that he interviewed Salaz on August 5, 2000, after the truck hit her car. (RT4 353-55.) Salaz told him that the driver of the truck lived across the street from her and was the grandson of a lady across the street. (RT4 353-57.) Jackson testified that Salaz then became reluctant to assist any further with the investigation. (RT4 356.) However, Jackson re-interviewed Salaz on August 30, 2000, and at that time, Salaz told him the truck involved in the accident was white at the time of the accident but had recently been painted black. (RT4 357-58.)

Witness Ariel Posueloz ("Posueloz") testified that, on August 16, 2000, he lived at 5335 Huntington Drive North, which was located in the area where Landon and Moreno were shot, and he was present when police came to the scene that day. (RT4 329-330.) Posueloz observed gang graffiti in that area around August 16, 2000; however, later that day, after police arrived to investigate the shooting, he noticed that the graffiti had been "crossed out." (RT4 330-336.)[7] Poseuloz may have seen a white van or truck

[7] The evidence showed that there was graffiti in red, which read "Barrio Sereno-Locke Street" and "Bugsy, Solo, Isaac"

(Continued on following page)

on August 16, 2000, and he heard shooting about 10 or 15 minutes after he saw the white van or truck. (RT4 338-40.) He observed at least two people in the white van or truck, and there could have been more people in the vehicle. (RT4 342-43.)

Los Angeles Police Detective Thomas Herman ("Herman") testified that he went to the crime scene on August 16, 2000. (RT4 284-85.) He testified that a videotape of the area had been obtained from a near-by Super 8 Motel, which allegedly contained an image of a white pickup truck, but the videotape subsequently was lost. (RT6 738-40.) No such videotape was introduced at trial.

Lanisha Henderson ("Henderson") testified at trial that, just before the shots were fired, she had been talking to Landon in front of an apartment building at 5335 Huntington Drive North when a

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("Bugsy" was the moniker of Michael Ortega, Petitioner's original co-defendant) and indicated that Bugsy *et al.* were from the El Sereno/Locke Street gang. Graffiti in black had been added some time later and shortly before Landon was shot. That black graffiti crossed out the above-noted words in red and included the words "Lott Dogs" at the top and "Fuck Serotes" below that. "Serotes" was a derogatory term meaning, in essence, a piece of excrement, and it was a disrespectful way to refer to an El Sereno member. A gang expert testified that the significance of the graffiti in black was that the Lott Dogs had "disrespected" and challenged the El Sereno members by crossing out their names, writing in the Lott Dogs name, and essentially calling the El Sereno gang a piece of excrement, and this act would have caused the El Sereno gang to retaliate against Lott Dogs members. (*See* RT4 330-35, RT5 515-17, 522.)

white pickup truck, in which there were three occupants, approached. (RT5 440-42, 453-54.) Landon looked at the truck's occupants and said either "Lowell Street" or "Locke Street." (RT5 453-54.)[8] Henderson lived in the neighborhood (RT5 433-39), and she knew that "Lowell Street," "Locke Street," and "El Sereno" were gangs active in the neighborhood, along with the "Lott Dogs," a graffiti tagging crew (RT4 446-47). When Henderson heard Landon say "Lowell Street" or "Locke Street," she took off running, because she suspected that gang violence was about to occur. (RT5 453-54.) Henderson ran inside the apartment building at the scene, and from there, she heard up to ten shots being fired outside. (RT5 445-57.) After the shooting, she saw Moreno holding his wounded arm. (RT5 455-57.)

Henderson identified a picture of the white truck during her testimony. (RT5 440-50.) The middle one of the truck's three occupants had an "El Sereno" tattoo on his neck. (RT6 689.) Henderson had never seen the person sitting in the truck's passenger seat before. (RT5 462-63.) In court, Henderson identified Petitioner as the person she saw in the passenger seat of the truck, and as the person she eventually identified in a photographic six-pack some months

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[8] Although Henderson testified that Landon said either "Lowell Street" or "Locke Street" when the three men approached, Detective Herman testified that Henderson told him Landon had said "Locke Street," not "Lowell Street." (RT6 742-44.)

after the incident. (RT5 465, RT6 717.) Notwithstanding earlier statements Henderson made to the police, she could not remember, at the time she was testifying at trial, if Petitioner had a gun at the scene of the incident. (RT5 470-73.)

Armida Estrella ("Estrella") also testified at trial regarding the events of August 16, 2000. (RT5 382-432.) Estrella was at home near the shooting that day and saw a white truck going back and forth in front of her home on Huntington Drive. (RT5 383-86.) Estrella saw three people in the truck. (RT5 387-88.) The truck eventually pulled up in her driveway, and a man got out of the passenger side and addressed several persons who were sitting in front of the building, one of whom was Estrella's daughter. Estrella heard the man ask, "Where you from?" and "Where do Locke Dogs live?" Estrella knew these questions could be gang-related inquiries, so Estrella began yelling, "What do you want?" (RT5 388-90, 393-94.)[9] Estrella had never seen the man before, although at trial, she stated that she thought he was the same man that she had seen earlier as the truck drove back and forth on her street. (RT5 391-92.)

About an hour after she first saw the white truck on August 16, Estrella saw the truck again on the same street, when her friend drove her to a service

[9] Although Estrella said "Locke Dogs," she later referred to "Lott Dogs" as the name she had seen in neighborhood graffiti. (RT5 393-94.)

station to pick up Estrella's car. (RT5 395-96, 398.) The white truck passed in the opposite direction, just a few feet away from her, and Estrella saw the same man in the passenger seat; this time, he was holding a gun out of the truck window. (RT5 397-400, 416-17.) When Estrella saw the gun, she panicked and said to her friend, "Let's just get out of here. Get out of here, that guy has a gun." (RT5 398.) Estrella was shown photographs of a black truck at trial, and she testified that, except for the color, it was the same as the white truck she saw on August 16, 2000. (RT5 385-86.)

Estrella testified that she was reluctant to talk to the police, and she told the police she would not get involved until her daughter was relocated. (RT5 395.) Estrella's daughter thereafter was relocated. (RT5 395-96.)

Central to the case was the sequence of events surrounding Henderson's and Estrella's identification of Petitioner from various photographic "6-packs" that were presented to Henderson and Estrella by the police. A total of six photo "6-packs" were presented to Henderson and Estrella at various times before trial (*see* CT 154-59), and the circumstances and significance of the witnesses' identifications of Petitioner from those 6-packs was argued at length at trial.

Testimony reflected that, on September 20, 2000, in a taped initial interview, Detective Herman showed Henderson four 6-packs, marked as photo displays "A" through "D," in an effort to identify the principals involved in the shootings. (RT4 300-01,

RT6 729-30; *see also* CT 154-57.) Although a photo of Petitioner was in position no. 2 in display "B," Henderson was not able to identify anyone involved in the shootings from the four 6-packs. (RT6 729-30.)

Sometime between February 5 and 9, 2001, Herman showed Henderson another 6-pack, identified as People's Exhibit no. 14, photo display "E." (RT4 301-02, RT6 730-32; *see also* CT 158.) Herman testified that Henderson immediately picked out Petitioner's picture, at photo no. 5, and said she was positive of the identification. (RT6 730-32.) Henderson wrote on the 6-pack:

> The day of the shooting I was present. No. 5, I do believe, this guy looks so familiar to me. He was the guy sitting on the passenger side of the . . . white pickup truck. [¶] I seen this guy, No. 5, gesture to raise his arm and hand in which contained a gun. I seen all three guys in the truck looking down as if they were fumbling with something in their hands.

(RT5 464.) Henderson then identified Petitioner in the courtroom as the same person she had identified in that 6-pack. (RT5 465.)

On cross-examination, Henderson had trouble recounting how or why she reacted as she did to the 6-packs she was shown, and, in particular, why she did not recognize Petitioner in photo display "B" on September 20, 2000. (RT6 696-711.) Henderson stated that she was scared to testify, because a person on a

bus mentioned the shooting to her and a person came to her mother's house looking for Henderson. (*See, e.g.,* RT6 692-95, 711.) Henderson further testified that she had been moved, and her rent had been paid, by government authorities before she testified. (RT6 692-95.) However, on redirect examination, Henderson reiterated that there was no doubt in her mind that the person she identified in photo display "E," photo no. 5, was the man sitting in the courtroom (Petitioner) and the same man she saw on the day of the shooting. (RT6 717.)

Detective Herman testified that he showed Estrella photo displays "A", "B," and possibly "C" on November 13, 2000. (RT4 302-03.) Estrella testified that she did not identify anyone from the 6-packs she was shown on November 13, 2000. (RT5 427-28.)

Detective Herman showed Estrella photo display "E" on June 6, 2001. (RT4 302-03; RT5 403-04.) Estrella identified Petitioner in photo no. 5, just as Henderson had done. Estrella wrote on the 6-pack that "[h]e is the person who was parked in front of my apartment building asking if anyone was from the Lott Dogs, and later on that day in the white truck driving west on North Huntington Drive with a gun in his hand." (RT5 406.) Estrella testified that when she first looked at the photo, she "wasn't too sure, because at the time [ ] he had long hair and he had a baseball cap on"; but Estrella then said, "I remember the features were fine . . . [and] I kept looking and I said: Yeah, he looks like him." (RT5 406.) Estrella

testified that, as she sat looking at Petitioner in court, she was "confident it's him." (RT5 406.)

Detective Herman testified that, at one point, the police considered showing Henderson a live lineup that would have included Petitioner. However, in the opinion of the police, once Estrella identified Petitioner, which corroborated Henderson's identification, this made a live lineup unnecessary. (RT6 738-42.)

Detective William Eagleson testified at trial as the prosecution's gang expert. (RT5 482-579.) Eagleson identified "El Sereno" as a violent neighborhood gang with 50 to 100 members who had committed numerous "predicate" gang crimes. (RT5 522-29.) He testified that "Locke Street" is the "dominant clique" within the "El Sereno" gang (RT5 488-89, 495-96), and that the "Lowell Street" gang members "are big, big rivals" of the "El Sereno" gang (RT5 491-92; *see also* RT6 719-20). Eagleson identified Petitioner as a member of the "Locke Street" subset of the "El Sereno" gang and testified that one of Petitioner's monikers was "Chico." (RT5 499-500.) Eagleson testified that Michael Ortega was also a member of the "Locke Street/El Sereno" gang, and Ortega's moniker was "Bugs." (RT5 501-04.) Eagleson further testified that he had met the victim, Landon, and knew Landon as a member of a tagging crew known as the "Lott Dogs," who were "middle of the road" but answered more to the "Lowell Street" gang than to the "Locke Street" gang. (RT5 497-98.)

Eagleson testified that Petitioner has gang tattoos including: "Sereno" written in large script across his back; "ESR Locke Street" on his right elbow, which apparently has been tattooed over in an attempt to cover it up; two dots under his eye; tattoos on his lower kneecaps; an "L.A." tattoo, which Eagleson opined referred to the El Sereno gang; and a tattoo on his left arm, which also appeared to have been covered up. (RT5 504-11, 564-65.) Petitioner also apparently had a tattoo of "two small characters" with a "horn," which appeared to be tearing its way out of Petitioner's skin. (RT5 512-13.)

Eagleson testified that, in his expert opinion, Landon and Moreno were shot in retaliation for the crossing out of El Sereno graffiti by the Lott Dogs tagging crew. (RT5 529-30.) While Eagleson could not say with certainty whether El Sereno graffiti was in place before August 16, 2000, and was "crossed out" by a rival group before the shooting on August 16, 2000, he said it was likely that the drive-by shooting was "in furtherance of the Locke Street gang to revenge the disrespect that was shown to them earlier . . . in the marking off of the graffiti." (RT5 536-45.)

Testimony was received about the significance of graffiti painted some time after the shootings that read "187 T-Bone. Where's Chico? Sleepy, Rest in Peace." (*See* RT6 721-23.) Henderson testified that her nickname was "T-Bone" (RT4 437-39); as noted above, Eagleson testified that Petitioner's nickname was "Chico" (RT4 544-45); and "Sleepy" was victim

Landon's nickname (RT6 712). Henderson and Eagleson testified that the graffiti may have: implied that someone knew Henderson had knowledge of the shootings; been threatening Henderson with murder, *i.e.,* a "187" in regard to the shootings; and been acknowledging that "Chico," *i.e.*, Petitioner, was involved as well. (RT6 712-13, 721-26.) Eagleson speculated that the graffiti could have been put up by the "Lott Dogs," who may have been looking for Petitioner. (RT6 721-23.) On May 16, 2001, Henderson called Detective Herman and told him that she felt she had received threats, and later in May, Herman helped to relocate Henderson. (RT6 732-33.)

California Highway Patrol Officer Robert E. McGrory testified that, on October 26, 2000, about two months after the shootings, he was "running radar" on the I-15 highway in the area of Victorville, California, when Petitioner came speeding past at 97 miles per hour in what turned out to be a stolen car. McGrory gave chase, and Petitioner stopped his car. (RT4 251-53.) McGrory asked Petitioner for the keys to the car, and when Petitioner did not immediately comply, McGrory drew his gun, pointed it at Petitioner, and told Petitioner to give him the keys. (RT4 254-55.) At that point, Petitioner shifted the car into gear and sped away. (RT4 255.) McGrory chased Petitioner again at speeds of up to 110 miles per hour, and during this chase, Petitioner sped through a construction zone, where as many as ten people were working, and passed vehicles on the shoulder of the road. (RT4 254-56.) The CHP put down spike strips, which

Petitioner drove over, but eventually Petitioner pulled over and stopped his car. (RT4 257-58.) McGrory pulled his gun again and arrested Petitioner, advised him of his *Miranda* rights, and obtained a statement from him. (RT4 258, 265.) Petitioner gave McGrory a false name and told McGrory that he had bought the car from a person named "Guillermo" for $200, even though Petitioner admitted to McGrory that the car was probably worth about $20,000 to $25,000. (RT4 261-63.) Petitioner also told McGrory that he was going to Las Vegas to start a new life. (RT4 264.) McGrory identified Petitioner in court during trial. (RT4 260.)

The parties stipulated to the admission into evidence of a docket sheet from the Victorville Superior Court, which Petitioner's defense counsel described as follows:

> It's a docket sheet from the Superior Court of California, County of San Bernardino, Victorville District, a minute order indicating in the case that was mentioned here, the fleeing from the scene case, the car case that on 11/7/00 [Petitioner] was in custody but [was] released O.R. [*i.e.,* on his own recognizance], and that he returned back to Court again on 1/19/01, same Court, the third page of the second docket entry, and again he was released O.R.

(RT6 781-82.) Petitioner's counsel stated to the trial court that "I want to admit it and we'll stipulate that this can come in." (RT6 782.) The trial judge provided

the docket sheet and the minute order from the "flight case" to the jury. (RT6 786-87.)[10]

Police Officer Michael Yoro ("Yoro") testified that, on June 14, 2001, he went to 5510 Allan Street with his partner, Officer Lopez ("Lopez"), to arrest Petitioner for the shootings of Landon and Moreno. (RT4 364-66.) Lopez knocked on the front door; Petitioner answered, identified himself as Christopher Lundin, and clearly indicated that he resided at that address. (RT4 366-70.) Petitioner then locked the door and went to the rear of the house. (RT4 368-69.) Yoro radioed for backup. (RT4 369-370.) Petitioner came out through the front door about two or three minutes later and was arrested. (RT4 370-71.)

