UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALFRED ROLDAN, Petitioner, v. RON BARNES, Warden, Respondent.	NO. ED CV 13-394-JLS(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Josephine L. Staton, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on March 4, 2013, to which was attached a memorandum ("Pet. Mem.") and a copy of Petitioner's then-pending California Supreme Court habeas corpus petition in California Supreme

Court case number S208679 ("Pet. Attach.").

On April 22, 2013, the Court received from Petitioner a "Petition for Abeyance," which the Court rejected for filing on that date on the ground that the proof of service did not reflect service on Respondent. On May 13, 2013, the Court received from Petitioner a "Notice of Motion and Motion to Amend Habeas Corpus," to which was attached a copy of the California Supreme Court's order denying the petition in case number S208679. On May 16, 2013, the Court rejected this Motion for filing on the ground that Petitioner had not attached a proof of service.[1]

Respondent filed an Answer on June 3, 2013. On July 2, 2013, Petitioner filed a motion for an extension of time to file a Reply, which the Court granted on that date.

On August 2, 2013, the Court received from Petitioner: (1) a motion for an extension of time to file a Reply; (2) a "Petition for Abeyance, etc."; and (3) a "Notice of Motion and Motion to Amend Habeas Corpus." On August 6, 2013, the Court rejected these documents for filing on the ground that the proofs of service did not reflect service on Respondent.

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[1] On May 15, 2013, the Court also rejected for filing another "Petition for Abeyance" submitted by Petitioner, again on the ground that the proof of service did not reflect service on Respondent.

On August 2, 2013, the Court received from Petitioner: (1) another motion for an extension of time to file a Reply; (2) another "Petition for Abeyance"; and (3) a "Notice of Motion and Motion to Amend Habeas Corpus, etc." ("Motion to Amend"). On August 6, 2013, the Court rejected these documents for filing for failure to show proof of service on Respondent. On October 7, 2013, however, the Court issued an order sua sponte vacating the August 6, 2013 Order and permitting the documents to be filed. In the October 7, 2013 Order, the Court also denied as moot both the motion for an extension of time and the "Petition for Abeyance."

The Motion to Amend sought to amend the Petition to add allegedly newly exhausted grounds for relief that were contained in his California Supreme Court habeas corpus petition. Respondent filed an Opposition to the Motion to Amend on December 5, 2013, alleging that Petitioner's new claims were untimely.

On April 9, 2014, the Magistrate Judge issued a Minute Order construing the original Petition to contain the claims raised in the California Supreme Court habeas petition attached to the original Petition and ordering Respondent to file a Supplemental Answer addressing the merits of those claims.

On April 24, 2014, the Court denied Petitioner's most recent "Motion for Abeyance," which had been filed on March 31, 2014.

On May 22, 2014, Respondent filed a Supplemental Answer addressing the merits of the claims raised in the California Supreme

Court petition attached to Petitioner's original federal Petition. On July 9, 2014, Petitioner filed a Reply, accompanied by declarations and documentary evidence.

BACKGROUND

An Amended Information charged Petitioner and co-defendant Frank Ahumada with: (1) one count of the robbery of Arif Arif on January 19, 2004 in violation of California Penal Code section 211 (Count 1); (2) one count of assault with a firearm on Arif Arif on January 19, 2004 in violation of California Penal Code section 245(a)(2) (Count 2); and (3) one count of unlawful participation in a criminal street gang on January 19, 2004 in violation of California Penal Code section 186.22(a) (Count 3) (Clerk's Transcript ["C.T.] 259-61)[2]. The Amended Information also charged Petitioner with one count of the robbery of Adam Sappenfield on January 18, 2014 in violation of California Penal Code section 211 (Count 4); and one count of unlawful participation in a criminal street gang on January 18, 2004 in violation of California Penal Code section 186.22(a) (Count 5) (C.T. 261-62).

The Amended Information further alleged that: (1) with respect to Count 1, Ahumada personally and intentionally discharged a firearm and proximately caused great bodily injury to another person within the meaning of California Penal Code sections 12022.53(d) and

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[2] Respondent lodged two non-identical copies of a Clerk's Transcript identified as "Lodgment 1." Unless otherwise indicated, the Court refers to the Clerk's Transcript lodged on or about May 28, 2014, and identified in Respondent's "Supplemental Notice of Lodgment" filed on that date.

1192.79(c)(8); (2) with respect to Count 1, Petitioner violated California Penal Code section 186.22(a), was a principal in the offense and at least one principal personally and intentionally discharged a firearm and proximately caused great bodily injury to another person within the meaning of California Penal Code sections 12022.53(d) and (e) and 186.22(b); (3) with respect to Count 2, Ahumada personally used a firearm within the meaning of California Penal Code sections 12022.5(a) and 1192.7(c)(8) and personally inflicted great bodily injury on Arif within the meaning of California Penal Code sections 12022.7(a) and 1192.7(c)(8); (4) with respect to Counts 1 and 2, Petitioner and Ahumada committed the Arif robbery and assault for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of California Penal Code section 186.22(b); and (5) with respect to Count 4, Petitioner committed the Sappenfield robbery for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of California Penal Code section 186.22(b) (C.T. 259-61).

The jury found Petitioner guilty of all the charged offenses and found true all of the enhancement allegations (Reporter's Transcript ["R.T."] 596-99; C.T. 477-85, 492, 494, 499-500). The court sentenced Petitioner to the midterm of three years on Count 1,[3] plus twenty-five years to life pursuant to the section 12022.53(d) and (e)

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[3] See Cal. Penal Code § 213.

enhancements,[4] plus a consecutive ten year term for the gang enhancement (R.T. 620-21; C.T. 512). The court imposed a consecutive sentence of one year and four months on Count 4, plus a consecutive term of one year and four months for the personal use enhancement on that count, plus a consecutive term of three years and three months for the gang enhancement (R.T. 621; C.T. 513). The court stayed sentence on counts 2, 3 and 5 pursuant to California Penal Code section 654 (R.T. 620-21; C.T. 512-13). The court calculated Petitioner's total sentence to be forty-three years and seven months to life (R.T. 621; C.T. 513).

The California Court of Appeal remanded the matter for resentencing but otherwise affirmed the judgment (see People v. Ahumada, 2009 WL 1653840 (Cal. App. June 12, 2009). On remand, the sentencing court again imposed a three year sentence on Count 1, plus twenty-five years to life pursuant to the section 12022.53(d) and (e) enhancements (Reporter's Transcript of Proceedings on April 7, 2010 ["April 7, 2010 R.T."] 8-9; Clerk's Transcript lodged on or about

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[4] Section 12022.53(d) mandates "an additional and consecutive term of imprisonment in the state prison for 25 years to life" for "any person who . . . personally and intentionally discharges a firearm." Section 12022.53(e)(1)(A) provides that section 12022.53(d) also applies to any principal in the commission of the section 12022.53(d) offense who "violated subdivision (b) of Section 186.22." Because the jury found true the street gang enhancement in Section 186.22(b), section 12022.53(d) applied to Petitioner. See Garcia v. Yarborough, 2006 WL 6185670 (C.D. Cal. Apr. 18, 2006), aff'd, 310 Fed. App'x 988 (9th Cir.), cert. denied, 558 U.S. 837 (2009) ("Subdivision (e) of section 12022.53 authorizes the imposition of the enhanced sentence under 12022.53(d) to aiders and abettors if a criminal street gang allegation is also pled and proven.") (citation omitted).

