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SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	Court of Appeal
	)	No. C071065
v	)	
	)	
ZACKERY PRUNTY,	)	Super. Ct. No.
	)	10F07981
Defendant and Petitioner.	)	
	)	
_____	)	

PETITION FOR REVIEW TO EXHAUST STATE REMEDIES

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SUPREME COURT
FILED

APR 26 2013

Frank A. McGuire Clerk

Deputy

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PETITION OF APPELLANT FOR REVIEW TO EXHAUST STATE REMEDIES AFTER THE PUBLISHED DECISION BY THE COURT OF APPEAL FOR THE THIRD APPELLATE DISTRICT IN CASE NUMBER C071065, AFFIRMING THE JUDGMENT OF THE SUPERIOR COURT OF SACRAMENTO COUNTY.

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner Zackery Prunty respectfully petitions this Court for review to exhaust his state remedies, pursuant to California Rules of Court, rule 8.508 regarding the unpublished decision of the Court of Appeal, Third Appellate District in Appeal No. C071065, affirming the judgment of the

Sacramento County Superior Court in Superior Court Case No. 10F07981. The case presents no grounds for review under California Rules of Court, rule 8.500(b), and the petition is filed solely to exhaust state remedies for federal habeas corpus purposes.

STATEMENT OF THE CASE

Petitioner adopts the statement of the case set forth in the Court of Appeal opinion. (Attachment A, 3.)

On March 26, 2013, the Court of Appeal affirmed the judgement of the superior court. (Attachment A.)

STATEMENT OF FACTS

Petitioner adopts the statement of facts set forth by the Court of Appeal. (Attachment A, 2-3.)

ARGUMENT

I

WHETHER THE TRUE FINDINGS TO THE CRIMINAL STREET GANG ENHANCEMENTS TO COUNTS ONE AND TWO MUST BE REVERSED BECAUSE THE PROSECUTION EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE PETITIONER COMMITTED THE OFFENSES FOR THE BENEFIT OF A CRIMINAL STREET GANG.

The prosecution presented evidence about seven different Norteño subset gangs, but failed to present any evidence linking the subsets together with one another, or to the larger Norteño gang. There was no substantial evidence showing the subsets either coordinated or collaborated with one another, or with the larger gang. There simply was no substantial evidence that the multiple gangs, about which the prosecution presented evidence, were connected to one another. Specifically, there was no substantial evidence of any "collaborative activities or collective organizational structure . . . , so that the various groups reasonably can be viewed as parts of the same overall organization." (*People v. Williams* (2008) 167 Cal.App.4th 983, 988.) Such a connection among different gangs is required by section 186.22, subdivision (b). Instead, the prosecution and its expert impermissibly conflated multiple gangs into one. Detroit Boulevard Norteños (1CT 141 [petitioner's gang]), Del Paso Heights Norteños (1RT

212 [predicate offense]), Vario Gardenland Norteños (1RT 212 [predicate offense]), Varrio Centro Norteños (1RT 214 [predicate offense], 250 [location of charged offenses]; 1RT 250 [location of charged offenses]), Varrio Franklin Boulevard Norteños (1RT209 [Chacon's gang]), Varrio Diamonds Norteños (1RT 218 [another active crew]), and Southside Park Norteños (1RT 250 [location of charged offenses]) all were condensed into a single gang: Norteños.

Petitioner does not dispute his affiliation with a criminal street gang. What petitioner disputes is the notion that anything he does, even with another person who also happens to be affiliated with (some other, different) street gang, is for the benefit of one gang, or another, or both. Thus, respondent's litany of petitioner's gang affiliation does nothing to address whether the evidence was sufficient. That is because gang affiliation, even gang membership, is not a crime. (*People v. Gardeley* (1996) 14 Cal.4th 605, 623.) Neither is a defendant's gang affiliation and criminal history sufficient to prove the current offense is gang-related. (*People v. Martinez* (2004) 116 Cal.App.4th 753.) Further, "[n]ot every crime committed by gang members is related to a gang." (*People v. Albillar* (2010) 51 Cal. 4th 47, 60.) Thus, the fact that petitioner and Chacon each was affiliated with a gang, and they committed crimes together, also does

not make sufficient evidence the crimes were committed for the benefit of a gang.

The prosecution's evidence contradicted the theory of collaboration among the subset gangs. The evidence showed the subset Norteño gangs were often in fierce rivalry with one another - - not working together for any common Norteño purpose. For example, both Varrio Centro Norteños and Southside Park Norteños had competing claims to the location of the charged offenses. (1RT 250.) One of the predicate crimes, used to establish a "pattern of criminal gang activity," was an "in-house" (1RT 212) shooting homicide by Varrio Gardenland Norteños against a Del Paso Heights Norteño gang member. (1RT 211-212.)

Conflating all the Norteño subsets into a single gang is no different from conflating the Norteño and Sureño gangs into one Hispanic gang. There was no substantial evidence these various subsets participated in collaborative efforts, or had any organization, structure or communication that linked the subsets. (*People v. Williams*, *supra,* 167 Cal.App.4th at p. 988.) Because of the expert's reliance on different subset gangs to establish both the primary activities and the pattern of criminal gang activity, the evidence was insufficient as a matter of law to prove the gang enhancement. Hence, the true findings to the gang enhancements violate due process and

should have been reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 313-314 [61 L.Ed.2d 560, 99 S.Ct. 2781]; see also, *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

The due process clauses of the Fifth and Fourteenth Amendments safeguard petitioner from criminal liability "except upon evidence that is sufficient fairly to support a conclusion that every element . . . has been established beyond a reasonable doubt." (*Jackson v. Virginia, supra*, 443 U.S. at pp. 313-314.) This Court explained the inquiry is twofold:

> First, we must resolve the issue in the light of the whole record -- i.e., the entire picture of the defendant put before the jury -- and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.'" [Citations.]

(*People v. Johnson* (1980) 26 Cal.3d 557, 576; in accord *People v. Green* (1980) 27 Cal.3d 1, 55.) Thus, a reviewing court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact

could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson, supra*, 26 Cal.3d at p. 578.) The same standard applies to enhancement allegations. (*People v. Sengpadychith, supra*, 26 Cal.4th 316.)

The quantum of evidence necessary to sustain a verdict must exceed that which raises a mere suspicion of guilt. However,

> "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." [Citation.] "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence." [Citation.]

(*People v. Thompson* (1980) 27 Cal.3d 303, 324.)