Petitioner did not testify (RT 781), and the defense presented two witnesses – Dr. Kathy Pezdak and Clayton Hollopeter. Dr. Pezdak, an eyewitness identification expert, testified, *inter alia,* about the general factors that relate to the accuracy of memory and eyewitness identifications, and she opined that high levels of stress and police suggestion can make eyewitness identifications unreliable. (*See* RT6 587-616.) Dr. Pezdak further testified that a live lineup would have been a more accurate and reliable

[10] During trial, defense counsel objected to the trial court's proposed instruction on the "flight case" and "consciousness of guilt," and the trial court held a hearing on the issue. (RT7 789-800.) The trial court eventually gave a modified instruction on "flight" and "consciousness of guilt." (*See* RT7 813.)

identification method than the photo 6-packs that the police showed Henderson and Estrella. (RT6 617-18.)

On cross-examination, the prosecutor questioned Dr. Pezdak at length about the lack of any scientific study confirming that in-court testimony based on eyewitness identifications was unreliable. (RT6 649-54.) The prosecutor also examined Dr. Pezdak on the difference between a person's ability to "describe" an event and a person's ability to "recognize" what happened during an event. In particular, the prosecutor questioned Dr. Pezdak about the ability of the witnesses to the 9/11 terrorist attacks on the World Trade Towers to "recognize" what had happened, as opposed to accurately "describing" details of the attacks, such as which tower was hit first. (*See, e.g.,* RT6 626-32, 672-77.) The prosecutor also examined Dr. Pezdak about the reliability of eyewitness testimony when more than one eyewitness has identified, under oath, the same person as the perpetrator of a crime. (RT6 675-80.)

Clayton Hollopeter ("Hollopeter"), the Executive Director of the Boys and Girls Club of San Gabriel Valley, testified as the defense's gang expert. (RT6 753-79.) Hollopeter testified, *inter alia,* that he formerly was a graffiti removal contractor for the City of Alhambra and had removed "a lot" of El Sereno gang graffiti. (RT6 770-72.) Hollopeter called graffiti the "newspaper of the gangs that's on the walls" (RT6 773-74), and he acknowledged that the "187 T-Bone" graffiti was "probably a threat" toward Henderson (RT6 779).

PETITIONER'S HABEAS CLAIMS

Ground One: Petitioner's right to the effective assistance of trial counsel was violated when counsel failed to object to the prosecutor's misconduct during closing argument. (Petition at 11.)

Ground Two: Petitioner's right to the effective assistance of trial counsel was violated when counsel failed to object to the admission of evidence, including expert testimony, related to graffiti that ostensibly named Petitioner as the perpetrator of the charged crimes and identified an eyewitness to the crimes. (Petition at 20.)

Ground Three: The evidence was insufficient to support Petitioner's convictions. (Petition at 45.)

Ground Four: The admission of the graffiti evidence, including expert testimony about it, violated the Confrontation Clause and the Due Process Clause. (Petition at 6.)

Ground Five: The prosecutor committed misconduct during closing argument. (Petition at 6.)

STANDARD OF REVIEW

The Petition is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under Section 2254(d), a state prisoner whose claim has been "adjudicated on the merits" cannot obtain federal habeas relief unless that adjudication: "(1) resulted in a

decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"; *see also Harrington v. Richter,* ___ U.S. ___, 131 S. Ct. 770, 784 (2011) ("By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2).").

Petitioner raised Ground Three in his direct appeal, and the California Court of Appeal court denied the claim on its merits in a written, reasoned decision. Petitioner raised this same claim in his petition for review filed with the California Supreme Court, which summarily denied the claim without comment or citation to authority. Petitioner raised his remaining four claims – *i.e.,* Grounds One, Two, Four, and Five – through habeas petitions. The trial court denied the four claims on their merits in a two-page Order, and the state appellate and high courts denied relief on the claims summarily. The state high court's summary denial of the claims is presumed to be "on the merits." *Richter,* 131 S. Ct. at 784-85 (holding that Section 2254(d) "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits' ").

Accordingly, as the parties agree, the denial of all five claims was on the merits, and thus, the Section 2254(d) standard of review applies to the Court's

review of the state courts' denial of Petitioner's claims. *See Lambert v. Blodgett,* 393 F.3d 943, 966-69 (9th Cir. 2004) (Section 2254(d) applies when the state court has denied a claim based on its substance, rather than on the basis of a procedural or other rule precluding state court review of the merits).

"[C]learly established Federal law, for purposes of Section 2254(d)(1) review,[11] means Supreme Court holdings in existence at the time of the state court decision in issue. *Cullen v. Pinholster,* ___ U.S. ___, ___ S. Ct. ___, 2011 WL 1225705, *9 (2011); *Thaler v. Haynes,* ___ U.S. ___, 130 S. Ct. 1171, 1173 (2010) (*per curiam*); *Lockyer v. Andrade,* 538 U.S. 63, 71, 123 S. Ct. 1166, 1172 (2003); *Williams v. Taylor,* 529 U.S. 362, 412, 120 S. Ct. 1495, 1523 (2000). "What matters are the holdings of the Supreme Court, not the holdings of lower federal courts." *Plumlee v. Masto,* 512 F.3d 1204, 1210 (9th Cir. 2008) (*en banc*); *see also Lambert,* 393 F.3d at 974 (Section 2254(d)(1) "plainly restricts the source of clearly established law to the Supreme Court's jurisprudence").

Under the first prong of Section 2254(d)(1), a state court decision is "contrary to" federal law if the state court applies a rule that contradicts the governing law as stated by the Supreme Court or reaches a different conclusion than that reached by

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[11] Petitioner does not contend that Section 2254(d)(2) is applicable to his claims, and there is no basis in the record for applying it in this case.

the high court on materially indistinguishable facts. *Price v. Vincent,* 538 U.S. 634, 640, 123 S. Ct. 1848, 1853 (2003). This includes "use of the wrong legal rule or framework." *Frantz v. Hazey,* 533 F.3d 724, 734 (9th Cir. 2008) (*en banc*).

The "unreasonable application" predicate for the second prong of Section 2254(d)(1) is an objective standard that is not satisfied merely by finding error or incorrect application of the clearly established federal law. *Andrade,* 538 U.S. at 75, 123 S. Ct. at 1174; *Williams,* 529 U.S. at 409, 120 S. Ct. at 1521. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Landrigan,* 550 U.S. at 473, 127 S. Ct. at 1939.

When a state court's denial of relief is summary, a petitioner can satisfy the "unreasonable application" prong of Section 2254(d)(1) "only by showing that 'there is no reasonable basis'" for the state court's decision. *Pinholster,* 2011 WL 1225705, *11 (citation omitted). A federal habeas court "must determine what arguments or theories supported or [in the instance of a summary denial] could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter,* 131 S. Ct. at 786; *see also id.* at 786-87 (further describing the standard as requiring a petitioner to prove that the state decision "was so

lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"); *see also Renico v. Lett,* ___ U.S. ___, 130 S. Ct. 1855, 1866 (2010) (concluding that "whether or not" the state court's decision was "*correct,*" because "it was clearly *not unreasonable,*" habeas relief was not available under Section 2254(d)(1)) (emphasis in original). "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief is precluded by Section 2254(d). *Richter,* 131 S. Ct. at 786 (citation omitted).

"AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' . . . and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico,* 130 S. Ct. at 1862 (citations omitted). The standard is "'difficult to meet,'" and "[t]he petitioner carries the burden of proof.'" *Pinholster,* 2011 WL 1225705, *8 (citation omitted).

DISCUSSION[12]

I. GROUND THREE: SUFFICIENCY OF THE EVIDENCE OF PETITIONER'S IDENTITY

In Ground Three, Petitioner complains that the evidence of identity presented at trial was insufficient

[12] The Court has considered Petitioner's five claims in their logical order, rather than in the numerical sequence in which they were alleged in the Petition.

to support his conviction,[13] *i.e.*, the evidence adduced was insufficient to establish that he was one of the men in the truck involved in the shootings of Landon and Moreno. Petitioner's claim rests on his contention that the identifications of Petitioner by eyewitnesses Henderson and Estrella were too unreliable to support a finding that he was involved in the crimes. Petitioner argues that the testimony of the women could not constitute sufficient evidence, because: neither woman selected Petitioner's photograph the first time they were shown 6-packs; both women observed the relevant events for only a matter of seconds; and their initial, respective descriptions of hair length, skin tone, and headwear contradict each other. Petitioner further notes that: his fingerprints were not found in the truck allegedly involved in the shooting; and the jury did not find that Petitioner personally discharged a firearm and, instead, found "true" the enhancement allegation that a principal

[13] As Ground Three was exhausted in the state courts, Petitioner challenged *only* the sufficiency of the evidence of identity to the extent his identification was based on the eyewitness identifications of Estrella and Henderson. (*See* Lodg. No. 3, Ex. A at 20-31, and Ex. E at 2, 5-16.) As alleged in the Petition, Ground Three also challenges *only* the sufficiency of the evidence as to identity. (Petition at 45-47.) Thus, the Court has construed and analyzed this claim solely as a challenge to the sufficiency of the evidence of Petitioner's identity and does not address the sufficiency of the evidence relating to the other elements of the charged crimes and enhancements.

personally discharged a firearm.[14] (Petition at 45-47; Traverse at 22-25.)

A. The Clearly Established Federal Law

The Fourteenth Amendment's Due Process Clause guarantees that a criminal defendant may be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

[14] The jury was given verdict forms that had separate findings for the allegations that Petitioner personally used a firearm and/or a principal personally used a firearm. The jury left the personal use by Petitioner finding unsigned and expressly found "true" the separate allegation that a principal personally discharged a firearm. (CT 210-215.) As the trial judge explained to Petitioner following his conviction, this finding meant that the jury did not reach a unanimous decision on whether Petitioner personally used a gun, but the unanimous finding that a principal personally used a firearm meant that the jury concluded that someone in the truck, whether Petitioner or one of the other men, fired the gun. (RT 998; *see also* CT 179; RT7 885-89 (the prosecutor argued that Petitioner was guilty, whether he directly fired the gun or whether one of the other men did and he was an aider and abettor by acting as the lookout or driver with knowledge of what was to occur, and that, with respect to the use of a firearm allegation, the jurors were not required to reach agreement on whether Petitioner was an aider and abettor or a direct perpetrator.)

The fact that the jury did not reach a unanimous verdict on the personal use of a firearm allegation has no bearing on the sufficiency of the eyewitness testimony of Estrella and Henderson. Moreover, Petitioner did not exhaust any claim in the state courts regarding the sufficiency of the evidence to find him guilty under an aiding and abetting theory. Accordingly, the Court will not address this issue further.

which he is charged." *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970). The Supreme Court announced the federal standard for determining the sufficiency of the evidence to support a conviction in *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781 (1979).

Under *Jackson,* "[a] petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." *Juan H. v. Allen,* 408 F.3d 1262, 1274 (9th Cir. 2005). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319, 99 S. Ct. at 2789; *see also Wright v. West,* 505 U.S. 277, 284, 112 S. Ct. 2482, 2485-86 (1992); *Bruce v. Terhune,* 376 F.3d 950, 957 (9th Cir. 2004) ("*Jackson* cautions reviewing courts to consider the evidence 'in the light most favorable to the prosecution.'"). A habeas court must "preserve 'the factfinder's role as weigher of the evidence' by reviewing '*all* of the evidence . . . in the light most favorable to the prosecution.'" *McDaniel v. Brown,* ___ U.S. ___, 130 S. Ct. 665, 674 (2010) (*per curiam*) (quoting *Jackson*; emphasis in original).

"Put another way, the dispositive question under *Jackson* is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" *Chein v. Shumsky,* 373 F.3d 978, 982-83 (9th Cir. 2004) (*en banc*) (quoting *Jackson*). A conviction is

not supported by sufficient evidence only "if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson,* 443 U.S. at 324, 99 S. Ct. at 2791-92. Significantly, the *Jackson* standard does not require a reviewing court to decide whether *it* would have found the trial evidence sufficient. *Jackson,* 443 U.S. at 318-19, 99 S. Ct. at 2788-89. The *Jackson* standard also does not require a reviewing court to scrutinize "the reasoning process actually used by the fact-finder." *Id.* at 319 n.13, 99 S. Ct. at 2789 n.13.

For the evidence to be sufficient to sustain a conviction, the prosecutor is not required to affirmatively "'rule out every hypothesis except that of guilt.'" *Wright,* 505 U.S. at 296, 112 S. Ct. at 2492 (quoting *Jackson*); *see also Schell v. Witek,* 218 F.3d 1017, 1023 (9th Cir. 2000). As the Ninth Circuit has explained, "[t]he relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the jury could reasonably arrive at its verdict." *United States v. Mares,* 940 F.2d 455, 458 (9th Cir. 1991). Under *Jackson,* the Court need not find that the conclusion of guilt was compelled, only that it rationally could have been reached. *Drayden v. White,* 232 F.3d 704, 709-10 (9th Cir. 2000).

When the factual record supports conflicting inferences, the federal court must presume – even if it does not affirmatively appear on the record – that the trier of fact resolved any such conflicts in favor of the prosecution and the federal court must defer to that

resolution. *Jackson,* 443 U.S. at 326, 99 S. Ct. at 2793; *see also Wright,* 505 U.S. at 296, 112 S. Ct. at 2492-93 (reiterating this presumption and the deference owed). Additionally, "'[c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction.'" *Walters v. Maass,* 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted). Further, a habeas court reviewing a *Jackson* sufficiency of the evidence claim must consider all evidence admitted at trial, notwithstanding a contention by a petitioner that some of the admitted evidence should have been excluded. *Brown,* 130 S. Ct. at 672.

The *Jackson* standard applies to federal habeas claims attacking the sufficiency of the evidence to support a state conviction. *See Juan H.,* 408 F.3d at 1274; *Chein,* 373 F.3d at 983. Section 2254(d)(1), however, requires the federal court to "apply the standards of *Jackson* with an additional layer of deference." *Juan H.,* 408 F.3d at 1274. Thus, the federal habeas court must determine whether the state court's rejection of a sufficiency of the evidence challenge to a conviction was an unreasonable application of *Jackson. Id.* at 1275 & n.13; *see also Brown,* 130 S. Ct. at 673 (noting the "deferential review that *Jackson* and § 2254(d)(1) demand").

B. The State Court Decision

The California Court of Appeal initially observed that California law does not require eyewitness testimony to be corroborated. (Lodg. No. 3, Ex. D at 3.)

The state appellate court described its standard of review as follows:

> Evidence is sufficient to support a conviction only if a review of the whole record in the light most favorable to the judgment discloses substantial evidence; that is, evidence which is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . "In making this determination we must view the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. . . ."

(*Id.*; citation omitted.)

The California Court of Appeal then reviewed the evidence linking Petitioner to the crime. The state court discussed, *inter alia,* the testimony establishing that: when Henderson initially was shown 6-packs, one of which contained a photograph of Petitioner taken several years before when he was 17, she indicated that Petitioner's photograph, along with four others, looked similar to the men she saw in the truck, but she was not sure; several months later, when Henderson was shown a 6-pack containing a recent photograph of Petitioner, she positively identified him; and at trial, Henderson firmly identified Petitioner as the man she saw in the passenger side of the truck. (Lodg. No. 3, Ex. D at 4.) The state court also discussed the evidence regarding

Estrella's identification, including that: like Henderson, Estrella selected Petitioner's photograph from a subsequent 6-pack shown her that included a recent photograph of Petitioner; and at trial, Estrella confidently identified Petitioner as the man she had seen in the truck. (*Id.* at 5.) The state appellate court noted the other evidence connecting Petitioner to the truck used in the shooting. (*Id.* at 6-7.) The California Court of Appeal concluded that, based on the trial evidence it had reviewed, "substantial evidence placed [Petitioner] in the truck at the time of the shooting," because he "was seen earlier driving the truck, and he was identified with certainty in court by two witnesses as having been in the truck at the time of the shooting." (*Id.* at 7.)

