

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

VICTOR WARE, et al.,

Defendant and Appellant.

Case No. S263923

Fourth Appellate District, Division One, Case No. D072515
San Diego County Superior Court, Case No. SCD255884
The Honorable Leo Valentine, Jr., Judge

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
Introduction.....	5
Issue Presented.....	5
Statement of the Case	5
A. Procedural Background	5
B. Relevant Facts	7
Reasons for Denial of Petition.....	16
Argument.....	16
I. Petitioner Has Not Established a Valid Ground for This Court to Grant Review	16
II. The Court of Appeal Correctly Found That Sufficient Evidence Supports the Conspiracy to Commit Murder Convictions	17
Conclusion	25
Certificate of Compliance	26

TABLE OF AUTHORITIES

	Page
CASES	
<i>In re Hardy</i> (2007) 41 Cal.4th 977.....	19
<i>Jackson v. Virginia</i> (1979) 443 U.S. 307.....	18
<i>People v. Chavez</i> (1962) 208 Cal.App.2d 248	19
<i>People v. Guerra</i> (2006) 37 Cal.4th 1067.....	18
<i>People v. Kraft</i> (2000) 23 Cal.4th 978.....	18
<i>People v. Lowery</i> (1988) 200 Cal.App.3d 1207	20
<i>People v. Maciel</i> (2013) 57 Cal.4th 482.....	19
<i>People v. Manson</i> (1976) 61 Cal.App.3d 102	21
<i>People v. Means</i> (1960) 179 Cal.App.2d 72	19
<i>People v. Morante</i> (1999) 20 Cal.4th 403.....	18
<i>People v. Rayford</i> (1994) 9 Cal.4th 1.....	18
<i>People v. Rodriguez</i> (1999) 20 Cal.4th 1.....	20

TABLE OF AUTHORITIES **(continued)**

	Page
<i>People v. Smith</i> (2014) 60 Cal.4th 603.....	24
<i>People v. Story</i> (2009) 45 Cal.4th 1282.....	20
<i>People v. Superior Court (Quinteros)</i> (1993) 13 Cal.App.4th 12	21
<i>People v. Tran</i> (1996) 47 Cal.App.4th 759	21
<i>People v. Ware, et. al.</i> (2020) 52 Cal.App.5th 919	<i>passim</i>
<i>People v. Zamudio</i> (2008) 43 Cal.4th 327.....	18

STATUTES

Penal Code

§ 182, subd. (a)	6
§ 182, subd. (a)(1).....	18
§ 182.5.....	6
§ 186.22, subd. (b)(1).....	6
§ 187.....	6
§ 187, subd. (a)	18

CONSTITUTIONAL PROVISIONS

First Amendment.....	21
----------------------	----

COURT RULES

California Rules of Court

rule 8.500(b)	16, 17
rule 8.500(b)(1).....	16

INTRODUCTION

Petitioner seeks review of the sufficiency of the evidence of his conspiracy to commit murder conviction, claiming it is based solely on his gang association and “generalized” social media. Review is unwarranted because his sufficiency of evidence claim not only fails to raise any issue of unsettled or conflicted law but also turns on a misapplication of well-settled law, that is, to review the evidence in light most favorable to the judgment. Under the correct the standard, the Court of Appeal properly found substantial evidence supported his conviction given petitioner’s gang was in war with a rival gang and petitioner was an active leader in the “Hit Squad” responsible for killing their rivals.

ISSUE PRESENTED

“Whether a defendant may be convicted of conspiracy to commit murder where it was undisputed that the conviction was based entirely on circumstantial evidence of a conspiracy and his only connection to the coconspirators is common gang affiliation and social media posts which fail to prove his involvement in the conspiracy.” (Order Requesting Answer to Petn. for Review.)

