

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

DANIEL LUA MENDOZA, JR.,

1:08-cv-01617-OWW-DLB (HC)

Petitioner,

FINDINGS AND RECOMMENDATION  
REGARDING PETITION FOR WRIT OF  
HABEAS CORPUS

v.

[Doc. 1]

KEN CLARK, Warden

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

RELEVANT HISTORY

Following a jury trial in the Tulare County Superior Court, Petitioner was convicted of three counts of attempted premeditated murder (Cal. Penal Code<sup>1</sup> §§ 664/187 [counts 1, 4, and 5]), two counts of shooting at an inhabited dwelling (§ 246 [counts 2 and 6]), and two counts of permitting another to shoot from a vehicle (§ 12034(b) [counts 3 and 7]). Street gang allegations (§ 186.22(b)) and firearm enhancements (§ 12022.53(c), (d) & (e)(1)) were also found true. On November 29, 2005, Petitioner was sentenced to an aggregate prison term of 59 years-to-life.

Petitioner filed a timely notice of appeal. On May 9, 2007, the California Court of Appeal, Fifth Appellate District affirmed the judgment of conviction, but vacated the sentence and remanded to the trial court for resentencing. (Lodged Doc. No. 1.)

<sup>1</sup> All further statutory references are to the California Penal Code unless otherwise indicated.

1 Petitioner filed a petition for review in the California Supreme Court, which was denied  
2 on July 25, 2007. (Lodged Doc. Nos. 2-3.)

3 On remand, the trial court resentenced Petitioner on August 24, 2007, and an amended  
4 abstract of judgment was filed on September 10, 2007. (Lodged Doc. No. 4.) Petitioner did not  
5 appeal from the resentencing.

6 Petitioner filed the instant federal petition for writ of habeas corpus on October 24, 2008.  
7 (Court Doc. 1.) Respondent filed an answer to the petition on February 19, 2009. (Court Doc.  
8 13.) Petitioner filed a traverse on August 12, 2009. (Court Doc. 22.)

9 STATEMENT OF FACTS<sup>2</sup>

10 [Petitioner] was the driver in two drive-by shootings that occurred on May  
11 22, 2004. Julian Espitia fired a handgun out the passenger window at two houses.  
12 A man was struck in the chest by a bullet, but he survived. An occupant of one of  
13 the houses admitted that he had been a member of the Original Gangsters Surenos  
14 (OGS), which is a Surenos subset. Gang expert Joe Aguilar testified that  
15 [Petitioner] is a member of the Brown Pride Catella (BPC), which is a Nortenos  
16 subset. Nortenos and Surenos are rivals. [Petitioner] and six other BPC members  
17 had been injured in a drive-by shooting that occurred on February 28, 2004.  
18 Detective Aguilar opined that the May 22, 2004, drive-by shooting was committed  
19 to enhance and benefit the BPC. [Petitioner] denied knowingly participating in  
20 the drive-by shootings. He testified that he was simply giving friends a ride and  
21 Espitia unexpectedly fired a handgun out of the passenger window on two  
22 occasions.

23 (Lodged Doc. No. 1, Opinion, at 2.)

24 DISCUSSION

25 A. Jurisdiction

26 Relief by way of a petition for writ of habeas corpus extends to a person in custody  
27 pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws  
28 or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor,  
529 U.S. 362, 375, 120 S.Ct. 1495, 1504, n.7 (2000). Petitioner asserts that he suffered  
violations of his rights as guaranteed by the U.S. Constitution. The challenged conviction arises  
out of the Tulare County Superior Court, which is located within the jurisdiction of this Court.

---

<sup>2</sup> The Court finds the Court of Appeal correctly summarized the facts in its May 9, 2007 opinion. Thus, the Court adopts the factual recitations set forth by the California Court of Appeal, Fifth Appellate District.

1 28 U.S.C. §§ 2254(a); 2241(d).

