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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

FELIX ROLANDO HERNANDEZ,  
Petitioner,  
v.  
ANTHONY HEDGPETH,  
Respondent.

Case No. 1:12-cv-00785-AWI-SAB-HC  
FINDINGS AND RECOMMENDATION  
REGARDING PETITION FOR WRIT OF  
HABEAS CORPUS

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

**I.**  
**BACKGROUND**

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation pursuant to a judgment of the Superior Court of California, County of Fresno, following his conviction by jury trial on January 12, 2009, of two counts of home invasion robbery (Cal. Penal Code §§ 211/213(a)(1)(A)). (CT<sup>1</sup> 500-503.) It was also found true that the principal discharged a firearm during the commission of those counts, causing death (Cal. Penal

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<sup>1</sup> “CT” refers to the Clerk’s Transcript on Appeal.

1 Code § 12022.53(d), (e)(1)). (CT 500-503.) In a bifurcated bench trial, the trial court convicted  
2 Petitioner of participating in a criminal street gang (Cal. Penal Code § 186.22(a)), and  
3 determined that he committed the robbery for the benefit of a criminal street gang (Cal. Penal  
4 Code § 186.22(b)(1)). (CT 543.) Petitioner was sentenced to 156 years to life in prison. (CT  
5 555-600.)

6 On November 10, 2010, the California Court of Appeal for the Fifth District affirmed the  
7 judgment but remanded the case to the trial court to correct a sentencing error.

8 On December 6, 2010, Petitioner filed a petition for review in the California Supreme  
9 Court. On February 16, 2011, the California Supreme Court granted review and transferred the  
10 case back to the Court of Appeal to specifically consider a sentencing issue.

11 On April 15, 2011, the Court of Appeal again affirmed the convictions but modified  
12 Petitioner's sentence.

13 Petitioner filed a federal petition for writ of habeas corpus in this Court on May 14, 2012.  
14 On October 8, 2012, Respondent filed a motion to dismiss the petition for failure to exhaust state  
15 court remedies. The undersigned issued a Findings and Recommendation on February 7, 2013,  
16 which recommended Petitioner be granted leave to file an amended petition; in the event  
17 Petitioner did not file an amended petition, the undersigned recommended that Respondent's  
18 motion be granted. On June 7, 2013, Petitioner lodged an amended petition. On June 20, 2013,  
19 the District Court adopted the Findings and Recommendation and directed the Clerk of Court to  
20 file the lodged amended petition. On September 18, 2013, Respondent filed an answer to the  
21 amended petition. Petitioner did not file a traverse.

## 22 II.

### 23 STATEMENT OF FACTS<sup>2</sup>

24 On March 28, 2008, at about 9:00 or 10:00 p.m., defendant (nicknamed  
25 "Mellow") and Ortega (nicknamed "Little Demon") picked up 21-year-old Benita

26 <sup>2</sup> The Fifth DCA's summary of the facts in its November 10, 2010, opinion is presumed correct. 28 U.S.C. §§  
27 2254(d)(2), (e)(1). Petitioner does not present clear and convincing evidence to the contrary; thus, the Court adopts  
28 the factual recitations set forth by the appellate court. See Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9<sup>th</sup>  
Cir.2009), *cert. denied*, 130 S.Ct. 1086 (2010) ("We rely on the state appellate court's decision for our summary of  
the facts of the crime."); Moses v. Payne, 555 F.3d 742, 746 (9<sup>th</sup> Cir.2009) ("For a summary of the preliminary facts,  
we rely on the appellate court's decision.").

1 (nicknamed "Cute") at her boyfriend's apartment. Ortega was driving a stolen  
2 Mazda Tribute sport utility vehicle (the SUV), the vehicle Benita had always seen  
3 him drive. He was wearing a red shirt, and both he and defendant were wearing  
4 red bandanas around their necks. They went to a house where they joined several  
5 other people, including Verdugo (nicknamed "Little Silent"), whom Benita had  
6 never met. Everyone at the party had been smoking methamphetamine and was  
7 "high" or "tweaking." At some point, Ortega pulled his red bandana over his face  
8 and took pictures of himself and defendant with a cell phone. When the  
9 methamphetamine started to run low, Ortega said they should go get more, and  
10 defendant agreed.

11 During the party, Benita was sending text messages to 27-year-old Regina. Ortega  
12 asked Benita if he could borrow her cell phone. Benita let him use the phone and  
13 when he returned it to her, she could see he had accessed her contacts list. He  
14 asked her, "Who is that girl Regina in your phone?" Benita said she was a friend.  
15 Ortega asked Benita if she wanted a ride to Regina's home. Benita said she  
16 wanted a ride to her own home, but Ortega insisted on taking her to Regina's  
17 home. Ortega asked her if Regina still sold drugs and Benita replied that she did.  
18 Ortega said, "All right[,] I'm going to take you to Regina's."

