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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MATTHEW BRYAN MARTIN,  
Petitioner,  
v.  
SCOTT FRAUENHEIM,  
Respondent.

No. 2:17-cv-1538 KJM GGH

FINDINGS AND RECOMMENDATIONS

*Introduction and Summary*

This case involves a petitioner, with gang ties, who was convicted of robbery and an after-the-fact-of-robbery battery as a lesser included offense of mayhem. Petitioner was also convicted of participating in the robbery as a member of a gang. The superficial twist to this case involves the fact that the Court of Appeal found the evidence insufficient to sustain a charge of assault with great bodily injury, but upheld the battery/mayhem conviction. The petition for writ of habeas corpus was filed on July 14, 2017. ECF No. 1. Respondent filed an Answer on October 30, 2017, ECF No. 13, and petitioner filed a Traverse on December 4, 2017. ECF No. 14.

Petitioner brings the following issues:

1. The evidence for the robbery conviction was insufficient in that it failed to show that

- 1 petitioner was at the scene of the robbery;
- 2 2. The evidence was otherwise insufficient to support the robbery conviction;
- 3 3. Insufficient evidence for battery as a lesser included offense to mayhem.

4 If petitioner's assertions were meritorious, his gang affiliation would become  
5 inconsequential as there would be no crime left to attach the affiliation. Unfortunately for  
6 petitioner, his predicate assertions fail, and the petition should be denied.

7 *Factual Background*

8 The underlying facts in this case are best explained by the Third District Court of  
9 Appeal's review of petitioner's appeal which rendered the last reasoned decision in this matter  
10 published "as modified on denial of rehearing 9/2/2016." Exhibit A to Respondent's Answer.

11 **Opinion**

12 \*1 Defendant Matthew Bryan Martin, along with other Norteno gang members,  
13 participated in an attack on Osvaldo Hernandez and Victor Arechiga. Defendant  
14 stole beer that Arechiga had just purchased and put in the back of Hernandez's car.  
15 Then, another of the gang members slashed Hernandez's face. We conclude the  
16 evidence was not sufficient to convict defendant of assault by means of force  
likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1))<sup>1</sup> and accept  
the People's concession that the sentence imposed on defendant's conviction for  
active participation in a criminal street gang (§ 186.22, subd. (a)) should be stayed.  
We find no merit in the remainder of defendant's contentions.

17 **PROCEDURAL AND FACTUAL BACKGROUND**

18 In the early morning hours of September 20, 2009, Osaldo Hernandez drove  
19 acquaintance Victor Arechiga to a gas station with a convenience store in order to  
20 buy beer. Hernandez parked in front of the store, and Arechiga went inside to buy  
21 beer. Arechiga came out of the store with two 30-packs of beer. Two girls were  
walking behind Arechiga. Arechiga looked back and said something to the girls.

22 Arechiga put the beer on the backseat of Hernandez's car; a group of men  
23 approached the car and asked Arechiga what he said to the girls. Defendant took a  
24 swing at Arechiga. Believing defendant was going to beat him up, Arechiga  
backed up and "squared off." The other men with defendant then rushed the car.  
25 One of the men yelled, "Are you a scrap?" or, "You're a scrap," a disrespectful  
26 term used by Nortenos for Surenos and defendant took the beer from the backseat.  
27 At the same time, the other men began hitting and kicking Hernandez as he sat in

28 <sup>1</sup> [court footnote] Undesignated statutory references are to the Penal Code.

1 the driver's seat, trapped because one of the men was blocking the door. Someone  
2 else then entered the car from the front passenger door, leaned over, and slashed  
3 Hernandez across the right cheek from his ear to this mouth – splitting open his  
4 face. This left Hernandez with a “bitch mark” or “puta mark,” signifying  
5 Hernandez is no good within the gang.” Such marks are left intentionally to mark  
6 the victim for life. Leaving such a mark often benefits the Nortenos and boosts the  
7 status of the gang member who inflicted it.

8 In 2011, defendant and three other men were tried by jury for crimes committed  
9 during the attack on Hernandez.<sup>2</sup> The jury found defendant guilty of second  
10 degree robbery (§§ 211, 212.5, subd. (c), assault by means of force likely to  
11 produce great bodily injury (245, subd. (a)(1)), active participation in a criminal  
12 street gang (§ 186.22, subd. (a)), and battery causing serious bodily injury (§ 243,  
13 subd. (d)), a lesser included offense to the charged offense of aggravated mayhem  
14 (§ 205).

15 \*2 In a bifurcated proceeding, the trial court found true the People's allegations  
16 that defendant was previously convicted of a strike offense and served two prior  
17 prison terms. The trial court sentenced defendant to an aggregate term of 19 years  
18 four months in state prison, awarded him 1,001 days of custody credit, and ordered  
19 him to pay various fines and fees.

