defendant was acquitted of possession of cocaine, but convicted of "telephone facilitation" offenses that required possession of cocaine. *Id.* at 65-66. The Supreme Court rejected this claim of error, stating that "nothing in the Constitution would require" setting aside inconsistent verdicts. *Id.* at 65; *see also Harris v. Rivera*, 454 U.S. 339, 345 (1981) (holding, in a case involving allegedly inconsistent state court verdicts, that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside"); *Masoner v. Thurman*, 996 F.2d 1003, 1005 (9th Cir. 1993) ("The general rule is that jury verdicts ... are insulated from review on the ground that they are inconsistent."). Thus, the Supreme Court has never held that inconsistent verdicts violate the Constitution.

In *Powell*, the Supreme Court specifically left open the question of whether a defendant who "is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other," may properly challenge a jury verdict. *Id.* at 69 n. 8; *see also Ferrizz v. Guirbino*, 432 F.3d 990, 993 & n. 5 (9th Cir. 2005). In applying *Powell*, the Ninth Circuit has held that "a due process challenge to a jury verdict on the ground that convictions of multiple counts are inconsistent with one another will not be considered if the defendant cannot demonstrate that the challenged verdicts are necessarily logically inconsistent." *Masoner*, 996 F.2d at 1005.

Petitioner has failed to demonstrate that the two convictions - the true finding on the sentencing enhancement for personally and intentionally discharging a firearm with respect to the officer in count 8, and the grossly negligent discharge of a firearm charge in count 11 - are logically or legally inconsistent. A true finding on

the sentencing enhancement under Cal. Penal Code § 12022.53(c) requires proof beyond a reasonable doubt of the personal and intentional discharge of the firearm during the commission of a crime. *See People v. Palmer*, 133 Cal.App.4th 1141, 1148-49 (Cal.App. 2005); Cal. Penal Code § 12022.53(c); CALJIC 17.19.5. In Petitioner's first petition for writ of habeas corpus, this Court found that the evidence was sufficient to allow a rational trier of fact to find beyond a reasonable doubt that Petitioner personally and intentionally discharged a firearm in connection with his assault on the police officers.[4] In order to reach that verdict, the jury obviously believed the police officers' testimony that Petitioner intentionally pointed and fired the gun at them and rejected Petitioner's testimony that the gun went off accidentally.

The crime of discharge of a firearm in a grossly negligent manner also requires a showing that the defendant wilfully and intentionally discharged a firearm, albeit only in a grossly negligent manner which could cause injury or death to a person. *See People v. Alonzo*, 13 Cal.App.4th 535, 538-39 (1993), *see also* CALJIC 9.03.3. Thus contrary to Petitioner's assertions, both crimes require proof of a willful and intentional discharge of a firearm and are therefore not legally inconsistent as Petitioner claims.

Nor can it be said that convictions of the two offenses are factually inconsistent. It must be remembered that there were other individuals in the restaurant aside from the police officers when the shot was fired. The verdicts are not factually or logically inconsistent because the jury could reasonably find that Petitioner

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[4] *Arenas v. Walker*, Case No. EDCV 08-00943-GAF (MLG), Report and Recommendation filed on August 20, 2009, pp. 26-29.

personally and intentionally discharged the firearm at the officers as part of the offense of assault on a police officer with a semiautomatic firearm, and also that he discharged the firearm in a grossly negligent manner with respect to the civilians in the restaurant while he was being pushed to the ground. Thus, there is no "inevitable logical inconsistency" between the two verdicts. *Ferrizz*, 432 F.3d at 994. For this reason, Petitioner is not entitled to habeas corpus relief on this claim.[5]

C. The Admission of Gang Expert Testimony Did Not Violate Petitioner's Right to Due Process

Petitioner contends that the admission at trial of evidence that he was a member of a criminal street gang was unduly prejudicial and therefore violated his right to due process, particularly given that this Court later determined that there was insufficient evidence to support the gang enhancement allegation. (Pet. at 5, 7.)