The California Court of Appeal then addressed Petitioner's contentions – as made here – that the evidence of his identity is insufficient, because: Henderson and Estrella failed to select the first photograph of Petitioner shown to them; Henderson stated that her attention was focused more on the truck's driver than on the passenger, and she described Petitioner as "'brown skinned' not 'light skinned,'" despite her acknowledgment at trial that Petitioner is light-skinned; and although Estrella allegedly described Petitioner as having shoulder-length hair and wearing a baseball cap, Henderson described all three occupants of the trick as bald and hatless. (Lodg. No. 3, Ex. D. at 7.) The state appellate court described the law that governed the determination of Petitioner's claims regarding the asserted deficiencies in the

identifications made by the two eyewitnesses as follows:

> "It is well settled that, absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to support a criminal conviction. [Citation.] 'To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]' [Citations.] Further, a jury is entitled to reject some portions of a witness' testimony while accepting others. [Citation.] Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate."

(*Id.* at 7-8.)

The California Court of Appeal reviewed the instructions given to the jury regarding eyewitness identifications, and it concluded that the jury was "well instructed" regarding the evaluation of eyewitness

testimony. (Lodg. No. 3, Ex. D at 8-9.)[15] The state appellate court also noted the well-established

[15] The California Court of Appeal noted the burden of proof instruction given to the jury (CALJIC No. 2.91), which made clear that the jury was to find Petitioner not guilty if it had any reasonable doubt that he was the perpetrator "after considering the circumstances of the identification and any other evidence in this case." (Lodg. No. 3, Ex. D. at 8; *see also* CT 197.) The state appellate court also noted that, pursuant to CALJIC No. 2.92, the jury was specifically instructed regarding the factors to be considered in evaluating eyewitness testimony as follows:

> "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:
>
> "The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act; [¶] The stress, if any, to which the witness was subjected at the time of the observation; [¶] The witness' ability, following the observation, to provide a description of the perpetrator of the act; [¶] The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness; [¶] The cross-racial nature of the identification; [¶] The witness' capacity to make an identification; [¶] Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act; [¶] Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup; [¶] The period of time between the alleged criminal act and the witness' identification; [¶] Whether the witness had prior contacts with the alleged perpetrator; The extent to which the witness is either certain or uncertain of the identification; [¶] Whether the witness'

(Continued on following page)

assumption that "'jurors generally understand and faithfully follow instructions.'" (*Id.* at 9; citation omitted.)

Based on these matters, the California Court of Appeal found as follows:

> We do not find any physical impossibility or inherent improbability created by any of the conflicts or inconsistencies. Henderson's earlier uncertainty did not create a conflict with her later identification, since the earlier photograph of [Petitioner] was taken when he was much younger and looked less like him.[16] And we do not see great significance in an inconsistency in Henderson's perception of [Petitioner's] complexion, particularly since the shooting took place in late Summer, and the trial took place three years after the shooting and two years after [Petitioner] was arrested.
>
> The two witnesses' descriptions were different, but not so conflicting as [Petitioner] claims. Henderson testified that the three occupants of the truck were either bald, or

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> identification is in fact the product of his or her own recollection; and [¶] Any other evidence relating to the witness' ability to make an identification."

(Lodg. No. 3. Ex. D at 809; *see also* CT 197.)

[16] Footnote 6 in original: "We have viewed the two photographs. The earlier photograph is clearly that of an adolescent, while the later photograph is one of an adult male. The two are similar, but could reasonably be mistaken for different people."

> had short hair. When Estrella was asked whether "the passenger" had long hair, she replied that it was shoulder-length, and he was wearing a baseball cap. There were *two* passengers in the truck that day, however. Estrella made it reasonably clear that it was the *middle* occupant of the truck who was the one with shoulder-length hair, and whom she confused as a girl. With regard to [Petitioner], who was the passenger nearest the passenger-side window, Estrella testified that his hair was longer on the day of the shooting than it was in the photograph of him that she picked out, but it was "not long, long."
>
> These differences in perception were issues for the jury to resolve, and we assume that it considered all relevant factors in doing so.

(Lodg. No. 3, Ex. D at 9-10; emphasis in original.)

C. The State Court Decision Is Entitled To Deference.

The jury was instructed regarding the charged crimes of murder and attempted murder and related issues (*e.g.*, malice, deliberation and premeditation, drive-by shooting, etc.) (CT 199-203.) The jury also was instructed regarding the concepts of principals and aiders and abettors as they related to both the charged crimes and the charged firearm enhancements, and the jurors were told that "principals" include those who aid and abet a crime. (CT 198,

205-06.) As set forth above in Note 14, the jury was instructed in detail regarding the factors to be considered in evaluating eyewitness testimony. The jury also was instructed generally regarding witness testimony as follows:

> You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. [¶] In determining the believability of a witness you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:
>
> The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified;
>
> The ability of the witness to remember or communicate any matter about which the witness has testified;
>
> The character and quality of that testimony;
>
> The demeanor and manner of that witness while testifying;
>
> The existence or nonexistence of a bias, interest, or other motive;
>
> The existence or nonexistence of any fact testified to by the witness;
>
> The attitude of the witness toward this action or toward the giving of testimony;

> A statement previously made by the witness that is consistent or inconsistent with his or her testimony;
>
> An admission by the witness of untruthfulness.
>
> Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that any witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. You should consider whether a discrepancy relates to an important matter or to something trivial.
>
> . . . .
>
> You should give the testimony of a single witness whatever weight you think it deserves. Testimony concerning any fact by one witness, which you believe, is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends.

(CT 193-94.)

In assessing Petitioner's claim that the eyewitness testimony of Estrella and Henderson was too weak to support his conviction, the Court must "generally presume that jurors follow their instructions." *Penry v. Johnson,* 532 U.S. 782, 799, 121 S. Ct. 1910, 1922 (2001); *see also Weeks v. Angelone,* 528 U.S. 225,

234, 120 S. Ct. 727, 732 (2000); *Richardson v. Marsh,* 481 U.S. 200, 206, 107 S. Ct. 1702, 1707 (1987). "The Court presumes that jurors, conscious of the gravity of their task, attend closely to the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin,* 471 U.S. 307, 324 n.9, 105 S. Ct. 1965, 1976 n.9 (1985). There is nothing in the record to indicate that the jurors did not do so in Petitioner's case, and there is no basis for speculating otherwise. Thus, the Court assumes that the jurors at Petitioner's trial adhered to the instructions given them regarding how to assess witness credibility, in general, and how to evaluate eyewitness testimony, in particular.

Further, as the California Court of Appeal reasonably found, regardless of the fact that Petitioner's fingerprints were not found in the truck allegedly involved in the shooting (RT 315-16), evidence presented at trial, which was entirely independent of the Estrella/Henderson identifications of Petitioner, tied Petitioner to the truck. The record supports the following finding of the California Court of Appeal:

> Linda Salaz testified that for 27 years, she has resided directly across the street from 5510 Allan Street. On August 5, 2000, while gardening in her backyard, she heard a bang, like a crash, and went out to check her car, which was parked on the street. Her car had been hit by an older model truck with two young men inside. The driver was male

Hispanic, with dark hair, 5 feet 6 inches to 5 feet 8 inches, 130 to 150 pounds, and both boys were between 17 and 20.[17]

Salaz had a conversation with the driver, who refused to give her his identity, so she called the police, and gave them a handwritten note with a description of the driver and the truck, and the license number of the truck. The note describes a white truck with a license plate bearing the same number as the 1986 Chevrolet pick-up truck stolen from Jose de Jesus Nunez.

Salaz reported the accident to Officer Howard Jackson, who testified that Salaz had recognized the driver as the grandson of the lady who lived across the street. In his first interview with her on August 5, 2000, she said the truck was white, but when he interviewed her a second time on August 30, 2000, she told him that it had recently been painted black. Salaz testified that after she left a note in the mailbox at 5510 Allan Street, stating the amount of the damage to her car, the woman who lived there paid the damages.

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[17] Footnote 5 in original: "[Petitioner] is an Hispanic male, was 20 years old at the time of trial, and almost 18 at the time of the shooting. We find no description of his height and weight in the record."

> On June 14, 2001, [Petitioner] was arrested on this charge at 5510 Allan Street, and told the officers that he resided there.

(Lodg. No. 3, Ex. D at 6-7; *see also* RT 270-80, 353-58, 365-67, 369-70.)

Significantly, Petitioner does not question the sufficiency of this evidence tying him to the truck. Indeed, he concedes that the evidence typing [sic] him to the truck "was, admittedly, pretty solid." (Petition at 38.) Accordingly, independent of the testimony of Estrella and Henderson at issue in Ground Three, the jury was presented with sufficient evidence from which a rational factfinder could find that, during the relevant time period, Petitioner was in possession of the truck alleged to be involved in the shooting.

Turning to Petitioner's principal claim – *viz.,* that the Estrella and Henderson identifications of Petitioner were too weak to support a jury finding of guilt – the Court finds that the California Court of Appeal's contrary conclusion was reasonable, under the clearly established federal law, and is entitled to deference.

Petitioner's claim rests, at its heart, on his contention that neither Henderson nor Estrella was credible. However, the jury was made fully aware that it needed to determine whether or not either woman was credible with respect to her identification of Petitioner. As quoted above, the jury was explicitly instructed on the factors to consider in determining whether a witness was credible and the weight to accord eyewitness testimony. Petitioner's counsel

extensively cross-examined both women about their observations on the day in question and their identifications in connection with 6-pack displays. (RT 410-27, 430-32, 467-80, 689-708, 713-15, 717.) Through the testimony of eyewitness expert Dr. Pezdak, Petitioner attempted to impeach the validity of the identifications made by Estrella and Henderson. (RT 581-618, 683-86.) In closing arguments, Petitioner's counsel argued vigorously that the eyewitnesses' identifications were unreliable and should not be believed. (RT 902-03, 916-35, 945-46.)

The jury, thus, knew that there was an issue about whether or not the Estrella and Henderson identifications of Petitioner should be believed. The verdicts reached show that the jurors found Estrella and/or Henderson to be credible. As the California Court of Appeal correctly observed, the determination of a witness's credibility is a question for the jury. When a defendant has been "able to cross-examine the eyewitnesses and to argue to the trier of fact that the discrepancies in their identifications made those identifications unreliable," the "trier of fact then ha[s] the responsibility of determining whether the identifications were credible." *United States v. Ginn,* 87 F.3d 367, 369 (9th Cir. 1996). Petitioner's various arguments about why Estrella and Henderson's identifications were not credible misapprehend the operation of the *Jackson* standard in habeas review. "A jury's credibility determinations are . . . entitled to near-total deference under *Jackson." Bruce,* 376 F.3d at 957; *see further* 957-58 ("[e]xcept in the most

exceptional of circumstances, *Jackson* does not permit us to revisit credibility determinations"); *see also Schlup v. Delo,* 513 U.S. 298, 330, 115 S. Ct. 851, 868 (1995) ("under *Jackson,* the assessment of the credibility of witnesses is generally beyond the scope of review"). The reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." *Walters,* 45 F.3d at 1358.

The Court agrees with the California Court of Appeal that the failure of Estrella and Henderson to select Petitioner's photograph in the first 6-pack shown to them does not warrant disregarding the deference that otherwise would be accorded the jury's credibility determinations. Critically, the photograph of Petitioner contained in the original 6-pack shown to Estrella and Henderson was taken several years earlier, while Petitioner was an adolescent. When both women subsequently were shown a 6-pack containing a current photograph of Petitioner as a young adult – *i.e.,* one taken two months after the crimes (*see* RT 312, 732) – both women confidently identified Petitioner, as they later did at trial. In her trial testimony, Estrella noted that the photograph of Petitioner in the first 6-pack shown to her was of someone "younger" than the individual she had observed, and the photograph in the second 6-pack was of an "older" individual who was closer in age to the man she saw. (RT 431-32.) The jury was shown

enlargements of these two photographs and, thus, was able to compare the age disparity between the photograph in the first 6-pack and the photograph in the second 6-pack. (RT 311-13.) A rational fact-finder, therefore, reasonably could have found that the initial failure by Estrella and Henderson to select Petitioner's photograph did not detract from the credibility of their later identifications of him in a subsequent 6-pack showing and at trial.

Like the California Court of Appeal, this Court does not find any of the asserted discrepancies in or between the descriptions given by Estrella and Henderson to be exceptional enough to warrant disregarding the jury's resolution of such discrepancies in favor of finding one or both women to be credible. As the jury was instructed, "[d]iscrepancies in a witness's testimony or between a witness's testimony and that of other witnesses . . . do not necessarily mean that any witness should be discredited, because failure of recollection and misrecollection are common and two persons witnessing an incident may perceive it differently." (CT 194.) Any discrepancies or inconsistencies in the descriptions given by Estrella and Henderson were factors for the jurors to consider under the instructions they received. Given the standard governing here – *to wit,* that evidence must be viewed in the light most favorable to the prosecution – and the Court's review of the record as a whole, the Court cannot say that the account by either woman of what she observed "is physically impossible and simply could not have occurred as described," and

thus, the jury's credibility determination cannot be revisited. *Bruce,* 376 F.3d at 958; *see also Jones v. Wood,* 207 F.3d 557, 564 (9th Cir. 2000) (rejecting a sufficiency of the evidence claim when the prosecution's view of the evidence supported guilt, even though an alternate view of the evidence was credible and pointed to the opposite conclusion, because under *Jackson,* resolving credibility is a "key question for a jury"). Under the *Jackson* standard, the fact that Henderson's and Estrella's descriptions may have varied with respect to hairstyle and headwear does not warrant the conclusion that *neither* should have been believed by the jury.

Having been instructed about the factors they should consider, the jurors found Estrella or Henderson, or possibly both women, to be credible. If either woman's identification of Petitioner was believed, there was evidence of identity sufficient to support Petitioner's conviction. It is well-settled that the testimony of a single witness is sufficient to support a conviction under the *Jackson* standard. *See United States v. McClendon,* 782 F.2d 785, 790 (9th Cir. 1986); *United States v. Larios,* 640 F.2d 938, 940 (9th Cir. 1981). The jury was instructed consistently. (*See* CT 194.)

Based on its own review of the record, and after viewing the evidence presented at trial in the light most favorable to the prosecution, the Court finds that the state court's conclusion – that the prosecution offered sufficient evidence to identify Petitioner – is consistent with the record and cannot be characterized

as an unreasonable application of *Jackson*. *See Brown,* 130 S. Ct. at 673; *Juan H.,* 408 F.3d at 1274-75. Accordingly, federal habeas relief is not warranted pursuant to Section 2254(d), and Ground Three must be denied.

II. GROUNDS TWO AND FOUR: THE ADMISSION OF EVIDENCE RELATED TO GRAFFITI AND INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's second and fourth claims alleged in the Petition are related. In Ground Four, Petitioner argues that the admission of the earlier-described graffiti evidence – namely, "187 T-Bone. Where is Chico? Sleepy, Rest in Peace" (the "Graffiti") – coupled with the expert testimony about such Graffiti, violated Petitioner's rights under the Due Process and Confrontation Clauses. In Ground Two, Petitioner argues that his trial counsel was ineffective for failing to object to the admission of the evidence of the Graffiti itself, as well as to the expert testimony about the Graffiti. In his Traverse, however, Petitioner limits these claims by clarifying that he is complaining *only* about the admission of the "Where is Chico?" portion of the Graffiti, the expert testimony related to that specific portion of the Graffiti, and counsel's failure to object to this particular evidence. (Traverse at 13-14, further noting that "Petitioner sees no constitutional wrong in the jury's exposure to the portions of the graffiti that read: '187 T-Bone – Rest in Peace, Sleepy.'")