2 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
3 of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its  
4 enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997); Jeffries v. Wood, 114  
5 F.3d 1484, 1499 (9th Cir. 1997), *cert. denied*, 522 U.S. 1008, 118 S.Ct. 586 (1997) (quoting  
6 Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir.1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct.  
7 1114 (1997), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059  
8 (1997) (holding AEDPA only applicable to cases filed after statute's enactment). The instant  
9 petition was filed after the enactment of the AEDPA and is therefore governed by its provisions.

10 B. Standard of Review

11 Where a petitioner files his federal habeas petition after the effective date of the Anti-  
12 Terrorism and Effective Death Penalty Act (“AEDPA”), he can prevail only if he can show that  
13 the state court’s adjudication of his claim:

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

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

19 28 U.S.C. § 2254(d). A state court decision is “contrary to” federal law if it “applies a rule that  
20 contradicts governing law set forth in [Supreme Court] cases” or “confronts a set of facts that are  
21 materially indistinguishable from” a Supreme Court case, yet reaches a different result.” Brown  
22 v. Payton, 544 U.S. 133, 141 (2005) citing Williams (Terry) v. Taylor, 529 U.S. 362, 405-06  
23 (2000). A state court decision will involve an “unreasonable application of” federal law only if it  
24 is “objectively unreasonable.” Id., quoting Williams, 529 U.S. at 409-10; Woodford v. Visciotti,  
25 537 U.S. 19, 24-25 (2002) (*per curiam*). “A federal habeas court may not issue the writ simply  
26 because that court concludes in its independent judgment that the relevant state-court decision  
27 applied clearly established federal law erroneously or incorrectly.” Lockyer, at 1175 (citations  
28 omitted). “Rather, that application must be objectively unreasonable.” Id. (citations omitted).

“Factual determinations by state courts are presumed correct absent clear and convincing

1 evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court  
2 and based on a factual determination will not be overturned on factual grounds unless objectively  
3 unreasonable in light of the evidence presented in the state court proceedings, § 2254(d)(2).”  
4 Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Both subsections (d)(2) and (e)(1) of § 2254  
5 apply to findings of historical or pure fact, not mixed questions of fact and law. See Lambert v.  
6 Blodgett, 393 F.3d 943, 976-77 (2004).

7 Courts further review the last reasoned state court opinion. See Ylst v. Nunnemaker, 501  
8 U.S. 979, 803 (1991). However, where the state court decided an issue on the merits but  
9 provided no reasoned decision, courts conduct “an independent review of the record . . . to  
10 determine whether the state court [was objectively unreasonable] in its application of controlling  
11 federal law.” Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000). “[A]lthough we  
12 independently review the record, we still defer to the state court’s ultimate decisions.” Pirtle v.  
13 Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

14 C. Conviction Based On Erroneous Legal Theory

15 Petitioner contends that the prosecutor and trial court erroneously advised the jury  
16 regarding the legal theory upon which he could be convicted in violation of the Fifth, Sixth, and  
17 Fourteenth Amendments.

18 1. *State Court Review*

19 The California Court of Appeal thoroughly analyzed and rejected the claim as follows:

20 **A. Facts**

21 After the parties rested, the court instructed the jury on the relevant  
22 principles of law, including the applicable mental states for the charged offenses  
23 and enhancements. (CALJIC Nos. 8.66, 8.66.1, 8.67 [attempted murder]; CALJIC  
24 No. 9.03 [shooting at an inhabited dwelling]; CALJIC No. 9.04 [permitting  
25 shooting from vehicle]; CALJIC No. 17.19.5 [intentional and personal discharge  
26 of a firearm causing great bodily injury enhancement]; CALJIC No. 17.24 .2  
27 [gang enhancement].) The court gave CALJIC Nos. 2.02 [sufficiency of  
28 circumstantial evidence to prove specific intent], 3.30 and 3.31 [concurrency of  
act and intent], and 3.32 [evidence of mental defect received for the purpose of  
determining whether appellant actually formed the required specific intent or  
premeditation].

During his initial closing argument, the prosecutor argued that appellant's  
testimony conflicted with his earlier statements to the police. In relevant part, she  
argued:

1           “The defendant lied [the night he was arrested]. The defendant himself  
2 admitted to you he lied....

