No. _____

IN THE

Supreme Court of the United States

WILSON C. ORTEGA,

Petitioner,

v.

SCOTT KERNAN, DIRECTOR OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In California, evidence of other gang members' commission of qualifying predicate offenses is relevant to prove criminal street gang enhancements, but the predicate offenses need not be "gang related." At Petitioner's trial for assault, criminal threats, threatening a witness, and false imprisonment, the prosecutor elicited the underlying details of other gang members' violent offenses on the ground that such evidence was required to prove that the predicate offenses were "gang cases." Was Petitioner prejudiced by trial counsel's inexplicable failure to challenge the admission of this irrelevant and inflammatory gang evidence?

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PETITION FOR A WRIT OF CERTIORARI

Wilson C. Ortega ("Ortega" or "Petitioner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit's decision affirming the judgment of the district court is unreported. (App. 1a-3a.)

JURISDICTION

The judgment of the Ninth Circuit sought to be reviewed was entered on July 26, 2018. (App. 1a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const., amend. XIV, § 1

. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 2254(d)(1):

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

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

STATEMENT OF THE CASE

I. Course of Proceedings

On October 8, 2009, a jury found Ortega guilty of assault with a firearm, in violation of California Penal Code § 245(a)(2); criminal threats, in violation of Penal Code § 422; threatening a witness, in violation of Penal Code § 140(a); and two counts of false imprisonment, in violation of Penal Code § 236. (ER 447-450.)[1] The jury also found several gang and firearms enhancement allegations to be true. (ER 447-450.) On November 23, 2009, Ortega was sentenced to a total of 23 years in prison. (ER 459.)

On March 8, 2011, the California Court of Appeal affirmed Ortega's convictions. (ER 461-480.) On June 22, 2011, the California Supreme Court denied Ortega's petition for review. (ER 481.) This Court denied Ortega's petition for a writ of certiorari on November 14, 2011. (ER 482.)

On November 15, 2012, Ortega filed a pro se habeas corpus petition in Los Angeles County Superior Court. (ER 483-589.) In the petition Ortega argued, *inter alia*, that trial and appellate counsel were ineffective in failing to object to the admission of gang evidence at his trial. On November 26, 2012, the superior court

[1] "ER" refers to the Excerpts of Record filed in the Ninth Circuit Court of Appeals, and "CR" refers to the district court clerk's record.

denied Ortega's petition, on the ground that "[t]he issues raised in the petition either were or could have been raised on appeal. (In re Rinegold (1970) 13 Cal. App. 3d 723)." (ER 1.) The superior court denied a second habeas petition, filed concurrently with a motion for reconsideration, as an abuse of the writ. (ER 3-4, 590-638.)

On February 8, 2013, the California Court of Appeal denied Ortega's habeas petition, stating, "The court has read and considered the petition for writ of habeas corpus filed January 31, 2013. The petition is **DENIED**." (ER 5.) The California Supreme Court denied Ortega's habeas petition without comment on May 22, 2013. (ER 6.)

Prior to filing his state habeas petitions, on November 8, 2012, Ortega had filed a federal habeas petition under 28 U.S.C. § 2254. (CR 1.) On May 31, 2013, after the California Supreme Court denied his habeas petition, Ortega filed a First Amended Petition containing seven claims, including the ineffective assistance claim regarding gang evidence at issue here. (ER 639-749; CR 21, 23.)

On May 20, 2016, the federal magistrate judge, the Honorable Rozella A. Oliver, filed a report and recommendation. (ER 7-47; CR 95.) The magistrate judge recommended denial of the petition. (ER 7-47, 46.)

On June 27, 2016, the district court, the Honorable Philip S. Gutierrez, adopted the findings and recommendation of the magistrate judge and entered a judgment dismissing the action with prejudice. (ER 48-49.) The district court also denied in full Ortega's application for a certificate of appealability. (ER 750.)

On April 21, 2017, the Ninth Circuit granted a certificate of appealability on the issue raised in this petition: "whether trial counsel was ineffective for failing to challenge unduly prejudicial gang evidence." (Ninth Circuit Docket No. 3-1, CA No. 16-55927.) Following briefing and argument, the Ninth Circuit affirmed the denial of Ortega's Section 2254 petition on July 26, 2018. (App. 1a-3a.)

II. Statement of Facts

A. The Evidence at Trial

1. Prosecution Case

In his opening statement, the prosecutor previewed evidence of Sarai Rodriguez having previously testified against Ortega in a "gang-related manslaughter case, a gang-related killing case" "when she was much younger, 13, 14, something like that." (ER 121, 123.)

Rodriguez initially refused to take the stand to testify but eventually walked into court with a deputy's hand on her elbow. (ER 128, 130.) She testified that she had failed to obey prior subpoenas in the case and that she did not want to miss work to appear in court. (ER 169-170, 174, 182-183.)