"Substantial evidence" to affirm a conviction is evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020; in accord *People v. Conner* (1983) 34 Cal.3d 141, 149.) Reasonableness is ultimately the standard underlying the substantial evidence rule. (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must determine whether any reasonable trier of fact could have found,

upon the evidence presented, each essential element of the crime "beyond a reasonable doubt." The substantial evidence rule necessarily mandates consideration of the weight of the evidence considered by the trier of fact in determining whether it is sufficient. (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

The prosecution evidence was insufficient to prove petitioner committed counts one and two to benefit a criminal street gang. The gang enhancement allegation to each count was alleged and found true under section 186.22, subdivision (b)(1). Section 186.22, subdivision (b)(1) provides, "any person who is convicted of a felony committed 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, shall, upon conviction of that felony," be subject to additional, consecutive punishment. The section defines "criminal street gang" in section 186.22, subdivision (f), as any ongoing group of three or more persons having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision (e), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. The acts set forth in subdivision (e), include carjacking and vehicle theft, and other felonies.

Section 186.22, subdivision (b)(1), describes two prerequisite elements. First, the nature of the crime must be for the benefit of, at the direction of, or in association with a criminal street gang. Association with a gang member is not what is proscribed by this element. Second, the defendant's state of mind must be the specific intent to promote, further, or assist in criminal conduct by the gang. (*People v. Gardeley* (1996) 14 Cal.4th 605, 623; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1195.) Here, there was no substantial evidence to support a true finding on either of these two elements. That is because the prosecution evidence treated all Norteño subsets as fungible goods, without providing any substantial evidence that such treatment was warranted.

There was no substantial evidence of any: (1) "ongoing" association among the subsets; (2) that one gang had the requisite primary activities; or (3) that one gang engaged in a pattern of criminal gang activity. Petitioner will discuss each of the three elements, and the absence of substantial evidence to prove them.

First, the prosecution evidence was insufficient as a matter of law because it failed to provide substantial evidence of any collaborative effort among the various Norteño subsets, about which the gang expert testified. (*People v. Williams*, *supra,* 167 Cal.App.4th at p. 988.) Thus, the

prosecution evidence failed to prove the existence of any criminal street gang petitioner promoted by his offenses. Specifically, the reasonable inference from the evidence was that petitioner was a member of Detroit Boulevard Norteños. Detroit Boulevard gang paraphernalia was seized from petitioner's home (1RT 217), which was located within Detroit Boulevard territory. (1RT 217.) All total, Sample testified about seven different subsets.[1] Sample testified to two different predicate offenses: one committed by Varrio Gardenland Norteños (1RT 211-212), and another by a Varrio Centro Norteño (1RT 214). The Varrio Gardenland offense was committed against another subset member from Del Paso Heights. (1RT 212.)

Sample had no basis to believe petitioner knew anything about the perpetrators, or, by inference, their offenses. (1RT 255.) Petitioner and Chacon were from different subsets: Detroit Boulevard Norteños and Varrio Franklin Boulevard Norteños, respectively. (1RT 197, 207.) The only evidence about some overarching Norteño umbrella was elicited on cross-

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1 Detroit Boulevard (1CT 141 [petitioner's gang]), Del Paso Heights (1RT 212 [relating to a predicate offense]), Vario Gardenland (1RT 212 [predicate offense]), Varrio Centro (1RT 214 [predicate offense], 250 [location of charged offenses]; 1RT 250 [location of charged offenses]), Varrio Franklin Boulevard (1RT209 [Chacon's gang]), Varrio Diamonds (1RT 218 [another active crew]) and Southside Park (1RT 250 [location of charged offenses]).

examination when Sample explained the genesis of the Norteño gang in the California prison system back in the 1960's and 1970's. (1RT 234-235.) As this Court explained in *People v. Acuna* (2010) 182 Cal.App.4th 866, 875-876, the question decided in *Williams* was "whether, in proving a crime was committed for the benefit of a criminal street gang, the People are limited to evidence regarding activities of the local gang or may rely on the activities of a larger group of which the local gang is part." Justice Hull, writing for the panel concluded *Williams* held the prosecution may rely on the activities of the larger group, in petitioner's case the Norteños "only if the People establish collaborative activities *and* a collective organizational structure between the local gang and the larger gang. (*People v. Acuna, supra,* 182 Cal.App.4th at p. 876.)

Second, the prosecution evidence was insufficient because it failed to prove the nature of a gang's primary activities. Subdivisions (f) and (j) explain the differences between primary activities and a pattern of gang activity. (§ 186.22, subd. (f) and (g); see also, *In re Alexander L.* (2007) 149 Cal.App.4th 605, 610 [discussing difference between primary activities and pattern] and CALCRIM No. 1401.) While Sample testified the Norteños had primary activities of homicide, assault with firearm, shooting at inhabited dwellings and attempted murder, he never related those

activities to petitioner, his Detroit Boulevard gang (or to Chacon and his Varrio Franklin Boulevard gang). To prove a gang enhancement allegation, the prosecution must present "substantial evidence" that "the group has as one of its 'primary activities' the commission of one or more specified crimes." (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1221-1222.) Here, the evidence did not show this because of the mixing and matching among the various Norteño subsets.

Third, there was insufficient evidence of a pattern of gang activity for much the same reason: the conflating of multiple gangs into one. "[A] gang otherwise meeting the statutory definition of a criminal street gang' ... is considered a criminal street gang under the STEP Act only if its members 'individually or collectively engage in or have engaged in a pattern of criminal gang activity' [citation] by 'the commission, attempted commission, or solicitation of two or more' (italics added) of the statutorily enumerated offenses within the specified time frame [citation]." (*People v. Gardeley, supra*, (1996) 14 Cal.4th at p. 621.)

In *People v. Williams*, the defendant was alleged to be a member of the SmallTown Peckerwoods criminal street gang. (*People v. Williams, supra*, 167 Cal.App.4th 983, 987.) Like petitioner's case, the SmallTown Peckerwoods was a smaller, subset gang, and the prosecution evidence

showed defendant Williams belonged to that subset. (*Ibid.*) So, too, the prosecution evidence here was that petitioner belonged to Detroit Boulevard. Like petitioner's case, in *Williams* there was a larger gang, the Peckerwoods, and the Norteños here. (*People v. Williams, supra*, 167 Cal.App.4th 983, 987.) Like *Williams*, there was insufficient evidence of any connection or collaborative effort between the subset and the larger gang. (*Ibid.*)

Williams held that having a similar name - - SmallTown Perckerwoods and Peckerwoods - - did not permit the status or deeds of the larger group to be ascribed to the smaller group. (*People v. Williams, supra*, 167 Cal.App.4th at p. 987.) Thus, even referring to Detroit Boulevard or the other subsets by adding "Norteño" to the end of the subset name, did not transmute the gangs into one. *Williams* also held a common ideology between the gangs was insufficient. (*Id.* at p. 988.) Thus, Sample's testimony the Norteño subsets shared a common ideology of rivalry with Sureños (1RT 210) was likewise insufficient. Before treating a subgroup as a part of a whole when "determining whether a group constitutes a criminal street gang," more evidence than a name that contains the same word is required. (*People v. Williams, supra*, 167 Cal.App.4th at p. 988.)