3           “Also undisputed is that seven months later he gave a statement to  
4 Detective King.... And nine months after that, yesterday he tells you yet another  
5 story. And this is the story that he expects you, the jury, to now believe.

6           “Also, he expects you to believe because remember, he had details of  
7 everything that happened, how he was driving around the people he picked up. Of  
8 course, remember yesterday's version of who he picked up when who was [sic] in  
9 the car during the shootings. All of a sudden it was a complete turnaround from  
10 what he said nine months before that to Detective King.

11           “He also stated that conversations were had in that van, but for some reason he  
12 couldn't even tell you what the topics of the conversations were, let alone exactly what  
13 was talked about.

14           “Is that reasonable? Is that really reasonable to think that? When he remembers so  
15 much detail of everything else that happened, but all of a sudden he doesn't remember the  
16 conversations?

17           “In our law we are governed by a reasonable person's standard. What would a  
18 reasonable person do? And that's what you compare the defendant to.

19           “In this situation, a reasonable person after the first shooting, would say hey, you  
20 just shot from my car. Get out of my van.”

21           The court interrupted the prosecutor's argument sua sponte and ordered a  
22 brief recess. During a conference with counsel, the court stated, “I don't think it is  
23 right to say what would a reasonable person do. This is a specific intent crime. I  
24 think we'll get into trouble when you say that, so modify that and clarify that.” The  
25 prosecutor replied, “All I'm doing is comparing what a reasonable person would  
26 do with what the defendant did, to judge what his actions were. [¶] I'm going to  
27 get into specific intent in a moment.” The court responded, “Now, what I'm  
28 suggesting is that you need to stay away from what a reasonable person would do  
to show some sort of criminal liability. It can become muddled and misconstrued  
and problematic.” The prosecutor asked, “How do I compare what he would do to  
what anyone else would do? Is it allowed to say is it reasonable to assume?” The  
court answered, “Sure. [¶] But please clarify that.” The prosecutor replied, “Yes.  
We'll leave it at what's reasonable. Not a problem.” The court asked, “Anything  
else on that issue?” and defense counsel replied, “No.”

The prosecutor resumed her closing argument, as follows:

“... What is reasonable in this case?

“It is reasonable that when someone shoots from your car you pull over  
and you tell them to get out. It is reasonable that after a second shooting occurs  
from your car, in that same trip you pull over at least at that point and tell them to  
get out. It is reasonable to get them out of your vehicle. [¶] It is also reasonable  
that when you finally do drop them off-“

Defense counsel objected and asked to approach the bench. During a  
sidebar conference, the court stated, “On the same issue, what's reasonable. This is  
a little bit difficult because you talk about what's governed by the reasonable

1 standard.” The prosecutor replied, “That's why we are talking about reasonable  
2 doubt. I understand the reasonable-what's reasonable governs every single thing. It  
3 is reasonable doubt. We are trying to show what the defendant claims happened is  
4 not true, therefore, his claims do not count as a reasonable doubt.” Defense  
5 counsel stated, “The Court made a comment earlier because we have a specific  
6 intent crime, the reasonable person standard does not apply.” The court directed  
7 the prosecutor “to clarify that reasonable person standard, and say we are not  
8 really talking a reasonable person in these cases.” The prosecutor replied, “Let me  
9 tell you where I'm going. I'm going to finish with what's reasonable, then I'm  
10 going to talk about what the defendant did. What the defendant did, that is not  
11 reasonable. Therefore, his claims do not make a reasonable doubt in this case.”  
12 Defense counsel objected, “That's the problem with that whole issue. You pointed  
13 out specific intent. She's put before the jury already the statement a reasonable  
14 person, and then the Court stopped it or wanted it out, specific intent. You asked  
15 her to clarify that, and she continues to use the word reasonable. So the jurors  
16 [have] been given that word. It's still not clear.” The court concluded the matter by  
17 stating that it was going to make a brief statement to the jury.

18 The court gave the jurors the following admonishment:

19 “... One of the things we're talking about here is statements by counsel. We  
20 are governed by a reasonable person standard. Generally that's used if you are in a  
21 civil case and you cause somebody harm and say what a reasonable person would  
22 do. And in no way is counsel trying to mislead you.