June 3, 2013, at 28). With respect to the gang enhancement on Count 1, the court stated, with the prosecutor's acquiescence, that the gang enhancement on Count 1 was "not imposed and stayed pursuant to 654 of the Penal Code" (April 7, 2010 R.T. 9). The court imposed a three year consecutive sentence on Count 4 plus "3.3 years" on the personal use enhancement, plus "3.3" years on the gang enhancement, for a total calculated sentence of thirty-five years and six months to life (April 7, 2010 R.T. 10; Clerk's Transcript lodged on or about June 3, 2013, at 28-29). The court again stayed sentence on Counts 2, 3 and 5 (April 7, 2010 R.T. 9-10; Clerk's Transcript lodged on or about June 3, 2013, at 28-29).

The Court of Appeal amended Petitioner's sentence to a term of thirty-five years eight months to life, but otherwise affirmed the judgment (Respondent's Lodgment 7; see People v. Roldan, 2011 WL 3873858 (Cal. App. Sept. 2, 2011). On November 16, 2011, the California Supreme Court denied Petitioner's petition for review "without prejudice to any relief to which [Petitioner] might be entitled after the court decides People v. Caballero, S190647" (Respondent's Lodgments 8, 9). Petitioner filed a habeas corpus petition in the California Supreme Court, which that court denied summarily on April 17, 2013 (Respondent's Lodgments 10, 11).

SUMMARY OF TRIAL EVIDENCE

The following summary is taken from the opinion of the California Court of Appeal in People v. Roldan, 2011 WL 3873858 (Cal. App. Sept. 2, 2011). See Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir.

2009) (taking factual summary from state appellate decision).

> On January 18, 2004, defendant robbed Adam Sappenfield who was sitting in his car with two friends. Defendant and two others approached the vehicle. Defendant tapped on Sappenfield's window and asked if he had any weed. Sappenfield said no, and defendant pulled out a weapon, placed it in the window, and demanded Sappenfield's cell phone. After taking the phone, defendant demanded money. Sappenfield denied having any. Defendant and the two individuals with him fled.
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> The next evening, defendant entered the Corona Discount Place with his codefendant, Frank Ahumada, Jr. Like Ahumada, defendant was a member of Corona Vario Locos, a criminal street gang. Each wore black pants and a black sweatshirt with the hood pulled up. Arif Arif, the clerk in the store recognized them as regular customers. Ahumada pulled out a gun and demanded money. Defendant had a gun as well and Arif was trapped behind the counter. He took approximately $300 from the register and handed it to defendant. Ahumada demanded more money and Arif gave over another approximately $200. The robbers demanded more and Arif gave them approximately $200 from his wallet. More money was demanded and Ahumada shot Arif in the hand. Ahumada and defendant fled.

(Respondent's Lodgment 7, pp. 2-3; People v. Roldan, 2011 WL 3873858

at *1).

PETITIONER'S CONTENTIONS

Petitioner contends:

1. The evidence allegedly was insufficient to show Petitioner committed the crimes for the benefit of a criminal street gang within the meaning of the gang enhancement statute, California Penal Code section 186.22(b);

2. Petitioner's trial counsel allegedly rendered ineffective assistance by: (a) failing to request a continuance prior to the commencement of trial; (b) failing to file a motion to suppress allegedly irrelevant and prejudicial gang evidence; (3) failing to request instructions concerning the use of gang evidence, lesser included offenses and the alleged distinction between the intent of the shooter and that of the accomplice; (4) failing to challenge the sufficiency of the evidence to show Petitioner's involvement and intent with respect to the Arif robbery; (5) failing to "seek discovery[,] to investigate, object, file motions and develop a working defense and relationship with his client as counsel mis-led and had conflict of interest with petitioner through out proceedings"; and (6) failing to investigate purported mitigating evidence with respect to Petitioner's sentence (Pet. Attach., ECF Docket No. 1, pp.

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43-46).[5]

3. Petitioner allegedly received an unconstitutional sentence; and

4. The sentencing court allegedly was unaware of its discretion to strike the gang enhancement.

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody 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); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the

[5] The Petition does not bear consecutive page numbers. The Court uses the ECF pagination.

state court renders its decision on the merits. Greene v. Fisher, 132 S. Ct. 38, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported,

. . . or 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." Harrington v. Richter, 131 S. Ct. 770, 786 (2011). This is "the only question that matters under § 2254(d)(1)." Id. (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. at 786-87 ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.").

In applying these standards, the Court looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, as where the state court summarily denies a claim, "[a] habeas court must determine what arguments or theories . . . 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." Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011) (citation, quotations and brackets omitted).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the

Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

Furthermore, on federal habeas review of trial-type errors, this Court must apply the harmless error standard set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993) ("Brecht"). Brecht forbids a grant of habeas relief for a trial-type error unless the error had a "substantial and injurious effect or influence" on the outcome of proceeding. Id. at 637-38.

DISCUSSION

I. Petitioner's Challenge to the Sufficiency of the Evidence to Support the Gang Enhancement Does Not Merit Habeas Relief.

A. Governing Legal Standards

Petitioner contends the evidence did not suffice to show that Petitioner committed the crimes for the benefit of a criminal street gang, arguing that there allegedly was no evidence that the perpetrators wore gang colors, threw gang signs or claimed gang affiliation during the crimes (Pet. Attach, ECF Document 1, p. 45). Because the California Supreme Court summarily rejected this claim, the federal Court "must determine what arguments or theories . . . 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 [United States Supreme] Court." Cullen v. Pinholster, 131 S. Ct. at 1403 (citation, quotations and brackets omitted).

On habeas corpus, the Court's inquiry into the sufficiency of evidence is limited. Evidence is sufficient unless the charge was "so totally devoid of evidentiary support as to render [Petitioner's] conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment." Fish v. Cardwell, 523 F.2d 976, 978 (9th Cir. 1975), cert. denied, 423 U.S. 1062 (1976) (citations and quotations omitted). A conviction cannot be disturbed unless the Court determines that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 317 (1979). A verdict must stand unless it was "so unsupportable as to fall below the threshold of bare rationality." Coleman v. Johnson, 132 S. Ct. 2060, 2065 (2012).

Jackson v. Virginia establishes a two-step analysis for a challenge to the sufficiency of the evidence. United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc). "First, a reviewing court must consider the evidence in the light most favorable to the prosecution." Id. (citation omitted); see also McDaniel v.

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Brown, 558 U.S. 120, 133 (2010).[6] At this step, a court "may not usurp the role of the trier of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial." United States v. Nevils, 598 F.3d at 1164 (citation omitted). "Rather, when faced with a record of historical facts that supports conflicting inferences a reviewing court must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Id. (citations and internal quotations omitted); see also Coleman v. Johnson, 132 S. Ct. at 2064 ("Jackson leaves [the trier of fact] broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that [the trier of fact] draw reasonable inferences from basic facts to ultimate facts") (citation and internal quotations omitted); Cavazos v. Smith, 132 S. Ct. 2, 4 (2011) ("it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial"). The State need not rebut all reasonable interpretations of the evidence or "rule out every hypothesis except that of guilt beyond a reasonable doubt at the first step of Jackson [v. Virginia]." United States v. Nevils, 598 F.3d at 1164 (citation and internal quotations omitted). Circumstantial evidence and the inferences drawn therefrom can be sufficient to sustain a conviction. Ngo v. Giurbino, 651 F.3d 1112, 1114-15 (9th Cir. 2011).