The lack of commonality among the Norteño subsets was revealed in Sample's testimony. For example, Sample testified Chacon was a member of Varrio Franklin Boulevard Norteños. (1RT 197.) When the prosecutor later asked if Chacon was a member of Varrio Gardenland, Sample disagreed, correcting the prosecutor that Chacon's membership was with Varrio Gardenland Norteños. (1RT 209-210.) Similarly, the first predicate offense, to which Sample testified, was a homicide committed by Gardenland Norteños against a Del Paso Heights Norteño victim. (1RT 211-212.) Both Varrio Centro Norteños and Southside Park Norteños had competing claims to the location of the charged offenses. (1RT 250.) As in *Williams*, appending "Norteños" to the end of the subsets' names did not turn them into a single gang.

Finally, Sample's unsupported opinion did not constitute substantial evidence to prove the gang enhancement allegations. His opinion exemplifies typical gang expert testimony that "comes from highly unreliable sources . . ." providing "no credible data upon which the officer can base his opinion." (Gomez, *It is Not So Simply Because An Expert Says It Is So: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Texas Rule of Evidence 702* (2003) 34 St. Mary's L.J. 581, 605.) Sample was an officer with the

Sacramento Police Department. His job was to gather gang intelligence to be used by the prosecution. (1RT 195, 204-206.) Sample can be fairly considered a witness with prosecution bias. (Cf., *People v. Buffington* (2007) 152 Cal.App.4th 446, 454-455 [well paid expert routinely reaching favorable conclusion for one party supported inference expert was not entirely objective].)

The law requires that "any material that forms the basis of an expert's opinion must be reliable." (*People v. Carpenter* (1997) 15 Cal.4th 312, 404 [internal quotation marks omitted].) Here, Sample provided no substantial evidence linking the various subsets to the larger gang. Thus, his opinion about primary activities and pattern of gang activity did not, and could not, be substantial evidence. "[T]he law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*People v. Gardeley*, *supra,* 14 Cal.4th at p. 618 [internal quotation marks and citation omitted].)

Other than the nebulous generalizations by the expert that treated the various Norteño subsets as a single entity, there was no evidence of a single gang's relationship to petitioner's offenses. At some level, an offense linked in any way to a perpetrator with any gang connection, however

infinitesimal, would benefit all gangs by causing a generalized fear in the citizenry. (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1363-1364.) This is not, however, the conduct proscribed by statute. (Cf., *People v. Ramon* (2009) 175 Cal.App.4th 843, 853 [cannot transmute gang enhancement allegation into general intent crime].)

The prosecution failed to carry its burden by substantial evidence. The First Appellate District, Division Four, reversed the gang enhancement to a robbery charge because the gang expert's opinion failed to provide sufficient evidence. (*In re Daniel C., supra*, 195 Cal.App.4th at p. 1365.) The only evidence to support the gang enhancement was that the juvenile was associated with the Norteño gang, was in the company of two Norteño gang members when committing the crime, and all three wore red, a color associated with the Norteño gang. The juvenile took a large bottle of Jack Daniels from a supermarket. Like petitioner's crime, the offense was objectively for personal reasons. Here, Manzo, who was larger, heavier and older than petitioner (1RT 252-253), insulted petitioner and acted aggressively. (1RT 38-39.) As petitioner and Chacon were backing away (1RT 79 [Chacon pulled petitioner back]), Manzo baited them. (1RT 42, 46-47 [Santiago Aguilar reported Manzo asked petitioner why he was backing away].) In *In re Daniel C.*, the reason for the juvenile's offense

was to obtain and to drink alcohol personally. In petitioner's case, the reason for the confrontation was to confront, and defend against, Manzo who was aggressive toward petitioner and Chacon.

Based on the foregoing, the evidence was insufficient as a matter of law to prove any common Norteño gang's primary activities were those enumerated in 186.22, subdivision (e), a pattern of gang activity by a Norteño gang, or that the crimes were gang related, not personal. Therefore the true findings on the gang enhancements to both counts should have been reversed.

II

WHETHER REVERSAL OF COUNT 1, ATTEMPTED VOLUNTARY MANSLAUGHTER, WHICH IS A SPECIFIC INTENT CRIME, IS REQUIRED BECAUSE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO REQUEST INSTRUCTION THAT VOLUNTARY INTOXICATION MAY BE CONSIDERED IN DECIDING WHETHER PETITIONER HAD SPECIFIC INTENT, AND THEREFORE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL AND FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS WERE VIOLATED.

There was uncontested evidence that petitioner was drunk at the time of the incident. (1CT 173.) The evidence was petitioner was drunk on brandy. (1CT 173-174.) His behavior was consistent with intoxication, that is, uninhibited aggression typical of some people under the influence of alcohol. No evidence, and no reasonable inference from the evidence, supported a conclusion petitioner was not drunk. Penal Code section 22, subdivision (b), provides, "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent . . . ."

It is ineffective assistance of counsel for a lawyer to fail to request or offer appropriate defense instructions. In fact, even where the trial court has a sua sponte duty to correctly instruct the jury on basic principles of law

relevant to the issues raised by the evidence in a criminal case, defense counsel must be deemed negligent if he fails to remind the court of that duty and insist that instructions helpful to his client be given. (*United States v. Alferahin* (9th Cir. 2006) 433 F.3d 1148, 1161, n.6 [ineffective assistance of counsel established on direct appeal where counsel rejected jury instruction that would have supported one of the strongest aspects of the defendant's case].)

The prosecution's case relied heavily on petitioner's statement to law enforcement. A tape of the interview was played for jurors during the prosecution's case-in-chief. (1RT 202-204.) During petitioner's interrogation, he made admissions concerning the charged crimes, and also explained he was drunk at the time of the incident. (1CT 173.)