Rodriguez acknowledged having met with then-Detective Daniel Fournier of the Los Angeles Police Department, the investigating officer in the instant case, at some point in August 2008. (ER 133-135, 186.) She denied having seen Ortega and his brother, Wilmington Ortega ("Wilmington"), in person before. (ER 139.) She could not recall whether she had identified Ortega and Wilmington's photographs for Fournier in August 2008. (ER 143-144.)

Rodriguez first met Fournier in approximately 2003, when she was 13 years old. (ER 140-141.) Fournier had been the investigating officer in a case in which Rodriguez had been a witness. (ER 188.) Rodriguez had testified against Ortega in a gang-related voluntary manslaughter case and identified him as "Trigger." (ER 144-145.) She denied having identified Ortega as a member of the North Hollywood Boyz gang, could not recall whether she testified against two other defendants in the same trial, and denied having identified Jaime Vega and Gabriel Medina as North Hollywood Boyz members with the monikers "Boo Boo" and "Trippy," respectively. (ER 145-146.)

In court, Rodriguez denied having been approached by Ortega, Wilmington, and others on August 3, 2008. (ER 146.) She also denied having told Fournier of being choked by someone named Mona, having had a gun pointed at her head by Ortega, and having been threatened by Ortega. (ER 146-150.)

As to the events of August 15, 2008, Rodriguez testified that she did not recall whether she encountered Vega ("Boo Boo") near her workplace. (ER 150.) She denied having told Detective Fournier that Boo Boo threatened her with a gun on that occasion. (ER 151.) She also denied having told Fournier that she feared for her safety and the safety of her friends and family members. (ER 152-153.) She could not recall whether she had identified a photo of Boo Boo for Fournier. (ER 155.)

Rodriguez testified that she had not complied with a subpoena for the preliminary hearing in the instant case and had been put into custody as a result.

(ER 154-155.) She acknowledged that, in the preliminary hearing, she had testified that a group of men and women had threatened her. (ER 156.)

A CD and transcript of Rodriguez's interview with police were admitted as exhibits at trial. (ER 57-73, 160, 354.) Rodriguez initially testified that the voice on the tape was hers, but she later added that she didn't "talk like that." (ER 161.) Rodriguez further testified that she knew a lot of gang members and that it was bad, and possibly dangerous, to be called a "snitch," or tattletale. (ER 166-168.)

In the taped interview, conducted on August 19, 2008, Rodriguez described two incidents to Fournier. (ER 58.) With respect to the first incident, which occurred approximately two weeks before August 19, Rodriguez stated the following:

- She and Abraham Morales were walking down the street at the corner of Tujunga and Tiara when a group of people in a car pulled over. (ER 59, 61, 64.) The group included "Trigger,"[2] "Little Trigger" (Trigger's little brother), Mona, Kathy, Victalina, and Leo. (ER 62.) Mona, Leo, and Kathy were members of a gang called Clanton, or C-14. (ER 62-64.) Rodriguez had previously gotten into a fight with Mona over Victalina, Mona's girlfriend. (ER 63, 65, 68.)

[2] Rodriguez did not remember Trigger's name but stated that he was the same person she had previously testified against. (ER 58.)

- "Trigger" was angry and pointed a gun at Rodriguez's head while Mona pushed her up against a fence and choked her. (ER 59, 66-67.) Little Trigger acted as a lookout and said nothing. (ER 66-67.)
- Trigger asked Rodriguez if she remembered him, called her a "rata" and "snitch," and told her that North Hollywood Boyz had a "green light" on her. (ER 59, 67.) At this point, Little Trigger whistled to warn the others that a police car was nearby, and the group from the car left. (ER 67-68.)
- Rodriguez expressed fear of returning to her home or her mother's home, and she asked for information about receiving reimbursement for staying elsewhere. (ER 69-73.)

In the taped August 19 interview, Rodriguez also told Fournier of an incident that had occurred as she left work a few days ago. (ER 59-60.) She stated that Boo Boo had gotten out of a car and pointed a gun at her; he said he hated Rodriguez because she had caused him to serve time in prison, and he threatened to kill her. (ER 58, 60.) Rodriguez did not implicate Ortega in the second incident. (ER 179-180.) Rodriguez then identified photos of Trigger, Little Trigger, and Kathy. (ER 72.)

On cross-examination, Rodriguez testified that everything she told Fournier on the tape was a lie, and that nothing happened on August 3, 2008. (ER 172-173, 178.) She denied being afraid of Ortega or Wilmington. (ER 174, 180.) She further

testified that she had tried to tell Fournier that the August 3 incident never happened, but he didn't listen. (ER 174-175.)

