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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PEDRO HERNANDEZ,

No. C 05-02093 MHP

Petitioner,

**MEMORANDUM & ORDER**

v.

**Re: Petition for Writ of Habeas Corpus**JEANNE WOODFORD, Director of the  
California Department of Corrections,Respondent.  

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Pedro Hernandez, a prisoner currently in custody of the California Department of Corrections and Rehabilitation, filed this petition for a writ of habeas corpus on May 20, 2005, seeking relief pursuant to 28 U.S.C. § 2254 on the basis of insufficient evidence to support his conviction and ineffective assistance of counsel. Hernandez's petition is now before the court for consideration on the merits. Having considered the parties arguments, the court now enters the following memorandum and order.

**BACKGROUND**

On March 27, 2003, Hernandez was convicted after a bench trial on charges of second degree murder and attempted murder under California Penal Code §§ 187, 664. These convictions were enhanced by findings that the crimes were committed for the benefit of a gang and that Hernandez personally used a firearm. Docket No. 21 (Exhibits re Answer to Order to Show Cause) ("Ans."), Exh. 4 (State Court Reporter's Transcript) at 1253. On May 15, 2003, Hernandez was sentenced to 50 years to life . *Id.* at 1509.

1           At trial, Hernandez raised the affirmative defenses of self-defense and, in the alternative,  
2 imperfect self-defense. Hernandez argued that he had a sincere, if not reasonable, belief that the  
3 victim was about to attack based on factual allegations including, but not limited to, (1) that the  
4 victim, a member of the Sureno gang, and Hernandez, a member of the Norteno gang, exchanged  
5 their rivaling gang’s verbal and hand signals, (2) that the victim had made a motion as if reaching for  
6 something under the car seat, and (3) that the victim had opened the car door. *Id.* at 1254. The  
7 judge, acting as the trier of fact, did not make any findings as to the first point, the exchange of hand  
8 signals, but found that the evidence supported neither the second nor third alleged fact in the  
9 narrative. *Id.* at 1254-55. The judge found that the driver of the car attempted to flee after the first  
10 shot was fired. *Id.* at 1255. The judge’s other findings relevant to the assertion of self-defense were  
11 that Hernandez was armed in anticipation of “any possible confrontation,” that Hernandez had  
12 significant consciousness of guilt, and that Hernandez’s complete denial of involvement in the  
13 murders when first contacted by police undermined Hernandez’s credibility. *Id.* Citing CALJIC 8,  
14 *et seq.*, 5.50-5.56, the judge rejected the theory of self-defense. *Id.* at 1254.

15           On March 26, 2004, the California Court of Appeal determined that the trial court had erred  
16 by imposing the gang enhancement, but affirmed the convictions for second degree murder and  
17 attempted murder, as well as the firearm enhancement. *People v. Hernandez*, No. H026017, 2004  
18 WL 632943 at \*2-3 (Cal. Ct. App. Mar. 26, 2004) (unpublished opinion). On remand for  
19 sentencing, Hernandez’s 50-year term was reduced to 40 years. *Id.*

20           Hernandez filed the first petition for a writ of habeas corpus with the Monterey County  
21 Superior Court, challenging his conviction on the basis of insufficiency of evidence and ineffective  
22 assistance of counsel. Ans., Exh. 9 (Denial of Petition for Writ of Habeas Corpus, HC 05059,  
23 Monterey County Superior Court, July 6, 2005) at 1. The Monterey County Superior Court rejected  
24 the petition on July 6, 2005. *Id.* at 4. The court held that the insufficiency of evidence claim was  
25 procedurally barred due to Hernandez’s failure to raise it on direct appeal. *Id.* The claim of  
26 ineffective assistance of counsel was based on the trial counsel’s decision not to frame self-defense  
27 in terms of the antecedent assault rule, which allows a defendant who has been assaulted by the  
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1 victim in the past to take harsher and quicker measures in self-defense, or to present evidence that  
2 Hernandez suffered from “traumatized child syndrome.” *Id.* at 2. With respect to the claim of  
3 ineffective assistance of counsel based on the antecedent assault doctrine, the court held that the trial  
4 counsel’s performance had fallen within professional norms and that the defendant had suffered no  
5 prejudice. *Id.* at 4. The court mentioned the claim based on “traumatized child syndrome” but did  
6 not analyze it independently of the claim based on antecedent assault before rejecting the petition.  
7 The subsequent petition was denied without comment by the California Court of Appeal on  
8 December 7, 2005. Ans., Exh. 11 (Denial of Petition for Writ of Habeas Corpus, No. H029496) at 1.  
9 The California Supreme Court denied the petition without comment on November 20, 2006. Ans.,  
10 Exh. 13 (Denial of Petition for Writ of Habeas Corpus, No. S142543) at 1.