19 At about 1:45 a.m., Ortega got in the SUV. Benita got in the passenger seat and  
20 defendant and Verdugo got in the back seat. Ortega's rifle was between the seats  
21 by his right leg; Benita had always seen him with it. He frequently played with it  
22 and she had seen him shooting chickens with it in the mountains. As they drove to  
23 Regina's apartment, Ortega passed the rifle to the back seat. Ortega parked the  
24 SUV about half a block from Regina's apartment, on a side street perpendicular to  
25 the alley that ran behind the apartments. Everyone got out of the SUV and Ortega  
26 told Benita to go inside. Benita thought they were just going to drop her off, but  
27 they said they were going to another house nearby. Ortega told Benita to contact  
28 them when she was ready to leave Regina's.

Benita walked down the alley and knocked on Regina's back door because Regina  
was usually in the back bedroom on the back side of the apartment. No one  
answered, so Benita went to the front door and rang the doorbell. Again no one  
answered, so she left and returned to the SUV. The three men were still standing  
next to the SUV talking. Ortega asked Benita why she had returned. When she  
said no one answered the door, Ortega told her to go back to Regina's apartment.  
As she walked back, she called Regina and asked her to let her in. It was not  
unusual for Benita to show up at Regina's apartment late at night. When Benita  
knocked on the front door, Gabriel, Regina's ex-boyfriend, answered the door.

Benita went into Regina's bedroom and gave Regina a hug. While they sat and  
talked with Gabriel, Benita and Regina smoked some methamphetamine. After a  
short time, Benita went into the kitchen to eat something. Benita finished eating  
and returned to the bedroom to talk with Regina. Benita sent a text message to  
Ortega to come pick her up. He responded that they wanted to buy some drugs  
from Regina, and Benita should let them in when they got there. Benita did not  
mention Ortega or defendant to Regina.

Ortega repeatedly sent Benita text messages, asking her which apartment was  
Regina's. According to cell phone records, Ortega and Benita exchanged 42 text  
messages in the hour between 2:20 a.m. and 3:20 a.m. Benita sent Ortega Regina's  
address.

While Benita was still in the living room, and Regina and Gabriel were in the

1 front bedroom, Benita heard the back door open. She saw Ortega and defendant  
2 walk in the back door, which was unlocked. Benita went to the door and asked  
3 Ortega what he was doing because they just walked in. Ortega and defendant were  
4 wearing sweaters and they stood right next to each other with their hands behind  
5 their backs. Benita did not see a gun. Ortega put his hand on Benita's face and told  
6 her to shut up, and he guided her toward the door. Again, she asked him what he  
7 was doing and he told her to shut up. He said to her in a harsh whisper, "Shut up,  
8 Benita. I'm trying to rob this bitch." But Benita protested. Ortega told her "not to  
9 trip." He promised not to harm Regina. He said that "his word [was] with Bond,"  
10 and he "put that on the block he wasn't going to hurt Regina." This meant that he  
11 was promising on his street and on the Bond Street Bulldog gang members with  
12 whom he claimed to associate. He repeatedly told Benita to go to the car, but she  
13 refused. She begged them not to do anything. Ortega was getting mad and he told  
14 her to "get the fuck in the car." Defendant pushed her out the door and promised  
15 not to let Ortega harm Regina. Benita was afraid. She left the apartment and  
16 walked to the alley. She was surprised to see that the SUV was now parked in the  
17 alley behind Regina's garage. The SUV was running and Verdugo was in the  
18 driver's seat. Benita got into the passenger's seat.

19 According to Gabriel, when Benita was in the living room looking at her cell  
20 phone, he and Regina heard a knock on the back screen door. Then Ortega and  
21 defendant barged into the room. Ortega was wearing a red beanie on his head and  
22 a red bandana covering his face. He was holding a rifle. Defendant was wearing a  
23 dark jacket with a hood over his head. Ortega immediately shot Regina and she  
24 fell to the floor. Defendant hit Gabriel on the side of his head with a fist. Then  
25 defendant yelled at Regina, "Where are your keys, bitch?" Defendant yelled at  
26 Gabriel, "Give me your shit." Gabriel gave defendant his house keys and said, "I  
27 don't have anything else." Defendant left Regina's purse on the bed and ran out of  
28 the room.

Ortega kicked Regina and asked her, "Where is the money, bitch?" While he was  
kicking her, he kept the rifle pointed at Gabriel, who was sitting on the bed.  
Gabriel was afraid and he regretted not being able to protect Regina. Ortega told  
Gabriel to lie face-down on the bed, but Gabriel refused to comply for fear that  
Ortega would shoot him in the back of his head. Gabriel held his hands up and  
said, "I don't have anything to do with this. I don't know what's going on." Ortega  
said, "I heard she's got a gun, too. Do you know where the gun's at?" Gabriel said,  
"I never knew about her having no gun." When Ortega again asked where the  
money was, Gabriel offered to look through Regina's purse for him. Ortega  
signaled for him to do it, so Gabriel grabbed the purse and dumped it on the bed.  
He found a gold bracelet, but no money.