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[6] The Court must conduct an independent review of the record when a habeas petitioner challenges the sufficiency of the evidence. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997). The Court has conducted such an independent review with respect to Petitioner's sufficiency claim.

At the second step, the court "must determine whether this evidence, so viewed, is adequate to allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." United States v. Nevils, 598 F.3d at 1164 (citation and internal quotations omitted; original emphasis). A reviewing court "may not ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Id. (citations and internal quotations omitted; original emphasis).

In applying these principles, a court looks to state law for the substantive elements of the criminal offense, but the minimum amount of evidence that the Constitution requires to prove the offense "is purely a matter of federal law." Coleman v. Johnson, 132 S. Ct. at 2064.

B. Discussion

California Penal Code section 186.22(b)(1) authorizes a sentence enhancement for any person who is convicted of a violent felony which was "committed for the benefit or, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."

Here, the prosecution introduced evidence that:
(1) Petitioner and Ahumada admitted membership in CVL or one of its

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member "clicks" (presumably cliques) (R.T. 176-79, 185-86, 198, 230-33, 242-43)[7]; (2) Ahumada had gang tattoos; (R.T. 178-80, 302-04); (3) a photograph recovered from the search of Ahumada's residence showed Petitioner, wearing gang colors, posing along with two gang members, one of whom was displaying a gang sign (R.T. 195-97, 243-44); (4) the cell phone taken from Sappenfield and recovered during the search of Ahumada's residence displayed the words "Crown Town," signifying CVL, and contained photographs of gang members which Sappenfield said were not on the phone when it was taken from him (R.T. 70-71, 204-05, 215-16, 262, 263-64); and (5) Petitioner was observed writing "Lil Critter," Petitioner's moniker, on a fence (R.T. 241-43). Furthermore, the prosecution's gang expert testified that, in his opinion: (1) CVL was an active criminal street gang whose primary activities included robbery and assault; (2) CVL gang members "put in work" by committing crimes; and (3) both crimes were committed for the benefit of, at the direction or in association with a criminal street gang (R.T. 222-23, 226, 314-18, 319-21).

This evidence amply supported the gang enhancement. See Emery v. Clark, 643 F.3d 1210, 1214 (9th Cir. 2011) (evidence sufficient where gang expert testified that petitioner shot victim because victim had "disrespected" petitioner's gang and that it was important for petitioner to maintain respect accorded to him as a gang member; applying California law); People v. Vang, 52 Cal. 4th 1038, 1048, 132 Cal. Rptr. 3d 373, 262 P.3d 581 (2011) ("Expert opinion that

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[7] The prosecution's gang expert testified that the CVS member "clicks" all got along with each other (R.T. 227).

particular criminal conduct benefitted a gang is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement.") (citation and internal quotations omitted); People v. Albillar, 51 Cal. 4th 47, 63, 119 Cal. Rptr. 3d 415, 244 P.3d 1062 (2010) ("Expert opinion that particular criminal conduct benefitted a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of a [criminal street gang]' within the meaning of section 186.22(b)(1)") (citation omitted); People v. Romero, 140 Cal. App. 4th 15, 18-19, 43 Cal. Rptr. 3d 862 (2006) (evidence sufficient to show crime was gang-related, where evidence showed defendant was a gang member, shootings occurred in territory and at hangout of rival gang, and gang expert testified that shootings were committed for benefit of defendant's gang, although evidence did not show victims were gang members or that anyone involved wore gang colors or used gang signs). Although the defense gang expert opined that the offenses were not gang-related (see R.T. 426-32), the jury chose to credit the testimony of the prosecution expert. This Court cannot revisit that credibility determination. See McDaniel v. Brown, 538 U.S. at 131-34 (ruling that the lower federal court erroneously relied on inconsistencies in trial testimony to deem evidence legally insufficient; the reviewing federal court must presume that the trier of fact resolved all inconsistencies in favor of the prosecution, and must defer to that resolution); United States v. Franklin, 321 F.3d 1231, 1239-40 (9th Cir.), cert. denied, 540 U.S. 858 (2003) (in reviewing the sufficiency of the evidence, a court does not "question a jury's assessment of witnesses' credibility" but rather presumes that the jury resolved conflicting inferences in favor of the

prosecution).

For the foregoing reasons, the California Supreme Court's rejection of Petitioner's challenge to the sufficiency of the evidence to support the gang enhancements was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d); Harrington v. Richter, 131 S. Ct. 770, 785-87 (2011). Petitioner is not entitled to habeas relief on this claim.

II. Petitioner's Claims of Ineffective Assistance of Counsel Do Not Merit Habeas Relief.

Petitioner contends his trial counsel rendered ineffective assistance in several ways. Because the California Supreme Court rejected these claims in an unreasoned order, this federal Court "must determine what arguments or theories . . . 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 [United States Supreme] Court." Cullen v. Pinholster, 131 S. Ct. at 1403 (citation, quotations and brackets omitted).

A. Governing Legal Standards

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but

for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted).

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight. . . ." Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009), cert. denied, 558 U.S. 1154 (2010) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Petitioner bears the burden to show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Harrington v. Richter, 131 S. Ct. at 787 (citation and internal quotations omitted); see Strickland, 466 U.S. at 689

(petitioner bears burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (citation and quotations omitted).

A state court's decision rejecting a Strickland claim is entitled to "a deference and latitude that are not in operation when the case involves review under the Strickland standard itself." Harrington v. Richter, 131 S. Ct. at 785. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. at 788.

"In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." Id. at 791-92 (citations omitted). Rather, the issue is whether, in the absence of counsel's alleged error, it is "'reasonably likely'" that the result would have been different. Id. at 792 (quoting Strickland, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." Id.

B. Discussion

1. Failure to Request a Continuance

Petitioner contends that his "newly appointed" trial counsel failed to request a continuance, contending counsel had "hardly enough

time to prepare for an armed robbery trial" (see Pet. Attach., ECF Docket 1, p. 46). Petitioner's contention that counsel did not request a continuance is mistaken. The record shows that, on September 13, 2007, the attorney who tried the case, Joseph Galasso III, filed a motion for a continuance, alleging that Petitioner's prior counsel had been transferred to a different courthouse and that Mr. Galasso required additional time to prepare the case (C.T. 238-238B). The court granted the motion on September 26, 2007, and set trial for November 5, 2007 (C.T. 243-44). The court subsequently granted two motions for continuances filed by Ahumada's counsel (C.T. 245-48, 250-53, 255). Trial did not begin until January 8, 2008 (C.T. 287-88).

Furthermore, Petitioner has not alleged any facts showing how Petitioner was prejudiced by counsel's alleged failure to request a (further) continuance. Accordingly, Petitioner has shown neither counsel's unreasonableness nor any resulting prejudice. See United States v. Sarno, 73 F.3d 1470, 1492-93 (9th Cir. 1995), cert. denied, 518 U.S. 1020 (1996), and 519 U.S. 859 (1996) (general allegations that a continuance would have permitted defendant to prepare a better defense insufficient); Windham v. Cate, 2012 WL 3150354, at *10 (C.D. Cal. June 11, 2012), adopted, 2012 WL 2913160 (C.D. Cal. July 17, 2012) ("Given the complete absence of any evidence that trial counsel's failure to seek an additional continuance impaired Petitioner's defense, Petitioner's ineffective assistance claim fails under both prongs of Strickland.") (citation omitted). Therefore, Petitioner is not entitled to habeas relief on this claim.