23 “But you have to understand what we are here for, the defendant must have had a  
24 criminal intent, either general criminal intent in allowing somebody to shoot out of his  
25 car, or specific intent to aid and abet a wrongdoer in the other counts.

26 “So, remember, we are talking about specific intent or general intent. The  
27 defendant must have an intent.”

28 The prosecutor resumed her argument, as follows:

29 “... Just to finish that thought, the reason that this information is being  
30 given to you, which I'll just give to you in advance, is you are governed in the  
31 criminal law by what is a reasonable doubt. It is only if you have a doubt that's  
32 reasonable that you don't convict. We're talking about what's reasonable to do. We  
33 left off with defendant drops off the shooter and some of the other people that he  
34 now claims were in the car with him. He continues to drive home.

35 “What's reasonable? You go to the police if you just witnessed a crime like  
36 that. You go tell them what you know.

37 “What else is reasonable? That when you are finally even contacted by the  
38 police, that you then tell them what happened.

39 “What do we have the defendant doing in this case? What are his claims  
40 and are those claims reasonable?”

41 The prosecutor continued, arguing that appellant's conduct was unreasonable.

42 Immediately thereafter, the prosecutor turned to the issue of appellant's  
43 intent. She argued, “The intent. We've been talking about crimes that require a  
44 specific intent. What shows the defendant's intent in this case? You have several

1 key pieces of information.” Later, she argued:

2 “We’re left in this case with the main issue of being intent. What did the  
3 defendant intend to do? We just talked about the different ways and the different  
4 things that point to the defendant’s specific intent in these crimes.

5 “Ladies and gentlemen, if it walks like a duck, it talks like a duck, it looks  
6 like a duck, it is not a horse. Call it what it is. This defendant knew what was  
7 going on. He intended to help in what was going on. He had a motive and he  
8 continued to drive so that the shooter could commit these crimes, and that he,  
9 being the defendant, could help.”

10 During the prosecutor’s rebuttal, she argued that the evidence  
11 demonstrated that appellant formed the specific intent to participate in the drive-  
12 by shooting. She then argued:

13 “Now, there’s an instruction that was read to you about the sufficiency of  
14 circumstantial evidence when you are trying to prove a specific intent. Don’t  
15 forget one theory, it must be consistent with the theory that the defendant had the  
16 required specific intent, but two, don’t forget this, it cannot be reconciled with any  
17 other rational conclusion. It has to be a reasonable interpretation. This is why it is  
18 important to consider what is reasonable in this case. This is what was discussed  
19 before.

20 “What is reasonable in these situations? The People submit to you that the claims  
21 the defendant made were not reasonable in light of the circumstances and in light of what  
22 the law requires. Because they are not reasonable. They can be totally discredited and not  
23 used by you if you so choose.

24 “You are [ ] also read an instruction about a mental defect. And this is to  
25 be used by you to determine if the defendant actually formed a specific intent to  
26 commit these crimes.”

27 **B. Neither the prosecutor nor the court misstated the law.**

28 Appellant argues that the prosecutor and the court both misstated the law,  
allowing the jury to convict him on an erroneous legal theory in violation of his  
fifth, sixth and fourteenth amendment rights. He contends that as a result of the  
prosecutor’s impermissible argument and the court’s erroneous clarifying  
admonishment the jury was permitted to apply a “reasonable person standard” to  
the charged offenses, rather than requiring it to find that the defendant possessed  
the required knowledge and intent for each of the offenses and enhancements. We  
are not convinced.

Appellant bears the burden of proving the existence of prejudicial  
prosecutorial misconduct. (*People v. Van Houten* (1980) 113 Cal.App.3d 280,  
292.) “[W]hen the claim focuses upon comments made by the prosecutor before  
the jury, the question is whether there is a reasonable likelihood that the jury  
construed or applied any of the complained-of remarks in an objectionable  
fashion.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) The prosecutor’s  
remarks must be considered in the context of the argument as a whole; words and  
phrases should not be singled out and analyzed without reference to the entirety of  
the prosecutor’s argument. (*People v. Dennis* (1988) 17 Cal.4th 468, 522.) The  
court should not lightly infer that the jury drew the most damaging, rather than the  
least damaging, meaning from the prosecutor’s statements. (*People v. Guerra*

1 (2006) 37 Cal.4th 1067, 1153.)