Ortega said, "I'm going to kill this bitch." He told Gabriel he was going to kill  
him too because he thought Gabriel was going to try something. Ortega said he  
was getting an "itchy trigger finger" and he was "ready to die by the Fresno PD."  
Afraid for his life, Gabriel told Ortega, "My cousin is Donkey," referring to a  
cousin who was well-known in prison. Gabriel hoped Ortega would realize there  
would be retribution if he hurt him. Gabriel repeated that he would not do  
anything and that he did not know what was going on. Ortega told him to go sit in  
the hallway with his legs crossed and his hands on his head. He said, "I ain't going  
to kill you[;] it's this bitch." Gabriel asked Ortega why he was going to kill  
Regina, and he answered, "She burned my homeboy. Sold him 50 dollars worth of  
cut." This meant the methamphetamine appeared to be real, but was not.

Gabriel heard Ortega shoot the rifle a few more times, then Ortega said, "I'm

1 gone,” and he ran past Gabriel. Gabriel thought the rifle sounded like a .22-caliber  
2 rifle. Gabriel waited about 10 seconds, then got up and went to Regina. He told  
3 her, “It’s okay. Get up. They’re gone.” He picked her up and sat her on the bed,  
4 but she fell back on her back, unresponsive. He said, “They’re gone. They’re  
5 gone.” She gasped for air and her eyes rolled back in her head. When Gabriel saw  
6 blood on his hand, he lifted Regina’s shirt and saw a bullet wound near her pelvis.  
7 Only then did he realize she had been shot. He ran around the apartment looking  
8 for a telephone, then ran outside and told a neighbor to call 911.

9 Ortega returned to the SUV in the alley carrying his rifle and Regina’s purse.  
10 Defendant backed Regina’s red Geo Prizm out of her garage, and both cars  
11 returned to the house where the party was held.

12 Chica, a young woman at the party, came out and asked about Regina. Chica  
13 recognized Regina’s car and asked Benita, “Is that Regina’s car over there? [¶] ...  
14 [¶] Is Regina in there? Tell her to get down and say hi.” Defendant told Benita not  
15 to say anything. Ortega told someone, “Take that bitch inside and tell her to shut  
16 up.”

17 Chica saw Ortega come back into the house. Then she saw some girls looking  
18 through a purse that she believed was Regina’s.

19 Benita stayed in the car, and after a few minutes, she, Ortega, and Verdugo left.  
20 Ortega dropped Benita off at her apartment.

21 Officers responded to Regina’s apartment at 3:42 a.m., two minutes after being  
22 dispatched. The officers found Regina lying on the bed with her legs hanging  
23 down. She was gasping for air and her eyes were open, but her pupils were totally  
24 dilated and she was not blinking. Her eyes were becoming dry. The officers  
25 observed a small bullet wound in her right pelvis from a .22-caliber gunshot, and  
26 a small graze wound on her right arm. Regina was taken to the hospital.

27 Four expended .22-caliber cartridges were found in Regina’s living room,  
28 hallway, and bedroom. A criminologist later determined that two of the four  
expended .22-caliber cartridges found in Regina’s apartment had been fired by  
Ortega’s rifle. Two of the expended cartridges could not be conclusively identified  
as having been fired by the rifle.

At 4:42 a.m., Benita received a text message from Ortega asking her how she was  
going to act. He said, “Man my girl. How gonna you act.”

At 7:33 a.m., Benita received another message from him telling her he was  
leaving town. He said, “Cute, I’m gone b. Yo boy wiggin out.” “I’m smashing out  
of town.” “C U when I see U.”

At about 8:00 a.m., Regina died at the hospital.

Also at about 8:00 a.m., Ortega gave Chica a ride to work. Ortega drove with a  
rifle across his lap. Defendant, who was also in the car, had a long, samurai-type  
sword.

At about 10:00 a.m., Ortega and defendant came to Benita’s apartment. Benita  
asked Ortega what had happened, but he shook his head and did not answer. He  
kept saying, “Get your stuff[,] we’re going to the mountains. We can’t be here.”  
Then he said, “I think I murked [Regina],” which meant he thought he had killed

1 her. Benita started crying and told Ortega to get out. He put his head down and  
2 repeated that he was sorry. Defendant just shook his head. Benita told them to  
leave.

3 At 7:31 p.m., Benita received a text message from Ortega. He said, “[M]y dog,  
4 answer da phone. Hella important. Number 007.” He had sent her many other  
5 messages and he kept calling her, but she did not want to talk to him and she  
refused to answer.