STATEMENT OF THE CASE

A. Procedural Background

Between approximately June 2011 and April 2014, San Diego County 5/9 Brim criminal street gang members, including petitioner Nicholas Hoskins, conspired to kill several individuals who were members of rival Crip gangs. This “gang war” was sparked by the April 11, 2011, murder of 5/9 Brim member

Dereck Peppers, aka Fat Ocean, by rival Crip gang members. (19 RT 2576; 28 RT 4218-4219; 34 RT 4790-4792; 35 RT 4943-4944.) During this time frame, a subset of the 5/9 Brim gang, collectively known as Hit Squad, committed several shootings, murders and attempted murders against members or suspected members of two of their rival gangs, the Neighborhood Crip and West Coast Crip gangs. (19 RT 2557-2558, 2576; 28 RT 4218-4219; 34 RT 4790-4792, 4800; 35 RT 4943-4944.) As set forth below, petitioner was not only a high level member of the Hit Squad and repeatedly found in possession or close proximity to firearms but was also tied to the shooting sprees committed by the Hit Squad by social media posts touting the shootings and by virtue of his presence in a vehicle or photos at the scene of some of the shootings. (28 RT 4212-4213, 4216, 4228-4231; 35 RT 4996-4998; 36 RT 5100-5101.)

The San Diego County District Attorneys' Office charged petitioner, along with 17 fellow gang members, for crimes arising out of their gang war.¹ A jury found petitioner guilty of conspiracy to commit murder (count one; Pen. Code, §§ 182, subd. (a), 187) with a true finding on a criminal street gang enhancement (Pen. Code, § 186.22, subd. (b)(1)), and criminal street gang conspiracy (count seven; Pen. Code, § 182.5). (7 CT 1762–1767.) He is serving 25 years to life in prison. (7 CT 1810-1813, 1900-1902.)

¹ The complaint originally charged 18 defendants; however, the cases of all but three defendants were resolved before trial.

Petitioner appealed on numerous grounds including the ground raised in the instant petition, that insufficient evidence supported his convictions for conspiracy to commit murder and criminal street gang conspiracy.

On July 21, 2020, in a partially published opinion, the Court of Appeal affirmed the judgment in part, reversed in part, and remanded for resentencing.² As relevant here, the Court of Appeal affirmed petitioner's conviction for conspiracy to commit murder, but reversed his conviction criminal street gang conspiracy, finding that there was insufficient evidence that a felony was committed or attempted to be committed, as required by the statute.

On September 14, 2020, petitioner filed the instant petition for review and, on October 19, 2020, this Court invited an answer.

B. Relevant Facts³

5/9 Brim is a criminal street gang in San Diego that has between 200 and 220 members at any given time. (19 RT 2551, 2558, 2574–2576; 28 RT 4213; 35 RT 4983, 4993, 4996–4998.) RT 2551.) Petitioner aka Bick Nick, Mikey 3, or Baby

² The opinion was modified on July 29, and August 12, 2020, without changing the judgment. Orders certifying the opinion for partial publication were entered on July 31, and August 12, 2020.

³ Because the nature and extent of criminal activity by petitioner and his co-conspirators in this matter is quite lengthy, the factual background provided here focuses on the facts relevant to petitioner. The full factual background is set forth in *People v. Ware, et. al.* (2020) 52 Cal.App.5th 919, 927-937.

Mikey, is a documented 5/9 Brim gang member who had a “B” tattooed on his chest, like the Superman emblem, to show his support. (28 RT 4213; 35 RT 4996–4998.) Petitioner is also member of a subset of 5/9 Brim referred to as the Hit Squad. (19 RT 2627; 34 RT 4814–4815.) In gang terms, a “hit” means to kill someone. (38 RT 5561.)

During the time frame of the gang war, petitioner was actively involved with gang. After a June 14, 2011 shooting, officers searched the garage of a 5/9 Brim member and found 5/9 Brim gang graffiti, including the number “311” which commonly referred to “CK” or “Crip Killer,” because “c” is the third letter of the alphabet, and “k” is the eleventh letter. (17 RT 2080–2081, 2163; 18 RT 2465; 19 RT 2588–2590, 2638; 35 RT 4834–4844.) Several gang monikers were written on the walls of the garage, including petitioner’s (Baby Black Mikey). (19 RT 2589; 35 RT 4835–4844.)