20 People v. Martin, 2016 WL 4156687 at\*1-2 (Cal. App. 2016)

21 *AEDPA Standards*

22 The statutory limitations of the power of federal courts to issue habeas corpus relief for  
23 persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and  
24 Effective Death Penalty Act of 1996 (“AEDPA”). The text of § 2254(d) provides:

25 An application for a writ of habeas corpus on behalf of a person in custody  
26 pursuant to the judgment of a State court shall not be granted with respect to any  
27 claim that was adjudicated on the merits in State court proceedings unless the  
28 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;

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29 <sup>2</sup> [court footnote] The three other defendants were Jose Rivas, Michael Santiago, and Arturo  
30 Vega. The jury deadlocked on all counts related to Rivas and the trial court declared a mistrial.  
31 The jury found Santiago and Vega not guilty on all counts. Rivas was later convicted of  
32 aggravated mayhem, robbery, aggravated assault, and participation in a criminal street gang along  
33 with various firearm and gang enhancements. (*See People v. Rivas* (2015) 238 Cal.App.4th 1967.)

1 Or

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

4 For purposes of applying § 2254(d)(1), clearly established federal law consists of holdings  
5 of the United States Supreme Court at the time of the last reasoned state court decision.

6 Thompson v. Runnels, 705 F.3d 1089, 1096 (9th Cir.2013) *citing* Greene v. Fisher, 565 U.S. 34,  
7 39 (2011); Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir.2011) *citing* Williams v. Taylor, 529  
8 U.S. 362, 405-406 (2000). Circuit precedent may not be “used to refine or sharpen a general  
9 principle of Supreme Court jurisprudence into a specific legal rule that th[e] [Supreme] Court has  
10 not announced.” Marshall v. Rodgers, 569 U.S. 58, 63-64 (2013) *citing* Parker v. Matthews, 587  
11 U.S. 37, 48 (2012). Nor may it be used to “determine whether a particular rule of law is so  
12 widely accepted among the Federal Circuits that it would, if presented to th[e] [Supreme] Court,  
13 be accepted as correct. *Id.* A state court decision is “contrary to” clearly established federal law  
14 if it applies a rule contradicting a holding of the Supreme Court or reaches a result different from  
15 Supreme Court precedent on “materially indistinguishable” facts. Price v. Vincent, 538 U.S. 634,  
16 640 (2003). Under the “unreasonable application” clause of § 2254(d)(1), a federal habeas court  
17 may grant the writ if the state court identifies the correct governing legal principle from the  
18 Supreme Court’s decisions, but unreasonably applies that principle to the facts of the prisoner’s  
19 case. Lockyer v. Andrade, 538 U.S. 63, 75 (2003); Williams, *supra*, 529 U.S. at 413; Chia v.  
20 Cambra, 360 F.3d 997, 1002 (9th Cir.2004). In this regard, a federal habeas court “may not issue  
21 the writ simply because that court concludes in its independent judgment that the relevant state-  
22 court decision applied clearly established federal law erroneously or incorrectly. Rather, that  
23 application must also be unreasonable.” Williams, *supra*, 529 U.S. at 412. *See also* Schriro v.  
24 Landrigan, 550 U.S. 465, 473 (2007); Lockyer, *supra*, 538 U.S. at 75 (it is “not enough that a  
25 federal habeas court, ‘in its independent review of the legal question,’ is left with a ‘firm  
26 conviction’ that the state court was ‘erroneous.’” “A state court’s determination that a claim  
27 lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the  
28

1 correctness of the state court’s decision.” Harrington v. Richter, 562 U.S. 86, 101 (2011) *quoting*  
2 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Accordingly, “[a]s a condition for obtaining  
3 habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the  
4 claim being presented in federal court was so lacking in justification that there was an error well  
5 understood and comprehended in existing law beyond any possibility for fairminded  
6 disagreement.” Harrington, supra, 562 U.S. at 103.