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2. Failure to Move to Suppress Gang Evidence

Petitioner faults counsel for failing to seek suppression of the allegedly "irrelavant [sic] prejudicial gang evidence" (Pet. Attach., ECF Docket No. 1, p. 46). In California, "[g]ang evidence, including expert testimony, is relevant and admissible to prove the elements of the substantive gang crime and gang enhancements." People v. Williams, 170 Cal. App. 4th 587, 609, 88 Cal. Rptr. 3d 401 (2009) (citation omitted). Even relevant gang evidence may be excluded if the probative value is substantially outweighed by the probability that the evidence would be unduly prejudicial. See People v. Carter, 30 Cal. 4th 1166, 135 Cal. Rptr. 2d 553, 70 P.3d 981 (2003), cert. denied, 540 U.S. 1124 (2004). Undue prejudice arises from evidence that is likely to evoke an emotional bias against the defendant or to cause the jury to prejudge the issues based on extraneous factors. People v. Crabtree, 169 Cal. App. 4th 1293, 1315, 88 Cal. Rptr. 3d 41 (2009). Here, the gang evidence was relevant to the substantive gang charges and the gang enhancements. Petitioner alleges no facts showing undue prejudice. Petitioner has shown neither counsel's unreasonableness in failing to file a motion to suppress the gang evidence nor any resulting prejudice.

3. Failure to Request Instructions

Petitioner faults counsel for failing to request instructions concerning the use of gang evidence, lesser included offenses and the alleged distinction between the intent of the shooter and that of the accomplice. These claims lack merit.

With respect to the use of gang evidence, the court instructed the jury that it could consider evidence of gang activity "only for the limited purpose of deciding whether: A defendant acted with the intent, purpose and knowledge that are required to prove the gang related crimes and enhancements charged [and] when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion" (R.T. 509-10; C.T. 464). The court also told the jury it could not consider the gang evidence "for any other purpose" and could not "conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime" (R.T. 509-10; C.T. 464). Petitioner does not assert what additional instruction counsel purportedly should have requested, and does not allege how the failure to give any additional instruction could have prejudiced Petitioner. See Greenway v. Schriro, 653 F.3d 790, 804 (9th Cir. 2011) (a "cursory and vague claim cannot support habeas relief") (citation omitted); Jones v. Gomez, 66 F.3d 199, 204-205 (9th Cir. 1995), cert. denied, 517 U.S. 1143 (1996) (conclusory allegations do not warrant habeas relief); Marroquin v. Hernandez, 2013 WL 1498856, at *28 (C.D. Cal. Jan. 24, 2013), adopted, 2013 WL 1498914 (C.D. Cal. Apr. 9, 2013) (habeas relief unavailable where petitioner did not "specify what kind of cautionary instruction counsel should have requested or suggest how he was prejudiced by counsel's failure to do so").

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Petitioner's vague allegation that counsel allegedly failed to seek a lesser included offense instruction is similarly defective.[8] Petitioner does not describe what lesser included offense instruction counsel purportedly should have requested or how the absence of any instruction prejudiced Petitioner. Such vague and conclusory allegations do not warrant habeas relief. See Greenway v. Schriro, 653 F.3d at 804; Jones v. Gomez, 66 F.3d at 204-205 (9th Cir. 1995).

4. Failure to Challenge the Sufficiency of the Evidence to Show Petitioner's Involvement and Intent with Respect to the Arif Robbery

Petitioner contends counsel should have challenged the sufficiency of the evidence of Petitioner's involvement and intent with respect to the offenses against Arif, contending that Petitioner purportedly did not know Ahumada would fire the rifle (Pet. Attach, ECF Document 1, p. 46).

To the extent Petitioner contends counsel should have challenged the sufficiency of the evidence of the robbery of Arif, Petitioner's claim plainly lacks merit. In California, robbery is a "taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of

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[8] At trial, the court granted a defense request to instruct the jury, with respect to Count 1, on the enhancement of personal use of a firearm pursuant to California Penal Code section 12022.53(b), assertedly a lesser enhancement to the section 12022.53(d) enhancement (R.T. 481-88). Petitioner does not allege what other lesser included offense instruction supposedly was appropriate in his case.

force or fear." Cal. Penal Code § 211. The evidence that Petitioner pointed a gun toward Arif (R.T. 106-09, 127, 129, 151, 161) and then took money from Arif (R.T. 110-13) sufficed to support Petitioner's robbery conviction. See People v. Jackson, 222 Cal. App. 2d 296, 298, 35 Cal. Rptr. 38 (1963) (evidence that defendant pointed gun at victim and said "this is it" sufficed to show defendant's intent to commit robbery); People v. Franklin, 200 Cal. App. 2d 797, 798, 19 Cal. Rptr. 465 (1962) (evidence that defendant pointed gun at victim and demanded money sufficient to show taking was by force or fear). Counsel was not ineffective in failing to make a meritless argument. See Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996), cert. denied, 519 U.S. 1142 (1997) ("the failure to take a futile action can never be deficient performance").

To the extent Petitioner contends counsel should have challenged the sufficiency of the evidence to support Petitioner's conviction for assault with a firearm on Arif, Petitioner also has failed to show a Strickland violation. Under California law, an assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code section 240. An assault is an attempt to commit a battery, which is defined as "any willful and unlawful use of force or violence upon the person of another." People v. Rocha, 3 Cal. 3d 893, 899, 92 Cal. Rptr. 172, 479 P.2d 372 (1971); Cal. Penal Code § 242.

"[I]t is a defendant's action enabling him to inflict a present injury that constitutes the actus reus of assault." People v. Chance, 44 Cal. 4th 1164, 1172, 81 Cal. Rptr. 3d 723, 189 P.3d 971 (2008).

"There is no requirement that the injury would necessarily occur as the very next step in the sequence of events, or without any delay." Id. Assault is a general intent crime and "does not require a specific intent to injure the victim." People v. Williams, 26 Cal. 4th 779, 788, 111 Cal. Rptr. 3d 114, 29 P.3d 197 (2001). "[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." Id. "He, however, need not be subjectively aware of the risk that a battery might occur." Pointing a gun at another person within range of the weapon can constitute an assault with a deadly weapon. See People v. Raviart, 93 Cal. App. 4th 258, 263, 267, 112 Cal. Rptr. 2d 850 (2001); Salcedo v. Ollison, 2009 WL 1041527, at *2 (C.D. Cal. Apr. 17, 2009); see also People v. Licas, 41 Cal. 4th 362, 366-67, 60 Cal. Rptr. 3d 31, 159 P.3d 507 (2007) ("Once a defendant has attained the means and location to strike immediately he has the 'present ability to injure.'") (citation omitted).