On January 3, 2012, at approximately 2:00 p.m., shots were fired at a house on Clay Avenue, which is in West Coast Crip gang territory. (20 RT 2679–2680, 2686–2687, 2692–2698; 35 RT 4844–4845.) Petitioner later posted a photograph on his Facebook account of fellow gang member Hurst standing on the same corner as the shooter in the January 3rd shooting. (35 RT 4932–4934.)

On February 19, 2012, officers conducted a vehicle stop of a vehicle driven by Edward Laplanche, a 5/9 Brim gang member who was on probation. (20 RT 2722, 2808–2809.) Petitioner was the front seat passenger and, after he appeared to be very

nervous, officers searched petitioner and found a loaded firearm in his waistband. (20 RT 2748, 2809–2811.) Officers later searched petitioner’s cell phone and found several gang related photographs showing petitioner throwing up 5/9 Brim gang signs. In many of the photographs, petitioner was with other 5/9 Brim gang members, including one with Simpson⁴ throwing up 5/9 Brim gang signs. (20 RT 2722–2730.)

During a recorded conversation between petitioner and Laplanche while they were in the back of the patrol car, petitioner said he would take the rap for possession of the firearm. (20 RT 2730–2731, 2733; 1 Supp. CT 31; 20 RT 2733.) Petitioner also said that they found the “gig” on him, which is a street term for a firearm or handgun, and that he should have left it at the house of a fellow gang member, Timothy Hurst. (1 Supp. CT 34; 20 RT 2741, 2749.) The two gang members talked about whether petitioner would serve time in jail, and Laplanche said he would have access to money for bail. (20 RT 2736, 2738–2740; 1 Supp. CT 31–34.) Petitioner said that he knew he was going to get locked up sooner or later—“I knew it was coming.” (1 Supp. CT 39.)

⁴ Simpson was a fellow 5/9 Brim gang member and one of petitioner’s co-defendants at trial. Simpson was a shot-caller in the gang who procured guns for other gang members, and was involved in at least one of the shootings. (17 RT 2052–2057, 2060–2066, 2167, 2187–2189, 2195–2196, 2211–2212, 2225–2229, 2239, 2243; 18 RT 2344–2349, 2423, 2430–2432, 2434; 19 RT 2487–2490, 2571–2573; 24 RT 3480–3481; 35 RT 4969–4970.)

Petitioner also said that he would not be in the system until he was booked, and he told Laplanche to put him on Facebook. (1 Supp. CT 35–36; 20 RT 2742.) The gang expert said that when a gang member was arrested, he would reach out on Facebook so everyone on the streets would know he was out of play, and also so fellow gang members would visit or put money on his books—gang members used Facebook to get the word out. (20 RT 2742–2743.)

On April 9, 2012, five and six days after two shootings by fellow 5/9 Brim members in rival gang territory, petitioner posted to his Facebook account, “Son was Born healthy, cKrossys got Hit, all I need is some Dro and my day is set lol #HappyEaster!” One of the victims of the shooting would have been considered a “crossy” or rival of 5/9 Brim. (35 RT 5006–5007; 37 RT 5392–5393.)

On May 2, 2012, a girlfriend of fellow 5/9 Brim member Simpson, was detained by police. (21 RT 2999–3000, 3011–3012, 3018; 24 RT 3472–3473, 3481, 3493; 34 RT 4730.) During a subsequent interview, she confirmed that “Baby Mikey” was petitioner, who also went by Bick Nick, and he was part of Tiny Hit Squad. (2 Supp. CT 255; 34 RT 4734.) In some of her Instagram photographs, which were recovered from her phone, she was with Simpson and one of the photographs was the same photograph that was found in petitioner’s cell phone. (35 RT 4881–4882.)

On May 10, 2012, the night before another killing by 5/9 Brim gang members, petitioner posted on Facebook, “I’m making

a lot of stupid decisions but IDAF. Deal with the consequences when they get there. #YOBO⁵.” (35 RT 5012.)