6 At about 11:30 p.m., a woman walking in her neighborhood saw an SUV parked  
7 behind a small red Geo. Ortega and two other men in dark clothing were standing  
8 by the red Geo. They poured gas over the red Geo, set it on fire, and drove away.  
9 The woman had previously seen Ortega and a neighbor pushing the red Geo into  
the neighbor's back yard. A few days after the car fire, the neighbor threatened the  
10 woman, telling her to keep her mouth shut or what had happened to her friend  
would happen to her.

11 On April 1, at about 8:00 p.m., undercover officers observed Ortega walking with  
12 a limp and an obvious bulge in his clothing. They watched him place a .22-caliber  
13 rifle, containing a loaded magazine of nine live cartridges, behind a gas station  
14 and quickly walk into an adjacent fast food restaurant, where the officers  
15 apprehended him. Defendant and Verdugo were not with him.

16 Ortega was carrying keys to the SUV, which was parked nearby. The SUV's  
17 license plates were covered with Auto Maxx paper plates. Ortega was also  
18 carrying a cell phone, a red bandana, and some papers, one of which was signed  
19 by “Little Demonologist.” When the detective, who was present at the scene,  
20 picked up Ortega's cell phone and looked at it, he immediately saw a “wallpaper”  
21 (background) photograph displayed on the phone's face. It was a photograph of a  
22 male wearing a red hat down to his eyebrows, a red bandana over his face  
23 (revealing only his eyes), and red clothing. [FN3.] When the detective examined  
24 the contacts in Ortega's cell phone, he found someone referred to as “Mellow  
25 Bonded 007,” with a number the detective knew was defendant's number, even  
though it was registered to someone else.

26 FN3. The detective testified the male in the photograph was wearing red clothing,  
27 but it appears to us he was wearing a shirt that was predominantly light blue.

28 The SUV contained five live .22-caliber cartridges and six expended .22-caliber  
cartridge casings. The criminologist later determined that four of the six expended  
.22-caliber casings had been fired from Ortega's rifle. The others were  
inconclusive. The SUV's glove compartment contained several CD's, four of  
which had Regina's name written on them. Regina always signed her name on her  
things. Behind the seat was Regina's daughter's toy.

When the police searched defendant's bedroom, they found a samurai-type sword  
in a case and a CD case between two mattresses on the floor. They also found  
CD's and a CD case, all with Regina's name on them.

The detective testified that, about 30 hours before Regina was shot (i.e., at about  
9:40 p.m. on March 27), Ortega left someone a voicemail message (the parties  
stipulated it was not left for either defendant or Verdugo). The detective  
recognized Ortega's voice. In the message, Ortega said, “Aye Bulldog man. [¶] ...  
[¶] I been cup caking with some little hoe ass beezee ... nigga ..., you know what I  
mean? [¶] ... [¶] Hit me up boy, Little D.” At this point, a female voice could be

1 heard in the background. Then Ortega said, "Lay down this ... hit me up boy. [¶]  
2 ... [¶] I need the strap at least, man." The detective testified that the term "strap"  
3 meant a firearm or gun.

4 Also on March 27, Ortega left a message for "Mellow" on a cell phone registered  
5 to someone named Dominguez Perez. The cell phone contained seven voicemail  
6 messages that mentioned the name "Mellow."

7 The pathologist who conducted the autopsy of Regina's body found four gunshot  
8 wounds: a grazing wound on her upper right arm, a wound through her right  
9 thigh, a wound near her vagina, and a wound to her right hip. The bullet that  
10 caused the wound to her hip injured her iliac artery and vein, and caused her to  
11 bleed to death.

### 12 *Bifurcated Trial*

13 At the bifurcated trial, Gabriel testified that Ortega's use of the word "dog" and  
14 the red bandana he wore on his face led Gabriel to believe that Ortega and  
15 defendant were in the Bulldog gang. Due to this belief, Gabriel mentioned the  
16 name of his cousin, "Donkey," who was a known Bulldog, hoping his life would  
17 be spared if they knew he was related to someone in their gang.

18 The gang expert testified there are no "shot caller[s]" in the Bulldog gang; the  
19 mentality is every man for himself. Bulldog gang tattoos include the words  
20 "Fresno" and "Bulldogs," the letters "FS," and pictures of actual bulldog faces  
21 and bodies. There are three main sub-groups of the Bulldog gang: the Fresno  
22 Bulldogs, the East Side Fresno Bulldogs, and the North Side Fresno Bulldogs.  
23 Each sub-group uses a tattoo to differentiate themselves such as "FB," "ESF," and  
24 "NSF," respectively. Each sub-group has further sub-groups; the Bond Street  
25 Bulldogs are the largest sub-group of the East Side Fresno Bulldogs. In addition  
26 to the general Bulldog tattoos noted above, Bond Street Bulldog tattoos consist of  
27 the words "Bond" and "Bond Street," the letters "BSD," and the numbers "007."  
28 Primary activities of the Bond Street Bulldogs include assault with a deadly  
weapon, murder, arson, robbery, vehicle theft, assault, battery, and numerous  
other crimes. In the expert's opinion, the Bond Street Bulldogs are a criminal  
street gang.