The court instructed the jury on the elements of assault with a firearm (R.T. 510-11; C.T. 460). The court also gave aiding and abetting instructions, informing the jury that to prove guilt based on a theory of aiding and abetting, the prosecution was required to show that a person aids and abets a crime if he knows of the perpetrator's unlawful purpose and specifically intends to, and does in fact, aid, facilitate, promote, encourage or instigate the perpetrator's commission of that crime (R.T. 503-04; C.T 458-59). Arif testified that: (1) Petitioner and Ahumada entered the store wearing black sweatshirts with the hoods covering their heads; (2) Arif recognized

the two as "regular customers"; (3) as Arif returned to the counter where the cash register was located; Petitioner closed the door and Ahumada and Petitioner entered the first aisle; (4) Ahumada approached Arif, pointed a gun at Arif's upper body and said, "We want the money"; (5) Petitioner stood at the end of the counter, blocked Arif's path, and also pointed a gun at Arif; (6) trapped, Arif took some money from the cash register and gave it to Petitioner; (7) Ahumad told Arif, "We want more"; (8) Arif gave the rest of the money in the cash register to Petitioner; (9) at Ahumada's command, Arif took money from his wallet and gave it to Petitioner; (10) Arif turned to the right, pointed to the cash register with his right hand and said: "I gave you everything you want. Take everything. You can take it."; (11) Ahumada shot Arif in the right hand; (12) at Ahumada's command, Arif dropped to the floor; and (13) Ahumada and Petitioner left the store (R.T. 103-16, 127, 129, 151, 156-57, 161).[9] An attorney faced with this evidence reasonably could have concluded that challenging the sufficiency of the evidence to support Petitioner's conviction for assault with a firearm on Arif, either as a direct perpetrator or as an aider and abettor, would fail. Rupe v. Wood, 93 F.3d at 1445. Petitioner has not shown counsel's unreasonableness in this regard or any resulting prejudice.

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[9] Although Arif confused Ahumada's and Petitioner's first names, his in-court identifications and his testimony make it clear that Ahumada was the robber who shot Arif and Petitioner was the robber who blocked Arif's exit from the counter and took the money. Arif testified that, although he had seen Petitioner and Ahumada in his store since they were young, he did not know their names "for sure" (R.T. 155).

5. Failure to "Seek Discovery[,] to Investigate, Object, File Motions, and Develop a Working Defense and Relationship, etc."

Petitioner's vague and conclusory claims that trial counsel allegedly failed to seek unidentified discovery, to perform unspecified investigations, to make unspecified objections, or to file unspecified motions do not establish counsel's alleged unreasonableness or any resulting prejudice. See Bible v. Ryan, 571 F.3d 860, 871 (9th Cir. 2009), cert. denied, 559 U.S. 995 (2010) (speculation insufficient to show Strickland prejudice); Ceja v. Stewart, 97 F.3d 1246, 1255 (9th Cir. 1996), cert. denied, 522 U.S. 971 (1997) (rejecting Strickland claim where petitioner failed to explain what compelling evidence would have been uncovered had counsel interviewed more witnesses); United States v. Murray, 751 F.2d 1528, 1535 (9th Cir.), cert. denied, 474 U.S. 979 (1985) (rejecting claim that counsel ineffectively failed to call witnesses, where defendant did not "identify any witnesses that his counsel should have called that could have been helpful"); see also Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir.), cert. denied, 502 U.S. 902 (1991) (petitioner cannot satisfy Strickland standard by "vague and conclusory allegations that some unspecified and speculative testimony might have established his defense").

Petitioner's equally conclusory claims that counsel allegedly failed to "develop a working defense and relationship with his client," misled Petitioner in an undescribed fashion and operated under an unspecified conflict of interest also fail to show a

Strickland violation. See Morris v. Slappy, 461 U.S. 1, 14 (1983) (Sixth Amendment does not guarantee a "meaningful relationship" with counsel); Bragg v. Galaza, 242 F.3d 1082, 1087 (9th Cir.), amended, 253 F.3d 1150 (9th Cir. 2001) (conclusory allegations insufficient to establish an actual conflict of interest); Morris v. State of California, 966 F.2d 448, 455 (9th Cir. 1991), cert. denied, 506 U.S. 831 (1992) ("bare allegation of a conflict of interest" insufficient).

6. Failure to Investigate and Present Alleged Mitigating Evidence

Petitioner contends counsel failed to investigate and present at sentencing purported mitigating evidence. Petitioner contends counsel should have discovered and presented evidence concerning Petitioner's alleged "lack of maturity[,] under developed [sic] sense of responsibility and negative influences from gangs" (Pet. Attach., ECF Docket No. 1, p. 43). In this regard, Petitioner contends counsel should have obtained and presented information concerning Petitioner's background history, a character assessment, a family and social history, an "educational training history," as well as evidence concerning Petitioner's alleged "prior juvenile experience" and religious and cultural influences (id.). In the Petition, however, Petitioner does not describe what specific information in Petitioner's history, character, education, experiences or influences counsel purportedly should have presented to the court or how any such alleged information would have affected Petitioner's sentence. Petitioner's conclusory allegations do not show that the California Supreme Court's rejection of this claim was objectively unreasonable. See Bible v.

Ryan, 571 F.3d at 871; Ceja v. Stewart, 97 F.3d at 1255; United States v. Murray, 751 F.2d 1535; see also Zettlemoyer v. Fulcomer, 923 F.2d at 298.

Petitioner attaches to his Reply the declarations of Petitioner, Ahumada, Petitioner's mother and Petitioner's uncle, as well as Petitioner's alleged scholastic test report and special education report (Reply, ECF Docket No. 51, pp. 15-32). The declarations purport to describe Petitioner's alleged hardships growing up and Ahumada's alleged influence over Petitioner. The other documents purport to show Petitioner's alleged learning problems.

The Court cannot properly consider these declarations. Where, as here, the state court adjudicated a claim on the merits and such adjudication was not "unreasonable" under section 2254(d), habeas relief is unavailable regardless of the nature of any additional evidence Petitioner might present for the first time in federal court. See Cullen v. Pinholster, 131 S. Ct. 1388, 1400 (2011) ("if a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before the state court," even where the state court denied the petition summarily) (footnote omitted); Gulbrandson v. Ryan, 738 F.3d 976, 993-94 n.6 (9th Cir. 2013), cert. denied, 134 S. Ct. 2823 (2014) (Pinhoster's preclusion of a federal evidentiary hearing applies to section 2254(d)(2) claims as well as to section 2254(d)(1) claims).

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C. Conclusion

For all of the foregoing reasons, the California Supreme Court's rejection of Petitioner's claims of ineffective assistance of counsel was not contrary to, or an objectively unreasonable application of, any clearly established United States Supreme Court precedent. Petitioner is not entitled to habeas relief on these claims.

III. Petitioner's Challenge to the Constitutionality of His Sentence Does Not Merit Habeas Relief.

A. Background

At Petitioner's initial sentencing on March 21, 2008, Petitioner's counsel presented the testimony of Petitioner's mother, who told the court that Petitioner was "only a kid," was remorseful, and had "learned his lesson" (R.T. 605). Petitioner's counsel reminded the court that Petitioner was only fifteen years old at the time of the offenses, and that fifteen-year-olds did "stupid things" (R.T. 606). Petitioner's counsel said Petitioner had been "very immature," but had matured and expressed remorse (R.T. 606). Recognizing that the sentence of twenty-five years to life pursuant to California Penal Code section 12022.53(d) was mandatory,[10] Petitioner's counsel asked the court to exercise its discretion to impose concurrent sentences on Counts 4 and 5 (R.T. 607-08).