As a preliminary matter, the Court notes that Petitioner's claim that the trial court erred in allowing gang expert testimony does not raise a cognizable claim for federal habeas corpus relief. This claim of error arises out of state law, and it is well established that allegations state law errors are not cognizable on federal habeas corpus review. *See Estelle v. McGuire*, 502 U.S. at 71-72. "[I]t is not the province of a federal habeas court to re-examine state-court

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[5] The Court also notes that while review of count 11 might seem to warrant application of the discretionary concurrent sentence doctrine, as the sentence was stayed on this conviction, *see Benton v. Maryland*, 395 U.S. 784, 790-91 (1969); *Cheeks v. Gaetz*, 571 F.3d 680, 689-91 (7th Cir. 2009); *Van Gelden v. Field*, 498 F.2d 400, 403 (9th Cir. 1974)(holding federal courts may decline to review a conviction carrying a concurrent sentence when one concurrent sentence is found valid), the argument has not been raised by Respondent and the Court will assume that the conviction on count 11 carries collateral parole or enhanced sentencing consequences.

determinations on state law questions." *Id.* at 68.

Even assuming that Petitioner has stated a cognizable federal habeas claim, he has failed to show that the admission of gang expert testimony violated his federal constitutional rights or deprived him of a fundamentally fair trial. The Supreme Court has never clearly held that "admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). A writ of habeas corpus will be granted for the erroneous admission of evidence "only where the 'testimony is almost entirely unreliable and . . . the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings.'" *Mancuso v. Olivarez*, 292 F.3d 939, 956 (9th Cir. 2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983)). Thus, the erroneous admission of evidence violates due process only when "there are no permissible inferences the jury may draw from the evidence." *Boyde v. Brown*, 404 F.3d 1159, 1172 (9th Cir.), *amended on other grounds* by 421 F.3d 1154 (9th Cir. 2005) (quoting *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991)). Even then, evidence must "be of such quality as necessarily prevents a fair trial." *Jammal*, 926 F.2d at 920. The due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. at 67; *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995). Generally, only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. *See Jammal*, 926 F.2d at 920.

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In this case, there clearly were permissible inferences that the jury could draw from the gang evidence. The information alleged that Petitioner committed counts 1 and 5-11 for the benefit of a criminal street gang. The gang evidence was therefore relevant and admissible at the time of trial to prove the gang allegations, notwithstanding this Court's subsequent determination that there was insufficient evidence to support those allegations.

Even assuming that the admission of the gang expert testimony rose to the level of a due process violation, it cannot be said that such error had a substantial and injurious effect on the jury's verdict as to the other charges. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993); *see also Fry v. Plilar*, 551 U.S. 112, 121-122 (2007). The evidence of guilt was overwhelming. Consuelo Gutierrez, Petitioner's then-girlfriend, testified that he punched her in the cheek after accusing her of having an affair with his uncle. Elizabeth Ruiz, Gutierrez's sister-in-law, testified that, when she tried to calm Petitioner down, he pointed a gun directly at Ruiz's chest and tried to fire, although the gun apparently jammed. In addition, the police officers who responded to the call, Officers Katelhut, Signorio, Wessely, Hajj and West, all testified that Petitioner repeatedly pointed his gun at police and tried to fire, although the gun jammed each time, and further testified that Petitioner fired his gun at the police officers either as he was falling or while on the ground. (Lodgment 16 at 1-6.)

Given the overwhelming evidence establishing Petitioner's guilt of the crimes for which he was convicted, any possible error in admitting the gang evidence cannot be said to have had a substantial and injurious effect on the jury's verdict. *Brecht*, 507 U.S. at

637-38; *Fry*, 551 U.S. 112 at 121-122. Accordingly, Petitioner is not entitled to habeas corpus relief on this claim.

IV. Order

The petition for writ of habeas corpus is **DENIED.** In addition, because Petitioner cannot make a colorable claim that jurists of reason would find debatable or wrong the decision denying the petition, Petitioner is not entitled to a Certificate of Appealability. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Dated: May 2, 2012

Marc L. Goldman
United States Magistrate Judge