The expert testified that a hypothetical crime, very similar to the crime at hand,  
would benefit a criminal street gang because it would bolster the gang's reputation  
for using violence to regain respect, and defendant's actions benefitted the gang  
because he was acting as "crowd control." Respect is everything to a gang  
member; committing a crime to avenge a fellow gang member who was ripped off  
increases that respect. As a result of this type of crime, other drug dealers would  
know not to sell their gang "cut" drugs. In the expert's opinion, this crime was  
associated with the Bond Street Bulldogs.

The expert translated Ortega's voice-mail. "Aye, Bulldog man" meant "How are  
you doing[?]" or "What's up, Bulldog?" "Bond up and call me back" meant  
"[G]et ready, I might need you to do something, commit a crime or [a] number of  
things." "I need the strap at least, man" meant that Ortega was looking for a gun.  
The expert further explained that the phrase "[B]ond up" is not normally used in  
casual conversation, nor is it used by or towards a non-gang member. "[B]ond up"  
is normally used only among gang members to discuss perpetrating criminal acts  
or taking care of business for their gang.

1 The police use several criteria to determine whether or not someone is an active  
2 participant in a criminal street gang. If three of the criteria are met, a person could  
3 be classified as an active gang participant. The criteria include self-admission of  
4 membership to an officer, gang tattoos, association with known gang members on  
5 a regular basis, gang graffiti on documents, correspondence with gang members,  
6 arrest in the company of known gang members, identification as a gang member  
7 by a reliable source (teachers, law enforcement, parents, rival gangs), name on  
8 graffiti or roll call list, and appearance in a photograph with known gang  
9 members.

10 Ortega, with whom defendant committed the crimes, repeatedly admitted that he  
11 was an “ESF” gang member, including during five different jail classification  
12 proceedings. His tattoos included the word “FRESNO” with the letters “ES”  
13 emphasized, the letters “ESF” and “BDS,” the letter “B,” one bulldog body, two  
14 bulldog faces, and three “dog paws.”

15 In the expert's opinion, defendant was a current, active participant in the Bond  
16 Street Bulldog gang. On eight different occasions, defendant admitted being in the  
17 Bulldog gang, and on five of those occasions, he specifically indicated he was a  
18 Bond Street Bulldog. Defendant's tattoos included the words “FRESNO,”  
19 “BULLDOG,” and “BOND STREET,” and three bulldog faces. He also had the  
20 letter “B” on his face, which was “like a billboard” because he was showing his  
21 level of commitment to the gang. Defendant was in two photographs with known  
22 Bond Street Bulldog gang members. In one of the photographs, defendant was  
23 “throwing” gang signs.

#### 24 *Defense Evidence*

25 The expert testified that two active gang participants could commit a crime  
26 together for non-gang-related purposes—for example, to obtain more drugs. The  
27 word “dog” is not specific to gang members, but is also used in popular culture.  
28 Similarly, the color red is not exclusive to the Bulldog gang. Also, a non-active  
gang member could claim to be in a gang during jail classification for protection  
purposes.

(LD<sup>3</sup> 8 at 4-13.)

### III.

#### DISCUSSION

##### A. Jurisdiction

Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws 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 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the U.S. Constitution. The challenged conviction arises out of Fresno County

<sup>3</sup> “LD” refers to the documents lodged by Respondent with his response.

1 Superior Court, which is located within the jurisdiction of this Court. 28 U.S.C. § 2254(a); 28  
2 U.S.C. § 2241(d).

3 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act  
4 of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its  
5 enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th  
6 Cir. 1997) (en banc). The instant petition was filed after the enactment of the AEDPA and is  
7 therefore governed by its provisions.

8 **B. Standard of Review**

9 Under the AEDPA, relitigation of any claim adjudicated on the merits in state court is  
10 barred unless a petitioner can show that the state court’s adjudication of his claim:

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

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

15 28 U.S.C. § 2254(d); Harrington v. Richter, \_\_\_ U.S. \_\_\_, \_\_\_, 131 S.Ct 770, 784, 178 L.Ed.2d 624  
16 (2011); Lockyer v. Andrade, 538 U.S. 63, 70-71 (2003); Williams, 529 U.S. at 413.