On August 27, 2013, at approximately 5:00 p.m., Byreese Taylor, a Lincoln Park gang member, was walking home in an area that was a hub of West Coast Crips’ territory. (21 RT 2948–2949; 22 RT 3223–3226; 24 RT 3451–3452, 3457–3458, 3462–3463; 27 RT 4008; 35 RT 4926–4927; 1 Supp. CT 82–83.) As he was walking, a white minivan eventually determined to be registered to 5/9 Brim gang member Timothy Hurst approached and a passenger leaned out of the window and began firing in Taylor’s direction.⁶ (21 RT 2949–2952, 2960; 22 RT 3128–3130, 3142, 3232–3247, 3262–3263; 24 RT 3454; 34 RT 4767; 1 Supp. CT 47, 51, 54–55, 78, 80.)

Hurst’s cell phone had contact information for petitioner.⁷ (22 RT 3248, 3259.) Petitioner’s DNA was found inside the passenger side of the minivan. (24 RT 3587–3591.) The firearm used in this shooting was later recovered from other 5/9 Brim gang members, and was used in two other gang shootings. (34 RT 4768.)

About six months before the August 2013 shooting, petitioner had posted on Facebook a photograph of Hurst in front

⁵ The gang expert testified that “YOBO” was a take-off from “YOLO,” and means you only Brim once. (35 RT 5012.)

⁶ Hurst was arrested for, and later pled guilty to, a crime relating to the August 27th shooting. (22 RT 3244–3245; 35 RT 4928.)

⁷ Petitioner’s grandmother lived next door to Hurst’s grandmother. (22 RT 3258.)

of Memorial Recreation Center, a West Coast Crips hangout about a mile from the August 27th shooting. In the photograph, Hurst was tossing up 5/9 Brim and Crip killer hand signs. (35 RT 4929.) On the morning of August 27, 2013, Paris posted on Instagram two photographs of petitioner and Paris in West Coast Crips territory, also about a mile or so from the shooting location, throwing up gang signs challenging and promoting the killing of Crips. In one of the photographs, petitioner and Paris were making a “W” for West Coast with one hand, and flipping it off with their other hand. (22 RT 3249–3253, 3264–3265; 35 RT 5020–5022.)

Petitioner subsequently posted a threat to Hurst on Facebook on February 27, 2014, “I switch up on bitckh (N word), fast. I love my bros, but I’m truer to the code shit. I turn on TB if he does some gay shit and vice versa. Nothing personal. #one Brims.” (34 RT 4793.) The gang expert explained that petitioner was accusing Timothy Hurst aka Tim Brim (TB) of snitching, and was saying that if somebody snitched on petitioner, he would go after them because he was truer to the code of no snitching. (34 RT 4793–4794.)

On December 16, 2013, the day after another 5/9 Brim shooting in the heart of West Coast Crip gang territory, petitioner posted on Facebook, “I’m tired of grinding, fighting, running, jail, death, stress, betrayal, and everything else this game has to offer. But it’s what we signed up for. Right?” (22 RT 3284, 3286, 3324–3328; 27 RT 3976, 4007–4008; 32 RT 3284–3285, 3324–3325; 35 RT 4952, 4968, 4985, 5006.)

On March 2, 2014, shortly after shots were fired at Carlton Blue, a West Coast Crips affiliate, and his girlfriend, petitioner, who was Facebook friends with Carlton Blue, posted on Facebook, “That’s some gay shit. Not gangster. You all get back. Tagging in the set. That’s all your dead homie’s worth. That’s why I call y’all crabs.” (25 RT 3677–3689, 3709–3711, 3713–3717, 3720–3730; 35 RT 4962, 4999–5000.) This was complete disrespect to West Coast Crips, and it was saying that they were nothing more than taggers versus actual gangsters. (35 RT 5000–5001.)