Fournier testified that Rodriguez came to the police station on August 19, 2008, to report a crime, as recorded on the audiotape. (ER 188.) Fournier testified that, during the meeting, Rodriguez identified Ortega as Trigger and Wilmington as Trigger's brother, known as Lil' Trigger. (ER 191-192.)

According to Fournier, in 2004, Rodriguez had testified against Ortega and two other men, Jaime Vega (Boo Boo) and Gabriel Medina (Trippy), in a "homicide" or "killing." (ER 188-189.) Fournier believed that Rodriguez knew that the 2004 trial involved a "gang-related killing" and a "gang-related case." (ER 190.)

Fournier also testified to the following as the prosecution's gang expert. (ER 118.) In Fournier's opinion, North Hollywood Boyz was a "pretty hardcore" gang, and their primary turf was located at Tiara Street and Tujunga Avenue in North Hollywood. (ER 193-194.) North Hollywood Boyz ("NHBZ") used the initials "N.H.B.Z." and had a special hand sign. (ER 196.) The gang's primary activities included murder, extortion, robberies, assaults with a deadly weapon, and witness intimidation. (ER 197.)

Fournier had investigated a case involved NHBZ gang member Jose Orozco; Orozco, who went by the moniker "Demon," had been convicted of attempted murder, and Fournier opined that the crime was related to NHBZ. (ER 197-199.) Wilmington's attorney raised a foundational objection to Fournier's opinion that Orozco's crime was gang-related, and Ortega's attorney objected as well. (ER 199.)

Upon questioning from the prosecutor, Fournier testified that he had personally investigated Orozco's case. (ER 198-199.) Fournier then proceeded to relate the facts of Orozco's case, which he described as a car-to-car shooting in which Orozco shot someone in the head at a location just south of NHBZ territory. (ER 200.) Defense counsel did not object. (ER 200.)

Fournier had also investigated a case involving NHBZ gang member Luis Vega, whose moniker was "Wicked." (ER 201.) Luis Vega was a brother of Jaime Vega (Boo Boo). (ER 201.) Fournier testified that Luis Vega's case involved "a 15-year-old boy that was murdered in an alley." (ER 201.) Fournier believed that the murder was gang-related because NHBZ had been extorting money from a family, and NHBZ gang members were beating up a "kid" from that family because the family reported the extortion to the police; the teenage victim went to render aid during the beating and was killed. (ER 201-202.)

At this point, Wilmington's attorney objected. (ER 202.) At sidebar, the trial court stated, "I thought we weren't going to go into the facts of the case most of it being the motive for this particular crime?" (ER 202.) The prosecutor responded that Fournier was not describing Ortega's prior case and that "Penal Code requires me to prove that one of the primary activities of a gang is this type of action. There was a foundational objection. I'm just trying to show how it was a gang case and how the detective came to know of that." (ER 202.) Counsel for Wilmington objected that the evidence was "highly inflammatory" and pointed out that the foundational objection went to Fournier's personal knowledge of the Orozco and

Vega cases, not to the underlying facts of those cases. (ER 202-203.) Counsel for Wilmington argued that since the foundation had been laid, no further facts of those convictions need be explored. (ER 203-204.) During this colloquy, Ortega's attorney stood by and said nothing. (ER 204.)

Fournier testified to the following contacts with Ortega and Wilmington. He had known Ortega and Wilmington since about 2001 but had had no contacts with Ortega since his manslaughter conviction in 2004. (ER 204, 206.) Prior to that, Ortega had admitted to Fournier that he was a NHBZ member with the moniker Trigger, and that both he and Wilmington had NHBZ tattoos. (ER 206.) Fournier testified that he had seen those tattoos. (ER 206, 269.)

In 2001, Wilmington had admitted to Fournier that he was a NHBZ member with the moniker Lil' Trigger. (ER 205.) However, Fournier had had no contacts with Wilmington in the past five years. (ER 205.) Fournier had no information that Wilmington had been hanging out in NHBZ territory for a while. (ER 259.) In fact, Wilmington's record as a gang member had been purged for lack of contacts. (ER 268-269.)

Fournier testified that Ortega's 2004 case was "absolutely a gang case."[3] (ER 207.) Fournier believed the co-defendants in that case (Jaime Vega and Medina) to be gang members based on their admissions to him. (ER 207.) When asked whether there was something about the victim in that case that led him to believe it was a gang case, Fournier testified that "it was basically a drive-by —." (ER 208.) The

[3] Wilmington was not involved in the 2004 case. (ER 264.)

trial court sua sponte struck the "drive-by" portion of the answer. (ER 208.) At sidebar, the prosecutor sought to elicit Fournier's opinion that Ortega's prior case was "a gang case" because the victim was "a rival gang member that was selling drugs in [NHBZ] territory," even though the jury had not found, and Ortega had not pleaded guilty to, a gang allegation. (ER 208-211.) Counsel for Ortega objected on foundation grounds. (ER 209-210.)