2 When the challenged remarks are properly considered in context, it is  
3 readily apparent that the prosecutor did not confuse or mislead the jury; it is not  
4 reasonably likely that the jury would have construed or applied the challenged  
5 remarks in such a way that they would disregard their instructions concerning the  
6 applicable intent and knowledge elements of the charged offenses and  
7 enhancements. The remarks challenged by appellant were part of an argument in  
8 which she contended that appellant's testimony was unreasonable and not credible.  
9 After she demonstrated the unreasonableness of appellant's defenses, she then  
10 discussed the intent requirements of the charged crimes. She set forth the evidence  
11 and argued that inferences drawn from such evidence proved appellant's  
12 knowledge and malicious intent. At no time did the prosecutor argue, either  
13 directly or inferentially, that the jurors should substitute a "reasonable person"  
14 standard in lieu of determining whether defendant acted with the required intent  
15 and knowledge.

16 We also reject appellant's contention that the court's clarifying  
17 admonishment actually confused and misled the jury. In assessing this claim, "we  
18 inquire "whether there is a reasonable likelihood that the jury has applied the  
19 challenged instruction in a way" that violates the Constitution.' [Citations.]"  
20 (*People v. Frye* (1998) 18 Cal.4th 894, 957.) Appellant improperly isolates one  
21 sentence to provide a skewed interpretation of the court's admonishment. When  
22 the challenged sentence is read in context, it is clear that the court did not direct  
23 the jury to apply a reasonable person standard. Rather, it explained that while the  
24 reasonable person standard generally is used in civil cases, in this matter the jury  
25 must determine whether appellant committed the prohibited acts with the required  
26 intent. It is not reasonably likely that the jury applied the court's clarifying  
27 admonishment in an impermissible manner.

28 Appellant's comparison of the prosecutor's remarks in this instance to  
those at issue in *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*) is not  
convincing. There, the prosecutor incorrectly informed the jury on two occasions  
that a determination of heat of passion should be based on the defendant's conduct  
in response to the provocation rather than whether the provocation itself was such  
that it would cause an ordinary person of average disposition to act rashly. The  
Court of Appeal explained, "How the killer responded to the provocation and the  
reasonableness of the response is not relevant to sudden quarrel or heat of  
passion." (*Id.* at p. 223.) In contrast here, the prosecutor did not incorrectly  
explain a principle of law. Rather, she urged the jury to reject defendant's  
testimony because it was unreasonable and, therefore, not credible. The  
prosecutor's subsequent discussion of the applicable intent and knowledge  
elements of the charged offenses and enhancements was legally correct. Thus, the  
comparison fails.<sup>3</sup>

Accordingly, we conclude that neither the prosecutor nor the court

---

<sup>3</sup> In any event, the judgment in *Najera* was affirmed because the court cured the prosecutor's error by responding to a question by the jury on this point and directing them to the instruction correctly setting forth the applicable legal principle. (*Najera, supra*, 138 Cal.App.4th at pp. 224, 229.) Similarly here, the court correctly explained to the jury that the reasonable person standard is generally applicable in civil cases and that, in this instance, the jury must determine whether appellant possessed the requisite intent before convicting him of the charged offenses.

1 misstated the law and the jury was not permitted to convict appellant on an  
2 erroneous legal theory. Neither the prosecutor nor the court created conflicting or  
3 inadequate instructions relating to intent that removed the elements of intent and  
4 knowledge from the jury's consideration.

(Lodged Doc. No. 1, Opinion, at 3-10; footnote in original.)