7 The court looks to the last reasoned state court decision as the basis for the state court  
8 judgment. Stanley, supra, 633 F.3d at 859; Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th  
9 Cir.2004). If the last reasoned state court decision adopts or substantially incorporates the  
10 reasoning from a previous state court decision, this court may consider both decisions to ascertain  
11 the reasoning of the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir.2007) (*en*  
12 *banc*). “[Section] 2254(d) does not require a state court to give reasons before its decision can be  
13 deemed to have been ‘adjudicated on the merits.’” Harrington, supra, 562 U.S. at 100. Rather,  
14 “[w]hen a federal claim has been presented to a state court and the state court has denied relief, it  
15 may be presumed that the state court adjudicated the claim on the merits in the absence of any  
16 indication or state-law procedural principles to the contrary.” Id. at 99. This presumption may be  
17 overcome by a showing “there is reason to think some other explanation for the state court’s  
18 decision is more likely.” Id. at 99-100. Similarly, when a state court decision on a petitioner’s  
19 claims rejects some claims but does not expressly address a federal claim, a “federal habeas court  
20 must presume (subject to rebuttal) that the federal claim was adjudicated on the merits.” Johnson  
21 v. Williams, 568 U.S. 289, 293 (2013). When it is clear, however, that a state court has not  
22 reached the merits of a petitioner’s claim, the deferential standard set forth in 28 U.S.C. § 2254(d)  
23 does not apply and a federal habeas court must review the claim de novo. Stanley, supra, 633  
24 F.3d at 860; Reynoso v. Giurbino, 462 F.3d 1099, 1109 (9th Cir.2006); Nulph v. Cook, 333 F.3d  
25 1052, 1056 (9th Cir.2003).

26 The state court need not have cited to federal authority, or even have indicated awareness  
27 of federal authority in arriving at its decision. Early v. Packer, 537 U.S. 3, 8 (2002). Where the  
28 state court reaches a decision on the merits but provides no reasoning to support its conclusion, a

1 federal habeas court independently reviews the record to determine whether habeas corpus relief  
2 is available under § 2254(d). *Stanley, supra*, 633 F.3d at 860; Himes v. Thompson, 336 F.3d 848,  
3 853 (9th Cir.2003). “Independent review of the record is not de novo review of the constitutional  
4 issue, but rather, the only method by which we can determine whether a silent state court decision  
5 is objectively unreasonable.” *Id.* at 853. Where no reasoned decision is available, the habeas  
6 petitioner still has the burden of “showing there was no reasonable basis for the state  
7 court to deny relief.” Harrington, supra, 562 U.S. at 98. A summary denial is presumed to be a  
8 denial on the merits of the petitioner’s claims. Stancle v. Clay, 692 F.3d 948, 957 & n. 3 (9th Cir.  
9 2012). While the federal court cannot analyze just what the state court did when it issued a  
10 summary denial, the federal court must review the state court record to determine whether there  
11 was any “reasonable basis for the state court to deny relief.” Harrington, supra, 562 U.S. at 98.  
12 This court “must determine what arguments or theories ... could have supported, the state court’s  
13 decision; and then it must ask whether it is possible fairminded jurists could disagree that those  
14 arguments or theories are inconsistent with the application was unreasonable requires considering  
15 the rule’s specificity. The more general the rule, the more leeway courts have in reaching  
16 outcomes in case-by-case determinations.” *Id.* at 101 *quoting Knowles v. Mirzayance*, 556 U.S.  
17 111, 122 (2009). Emphasizing the stringency of this standard, which “stops short of imposing a  
18 complete bar of federal court relitigation of claims already rejected in state court proceedings[,]”  
19 the Supreme Court has cautioned that “even a strong case for relief does not mean the state  
20 court’s contrary conclusion was unreasonable.” *Id.* at 102, *citing Lockyer v. Andrade*, 538 U.S.  
21 63, 75 (2003).

22 The petitioner bears “the burden to demonstrate that ‘there was no reasonable basis for the  
23 state court to deny relief.’” Walker v. Martel, 709 F.3d 925, 939 (9th Cir.2013) *quoting*  
24 Harrington, 562 U.S. at 98. Circuit precedent may not be “used to refine or sharpen a general  
25 principle of Supreme Court jurisprudence into a specific legal rule that th[e] [Supreme] Court has  
26 not announced.” Marshall v. Rodgers, supra, 569 U.S. at 64. Nor may it be used to “determine  
27 whether a particular rule or holding in a prior decision of [the Supreme] Court” . . . is so widely  
28 accepted among the Federal Circuits that it would, if presented to th[e] [Supreme] Court, be