Voluntary intoxication can negate specific intent. (§ 22.) If counsel had requested instruction on voluntary intoxication, the trial court would have had to so instruct. (*People v. Castillo* (1997) 16 Cal.4th 1109, 1014; *People v. Saille* (1991) 54 Cal.3d 1103, 1120.) However, the trial court was not required to instruct on voluntary intoxication without a request. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 690.) Because there was evidence of intoxication, and because there could have been no reasonable, tactical decision not to request an instruction favorable to the defense, petitioner

received ineffective assistance of counsel and his Sixth Amendment right to counsel was violated. Further, this failure violated petitioner's constitutional right to the determination of every material issue presented by the evidence (*People v. White* (1980) 101 Cal.App.3d 161, 169), resulting in a violation of due process. (U.S. Const., 5th, 6th, & 14th Amends; Calif. Const., art. I, § 15; see *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L. Ed.2d 385]; *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) Accordingly, reversal of count 1 is warranted.

"To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) Generally, if the record on appeal fails to disclose why counsel failed to act in a particular way, the judgment is affirmed in order to allow the claim to be pursued in a habeas corpus proceeding in the superior court. That way, trial counsel may have an opportunity to explain, in the course of an evidentiary hearing, the

reasons for the complained of action. (*People v. Pope* (1979) 23 Cal.3d 412, 426; *In re Lower* (1979) 100 Cal.App.3d 144, 152-153.)

When there "simply could be no satisfactory explanation" (*People v. Pope, supra*, at p. 426) for counsel's action, an appellate court can grant relief if it finds that the defendant was prejudiced by counsel's constitutionally inadequate representation. Where there is no conceivable rational tactical explanation for an omission, nothing more is necessary to establish counsel's inadequacy. (In accord, *People v. Guizar* (1986) 180 Cal.App.3d 487, 492, fn. 3.) In this context, prejudice means that "the result of the proceeding was fundamentally unfair or unreliable . . .." (*Lockhart v. Fretwell* (1993) 506 U.S. 364 [122 L.Ed.2d 180, 189, 113 S.Ct. 838, 842].) Thus, when counsel's acts are "beyond any discernible trial strategy" relief may be granted on direct appeal. (Cf., *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438 [discussing defense counsel's ineffective closing argument].)

In *Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674, 104 S.Ct. 2052], the United States Supreme Court held that error made by defense counsel requires reversal when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.) This test is <u>not</u> outcome

determinative. *Strickland* does not require a showing "that counsel's deficient conduct more likely than not altered the outcome in the case." (*Id.* at p. 693.) The sole question is whether counsel's errors were "sufficient to undermine confidence in the outcome" of the trial. (*Id.* at p. 694.)

In re Cordero (1988) 46 Cal.3d 161, 189, held effective assistance includes a duty to prepare and request all instructions applicable to the case. It is inconceivable that in a case where petitioner faced (and received) such a lengthy sentence that counsel would not have sought every supportable instruction to the jury that would have benefitted petitioner and held the prosecution to its burden of proving every element.

Evidence of voluntary intoxication is relevant and admissible on the question whether a defendant actually formed specific intent. (§ 22, subd. (b).) A requested instruction must be given if the theory is supported by evidence that is sufficient to deserve consideration by the jury, namely, evidence that a reasonable jury could find to exist in regard to that theory. (See *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) The prosecution presented petitioner's statement to police and urged jurors to believe its contents. During the course of making this statement, petitioner told police he was drunk at the time of shooting. Indeed, petitioner was very specific. He said he was already drunk on E&J Brandy that he stole

from Foodmax, and he intended to steal more. (1CT 173-174.) There was no evidence contradicting petitioner's assertion of his intoxication. To the contrary, the reasonable inference from the evidence was that petitioner was drunk: he overreacted to aggression from Manzo, and when he shot, he fired six shots wildly. (See e.g., 2RT 348.)

In order for a jury to determine every material issue presented by the evidence (*People v. Abilez* (2007) 41 Cal.4th 472, 516), and to enable the jury to perform its function and to make a proper determination in conformity with applicable law (*People v. Sanchez* (1950) 35 Cal.2d 522, 528; the jury must be adequately instructed. The omission of instruction on voluntary intoxication failed to point out to the jury that voluntary intoxication could negate the specific intent required for attempted murder, or attempted voluntary manslaughter. That omission of this instruction prevented the jury from performing its function in a competent manner. Accordingly, petitioner was deprived due process of law.

There is a pattern jury instruction on voluntary intoxication. CALCRIM No. 3426 provides:

> You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted [or failed to do an act] with _____ <insert specific intent or mental state required,

e.g., "the intent to permanently deprive the owner of his or her property" or "knowledge that ..." or "the intent to do the act required"> .

A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

[Do not consider evidence of intoxication in deciding whether _____ <insert non-target offense> was a natural and probable consequence of _____ <insert target offense> .]

In connection with the charge of _____ <insert first charged offense requiring specific intent or mental state> the People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with _____ <insert specific intent or mental state required, e.g., "the intent to permanently deprive the owner of his or her property" or "knowledge that ..."> . If the People have not met this burden, you must find the defendant not guilty of _____ <insert first charged offense requiring specific intent or mental state> .

<Repeat this paragraph for each offense requiring specific intent or a specific mental state.>

You may not consider evidence of voluntary intoxication for any other purpose. [Voluntary intoxication is not a defense to

_____ <insert general intent offense[s]> .]

While voluntary intoxication was not an absolute defense to count 1, intoxication was a factor the jury could have considered in determining whether petitioner harbored specific intent. As such, it was analogous to a defense. In the plurality decision of *People v. Frierson* (1985) 39 Cal.3d 803, the Court held that even in a capital case, defense counsel cannot decline to present the defendant's only viable guilt defense for the purpose of saving it for the penalty phase. The defendant had wanted to present a defense of diminished capacity, but counsel declined to do so. Defense counsel brought the disagreement to the trial court's attention. The trial court ruled that defense counsel had the authority to decline to present a defense even though the defendant disagreed. (*Id.* at pp. 810-811.) *Frierson* expressly held that defense counsel does not have authority to refuse to present a defense at the guilt phase "in the face of a defendant's openly expressed desire to present a defense at that stage and despite the existence of some credible evidence to support the defense." (*Id.* at pp. 803, 812, 817-818.) This was not a choice of mere trial tactics (*id.* at p. 814), but rather an impermissible waiver of a defense. Here, there was evidence of petitioner's voluntary intoxication, which jurors could consider in determining whether petitioner specifically intended to murder, or to kill,

Manzo. Petitioner's statement about his drunkenness constituted credible evidence under *Frierson.*

The first prong of *Strickland* was established by evidence of petitioner's intoxication and the availability of a pattern instruction, favorable to the defense. Under *Frierson*, the failure to request instruction with CALCRIM No. 3426 had the effect of withdrawing a potentially meritorious defense, (*People v. Pope, supra*, 23 Cal.3d at p. 425) and violated due process (see *In re Saunders* (1970) 2 Cal.3d 1033, 1041-1043). As the Ninth Circuit Court of Appeals held, "[w]e have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately [make such an error]." (*United States v. Span* (9th Cir. 1996) 75 Fd.3d 1383, 1390.)