5 2. *Review Of Claim*

6 To obtain federal collateral relief for errors in the jury charge, a petitioner must show that  
7 the ailing instruction by itself so infected the entire trial that the resulting conviction violates due  
8 process. Estelle v. McGuire, 502 U.S. 62, 72 (1991). Additionally, the instruction may not be  
9 judged in artificial isolation, but must be considered in the context of the instructions as a whole  
10 and the trial record. Id. The court must evaluate jury instructions in the context of the overall  
11 charge to the jury as a component of the entire trial process. See United States v. Frady, 456 U.S.  
12 152, 169 (1982) (*citing Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)). Furthermore, even if it  
13 is determined that the instruction violated the petitioner's right to due process, a petitioner can  
14 only obtain relief if the unconstitutional instruction had a substantial influence on the conviction  
15 and thereby resulted in actual prejudice under Brecht v. Abrahamson, 507 U.S. 619, 637, 113  
16 S.Ct. 1710 (1993) (whether the error had a substantial and injurious effect or influence in  
17 determining the jury's verdict.). See Hanna v. Riveland, 87 F.3d 1034, 1039 (9<sup>th</sup> Cir. 1996). The  
18 burden of demonstrating that an erroneous instruction was so prejudicial that it will support a  
19 collateral attack on the constitutional validity of a state court's judgment is even greater than the  
20 showing required to establish plain error on direct appeal." Id.

21 In addition, a habeas petition will be granted for prosecutorial misconduct only when the  
22 misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of  
23 due process." Darden v. Wainwright, 477 U.S. 168, 171, 106 S.Ct. 2464 (1986) (*quoting*  
24 Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974)); see Bonin v.  
25 Calderon, 59 F.3d 815, 843 (9<sup>th</sup> Cir. 1995). To constitute a due process violation, the  
26 prosecutorial misconduct must be "of sufficient significance to result in the denial of the  
27 defendant's right to a fair trial." Greer v. Miller, 485 U.S. 756, 765, 107 S.Ct. 3102, 3109 (1987)  
28 (*quoting United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985)). Under this standard, a

1 petitioner must show that there is a reasonable probability that the error complained of affected  
2 the outcome of the trial - i.e., that absent the alleged impropriety, the verdict probably would  
3 have been different.

4 As fully explained by the California Court of Appeal, considering the prosecutor's  
5 comments and the trial court's clarifying instruction in context, there was no misstatement of the  
6 applicable standard under California law.<sup>4</sup> As noted, "[at no time did the prosecutor argue, either  
7 directly or inferentially, that the jurors should substitute a 'reasonable person' standard in lieu of  
8 determining whether defendant acted with the required intent and knowledge." (Lodged Doc.  
9 No. 1, Opinion, at 8.) The prosecutor's comments viewed in the context of the overall argument  
10 merely conveyed to the jury that Petitioner's actions, as presented to them, were not reasonable.  
11 Considering the evidence presented at trial, such argument was certainly legitimate. Petitioner  
12 admitted his association with the criminal street gang Brown Pride Catella, and admitted that he  
13 knew the occupants of the vehicle in which he was driving were members of that gang. (RT 368-  
14 371.) There was evidence that the shooting was in retaliation for a drive-by shooting a few  
15 months before that injured Petitioner and other gang members. (RT 223-229, 267-274.) One of  
16 the witnesses-an occupant in one of the houses shot at, admitted he was a member of a rival  
17 gang. (RT 110-111.) Petitioner's claim that he was merely giving two friends a ride and one of  
18 them unexpectedly fired a handgun out of the window on two occasions was arguably (and  
19 reasonably so) incredible. In light of this evidence, nothing about the prosecutor's argument "so  
20 infected the trial with unfairness as to make the resulting conviction a denial of due process."  
21 Darden v. Wainwright, 477 U.S. at 171.

22 Moreover, any potential confusion that may have arose from the prosecutor's comments  
23 was rectified by the trial court's subsequent advisement. Contrary to Petitioner's claim in his  
24 traverse, the court addressed any potential confusion regarding the "reasonable person" standard  
25 and clarified that was not the applicable standard in this case. Rather, the jury was required to  
26

---

27 <sup>4</sup> Petitioner's claim that the prosecutor violated state law is not cognizable in this forum. [The availability  
28 of a claim under state law does not of itself establish that a claim was available under the United States  
Constitution." Sawyer v. Smith, 497 U.S. 227, 239 (1990), *quoting*, Dagger v. Adams, 489 U.S. 401, 409 (1989).