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[10] See California Penal Code sections 12022.53(d), (h).

The court expressed concern regarding imposing a life sentence on a "child" with no prior record (R.T. 607). The court acknowledged that the crimes were "very, very serious" but observed that Petitioner had a "minimal" criminal history consisting of "law enforcement contact" and no history of drug use (R.T. 617-18). The court acknowledged that Sappenfield's mother had asked for mercy and reported that her son assertedly believed Petitioner had refused an order to shoot Sappenfield (R.T. 618). However, the court also said there was "not a lot of mitigation" (R.T. 619).

The court explained that, in selecting the middle term, it had concluded that the mitigating factors including Petitioner's youth, the absence of a prior record or drug use and the request of Sappenfield's mother for mercy, did not outweigh the aggravating factors including the seriousness of the offenses (R.T. 620-21). The court then imposed a sentence that included twenty-five years to life pursuant to California Penal Code section 12022.53(d) (R.T. 620).

As indicated above, the Court of Appeal reversed and remanded for resentencing. The Court of Appeal commented that it was not preventing the sentencing court on remand from reconsidering "the sentence as a whole, including the discretionary portions, as long as the new sentence does not exceed the original one" (see People v. Ahumada, 2009 WL 1653820 at *10) (citation omitted).

At sentencing on remand, Petitioner's counsel again argued that Petitioner had been fifteen at the time of the offenses and had no prior criminal record (April 7, 2010 R.T. 2). Counsel argued that

Petitioner should receive a lesser punishment than Ahumada, contending that Petitioner was not the shooter in the Arif robbery but "was only there" (April 7, 2010 R.T. 2). Counsel argued that murderers received a sentence of twenty-five years to life, and that Petitioner was receiving a life sentence "for the actions of another person" (April 7, 2010 R.T. 3-4). Counsel argued that a sentence of "30-some-odd years to life" would be "tantamount to a life sentence" which assertedly would violate the Eighth Amendment (April 7, 2010 R.T. 5).

The court observed that Petitioner had committed "serious felonies" which caused trauma to the victims, and that gang activity "raises a serious threat to public safety" (April 7, 2010 R.T. 6-7). The court noted Petitioner's statements in the probation report that Petitioner reportedly had been living with his grandmother and sister, had not been doing well in school and had "drifted off with the wrong crowd" (April 7, 2010 R.T. 7). Petitioner reportedly said his grandmother and sister had tried to intervene but Petitioner assertedly ignored them (April 7, 2010 R.T. 7). Petitioner allegedly regretted not having listened to them, but said the peer pressure "was hard to resist" (April 7, 2010 R.T. 7). Petitioner reportedly apologized for frightening and upsetting the victims and acknowledged that he deserved punishment (April 7, 2010 R.T. 7).

The court also noted the reported statements of Sappenfield's mother that Sappenfield assertedly believed Petitioner disregarded someone's scream to shoot Sappenfield and that she did not want Petitioner to receive "the fullest extent of punishment" (April 7, 2010 R.T. 7-8). Sappenfield's mother reportedly said her heart broke

for Petitioner because she "observed his devastation in court" (April 7, 2010 R.T. 8).

The court said it also had taken into consideration the statements in the probation report that Petitioner allegedly was "impressionable, unsophisticated and naive" and "believed to be immature at the time of the instant matter " (April 7, 2010 R.T. 8). The court considered Petitioner's expressions of alleged remorse (April 7, 2010 R.T. 8). The court again selected the middle term on count 1, and stated it had "no discretion" (April 7, 2010 R.T. 8-9). As indicated previously, Petitioner received a sentence of 35 years and six months to life (April 7, 2010 R.T. 10).

The Court of Appeal rejected Petitioner's Eighth Amendment claim, ruling that Petitioner's claim was not governed by Graham v. Florida, 560 U.S. 48 (2010) ("Graham") (see Respondent's Lodgment 7, p. 7; People v. Roldan, 2011 WL 3873858, at *4-5). Graham held that a sentence of life without parole for a juvenile offender in a nonhomicide case is unconstitutional. The Court of Appeal distinguished Graham because Petitioner did not receive a sentence of life without the possibility of parole (see Respondent's Lodgment 7, p. 7; People v. Roldan, 2011 WL 3873858, at *4-5). The Court of Appeal also held that Petitioner's "as applied" Eighth Amendment challenge to his sentence failed for lack of evidence that Petitioner's sentence was constitutionally disproportionate (see Respondent's Lodgment 7, pp. 8-9; People v. Roldan, 2011 WL 3873858, at *4-5). The California Supreme Court rejected Petitioner's Eighth Amendment claim summarily (Respondent's Ex. 11).

B. Discussion

1. Petitioner's Categorical Challenge to His Sentence

The Eighth Amendment forbids the imposition of "cruel and unusual punishments." United States Constitution, Amend. VIII. In Graham, the Supreme Court recognized that its cases addressing Eighth Amendment challenges to sentences fell within two general classifications. Graham, 560 U.S. at 59. "The first involves challenges to the length of term-of-years sentences given in all the circumstances in a particular case." Id. "The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty." Id.; see, e.g., Roper v. Simmons, 543 U.S. 551 (2005) (Eighth Amendment forbids imposition of death penalty for a juvenile offender under the age of 18 at the time of the capital crime).

In Graham, the Supreme Court ruled that, under the categorical approach, the Eighth Amendment prohibited the imposition of a sentence of life without the possibility of parole on a juvenile convicted of a non-homicide offense. Graham, 560 U.S. at 74-75. The Graham court reasoned that the penological goals of retribution, deterrence, incapacitation and rehabilitation did not justify a sentence of life without parole on one who committed the crime as a juvenile, in light of, among other things, juveniles' lack of maturity, underdeveloped sense of responsibility, inclination to "impetuous and ill-considered actions and decisions" and diminished moral responsibility. Id. at 71-74. Under Graham, a state "is not required to guarantee eventual

freedom to a juvenile offender convicted of a nonhomicide crime." Id. at 75. "What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75.

In Miller v. Alabama, 132 S. Ct. 2455 (2012) ("Miller"), the Supreme Court applied the categorical approach to deem unconstitutional a mandatory sentence of life without the possibility of parole on a juvenile offender convicted of a homicide. The Court reasoned that "[m]andatory life without parole for a juvenile precludes consideration of [the defendant's] chronological age and its hallmark features, - among them, immaturity, impetuostity, and failure to appreciate risks and consequences." Id. at 2468. The court stated that such a sentence prevents taking into account the defendant's family and home environment, the circumstances of the underlying homicide offense, the fact that the offender "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth," and "the possibility of rehabilitation." Id. The Court ruled that the Eighth Amendment requires "a judge or jury . . . to consider [such] mitigating circumstances before imposing the harshest penalty possible for juveniles [i.e., life without the possibility of parole]." Id. at 2475.

In Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013), the Ninth Circuit held that the Eighth Amendment prohibited a term-of-years sentence of 254 years imposed on a juvenile offender for nonhomicide offenses. The Moore Court deemed the sentence "materially indistinguishable" from a sentence of life without the possibility of

parole because the petitioner would never be eligible for parole within his lifetime. Id. at 1191-92[11]; see also People v. Caballero, 55 Cal. 4th 262, 268, 145 Cal. Rptr. 3d 286, 282 P.3d 291 (2012) (holding that, under Graham and Miller, "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment").