After an April 15th shooting by a 5/9 Brim gang member in rival West Coast Crip gang territory, petitioner made several Facebook posts, including one on the day of the shooting that said, “I ain’t going to survive too much longer in Dago. Too much shit going on, and I can’t keep my ass out of the mix.” (27 RT 3957–3959, 3962–3969, 3980–3981, 4041, 4044; 28 RT 4165–4166; 35 RT 4968, 5004–5005.) The next day, petitioner posted, “The status of an OG isn’t established by age or how long you been around. I mean it count but you need the stripes and reputation to match. Big homie. LOL.” (35 RT 5003.) This could mean that just because you have the age and time in the gang, it does not make you an OG or original gangster. You have to put in work to get that reputation and work counts more than time in to get true OG status. (35 RT 5003.)

Two days later, petitioner posted on Facebook, “Think about it. We all young, dumb, black, and ain’t turning down shit. We all think we tough. All of us got too much pride to take a loss.

What you think going to happen when we butt heads. Bl59d. That's what." (35 RT 5002–5003.) The gang expert explained that petitioner was saying they had too much pride to walk away or take a loss, so they would not turn down a fight or gunfight, and will move forward to the end. (35 RT 5002–5003.)

Three days later, on April 20, 2014, a 5/9 Brim gang member posted on Facebook a photograph of himself tossing up “fuck nappy heads,” and captioned, “The Blood, Little Bick Nick.” (36 RT 5115.) 5/9 Brim member Gordon also posted a status update that said, “It’s a new Brim and town, and he mash on everybody. Ain’t fucking with the Brims or him. They call him Little Bick Nick.” (36 RT 5117.) Petitioner aka Bick Nick commented on this Facebook post: “I’m Big Bick Nick. CKA Baby Mikey. Sherb know what’s bracking. Brim bidness.” (36 RT 5118.) The gang expert explained that “CKA” was a reference to Crip killing and was used instead of putting “aka.” (36 RT 5118–5119.) The expert further explained that in order for a young gang member to take your name, such as Gordon took petitioner’s, there had to be a level of respect and it meant the older gang member was working towards rider or OG status. (36 RT 5119.)

During this time period of repeated shootings by 5/9 Brim gang members in Crips territory, between April 9, 2012 and May 10, 2014, various members posted to social media about their exploits and their hostility toward Crips for the killing of Dereck Peppers. (See, i.e. 35 RT 4894–4934, 4938–4951, 4964–4968; 36 RT 5106–5108.) For example, on January 13, 2014, petitioner posted a status update on Facebook that read, “Violence may be

the easy thing to do, but I like easy. It makes sense. #9s.” (35 RT 5005.) That same day he also posted, “Never back down. It’s the mother fucking motto.” (35 RT 5005.) The gang expert said that this was consistent with his opinion that a gang member is not allowed to back down from a challenge because doing so makes the individual look weak, and the gang is only as strong as its weakest member. (35 RT 5005.)

The social media postings showed the connection between the various 5/9 Brim gang members. (See, i.e., 35 RT 4938–4943, 4953–4956, 4969–4973; 37 RT 5396–5398.) For example, a photograph posted on Facebook at an unknown date showed Simpson tossing up 5/9 Brims. Petitioner and other 5/9 Brim gang members were also in the photograph. (35 RT 4971-4972; 37 RT 5393–5394.) On January 1, 2012, Price posted on Facebook a photograph of himself, petitioner, Hurst, Taylor and William Washington, all tossing up 5/9 Brim gang signs. (35 RT 4956–4957.)

A status update on petitioner’s Facebook account referred to being a fulltime gang member in custody, and talked about how many West Coast Crip members were in county jail, so 5/9 Brim members needed to represent the set. (34 RT 4809–4810.) This update was posted after several members of 5/9 Brim, including Edward Paris and Sherbly Gordon, had been arrested.⁸ (34 RT 4811.)

⁸ 5/9 Brim gang members often made social media posts referencing fellow 5/9 Brim gang members who were incarcerated. (See, i.e., 34 RT 4782–4788; 35 RT 4880–4881; 36 RT 5103–5104.)