As to the second prong, it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's omission. (*Strickland, supra*, 466 U.S. at p. 687.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*In re Hardy* (2007) 41 Cal.4th 977, 1018 [internal quotes omitted].) This Court explained that "[t]his second part of the *Strickland* test is not one solely of outcome determination. Instead, the question is whether counsel's deficient performance renders the result of the trial

unreliable or the proceedings fundamentally unfair." (*In re Hardy, supra*, 41 Cal.4th at p. 1019.)

Woodford v. Visciotti (2002) 537 U.S. 19, 22 [123 S.Ct. 357, 154 L.Ed.2d 279], examined the meaning of "a probability sufficient to undermine confidence in the outcome." *Woodford v. Visciotti* explained that, while the defendant's burden is to establish a "'reasonable probability that, but for counsel's unprofessional errors, the result would have been different,' . . . [*Strickland*] specifically rejected the proposition that the defendant had to prove more likely than not that the outcome would be altered [citation]." (*Woodford v. Visciotti, supra*, at p. 22 [italics in original omitted].)

The *Strickland* standard is more rigorous than the *Watson* standard. (*People v. Watson* (1956) 46 Cal.2d 818.) *Strickland* falls somewhere between the *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]) and the *Watson* standard. (*People v. Howard* (1987) 190 Cal.App.3d 41, 47-48, fn. 4.) However, even the lesser *Watson* standard is a good deal more favorable to the defense than often thought. This Court "made clear that a 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*College Hospital, Inc. v. Superior Court* (1994) 8

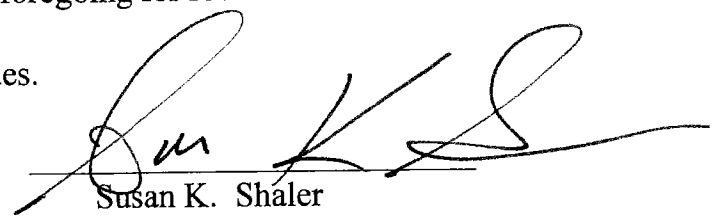
Cal.4th 704, 715 [italics in original omitted].) Thus, the correct measure of prejudice in this case is even more favorable to the defense.

The "touchstone" of the prejudice test in ineffective assistance of counsel claims is "a 'reasonable probability' of a different result." (*Kyles v. Whitley* (1995) 514 U.S. 419, 434 [115 S.Ct. 1555; 131 L.Ed.2d 490], applying *Strickland.*) The question is not whether the defendant would more likely than not have received a different verdict, but whether he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. (*Ibid.*) Applying this standard, one must conclude that there is "a reasonable chance" – much more than a mere abstract possibility – that trial counsel's failure could have contributed to the verdict. That is because jurors never knew they could consider the effect of petitioner's voluntary intoxication on his ability to form and harbor the specific intent element of attempted murder, or attempted voluntary manslaughter. Here, "counsel's deficient performance render[ed] the result of the trial unreliable [and] the proceedings fundamentally unfair" (*In re Hardy, supra*, 41 Cal.4th at p. 1019), denying petitioner his constitutional rights to effective assistance of counsel and due process. Accordingly, reversal of count 1 was required.

CONCLUSION

Petitioner respectfully submits the foregoing for review to exhaust state remedies arising from the above issues.

DATED: April 22, 2013



Susan K. Shaler
Attorney for Petitioner,
Zackery Prunty

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Filed 3/26/13

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ZACKERY PRUNTY, Defendant and Appellant.	C071065 (Super. Ct. No. 10F07981)

APPEAL from a judgment of the Superior Court of Sacramento County, Marjorie Koller, Judge. Affirmed.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputies Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of part I of the Discussion.

Confronted by a person he perceived to be a rival Sureño gang member, defenda Zackery Prunty, an admitted Norteño gang member, pulled a gun and fired six shots, striking and injuring his perceived rival and another person. A jury found defendant guilty of attempted voluntary manslaughter as a lesser included offense of attempted murder and of assault with a firearm and found true various enhancement allegations, including criminal street gang enhancement allegations under Penal Code[1] section 186.22.

On appeal, defendant contends there was insufficient evidence the Norteños qualify as a criminal street gang for purposes of the gang enhancements.[2] In support of his argument, defendant relies on *People v. Williams* (2008) 167 Cal.App.4th 983 for th proposition that where a larger group -- like the Norteños -- consists of different, smalle subsets, the larger group cannot be treated as a criminal street gang for purposes of section 186.22 unless there is evidence of collaborative activities or collective organizational structure between the subsets. As we explain, to the extent *Williams* can be understood to support this proposition, we disagree with *Williams* on this point because there is nothing in the statute that requires such evidence. Here, even if it coul be found that defendant was a member of a smaller subset of the Norteños affiliated wi his neighborhood, the evidence was sufficient for the jury to find that the Norteños as a whole qualify as a criminal street gang within the meaning of section 186.22, even

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1 All further section references are to the Penal Code unless otherwise noted.

2 Defendant also contends his trial attorney provided ineffective assistance of counsel because the attorney failed to request an instruction telling the jury it could consider defendant's voluntary intoxication in determining whether he had the specific intent necessary for attempted murder and attempted voluntary manslaughter. We address and reject that argument in the unpublished part of our opinion because we conclude that on the facts here, defense counsel could have reasonably determined that requesting an instruction on voluntary intoxication would have been fruitless.

without evidence of collaborative activities or collective organizational structure between the various Norteño subsets. Accordingly, we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

One evening in November 2010, Gustavo Manzo went to a restaurant in midtown Sacramento with his girlfriend and her little brothers to get something to eat. He was wearing an L.A. Dodgers cap. As they were walking up to the restaurant, two guys approached them and "started talking like mess." One of the guys, later identified as defendant, was wearing a red checkered jacket. He asked Manzo where Manzo was from and said, "fuck a Skrap, 916." Skrap is a derogatory term Norteño gang members use for Sureño gang members. In return, Manzo called defendant a "Buster" -- a derogatory term for a Norteño gang member. Defendant's companion, later identified as Emilio Chacon, tried to get defendant to leave, but defendant kept saying, "this is Norte, fuck a Skrap, 916." As defendant and Chacon eventually started backing away, Manzo took a couple of steps toward them. Defendant drew a gun and fired six times. Manzo tried to run but was struck in the buttocks with a bullet. One of Manzo's girlfriend's brothers was hit in the leg.