The court decided that the prosecution could not delve further into the facts of Ortega's prior case. First, the trial court indicated that a foundation could not be laid without "going into the facts of this case." (ER 210.) Second, the trial court told the prosecutor that it would be "highly prejudicial to get into the actual facts. You've got the proof of the conviction for manslaughter." (ER 211.) Third, the trial court indicated that the prosecutor was "bootstrapping" because it was "highly speculative" to say that Ortega's previous commission of a gang-related crime "proves this crime. . . . I think you are going a little far afield and you are running into dangerous territory here." (ER 212.) The trial court therefore sustained the objection and gave the following limiting instruction:

> You are hearing evidence of gang activity regarding the defendants but only for the limited purpose of deciding whether or not either defendant acted with the intent, purpose and knowledge required to prove the gang enhancement that is alleged or to prove that either defendant or both had a motive to commit the crime.
>
> You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his opinion.

> You may not consider this evidence for any other purpose. You may not conclude from this evidence that a defendant is a person of bad character or that he has a disposition to commit crime.

(ER 213.)

During Fournier's testimony, the prosecution introduced posterboards depicting Ortega's gang tattoos, located on his head, stomach, lower back, and arm. (ER 214-219.) The tattoos said "North Hollywood Boyz," "Vallero," "NH," "NH Boyz," and "Tiara Street."[4] (ER 215-219.) On cross-examination, Fournier clarified that tattoos indicated that someone had at one time been a member of a gang, not that he was necessarily currently active. (ER 255-256.) On redirect, Fournier testified that police records indicated that Wilmington had several NHBZ tattoos. (ER 266.)

Based in part on the tattoos, Fournier opined that Ortega was a member of the North Hollywood Boyz gang. (ER 219-220.) Fournier further opined that the instant offense was committed for the benefit of the North Hollywood Boyz gang. (ER 220.) At sidebar, the trial court instructed the prosecutor to elicit Fournier's opinion through a hypothetical. (ER 220-226.) In response to a hypothetical using Rodriguez's and Ortega's names, Fournier testified that the crime was for the benefit of and in association with a criminal street gang. (ER 227-228.) Fournier testified that the crime benefitted the gang by showing what happens to a "rat or snitch," especially one who was walking on Tiara Street, the gang's main turf. (ER

[4] Fournier testified that "Vallero" and "Tiara Street" referred to cliques within the gang. (ER 216, 219.)

229, 233-234.) Fournier testified that the crime was in association with a gang because Ortega and Wilson were two NHBZ gang members, on gang turf, "associating with each other whether or not they are brothers." (ER 236.) Fournier testified that Rodriguez's manner of giving testimony was common in gang cases because victims feared the gang. (ER 237.)

Fournier testified that he telephoned Anthony Morales[5] to corroborate Rodriguez's story, and that Morales did so. (ER 254-255.) Morales refused to come to the police station. (ER 257.) Fournier felt that Morales provided sufficient corroboration and did not follow up with any of the other people Rodriguez named as being present during the alleged assault, nor did he try to find eyewitnesses. (ER 256, 258.)

An LAPD fingerprint expert testified that Ortega's fingerprints matched the fingerprints of a "William Ortega" convicted of manslaughter in 2004. (ER 270-274.)

2. Defense Case

Ortega called Abraham Morales as a witness. (ER 280.) Morales testified that Fournier had called him to talk about Ortega but Morales did not tell him anything. (ER 282-283, 298-302.) Morales had learned that his name was included in a police report and didn't like that. (ER 294.) He further testified that he had never been threatened by Ortega or Wilmington and denied knowing them. (ER 284-285.) He testified that he had been playing video games with his cousin on

[5] Rodriguez referred to Morales as "Abraham Morales." (ER 254-255.) At trial, Morales denied that his true name was "Anthony." (ER 282.)

Sunday, August 3, 2008, and denied having been with Rodriguez, a friend, at any time that weekend. (ER 284, 293-294.)

Two witnesses provided an alibi for Ortega. Iris Martinez testified that on August 3, 2008, she had held a fundraiser at her home in Arleta. (ER 305-307.) Martinez testified that Ortega arrived between 2:00 and 3:00 p.m. and stayed late into the night to help her husband fix her car. (ER 308.) Martinez did not previously go to the police or the district attorney's office with this information because she was never asked to do so. (ER 314-316.) Mario Valdivia, a host of the fundraiser, testified that Ortega was present from approximately 3:00 p.m. until midnight or later. (ER 319-320.)

Rogelio Contreras, who lived in Wilmington's apartment building, testified that he was working on his car in the parking area and saw Wilmington off and on from 10:00 a.m. until 6:00 or 7:00 p.m. on August 3, 2008. (ER 336-338.)