17 As a threshold matter, this Court must “first decide what constitutes ‘clearly established  
18 Federal law, as determined by the Supreme Court of the United States.’” Lockyer, 538 U.S. at 71  
19 (quoting 28 U.S.C. § 2254(d)(1)). In ascertaining what is “clearly established Federal law,” this  
20 Court must look to the “holdings, as opposed to the dicta, of [the Supreme Court’s] decisions as  
21 of the time of the relevant state-court decision.” Williams, 592 U.S. at 412. “In other words,  
22 ‘clearly established Federal law’ under § 2254(d)(1) is the governing legal principle or principles  
23 set forth by the Supreme Court at the time the state court renders its decision.” Id. In addition,  
24 the Supreme Court decision must “‘squarely address [] the issue in th[e] case’ or establish a legal  
25 principle that ‘clearly extend[s]’ to a new context to the extent required by the Supreme Court in  
26 . . . recent decisions”; otherwise, there is no clearly established Federal law for purposes of  
27 review under AEDPA. Moses v. Payne, 555 F.3d 742, 754 (9th Cir.2009) (quoting Wright v.  
28 Van Patten, 552 U.S. 120, 125 (2008)); Panetti v. Quarterman, 551 U.S. 930 (2007); Carey v.

1 Musladin, 549 U.S. 70 (2006). If no clearly established Federal law exists, the inquiry is at an  
2 end and the Court must defer to the state court's decision. Carey, 549 U.S. 70; Wright, 552 U.S.  
3 at 126; Moses, 555 F.3d at 760.

4 If the Court determines there is governing clearly established Federal law, the Court must  
5 then consider whether the state court's decision was "contrary to, or involved an unreasonable  
6 application of," [the] clearly established Federal law." Lockyer, 538 U.S. at 72 (quoting 28  
7 U.S.C. § 2254(d)(1)). "Under the 'contrary to' clause, a federal habeas court may grant the writ  
8 if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a  
9 question of law or if the state court decides a case differently than [the] Court has on a set of  
10 materially indistinguishable facts." Williams, 529 U.S. at 412-13; see also Lockyer, 538 U.S. at  
11 72. "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite  
12 in character or nature,' or 'mutually opposed.'" Williams, 529 U.S. at 405 (quoting Webster's  
13 Third New International Dictionary 495 (1976)). "A state-court decision will certainly be  
14 contrary to [Supreme Court] clearly established precedent if the state court applies a rule that  
15 contradicts the governing law set forth in [Supreme Court] cases." Id. If the state court decision  
16 is "contrary to" clearly established Supreme Court precedent, the state decision is reviewed  
17 under the pre-AEDPA de novo standard. Frantz v. Hazezy, 533 F.3d 724, 735 (9th Cir.2008) (en  
18 banc).

19 "Under the 'reasonable application clause,' a federal habeas court may grant the writ if  
20 the state court identifies the correct governing legal principle from [the] Court's decisions but  
21 unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at  
22 413. "[A] federal court may not issue the writ simply because the court concludes in its  
23 independent judgment that the relevant state court decision applied clearly established federal  
24 law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411;  
25 see also Lockyer, 538 U.S. at 75-76. The writ may issue only "where there is no possibility  
26 fairminded jurists could disagree that the state court's decision conflicts with [the Supreme  
27 Court's] precedents." Harrington, 131 S.Ct. at 784. In other words, so long as fairminded jurists  
28 could disagree on the correctness of the state courts decision, the decision cannot be considered

1 unreasonable. Id. If the Court determines that the state court decision is objectively  
2 unreasonable, and the error is not structural, habeas relief is nonetheless unavailable unless the  
3 error had a substantial and injurious effect on the verdict. Brecht v. Abrahamson, 507 U.S. 619,  
4 637 (1993).

5 Petitioner has the burden of establishing that the decision of the state court is contrary to  
6 or involved an unreasonable application of United States Supreme Court precedent. Baylor v.  
7 Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the  
8 states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a  
9 state court decision is objectively unreasonable. See LaJoie v. Thompson, 217 F.3d 663, 669  
10 (9th Cir.2000); Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir.1999).

11 AEDPA requires considerable deference to the state courts. “[R]eview under §  
12 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on  
13 the merits,” and “evidence introduced in federal court has no bearing on 2254(d)(1) review.”  
14 Cullen v. Pinholster, \_\_\_ U.S. \_\_\_, \_\_\_, 131 S.Ct. 1388, 1398-99 (2011). “Factual determinations  
15 by state courts are presumed correct absent clear and convincing evidence to the contrary.”  
16 Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (citing 28 U.S.C. § 2254(e)(1)). However, a  
17 state court factual finding is not entitled to deference if the relevant state court record is  
18 unavailable for the federal court to review. Townsend v. Sain, 372 U.S. 293, 319 (1963),  
19 *overruled by*, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

### 20 C. Review of Claims

21 Petitioner raises two separate claims for relief but they are essentially the same claim. He  
22 contends the evidence was insufficient to prove the robberies were committed with the specific  
23 intent to benefit, promote, or assist criminal street gang activity.