Defendant was charged with the attempted murder of Manzo and assault with a firearm on Manzo's girlfriend's brother. Various enhancements were also charged, including criminal street gang enhancements under section 186.22, subdivision (b)(1). At trial, the People's gang expert testified that both defendant and Chacon were Norteño gang members and that the shooting would benefit the Norteños by making them look stronger. Defendant's theory at trial was that he acted in self-defense.

The jury found defendant guilty of attempted voluntary manslaughter as a lesser included offense of attempted murder and of assault with a firearm and found the various enhancement allegations true. The trial court sentenced defendant to an aggregate prison term of 32 years. Defendant timely appealed.

DISCUSSION

I

Ineffective Assistance Of Counsel

Defendant contends his trial attorney provided ineffective assistance of counsel because there was evidence defendant was drunk when he committed the shooting but his attorney did not request an instruction on how the jury could consider defendant's voluntary intoxication in determining whether he had the specific intent required for attempted murder or attempted voluntary manslaughter. We find no merit in this argument.

"To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) When "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged," "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal." (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

Citing *In re Cordero* (1988) 46 Cal.3d 161, 189, defendant first asserts that "effective assistance includes a duty to prepare and request all instructions applicable to the case." In effect, defendant suggests that because a voluntary intoxication instruction would have been applicable here, his trial attorney rendered ineffective assistance by failing to prepare and request such an instruction. But *Cordero* held no such thing. What the court in *Cordero* held was that "[a]dequate representation requires an attorney to research ' "carefully all defenses of . . . law that may be available to the defendant," ' " and "counsel's duty 'includes careful preparation of and request for all instructions which in his judgment are necessary to explain all of the legal theories upon which his defense

rests.' " (*Ibid.*) Contrary to defendant's suggestion, ineffective assistance of counsel cannot be proven under *Cordero* merely by showing that trial counsel failed to prepare and request an instruction that was potentially applicable to the case.

Defendant next cites *People v. Frierson* (1985) 39 Cal.3d 803 for the principle that "defense counsel cannot decline to present the defendant's only viable guilt defense for the purpose of saving it for the penalty phase." Like *Cordero*, however, defendant misreads *Frierson* and misapplies it to this case. The court in *Frierson* made clear that "[t]he principal issue presented [there wa]s whether a defense counsel's traditional power to control the conduct of a case includes the authority to withhold the presentation of *any* defense at the guilt/special circumstance stage of a capital case, *in the face of a defendant's openly expressed desire to present a defense at that stage* and despite the existence of some credible evidence to support the defense." (*Id.* at p. 812, italics added.) Indeed, the court "emphasize[d] that [its] holding rest[ed] on the fact that the record in th[e] case expressly reflect[ed] a conflict between defendant and counsel over whether a defense was to be presented at the guilt/special circumstance stage." (*Id.* at p. 818, fn. 8.) No such thing happened here. Trial counsel did, in fact, present a defense for defendant -- self-defense -- and defendant points to no evidence that he openly expressed a desire to take a different tack by relying on voluntary intoxication instead of (or in addition to) self-defense. *Frierson* simply has no application here.

As we have indicated, as long as trial counsel could have had *some* satisfactory explanation for the conduct complained of, a claim of ineffective assistance must be rejected on direct appeal. (*People v. Pope*, *supra*, 23 Cal.3d at p. 426.) On the record here, we conclude that defendant's trial attorney could have reasonably determined that requesting an instruction on voluntary intoxication would have been fruitless. Accordingly, the failure to request such an instruction did not amount to ineffective assistance of counsel.

The principles of law involved here are straightforward. "Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act." (Pen. Code, § 29.4, subd. (a) [formerly § 22].) "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (*Id.*, subd. (b).) However, "[a] defendant is entitled to such an instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' " (*People v. Williams* (1997) 16 Cal.4th 635, 677.)

In *Williams*, the defendant requested an instruction on voluntary intoxication as a defense to homicide based solely on a witness's testimony that the defendant was " 'probably spaced out' on the morning of the killings." (*People v. Williams*, *supra*, 16 Cal.4th at p. 677.) The trial court refused to give the requested instruction. (*Ibid.*) On review, the defendant contended the trial court erred in refusing to give the instruction, and he sought "to bolster that argument by pointing to comments he had made in the recorded interview with police that around the time of the killings he was 'doped up' and 'smokin' pretty tough then.' " (*Ibid.*) The Supreme Court rejected the defendant's argument, stating as follows: "Even if we consider all three of these statements, there was no error. Assuming this scant evidence of defendant's voluntary intoxication would qualify as 'substantial,' there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent." (*Id.* at pp. 677-678.)

The same conclusion applies here. As in *Williams*, the evidence of intoxication here was scant. In fact, the only such evidence was defendant's statement to police that he was "drunk already" on brandy, from a bottle he had stolen earlier in the evening in South Sacramento and had drunk with a couple of other people, when he headed

downtown with Chacon to steal another bottle. There was no evidence of exactly how much alcohol defendant had actually consumed, over what period he had consumed it, or just how drunk he was at the time of the shooting. Furthermore, just as in *Williams*, there was no evidence at all that defendant's voluntary intoxication had any effect on his ability to formulate intent. To the contrary, by his own admission in his statement to police, despite his consumption of some unknown portion of the original bottle of brandy, defendant nonetheless managed to formulate the intent to "go steal [another] bottle from Safeway." If he could form the intent to steal another bottle despite his earlier alcohol consumption, there would have been no rational basis for the jury to conclude that he could not also have formed the intent to kill required for attempted murder or attempted voluntary manslaughter. Under these circumstances, defendant's trial attorney could have reasonably determined that the trial court would have refused to give a voluntary intoxication instruction, and that the jury would not have been persuaded by such an instruction in any event. Accordingly, the failure to request such an instruction did not amount to ineffective assistance of counsel.

II

Evidence Of A Criminal Street Gang

Subdivision (b) of section 186.22 provides an additional term of imprisonment for "any person who is convicted of a felony committed 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." For purposes of this enhancement, a " 'criminal street gang' " is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [the statute], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) A " 'pattern of criminal gang activity' " is "the

commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [certain] offenses [identified in the statute], provided at least one of these offenses occurred after the effective date of [the law] and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (*Id.*, subd. (e).)

The People sought to prove the gang enhancement allegations here by showing "that there is a criminal street gang known as the Norteños , who have three or more members, who have a common name, sign or identifying symbol, and whose primary criminal activities are the commission of [certain] crimes." On appeal, however, defendant contends there was insufficient evidence to prove that the Norteños *as a whole* constitute a criminal street gang within the meaning of section 186.22. Defendant argues that this is so "because [the People] failed to provide substantial evidence of any collaborative effort among the various Norteño subsets" and the People "treated all Norteño subsets as fungible goods, without providing any substantial evidence that such treatment was warranted." Stated another way, defendant contends the People wrongfully "conflat[ed] multiple gangs into one."