REASONS FOR DENIAL OF PETITION

Review of the issue presented is unnecessary. Petitioner has identified no conflicting decisions by the courts of appeal nor any important unsettled question of law warranting a grant of review. (Cal. Rules of Court, rule 8.500(b)(1).) Rather, petitioner seeks to relitigate a sufficiency of evidence claim. The application of settled law to the particular facts of this case is not an appropriate ground for review.

ARGUMENT

I. PETITIONER HAS NOT ESTABLISHED A VALID GROUND FOR THIS COURT TO GRANT REVIEW

At the outset, this Court should deny the petition for review because petitioner has not shown why review is authorized or appropriate. The permissible grounds for review by this Court are set forth in the California Rules of Court, rule 8.500(b). Petitioner does not cite to Rule 8.500(b)(1) in his petition, nor does he aver that his petition meets any of the criteria for review set forth therein. (Pet. at p. 9-20.) He claims only that “review is necessary because the Court of Appeal opinion relied on unreasonable and unsupported inferences to uphold the conviction for conspiracy to commit murder thereby violating Hoskins’s federal constitutional rights.” (Pet. at p. 20.) While the resolution of that question may be important to him, it is not an issue that would secure uniformity of law or answer a question of statewide importance. He does not explain how or why the diverse situations of numerous current and future

defendants would be impacted by the particular decision in this case.

Thus, the issue presented is nothing more than a disagreement with the Court of Appeal's analysis of the sufficiency of the evidence. For this reason, this Court should reject the petition for review in light of Rule 8.500(b) and the policies that inform the appropriateness of review.

II. THE COURT OF APPEAL CORRECTLY FOUND THAT SUFFICIENT EVIDENCE SUPPORTS THE CONSPIRACY TO COMMIT MURDER CONVICTIONS

The Court of Appeal concluded that there is sufficient evidence supporting the conviction for conspiracy to commit murder. (*People v. Ware, et al.* (2020) 52 Cal.App.5th 919, 937-944.) In doing so, the court correctly identified the governing law, which petitioner does not dispute, and reasonably weighed the evidence, which petitioner does dispute. Petitioner argues that the Court of Appeal erred by finding sufficient evidence supported his conviction for conspiracy to commit murder because his only connection to the coconspirators was common gang affiliation and social media posts, which failed to prove his involvement in the conspiracy. (Pet. at pp. 9-20.) But the Court of Appeal, unlike petitioner, properly viewed the entire record in a light most favorable to the judgment, and found more than ample evidence that appellant conspired to commit murder.

As correctly noted by the Court of Appeal, the standard of review for a claim that the evidence was insufficient to support a conviction is whether, after reviewing all “the evidence in the light most favorable to the prosecution, *any* rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, original italics; see *People v. Ware, supra*, 52 Cal.App.5th at p. 937, citing *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) In making this determination, the reviewing court must presume every fact in support of the judgment that could have reasonably been deduced from the evidence. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) A reviewing court does not reweigh the evidence or re-evaluate the credibility of witnesses in reviewing a claim of insufficiency of the evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.) “A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

The Court of Appeal also correctly identified the elements of conspiracy to commit murder (and the jury was so instructed). (*People v. Ware, supra*, 52 Cal.App.5th at pp. 937-938.) Section 187, subdivision (a), defines murder as the unlawful killing of a human being, with malice aforethought. Section 182, subdivision (a)(1), states that a conspiracy is committed when two or more persons conspire to commit any crime. A criminal conspiracy exists when there is an unlawful agreement between two or more people to commit a crime, and an overt act in furtherance of the agreement. (*Ware, supra*, at p. 938; *People v. Morante* (1999) 20 Cal.4th 403, 416.)