11 On May 20, 2005, Hernandez filed his petition for a writ of habeas corpus with this court.  
12 Docket No. 1 (Pet.) at 1. On June 18, 2008, the court issued an order to show cause, Docket No. 15  
13 (Order to Show Cause) at 1, and the response was filed on March 24, 2010, Docket No. 20. On  
14 August 23, 2010, Hernandez filed the traverse. Docket No. 32 (Traverse) at 1.

#### 15 16 LEGAL STANDARD

17 The court analyzes state habeas corpus claims under the Antiterrorism and Effective Death  
18 Penalty Act of 1996 (“AEDPA”). 28 U.S.C. § 2254. Under AEDPA, the court may entertain a  
19 petition for writ of habeas corpus “on behalf of a person in custody pursuant to the judgment of a  
20 state court only on the ground that he is in custody in violation of the Constitution or laws or treaties  
21 of the United States.” 28 U.S.C. § 2254(a). The petition may not be granted with respect to any  
22 claim that was adjudicated on the merits in state court unless the state court’s adjudication of the  
23 claim resulted in a decision that was: 1) “contrary to, or involved an unreasonable application of,  
24 clearly established Federal law, as determined by the Supreme Court of the United States;” or 2)  
25 “based on an unreasonable determination of the facts in light of the evidence presented in the State  
26 court proceeding.” 28 U.S.C. § 2254(d).

1 DISCUSSION

2           The petition for a writ of habeas corpus raises two distinct issues. First, the petition asserts  
3 that there is insufficient evidence to support the trial court’s rejection of Hernandez’s self-defense  
4 theories. Second, the petition alleges ineffective assistance of counsel based on the failure to raise  
5 legal arguments on the antecedent assault rule and to frame the case in terms of “traumatized child  
6 syndrome.”

7 I.       Insufficiency of the Evidence

8           California state law requires that claims of insufficiency of evidence be brought only on  
9 direct appeal. *In re Lindley*, 29 Cal. 2d 709, 723 (1945). Where a state court’s decision rests on an  
10 independent and adequate state law basis, federal courts may not provide a remedy in habeas corpus.  
11 *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). California law’s prohibition against raising  
12 insufficiency of evidence claims in habeas serves as an independent and adequate basis for a  
13 decision. *Carter v. Giurbino*, 385 F.3d 1194, 1198 (9th Cir. 2004) (holding that the procedural bar  
14 is independent because it “is not intertwined with federal substantive or procedural law” and  
15 adequate because the rule is “‘firmly established and regularly followed’ by the state court at the  
16 time of the petitioner's procedural default”).

17           Hernandez attempts to circumvent the decision in *Carter*—binding upon this court—that the  
18 *Lindley* bar is an independent and adequate state law basis by pointing to a purported exception to  
19 the *Lindley* rule mentioned by the California Supreme Court in *In re Giannini*, 69 Cal. 2d 563  
20 (1969). *See* Traverse at 21-23. In *Giannini*, the court observed in a footnote that “[a]lthough  
21 numerous cases have held that sufficiency of the evidence to support a conviction is not a proper  
22 issue on habeas corpus . . . the United States Supreme Court has declared that conviction of a crime  
23 without any evidence in the record to support the accused’s guilt constitutes a denial of due  
24 process.” *Id.* at 577 n.11. The court concluded that habeas relief was available because petitioners  
25 were convicted without evidence of “a crucial element in the proof of guilt,” in violation of due  
26 process. *Id.* Even were *Giannini* a sufficient basis for side-stepping *Carter*, the court would deny  
27 the relief Hernandez requests.



1 First, Hernandez must establish that his trial counsel’s performance fell below an “objective standard  
2 of reasonableness” under prevailing professional norms. *Id.* at 687-88. The relevant inquiry is not  
3 what defense counsel could have done, but rather whether the choices made by defense counsel were  
4 reasonable in light of what was known at the time. *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th  
5 Cir. 1998). Judicial scrutiny of counsel’s performance must be highly deferential, and a court must  
6 indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable  
7 professional assistance. *Strickland*, 466 U.S. at 689. Secondly, a petitioner must establish that he  
8 was prejudiced by counsel’s deficient performance, by showing that “there is a reasonable  
9 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have  
10 been different.” *Id.* at 694. Review is “doubly deferential,” because the initial state habeas review  
11 under *Strickland* defers to any reasonable decisions made by the attorney and then federal habeas  
12 review defers again to any reasonable determinations by the state court regarding the attorney’s  
13 conduct. *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam).