24 This claim was presented on direct appeal to the state appellate court and it was denied in  
25 a reasoned decision. Petitioner then raised the claim to the California Supreme Court in a  
26 petition for review. The petition was denied without comment. When the California Supreme  
27 Court’s opinion is summary in nature, the Court must “look through” that decision to a court  
28 below that has issued a reasoned opinion. Ylst v. Nunnemaker, 501 U.S. 797, 804-05 & n. 3

1 (1991). Here, the appellate court analyzed and rejected the claims as follows:

2 Defendant contends insufficient evidence supported the finding that the robberies  
3 were committed with the intent to benefit or promote criminal gang activity;  
4 therefore, the gang enhancements under section 186.22, subdivision (b) and,  
5 consequently, section 12022.53, subdivision (e), should not apply. Rather, he  
6 asserts the crimes were committed to obtain drugs and/or money to buy drugs. We  
7 disagree. There was ample evidence to support the finding that defendant was  
8 involved in a gang, and intended to advance criminal gang activity within the  
9 meaning of section 186.22, subdivision (b).

10 “To determine the sufficiency of the evidence to support a conviction, an  
11 appellate court reviews the entire record in the light most favorable to the  
12 prosecution to determine whether it contains evidence that is reasonable, credible,  
13 and of solid value, from which a rational trier of fact could find the defendant  
14 guilty beyond a reasonable doubt.” (*People v. Bolden* (2002) 29 Cal.4th 515,  
15 553.) “It is not our function to reweigh the evidence, reappraise the credibility of  
16 witnesses, or resolve factual conflicts, as these are functions reserved for the trier  
17 of fact.” (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955.) We may not reverse  
18 a conviction for insufficiency of the evidence unless it appears “that upon no  
19 hypotheses whatever is there sufficient substantial evidence to support [the  
20 conviction].” [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We must  
21 draw all reasonable inferences in support of the judgment. (*People v. Wader*  
22 (1993) 5 Cal.4th 610, 640.) Although we review the whole record, “[t]he  
23 uncorroborated testimony of a single witness is sufficient to sustain a conviction,  
24 unless the testimony is physically impossible or inherently improbable.” (*People*  
25 *v. Scott* (1978) 21 Cal.3d 284, 296; *People v. Panah* (2005) 35 Cal.4th 395, 489.)  
26 This standard equally applies to a claim of insufficiency of the evidence to  
27 support a gang enhancement. (*People v. Killebrew* (2002) 103 Cal.App.4th 644,  
28 660.)

For a gang enhancement under section 186.22, subdivision (b) to properly apply,  
the defendant must have committed a felony “for the benefit of, 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 ....” (§  
186.22, subd. (b)(1).)

In *People v. Vasquez* (2009) 178 Cal.App.4th 347 (*Vasquez*), expert witness  
testimony “that violent crimes ... increase ‘respect’ for the gang and facilitate its  
criminal activities by intimidating members of rival gangs and law-abiding  
neighborhood residents” was sufficient evidence to support a finding under  
section 186.22, subdivision (b). (*Vasquez, supra*, at pp. 353.) The *Vasquez* court  
further noted that intimidation benefits the gang by “elevat[ing] the status of the  
gang within gang culture.” (*Id.* at p. 354.)

“Commission of a crime in concert with known gang members is substantial  
evidence which supports the inference that the defendant acted with the specific  
intent to promote, further or assist gang members in the commission of the crime.  
[Citation.]” (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; *People v.*  
*Morales* (2003) 112 Cal.App.4th 1176, 1197-1199 [intending to commit and/or  
aid and abet a robbery in association with fellow gang members was sufficient  
evidence that the defendant intended to assist criminal gang activity].) “[I]f  
substantial evidence establishes that the defendant is a gang member who  
intended to commit the charged felony in association with other gang members,  
the jury may fairly infer that the defendant also intended for his crime to promote,

1 further or assist criminal conduct by those gang members. [Citation.]” (*Vazquez*,  
2 supra, 178 Cal.App.4th at pp. 353-354.)

3 Here, sufficient evidence supported the gang enhancement under section 186.22,  
4 subdivision (b). The expert testified that the crimes committed would benefit a  
5 criminal street gang because other drug dealers would not sell the gang “cut”  
6 drugs, and the gang's reputation would be bolstered by using violence to regain  
7 respect. Defendant committed the crime in association with Ortega, a known gang  
8 member, and that alone was sufficient to support a finding that he had the specific  
9 intent to “promote, further or assist” under section 186.22 subdivision (b). (*People*  
10 *v. Villalobos*, supra, 145 Cal.App.4th at p. 322; *People v. Morales*, supra, 112  
11 Cal.App.4th at pp. 1197-1199.)