“It is seldom possible for the prosecution to offer direct evidence of an agreement to commit a crime. The agreement to

commit the crime is usually made in secrecy. The conspiracy must be inferred by the trier of fact from all the circumstances that are proven, and if the inference is a reasonable one it will not be disturbed on appeal.” (*Ware, supra*, at p. 938 quoting *People v. Chavez* (1962) 208 Cal.App.2d 248, 253.) “Common design is the essence of a conspiracy and the crime can be committed whether the parties comprehend its entire scope, whether they act in separate groups or together, by the same or different means known or unknown to them, if their actions are consistently leading to the same unlawful result” (*Ware, supra*, at p. 938 quoting *People v. Means* (1960) 179 Cal.App.2d 72, 80.) “Evidence is sufficient to prove an agreement ‘if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy.” (*Ware, supra*, at p. 938 quoting *People v. Maciel* (2013) 57 Cal.4th 482, 515-516.) “Each member of the conspiracy is liable for the acts of other members in carrying out the common purpose of the conspiracy.” (*Ware, supra*, at p. 938 citing *In re Hardy* (2007) 41 Cal.4th 977, 1025.)

Applying the correct law, the Court of Appeal properly and reasonably found substantial evidence supported petitioner’s conspiracy to commit murder conviction. The conduct, relationship, interests and activities of petitioner with his fellow 5/9 Brim gang members before, during and after the killings provided a strong evidentiary basis from which to infer that these

individuals had reached a tacit agreement to commit the murders.

Petitioner does not dispute the evidence of his entrenched involvement in his gang or the gang war but instead claims there is no evidence that he directly participated or aided and abetted in any of the shootings. (Pet. at pp. 10-11, 13-15.) But the Court of Appeal (as well as the jury) considered these very claims, and reasonably found regardless of the lack of direct evidence of participation there was ample evidence, based on petitioner's role and activities, to find he was part and parcel of the conspiracy to murder rival gang members.

Petitioner focuses on the evidence that is missing and asks this Court to reweigh the evidence. However, the reviewing court does not "focus on evidence that did not exist rather than on the evidence that did exist." (*People v. Story* (2009) 45 Cal.4th 1282, 1299; *People v. Rodriguez* (1999) 20 Cal.4th 1, 12.)

As the Court of Appeal recognized in rejecting this claim, the crime of conspiracy can be committed whether the conspirators acted together or in separate groups, whether they used the same or different means known or unknown to some of them, but leading to the same unlawful result. (*People v. Lowery* (1988) 200 Cal.App.3d 1207, 1219.) And, as the Court of Appeal found, there was sufficient circumstantial evidence from which the jurors could conclude that petitioner knew of the conspiracy and "had the deliberate, knowing, and specific intent to join the conspiracy." (*People v. Ware, supra*, 52 Cal.App.5th at p. 941.)

Not only was petitioner a member of the 5/9 Brim gang hit squad, whose mission was to kill Crips, but the evidence also showed that he was a very dedicated and high level member who consistently advocated for Crip killing. Petitioner was also consistently found in the company of his fellow Hit Squad members, which further supported his involvement in the conspiracy to murder Crips. (See, i.e., 20 RT 2722-2741, 2743, 2807-2810; 28 RT 4212–4213, 4216.) And petitioner’s possession of and proximity to firearms showed he was or could easily be armed if the opportunity to shoot rival Crip gang members arose. (28 RT 4228-4231.) In fact, in a May 2014 Facebook status update, petitioner posted, “Gangsters don’t flick it with gigs. They use it.” This meant that gang members do not take photographs with guns, they use them. (35 RT 5013-5014.)

Petitioner further claims that his conviction was impermissibly based on his gang membership and his “generalized” social media posts.⁹ (Pet. at pp. 11-13, 19.) Although association, by itself, does not prove criminal conspiracy, it is a fact to be considered. (*People v. Manson* (1976) 61 Cal.App.3d 102, 126.) Thus, association or gang membership may be a factor in finding substantial evidence of a conspiratorial agreement. (See *People v. Tran* (1996) 47 Cal.App.4th 759, 772–773; *People v. Superior Court (Quinteros)* (1993) 13 Cal.App.4th

⁹ In his second claim, petitioner challenges the Court of Appeal’s finding that use of his social media posts did not violate his First Amendment right to free speech. The answer, as ordered by this Court, addresses only issue number one.