1 accepted as correct. Id. at 102. A state court decision is “contrary to” clearly established federal  
2 law if it applies a rule contradicting a holding of the Supreme Court or reaches a result different  
3 from Supreme Court precedent on “materially indistinguishable” facts. Price v. Vincent, 538  
4 U.S. 634, 640 (2003). Under the “unreasonable application” clause of § 2254(d)(1), a federal  
5 habeas court may grant the writ if the state court identifies the correct governing legal principle  
6 from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the  
7 prisoner’s case. Lockyer v. Andrade, 538 U.S. 63, 75 (2003); Williams, supra, 529 U.S. at 413;  
8 Chia v. Cambra, 360 F.3d 997, 1002 (9th Cir.2004). In this regard, a federal habeas court “may  
9 not issue the writ simply because that court concludes in its independent judgment that the  
10 relevant state-court decision applied clearly established federal law erroneously or incorrectly.  
11 Rather, that application must also be unreasonable.” Williams, supra, 529 U.S. at 412; see also  
12 Schriro v. Landrigan, 550 U.S. 465, 473 (2007); Lockyer, supra, 538 U.S. at 75 (it is “not enough  
13 that a federal habeas court, in its independent review of the legal question, is left with a ‘firm  
14 conviction’ that the state court decision was ‘erroneous.’ A state court’s determination that a  
15 claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on  
16 the correctness of the state court’s decision.” Harrington, supra, 562 U.S. at 101 *quoting*  
17 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Accordingly, “[a]s a condition for obtaining  
18 habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the  
19 claim being presented in federal court was so lacking in justification that there was an error well  
20 understood and comprehended in existing law beyond any possibility for fairminded  
21 disagreement.” Harrington, supra, 562 U.S. at 103.

22 With these principles in mind the court turns to the merits of the petition.

### 23 *Discussion*

#### 24 A. Sufficiency of the Evidence (Claims 1 and 2)

25 As set forth above, petitioner, claims that the evidence was insufficient to show that he  
26 was at the scene of the robbery (Claim 1), and that in any event, the evidence was insufficient to  
27 show that a robbery took place, (Claim 2). As always, the focus of an AEDPA review is the last  
28 reasoned decision of the state courts. The discussion begins with the Court of Appeal analysis:

1           *Sufficiency of the Evidence*

2           Defendant contends the evidence was insufficient to convict him on any of the  
3 charges. He claims that, as to all of the charges, the evidence was insufficient to  
4 establish that he was present at the scene of the crimes. As to the robbery count,  
5 he claims the evidence was insufficient that Hernandez possessed the stolen beer.  
6 He also claims the evidence was insufficient to convict him on the remaining  
7 counts of assault, battery, and participation in a criminal street gang. We conclude  
8 that, with the exception of the assault charge, the evidence was sufficient to  
9 convict defendant of each of these charges.

10           A. *Legal Background*

11           “ ‘In reviewing the sufficiency of evidence under the due process clause of the  
12 Fourteenth Amendment to the United States Constitution, the question we ask is  
13 “whether, after viewing the evidence in the light most favorable to the prosecution,  
14 any rational trier of fact could have found the essential elements of the crime  
15 beyond a reasonable doubt.” ‘ [Citation.] We apply an identical standard under  
16 the California Constitution. ‘In determining whether a reasonable trier of fact  
17 could have found defendant guilty beyond a reasonable doubt, the appellate court  
18 “must view the evidence in a light most favorable to respondent and presume I  
19 support of the judgment the existence of every fact the trier could reasonably  
20 deduce from the evidence.” ‘ [Citation.]: (*People v. Young* (2005) 34 Cal.4<sup>th</sup>  
21 1149, 1175, italics omitted.) In reviewing the sufficiency of the evidence, “a  
22 reviewing court resolves neither credibility issues nor evidentiary conflicts.  
23 [Citation.] Resolution of conflicts and inconsistencies in the testimony is the  
24 exclusive province of the trier of fact. [Citation.]” ‘ “(*People v. Manriquez* (2005)  
25 37 Cal.4<sup>th</sup> 547, 577.)

26           B. *Analysis*

27           1. Presence at the Scene

28           Defendant contends the evidence presented at trial was insufficient to prove he  
was present at the scene of the attack. To the contrary, the attack was recorded by  
surveillance cameras. That video was admitted into evidence. After watching the  
video, two detectives and a parole officer identified defendant, whose left arm is  
amputated below the elbow and whose neck is tattooed, as present at the scene of  
the attack. Such evidence is sufficient to place defendant at the scene of the attack.

          2. Robbery

\*3 Defendant argues the evidence was insufficient to convict him of robbery  
because the evidence was insufficient to show Hernandez had possession of the  
beer when it was stolen. We disagree.



1 “Robbery is the felonious taking of personal property in the possession of another,  
2 from his person or immediate presence, and against his will, accomplished by  
3 means of force or fear.” (§ 211.) A person possesses property if he owns it or has  
4 direct physical control over it. (*People v. Scott* (2009) 45 Cal.4<sup>th</sup> 743, 749.) Here,  
5 the property at issue was the beer purchased by Arechiga. That beer was on the  
6 backseat of Hernandez’s car and Hernandez was still in the driver’s seat when  
7 defendant stole it. Hernandez could have driven off with the beer, drunk the beer,  
8 or thrown the beer out of the car window. Because it was inside his car,  
9 Hernandez also could exclude strangers from getting the beer.