Petitioner contends that the "Where is Chico?" portion of the Graffiti was "accusatory," because the prosecution's gang expert (Detective Eagleson) testified that that this particular phrase may have indicated that the Graffiti's author believed Henderson knew who killed Landon, and the author knew the perpetrator was Chico and was looking for him. (RT6 723-25.) Petitioner contends that, as a result, this portion of the Graffiti was "non-testimonial hearsay," and its admission violated his rights under: the Confrontation Clause, pursuant to *Ohio v. Roberts,* 448 U.S. 56, 100 S. Ct. 2531 (1980), because it lacked any indicia of reliability; and the Due Process Clause, because the *only* inference the jury could draw from the evidence was that Petitioner was the perpetrator. (*See* Petition at 26-28 & n.1; Traverse at 15-17 & n.1.) Petitioner contends that, as a result, his counsel was obligated to object to the admission of this portion of the Graffiti and Detective Eagleson's related testimony, because the objection would have been sustained. (Petition at 28, 30; Traverse at 17-18.)

A. The Clearly Established Federal Law.

1. Ground Four

State court evidentiary rulings cannot serve as a basis for habeas relief unless the asserted error rises to the level of a federal constitutional violation. *See, e.g., Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S. Ct. 475, 480 (1991); *Jammal v. Van de Kamp,* 926 F.2d 918, 919-20 (9th Cir. 1991). It is "well settled that a

state court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process." *Spivey v. Rocha,* 194 F.3d 971, 977-78 (9th Cir. 1999); *see also Larson v. Palmateer,* 515 F.3d 1057, 1065 (9th Cir. 2008) (for purposes of federal habeas review, it is "irrelevant" whether an evidentiary ruling is correct or not under state law; the only question is whether the ruling rendered the trial so fundamentally unfair as to violate due process); *Windham v. Merkle,* 163 F.3d 1092, 1103 (9th Cir. 1998); *Jeffries v. Blodgett,* 5 F.3d 1180, 1192 (9th Cir. 1993).

"The improper admission of evidence does not violate the Due Process Clause unless it is clearly prejudicial and 'rendered the trial fundamentally unfair.'" *Drayden v. White,* 232 F.3d 704, 710 (9th Cir. 2000) (citation omitted); *see also Jammal,* 926 F.2d at 919. "Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.'" *Id.* at 920 (emphasis in original; citation omitted).

> A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision. "Evidence introduced by the prosecution will often raise more than one inference, some permissible, some not." . . . In such cases, "we must rely on the jury to sort [the inferences] out in light of the court's instructions." . . .

> Admission of evidence violates due process "[o]nly if there are no permissible inferences the jury may draw" from it. . . .

Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005) (*citing Jammal, supra*). Moreover, in cases governed by Section 2254(d), such as this one, "even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by 'clearly established Federal law,' as laid out by the Supreme Court." *Holley v. Yarborough,* 568 F.3d 1091, 1101 (9th Cir. 2009) (observing that the Supreme Court: "has made very few rulings regarding the admission of evidence as a violation of due process"; and "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").

The Confrontation Clause of the Sixth Amendment provides that, in criminal cases, the accused has the right to "be confronted with witnesses against him." U.S. Const. Amend. VI. In *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354 (2004), the Supreme Court overruled prior Confrontation Clause jurisprudence and held that the Confrontation Clause bars the admission of "testimonial" out-of-court statements by witnesses not appearing at trial, unless the witnesses are unavailable and the defendant had a prior opportunity to cross-examine them. *Id.* at 53-54, 59, 124 S. Ct. at 1364-65, 1369. Only "testimonial statements" implicate the Confrontation Clause

and *Crawford*'s holding. *Davis v. Washington,* 547 U.S. 813, 821, 126 S. Ct. 2266, 2273 (2006); *see also Whorton v. Bockting,* 549 U.S. 406, 420, 127 S. Ct. 1173, 1183 (2007) ("the Confrontation Clause has no application to" an "out-of-court nontestimonial statement"); *Ponce v. Felker,* 606 F.3d 596, 600 n.2 (9th Cir. 2010) ("[n]ot all out-of-court statements are 'testimonial,' and the Confrontation Clause does not apply to non-testimonial statements"), *cert. denied,* 131 S. Ct. 521 (2010).[18]

While the Supreme Court, in *Crawford,* declined to define the meaning of "testimonial," it noted that a testimonial statement includes, at a minimum, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." 541 U.S. at 68-69, 124 S. Ct. at 1374. In *Melendez-Diaz v. Massachusetts,* ___ U.S. ___, 129 S. Ct. 2527 (2009), the Supreme Court opined that for

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[18] *Crawford* was decided before Petitioner's conviction became final on direct appeal and, thus, governs Petitioner's asserted right to relief. *See Bockting,* 549 U.S. at 409, 127 S. Ct. at 1177. Although Petitioner concedes that *Crawford* overruled the *Ohio v. Roberts* "indicia of reliability" rule with respect to testimonial hearsay statements, he argues that the *Ohio v. Roberts* rule remains viable, and continues to apply, with respect to non-testimonial hearsay statements. (Petition at 27 n.1; Traverse at 15 n.1.) Petitioner is mistaken, as the Supreme Court made clear in *Bockting,* 549 U.S. at 420, 127 S. Ct. at 1183 (noting *Crawford's* "elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements," the admission of which are permitted "even if they lack indicia of reliability").

a statement to be "testimonial" within the meaning of *Crawford,* it must have been made "'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* at 2532 (citation omitted). As the Ninth Circuit has observed, *Crawford*'s discussion of what may constitute a testimonial statement was premised on the use of statements "made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." *Jensen v. Pliler,* 439 F.3d 1086, 1089 (9th Cir. 2006).

In addition, the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford,* 541 U.S. at 59 n.9, 124 S. Ct. at 1369 n.9. For example, in *Tennessee v. Street,* 471 U.S. 409, 413-14, 105 S. Ct. 2078, 2081-82 (1985), the Court found that "no Confrontation Clause concerns" existed when an accomplice's confession was admitted for a nonhearsay purpose, namely, to rebut defendant's testimony that the police coerced him to confess by directing him to repeat the accomplice's statement. Similarly, in *Moses,* 555 F.3d at 755-56, the Ninth Circuit found that the Confrontation Clause was not implicated by a social worker's testimony regarding out-of-court statements made by the victim's son, because the testimony was offered to explain why the social worker contacted the child protective services agency, rather than for the truth of what the child said. *Crawford* also did not affect the

rule (*see, e.g.,* Fed R. Evid. 703; Cal. Evidence Code § 801(b)) that experts may rely on otherwise inadmissible evidence in formulating the opinions to which they testify *See, e.g., United States. v. Law,* 528 F.3d 888, 911-12 (D.C. Cir. 2008) (finding no Confrontation Clause violation based on a gang expert's testimony about the typical operations of narcotics dealers, even though his opinion was based on his numerous interviews of such dealers, because the expert testified based on his experience as a narcotics investigator and he did not relate any statements made by the dealers he had interviewed).

Finally, even if a violation of the Confrontation Clause is found, any such error is trial error and, therefore, is subject to harmless error analysis. *See, e.g., Moses,* 555 F.3d at 755; *Winzer v. Hall,* 494 F.3d 1192, 1201 (9th Cir. 2007). Thus, a petitioner is entitled to federal habeas relief only if the Confrontation Clause violation had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637-38, 113 S. Ct. 1710, 1722 (1993).

2. Ground Two

The Sixth Amendment guarantees the effective assistance of counsel at trial. *Strickland v. Washington,* 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). When a petitioner claims that his counsel's performance violated the Sixth Amendment, "[i]n addition to the deference granted to the state court's decision

under AEDPA, [federal habeas courts] review ineffective assistance of counsel claims in the deferential light of" *Strickland. Brown v. Ornoski,* 503 F.3d 1006, 1011 (9th Cir. 2007); *see also Knowles v. Mirzayance,* ___ U.S. ___, 129 S. Ct. 1411, 1420 (2009) (review of a *Strickland* claim pursuant to Section 2254(d)(1) is "doubly deferential").

To establish ineffective assistance by his trial counsel, Petitioner must demonstrate both that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland,* 466 U.S. at 688-93, 104 S. Ct. at 2064-68; *see also Mirzayance,* 129 S. Ct. at 1420 ("*Strickland* requires a defendant to establish deficient performance and prejudice"). As both prongs of the *Strickland* test must be satisfied to establish a constitutional violation, failure to satisfy either prong requires that an ineffective assistance claim be denied. *See Strickland,* 466 U.S. at 697, 104 S. Ct. at 2069 (no need to address deficiency of performance if prejudice is examined first and found lacking); *Rios v. Rocha,* 299 F.3d 796, 805 (9th Cir. 2002) ("[f]ailure to satisfy either prong of the *Strickland* test obviates the need to consider the other").

The first prong of the *Strickland* test – deficient performance – requires a showing that, in the light of all the circumstances, counsel's performance was "outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690, 104 S. Ct. at 2066. Judicial scrutiny of counsel's performance "must be highly deferential," and this Court must

guard against the distorting effects of hindsight and evaluate the challenged conduct from counsel's perspective at the time in question. *Id.* at 689, 104 S. Ct. at 2065; *see also Mirzayance,* 129 S. Ct. at 1420 ("'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,'" *quoting Strickland*); *Yarborough v. Gentry,* 540 U.S. 1, 8, 124 S. Ct. 1, 6 (2003) (*per curiam*) (noting that even inadvertent, as opposed to tactical, attorney omissions do not automatically guarantee habeas relief, because "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight"); *Wiggins v. Smith,* 539 U.S. 510, 523, 123 S. Ct. 2527, 2536 (2003) (the first *Strickland* prong is a "context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time'"). Due to the difficulties inherent in making this evaluation, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689, 104 S. Ct. at 2065; *see also Matylinsky v. Budge,* 577 F.3d 1083, 1091 (9th Cir. 2009) (the petitioner "bears the burden of proving that [counsel's] trial strategy was deficient"), *cert. denied,* 130 S. Ct. 1154 (2010).

The second prong of the *Strickland* test – prejudice – requires showing a "reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is a probability "sufficient to undermine

confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Richter,* 131 S. Ct. at 792. "Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial." *Kimmelman v. Morrison,* 477 U.S. 365, 382, 106 S. Ct. 2574, 2586-87 (1986).

Finally, to succeed on an ineffective assistance of counsel claim governed by Section 2254(d), "it is not enough" to persuade a federal court that the *Strickland* test would be satisfied if a claim "were being analyzed in the first instance." *Bell v. Cone,* 535 U.S. 685, 698-99, 122 S. Ct. 1843, 1852 (2002). It also "is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Id.* Rather, the petitioner must show that the state courts "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Id.* "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Mirzayance,* 129 S. Ct. at 1420.

B. Federal Habeas Relief Is Not Warranted.

To the extent Petitioner is complaining that the evidence of the Graffiti and the related expert testimony about its meaning were admitted in violation of California law (*see, e.g.,* Petition at 28), that claim is

not cognizable on federal habeas review. *See Estelle,* 502 U.S. at 67-68, 112 S. Ct. at 480. Although Petitioner's Confrontation Clause and Due Process Clause claims are cognizable, they fail to establish a basis for habeas relief under Section 2254(d)(1), for the following reasons.

With respect to Ground Four – the Confrontation Clause and due process challenge to the admission of the Graffiti and the related expert testimony – the state court decision was reasonable and thus entitled to deference, because no Confrontation Clause or due process violation resulted from the admission of the Graffiti evidence, including the "Where is Chico?" portion, and the expert testimony related to it.

For purposes of the Confrontation Clause, Petitioner appears to concede that the Graffiti is non-testimonial. (*See, e.g.,* Petition at 27 n.1; Traverse at 15 n.1.) Even without such a concession, however, no other conclusion is possible. There is no factual or logical basis for concluding that when the Graffiti was spray-painted onto a wall, the anonymous tagger did so in the reasonable belief that the Graffiti would be "used prosecutorially" and/or "available for use at a later trial," and the Graffiti plainly is not an extra-judicial statement contained in formalized testimonial materials. *See Melendez-Diaz,* 129 S. Ct. at 2532; *Crawford,* 541 U.S. at 51-52, 124 S. Ct. at 1364. The Court cannot reasonably find that this spray-painted message was "made to a government officer with an eye toward trial." *Jensen,* 439 F.3d at 1089. The Court

concludes that the Graffiti is non-testimonial within the meaning of *Crawford.*

As the Graffiti itself was non-testimonial, the clearly established federal law makes clear that evidence of the Graffiti falls outside the scope of the Confrontation Clause,[19] and thus, the admission of such evidence at trial, including the "Where is Chico?" portion, cannot have resulted in a Confrontation Clause violation. Detective Eagleson's expert testimony about the Graffiti, including the meaning of the "Where is Chico?" phrase, also falls outside of the Confrontation Clause's bar, because Eagleson's testimony about the Graffiti was proffered for a reason other than the truth of the statements set forth in the Graffiti.[20] Eagleson did not opine that the substance of the Graffiti was true, nor did he opine that the Graffiti established that Petitioner *was,* in fact, the perpetrator. Rather, Eagleson's testimony regarding

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[19] Petitioner's arguments about the asserted unreliability of the Graffiti evidence are unavailing, because *Crawford* abrogated the need to assess the reliability of such non-testimonial evidence.

[20] Significantly, the prosecutor never argued that the Graffiti established that Petitioner was the perpetrator. (*See* RT7 842-92, 948-68.) The prosecutor made a single, brief reference to the Graffiti in closing argument, namely, to argue that Henderson felt threatened by it and that the Graffiti may have provoked Petitioner's attempt to flee. (RT 963-64.)

the Graffiti was focused on its relation to Henderson and the gang rivalry issues present in the case.[21]

Eagleson testified that the significance of the Graffiti was that it told a "story" and captured "the reaction after the fact" of the crime with respect to rival gangs. (RT6 721-22.) Eagleson testified that, when a homicide occurs and it appears that gang rivalry is involved, the gang whose member was killed will tag property with graffiti "warning signals." (*Id.*) He described "warning signals" graffiti as follows:

> They will start writing their homeboy rest in peace and those people they believe are involved, or they will disgrace the gang by putting 187 slash and the name of the gang and rest in peace, and they might put their neighborhood next to that, meaning they are going to quickly want to retaliate against that gang, or a specific individual that was responsible for that killing of their homeboy.

(RT 722.) When asked about "the story" the Graffiti told, Eagleson stated that: the reference to "T-Bone" referred to Henderson and the gang's awareness that she saw something involving the murder of the gang's

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[21] As noted earlier, evidence was presented that Landon and Moreno were victims of a retaliatory shooting after Lott Dogs members apparently crossed out El Sereno graffiti and wrote derogatory comments about the El Sereno gang and its Locke Street subset, to which Petitioner belonged.

homeboy, "Sleepy"; and the "Chico" reference indicated the gang's belief that Chico was the person "who did the shooting" and its intent to deal with him. (RT 722-23, 725.)

Eagleson's testimony about the Graffiti, thus, supported the prosecution's theory that the shootings were the result of gang rivalry. His testimony was probative of the P.C. § 186.22(b)(1) gang enhancement allegations made with respect to both the murder and attempted murder counts. Indeed, the testimony of the defense gang expert, Hollopeter, confirmed the relevance of the Graffiti evidence on those issues when he opined that graffiti is the "newspaper of the gangs that's on the walls." (RT6 773-74.)