3. Rebuttal Case

In rebuttal, Fournier testified that he recognized Morales's voice as the person he spoke with on the phone regarding the threats against him and Rodriguez. (ER 345-348.) Fournier testified that Morales thought the incident occurred on a Friday or Saturday, and that Morales declined his requests to come to the police station. (ER 347-350.)

4. Closing Argument

In closing, the prosecutor told the jury that he was departing from his usual practice of laying out the evidence that supported each element of each charged crime. (ER 401.) Instead, much of his focus was directed to the "gang allegation"

and "gang case," and the significance of Ortega's prior case. (ER 405-411.) In doing so, the prosecutor repeatedly emphasized Rodriguez's young age, both at the time of trial and at the time of the previous trial.[6] Witness retaliation was also a theme. The prosecutor even alluded to a prospective juror who had been afraid upon witnessing a gang-related killing: "She had her kid in the car and she took off as a result because she thought it was a gang case." (ER 408.) He added: "Do you think the people in that community knowing what can happen to a witness in a North Hollywood Boyz criminal street gang case, do you think they want to pick up the phone and participate and be a good citizen and see if they can stop this sort of crime in their community?" (ER 409-410.)

In rebuttal closing, the prosecutor returned to his "gang case" label: "Now, ladies and gentlemen, over the last couple days you've got an introduction to gang cases. You got sort of a course in gang cases. Gang 101, if you will. [¶] You got to see the clear and obvious impact that a criminal street gang like the North Hollywood Boyz gang has on witnesses, has on victims." (ER 432.)

The prosecutor recapped his themes of youthful victims and witness retaliation: "Sarai Rodriguez when she was 12 was a victim. She had to deal with a terrible thing, being a witness in a gang-related killing. She was a victim again in

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[6] *See, e.g.*, ER 396 ("Now, she recognizes him because when she was much younger, she was a witness in a gang-related killing case[.]"; ER 398 ("She's a tough kid. She's a kid from the streets."); ER 409 ("four years ago little Sarai Rodriguez testified against Trigger and other gang members from the North Hollywood Boys"); ER 414 ("Nothing can change the fact that when Sarai was a young girl, she was a witness in a gang-related killing case . . . ."); ER 434 ("We know that Sarai is a young girl who had testified against Wilson Ortega . . ..").

2004 when at age 14 she had to testify and deal with this process and face Trigger, Wilson Ortega. [¶] She sure as heck was a victim in August 2008 when she had a gun put to her head." (ER 435.) He then concluded with a call to the jury "to say enough" and "to communicate" a message by convicting Ortega and Wilmington. (ER 436.)

B. State Appellate Proceedings

Relevant to this petition, Ortega argued on direct appeal that the trial court erred in (1) permitting Detective Fournier to testify to the underlying facts of crimes committed by North Hollywood Boyz gang members Jose Orozco and Luis Vega; and (2) permitting the prosecution to introduce enlarged photographs of Ortega's tattoos. (ER 473.) In the course of affirming Ortega's conviction, the California Court of Appeal concluded that the other-crimes issue had been forfeited due to counsel's failure to object to the admission of the facts of Orozco's crime and to press for a ruling regarding the facts of Vega's crime. (ER 473-474.) The California Court of Appeal further concluded that counsel had failed to secure a ruling regarding the tattoo photographs, make a specific objection to them, and expressly waived any objection. (ER 475.)

The California Supreme Court denied Ortega's petition for review, and this Court denied the petition for a writ of certiorari. (ER 481-482.)

C. State Habeas Proceedings

Ortega filed habeas corpus petition in Los Angeles County Superior Court on November 15, 2012. (ER 483-589.) Ground Two — at issue on appeal and in this petition — challenged the admission of evidence of Ortega's prior conviction and

other crimes by NHBZ gang members as a denial of due process and a fair trial; in this ground, Ortega also argued that trial and appellate counsel were ineffective for failing to object contemporaneously and develop the issue on appeal, respectively. (ER 513-523.) Eleven days later, the superior court denied Ortega's petition, stating that "[t]he issues raised in the petition either were or could have been raised on appeal. (In re Rinegold (1970) 13 Cal. App. 3d 723)." (ER 1.)

On January 3, 2013, Ortega filed a motion for reconsideration in the superior court, arguing that the claims in his petition were not or could not have been raised on direct appeal, whether as a result of trial and appellate counsel's ineffective assistance or the petition's reliance on extra-record facts to prove ineffective assistance of trial counsel. (ER 590-594.) Ortega filed another habeas petition in superior court raising the same five claims, along with a motion for reconsideration. (ER 590-638.) On January 14, 2013, the superior court denied the petition, stating, "Petitioner has abused this writ by filing repetitious claims. (In re Clark (1993) 5 Cal 4th 750)." (ER 3-4.)