In the present case, Petitioner's categorical challenge to his sentence plainly fails. As Petitioner acknowledges, Graham does not prohibit sentences of life with the possibility of parole for juvenile nonhomicide offenders (see Pet. Mem., ECF Docket No. 1, p. 16).[12] Petitioner, age fifteen when he committed the offenses in 2004, will serve approximately twenty-eight years of the sentence imposed on April 7, 2010, after application of credits (see April 7, 2010 R.T. 13). Hence, Petitioner will be approximately fifty years old when he becomes eligible for parole. Petitioner's parole eligibility date does not fall outside Petitioner's natural life expectancy. See People v. Perez, 214 Cal. App. 4th 49, 57-58, 154 Cal. Rptr. 3d 114 (2013), cert. denied, 134 S. Ct. 527 (2013) (where defendant who

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[11] The Ninth Circuit also held that Graham should be applied retroactively on collateral review and that the state court's rejection of the petitioner's Eighth Amendment challenge to his sentence was contrary to clearly established Supreme Court law as expressed in Graham. Moore v. Biter, 725 F.3d at 1191-93. The United States Supreme Court decided Graham before the California Supreme Court denied Petitioner's petition for review.

[12] See Graham, 560 U.S. at 63 ("The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.").

committed crimes at age 16 would be eligible for parole at age 47, there was "plenty of time" for him to seek release based on demonstrated maturity and rehabilitation). Petitioner fails to argue, and the record fails to show, that Petitioner would not receive a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" at a future parole suitability hearing. See Graham, 560 U.S. at 75; see also California Penal Code § 3041.5 (inmate shall be permitted to review his or her file prior to parole suitability hearing, and shall be afforded the right to be present, to answer and ask questions and to speak on his own behalf); Cal. Code of Regs., tit. 15, § 2281(b) (in determining suitability for parole, Board may consider, inter alia, "the circumstances of the prisoner's: social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release."); Cal. Code of Regs., tit. 15, § 2281(d) (circumstances tending to show suitability for parole include stable social history, signs of remorse, lack of criminal history of violent crime, and applicant's age, understanding and plans for the future and institutional behavior). Therefore, Petitioner's sentence was not a de facto sentence of life without the possibility of parole. Compare Moore v. Biter, 725 F.3d at 1191-92 (sentence of 254 years "materially indistinguishable" from a sentence of life without the possibility of parole because petitioner was "guaranteed to die in

prison regardless of his remorse, reflection, or growth"). Accordingly, the state courts' rejection of Petitioner's categorical challenge to his sentence was not contrary to Graham, Miller or Moore.

Additionally, lower courts have applied Graham inconsistently where a defendant who was a juvenile at the time of the offense received a lengthy term-of-years sentence which nevertheless provided some possibility for parole. See Moore v. Biter, 725 F.3d at 1194 n.6 (citing cases). Given the inconsistency in the case law, and given the material difference between Petitioner's sentence and the 254-year sentence in Moore, this Court cannot conclude that the state courts' rejection of Petitioner's categorical Eighth Amendment challenge to his sentence was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." See Harrington v. Richter, 131 S. Ct. 770, 786-87 (2011); see also White v. Woodall, 134 S. Ct. 1697, 1705 (2014) ("where the precise contours of the right [at issue] remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims") (citations and internal quotations omitted).

For all of the foregoing reasons, to the extent Petitioner makes a categorical challenge to his sentence by analogizing it to a juvenile sentence of life without the possibility of parole under Graham and Miller, Petitioner is not entitled to habeas relief.

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2. Petitioner's Proportionality Challenge to His Sentence

Petitioner also mounts a proportionality challenge to his sentence, arguing that the "principles underlying the decision in *Graham* must be taken into account in an Eighth Amendment analysis of a life sentence imposed on a juvenile offender" (Pet. Mem., ECF Docket No., p. 16) (citation omitted). Petitioner points out that he was fifteen years old at the time of the offenses, and contends he was "impressionable, unsophisticated, and naive," and "youthful and immature" at the time (id., p. 17). Petitioner contends that he was influenced by friends more than family members, and that he did not understand the seriousness of his actions until he heard the victims testify at trial (id.). Petitioner asserts that he expressed remorse to the probation officer and adds that Sappenfield's mother reportedly stated that Petitioner appeared to be devastated (id.; see C.T. 545, 547 [probation report]). Petitioner also argues that, although his crimes were serious, he allegedly did not inflict any injury on Arif and assertedly refused to shoot Sappenfield (Pet. Mem., ECF Docket No. 1, p. 17).

In Rummel v. Estelle, 445 U.S. 263 (1980), the Supreme Court upheld a sentence of life with the possibility of parole for the crime of obtaining $120.75 by false pretenses, following prior convictions for fraudulent use of a credit card to obtain $80 worth of goods and services and passing a forged check for $28.36. In Solem v. Helm, 463 U.S. 277 (1983), the Court struck down a sentence of life without the possibility of parole for uttering a "no account" check for $100, "one of the most passive felonies a person could commit," where the

petitioner had three prior third-degree burglary convictions and convictions for obtaining money by false pretenses, grand larceny and driving while intoxicated. In Harmelin v. Michigan, 501 U.S. 957 (1991) ("Harmelin"), five Justices, although in disagreement regarding the rationale, upheld a sentence of life without the possibility of parole for a first offense of possession of more than 650 grams of cocaine. In a concurring opinion, Justice Kennedy opined that a non-capital sentence could violate the Eighth Amendment if it were grossly disproportionate to the crime. Id. at 996-1009. Justice Kennedy articulated a test whereunder the court first conducts a threshold review of the gravity of the offense and the severity of the sentence to determine whether the case is the "rare" case in which this analysis supports an inference of gross disproportionality. Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring). If such an inference arises, the court thereafter compares the challenged sentence with those received by other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions. Id.

In 2003, the United States Supreme Court decided two cases involving the constitutionality of sentences imposed under California's Three Strikes Law. In Ewing v. California, 538 U.S. 11 (2003), the Court upheld a sentence of twenty-five years to life for felony grand theft consisting of the non-violent theft of three golf clubs. In Lockyer v. Andrade, 538 U.S. 63 (2003) ("Andrade"), the Court upheld, under the AEDPA standard of review, the California Court of Appeal's determination that a sentence of fifty years to life for two non-violent petty thefts with a prior theft-related conviction was not disproportionate. Andrade, 538 U.S. at 66-67.

In Andrade the United States Supreme Court acknowledged that, "in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow." Andrade, 538 U.S. at 72. However, the Court observed that "one governing legal principle emerges as 'clearly established' under [28 U.S.C.] § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years." Id.