Under California law, gang evidence is admissible when relevant to the charged offense and any gang enhancement alleged. *See, e.g., Contreras v. Cate,* 2010 2487759, at *17-*18 (S.D. Cal. April 2, 2010), *adopted by* 2010 WL 2485796 (S.D. Cal. June 15, 2010) (citing cases); *People v. Hernandez,* 33 Cal. 4th 1040, 1048-51, 16 Cal. Rptr. 3d 880, 886-87 (2004) (discussing the permissibility of gang expert testimony, both as to the underlying offense and gang enhancement allegations); *see also Windham v. Merkle,* 163 F.3d 1092, 1103-04 (9th Cir. 1998) (rejecting a habeas due process challenge to gang expert testimony that, *inter alia,* gang members engage in retributive behavior when one of their members is wronged, after finding that the expert testimony was probative of the defendants' motive); *People v. Olguin,* 31 Cal. App. 4th 1355, 1367-70, 37 Cal. Rptr. 2d 596, 600-01

(1994) (gang expert's testimony – including that crossing out a gang's graffiti and calling out a gang's name when rival gang members were near is viewed as disrespectful and can result in a violent confrontation – held to be relevant to motive and intent issues, because it explained the defendants' behavior). The Ninth Circuit has rejected a federal constitutional challenge to gang expert testimony directed specifically to a gang enhancement allegation (*i.e.,* that the crime was committed in furtherance of or to benefit a gang), reasoning that there is no due process or other clearly established constitutional right to be free of an expert opinion on this type of ultimate issue. *Briceno v. Scribner,* 555 F.3d 1069, 1076-78 (9th Cir. 2009).

The Graffiti and Eagleson's testimony about it bore on relevant issues at trial, including the prosecution's theory that the charged murder and attempted murder stemmed from a gang dispute and were committed in furtherance of or to benefit Petitioner's gang (the gang enhancement allegation). A finding that the Graffiti reflected the response of a rival gang to the shootings of Landon and Moreno, as Eagleson testified, tended to support the prosecution's theory that the charged shootings were gang-related. Moreover, because Petitioner was charged with a gang enhancement pursuant to P.C. § 186.22, the prosecutor was required to prove that petitioner participated in the shootings for the benefit of a criminal street gang. *See* P.C. § 186.22(b)(1). Thus, Eagleson's testimony about the meaning of the Graffiti – *viz.,* that it

reflected one gang's response to a gang-related killing – was relevant to establishing the gang enhancement allegation. There was a permissible inference the jury could draw from the Graffiti and Eagleson's testimony about its significance, and therefore, due process was not violated by the admission of such evidence. *Jammal,* 926 F.2d at 920. That conclusion is not altered even if there were other inferences that could be drawn from the evidence. *Boyde,* 404 F.3d at 1172.

Because neither the Confrontation Clause nor due process were violated by the admission of the Graffiti and Eagleson's testimony about it, the state court's denial of relief based on Ground Four was neither contrary to nor an unreasonable application of the clearly established federal law. Accordingly, the state court's decision regarding Ground Four cannot warrant relief under Section 2254(d)(1).

With respect to Ground Two – Petitioner's contention that his trial counsel provided ineffective assistance by failing to raise Confrontation Clause and due process objections to the Graffiti and Eagleson's related testimony – the Court concludes that the state court's rejection of this claim, again, is entitled to deference under Section 2254(d)(1).

As noted above, California law allowed evidence of the Graffiti and related expert testimony to be admitted. As the California Supreme Court has recognized, the "subject matter of the culture and habits of criminal street gangs" satisfies the criteria of California Evidence Code §§ 720 and 801 regarding

expert opinion testimony, and such expert testimony is relevant to establishing the gang enhancement charged in Petitioner's case. *People v. Gardeley,* 14 Cal. 4th 605, 617-20, 59 Cal. rptr. 2d 356, 363-65 (1997); *see also Studebaker v. Uribe,* 658 F. Supp. 2d 1102, 1115-17 (C.D. Cal. 2009) (discussing California case law regarding the admissibility of gang expert evidence). Indeed, when Petitioner raised Ground Four in his trial court habeas petition, the trial court concluded that the Graffiti and Eagleson's related testimony were properly admitted under California law, and thus, no objection to such evidence was warranted. (Lodg. No. 3, Ex. G.)

Because the Graffiti and related gang expert testimony was admissible under California law, Petitioner has failed to show that his trial counsel was deficient for failing to object to its admission on a state law basis. *See People v. Williams,* 16 Cal. 4th 153, 193, 66 Cal. Rptr. 2d 123, 153 (1997) (finding no error in denying the defendant's motion to exclude gang evidence, because "in a gang-related case, gang evidence is admissible if relevant to prove motive or identity"). Any such objection by counsel would have been futile, and thus, no Sixth Amendment violation can be found. "A lawyer's zeal on behalf of his client does not require him to" take meritless action. *Lowry v. Lewis,* 21 F.3d 344, 346 (9th Cir. 1994); *see also Ceja v. Stewart,* 97 F.3d F.3d [sic] 1246, 1253 (9th Cir. 1996). The Sixth Amendment does not require defense counsel to make futile and/or unwarranted objections and motions. *See, e.g., Kimmelman,* 477

U.S. at 375, 106 S. Ct. at 2583 (omitted action or claim must be shown to be meritorious to support ineffective assistance of counsel claim); *James v. Borg,* 24 F.3d 20, 26-27 (9th Cir. 1994) (counsel's failure to make what would have been a futile motion does not qualify as ineffective assistance of counsel).

In addition, in view of its findings that Petitioner's Confrontation Clause and due process arguments fail, the Court cannot find the *Strickland* standard satisfied by reason of trial counsel's failure to object to the Graffiti and Eagleson's related testimony on these federal constitutional grounds. Given that the admission of this evidence did not violate Petitioner's rights under the Confrontation and Due Process Clauses, his counsel's failure to raise such an objection cannot be found to constitute deficient performance or to satisfy the prejudice requirement. *See Rupe v. Wood,* 93 F.3d 1434, 1445 (9th Cir. 1996) ("the failure to take futile action can never be deficient performance"); *Boag v. Raines,* 769 F.2d 1341, 1344 (9th Cir. 1985) (the "[f]ailure to raise a meritless argument does not constitute ineffective assistance").

Finally, even if the Court could find, *arguendo,* that Petitioner's counsel should have objected to the Graffiti and Eagleson's related testimony on some basis *and* that such an objection likely would have been sustained (a finding the Court does not make), the Court nonetheless cannot find the *Strickland* prejudice requirement satisfied. Regardless of the Graffiti evidence and Eagleson's testimony, there was ample evidence that Petitioner was in the white

truck with a gun on the day of the shootings, driving through the neighborhood, asking gang-related questions concerning the "Lott Dogs," and eventually approaching Landon and Moreno seconds before both were shot. Furthermore, the eyewitnesses, Henderson and Estrella, confidently identified Petitioner in court. As discussed above in connection with Ground Three, this evidence was sufficient to support the convictions, and precludes any reasonable probability that the result of the trial would have been different even if trial counsel somehow had managed to obtain the exclusion of the "Where is Chico?" portion of the Graffiti and Eagleson's related testimony. *See Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068. Put otherwise, the required "'substantial' . . . likelihood of a different result" absent such evidence does not exist. *Richter,* 131 S. Ct. at 792.

Neither *Strickland* prong is satisfied based on trial counsel's failure to object to the Graffiti evidence and Eagleson's related testimony. Accordingly, the state court's rejection of Ground Two is entitled to deference under Section 2254(d)(1).

III. GROUNDS ONE AND FIVE: PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL

In Ground Five, Petitioner alleged that the prosecutor committed misconduct during his closing argument, which falls into the following four categories:

First, Petitioner contends that the prosecutor improperly vouched for eyewitnesses Estrella and Henderson and appealed to the jurors' passions and prejudice through the following argument:

> A witness [*i.e.,* Henderson] who would come to court alone under the facts and circumstances of this case – because sometimes this is all it comes down to, one witness. *A brave citizen who would come forward. And you know what, that's got to mean something for us all. We have to stand behind citizens like that.* And certainly, by this instruction[22] the law recognizes the value of that one witness. [¶] And keep in mind, she doesn't get to maintain her confidentiality, except perhaps as to her current address.

(RT7 861; emphasis added by Petitioner in Petition at 11.)

> [Referring to the eyewitnesses Estrella and Henderson]: *You diminish yourselves if you diminish good people* with no motive to tell you that they are here under reluctance, but were willing to tell the truth and take an oath and ask and seek that justice be done.

(RT7 954; emphasis added by Petitioner in Petition at 12.)

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[22] The prosecutor was referring to the jury instruction that the testimony of one witness, if believed, may be sufficient to prove the fact in issue. (RT 861.)

Second, Petitioner contends that the prosecutor improperly interjected his own opinion into the case and made reference to "facts" outside the trial record by the following arguments regarding Dr. Pezdak, the defense eyewitness expert witness:

> We had an expert testify about eyewitness identification, and frankly, *you saw me and I* – believe it or not, *I lose* all self-consciousness when I was doing what I'm doing. I come back to myself on occasion and then I am lost again. . . .
>
> *But I find it offensive,* and I hope you would, that somebody would make a livelihood telling you what you already know.
>
> It's a waste. *And it should offend you* as adults with common sense.
>
> *And it should even offend you more* when they stretch beyond common sense, beyond its borders to try to convince you of things that cannot possibly be true based upon *the most spurious, scurrilous,* unsubstantiated evidence of their experimentations.
>
> *It should just upset you to no end* that childbirth is the same as witnessing a violent crime. It's ridiculous. It's not the same.
>
> *I am really offended that everybody,* especially on this day, make the Twin Towers and September 11th their opportunity for a lesson that they can teach us all, that somehow people did not witness that event

> accurately because they didn't get the sequence of events correct.
>
> *That's offensive to me,* you know. And as I tried to point out, they were right about the planes crashing into the buildings. They didn't say it was a helicopter, or a blimp, or a bus, or a train. They just might have gotten the order a little bit wrong.
>
> . . . .
>
> And again, *it really enrages me* that these people could come into a public court, watch what goes down every day, make a study of all the case files here where 12 people believe the evidence or don't believe the evidence, where there is corroboration of confessions and everything like that, and decide is eyewitness identity – identification reliable or not. Reliable.
>
> . . . .
>
> They don't want to undertake that study, because they are afraid they will be out of work and *the gravy train will end. It should offend you.*

(RT7 863-65; emphasis added by Petitioner in Petition at 11-12.)

> He [Petitioner's counsel] talked a couple times about this lady, and she may be a very nice lady. I don't know Miss Pe[zd]ak. But *I do know it is junk pseudo science.*

> I can't take something – you know, science in the laboratory is removing all other distractions, all other variables, limiting the experiment to some controllable thing and determining from that what principles are involved.
>
> But when you go into something else and you have no control over any of those variables, and it's whatever happens happens, that's not science. It's whatever you want it to be.
>
> [Referring to Dr. Pezdak's testimony about the difficulties in making cross-racial identifications] Oh, the defect, even though it was in Texas, *which is a cross-racial society,* that there [are] some people who – you know, they lived with other races. That may very well be true.
>
> But we don't know anything about those people who participated in that study, because those scientists aren't scientists. *They're pseudo scientists creating a field of specialty that they can exploit in courtrooms on behalf of defendants.*
>
> And it is nonsense. *And frankly, if I could end it, I would. But I am not in charge.*

(RT7 957-58; emphasis added by Petitioner in Petition at 12-13.)

Third, Petitioner contends that the prosecutor asserted facts in evidence and implied that Petitioner's counsel did not believe in Petitioner's innocence,

and thus interfered with Petitioner's right to the effective assistance of counsel, by the following argument:

> *I* submit to you – and [Petitioner's counsel] fully well knows this – he had every right to ask for a lineup if he thought it would in any way whatsoever be of any benefit to his client.
>
> And so to say that the lineup wasn't done and that the meaning of that is that all of these identifications are suspect or unworthy is completely fallacious. If there was *any belief* or urgency in that he could have gone to the court and asked and gotten an order, and it would be done. *He did not,* because there was no value there.

(RT7 955-56; emphasis added by Petitioner in Petition at 12.)

Fourth, Petitioner contends that the prosecutor again improperly interjected his personal opinion when he addressed Petitioner's flight from arrest and "consciousness of guilt," Petitioner complains of the prosecutor's following remarks during his rebuttal:

> *I* don't believe you see many of those [police chases] where a gun is pointed at a guy's head and he is willing to risk it and that he keeps going after his tires are spiked out. [¶] But *I* am almost 100 percent certain that you don't see any of those where the guy's explanation is "I want to change my life. I want to start over." That's not the way to do it. . . . [¶]

> I am telling you, you don't hear that very often. It's a festering, volcanic eruption of the guilty mentality. . . .

(RT7 963; emphasis added by Petitioner in Petition at 13.)

In Ground One, Petitioner argues that his trial counsel provided ineffective assistance by failing to object to the above-quoted portions of the prosecutor's closing arguments.

A. The Clearly Established Federal Law.

The clearly established federal law governing Petitioner's Ground One ineffective assistance of counsel claim has been set forth above in Section II.A.2.

With respect to Ground Five, habeas relief based on claims of prosecutorial misconduct will be granted only when the misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S. Ct. 2464, 2471 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S. Ct. 1868, 1871 (1974)); *see also Sassounian v. Roe,* 230 F.3d 1097, 1106 (9th Cir. 2000). "Th[is] standard allows a federal court to grant relief when the state-court trial was fundamentally unfair but avoids interfering in state-court proceedings when errors fall short of constitutional magnitude." *Drayden v. White,* 232 F.3d 704, 713 (9th Cir. 2000). "To constitute a due process violation, the prosecutorial misconduct must

be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Greer v. Miller,* 483 U.S. 756, 765, 107 S. Ct. 3102 (1987) (citation omitted).

"[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips,* 455 U.S. 209, 219, 102 S. Ct. 940, 947 (1982). Hence, "[i]mproper argument does not, per se, violate a defendant's constitutional rights." *Jeffries v. Blodgett,* 5 F.3d 1180, 1191 (9th Cir. 1993). "[I]t is not enough that the prosecutor's remarks were undesirable or even universally condemned." *Darden,* 477 U.S. at 181, 106 S. Ct. at 2471 (internal punctuation and citation omitted). Furthermore, the prosecutor is entitled to argue reasonable inferences from the evidence. *See Ceja v. Stewart,* 97 F.3d 1246, 1253-54 (9th Cir. 1996) ("Counsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom."); *United States v. Molina,* 934 F.2d 1440, 1445 (9th Cir. 1991) ("freedom to argue reasonable inferences based on the evidence" is inherent in the prosecution's latitude to fashion closing arguments). The Court must view the challenged comments by the prosecutor in the context of the entire trial. *See Greer,* 483 U.S. at 765-66, 107 S. Ct. at 3109; *Hall v. Whitley,* 935 F.2d 164, 165 (9th Cir. 1991).

If, after such an analysis, the Court finds that the prosecutor did commit misconduct rising to the level of a due process violation, the Court then must assess whether such error was "harmless" within the meaning of *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S. Ct. 1710, 1722 (1993) (the test is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict"). "If prosecutorial misconduct is established, and it was constitutional error," the reviewing court then applies the *Brecht* harmless error test to determine whether federal habeas relief is merited. *Fields v. Woodford,* 309 F.3d 1095, 1109 (9th Cir.), *as amended by* 315 F.3d 1062 (9th Cir. 2002).

B. Habeas Relief Is Not Warranted.

Not all of the prosecutor's statements of which Petitioner complains rise to the level of prosecutorial misconduct. Some of the prosecutor's comments, however, plainly were inappropriate and may constitute misconduct within the meaning of the foregoing standard. That said, the Court concludes, for the reasons set forth below, that habeas relief is not warranted.[23]

With respect to Petitioner's fourth contention – regarding the prosecutor argument about Petitioner's flight from arrest and "consciousness of guilt" – the

[23] The Court discusses Petitioner's four contentions (identified above at pp. 58-64) in reverse order.