1 find that Petitioner posed the requisite criminal intent. (RT 435.) Therefore, the state courts’  
2 determination of this issue was not contrary to, or an unreasonable application of, clearly  
3 established Supreme Court precedent, nor an unreasonable determination of the facts in light of  
4 the evidence presented. 28 U.S.C. §§ 2254(d)(1), (2).

5 D. Sentencing Errors

6 Petitioner raises the same sentencing errors that he raised on direct appeal to the state  
7 courts. The California Court of Appeal analyzed the claims and agreed with Petitioner, and  
8 vacated the sentence and remanded for resentencing stating:

9 [Petitioner] was sentenced on count 1 to seven years to life plus a  
10 consecutive term of 25 years to life plus a consecutive term of 10 years that [was]  
11 stayed pursuant to section 654. He was sentenced on count 2 to 15 years to life  
12 concurrent with count 1. He was sentenced on count 4 to seven years to life  
13 consecutive to count 1 plus 20 years consecutive to count 1 plus 10 years stayed  
14 pursuant to section 654. He was sentenced on count 5 to seven years to life  
15 concurrent to count 4 plus 20 years concurrent to count 4 plus 10 years stayed  
16 pursuant to section 654. He was sentenced to count 6 to 15 years to life  
17 concurrent to count 4 plus five years to life stayed pursuant to section 654. No  
18 terms were set for counts 3 and 7; the court set forth the sentencing range for these  
19 terms and then stated, “That’s stayed pursuant to [section] 654.”

20 [Petitioner] contends that he was improperly sentenced. Respondent  
21 concedes the sentencing errors and we accept this concession as properly made.  
22 First [Petitioner] did not personally use or discharge a firearm in the commission  
23 of the attempted murders. Therefore, a criminal street gang enhancement should  
24 not have been imposed in addition to the firearm discharge enhancements for  
25 counts 1, 4, and 5. *People v. Salas*, 89 Cal.App.4th 1275, 1281-1282 (2001).  
26 Second, the court erred in failing to specify the terms imposed on counts 3 and 7.  
27 The correct procedure is to impose a sentence for the count and then to stay its  
28 execution pursuant to section 654. *People v. Thompson*, 209 Cal.App.3d 1075,  
1079 (1989). Finally, the proper sentence on count 1 is 25 years to life. § 664(a);  
*cf. People v. Jefferson*, 21 Cal.4th 86, 90, 99-102 (1999).

(Lodged Doc. No. 1, Opinion, at 10-11.)

22 The sentence was vacated and the matter was remanded for resentencing. (*Id.*) Pursuant  
23 to the appellate court’s decision, the trial court resentenced Petitioner on August 24, 2007, and an  
24 amended abstract of judgment was filed on September 10, 2007. (Lodged Doc. No. 4.)  
25 Petitioner did not appeal after resentencing. Notwithstanding the fact that the instant claim is not  
26 exhausted (28 U.S.C. § 2254(b)(1)(A)), there is no controversy to resolve here. Petitioner  
27 received any relief available from the state court and no further relief is available from this Court.

28 RECOMMENDATION

1 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 2 1. The instant petition for writ of habeas corpus be DENIED; and,  
3 2. The Clerk of Court be directed to enter judgment in favor of Respondent.

4 This Findings and Recommendation is submitted to the assigned United States District  
5 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304 of  
6 the Local Rules of Practice for the United States District Court, Eastern District of California.  
7 Within thirty (30) days after being served with a copy, any party may file written objections with  
8 the court and serve a copy on all parties. Such a document should be captioned "Objections to  
9 Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served  
10 and filed within ten (10) court days (plus three days if served by mail) after service of the  
11 objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §  
12 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time  
13 may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th  
14 Cir. 1991).

15  
16 IT IS SO ORDERED.

17 **Dated: August 19, 2009**

**/s/ Dennis L. Beck**  
UNITED STATES MAGISTRATE JUDGE