D. Federal Habeas Proceedings

As relevant here, Ground Four of Ortega's First Amended Petition in federal court corresponded to Ground Two in the state habeas petitions — a claim that trial and appellate counsel were ineffective in failing to properly challenge the admission of evidence of other crimes by NHBZ gang members and Ortega's prior conviction. (ER 655-664.)

The magistrate judge recommended denial of all seven claims in Ortega's First Amended Petition. (ER 8-9, 46.) With respect to Ground Four, the magistrate

judge declined to "look through" the summary denials of the California Supreme Court and California Court of Appeal to the superior court's procedural ruling. (ER 18-21.) The magistrate judge recognized that, under the "look through" doctrine set forth in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the federal habeas court generally looks to the "last reasoned decision" of a state court to determine the rationale for the state courts' denial of the claim. (ER 16.) It was undisputed that the last reasoned decision on Ground Four was the superior court's procedural ruling. (ER 17-18.) Further, the State had conceded that the last reasoned decision on Ground Four, the superior court's procedural ruling, was "patently incorrect" and therefore did not bar federal habeas review. (ER 18.) Nevertheless, the magistrate judge treated the California Supreme Court's and California Court of Appeal's summary denials as denials on the merits, and applied the deferential standard of review in 28 U.S.C. § 2254(d) accordingly, because it determined that *Ylst*'s "look through" presumption had been rebutted in this case by the superior court's reliance on an "invalid" procedural rule. (ER 19-21.)

On the merits, the magistrate judge concluded that trial counsel was not ineffective for failing to challenge the admission of unnecessary and prejudicial gang evidence.[7] (ER 36-37.) The magistrate judge reasoned that evidence of Ortega's NHBZ gang membership and NHBZ gang members' convictions in unrelated cases was relevant to prove the gang enhancement and to establish a

[7] The magistrate judge reviewed this claim under Section 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), but also noted in passing that relief was not warranted under de novo review. (ER 21& n.8.)

motive for the charged assault and threats. (ER 36-37.) Accordingly, the magistrate judge concluded that it was "entirely speculative" that such evidence would have been excluded had trial counsel objected. (ER 37.) Similarly, the magistrate judge determined that trial counsel was not ineffective for failing to object to evidence of Ortega's prior conviction for voluntary manslaughter; this objection would have been meritless because Rodriguez had testified against Ortega in the prior case, and the resulting conviction was therefore relevant to motive in the instant case. (ER 37.)

The district court adopted the magistrate judge's findings and recommendations and dismissed the action with prejudice. (ER 48-49.) Although the district court denied a certificate of appealability, the Ninth Circuit granted a certificate of appealability on Ortega's ineffective assistance claim regarding trial counsel's failure to challenge the admission of gang evidence. (ER 750.)

The Ninth Circuit affirmed the denial of Ortega's Section 2254 petition, albeit on a different ground than that relied on by the district court. (App. 1a-3a.) First, unlike the district court, the Ninth Circuit did not resolve the dispute as to whether the California Supreme Court had silently adjudicated the merits of Ortega's state habeas petition, and whether AEDPA's deferential standard of review therefore applied. (App. 2a.) Second, unlike the district court, the Ninth Circuit did not reach the question of whether Ortega's trial counsel performed deficiently. (App. 2a-3a.) Rather, the Ninth Circuit concluded that "Ortega's counsel's allegedly deficient failure to object to the government's gang expert's description of other

homicide crimes committed by two North Hollywood Boyz members, Luis Vega and Jose Orozco, could not have prejudiced Ortega under any standard of review." (App. 2a.) It based this conclusion on the other gang evidence admitted against Ortega and not challenged on habeas, as well as on the fact that the other gang members' crimes were "not presented to the jury as substantively attributable to Ortega, either in the gang expert's testimony or during closing arguments." (App. 2a-3a.)

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to review the Ninth Circuit's denial of Petitioner's ineffective assistance claim concerning trial counsel's failure to challenge the admission of graphic and gratuitous gang evidence. The Ninth Circuit's prejudice ruling conflicts with this Court's holding that a defendant need only show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668 (1984). In concluding that any erroneously admitted details of the NHBZ gang members' crimes "added little" and were of "peripheral import" to the prosecution's case, the Ninth Circuit misapplied the "reasonable probability" standard. (App. 3a.)

The constitutional right to the effective assistance of counsel safeguards a defendant's right to a fair trial. *Strickland*, 466 U.S. at 684-85. Indeed, "[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Id.* at 685 (quoting *Adams v. United States ex rel. McCann*, 317 U.S.

269, 275, 276 (1942)). Counsel therefore "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688. Here, counsel's failure to challenge highly prejudicial evidence of violent crimes committed by NHBZ gang members deprived Ortega of this reliable adversarial testing process, thus rendering his trial unfair.