10 The evidence shows Hernandez had direct physical control over the beer and was,  
11 therefore, in possession of the beer when it was stolen. Just because Hernandez  
12 chose not to stop defendant from taking the beer does not, as defendant suggests,  
13 belie the fact that Hernandez possessed the beer. Indeed, defendant cites no  
14 authority to support a rule that a victim must defend the property being stolen in  
15 order to establish possession. Such a rule would be misguided in any event. There  
16 also is no basis in the law or logic for defendant’s argument that because  
17 Hernandez did not intend to drink the beer that he did not possess the beer.

#### 18 1. Federal Standard of Review

19 “A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging  
20 the sufficiency of the evidence used to obtain a state conviction on federal due process grounds.”  
21 Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir.2005). Sufficient evidence supports a conviction  
22 if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact  
23 could have found the essential elements of the crime beyond a reasonable doubt. Jackson v.  
24 Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).” “After AEDPA, we apply  
25 the standards of Jackson with an additional layer of deference.” Juan H. v. Allen, *supra*, 408 F.3d  
26 at 1274. See also the AEDPA standards set forth above. Moreover, petitioner's challenge to the  
27 sufficiency of evidence based on credibility of the witnesses is not cognizable in an insufficient  
28 evidence claim. See McMillan v. Gomez, 19 F.3d 465, 469 (9th Cir.1994); see also Schlup v.  
Delo, 513 U.S. 298, 330 (1995) (recognizing that the credibility of witnesses is generally beyond  
the scope of sufficiency of the evidence review). Therefore, when a challenge is brought alleging  
insufficient evidence, federal habeas corpus relief is available if it is found that upon the record  
evidence adduced at trial, viewed in the light most favorable to the prosecution, no rational trier  
of fact could have found “the essential elements of the crime” proven beyond a reasonable doubt.  
Jackson, *supra*, at 319.

1           In Jackson the Supreme Court articulated a two-step inquiry for considering a challenge to  
2 a conviction based on sufficiency of the evidence. United States v. Nevils, 598 F.3d 1158, 1164  
3 (9th Cir. 2010) (*en banc*). First, a reviewing court must consider the evidence presented at trial in  
4 the light most favorable to the prosecution. Jackson, *supra*, at 319. When “faced with a record of  
5 historical facts that supports conflicting inferences” a reviewing court “must presume—even if it  
6 does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in  
7 favor of the prosecution, and must defer to that resolution.” *Id.* at 326; *see also* McDaniel [v.  
8 Brown], 558 U.S. 120, 132 (2010). Second, after viewing the evidence in the light most  
9 favorable to the prosecution, the reviewing court must determine whether this evidence, so  
10 viewed, is adequate to allow “any rational trier of fact [to find] the essential elements of the crime  
11 beyond a reasonable doubt.” Jackson, *supra* at 319. “At this second step, we must reverse the  
12 verdict if the evidence of innocence, or lack of evidence of guilt, is such that all rational fact  
13 finders would have to conclude that the evidence of guilt fails to establish every element of the  
14 crime beyond a reasonable doubt.” Nevils, *supra*, 598 F.3d at 164–1165. And, where the trier of  
15 fact could draw conflicting inferences from the facts presented, one favoring guilt and the other  
16 not, the reviewing court will assign the one which favors conviction. McMillan v. Gomez, 19  
17 F.3d 465, 469 (9th Cir. 1994). However, the mere fact that an inference can be assigned in favor  
18 of the government’s case does not mean that the evidence on a disputed crime element is  
19 sufficient—the inference, along with other evidence, must demonstrate that a reasonable jury  
20 could find the element beyond a reasonable doubt, i.e., “[a] reasonable inference is one that is  
21 supported by a chain of logic, rather than mere speculation dressed up in the guise of evidence.”  
22 United States v. Katakis, 800 F.3d 1017, 1024 (9th Cir. 2015).

23           In reviewing the sufficiency of the evidence supporting a conviction, we search the record  
24 to determine “whether a reasonable factfinder, after viewing the evidence in the light most  
25 favorable to the government, could have found the defendants guilty beyond a reasonable doubt  
26 of each essential element of the crime charged.” United States v. Douglass, 780 F.2d 1472, 1476  
27 (9th Cir.1986). The relevant inquiry is not whether the evidence excludes every hypothesis  
28 except guilt, but whether the factfinder could reasonably arrive at its verdict. United States v.

1 Fleishman, 684 F.2d 1329, 1340 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982); United States v.  
2 Federico, 658 F.2d 1337, 1343 (9th Cir.1981)(overruled on other grounds), United States v. De  
3 Bright, 730 F.2d 1255, 1259 (9th Cir.1984) (*en banc*).