The gang evidence here was substantially as follows: Detective John Sample of the Sacramento Police Department testified as an expert in the area of Hispanic street gangs, including their culture. When asked, "who are the Nortenos?" Detective Sample responded that "[t]hey're a Hispanic street gang active in Sacramento and throughout California." There are approximately 1,500 local members of the Norteños. The Norteños identify with the north and use the letter N as a common identifying symbol and also the number 14 because N is the 14th letter of the alphabet. The color typically associated with Norteños is red. They are affiliated with a prison gang known as Nuestra Familia. Norteños are predominant in Northern California.

The primary enemies of the Norteños are Sureño gang members. Sureños identify themselves with the south, the color blue, and the letters S and M and the number 13.[3] They are predominant in Southern California.

The Norteños do not have a particular "turf" in the area but are located all over Sacramento. There are a lot of subsets based on different neighborhoods. For example, Chacon was affiliated with Varrio Franklin Boulevard, a local set of Norteños in South Sacramento. Chacon had a tattoo of the San Francisco 49ers emblem, which can be gang-related because Norteño gang members used the letters "SF" to refer to "Skrap free" or "Sureno free." Chacon also had tattoos on the interiors of his fingers, a one on the left hand and a four on the right side, consistent with the number 14.

In an interview with Detective Sample, defendant identified himself as a Northerner from Detroit Boulevard. He claimed Detroit Boulevard as his set. Defendant started claiming Norte because his mother's side of the family claims Norte.[4]

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[3] Sureños identify with the number 13 and the letter M (the 13th letter of the alphabet) because they are connected to the Mexican Mafia, which is a Hispanic prison gang.

[4] It is not even clear from the evidence whether a discernible subset of Norteños based in defendant's Detroit Boulevard neighborhood actually exists. During an interview, Detective Sample asked defendant if he was a "Northerner." Defendant responded, "Yeah." When Detective Sample asked "from where?" defendant answered, "Detroit Boulevard." Detective Sample responded, "Now is that a set down there cause I haven't heard -- or is it or do you just claim Norte?" Defendant replied, "Yeah. That's my set. But everybody else from the D's is Bloods." Detective Sample said, "[S]o you're a Norte and you're just claiming your neighborhood?" Defendant responded, "Boulevard yeah." When Detective Sample asked, "So nobody else claims Detroit Boulevard?" defendant answered, "Mm-mm. Well some other people do but not like me. They ain't putting down on me." At trial, Detective Sample testified, "I think he was saying they're not putting it down like me," which the detective understood to mean "that they're active within the gang."

From this evidence, it is not clear that a discernible subset of Norteños based in defendant's Detroit Boulevard neighborhood actually exists. Assuming for the sake of

Detective Sample testified that the primary activities of the Norteños in the Sacramento area include unlawful homicide, attempted murder, assault with a firearm, shooting into an inhabited dwelling, shooting at an occupied motor vehicle, and weapons violations. Detective Sample also testified that Norteños in the Sacramento area engage in a pattern of criminal gang activity. For one of the predicate crimes, Detective Sample testified that members of a subset of Norteños in North Sacramento, the Varrio Gardenland Norteños, were convicted of various charges, including murder and attempted murder, for an incident in August 2007 arising out of a conflict with a Del Paso Heights Norteño. For the other predicate crime, Detective Sample testified that in July 2010 members of the Varrio Centro Norteños shot at a drop-out Norteño gang member.

The testimony offered by Detective Sample to establish the Norteños as a criminal street gang within the meaning of section 186.22 was remarkably similar to evidence offered for the same purpose in *In re Jose P.* (2003) 106 Cal.App.4th 458. There, "Officer Burnett testified that the Norteño gang was an ongoing association of around 600 persons, identified by the color red and the number 14, and that it had as one of its primary activities the commission of the criminal acts listed in section 186.22. She detailed the gang's pattern of criminal activity by describing [certain] firearms offenses and [a] convenience store robbery." (*Jose P.*, at p. 467.) On appeal, the appellate court concluded "[t]his [wa]s sufficient evidence to establish that Norteño was a criminal street gang." (*Ibid.*)

In *People v. Ortega* (2006) 145 Cal.App.4th 1344, much like defendant here, the defendant argued "there was insufficient evidence to sustain a finding of the existence of a criminal street gang because the gang to which the prosecution's expert testified was

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argument that there was sufficient evidence for the jury to find the existence of such a subset, we nonetheless conclude for the reasons stated hereafter that the jury still could find that the Norteños as a whole constituted a criminal street gang for purposes of section 186.22.

the Norteño gang, and the term 'Norteño' is merely the geographical identity of a number of local gangs with similar characteristics, but is not itself an entity." (*Id.* at p. 1355.) This court rejected that argument, explaining as follows: "Detective Aurich, the prosecution's gang expert, testified there were thousands of documented Norteño gang members in Sacramento. He testified some of their commonly used symbols are the letter N, the Roman numeral IV, 'catorce' (Spanish for 14), and the color red. He testified some of their primary activities are the commission of murder, assault, witness intimidation, car-jacking, robbery, extortion, and dope dealing. Detective Aurich also testified regarding the facts of two crime reports of offenses committed by Norteños. One involved a shooting into a crowd of rival gangsters. The other involved a Norteño gang member shooting someone at a gas station who was wearing Sureño colors. [¶] Evidence was thus presented, through the prosecution's gang expert, to establish every element of the existence of the Norteños as a criminal street gang." (*Ibid.*)

Virtually ignoring *Jose P.* and *Ortega*, defendant instead relies primarily on *People v. Williams*, *supra*, 167 Cal.App.4th at page 983 in arguing that the evidence that the Norteños qualify as a criminal street gang was insufficient here. In *Williams*, the victim "was stabbed to death because she ostensibly caused a conflict between two members of a group of young men calling themselves the Small Town Peckerwoods." (*Id.* at p. 985.) A jury found the defendant guilty of murder with a criminal street gang enhancement and of active participation in a criminal street gang. (*Id.* at pp. 983, 985.) On appeal, he challenged the sufficiency of the evidence underlying the gang enhancement and the gang crime -- specifically, he asserted "there was insufficient evidence of the primary activities element that had to be proven in order to establish the Small Town Peckerwoods (STP) constituted a criminal street gang." (*Id.* at p. 986.) The appellate court "conclude[d] the evidence was sufficient to establish the Small Town Peckerwoods were a criminal street gang, but [the court could not] determine whether jurors based their determination in this regard solely on evidence concerning that group

or also erroneously considered evidence related to some larger Peckerwood organization." (*Id.* at p. 985.) Accordingly, the court reversed the gang enhancement finding and the conviction for the gang crime. (*Ibid.*)