14 Hernandez asserts that the Monterey County Superior Court unreasonably applied *Strickland*  
15 in rejecting his claim of ineffective assistance of counsel. Hernandez states that his trial counsel  
16 ought to have presented argument emphasizing the antecedent assault doctrine of self defense and  
17 “traumatized child syndrome” as a part of his defense. Hernandez’s argument attacks the  
18 reasonableness of the Monterey County Superior Court’s decision on both of the *Strickland* prongs.

19 a. Antecedent Assault

20 Hernandez asserts that counsel fell below established professional norms by failing to raise  
21 the antecedent assault theory in closing argument. California’s antecedent assault rule is found in  
22 CALJIC 5.50.1, which instructs a jury to consider allowing the defendant more leeway in taking  
23 quicker and harsher defensive measures if the jury finds that “on a prior occasion the alleged victim  
24 threatened or assaulted or participated in an assault or threat of physical harm upon the defendant.”  
25 A defendant is entitled to this instruction even when the threats are by a third party, as long as the  
26 jury could find those threats were attributable to the victim as well. *See e.g., People v. Minifie*, 12  
27 Cal. 4th 1055, 1067 (1996) (addressing the issues of admissibility of evidence of antecedent assaults  
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1 and applicability of the doctrine in a case where the victim’s associates had killed a defendant’s  
2 friend and told defendant he would be “next”). Hernandez argues that the antecedent assault rule  
3 should apply in this case because of the continuous violent conflict between the rival Norteno and  
4 Sureno gangs.

5 Hernandez points to no evidence, either in the extant record or through declarations  
6 submitted to this court, which suggests that Hernandez had been personally assaulted or threatened  
7 by the victims personally or by the Sureno gang generally. Hernandez relies exclusively on  
8 evidence that the neighborhood is a flashpoint in the wider war between the Sureno and Norteno  
9 street gangs. Hernandez points to no case in which the fact that the defendant and the victim were  
10 merely members in antagonistic street gangs, without any prior contact with one another directly or  
11 through intermediaries, served as a valid predicate for the jury to receive this instruction.<sup>1</sup>

12 The Monterey County Superior Court’s held that trial counsel’s performance was not  
13 deficient because “although trial counsel did not specifically refer to the ‘antecedent assault’ theory,  
14 he clearly argued that Hernandez’s actions should be viewed through the eyes of someone growing  
15 up in a gang-infested neighborhood.” Ans., Exh. 9 at 3. Hernandez’s petition acknowledges that,  
16 during cross-examination testimony developed by his trial attorney, one of the police witnesses for  
17 the prosecution “adequately framed petitioner’s state of mind” with respect to the apprehension of  
18 imminent violence during an exchange of gang signs. Pet. at 46-47. Although Hernandez’s trial  
19 counsel could have focused his closing on the antecedent assault instruction, arguing that it should  
20 be applicable in cases of general gang enmity, *Strickland* does not require that he do so. The United  
21 States Supreme Court has noted that “deference to counsel’s tactical decision in his closing  
22 presentation is particularly important because of the broad range of legitimate defense strategy at  
23 that stage.” *Yarborough*, 540 U.S. at 5. In this case, as the Monterey County Superior Court  
24 correctly points out, trial counsel chose to pursue a viable alternative strategy.

25 This court finds no compelling flaw in the state court’s determination that counsel exercised  
26 reasonable professional judgment by pursuing the “totality of circumstances” approach from  
27 CALJIC 5.50 rather than the more specific antecedent assault rule from CALJIC 5.50.1.





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**ENDNOTES**

1. There is no indication in the record that any member of the Sureno gang was even aware of Hernandez's existence until the shooting, much less any indication that any Sureno had threatened Hernandez personally. Furthermore, Hernandez's own arguments that he was wearing neutral colors and a marginal figure in the Norteno gang would seem to support the proposition that he was not a specific target of interest to the Sureno organization.

2. Addressing the second prong of the *Strickland* test, the state court also held that Hernandez suffered no prejudice as a result of his counsel's decision. *Ans., Denial of Pet. Monterey County Superior Court*, at 4. In order to show prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In the absence of any "unprofessional errors," there was no need for the state court to address the question of prejudice.