4 The factual summation of the trial given by the Court of Appeal, presumed correct, is set  
5 forth in full above. It is that factual analysis to which petitioner must show such a distortion of  
6 reality in the evidence, that reasonable jurists reviewing the record could not come to the  
7 conclusion about the sufficiency of the evidence, *i.e.*, that no reasonable juror could have arrived  
8 at the verdict which the jury in this case did.

9 2. Sufficiency of Identification of Petitioner

10 Petitioner contends that since the three victims were unable to identify him, despite being  
11 able to identify the other defendants and having claimed they believed they could identify all of  
12 the perpetrators, there is insufficient evidence that he was even at the scene. Petitioner is  
13 undoubtedly upset as two of his co-defendants were eventually acquitted.

14 In fact, a review of the transcripts<sup>3</sup> of the trial testimony performed by this court shows  
15 that although not all witnesses identified petitioner, there were witnesses who did identify  
16 petitioner as present at the crime scene and at least one professes to have seen him punch one of  
17 the victims. While the primary victim, Ozvaldo Hernandez, was able to identify one of the  
18 defendants in the courtroom during his testimony – Jose Rivas – he could not identify petitioner.  
19 RT 115:5-10. The second victim, Victor Arechiga, could identify only one of the defendants  
20 during his testimony – defendant Vega. RT 193:20-27. Mike Ha, a probation officer, identified  
21 defendants Rivas and Vega only. 301:15-16. Another parole officer, Marcos Perez, however,  
22 testified that he knew petitioner as his partner supervised petitioner as a probationer and the  
23 witness shared duties with the partner. RT 393:12-27, 395:27-396:74. Officer Perez identified  
24 petitioner both from seeing him in the courtroom, RT 398:4-13, and from viewing the  
25 surveillance video from the site of the attack. RT 405:15-19. He said he first noticed Martin in  
26 the video when he threw a punch. RT 4-5:15-19, and he saw his missing limb. RT 405:6-10, and

27 \_\_\_\_\_  
28 <sup>3</sup> The Reporter's Transcript was lodged by respondent at "RT, Vol. I-IV, and the citations are to the reporter's pagination of those documents.

1 that led him to the identification he made in court. 406:6-16, 412:4-10. Officer Cortez, who  
2 responded to the scene of the attack, interviewed witness Christy Hernandez, who told him one of  
3 the attackers had a tattoo on his neck as did a second witness, O'Connor. 431:27-432:2. Officer  
4 Omar Flores, who is assigned to the Woodland gang unit, identified all of the defendants,  
5 including petitioner, as members of the Nortenos street gang. Finally, Jennifer Hernandez, an  
6 uninvolved witness who was present at the scene identified defendants Rivas and Santiago from  
7 the witness stand as participants in the attack, RT 566:28-567:1, she verified her initials on two  
8 photographs in photo line-ups she viewed after the incident, one of which was petitioner and the  
9 other of which was defendant Vega. ECF No. 562:4-20, 574:3-22. She also informed the  
10 authorities that she saw a tattoo of a star inside a circle on the neck of one of the perpetrators.  
11 ECF 591:13-27. Petitioner has such a tattoo. See 3:19-21, supra.

12 Keeping in mind the fact that “[t]he habeas corpus petitioner bears the burden of  
13 demonstrating the objectively unreasonable nature of the state court decision in light of the  
14 controlling Supreme Court authority discussed above, the court has reviewed the “record  
15 evidence adduced at trial, viewed in the light most favorable to the prosecution,” and the  
16 undersigned is unable to conclude that no rational trier of fact could have found petitioner  
17 present at the scene of the robbery based on the evidence put before the jury in this case. See  
18 Jackson, supra, 443 U.S. at 319. Although the identity evidence may not have been as strong  
19 against petitioner as it was against defendants Santiago and Vega, “it is the province of the jury to  
20 ‘resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from  
21 basic facts.’ “Fulford v. Clay, 2008 WL 802342 \*5 (E.D.Cal. 2008), *quoting Jackson, supra*, 443  
22 U.S. at 319. For this court to jettison the deliberated decision of the jury based on an independent  
23 determination of fact would require a “factual error . . . so apparent that ‘fairminded jurists’  
24 examining the same record could not abide by the state court factual determination.” Miller v.  
25 Figuroa, 2015 WL 8780633 \*3 (E.D.Cal. 2015) *citing Rice v. Collins*, 546 U.S. 333, 338 (2006).  
26 In other words, the relevant inquiry is not whether the evidence excludes every hypothesis, but  
27 whether the jury could reasonably arrive at its verdict. United States v. Federico, 658 F.2d 1337,  
28 1343 (9<sup>th</sup> Cir. 1981), *overruled on other grounds*, United States v. De Bright 730 F.2d 1255, 1259

1 (9<sup>th</sup> Cir. 1984).