In explaining its conclusion, the appellate court in *Williams* noted that "[e]vidence of gang activity and culture need not necessarily be specific to a particular local street gang as opposed to the larger organization," but the court concluded that "having a similar name is [not], of itself, sufficient to permit the status or deeds of the larger group to be ascribed to the small group." (*People v. Williams, supra*, 167 Cal.App.4th at p. 987.) The expert in the case had "testified that the Peckerwoods are a criminal street gang, as defined by the Penal Code, and that smaller groups, such as the Small Town Peckerwoods, are all factions of the Peckerwood organization." (*Id.* at p. 988.) As far as the record showed, however, the expert's conclusion "appear[ed] to have been based on commonality of name and ideology, rather than concerted activity or organizational structure." (*Ibid.*) The court concluded as follows: "In our view, something more than a shared ideology of philosophy, or a name that contains the same word, must be shown before multiple units can be treated as a whole when determining whether a group constitutes a criminal street gang. Instead, some sort of collaborative activities or collective organizational structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization. There was no such showing here." (*Ibid.*)

Relying on *Williams*, defendant contends there was no substantial evidence here of any connection between the various Norteño subsets to which Detective Sample testified. Defendant argues further that the People's evidence "contradicted the theory of collaboration among the subset gangs" by showing "the subset Norteño gangs were often in fierce rivalry with one another -- not working together for any common Norteño purpose." According to defendant, the evidence here was insufficient under *Williams* because "[t]here was no substantial evidence these various subsets participated in

collaborative efforts, or had any organization, structure or communication that linked the subsets."

To the extent the appellate court in *Williams* required that "some sort of collaborative activities or collective organizational structure must be inferable from the evidence" before "various groups reasonably can be viewed as parts of the same overall organization" for purposes of determining the existence of a criminal street gang under section 186.22 (*People v. Williams, supra*, 167 Cal.App.4th at p. 988), we believe the court erred in adding an element to the statute that the Legislature did not put there. (See Code Civ. Proc., § 1858 ["In the construction of a statute . . . , the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert was has been omitted"].) The statute requires an "ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [the statute], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) Whether such an organization, association, or group exists does not necessarily depend on proof of collaborative activities or collective organizational structure between various subsets that identify themselves as part of a larger group. Where, as here, smaller neighborhood subsets all claim a common name (Norteño) and common identifying signs and symbols (the color red, the letter N, the number 14), *and* share a common enemy (the Sureños) (even though sometimes they fight amongst themselves too), it is for the finder of fact to decide whether the larger group, as opposed to each smaller subset, has been shown to constitute a criminal street gang. Certainly proof of collaborative activities or collective organizational structure between various subsets can support a finding that the larger group satisfies the statutory requirements necessary to be a criminal street gang, but we find nothing in section 186.22 *requiring* proof of such activities or structure. Just as in *Jose P.* and *Ortega*, where

evidence that did not include proof of collaborative activities or collective organizational structure between various subsets was found sufficient to support the finding that the larger group (the Norteños) constituted a criminal street gang, so the evidence here was sufficient for that purpose.

The evidence here showed that defendant identified himself as a Norteño -- albeit a Norteño associated with the Detroit Boulevard neighborhood. The evidence further showed that those like defendant who claim to be Norteños identify with the north and the color red and use the letter N and the number 14 as common identifying symbols. The evidence showed that those who identify themselves as Norteños also share a common enemy -- the Sureños -- who identify with the south, the color blue, the letters M and S, and the number 13. The evidence also showed that the primary activities of the Norteños in the Sacramento area include various qualifying crimes and that Norteños in the Sacramento area engage in a pattern of criminal gang activity. We believe nothing more was required to prove the existence of a criminal street gang under section 186.22. From this evidence, the jury could have reasonably found, at the very least, that the Norteños in the Sacramento area constitute an "informal," "ongoing organization, association, or group of three or more persons" that has "a common name [and] common identifying sign[s] or symbol[s]" and has "as one of its primary activities the commission of one or more of the criminal acts enumerated in [section 186.22]" and "whose members individually or collectively . . . have engaged in a pattern of criminal gang activity."

To the extent defendant argues that the crimes he committed were "objectively for personal reasons" rather than for the benefit of, at the direction of, or in association with a criminal street gang, and to the extent that argument is based on his assertion that "there was no evidence of a single gang's relationship to [his] offenses" because the People failed to provide sufficient evidence that the Norteños as a whole constituted a criminal street gang, our discussion above disposes of this argument. There was sufficient evidence that the Norteños in the Sacramento area constitute a criminal street gang within

the meaning of section 186.22, notwithstanding the evidence that there are different subsets of the gang associated with various neighborhoods throughout the area. Furthermore, there was more than enough evidence that defendant committed the shooting because he found himself threatened in a confrontation with a person he perceived to be a rival Sureño gang member. Under the facts presented here, it was more than reasonable for the jury to conclude that defendant committed the shooting for the benefit of or in association with the Norteño gang.

DISPOSITION

The judgment is affirmed.

ROBIE, Acting P. J.

We concur:

BUTZ, J.

DUARTE, J.

CERTIFICATE OF WORD COUNT APPELLATE COUNSEL

I, SUSAN K. SHALER, appointed counsel for petitioner, hereby certify that I prepared the foregoing petition on behalf of my client. I calculated the word count for the petition in the word-processing program Corel WordPerfect X4. The word count for the petition is 5,897, including footnotes, but not including the cover, tables or attachments. The petition therefore complies with the rule, which limits the word count to 8,400. I certify that I prepared this brief in the word-processing program Corel WordPerfect X4 and this is the word count WordPerfect generated for this petition.

Dated: April 22, 2013

SUSAN K. SHALER

ATTACHMENT B

PROOF OF SERVICE
STATE OF CALIFORNIA, SAN DIEGO COUNTY

I reside in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action; My business address is: Susan K. Shaler Professional Law Corp., 991 Lomas Santa Fe Dr., Ste C, #112, Solana Beach, CA 92075

On April 23, 2013, I served the foregoing document described as:

APPELLANT'S PETITION FOR REVIEW

on all parties to this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Clerk, California Supreme Court
350 McAllister St
San Francisco, CA 94102

Clerk, Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

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I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at Solana Beach, California.

Executed on April 23, 2013, Solana Beach, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

SUSAN K. SHALER