12 Similarly, the enhancement under section 12022.53, subdivision (e) was also  
13 properly imposed on both robberies. Section 12022.53, subdivision (e), states:  
14 “enhancements provided in this section shall apply ... if... [¶] (A) The person  
15 violated subdivision (b) of Section 186.22 [and ¶] (B) Any principal in the offense  
16 committed any act specified in subdivision (b), (c), or (d) [which involve using a  
17 firearm in the commission of a felony].” (Italics added.) In this case, because the  
18 use of a firearm by a principal was not in dispute, a finding under section 186.22,  
19 subdivision (b) supported a finding under section 12022.53, subdivision (e). Both  
20 enhancements were sufficiently supported by evidence and properly applied to  
21 both robberies.

22 (LD 8.)

23 The United States Supreme Court has held that when reviewing an insufficiency of the evidence  
24 claim, a court must determine whether, viewing the evidence and the inferences to be drawn  
25 from it in the light most favorable to the prosecution, any rational trier of fact could find the  
26 essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307,  
27 319 (1979). On federal habeas review, AEDPA requires an additional layer of deference to the  
28 state decision. *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir.2005). This Court must determine  
whether the state decision was an unreasonable application of the *Jackson* standard.

29 Sufficiency claims are judged by the elements defined by state law. *Jackson*, 443 U.S. at  
30 324 n.16. Cal. Penal Code § 186.22(b)(1)'s gang enhancement may only be applied if the  
31 prosecution proves the following two elements beyond a reasonable doubt: (1) that Petitioner  
32 committed a felony “for the benefit of, at the direction of, or in association with any criminal  
33 street gang,” and (2) that he did so “with the specific intent to promote, further, or assist in any  
34 criminal conduct by gang members.” To sustain the imposition of a gang enhancement pursuant  
35 to Cal. Penal Code § 186.22(b)(1), “there must have been evidence upon which a rational trier of  
36 fact could find that [a defendant] acted with the ‘specific intent to promote, further, or assist in’

1 some type of ‘criminal conduct by gang members,’ which may include the crimes of conviction.”

2 Emery v. Clark, 643 F.3d 1210, 1216 (9<sup>th</sup> Cir.2011) (quoting Cal. Penal Code § 186.22(b)(1).)

3 In this case, the appellate court applied the correct standard in reviewing the claim by  
4 viewing the evidence in the light most favorable to the judgment to determine whether a rational  
5 trier of fact could have found the defendant guilty beyond a reasonable doubt. Moreover, it  
6 cannot be said that no fairminded jurist would agree with the state court’s decision. There was  
7 ample evidence from which to conclude that Petitioner committed the home invasion robbery in  
8 association with a criminal street gang, and with the specific intent to promote, further, or assist  
9 criminal conduct by gang members. Petitioner was an admitted associate of the Bond Street  
10 Bulldogs and he committed the crimes in association with Ortega, a fellow gang member. As  
11 noted by the appellate court, prior to the attack, Ortega told Benita that “his word [was] with  
12 Bond,” and he “put that on the block he wasn’t going to hurt Regina.” This meant that Ortega  
13 was promising on his gang that he would not harm Regina. Nevertheless, when Ortega and  
14 Petitioner broke into the residence, Ortega immediately shot Regina while Petitioner hit Gabriel  
15 in the head. When later asked why he was going to kill Regina, Ortega said it was because she  
16 sold his “homeboy” “50 dollars worth of cut,” which meant she had sold his associate weak or  
17 fake drugs. The state court noted the expert testimony that Ortega’s and Petitioner’s actions  
18 served to benefit the criminal street gang because other drug dealers would be disinclined to sell  
19 the gang “cut” drugs, and the gang’s reputation would be bolstered by the use of violence in  
20 retaliation for a wrong done to a fellow gangmember. The morning after the crime, Petitioner  
21 and Ortega planned to flee to the mountains together. A witness, Chica, testified that Ortega  
22 drove with a rifle across his lap while Petitioner had a long, samurai-type sword.

23 In these circumstances, it would not be unreasonable to conclude that a rational trier of  
24 fact could have found that when Petitioner and Ortega acted together to commit the robbery and  
25 murder, Petitioner specifically intended to “assist in” criminal conduct (murder and robbery) by  
26 known gang members (himself and Ortega) within the meaning of section 186.22(b)(1).  
27 Accordingly, the state court rejection of Petitioner’s claim was not contrary to or an  
28 unreasonable application of clearly established Supreme Court precedent. 28 U.S.C. §

1 2254(d)(1). The petition must be denied.

2 **IV.**

3 **RECOMMENDATION**

4 Accordingly, the Court HEREBY RECOMMENDS that the petition for writ of habeas  
5 corpus be DENIED WITH PREJUDICE and the Clerk of Court be DIRECTED to enter  
6 judgment.

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

17 IT IS SO ORDERED.

18 Dated: March 24, 2014

19   
20 UNITED STATES MAGISTRATE JUDGE