To prevail on an ineffective assistance of counsel claim, a petitioner must show (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. When the alleged deficient performance involves counsel's failure to move to exclude evidence, a petitioner must show that "had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious." *Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999). "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. In assessing performance, "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

Ortrega's trial counsel performed unreasonably by not moving to exclude Fournier's testimony regarding the underlying facts of violent crimes committed by NHBZ gang members not involved in the instant offense. On direct review, the California Court of Appeal expressly found that trial counsel had failed to object, and therefore declined to address the issue on the merits. (ER 473-474.) While

Ortega's trial attorney sat on his hands, the prosecution elicited inflammatory details of other NHBZ members' convictions for attempted murder and murder. (ER 199-202.) Fournier testified that the attempted murder was a "gang-related conviction" involving a car-to-car shooting committed by NHBZ member Anthony Orozco, or "Demon." (RT 996-997.) Fournier also testified that NHBZ member Luis Vega, or "Wicked," murdered "a 15-year-old boy" in an alley, in the course of assaulting another "kid" who had reported the gang's extortion to the police. (ER 201-202.) The details of these violent crimes were highly inflammatory. See *People v. Albarran*, 149 Cal. App. 4th 214, 227-28 (Cal. Ct. App. 2007) (holding that "descriptions of the criminal activities of other gang members" was "extremely inflammatory").

Had Ortega's trial attorney brought the appropriate skill and knowledge to bear on this crucial question of admissibility, it is reasonable that the trial court would have excluded the gang evidence. The prosecutor justified his questioning about the underlying facts of other NHBZ cases as follows: "Penal Code requires me to prove that one of the primary activities of a gang is this type of action. There was a foundational objection. I'm just trying to show how it was a gang case and how the detective came to know of that." (ER 203.) In response to an objection by Wilmington's attorney that the details of the offenses were "highly inflammatory" and "unduly prejudicial," the prosecutor reiterated, "I was just concerned regarding establishing it was a gang case. . . . If I'm informed there's no real concern about these cases being gang cases or labeled gang cases for the gang allegation in terms

of me meeting that element, then I can stop asking him about it." (ER 203.) Again, trial counsel failed to rebut the prosecutor's mistaken view of the law, or to request that the inflammatory details of the murder and attempted murder be stricken from the record. (ER 203-204.)

While the existence of predicate offenses may have been relevant to the gang enhancement, trial counsel performed deficiently by failing to object on the meritorious ground that the details of those offenses were wholly irrelevant to prove the criminal street gang enhancements under California Penal Code § 186.22(b)(1)(B). By statute, a "criminal street gang" is defined as having "as one of its primary activities the commission of one more of" a number of enumerated criminal acts, ranging in seriousness from unlawful taking of a vehicle to murder. Cal. Penal Code §§ 186.22(e), 186.22(f). To constitute a "criminal street gang", the gang's members must also "individually or collectively engage in or have engaged in a pattern of criminal gang activity," by "the commission, attempted commission, or solicitation of two or more" of the statutorily enumerated offenses within the specified time frame. *Id.* § 186.22(e). But long before Ortega's trial, the California Supreme Court had concluded that "the Legislature did not intend that the predicate offenses must be 'gang related.'" *People v. Gardeley*, 14 Cal. 4th 605, 621 (1996). In fact, the jury instructions in this very case confirmed that "[t]he crimes, if any, that establish a pattern of criminal gang activity need not be gang-related." (ER 390.) Thus, there were no permissible inferences that the jury could draw from this highly prejudicial evidence. Yet Ortega's trial counsel inexplicably and

unreasonably failed to object on relevance grounds, thus "betray[ing] a startling ignorance of the law." *See Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (holding that counsel's failure to file timely suppression motion constituted deficient performance).

Not could counsel's failure to object on relevance grounds be viewed as "sound trial strategy." *See Strickland*, 466 U.S. at 689 (internal quotation marks omitted). Prior to trial, counsel attempted to exclude other gang evidence pertaining to Ortega's NHBZ membership and tattoos. (ER 91-92.) Counsel also made a halfhearted attempted to block Fournier's opinion on the gang-related nature of Orozco and Luis Vega's crimes by joining Wilmington's objection on foundation grounds. (ER 199.) But the foundation objection was, if anything, counterproductive: the prosecutor took the foundational objection as a license to delve into Fournier's knowledge of the underlying facts of the case. (ER 199-203.) There was no conceivable reason why trial counsel would have strategically refrained from challenging the admission of inflammatory details of NHBZ gang members' crimes in other cases.

Ortega was prejudiced by counsel's unreasonable failure to object to the admission of testimony containing detailed descriptions of the predicate offenses. To establish *Strickland* prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In the context of the charged offenses, and the prosecution's proffered motive for the assault and threats, there is a reasonable probability that the inadmissible details of the predicate offenses swayed or confused the jury, thereby undermining confidence in the guilty verdicts.