Court finds that the prosecutor's comments, while inappropriate to some extent, do not rise to the level of unconstitutional misconduct. Before trial, the prosecutor filed a motion to allow "flight evidence" showing Petitioner's "consciousness of guilt" based on the car chase and his subsequent arrest. (*See* CT 160-67.) The judge allowed the evidence, and it was later agreed that the judge would give a modified jury instruction that preserved for the jury the issue of whether Petitioner was fleeing with consciousness of guilt because he was in a stolen car or because he had a consciousness of guilt with respect to the earlier shootings. (*See, e.g.,* RT7 789-90.) That instruction was given to the jurors. (*See* RT & 813.)

Thus, the jury was required to decide whether Petitioner's attempted flight from police evidenced a consciousness of guilt, and both the prosecution and the defense were entitled to argue the issue. During his closing argument, Petitioner's counsel asserted that the flight-related evidence was "stupid," innocuous, and irrelevant, and any inference of a consciousness of guilt was belied by Petitioner's conduct, including his asserted willingness to accept responsibility by doing the "correct thing" and appearing in court after being released on his own recognizance. (RT7 897-901.) Petitioner's counsel labeled Petitioner's flight from the police as a "senseless act," asserting that "anyone in L.A. knows how crazy it is to try to run from the police in a car" and "[w]e have seen more chases on TV probably than the rest of the country combined," but "for whatever weird reason,

people do stupid things and try to get on a freeway or whatever and drive around and think they're going to get away." (RT7 901.)

The prosecutor's remarks regarding the car chase and consciousness of guilt were made in rebuttal to the above arguments by Petitioner's counsel regarding the interpretation of the flight evidence, and highlighted the reasonable inferences that the jury could draw from the facts. *See Ceja,* 97 F.3d at 1253-54 (prosecutor is entitled to argue reasonable inferences from evidence). The prosecutor's use of "I" when arguing that Petitioner's conduct was indicative of guilt may have been inappropriate, but it did not render Petitioner's trial unfair. The prosecutor's comments contained no suggestion that he was relying on information outside the evidence presented at trial. Moreover, as the Supreme Court observed in *Darden,* in connection with an allegedly improper comment during closing argument, "[m]uch of the objectionable content was invited by or in response to the opening summation of the defense." 477 U.S. at 182, 106 S. Ct. at 2472. "[T]he idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole." *Id.* (citation omitted); *cf. United States v. Young,* 470 U.S. 1, 12-13, 105 S. Ct. 1038, 1045 (1985) ("the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo," to which the prosecutor may "respond substantially in order to 'right the scale' "). "[T]he propriety of the remarks

must be judged in relation to what would constitute a fair response to the remarks of defense counsel." *United States v. Lopez-Alvarez,* 970 F.2d 583, 597 (9th Cir. 1992).

In this instance, the prosecutor was responding to the arguments of Petitioner's counsel in which counsel expressed his own personal opinion about fleeing from the police and why people act as they do, as well as about Petitioner's motivations. In context, the prosecutor's reference to "I" was not so much an expression of personal opinion as a plea that jurors should reject the argument of Petitioner's counsel based on common sense. Even if the prosecutor's "I' references were indecorous, they plainly were made in response to the defense arguments and did not infect Petitioner's trial with unfairness. *See Cheney v. Washington,* 614 F.3d 987, 997 (9th Cir. 2010) (observing that when the prosecutor's challenged comments were made in rebuttal argument, and thus in response to the defense closing statements, the jury "may have understood the remarks as invited by the defense's provocations and therefore discounted them or accorded them less significance").

The Court reaches a similar conclusion with respect to Petitioner's third contention, based on the prosecutor's argument regarding the defense failure to request a lineup. During his closing argument, Petitioner's counsel attacked Detective Herman's explanation for why a live lineup was not conducted – *i.e.,* that a lineup was unnecessary, because Estrella corroborated Henderson's identification of Petitioner.

(RT7 926-31.) Petitioner's counsel characterized this proffered reason as "scary" and "a terrible thing," arguing that the stakes in the case were so high that a lineup should have been conducted no matter what. (RT7 930-31.) The prosecutor's argument regarding why no lineup was conducted clearly was an invited response to this argument by Petitioner's counsel. (*See* RT & 955, prefacing the comments with "Now, why wasn't there a lineup?") The prosecutor correctly pointed out that, under California law, Petitioner's counsel could have requested a lineup if he believed one was warranted. Even if this was a "fact" not in evidence, the argument fell within the permissible range of "hard blows" as an invited response to defense counsel's contention that a lineup was critical and the police acted wrongfully in failing to hold one.

The Court is not persuaded by Petitioner's assertion that the prosecutor's comments regarding the defense failure to request a lineup implied that Petitioner's counsel "knew his client to be guilty" and, by failing to request a lineup, had admitted the "strength of the State's case." (Petition at 19; Traverse at 10.) The interpretation Petitioner gives the prosecutor's brief comments is strained and unreasonable, and "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly,* 416 U.S. at 647, 94 S. Ct. at 1873.

With respect to Petitioner's second contention – *viz.,* that the prosecutor improperly attacked the opinion of defense eyewitness expert Dr. Pezdak – some of the prosecutor's arguments regarding Dr. Pezdak's testimony were not improper. While the prosecutor's references to "junk pseudo science" and "pseudo scientists creating a field of specialty that they can exploit in courtrooms on behalf of defendants" certainly constituted "hard blows," the comments were a direct challenge to the expert's methodologies and findings and, thus, were directed to the evidence. The comments, while indelicate, did not exceed the bounds of constitutionally permitted vigorous argument.

Accordingly, the Court concludes that the state court's rejection of Ground Five, to the extent that the claim is based on Petitioner's third and fourth contentions and the above-noted portions of his second contention, was a reasonable application of the clearly established federal law related to prosecutorial misconduct in closing argument. The Court further concludes that the state court's rejection of the related aspects of Ground One, *i.e.,* trial counsel's asserted ineffective assistance for failing to object to these same portions of the prosecutor's closing argument, was reasonable. As these portions of the prosecutor's argument did not constitute misconduct, the failure of Petitioner's counsel to object to these comments cannot be considered deficient performance, nor can it have given rise to prejudice within the meaning of the *Strickland* standard. *See, e.g., Dubria v. Smith,* 224

F.3d 995, 1003-04 (9th Cir. 2000) (when the prosecutor's challenged closing argument statements were ambiguous and were not misconduct depending on how they were construed, the petitioner's trial counsel did not render ineffective assistance by failing to object to such statements).

With respect to Petitioner's first contention, the prosecutor's remarks about Henderson being a "brave citizen" were made during the prosecutor's argument about the "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact" jury instruction. (RT7 861.) To the extent that the prosecutor was pointing out that Henderson experienced threats in connection with her knowledge of the shootings and, therefore, was "brave" to testify, this characterization, while bordering on inappropriate, fell within the permissible bounds of commentary on the evidence of record. Evidence had been presented regarding the threats made to Henderson and her consequent fear and desire to be relocated, and this argument bore on the jury's analysis of Henderson's credibility.[24]

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[24] Petitioner labels the "brave" comment as improper "vouching." (Petition at 14-15.) "As a general rule, a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of government witnesses." *United States v. Williams,* 989 F.2d 1061, 1071 (9th Cir. 1993). "Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." *United States v. Necoechea,* 986 F.2d 1273,

(Continued on following page)

The prosecutor's remaining comments challenged by Petitioner's first and second contentions, however, are not as readily dismissed. With respect to the remainder of Petitioner's first contention, the prosecutor's subsequent statement that Henderson's asserted bravery has "got to mean something for us all" and "[w]e have to stand behind citizens like that" was an appeal to the passions of the jurors, rather than a comment on the evidence. Likewise, the prosecutor's statement in his rebuttal argument that "you diminish yourselves if you diminish good people" like Estrella or Henderson was not a comment on the evidence but, rather, an appeal to the emotions of the jurors. A prosecutor may not make comments calculated to arouse the passions or prejudices of the jury. *Viereck v. United States,* 318 U.S. 236, 247-48, 63 S. Ct. 561, 566 (1943); *United States v. Leon-Reyes,* 177 F.3d 816, 822 (9th Cir. 1999); *see also United States v. Nobari,* 574 F.3d 1065, 1076 (9th Cir. 2009) (prosecutors are not permitted to urge jurors to convict based on the protection of community values, preservation of civil order, or deterrence of future lawbreaking, because of the risk that the defendant "will be convicted for reasons wholly irrelevant to his own guilt or innocence") (citations and internal quotation marks omitted)), *cert. denied,* 131 S. Ct.

1276 (9th Cir. 1993). While the Court does not condone this sort of positive characterization of a state witness by the prosecutor, given that there was some evidentiary basis for it, the Court does not believe that the comment rises to the level of improper vouching.

640 (2010); *United States v. Weatherspoon,* 410 F.3d 1142, 1149-50 (9th Cir. 2005) (statements "clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact" are "irrelevant and improper").

Similarly, the prosecutor's expression of outrage about Dr. Pezdak's testimony made during his closing and rebuttal arguments – peppered with repeated assertions that the jury "should be" "upset" and "offended" by the testimony, as the prosecutor claimed to be himself, and insinuations (*viz.,* "gravy train") that experts such as Dr. Pezdak reach their opinions based on the prospect of monetary reward rather than objective scientific criteria – also was an improper appeal to the juror's passions and emotions.[25] These comments were not appropriate argument addressed to the merits of Dr. Pezdak's findings and opinions and, instead, were premised improperly on the prosecutor's *own* views of the expert's testimony. *See United States v. Wright,* 625 F.3d 583, 612 (9th Cir. 2010) (finding "the prosecutor's repeated references to how he viewed the evidence" to be improper,

[25] The Court notes that the prosecutor's comments referencing "the Twin Towers and September 11th" did not arise out of the blue. Dr. Pezdak's testimony touched upon the accuracy of the accounts of witnesses to the 9/11 attacks, and therefore, the prosecutor's comments referencing 9/11 and Dr. Pezdak's testimony about such witness accounts – coming, as they did, two years to the day later on September 11, 2003 – had some basis in the evidence and, thus, did not reflect solely an appeal to the emotions and passions of the jurors.

because "'prosecutors' arguments not only must be based on facts in evidence, but should be phrased in such a manner that it is clear to the jury that the prosecutor is summarizing evidence rather than inserting personal knowledge and opinion into the case'") (citation omitted); *United States v. Kerr,* 981 F.2d 1050, 1053 (9th Cir. 1992) ("[a] prosecutor has no business telling the jury his individual impressions of the evidence").[26]

These portions of the prosecutor's closing argument, thus, were improper. However, as noted earlier, improper argument, in and of itself, does not warrant federal habeas relief; rather, a two-fold inquiry must be made. First, for purposes of Ground Five, the Court must decide whether the improper argument infected Petitioner's trial with unfairness and, thus, deprived him of due process; if the answer is yes, the Court then must determine whether the due process violation was harmless, *i.e.*, whether it had a substantial and injurious effect or influence in determining the jury's verdict. Second, for purposes of Ground One, the Court must determine whether both *Strickland* prongs are satisfied by the failure of Petitioner's

[26] Although Petitioner labels these comments "vouching," this is not accurate. *See Wright,* 625 F.3d at 611 & n.15 (finding it incorrect to label certain comments by the prosecutor, in which he expressed his personal opinion about the evidence, as "vouching," because "[i]n the ususal [sic] case of vouching, the prosecutor does not merely give his impression of the defendant's case, or highlight his own experience; rather, he explicitly assures the government witnesses' veracity").

trial counsel to object to these portions of the prosecutor's closing argument.

The jurors were instructed repeatedly – both at the outset of trial and prior to closing arguments – that they must base the decisions they made "on the facts and on the law" and "must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (RT3 218, 220; RT7 804-05.) The jurors were instructed that "[s]tatements that are made by the attorneys during trial are not evidence." (RT3 220.) The jurors also were instructed repeatedly that they "must accept and follow the law as I state it to you, regardless of whether you agree with it. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." (RT3 219; RT7 804.) Furthermore, as discussed above, the jury was instructed on how to evaluate witness testimony in general, as well as on how to evaluate eyewitness testimony in particular. (RT7 814-16.)

As discussed earlier, it is firmly established that this Court must presume that the jurors followed their instructions, including those noted above. *See* p. 35, *supra*; *see also Cheney,* 614 F.3d at 997. Moreover, "it is well established that 'arguments of counsel generally carry less weight with a jury than do instructions from the court.'" *Id.* (*citing Boyde v. California,* 494 U.S. 370, 384, 110 S. Ct. 1190, 1200 (1990)); *see also Waddington v. Sarausad,* 555 U.S.

179, 129 S. Ct. 823, 834 (2009) (finding that the state court reasonably concluded that the prosecutor's use of an improper hypothetical during closing argument "did not taint the proper instruction of state law," because of the foregoing statement in *Boyde*). "[J]uries generally 'vie[w] [closing arguments] as the statements of advocates' rather than 'as definitive and binding statements of the law.'" *Id.* at 834 n.6 (*quoting Boyde, supra*).

In *Cheney, supra,* petitioner brought an ineffective assistance claim based on his counsel's delay in objecting to prosecutorial vouching. Following counsel's delayed objection, the trial judge instructed the jurors that personal belief asserted by counsel in closing arguments were not to be considered in determining the facts. 614 F.3d at 997. The Ninth Circuit found the state court's rejection of the ineffective assistance claim to be reasonable under Section 2254(d)(1), because "[i]n view of the presumption that the jury properly disregarded the prosecutor's statements in accordance with the curative instruction," counsel's failure to prevent the prosecutor's remarks was not prejudicial. *Id.* In *Darden, supra,* the Supreme Court concluded that the petitioner was not deprived of a fair trial based on numerous "undoubtedly" improper comments made by the prosecutor during closing argument, because, *inter alia,* "[t]he trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel

were not evidence." 477 U.S. at 181-82, 106 S. Ct. at 2471-72.

Petitioner has not adduced any evidence showing that the jury failed to follow the above-noted instructions. There is no basis for concluding that the jurors perceived the prosecutor's improper comments to override their duty to base their decision on the facts and the law and not to be swayed by passion or emotion.

The above-noted comments by the prosecutor plainly were inappropriate. However, given the unrebutted presumptions that govern here and the substantial evidence of Petitioner's guilt, the Court concludes that the prosecutor's comments, even when considered cumulatively, did not rise to a level of misconduct of sufficient significance to render Petitioner's trial fundamentally unfair and to deprive him of due process. Each of the two eyewitnesses made confident in-court identifications of Petitioner, and the prosecutor's arguments could only bolster the significance of those identifications marginally, if at all. Dr. Pezdak testified at length during the trial, and defense counsel argued at length in support of her testimony in closing; thus, the prosecutor's arguments were counter-balanced by significant efforts from the defense. Considering the prosecutor's remarks in the context of the evidence, the instructions, and the overall argument of both parties, there is no reasonable likelihood that the challenged comments so infected the trial with unfairness as to render

Petitioner's conviction a violation of due process. *Darden,* 477 U.S. at 181, 106 S. Ct. at 2471.[27]

The Court further concludes that no Sixth Amendment violation has been established based on the failure of Petitioner's counsel to object to the prosecutorial statements identified in Petitioner's first and second contentions. A reasonable attorney may elect not to object to a prosecutor's improper statement to avoid highlighting it. *See, e.g., Necoechea,* 986 F.2d at 1281 (opining that the failure to object during closing argument "absent egregious misstatements" is generally within the wide range of permissible professional legal conduct); *see also Molina,* 934 F.2d at 1448 (observing that, for strategic reasons, counsel may decide to "refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality"). Given the "doubly deferential" review involved here, it would be difficult to conclude that trial counsel's failure to object to these statements constituted deficient performance and that the state court unreasonably concluded otherwise. However, the Court need not resolve the

[27] Even if the Court had any doubts about whether the prosecutor's comments rendered Petitioner's trial fundamentally unfair, the Court would be hard-pressed to find anything other than harmless error given the poor quality of the prosecutor's closing and rebuttal arguments, which were disjointed, cryptic, and bordering on incoherent at times.

deficient performance prong, because for the reasons set forth above, trial counsel's failure to object to these statements did not prejudice Petitioner within the meaning of the *Strickland* test. There simply is no substantial likelihood of a different result at Petitioner's trial had his counsel objected to the prosecutor's statements at issue in Petitioner's first and second contentions.