In Graham, the Supreme Court expressly adopted Justice Kennedy's approach in Harmelin. See Graham, 560 U.S. at 61 (2010); see also Norris v. Morgan, 622 F.3d 1276, 1287 n.12 (9th Cir. 2010), cert. denied, 131 S. Ct. 1557 (2011). Thus, "[t]he threshold determination in the eighth amendment proportionality analysis is whether [the] sentence was one of the rare cases in which a . . . comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." United States v. Bland, 961 F.2d 123, 129 (9th Cir.), cert. denied, 506 U.S. 858 (1992) (citations and quotations omitted); see Andrade, 538 U.S. at 73 (gross proportionality principle "applicable only in the 'exceedingly rare' and 'extreme' case") (citations omitted); Harmelin, 501 U.S. at 1001 (1991) (Kennedy, J., concurring) ("The Eighth Amendment does not require strict proportionality between crime and sentence"); see also Norris v. Morgan, 622 F.3d at 1287 ("the Supreme Court has uniformly applied - and thus given meaning to - the gross disproportionality principle by consistently measuring the relationship between the severity of the punishment inflicted upon the offender and the nature and number of offenses committed . . ."); Cocio v. Bramlett, 872 F.2d

889, 892 (9th Cir. 1989) ("we are required to defer to the power of a state legislature to determine the appropriate punishment for violation of its laws based on principles of federalism, unless we are confronted with a rare case of a grossly disproportionate sentence").

Petitioner's challenge to the proportionality of his sentence fails under these strict standards. Nothwithstanding Petitioner's youth, alleged immaturity, lack of criminal history, expressions of asserted remorse and other alleged mitigating circumstances, Petitioner committed two gang-related armed robberies on two consecutive days. Petitioner robbed Sappenfield at gunpoint, putting the gun in the car window next to Sappenfield. The next day Petitioner and his companion robbed Arif, during which robbery Petitioner accosted Arif at gunpoint, blocked Arif from escaping, took money and Arif's wallet, and stood by with gun at the ready as Petitioner's confederate Ahumada shot Arif. Courts have upheld sentences of life without the possibility of parole for crimes significantly less heinous than Petitioner's crimes. See Harmelin (life without possibility of parole for possession of 672 grams of cocaine); United States v. Jensen, 425 F.3d 698, 708 (9th Cir. 2005), cert. denied, 547 U.S. 1056 (2006) (life without possibility of parole for possession of methamphetamine with intent to distribute); United States v. Van Winrow, 951 F.2d 1069, 1071 (9th Cir. 1991) (life without possibility of parole for possession of cocaine with intent to distribute); Terrebonne v. Butler, 848 F.2d 500, 506-07 (5th Cir. 1988), cert. denied, 489 U.S. 1020 (1989) (en banc) (life without possibility of parole for 21-year-old heroin addict who delivered packets of heroin to an undercover officer); Holley v. Smith, 792 F.2d

1046, 1051-52 (11th Cir. 1986), cert. denied, 481 U.S. 1020 (1987) (life without possibility of parole for recidivist robber); Holmes v. Valadez, 2005 WL 3113085, at *8-9 (N.D. Cal., Nov. 21, 2005) (ninety years to life for two first degree-burglary convictions for recidivist burglar).

The Andrade decision also appears to foreclose the possibility of a successful disproportionality claim in the present case. In Andrade, the Supreme Court acknowledged: "in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow." Andrade, 538 U.S. at 72. Because of this lack of clarity, the Andrade Court found not unreasonable a California court's affirmance of a sentence of 50 years to life for two petty thefts with a prior theft-related conviction. Id. The same lack of clarity would prevent this Court from concluding that the state appellate courts' refusals to interfere with Petitioner's sentence was "contrary to" or an "unreasonable application of" "clearly established Federal law as determined by the Supreme Court of the United States." See 28 U.S.C. § 2254(d); see also Silva v. McDonald, 891 F. Supp. 2d 1116, 1131 (C.D. Cal.), app. dism'd, (9th Cir. 12-56765) (Oct. 22, 2012) (denying habeas relief under the AEDPA standard of review because "this Court is not aware of any controlling Supreme Court precedent which holds, or could be construed to hold that the sentence at issue here of 40-years-to-life with the possibility of parole, for a juvenile who was 16 years old at the time of the nonhomicide crime, violates the Eighth Amendment").

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In sum, the California courts' rejection of Petitioner's disproportionality claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal Law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d); Harrington v. Richter, 131 S. Ct. 770, 785-87 (2011). Thus, Petitioner is not entitled to federal habeas relief on this claim.

IV. Petitioner's Claim that the State Court Allegedly Was Unaware of Its Sentencing Discretion Does Not Merit Habeas Relief.

Petitioner contends the sentencing court was unaware of its discretion to strike the gang enhancement appended to Count 4 (Pet., "Attachment" to "Ground II," ECF Docket No. 1, p. 7). The Court of Appeal rejected this assertion, ruling that nothing in the record suggested that the court was unaware that it had the discretion to strike the enhancement (Respondent's Lodgment 7, p. 6; see People v. Roldan, 2011 WL 3873858, at *3).

To the extent Petitioner contends his sentence violated state law, Petitioner is not entitled to habeas relief. Federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Matters relating to sentencing and serving of a sentence generally are governed by state law and do not raise a federal constitutional question. See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994), cert. denied, 514 U.S. 1026 (1995) ("The decision whether to impose sentences concurrently or consecutively is a matter of state criminal procedure and is not

within the purview of federal habeas corpus.") (citation omitted); Watts v. Bonneville, 879 F.2d 685, 687 (9th Cir. 1989) (rejecting as not cognizable petitioner's contention the California court violated section 654 by imposing two consecutive terms for rape in concert based on petitioner's single act of standing guard while others raped the victim); Dowell v. Clark, 2011 WL 5326166, at *6-7 (C.D. Cal. Mar. 23, 2011), adopted, 2011 WL 5331718 (C.D. Cal. Nov. 3, 2011) (claim that sentencing court misunderstood its discretion to strike gang enhancement presented only a claim of state law error not cognizable on federal habeas review); see also Wilson v. Corcoran, 131 S. Ct. 13, 16 (2010) (per curiam) ("[I]t is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts.") (original emphasis).

Under narrow circumstances, however, the misapplication of state sentencing law may violate due process. See Richmond v. Lewis, 506 U.S. 40, 50 (1992). "[T]he federal, constitutional question is whether [the error] is so arbitrary or capricious as to constitute an independent due process" violation. Id. (internal quotation and citation omitted); see also Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994) ("Absent a showing of fundamental unfairness, a state court's misapplication of its own sentencing laws does not justify federal habeas relief.").

Petitioner has shown no such fundamental unfairness. The California sentencing court has the discretion to strike the gang enhancement "in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into

the minutes the circumstances indicating that the interests of justice would best be served by that disposition." Cal. Penal Code § 186.22(g). Even assuming arguendo the court was unaware of its discretion to strike the gang enhancement, Petitioner has failed to demonstrate that, had the judge understood his discretion, the judge would have exercised that discretion. To the contrary, as indicated above, the judge imposed the midterm, not the low term, on Count 4, after indicating that the circumstances in mitigation did not outweigh the circumstances in aggravation (April 7, 2010 R.T. 16-18). Accordingly, there is insufficient cause to believe that the judge would have deemed Petitioner's case to be the "unusual" case warranting dismissal of the gang enhancement within the meaning of section 186.22(g). Hence, Petitioner's sentence was not "fundamentally unfair." For the same reasons, Petitioner has not shown that the alleged error had any substantial and injurious effect or influence on Petitioner's sentence within the meaning of Brecht v. Abrahamson, 507 U.S. 619 (1993) ("Brecht"). See Brecht, 507 U.S. at 637-38; Estrella v. Ollison, 668 F.3d 593, 598 (9th Cir. 2011) (applying Brecht to claim of sentencing error).

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RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) denying and dismissing the Petition with prejudice.

DATED: August 12, 2014.

_____/S/_____
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the 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.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.