The Ninth Circuit noted that Orozco's and Vega's convictions "were not presented to the jury as substantively attributable to Ortega, either in the gang expert's testimony or during closing arguments." (App. 3a.) While this is true, it does not neutralize the evidence's prejudicial impact. Indeed, the trial court's own reaction to the evidence highlights the serious potential for confusion and prejudice arising from detailed evidence of Orozco's and Vega's prior criminal acts. After Wilmington's attorney objected to Fournier's testimony regarding Luis Vega's killing of a 15-year-old boy, the trial court said at sidebar, "I thought we weren't going to go into the facts of the case most of it being the motive for this particular crime?" (ER 202.) The prosecutor replied that Fournier was "describing for the court one of the gang cases that's a predicate. He's not talking about the gang case in which our defendant was involved in." (ER 202.) That is, even the trial court conflated the description of Luis Vega's crime with Ortega's prior conviction for manslaughter. (ER 202.)

In analyzing *Strickland*'s prejudice prong, the Ninth Circuit also overlooked how the erroneously admitted evidence strengthened the prosecution's case. In

particular, the fact that one of the prior incidents involved Luis Vega, the brother of Ortega's former codefendant, Jaime Vega ("Boo Boo"), heightened the prejudice to Ortega. The prosecutor specifically elicited the fact that Luis and Jaime Vega were brothers. (ER 201.) The jury had already heard evidence that Boo Boo and Ortega had participated in a prior killing together, that Rodriguez had testified against them both, and that Boo Boo had committed a strikingly similar offense involving assault and threats against Rodriguez not long after the offenses for which Ortega was on trial. (ER 58-60, 188-190.) That Boo Boo's brother was a NHBZ member who had been convicted of murder not only bolstered the prosecution's argument that Ortega had a similar previous conviction and thus had a motive to commit the substantive offenses; the close association between Ortega, Boo Boo, and Luis Vega also made the jury likely to rely on an impermissible basis for finding the gang enhancement allegation true. In addition, in a case where Ortega was standing trial with his brother Wilmington, the evidence of Vega's identity as Boo Boo's brother made the jury more likely to accept the prosecutor's argument that Wilson and Wilmington were associating as gang members, and not just as brothers, even where evidence of Wilmington's gang affiliation was thin and stale. (ER 236.)

The detailed evidence of Orozco's and Vega's predicate offenses was "so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of . . . actual guilt." *Albarran*, 149 Cal. App. 4th at 227. Both predicate offenses involved convictions for murder or attempted murder, the most serious of the possible predicate offenses underlying a

gang enhancement. Cal. Penal Code § 186.22(e). *Cf. People v. Hernandez*, 33 Cal. 4th 1040, 1087 (2004) (holding that predicate-offense evidence that some gang members had been convicted of driving a vehicle without the owner's consent "was not particularly inflammatory"). Orozco's "car-to-car shooting" resonated with Fournier's description of Ortega's prior conviction as a "drive-by" — a characterization that the trial court struck from the record. (ER 208.) In particular, there is a reasonable possibility that testimony regarding Luis Vega's killing of a teenage Good Samaritan, who had gone to render aid to a "kid" who had reported the gang to the police, impacted the jury's consideration in a case alleging an assault and threats against Rodriguez, who had testified against gang members when she was "much younger." (ER 123.) The prosecutor harped on Rodriguez's youth by referring to her as "little, "a kid, "a young girl" (ER 396, 398, 409, 414, 434), and emphasized that this was a case about witness retaliation (ER 408-410), which only cemented the link in the jury's mind between the charged offenses and the prior misdeeds of the NHBZ gang.

The overall shakiness of the prosecution's case shows the prejudicial effect of trial counsel's ineffectiveness. *See Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). The case turned entirely on the testimony of the alleged victims, Rodriguez and Morales. There were no confessions, no forensic evidence, and no other witnesses to the event. Indeed, Fournier admitted that he had not conducted additional interviews or sought

disinterested eyewitnesses. (ER 256, 258.) But Rodriguez recanted the account she gave to Fournier in the taped conversation, and Morales testified as a witness for the defense and denied the assault ever occurred. Ortega also presented alibi witnesses to attest to his whereabouts on Sunday, August 3, the most likely date of the offenses.

"[G]ang members, like everyone else, are entitled under our Constitution to effective representation of counsel." *Griffin v. Harrington*, 727 F.3d 940, 946 (9th Cir. 2013). In light of counsel's failure to subject the prosecution's case to adversarial testing, this Court should grant certiorari on Petitioner's ineffective assistance claim.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for a writ of certiorari to review the decision of the Ninth Circuit in this case.

Respectfully submitted,

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