For all of the foregoing reasons, the state court's denial of relief with respect to Grounds One and Five was neither contrary to, nor an unreasonable application of, the clearly established federal law governing these claims. Accordingly, under Section 2254(d)(1), federal habeas relief may not issue based on either Ground One or Ground Five.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the District Judge issue an Order: (1) approving and adopting the Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: April 15, 2011.

/s/ Margaret A. Nagle
MARGARET A. NAGLE
UNITED STATES
MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the United States Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

APPENDIX E

Filed 10/27/04 P. v. Lundin CA2/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

The PEOPLE, Plaintiff and Respondent, v. Christopher LUNDIN, Defendant and Appellant.	B171362 (Los Angeles County Super. Ct. No. BA218548)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tricia A. Bigelow, Judge. Affirmed in part; Vacated and Remanded with Directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND

On August 16, 2000, David Landon was killed in a drive-by shooting, and his companion, Jeremy Moreno, was wounded. On September 15, 2003, appellant was convicted of Landon's murder in the first degree and the attempted first-degree murder of Moreno.

With regard to the murder, charged in count 1, the jury found to be true the allegation that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, with intent to promote or assist the criminal conduct of gang members.[1] In addition, the jury found true the allegation that a principal personally and intentionally discharged a handgun in the commission of the crime, which caused great bodily injury to Landon.[2]

With regard to the attempted murder, charged in count 2, the jury found it to have been committed willfully, deliberately, and with premeditation, that the criminal street gang allegation was true, and that a principal personally and intentionally discharged a handgun, causing great bodily injury to Moreno.

Appellant's motion for new trial was denied, and appellant was sentenced to 90 years to life in prison.

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[1] *See* Penal Code section 186.22, subdivision (b)(1). All further statutory references are to the Penal Code.

[2] *See* section 12022.53, subdivisions (d) and (e).

He then filed a timely notice of appeal from the judgment.

DISCUSSION

Appellant contends that there was insufficient evidence of his identity, that the trial court erred in admitting evidence of flight, and that the court made several instructional errors. In addition, appellant contends that the trial court made several sentencing errors. We discuss each contention in turn.

1. *Sufficiency of the Evidence of Identity*

Appellant contends that the prosecution's entire case against him rested upon the eyewitness testimony of just two witnesses, Lanisha Henderson and Armida Estrella, that their identification of appellant was too weak to constitute substantial evidence, and that the only corroborating evidence was appellant's membership in the El Sereno gang.

Since the eyewitnesses in this case were not accomplices, there was no special corroboration requirement, as appellant suggests. (*See People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.) The sufficiency of eyewitness identification is determined in the same manner as the sufficiency of other evidence. (*Id.* at p. 257.) And in any event, an in-court identification under oath, as both witnesses gave here, provides additional evidence to support the photographic identification. (*See id.* at p. 270.)

Evidence is sufficient to support a conviction only if a review of the whole record in the light most favorable to the judgment discloses substantial evidence; that is, evidence which is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "In making this determination we must view the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. [Citation.]" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1019.)

With these guidelines in mind, we review the identifications and all the evidence linking appellant to the crime. Lanisha Henderson testified that just before the shots were fired, she had been talking to Landon in front of the building at 5335 Huntington Drive North, when a white pickup truck approached with three occupants. Landon looked at them and said either, "Lowell Street." or "Locke Street."[3] Knowing that "Lowell Street" and "Locke Street" were both gangs, and that Landon belonged to a gang that considered both of them rivals, she ran into the building. As soon as she was inside, she heard 8 to 10

[3] Thomas Herman, a Los Angeles City Police Officer assigned to Hollenbeck Division, homicide, testified that he interviewed Henderson after the shooting, and that she told him that it was "Locke Street," not "Lowell Street," that Landon uttered.

shots, and soon saw Moreno run past, holding his bleeding arm.

On September 20, 2000, Officer Herman showed Henderson four "sixpack" photo lineups in display folders marked "A" through "D." Appellant's photo was in position No. 2 in the display folder marked "B," and had been taken a few years before, when he was 17 years old. Henderson stated that photos Nos. 1, 2, and 5 of display folder B, and Nos. 4 and 6 of D looked similar to persons in the truck, but she could not positively identify any one of them.

A few months later, Herman showed her Display Folder E, which contained a more recent photo of appellant in position No. 5, and she positively identified No. 5 as the shooter. Henderson also identified appellant in court, and testified that there was no doubt in her mind that appellant was on the passenger side in the truck that day.

Armida Estrella testified that on August 16, 2000, between 3:00 and 5:00 p.m. she observed a white truck going back and forth from a window of her apartment in the building that she manages on Huntington Drive North. She had lived in the neighborhood for 29 years, was a participant in her neighborhood watch program, and was aware of gang activity in the area. She therefore kept an eye on the truck, an older model with a large grille and no camper top. There were three people in the truck, a man driving, a man next to the passenger window,

and someone with long hair in the middle – she guessed female.

The truck stopped at one point, a male passenger emerged, and he asked a group of young bystanders, which included Estrella's daughter, "Where you from?" and "Where do Locke Dogs live?"[4] Estrella knew that the question, "Where you from," is usually asked to determine whether someone is a gang member, so Estrella shouted at the occupants of the truck, "Hey, what do you want?" or "What the hell do you want here?" The bystanders ran into the building, and the truck and its occupants drove off. Estrella picked appellant's photograph from display folder E as the person who emerged from the truck to speak to the bystanders, and identified him at trial as that person.

Later that day, on her way to pick up her car where it had been serviced, Estrella saw the truck again just a few feet away from her. It passed the car in which she was riding, going the opposite direction, and turned left onto North Huntington Drive. Estrella saw a passenger's hand outside the window, holding something shiny. She panicked, and said to her companion, "Let's just get out of here. Get out of here, that guy has a gun." Although the driver was closest to her, she focused on the passenger with the gun, and remembered him best. On June 6, 2001, she

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[4] Although Estrella said, "Locke Dogs," she later referred to "Lott Dogs" as the name she had seen in neighborhood graffiti.

picked appellant's photo out of display folder E, and identified him as the passenger with the gun. At trial, Estrella identified appellant as one of the occupants of the truck and the same individual she saw in the photograph that she picked on June 6, 2001. She testified that she was very confident of her identification.

Other evidence connected appellant with the truck used in the shooting in the same time-frame. Jose de Jesus Nunez testified that his 1986, white Chevrolet pick-up truck with a camper shell was stolen sometime in 2000, and recovered a few months later. When he retrieved it from an impound, it had been painted black. Shown photographs at trial of the recovered truck, after it had been painted black, Henderson testified that the truck involved in the shooting looked like the same truck, except the color. Estrella was also shown the photographs of the truck at trial, and she was certain that it was the same truck in which she had seen appellant.

Linda Salaz testified that for 27 years, she has resided directly across the street from 5510 Allan Street. On August 5, 2000, while gardening in her backyard, she heard a bang, like a crash, and went out to check her car, which was parked on the street. Her car had been hit by an older model truck with two young men inside. The driver was male Hispanic, with dark hair, 5 feet 6 inches to 5 feet 8 inches, 130

to 150 pounds, and both boys were between 17 and 20.[5]

Salaz had a conversation with the driver, who refused to give her his identity, so she called the police, and gave them a handwritten note with a description of the driver and the truck, and the license number of the truck. The note describes a white truck with a license plate bearing the same number as the 1986 Chevrolet pick-up truck stolen from Jose de Jesus Nunez.

Salaz reported the accident to Officer Howard Jackson, who testified that Salaz had recognized the driver as the grandson of the lady who lived across the street. In his first interview with her on August 5, 2000, she said the truck was white, but when he interviewed her a second time on August 30, 2000, she told him that it had recently been painted black. Salaz testified that after she left a note in the mail-box at 5510 Allan Street, stating the amount of the damage to her car, the woman who lived there paid the damages.

On June 14, 2001, appellant was arrested on this charge at 5510 Allan Street, and told the officers that he resided there.

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[5] Appellant is an Hispanic male, was 20 years old at the time of trial, and almost 18 at the time of the shooting. We find no description of his height and weight in the record.

Thus, substantial evidence places appellant in the truck at the time of the shooting. Appellant was seen earlier driving the truck, and he was identified with certainty in court by two witnesses as having been in the truck at the time of the shooting. Nevertheless, appellant contends that the evidence is insubstantial, because the testimony of the two identifying witnesses contained inconsistencies, and they were both uncertain in their identifications when first presented with photographic lineups.

Appellant also points out Henderson testified that her attention was focused more on the driver than appellant, and she described appellant at the time as "brown skinned" not "light skinned," although she acknowledged in court that appellant was light-skinned at the time of trial. Appellant also asserts that Estrella identified appellant as having shoulder-length hair and a baseball cap on; whereas, Henderson testified that all three occupants of the truck were bald, and none was wearing a hat.

"It is well settled that, absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to support a criminal conviction. [Citation.] 'To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province

of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]' [Citations.] Further, a jury is entitled to reject some portions of a witness' testimony while accepting others. [Citation.] Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate." (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

The jury was well instructed with regard to evaluating eyewitness testimony. First the court read CALJIC No. 2.91: "The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which he is charged. [¶] If, after considering the circumstances of the identification and any other evidence in this case, you have a reasonable doubt whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find him not guilty."

The trial court also read CALJIC No. 2.92 to the jury: "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:

"The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act; [¶] The stress, if any, to which the witness was subjected at the time of the observation; [¶] The witness' ability, following the observation, to provide a description of the perpetrator of the act; [¶] The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness; [¶] The cross-racial nature of the identification; [¶] The witness' capacity to make an identification; [¶] Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act; [¶] Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup; [¶] The period of time between the alleged criminal act and the witness' identification; [¶] Whether the witness had prior contacts with the alleged perpetrator; The extent to which the witness is either certain or uncertain of the identification; [¶] Whether the witness' identification is in fact the product of his or her own recollection; and [¶] Any other evidence relating to the witness' ability to make an identification."

" '[T]he crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.' [Citation.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

We do not find any physical impossibility or inherent improbability created by any of the conflicts or inconsistencies. Henderson's earlier uncertainty did not create a conflict with her later identification,

since the earlier photograph of appellant was taken when he was much younger and looked less like him.[6] And we do not see great significance in an inconsistency in Henderson's perception of appellant's complexion, particularly since the shooting took place in late Summer, and the trial took place three years after the shooting and two years after appellant was arrested.

The two witnesses' descriptions were different, but not so conflicting as appellant claims. Henderson testified that the three occupants of the truck were either bald, or had short hair. When Estrella was asked whether "the passenger" had long hair, she replied that it was shoulder-length, and he was wearing a baseball cap. There were *two* passengers in the truck that day, however. Estrella made it reasonably clear that it was the *middle* occupant of the truck who was the one with shoulder-length hair, and whom she confused as a girl. With regard to appellant, who was the passenger nearest the passenger-side window, Estrella testified that his hair was longer on the day of the shooting than it was in the photograph of him that she picked out, but it was "not long, long."[7]

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[6] We have viewed the two photographs. The earlier photograph is clearly that of an adolescent, while the later photograph is one of an adult male. The two are similar, but could reasonably be mistaken for different people.

[7] We do not know how long appellant's hair was at trial.

These differences in perception were issues for the jury to resolve, and we assume that it considered all relevant factors in doing so. (*See People v. Delgado, supra,* 5 Cal.4th at p. 331.)

2. *Flight Instruction*

On October 26, 2000, California Highway Patrol Sergeant Robert McGrory was operating radar on northbound I-15 near Victorville in San Bernardino County, when he tracked a vehicle traveling at 97 miles per hour. He pulled the car over, and standing at the right side of the car, had a brief conversation with the driver, whom he later identified as appellant. McGrory asked for appellant's driver's license and who the owner of the car was. Appellant replied that it belonged to "Guillermo," and gave him the registration, which was not in the name of anyone named Guillermo.

Appellant handed McGrory his wallet, and McGrory looked through it, but found no identification. The car was still running, and appellant appeared to become fidgety, and so when appellant reached for the gearshift, McGrory asked for the keys at gunpoint. Appellant put the car into gear and fled, traveling at up to 110 miles per hour and using all three lanes and the shoulder to pass other vehicles. McGrory pursued him. When they reached a construction zone and the lanes were reduced to two, other vehicles on the highway were required to take evasive action to avoid a collision with appellant's car.

Other patrolmen joined the pursuit and although they deployed spike strips ahead of appellant, flattening his two left tires, appellant kept going. Finally, after appellant passed a big rig on the shoulder, one of the tires separated from the rim, causing him to spin out and come to a stop on the shoulder, where he was taken into custody.

Given his *Miranda* warnings and asked why he was driving so fast before he was pulled over the first time, appellant said he was in a hurry to get to Las Vegas to start a new life. Appellant gave his name as Christopher Neal Bravo, but an identification check came back with the name Cavallera. McGrory later determined that he was Christopher Neal Lundin. Asked why he fled, appellant said he was scared because he had no driver's license. Appellant told McGrory that he had bought the car from Guillermo for $200. McGrory thought the car was probably worth $20,000 to $25,000, and he later determined it to be stolen.

Penal Code section 1127c section, provides: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine."

The trial court instructed the jury with regard to flight, as follows: "The attempted flight of a person after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. Whether or not evidence of flight at a time after the crime shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination."

Appellant contends that the trial court erred in admitting evidence of his flight from the Highway Patrol, and by removing the word "immediately" from the instruction.

The instruction was not required to be in the exact words of the statute, so long as the wording is *substantially* as set forth. (*See* § 1127c.) And evidence of flight is not inadmissible simply because it was not immediate. (*People v. Mason* (1991) 52 Cal.3d 909, 941 [four-week delay].) There are no "inflexible rules about the required proximity between crime and flight. Instead, the facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilt." (*Id.* at p. 941.) Appellant acknowledges this, but contends that evidence of flight more than four weeks after the crime must be accompanied by evidence that he knew that he was a suspect.

Appellant relies upon *People v. Santo* (1954) 43 Cal.2d 319, in which it was stated: "[T]he flight of one who knows that he is suspected of or charged with crime may be indicative of guilt [citation]." (*Id.* at p. 330.) The case did not, however, hold that knowledge was prerequisite to the admission of flight evidence. Appellant also relies upon *People v. Hoyt* (1942) 20 Cal.2d 306, 313, in which there was no mention of evidence that the defendant knew he was a suspect at the time he fled. Neither authority enunciated a knowledge prerequisite, either for flights that are remote in time, or for immediate flights.

In any event, it is not the rule today. (*See People v. Mason, supra,* 52 Cal.3d at p. 943, fn. 13.) "The Legislature's purpose in enacting section 1127c was to abolish the rule stated in many early cases that the jury could not be instructed to consider flight as evidence of guilt unless it had been proved that the fleeing suspect had previously learned that he was accused of commission of a particular crime. [Citations.]" (*People v. Hill* (1967) 67 Cal.2d 105, 120-121.)

Appellant also contends that the potential for prejudice outweighed the probative value of the evidence, because the high-speed pursuit took place far from the scene of the shooting, he was released on his own recognizance after the pursuit, he voluntarily appeared in the Victorville court, and he returned to the Allan Street residence after his release on the flight charge. It was the jury's task, however, to consider alternative explanations for that flight and to determine whether an inference other than

consciousness of guilt was more reasonable. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1152-1153.)