2 3. Sufficiency of Proof a Robbery Occurred

3 In his traverse petitioner claims that since the criminal charge of robbery brought against  
4 him and the jury instruction on robbery both named Hernandez, the driver of the car from which  
5 the subject of the robbery – a case of beer – was taken, the fact of a robbery could not be proven  
6 for the following reasons: (1) Hernandez was merely transporting the beer on behalf of his  
7 passenger, Arechiga; (2) Hernandez testified that he was under age and could not purchase beer;  
8 (3) Hernandez testified he had not contributed money to the purchase of the beer; and (4)  
9 Hernandez testified that he had no intention of drinking any of the beer. ECF No. 14 at 11:12:8.  
10 Rather Mr. Arechiga purchased the beer, intended to drink it with his friends, and remained at the  
11 scene during the attack. Id. at 12:2-8. Thus, the charge that petitioner “willfully and unlawfully  
12 took personal property *in the possession of another person, to wit, O.H., i.e., Osvaldo Hernandez,*  
13 against the person’s will, accomplished by means of force or fear,” was not proven in court. Id. at  
14 8:27-9:3.

15 The Court of Appeal in this case found:

16 “Robbery is the felonious taking of personal property in the possession of another,  
17 from his person or immediate presence, and against his will, accomplished by  
18 means of force or fear.” (§ 211.) A person possesses property if he owns it or has  
19 direct physical control over it. (*People v. Scott* (2009) 45 Cal.4th 743, 749.) Here,  
20 the property at issue was the beer purchased by Arechiga. That beer was on the  
21 backseat of Hernandez’s car and Hernandez was still in the driver’s seat when  
22 defendant stole it. Hernandez could have driven off with the beer, drunk the beer,  
23 or thrown the beer out of the car window. Because it was inside his car, Hernandez  
24 also could exclude strangers from getting the beer.

25 The evidence shows Hernandez had direct physical control over the beer and was,  
26 therefore, in possession of the beer when it was stolen. Just because Hernandez  
27 chose not to stop defendant from taking the beer does not, as defendant suggests,  
28 belie the fact that Hernandez possessed the beer. Indeed, defendant cites no  
authority to support a rule that a victim must defend the property being stolen in  
order to establish possession. Such a rule would be misguided in any event. There  
also is no basis in the law or logic for defendant’s argument that because  
Hernandez did not intend to drink the beer that he did not possess the beer.

1 People v. Martin, at \*3

2 Petitioner relies on People v. Scott, 45 Cal.4<sup>th</sup> 743-749-750 (2009), but ultimately that  
3 case does not help petitioner. First, the Court of Appeal cited Scott, and its interpretation of state  
4 law is binding. Bradshaw v. Richey, 546 U.S. 74, 76 (2005).

5 Secondly, in People v Scott, 45 Cal.4<sup>th</sup> 743. 749 (2009) the California Supreme Court held  
6 that mere employees of a business establishment who were present when money was stolen in  
7 their presence were not victims of the robbery unless they “owned” the property or “exercised  
8 direct physical control over it” for purposes of establishing robbery. The court also noted that  
9 constructive possession of the property of another was sufficient to establish the one from whom  
10 it was taken as a robbery victim. Id. at 751. After assessing several situations in which the  
11 immediate victim was not the “owner” of the property, Scott indicated that

12 the Legislature has included as victims those persons who, because of their  
13 relationship to the property or its owner, have the right to resist the taking, and has  
14 excluded as victims those bystanders who have no greater interest in the property  
15 than any other member of the general population. It would not further the  
16 purposes of the robbery statute to require that the robbery victim have the same  
17 level of custody or control over the property that is required to establish that the  
perpetrator is guilty of possessing contraband.

18 Id. at 758.

19 Further, the Court acknowledged that “those who commit robberies are likely to regard all  
20 employees as potential sources of resistance, and their use of threats and force against those  
21 employees is not likely to turn on fine distinctions regarding a particular employee’s actual or  
22 implied authority.” Id. at 755. The Court then upheld the conviction of the defendant who had  
23 stolen from employees of the property owner.