12, 20-21 [“circumstances from which a conspiratorial agreement may be inferred include ‘the conduct of defendants in mutually carrying out a common illegal purpose, the nature of the act done, the relationship of the parties [and] the interests of the alleged conspirators.’”].)

Here, social media added to the strong evidence that petitioner was part of the conspiracy. Petitioner used social media to advocate and rejoice in the killings of the rival gang members. In several postings, petitioner is with other Hit Squad members, tossing up 5/9 Brim gang signs and Crip killing signs. In fact, petitioner made numerous social media posts referencing killing Crips or “Nap bashing,” and in one post, states that they put “rags around [their] face,” so they do not get caught committing the crimes. (34 RT 4793–4794; 35 RT 4956–4957, 5004–5007, 5009–5019.) Petitioner also brags about his moniker, “Bick Nick,” pointing out the “ck” in his name stands for Crip killer. (35 RT 5008–5009.) He used social media to disrespect and taunt rival Crip gang members. (22 RT 3249–3250, 3253; 35 RT 4929–4934, 5012, 5017–5022.) Petitioner was Facebook friends with at least two rival West Coast Crip gang members—Carlton Blue and Troy McKay. (35 RT 4999–5000.)

5/9 Brim member Gordon’s April 2014 Facebook post introducing himself as “Little Bick Nick” referencing Crip killing, and petitioner’s response, that he was “Big Bick Nick,” showed that petitioner had been putting work towards OG status in the gang because a younger gang member only took an older gang

member's name when there was a level of respect. (36 RT 5115–5119.)

In addition, a moniker that had been associated with petitioner, “Baby Black Mikey,” was included in the gang graffiti in a fellow gang member's garage. (35 RT 4834–4838.) During her interview, Person said that petitioner was about the gangster life. (34 RT 4734.)

Thus, in addition to common gang membership among the alleged conspirators, as set forth above, the circumstantial evidence showed that after the killing of Dereck Peppers, several members of the Hit Squad subset of the 5/9 Brim criminal street gang agreed to hunt down and kill rival West Coast Crip and Neighborhood Crip gang members. As the Court of Appeal concluded, when viewing evidence of petitioner's gang membership and social media posts, along with the evidence of the coconspirators' activities and petitioner's relationship to the coconspirators, there was sufficient evidence from which the jurors could find that petitioner “knew of the conspiracy and had the deliberate, knowing, and specific intent to join the conspiracy.” (*People v. Ware, supra*, 52 Cal.App.5th at p. 942.)

Thus, although gang membership was a factor, it was not the sole evidence that established that petitioner was a member of the conspiracy to commit murder. Viewing the evidence as a whole, and not piecemeal as petitioner does, demonstrates that the Court of Appeal reasonably found that sufficient evidence supports petitioner's conviction for conspiracy to commit murder.

Petitioner also asserts that his conviction cannot be upheld because of the 104 overt acts alleged in the Amended Information, he was only identified in three overt acts. (Pet. at pp. 15-18.) However, as the Court of Appeal correctly pointed out, “[o]ther than the agreement, the only act required is an overt act by *any* of the conspirators, not necessarily the defendant, and that overt act need not itself be criminal.” (*People v. Ware, supra*, 52 Cal.App.5th at p. 938 quoting *People v. Smith* (2014) 60 Cal.4th 603, 616.)

In sum, this Court should reject petitioner’s invitation to consider a fact-intensive question regarding the Court of Appeal’s application of the law to the facts of this case. This issue does not involve an important question of law, nor is it necessary to secure uniformity of decisions in the lower courts.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny review.

Dated: October 29, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER TO PETITION FOR REVIEW** uses a 13 point Century Schoolbook font and contains 4,894 words.

Dated: October 29, 2020

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S.
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No.: **S263923**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 29, 2020, at San Diego, California.

Walter Hernandez



Declarant

Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. WARE**

Case Number: **S263923**

Lower Court Case Number: **D072515**

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10/29/2020

Date

/s/Walter Hernandez

Signature

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