We conclude from our review of the evidence that appellant's flight was sufficiently probative to permit the jury to consider it. Appellant had all his clothing and tools in the car when he fled the Highway Patrol, and McGrory testified that appellant said that he was on his way to Las Vegas to start a new life. From this, the jury could reasonably infer that appellant was fleeing something more significant than a charge of car theft: the potential charge of murder. Thus, it was proper for the jury to weigh such evidence to determine whether the evidence indicated a consciousness of guilt. (*See People v. Mason, supra,* 52 Cal.3d at p. 943.)

3. *Premeditation and Deliberation as an Aider and Abettor*

Appellant contends that the trial court erred in failing to instruct the jury that to find appellant guilty of willful, deliberate, and premeditated attempted murder, it must find that appellant personally premeditated and deliberated. Appellant acknowledges that the Supreme Court has held that personal deliberation and premeditation is not a prerequisite to a finding of guilt as an aider and abettor of attempted first degree murder. (*See People v. Lee* (2003) 31 Cal.4th 613, 624-625, 628 (*Lee*).) Appellant invites us to reject the majority opinion in *Lee* in favor of the

contrary view expressed in the dissenting opinion of Justice Kennard. (*See id.* at p. 629.)

We are bound to follow the majority opinions of the Supreme Court, and do not have discretion to reject them in favor of the dissent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Even it [sic] we had such discretion and agreed with appellant, there could be no prejudice shown here. Justice Kennard was of the opinion that "[s]uch an error would be prejudicial only if there was evidence that some but not all of the perpetrators acted with premeditation." (*Lee, supra,* 31 Cal.4th at p. 633, dis. opn., Kennard, J.)

There was evidence presented that the tagging crew to which Landon belonged, Lott Dogs, had recently crossed out gang member's names in the nearby graffiti of the El Sereno-Locke Street Gang, of which appellant was a member, and had written insults over the names. Detective Eagleson testified that by crossing the names out, the Lott Doggs were showing disrespect and issuing a challenge, like spitting in their faces. This is the sort of activity that would typically precipitate a killing.

Eagleson also testified that drive-by shootings are typically carried out by three persons, the driver, the shooter, and one to watch out, and that most drive-by shooters use stolen cars. Estrella identified appellant as the person who emerged from the truck to ask the young bystanders, "Where you from?" and "Where do Locke Dogs [meaning Lott Dogs] live?"

Appellant and his friends were looking for Lott Doggs as a threesome in a stolen car soon after members of Lott Doggs had issued a graffiti challenge. Appellant took an active part in the search, and it is reasonable to infer from all the evidence that he willfully, with deliberation and premeditation, took part as either the shooter or the look-out. Since the evidence does not suggest that any of the three occupants of the truck did not premeditate or deliberate, no prejudice is shown under Justice Kennard's view. (*Lee, supra,* 31 Cal.4th at p. 633, dis. opn., Kennard, J.)

4. *Lesser Included Offenses under Accusatory Pleadings Test*

Appellant contends that the trial court erred in failing to instruct sua sponte with regard to assault with a deadly weapon and assault with a firearm, which, he asserts, are lesser included offenses of attempted murder.

"California law requires a trial court, sua sponte, to instruct fully on all lesser necessarily included offenses supported by the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149 .) "Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the

lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117-118.)[8]

Assault with a deadly weapon, however, is not a lesser included offense of attempted murder under California law. (*People v. Richmond* (1991) 2 Cal.App.4th 610, 616.) And assault with a firearm is not a lesser included offense of attempted murder. (*People v. Parks* (2004) 118 Cal.App.4th 1, 6.)

Appellant urges us to apply the "accusatory pleading test" rejected by the California Supreme Court in *People v. Wolcott* (1983) 34 Cal.3d 92, 100-101 (*Wolcott*), in favor of the "statutory elements test." (*See People v. Parks, supra,* 118 Cal.App.4th at p. 6.) If the accusatory pleading test were required in California, enhancement allegations in the accusatory pleading would be used for the purpose of defining lesser included offenses. (*Wolcott, supra,* 34 Cal.3d at p. 101.) In rejecting that test, the Court approved the one already in use, which "contemplates that the trier of fact first determines whether the defendant is guilty of the charged offense or a lesser included offense, and only then decides the truth of any enhancements." (*Id.* at p. 101.)

Appellant prefers the reasoning of Justice Bird's dissent in *Wolcott,* and asks that we reject the majority

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[8] The information in this case set forth the statutory elements of the offenses, but did not allege the facts underlying their commission.

opinion. Justice Bird was of the opinion that "the proper inquiry is whether every element necessary to the uncharged offense has been alleged in related portions of the accusatory pleading. If every necessary element appears on the face of the pleading, the accused is 'adequately warn[ed] . . . that the People will seek to prove the elements of the lesser offense.' [Citations.]" (*Wolcott, supra,* 34 Cal.3d at p. 113, dis. opn., Bird, J.)

Appellant asserts that the United States Supreme Court's opinion in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), "vindicates" Justice Bird's dissent. *Apprendi* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.)

Under appellant's expansive reading of *Apprendi,* it may be that Justice Bird has been vindicated, but we express no opinion on that point, since neither *Apprendi* nor any other United States Supreme Court decision has held that courts must apply the accusatory pleading test. Indeed, the United States Supreme Court has recognized the different approaches adopted by the states, and has held that states are not constitutionally required to instruct with regard to offenses that are not lesser-included offenses under state law. (*Hopkins v. Reeves* (1998) 524 U.S. 88, 94-96, fn. 6; *see also*, *Schmuck v. United States* (1989) 489 U.S. 705, 720 [adopting statutory elements test for federal courts].) Thus, we must follow the majority

opinion of *Wolcott, supra,* 34 Cal.3d at pages 100-101, and cannot find error in the court's failure to apply the accusatory pleading test. (*See Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455; *People v. Whitfield* (1996) 46 Cal.App.4th 947, 957.)

5. *Ireland Merger Doctrine, Section 654, and Enhancements*

Appellant was sentenced on count 1 to the mandatory term of 25 years to life, plus 10 consecutive years pursuant to the gang allegation. (*See* § 190, subd. (a); § 186.22, subd. (b)(1).) That sentence was enhanced by a consecutive term of 25 years to life pursuant to 12022.53, subdivisions (d) and (e).

On count 2, appellant was sentenced to 15 years to life pursuant to section 186.22, subdivision (b)(5), enhanced by a consecutive term of 25 years to life pursuant to section 12022.53, subdivisions (d) and (e), and an additional enhancement of 20 years pursuant to section 12022.53, subdivisions (c) and (e), stayed pursuant to section 654.

Section 12022.53, subdivision (d) provides: "Notwithstanding any other provision of law, any person who, in the commission of [a felony punishable by life imprisonment], personally and intentionally discharges a firearm and proximately causes great bodily

injury, as defined in Section 12022.7,[9] or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

Subdivision (c) provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years."

And subdivision (e)(1) provides: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186 .22.[¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

Relying upon the merger doctrine of *People v. Ireland* (1969) 70 Cal.2d 522, appellant contends that the trial court should have imposed the 10-year enhancement of section 12022.53, subdivisions (b) and (e), with regard to count 1, instead of 25 years to life as provided in subdivisions (d) and (e).[10] Appellant

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[9] Under that section, "great bodily injury" means "a significant or substantial physical injury." (§ 12022.7, subd. (f).)

[10] Section 12022.53, subdivision (b) provides: "Notwithstanding any other provision of law, any person who, in the commission of [a felony punishable by life imprisonment], personally uses a firearm, shall be punished by an additional

(Continued on following page)

also contends that the trial court erred in imposing enhancements upon count 2, pursuant to section 12022.53, subdivisions (c) and (d). He reasons that since the murder was committed with a firearm, the elements of the enhancements are subsumed within the elements of murder, as it was committed here.

The merger doctrine upon which appellant relies is applicable to felony-murder convictions based on the predicate felony of assault, and has not been applied in other contexts. (*See People v. Hansen* (1994) 9 Cal.4th 300, 312; *People v. Ireland, supra,* 70 Cal.2d at p. 539.) It does not bar sentence enhancements under section 12022.53, subdivision (d) when a defendant is convicted of first degree murder, even when the murder is committed with a firearm. (*People v. Sanders* (2003) 111 Cal.App.4th 1371, 1374-1375.)

Appellant also contends that the prohibition against double punishment of section 654 bars a firearm enhancement under section 12022.53, subdivision (d), where the murder was committed with a firearm. Both appellant's contentions with regard to merger and section 654 are premised upon his assertion that assault with a firearm is a lesser included offense of attempted murder, when a firearm is used to commit the murder. We have already rejected

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and consecutive term of imprisonment in the state prison for 10 years."

that assertion. (*See People v. Parks, supra,* 118 Cal.App.4th at p. 6 .)

Section 654 does not bar imposition of a firearm enhancement here, since the use of a firearm was not a specific element of the crime of murder. (*See People v. Sanders, supra,* 111 Cal.App.4th at pp. 1375-1376; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1314; *People v. Myers* (1997) 59 Cal.App.4th 1523, 1529; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157-1159.) We decline appellant's invitation to disagree with these authorities.

Appellant also contends that the enhancement was imposed in violation of *Apprendi, supra,* 530 U.S. 466. The truth of the allegation that a principal intentionally and personally discharged a firearm, causing great bodily injury or death, was submitted to the jury for determination, and the jury was instructed that it must be proved beyond a reasonable doubt. The jury found the allegation to be true with regard to both counts. Thus, there was no violation of *Apprendi.* (*See id.* at p. 490.)

For the first time in his reply brief, appellant contends that once the trial court imposed a consecutive term of 25 years to life pursuant to the enhancement provision of section 12022.53, subdivisions (d) and (e), the additional enhancement of 20 years pursuant to section 12022.53, subdivisions (c) and (e), should have been stricken, rather than stayed. The trial court was correct in staying, rather than striking

the second enhancement. (*See People v. Bracamonte* (2003) 106 Cal.App.4th 704, 713.)

6. *Gang Enhancements*

Appellant contends that the trial court erred in imposing a 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1), on count 1, and a sentence of 15 years to life pursuant to section 186.22, subdivision (b)(5), on count 2, in addition to the firearm enhancements. Respondent agrees, and we agree, as well.

Section 12022.53, subdivision (e)(2) provides: "An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense." Appellant was not found to have personally used or discharged a firearm. Thus, the 10-year gang enhancement should not have been imposed in count 1, and the minimum parole eligibility period of 15 years should not have been imposed with regard to count 2. (*See People v. Salas* (2001) 89 Cal.App.4th 1275, 1278-1283.)

We shall therefore remand the matter for resentencing. (*See People v. Calderon* (1993) 20 Cal.App.4th 82, 88.)

DISPOSITION

The sentence is vacated and the case is remanded for resentencing consistent with this opinion. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, P.J.

GRIMES, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX F

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT 100

Date: OCTOBER 20, 2006
Honorable: DAVID S. WESLEY
NONE

Judge	J. PULIDO	Deputy Clerk
Bailiff	NONE	Reporter

(Parties and Counsel checked if present)

BH 003840/BA218548
In re,
CHRISTOPHER LUNDIN,
Petitioner
On Habeas Corpus

Counsel for Petitioner
Counsel for Respondent:

Nature of Proceedings: ORDER RE: WRIT OF HABEAS CORPUS

The Court has read and considered the writ of habeas corpus filed on January 18, 2006 and extended from time to time.

Petitioner argues that his counsel was ineffective because (1) counsel failed to object to the admission of graffiti that named him as the perpetrator of the crime; (2) counsel failed to object to the gang expert's testimony interpreting the graffiti and naming him as the perpetrator; and (3) counsel failed to object to the People's alleged misconduct in summation. (Habeas, p. 21, 26, 49.) Specifically, petitioner contends that

the reference to the graffiti, together with the expert's testimony as to the meaning of the graffiti, violated his right to due process and the confrontation clause.

The graffiti at issue was tagged after the murder of victim David Landon and was phrased "187 T-Bone – Rest in Peace Sleepy – Where is Chico." At trial, witness Henderson testified that she was frightened after observing the graffiti because she was named in the graffiti as T-Bone. Similarly, the murder victim, David Landon, whose moniker was "Sleepy" was also referenced in the graffiti. According to the gang expert's testimony, the graffiti meant that the tagger knew Henderson had witnessed the victim's murder. Additionally, the tagger used the graffiti as an opportunity to show respect to the murder victim, Sleepy, through the phrase "rest in peace Sleepy." The reference to Chico, petitioner's moniker, showed that the tagger identified petitioner as the perpetrator of the murder and showed that petitioner's identity as the perpetrator was known to the tagger and that the tagger was attempting to locate petitioner.

The record reveals no error by defense counsel in failing to object to the admission of testimony referencing the graffiti nor in failing to object to the gang expert's testimony.

According to the record, witness Henderson's testimony referencing the graffiti was not hearsay as her testimony tended to show her state of mind – that she was frightened when she observed the graffiti.

Furthermore, the expert's testimony relating to gangs and the meaning assigned to the graffiti at issue here was properly admitted. A qualified gang expert may, where appropriate, testify to a wide variety of matters, including gang graffiti. (*People vs. Ochoa* (2001) 26 Cal. 4th 398, 438-439; see also *People vs. Killebrew* (2002) 103 Cal. App.644, 656-657.) The gang expert's opinion on the issue of graffiti matter would reasonably assist the trier of fact. (Evid. Code, § 801, subd. (a).) Gang culture and habits, which are relevant in cases in which a gang enhancement is alleged, are matters not within the common knowledge of a jury and, therefore, are a proper subject for expert testimony. (*People vs. Gardeley* (1996) 14 Cal. 4th 605, 617,) As petitioner was charged with gang enhancements here, expert testimony was relevant.

Furthermore, the subject of how gang members would interpret and understand graffiti and epithets has been held to be a proper subject of expert testimony (e.g., *People vs. Gomez*, 235 Cal. App. 3d 957 [graffiti, hand signals, dress)); *People vs. Gardele*, *supra*, 14 Cal. 4th 605.) In the present matter, the gang expert testified how the graffiti described as "187 T-Bone Rest in Peace Sleepy – Where is Chico" was likely interpreted and understood. Since such testimony is properly within the subject of expert testimony, no objection by defense counsel was merited to the admission of such testimony.

Further, the record discloses no misconduct by the People in closing argument meriting an objection by defense counsel.

Any additional issues brought forth in the petition should have been argued on appeal, and as a result, will not be addressed here.

The writ of habeas corpus is denied in fight of the above.

The court order is signed and filed this date.

A true copy of this minute order is sent to the petitioner via U.S. Mail as follows:

Christopher Lundin
V-16978
California State Prison, Sacramento
P.O. Box 290066
Represa, CA 95671-0066

APPENDIX G

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re CHRISTOPHER LUNDIN, on Habeas Corpus.	B 195443 (Super. Ct. No. BA218548; BH003840) (Tricia A. Bigelow, David H. Wesley, Judges) ORDER (Filed Apr. 13, 2007)

THE COURT:*

The petition for writ of habeas corpus has been read and considered.

The petition is denied. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474-475; see also *In re Clark* (1993) 5 Cal.4th 750, 765 ["It is . . . the general rule that issues resolved on appeal will not be reconsidered on habeas corpus. . . ."].)

/s/ [Illegible]	/s/ Manella	/s/ Suzuka
*WILLHITE, Acting P.J.	MANELLA, J.,	SUZUKA WA, J.

APPENDIX H

S152387

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re CHRISTOPHER LUNDIN on Habeas Corpus

(Filed Jul. 30, 2008)

The petition for writ of habeas corpus is denied.

George, C. J., was absent and did not participate.

MORENO
Acting Chief Justice