24 If petitioner’s theory were correct, a husband would be legally powerless to resist the theft  
25 of his wife’s purse which she left in the car with him while she went on a quick errand.  
26 Obviously, petitioner’s position is incorrect. The question in this case, then, is whether  
27 Hernandez was in “constructive possession” of the beer that was the property stolen. Focusing on  
28

1 the facts, it is perfectly reasonable to accept that Hernandez was in control of, and the possessor  
2 of the vehicle that was attacked, and that the purpose of the robbers was to gain control of that  
3 beer which was in the car. The Third District Court of Appeal had no hesitancy about the issue  
4 although the term “constructive possession” was not mentioned in the opinion. Applying the  
5 deferential approach required by Jackson, this court may reverse the verdict only “if the evidence  
6 of innocence, or lack of evidence of guilt fails to establish the essential elements of the crime  
7 beyond a reasonable doubt.” Jackson, supra, 443 U.S. at 319. Applying the chain of logic  
8 discussed here results in a “reasonable inference” . . . [of Hernandez’ possession of the beer] that  
9 is supported by that chain of logic, rather than mere speculation dressed up in the guise of  
10 evidence.” United States v. Katakis, 800 F.3d 1017, 1024 (9<sup>th</sup> Cir. 2015).

11 Finally, it cannot be ignored that the actual owner of the beer, Mr. Arechiga, had moved  
12 outside the circle of violence and left it to Mr. Hernandez to fend off the robbers who were  
13 insistent enough to get into the car to get the beer, and afterwards to beat Mr. Hernandez and  
14 slash his face.

15 In sum, considering that, as the appellate court found, the car that was attacked was  
16 Hernandez’s car, that he was in possession and control of the car in which the beer was resting,  
17 that it was he who was attacked to facilitate the removal of the beer, this court cannot find that  
18 any fair-minded jurist would reject as irrational a conclusion that Hernandez was in constructive  
19 possession of the beer and thus was a victim of the robbery.

### 20 C. Insufficient Evidence to Support the Battery Charge (Claim 3)

21 Petitioner’s claim is not directed at the assault likely to cause great bodily injury for which  
22 the Court of Appeal found insufficient evidence. The claim is directed at petitioner’s conviction  
23 on the after-the-fact-of-robbery slashing of Hernandez’ ear-to-throat as a gang marker. This  
24 battery conviction was presented to the jury as a lesser included offense of mayhem. The Court  
25 of Appeal found:

#### 26 4. Battery Causing Serious Bodily Injury—As a Lesser Included Offense of 27 Aggravated Mayhem

28 The trial court instructed the jury that in order to find defendant guilty of

1 aggravated mayhem or the lesser included offense of battery causing serious  
2 bodily injury, the jury must first find defendant guilty of either robbery or assault.  
3 Then, determine whether a reasonable person would have known that the mayhem  
4 or battery was the natural and probable consequence of the robbery or the assault.

5 Defendant contends because there was insufficient evidence to convict him of  
6 either robbery or assault, the evidence was necessarily insufficient to convict him  
7 of battery. Because we conclude the evidence was sufficient to convict defendant  
8 of robbery, this contention fails.

9 The sufficiency of the evidence for the robbery conviction has likewise been found for  
10 this habeas petition.

11 The Court of Appeal did not further expound in its discussion in that section on the  
12 “natural and probable consequence” factor because it determined that petitioner had participated  
13 in the throat slashing as a supportive element of gang participation after the fact of robbery itself.<sup>4</sup>

14 Second, we must accept the trial court's interpretation of the evidence because it is  
15 supported by the evidence. The evidence was sufficient to support the conclusion  
16 that the slashing of Hernandez's face was meant to disfigure him and leave the  
17 mark as an advertisement for the Norteno gang. It did not facilitate the robbery,  
18 which had already been accomplished, and it was done with a separate intent.

19 People v. Martin at \*5.

20 Reasonable jurists would not dispute the finding of the Court of Appeal. Claim 3  
21 should be denied.

22 *Conclusion*

23 In light of the foregoing IT IS HEREBY RECOMMENDED that:

- 24 1. The petition be dismissed with prejudice;
- 25 2. That no Certificate of Appealability should issue;
- 26 3. That the Clerk of the Court should close the file

27 These findings and recommendations are submitted to the United States District Judge  
28 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty (30) days

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<sup>4</sup> Petitioner does not contend here that there was insufficient evidence to support his gang participation count.



1 after being served with these findings and recommendations, any party may file written  
2 objections with the court and serve a copy on all parties. Id.; see also Eastern District of  
3 California Local Rule 304(b). Such a document should be captioned “Objections to Magistrate  
4 Judge’s Findings and Recommendations.” Any response to the objections shall be filed with the  
5 court and served on all parties within ten (10) days after service of the objections. Id. Rule  
6 304(d). Failure to file objections within the specified time may waive the right to appeal the  
7 District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst,  
8 951 F.2d 1153, 1156-57 (9th Cir. 1991).

9 Dated: December 10, 2018

10 /s/ Gregory G. Hollows  
11 UNITED STATES MAGISTRATE JUDGE  
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